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CASE NO. 51317-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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CESAR BELTRAN-SERRANO, an incapacitated person, individually,  
and BIANCA BELTRAN as guardian *ad litem* of the person and estate of  
CESAR BELTRAN-SERRANO,

Respondents,

v.

CITY OF TACOMA, a political subdivision of  
the State of Washington,

Petitioner.

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**RESPONDENTS' ANSWER TO  
WASHINGTON DEFENSE TRIAL LAWYERS AMICUS BRIEF**

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## I. INTRODUCTION

The Washington Defense Trial Lawyers Association (WDTL) asks this Court to abrogate hundreds of years of common law by holding, as a matter of law, that a defendant in a personal injury action may introduce evidence of collateral benefits to reduce a plaintiff's damages. WDTL's argument is in direct violation of Washington's well-established collateral source rule.

WDTL attempts an end-run around the collateral source rule by first attempting to claim that "the collateral source is never implicated" in its amicus brief, but then asks this Court to adopt the California rule that does just that as announced in *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4<sup>th</sup> 541, 257 P.3d 1130, 129 Cal. Rptr. 3d 325 (2011). WDTL Amicus Brief, 2. It is difficult to reconcile how the methodology employed by Dr. Wickizer would "never implicate" the collateral source rule. In response, WDTL has argued that collateral sources are only those which actually paid benefits on the plaintiff's behalf. Professor Wickizer may testify, WDTL asserts, precisely because he is not testifying about the plaintiff Mr. Beltran-Serrano. This is problematic, as noted by the trial court, because it is detached from the trial inquiry—real life economic damages—and because it contravenes the evidentiary principles of the collateral source rule.

WDTL's requested sea change in legal doctrine would cap past medical costs based on what a made-up or real collateral source paid. *See*, WDTL Amicus Brief, 2. Not only is this directly barred by Washington's collateral source rule, but WDTL's requested rule would reward those who do not purchase insurance while punishing the most vulnerable who are either on Medicare or Medicaid. It would also make the value of the same medical service vary based on who paid the bill as opposed to who provided the service. Medical services such as those provided to Mr. Beltran-Serrano should have the same value no matter whether a person is insured or uninsured, and whether they have resources or not. Washington's current application of the collateral source rule creates an even system for all no matter who they purchase insurance from. This is one of the reasons the majority of states agree with Washington that "plaintiffs are entitled to claim and recover the full amount of reasonable medical expenses charged, based on the reasonable value of the medical services rendered, including amounts written off from the bills pursuant to contractual reductions." *See e.g., Lopez v. Safeway Stores, Inc.* 212 Ariz. 198, 129 P.3d 487, 492 (2006). WDTL advocates for the minority view on collateral source—one that the Washington Supreme Court has repeatedly declined to follow for over a century.

There is no reason to throw out Washington's 105 year "rule of strict exclusion of evidence of collateral benefits" in personal injury actions—especially when doing so creates a system of second class citizens, rewarding only tortfeasors who harm others. *See Sutton v. Shufelberger*, 31 Wn. App. 579, 583, 643 P.2d 920 (1982). Accordingly, this Court should continue to follow Washington's established collateral source rule and deny WDTL's invitation to overturn clear Washington Supreme Court precedent.

Nothing in WDTL's brief substantiates the methodology underlying Dr. Wickizer's opinions or explains how the collateral source rule is not implicated. Dr. Wickizer admits that he uses Medicare payment data in order to determine the reasonable value of medical services. He then adds an arbitrary self-created profit margin for the hospital. Following his methodology, the jury could actually award less than the amount paid by a private insurer for medical benefits, or in the case where no insurance exists at all it would put the plaintiff in a position of potentially owing more to a hospital or medical provider than was awarded by the jury. (WDTL completely ignores the fact insurers have a right to subrogation and that where no insurance exists hospitals apply a lien that requires full payment of the amount billed.) Dr. Wickizer readily admits that in coming up with amounts for physician's services that he uses the amount that Medicare pays. This is a collateral source which is inadmissible as a matter of law.

