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COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

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

Plaintiff-Appellee:

Raphael Mukendi

v.

Defendant-Appellant:

Bradley Schrock

▲ COURT USE ONLY ▲

Case Number: 2021CA1710

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# COLORADO DEFENSE LAWYERS ASSOCIATION'S AMICUS BRIEF IN SUPPORT OF APPELLANT

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

_X_ It contains 3,617 words.

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

Dated: May 31, 2022

*s/ Robert Bacaj*
Signature of attorney

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## I. STATEMENT OF AMICUS CURIAE'S IDENTITY

The Colorado Defense Lawyers Association (CDLA) is a nonprofit association which exists to support and serve the interests of lawyers involved in the defense of civil litigation. CDLA has roughly 800 members, from all corners of the State of Colorado. CDLA members actively support the preservation of civil jury trials and the promotion of fairness and integrity in the civil justice system.

CDLA's mission includes the following objectives:

1. Enhancing the skills, effectiveness, and professionalism of Colorado defense lawyers;

2. Anticipating and addressing, where possible, issues significant to the defense of civil matters and the civil justice system;

3. Promoting among all lawyers involved in civil litigation the highest standards of professionalism, civility, and courtesy in the conduct of trials and related proceedings, while promoting an appreciation of the role of the defense lawyer;

4. Encouraging and promoting better communication and relations between lawyers engaged in the defense of civil cases and the people, entities, and judges involved in civil litigation;

5. Improving the civil justice system and the legal profession; and

6. Developing collegiality and camaraderie among members of the Colorado bar.

In filing this Amicus Brief, CDLA emphasizes the important policy considerations involved beyond just the facts of this case. That is, CDLA members

have an interest in ensuring that Colorado law is applied correctly and consistently, particularly with regard to a damages limitation that is so restrictive to defendants.

CDLA urges this Court to consider the probable impact of the trial court's decision, if affirmed. Indeed, if the trial court is correct (it is not), defendants statewide are unable to challenge the reasonableness of plaintiff's medical expenses at trial. Affirming the trial court's decision would essentially eliminate an element of proof altogether. Further, precluding all evidence challenging the reasonableness of medical expenses exposes defendants to extreme risk because economic damages are not capped and medical providers continue to charge increasingly high amounts for medical services.

## II. INTRODUCTION

This case exemplifies a consistent problem permeating Colorado's trial courts: these courts often misapply the collateral source rule to wholesale bar defendants from presenting any evidence to rebut that plaintiffs' billed medical expenses represent the necessary and reasonable value of medical services. In *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, 276 P.3d 562, the Colorado Supreme Court held that the collateral source rule's pre-verdict evidentiary component, which excludes evidence of benefits received by the plaintiff from sources independent of the defendant, bars the admission of the amounts paid for medical

services in collateral source cases. District courts, however, have expanded upon that holding, and erroneously and inconsistently reasoned that the collateral source rule and *Crossgrove* bar any evidence of the amounts that medical providers generally charge for the at-issue service. Accordingly, defendants are left unable to meaningfully dispute that the billed charges for medical services—which are typically significantly higher than, and bear only a tenuous relationship to, the amount that actually gets paid—are unreasonable.

Published guidance from this Court will help correct this problem. Accordingly, this Court should take the opportunity to explain the scope of the collateral source rule and enumerate types of evidence that district courts should admit, or else defendants will continue to be hamstrung.

## III. ARGUMENT

### A. The Amount Paid for Medical Services Is Relevant to the Necessary and Reasonable Value of Those Services.

In tort cases involving medical services, "the correct measure of damages is the necessary and reasonable value of the services rendered." *Kendall v. Hargrave*, 142 Colo. 120, 123, 349 P.2d 993, 994 (1960); *Lawson v. Safeway, Inc.*, 878 P.2d 127, 131 (Colo. App. 1994). It had long been the rule in Colorado that the amount paid for medical services was proper evidence of the necessary and reasonable value of those services. *Oliver v. Weaver*, 72 Colo. 540, 547, 212 P. 978, 981

(1923) (holding that "the amount paid for [medical] services is some evidence as to their reasonable value"); *accord Kendall*, 349 P.2d at 994; *Palmer Park Gardens, Inc. v. Potter*, 162 Colo. 178, 184–85, 425 P.2d 268, 272 (1967). The same was true of the amount billed for medical services. *See, e.g., Lawson*, 878 P.2d at 131 (holding that the jury could rely on the testimony of one of the plaintiff's doctors "that the charges for medical services reflected in his bill . . . were reasonable and necessary").

