

2005

Julie Tschaggeny v. Milbank Insurance Company, and Does 1 through 5, inclusive : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

STATE OF UTAH

JULIE TSCHAGGENY,

Plaintiff/Appellant,

vs.

MILBANK INSURANCE COMPANY,
AND DOES 1 THROUGH 5,
INCLUSIVE,

Defendants/Appellees.

Appellate Case No. 20050744

District Ct. No.010909329

Oral Argument Requested — Priority 15

APPELLANT'S REPLY BRIEF

APPEAL FROM THE THIRD DISTRICT COURT OF SALT LAKE COUNTY

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APPELLANT’S REPLY BRIEF

Appellant Julie Tschaggeny (“Ms. Tschaggeny” pronounced “Choggany”) hereby submits her Appellant’s Reply Brief and makes the following arguments in reply to those raised by Appellee Milbank Insurance Company (“Milbank”):

ARGUMENT

Upon review of both the *Appellant’s Brief* and the *Appellee’s Brief*, it appears that the application of a couple of controlling authorities is undisputed. The first authority is a case which upheld the use of the collateral source rule in Utah. The second authority is the plain language of statutory interest in the Utah Code Annotated (“U.C.A.”)

It is undisputed that Mahana v. Onyx Acceptance Corp., 2004 UT 59, 96 P.3d 893 (2004) stands for the proposition that if one party will receive a windfall due to

overlapping coverage for a personal injury, the insured victim, not the insurer should be the party awarded the windfall under the collateral source rule. Milbank expressly recognizes Mahana as defining or restating the collateral source rule and as acceptable precedent in Utah. See Appellee's Brief at 22-23. Utah case law establishes firmly that the collateral source rule applies to tortfeasors, such as the woman who negligently collided with Ms. Tschaggeny and caused her serious injuries. See, e.g., Phillips v. Bennett, 439 P.2d 457, 458 (Utah 1968).

However, the issue of whether the collateral source rule expressly applies to a an insurer, such as Milbank, who provides insurance for damages cause by an uninsured motoris ("UM insurer") is an issue of first impression in Utah. The majority of jurisdictions which have addressed whether the collateral source rule applies to UM insurers has been that the collateral source rule, such as Milbank in this case, have found that the collateral source rule applies to UM actions. See, e.g., Lomax v. Nationwide Mut. Ins. Co., 964 F.2d 1343, 1347 n.3 (3rd Cir. 1992) (holding that the majority of jurisdictions apply the collateral source rule to UM actions

One distinct issue in this case is whether medical bills contractually written-off by health insurance providers will be treated by the court as a collateral source. This is also an issue of first impression in Utah. However, case law from Utah and other jurisdictions provide guidance on the analysis of the collateral source rule.

The majority of states apply the collateral source rule to contractual write-offs. See, e.g., Robinson v. Bates, 828 N.E.2d 657, 664-669 (Ohio Ct. App. 2005) (finding that a majority of jurisdictions include write-offs in the collateral source rule).

Finally, it is undisputed that the trial court failed to follow the proper statutory method of calculating prejudgment interest as found in Utah Code Ann. § 78-27-44. Milbank argued that the method proscribed therein is unfair, but admits that the statute is controlling law. *See Appellee's Brief* at 18-19.

I. THE EXCLUSION OF MS. TSCHAGGENY'S MEDICAL BILLS WAS A REVERSIBLE ERROR

A. Injured Parties in Utah Are Entitled To Retain The Benefits Of Collateral Sources.

The collateral source rule provides that “when an insurance company pays a party a sum of money pursuant to a policy, the premium of which was not paid by nor contributed to by the defendant, the payments so received belong to the plaintiff and are not to be credited to the defendant.” *Phillips v. Bennett*, 439 P.2d 457, 458 (Utah 1968) (citing 22 Am.Jur.2d, Damages, § 206). In *Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶ 37, 96 P.3d 893 (2004), the Utah Supreme Court explained the purpose and the application of the collateral source rule is to ensure that a wrongdoer does not profit from the compensation or indemnity from a third party. It also stated that it is permissible for the plaintiff in these situations to receive a windfall if that is what it takes to avoid rewarding the wrongdoer. *See Id.* at ¶ 37. This holding was built on several prior cases which laid the foundation the collateral source rule. *See, e.g., Gibbs M. Smith, Inc. v. U.S. Fid. & Guar. Co.*, 949 P.2d 337, 345 (Utah 1997) (quoting *DuBois v. Nye*, 584 P.2d 823, 825 (Utah 1978) “[A] wrongdoer is not entitled to have damages, for which he is liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source”).

The court in Mahana specifically stated that any source of aid, whether in the form of cash payment or in gift, could not be credited to the defendant in an action. See Mahana, 2004 UT 59, ¶39.