Because the methodology underlying his opinions violates the collateral source rule and relies on inadmissible data his opinions regarding the reasonable value of medical service should be excluded.

## II. ARGUMENT

The proposed approach of the Washington Defense Trial Lawyers necessarily implicates the collateral source rule and as such should be rejected by this Court in accordance with Washington law. The principle that a collateral source may not be taken into consideration when assessing the damages that the defendant must pay is a well settled area of law.

It is well established that the fact a plaintiff receives, from a collateral source, payments of this nature which have a tendency to mitigate the consequences of the injury that he otherwise would have suffered, may not be taken into consideration when assessing the damages the defendant must pay. *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 P. 843 (1913); *A. H. Bull Steamship Co. v. Ligon*, 285 F.2d 936 (1960); 75 A.L.R.2d 885; 15 Am.Jur., Damages § 198.

*Stone v. City of Seattle*, 64 Wn.2d 166, 172, 391 P.2d 179 (1964).

WDTL makes no attempt to explain how Dr. Wickizer's methodology does not implicate collateral sources. Indeed, WDTL cannot. WDTL avoids the collateral source rule entirely in its argument, instead launching into a treatise on healthcare economics. WDTL would have this Court abolish the collateral source rule and ask juries to sift through expert opinion which relies on big data far removed from the reality of Mr. Beltran-

Serrano's injuries and treatment. The opinions of Dr. Wickizer, and his methodology, should firmly be rejected by this Court as violative of the collateral source rule and public policy.

**A. WDTL's Reliance on Out-of-State Authority should not be Persuasive to this Court and is Contrary to Washington law**

WDTL relies entirely on out-of-state authority to attempt to justify Dr. Wickizer's opinions. First it asks this Court to adopt the much criticized and minority California rule which plainly abandons the collateral source rule. Second, it claims that court's and case law approve of Dr. Wickizer's methodology. However, each of the cases that WDTL cites to have either abandoned the collateral source rule in its entirety, i.e. California, or have adopted a modified rule wherein they allow the jury to consider both the amount billed and the amount paid, *i.e. Patchette v. Lee*, 60 N.E.3d 1025, 1032 (Ind. 2016) (determination of the reasonable value of medical services permits evidence of both the amount billed and the discounted amounts accepted by health care providers). WDTL advocates for this because it recognizes that Dr. Wickizer's methodology can only be allowed if this Court abandons the collateral source rule.

As is further set out below, a majority of Courts hold as Washington does and enforce the collateral source rule excluding evidence of amounts paid by collateral sources including Medicare. See Section B2 *infra*. The

minority approach, as advocated by WDTL and as set forth in the *Howell* case relied on by WDTL, has been firmly rejected by the majority of courts who have considered the same issues. *See e.g., Dedmon v. Steelman*, 535 S.W. 3d 431 (2017); *McConnell v. Wal-Mart Stores, Inc.*, 995 F. Supp. 2d 1164 (D. Nev. 2014). Significantly, “[f]ew other courts have chosen to follow this approach. Where they have, the result is often dictated to some extent by statute”. *Dedmon*, 535 S.W. 3d at 455. WDTL is asking this Court to reject hundreds of years of precedent in favor of adopting a rule which “has been the subject of criticism” and called “schizophrenic” and “incoherent”. *Dedmon*, 535 S.W. 3d at 456 (internal citations omitted).

Finally, WDTL does not deliver on its promise and does not cite to a single court that permitted an expert to testify based on Dr. Wickizer’s methodology. None exist. Dr. Wickizer is alone in his use of Medicare CCR data in order to determine the reasonable cost of medical services.

#### **B. The Collateral Source Rule is a Bar to WDTL’s Novel Request**

WDTL’s request to use Medicare federal cost data, a collateral source, instead of the reasonable value of medical care violates the collateral source rule. *Cox v. Spangler*, 141 Wn.2d 431, 440-41, 5 P.3d 1265 (2000). This method doesn’t examine “the reasonable value of necessary medical

care” as required by WPI 30.07.01, but serves one purpose: reducing medical bills in the context of litigation. CP, 306:11-16.

