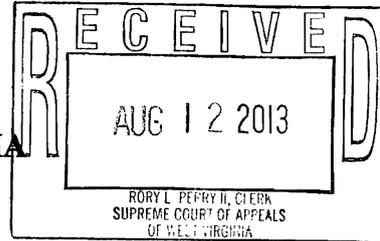


No. 13-0427



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**JOHN N. KINNEY,**

**Petitioner,**

**BRIEF FILED  
WITH MOTION**

**v.**

**SAMUEL C. LISTON,**

**Respondent.**

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***AMICUS CURIAE* BRIEF ON BEHALF OF  
WEST VIRGINIA ASSOCIATION FOR JUSTICE  
SUPPORTING RESPONDENT AND AFFIRMANCE OF  
TRIAL COURT RULINGS ON COLLATERAL SOURCE RULE**

Appeal taken from Final Order  
in the Circuit Court of Monongalia County  
Civil Action No. 11-C-102  
(Judge Susan Tucker)

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**I. IDENTITY OF *AMICUS CURIAE* AND STATEMENT OF ITS INTEREST AND AUTHORITY TO FILE**

The West Virginia Association for Justice ("WVAJ") is a voluntary state bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits and employment related cases. Its members represent a substantial number of wrongfully injured West Virginians. Throughout its history, the WVAJ has championed the fundamental right of every West Virginian to legal recourse for redress of wrongful injury and protection of their legal rights. At the core of its mission lies the duty to protect the fundamental legal principles that have served as a bulwark of the civil justice system, such as those implicated herein. Thus, WVAJ, and indeed all West Virginians, have a substantial interest in the outcome of these proceedings.

Mindful of the high duty of this Honorable Court in interpreting and clarifying the rights of the citizens of this State under and pursuant to law, WVAJ respectfully requests this Honorable Court consider the experience and knowledge of its membership who are charged with responsibilities of protecting the rights of those wrongfully injured.<sup>1</sup> The WVAJ *amicus curiae* brief will assist the court in continuing to uphold the letter and spirit of the Collateral Source Rule – both as a rule of damages and a rule of evidence.<sup>2</sup> WVAJ supports the position of the Respondent, an underlying Plaintiff seriously injured by a drunk driver in Monongalia County, and urges affirmance of the Trial Court's rulings as to the essential, continued operation of the Collateral Source Rule in West Virginia, both as a rule of damages and rule of evidence.

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<sup>1</sup>Pursuant to Rev. R.A.P. Rule 30(e)(5), WVAJ certifies that no counsel for a party authored this *amicus curiae* brief in whole or in part, nor did any counsel, party, or any other person make a monetary contribution towards its preparation and submission.

<sup>2</sup>The scope of WVAJ's *amicus curiae* brief is limited to the Trial Court's rulings on the recoverability of medical expenses and admissibility of collateral, private health insurance payments and directly resulting contractual adjustments. See Petitioner's Brief, pp. 21-36.

## **II. REQUEST TO PARTICIPATE IN ORAL ARGUMENT**

While mindful that Rev. R.A.P. 30(f) permits *amicus curiae* to participate in oral argument only in “extraordinary” circumstances, the potential outcome of this decision is of such significance to the future of West Virginia’s civil justice system that WVAJ would so request.

## **III. ARGUMENT**

### **A. THE COLLATERAL SOURCE RULE HAS A WELL-ESTABLISHED HISTORY IN WEST VIRGINIA AS BOTH A FUNDAMENTAL RULE OF DAMAGES AND RULE OF EVIDENCE**

Though nuanced, it should be clear that the present case implicates the very future of the Collateral Source Rule in West Virginia, both as a rule of damages and a rule of evidence. At its essence, the question is whether a tortfeasor should be receive the benefit of his victim’s independent, collateral insurance sources, including any resulting “write-offs” or “adjustments” contractually negotiated between the victim’s insurance carrier and his healthcare providers. Alternatively, as an “end run around” the Collateral Source Rule, the Petitioner seeks a practical, evidentiary abrogation of the Collateral Source Rule by introducing evidence of contractual adjustments derived solely as a result of payments made by the victim’s private health insurance – a collateral source wholly independent of the tortfeasor, for which premiums were paid.

West Virginia common law has long recognized the Collateral Source Rule, which, as a rule of damages, requires that a tortfeasor pay full compensatory damages to an injured party, regardless of whether the injured party receives benefits from a collateral source. *See, e.g., Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973); *Ellard v. Harvey*, 159 W. Va.

871, 231 S.E.2d 339 (1976).<sup>3</sup> Simply put, the Collateral Source Rule prohibits the use of payments from other sources to the plaintiff from being used to reduce damage awards imposed on culpable defendants. *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983).

This Court has stressed the importance of the Collateral Source Rule to the civil justice system, explaining its underlying policy as such:

“It is axiomatic that a party who becomes obligated to pay damages because of a wrong done may not benefit by payments or medical services rendered to the injured party from collateral sources.”

*Id.* (quoting *Grove v. Myer*, 181 W. Va. 342, 350, 382 S.E.2d 536 (1989)). The Collateral Source Rule is based on the long-standing premise that "it is better for injured plaintiffs to receive the benefit of collateral sources in addition to actual damages than for defendants to be able to limit their liability for damages merely by the fortuitous presence of these sources." *Id.*

The Collateral Source Rule "was established to prevent the defendant from taking advantage of payments received by the plaintiff as a result of his own contractual arrangements entirely independent of the defendant." *Ratlief v. Yokum*, 167 W.Va. 779, 787, 280 S.E.2d 584, 590 (1981).<sup>4</sup> "Part of the rationale for this rule is that the party at fault should not be able to

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<sup>3</sup>W.Va. Code section 55-7B-9a addresses collateral source payments in medical negligence cases. The case *sub judice* involves a motor vehicle accident and our common law Collateral Source Rule only.