### B. The Collateral Source Rule Prevents Defendants From Avoiding or Mitigating Liability With Evidence That a Plaintiff Received Benefits From a Source Independent of a Defendant.

As explained in Mr. Schrock's opening brief, the collateral source rule addresses the legal effect of a benefit that the plaintiff receives from a source independent of the alleged tortfeasor. For most of its history, the collateral source rule only prevented defendants from avoiding or mitigating liability by directly stating that a plaintiff received benefits from a collateral source independent of a defendant.

Originating in English common law, Michael W. Cromwell, *Cutting the Fat Out of Health-Care Costs: Why Medicare and Medicaid Write Offs Should Not Be Recoverable Under Oklahoma's Collateral Source Rule*, 62 Okla L. Rev. 585, 589 (2010), the collateral source rule was first recognized in American courts in 1855

when the United States Supreme Court decided an admiralty case arising from the collision of two ships on Lake Huron, *The Propeller Monticello v. Mollison*, 58 U.S. 152, 153–54 (1855). The defendant argued that it should avoid liability altogether because the plaintiffs "have received satisfaction from the insurers." *Id.* at 155. The Supreme Court rejected this argument, holding that it was "well established at common law and in courts of admiralty" that "[t]he insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others." *Id.*

The Colorado Supreme Court adopted this rule in 1916. In *Rhinehart v. Denver & Rio Grande Railroad Co.*, 61 Colo. 369, 370–71, 158 P. 149, 150 (1916), *overruled on other grounds by Morgan Cty. Junior College Dist. v. Jolly*, 168 Colo. 466, 452 P.2d 34 (1969), the plaintiffs suffered property damage because of the railroad's negligence. The railroad argued that it could not be liable to the plaintiffs because the plaintiffs had been indemnified for their losses by an insurer and therefore had no losses and were not the real parties in interest. *Id.* at 372, 158 P. at 150–51. The supreme court held that the railroad "cannot escape any part of its liability . . . by showing that [the plaintiffs were] protected by insurance." *Id.* at 379–80, 158 P. at 153.

In the decades that followed, the supreme court continued to apply this rule to prevent a post-verdict setoff of the amount of the benefit that a plaintiff had received from an insurer. *See, e.g., Riss & Co. v. Anderson*, 108 Colo. 78, 84–85, 114 P.2d 278, 281 (1941) ("[I]f plaintiff in effect bought an accident policy, he rightly receives a benefit therefrom and that is merely his good fortune. His action in that respect added no burden to defendant, and having carried no liability, the latter can predicate no advantage therefrom.").

In 1951, the Colorado Supreme Court extended the collateral source rule to include a pre-verdict evidentiary component. *Carr v. Boyd*, 123 Colo. 350, 229 P.2d 659 (1951). In *Carr*, a negligence suit involving a car collision, the supreme court reviewed whether the district court erred in admitting evidence that the plaintiff had received insurance benefits after the accident and that the insurer might have a lien on any judgment in his favor. *Id.* at 355, 229 P.2d at 662. The defense conceded that the evidence was inadmissible to mitigate damages but argued that any error was harmless because the jury had rendered a defense verdict on liability. *Id.* at 358, 229 P.2d at 663. The supreme court rejected this argument, reasoning that "it would have been easy for the jury to have concluded that the real controversy was . . . the fact that the [insurer] was making claim for the proceeds of any verdict [and] further conclude that plaintiff would lose nothing by reason of

having been paid." *Id.* at 358–59, 229 P.2d at 663–64. In other words, because the jury was told that the plaintiff had, as a practical matter, not suffered losses, there was a risk that the jury rendered a defense verdict based on the insurance relationship rather than the evidence in the suit.