Since 1913, Washington courts have applied a “rule of strict exclusion of evidence of collateral benefits” in personal injury actions. *See Heath v. Seattle Taxicab Co.*, 73 Wn. 177, 186, 131 P. 843 (1913); *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 804, 953 P.2d 800 (1998); *Sutton v. Shufelberger*, 31 Wn. App. 579, 583, 643 P.2d 920 (1982). Under this rule, plaintiffs in negligence actions are entitled to recover the reasonable value of medical services provided to them, not the amount that a collateral source paid for those services. *See Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000); *Ciminski v. SCI Corp.*, 90 Wn.2d at 803; *Hayes v. Weiber Enterprises*, 105 Wn. App. at 616. Even when it is otherwise relevant, proof of such actual and hypothetical collateral sources is excluded, lest it be improperly used by the jury to reduce the plaintiff’s damage award. *Boeke v. International Paint Co.*, 27 Wn. App. 611, 618, 620 P.2d 103 (1980) (quoting *Reinan v. Pacific Motor Trucking Co.*, 527 P.2d 256 (1974)).

The leading case is *Ciminski v. SCI Corp.* In *Ciminski*, the plaintiff, a 73-year-old widow, fell in the defendant’s restaurant and sustained severe hip injuries. Medicare paid \$14,000 for her medical expenses. The jury returned a verdict for \$79,000 in favor of the plaintiff. The defendant then moved to reduce the award by the amount of the Medicare benefits that the

plaintiff received. The trial court denied the motion on the ground that the payments were from a collateral source and the defendant appealed.

The Supreme Court affirmed, rejecting the arguments that the plaintiff was not entitled to the benefit of the collateral source rule because she had not paid into Medicare. *Ciminski* makes clear that the collateral source rule requires exclusion of evidence of the amount that Medicare or Medicaid could have paid to plaintiff's medical providers. Dr. Wickizer's attempt to inject collateral sources into personal injuries is barred by *Ciminski*.

1. *MEDICARE REIMBURSEMENT RATES ARE NOT ADMISSIBLE ON THE ISSUE OF THE "REASONABLE VALUE" OF THE MEDICAL SERVICES PROVIDED TO PLAINTIFF.*

WDTL asks the Court to permit tortfeasors to use amounts paid by Medicare and Medicaid for medical care to represent the reasonable value of the medical care. In *Cox v. Spangler*, our Supreme Court held that the collateral source rule precludes the introduction of collateral source evidence even when such evidence is ostensibly offered for another purpose:

In reaching our decision, we are not unmindful of Spangler's contention that evidence that Cox received industrial insurance benefits should have been admitted for a variety of purposes ... In making this argument, Spangler ignores the point that though evidence of collateral source compensation may well be relevant for a variety of purposes, such evidence is excluded on the basis

that it is unfairly prejudicial because the jury could use it for improper purposes. As we said in *Johnson v. Weyerhaeuser*: “[t]he very essence of the Collateral Source Rule requires exclusion of evidence of other money recovered by the claimant so the fact finder will not infer the claimant is receiving a windfall and nullify the defendant’s responsibility.” 134 Wn.2d at 803. Thus, **even when it is otherwise relevant, proof of such collateral payments is usually excluded, lest it be improperly used by the jury to reduce the plaintiff’s damage award.**

*Cox*, 141 Wn.2d at 440-441 (emp. added).

The holding in *Cox* not only is the law, it is a ruling grounded in common sense. As the *Cox* court acknowledged, to admit such evidence, even for another purpose such as challenging the reasonableness of the amounts charged to the plaintiff for health care services, would invite the jury to improperly reduce the plaintiff’s damage award based on what a collateral source paid. ER 403.

