

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRI-COUNTY EQUIPMENT &
LEASING, LLC

Appellant,

vs.

ANGELA KLINKE,

Respondent.

Case No. 55121

FILED

JUN 13 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Ingerson*
DEPUTY CLERK

ANSWER TO PETITION FOR EN BANC RECONSIDERATION

COMES NOW, Respondent Angela Klinke, by and through her undersigned counsel, Kilpatrick, Johnston & Adler, pursuant to ORDER DIRECTING ANSWER TO PETITION FOR EN BANC RECONSIDERATION dated June 2, 2011, and submits herewith her answer to the petition.

SUMMARY OF ARGUMENT

There is no need to sound the alarm or circle the legal wagons because Respondent Angela Klinke received a \$5,000 collateral source benefit which took the form of a provider write-down. The facts of this case are simple and do not require a modification of the collateral source rule or plaintiff's burden of proof on the issue of recoverable damages. There was no error at the district court level because the facts are simple, the law is clear, and the law was properly applied. Creative arguments cannot change these basic facts.

PROVIDER DISCOUNTS ARE A COLLATERAL SOURCE BENEFIT

The most basic flaw in Appellant's position is the completely inaccurate assertion that under Nevada law, a provider discount is not a collateral source benefit. This assertion is totally at odds with the definition of a

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1 collateral source benefit as one received by an injured party
2 from a source wholly independent of the tortfeasor. Proctor v.
3 Castelletti, 112 Nev. 88, 911 P.2d 853 (1996). Appellant cites
4 no case from any state or federal court in this country in
5 which a court held that a medical provider's discount to a
6 patient is not a collateral source benefit. In fact, every
7 state supreme court in this country that has addressed this
8 issue directly has held that provider write-downs are indeed a
9 collateral source benefit. White v. Jubitz, 219 P.3d 566 at
10 583, (Oregon 2009); Wills v. Foster, 229 Ill.2d 393, 892 N.E.
11 2d 1018 (Illinois 2008); Bynum v. Magno, 101 P3d. 1149 (Hawaii
12 2004); Calva-Cerqueria v. U.S., 281 F.Supp.2d 279 (D.D.C.2003);
13 Acuar v. Letorneau, 531 S.E.2d 316 (Virginia 2000). Once the
14 provider discount has been properly identified as a collateral
15 source benefit, Proctor v. Castelletti, is controlling. There
16 was no error at trial.

17 THERE WAS NO ERROR AT TRIAL OR IN THE PANEL'S ORDER

18 The two district court judges that reviewed the pre-trial
19 motions and the district court judge that reviewed the post-
20 trial Motion to Reduce Verdict properly applied Nevada law to
21 exclude evidence of a collateral source benefit and to properly
22 reject any verdict reduction based on the Plaintiff receiving a
23 collateral source benefit. Additionally, the Panel correctly
24 applied Nevada case law. Appellant has failed to demonstrate
25 that *en banc* reconsideration is necessary for uniformity of the
26 Court's decisions, or that this appeal involves an issue of
27 substantial precedential, constitutional or public policy. NRAP
28 40(A) (a).

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, is controlling. Proctor
v. Castelletti, 112 Nev. 88, 911 P.2d 853(1996), Bass-Davis v.

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1 Davis, 122 Nev. 442, 134 P.3d 103(2006), Winchell v. Schiff,
2 193 P.3d 946 (2008).

3 Nevada law also recognizes a substantive component to the
4 collateral source rule which precludes a reduction in
5 recoverable damages where a plaintiff has received a collateral
6 source benefit. Proctor v. Castelletti, 112 Nev. 88, 911 P.2d
7 853 (1996); Bass-Davis v. Davis, 122 Nev. 442, 134 P.3d
8 103(2006); Winchell v. Schiff, 193 P.3d 946 (2008); Wills v.
9 Foster, 229 Ill.2d 393, 892 N.E.2d 1018 (Illinois 2008). All
10 three of the referenced Nevada Supreme Court cases specifically
11 hold that where an injured party receives compensation for her
12 injuries from a source other than the tortfeasor, the
13 collateral source rule prohibits a reduction of damages from
14 which the plaintiff would otherwise collect from the
15 tortfeasor.

