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IN THE SUPREME COURT OF THE STATE OF NEVADA

TRI-COUNTY EQUIPMENT AND
LEASING, LLC,

Appellant,

vs.

ANGELA KLINKE.

Respondent.

) Supreme Court Case No. 55121

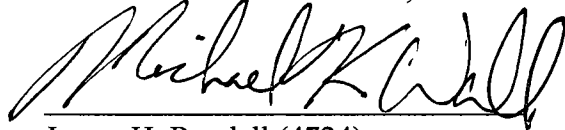
) Lower Court No. 08-TRT-00013-B

) **MOTION FOR LEAVE TO FILE**
) **AMICUS BRIEF**

Nevada Capital Insurance Company ("CIG") submits its Motion for Leave to File
Amicus Brief. This Motion is based on NRAP 29, the pleadings on file, and the points and
authorities that follow.

DATED this 25 day of October, 2011.

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POINTS AND AUTHORITIES

1. Introduction

The Respondent in this appeal, Angela Klinke, initiated this action after being injured when a generator being towed by appellant Tri-County Equipment and Leasing, LLC (“Tri-County”) struck her car. Klinke’s employer negotiated write-downs of Klinke’s medical bills, which were paid by worker’s compensation. Before trial, Klinke successfully moved to exclude evidence of the worker’s compensation payments by operation of the collateral source rule. Tri-County then requested that the district court limit Klinke’s presentation of her medical costs to the amounts paid by worker’s compensation rather than the higher amounts that were initially billed but for which Klinke was never liable. That request was denied. Klinke prevailed at trial. Following trial, Tri-County moved to have Klinke’s damages award lowered to match the amount of medical bills that were paid. Again, that request was denied.

Tri-County then filed an appeal, arguing that the district court erroneously:

- 1) precluded evidence of Klinke’s worker’s compensation benefits;
- 2) denied Tri-County’s motion to limit evidence at trial to the amounts paid for Klinke’s medical bills; and
- 3) denied Tri-County’s motion to reduce the damages award to reflect the amount paid for Klinke’s medical bills.

The Supreme Court heard the appeal and affirmed the district court’s order. Justice Pickering dissented. A petition for rehearing was denied, but a subsequent petition for rehearing *en banc* was granted. On September 12, 2011, the Supreme Court vacated its order on the appeal. The Supreme Court is scheduled to hear oral arguments in this appeal on November 1, 2011.

1 Nevada Capital Insurance Company ("CIG") is a Nevada insurer. CIG insures personal,
2 commercial and agricultural property against a variety of potential losses, damage and liability.
3 CIG's interests will be greatly affected by the outcome of this appeal.
4

5 **2. Discussion**

6 Pursuant to NRAP 29, the Court has discretion to allow filing of an amicus brief.
7 Although the rule specifies that amicus briefs must be filed within seven days of the due date of
8 the brief of the party being supported, "the Court may grant leave for later filing." NRAP 29(f).
9 CIG concedes that the seven-day time frame has passed, but respectfully requests that it be
10 granted leave to file its amicus brief due to the serious impact the issues in this appeal will have
11 on CIG.
12

13 The outcome of this appeal will have far-reaching consequences for Nevada tort
14 plaintiffs, defendants, and their insurers. Through this appeal, the Court is being asked to
15 determine not only whether the collateral source rule applies to unpaid amounts that have been
16 written off of medical bills, but also how damages are to be determined in such cases. This
17 appeal has the potential of redirecting the course of nearly every personal injury case in Nevada.
18 As an insurer in the position of both paying and recovering judgments, CIG's interests will be
19 affected by the outcome of this matter, as will the interests of the majority of Nevada insurers.
20

21 CIG's application comes at this late date because CIG did not learn until a short time
22 ago of the existence of this case. CIG's brief is not submitted for any improper purpose or for
23 delay. CIG believes the research and analysis in the attached, proposed amicus brief will be of
24 assistance to Court in resolving this difficult issue.
25

26 ///

27 ///

CONCLUSION

Because the issues being resolved in this appeal carry severe consequences for CIG's interests as a Nevada insurer, CIG respectfully requests it be granted leave to file its amicus brief.

Dated this 25 day of October, 2011.