<sup>4</sup>*Bozeman v. State*, 879 So. 2d 692, 700 (La. 2004) describes the Rule's American origins:

The origins of the collateral source rule can be traced to a decision by the United States Supreme Court in 1854, *The Propeller Monticello v. Mollison*, 58 U.S. (17 How.) 152, 15 L. Ed. 68 (1854). This case arose from a shipwreck involving a steamship, The Propeller Monticello, and a schooner ship named the Northwestern. Both ships carried cargo, and the schooner, which sank, was insured. The schooner's insurer paid for the loss of the schooner and its cargo prior to the filing of the suit, which was initiated by the schooner's owner. As a defense, the steamship's owner argued that the insurance pay-off released it from liability. The Supreme Court disagreed, and held instead that the schooner's "contract with the insurer is in the nature of a wager between third parties, with which the trespasser has no concern. The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others." *Id.*

minimize his damages by offsetting payments received by the injured party through his own independent arrangements." *Id.* As such, "the collateral source rule operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party." *Id.*

In the present case, Petitioner first seeks to "bar" the injured victim, as a matter of law, from recovering any portion of his medical bills that are adjusted as direct result of payments made by the victim's collateral, private health insurance. As a backdrop to the predicate issue of *recoverability* of medical expenses that are "written off" or "written down" as a result of collateral, private health insurance payments, it is important to recall the Court's decision forty (40) years ago in *Kretzer v. Moses Pontiac Sales, Inc.*, 157 W.Va. 600, 201 S.E.2d 275 (1973). Going far beyond the question of whether adjustments that result directly from collateral, private health insurance payments are recoverable, the *Kretzer* Court held that damages for services provided at *no cost* to the injured Plaintiff are *properly recoverable*. The Court stated:

"The general rule is that a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonably required by the injury. This is a recovery for their value and not for the expenditures actually made or obligations incurred. Thus, under this general rule, the fact that the medical and nursing services were rendered gratuitously to the one who was injured will not preclude the injured party from recovering the value of those services as a part of his compensatory damages."

*Kretzer*, 157 W. Va. at 610, 201 S.E.2d at 281 (*quoting* Am.Jur.2d *Damages* § 207). Indeed, as discussed *infra*, precedent permitting recovery of gratuitous services has justified other courts in recognizing the logical recoverability of contractual adjustments.

The importance of the public policy underlying the Collateral Source Rule in

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at 155. Further, the Supreme Court concluded that the tortfeasor "is bound to make satisfaction for the injury he has done." *Id.*

West Virginia jurisprudence is also demonstrated by its long history of application to a number of different collateral sources. *See, e.g., Jones*, 156 W.Va. 479, 195 S.E.2d 821 (1973)(workers' compensation benefits, accident, health and life insurance); *Kretzer*, 157 W. Va. 600, 201 S.E.2d 275 (1973)(gratuitous nursing services); *Ellard*, 159 W.Va. 871, 231 S.E.2d 339 (1976)(unused sick or vacation time); *King v. Bittinger*, 160 W.Va. 129, 231 S.E.2d 239 (1976)(sick leave); *Ratlief*, 167 W.Va. 778, 280 S.E.2d 584 (1981)(medical insurance payments); *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983)(unemployment compensation); *Johnson v. General Motors Corp.*, 190 W.Va. 236, 438 S.E.2d 28 (1993)(UM/UIM coverage).

To appreciate the gravity of the present attack on the Collateral Source Rule, one must understand its dual nature as both a rule of damages and a rule of evidence. Its nature as a rule of damages goes to the issue of *recoverability* of contractual adjustments, while its nature as a rule of evidence addresses *admissibility* of prejudicial disclosures about benefits from Plaintiff's collateral sources. In *Ilosky*, the Court acknowledged the evidentiary nature in considering cross examination of an economist about the effects of the Plaintiff's receipt of insurance funds for certain expenses. The Court prohibited the introduction of such evidence, with prescient understanding of the threat that such prejudicial disclosures pose to the Collateral Source Rule:

The appellant's position is that it should not be held liable for prejudgment interest on expenses which the appellee did not actually incur because she then did not actually lose the use of funds. However, we believe that induction of collateral sources into the jury's consciousness for whatever purpose is to be avoided. The purpose of the collateral source doctrine is to prevent reduction in the damage liability of defendants simply because the victim had the good fortune to be insured or have other means of compensation. There is always the danger that jury exposure to sources of collateral payments will cause it to award less than actual damages, thereby allowing defendants to reduce their liability.

*Id.* 172 W. Va. at 447, 307 S.E.2d at 615. As discussed *infra*, this evidentiary prohibition is widely held by the majority of Courts that have analyzed the issue in the context of the common

law Collateral Source Rule and clearly supports affirmance of the Trial Court's rulings.

The public policy foundations of the Collateral Source Rule are no less fundamental today than forty (40) years ago, when first articulated by this Court. Indeed, its proffered abrogation suggests that decades of sound West Virginia precedent be summarily eradicated and that those public policy concerns voiced by this Court have magically disappeared. Culpable defendants (and their liability carriers) should now unjustly receive benefit of the health insurance premiums paid by injured victims. The deterrent aspect of the Rule to the tort system should be nullified. Proceedings should be made infinitely more complicated by the introduction of collateral payments, premiums, adjustment schedules, contracts between health insurance carriers and providers and other evidence relevant to the adjustment. Classes of recovery for injured victims should be created based solely on the fortuity of whether identically situated victims have private health insurance, Medicaid, Medicare, or no coverage whatsoever.<sup>5</sup> Introducing evidence of the results of collateral payments no longer risks jury confusion and nullification by what this Court has cautioned as potentially "inaccurate" and "unfair" damage awards. Rather, the suggested abrogation stands not only in stark contrast to *stare decisis* but would constitute an unprecedented gutting of a foundational principle of West Virginia's civil justice system.

**B. PETITIONER'S POSITION, IF ADOPTED, WOULD CONSTITUTE A DE FACTO ABROGATION OF THE COLLATERAL SOURCE RULE AS BOTH A RULE OF DAMAGES AND RULE OF EVIDENCE**

Petitioner's fifth contended point of error focuses entirely on the Trial Court's ruling

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<sup>5</sup>Ironically, the culpable defendant would be liable for a larger damages award to an uninsured victim than to one with identical injuries and treatment like the injured Plaintiff herein, who earned, worked for and paid premiums for private health insurance. This is yet another example of the absurd public policy implications of Petitioner's position, and perhaps why it is admittedly a "minority view."

regarding the Respondent's past medical expenses and is divided by Petitioner into three (3) distinct subparts (Argument, V(A), (B) and (C)). Subparts (A) and (B) attack the Collateral Source Rule as a rule of damages, arguing that Respondent should be "barred from recovering" portions of medical expenses that are "written off" as a result of contractual adjustments required as a direct result of payments by Respondent's private health insurance ("*recoverability*"). Subpart (C) attacks the Collateral Source Rule as a rule of evidence, arguing that evidence of the direct effects of payments by Respondent's collateral private health insurance, including contractual adjustments or "write offs," is nevertheless properly admissible ("*admissibility*"). The success of either prong of the Petitioner's "two front attack" on the Collateral Source Rule is an existential threat and will be addressed in turn.

