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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL JUDICIAL DISTRICT

AZAT VARDERESYAN,

Plaintiff,

vs.

DEPENDABLE HIGHWAY EXPRESS, INC., a California Corporation; and DOES 1 through 80, Inclusive,

Defendants.

Case No.: BC423132

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORTIES IN OPPOSITION TO DEFENDANT'S NOTICE OF MOTION AND MOTION TO REDUCE THE VERDICT AS TO DAMAGES AWARDED FOR PAST MEDICAL EXPENSES; DECLARATION OF BARRY P. GOLDBERG.

[Filed concurrently with Objections to Evidence]

Date: May 27, 2011
Time: 8:30 a.m.
Dept: 13

Assigned To: Hon. Luis A. Lavin

Plaintiff, AZAT VARDERESYAN, by and through his attorneys of record, submits the following Opposition to Defendant's Notice of Motion and Motion to Reduce the Verdict as to Damages Awarded for Past Medical Expenses:

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Defendant's "motion" was not served with sufficient notice in accordance with CCP § 1005. Defendant has had 19 days to prepare this motion. Defendant will have 5 days to reply to this opposition and ***plaintiff has only 5 days to oppose this motion***. Such timing is, on its face, is unfair and prejudicial to the plaintiff. The motion should be denied on that basis alone.

The substantive issue in this case is whether a trial court can reduce the past medical expenses portion of a jury verdict post trial where the jury determined the reasonable value of such past medical expenses and the defendant has not offered any evidence regarding collateral payments or conclusively established a gratuitous "reduction" that would relieve the plaintiff from all responsibility for all of his past medical expenses.

The jury trial of the underlying litigation commenced on April 11, 2011. On April 21, 2011, the jury delivered a special verdict in favor of Plaintiff Azat Varderesyan (hereinafter "Mr. Varderesyan"). The total amount of the jury verdict was $147,500, of which $95,000 was for "past medical expenses."

Defendant DHE belatedly moves to reduce the verdict as to damages awarded for past medical expenses by $74,499.81 based upon a single unexplained line "adjustment" in one of the medical "itemizations" dated January 31, 2010 -- over 15 months before this motion. In so doing, defendant seeks to ignore the largely undisputed trial testimony of the reasonable value of the hospital costs ($95,000 to $97,000) and ***the completely undisputed testimony of the treating surgeon for the reasonable value of his surgery fee ($20,000)***.

The purported hospital "bill" states on its face: "This statement is for informational purposes." There is no evidence that the "adjusted" amount was ever paid. There is no evidence that the "adjustment" apparently ***proposed*** 15 months ago is still viable or available. To the contrary, it appears that the account was assigned to a third-party for collection.

Defendant seeks to create unprecedented new law in this case. No California case has ever reduced a verdict post-trial without there ***actually being a payment*** by an insurance

company for the subject medical services. While there currently is an active legal discussion in the California Supreme Court whether post-trial reductions can be permitted ***for insurance payments*** made outside the Medicare/Medicaid context, no court has abrogated California's collateral source rule which would apply to a possible gratuitous "adjustment."

A gratuitous payment or a possible medical bill reduction is subject to the collateral source rule. A tortfeasor has no right to take advantage of the ***possible*** benefits afforded to a victim. Such benefits are completely "collateral" to the damage caused by the defendant.

Perhaps more importantly in our case, and the controlling issue, is that a "collateral" benefit has not been unequivocally established. From the inadequate foundational evidence proffered, it is far from clear as to what, if anything is "adjusted," and to what extent Mr. Varderesyan currently remains liable for the charges incurred. It would be reversible error to reduce the amount of the jury verdict on the insufficient evidence presented in this motion. (See, *Olsen v. Reid* (2008) 164 Cal.App.4th 200.)

As set forth in the attached declaration of Barry P. Goldberg, if the court were to reduce the verdict on any theory, not only would Mr. Varderesyan receive no compensation whatsoever for his substantial injuries, there would not be any funds available to pay the so-called "adjusted" hospital bill or any medical expenses. This eventuality completely undermines defendant's argument that the plaintiff would be receiving some sort of a "windfall."

II. STATEMENT OF THE CASE

A. The Underlying Case

On August 25, 2009, Azat Varderesyan was severely injured when a forklift driver for defendant DHE dropped a heavy pallet on his right leg requiring the surgical implant of a titanium intermedullary rod. Mr. Varderesyan ***incurred*** more than $97,000 in past medical expenses related to his injuries in his first 9 days of hospitalization.

At the time of the accident, Mr. Varderesyan was an independent contractor. Despite this fact, when Mr. Varderesyan was taken to White Memorial Hospital in Los Angeles for emergency treatment and surgery, his medical records indicated that he was an employee of

DHE and that, presumably, Workers' Compensation applied to the accident. The workers compensation claim was ultimately denied by DHE's insurer. From the fact that the hospital statement was sent to DHE, rather than the Plaintiff, it is reasonable to infer that the hospital was offering DHE a workers' compensation "adjustment" at that time--- an offer that DHE never accepted. (Dec. of Goldberg ¶ 14.)