Because Utah has adopted the collateral source rule, the court should determine whether the collateral source rule applies to a UM insurer in a similar manner to a tortfeasor and whether Ms. Tschaggeny's health insurer's payment of the medical bills through a contractual write off should be considered a collateral source.

B. A Majority Of Jurisdictions Apply The Collateral Source Rule To Uninsured Motorist Policy Carriers.

Under Utah law the collateral source rule should apply to a UM insurer in a similar way that the rule applies to a tortfeasor. Utah law establishes that an insurer who writes coverage for damages suffered at the hands of an underinsured motorist steps into the shoes of the underinsured tortfeasor. See, e.g., Estate of Berkemeir ex rel. Nielsen v. Hartford Ins. Co. of Midwest, 2003 UT App 78, ¶ 7, 67 P.3d 1012. The fact that Milbank's duties to Ms Tschaggeny were created contractually as Ms. Tschaggeny's insurer should not change the nature of Milbank's obligations under Utah tort law. Because the insurer steps in the shoes of the uninsured motorist, Milbank should be viewed under the law as the tortfeasor in all respects. Were the uninsured motorist sued directly in this action, the collateral source rule would certainly permit Ms. Tschaggeny to recover her medical expenses from such tortfeasor even if the same expenses were also covered by a Health Insurer.

Under the facts of the present case, public policy favors application of the collateral source rule to Milbank as it would to the tortfeasor. Milbank has accepted premiums for the very purpose of protecting Ms. Tschaggeny. Legally, Milbank stands in the shoes of the tortfeasor and should be viewed in all respects as the tortfeasor. Since Milbank is legally the tortfeasor, the public policy of favoring the victim over the wrongdoer applies here for the following reasons: Ms. Tschaggeny has the risk of future complications from her injuries; she did nothing wrong, so equity would favor her over the party standing in the shoes of the tortfeasor; and Ms. Tschaggeny paid both for the UM insurer's premiums and for the health insurance premiums.

Ms. Tschaggeny takes upon her any risk that the injury caused by the uninsured motorist may be exacerbated in the future. She, not Milbank, will be responsible for any such potential damages. The risk of future loss lies with her. It would be equitable that any potential windfall should lie with her as well.

Because Milbank has received premiums to stand in the shoes of the tortfeasor, it should be treated under the law as a tortfeasor. Milbank contractually limited its responsibility to Tschaggeny to a certain policy limit. However, up to that limit the law places Milbank in the tortfeasor's shoes. Milbank is the party which drew the contract between the parties. Milbank is on notice that in Utah it steps into the shoes of the tortfeasor in all respects. Yet, there is nothing in the contract between the parties that changes that result. Ms. Tschaggeny has had her life and health interrupted while the tortfeasor inflicted these damages. If one party must benefit over the other through a windfall because of double coverage, it should be Ms. Tschaggeny.

Ms. Tschaggeny is the party who incurred the expense of premiums to obtain health insurance. Any benefit from that investment should flow to Ms. Tschaggeny who paid for it. Milbank would not have a defense to paying for Ms. Tschaggeny's medical bills if Ms. Tschaggeny did not have health insurance. Milbank should not receive a benefit that would not be there in the absence of Ms. Tschaggeny's investment for health insurance coverage.

As set out in Ms. Tschaggeny's *Appellant's Brief*, the majority of jurisdictions apply the collateral source rule to uninsured motorist policy carriers. See, e.g., Lomax, 964 F.2d at 1347 n.3 (holding that the majority of jurisdictions apply the collateral source rule to UM actions).

C. A Majority Of Jurisdictions Consider Medical Bill Write-Offs To Be A Collateral Source

As described more fully in Ms. Tschaggeny's *Appellant's Brief*, the majority of jurisdictions consider medical bill write-offs to be a collateral source. See, e.g., Robinson, 828 N.E.2d at 664-669 (finding that a majority of jurisdictions include write-offs in the collateral source rule).

In the present case, Ms. Tschaggeny's medical insurance company contractually agreed with the doctor to pay his bills if he would accept less for his fee than his normal charge. How the doctor and the health insurer structure their relationship should not effect the responsibilities of Milbank to Ms. Tschaggeny. The benefit of health insurance to Ms. Tschaggeny is that the health insurer's pays a majority of her medical bill. Whether payment is in cash to the doctor or not, the benefit to Ms.

Tschaggeny is the same. The structure of payment to the doctor does not make the treatment of the doctor less valuable. He receives benefits from the insurance company that are non cash. For example, the insurance company may provide a source of referral and the insurance company relieves the doctor of the risk of collection. On the other hand Ms. Tschaggeny has conferred a benefit on the health insurance company through payment of premiums. It would be over simplistic to say that the value of the doctor's services should be determined by the actual amount he received. The effect of health insurance should be seen as redistributing risk and expense, rather than as lowering the cost of medical care.

