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COLORADO COURT OF APPEALS
Ralph L. Carr Judicial Center
2 East 14th Avenue
Denver, Colorado 80203

DISTRICT COURT, JEFFERSON COUNTY
Honorable Randall C. Arp
Case No. 2019CV30826

Plaintiff-Appellee,
RAPHAEL MUKENDI,
v.

Defendant-Appellant,
BRADLEY SCHROCK

▲COURT USE ONLY▲

Case No.: 2021CA1710

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OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g).

It contains 8,231 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Dated: May 23, 2022

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Colorado law is well-settled that a plaintiff must establish the reasonableness of past medical expenses as a prerequisite to their recovery. *See Kendall v. Hargrave*, 349 P.2d 993, 994 (Colo. 1960). Plaintiff Raphael Mukendi was permitted to recover nearly $750,000 in billed past medical expenses without any evidence substantiating that those charges were reasonable. The district court further prohibited Defendant Bradley Schrock from presenting market evidence demonstrating the unreasonableness of those charges, instead declaring that the billed amounts were the "best evidence," to the exclusion of all other evidence. (CF, p. 758.)

The appeal presents the following issues:

1. Whether the district court reversibly erred in applying *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, to exclude evidence that did not run afoul of the collateral source rule, thereby depriving Defendant of the ability to present any evidence that Plaintiff's claimed medical expenses were unreasonable?

2. Whether remand is necessary to reduce the judgment by the amount of past medical expenses awarded where Plaintiff failed to present any evidence that the billed amounts were reasonable, as Colorado precedent demands?

STATEMENT OF THE CASE

A. Defendant collides with Plaintiff's car, causing an accident.

In April 2018, Plaintiff drove his 2015 Honda Accord in the wrong lane of traffic, into oncoming traffic, and collided with Plaintiff's 1998 Isuzu Trooper. (CF, p. 3-4.) Plaintiff had multiple broken bones. (CF, p. 500.)

Plaintiff was taken by ambulance to University of Colorado Hospital, where he was hospitalized for eleven days. (CF, p. 500.) He was found to have a Grade II splenic laceration. (CF, p. 500.) During his stay, he developed a pressure sore on his nose and underwent three surgeries to set his broken leg and wrist. (CF, p. 500.)

He was subsequently transferred to Swedish Hospital for continued treatment, where he remained for less than a week. (CF, p. 500.) Plaintiff was then transferred to Powerback Rehabilitation Facility for twenty-six days. (CF, p. 500.)

B. Plaintiff sues Defendant, seeking nearly $600,000 in past medical expenses for his hospitalizations.

In May 2019, Plaintiff brought the lawsuit underlying this appeal. (CF, p. 1.) Plaintiff asserted a claim for negligence and for negligence per se against Defendant. (CF, pp. 6-7.) Defendant denied any liability, asserting that Plaintiff was comparatively negligent and, among other defenses, failed to mitigate his damages. (CF, p. 501.) Plaintiff sought $712,219.03 in past medical expenses, comprised largely of expenses from his hospitalizations at University and Swedish

Hospitals. (CF, p. 502; EX. 31.) Plaintiff did not elicit any expert opinion testimony in support of the reasonableness of his claimed past medical expenses at trial.

To rebut the reasonableness of Plaintiff's claimed past expenses, Defendant disclosed expert Richard F. Lacy and designated University Hospital employee Mike Bishop. Each would testify as follows:

1. Defense expert Richard Lacy opines, based on a cost-to-charges ratio, that the reasonable value of Plaintiff's past hospital expenses was $278,520.

Mr. Lacy has been a consultant with Health Care Revenue Consulting since 2012. (CF, p. 611.) Prior to that, he held several senior-level positions with Kaiser Permanente, Delta Dental, The Children's Hospital, and Colorado Access. (CF, pp. 611-12.) Mr. Lacy disclosed "an explanation of the medical bills and the market value of the services provided to" Plaintiff. (CF, p. 603.) Overall, Mr. Lacy had 20 years of experience working for hospitals and health insurance companies, with "a focus on cost analytics, health care revenue cycle and contract management." (CF, p. 603.)

Specifically, Mr. Lacy explained in his report that the "market value of services rendered at University Hospital and Swedish Medical Center was aided by accessing their cost-to-charges ratio." (CF, p. 603.) "The amounts charged by

hospital providers are significantly inflated above their cost to provide services," he opined. (CF, p. 603.) Relying on "excessive mark-ups," "greater variation in charges for the same service," and lack of price regulation, Mr. Lacy characterized hospital charges as "arbitrary." (CF, pp. 603-04.) He explained that "hospitals typically compare their total charges to their cost using a cost-to-charges determination," or the "ratio between a hospital's expenses and what they charge." (CF, p. 604.) "The closer a cost-to-charges ratio is to 1, the less difference there is between a hospital's actual cost and the amount charged." (CF, p. 604.)

Relying on publicly available hospital cost to charges information, Mr. Lacy determined that University of Colorado's cost-to-charges ratio in 2019 was .169 or 16.9%. (CF, p. 604.) This meant that for every $1,000 it charged, the hospital's actual cost was $169. (CF, p. 604.)

Similarly, Mr. Lacy determined that Swedish Medical Center's cost-to-charges ratio was .12, or 12%. (CF, p. 604.) This meant that for every $1,000 it charged, the hospital's actual cost was $120. (CF, p. 604.)

Applying his 16.9% cost-to-charges ratio to University Hospital's $509,784 in charges, Mr. Lacy determined their cost was $86,153. (CF, p. 604.) He then applied a 45% profit margin to those services (explaining that the 10% increase from the typical 35% profit margin was warranted because "[a]cademic teaching

facilities are able to demand a premium for their services" and because University Hospital is "one of five Level 1 trauma centers in Colorado," a costly designation). (CF, p. 604.) Doing so, he determined that "the market value of services rendered at University Hospital is $249,845." (CF, pp. 604-05.)