B. <u>The Disputed "Statement"</u>

In January 2010, over 15 months ago, White Memorial Hospital produced a statement and apparently sent it directly to Defendant DHE for "informational purposes." ***That statement was never sent to Mr. Varderesyan or his counsel***. The aged statement reflects a ***proposed*** adjusted balance due to the hospital in an apparent attempt to compromise the bill which was a fraction of the reasonable value of the services rendered. It would appear that the dramatic ***proposed*** adjustments that were offered by the hospital at that time reflected the equivalent of a worker's compensation credit, insurance, insurance-like benefits, or otherwise. It is equally possible that the hospital was just trying to raise money at that time. The "informational" statement does not explain what the cryptic "adjustment" meant and the bill total after the adjustment does not appear to bear any relationship to the fair value for the services rendered.

As set forth more fully in the attached Declaration of Barry P. Goldberg (¶ 15), the provenance of defendant's proffered statement is also questionable. Plaintiff's order of records pursuant to defendant's subpoena yielded a completely different document consisting of several additional pages. The amount "incurred" on the plaintiff's ordered documents was $195,000---- not $97,000. Plaintiff never received a second subpoena which yielded defendant's document with a different number, presumably after defendant intervened with the custodian of records. A copy of the hospital statement provided to plaintiff through defendant's subpoena and copy service is attached hereto as Exhibit "1."

In support of this motion, defendant has not presented a single piece of evidence that the "adjusted" amount was ever paid. Similarly, defendant has not presented any credible evidence that the possible "adjustment" offer made 15 months ago is still in existence. In fact, as set forth

more fully in the attached declaration of Barry P. Goldberg, the hospital account was apparently assigned to a third party ***after*** that statement was prepared. (Dec. of Goldberg ¶ 7.)

If the Court were to "reduce" the past medical expenses based upon this inadequate record, plaintiff may well be faced with having to pay $97,000, or more, while defendant actually pays less than $23,000. The court should not engage in such post-trial speculation which could create such an inconsistent result.

C. Pre-Trial Motion In Limine

On April 11, 2011, the trial court heard and ruled on several motions in limine, including Plaintiff's Motion In Limine No. 4A to Exclude Reference to Medical Bill Reduction Offer by Hospital as Collateral Source. The court granted that motion and no evidence of a purported reduction or collateral source would be permitted at trial. (Dec. of Goldberg ¶ 7.)

At the request of defendant, the court specifically reserved the issue of a collateral source reduction for a post-trial motion, but did not relieve the defendant of the requirements with respect to any such post-trial motion. Plaintiff contends that it was incumbent upon defendant to secure the reporter's transcript knowing in advance that it planned such a motion rather than rely on inaccurate and disputed hearsay. (Dec. of Goldberg ¶ 8.)

It is improper for the court to rely on disputed and inaccurate hearsay regarding trial testimony as a foundation to drastically reduce a jury's verdict.

D. Evidence Regarding Mr. Varderesyan's Medical Expenses

Contrary to defendant's suggestion, at trial, there was no significant dispute that the vast majority of the medical expenses incurred by Mr. Varderesyan were reasonable and necessary in light of his severely comminuted femur fracture and intermedullary rod surgery. Defendant's hearsay recitation of the facts presented at trial is simply wrong or insufficient.

The defense medical expert, Geoffrey Miller, M.D., unequivocally testified that the reasonable value of Mr. Varderesyan's hospital treatment was between $95,000 and $100,000. Dr. Miller was confronted with his deposition testimony wherein he was asked to review the

medical bills from the subpoena order totaling $195,000. The cross-examination went something like this:

> Q. Do you remember me handing you the hospital medical bills totaling $195,000?
> A. Yes.
> Q. At that time you testified that you were qualified to examine such records and determine whether the costs incurred for the services rendered were reasonable and necessary. Do you recall that?
> A. Yes.
> Q. And, I handed you several pages of medical bills at your deposition and you took time to review the bills page by page. Do you recall that?
> A. Yes.
> Q. After reviewing those records, you concluded that that the reasonable and necessary costs for Mr. Varderesyan's hospital stay was about half of $195,000---between $95,000 and $100,000. Correct?
> A. I recall that.
> Q. Is it still your opinion that the reasonable and necessary costs for Mr. Varderesyan's hospital stay is between $95,000 and $100,000?
> A. Yes.

On re-direct, Dr. Miller testified he had ***seen*** hospital bills for similar surgeries to be as low as $25,000. However, he qualified that statement by testifying that, in certain cases, some patients were able to leave the hospital after 3 days. He never testified that the reasonable value of the services rendered to Mr. Varderesyan was less than $95,000 to $100,000. (Dec. of Goldberg ¶ 10.)

Although it is true that Dr. Galloni was not permitted to testify concerning the reasonable cost of Mr. Varderesyan's hospital stay, Dr. Galloni was permitted to testify concerning the reasonable cost of his own surgical fee. ***He testified that his fee alone was at least $20,000. Defendant omits mention of this testimony in its moving papers.*** Constantine Boukidis, M.A., an economist, testified that based upon information provided to him from the depositions of Dr. Rosen and Dr. Miller, the reasonable cost for Mr. Varderesyan's hospital stay was $97,000. No actual medical bills were introduced into evidence. (Dec. of Goldberg ¶ 12.)

Against this background, the jury awarded $95,000 in past medical expenses. It will never be known whether the jury considered Dr. Galloni's surgical fee in making its award.

