ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRI-COUNTY EQUIPMENT & LEASING, LLC

Appellant,

vs.

ANGELA KLINKE,

Respondent.

Case No. 55121

APPEAL FROM JUDGMENT – FIRST JUDICIAL DISTRICT COURT
STATE OF NEVADA, COUNTY OF CARSON CITY
HONORABLE JAMES T. RUSSELL, DISTRICT COURT JUDGE

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

I. Issues On Appeal.

A. Whether the district court committed reversible error in granting Respondent Angela Klinke's pre-trial motion *in limine* to exclude evidence of the worker's compensation benefits paid to Klinke's medical providers following the June 1, 2007 automobile accident?

B. Whether the district court committed reversible error in denying Appellant Tri-County Equipment & Leasing, LLC's pre-trial motion *in limine* to preclude Respondent Angela Klinke from claiming the billed amount of her medical expenses as damages at trial, where portions of such billed amount were written-off by her medical providers?

C. Whether the district court committed reversible error in denying Appellant Tri-County Equipment & Leasing, LLC's post-trial motion to reduce the special damages awarded by the jury to only those medical expenses actually paid for Respondent Angela Klinke's medical care?

II. Jurisdictional Statement.

The present matter is an appeal from a final judgment entered on November 16, 2009 (the "Judgment"). (See Appellant's Appendix, Vol. 8 ("AA8"), at pp. 1263-1264). Written notice of entry of the Judgment was filed and served November 16, 2009. (See AA8, at p. 1265). The notice of appeal in this matter was filed and served December 17, 2009. (See AA8, at pp. 1267-1269).

Based on the foregoing, the present appeal is timely under Nevada Rules of Appellate Procedure ("NRAP"), Rule 4(a)(1). In addition, as this is an appeal from the

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final judgment of a district court, the basis for appellate jurisdiction is provided under NRAP, Rule 3A(b)(1).

III. Introduction.

This is a personal injury action arising out of a June 1, 2007 automobile accident which occurred in Washoe Valley, Nevada (the "Accident"). In her complaint, Appellant Angela Klinke ("Klinke") asserted a single cause of action for negligent operation of a motor vehicle. Following trial, the jury returned a verdict in favor of Klinke and against Respondent Tri-County Equipment & Leasing, LLC ("Tri-County"), and awarded Klinke damages in the principal amount of $27,510.00. This amount included $17,510.00 in special damages relating to medical treatment received by Klinke following the Accident, and $10,000.00 in general damages. A judgment was entered on the jury verdict on November 16, 2009.

In this appeal, Tri-County challenges three rulings of the district court, each of which deals with the treatment of evidence showing that the amount of medical expenses actually incurred by Klinke as a result of the Accident was less than the amount initially billed by the medical providers.[1] This evidence was in the form of records pertaining to a worker's compensation claim made by Klinke following the Accident. As explained below, these records showed that although certain of Klinke's medical providers initially billed $17,510.00 for medical services rendered to Klinke as a result of the Accident, the actual amount paid for those medical services was only $12,162.26.

[1]For purposes of this appeal, Tri-County is not challenging the medical treatment the jury determined was reasonable and necessarily related to the Accident. Instead, Tri-County is only challenging the amount to which Klinke should be compensated for that medical treatment.

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The issues created by the discrepancy between the billed and the paid amounts of the pertinent medical bills were first raised with the district court by Klinke's motion *in limine* to preclude the introduction of evidence at trial concerning the worker's compensation benefits received by Klinke as a result of the Accident. Tri-County opposed this motion on the basis that such evidence is specifically admissible under NRS 616C.215(10), and, among other things, is necessary to prevent the jury from erroneously basing an award of damages on medical bills which did not reflect the true value of the medical services provided to Klinke. In this regard, Tri-County maintained that the district court should simply allow the worker's compensation records into evidence for the jury's consideration in determining the medical expense aspect of any damage award.

In the alternative, Tri-County sought to preclude Klinke from claiming the billed amount of her medical expenses as damages at trial. Specifically, Tri-County requested that, should the district court preclude the admission of the worker's compensation records into evidence at trial, the court should also limit the medical expense damages claimed by Klinke to the amounts actually paid for the underlying medical services. As discussed in more detail below, the district court erroneously rejected Tri-County's position on both of the foregoing motions.

Thereafter, following a four-day jury trial, the verdict entered by the jury reflected a special damages component based on the billed medical expenses of $17,510.00, rather than the actual cost of the medical services Klinke received after the Accident. Thus, following the jury verdict, Tri-County filed a post-trial motion requesting that the verdict be reduced by the amount of $5,347.74, representing the difference between the

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$17,510.00 billed for Klinke's medical care, and the $12,162.26 actually paid for such medical care. Tri-County's motion in this regard was also denied by the district court.

Each of the foregoing decisions by the district court had the effect of imposing liability on Tri-County for damages which were not actually incurred by Klinke. As explained in detail below, this result is both inequitable and contrary to Nevada law.

