DATE FILED: July 18, 2022 6:15 PM
FILING ID: 95D6F484F6039
CASE NUMBER: 2021CA1710

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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REPLY 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 5,680 words (reply brief does not exceed 5,700 words).

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: July 18, 2022

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INTRODUCTION

This is not a narrow C.R.E. 702 appeal. The district court improperly predicated its exclusion of relevant, highly probative expert testimony on the collateral source rule. In doing so, the district court usurped from the jury its role of determining the reasonable value of medical services provided to Plaintiff. It forced the jury to consider only the billed amounts which Plaintiff presented through an unsupported summary, without any ability for Defendant to challenge reasonable value.

Defendant is legally entitled to contest Plaintiff's claim for increasingly arbitrary and artificially inflated medical bills. Permitting Defendant to challenge such claimed damages does not place Plaintiff in the position of explaining or defending hospital billing practices. It instead balances the parties' ability to fairly litigate in ways entirely consistent with Colorado's collateral source rule.

Plaintiff should not be allowed to establish the reasonable value of medical care by presenting undiscounted medical bills without challenge or foundation. Permitting Defendant here, and defendants generally, to challenge reasonable value through any competent evidence not running afoul of the collateral source rule is essential to the fundamental fairness of personal injury cases and helps juries better do their job of determining the reasonable value of medical services.

ARGUMENT

I. THE DISTRICT COURT REVERSIBLY ERRED IN EXCLUDING RELEVANT EVIDENCE OF REASONABLE VALUE THAT DOES NOT RUN AFOUL OF THE COLLATERAL SOURCE RULE.

A. Standard of review.

As a threshold matter, Plaintiff's argument that a misapplication of law only amounts to an abuse of discretion where a court "applies a wholly incorrect legal standard" is wrong. (A.B., p. 16.) Colorado law is unequivocal that any misapplication of law may constitute an abuse of discretion. *See, e.g., Freedom Colorado Info., Inc. v. El Paso Cnty. Sheriff's Dep't*, 196 P.3d 892, 899 (Colo. 2008) ("A misapplication of the law would also constitute an abuse of discretion."); *Antero Res. Corp. v. Strudley*, 2015 CO 26, ¶ 14 (same).

B. The district court's rulings were predicated on, or at minimum tainted by, the collateral source rule.

In an effort to recast Defendant's arguments as a narrow C.R.E. 702 appeal, Plaintiff argues that the district court did not apply or rely on the collateral source rule in its orders excluding Messrs. Lacy's and Bishop's testimony. (A.B., pp. 27-38.) Plaintiff is wrong. The district court based its rulings on the collateral source rule. Plaintiff also fails to acknowledge, that at a minimum, the collateral source rule tainted the district court's analysis underlying its orders. Either is reversible error.

1. The ruling excluding Mr. Lacy's testimony was based on the collateral source rule.

In excluding Mr. Lacy's testimony, the district court framed its inquiry as a determination of "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." (CF, p. 757.) But in assessing whether such testimony is helpful or appropriate, the district court immediately addressed the collateral source rule. (*Id*.) It noted *Crossgrove's* holding that amounts paid by an insurer are inadmissible, and emphasized the risk of prejudice to a plaintiff if the jury learned the provider accepted a "lesser amount" than that billed. (*Id*.) The district court then re-emphasized its concern about a jury mishandling any information related to a "lesser amount." (*Id*., pp. 757-58 (reiterating *Crossgrove's* warning that "a reasonable juror will likely infer the existence of a collateral source if presented with evidence of a lower amount paid to satisfy a higher amount billed[.]").)

Accordingly, under its interpretation of *Crossgrove*, the district court was resistant to allow any evidence potentially indicating a provider might accept a "lesser amount" than that billed. The district court then evaluated Mr. Lacy's testimony under this flawed rationale and determined 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.) Under the district court's analysis, such testimony implicated the collateral source rule. (*Id*.)

The logic underlying the collateral source rule was thus a basis for the district court's ruling to exclude Mr. Lacy's testimony. At minimum, the district court's concern for the "lesser value" of Plaintiff's medical bills was simply the alter ego of the collateral source rule, and such concern tainted the district court's determination of whether Mr. Lacy's testimony was a helpful or appropriate issue for the jury. Either is error, because as set forth in argument I.C., *infra*, Mr. Lacy's testimony did not violate or even implicate the collateral source rule.