Therefore, it cannot be ascertained from the verdict what amount was credited to the hospital bill. It would be an improper function of this court to unilaterally conclude that Dr. Galloni's fee was not considered by the jury and that the $95,000 was for the hospital bill and the hospital bill only.

E. Defendant's Post-Trial "Motion to Reduce the Verdict" is Inexcusably Late

Regrettably, defendant has tried to make it sound like plaintiff agreed to "waive" sufficient time to oppose this motion. On April 21, 2011, after the verdict was read, the court inquired whether May 27, 2011 was sufficient time for defendant to bring its post-trial reduction motion. Counsel stated that it was sufficient and the date was reserved. (Dec. of Goldberg ¶ 4.) Although there is no agreed authority for the bringing of these types of motions for a non-public entity, the court fashioned an elegant solution by reserving, by an Order to Show Cause, the signing and entry of judgment until May 27, 2011. Otherwise, the judgment would have had to be entered within 24 hours.

The Court asked plaintiff's counsel to prepare and submit a judgment form. Counsel waived notice of the court's setting of the Order to Show Cause re signing of the verdict. Contrary to counsel's assertion, plaintiff's counsel never waived plaintiff's right to receive proper notice of a motion and a reasonable opportunity to respond. (Dec. of Goldberg ¶ 5.)

Pursuant to the court's instruction, plaintiff timely prepared and lodged the judgment form on April 27, 2011, with notice to counsel. On May 3, 2011, counsel served a so-called "Objection to Proposed Judgment on Special Verdict." That objection states; "Entry of Judgment is premature pending the outcome of defendant's post-trial motion to reduce the verdict as to past medical expenses, set for hearing on May 27, 2011." Accordingly, as of May, 3, 2011, defendant knew full well that its motion must be filed with sufficient time to be heard on May 27, 2011. Notwithstanding that knowledge, counsel waited until after the proper notice period elapsed, then served its belated motion. No ex parte order was obtained for the belated filing. Instead, counsel baldly states that plaintiff knew of the hearing ***and waived notice***. Such

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"slight of hand" should not be sanctioned by the court. Plaintiff never waived the statutory motion timing protections. (Dec. of Goldberg ¶ 6.)

III. ON THE EVIDENCE SUBMITTED, IT WOULD BE REVERSABLE ERROR TO REDUCE THE JURY'S VERDICT.

This case is controlled by *Olsen v. Reid* (2008) 164 Cal.App.4th 200. In that case, *supra*, on remarkably similar facts, the Court of Appeal reversed a trial court's post-verdict reduction based upon an ambiguous medical bill "adjustment."

In *Olsen v. Reid, supra,* the plaintiff suffered injuries when she was struck from behind by a motorized wheelchair. Prior to trial, the court excluded reference to any medical payments or reductions and reserved the matter for a post-trial motion. (*Id.* at 202.) The trial record indicated that plaintiff was billed $62,475.81 for medical care. The jury awarded that amount for "past economic loss, including medical expenses." (*Id*.)

After the trial, defendant filed a motion to reduce the jury's verdict, relying on *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 and *Nishiama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298. Defendant claimed she was entitled to a reduction in the verdict of $57,394.24 because the hospital had "written off" that portion of plaintiff's bills. In support of the motion, defendant submitted a bill from Anaheim Memorial Hospital that included line items starting with "ADJ" presumably meaning "adjustments." The "Total payments & adjustments" was listed as "$55,094.20--." (*Id*.)

Based upon that record, the trial court granted defendant's reduction motion and reduced the verdict accordingly. (*Id*. at 203.) The Court of Appeal ***reversed the trial court***, stating:

"Despite [defendant's] arguments to the contrary, we find it far from clear as to what was paid, if anything, was "written off," and to what extent [plaintiff] remained liable for any further charges. The cryptic notations the court relied upon may reflect payments, or write-downs or write-offs; we cannot know . . . ." (*Olsen v. Reid, supra,* at 203.) "We therefore find the trial court erred in reducing the amount of the jury verdict. We reverse this order and direct the trial court to enter a new judgment reflecting the full amount of the jury's verdict." (*Id*.)

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Applying *Olsen v. Reid, supra*, to the case at bar, it would invite obvious error to reduce a jury verdict based upon an outdated "statement" with just the cryptic description "adjustment." It is pure speculation what was meant by that entry 15 months ago and nothing in defendant's motion sheds any light on the cryptic description. More importantly, there is no evidence submitted that the aged "statement" is current or that the hospital will extinguish Mr. Varderesyan's debt for that amount. In fact, there is evidence to the contrary that the hospital assigned its claim to a third-party and may not even own the debt.

The facts are even more compelling in our case. In *Olsen v. Reid, supra*, the facts introduced at trial were undisputed as to the amount of the past medical bills being awarded for the hospital bill only. In the present case, the hospital bill itself was never entered into evidence. Plaintiff elicited testimony that the reasonable cost for the hospitalization was $95,000 to $100,000 and, from the treating surgeon, that the reasonable cost for his services alone was at least $20,000. In contrast to every other reported case, we do not have a conclusive "breakdown" on how the jury arrived at its past medical expenses award.

As the record stands, if the Court were to "reduce" the past medical expenses, plaintiff may well be faced with having to pay $97,000, or more, while defendant is improperly credited to pay only $23,000. The court should not engage in such post-trial speculation which could create such an inconsistent result.