In this case Ms. Tschaggeny paid for two sources for recovery. One source is the benefit of the health insurance contract that Ms. Tschaggeny was entitled to through her payment of health insurance premiums. The second source is the payment of the doctors' bills by the insurance company which stands in the shoes of the tortfeasor . The fact that the doctor did not actually receive payment for a portion of his bill should not be a benefit that offsets the tortfeasor's liability. The UM insurer paid nothing to the health insurer for such an offset. The benefit of the various insurances should flow to the party who paid for it.

This Court's recent holdings on the collateral source rule in personal injury cases should be explicitly extended to the context of UM insurers as well. If the collateral source rule would give a benefit to victim vis-à-vis the tortfeasor, that same benefit should flow to Ms. Tschaggeny vis-à-vis her UM insurer. Further, this court

should explicitly determine that contractual write offs in Utah are a collateral source and should be analyzed similarly to any other benefit of insurance.

II. THE STANDARD OF REVIEW FOR CASES INVOLVING THE COLLATERAL SOURCE RULE IS FOR CORRECTNESS, WITHOUT DEFERENCE TO THE DISTRICT COURT’S CONCLUSIONS

The standard of review for collateral source rule issues was set out in Utah’s most recent Supreme Court case on the issue: “Whether the district court was correct in its application of the collateral source rule is a question of law that [appellate courts] review for correctness, without deference to the district court’s conclusions.”

Appellant’s Brief, 1 (citing Mahana, 2004 UT 59, ¶ 35). In *Appellee’s Brief* (Milbank’s “Brief”) Milbank argues that an admissibility of evidence standard should be used, in accordance with a 1990 case from the Utah Court of Appeals. See Appellee’s Brief at 1 (citing Erickson v. Wasatch Manor, Inc., 802 P.2d 1323, 1325 (Utah App. 1990)). The present case is distinguishable from the 1990 case of Erickson. In that case, the trial court excluded the prior testimony of several key witnesses, but reversed itself upon Erickson’s submission of a Motion for Reconsideration. See id. at 1324. Erickson was a case on the admissibility of witness testimony which had no relation to the collateral source rule. In this case, if the collateral source rule applies, the full medical bills should have been admissible. The collateral source issue should be determined under the standard of correctness.

III. THE EXCLUSION OF MS. TSCHAGGENY'S ACTUAL MEDICAL BILLS WAS A REVERSIBLE ERROR

A. The Fact That Ms. Tschaggeny Did Not File A Memorandum In Opposition To Milbank's Motion In Limine Does Not Make The Ruling Proper

1. The court considered Ms. Tschaggeny's position on this issue. Ms.

Tschaggeny presented an oral opposition to Milbank's Motion in Limine with the court's permission. Milbank argues that since Ms. Tschaggeny filed no Memorandum in Opposition to Milbank's Motion in Limine, she cannot complain that the subsequent ruling was made in error. See Appellee's Brief at 4-6. Milbank then cited to Pratt v. Nelson, 2005 UT App 541, 127 P.3d 1256 in support. See Appellee's Brief at 5. In Pratt, the defendants moved the court to strike the opposing memorandum, which the court granted. See Pratt, 2005 UT App 541 at ¶6. Pratt is distinguishable because the court considered Ms. Tschaggeny's opposition.

Motions in limine are often filed on the eve of trial as was Milbank's. The court often decides a motion in limine without formal briefing and on argument alone. In the present case, trial was continued so the motion in limine was not addressed when filed. However, the court still had discretion to decide the motion based upon an oral opposition.

2. Defendant has waived any claim that the court should not have considered Plaintiff's opposition the Motion in Limine. Defendant has not preserved for appeal the argument that the court should not have heard Plaintiff's opposition. Both Ms. Tschaggeny's oral objection to the Defendant's Motion in Limine and Ms. Tschaggeny's Motion for Reconsideration were considered prior to trial in this case.

B. Ms. Tschaggeny Did Not Agree With Milbank's Motion In Limine

Milbank asserted in its Brief that Ms. Tschaggeny agreed with its Motion in Limine at the June 24 hearing. See Appellee's Brief at 6-8. However, Ms. Tschaggeny did not agree with Milbank's motion. Milbank quoted words from the final paragraph of counsel's argument; however, that paragraph should not be read out of the context of the entire argument. As Milbank noted in its Brief, Ms. Tschaggeny's counsel unequivocally opposed the Motion in Limine:

THE COURT: Let me just make the inquiry as to whether at this juncture Mr. Christensen is opposed.

MR. CHRISTENSEN: Your Honor, I apologize. I was not aware we were going to raise this motion as well, but we do oppose it.

