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 REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I. Introduction.

In this appeal, Appellant Tri-County Equipment & Leasing, LLC ("Tri-County") challenges the manner in which the district court treated evidence showing that the amount of medical expenses actually incurred by Respondent Angela Klinke ("Klinke") as a result of a June 1, 2007 automobile accident (the "Accident") was less than the amount initially billed by the medical providers. This evidence was in the form of records pertaining to a worker's compensation claim made by Klinke following the Accident. 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 significantly less.

This issue was 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 was admissible under NRS 616C.215(10), and, among other things, was 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

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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 Tri-County's Opening Brief, the district court erroneously rejected Tri-County's position on both of the foregoing motions. As a result, and 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.

Following the jury verdict, and in another attempt to prevent Klinke from recovering medical expense she never incurred, Tri-County requested that the district court reduce the verdict by the difference between the $17,510.00 originally billed by Klinke's medical providers and the amount actually paid for the medical services at issue. Tri-County's request 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. In the present appeal, Tri-County seeks to correct the district court's error in this regard through the reversal of at least one of the foregoing determinations. In her Answering Brief, Klinke has raised various arguments in response. However, as discussed below, these arguments should be rejected.

II. Argument.

A. The record establishes that the amount paid for the medical treatment received by Klinke following the Accident was significantly less than the amount awarded by the jury as special damages.

In her Answering Brief, Klinke maintains that the record fails to establish the medical expenses actually paid by the worker's compensation carrier, Starbucks Coffee

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Company and Safety National Casualty Corporation ("Starbucks"), were less than the original bills submitted by Klinke's medical providers. In responding to Klinke's argument in this regard, it is first significant to note that the Starbucks records which establish the medical provider discounts have been cited to numerous times in pleadings and papers filed with the district court in this matter. Notwithstanding this fact, prior to filing the Answering Brief in this appeal, Klinke had never challenged either the citations to the worker's compensation records or the amounts of the medical provider discounts represented by Tri-County. Thus, because this specific issue had not been raised, the citations to the Starbucks records and/or the amounts of the medical provider discounts had not been re-reviewed or double-checked.

Notwithstanding the foregoing, and now that the issue has been raised by Klinke, a detailed review of the worker's compensation records has been undertaken to confirm the citations and amounts previously represented. Unfortunately such review has revealed that the specific Starbucks records cited to by Tri-County in support of its position (as well as the amounts of the medical provider discounts previously maintained by Tri-County), in both the district court and in its Opening Brief in this appeal, are not correct. In this regard, it has always been Tri-County's contention that the medical provider discount at issue pertained only to three providers, Renown Medical Center ("Renown"), Barton Memorial Hospital ("Barton") and Concentra. It was Tri-County's belief that three of the categories of medical expenses itemized in the claim payments summary provided by Starbucks (see AA8, at p.1279) directly corresponded to these specific medical providers. See Opening Brief, at p. 5, fn. 4. In this regard, Tri-County believed that (i) the reference in such claims payment summary to "Ambulatory

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Surgical Center" referred to Renown, (ii) the reference to "Hospitals –Outpatient" referred to Barton, and (iii) the reference to "PPO Fee" referred to Concentra. (See AA8, at p.1279.)

Upon a closer review of such records, however, it is clear these references in the claims payment summary were general categories of expenses which were comprised of amounts paid to various providers depending on the services rendered to Klinke. For instance, and by way of example, the reference in the claims payment summary to "Hospital – Outpatient" referred to the amounts paid to all medical providers who rendered outpatient hospital services to Klinke, including, but not necessarily limited to, Barton. (See AA8, at p.1279.) Thus, Tri-County was incorrect in its citation to, and reliance upon, the claims payment summary to support its contentions regarding the medical provider discounts at issue in this matter.

Notwithstanding the foregoing, a review of the Starbucks records reveals that other documents contained in such records establish that the amounts paid to Renown and Barton were significantly less than the amounts originally billed by these medical providers. Specifically, with respect to Renown, an "Explanation of Benefits," or "EOB," dated May 6, 2008 establishes that the $6,875.75 originally billed by Renown was reduced by $1,349.43 in "Bill Review Reductions" and $4,527.20 in "PPO Discounts."[1]

[1] The EOBs were part of the records contained in Starbucks' worker's compensation claim file relating to Klinke. These worker's compensation records 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 AA2, at pp. 207-208, and 291-292; AA3, at 612-620; 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 regard. (See AA5, at pp. 897-898.) This request was denied by the district court. (See AA5, at p. 898.)