2. The ruling excluding Mr. Bishop's testimony was based on the collateral source rule.

In excluding Mr. Bishop's testimony regarding a 55% self-pay discount routinely accepted at University Hospital, the district court expressly relied on the collateral source rule. (TR 3.24.2021, pp. 13:25-14:12.) It initially stated its concern to Defendant's trial counsel that permitting Mr. Bishop to testify on a self-pay discount would be "directly contrary" to *Crossgrove*. (*Id*., p. 14:2-4.) It then held that evidence of a self-pay discount which Plaintiff did not receive would lead to the jury's inference that Plaintiff had insurance, thereby violating the collateral

source rule. (*Id.*, p. 14:8-11 ("I agree with Plaintiff that it only suggests then to the jury that he, in fact, has insurance which flies in the face of the collateral source rule and the case law that says the jury's not to know about that and/or to consider that.").)

This reasoning was critical to the court's order excluding Mr. Bishop's testimony. The district court even re-emphasized that Mr. Bishop's testimony would violate the collateral source rule in another part of its oral ruling. When Defendant's counsel conceded that he could not bring Plaintiff's self-pay status in front of the jury, the district court again stated that permitting Mr. Bishop's testimony "flies in the face of" the collateral source rule. (*Id.*, p. 18:11-15.)

Plaintiff's suggestion that the district court's analysis of Mr. Bishop's testimony under the collateral source rule occurred "[o]nly after" a separate and distinct analysis of the testimony's relevance is thus wrong. (A.B., p. 34.) The district court expressly reasoned throughout its ruling that evidence of a self-pay discount implicates Plaintiff's insurance status and violates the collateral source rule.

The district court thus unquestionably relied on the collateral source rule in excluding Mr. Bishop testimony. Alternatively, at minimum, the collateral source rule tainted the district court's determination of whether Mr. Bishop's testimony

was relevant. Either is error, because as set forth in argument I.C, *infra*, Mr. Bishop's testimony did not violate or even implicate the collateral source rule.

Accordingly, this appeal does not present a narrow C.R.E. 702 issue. The collateral source rule and its scope are squarely at issue in this appeal.

C. The district court erred in concluding that Messrs.' Lacy's and Bishop's testimony violated the collateral source rule.

1. Plaintiff agrees that *Crossgrove* permits defendants to introduce any competent evidence of reasonable value which does not run afoul of the collateral source rule.

Crucially, Plaintiff does not contest the legal standard which Defendant advocates this Court to adopt and publish: under *Crossgrove* and its progeny, defendants may introduce any competent evidence of the reasonable value of medical services that does not run afoul of the collateral source rule. (O.B., p. 28.)

Plaintiff effectively advocates for the same legal standard in multiple sections of his brief. He does so in arguing that a defendant's evidence of reasonable value must be relevant, qualified (if expert testimony), and comply with the collateral source rule:

> Of course, allowing plaintiffs to claim the full amounts billed as their "reasonable" economic damages does not preclude defendants from submitting their own evidence suggesting that a different amount would be "reasonable." However, any such evidence must not only be admissible under the normal rules of evidence, including those requiring relevance and prohibiting unqualified opinion testimony, but must also comply with the collateral source rule.

(A.B., p. 25.)

Plaintiff does so again in suggesting that relevant and otherwise admissible evidence of reasonable value is admissible where it does not violate the collateral source rule:

> Again, nothing in the court's exclusion of Bishop precluded or foreclosed Defendant's submission of potential evidence on the issue or reasonable value where such evidence was relevant, helpful, and otherwise admissible, and did not run afoul of the collateral source rule.

(A.B., p. 37.)

Plaintiff agrees that any competent evidence of reasonable value—that is, evidence otherwise admissible under Colorado's Rules of Evidence—should be admitted where such evidence does not run afoul of the collateral source rule. The parties thus agree that *Crossgrove* and its progeny did not and could not categorically bar Defendant from presenting any evidence to challenge reasonable value. Such a sweeping prohibition would deny Defendant fundamental due process. *See In re Marriage of Goellner*, 770 P.2d 1387, 1389 (Colo. App. 1989) (recognizing defendants' due process rights "to meet opposing evidence and to oppose with evidence").