He applied a similar methodology to Swedish Medical Center. Applying his 12% cost to charges ratio to Swedish Medical Center's $88,502 in charges, Mr. Lacy determined their cost was $10,620. (CF, p. 605.) Noting that Swedish Medical Center "has the second lowest cost-to-charges ratio of hospitals in the Denver area," which meant it had "the second highest inflated charges above cost," Mr. Lacy applied the same 45% margin (because Swedish Medical Center is also a Level 1 trauma hospital). (CF, p. 604.) Doing so, he determined that "the market value of services provided at Swedish Medical Center is $28,675." (CF, p. 605.)

Stated differently, Mr. Lacy opined that an approximate $320,000 reduction in the past medical expenses for Plaintiff's hospital charges was appropriate.

2. Defense witness Michael Bishop testifies in deposition that if Plaintiff were a private-pay patient, he would pay only $229,402.78 for his care at University Hospital.

Mr. Bishop, who was designated as University Hospital's C.R.C.P. 30(b)(6) witness, is the Director of Customer Service, Collection and Quality analytics. (CF, p. 922.) He reviewed the University Hospital itemization of hospital services and

explained that there was no charge that was "too high" because it was "priced using the Chargemaster which does not change."[1] (CF, p. 922-23.) Each service on the Chargemaster was "priced based off a complex cost structure evaluation" that included consideration of fixed direct, fixed variable, indirect variable, and indirect fixed costs. (CF, p. 925.) He further explained that the Chargemaster price considered uncompensated care, ER services, uninsured patients, and was "generally" increased by "about 6 percent" annually. (CF, pp. 925-26.) Each Chargemaster service includes a "markup to the cost after the evaluation of all the costs associated with a particular product or service." [2] (CF, p. 928.)

Mr. Bishop also testified that while University Hospital does not provide discounted charges (all patients are charged the same for every service), the amounts it will ultimately accept for services are discounted based on the payor.

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[1] As Colorado Supreme Court Justice Melissa Hart has explained: "Most hospitals use a chargemaster database —a comprehensive list of charges for every supply or service a hospital might provide in serving a patient —in producing a 'bill' for medical services. Those chargemaster charges, however, are not actually the amounts paid by [] most private insurance companies, which negotiate different rates." *Rudnicki v. Bianco*, 2021 CO 80, ¶ 68 fn. 3 (Hart, J., dissenting).

[2] The Colorado Supreme Court has recently cautioned on the "increasingly arbitrary" rates set by chargemasters: "[H]ospital chargemasters have become increasingly arbitrary and, over time, have lost any direct connection to hospitals' actual costs, reflecting, instead, inflated rates set to produce a targeted amount of profit for the hospitals after factoring in discounts negotiated with private and governmental insurers." *French v. Centura Health Corp.*, 2022 CO 20, ¶ 40.

(CF, p. 930.) This included a "self-pay discount," which at one point was 60%. (CF, pp. 930, 931.) This meant that if Plaintiff were to make a "lump sum payment of cash as a self-pay patient," the amount owed would be discounted by 40%. (CF, pp. 929-30.) University Hospital "allow[s] a patient to not access their healthcare insurance and pay the self-pay discount out of pocket." (CF, p. 931.) Accordingly, if Plaintiff were a self-pay patient, University Hospital would accept 45% of $509,783.96 billed, or $229,402.78. (CF, p. 931.)

C. Pretrial, the district court strikes Defendant's witnesses on the reasonableness of Plaintiff's medical expenses.

Pretrial, Plaintiff moved to strike Mr. Lacy and to exclude Mr. Bishop from testifying. (CF, pp. 591, 802.) The district court granted both motions.

1. The district court strikes Mr. Lacy because he is "opining on a lesser value of medical services that the hospitals should charge."

As to Mr. Lacy, Plaintiff first argued that he was unqualified to testify because his theory had not been subjected to peer review and publication and he was generally unqualified to offer any opinion on the reasonableness of Plaintiff's medical expenses. (CF, p. 594-98.) He further argued that Mr. Lacy's testimony would be unhelpful to the jury because "[i]f the jury hears evidence that the market value is much lower than what was billed, the jury will perceive that the plaintiff can, could, or actually did satisfy the bill for that amount." (CF, p. 598.) As

grounds for his argument, Plaintiff cited *Crossgrove*, arguing that it applied by analogy to evidence "that the market value of the medical treatment is a lesser, discounted amount." (CF, p. 598.)

In granting Plaintiff's motion to strike Mr. Lacy, the district court was "unpersuaded" that Mr. Lacy was unqualified to render an opinion as to the bills' reasonableness. (CF, p. 757.) Rather, the crux of its ruling excluding him rested on "whether testimony regarding market value of medical services is helpful or an appropriate issue for the jury to consider when determining necessary and reasonable medical expenses." (*Id*.) Relying on *Crossgrove* and a federal district court case pre-dating *Crossgrove*, *Walters v. Encompass Ins. Co. of Am*., 2007 WL 3090766 (D. Colo. Oct. 18, 2007), the district court noted that "although Lacy is not opining on collateral sources, he is opining on a lesser value of medical services that the hospitals should charge." (CF, p. 758.) It held that "it cannot find that expert testimony regarding the expert's calculation of market value of medical services is relevant to the reasonable and necessary determination." (CF, p. 758.) Such values, it concluded, "may be relevant in a case where the plaintiff searches and shops for medical services." (*Id*.) But because Plaintiff here was rushed for emergency medical attention, the district court refused to permit the jury to even consider Mr. Lacy's calculations of the reasonable value of medical services. (CF,

p. 758.) Instead of allowing the jury to consider and assign whatever weight to Mr. Lacy's calculations it deemed appropriate, the district court, rather than the jury, decided that Mr. Lacy's calculations were "not relevant or helpful" because "the Court cannot find that Plaintiff chose UCH and Swedish to perform his medical services and therefore the best evidence of Plaintiff's medical expenses are the amounts that he was billed." (CF, p. 758.)

2. The district court excludes Mr. Bishop from testifying because Plaintiff was not a self-paying patient.

Plaintiff argued that "[a]ny testimony by Mr. Bishop that … the billed amount may not be the same as the paid amount violates the collateral source rule set forth by the Supreme Court in [*Crossgrove*]." (CF, p. 803.) Because Plaintiff "had and has health insurance through Kaiser[]," Plaintiff argued that "Mr. Bishop's testimony adds nothing of substance to the trial as the authenticity of the UCH bill is not in question." (CF, p. 803.)