IV. Statement Of The Case.

The Accident took place on June 1, 2007 when a generator being towed by a truck owned by Tri-County and being operated by its employee, Jose Montelongo ("Montelongo"), detached from the truck and struck Klinke's vehicle. (See Appellant's Appendix, Vol. 1 ("AA1"), at pp. 20-21, and 33-34; and Appellant's Appendix, Vol. 3 ("AA3"), at p. 525). As noted above, in her complaint, Klinke asserted a single cause of action against both Montelongo and Tri-County for negligent operation of a motor vehicle.[2] (See AA1, at pp. 20-21).

At the time of the Accident, Klinke was in the course and scope of her employment with a Starbucks coffee restaurant in Truckee, California. (See AA1 at pp. 33-34; and AA3, at p. 525). As such, following the Accident, Klinke filed a worker's compensation claim. (See AA1, at pp. 33-34, 44-45, and 153-154; and AA8, at 1271-1369 [pertinent portions of Trial Exhibit 30]).[3] The claim was accepted, and thereafter,

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[2] Prior to trial, Montelongo was dismissed from the action by stipulation of the parties. (See AA3, at p. 524).

[3] The records obtained from Starbucks with respect to Klinke's worker's compensation claim were marked prior to trial as Trial Exhibit 30. (See AA3, at pp. 535-536 [list of trial exhibits]; and AA8, at 1271-1369 [pertinent portions of Trial Exhibit 30]). However, based on the district court's granting of Klinke's motion *in limine*, Tri-County was precluded from offering Trial Exhibit 30 into evidence during trial. (See Appellant's Appendix, Vol. 2 ("AA2"), at pp. 207-208, and 291-292; AA3, at 612-620; Appellant's Appendix, Vol. 4 ("AA4"), at 639-643; and AA8, at 1239 [footnote 1]). During trial, counsel for Tri-County requested that the district court reconsider its ruling in this

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Klinke's worker's compensation carrier, Starbucks Coffee Company and Safety National Casualty Corporation ("Starbucks"), paid Klinke's medical bills resulting from the Accident. (See AA1, at pp. 33-34, 44-45, and 153-154; and AA8, at 1271-1369 [pertinent portions of Trial Exhibit 30]).

Before trial, Tri-County sought and obtained discovery with respect to the California worker's compensation benefits paid to Klinke. (See AA8, at 1271-1369 [pertinent portions of Trial Exhibit 30]). This discovery revealed that, based on contracts between the medical providers and Starbucks, Starbucks only paid $12,162.26 to certain providers for medical services rendered to Klinke following the Accident and originally billed at $17,510.00. (See AA1, at pp. 45-46; AA3, at p. 526, AA8, at pp. 1238-1239, 1270 [Trial Exhibit 1 – Klinke's Schedule of Medical Expenses] and 1279 [Trial Exhibit 30]). The billed and paid amounts at issue are as follows:

Medical Provider	Amount Billed	Amount Paid
REMSA	$ 4,516.00	$ 4,516.00
Renown Medical Center	$ 6,876.00	$ 5,221.00
No. Nev. Emergency Phys.	$ 400.00	$ 400.00
Emerald Bay Phys. Therapy	$ 494.00	$ 494.00
Barton Memorial Hospital	$ 4,810.00	$ 1,370.00
Concentra	$ 266.00	$ 13.26
Reno Radiological	$ 148.00	$ 148.00
	$17,510.00	$12,162.26

(See AA1, at pp. 45-46; AA3, at p. 526, AA8, at pp. 1238-1239, 1270 [Trial Exhibit 1] and 1279 [Trial Exhibit 30].[4]

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regard. (See AA5, at pp. 897-898). This request was denied by the district court. (See AA5, at p. 898).

[4] Of relevance to the present appeal, Starbucks' "write-downs" affected only three of the seven medical providers identified in the jury's special verdict form, to wit, Renown Medical Center, Barton Memorial Hospital and Concentra. (See AA8, at pp. 1198, and 1279 [Trial Exhibit 30]). The $5,221 paid to Renown is noted in Klinke's worker's compensation records payment summary as payments to "Ambulatory Surgical Center."

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Prior to trial, Klinke filed a motion *in limine* requesting that the district court preclude Tri-County from making any reference to, or introducing any evidence of, Klinke's receipt of California worker's compensation benefits. (See AA1, at pp. 31-43). Tri-County opposed this motion asserting that NRS Chapter 616C mandated that the receipt of worker's compensation benefits be disclosed. (See AA1, at pp. 87-139). In addition, Tri-County filed a separate motion *in limine* requesting that, should the district court preclude Tri-County from offering evidence of Klinke's receipt of worker's compensation benefits, the court further preclude Klinke from claiming the billed amount of her medical expenses as damages where portions of such billed amount were written-off by her medical providers. (See AA1, at pp. 44-62, and 158-164). In filing this motion, Tri-County hoped to prevent Klinke from claiming medical expense damages at trial which neither she, nor anyone else, was legally obligated to pay. (See AA1, at pp.44-48, and 158-162; and AA2, at pp. 197-211). Klinke's motion *in limine* was granted by the district court on June 1, 2009. (See AA2, at pp. 197-211, and 291-292). Additionally, in the same order, the district court denied Tri-County's motion *in limine*.[5] (See AA2, at pp. 211 and 292).