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(See AA8, at pp. 1320-1321.) Thus, the amount actually paid for the medical services provided to Klinke by Renown was only $999.12.[2] (See AA8, at p. 1321.)

Similarly, multiple EOBs contained in the Starbucks records establish that the amount actually paid to Barton for medical services rendered to Klinke was less than the amount originally billed by the provider and considered by the jury in determining Klinke's special damage award. This is illustrated by the chart below which references the date of each EOB pertaining to Barton, the amount billed by Barton, the amount paid to Barton by Starbucks, and the pertinent citation to the record.

Check Date	Billed	Paid	Citation to Record
03/07/2008	$ 146.00	$ 138.70	AA8, at p. 1341
03/20/2008	$ 121.00	$ 114.95	AA8, at p. 1338
04/01/2008	$1,147.70	$ 151.30	AA8, at p. 1334-1335
04/07/2008	$2,679.00	$ 516.80	AA8, at p. 1328
04/09/2008	$ 121.00	$ 121.00	AA8, at p. 1326
04/14/2008	$ 58.00	$ 56.93	AA8, at p. 1324
04/22/2008	$ 121.00	$ 121.00	AA8, at p. 1322
08/1/2008	$ 983.57	$ 179.90	AA8, at pp. 1301-1302
Totals	$5,377.27	$1,400.58	

From the foregoing, the record establishes that although Barton originally billed the total amount of $5,377.27 for the medical services provided to Klinke,[3] the total

[2] Tri-County's Opening Brief in this appeal incorrectly cited the "paid" amount as $5,221.00, when in fact the total amount actually paid to Renown for services rendered to Klinke was $999.12. (See Opening Brief, at pp. 5-6; and AA8, at pp. 1320-1321.)

[3] This amount differs from the "billed" amount of $4,810.27 represented to the jury at trial and in Tri-County's Opening Brief. (See Opening Brief, at pp. 5-6; AA8, at p. 1270

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amount actually paid for such services was $1,400.58.[4] Thus, Klinke's contention in her Answering Brief that the record does not establish the medical provider discounts at issue is simply incorrect.[5]

What the foregoing means in the context of the present appeal is that the jury's total special damages award of $17,510.00 included the $11,685.75 billed by Barton and Renown ($4,810.00 billed by Barton and $6,875.75 billed by Renown), notwithstanding the fact the total amount actually paid on these bills was only $2,399.70 ($999.12 paid to Renown and $1,400.58 paid to Barton). This difference between the medical expenses awarded by the jury and reflected in the Judgment and the amount actually paid to Klinke's medical providers for the medical services she received following the Accident is illustrated in the following table:

. . .

[Trial Exhibit 1]; and AA8, at p. 1279 [Trial Exhibit 30].) However, for the purposes of this appeal, such difference is irrelevant in that the special damage award should have been based on the "paid" amount of $1,400.58 regardless of the amount originally billed by the medical provider.

[4] Tri-County's Opening Brief in this appeal incorrectly cited the "paid" amount as $1,370.00, when in fact the total amount actually paid to Barton for services rendered to Klinke was $1,400.27. (See Opening Brief, at pp. 5-6; and AA8, at pp. 1301-1302, 1322, 1324, 1326, 1328, 1334-1335, 1338 and 1341.)

[5] In her Answering Brief, Klinke also takes issue with the fact the amount REMSA billed was less than the amount Starbucks ultimately paid to REMSA for ambulance services. See Opening Brief, at p. 3, lines 2-4. However, a review of Starbucks records shows that in addition to the $4,516.00 paid to REMSA for the ambulance service, Starbucks also paid interest on the bill in the amount of $343.09. (See AA8, at pp. 1340; and Appellant's Supplemental Appendix, at p. 1.) The document contained at page 1 of Appellant's Supplemental Appendix is one of the records contained in Starbucks' worker's compensation claim file relating to Klinke, and was part of Tri-County's Trial Exhibit 30. Again, the district court precluded the admission of Tri-County's Trial Exhibit 30 into evidence at trial. (See AA2, at pp. 207-208, and 291-292; AA3, at 612-620; AA4, at 639-643; AA5, at p. 898; and AA8, at 1239 [footnote 1].)