IV. THE TRIAL COURT CANNOT WEIGH THE QUESTIONABLE EVIDENCE SUBMITTED AND IGNORE SUBSTANTIAL EVIDENCE SUPPORTING THE FULL AMOUNT OF THE JURY VERDICT.

In *Clemmer v. Hartford* (1978) 22 Cal.3d 865, the California Supreme Court affirmed the standard for ruling on a motion for JNOV which is probably the standard is this "unauthorized" motion:

> "The trial court's power to grant a [JNOV] is identical to his power to grant a directed verdict. The trial judge cannot re-weigh the evidence, or judge the credibility of witnesses. If the evidence is conflicting or if several reasonable inferences can be drawn,

the motion for [JNOV] must be denied. A motion for [JNOV] may be properly granted *only* if it appears from the evidence, *viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict.* If there is any substantial evidence or reasonable inferences to be drawn therefrom in support of the verdict, the motion should be denied." (*Id*. at 877-78; citation omitted, emphasis added.)

Likewise, "when reviewing the validity of a [JNOV], an appellate court must resolve all reasonable inferences there from in favor of the jury's verdict." (*Czubinsky v. Doctors Hospital* (1983) 139 Cal.App.3d 361, 364.) In ruling upon a JNOV, a trial court may not *weigh the evidence or assess witness credibility*. (*Id*.)

In the instant case, Mr. Varderesyan met his burden of proof regarding the reasonable cost of his medical care. We do not know how the jury reached its number in light of the testimony of Drs. Miller and Galloni as the actual medical bills were never introduced. Defendant's argument that Dr. Miller suggested a lower number for Mr. Varderesyan's hospitalization is clearly disputed.

Evidence of an unpaid medical bill is properly excluded. (See, *Calhoun v. Hildebrandt* (1964) 230 Cal.App.2d 70, 73.) Moreover, the courts have regularly held that unpaid bills for hospital services do not prove the reasonable value of such services and are insufficient to support an award. (See, *Linde v. Emmick* (1936) 16 Cal.App.2d 676, 684.)

In order for this court to reach a conclusion regarding the existence of an "adjustment" notated 15 months ago, it would have to *weigh the evidence* or *assess witness credibility* in the context of a purported motion for JNOV. Since no evidence had been presented at trial or in the context of the moving papers regarding the alleged "adjustment" of the White Memorial Bill, the trial court would have to improperly engage in its own independent evidentiary assessment regarding such an "adjustment." That is not a proper function in the context of a motion for JNOV.

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V. AN OFFERED REDUCTION OF A MEDICAL BILL IS A "COLLATERAL SOURCE" UNDER CALIFORNIA LAW

If the court ever reaches the substantive issue, the motion should still be denied because the collateral source rule is still well-recognized by the courts of this state. A defendant may not mitigate damages from collateral payments where the plaintiff has been compensated by an independent source, such as insurance, pension, continued wages or disability payments. (*Helfend v. So. Cal. Rapid Trans. District* (1970) 2 Cal.3d 1.) Recoveries from a source wholly independent of the wrongdoer are therefore inadmissible. (*DeCruz v. Reed* (1968) 69 Cal.2d 217*; Acosta v. So. Cal. Rapid. Trans. District* (1970) 2 Cal.3d 19*; Hrnjack v. Graymar, Inc.* (1971) 4 Cal.App.3d 725*).*

The collateral source rule is (still) the law in California. Even the errant *Cabrera v. E. Rojas Properties, Inc.* (2011) 192 Cal.App.4th 1319, cited by defendants, is clearly distinguishable from the facts at bar because it involved confirmed payments by an insurer and stipulations regarding the acceptance of those payments to extinguish the medical debt. The *Cabrera* case appears to be in direct conflict with the California Supreme Court on the substantive collateral source issue. (See, *Helfend v. So. Cal. Rapid Trans. District* (1970) 2 Cal.3d 1.) As recognized in *Olsen v. Reid, supra*:

> "Subsequent cases have reaffirmed the continuing vitality of the [collateral source] rule. In *Arambula v. Wells*, (1999) 72 Cal.App.4th 1006, 85 Cal.Rptr.2d 584 (*Arambula*), the plaintiff, who worked for a family-owned company, continued to receive his weekly salary from his brother after a car accident. The plaintiff did not prove at trial that his brother had the right to be reimbursed, and the trial court therefore instructed the jury not to award damages for lost earnings. (*Id*. at pp. 1008-1009, 85 Cal.Rptr.2d 584.)
>
> "We found this was error, holding that the collateral source rule allowed the plaintiff to recover despite his receiving compensation from an external source. (*Arambula, supra*, at 72 Cal.App.4th at p. 1009, 85 Cal.Rptr.2d 584.) We held that public policy weighed heavily in favor of applying the collateral source rule to gratuitous payments. (*Id.* at p. 1012, 85 Cal.Rptr.2d 584.) Further, we noted that the "collateral source rule also recognizes the inadequacies of damage awards for personal injuries. That is because '[l]egal "compensation" for personal injuries does not actually compensate. Not many people would sell an arm for the average or even the maximum amount that juries award for loss of an arm. Moreover the injured person seldom gets the compensation he "recovers," for a substantial attorney's fee usually comes out of it. The Rule helps to

> remedy these problems inherent in compensating the tort victim.' (Note, *California's Collateral Source Rule and Plaintiff's Receipt of Uninsured Motorist Benefits* (1986) 37 Hastings L.J. 667, 672.)" (*Id*. at pp. 1009-1010, fn. 7, 85 Cal.Rptr.2d 584.)"