**1. THE TRIAL COURT CORRECTLY REJECTED THE ATTACK ON THE COLLATERAL SOURCE RULE AS A RULE OF DAMAGES**

Petitioner first argues that the Trial Court erred by permitting the Plaintiff to recover those portions of his medical expenses that were adjusted downward by providers as a result of the Plaintiff's collateral, private health insurance carrier's contractual agreements with those providers. Section V(A) of Petitioner's Brief argues that the adjusted portion of the medical expenses, or "write offs," are not "incurred" so as to implicate the Collateral Source Rule while Section V(B) urges the same conclusion because such expenses are not ultimately the Plaintiff's "responsibility for payment." Despite West Virginia law permitting even the recovery of gratuitously provided services, the Petitioner submits that the Trial Court erred by permitting recovery of expenses contractually adjusted only because of a collateral health insurance payment.

From the patient's perspective, he receives the benefits of his collateral health insurance

coverage by having his medical expenses discharged in part by his health insurer. The discharge is effectuated by both: (1) the actual cash payment to his providers at a “negotiated rate;” and (2) being the beneficiary of his insurer’s negotiated discounting with participating providers. Both are a “benefit of the bargain” to the Plaintiff that arise wholly from his payment of premiums to the collateral, private health insurer and both logically fall under the protection of the Rule.<sup>6</sup>

While West Virginia has an extensive history of upholding the Collateral Source Rule as a rule of damages, the Supreme Court of Appeals has not previously addressed this specific wrinkle. Petitioner urges we join a minority of Courts that have abrogated the common law Collateral Source Rule by barring the recovery of contractual adjustments, despite the clear majority of States having refused to do so.<sup>7</sup> Our sister state for instance, Virginia, addressed the

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<sup>6</sup>Plaintiff’s bargain also entails many responsibilities such as further subrogation obligations, often under ERISA, with priority liens and rejection of the “made whole” and “common fund” doctrines.

<sup>7</sup>Petitioner cites as minority view: California: *Howell v. Hamilton Meats & Provisions*, 257 P.3d 1130 (Cal. 2011)(although conceding “ours may presently be the minority view”); Indiana: *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009)(although recognizing that “[Indiana] Legislature has abrogated the Collateral Source Rule [statutorily]”); Kansas: *Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205 (Kan. 2010); Louisiana: *Suhor v. Lagasse*, 770 So.2d 422 (La. App. 2000); *but see Bozeman v. State*, 879 So.2d 692 (La. 2004)(Louisiana Supreme Court subsequently allowing recovery of “write offs” in instances of private health insurance and Medicare, but not Medicaid); New York: *Katsick v. U-Haul of W. Mich.*, 292 A.D.2d 797 (N.Y. App. Div. 2002)(prohibiting recovery of contractual adjustments in Medicare cases); Ohio: *Robinson v. Bates*, 857 N.E.2d 1195 (Ohio 2006)(although addressing admissibility only, not recoverability: “whether plaintiffs should be allowed to seek recovery for medical expenses as they are originally billed or only for the amount negotiated and paid by insurance is for the General Assembly to determine.”); Pennsylvania: *Moorhead v. Crozer Chester Medical Center*, 765 A.2d 786 (Pa. 2001).

Recognized as the “clear majority” of jurisdictions having heard the issue are the following: Arizona: *Lopez v. Safeway Stores, Inc.*, 120 P.3d 487 (Ariz. App. 2006), *review denied* 2006 Ariz. LEXIS 1120; Colorado: *Volunteers of America v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010); Delaware: *Mitchell v. Haldar*, 883 A.2d 32 (Del. 2005); District of Columbia: *Hardi v. Mezzanotte*, 818 A.2d 974 (D.C. App. 2003); Georgia: *Olariu v. Marrero*, 549 S.E.2d 121 (Ga. App. 2001); Hawaii: *Bynum v. Magno*, 101 P.3d 1149 (Haw. 2004); Illinois: *Wills v. Foster*, 892 N.E.2d 1018 (Ill. 2008); Kentucky: *Baptist Healthcare Sys. v. Miller*, 177 S.W.3d 676 (2005); Louisiana: *Bozeman v. State*, 879 So.2d 692 (La. 2004); Massachusetts: *Scott v. Garfield*, 912 N.E.2d 1000 (Mass. 2009); Mississippi: *Brandon HMA v. Bradshaw*, 809 So.2d 611 (Miss. 2001); Oregon: *White v. Jubitz Corp.*, 219 P.3d 566 (Ore. 2009); South Carolina: *Covington v. George*, 597 S.E.2d 142 (S.C. 2004); South Dakota: *Papke v. Harbert*, 738 N.W.2d 510 (S.D. 2007); Virginia: *Acuar v. Letourneau*, 531 S.E.2d 316 (Va. 2000); Wisconsin: *Leitinger v. DBart, Inc.*, 736 N.W.2d 1 (Wis. 2007).

recoverability issue in *Acuar v. Letourneau*, 531 S.E.2d 316 (2000). As here, the Plaintiff in *Acuar* had medical expenses written off based on contractual agreements between his providers and his health insurance carrier. *Id.* The Defendant unsuccessfully made the same argument:

[Defendant] contends that the collateral source rule is not applicable to the present case because [plaintiff] is not, and never will be, legally obligated to pay those portions of his medical bills that were written off, nor were those amounts paid on his behalf. According to [defendant], the amounts written off by health care providers are not benefits derived from a collateral source, and to allow [plaintiff] to recover such amounts as damages in this tort action would create a double recovery or windfall in his favor.

*Acuar*, 531 S.E.2d at 321.

The Virginia Supreme Court disagreed and upheld the Rule's fundamental purpose:

. . . [Defendant's] argument overlooks the fundamental purpose of the [collateral source] rule, explained above, to prevent a tortfeasor from deriving any benefit from compensation or indemnity that an injured party has received from a collateral source. In other words, the focal point of the collateral source rule is not whether an injured party has "incurred" certain medical expenses. Rather, it is whether a tort victim has received benefits from a collateral source that cannot be used to reduce the amount of damages owed by a tortfeasor.

[Plaintiff] is entitled to seek full compensation from [defendant]. Based on the cases cited above dealing with the collateral source rule, we conclude that [defendant] cannot deduct from that full compensation any part of the benefits [plaintiff] received from his contractual arrangement with his health insurance carrier, whether those benefits took the form of medical expense payments or amounts written off because of agreements between his health insurance carrier and his health care providers. Those amounts written off are as much of a benefit for which [plaintiff] paid consideration as are the actual cash payments made by his health insurance carrier to the health care providers. The portions of medical expenses that health care providers write off constitute "compensation or indemnity received by a tort victim from a source collateral to the tortfeasor . . . .

