Vacated per order filed 9/12/11.

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRI-COUNTY EQUIPMENT & LEASING, LLC,
Appellant,
vs.
ANGELA KLINKE,
Respondent.

No. 55121

FILED

APR 27 2011

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a district court judgment entered on a jury verdict in a tort action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Respondent Angela Klinke filed a complaint for personal injury against appellant Tri-County Equipment & Leasing, LLC, after a generator being towed by a Tri-County truck struck Klinke's vehicle, injuring Klinke. Klinke received California workers' compensation benefits to cover her medical expenses because she was in the course and scope of her employment at the time. However, Klinke's employer negotiated write-downs on those medical expenses, and was therefore not required to pay the full amount as it appeared on the medical bills.

Prior to trial, Klinke sought to preclude Tri-County from presenting any evidence of her California workers' compensation benefits under the collateral source rule. The district court granted Klinke's request stating that

> absent an award under Chapter 616A to 616D or Chapter 617 of the Nevada Revised Statutes, the collateral source rule bars any evidence as to the benefits received under the California workman's compensation policy. Nothing under NRS

> 616C.215 indicates that it applies to benefits received under another state's workmen's compensation statutes. This is a limited exception applicable only to Nevada benefits.

Tri-County sought to limit Klinke's presentation of the medical costs to the amount actually paid rather than the amount billed, but the district court denied Tri-County's request. After the trial, Tri-County moved the district court to reduce the jury's verdict on the medical cost damages to the amount actually paid, but the district court denied the request.

Tri-County now appeals, arguing that the district court erred in (1) precluding Tri-County from presenting evidence of Klinke's workers' compensation benefits, (2) denying Tri-County's motion in limine to limit Klinke's presentation of the medical costs to the amount actually paid by her employer, and (3) denying Tri-County's motion to reduce the jury's verdict to include only the medical costs actually paid rather than the medical costs billed.

For the reasons set forth below, we conclude that the district court did not err, and thus, we affirm the district court's decision. Because the parties are familiar with the facts and procedural history in this case, we do not recount them further except as is necessary for our disposition.

The district court properly excluded evidence of Klinke's foreign workers' compensation benefits under the collateral source rule

Tri-County contends that the district court erred by preventing it from introducing evidence of Klinke's California workers' compensation benefits because (1) both California and Nevada have an exception to the collateral source rule for workers' compensation benefits and (2) the preclusion of such evidence was prejudicial in that it resulted

in the jury only seeing the amounts billed for Klinke's medical expenses instead of the amounts paid. We disagree.

Where the facts are not in dispute and the district court's decision is based on an application of law, we review the district court's decision de novo.[1] Canfora v. Coast Hotels & Casinos, Inc., 121 Nev. 771, 775, 121 P.3d 599, 602 (2005).

Nevada's collateral source rule bars the introduction of evidence that a plaintiff has received compensation for his injuries from a third-party wholly independent of the tortfeasor. Proctor v. Castelletti, 112 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996). Proctor dealt with a personal injury lawsuit where the district court permitted the defendant to admit evidence of the plaintiff's disability insurance. Id. at 89, 911 P.2d at 853. In Proctor, we adopted "a per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose." Id. (second emphasis added). In so doing, we followed the U.S. Supreme Court's lead, Eichel v. New York Central Railroad Co., 375 U.S. 253 (1963), in concluding that "[c]ollateral source evidence inevitably prejudices the jury because it greatly increases the likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation," and therefore, "the prejudicial impact of collateral source evidence inevitably outweighs the probative value of such evidence." Id. at 90-91, 911 P.2d 854 (reasoning that "there is no

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[1]In Tri-County's opening brief, it asserted that the appropriate standard of review was abuse of discretion. However at oral argument, both parties stated that the appropriate standard of review is de novo.

circumstance in which a district court can properly exercise its discretion in determining that collateral source evidence outweighs its prejudicial effect"). Ultimately in Proctor, we held that the district court erred in admitting evidence of disability insurance payments. Id. at 91, 911 P.2d at 854.