In *Arumbula v. Wells* (1999) 72 Cal.App.4th 1006, the Court held that a gratuitous payment also qualified as a "collateral source." In that case, the Court rejected some of the very same arguments advanced by defendant in our case and found that that nothing in the California Supreme Court case of *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, prevented application of the collateral source rule to other financial benefits received by plaintiff. To the contrary, the Court held that a defendant tortfeasor should not receive the "windfall" of such benefits:

> "[S]everal post-*Helfend* decisions have allowed plaintiffs to recover the costs of gratuitous medical care as an element of their damages even without any contractual right to reimbursement. (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 644 . . . [parents who cared for minor child can recover special damages for reasonable costs of such care based on prevailing rates for home care nurses, even though services were rendered 'without an agreement or expectation of payment']; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 662, . . . [same with respect to wife who provided 24-hour-a-day attendant care to her injured husband: 'Insofar as gratuities are concerned, the rule appears to be in keeping with the collateral source rule rationale.']; see also *Pacific Gas & Electric Co. v. Superior Court*, *supra*, (1994) 28 Cal.App.4th at p. 180, ['[I]n California even [gratuitous] benefits are subject to the collateral source rule.'].) [Defendant]'s proposal would create a conflict in the law with the case authority *Hanif*, *Rodriguez* and *Pacific Gas & Electric Co*."

The *Arumbula* court cited with approval a persuasive case from outside this jurisdiction on remarkably similar facts. In *Montgomery Ward & Co. v. Anderson* (1998) 976 S.W.2d 382, the Court held that the "***forgiveness of a debt for medical services is a collateral source to be sheltered***" by the collateral source rule. (*Id.* at pp. 383-85, emphasis added.) (A copy of the *Montgomery Ward* Case is attached hereto as Exhibit "2.") In that case, the plaintiff had reached an agreement with her healthcare provider that it would discount the bill by 50 percent. (*Id.* at 383.) The court based its holding that the collateral source rule applied on the policy underlying the collateral source rule. (*Id*. at pp. 384-85.)

The collateral source rule is not limited to protecting merely the cash amounts paid to providers for services rendered; rather, the rule is broad enough to encompass the amount by which a medical provider's bill may or may not be discounted pursuant to a contractual arrangement between the provider and third-party payor or otherwise. Defendant's "windfall" argument is simply unsupported. As stated in *Arumbula, supra*, "The rationale of the collateral source rule thus favors sheltering gratuitous gifts of money or services intended to benefit tort victims, just as it favors insurance payments from coverage they had arranged. No reason exists in these circumstances to confer a bonanza upon the party causing the injury."

In this case, if the verdict is unilaterally reduced, the only party that will gain is the tortfeasor who inflicted the injury. The victim will be left without resources to pay ***all or any*** of his medical bills. The hospital, if it ever even accepted a potential "adjustment," will be providing the tortfeasor with a windfall at its own expense. Perhaps more importantly in our case, and the controlling issue, is that a "collateral" benefit has not been unequivocally established. From the inadequate foundational evidence proffered, it is far from clear as to what, if anything is "adjusted," and to what extent Mr. Varderesyan currently remains liable for the charges incurred.

VI. THE CABRERA CASE CITED BY DEFENDANT IS DISTINGUISHABLE AND DOES NOT SUPPORT A REDUCTION OF THE VERDICT.

Defendant puts great stock in the errant *Cabrera v. E. Rojas Properties, Inc.* (2011) 192 Cal.App.4th 1319, which is clearly distinguishable from the facts at bar and was decided on peculiar facts. In *Cabrera, supra*, the parties ***stipulated*** to the correctness of all of the medical provider's billings and they ***stipulated*** to all of the amounts actually paid by the plaintiff's health insurer. (*Id.* at 1323.) This circumstance is clearly different than the facts presently at bar and makes the court's analysis completely irrelevant. In our case, defendant vigorously opposed the correctness of the medical billings and refused to stipulate to anything. We do not know what made up the jury's determination of past medical expenses and billings were not introduced at

trial. There is no evidence of payment by an insurer, and the amount currently owing to all of Mr. Varderesyan's providers is speculative, at best.

On the stipulated facts presented, the *Cabrera* court held that the collateral source rule did not preclude reducing compensation from the amount billed by the medical provider to the ***amount actually paid and accepted by the health insurer.*** (*Id.* at 1326.) Based upon those unique and certain facts, the court found that existing law supported a reduction ***to the amounts actually paid by the health insurer.*** (*Id.* at 1327.) The court emphasized the fact that the amount ***actually paid*** was conclusive evidence of the reasonable value for the medical services. (*Id.* at 1327, citing *People v. Bergin* (2008) 167 Cal.App.4th 1166.)