This conclusion is consistent with the purpose of compensatory damages,

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Under Rev. R.A.P. 30(e) WVAJ submits an Appendix with seven (7) West Virginia Circuit Court Orders rejecting the arguments made by Petitioner herein: *Myers v. Ford Motor Co., et al.*, 06-C-653-DS (Mercer County); *Reed v. Baylor Mining, Inc.*, 07-C-250 (Wyoming County); *Jennings, et al. v. Azzo*, 09-C-397-OA (Mercer County); *McCord v. The Lewis County Comm'n*, 08-C-59 (Lewis County); *Price v. West Virginia-American Water Co.*, 11-C-209 (Wayne County); *Miller v. Davy, et al.*, 12-C-15 (Hardy County); *Lintner v. Doe*, 12-C-384 (Monongalia County).

which is to make a tort victim whole. However, the injured party should be made whole by the tortfeasor, not by a combination of compensation from the tortfeasor and collateral sources. The wrongdoer cannot reap the benefit of a contract for which the wrongdoer paid no compensation. The extent of [defendant's] liability to [plaintiff] cannot be "measured by deducting financial benefits received by [plaintiff] from collateral sources." In other words, "it is the tortfeasor's responsibility to compensate for all harm that he [or she] causes, not confined to the net loss that the injured party receives."

To the extent that such a result provides a windfall to the injured party, we have previously recognized that consequence and concluded that the victim of the wrong rather than the wrongdoer should receive the windfall.

*Id.*, 531 S.E.2d at 321-23 (internal citations omitted).

The reasoning set forth by the Court in *Acuar* was highly persuasive to the Arizona Court of Appeals when addressing the issue in *Lopez v. Safeway Stores, Inc.*, 129 P.3d 487 (Ariz. App 2006), *review denied* 2006 Ariz. LEXIS 112:

At the heart of this appeal is whether the collateral source rule applies to Lopez's claim for medical expenses that apparently were charged to her but which neither she nor her medical insurance carriers had to pay. "The collateral source rule," as our supreme court has stated, requires that "payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable."

*Lopez*, 129 P.3d at 491 (internal citations omitted).

In rejecting the Petitioner's argument, the *Lopez* Court recognized: (1) the importance of the Collateral Source Rule; (2) the sound logic of the Virginia Court in *Acuar*; and (3) the "clear majority rule" that was followed by the Trial Court herein:

We find the reasoning in *Acuar* sound and consistent with Arizona's broad application of the collateral source rule and the clear majority view. Therefore, we hold that Lopez was entitled to claim and recover the full amount of her reasonable medical expenses for which she was charged, without any reduction for the amounts apparently written off by her healthcare providers pursuant to contractually agreed-upon rates with her medical insurance carriers. As this court has stated, the collateral source rule is an attempt to resolve a basic conflict between two guiding principles of tort law, namely, (1) the limitation of compensation to the injured party to the amount necessary to make him whole and (2) the avoidance of a windfall to the tortfeasor if a choice must be made between

him and the injured party. "Because the law must sanction one windfall and deny the other, it favors the victim of the wrong rather than the wrongdoer."

*Id.* at 496 (citing *Acuar*, 531 S.E.2d at 323 (internal citations omitted)).

Like the Petitioner, the unsuccessful Defendant in *Lopez* relied heavily on Comment (h) to section 911 of the Restatement (Second) of Torts for the proposition that the definition of "value" means the "exchange value or value to the owner." *Lopez*, 129 P.3d at 492-93. However, as the *Lopez* Court noted, section 911 and its Comment (h) are clearly inapplicable because they only "pertain[ ] to suits resulting from fraud or duress or involving mitigation of damages." *Id.* (quoting Restatement (Second) of Torts § 911 cmt. h). Indeed, the first sentence of Comment (h) states "[t]he measure of recovery of a person who sues for the value of his services tortiously obtained by the defendant's fraud or duress, or for the value of services rendered in an attempt to mitigate damages, is the reasonable exchange value of the services at the time and place." *Id.* As *Lopez* noted, "the remainder of Comment (h), including the portion on which Petitioner relies herein, refers to that limited context." *Id.*; see also *Bynum*, 101 P.3d 1149 (Haw. 2004)(finding cmt (h) to § 911 inapplicable unless damages sought "by a provider who is suing for the value of the medical services provided or who seeks to recover expenditures incurred to third persons.")

While Comment (h) to section 911 of the Restatement (Second) of Torts is inapplicable, *Lopez* notes that the portions of the Restatement that do actually apply here – sections 920A and 924 – support the Trial Court's rulings on recoverability. The former states that "[p]ayments made or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or part of the harm for which the tortfeasor is liable."<sup>8</sup>

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<sup>8</sup>Though addressing Florida's statutory abrogation of its common law Collateral Source Rule, its Supreme Court used dictionary definitions to logically treat resulting "write offs" as "payments."

*Lopez*, 129 P.3d at 493 (*quoting* Restatement (Second) of Torts § 920A). Comment (b) to that section is entitled “Benefits from Collateral Sources” and states:

“Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers. The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him. One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives.”

*Lopez*, 129 P.3d at 493 (*quoting* Restatement (Second) of Torts § 920A cmt. b).

Similarly, Section 924 of the Restatement (Second) of Torts, entitled “Harm to the Person” and found under the heading “Compensatory Damages for Specific Types of Harm,” addresses the tort victim’s right to recover medical expenses. Comment (f) of that section states:

“The injured person is entitled to damages for all expenses and for the value of services reasonably made necessary by the harm. . . . The value of medical

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Virtually all dictionaries include, among the first three definitions of “payment” or “pay,” the concept of discharge of a debt. *See: e.g.*, Merriam-Webster's Collegiate Dictionary 851 (10th ed. 1993) (“to discharge a debt or obligation”); Webster's Third New Int'l Dictionary 1659 (1981) (“discharge of a debt or obligation”). In this case, the discounts negotiated by [Plaintiff's] HMO fully discharged [Plaintiff's] obligation to his medical providers. Because of the medical providers' contracts with [Plaintiff's] HMO, [Plaintiff] was obligated to pay the claimants \$ 145,970.76, rather than the billed charges of \$ 574,554.31. In this light, the discounts negotiated by [Plaintiff's] HMO are as much a benefit to [Plaintiff] as the HMO's remittance of \$145,970.76 to satisfy the remaining charges on [Plaintiff's] medical bills. The contractual discounts, therefore, constitute “amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from [a] collateral source[.]”

*Goble v. Frohman*, 901 So. 2d 830, 833 (Fla. 2005).

services made necessary by the tort can ordinarily be recovered although they have created no liability or expense to the injured person, as when a physician donates his services.”