The parties' agreement on *Crossgrove* is significant and further reason for a published opinion from this Court articulating and clarifying the controlling legal standard under *Crossgrove* and its progeny. As set forth in the Colorado Defense Lawyers Association's amicus brief, a published opinion would help remedy inconsistent district court interpretations of *Crossgrove*. (CDLA Amicus Br., pp. 10-12.) This Court should thus adopt and publish the legal standard on which the parties agree: under *Crossgrove* and its progeny, defendants may introduce any competent evidence of the reasonable value of medical services that does not run afoul of the collateral source rule. Competent evidence of reasonable value is any evidence otherwise admissible under Colorado's Rules of Evidence.

2. The collateral source rule only prohibits evidence of paid amounts in collateral source cases.

Equally significant as Plaintiff's agreement on the controlling legal standard under *Crossgrove*, Plaintiff also does not contest the collateral source rule's narrow application. As Plaintiff advocates, the rule only functions to "prohibit[] the admission of amounts paid evidence in collateral source cases[.]" (A.B., p. 19 (quoting *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 2012 CO 30M, ¶ 15).)

But the Colorado Trial Lawyers Association (CTLA), as amicus, attempts to expand the reach of the collateral source rule. CTLA argues that the collateral

source rule prohibits "indirect" evidence of collateral source payments, including any evidence which might require a plaintiff to address health insurance or other collateral source payments in rebuttal. (CTLA Amicus Br., pp. 4-11.) This notably departs from Plaintiff's argument, which recognizes that the collateral source rule only bars amounts paid evidence in collateral source cases—not any and all evidence which might require a plaintiff to address market forces impacting the pricing of healthcare, such as insurance and self-pay, in general.

CTLA's attempt to dramatically expand the scope of the collateral source rule finds no support in Colorado law. Instead, Colorado law expressly limits the collateral source rule to exclude evidence only of amounts paid by true collateral sources. *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, ¶ 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."); *Sunahara*, ¶ 15 (where "a party offers evidence of the amount paid by a collateral source for the purpose of determining the reasonable value of the medical services rendered[,]" the collateral source rule "prohibits the admission of amounts paid evidence[.]").

No Colorado authority holds or even suggests that the collateral source rule further applies to bar any evidence which might require a plaintiff to address

market factors like self-pay and health insurance for purposes of establishing reasonable value. Such a standard would be unworkable, likely result in extensive litigation regarding which types of evidence require a plaintiff to address insurance in rebuttal, and risk categorical exclusion of defense evidence challenging reasonable value (the error the district court committed here). CTLA's proffered standard is therefore unsubstantiated.

Colorado's collateral source rule is simple and narrow. It excludes evidence of payments by sources collateral to a particular plaintiff, and nothing further.

3. The collateral source rule allows market-based evidence of reasonable value where no evidence is presented of a collateral source payment for the benefit of a plaintiff.

While *Crossgrove* and *Sunahara* make clear that defendants may introduce any competent evidence of reasonable value not running afoul of the collateral source rule, neither case provides explicit guidance regarding the form of such evidence. This Court should join other jurisdictions which have applied *Crossgrove's* rationale to hold that market-based evidence of reasonable value is admissible where no evidence is presented of a collateral source payment. (O.B., pp. 22-28.) Plaintiff apparently does not disagree, as he makes no argument as to why this Court should not. (*See generally*, A.B.)

Such market-based evidence includes evidence "about the range of charges the provider has for the same services[.]" *Weston v. AKHappytime, LLC*, 445 P.3d 1015, 1028 (Alaska 2019). It also includes testimony explaining or estimating the reasonable value of the medical services provided based on market data. *See, e.g.*, *Nomat v. Mota*, No. OP 140102-U, 2015 WL 5257886, at *8 (Ill. App. 2015) (holding that defense expert should be allowed 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); *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[, including], for example, evidence as to what [] other providers usually charge").

These two primary types of evidence—namely, (1) the range of charges a provider has for the same service; and (2) explanations or estimates of the reasonable market value of medical services based on market data—do not violate or implicate the collateral source rule where the evidence does not mention a payment by a source collateral to a plaintiff. It logically follows that where no evidence of such payments is elicited, such evidence must be admissible. As detailed in argument section I.C.4, *infra*, Messrs. Lacy's and Bishop's testimony fit

within these two categories, without remotely opining as to any payments by sources collateral to Plaintiff.

4. Messrs. Lacy's and Bishop's testimony did not violate or implicate the collateral source rule.

Importantly, Plaintiff makes no argument that either Messrs. Lacy's or Bishop's testimony violated the collateral source rule. (*See generally* A.B.) Nor could he. Instead, Plaintiff tellingly strives only to distance the district court's rulings from the appropriate collateral source rule analysis.