The *Cabrera* court was careful to note that in its case, "there is no dispute what Cabrera's insurer paid and what was written off by the hospital. (Cf. *Olsen v. Reid* (2008) 164 Cal.App.4th 200, 203 . . . [finding it improper to reduce damages where it was unclear what was paid].) Nor is there any evidence that Cabrera continued to remain liable for any charges. (See, *ibid.* [finding reduction improper where unclear whether victim remained liable for any damages].)" (*Id.* at 1328, fn 4.) This is precisely the situation in our case.

Further the *Cabrera* court acknowledged that the "reduction" in its case was not received by Cabrera from an independent source---like the hospital in the present case. The *Cabrera* further contrasted the situation in *Arambula v. Wells* (1999) 72 Cal.App.4th 1006, where the collateral source was completely "gratuitous"---as in the present case. (*Id*. at 1328.)

This court should not extend *Cabrera* beyond its peculiar facts where there is no evidence of what was paid and what was actually accepted by all the medical care providers.

VII. EQUITABLE REASONS FOR REDUCING THE JURY'S VERDICT ARE NOT PRESENT IN THIS CASE.

Throughout defendant's brief it is asserted that; plaintiff should not be allowed to "pocket the windfall" of the amount awarded by the jury (Moving Papers, p. 4, ln 19-20.); plaintiff should not be bestowed a "profit" or "windfall" (Moving Papers, p. 6, ln 14.); plaintiff would

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receive "an undue profit or windfall (Moving Papers, p. 7, ln 13.); and plaintiff should not be entitled "to a windfall" (Moving Papers, p. 9, ln 7.)

However, as set forth more fully in the attached declaration of Barry P. Goldberg (¶ 18), the only party in line to receive a windfall is the tortfeasor which caused the damage in the first place. ***If the Court were to reduce the verdict, after attorney fees and trial costs, there would not be sufficient funds to pay any medical costs, let alone money for the actual victim.***

The so-called equitable reasons for reducing a jury verdict are not present in this case. Perhaps that is why several cases which have considered the reduction have done so only where the medical care providers have ***actually been paid***. There are no cases---nor should there be---where the tortfeasor is relieved of a jury's verdict to the detriment of the medical care providers. The question in this case to White Memorial Hospital should be; if you agreed to adjust your bill 15 months ago, are you now willing to accept $0 for the $97,000 incurred by Mr. Varderesyan? Because ***if the verdict is reduced, there will be no funds to pay any medical care providers***.

To make matters worse, and to further dispel defendant's less than earnest concern about bestowing a windfall on plaintiff, is that a possible reduction will drop the verdict below defendant's CCP 998 Offer. Not only will the medical care providers receive nothing, the victim may end up owing money to the defendant for trial costs and expert fees. This would be an intolerable result. (Dec. of Goldberg ¶ 18.)

Applying *Olsen v. Reid*, *supra*, to the case at bar, it would invite obvious error to reduce a jury verdict based upon an outdated "statement" with just the cryptic description "adjustment." It is pure speculation what was meant by that entry 15 months ago and nothing in defendant's motion sheds any light on the cryptic description. More importantly, there is no evidence submitted that the aged "statement" is current or that the hospital will extinguish Mr. Varderesyan's debt for that amount. In fact, if the verdict is reduced, the hospital bill will never be paid.

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VIII. CONCLUSION.

Although some cases have strayed from the collateral source rule, and part of the issue is presently before the California Supreme Court, the reasons for the rule in the first place support denial of defendant's motion:

"The collateral source rule has long been a part of California law. 'The rule derives its earliest articulation in cases of equity and admiralty, where a wrongdoer was held to be responsible for injury irrespective of whether anyone else provided protection or indemnity to the victim. "The respondent is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done." [Citation.]' (*Smock v. State of California* (2006) 138 Cal.App.4th 883, 886 [41 Cal.Rptr.3d 857] (Smock).)

"The doctrine has been reaffirmed numerous times over the years. (*De Cruz v. Reid* (1968) 69 Cal.2d 217, 223-227 [70 Cal.Rptr. 550, 444 P.2d 342].) The principle has been applied to payments received through insurance (*Peri, supra,* 22 Cal.2d at p. 131), wages received from a plaintiff's employer (*Tremeroli v. Austin Trailer Equip. Co.* (1951) 102 Cal.App.2d 464, 482 [227 P.2d 923]), payments under workers' compensation statutes (*Baroni v. Rosenberg* (1930) 209 Cal. 4, 6 [284 P. 1111]), and myriad other factual situations." (*Olsen v. Reid* (2008) 164 Cal.App.4th 200, 204-05.)

To the extent that some courts have turned the collateral source rule on its head and, in fact, are using it to confer a windfall to tortfeasors, this court should decline to follow such misapplication. Based on the foregoing, it is respectfully submitted that defendant's motion should be denied.

DATED: June 9, 2011

BARRY P. GOLDBERG,
A Professional Law Corporation

BY: _____
BARRY P. GOLDBERG, Attorney for Plaintiff AZAT VARDERESYAN

DECLARATION OF BARRY P. GOLDBERG

I, BARRY P. GOLDBERG, declare:

1. I am an attorney at law licensed to practice before the Courts of the State of California and am the principal in the law firm of Barry P. Goldberg, A Professional Law Corporation. As such, I am the attorney of record for Plaintiff AZAT VARDERESYAN. I have personal knowledge of the following facts and if called upon to testify, I could and would competently testify to those facts.