R. at 975, p. 1. When the trial court gave Ms. Tschaggeny the opportunity to explain her opposition, she did so as follows:

MR. CHRISTENSEN: ... Our opposition is that if there was an agreement between Ms. Tschaggeny and her doctors that they would not charge her a certain amount then I think the defendant's position would be well taken. In other words, if they put on the books something different than they actually intended to enforce.

But the opposition is that under Utah law what a health insurance company does in the context of a personal injury case does not bind the doctor or Ms. Tschaggeny to what that doctor would be entitled to recover in a personal injury context.

And I think that the confusion that could arise in such a motion in Limine where Ms. Tschaggeny – there is an insurance overlay, but the fact that a doctor has a contract with a health insurance company to say I will – these charges under this limit, does not prevent that doctor from coming after Ms. Tschaggeny or against the tortfeasor [sic] for that contractual writeoff [sic] because the doctor would charge a non-

contracting patient who is not under the health insurance umbrella that full amount ...

So we would ask even though – I think the way this has been presented by the defense makes sense and probably does not need an opposition in the terms of there's binding write down. I think to avoid future complications with the health insurance overlayer we'd just ask the courts to restrict the motion to what it has been brought rather than as a broad writeoff [sic] of any health insurance amounts. And on that basis we will submit it.

Id. at pp. 4-5.

Ms. Tschaggeny acknowledges that her words from the final paragraph of her argument were unclear and could be read out of context to imply that she was agreeing with Milbank's Motion in Limine as it was written. However, taken in context with her entire argument, it is obvious that she did not intend to agree to the Motion in Limine. Rather, her argument was clear (other than the final paragraph) that she opposed the Motion except as it would apply to any non-contractual write-offs that she personally arranged with the physicians (such as the gift of a reduced bill), of which there were none in this case. The Milbank's argument suggested that if there was an agreement between the provider and the patient to accept less than charged, then the amount of the agreed charge was what should be admissible. Ms. Tschaggeny never intended to agree, nor did she ever agree to Milbank's Motion in Limine on contractual health insurance benefits.

Rather, Ms. Tschaggeny opposed disallowing evidence of write offs due to a contract with an insurance company. Ms. Tschaggeny did not agree that amounts the health insurance company had reduced should not be admissible.

C. Ms. Tschaggeny's Motion For Reconsideration Was Timely

Milbank stated in its brief that regardless of the merits of Ms. Tschaggeny's Motion for Reconsideration, it should not be considered because it was untimely. See Appellee's Brief at 8-12. The trial court has discretion in managing trial proceedings. However, evidentiary motions should be considered timely if there is no scheduling order to the contrary and the motion is brought prior to the introduction of the evidence. In this case the motion was brought before the jury was called and the court continued trial for one day to consider the motion.

Further, the court had been briefed by the Defendant previously on this issue. The court's ruling on admissibility of evidence should have been based on the merits and that ruling should be reviewed for correctness. See Mahana, 2004 UT 59, ¶ 35. The only rule that governs the timeliness of evidentiary motions in civil practice is Utah R. Evid. 103(1), which simply states that an objection to the admissibility of evidence must be made in a timely manner. Id. There was time for the court to consider this motion for admission of evidence on its merits.

In its brief, Milbank referred this Court to the case of Parker v. General Motors Corp., 503 P.2d 148, 149 (Utah 1972) for the argument that any issue once decided cannot be "resurrected." In Parker, this Court rejected Parker's appeal in a very short opinion that provided few facts. It appears that Parker failed to timely appeal an issue with factual and legal merit and is distinguishable from the present case.

However, Parker is not all-out ban on reconsideration of any issues that have been decided. For example, in a much more recent case, this Court stated,

Utah Rule of Civil Procedure 54(b) specifically provides: [A]ny order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Indeed, “[i]t is settled law that a trial court is free to reassess its decision at any point prior to entry of a final order or judgment.” Ron Shepherd Ins., Inc. v. Shields, 882 P.2d 650, 654 (Utah 1994)

Hall v. Utah State Dept. of Corrections, 2001 UT 34, ¶12, 24 P.3d 958. Thus, even if Parker was intended to preclude any reconsideration of decided issues, this Court overruled that doctrine in these later decisions.

In at least one instance, a motion for reconsideration regarding prior exclusion of evidence filed on the last day of trial was upheld by the Utah Court of Appeals. See Erickson, 802 P.2d 1323. In that case, Erickson submitted a motion for reconsideration on the last day of trial in which he requested that the trial court reconsider its prior ruling that excluded some of his evidence. See id. at 1325. The trial court granted the motion and Wasatch Manor appealed. The Utah Court of Appeals upheld the trial court’s actions, explaining that even at the time the evidence was excluded, it was admissible nonetheless and that Wasatch Manor was on fair notice of the evidence from pre-trial discovery. See id. at 1326-1327. Certainly if the collateral source rule applies to contractual write offs, Ms. Tschaggeny’s actual medical bills, like the evidence in Erikson, were admissible even though the court excluded them. A motion to reconsider an improper exclusion of admissible evidence should have been granted.