The district court granted Plaintiff's motion—before Defendant even had an opportunity to file a response. (CF, p. 912.) In so doing, it concluded that because the amount paid was not the discount to which Mr. Bishop testified, his testimony was irrelevant. (TR 3/24/2021, p. 16:13-21.) It further held that Defendant could not bring up before the jury that Plaintiff was not a self-pay individual. (*Id*. at

18:11-12.) "[T]hat's why," the district court ruled, "your argument flies in the face of *Crossgrove* because you can't bring it in [] because it implicates whether he is or is not a self-pay individual because he's not. He's got insurance, and so this 55 percent discount is not applicable to him" (*Id*., p. 18:16-17.) It therefore had "no relevance" to what he has or will be required to pay. (*Id*., p. 18:17-21, 20:15-22:4.)

Thus, going into trial, Defendant was left with no witnesses to demonstrate that the amount Plaintiff sought in past medical expenses was unreasonable. Under the district court's ruling, Defendant was completely foreclosed from presenting that evidence by any means.

D. **At trial, Plaintiff fails to introduce evidence of reasonableness.**

At trial, Plaintiff called no experts to testify as to the reasonableness of his past medical expenses. His counsel was permitted to admit a C.R.E. 1006 summary of billed amounts for medical expenses totaling $738,659—Trial Exhibit 31. (TR 3/29/2021, p. 250:1-18; EX 31.) Plaintiff testified that exhibit was a "true and accurate representation of [his] medical bills." (*Id*, p. 250:4-8.)

Defense counsel cross-examined Plaintiff as to the cost of certain medical charges, demonstrating, for example, that the cost of "HB sponge gauze 4x4-12 ply" was $5.84. (TR 3/30/2021, pp. 82:17-83:9.) Plaintiff responded that "I don't know what's going on with the billing stuff." (*Id*., p. 83:10-11.) When similarly

questioned about the $6.33 charge for a single Tylenol as compared to the cost of Tylenol that Plaintiff may have later purchased, Plaintiff responded that "one or two times I buy a bottle for $12 or $15." (*Id*., p. 83:16-84:17.) When asked about potentially duplicative charges for "both therapeutic exercise and manual therapy" and other potentially duplicative charges, Plaintiff testified simply "I don't know." (*Id*., p. 85:21-86:10.)

At no point did Plaintiff ever testify as to the reasonableness of the nearly $750,000 in past medical expenses he sought from Defendant. Nor did any other witness. Indeed, no other evidence of past medical bills was admitted, nor was the requisite foundation to support the medical expenses appropriately laid.

The jury returned a verdict against Defendant, awarding Plaintiff $2.75 million, including $772,480.00 in past economic damages. (CF, p. 978.) Defendant now appeals.

SUMMARY OF THE ARGUMENT

This Court should vacate the judgment and remand this case for a new trial, with directions that Messrs. Lacy and Bishop be permitted to testify. A plaintiff must establish the reasonableness of past medical expenses as a prerequisite to their recovery. The reasonable value of medical services is a factfinder's determination. While the Colorado Supreme Court in *Crossgrove* barred evidence

of the amount paid by collateral sources for medical expenses, *Crossgrove* and its progeny did not—and cannot—be applied to bar all evidence which rebuts the claimed reasonable value of medical services. The district court erred in excluding evidence at trial of the reasonable value of medical services where that evidence was not based on payments made by a collateral source. This error tainted the jury's verdict and requires a new trial.

Alternatively, this Court should vacate the judgment and remand the case to the district court with directions to (1) remove $738,659.00 from the judgment and (2) recalculate the applicable prejudgment and post-judgment interest accordingly. A plaintiff must prove that the medical damages sought reflect the reasonable value of the medical services provided. Plaintiff failed to offer any evidence of reasonableness, and the district court's error in allowing the jury to award past medical expenses predicated solely on a C.R.E. 1006 summary was not harmless and requires remand and remittitur.

ARGUMENT

I. DEFENDANT IS ENTITLED TO A NEW TRIAL BECAUSE THE DISTRICT COURT INCORRECTLY PREVENTED HIM FROM PRESENTING ANY EVIDENCE DEMONSTRATING PLAINTIFF'S DAMAGES WERE UNREASONABLE.

A. Standard of review.

This Court reviews a district court's decision to exclude expert testimony for an abuse of discretion. *Gonzales v. Windlan*, 2014 COA 176, ¶ 20. A district court abuses its discretion where its ruling is "manifestly arbitrary, unreasonable, or unfair." *Id*. "In assessing whether a trial court's decision is manifestly arbitrary, or unfair, we ask not whether we would have reached a different result but, rather, whether the trial court's decision fell within a range of reasonable options[.]" *E-470 Pub. Highway Auth. v. Revenig*, 140 P.3d 227, 230-31 (Colo. App. 2006). A misapplication of law also constitutes an abuse of discretion. *Clark v. Farmers Ins. Exch.*, 117 P.3d 26, 29 (Colo. App. 2004). Whether the trial court applied the correct legal standard is a question of law this Court reviews de novo. *Corsentino v. Cordova*, 4 P.3d 1082, 1087-88 (Colo. 2000).

B. Preservation.

This issue is preserved. Specifically, Plaintiff moved to strike Mr. Lacy's testimony, to which Defendant objected. (CF, pp. 591, 660.) The district court granted Plaintiff's motion. (CF, p. 756.) Plaintiff also moved *in limine* to exclude

Mr. Bishop's testimony. (CF, p. 802.) Before Defendant could file a response, the district court granted Plaintiff's motion over Defendant's objection. (TR 3/24/2021, pp. 11:8-22:4.)