2. I make this declaration in opposition to defendant's belated motion to reduce jury verdict.

3. Defendant's "motion" was not served with sufficient notice in accordance with CCP § 1005. The motion had to be personally served at least 16 *court* days before the hearing. Defendant has had 19 days to prepare this motion. Defendant will also have 5 days to reply to this opposition and ***plaintiff has only 5 days to prepare an opposition to this motion***. Such timing is, on its face, is unfair and prejudicial to the plaintiff. The motion should be denied on that basis alone.

4. On April 21, 2011, after the verdict was read, the court inquired whether May 27, 2011 was sufficient time for defendant to bring its post-trial reduction motion. Counsel stated that it was sufficient and the date was reserved and the court set an OSC re signing of the verdict. Although there is no agreed authority for the bringing of these types of motions for a non-public entity, the court fashioned an elegant solution by reserving the signing and entry of judgment until May 27, 2011. Otherwise, the judgment would have had to be entered within 24 hours.

5. The Court asked plaintiff's counsel to prepare and submit a judgment form. Counsel waived notice of the court's scheduling of the OSC re the signing of the verdict. Contrary to counsel's assertion, plaintiff's counsel never waived plaintiff's right to proper service of the motion and sufficient time to oppose the motion.

6. Pursuant to the court's order, plaintiff timely prepared and lodged the judgment form on April 27, 2011, with notice to counsel. On May 3, 2011, counsel served a so-called

"Objection to Proposed Judgment on Special Verdict." That objection states; "Entry of Judgment is premature pending the outcome of defendant's post-trial motion to reduce the verdict as to past medical expenses, set for hearing on May 27, 2011." Accordingly, as of May, 3, 2011, defendant knew full well that its motion must be filed with sufficient time to be heard on May 27, 2011. Notwithstanding that knowledge, counsel waited until ***after*** the proper notice period elapsed, then served its belated motion. No ex parte order was obtained for the belated filing. Instead, counsel baldly states that plaintiff knew of the hearing ***and waived notice***. Such "slight of hand" should not be sanctioned by the court. Plaintiff never waived the statutory motion timing protections.

7. In late February or early March 2011, I personally telephoned the billing office at White Memorial Hospital in anticipation of the hearing on the Motion in Limine I filed concerning the Reference to Medical Bill Reduction Offer by Hospital as Collateral Source. I wanted to have additional information for the court should such an inquiry be made and I wanted to be prepared to cross-examine the so-called custodian of records which was listed on defendant's witness list. At that time, I spoke to a Hispanic female who worked in the billing office and inquired about the status of Mr. Varderesyan's bill. ***The woman informed me that the account had been assigned to a third-party collection agency***.

7. On April 11, 2011, the trial court heard and ruled on several motions in limine, including Plaintiff's Motion In Limine No. 4A to Exclude Reference to Medical Bill Reduction Offer by Hospital as Collateral Source. The court granted that motion and no evidence of a purported reduction or collateral source would be permitted at trial.

8. At the request of defendant, the court specifically reserved the issue of a collateral source reduction for a post-trial motion, but did not relieve the defendant of the requirements with respect to any such post-trial motion. Plaintiff contends that it was incumbent upon defendant to secure the reporter's transcript of the trial knowing in advance that it planned such a motion. It is improper for the court to rely on disputed and inaccurate hearsay regarding trial testimony as a foundation to drastically reduce a jury's verdict.

9. Contrary to defendant's suggestion, at trial, there was no significant dispute that the vast majority of the medical expenses incurred by Mr. Varderesyan were reasonable and necessary in light of his severely comminuted femur fracture and intermedullary rod surgery. Defendant's hearsay recitation of the facts presented at trial is simply wrong or insufficient. A separate Objection to Defendant's Evidence has been lodged concurrently herewith.

10. My copious notes from the trial confirm that the defense medical expert, Geoffrey Miller, M.D., unequivocally testified that the reasonable value of Mr. Varderesyan's hospital treatment was between $95,000 and $100,000. Dr. Miller was confronted with his deposition testimony wherein he was asked to review the medical bills from the subpoena order totaling $195,000. The cross-examination went something like this:

Q. Do you remember me handing you the hospital medical bills totaling $195,000?
A. Yes.
Q. At that time you testified that you were qualified to examine such records and determine whether the costs incurred for the services rendered were reasonable and necessary. Do you recall that?
A. Yes.
Q. And, I handed you several pages of medical bills at your deposition and you took time to review the bills page by page. Do you recall that?
A. Yes.
Q. After reviewing those records, you concluded that that the reasonable and necessary costs for Mr. Varderesyan's hospital stay was about half of $195,000---between $95,000 and $100,000. Correct?
A. I recall that.
Q. Is it still your opinion that the reasonable and necessary costs for Mr. Varderesyan's hospital stay is between $95,000 and $100,000?
A. Yes.

11. ***On re-direct***, Dr. Miller testified he had ***seen*** hospital bills for similar surgeries to be as low as $25,000. However, he qualified that statement by testifying that, in certain cases, some patients were able to leave the hospital after 3 days. He never testified that the reasonable value of the services rendered to Mr. Varderesyan was less than $95,000 to $100,000.