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Medical Provider	Amount Awarded by Jury	Amount Paid
REMSA	$ 4,516.00	$ 4,859.09
Renown Medical Center	$ 6,876.00	$ 999.12
No. Nev. Emergency Phys.	$ 400.00	$ 400.00
Emerald Bay Phys. Therapy	$ 494.00	$ 494.00
Barton Memorial Hospital	$ 4,810.00	$ 1,400.58
Concentra	$ 266.00	$ 266.00
Reno Radiological	$ 148.00	$ 148.00
	$17,510.00	$ 8,566.79

(See AA1, at pp. 45-46; AA3, at p. 526, AA8, at pp. 1238-1239, 1270 [Trial Exhibit 1], 1279 [Trial Exhibit 30], 1301-1302, 1320-1322, 1324, 1326, 1328, 1334-1335, 1338 and 1341; and Appellant's Supplemental Appendix, at p. 1.)[6]

Based on the foregoing, it is clear that the worker's compensation records contained in Tri-County's Trial Exhibit 30, and reflected in the record on appeal, establish that actual cost of the medical treatment Klinke received following the Accident was $8,566.79. When this is compared to the $17,510.00 in medical expenses originally billed by Klinke's medical providers and awarded to Klinke as special damages in the Judgment, Klinke received an unwarranted windfall at Tri-County's expense in the total amount of $8,943.21 ($17,510.00 less $ 8,566.79.)

B. 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 district court erroneously applied Nevada's collateral source rule to preclude the admission of records pertaining to Klinke's worker's compensation claim with Starbucks. In this regard, the district court's determination on this issue failed to

[6] The amount set out in the "Amount Billed and Awarded by Jury" column is based on Klinke's Trial Exhibit 1, Schedule of Medical Expenses (See AA3, at pp. 535-536; and AA8, at p. 1270), as well as the Special Verdict Form entered by the jury following trial. (See AA8, at pp. 1196-1203.)

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recognize an express exception to the collateral source rule, and had the effect of preventing the jury from considering the actual cost of Klinke's medical care in determining the amount of the special damage award.

As explained in Tri-County's Opening Brief, Nevada's collateral source rule generally precludes the admission of evidence concerning compensation an injured party receives from a third-party wholly independent of the tortfeasor. See Proctor v. Castelletti, 112 Nev. 88, 90, n.1, 911 P.2d 853, 854, no. 1 (1996). The policy underlying this rule is 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, as also discussed in the Opening Brief, both the California and the Nevada legislatures have created exceptions to the collateral source rule in the context of worker's compensation claims. See NRS 616C.215(4) and (10); and Cal. Labor Code, §3856.

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, the exceptions created by these statutes have the effect of providing the trier of fact with information concerning the amounts actually paid for the medical care received by a plaintiff. In other words, these statutory exceptions to the collateral source rule clearly allow the admission of evidence of worker's compensation benefits paid on behalf of an employee by an employer.

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In her Answering Brief, Klinke maintains that because NRS 616C.215 expressly encompasses only worker's compensation benefits paid under Nevada law, the California worker's compensation records at issue in this matter do not fall within the scope of the exception. However, given the fact both Nevada and California recognize this same exception to the collateral source rule, such a narrow construction of NRS 616C.215 is not appropriate in the present matter. Accordingly, 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.

C. The district court committed reversible error in allowing Klinke's special damages award to be based on billed but unpaid medical expenses.

As explained in Tri-County's Opening Brief, Nevada law clearly contemplates that a plaintiff may only recover those medical expenses actually incurred, to wit the amount actually paid for the medical treatment received by a plaintiff. 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 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). Thus, billed medical expenses which were discounted and for which no one became legally obligated to pay are not compensable. See United Services Auto Ass'n v. Schlang, 111 Nev. 486, 489 894 P.2d 967, 969 (1995) (recognizing that, under Nevada law, "[a]n expense can only be 'incurred' . . . when one

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has paid it or become legally obligated to pay it"). Accordingly, in the present matter, Klinke should not have been permitted to recover $17,510.00 in medical expenses, when the amount actually paid for the medical treatment she received following the Accident was only $8,566.79.

As the district court determined the Starbucks records were not admissible at trial under the exception to the collateral source rule created by NRS 616C.215, Tri-County proposed two additional and alternative approaches which the district court could have utilized to ensure the medical expenses awarded to Klinke as special damage would not exceed the actual value of the medical services she received following the Accident. First, as discussed in Tri-County's Opening Brief, Tri-County requested that the district court preclude Klinke from claiming medical expense damages at trial which exceed the actual amounts paid for the underlying medical services. This approach would have eliminated the public policy concern that the jury would misuse the worker's compensation records while ensuring Klinke was not awarded damages in excess of her actual injuries. The district court rejected this approach.