C. The measure of damages under Colorado law is the reasonable and necessary value of the medical services provided.

It is black letter law in Colorado that, in a negligence action, a plaintiff may recover only those damages caused by the alleged tortfeasor's conduct. *See Seaward Constr. Co. v. Bradley*, 817 P.2d 971, 975 (Colo. 1991) ("Compensatory damages in a negligence action are awarded to cover loss caused by the negligence of another and are intended to make the injured party whole." (emphasis added)). By logic and fundamental principles of tort law, this should include only those damages a plaintiff has actually incurred. The Colorado Supreme Court has recently affirmed as much. *See LeHouillier v. Gallegos*, 2019 CO 8, ¶ 44 (noting that the "bedrock goal of tort law is to make the plaintiff whole" and that tort law "disfavors windfall damages that make the plaintiff better off than she would have been had her legal rights not been violated." (internal quotations omitted)); *see also Dep't of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984) (holding that where an injury is to be remedied is economic in nature, "legal redress in the form of compensation should be equal to the injury.").

Yet Colorado law's approach to past medical expenses is different—and more expansive. Rather than recovering "incurred" medical expenses, a plaintiff is entitled to recover only "the necessary and reasonable value" of the medical services provided. *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, ¶ 19; *see also Kendall v. Hargrave*, 349 P.2d 993, 994 (Colo. 1960). In other words, Colorado law permits a plaintiff to recover an amount different—and usually greater— than that which the plaintiff has actually incurred.

This mandates an inquiry into what evidence is admissible to prove reasonable value. Under still persuasive Colorado Supreme Court precedent, evidence of the amount paid for medical services is admissible as "some evidence of their reasonable value." *Kendall*, 349 P.2d at 994 (holding that amount paid "is some evidence of [the expenses'] reasonable value"); *see also Palmer Park Gardens, Inc. v. Potter*, 425 P.2d 268, 272 (Colo. 1967) (allowing evidence of amounts paid).

But as set forth below, despite its obvious relevancy, evidence of the paid amounts in cases involving true collateral sources is now inadmissible.

D. **Relying on the collateral source rule, the Colorado Supreme Court in *Crossgrove* bars evidence of the amount paid for medical expenses.**

In 2012[3], the Colorado Supreme Court barred evidence of the amount paid by collateral sources for medical expenses as relevant to the medical service's reasonable value, concluding that such evidence violates the collateral source rule. *Crossgrove*, ¶ 20 (holding that in cases involving a true collateral source, the collateral source rule "bar[s] the admission of the amounts paid for medical services."). Specifically, the *Crossgrove* court concluded that the "pre-verdict evidentiary component" of the collateral source rule "remain[ed] in place and bars from admission all evidence of benefits from a collateral source received by a plaintiff." *Id*., ¶ 18, The court believed that "[d]ue to the nature of modern healthcare billing practices, a reasonable juror could easily infer the existence of a collateral source if presented with evidence, for example, that the provider accepted $40,000 in satisfaction of a $250,000 medical bill." *Id*., ¶ 21. It concluded that "amounts paid evidence" would lead to the inference of a collateral source and was inadmissible. *Id*., ¶ 23 ("As such, a reasonable juror will likely infer the

[3] Two years earlier, in *Volunteers of America Colorado Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010), the Colorado Supreme Court applied a similar rule as to the post-verdict collateral source rule. Specifically, the Court concluded that paid amounts were collateral sources that could not be used to reduce a jury verdict. *Id*. at 1088.

existence of a collateral source if presented with evidence of a lower amount paid to satisfy a higher amount billed because, unlike cases involving uninsured patients, providers routinely accept discounted rates to satisfy insured patients' bills."); *see also Sunahara v. State Farm Mut. Auto. Ins. Co.*, 2012 CO 30M, ¶ 15 (prohibiting evidence of paid amounts and released concurrently with *Crossgrove*); *Forfar v. Wal-Mart Stores, Inc.*, 2018 COA 125, ¶¶ 20-30 (applying *Crossgrove* to Medicare benefits).

The *Crossgrove* court recognized "the tension between the pre-verdict evidentiary component of the collateral source rule … and the reasonable value rule stated in *Kendall*[.]" *Id.*, ¶ 19. It believed excluding evidence of paid amounts by collateral sources would "resolve this friction" and that the "risk of prejudice—in the form of reduced damages" to an insured plaintiff resulting from the inference of insurance "justifie[d] the application of the common law pre-verdict collateral source rule instead of the reasonable value rule in collateral source cases." *Id.*, ¶¶ 20, 23 (citing, as basis for prejudice analysis, C.R.E. 403); *Sunahara*, ¶ 15 (affirming *Crossgrove*'s analysis and holding that "the common law evidentiary component of the collateral source rule prohibits the admission of amounts paid evidence in collateral source cases, even for the purpose of determining the reasonable value of medical services rendered.").

However, and importantly, *Crossgrove* does nothing to disturb *Kendall's* general principle that the amount paid for medical services "is some evidence of their reasonable value." *Kendall*, 349 P.2d at 994. Instead, *Crossgrove* expressly limits its holding to excluding evidence only of amounts paid by true collateral sources. *Crossgrove*, ¶ 20 ("[W]e hold that the pre-verdict evidentiary component of the collateral source rule prevails in collateral source cases to bar the admission of the amounts paid for medical services." (emphasis added)).

E. The *Crossgrove* rule encourages jury verdicts that bear no reasonable relationship to the actual harm a plaintiff incurred.

Crossgrove and its progeny injected into Colorado law the "billed v. paid" paradigm—in which plaintiffs are permitted to present evidence of "billed" medical expenses, while defendants are precluded from presenting evidence of the paid amounts which are typically dramatically lower.

Colorado's application of the collateral source rule to prevent evidence of the amounts paid for medical expenses has not been without its critics. *See, e.g.*, *Crossgrove*, ¶ 29 (Eid., J., dissenting) (recognizing that the billed amount is "an amount that no one actually paid[]" and that under the collateral source rule, "the jury is left with what is at best an incomplete picture of the services' reasonable value."); *Gardenswartz*, 242 P.3d at 1092 (Colo. 2010) (Rice, J., dissenting)

(noting that "neither the plaintiff nor his insurer ever actually incur[s]" damages for amounts billed that are not paid.); *see also and accord Rudnicki v. Bianco*, 2021 CO 80, ¶ 68 (Hart, J., dissenting) ("The collateral source rule thus puts defendants … at a disadvantage as they try to explain why the reasonable value of the medical expenses is not actually the billed amount.").