Thereafter, a jury trial was held in the matter beginning October 5, 2009. (See AA3, at pp. 537-635; AA4, at pp. 636-774; Appellant's Appendix, Vol. 5 ("AA5"), at pp. 775-931; Appellant's Appendix, Vol. 6 ("AA6"), at pp. 932-1064; and Appellant's

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(See AA8, at p. 1279 [Trial Exhibit 30]). The $1,370 paid to Barton Memorial Hospital is noted in Klinke's worker's compensation records payment summary as payments to "Hospitals – Outpatient." (See AA8, at p. 1279 [Trial Exhibit 30]). The $13.26 paid to Concentra is noted in Klinke's worker's compensation records payment summary as payments to "PPO Fee." (See AA8, at p. 1279 [Trial Exhibit 30]).

[5] Tri-County later filed a motion requesting that the district court reconsider its rulings in this regard. (See AA2, at pp. 328-336). However, this motion was also denied by the district court. (See AA2, at pp. 358-361).

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Appendix, Vol. 7 ("AA7"), at pp. 1065-1194). At the conclusion of the trial, the jury returned a verdict in favor of Klinke and against Tri-County, and awarded Klinke damages in the total principal amount of $27,510.00. (See AA8, at p. 1195). As a result of the district court's orders on the motions *in limine* noted above, the jury verdict reflected a special damages component of $17,510.00 (the billed medical expenses) rather than $12,162.26 (the medical expenses actually paid for Klinke's medical care). (See AA8, at pp. 1195-1203). A special verdict form was returned by the jury specifically itemizing the medical expenses which comprised the special damages component of the award. (See AA8, at pp. 1196-1203).[6]

Following the trial, but before entry of the Judgment, Tri-County filed a motion to reduce the jury verdict. (See AA8, at pp.1238-1245). In that motion, Tri-County argued that Klinke was not entitled to recover damages for medical expenses which had been written-off by the medical providers. (See AA8, at pp.1239-1243). As such, Tri-County requested that the jury verdict be reduced by the amount of $5,347.74, representing the difference between the $17,510.00 billed for Klinke's medical care and awarded by the jury, and the $12,162.26 actually paid for such medical care. (See AA8, at pp.1239-1241).

On November 16, 2009, the district court denied Tri-County's motion to reduce the jury verdict and entered the Judgment. (See AA Vol. 8, at pp. 1254-1255, and 1263-1264). The Judgment simply affirmed the damage award set out in the jury's verdict. (See AA Vol. 8, at pp. 1263-1264). In this regard, the total principal amount of the

[6] For purposes of this appeal, Tri-County is only addressing the bills charged by the medical providers whose treatment the jury found to be reasonable and necessarily related to the subject Accident. (See AA8, at p. 1198). The worker's compensation carrier paid other medical bills on behalf of Klinke which the jury ultimately determined to not be medically related to the June 1, 2007 auto accident. (See AA8, at p. 1198).

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Judgment was $27,510.00, together with prejudgment interest in the amount of $4,839.43 and costs in the amount of $12,352.92, for a total recovery of $44,702.35. (See AA Vol. 8, at pp. 1263-1264). Notice of entry of the Judgment was filed by Klinke on November 16, 2009. (See AA Vol. 8, at pp. 1265-1266).

V. Argument.

1. The district court committed reversible error in precluding the introduction of evidence concerning the California worker's compensation benefits paid on Klinke's behalf.

The Nevada Supreme Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. See McLellan v. State, 124 Nev.Adv.Op. No. 25, 182 P.3d 106 (2008).

Nevada's collateral source rule generally provides that if an injured party receives compensation for his injuries from a third-party wholly independent of the tortfeasor, such payment should not be deducted from the damages the plaintiff would otherwise collect from the tortfeasor. See Proctor v. Castelletti, 112 Nev. 88, 90, n.1, 911 P.2d 853, 854, no. 1 (1996). In this regard, the Nevada Supreme Court has held that collateral source evidence should not be admitted because of the potential that the jury will misuse the evidence in a manner that is prejudicial to the plaintiff. See Id. However, under both California and Nevada law, evidence of worker's compensation payments is admissible as an exception to the collateral source rule.

NRS 616C.215 provides in part that ". . .evidence of the amount of compensation, accident benefits and other expenditures that the insurer, the uninsured employers' claim account or a subsequent injury account have paid or become obligated to pay by reason of the injury or death of the employee is admissible." See NRS 616C.215(4). Additionally, NRS 616C.215 mandates that the district court instruct

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the jury concerning the payment of worker's compensation benefits. See NRS 616C.215(10). In this regard, in Cramer v. Peavy, 116 Nev. 575, 3 P.3d 665 (2000), the Nevada Supreme Court specifically found that the Nevada legislature did not exceed its authority in enacting NRS 616C.215, and that such legislation was not superseded by Proctor v. Castelletti, *supra*, but rather, is an exception to the *per se* rule against the admission of collateral sources of payment for an injury. See Cramer, 116 Nev. at 580, 3 P.3d at 669. As observed in Cramer, one of the purposes of NRS 616.215 is to prevent a jury from speculating as to how much a plaintiff receives in worker's compensation benefits. See Id.