Next, Tri-County proposed that because the verdict entered by the jury following trial was based on the billed rather than the paid amount of Klinke's medical expenses, the district court reduce such verdict by the difference between the two amounts. As with the first proposed approach, this would have ensured that the medical expenses awarded to Klinke in the Judgment were not in excess of the actual medical expenses she incurred following the Accident. Notwithstanding the fact such proposal was not in conflict with the public policy underlying the collateral source rule (to wit, that a jury

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might misuse evidence of third party payments made to, or on behalf of, the plaintiff), the district court also rejected this approach.

In her Answering Brief, Klinke requests an affirmance of the foregoing determinations by the district court. In this regard, Klinke continues to maintain the applicability of the collateral source rule in the present matter, and argues that a "vast majority" of courts outside of Nevada have similarly enforced the collateral source rule to preclude evidence of medical provider discounts. See Respondent's Answering Brief, at pp. 6-7. As authority for this proposition, Klinke cites to the Oregon Supreme Court case White v. Jubitz Corporation, 347 Or. 212, 219 P.3d 566 (2009). However, in reviewing the White opinion, as well as the additional authority cited in Klinke's brief and other case law from outside Nevada, it is clear that Klinke's representations regarding the approach taken by a "vast majority" of courts is misleading. Instead, what such case law reveals is that courts outside of Nevada have taken a variety of approaches in addressing this issue, which, to a large extent, are based on pertinent legislation or existing state court precedent.

For instance, many of the cases discussing the effect of medical provider discounts on a tort plaintiff's damages, including at least one case relied upon by Klinke, involved the application a "collateral source statute" adopted by the pertinent state's legislature. See Swanson v. Brewster, 784 N.W.2d 264 (Minn., 2010) (discussion the application of Minnesota Statutes, Section 548.251); White v. Jubitz Corporation, 347 Or. 212, 219 P.3d 566 (2009) (discussing Oregon Revised Statutes, Section 31.580); and Goble v. Frohman, 901 So.2d 830 (Fla.2005) (Florida Statute, Section 768.76.) Under these types of statutes, trial courts are given the ability to reduce a jury verdict by

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amounts an injured plaintiff receives from collateral sources such as health insurance.[7] See Swanson, 784 N.W.2d at 271. As such, the question presented in these cases was whether, under the pertinent "collateral source statute," a jury verdict should be offset by the medical provider discounts which were given with respect to the billed amount of medical expenses on which the jury's award was based. In answer to this question, both the Swanson and the Goble courts allowed such offsets, whereas the White court did not. Significantly however, the respective courts' conclusions in these cases were primarily based on the language of the pertinent statutes. Moreover, Nevada has no such "collateral source statute," and with a few limited exceptions, still follows the common law collateral source rule. See Proctor v. Castelletti, *supra*. As such, these opinions have limited instructive value in the present matter.

Another approach taken by courts outside of Nevada, and as alluded to in Klinke's Answering Brief, is to simply enforce the common law collateral source rule and preclude the admission of evidence concerning the amount actually paid by third parties such as health insurers for medical treatment received by a plaintiff. See Wills v. Foster, 229 Ill.2d 393, 892 N.E.2d 1018 (2008). In essence, under this approach, courts have applied the common law collateral source rule to either (i) preclude the admission of evidence concerning the amount actually paid by third parties such as health insurers for medical treatment received by a plaintiff, or (ii) deny a defendant post-trial offsets to account for medical provider discounts. See Wills v. Foster, 229 Ill.2d 393, 892 N.E.2d 1018 (2008); and Bynum v. Magno, 106 Haw. 81, 101 P.3d 1149 (2004) (holding that

[7] In essence, these statutes were enacted to prevent a plaintiff from being awarded amounts in excess of his or her actual damages. See Swanson, 784 N.W.2d at 269-270.

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the collateral source rule (i) prevents defendants from introducing any evidence concerning medical provider discounts or "write-offs," and (ii) bars a defendant from reducing the plaintiff's compensatory award by the amount of such discount or write-off). However, as explained in Tri-County's Opening Brief and below, this approach disregards both the substance and policy behind Nevada's collateral source rule, and is simply not consistent with existing Nevada precedent.