Such criticism is unsurprising, as tort law is designed to compensate a plaintiff for an injury suffered, not provide a windfall at the defendant's expense. Indeed, most recently, three justices on the Colorado Supreme Court recognized that "[b]ecause of Colorado's collateral source rule, a plaintiff claiming medical expenses as an element of damages is permitted to introduce evidence of the billed medical expenses even though what was actually paid most often bears no relationship to what was billed." *Rudnicki*, ¶ 68 (Hart, J., dissenting, in which Boatright and Márquez, JJ., joined).

Because economic damage awards are uncapped and still subject to application of the post-verdict collateral source rule, under the districts court's reasoning, defendants are without any mechanism to reduce or even challenge these awards where a collateral source may be involved. *See* C.R.S. § 13-21-102.5 (applying limitations only to non-economic damages); *Gardenswartz*, 242 P.3d at

1088 (applying post-verdict collateral source rule to prohibit reduction of damages by amount paid for past medical expenses).

Stated simply, the present collateral source evidentiary regime is punitive to defendants and a boon to plaintiffs. As applied by the district court, it nonsensically requires a jury to determine the reasonable value of those medical services provided while disallowing defendants from presenting any evidence to challenge that reasonable value. Several jurisdictions have elected not to follow the collateral source rule and have instead modified it to allow evidence of amounts paid to show the reasonable value of medical expenses. *See* Mo. Stat. Rev. § 490.715 (2021); *Patchett v. Lee*, 60 N.E.3d 1025, 1033 (Ind. 2016); *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1138-40 (Cal. 2011); *Moorhead v. Crozer Chester Med. Ctr.*, 765 A.2d 786, 789 (Pa. 2001), *abrogated on other grounds by Northbrook Life Ins. Co. v. Com.*, 949 A.2d 333 (Pa. 2008).

F. *Crossgrove* and its progeny did not—and cannot—bar <u>all</u> evidence of reasonable value.

1. *Crossgrove* bars only true collateral source evidence.

Notably, neither the *Crossgrove* nor *Sunahara* courts excluded evidence <u>beyond</u> that representative of a collateral source. Both opinions focus exclusively on the prejudice inherent from the inference that a plaintiff's medical insurance has reduced the cost of medical care. They do not stand for the sweeping proposition

(as the district court applied here) that a defendant is prohibited from introducing all evidence challenging the reasonableness of the amount billed for medical services simply because such evidence may touch on the areas of insurance and self-pay. Such a distorted application would entirely prevent defendants from challenging reasonable value—in that a challenge to the reasonable value of those medical services provided necessarily requires evidence of what providers accept from various market payers for the same or similar services.

Crossgrove nor *Sunahara* do not suggest anything to the contrary. *Crossgrove* and *Sunahara* operate as a narrow prohibition on a very specific type of evidence: cost reductions resulting from a source collateral to a specific plaintiff. A "collateral source" is narrowly defined to include only "a person or company, wholly independent of an alleged tortfeasor, that compensates an injured party for that person's injuries." *Smith v. Kinningham*, 2013 COA 103, ¶ 21 (defining collateral source). And the collateral source rule excludes only evidence that "could lead the fact-finder to improperly reduce the plaintiff's damages award on the grounds that the plaintiff already recovered his loss from the collateral source." *Sunahara*, ¶ 13 (collecting cases).

Crossgrove and *Sunahara* allow, by their repeated citation to *Kendall*, a defendant to present some evidence of the medical services' reasonable value, so

long as it does not run afoul of the collateral source rule—i.e., specific evidence of what another person or company has paid for the plaintiff's injuries. But neither explicitly provides guidance as to what such "other" evidence would look like.[4]

2. Other jurisdictions applying *Crossgrove*'s rationale permit a defendant to introduce any competent evidence of reasonableness that does not run afoul of the collateral source rule.

Courts nationwide have answered what evidence is admissible to inform the reasonable and necessary inquiry. Most recently, the Supreme Court of Alaska addressed the question in *Weston v. AKHappytime, LLC*, 445 P.3d 1015 (Alaska 2019). There, a hotel patron was injured when she slipped and fell on ice in the hotel parking lot. *Id*. at 1019. She sued the hotel for negligence. Pretrial, the hotel moved for a ruling excluding evidence of the patron's medical bills other than "the adjusted, preferred rates accepted by her providers as full and final payment for medical services rendered." *Id*. As grounds, the hotel argued that the billed amounts did not reflect the services' reasonable value. *Id.* The trial court granted

[4] The district court correctly observed that the issues raised in this appeal are ones "the Court of Appeals is going to have to address head on at some point in time." (3/30/2021 Conf. Tr., p. 16:8-10.) Indeed, as evidenced by the Colorado Defense Lawyers Association's forthcoming amicus brief, this issue is one on which courts often differ, and which results in inconsistent outcomes at the trial level. Accordingly, this Court should publish its opinion in this case to provide consistency and guidance to district courts in applying *Crossgrove* and its progeny.

the hotel's motion, and the Supreme Court of Alaska granted the patron's petition for review.

The court began with an analysis of the "essentially three approaches" other jurisdictions have taken regarding whether to admit undiscounted medical bills into evidence. *Id*. at 1023. These include: (a) the "actual amount paid" approach (which allows into evidence only the actual amount paid for medical care); (b) the "benefit of the bargain" approach (which allows the undiscounted medical bills into evidence if the plaintiff paid meaningful consideration for the insurance or other collateral source from which payment was made); and (c) the "reasonable value" approach (which allows admission of undiscounted medical bills without restriction as "at least some evidence of the medical services' value"). *Id*.

Following comprehensive discussion of the benefits and disadvantages of each, the court adopted the reasonable value approach. *Id*. at 1026-27. In analysis echoing *Crossgrove*, the Supreme Court of Alaska held:

> We also follow the majority of courts by adopting the "reasonable value" approach, in which an injured party is allowed to introduce the full, undiscounted medical bills into evidence at trial. This follows from our conclusion that the negotiated rate differential represents part of the benefit to the injured party. Both the actual amounts paid *and* any amounts the provider wrote off are relevant to the medical services' reasonable value.

Id. at 1027 (quotations and emphasis in original).