Like NRS 616C.215, the California Labor Code also provides that an employer who pays or becomes obligated to pay worker's compensation benefits to an employee as the result of the conduct of a third-party tortfeasor has the right to bring an independent action against the third person, intervene in the action, or assert a lien against the judgment. See Cal. Labor Code, §3856; see also Freemont Compensation Ins. Co. v. Sierra Pine Ltd., 121 Cal.App.4th 389, 396 (3d Dist., 2004). The intent of these California rules is to ensure that a plaintiff does not obtain a double recovery of special damages, and to ensure that the employee and the employer receive their due. See DeMeo v. St. Francis Hospital, 39 Cal.App.3d 174, 177 (2d Dist., 1974); and McKinnon v. Otis Elevator Co., 149 Cal.App.4th 1125, 1130 (3d Dist., 2007). Thus, California worker's compensation law ensures that the employer's or insurer's right to receive reimbursement from any proceeds paid to the employee by a third-party tortfeasor takes full priority over any recovery paid to the employee/plaintiff. See California Ins. Guarantee Ass'n v. W.C.A.B., 112 Cal.App.4th 358, 368 (3d Dist., 2003).

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In essence, then, both Nevada and California recognize an exception to the collateral source rule for evidence of amounts paid on behalf of an employee under a worker's compensation claim. Admittedly, the purpose of these statutes is to protect worker's compensation systems in these states, and allow those systems to recoup amounts paid on an employee claim from the tortfeasor who was responsible for the employee's injuries. However, it cannot be denied that the exception to the collateral source rule created by these statutes allows the admission of evidence of worker's compensation benefits paid on behalf of an employee by an employer. Moreover, as noted by the Cramer court, another purpose of NRS 616.215 is to prevent a jury from speculating as to how much a plaintiff receives in worker's compensation benefits. See Cramer, 116 Nev. at 580, 3 P.3d at 669.

In the present matter, such evidence would have been significant in that it would have provided the jury with information as to the damages actually incurred by Klinke, to wit, the amount paid to the medical providers for the services they rendered to Klinke following the Accident. (See AA1, at pp. 45-46; AA3, at p. 526, AA8, at pp. 1238-1239, and 1279 [Trial Exhibit 30]). By precluding such evidence, the district court only allowed the jury to see the billed amount of Klinke's medical expenses. The district court's preclusion of evidence in this regard was misleading and prejudicial to Tri-County in that the billed amount of medical expenses was over $5,000 more than what was actually paid for the underlying services. (See AA1, at pp. 45-46; AA3, at p. 526, AA8, at pp. 1238-1239, and 1279 [Trial Exhibit 30]).[7]

[7] Furthermore, during trial, Klinke's counsel's opening statement specifically referenced the fact that Klinke had received worker's compensation benefits. (See AA3, at p. 589, lines 21-25). Notwithstanding this, and although some questioning of Klinke regarding the existence of the worker's compensation claims was allowed (see AA4, at pp. 641-642, and 752-754; and AA5, at pp. 805-807, and 897-898), the district court still did not

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Based on the foregoing, Tri-County respectfully submits that the district court committed reversible error in precluding evidence of the amount paid by Klinke's worker's compensation carrier for the medical services provided to Klinke following the Accident.

2. The district court committed reversible error in allowing Klinke to claim the billed medical expenses as damages where portions of those expenses were written-off by her medical providers.

The Nevada Supreme Court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. See McLellan v. State, 124 Nev.Adv.Op. No. 25, 182 P.3d 106 (2008).

Klinke is only entitled to recover as damages the amount of medical expenses that were actually paid for the medical services she received following the Accident, not amounts that were billed but never paid. (See AA8, at pp. 1270 [Trial Exhibit 1], and 1279 [Trial Exhibit 30]). Although the Nevada Supreme Court has not spoken directly on the subject, Nevada legal authorities clearly contemplate that a plaintiff may only recover those medical expenses actually incurred. In Nevada, tort damages are intended to make an injured party "whole." See Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995) (recognizing tort law is designed to afford compensation for injuries sustained by one person as the result of the conduct of another); and K-Mart v. Ponsock, 103 Nev. 39, 49, 732 P.2d 1364, 1371 (1987) (recognizing that tort damages

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allow Tri-County to introduce evidence of the amount actually paid by the worker's compensation carrier for the medical services received by Klinke following the Accident. (See AA4, at pp.641, lines 17-21; and AA5, at pp. 897-898)). This error by the district court left the jury with no other alternative than to speculate as to how much Klinke received in worker's compensation benefits, and, more importantly, the actual amount of paid for the medical services provided to Klinke.

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serve to make an injured party whole), *abrogated on other grounds by* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137, 112 L.Ed. 474, 111 S.Ct. 478, 482 (1990).