*Lopez*, 129 P.3d at 493 (quoting Restatement (Second) of Torts § 924 cmt. f)(citing Am. Jur. 2d *Damages* § 396, at 358 (2003) (generally, "a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of medical and nursing services reasonably required by the injury," and "recovery is not necessarily limited to expenditures actually made or obligations incurred for medical care"))).

The Supreme Court of Kentucky also rejected Petitioner’s argument in *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676 (2005), albeit in the context of adjustments made as a result of Medicare payments, rather than private health insurance. In so doing, the Court held:

It is improper to reduce a plaintiff's damages by payments for medical treatment under a health insurance policy if the premiums were paid by the plaintiff or a third party other than the tortfeasor. The collateral source rule, as this rule is commonly known, allows the plaintiff to (1) seek recovery for the reasonable value of medical services for an injury, and (2) seek recovery for the reasonable value of medical services without consideration of insurance payments made to the injured party. The collateral source rule has long been followed in Kentucky. Medicare benefits are governed by the collateral source rule and are treated the same as other types of medical insurance.

...

Along with the considerations underlying granting any windfall to the injured party is the fact that Ms. Miller paid her premiums and deserves all appropriate benefits. Moreover, it is absurd to suggest that the tortfeasor should receive a benefit from a contractual arrangement between Medicare and the health care provider. Simply because Medicare contracted with Ms. Miller's physician to provide care at a rate below usual fees does not relieve a tortfeasor from negligence or the duty to pay the reasonable value of Ms. Miller's medical expenses.

*Id.*, 177 S.W.3d at 682-683, 684.

When the Supreme Court of South Dakota faced the issue in *Papke v. Harbert*, 738 N.W.2d 510 (S.D. 2007), it also acknowledged the Collateral Source Rule’s dual nature as a rule of damages and rule of evidence. With regard to how the proposed bar to recovery of adjusted

medical expenses would violate its nature as a rule of damages, the Court stated:

Applied as a rule of damages, the collateral source rule prohibits defendants from reducing their liability because of payments made to the plaintiff by independent sources. *Bynum v. Magno*, 101 P.3d 1149, 1155 (Haw. 2004) (Medicare/Medicaid write offs are akin to gratuitous services and therefore recoverable); *Arthur v. Catour*, 803 N.E.2d 647, 650 (Ill. Ct. App. 2004) (limiting recovery to amount paid "confers a significant benefit" to the defendant, "contrary to the collateral source" rule); *Rose v. Via Christi Health System, Inc.*, 78 P.3d 798, 806 (Kan. 2003) ("[b]ecause health care providers voluntarily contract with Medicare . . . the benefit of the write-offs should be attributed to the Medicare participant rather than the health care provider"); *Bozeman*, 879 So.2d at 699; *Esposito*, 886 A.2d at 1199-204; *Acuar v. Letourneau*, 531 S.E.2d 316, 320-23 (Va. 2000) (no deduction for amount written off because of contractual agreement between plaintiff's insured and health care providers); see also *Lindholm v. Hassan*, 369 F. Supp. 2d 1104 (DSD 2005) ("reasonable value of medical service is not controlled by whether a portion or all of the medical bills [were] paid as a gift, or written off pursuant to an insurance agreement or by operation of law"); see also *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611 (Miss. 2001) ("Medicaid payments are subject to the collateral source rule").

*Papke*, 738 N.W.2d at 532 (internal parallel citations omitted).

Upholding the recoverability of contractual adjustments, the *Papke* Court affirmed the Rule's public policy, noting that "when a plaintiff procures private medical insurance coverage and the insurance provider contracts with a healthcare provider for a lower rate, the plaintiff, not the defendant, should receive the benefit of that bargain."). *Id.* at 534, n.20. In support of its rationale, *Papke* relied heavily on *Degen v. Bayman*, 241 N.W.2d 703 (1976) – its version of West Virginia's *Kretzer* opinion – allowing the recovery of gratuitous service. *Id.* at 530.<sup>9</sup>

The Supreme Court of Colorado recently rejected Petitioner's recoverability argument, recognizing that contractual adjustments are a collateral benefit to the premium-paying Plaintiff:

The salient contract is the contract between [Plaintiff] and his insurance company, which gave rise to the discounted medical care pricing that [Defendant] seeks to

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<sup>9</sup>The *Papke* Court also addressed the *admissibility* issue: "the collateral source rule applies and defendants are precluded from entering into evidence the amounts "written off" by medical care providers because of contractual agreements with sources independent of defendants." *Id.* at 536.

use in limiting its tort liability. [Plaintiff's] healthcare providers' write offs or discounts are a direct result of an insurance contract that [Plaintiff] entered into and paid for on his behalf.

Moreover, write offs or pricing contracts inure to the benefit of the insurance company, the healthcare provider, and the covered plaintiff. The health insurance company's primary purpose is to attract and retain customers. The insurance company seeks and obtains write offs or pricing contracts from healthcare providers in order to attract consumers based on a lower price for premiums. In addition to increasing the insurance company's customer base, such write offs or pricing contracts inure to the benefit of insured persons like [Plaintiff] by reducing the rate of health insurance premiums.

The healthcare providers benefit as well, in part by expanding their patient base. There are many reasons why insurance companies and healthcare providers enter into contracts that discount the full amount charged by the providers. For example, the insurance company's ability to pay a large volume of claims promptly may be attractive to providers seeking to minimize the cost of collections and bad claims. The provider may also be interested in having access to a larger pool of patients who have health insurance coverage. By paying health insurance premiums, insured plaintiffs like [Plaintiff] gain access to a pool of providers who will not erect barriers to his receipt of medical care based on his ability to pay. Because the interests of the insurance company, the insured, and the healthcare provider are intertwined, it is an inaccurate oversimplification to assert that [Plaintiff's] insurer and healthcare providers entered into the write off contracts only to serve their own ends and not on [Plaintiff's] behalf. The contract between [Plaintiff's] insurance company and providers operates, at least in part, to his benefit. More importantly, the discounted medical rates paid by his insurance company are a direct result of his health insurance contract, and therefore [Defendant] may not claim these discounts to reduce its liability for the medical care that he received.

Second, [Defendant] asserts that the healthcare provider discounts do not fall within the contract clause because they do not constitute a "benefit paid." [Defendant] contends that the pricing differential between the amounts billed and the amounts paid is illusory because the charges are never actually paid by anyone. [Defendant] also argues that because [Plaintiff] was prohibited from being legally liable for the difference between the amounts billed by his providers and the amount paid by his insurance company, he was not directly benefitted by his insurance company's pricing contract.