Again, Nevada law precludes a plaintiff from recovering damages in excess of the value of his or her actual injuries. See Grosjean v. Imperial Palace, 125 Nev.Adv.Op. No. 30, 212 P.3d 1068, 1084 (2009) (recognizing Nevada's policy prohibiting double recovery for a single injury); and Banks ex. rel. Banks v. Sunrise Hospital, 120 Nev. 822, 843-844, 102 P.3d 52, 67 (2004) (acknowledging that NRS 17.245(1) comports with Nevada's policy prohibiting double recovery by a plaintiff). As explained above, the value of the medical expense component of Klinke's injuries is the amount paid for the medical services received by Klinke following the Accident.[8] Thus, to permit a plaintiff to recover medical expenses over and above the amount paid for the underlying medical services impermissibly allows an excess recovery or windfall.

Moreover, a blind application of the collateral source rule with respect to medical provider discounts overlooks the fact that medical provider discounts are not actually

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[8]In this regard, and as explained above, Nevada law contemplates that a plaintiff may only recover those medical expenses actually incurred, to wit the amount paid for the medical treatment received by a plaintiff. See Greco v. United States, 111 Nev. 405, 893 P.2d 345 (1995); and K-Mart v. Ponsock, 103 Nev. 39, 49, 732 P.2d 1364, 1371 (1987) (recognizing that tort damages serve to make an injured party whole). As such, billed medical expenses which have been discounted and for which no one became legally obligated to pay are not compensable. See United Services Auto Ass'n v. Schlang, 111 Nev. 486, 489, 894 P.2d 967, 969 (1995) (recognizing that, under Nevada law, "[a]n expense can only be 'incurred' . . . when one has paid it or become legally obligated to pay it").

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"collateral source" payments subject to the common law collateral source rule. In this regard, a contractual discount in the cost of services rendered by a medical provider is not a payment for services rendered. Instead, such write-off is, in essence, an agreement between the parties to a contract as to the actual value of the services to be performed. As explained by the Louisiana Court of Appeal in Terrell v. Nanda, 759 So.2d 1026 (La.App., 2000):

> . . . a plaintiff may not recover as damages that portion of medical expenses 'contractually adjusted' or 'written-off' by a healthcare provider pursuant to the requirements of the Medicaid program. Such expenses are not damages incurred by the incurred plaintiff and are not subject to recovery by application of the 'collateral source' rule.

Id. at 1031; see also Dyet v. McKinley, 139 Idaho 526, 529, 81 P.3d 1236, 1239 (2003) (acknowledging that a Medicare write-off is not "technically" a collateral source); and Kastick v. U-Haul, 740 N.Y.S.2d 167, 169, 292 A.D.2d 797, 798 (2002) (reasoning that "[a]lthough the write-off technically is not a payment from a collateral source within the meaning of [the collateral source statute], it is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefor"). Thus, where medical expenses are discounted by a provider and no one is responsible for the payment of the discounted amounts, there is no third party "payment" at issue and the collateral source rule is never triggered. See Kastick v. U-Haul, 740 N.Y.S.2d at 169, 292 A.D.2d at 797; and Terrell v. Nanda, 759 So.2d at 1031.

Applying this reasoning to the present matter, the medical expenses incurred by Klinke were only those expenses ultimately paid by her worker's compensation carrier, Starbucks. There was no liability on the part of either Klinke or Starbucks for expenses above the amounts paid. Thus, there is no "collateral source" payment at issue. Instead,

at issue are simply "write-offs" or "discounts" which establish the actual value of the medical treatment rendered to Klinke.

Based on the foregoing, it is clear that the district court's application of the collateral source rule both before and after the jury verdict was in error. Again, such application is not consistent with the substance of, or policy behind, Nevada's collateral source rule, and ignores existing Nevada case law. As such, Klinke's contention that the district court should be affirmed in its applications of the collateral source rule, both before and after the jury verdict, should be rejected.

Another, and clearly more reasoned, approach taken on this issue by courts outside of Nevada is to simply preclude a plaintiff from claiming medical expenses as damages at trial beyond the amounts actually paid for the medical services received by that plaintiff. See Nishihama v. City and County of San Francisco, 93 Cal.App.4th 298 (1st Dist., 2001); McAmis v. Wallace, 980 F.Supp. 181 (W.D. Va. 1997); and Hanif v. Housing Authority of Yolo County, 200 Cal.App.3d 635, 246 Cal.Rptr. 192 (1988). In this regard, and as explained by the California Court of Appeals for the Third District in Hanif:

> In tort actions, damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring him as nearly as possible to his former position, or giving him some pecuniary equivalent . . .
> The primary object of an award of damages in a civil action, and the fundamental principle on which it is based, are just compensation or indemnity for the loss or injury sustained by the complainant, and no more . . .
> A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done. . . .
> Thus, when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may

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> recover for that care despite the fact it may have been less than the prevailing market rate.