Further, Nevada Pattern Jury Instruction No. 10.02 instructs the jury that a plaintiff may recover "[t]he reasonable medical expenses plaintiff *has necessarily incurred* as a result of the accident." Nevada Patter Jury Instruction No. 10.02 (*emphasis added*). Considering the language of this instruction, it is significant to note that, under Nevada law, "[a]n expense can only be 'incurred' . . . when one has paid it or become legally obligated to pay it." United Services Auto Ass'n v. Schlang, 111 Nev. 486, 489 894 P.2d 967, 969 (1995). Thus, under established Nevada practice, billed medical expenses which were discounted and for which no one became legally obligated to pay are not compensable.

In the present matter, by reason of Klinke's receipt of worker's compensation benefits, no one, including Klinke, is liable for the cost of the medical services rendered to Klinke following the Accident beyond the amounts actually paid by Starbucks. (See AA8, at p. 1279 [Trial Exhibit 30]). Thus, the amount of medical expenses claimed by Klinke should have been limited to the amount paid by Starbucks taking into account the provider write-downs. As such, the district court committed reversible error when it allowed Klinke to present evidence which clearly misled the jury into thinking that the total amount of medical expenses she incurred as a result of the Accident was the amount initially billed by her medical providers. Although the Nevada Supreme Court has not yet had occasion to rule on this specific issue, courts outside of Nevada have concluded as such. See, e.g., Nishihama v. City and County of San Francisco, 93 Cal.App.4th 298 (1st Dist., 2001); Hanif v. Housing Authority, 200 Cal.App.3d 635, (3d

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Dist., 1988), Mitchell v. Hayes, 72 F.Supp.2d 635 (W.D. Va. 1999): and McAmis v. Wallace, 980 F.Supp. 181, 184 (W.D.Va. 1997).

In Hanif, the seven-year-old plaintiff was hit by an automobile. At trial, the plaintiff was awarded the "reasonable value" of all medical expenses as damages even though the expenses exceeded the amount Medi-Cal (the public state-based insurance company) had actually paid to the health care providers. See Hanif, 200 Cal.App.3d at 637-38. On appeal, the Hanif court reversed the award. In so doing, the court found that the appropriate measure of damages in a tort action is the amount which will compensate a plaintiff for all detriment proximately caused by the injury. Id. at 640-641 (noting that "a plaintiff in a tort action is not, in being awarded damages, to be placed in a better position that he would have been had the wrong not been done").

In reaching this conclusion, the Hanif court explained that "[m]edical expenses fall generally in the category of economic damages, representing the actual pecuniary loss caused by the defendant's wrong." Id. On this point, and citing California case law, the Hanif court noted:

> [i]mplicit in the above cases is the notion that a plaintiff is entitled to recover *up to, and no more than*, the actual amount expended or incurred for past medical services so long as that amount is reasonable. . . This notion is supported by the following comment on "value" from the Restatement Second of Torts, which comment directly addresses the point at issue here: "When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. *If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him.*" The record fails to disclose any evidence or any inference from evidence that the low rate charged was intended as a gift to the plaintiff.

Id. at 643 [*citations omitted*] [*emphasis added*]. Based on the foregoing, the Hanif court found that "an award of damages for past medical expenses in excess of what the

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medical care and services actually cost constitutes over-compensation." Id. at 643-644 (holding that the true measure of plaintiff's damages is "the actual amount expended or incurred for past medical expenses so long as that amount is reasonable").[8]

Similar to Hanif, in McAmis v. Wallace, 980 F.Supp. 181 (W.D. Va. 1997), the defendants filed a motion *in limine* to limit the potential recovery of a motorist's medical bills to actual fees paid or payable by Medicaid rather than the total cost of medical services received. Id. at 182. Of relevance to the motion, a large majority of the plaintiff's medical bills were paid by Medicaid. Id. Pursuant to contract, however, the medical providers agreed to accept a fixed fee for their services discounted from their customary charge. Id. In granting the defendant's motion, the trial court held that the plaintiff could not recover the portions of her medical bills written-off by Medicaid. Id. at 186.

In reconciling its conclusion with the collateral source rule, the McAmis court noted:

> The collateral source rule is designed to strike a balance between two competing principles of tort law: (1) a plaintiff is entitled to compensation sufficient to make him whole, but no more; and (2) a defendant is liable for all damages that proximately result from his wrong. *Id.* at 185-86.
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> . . .
>
> For the collateral source rule to be in effect under Virginia law, the injured party must be responsible for making payment, even if a collateral source actually pays. The present case is not a situation where plaintiff avoided personally paying a bill because a collateral source stepped in. Here, no one paid the written off amount and as a result, under Virginia law, plaintiff has not incurred this fee. While it is true that plaintiff would have been liable for these fees if she had not qualified for Medicaid, this distant liability is not enough to trigger the collateral source rule because plaintiff

[8]It should be noted that the California Court of Appeals for the Fourth District also addressed this issue and reached a conclusion contrary to the courts in Nishihama and Hanif. See Howell v. Hamilton Meats & Provisions, Inc., 179 Cal.App.4th 686 (4th Dist., 2009). However, a petition for review of the Howell decision has been granted by the California Supreme Court, and the case is still pending. See Howell v. Hamilton Meats & Provisions, Inc., 106 Cal.Rptr.3d 770, 227 P.3d 342 (2010).