However, by discharging [Plaintiff's] obligations to his medical providers, the insurer's remittances do constitute a "benefit" that was "paid." If [Plaintiff] had not had insurance coverage, he would have been liable for the entire amount billed or he may not have been treated at all. *See Trevino v. HHL Financial Services, Inc.*, 945 P.2d 1345, 1350 (Colo. 1997) ("When 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.").

Because he was insured, his medical providers wrote off part of the value of the medical services that they provided because they were contractually obligated to do so. Because this is a benefit paid for by [Plaintiff] through the payment of his health insurance premiums, co-payments, and deductibles, it should not be deducted from his award.

*Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d at 1086-87 (citations omitted).

Simply put, the logic utilized by the majority of Courts who have addressed this specific issue is sound and consistent with West Virginia's body of jurisprudence on the recoverability of damages under the common law Collateral Source Rule. This Court should be loathe to dismantle the common law Collateral Source Rule as a rule of damages, as Petitioner's position will most certainly do, and uphold the Rule's continued operation, as properly done by the Trial Court.

**2. THE TRIAL COURT CORRECTLY REJECTED  
PETITIONER'S ALTERNATIVE ATTACK ON THE  
COLLATERAL SOURCE RULE AS A RULE OF EVIDENCE**

The Petitioner next argues that even if contractually adjusted medical expenses rendered as a direct result of payments by a collateral, private health insurance carrier are recoverable, evidence of those resulting contractual adjustments should be admissible to establish the "reasonable value" of the services.<sup>10</sup> This second prong of attack on the Collateral Source Rule

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<sup>10</sup>It is important to note that upholding decades of Collateral Source Rule precedent in no way prevents the Defendant from contesting the reasonableness and necessity of medical expenses, as recognized in W.Va. Code § 57-5-4j. It simply cannot be done by introducing payments made by the collateral source or any contractual adjustments the result solely from the payments. It is an oversimplification to think that the "amounts paid" under the unique particularities of one's private health insurance contractual arrangement does not, in reality, entail many considerations beyond the value of the services. If forced to prove this reality in a "trial within a trial," Plaintiff must introduce evidence of amounts and length of time premiums paid, contractual adjustment language, subrogation rights and any harsh realities under ERISA, and how his specific carrier and provider have negotiated. The discovery and introduction of evidence would become so cumbersome and expensive as to transform the most simple of personal injury trials into a prolonged and expensive trial over medical expenses alone. It is respectfully submitted that the far better route is to uphold precedent and follow the majority rule, rejecting the faulty premise that "amounts paid" by a collateral source prove value, or, at the very

attacks its nature as a rule of evidence. In support, Petitioner again cites a minority of jurisdictions that do so. Petitioner ignores, however, the strong concerns voiced in West Virginia precedent for forty (40) years as well as majority position's sound logic. As most states have realized, Petitioner's position causes far more evidentiary problems than it can hope to solve.

West Virginia has voiced its strong evidentiary concerns for nearly forty (40) years. In 1976, the Court warned of the dangers of admission of such evidence "for whatever purpose:"

we believe that induction of collateral sources into the jury's consciousness for whatever purpose is to be avoided. The purpose of the collateral source doctrine is to prevent reduction in the damage liability of defendants simply because the victim had the good fortune to be insured or have other means of compensation. There is always the danger that jury exposure to sources of collateral payments will cause it to award less than actual damages, thereby allowing defendants to reduce their liability.

*Ilosky*, 172 W. Va. at 447, 307 S.E.2d at 615. Five years later, in *Ratlief*, the Court again reiterated the important public policy concerns that are just as present today, with the adoption of a new Syllabus Point:

[t]he collateral source rule also ordinarily prohibits inquiry as to whether the plaintiff has received payments from collateral sources. This is based upon the theory that the jury may well reduce the damages based on the amounts that the plaintiff has been shown to have received from collateral sources.

Syl. pt. 8, *Ratlief v. Yokum*, 167 W.Va. at 787, 280 S.E.2d at 590. Nearly twenty-five years later, the Court confirmed its evidentiary concerns over two (2) decades later in *Keese v. General Refuse Serv.*, 216 W. Va. 199, 206-07, 604 S.E.2d 449, 456 (2004): "[c]learly, we expressed in *Ratlief* the concern that a jury may inaccurately or unfairly determine the amount of damages to which a plaintiff is entitled."

The Court's concerns of an "inaccurate" or "unfair" determination of damages recognize the dangers of both jury confusion as well as the risk of *de facto* jury nullification of the Collateral

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least, to continue recognizing the concerns of prejudice arising from introducing such evidence.

Source Rule in damage awards. Those same concerns apply logically as much to the *amount paid* by a collateral, private health insurance carrier as they do to any *resulting adjustments that the payment directly triggers*. Without the collateral source payment, there is no resulting adjustment. They are clearly “two sides of the same coin” and no justification exists to abandon decades of public policy expressed in our precedent by treating them any differently.

In addition to the concerns of the potential for prejudice expressed by this Court over decades of precedent, there is a real threshold question as to whether a particular contractual arrangement between an injured Plaintiff’s health insurance carrier and his providers is truly probative of the real value of services. More realistically, those figures are necessarily intertwined with outside factors such as the actuarial analysis, membership rolls, demographics and health histories, and market share. The adjustments are far more reflective of the consequence of the negotiating power wielded by large entities, such as insurance companies, employers and governmental bodies, who pay the bills. It is impossible to separate the extraneous factors that make up a particular contractual adjustment in a transaction, giving rise to the very evidentiary concerns expressed by this Court.

The Petitioner’s oversimplified proposition was rejected by the Supreme Court of Virginia in *Radvany v. Davis*, 551 S.E.2d 347 (Va. 2001):

Payments made to a medical provider by an insurance carrier on behalf of an insured and amounts accepted by medical providers are one and the same. Regardless of the label used, they are payments made by a collateral source and, thus, are not admissible in evidence for that reason.

Furthermore, such amounts are not evidence of whether the medical bills are “reasonable, i.e., not excessive in amount, considering the prevailing cost of such services.” The amounts accepted by [Plaintiff’s] health care providers represent amounts agreed upon pursuant to contractual negotiations undertaken in conjunction with [Plaintiff’s] health insurance policy. Such negotiated amounts, presumably inuring to the benefit of the medical providers, the insurance carrier, and [Plaintiff], do not reflect the “prevailing cost” of those services to other patients.

*Id.*, 551 S.E.2d at 348 (Va. 2001)(internal citations omitted); *see also Covington v. George*, 597 S.E.2d 142 (S.C. 2004)(following *Radvary* and holding “[t]h trial judge correctly applied Rule 403 and the collateral source rule in excluding evidence of the actual payment amount. While a defendant is permitted to attack the necessity and reasonableness of medical care and costs, he cannot do so using evidence of payments made by a collateral source.)