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CERTIFICATE OF SERVICE

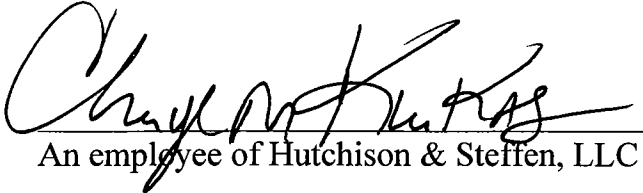
I certify that I am an employee of HUTCHISON & STEFFEN, LLC. and that on this 25th day of October, 2011, I forwarded via U.S. First Class Mail, postage prepaid, at Las Vegas, NV, a true and correct copy of **MOTION FOR LEAVE TO FILE AMICUS BRIEF** addressed as follows:

Stephen Michael Lowry
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An employee of Hutchison & Steffen, LLC

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IN THE SUPREME COURT OF THE STATE OF NEVADA

TRI-COUNTY EQUIPMENT AND)	
LEASING, LLC,)	Supreme Court Case No. 55121
)	
Appellant,)	Lower Court No. 08-TRT-00013-B
)	
vs.)	
)	
ANGELA KLINKE,)	
)	
Respondent.)	
_____)	

NEVADA CAPITAL INSURANCE COMPANY'S AMICUS BRIEF
IN SUPPORT OF TRI-COUNTY EQUIPMENT & LEASING, LLC,
AND IN FAVOR OF REVERSAL

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INTEREST OF *AMICUS CURIAE*

Nevada Capital Insurance Company (“CIG”) is a Nevada insurer. CIG insures personal, commercial and agricultural property against a variety of potential losses, damage and liability. In particular, CIG insures a number of common carriers and transportation companies.

The outcome of this appeal will have far-reaching consequences for Nevada tort plaintiffs, defendants, and their insurers. Through this appeal, the Court is being asked to determine not only whether the collateral source rule applies to unpaid amounts that have been written off of medical bills, but also how damages are to be determined in such cases. This appeal has the potential of redirecting the course of nearly every personal injury case in Nevada, and although the amount in controversy in the underlying action is small, the amount at stake is in the hundreds of millions of dollars. The importance of this case to cannot be understated. As an insurer in the position of both paying and recovering judgments, CIG’s interests will be affected by the outcome of this matter. This gives CIG a unique perspective to provide input as a friend to this Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. The collateral source rule does not bar admission of evidence that medical bills were written down.

STATEMENT OF THE CASE

CIG adopts Tri-County Equipment & Leasing, LLC's ("Tri-County") statement of the case.

SUMMARY OF THE ARGUMENTS

This brief contains two main arguments:

1. The collateral source rule should not be applied to exclude evidence of written-down medical bills because its use in that context conflicts with the policy justifications for the rule. The collateral source rule bars admission for any purpose of evidence of collateral sources of payment of damages claimed in a lawsuit. The rule constitutes a more extreme counterpart to Nevada Revised Statute 48.035, which says that evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury. The collateral source rule presupposes that evidence of collateral sources of payment will always satisfy Nevada Revised Statute 48.035 because jurors tend to lower the amount of judgments when they are aware that payments were made that satisfy a portion of the injured party's damages. In the case of written-down medical bills, the application of the rule results in an artificial increase of the amount of damages. This invariably results in unfair prejudice to the uninjured party, and in confusion of the issues or misleading the jury. These are the problems the rule was adopted to prevent.

2. The collateral source rule should not be applied to written down medical bills because written down amounts are not payments from any source, collateral or

1 otherwise; by their nature, those amounts are never paid. Consequently, applying the
2 rule to such amounts virtually guarantees excessive damages awards because the
3 plaintiff is able to present evidence of the initial higher bills, but the defendant is unable
4 to prove that plaintiff never incurred a portion of his claimed damages.
5

6 ARGUMENT

7 8 **1. Application of the collateral source rule to written-down 9 medical bills is in direct conflict with the policy 10 justifications for the rule.**

11 The collateral source doctrine arises out of the rules of evidence, specifically the
12 rule that relevant evidence is inadmissible if “its probative value is substantially
13 outweighed by the danger of unfair prejudice, of confusion of the issues or of
14 misleading the jury.” NRS 48.035. *See also* FED. R. EVID. § 403 (Federal equivalent of
15 NRS 48.035).
16

17 In Nevada, evidence of a collateral source of payment for an injury is *per se*
18 inadmissible “for any purpose,” because “the prejudicial impact of collateral source
19 evidence *inevitably* outweighs [its] probative value.” *Proctor v. Castelletti*, 112 Nev.
20 88, 90, 911 P.2d 853, 854 (1996) (citing *Eichel v. New York Central Railroad Co.*, 375
21 U.S. 253 (1963); emphasis in original). The ultimate justification for the rule was that
22 juries would often reduce damages awards when evidence of collateral sources of
23 payment was presented. *Id.* Often applied in a rigid, draconian manner, the collateral
24 source rule adopted in *Proctor* appears to be crumbling under the weight of its own
25 inflexibility. *See, e.g.*, NRS 616C.215(10) (requiring admission of evidence of worker’s
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1 compensation payments in certain cases).¹ Other states, as discussed below, are also
2 questioning the inflexibility of the rule.