Nevada recognizes a limited exception to the collateral source rule for workers' compensation payments. See NRS 616C.215(1)-(4); Cramer v. Peavy, 116 Nev. 575, 580-82, 3 P.3d 665, 669-70 (2000) (stating that NRS 616C.215's jury instruction regarding the admissibility of workers' compensation was "not intend[ed] to eviscerate the collateral source rule statute" but instead to create "a narrow exception to the rule"). NRS 616C.215(1)-(4) states that evidence of workers' compensation benefits, compensable pursuant to NRS Chapters 616A through 616D or NRS Chapter 617, is admissible and a district court must instruct the jury on the workers' compensation benefits.[2]

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[2]The dissent relies on section 10 of NRS 616C.215 to conclude that the exception is not limited to only Nevada's workers' compensation. However, the purpose of section 10 is to inform the district court what must be included in the jury instructions when it admits evidence of workers' compensation. NRS 616C.215(10). Whereas, section 2 is the applicable section here for admitting evidence of workers' compensation and that section explicitly only allows Nevada's workers' compensation. NRS 616C.215(2). "When construing a specific portion of a statute, the statute should be read as a whole . . . ." Building & Const. Trades v. Public Works, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992). Thus, the Legislature's failure to specify that only Nevada's workers' compensation is admissible in section 10 does not negate its earlier explicit references to Nevada's workers' compensation statutes.

NRS 616C.215 has created a narrow exception to the collateral source rule that only applies to the payment of Nevada workers' compensation benefits. Tri-County concedes that this statute is meant to protect the workers' compensation system in Nevada. We conclude that such a narrow exception does not apply to foreign workers' compensation benefits. The Legislature has amended NRS 616C.215 four times since Proctor was decided in 1996 and has never chosen to expand this exception to include foreign workers' compensation benefits. See generally NRS 616C.215. For us to conclude that the narrow exception created by the Legislature applies to foreign workers' compensation benefits, as Tri-County argues that we should, would require us to exceed the bounds of our judicial province, as it is wholly within the Legislature's province to expand this narrow exception. See SIIS v. Conner, 102 Nev. 335, 338, 721 P.2d 384, 386 (1986).

Here, the jury was instructed on Nevada law regarding the effect of a plaintiff receiving workers' compensation benefits because of the minor references made at trial to Klinke's workers' compensation benefits. The district court properly reduced the threat of prejudice caused by any reference to Klinke's workers' compensation benefits. We conclude that the district court did not abuse its discretion in excluding evidence of Klinke's foreign workers' compensation benefits, as it was barred under Proctor.

The district court properly excluded evidence of the medical cost write-downs

Tri-County argues that the district court erred when it refused to allow Tri-County to present evidence of the write-downs Klinke's employer received when paying Klinke's medical expenses because it

misled the jury into believing that the amount billed was the amount actually incurred by Klinke. We disagree.

In general, write-downs are negotiated between the medical provider and the third party paying the medical costs on behalf of the tort victim. Therefore, evidence of the write-downs leads, at the very least, to an inference of a collateral source. See Leitinger v. DBart, Inc., 736 N.W.2d 1, 14 (Wis. 2007) ("any attempts on the part of the plaintiff to explain the compromised payment would necessarily lead to the existence of a collateral source"); Covington v. George, 597 S.E.2d 142, 144 (S.C. 2004). As noted above, in Nevada, collateral source payment evidence is not admissible in a personal injury action for any purpose. Proctor, 112 Nev. at 90, 911 P.2d at 854. Evidence of write-downs creates the same risk of prejudice that the collateral source rule is meant to combat. See id. Other jurisdictions have held that the collateral source rule bars introduction of write-downs.[3] Leitinger, 736 N.W.2d at 15; Covington, 597 S.E.2d at 144; Bynum v. Magno, 101 P.3d 1149, 1162 (Haw. 2004) (dealing with Medicare/Medicaid write-offs); Wills v. Foster, 892 N.E.2d 1018, 1033 (Ill. 2008); Brandon HMA, Inc. v. Bradshaw, 809 So. 2d 611, 619-20 (Miss.