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> has neither paid these write-offs nor become legally obligated to pay them.... Since no one incurred the fees at issue, the collateral source rule does not require that plaintiff be permitted to recover the write off.

Id. at 184. (citations omitted). Based on this, the McAmis court ultimately found:

> Since Plaintiff did not incur the written-off amounts, they cannot be included in any compensatory damage award she may receive. In order to make Plaintiff whole, to reimburse her for costs expended as a result of this accident, Plaintiff need only receive the actual costs of medical care borne by Medicaid. These are the amounts that Plaintiff has incurred for the purposes of the collateral source rule. While Plaintiff was not able to pay her medical bills herself, under the collateral source rule, she may deserve to be compensated for what Medicaid paid as if these benefits were insurance.

McAmis, 980 F.Supp. at 185; see also Ward-Conde v. Smith, 19 F.Supp.2d 539 (E.D. Va. 1998) (limiting evidence of past medical expenses presented to the jury to those expenses actually incurred and paid); Mitchell v. Hayes, 72 F.Supp.2d 635 (W.D. Va. 1999) (plaintiff precluded from referring to or introducing at trial any amount of the medical bills that represented adjustments or write-offs); and Terrill v. Nanda, 759 So.2d 1026, 1031 (La. Ct. App. 2000) (a plaintiff may not recover medical expenses "contractually adjusted" or "written-off" by a health-care provider).

In articulating the strong policy behind the foregoing holdings while reconciling such holdings with the collateral source rule, the Federal District Court for the Eastern District of Virginia concisely explained:

> [The plaintiff] suffers no adverse consequences by the enforcement of the rule limiting the medical claims to those for which plaintiff is obligated because plaintiff is still permitted to recover one hundred percent of all expenses which must be paid. The operative words are "must be paid," whether those are paid in a negotiated fee agreement between a health care provider and an insurance company or through plaintiff's co-payment obligation. The collateral source rule is fully honored by the court's decision in that a defendant is denied the windfall of an insured plaintiff, protected against catastrophic loss, and defendants are protected against plaintiff's windfall by permitting plaintiff only to present to the jury those expenses for which she is legally obligated, or, as stated in Bowers, which have been "incurred."

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Ward-Conde, 19 F.Supp.2d at 542 (citations omitted). Similarly, in acknowledging the reality of modern medical economics, the Federal District Court for the Western District of Virginia recognized:

> Discounting is a reality of modern medical economics and it does no violence to the collateral source doctrine to bring to the tort compensation system the same intended savings. By allowing the plaintiff to show the discounted medical expenses as evidence of his damages, even though he paid no part of them, but refusing any evidence of the writ-offs that no one incurred, there is a proper balance of the competing interests at issue.

Mitchell, 72 F.Supp.2d at 637-38.

Based on the foregoing, it is clear that Klinke should not have been permitted to claim medical expenses as damages at trial beyond the amounts actually paid for the medical services Klinke received. In this regard, and as explained above, neither Klinke nor anyone else sustained an actual loss with respect to the portions of Klinke's medical bills which were written-off by the providers. (See AA8, at p. 1279 [Trial Exhibit 30]). Thus, the district court committed reversible error when it permitted Klinke to claim such "written-off" amounts as damages at trial.

3. The district court committed reversible error in refusing to reduce the jury verdict by the difference between the amount billed for Klinke's medical care and awarded by the jury, and the amount actually paid for such medical care.

Where the facts are not in dispute and the district court's decision is based on an application of law, the standard of review on appeal of the district court's decisions is *de novo*. See Canfora v. Coast Hotels and Casinos, Inc., 121 Nev. 771, 121 P.3d 599 (2005).

As noted above, the verdict ultimately entered by the jury in this matter reflected a special damages component based on the billed medical expenses of $17,510.00, rather than the actual cost of the medical services Klinke received after the Accident.

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(See AA8, at pp. 1198, and 1279). Because this verdict reflected a special damages award in excess of Klinke's actual loss with respect to her medical expenses, following the entry of the jury verdict, Tri-County filed a motion requesting that such verdict be reduced. (See AA8, at pp. 1238-1245). Specifically, in its motion, Tri-County requested that the jury's verdict be reduced by the amount of $5,347.74, representing the difference between the $17,510.00 billed for Klinke's medical care and awarded by the jury, and the $12,162.26 actually paid for such medical care. (See AA8, at pp. 1238-1245, 1253-1255, and 1279). As also noted above, the district court denied Tri-County's motion and entered the Judgment which reflected a special damages component of the $17,510.00 billed amount of Klinke's medical expenses. (See AA8, at pp. 1255, and 1263-1264).