The Supreme Court of Alaska picked up where *Crossgrove* left off, observing that its "holding requires us to consider what evidence a defendant may raise to rebut the reasonableness of the dollar amounts in the plaintiff's undiscounted medical bills." *Id*.

It initially rejected the "hybrid approach" (which allows the tortfeasor to "respond to the injured party's reliance on undiscounted medical bills by showing the amount actually paid") as "likely to undermine the collateral source rule." *Id*. at 1027-28. Recognizing that "the defendant's remaining evidentiary options for rebuttal are limited" by the collateral source rule, the court went on to explain what evidence would be admissible:

> Defendants may submit any competent evidence that does not run afoul of the collateral source rule. They are free to cross-examine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its witnesses to testify that the billed amounts do not reflect the reasonable value of the services. Such evidence may include, for example, testimony about the range of charges the provider has for the same services or what other providers in the relevant area charge for the same services.

Id. at 1028 (quotations and citations omitted). In other words, the Alaska Supreme Court left the evidence a defendant may introduce concerning reasonableness expansive, so long as it did not run afoul of the collateral source rule and reference sources collateral to a specific plaintiff.

Weston's holding is similar to and well-grounded in other jurisdictions' jurisprudence. For example, the Supreme Court of Tennessee has recognized that "potential overcompensation of plaintiffs has been a recognized drawback of the collateral source rule since its inception." *Dedmon v. Steelman*, 535 S.W.3d 431, 466 (Tenn. 2017). Despite that potential, Tennessee adheres to the general principle that "plaintiffs in personal injury cases may use their full, undiscounted medical bills to satisfy the burden of proving the reasonable value of medical expenses." *Id*. To rebut this evidence, "defendants are free to submit <u>any competent evidence</u> in rebuttal that does not run afoul of the collateral source rule." *Id*. (emphasis added); *see also Wills v. Foster*, 892 N.E.2d 1018, 1033 (Ill. 2008) ("[D]efendants are free to cross-examine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of the services.").

The Court of Appeals of Wisconsin articulates a similar expansive approach to a defendant's rebuttal evidence, giving the defendant leeway to "introduce[e] relevant evidence that the billed amounts were unreasonable." *Leittinger v. Van Buren Mgmt., Inc.*, 720 N.W.2d 152, 158 (Wis. App. 2006). Specifically, a "defendant must produce some competent evidence *other than* what the insurance

company paid upon which to base its argument that the amount billed was not the reasonable value of the services." (emphasis in original)).

This evidence includes "expert testimony as to the reasonable value of the medical services provided in support of its argument that the amount billed for the medical services was not the reasonable value of the services." *Id*.; *see also Nomat v. Mota*, No. OP 140102-U, 2015 WL 5257886, at *8 (Ill. App. 2015) (holding that defense expert should be permitted to testify about "reasonableness of medical bills for office visits, treatment, and markups for the hardware used in plaintiff's surgery" based on database of cost information in relevant geographic area); *see also Melo v. Allstate Ins. Co.*, 800 F.Supp.2d 596, 602 (D. Vt. 2011) (allowing defense to "introduce any relevant evidence of the reasonable value of medical services that is not barred by the collateral source rule [and including], for example, evidence as to what the provider usually charges for the services provided, or what other providers usually charge.").

This line of cases is consistent with another division of this Court in addressing the same issue (reasonableness) in a different context. *See Portercare Adventist Health Sys. v. Lego*, 312 P.3d 201 (Colo. App. 2010), *rev'd on other grounds*, 2012 CO 58 (addressing reasonable fee for health care provider's services where there is no express agreement to pay). There, the division deemed testimony

of a hospital's account manager as to the prevailing market rates evidence of the reasonableness of the hospital's charges. *Id*. at 206; *see also Temple Univ. Hosp., Inc. v. Healthcare Mgmt. Alternatives, Inc.*, 832 A.2d 501, 508 (Pa. Super. Ct. 2003) (cited with approval in *Lego* and holding that the amounts a hospital typically receives for its services is more probative of reasonable value than its published rates); *Fairbanks N. Star Borough v. Tundra Tours, Inc.*, 719 P.2d 1020, 1029-30 (Alaska 1989) (cited with approval in *Lego* and holding that evidence of actual cost is evidence of reasonable value).

These authorities are persuasive—if not dispositive—in *Crossgrove*'s application, or lack thereof, here. A defendant must be permitted to present rebuttal evidence to a plaintiff's billed amounts that does not run afoul of the collateral source rule. To hold to the contrary infringes on a defendant's due process rights to be meaningfully heard. *Whiteside v. Smith*, 67 P.3d 1240, 1248 (Colo. 2003) (due process requires opportunity to be heard "in a meaningful manner." (quotations omitted)). It also improperly takes from the jury its determination of reasonableness and it irrationally imposes a widespread preclusion on any and all evidence of reasonable value simply because such evidence touches on self-payment insurance and government reimbursement rates for healthcare. This information is inextricably linked to the American healthcare system, and to

foreclose the jury from considering these market dynamics constrains them to damages determinations based on a legal fiction where the purported value of medical services is, and can only ever be, what is billed. These false assumptions preclude the jury from even inquiring into the reasonable value of the medical services, and forces it to render an award under false pretenses without considering real, powerful, market factors—a scenario all the more concerning where the jury alone determines a proper damages amount. *Miller v. Rowtech, LLC*, 3 P.3d 492, 495 (Colo. App. 2000) ("The amount of damages to which an injured party is entitled is a matter within the sole province of the jury.").

Accordingly, this Court should adopt, as other jurisdiction have, guidelines allowing defendants to introduce any competent evidence of reasonableness that does not run afoul of the collateral source rule.

G. The district court erred in excluding evidence at trial that was not based on a collateral source.

The district court applied *Crossgrove* to prohibit Defendant from presenting any rebuttal evidence to Plaintiff's admission of the billed amounts and excluded Messrs. Lacy and Bishop. The district court was wrong in doing so.