12. Although it is true that Dr. Galloni was not permitted to testify concerning the reasonable cost of Mr. Varderesyan's hospital stay, Dr. Galloni was permitted to testify

concerning the reasonable cost of his own surgical fee. ***He testified that his fee alone was at least $20,000. Defendant omits mention of this testimony in its moving papers.*** Constantine Boukidis, M.A., an economist, testified that based upon information provided to him from the depositions of Dr. Rosen and Dr. Miller, the reasonable cost for Mr. Varderesyan's hospital stay was $97,000. Mr. Varderesyan testified that he was told that his hospital bill totaled over $100,000. The actual medical bills were not introduced at trial.

13. Against this background, the jury awarded $95,000 for past medical expenses. It will never be known whether the jury considered Dr. Galloni's surgical fee in making its award. Therefore, it cannot be ascertained from the verdict what amount was credited to the hospital bill. It would be an improper function of this court to unilaterally conclude that Dr. Galloni's fee was not considered by the jury and that the $95,000 was for the hospital bill and the hospital bill only.

14. The "statement" upon which defendant relies is of a dubious provenance. From looking at the statement itself it appears that in January 2010, over 15 months ago, White Memorial Hospital produced that statement and apparently sent it directly to Defendant DHE for "informational purposes." ***That statement was never sent to Mr. Varderesyan or to my office***. The aged statement reflects a ***proposed*** adjusted balance due to the hospital in an apparent attempt to compromise the bill which was a fraction of the reasonable value of the services rendered. Several reasonable inferences can be derived from this cryptic note. It would appear that the dramatic ***proposed*** adjustments that were offered by the hospital at that time reflected the equivalent of a worker's compensation credit, insurance, insurance-like benefits, or otherwise. Mr. Varderesyan was "listed" in the medical records as an employee of DHE. DHE subsequently denied workers' compensation benefits to Mr. Varderesyan. It is equally possible that the hospital was just trying to raise money at that time and was offering some sort of "deal." A questionable copy of that statement is attached to defendant's motion as Exhibit "A".

15. In early December 2009, my office received a copy of a deposition subpoena from defendant's copy service "Macro Pro." We sent back the form and ordered the subpoenaed

BARRY P. GOLDBERG,
A PROFESSIONAL LAW CORPORATION

records which included billing from White Memorial. In or about the last week of January 2010, I received the purported billing records from Macro Pro. I also paid the invoice for same. Attached hereto as Exhibit "1", is a true and correct copy of the records that I received which are demonstrably different from the records proffered by defendant in this motion. For instance, the custodian signed on January 27, 2010 and ***the statement itself is 17 pages as opposed to the 8 pages proffered by defendant***. In addition, ***the amount listed as incurred was $195,000 rather than $97,000 as proffered by defendant***. In fact, I used this larger total amount when I cross-examined Dr. Miller at his deposition.

16. Defendant's purported statement was produced from a different subpoena which was not provided to me. It is unclear why there was a change in the documents produced in a matter of a few days difference. There was no explanation provided by the custodian of records.

17. I have never received an explanation as to what the so-called "adjustment" offer to DHE meant 15 months ago. I have not been provided with any unequivocal assurance that any offers of reduction are current or available. To the contrary, I was informed that the account was assigned to a third-party.

18. Even if the purported "adjustment" were to be available, if the court were to reduce this verdict in the amount requested by defendant, there simply would not be any funds to actually pay such a bill, after deductions for attorney fees and trial costs. Therefore, the reliability of the so-called "adjustment" would, in fact, be non-existent.

19. To complicate matters, if the court were to reduce this verdict in the amount requested by defendant, the defendant would beat its CCP 998 Offer to Compromise. In addition to attorney fees and trial costs, plaintiff could potentially be liable for defendant's trial and expert costs. This inequitable result would not only guarantee that medical care providers would never be paid, the injured plaintiff may be affirmatively liable to defendant above and beyond any recovery in the case. Therefore, again, the reliability of the so-called "adjustment" would, in fact, be non-existent. The defendant would be the only recipient of a "windfall."

20. A persuasive case comes from outside this jurisdiction on remarkably similar facts and has been cited with approval by California Courts. In *Montgomery Ward & Co. v. Anderson* (1998) 976 S.W.2d 382, the Court held that the "forgiveness of a debt for medical services is a collateral source to be sheltered" by the collateral source rule. (*Id.* at pp. 383-85.) A true copy of the *Montgomery Ward* Case is attached hereto as Exhibit "2."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this __, day of May, 2010 at Woodland Hills, California.

Barry P. Goldberg

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 21650 Oxnard Street, Suite 1960, Woodland Hills, California, 91367.

On May __ 2011, I served the within documents described as:

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORTIES IN OPPOSITION TO DEFENDANT'S NOTICE OF MOTION AND MOTION TO REDUCE THE VERDICT AS TO DAMAGES AWARDED FOR PAST MEDICAL EXPENSES

on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, addressed as follows:

David M. Phillips, Esq.
POLLARD, MAVREDAKIS, CRANERT,
CRAWFORD & STEVENS
800 E. Colorado Blvd
Pasadena CA 91101
ATTY FOR DEFENDANT DHE

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day with postage fully prepaid thereon at Woodland Hills, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May __, 2011, at Woodland Hills, California.

_____
SARAH OREFICE