Id. at 640-641, 246 Cal.Rptr. at 197-198. Similarly, the Federal District Court for the Western District of Virginia in McAmis reasoned:

> [s]ince 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) (precluding a plaintiff from referring to or introducing at trial any amount of the medical bills that represented adjustments or write-offs); and Terrell v. Nanda, 759 So.2d 1026, 1031 (La. Ct. App. 2000) (holding that a plaintiff may not recover medical expenses "contractually adjusted" or "written-off" by a health-care provider). As noted above and in Tri-County's Opening Brief, this is one of the approaches Tri-County requested that the district court take in the present matter. (See AA1, at pp. 44-62, and 158-164, and AA2, at pp. 197-211).

Again, it is clear that, under Nevada law, Klinke should not have been permitted to claim medical expenses as damages at trial beyond the amounts actually paid for the medical services she received. See Grosjean v. Imperial Palace, *supra* (recognizing Nevada's policy prohibiting double recovery for a single injury); and Greco v. United States, *supra* (recognizing that tort damages serve to make an injured party whole).

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Specifically, because neither Klinke nor anyone else sustained an actual loss with respect to the portions of Klinke's medical bills which were written-off by her providers, such portions of the bills should not be recoverable as damages. (See AA1, at pp. 45-46; AA3, at p. 526, AA8, at pp. 1238-1239, 1270 [Trial Exhibit 1], 1279 [Trial Exhibit 30], 1301-1302, 1320-1322, 1324, 1326, 1328, 1334-1335, 1338 and 1341; and Appellant's Supplemental Appendix, at p. 1.) Thus, the district court committed reversible error when it permitted Klinke to claim such "written-off" amounts as damages at trial.

Notwithstanding the foregoing, and if this Court is inclined to affirm the district court's determination in this regard, information concerning the medical provider discounts 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. As explained in Tri-County's Opening Brief, under Nevada law, providing for a post-verdict offset of Klinke's damages in the amount of the medical provider discounts at issue would not be a violation of the collateral source rule. See Winchell v. Schiff, 124 Nev.Adv.Op. No. 80, 193 P.3d 946 (2008) (concluding that 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). Moreover, 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 to a plaintiff, while ensuring that the plaintiff does not recover an amount in excess of what she is entitled under Nevada law.

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III. Conclusion.

Again, the medical expenses Klinke incurred following the Accident totaled $8,566.79. Notwithstanding this fact, the Judgment entered by the district court in this matter awarded Klinke $17,510.00 to compensate her for such medical expenses. This result is contrary to Nevada law. Moreover, the district court's erroneous application of the common law collateral source rule to reach this result ignores the fact that, in today's healthcare industry, medical provider discounts through private health insurance, Medicare, Medicaid or worker's compensation are the norm, and clearly factor in to the valuation of tort claims based on bodily injury.

As discussed above and in Tri-County's Opening Brief, three separate and distinct approaches were proposed to the district court in the present matter to ensure that the damages awarded to Klinke for her medical expenses did not exceed the actual amount paid for the medical services received by Klinke following the Accident. First, Tri-County proposed that the district court simply allow the Starbucks records into evidence under an exception to the collateral source rule for evidence of amounts paid on behalf of an employee through a worker's compensation claim. Had the district court allowed these records into evidence, the jury's ultimate calculation of Klinke's special damage award would have been based on Klinke's actual damages, 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 almost $9,000 more than what was

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actually paid for the medical services at issue. As such, the district court committed reversible error in precluding such evidence.

In the alternative, Tri-County requested that the district court preclude Klinke from claiming 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. Thus, by limiting Klinke's claimed expenses to the medical expenses she actually incurred, the district court could have ensured that Klinke would not receive an impermissible windfall at the expense, and to the prejudice, of Tri-County. However, as noted above, the district court erroneously denied this alternative request.

Finally, following the entry of the jury verdict, Tri-County proposed that because the special damages awarded by the jury were based on Klinke's billed but unpaid medical expenses, such award be offset by the amount of the medical provider discounts at issue. However, notwithstanding the fact such a procedure would have corrected the windfall awarded to Klinke by the jury without unduly prejudicing Klinke, the district court erroneous denied this request as well.

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;

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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 $8,943.21, representing the difference between the $17,510.00 billed for Klinke's medical care and awarded by the jury, and the $8,566.79 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 20th day of September, 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 20th day of September, 2010.

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

APPELLANT'S REPLY 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 20 day of September, 2010.

Monica Evans
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