1. Mr. Lacy's cost-to-charges analysis was relevant to the hospital expenses' reasonable value.

The district court's analysis as to Mr. Lacy is perplexing. It correctly interpreted *Crossgrove* as prohibiting "evidence of amounts paid by plaintiff's insurer" to demonstrate reasonableness. (CF, p. 757.) It agreed that Mr. Lacy was not "opining on collateral sources, he is opining on a lesser value of medical services that the hospitals should charge." (CF, p. 758.) Yet it still excluded Mr. Lacy's testimony on relevance grounds.

As grounds, it ruled "[m]arket value of medical services may be relevant in a case where the plaintiff searches and shops for medical services[,]" but not where a plaintiff is rushed to the hospital for immediate medical attention. (CF, p. 758.) Rather, the "best evidence of Plaintiff's medical expenses are the amounts that he was billed." (CF, p. 758.) Put simply, the district court concluded that billed charges were the only evidence permitted to show reasonable value unless the plaintiff was permitted to shop for and compare providers.

Nothing in *Crossgrove*—or any other authority—supports such an expansive exclusion of evidence here. Indeed, the district court's conclusion is noticeably lacking in any citation to supporting authority.

To the contrary, such evidence was admissible because it did not implicate a collateral source. It was also probative of those expenses' reasonable value for all the reasons set forth above. The district court therefore erred in excluding Mr. Lacy's opinion.

The district court's partial citation[5] of a 2007 unpublished United States District Court for the District of Colorado order pre-dating *Crossgrove* does not remedy the error. (CF, p. 758 (citing *Walters v. Encompass Ins. Co. of Am.*, Case No. 06-cv-1688-LTB-KLM, 2007 WL 3090766, *2 (D. Colo. Oct. 18, 2007).) That case concludes that because the court "determined that both the amount billed and the amount paid are relevant to the jury's determination of the necessary and reasonable value of the medical services rendered, the collateral source rule does not preclude either parties' evidence as to these damages." *Id.* It does not support applying, as the district court did here, a complete bar on any evidence other than the billed, or charged, amount.

[5] The entirety of the district court's cited passages reads as follows: "As a result, both the amount he was actually charged by his health care providers, and how much Plaintiff and Kaiser actually paid in satisfaction of the medical bills is relevant evidence of the necessary and reasonable value of the medical services rendered in this case." *Id*. at *2 (omitted sections underlined).

2. Mr. Bishop's testimony concerning University Hospital's discounts and mark-ups.

The district court's analysis as to Mr. Bishop is even more perplexing and cyclical. Citing to *Crossgrove*, it precluded Mr. Bishop from testifying because his testimony did not account for Plaintiff's collateral source. Indeed, the district court concluded that because Plaintiff had health insurance, any other discounts were necessarily barred because it "implicates" a collateral source. (TR 3/24/2021, p. 18:11-17.) Because Plaintiff was not a self-pay individual, the district court ruled, any evidence of a self-pay discount was inadmissible to demonstrate the reasonable value of the medical services provided. (*Id.*, p. 20:15-22:4.)

Again, nothing in *Crossgrove* is so expansive. Moreover, it should not allow courts to engineer certain outcomes based upon evidence that is inherently relevant to the reasonableness of charges within the community. The fact that the evidence did not reference Plaintiff's health insurance or its bargained-for discount necessarily exempts such evidence from collateral source rule analysis—thereby making it admissible. The collateral source rule is plaintiff-specific; that is, any collateral source analysis must consider a source collateral to an individual plaintiff, not plaintiffs generally, nor the population generally. Evidence that University Hospital repeatedly increases its rates year-over-year, and has the

ability to discount its services by fifty-five percent in some cases, is precisely the type of market-rate evidence relevant to determining reasonable value. Indeed, any analysis of the reasonable value of medical services must necessarily implicate market-rate evidence concerning amounts a particular healthcare provider agrees to accept for services.

Accordingly, the district court erred in excluding Messrs. Lacy and Bishop from testifying and abused its discretion.

H. The district court's error was not harmless and requires a new trial.

This Court may not disregard errors that affect a party's substantial rights. C.A.R. 35(c); *see also Doyle v. People*, 2015 CO 10, ¶ 16 ("Error cannot be harmless if there exists a reasonable possibility that it affected the verdict.").

The jury here was presented only with Exhibit 31, Plaintiff's C.R.E. 1006 summary of billed amounts for medical expenses totaling $738,659. (TR 3/29/2021, p. 250:1-18; EX 31.) Plaintiff testified that exhibit was a "true and accurate representation of [his] medical bills." (*Id*., p. 250:4-8.) Defense counsel cross-examined Plaintiff as to the cost of certain medical charges, demonstrating, for example, that the cost of "HB sponge gauze 4x4-12 ply" was $5.84. (TR 3/30/2021, p. 82:17-83:9.) Plaintiff responded that "I don't know what's going on with the billing stuff." (*Id*., p. 83:10-11.) When similarly questioned about the

$6.33 charge for a single Tylenol as compared to the cost of Tylenol that Plaintiff may have later purchased, Plaintiff responded that "one or two times I buy a bottle for $12 or $15." (*Id*., p. 83:16-84:17.) And when asked about potentially duplicative charges for "both therapeutic exercise and manual therapy" and other potentially duplicative charges, Plaintiff testified simply "I don't know." (*Id*., p. 85:21-86:10.)

The jury was thus tasked to determine a reasonable measure of damages based upon presentation of a single $738,659 sum as the total billed amounts, with no foundation whatsoever as to the reasonableness and necessity of such amounts. Plaintiff could not explain these amounts and offered no evidence as to their reasonableness. But because Defendant was barred from presenting competing calculations—$278,520 according to Mr. Lacy, $229,402.78 according to Mr. Bishop—the jury had no other sum against which to compare. By precluding any evidence or arguments regarding the nearly $500,000 disparity between Plaintiff's billed amount summary and Defendant's experts' calculations, the district court sent the jury into deliberations with Plaintiff's lone $738,659 figure to consider.

The jury's award of $772,480.00 in past economic damages clearly indicates that Plaintiff's summary total of $738,659 influenced the jury. Without any other evidence supporting the reasonableness of Plaintiff's summary total, the jury

returned an award within $35,000 of the amount Plaintiff presented. There is thus at minimum a "reasonable possibility that [the district court's error] affected the verdict." *Doyle*, ¶ 16. The district court's error was therefore not harmless. *Id*.