Recognizing the very same evidentiary concerns, other Courts have aptly described Petitioner’s “evidentiary alternative” as an “end run” around the Collateral Source Rule. This was aptly discussed in *Aumond v. Dartmouth Hitchcock Medical Center*, 611 F.Supp.2d 78 (D.N.H. 2009):

[Defendant] protests that "because the billed amount is an illusory charge with no relationship to the cost or value of medical services," a damages award based on the sum of the plaintiffs' bills, rather than the sum paid in satisfaction of them, does not reflect "the reasonable value of past and future medical care," which, as *Williamson* observed, is the proper measure of that element of damages in a tort case. As an alternative to simply ruling that the medical expenses equal the payment, then, [Defendant] proposes that, in order to rectify this problem, it should be allowed to introduce the evidence of what it was paid in satisfaction of [Plaintiff's] bills as "the value of the services as represented by the market."

That strikes the court as an end-run around the collateral source rule, as a number of courts have concluded in upholding the exclusion of what a third party paid toward medical expenses as evidence of their value. *See Goble v. Frohman*, 848 So. 2d 406, 410 (Fla. Dist. Ct. App. 2003), *aff'd*, 901 So. 2d 830 (Fla. 2005); *Wills v. Foster*, 892 N.E.2d 1018 (Ill. 2008); *Covington v. George*, 597 S.E.2d 142, 144 (S.C. 2004); *Papke v. Harbert*, 738 N.W.2d 510, 536 (S.D. 2007); *Radvary v. Davis*, 551 S.E.2d 347, 348 (Va. 2001); *Leitinger v. DBart, Inc.*, 736 N.W.2d 1, 13-14 (Wis. 2007); *but see Robinson v. Bates*, 857 N.E.2d 1195, 1200 (Ohio 2006). These courts have generally reasoned that, while evidence of what was actually paid in satisfaction of the bills has some probative force as to the value of the plaintiff's medical expenses, the risk is simply too great that the jury will improperly subtract those payments from the plaintiff's recovery in violation of the collateral source rule.

*Aumond*, 611 F.Supp.2d at 91-92 (internal citations omitted).

Applying the Federal Rules of Evidence, the *Aumond* Court also acknowledged the

concerns voiced in *Ratlief* about avoiding prejudice to the Plaintiff by jury misuse:

That mode of analysis comports with the view of the court of appeals that the collateral source rule has an evidentiary component, i.e., proof of third-party payments to the plaintiff as compensation for his or her injuries is generally inadmissible, and a substantive component, i.e., such payments have no effect on the defendant's liability. So, under the Erie doctrine, a federal court exercising its diversity jurisdiction is bound to apply the rule's substantive component, but effects the rule's evidentiary component by applying the Federal Rules of Evidence, particularly Rule 403. In this regard, the court of appeals has recognized that, while collateral source evidence may have some probative worth in particular circumstances, it "almost inevitably creates a risk that a jury, informed, say that a plaintiff has recourse to first-party insurance proceeds, may be unduly inclined to return either a defendant's verdict or an artificially low damage award."

*Id.*, 611 F.Supp.2d at 92 (internal citations omitted).

In *Leitinger v. DBart, Inc.*, 736 N.W.2d 1 (Wis. 2007), the Supreme Court of Wisconsin also acknowledged the intertwined probative value of contractually paid benefits and adjustments:

The reimbursement rate of a particular health insurance company generally arises out of a contractual relationship and reflects a multitude of factors related to the relationship of the insurance company and the provider, not just to the reasonable value of the medical services.

*Id.*, 736 N.W.2d at 18 (*noting* the additional problem of creating "classes" of injured Plaintiffs:

"[o]ne plaintiff may be uninsured and receive the benefit of Medical Assistance, another's insurer may have paid full value for the treatment, and yet another's insurer may have received the benefit of reduced contractual rates."). The Supreme Court of Wisconsin also shared the serious concerns cautioned by this Court:

The admission in evidence of the amount actually paid in the present case, even if marginally relevant, might bring complex, confusing side issues before the fact-finder that are not necessarily related to the value of the medical services rendered. Accordingly, [Defendant] errs in insisting that the amount actually paid by a collateral source in the present case is a factor for the fact-finder in determining reasonable value of those services. The truth-seeking function of a trial is assisted, not perverted, by applying the collateral source rule and excluding the amount actually paid by a collateral source in the present case.

*Id.*

Other Courts have also echoed the evidentiary concerns of the Court in *Ratlief* with regard to the admissibility of amounts paid and/or adjusted by collateral sources such as private health insurance. The Colorado Supreme Court held in *Volunteers of Am.*:

To ensure that a jury will not be misled by evidence regarding the benefits that a plaintiff received from sources collateral to the tortfeasor, such evidence is inadmissible at trial. It is also inadmissible in adjusting or reducing a plaintiff's damages award. Thus, the collateral source rule prohibits a jury or trial court from ever considering payments or compensation that an injured plaintiff receives from his or her third-party insurance.

*Volunteers of Am.*, 242 P.3d at 1083-1084 (internal citations omitted). Likewise, the South Carolina Supreme Court warned:

[Defendant] argues that because he seeks only to introduce the fact of compromised payments as opposed to their source, that no violence has been done to the collateral source rule. While facially appealing, this argument ignores the reality that unexplained, the compromised payments would in fact confuse the jury. Conversely, any attempts on the part of the plaintiff to explain the compromised payments would necessarily lead to the existence of a collateral source. Inevitably, the inquiry would lead to the introduction of matters such as contractual arrangements between health insurers and health care providers, resulting in the very confusion which the trial judge sought to avoid in his proper application of Rule 403, SCRE.

*Covington*, 359 S.C. at 104.

Still other Courts have acknowledged the wisdom of the majority position:

Moreover, the court shared the concern expressed by the South Carolina Supreme Court in *Covington v. George*, 597 S.E.2d 142, 144 (2004), that this unexplained evidence would confuse the jury, and any attempt by plaintiff to explain the compromised payment would lead to the existence of a collateral source. *Leitinger*, 736 N.W.2d 1. See also *Papke*, 738 N.W.2d at 536 ("when establishing the reasonable value of medical services, defendants in South Dakota are currently prohibited from introducing evidence that a plaintiff's award should be reduced because of a benefit received wholly independent of the defendants"); *Radvany v. Davis*, 551 S.E.2d 347, 348 (2001) (amounts paid by insurance carrier not admissible on question of reasonable value of medical services); *Bynum*, 101 P.3d at 1162; *Goble v. Frohman*, 848 So. 2d 406, 410 (Fla. App. 2003) ("To challenge the reasonableness or necessity of the medical bills, [the defendant] could have introduced evidence on the value of or need for the medical treatment. As stated in *Gormley [v. GTE Products Corp.]*, 587 So. 2d 455, 457 (Fla. 1991)] 'there generally

will be other evidence having more probative value and involving less likelihood of prejudice than the victim's receipt of insurance-type benefits"). Chief Justice McMorrow expressed a similar concern in her dissent in *Arthur*, arguing that allowing the defense to bring out that the full billed amount had not been paid would compromise the protections of the collateral source rule and that "[a]llowing evidence of both the billed and discounted amounts compromises the collateral source rule, confuses the jury, and potentially prejudices both parties in the case." *Arthur*, 216 Ill. 2d at 98 (McMorrow, C.J., dissenting).