It was improper for the trial court to deny Ms. Tschaggeny’s motion which was brought prior to trial for lack of timeliness.

D. There Was No Invited Error

If Ms. Tschaggeny's evidence of actual medical charges was by nature admissible, it should have been admitted. Milbank asserted in its Brief that if the granting of the Motion in Limine and the denial of the Motion for Reconsideration were done in error, it was invited error based upon Ms. Tschaggeny's actions. See Appellee's Brief at 12-14. Milbank asserts as bases for this argument, "(1) her failure to file a memorandum in opposition; (2) her agreement with Milbank's motion in Limine; and (3) her untimely filing of a motion for reconsideration." *Appellee's Brief* at 13. However, none of these purported procedural roadblocks withstand scrutiny. Certainly, these arguments do not change the nature and content of the evidence. If under Utah law a jury could have considered evidence of write offs with a proper jury instruction, the court should have allowed the jury to do so.

E. Milbank's Motion In Limine Was Not Substantively Correct, And The Motion For Reconsideration Should Have Been Granted.

1. The collateral source rule allows a court to consider all monetary damages in calculations of damages whether or not such are paid by a collateral source. As both parties have acknowledged, there is no specific Utah statutory authority or case law on the applicability of the collateral source rule as it applies to the facts at hand. However, courts of this state have held in favor of the collateral source rule.

In its brief, Milbank asserts that this Court should not rule in Ms. Tschaggeny's favor by focusing entirely on the definition of "**payments** made by collateral sources."

Appellee's Brief, 15 (emphasis original). Milbank's focus on cash transactions is misplaced – Utah law is clear that the collateral source rule covers any source of aid, whether in the form of cash payment or in gift. See Mahana, 2004 UT 59, ¶39.

In footnote four to Milbank's brief, it asserts, "The term 'indemnity' is used to describe concepts of **reimbursement** and **compensation**" and supports this assertion by citing to Black's Law Dictionary. *Appellee's Brief*, 16 n. 4 (emphasis original). However, a careful reading of the definitions of the term "indemnity" in the latest version of Black's Law Dictionary reveals otherwise:

indemnity ... n. 1. A duty to make good any loss, damage, or liability incurred by another. 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. 3. Reimbursement or compensation for loss, damage, or liability in tort.

Black's Law Dictionary (8th Ed. 2004) (internal Keycite omitted, emphasis added).

While the third definition does refer to reimbursement or compensation, the first two refer to "making good" and "claiming reimbursement."

In addition, Milbank cites to Bates v. Hogg, 921 P.2d 249 (Kan. App. 2000) and Fischer v. Farmers Ins. Co. Inc., 106 P.3d 99 (Kan. App. 2005), to support its proposition that written-off bills are not covered by the collateral source rule. See *Appellee's Brief* at 17-18. However, Bates and Fischer were limited by the Kansas Supreme Court to apply only to Medicaid cases and Medicare cases where the Medicare provider is also the defendant and health care provider. See Rose v. Via Christi Health System, Inc., ("Rose 2") 113 P.3d 241, 248 (Kan. 2005) ("[W]e conclude that under the facts of this case, specifically where the Medicare provider ...

is the defendant and also the health care provider of the services which form the basis of the economic damages claim, the trial court did not err in allowing a setoff.”); Rose v. Via Christi Health System, Inc., (“Rose 1”) 78 P.3d 798, 804 (Kan. 2003) (“[W]e hold that the *Bates* decision is limited to cases involving Medicaid.”). The court in the Rose 2 could have expressly overruled itself on the Medicaid issue from Rose 1, but it did not. Therefore, it is reasonable to state that Kansas will only set aside written-off medical bills in those two limited circumstances, neither of which apply to this case.

The idea of indemnity does not require a cash transaction. Rather, reduction in a bill by agreement or for payment both have the same financial benefit to Ms. Tschaggeny—which she acquired through payment of health insurance premiums. Both should be seen as a collateral source.

2. The inclusion of the written-off bills should result in a windfall for Ms. Tschaggeny not the tortfeasor. Milbank argues that admission of the full medical bills before write offs would result in an impermissible windfall to Ms. Tschaggeny. This Court has previously ruled that such windfalls should benefit the victim not the tortfeasor:

The collateral source rule provides that a wrongdoer is not entitled to have damages, for which he is liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source. The rule applies even in those cases where it results in a windfall to the plaintiff based on the premise that the plaintiff victim, rather than the defendant tortfeasor, should be the beneficiary of any windfall.”

Mahana, 2004 UT 59, ¶37 (citations and internal quote marks omitted, emphasis added).