If this Court determines that the district court's rulings were based on or tainted by a collateral source rule analysis, Plaintiff has made no responsive argument as to how either Messrs. Lacy's or Bishop's testimony could have violated the collateral source rule. (*Compare* O.B., pp. 29-32 *with* A.B., *generally*.)

To be sure, Messrs. Lacy's and Bishop's opinions did not violate or even implicate the collateral source rule. The collateral source rule bars evidence only of payments made by sources collateral to a plaintiff. *Crossgrove*, ¶ 20; *Sunahara*, ¶ 15. Neither Mr. Lacy nor Mr. Bishop opined on payments from sources collateral to Plaintiff.

Instead, Mr. Lacy opined on the reasonable market value of medical services based on market data, without addressing collateral source payments specific to

Plaintiff. Nothing in *Crossgrove* or its progeny prohibits this. Permitting such evidence also finds support in jurisdictions applying Crossgrove's rationale. *See, e.g.*, *Nomat*, 2015 WL 5257886, at *8 (Ill. App. 2015) (permitting testimony which explains or estimates reasonable value based on market data without addressing collateral source payments); *Melo*, 800 F. Supp. at 602 (same).

By opining on a self-pay discount, Mr. Bishop was effectively testifying on the range of charges a provider has for the same service. A self-pay discount indicates a lower amount a provider might accept for identical services based on a category of payor and represents a valid, persuasive data point in establishing reasonable value. Nothing in *Crossgrove* or its progeny prohibits this. Other jurisdictions applying *Crossgrove's* rationale have specifically permitted evidence demonstrating a range of charges for the same service. *See, e.g.*, *Weston*, 445 P.3d at 1028 (concluding that "testimony about the range of charges the provider has for the same services" does not violate collateral source rule where it does not address collateral source payments).

Messrs. Lacy's and Bishop's testimony thus did not violate or implicate the collateral source rule. The district court reversibly erred in concluding that it did.

D. The district court's misapplication of the collateral source rule barred highly probative evidence and usurped the jury's determination of reasonable value.

Because it does not violate or implicate the collateral source rule, Messrs. Lacy's and Bishop's testimony should be admitted if it is otherwise admissible under Colorado's Rules of Evidence. As set forth below, it is otherwise admissible.

Plaintiff argues and the district court concluded that Messrs. Lacy's and Bishop's expert testimony is irrelevant. This is wrong. Expert testimony is relevant where it is helpful to the jury. *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001). "The bar for helpfulness is low—whether the expert can offer 'appreciable assistance' on a subject beyond the understanding of a typical juror." *People v. Vidauri*, 2019 COA 140, ¶ 60, *rev'd on other grounds*, 2021 CO 25. Messrs. Lacy's and Bishop's testimony easily meets and far exceeds this standard.

1. Mr. Lacy's testimony is relevant.

The district court's conclusion and Plaintiff's argument that Mr. Lacy's testimony is irrelevant relies on the faulty premise that the market value of medical services is somehow irrelevant to those services' reasonable value in cases of emergency treatment. (A.B., p. 29; CF, p. 758.) Notably, the district court never concluded that Mr. Lacy's testimony was irrelevant to the "market value" of the medical services Plaintiff received. It instead concluded that the "market value of

medical services" is irrelevant to those services' reasonable value in cases of emergency care. (CF, p. 758.) But neither the district court nor Plaintiff cite any Colorado law distinguishing the proper damages measure between cases of emergency and non-emergency care. Nor could they. In every case, emergency or non-emergency, "the correct measure of damages is the necessary and reasonable value of the [medical] services rendered." *Crossgrove*, ¶ 19.

Evidence of the market value of services rendered is unquestionably relevant to and probative of those services' reasonable value. It helps show what a willing buyer and seller might agree to pay and accept for a particular service, in context of healthcare market dynamics. This at minimum satisfies the "low bar" for helpfulness of expert testimony where the jury is tasked to determine reasonable value. *Vidauri*, ¶ 60. Holding to the contrary is nonsensical. It would mean the "market value" of medical services somehow has no relevance to those services' "reasonable value"—forcing juries to determine the "reasonable value" of medical services without any consideration of the broader healthcare market in which those services are provided.