II. DEFENDANT IS ENTITLED TO A REDUCTION OF JUDGMENT FOR PAST MEDICAL EXPENSES BECAUSE PLAINTIFF FAILED TO DEMONSTRATE THAT HIS PAST MEDICAL EXPENSES WERE REASONABLE.

A. Standard of review.

This Court reviews a motion for directed verdict de novo, viewing the evidence in the light most favorable to the non-moving party. *MDM Grp. Assocs., Inc. v. CX Reinsurance Co.*, 165 P.3d 882, 885 (Colo. App. 2007). If there is no evidence to support an element of a claim, a directed verdict is appropriate. *Id*.; *see Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 982 (Colo. App. 2011) ("Where the motion concerns a question of fact, we consider whether the evidence, viewed in the light most favorable to the nonmoving party, compels the conclusion that reasonable jurors could not disagree and that no evidence or inference therefrom has been received at trial upon which a verdict against the moving party could be sustained." (brackets and quotations omitted)).

A party may move for a directed verdict "as to some but not all of the issues presented a claim[.]" *Bd. of Cnty. Comm'rs of Summit Cnty. v. Rodgers*, 2015 CO 56, ¶ 19.

B. **Preservation.**

Defendant moved for a directed verdict as to "any economic damages, particularly in the medical bills and any future medical bills[]" on the grounds that Plaintiff provided no evidence establishing the reasonableness of the requested amounts. (3/30/2021 Conf. Tr. Tr., p. 5:3-7, *see also* 5:9-11:18.) The district court denied the motion. (*Id*. at 11:25-16:19.) The issue is preserved.

C. **A plaintiff must present evidence that the medical damages sought reflect the reasonable value of the medical services provided.**

As detailed at length above, Colorado law permits a plaintiff to recover only the "reasonable value" of medical services. *Crossgrove*, ¶ 19; *see also Kendall*, 349 P.2d at 994. Thus, to recover medical expenses, a plaintiff must present evidence establishing that those expenses reflect the reasonable value of the medical services provided. *Kendall*, 349 P.2d at 994 (holding "correct measure of damages is the necessary and reasonable value of the services rendered."); *Lawson v. Safeway, Inc.*, 878 P.2d 127, 131 (Colo. App. 1994) (plaintiff may recover medical expenses only where the "evidence demonstrate[s] they were reasonable, necessary, and incurred as a result of her [injury].").

This reasonable value inquiry does not occur in a vacuum, and no Colorado law prohibits evidence of market-rate factors that determine the value of the services provided—that is, what a willing buyer and seller agree to pay and accept

for a particular service. *See Crossgrove*, ¶ 19 (modifying, but leaving intact, *Kendall*'s requirement that "the correct measure of damages is the necessary and reasonable of the [medical] services rendered"); *Kendall*, 349 P.2d at 994 (same).

Accordingly, a plaintiff cannot establish reasonableness by presenting evidence of the billed amounts and nothing more. *See Lawson*, 878 P.2d at 131 (detailing evidence from physicians as to reasonableness of medical charges reflected in bills, and concluding that such testimony provided basis for jury to determine that expenses were reasonable where the billed amounts alone could not). Billed amounts are therefore some evidence of, but not dispositive of, reasonable value. And a party is permitted to rebut evidence of the billed amounts with other evidence of the "reasonable" value of the services. *See*, section I, *supra*.

Thus, where a plaintiff merely presents medical bills without any supporting evidence as to why or how the billed amounts reflect the reasonable value of the medical services provided, a plaintiff has failed to meet his burden to establish the reasonableness of the medical damages sought. *Crossgrove*, ¶ 19; *Kendall*, 349 P.2d at 994 (same); *Lawson*, 878 P.2d at 131. In turn, a plaintiff's failure to establish reasonableness precludes recovery of medical expenses. *Id*.

D. Plaintiff failed to offer any evidence of reasonableness, thus precluding recovery.

Plaintiff here never offered any evidence that the medical expenses set forth on Exhibit 31 were reasonable. Viewed in a light most favorable to Plaintiff, his testimony, at best, established (1) Exhibit 31 "accurately" represented his medical bills and (2) that Plaintiff had no knowledge of "what's going on with the billing stuff." (TR 3/29/2021, p. 250:4-8; TR 3/30/2022, p. 83:10-11.) Nothing in his testimony—even affording it all reasonable inferences—was sufficient to establish that any of the expenses set forth on Exhibit 31 satisfy *Kendall*'s requirement that only reasonable past medical expenses are recoverable.

Plaintiff therefore failed to prove this element of his negligence claim, entitling Defendant to relief. *Rodgers*, ¶ 19. The district court's denial of Defendant's motion for directed verdict as to damages for past medical expenses was therefore erroneous.

E. The district court's error in allowing the jury to award past medical expenses was not harmless and requires remand and remittitur.

This Court may not disregard errors that affect a party's substantial rights. C.A.R. 35(c); *see also Doyle*, ¶ 16.

Because the evidence was insufficient to support an award of past medical expenses, this Court should vacate the judgment and remand the case to the district

court with directions to (1) remove $738,659.00 from the judgment and (2) recalculate the applicable prejudgment and postjudgment interest accordingly.

CONCLUSION

For the reasons set forth above, this Court should vacate the judgment and remand this case for a new trial, with directions that Messrs. Lacy and Bishop be permitted to testify. Alternatively, this Court should remand the case to the district court with directions to (1) remove $738,659.00 from the judgment and (2) recalculate the applicable prejudgment and postjudgment interest accordingly.

Dated: May 23, 2022

MESSNER REEVES LLP

s/ Caleb Meyer
Caleb Meyer
Adam Royval

Attorneys for Appellant Bradley Schrock

CERTIFICATE OF SERVICE

I certify that on May 23, 2022, I filed the foregoing with the Colorado Court of Appeals and served a true and accurate copy on the following parties via the Colorado E-File System:

Joseph A. Sirchio
Natalie A. Brown
FRANKLIN D. AZAR & ASSOCIATES

s/ Caleb Meyer