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[3]We note that the California district courts of appeal are split as to whether the collateral source rule would preclude evidence of medical cost write-downs, see Olsen v. Reid, 79 Cal. Rptr. 3d 255, 257 (Ct. App. 2008); Nishihama v. City and County of San Francisco, 112 Cal. Rptr. 2d 861, 868 (Ct. App. 2001); Hanif v. Housing Authority, 246 Cal. Rptr. 192, 196 (Ct. App. 1988), and the California Supreme Court is currently considering the issue. Howell v. Hamilton Meats & Provisions, Inc., 227 P.3d 342 (Cal. 2010) (granting review).

2001) (dealing with Medicaid write-offs); Papke v. Harbert, 738 N.W.2d 510, 536 (S.D. 2007); Radvany v. Davis, 551 S.E.2d 347, 348 (Va. 2001).

We determine that evidence of write-downs is not relevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion. The write-downs reflect a multitude of factors mostly relating to the relationship between the third party and the medical provider and not actually relating to the reasonable value of the medical services. See Martinez v. Milburn Enterprises, Inc., 233 P.3d 205, 228 (Kan. 2010). Further, the evidence of the write-downs and the explanation of how they are calculated can lead to jury confusion. See Leitinger, 736 N.W.2d at 18 (noting that write-downs may "bring complex, confusing side issues before the fact-finder that are not necessarily related to the value of the medical services rendered"). Here, the evidence of the write-downs may have confused the jury because Tri-County itself was unsure of the amounts, as evidenced by the inconsistencies in the calculations presented to the district court, which were only ever clarified in Tri-County's reply brief to this court.

When medical costs are written down, one party is likely to receive a windfall. If one party must receive a windfall as a result of the write-downs, it should be the plaintiff and not the tortfeasor. See Lopez v. Safeway Stores, Inc., 129 P.3d 487, 496 (Ariz. Ct. App. 2006) ("Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer." (quotations omitted)); see also Restatement (Second) of Torts § 920A cmt. b (1979) ("a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor"). We conclude that the district court did not

abuse its discretion in excluding evidence of the write-downs, as such evidence is barred by the collateral source rule outlined in Proctor.

The district court properly denied the motion to reduce the jury verdict

Tri-County contends that the district court erred when denying its motion to reduce the jury's verdict to include only the amount of medical bills paid. We disagree.

Nevada has a per se collateral source rule. Proctor, 112 Nev. at 90, 911 P.2d at 854. Proctor is controlling here and, as such, it barred any evidence of the write-downs. The district court properly excluded this evidence, and thus, properly denied the motion to reduce the jury verdict. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

cc: Hon. James Todd Russell, District Judge
Hon. James E. Wilson, District Judge
Madelyn Shipman, Settlement Judge
Burton Bartlett & Glogovac, Ltd.
Kilpatrick Johnston & Adler
Carson City Clerk

PICKERING, J., dissenting:

Angela Klinke recovered $27,510 from a Nevada business, Tri-County Equipment & Leasing, LLC, for injuries she sustained while in Nevada on business for her California employer. Of that sum, $17,510 was for "special damages" representing past medical expenses. Ms. Klinke did not pay her medical providers; her California employer did, through its workers' compensation program. But the California employer didn't pay the $17,510 the jury was told Ms. Klinke's medical providers billed. It paid the providers $12,162.26, reflecting a standard, negotiated, workers'-compensation-based discount rate.

Tri-County appeals (1) the district court's refusal to admit evidence (a) that Ms. Klinke's employer's workers' compensation insurance paid her medical expenses in full and (b) that the medical providers billed $5,347.74 more than they accepted in full payment for their services; and (2) the district court's denial of its post-trial motion to deduct the $5,347.74 billed but not paid from the jury's "special damages" award. I would sustain Tri-County's appeal, which presents, at its core, the issue of how to harmonize the collateral source rule with our law of damages and workers' compensation statutes.

The Nevada collateral source rule is a judge-made doctrine that "bar[s] the admission of a collateral source of payment for an injury into evidence for any purpose." Proctor v. Castelletti, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996) (emphasis added). This rule prohibits evidence that someone besides the plaintiff paid her medical providers. It does not change the law of damages.

"[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort." Restatement (Second) of Torts § 901 cmt. a (1979); see also id. § 903 cmt. a ("[C]ompensatory damages are designed to place [the plaintiff] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed."). "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." Mozzetti v. City of Brisbane, 136 Cal. Rptr. 751, 757 (Ct. App. 1977). "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." Valdez v. Taylor Automobile Company, 278 P.2d 91, 98 (Cal. Ct. App. 1954).