Although not specifically stated by the district court, its denial of Tri-County's motion to reduce the jury verdict appears to be based on an application of Nevada's collateral source rule. (See AA8, at pp. 1254, lines 8-14). However, contrary to the district court's determination in this regard, the collateral source rule does not preclude a court from offsetting the damages awarded a plaintiff at trial by payments received from third parties with respect to the same injuries. See Winchell v. Schiff, 124 Nev.Adv.Op. No. 80, 193 P.3d 946 (2008). In Winchell, a landlord had allegedly misappropriated inventory from the tenant's cold storage unit. Prior to bringing an action against the landlord, the tenant filed a theft loss claim under its own policy of casualty insurance, and received payments from the insurer under such coverage. See Winchell, 124 Nev.Adv.Op. No. 80, at 2-3, 193 P.3d at 949.

In the action initiated by the tenant against the landlord, the district court precluded the landlord from introducing evidence of the insurance payment at trial

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based upon the collateral source rule. In addition, following the trial, the district court denied the landlord's motion to offset the damages awarded by the jury by the amount of the insurance proceeds received by the tenant. The landlord appealed. See Id.

On appeal, the Nevada Supreme Court affirmed the district court's application of the collateral source rule to the extent evidence of the insurance payment was excluded from trial. However, the Supreme Court overturned the district court's refusal to offset the jury award by the amount of such insurance payment. See Winchell, 124 Nev.Adv.Op. No. 80, at 5-6, 193 P.3d at 951. Although the offset in question was allowed by the Winchell court based upon a provision in the lease agreement between the landlord and tenant, the court was clear that the collateral source rule did not preclude post-trial offsets on jury awards based upon payments received by a plaintiff from third parties. Id.

As explained above, in the present matter, Klinke is not entitled to recover medical expenses as damages beyond the amounts actually paid for the underlying medical services. In this regard, Klinke did not sustain an actual loss with respect to those portions of her medical bills which were written-off by the medical providers. See Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995) (recognizing that tort law is designed to 'afford compensation for injuries sustained by one person as the result of the conduct of another'); and United Services Auto Ass'n v. Schlang, 111 Nev. 486, 489 894 P.2d 967, 969 (1995) (recognizing that an expense can only be "incurred" when one has paid it or become legally obligated to pay it). Notwithstanding this, the district court applied the collateral source rule to preclude the presentation of evidence at trial which established the amounts actually paid for the medical services rendered to Klinke following the Accident. In addition, and also under the guise of the collateral source rule,

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the district court allowed Klinke to claim as damages at trial medical expenses beyond the amounts actually paid for the underlying medical services. As noted above, it is Tri-County's contention that the district court committed reversible error with respect to its application of the collateral source rule in this regard. However, even if the district court was correct in its application of the collateral source rule in the above-referenced decisions, based on the holding in Winchell v. Schiff, *supra*, the district court's refusal to utilize such evidence following trial to reduce to the jury verdict to an amount commensurate with Klinke's actual loss clearly amounted to reversible error.

Again, the Nevada Supreme Court has not had occasion to rule on this specific issue. However, at least one opinion from outside of Nevada is instructive. See Greer v. Buzgheia, 414 Cal.App.4th 1150 (3d Dist., 2006), In Greer, the plaintiff motorist suffered personal injury and related loss of income from an automobile accident. Prior to trial, counsel for the defendant driver brought a motion *in limine* seeking to exclude evidence of medical expenses that exceeded the amount actually paid to plaintiff's medical providers. Id. at 1154. In this regard, plaintiff's medical bills resulting from the incident exceeded $211,000.00, whereas plaintiff's employer had reached an agreement with plaintiff's medical providers to satisfy plaintiff's medical bills for $132,984.92. Id.

Defense counsel argued, citing Hanif v. Housing Authority, *supra,* and Nishihama v. City and County of San Francisco, *supra*, that the jury should not be permitted to hear evidence of the greater amount, since no one would be obligated to pay the difference. Greer, 414 Cal.App.4th at 1154. The trial court denied the motion, noting that the holdings in Hanif nor Nishihama did not specifically prevent the jury from hearing evidence of non-discounted medical costs, and that the court would entertain a motion for post-verdict reduction if in fact the amount of medical costs awarded exceeded the

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amount paid. Greer, 414 Cal.App.4th at 1154. The jury ultimately found defendant fully liable and awarded plaintiff $260,000.00 in damages under the category of "past-economic loss." Id.

On appeal, defense counsel argued that the trial court erred in denying defendant's motion *in limine* to exclude evidence of the full amount of plaintiff's billed medical expenses on the grounds that Hanif and Nishihama limited recovery to the amount paid. Greer, 414 Cal.App.4th at 1156. Reviewing Hanif and Nishihama, the Third District Court of Appeal rejected the argument based on its belief that "Nishihama and Hanif stand for the principle that it is error for the plaintiff to *recover* medical expenses in excess of the amount paid or incurred," not that *evidence* of the full cost of medical services may not be admitted. Id. at 1157.