That Plaintiff's medical services were rendered in an emergency setting does not change the analysis or demand a different result, and it was error for the district court to usurp from the jury evaluation of whether the emergent or non-emergent

care setting impacted reasonable value. The provider still issues a bill for its emergency services and that bill is subject to the very market forces on which Mr. Lacy opines. The market value of those emergency services is thus relevant to and probative of their reasonable value. Mr. Lacy's testimony is thus relevant.

2. Mr. Bishop's testimony is relevant.

The district court concluded and Plaintiff argues that Mr. Bishop's testimony is irrelevant because a provider's self-pay discount is irrelevant to reasonable value in cases where a plaintiff is insured. (A.B., pp. 34-37; TR. 3.24.21, pp. 16-18.) This misses the point.

As stated above, a provider's self-pay discount shows the range of charges a provider has for the same services. It indicates a lesser amount a provider may accept for identical services based on a category of payor. Simply because Plaintiff in this case did not fit that payor category does not diminish the existence of a provider's range of charges based on payor. The mere existence of this range matters. It helps a jury assess what a willing buyer and seller might agree to pay and accept for a particular service. Thus, a provider's range of charges based on categories of payors helps a jury determine the reasonable value of services rendered—regardless of whether an injured plaintiff fits within a particular payor category. Other jurisdictions have concluded similar. *Weston*, 445 P.3d at 1028

("[T]estimony about the range of charges the provider has for the same services" can help demonstrate "that the billed amounts do not reflect the reasonable value of the services.").

Accordingly, by opining on a self-pay discount, Mr. Bishop was effectively testifying on the range of charges a provider has for the same services. This is relevant to and probative of those services' reasonable value. Mr. Lacy's testimony was thus relevant.

3. The district court usurped the jury's determination of reasonable value.

More fundamentally, the district court improperly constrained the jury's determination of reasonable value by substituting its own findings as to what is reasonable. (*See, e.g.*, CF, p. 758 (district court unilaterally concluding that "the best evidence of Plaintiff's medical expenses are the amounts that he was billed[]" to the exclusion of all others).

It is unequivocal that a jury determines reasonable value. *French v. Centura Health Corp.*, 2022 CO 20, ¶ 45. Plaintiff agrees. (A.B., p. 25 ("[T]he proper arbiter of the 'reasonable' value of medical services is not the hospital or either of the parties, but the jury (or other factfinder).").)

But by excluding Messrs. Lacy's and Bishop's testimony, thereby preventing Defendant from presenting any evidence to challenge reasonable value, the district court forced the jury to issue a damages award without assessing the healthcare market dynamics in which Plaintiff's medical services were rendered. The district court instead imposed its determination that the billed amounts were the "best evidence" on the jury. This usurped from the jury its role of determining reasonable value and forced it to only consider the billed amounts Plaintiff presented by way of summary. To be clear, the figures with which the jury was presented are of the same category as those that the Colorado Supreme Court has referred to as "increasingly arbitrary[.]" *French*, ¶ 40. This left the jury "with what is at best an incomplete picture of the services' reasonable value." *Crossgrove*, ¶ 29 (Eid., J., dissenting).

By excluding highly probative evidence and usurping the jury's role, the district court erred in excluding Messrs. Lacy's and Bishop's testimony.

E. The district court's ruling severely compromises the fairness of personal injury cases and hinders the ability of juries to do their job.

The importance of allowing defendants to present evidence challenging reasonable value cannot be overstated. It is essential to the fundamental fairness of

personal injury cases and helps juries better do their job of determining the reasonable value of medical services.

1. A plaintiff may recover only the reasonable value of medical services provided, not the full amount of inflated bills.

Colorado law is clear that an injured plaintiff is allowed to recover only "the necessary and reasonable value" of the medical services provided. *Crossgrove*, ¶ 19 ("[T]he correct measure of damages is the necessary and reasonable value of the [medical] services rendered." (quoting *Kendall v. Hargrave*, 349 P.2d 993, 994 (Colo. 1960)). Plaintiff agrees. (A.B., pp. 18-19.)

But as Colorado Supreme Court justices have consistently recognized, the reasonable value of medical services is often far less than the amounts providers charge in undiscounted medical bills. *Rudnicki v. Bianco*, 2021 CO 80, ¶ 68 (Hart, J., dissenting, in which Boatright and Márquez, JJ., joined) ("Because 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."); *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.").