Hospitals and other health care providers are required to accept Medicare reimbursement rates even though those rates do not cover the providers’ cost for some services provided. In addition, as noted by WDTL hospitals are required to accept charity care which then requires the hospital to balance the services provided by charging more for services from those who can afford to pay higher prices. Because health care providers are forced to accept Medicare reimbursement rates for their Medicare patients, the fact that a health care provider accepts a set reimbursement rate has no bearing on the issue of whether or not the amount billed by the health care

provider was reasonable. *Hayes*, is directly on point. 105 Wn. App. at 616. In *Hayes*, the plaintiff's doctor billed \$5,800 for medical services but accepted \$3,300 from her health insurer as payment in full. *Id.* at 615. The defendant contended that the insurer's payment of \$3,300 was evidence of the "fair market value" of the plaintiff's medical care and sought to introduce evidence of the amount the doctor accepted as payment in full. The Court of Appeals affirmed the trial court's exclusion of evidence of the reduced rate negotiated with the doctor by the plaintiff's medical insurer, holding that the introduction of such evidence would violate Washington's collateral source rule. *Id.*, at 616. As *Hayes* makes clear, the amount accepted by a health care provider has no bearing on this issue. Just as the court ruled in *Hayes*, many courts characterize contractual write offs as a benefit or contribution received by the plaintiff from a collateral source and hold that the collateral source rule applies to such write offs. *See e.g., Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 129 P.3d 487, 492 (2006) ("A majority of courts have concluded ... that plaintiffs are entitled to claim and recover the full amount of reasonable medical expenses charged, based on the reasonable value of medical services rendered, including amounts written off from the bills pursuant to contractual reductions.").

Washington's decisions in this area accord with the Restatement (Second) of Torts § 924 & 920A (1979). Under Restatement § 924,

comment f, “[t]he value of medical services made necessary by the tort can ordinarily be recovered although they have created no liability or expenses to the injured person, as when a physician donates his services.” Thus, the Restatement permits a plaintiff to recover from a tortfeasor the reasonable value of the medical treatment that he or she receives whether plaintiff is liable to pay or pays the medical providers’ charges for that treatment, the providers waive those charges, or a third party pays or otherwise satisfies those charges. This is a rule of uniformity. Plaintiffs who incur the same injuries as a result of defendant’s tortious actions may claim and recover the same damages.

WDTL has not presented any evidence that the amounts “actually paid for a plaintiff’s health care services” are reasonable. *See*, WDTL Amicus Brief, 11. WDTL’s request to only award the plaintiff an amount determined by Medicare cost-to-charge data—if anything—has no basis in Washington law, and would require those who are unable to pay for the medical costs, or those who get medical services at a discounted rate for any reason [like indigence] to be compensated substantially less based on their own ability to pay. *See e.g.*, *Ciminski*, 90 Wn.2d at 804.

WDTL seeks to completely eviscerate Washington’s collateral source rule. As explained by the court in *Hayes*, tortfeasors can challenge the reasonableness of medical care expense by providing evidence of what

other similarly situated hospitals would charge for the same services provided to the Plaintiff under the same and existing circumstances/medical conditions. 105 Wn. App. at 616. In this case, the City of Tacoma has opted to not offer any such evidence—nor can it. Its own expert, Dr. Alexandra Zietak, agreed the treatment costs were reasonable. CP at 114. This aligns with the expert testimony put forth by Beltran-Serrano through experts Jennifer James M.D. and Anthony Choppa. CP at 247.

A tortfeasor should not benefit because a plaintiff's medical provider is required to accept less than the reasonable value of medical services provided from Medicare, or that some doctors somewhere are required to accept less than the reasonable value of medical services. The fact that a medical provider accepts less than the amount charged from a collateral source has no relevance or bearing on the question of the reasonable value of the medical care provided to Beltran-Serrano. Allowing evidence of who paid for certain medical expenses creates a situation where the same medical service has different value depending on who pays for the service. This creates a system of second class citizens as compared to those who have private health insurance that pays at a higher rate. Such a principle runs afoul of basic tort principles that are meant to level the playing field and treat accident victims in the same unprejudiced manner.