The insurance provider's actions of payment cannot be separated from negotiation for reduction since both are benefits of the health insurance contract paid for by Ms. Tschaggeny, even though Milbank argues to the contrary. See Appellee's Brief at 14-18. Ms. Tschaggeny, not the tortfeasor, should get the benefit of both.

3. Ms. Tschaggeny incurred the written-off medical bills. Milbank repeatedly argues, "Ms. Tschaggeny did not actually incur the written-off portions of the medical bills. No one did." *Appellee's Brief*, 17; See also Appellee's Brief at 3, 18. However, this argument fails. Milbank does not dispute that the medical bills were assessed to Ms. Tschaggeny and that she had an obligation to pay them. Rather, it argues that since a portion of those bills were later written-off, that they were never actually incurred. To "incur" something is "[t]o suffer or bring on oneself (a liability or expense)." *Black's Law Dictionary* (8th Ed. 2004). Clearly, the moment that bills were levied against Ms. Tschaggeny, she incurred the liability for those bills. The fact that portions were later written-off has no bearing whatsoever on the fact that they were indeed incurred by her.

The trial court should have allowed evidence of the entire medical bills incurred by Ms. Tschaggeny. Further, the trial court should have excluded evidence of write offs by a health insurance company as requested by Ms. Tschaggeny in her motion in limine decided on the first scheduled day of trial. It was also error for the court to determine as a matter of law that the contractual health insurance write offs reduced Ms. Tschaggeny's medical bills dollar for dollar. In effect the court not only allowed the jury to see the contractual write off, but determined that such write off was binding

on the jury so that it could not award to Ms. Tschaggery the actual medical expenses she incurred. The effect of reducing the medical bills was to create an offset to the UM insurer's liability rather than to allow the benefit of insurance to flow to the insured.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MS. TSCHAGGENY'S MOTION TO AMEND JUDGMENT, MOTION FOR ADDITUR, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

A. Mahana Is Applicable To This Case

Milbank argues that Mahana does not apply to this case because it “does not address medical expense write-offs [and] ... is a Uniform Commercial Code conversion case” *Appellee's Brief*, 23 (citation omitted). Ironically, “Onyx,” the defendant in Mahana, made the same argument, and was overruled. Onyx argued that the collateral source rule did not apply to Mahana because it was primarily a rule that applied to insurance-related cases, not UCC conversion cases. However, this Court disagreed, stating,

The rule is not limited, however, as Onyx suggests. Rather, the collateral source rule is applicable unless the collateral recovery comes from the defendant or a person acting on his behalf. If the benefit was a gift to the plaintiff ... 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.

Mahana, 2004 UT 59, ¶39. Therefore, Milbank's argument that Mahana does not apply fails for the same reason Onyx's argument failed – the collateral source rule applies in any case involving collateral recovery, regardless of the nature of the wrongful conduct or the compensation therefrom. Therefore, Milbank's arguments are without merit and should be disregarded.

B. Mahana Did Add to, or Clarify, the Collateral Source Rule in Utah Law

Milbank contended that contrary to Ms. Tschaggeny's assertion, "Mahana adds nothing new to Utah case law regarding the collateral source rule." *Appellee's Brief*, 23. However, this argument is inaccurate. While it is true that Mahana largely restates the rule as it had been previously defined, this Court did add an element to the rule when it stated, "The rule applies even in those cases where it results in a windfall to the plaintiff based on the premise that the plaintiff victim, rather than the defendant tortfeasor, should be the beneficiary of any windfall." Mahana, 2004 UT 59, ¶37. This concept of allowing windfalls for the plaintiff clarified the Utah concept of the collateral source rule. The issue was not mentioned in any of the earlier Utah cases on the issue (set forth more fully in Ms. Tschaggeny's *Appellant's Brief*). Therefore, Ms. Tschaggeny's assertion that Mahana represented a change and clarification of Utah law was accurate. Further Mahana also states that the concept of collateral source applies beyond the exchange of cash payments to at least include gifts.

C. The Jury's Failure To Award Damages For Replacement Services Was An Error In Law Because It Indicates A Disregard Of Evidence

The facts and ruling of the very recent case of Balderas v. Starks, are applicable to the case at hand. 2006 UT App 218, 2006 WL 1422568. In that case, Balderas asserted that he incurred medical expenses of \$4,699.00, which was not contested by the defense; however, the jury only awarded \$3,237.00. Balderas submitted a motion for a new trial based on rule 59(a)(5) of the Utah Rules of Civil Procedure under the

theory that the jury's award was inadequate, which was denied by the trial court. The Utah Court of Appeals upheld the decision, but stated,

The jury was not required to adopt Balderas's damage theory wholesale. ... [However, t]he fact-trier should not be permitted to arbitrarily ignore competent, credible[,] and uncontradicted evidence. Nevertheless, [the jury] is not bound to slavishly follow the evidence and the figures given by any particular witness. Within the limits of reason it is [the jury's] prerogative to place [its] own appraisal upon the evidence which impresses [it] as credible and to draw conclusions therefrom in accordance with [its] own best judgment.