3
4 Angela Klinke received medical care for her injuries, which were paid for
5 through worker's compensation benefits. Prior to payment, Klinke's employer
6 negotiated for the hospital to write off a portion of the bill. Klinke's employer paid the
7 amount of the written-down bill in full satisfaction of Klinke's debt. Klinke personally
8 paid nothing for her hospital care. The amount of written-down bill constitutes Klinke's
9 actual damages.
10

11
12 At trial, Tri-County sought to introduce evidence showing the amount that was
13 paid for the written-down bill. The district court refused its admission, applying the
14 collateral source rule to the evidence. This left the original more costly hospital bill as
15 the measure of Klinke's damages, despite her never having been liable for that amount.
16 Through this rigid application of the rule, the district court actually increased Klinke's
17 damages by the amount of the written down portion of the bill, forcing Tri-County to
18 pay damages Klinke never incurred.
19
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21 The operation of the collateral source rule here prevented Tri-County from
22 establishing Klinke's actual damages. By applying the collateral source rule in this
23 manner, the jury was, in fact, confused and increased the award of damages beyond
24
25

26
27 _____
28 Undersigned counsel is personally aware of an unpublished order of
affirmance issued by this Court just last month in which this Court made a
significant exception to the collateral source rule.

1 Klinke's actual damages. The rigid application of the collateral source rule here resulted
2 in the very prejudice, confusion of the issues and misleading of the jury the rule was
3 designed to prevent.
4

5 The Court should therefore reconsider the issue and recognize that the collateral
6 source rule has no application to evidence that a plaintiff was never required to pay a
7 written-down bill, and thus did not suffer damages in the amount of the write-down. If
8 this Court believes the collateral source rule is implicated by such evidence, the Court
9 should fashion a narrow exception to the rule. It places no burden on a plaintiff
10 different from the present burden to require the plaintiff to submit to the jury evidence
11 of what the plaintiff actually paid (including amounts actually paid on behalf of the
12 plaintiff by a collateral source), rather than to submit evidence of what was billed. Such
13 matters are easily resolved in pretrial discovery.
14
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16

17 **2. Evidence of written-down medical bills serves to**
18 **establish the proper measure of an injured party's**
19 **damages, and the collateral source rule should not apply**
20 **to it.**

21 The collateral source rule only bars evidence of payments. *Proctor v. Castelletti*,
22 112 Nev. 88, 90, 911 P.2d 853, 854 (1996). The written-down portions of bills are
23 never paid, and therefore the collateral source rule should not apply to the written-down
24 portions of bills. In fact, several other states have determined that the collateral source
25 rule does not apply to written-down medical bills for this reason. *See, e.g., Robinson v.*
26 *Bates*, 857 N.E.2d 1195, 1200 (Ohio 2006) ("Because no one pays the write-off, it
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28

1 cannot possibly constitute payment of any benefit from a collateral source. . . .
2 Because no one pays the negotiated reduction, admitting evidence of write-offs does not
3 violate the purpose behind the collateral-source rule.”) (citations omitted); *Dyet v.*
4 *McKinley*, 81 P.3d 1236 (Idaho 2003) (a “write-off is not a collateral source”); *Bates v.*
5 *Hogg*, 921 P.2d 249 (Kan.App. 1996) (“Nothing in the reasoning underlying the
6 collateral source rule supports” its application to written-down medical bills); *Stanley v.*
7 *Walker*, 906 N.E.2d 852, 858 (Ind. 2009) (“The collateral source statute does not bar
8 evidence of discounted amounts in order to determine the reasonable value of medical
9 services.”); *Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205, 223 (Kan. 2010)
10 (“[T]he [collateral source] rule does not address, much less bar, the admission of
11 evidence indicating that something less than the charged amount has satisfied, or will
12 satisfy, the amount billed.”).