2. *THE MAJORITY OF COURTS FOLLOW THE COLLATERAL SOURCE RULE AND EXCLUDE EVIDENCE OF PAYMENTS FROM MEDICARE.*

WDTL's brief is supported solely by out-of-state cases from states which have adopted a minority rule based on an inapplicable section of the Restatement. WDTL amicus brief, 5-8. The vast majority of courts to consider the issue follow the common-law rule articulated in section 924 of the *Restatement* and permit plaintiffs to seek the reasonable value of their expenses without limitation to the amount that they pay or that third parties pay on their behalf. *See e.g., Dedmon*, 535 S.W. 3d at 457-58 (internal string citation to eleven cases omitted); *see also Wills v. Foster*, 229 Ill.2d 393, 414, 892 N.E.2d 1018 (2008); *Robinson v. Batres*, 160 Ohio App.3d 668, 828 N.E.2d 657 (2005) (“We agree with those jurisdictions – a large majority – that have held that a plaintiff’s recovery of the reasonable value of her medical treatment is not limited to the amount paid by her insurance.”).

In *Dedmon*, the Tennessee Supreme Court relied on its collateral source rule to hold that the plaintiff was entitled to the full, undiscounted medical bills as proof of her reasonable medical expenses. 535 S.W. 3d 431 at 467. The Court precluded defendant from submitting evidence of discounted rates for medical services accepted by medical providers. *Id.* In a lengthy deep-dive opinion, the *Dedmon* court ultimately concluded

“equating the value of medical services to the amount the medical provider accepts from an insurance company is simplistic at best and misleading at worst”. *Id.* at 461.

Similarly, in *Wills*, the Illinois Supreme Court relied on its collateral source rule to hold that the plaintiff was entitled to the full amount of her medical expenses, notwithstanding the fact that she had not paid those expenses and would not be required to do so. Medicare had satisfied the plaintiff’s obligation and had done so by paying less than the amounts that the plaintiff had been billed. The court noted, as the Washington Supreme Court did in *Ciminski*, that the policy behind the collateral source rule “that the wrongdoer should not benefit from the expenditures made by the injured party or take advantage of contract or other relations that may exist between the injured party and third persons” militated a result in which the plaintiff could claim the full value of the medical treatment. *Wills*, 229 Ill.2d at 413 (citation and emphasis omitted).

Clearly, another relationship between an injured plaintiff and a third party could be a relationship with the government that allows the plaintiff’s medical expenses to be paid because of factors such as her age or income level. Similarly, an arrangement between the plaintiff and a physician who agrees to perform free medical services is a relationship with a third party

who is collateral to the tortfeasor. In either case, the benefit is intended to be for the plaintiff, not for the tortfeasor.

In *White v. Jubitz Corp.*, 347 Or. 212, 219 P.3d 566 (2009), the Oregon Supreme Court addressed this issue and held in conformity with the majority rule:

Therefore, under the common-law collateral source rule, the extent of a tortfeasor's liability to a plaintiff is not determined by the vagaries of whether the plaintiff has purchased life or medical insurance, is eligible for employment or governmental life, medical, disability or retirement benefits, or by the terms of such insurance or benefits. Tortfeasors that cause the same injuries are responsible for the same damages, irrespective of the plaintiffs' receipt of benefits from, or legal relationships with, third-party benefit providers.

In *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 33, 302 Wis.2d 110 (Wis. 2007), the Wisconsin Supreme Court held “that the collateral source rule prohibits parties in a personal injury action from introducing evidence of the amount actually paid by the injured person’s health insurance company, a collateral source, for medical treatment rendered to prove the reasonable value of the medical treatment.” *Id.* at ¶ 7. The *Leitinger* court concluded that “[t]he collateral source rule prevents the fact-finder from learning about collateral source payments, even when offered supposedly to assist the jury in determining the reasonable value of the medical treatment rendered, so that the existence of collateral source payments will not influence the fact-finder.” *Id.* at ¶ 54.