The court summarized the extended collateral source rule as follows: "any benefits paid by [the collateral source] to plaintiff in the case at bar cannot be taken advantage of by defendant to mitigate the damage or otherwise." *Id.* at 357, 229 P.2d at 663.

### C. The Collateral Source Rule Is Expanded to Cover Amounts Accepted in Full Payment for the Plaintiff's Medical Treatment, Even Where the Jury Does Not Hear That a Collateral Source Exists.

The collateral source rule and the principle that the amount paid for medical services is evidence of the services' necessary and reasonable value "lived comfortably side-by-side for decades." *Crossgrove*, ¶ 36, 276 P.3d at 570 (Eid, J., dissenting). Then, in 2012, the Colorado Supreme Court considered whether "the amount accepted in full payment for medical treatment was inadmissible in light of *Kendall* [and the collateral source rule]." *Id.* at ¶ 6, n.2, 276 P.3d at 564 n.2 (majority opinion).

At the underlying trial, the district court had ruled that the amount paid by a collateral source in satisfaction of the plaintiff's medical bills was admissible,

relying on the well settled case law that "the amount paid for medical expenses is 'some evidence of their reasonable value.'" *Id.* at ¶ 3, 276 P.3d at 563–64 (quoting *Lawson*, 878 P.2d at 131). The parties stipulated to the amount paid, and this fact was introduced to the jury through the statement of counsel with no mention of who made the payment. *Id.* at ¶¶ 31–32, 276 P.3d at 569 (Eid, J., dissenting). On appeal, a division of the court of appeals reversed under the collateral source rule. *Id.* at ¶ 6, 276 P.3d at 564 (majority opinion).

The majority affirmed the court of appeals' ruling that the district court erred in admitting the evidence. *Id.* at ¶ 26, 276 P.3d at 568. For the first time, the court observed that there was a "tension" between the evidentiary portion of the collateral source rule and evidence of the paid amount of medical services. *Id.* at ¶ 19, 276 P.3d at 566. The court resolved this tension in favor of the collateral source rule. Stating that a jury could infer the existence of a collateral source from the fact that the amount paid was lower than the amount billed, *id.* at ¶¶ 20–23, 276 P.3d at 566–67, the majority reasoned that this created a "risk of prejudice – in the form of reduced damages – against the insured plaintiff," *id.* at ¶ 23, 276 P.3d at 567, and held that "[e]vidence of the [amount] paid by [the plaintiff's] insurance provider is inadmissible . . . because it is evidence of a collateral source benefit," *id.* at ¶ 25, 276 P.3d at 568.

This marked an expansion of the collateral source rule to bar evidence from which a jury could infer that the plaintiff had received a benefit from a collateral source, rather than evidence that directly stated this point. *Id.* at ¶ 30, 276 P.3d at 569 (Eid, J., dissenting).

Notably, the court confined its holding to that narrow issue. It expressly did "not opine as to whether evidence of amounts paid by a collateral source for medical expenses is relevant to the reasonable value of those expenses," *Crossgrove*, ¶ 13 n.4, 276 P.3d at 565 n.4 (majority opinion), and therefore left undisturbed the principle from *Kendall* and its progeny that the amount paid for medical services is relevant to the services' necessary and reasonable value.

Further, the court did not offer guidance on what evidence defendants could present to dispute the billed amount of medical treatment as reasonable. *See id.* at ¶¶ 23–25, 276 P.3d at 567–68. Accordingly, while *Crossgrove* is clear that the evidentiary component of the collateral source rule bars evidence of the amount accepted as full payment for the plaintiff's medical treatment, it leaves the question of what evidence is admissible to dispute that the billed amounts are necessary and reasonable.

### D. A Published Opinion From This Court Is Necessary to Resolve Conflicting Interpretations of the Scope of the Collateral Source Rule and *Crossgrove*.