Id., ¶24 (citing Even Odds, Inc. v. Nielson, 22 Utah 2d 49, 448 P.2d 709 (1968)) (most alterations original, emphasis added). Therefore, while a jury is not required to accept all uncontested evidence as absolutely accurate and true, it also may not ignore such evidence entirely. When a jury is found to have disregarded competent evidence, a trial court should grant a motion for new trial or additur. See Andreason v. Aetna Cas. & Sur. Co., 848 P.2d 171, 177 (Utah App. 1993) (holding that the trial court could have granted defendant's motion for a new trial or remittitur if it had found that the jury had disregarded competent evidence); Dupuis v. Nelson, 624 P.2d 685, 686 (Utah 1981) (holding that when awarded damages are so inadequate as to indicate a disregard of evidence by the jury, a court is empowered to entertain a motion for an additur); Batty v. Mitchell, 575 P.2d 1040, 1043 (Utah 1978) (holding that a jury award that bears no reasonable relationship to the plaintiff's injury in light of the evidence could warrant a motion for a new trial).

Milbank asserts that it contested the issue of the replacement services by going “into great detail in its cross-examination of Ms. Tschaggeny, and used the relevant

exhibits in doing so, regarding this claim and its validity, or lack thereof.” *Appellee’s Brief*, 25. However, what remains unsaid is the fact that Milbank was unable to elicit any information from Ms. Tschaggeny which would tend to disprove the value of or her entitlement to the replacement services, neither did Milbank present any of its own evidence as such. Therefore, the fact that Milbank did not present any evidence to challenge the value of the services or Ms. Tschaggeny’s right to receive the same should have resulted in an award of at least some amount, (as it did in *Balderas*), even if the jury did not agree that the full amount was due. However, the fact that Ms. Tschaggeny’s jury refused to award her even a nominal amount for the replacement services demonstrates that it arbitrarily ignored competent, credible, and uncontradicted evidence.

D. The Jury’s Failure To Award Ms. Tschaggeny Damages For The Replacement Services Is An Indication Of Passion Or Prejudice By The Jury

While Ms. Tschaggeny did not specifically argue that the jury was influence by passion or prejudice in her *Appellant’s Brief*, Milbank raised the issue in its Brief, to which Ms. Tschaggeny now chooses to respond pursuant to Utah R. App. P. 24(c). See Appellee’s Brief at 24-25.

Milbank is mistaken in its assertion that there is no evidence that the jury was influenced by passion or prejudice when it failed to award any damages for the replacement services to Ms. Tschaggeny. The jury’s award of nothing was so disproportionate from that which Ms. Tschaggeny proved Milbank owed to her, that the award in itself is an indication of prejudice on the part of the jury. See Procon Corp. v.

Utah Dept. of Transp., 876 P.2d 890, 896 (Utah App. 1994) (holding that since the trial court's award was not disproportionate, there was no indication of prejudice on the part of the trial court); See also Wheat v. Denver & R.G.W.R. Co., 250 P.2d 932, 935 (Utah 1952) (“[W]hen a verdict is so grossly disproportionate to any amount of damages which could have fairly been awarded as to make manifest that the verdict was so suffused with passion and prejudice that the defendant could not have had a fair trial on the issues, the trial court should unconditionally grant a new trial.”) Therefore, since the award was grossly disproportionate to what could or should have been awarded, it is would be appropriate to conclude that the jury was influenced by passion or prejudice.

V. THE TRIAL COURT DID NOT APPLY UTAH CODE ANN. § 78-27-44 PROPERLY IN ITS AWARD OF PREJUDGMENT INTEREST

A. Ms. Tschaggeny Suggested The Method Used By The Trial Court, But Only As An Alternative If The Court Chose To Ignore Statutory Rules

Milbank's assertion that the trial court used Ms. Tschaggeny's proposed method of calculation is only correct in part. See Appellee's Brief at 18-19. She originally asserted several times that the trial court should follow Utah Code Ann. § 78-27-44 and apply the interest from the date of the accident to the date of judgment, without any setoffs. R. at 784, 838-841, and 941-943. However, at the hearing on the matter, the trial court indicated to Ms. Tschaggeny that it was inclined to grant a setoff. Ms. Tschaggeny requested in her rebuttal that if the court was inclined to grant a setoff, the court should at least calculate the interest on the set off portion until the set off was effective. This argument was in the alternative: “The latter calculation comes into play

if the Court agrees with the defendant that Utah Code Annotated §78-27-44 does not apply.” R. at 873.