As discussed above, Tri-County believes the Greer court's construction of the Hanif and Nishihama decisions in this regard was erroneous, and that those decisions do stand for the proposition that a plaintiff should not be permitted to claim the billed amount of her medical expenses where portions of such amount have been written-off by her medical providers. However, of relevance to the third issue identified in this appeal, dicta in the Greer court's opinion implied that a better approach to the use of evidence of medical provider's write-offs would be in post-trial motion practice as a means of adjusting the jury's verdict to reflect to actual damages incurred by the plaintiff. See Greer, 414 Cal.App.4th at 1157-1158. Notwithstanding this reasoning, the Greer court found that the record before was inadequate to properly address the issue. Id. In this regard, the Greer court stated:

> To preserve for appeal a challenge to separate components of a plaintiff's damage award, a defendant must request a special verdict form that segregates the elements of damages. . .. The reason for this rule is simple. Without a special verdict separating the various damage

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> components, "we have no way of determining what portion-if any" of an award was attributable to a particular category of damage challenged on appeal.

Id. (noting that the defendant had failed to request a special verdict form thereby preserving his rights with respect to post-trial motions concerning the medical provider write-offs).

Again, the defendant in Greer failed to preserve the pertinent information in a special verdict form. However, this is precisely what was done in the present matter. (See AA8, at pp.1196-1203). In this regard, the special verdict form returned by the jury expressly states what portion of the jury's award was attributable to reimbursement for medical costs incurred by Klinke. (See AA8, at pp.1198 and 1203). Moreover, that form breaks down the amounts attributable to each provider, with the total amount awarded being $17,510.00. (See AA8, at p.1198). This is precisely the amount these providers initially billed Klinke for the medical services she received. However, as noted above, this is not the amount actually paid for such services. (See AA8, at pp. 1270 [Trial Exhibit 1], 1239-1240, and 1279 [Trial Exhibit 30]). Instead, and as noted above, the amount paid for the medical services in question was over $5,000 less than the amount of the initial bills. (See AA8, at pp. 1270 [Trial Exhibit 1], 1239-1240, and 1279 [Trial Exhibit 30]).

Thus, the district court had all of the necessary information to adjust the jury's verdict in this matter to reflect the actual amount of damages incurred by Klinke as a result of the Accident. However, in denying Tri-County's motion to reduce the jury verdict, the district court erroneously failed to do so. The district court's determination in this regard amounted to reversible error.

. . . .

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VI. Conclusion.

As discussed above, an exception to the collateral source rule exists for evidence of amounts paid on behalf of an employee through a worker's compensation claim. In the present matter, such evidence would have been significant in that it would have provided the jury with information as to the damages actually incurred by Klinke, to wit, the amount paid to the medical providers for the services they rendered to Klinke following the Accident. By precluding such evidence, the district court only allowed the jury to see the billed amount of Klinke's medical expenses. This was misleading to the jury and prejudicial to Tri-County in that such amount was over $5,000 more that what was actually paid for the medical services at issue. As such, the district court committed reversible error in precluding such evidence.

In the alternative, the district court committed reversible error in permitting Klinke to claim medical expenses as damages at trial beyond the amounts actually paid for the underlying medical services. As explained above, Klinke did not sustain an actual loss with respect to the portions of her medical bills which were written-off by the medical providers, and should not have been permitted to seek recovery of such amounts at trial.

Notwithstanding the foregoing, if this Court is inclined to find that a jury's consideration of such "write-downs" is precluded by the collateral source rule, such information should nonetheless have been used by the district court following the entry of the jury verdict to reduce such verdict to an amount which is commensurate with Klinke's actual loss. Such a procedure would avoid the concern expressed in Proctor v. Castelletti, *supra*, that a jury would misuse the evidence in a manner that is prejudicial

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to a plaintiff, while ensuring that the plaintiff does not recover an amount in excess of what she is entitled under Nevada law.

VII. Relief Requested.

Based on the foregoing, Tri-County respectfully requests the following relief:

1. That the Supreme Court reverse the district court's determination with respect to the application of the collateral source rule in this matter;

2. That the Supreme Court vacate the November 16, 2009 Judgment entered by the district court;

3. That the Supreme Court direct the district court to reduce the jury's verdict in this matter by the total amount of $5,347.74, representing the difference between the $17,510.00 billed for Klinke's medical care and awarded by the jury, and the $12,162.26 actually paid for such medical care; and

4. That the Supreme Court direct the district court to enter a judgment in this matter based on the reduced jury verdict, and in accordance with the foregoing and all other applicable Nevada law.

DATED this 3rd day of June, 2010.

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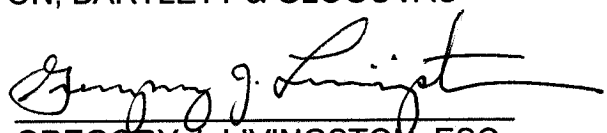
By: 

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the 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 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 3rd day of June, 2010.

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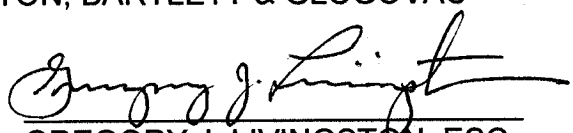
By: 

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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 3 day of June, 2010, I served the foregoing document(s) described as follows:

APPELLANT'S OPENING BRIEF

On the party(s) set forth below by:

_____ 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.

__X__ Personal delivery by LEGAL EXPRESS.

_____ 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
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DATED this 3 day of June, 2010.

Monica Evans

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