We agree with the latter cases. In *Arthur*, this court made clear that the collateral source rule "operates to prevent the jury from learning anything about collateral income" and that the evidentiary component prevents "defendants from introducing evidence that a plaintiff's losses have been compensated for, even in part, by insurance." Thus, defendants 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. Defendants may not, however, introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule.

*Wills v. Foster*, 892 N.E.2d 1018, 1032-33 (Ill. 2008)(internal citations omitted). *Accord Baptist Healthcare Systems, Inc.*, 177 S.W.3d 676 (Ky. 2005) ("[t]herefore, we hold that evidence of collateral source payments or contractual allowances was properly withheld from the jury and her award of medical expenses was proper."); *Koffman v. Leichtfuss*, 630 N.W.2d 201, 214 (Wisc. 2001)("[t]he admission of this irrelevant evidence of payments made was prejudicial. The sole purpose of the defendants' presentation of that evidence was to reduce the medical expense award by the simple fact of those payments.)

The Supreme Court of Hawaii agreed in *Bynum v. Magno*, 101 P.3d 1149 (2004), but raised yet another problem with the adoption of Petitioner's minority position – establishing the reasonable value of future medical expenses with unknown future collateral coverage(s):

The incongruity of the dissent's position is further evident for its effect on future medical expenses. Patients such as those receiving treatment at military hospitals and Kaiser would not be entitled to future medical expenses. This would inevitably invite trial disputes regarding the plaintiff's continuing indigency or the likelihood of a plaintiff's change in insurance coverage in the future and its consequential effect on the amount of recovery.

*Bynum*, 101 P.3d at 1162. It was this issue of future medical expenses (where obviously no future collateral payment or resulting adjustment have yet been made) that this Court addressed under Ohio substantive law in *In re E.B.*, 229 W.Va. 445, 729 S.E.2d 270 (2012).<sup>11</sup>

Consistent with the majority position, West Virginia jurisprudence is replete with serious public policy concerns raised by the introduction of collateral source payments, which concerns are no less prevalent with the introduction of the *direct effects that solely result from those payments*. There is no reason to abandon the decades of wisdom on this issue and the Court should continue to guard against the “danger(s)” it has long recognized – that “induction of collateral sources into the jury's consciousness for *whatever purpose* is to be avoided.”

#### IV. CONCLUSION

WVAJ submits that the present case raises an issue that has frequently reared its head across the Courts of this nation and State. Reaching far beyond this one drunk driving victim who had paid premiums for health insurance coverage, the decision in this case affects all present and future tort victims by implicating a fundamental principle of the civil justice system – the Collateral Source Rule. Rather than overtly asking for its abrogation, the Petitioner instead attacks both sides of its dual nature as a rule of damages and a rule of evidence. There should be no question, however, that an erosion of either nature will effectively result in the desired abrogation, erasing the very protections of important public policy concerns that have been

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<sup>11</sup> Petitioner concedes that *In re: E.B.* was decided under the *substantive law of Ohio*, and merely cites *Robinson* in the 39<sup>th</sup> footnote as potentially instructive Ohio law on the Ohio damages question. There was absolutely no discussion of a public policy challenge or analysis anywhere in the seventy-five (75) page opinion. The Court did however, recognize the propriety of the use of expert testimony as a valid method to contest the reasonable value of medical services. *Id.* at 111.

repeatedly affirmed by this Honorable Court for forty (40) years.

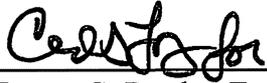
As a rule of damages, this Court has long held it “axiomatic” that a party who becomes obligated to pay damages because of a wrong done may not benefit by payments or medical services rendered to the injured party from collateral sources.” The Court has upheld this Rule for some forty (40) years and even extended it to allow the recoverability of services rendered gratuitously. To now retreat from the Rule’s underlying public policy considerations and bar portions of recovery triggered only by collateral, private health insurance payments would be an unwarranted and unwise deviation from principles of *stare decisis*. Respectfully, the Court should refuse to abandon years of precedent and resist the call to abrogate the common law Rule’s nature as a rule of damage – standing, instead, with the clear majority of Courts across the nation.

As a rule of evidence, this Court has long held that the “induction of collateral sources into jury’s consciousness for whatever purpose is to be avoided” because of the “danger” that a jury may “inaccurately or unfairly” determine damages. Likewise, the direct effects of collateral source payments carry no less “danger” and implicate the very same concerns of prejudice that have been repeatedly cautioned by this Court. Other Courts have wisely viewed this tactic for what it really is – an “end run around” the Collateral Source Rule. Such a drastic fundamental change would complicate personal injury trial practice with a “trial within a trial” that has been successfully, and wisely, avoided for decades. Respectfully, the Court should also resist the call to abrogate the common law Rule’s nature as a rule of evidence – also stranding with the clear majority of Courts.

As such, the WVAJ respectfully submits that the rulings of the Trial Court be affirmed and that the protections of the Collateral Source Rule remain in place in West Virginia’s civil justice system, as they have been for forty (40) years.

**WEST VIRGINIA ASSOCIATION FOR JUSTICE,**

**BY:**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHN N. KINNEY,

Petitioner,

v.

No. 13-0427

SAMUEL C. LISTON,

Respondent.

**CERTIFICATE OF SERVICE**

The undersigned, counsel of record for amicus curiae West Virginia Association for Justice, does hereby certify on the 12<sup>th</sup> day of August, 2013, that a true copy of the foregoing **“AMICUS CURIAE BRIEF ON BEHALF OF WEST VIRGINIA ASSOCIATION FOR JUSTICE SUPPORTING RESPONDENT AND AFFIRMANCE OF TRIAL COURT RULINGS ON COLLATERAL SOURCE RULE ”** and its **“APPENDIX”** have been served upon all counsel of record by U.S. Mail, postage prepaid, as follows:

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