This split between the reasonable value of medical services and the amounts billed results largely from providers' widespread use of chargemasters in generating bills. The rates set by chargemasters do not indicate the reasonable value of medical services. They instead "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*, ¶ 40. It is thus a "modern healthcare billing practice[]" for providers to accept payments "significantly less" than the billed amounts. *Crossgrove*, ¶¶ 21-22.

In a market reality where inflated medical bills do not reflect reasonable value, Colorado's mandate that personal injury plaintiffs may only recover the reasonable value of medical services rendered becomes critical and the burden of establishing reasonableness fundamental to their claims.

2. Defendants must be able to challenge reasonable value.

Allowing plaintiffs to establish reasonable value by presenting undiscounted medical bills without challenge is a dangerous policy. It incentivizes providers to

further inflate billed amounts and assert a lien for those inflated amounts. This would exacerbate the windfall injured plaintiffs might receive, at odds with Colorado law. *See, e.g., LeHouillier v. Gallegos*, 2019 CO 8, ¶ 44.

Plaintiff's counterarguments on this point are unpersuasive. Initially, Plaintiff's insistence that a "patient is legally liable to medical providers for the *entire* amount of the bills charged by medical providers" is a strawman argument. (A.B., p. 22 (emphasis in original).) Notably, Plaintiff provides no record citation that Plaintiff himself is or was personally liable for the full billed amount here. Even if Plaintiff had incurred personal liability for the full billed amount, the record evidence sharply undercuts any significance of that liability. Plaintiff, in all likelihood, would have never been required to pay the full amount billed. (*See* CF, p. 931 (Mr. Bishop indicating that if Plaintiff were a self-pay patient, University Hospital would accept 45% of the total billed).) A patient's purported personal liability for the full amount billed thus does not justify allowing a plaintiff to establish reasonable value by presenting undiscounted bills without challenge. This is particularly true here where there is no evidence before the Court supporting the argument that Plaintiff incurred full personal liability for such bills.

Equally unpersuasive is Plaintiff's contention that "[w]hen a hospital treats a patient's injuries, it has an enforceable claim for full payment for its services,

regardless of the patient's financial status." (A.B., p. 22 (quoting *Trevino v. HHL Fin. Servs., Inc.*, 945 P.2d 1345, 1350 (Colo. 1997)). Colorado limits a hospital's lien to the "reasonable and necessary charges for hospital care"—not the full amount billed. C.R.S. § 38-27-101(4).

Plaintiff's further argument, premised on *Trevino*, that "the supreme court has equated 'reasonable and necessary charges' with the full amount billed" is wrong. (A.B., p. 22.) In *Trevino*, the Colorado Supreme Court held that a hospital's lien recovery should not be deducted by the amount of attorney fees an injured plaintiff incurred in obtaining a damages award. *Trevino*, 945 P.2d at 1350-51. Thus, in context, Plaintiff's excerpt from *Trevino* that Colorado's hospital lien statute "plainly provides that the lien is in the full amount of the hospital charges[]" still refers only to the full amount of "reasonable and necessary" charges. *Id*. (*see also* A.B., p. 22). *Trevino* thus merely states that a hospital may recover the "full amount" of "reasonable and necessary charges" without deducting a plaintiff's attorney fees. This does nothing to equate reasonable charges with the full amount billed.

Additionally, Plaintiff's sweeping argument that the "overwhelming weight of jurisprudence conclusively establish[es] that the primary evidence of the 'reasonable and necessary' value of medical treatment is the amount charged for

those services[]" glaringly lacks citation to persuasive authority. (A.B., p. 20.) The statement itself is uncited, and it is unclear which if any cases Plaintiff relies upon to support his incorrect proposition. Even assuming solely for argument's sake that precedent did hold that medical bills are "primary evidence" of reasonable value, this determination does nothing to undermine or even complicate the need for courts to allow defendants to present competing evidence challenging reasonable value. As stated above, denying defendants this ability would deny them fundamental due process. *Goellner*, 770 P.2d at 1389.

Finally, Plaintiff's argument that "a majority of courts have concluded that plaintiffs are entitled to claim and recover the full amount of reasonable medical expenses charged, based on the reasonable value of medical services rendered, including amounts written off from the bills pursuant to contractual rate reductions[]" does not demand or even suggest a different result. (A.B., p. 24 (citing *Forfar v. Wal-Mart Stores, Inc.*, 2018 COA 125, ¶ 28). As framed in *Forfar* and those cases it cites, the core inquiry is still a determination of the "reasonable value of medical services rendered[.]" *Forfar*, ¶ 28. Defendant has not and does not argue that Plaintiff is prohibited from presenting medical bills as evidence of reasonable value, or that Plaintiff's recovery must be limited to the amounts paid by his insurance. (A.B., p. 22.) Defendant and Plaintiff agree that an injured

plaintiff may recover the reasonable value of medical services provided, and that Plaintiff may present evidence of the billed amounts with proper foundation. The pertinent question is what evidence Defendant may present in response to demonstrate that the reasonable value of medical services is different from and significantly lower than the billed amounts presented by Plaintiff.