The clear majority of jurisdictions apply the collateral source rule in the same manner. *Kenney v. Liston*, 233 W.Va. 620, 760 S.E.2d 434 (2014) (applying West Virginia law); *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md.App. 43, 66 A.3d 1073 (Md.Ct.Spec.App.2013) (applying Maryland law); *Crossgrove v. Wal-Mart Stores, Inc.*, 280 P.3d 29 (Colo.App.2010) (applying Colorado law); *Law v. Griffith*, 457 Mass. 349, 930 N.E.2d 126 (2010); *Brethren Melo v. Allstate Ins. Co.*, 800 F.Supp.2d 596 (2011) (applying Vermont law); *Simpson v. Saks Fifth Ave., Inc.*, 2008 WL 3388739 (N.D. Okla. 2008) (applying Oklahoma law); *McMullin v. U.S.*, 515 F.Supp.2d 904, 908 (E.D.Ark.2007) (applying Arkansas law); *Lindholm v. Hassan*, 369 F.Supp.2d 1104, 1111 (D.S.D.2005) (applying South Dakota law); *Bynum v. Magno*, 106 Hawaii 81, 88, 101 P.3d 1149, 1156 (2004); *Baptist Healthcare Systems, Inc. v. Miller*, 177 S.W.3d 676, 682–83 (Ky.2005); *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 618 (Miss.2001); *Haselden v. Davis*, 353 S.C. 481, 485, 579 S.E.2d 293, 295 (S.C.2003); *Papke v. Harbert*, 738 N.W.2d 510, 536 (S.D.2007).

In the related circumstance of physician “write-offs” pursuant to agreements with private insurance companies, courts in other states also have concluded, like Washington, that plaintiffs are entitled to seek and recover from tortfeasors the reasonable medical expenses that their medical providers bill to them without limitation to the amounts paid by insurers.

*Mitchell v. Haldar*, 883 A.2d 32, 40 (Del.2005); *Hardi v. Mezzanotte*, 818 A.2d 974, 985 (D.C.2003); *Acuar v. Letourneau*, 260 Va. 180, 192, 531 S.E.2d 316, 322 (2000); *Koffman v. Leichtfuss*, 246 Wis.2d 31, 630 N.W.2d 201 (2001); *Lopez v. Safeway Stores, Inc.*, 212 Ariz. 198, 206, 129 P.3d 487, 495 (App. Div. 2, 2006); *Tucker v. Volunteers of America Colorado Branch*, 211 P.3d 708, 713 (Colo.App.2008).

In sum, the common-law rule, as it has been articulated in the *Restatement* and the majority of jurisdictions, is that the plaintiff in a personal injury action is entitled to claim and recover from a tortfeasor the reasonable value of the medical services charged without limitation to the sums for which plaintiff is legally liable, that plaintiff has paid for those services, or that a third party has paid on plaintiff's behalf. Tying a plaintiff's claim to the amount that a third party has paid or satisfied undermines the collateral source rule by effectively linking the tortfeasor's obligation to the plaintiff's relationship with a third-party benefit provider. Moreover, exclusion of "write-offs" from the amount that a plaintiff may claim creates the anomaly that a defendant will be liable for the full reasonable charges that a medical provider makes to an uninsured person who is injured, but may have more limited liability if the injured person is insured or the beneficiary of other third-party benefits. Indeed, this would run directly contrary to the holding in *Ciminski*, conferring the windfall to

the tortfeasor. Even worse, this scheme creates a category of second-class citizens who are beneficiaries of government programs such as Medicare and Medicaid who require that hospitals accept less for certain services than would be paid by a private insurer or private party.<sup>1</sup> Washington, like the vast majority of jurisdictions, follows the more sensible rule that levels the playing field and eliminates the risks posed by injecting insurance payments and write-offs into a trial.