This question has not been answered by any subsequent published appellate opinion. *See, e.g.*, *Brooks v. Gates*, No. 10CV1628, 2013 Colo. Dist. LEXIS 399, at *29–36 (Colo. Dist. Sept. 17, 2013) (observing that, in the wake of the Colorado Supreme Court cases discussed above, "[t]he issue thus becomes what evidence a Defendant may introduce to challenge the reasonableness of medical expenses claimed by a Plaintiff. Unfortunately, there is little appellate court guidance on this issue after *Gardenswartz*, *Crossgrove*, *Sunahara*, and *Kinningham*" then addressing the categories of evidence that may be admissible and will not be admissible).

Accordingly, defendants have turned to other jurisdictions' statements regarding what evidence is admissible, including "the range of charges that the provider has for the same services, or what other providers in the area charge for the same services." *Weston v. AKHappyTime, LLC*, 445 P.3d 1015, 1028 (Alaska 2019); *see also Dedmon v. Steelman*, 535 S.W.3d 431, 466 (Tenn. 2017) ("[D]efendants are free to submit any competent evidence in rebuttal that does not run afoul of the collateral source rule.").

But in the absence of appellate guidance concerning the scope of the collateral source rule or expressly authorizing parties to present such evidence, trial courts have issued conflicting rulings about the admissibility of these types of evidence under the collateral source rule and *Crossgrove*. *Compare Taylor v. Summers*, No. 19CV30344, 2020 Colo. Dist. LEXIS 261, at *4–8 (Colo. Dist. Jan. 16, 2020) (granting plaintiff's motion to exclude defendant's expert testimony that the 75th percentile of data from a pricing database was the reasonable and necessary value of the medical services at issue, even when assuming that such data did not violate the collateral source rule), *with Eslinger v. Perron*, No. 20CV31329, 2021 Colo. Dist. LEXIS 1509, at *8–13 (Colo. Dist. Mar. 1, 2021) (granting in part plaintiff's motion to strike defendant's expert testimony that the 75th percentile of data from a pricing database was the reasonable and necessary value of the medical services at issue because such data "violate[s] the collateral source rule"), *and Brookman v. Dillon Cos.*, No. 19-cv-03292-KLM, 2021 WL 5174325, 2021 U.S. Dist. LEXIS 140520, at *8–15 (D. Colo. July 28, 2021) (denying defendant's motion to strike plaintiff's expert testimony that the 80th percentile of data from a pricing database was the reasonable and necessary value of the medical services at issue and noting that such evidence did not implicate the collateral source rule).

This Court should therefore take the opportunity presented by this appeal to offer published guidance to district courts on these issues. The cases cited in the previous paragraph demonstrate that additional guidance is needed for two reasons: (1) to clarify the scope of the evidentiary component of the collateral source rule, and (2) to explain the types of evidence that defendants may present to dispute the billed amount as reasonable.

Until there is published appellate guidance explaining what evidence that defendants may present regarding the necessary and reasonable value of medical services, there will be disputes over plaintiffs' damages because "[c]urrently the relationship between charges and costs [in hospitals] is tenuous at best. In fact, hospital executives reportedly admit that most charges have no relation to anything, and certainly not to cost." *Stanley v. Walker*, 906 N.E.2d 852, 857–58 (Ind. 2009) (citations and quotation marks omitted) (holding that "accepted charges for medical services may be introduced into evidence without referencing insurance").

### E. The Collateral Source Rule Is Not Implicated by General Evidence Regarding Charges for the Medical Services at Issue.

First, as the history of the collateral source rule shows, the rule "is implicated only where . . . the defendant seeks to introduce evidence of 'benefits received' for 'the purpose of mitigating damages.' Where the defendant does not

seek to introduce evidence of 'benefits received,' . . . the collateral source doctrine does not come into play." *Crossgrove*, ¶ 30, 276 P.3d at 569 (Eid, J., dissenting) (quoting *Carr*, 123 Colo. at 356–57, 229 P.2d at 663–64). In other words, the collateral source rule is not implicated when parties attempt to introduce evidence regarding the costs to the hospital of rendering the services at issue or data from a pricing database reflecting the costs of service at other providers in the area because that evidence does not introduce evidence of "benefits received" by the plaintiff.