14 PLAINTIFF'S BURDEN OF PROOF

15 Appellant's creative argument on damages attempts to
16 blend snippets from Nevada cases that do not address the
17 collateral source rule nor are they even cases involving
18 personal injury claims. For instance, Appellant relies on the
19 case of K-Mart v. Ponsock, 103 Nev. 39, 732 P.2d 1364 (1987),
20 which involved a labor dispute and did not involve a collateral
21 source issue. Likewise, reliance on Grosjean v. Imperial
22 Place, 125 Nev. Adv. Op. 30, 212 P.3rd 1068 (2009) is misplaced
23 because that case involved a dispute between a gambler and a
24 casino and again had nothing to do with the collateral source
25 rule or a personal injury claim. This approach was previously
26 advanced and rejected by the Virginia Supreme Court. Acuar v.
27 Letourneau, 531 S.E.2d 316 (Virginia 2000). The Virginia
28 Supreme Court in Acuar, patiently distinguished the defense
cases before stating the following:

Letourneau is entitled to seek full compensation from
Acuar. [citation omitted]. Based on the cases cited
above dealing with the collateral source rule, we

1 conclude that Acuar cannot deduct from that full
2 compensation any part of the benefits Letourneau
3 received from his contractual arrangement with his
4 health insurance carrier, whether those benefits took
5 the form of medical expense payments or amounts
6 written off because of agreements between his health
7 insurance carrier and his health care providers.
8 Those amounts written off are as much of a benefit
9 for which Letourneau paid consideration as are the
10 actual cash payments made by his health insurance
11 carrier to the health care providers. The portions of
12 medical expenses that health care providers write off
13 constitute "compensation or indemnity received by a
14 tort victim from a source collateral to the
15 tortfeasor...."

16 Acuar v. Letorneau at p. 323.

17 The fact is that recoverable damages in personal injury
18 claims are relatively straightforward. They are not and should
19 not be linked to or modified by the many different types of
20 collateral source benefits purchased by or on behalf of injured
21 plaintiffs. White v. Jubitz, 219 P.3d 566(Oregon 2009):

22 Therefore, under the common-law collateral source
23 rule, the extent of a tortfeasor's liability to a
24 plaintiff is not determined by the vagaries of
25 whether the plaintiff has purchased life or medical
26 insurance, is eligible for employment or governmental
27 life, medical, disability or retirement benefits, or
28 by the terms of such insurance or benefits.
Tortfeasors that cause the same injuries are
responsible for the same damages, irrespective of the
plaintiffs' receipt of benefits from, or legal
relationships with, third-party benefit providers.

29 White v. Jubitz, at p. 571.

30 CONCLUSION

31 This case presents no new legal issues. Both
32 district court judges reviewing this matter had no difficulty
33 identifying the provider discount as a collateral source
34 benefit, excluding evidence of the collateral source benefit,
35 and refusing to reduce a jury verdict because the Plaintiff
36 received a collateral source benefit. The decisions were made

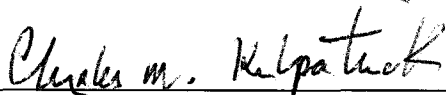
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1 and based upon long standing Nevada authority. What is new in
2 this case is the appellate review of a very common trial court
3 application of the collateral source rule.

4 Respectfully submitted this 13th day of June, 2011.

5 KILPATRICK, JOHNSTON & ADLER
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8 By:

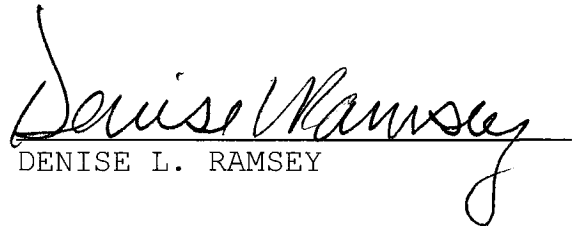


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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(b), I certify that I am an employee of the law offices of Kilpatrick, Johnston, & Adler, 412 No. Division Street, Carson City, NV 89703, and that on the 13th day of June, 2011, I deposited for hand-delivery with Reno Carson Messenger Service, a copy of ANSWER TO PETITION FOR EN BANC RECONSIDERATION addressed to:

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