**C. WDTL’s “Windfall” Argument was Rejected by the Washington Supreme Court in 1978**

WDTL further ignores binding precedent and argues that rejecting Dr. Wickizer’s approach would result in a “windfall” to plaintiffs. WDTL Amicus Brief, p. 10. Our Supreme Court rejected this argument in 1978. *Ciminski*, 90 Wn.2d at 806-807. The court emphasized that if there is a windfall it is more just that the person wronged receive it than the wrongdoer:

Appellant supplements its arguments by contending that failure to reduce respondent's verdict by the amount of the Part A payments has given her a windfall. We note, however, that to deny application of the rule in this instance would allow appellant the full benefit of the payments from the collateral source. Thus, the real question is not whether there is a windfall, but rather who is to get it. As

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<sup>1</sup> For example, one state has noted that an approach to the collateral source rule that “effectively creat[es] categories of plaintiffs” based on whether they had private insurance or received charitable benefits would result in a “possible violation of the equal protection provisions of the state and federal Constitutions.” *Martinez v. Milburn Enters., Inc.*, 233 P.3d 205, 221 (2010).

between an injured plaintiff and a defendant, we have no hesitation in saying that the former is entitled to prevail.

...

We hold that Part A Medicare payment made to respondent is payment from a collateral source and may not be used to reduce the jury's assessment of damages against appellant.

*Ciminski*, 90 Wn.2d at 806-807.

In making its already-rejected “windfall” argument, WDTL also ignores and shrugs off the reality that under Dr. Wickizer’s approach, more often than not, any perceived “windfall” would be to the benefit of the tortfeasors. For example, “[a] tortfeasor who injures a member of a managed care organization may pay less in compensation for medical expenses than one who inflicts the same injury on an uninsured person treated at a hospital”. *Howell*, 129 Cal. Rptr.3d 325, 257 P.3d at 1145. The majority of courts have rejected this unsavory result. *Dedmon*, 535 S.W. 3d at 457-58. As noted by the *Dedmon* Court, “reducing an insured plaintiff’s recovery by the negotiated rate differential ‘overlooks the fundamental purpose of the [collateral source] rule, ... to prevent a tortfeasor from deriving any benefit from compensation or indemnity that an injured party has received from a collateral source.’” *Dedmon*, 535 S.W. 3d at 456 (quoting *Acuar v. Letourneau*, 260 Va. 180, 531 S.E. 2d 316, 322 (2000)).

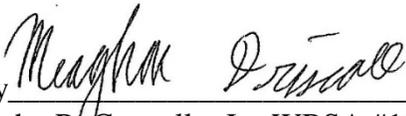
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### III. CONCLUSION

WDTL's request to abandon over 105 years of binding Washington precedent to abruptly restrict a "Plaintiff [to] recover the amounts actually paid for plaintiff's health care services" instead of the reasonable value of the medical services should be denied. WDTL's request directly violates Washington's collateral source rule. Further, as opposed to ensuring a plaintiff can recover the reasonable costs of their medical treatment from the tortfeasor who caused the need for the treatment, WDTL's proposed rule would require plaintiff's recovery to be dictated, not by the reasonable cost of medical services received, but instead by the type of health insurance, if any, a plaintiff is able to purchase. This dangerously unmoors tort law from its central purpose of just compensation, and discriminates against those who can't afford medical treatment or insurance. WDTL's seismic ask of this Court would lead to problematic discrimination and is barred by clear Washington law. Plaintiffs respectfully request the Court deny WDTL's urged abandonment of Washington's collateral source rule.

DATED this 4<sup>th</sup> Day of January, 2019.

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By   
\_\_\_\_\_  
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## DECLARATION OF SERVICE

On the date stated below, I electronically e-filed the foregoing Respondents' Answer to Washington Defense Trial Lawyers Amicus Brief, under Case No. 51317-0-II with the Clerk of the court for the Court of Appeals, Division II, for the State of WA and electronically served the same on the following parties:

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Original E-filed with:

WA Court of Appeals Div II

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

Dated this 4<sup>th</sup> day of January, 2019 at Tacoma, Washington.



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Pamela S. Wells, Paralegal  
Connelly Law Offices

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January 04, 2019 - 3:05 PM

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