By denying Defendants the ability to present any evidence at all challenging reasonable value, the district court severely compromised the fundamental fairness of the case and hindered the jury's ability to determine reasonable value. Reversal is required.

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

Plaintiff makes no responsive argument that the district court's error was harmless. For the reasons in Defendant's opening brief, the district court's error was not harmless and requires a new trial. (O.B., pp. 32-33.)

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

Plaintiff and CTLA attempt to frame this case as imposing an additional and unjust burden on injured plaintiffs to establish the reasonable value of medical

services. Their efforts fail. Colorado law is clear that a plaintiff must establish and may only recover the reasonable value of medical services rendered. *Crossgrove*, ¶ 19. This burden is neither new nor unjust. It is simply a part of what an injured plaintiff must establish to prove their case. *Id*.; *see also Lawson v. Safeway, Inc.*, 878 P.2d 127, 131 (Colo. App. 1994) (plaintiff may recover damages for medical expenses only where the "evidence demonstrate[s] they were reasonable, necessary, and incurred as a result of her [injury].").

Requiring injured plaintiffs to establish the reasonable value of medical services does not function to "hold insured persons responsible for alleged unfair billing practices by hospitals and other medical providers." (A.B., p. 1.) It simply holds injured plaintiffs, as litigants, to their burden, making them responsible for establishing that the damages they are requesting reflect the reasonable value of the services they received.

Nor does it "take the determination of 'reasonableness' and the proper amount of damages out of the hands of the jury[.]" (A.B., p. 43.) Plaintiff simply has the burden to prove his case, including reasonable value. The jury still determines whether Plaintiff did prove his case, and the jury still determines the reasonable value of those medical services for which Plaintiffs requests damages.

Further, Plaintiff's policy argument that requiring a plaintiff to establish reasonable value would "force plaintiffs to hire expensive expert witnesses in every single trial" is overstated. (A.B., p. 43.) The very experts on whom a plaintiff relies to establish their case in chief, namely their treaters, may provide the testimony regarding the reasonable value of services that the law demands. Because these witnesses are indispensable witnesses to the case anyway, their provision of testimony to establish reasonable value does nothing to increase plaintiffs' burden.

Plaintiff must therefore present evidence establishing that the medical damages requested reflect the reasonable value of the medical services provided.

B. Plaintiff failed to establish that the damages he requested reflect the reasonable value of the medical services provided.

Plaintiff presented no evidence to establish reasonable value. Plaintiff only established that Exhibit 31 "accurate[ly]" represented his medical bills. (TR 3/29/2021, p. 250:4-8.) Dr. Stoneback's and Dr. Wiener's testimony does not remedy this deficiency. (A.B., p. 47.) Both physicians testified only about the reasonableness of medical <u>treatment</u>. (Tr. 3/30/21, pp. 37:12-17 (Dr. Stoneback); Tr. 3/31/21 Pt. 1, pp. 36:24-37:2 (Dr. Wiener).) Neither testified about the reasonableness of the <u>amount billed</u> for that treatment. (*See id*.; *compare Lawson*,

878 P.2d at 131 ("One of [plaintiff]s doctors testified that the charges for medical services reflected in his bill, which represented over one-third of plaintiff's total medical expenses, were reasonable and necessary[.]" (emphasis added)).)

Accordingly, even affording it all reasonable inferences, Plaintiff's testimony could not establish that the medical damages he requested reflect the reasonable value of the medical services provided. The district court's denial of Defendant's motion for directed verdict as to damages for past medical expenses was error, requiring remand and remittitur. (O.B., pp. 37-38.)

CONCLUSION

For the reasons above, and in Defendant's opening brief, 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: July 18, 2022

MESSNER REEVES LLP

s/ Caleb Meyer

Caleb Meyer
Adam Royval
Attorneys for Appellant Bradley Schrock

CERTIFICATE OF SERVICE

I certify that on July 18, 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