13 Likewise, Nevada should adopt the position that the collateral source rule does
14 not apply to written-down portions of bills because its application results in inaccurately
15 inflated damages awards. Compensatory damages reimburse an injured party for his or
16 her actual damages. *See, e.g., Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068 (Nev.
17 2009) (citing *Woodward & Lothrop v. Hillary*, 598 A.2d 1142, 1148 (D.C. 1991)).
18 Without providing evidence of a party’s actual monetary injury, it is impossible to
19 determine the proper amount of damages. Applying the collateral source rule to
20 evidence of written-down bills allows the injured party to provide evidence of medical
21 bills which exceed the amounts actually paid. Further, it provides the tortfeasor no
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1 opportunity to rebut the injured party's claimed damages, despite the fact that they
2 include amounts for which the injured party was never liable. The application of the
3 collateral source rule in this context means that in every personal injury case where
4 medical bills were written down, the plaintiff can recover compensatory damages
5 exceeding the value of his or her injury without fear of the admission of contradictory
6 evidence. This inequity is exacerbated by the fact that the jury's award of pain and
7 suffering and other less exactly definable compensatory damages may likely be
8 increased on the basis of the amount of the medical bills presented, even when those
9 medical bills are artificially inflated and are written down as a matter of contract or
10 course. Additionally, in cases where exemplary damages are awarded, those amounts
11 may also be artificially inflated because the maximum allowable damages are based on
12 the compensatory award. NRS 42.005.

13
14 The application of the collateral source rule to written-down medical bills
15 artificially inflates damages awards in favor of the injured party as a matter of Nevada
16 law.² This calls into doubt the legitimacy of the vast majority of judgments in personal
17 injury cases where insurance is involved. The Court should therefore hold that the
18 collateral source rule is inapplicable to the written-down portions of medical bills.
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25 For a concrete example, recently undersigned counsel spent a day in a
26 local hospital. The bills came to \$20,000, of which my insurance carrier
27 paid nothing. However, based on the carrier's contracts with the
28 providers, I only had to pay the hospital and other providers a little over
\$2,000. My real damages (had this been due to a personal injury claim)
would be \$2,000, what I paid; not \$20,000, the amount I was billed.

1 In fact, most of the aforementioned states have additionally taken the position
2 that the proper measure of damages in the case of written-down medical bills is the
3 amount paid, not the amount billed. *Hanif v. Housing Authority of Yolo County*, 246
4 Cal.Rptr. 192 (Cal.Ct.App. 1988) (“when the evidence shows a sum certain to have been
5 paid or incurred for past medical care and services . . . that sum certain is the most the
6 plaintiff may recover for that care”); *Bates*, 921 P.2d at 253; *Gordon v. Forsyth*
7 *County Hospital Authority, Inc.*, 409 F.Supp. 708, 719 (M.D.N.C. 1976) (“It would be
8 unconscionable to permit the taxpayers to bear the expense of providing [Medicaid] to a
9 person and then allow that person to recover damages for medical services from a
10 tort-feasor and pocket the windfall.”) (unrelated section vacated); *Dyet*, 81 P.3d at 1239
11 (“plaintiffs may not recover the amount of the write-off from a tortfeasor because it was
12 not an item of damages for which the plaintiff ever became obligated.”); *Moorhead v.*
13 *Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001) (abrogated on unrelated
14 grounds). This position is in line with the Second Restatement of Torts, which states
15 that if an injured person pays a discounted rate for services, he can only recover what he
16 paid. RESTATEMENT (SECOND) OF TORTS, § 911 cmt. h (1977). The position taken by
17 these states is intuitive and just. Plaintiffs should not be allowed to recover
18 compensatory damages in excess of their injuries, especially where such an outcome is
19 as easily avoidable as it is here.

20
21 In ruling on this matter, the Court should adopt the positions that (1) the
22 collateral source rule does not apply to the written-down portions of medical bills, and
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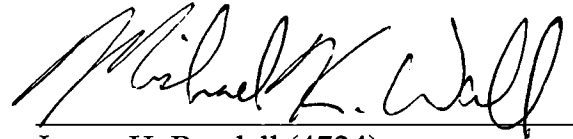
(2) the amount paid in satisfaction of medical bills is the measure of damages for the same.

CONCLUSION

For each of the reasons discussed above, CIG respectfully submits that the judgment below was improper, and the judgment should be reversed.

Dated this 25 day of October, 2011.

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ATTORNEY'S CERTIFICATE

I certify that I have read this appellate 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 Nevada Rule of Appellate Procedure 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 25 day of October, 2011.

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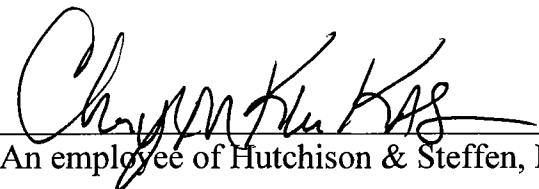
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