While the supreme court expanded the collateral source rule in *Crossgrove* by applying it to evidence from which a jury could infer the existence of a collateral source (rather than evidence that directly stated the existence of a collateral source), the court did not address whether more general evidence of the range of amounts charged and accepted for medical services—like the evidence rejected by the district court in this case—would run afoul of the collateral source rule. That is, the court did not categorically determine that <u>any</u> amounts paid or charged for medical treatment ran afoul of the collateral source rule; it only resolved the issue presented: evidence of the amount paid by a collateral source <u>for the plaintiff in the specific case at issue</u> in satisfaction of a bill for medical services is inadmissible under the collateral source rule. This court should clarify that the

supreme court's application of the collateral source rule in *Crossgrove* did not go any further because that question was not at issue. In other words, this Court should clarify that *Crossgrove* did not modify the principle that amounts paid for particular medical services are evidence of those services' necessary and reasonable value, so long as the evidence does not imply that the plaintiff in the case at issue had bills paid by a collateral source.

Moreover, expansively applying the collateral source rule to bar all evidence from which a jury could infer the existence of insurance coverage would be unworkable. For example, in this case, evidence that there was a car accident and the plaintiff received medical treatment could have led a jury reasonably to infer that the parties had car insurance and health insurance because Colorado law mandates that drivers have car insurance, § 42-4-1409(1)–(2), C.R.S. (2021), and, at the time of the accident, federal tax law mandated that all individuals have health insurance, 26 U.S.C. § 5000A(a)–(b) (2018). Because Colorado draws its jury pools from licensed drivers and taxpayers (among others), § 13-71-107, C.R.S. (2021), these requirements would have been well-known to jurors applying their general life experience to the evidence in the case, *see, e.g., Martinez v. Milburn Enters.*, 233 P.3d 205, 227–28 (Kan. 2010) (stating that the court is not concerned "about the purported catastrophic results emanating from a jury's 'likely

inference' about the existence of a plaintiff's collateral source, *e.g.*, medical insurance" because jurors "will 'likely infer' insurance coverage for defendants and plaintiffs in cases involving motor vehicle accidents" from their knowledge of motor vehicle insurance requirements). Accordingly, barring relevant evidence from which a jury could reasonably infer the existence of a collateral source would be too broad of a rule and lead to absurd results.

### F. Defendants Should Be Able to Present Evidence That Does Not Implicate a Collateral Source for the Plaintiff in the Case at Issue.

Second, under the proper interpretation of the collateral source rule, evidence of the range of charges that a provider has for particular services or evidence of the range of charges that other providers in the area charge for the same services (as well as the types of evidence at issue in this suit) do not create the implication that the plaintiff in a specific case has received a benefit from a collateral source; they demonstrate the amounts that satisfy an obligation to pay for the medical services at issue. As Mr. Schrock has argued in his opening brief, none of the collateral source rule caselaw has overturned the principle that the amount paid for medical services is relevant to the necessary and reasonable value of those services. Therefore, this Court should clarify that those types of evidence are admissible.

Moreover, to the extent that this Court perceives a conflict between the admission of any evidence concerning amounts paid for medical services—even from a general database—and *Crossgrove* (as the district courts have), this Court should highlight the issue for the Colorado Supreme Court so it may reconsider its ruling. As interpreted by the district courts, *Crossgrove* bars any evidence of amounts paid for medical services because it is either (1) implicates the collateral source rule by implying the existence of an insurer, or (2) is so abstract as to be irrelevant. In effect, this operates to overrule *Kendall* and its progeny by making the billed amount for medical services the default measure of damages. Nothing in *Crossgrove* indicated an intent to render so sweeping a ruling, and there is no authority that the correct measure of damages is, by default, the amount billed by the medical providers.

## IV. CONCLUSION

For these reasons, the CDLA respectfully asks this Court to reverse the district court's judgment.

## V. APPENDIX

A copy of the district court orders and secondary source cited in this brief are attached.

Dated this 31st day of May 2022.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2022 a true and correct copy of the foregoing was filed with the Court and served via Colorado Courts E-Filing upon all counsel of record.

hershey decker drake

*/s/ Robert Bacaj*_____
Robert Bacaj, #52376