B. Ms. Tschaggeny Did Preserve This Issue For Appeal

In its brief, Milbank claims that Ms. Tschaggeny did not preserve this issue for appeal and Ms. Tschaggeny’s motions “reveals no mention of the method of prejudgment interest calculation suggested by Ms. Tschaggeny during oral argument and adopted by the trial court.” *Appellee’s Brief*, 19. However, Ms. Tschaggeny would refer the Court to her proposed Judgment on Jury Verdict; Reply to Defendant’s Memorandum in Opposition to Plaintiff’s Motions for Entry of Judgment on Jury Verdict and for Attorney’s Fees; and Reply to Defendant’s Memorandum in Opposition to Motion to Amend Judgment, Motion for Additur, or in the Alternative, Motion for New Trial, in which she very clearly makes the argument that the trial court should have calculated prejudgment interest according to a strict reading of § 78-24-44. R. at 784, 838-841, and 941-943. Therefore, the issue was preserved for appeal.

C. The Statute Does Not Provide For Offsets Or Substitution Of Dates

This Court recently explained that when interpreting statutes, the Court’s primary goal

is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve. We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning. ... Only when we find that a statute is ambiguous do we look to other interpretive tools such as legislative history.”

State v. Holm, 2006 UT 31, ¶16, 2006 WL 1319595 (Utah 2006) (internal quote marks, internal changes, and citations omitted). The plain language of Utah Code Ann. § 78-24-44 states that the damages assessed by a jury verdict are to accumulate interest from the date of the incident to the date of the verdict.

No matter how strained a reading one may give to the statute, nowhere therein does it approve of bifurcating the award, excusing a part, and assessing interest from or to dates other than the ones indicated. Indeed if the trial court's method of assessing prejudgment interest were to be taken to the logical extreme, instead of the arbitrary manner employed, each bill levied against Ms. Tschaggeny would need to be assessed individually, with each billed amount bearing interest from a different date. Obviously, in cases of serious injuries such as this, there can easily be hundreds of separate medical bills, all of which would need to be tracked and calculated on their own – an arduous task which is avoided by the simple application of the statute.

However, instead of following the statute or the more detailed calculation described above, the trial court lumped several dozen different bills together into a single amount and arbitrarily chose a date for purposes of calculating the prejudgment interest. The trial court's actions were in error. Furthermore, when assessing its erroneous calculation, the trial court admitted that it was intentionally ignoring the statute: "Further, since the Court is not willing to entirely overlook the application of §78-27-44, ..." R. at 873 (emphasis added).

Milbank argues that to award prejudgment interest on an amount that was actually paid years before would be unjust. See Appellee's Brief at 20-21. Whether it

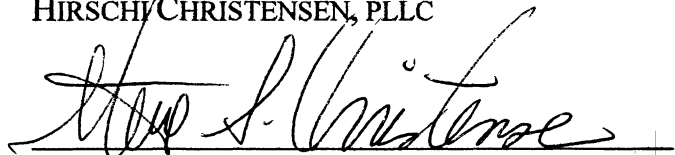
is correct in this argument is irrelevant because the statutory times and amount of interest is clear. Had the Utah Legislature intended to allow for variances, it could have done so easily by adding such language to the statute. However, the legislature did not. Since the language is clear, Utah courts must abide by the standard set forth in the statute. Therefore, Milbank's argument that the award would be inappropriate is contrary to the statute.

CONCLUSION

The trial court erred in its application of the collateral source rule to this case and in its application of Utah Code Ann. § 78-27-44 when awarding Ms. Tschaggeny prejudgment interest, and she was prejudiced by these legal errors. Furthermore, there was a unmistakable disregard of the evidence by the jury when it failed to award Ms. Tschaggeny damages for the replacement services that she incurred after her accident. Ms. Tschaggeny respectfully requests that the decisions of the trial court on these issues be reversed and that this case be remanded to the trial court with an order that the trial court propose the additur as originally requested and that if Milbank refuses the additur, she is entitled to a new trial on the issues giving rise to this appeal.

DATED this 21st day of June, 2006.

HIRSCH/CHRISTENSEN, PLLC

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Steve S. Christensen

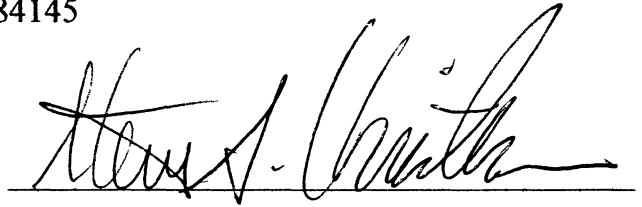
Robert J. Labrum

Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was sent by First Class U.S. Mail, postage prepaid, on the 21st day of June, 2006 to:

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A handwritten signature in black ink, appearing to read "Henry A. Smith", is written over a horizontal line.