Nevada law is in accord. See Grosjean v. Imperial Palace, 125 Nev. ___, ___, 212 P.3d 1068, 1083 (2009) ("The purpose for allowing the recovery of money damages" in tort actions "is to compensate the plaintiff for his or her injury caused by the defendant's breach of duty or intentional tort."); Topaz Mutual Co. v. Marsh, 108 Nev. 845, 852, 839 P.2d 606, 610 (1992) (noting that in a fraud action the plaintiff "is not permitted to recover more than her total loss plus any punitive damages assessed"). Thus, under Nevada law, an injured plaintiff may recover past medical damages but they are limited to the "reasonable medical expenses plaintiff has necessarily incurred as a result of the accident." Nev. J.I. 5PID.1(1) (2011). This is mainstream law. It does not allow a party to recover as damages sums never incurred or paid by her, her medical insurer, or anyone else.

> 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.

Restatement (Second) of Torts § 911 cmt. h. (1979) (emphasis added), cited with approval and discussed in Hanif v. Housing Authority, 246 Cal. Rptr. 192, 196-97 (Ct. App. 1988).

The jury should have been told the whole story, which is that the medical providers accepted $12,162.26 in full satisfaction of the $17,510 they billed, knowing the inflated charges would never be taken seriously or paid by anyone. If not, the district court should at least have subtracted the $5,347.74 difference from the judgment. See Winchell v. Schiff, 124 Nev. 938, 946, 193 P.3d 946, 951 (2008) (requiring the district court to offset a jury verdict because the parties' contract required indemnification of recovery under insurance policy). This $5,347.74 award did not represent damages Klinke sustained, but a windfall.

The result I suggest is dictated not only by the common law of damages but also by statute. Both the Nevada and California Legislatures have created express exceptions to the collateral source rule in the workers' compensation setting, to prevent the "'likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation,'" Bass-Davis v. Davis, 122 Nev. 442, 454, 134 P.3d 103, 110 (2006) (quoting Proctor, 112 Nev. at 90,

911 P.2d at 854). NRS 616C.215(10); Cal. Lab. Code § 3855.[1] Under NRS 616C.215(10), "In any trial of an action by the injured employee . . . against a person other than the employer . . . the jury must receive proof of the amount of all payments made or to be made by the insurer or the Administrator." (Emphasis added.) In this context, applying the statute eliminates juror speculation and confusion over the availability of workers' compensation.

The most that can be said is that NRS 616C.215(10)'s application in cases involving California employees injured in Nevada is ambiguous—and this is generous. However, given the substantial congruity between California and Nevada statutory law in providing for admission of evidence of workers' compensation payments, NRS 616C.215(10) should have applied. See Restatement (Second) of Conflicts

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[1]The majority relies on NRS 616C.215(4) to conclude that the entire statute was carefully limited by the Nevada Legislature to only apply to payments through the Nevada workers' compensation system. But the limiting language in subparagraph 4 and some of NRS 616C.215's other subsections does not appear in NRS 616C.215(10). By its terms, NRS 616C.215(4) only applies to "action[s] or proceedings taken by the insurer or the Administrator pursuant to this section"; since neither the insurer nor the Administrator sued here, this section doesn't apply. Nor do NRS 616C.215(2) and (3) apply, which speak to injuries "for which compensation is payable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS" and address offset and subrogation rights of Nevada workers' compensation providers. NRS 616C.215(10) is not concerned with offset or with the lien or subrogation rights of Nevada employers, as the other subsections are, and contains none of their limitations; it provides that "In any trial of an action by the injured employee . . . against a person other than the employer . . . the jury must receive proof of the amount of all payments made or to be made by the insurer or the Administrator." (Emphasis added.)

§ 90 cmt. b (1971) ("A mere difference between the local law rules of the two states will not render the enforcement of a claim created in one state contrary to the public policy of the other."). The evidence should have been admitted pursuant to the public policy expressed by both the Nevada and California Legislatures on the need to eliminate verdict-skewing speculation—whether for or against the worker—in suits by injured workers against third parties.

For these reasons, I respectfully dissent.

Pickering, J.

Pickering