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ADVANCE SHEET HEADNOTE
April 22, 2024

2024 CO 22

No. 22SC639, *Scholle v. Ehrichs*—Reduction of Damages—Collateral Source Evidence—Subrogation Against Insureds.

In this medical malpractice case, the supreme court considers the interrelationship between the collateral source statute, § 13-21-111.6, C.R.S. (2023), and the Health Care Availability Act ("HCAA"), §§ 13-64-101 to -503, C.R.S. (2023). Specifically, the court examines whether the contract exception to the collateral source statute applies in a post-verdict proceeding under the HCAA seeking to reduce a jury's damages award in a medical malpractice action.

The court concludes that the contract exception to the collateral source statute prohibits a trial court from considering evidence regarding a plaintiff's insurance contract liabilities when making its good cause determination under the HCAA and that section 13-64-402, C.R.S. (2023), does not compel a different result. Accordingly, the court reverses that portion of the division majority's opinion, affirms the rest of the judgment, and remands for the trial court to recalculate interest and enter judgment accordingly.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 22

Supreme Court Case No. 22SC639
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA2051

Petitioner:

Susan Ann Scholle as personal representative for the Estate of Daniel B. Scholle,

v.

Respondents:

Edward Ehrichs, M.D.; Michael Rauzzino, M.D.; and HCA-HealthONE, LLC.

Judgment Affirmed in Part and Reversed in Part
en banc
April 22, 2024

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JUSTICE BERKENKOTTER delivered the Opinion of the Court, in which **JUSTICE HOOD**, **JUSTICE GABRIEL**, and **JUSTICE SAMOUR** joined. **JUSTICE MÁRQUEZ**, joined by **CHIEF JUSTICE BOATRIGHT**, and **JUSTICE HART** dissented.

JUSTICE BERKENKOTTER delivered the Opinion of the Court.

¶1 In this medical malpractice case, we consider the interrelationship between the collateral source statute, § 13-21-111.6, C.R.S. (2023), and the Health Care Availability Act ("HCAA"), §§ 13-64-101 to -503, C.R.S. (2023). The specific question presented is whether the contract exception to the collateral source statute applies in a post-verdict proceeding under the HCAA seeking to reduce a jury's damages award in a medical malpractice action. A split division of the court of appeals answered this question no, holding that a trial court may properly consider collateral source evidence when determining whether good cause exists to allow a prevailing plaintiff in a medical malpractice case to exceed—as unfair—the $1 million statutory damages cap set forth in section 13-64-302(1)(b), C.R.S. (2023), of the HCAA.

¶2 We conclude that the contract exception to the collateral source statute prohibits a trial court from considering this type of evidence regarding a plaintiff's insurance contract liabilities[1] in making its good cause determination under the HCAA and that section 13-64-402, C.R.S. (2023), does not compel a different result. Therefore, we reverse the portion of the division majority's opinion holding that a

[1] We use the term "insurance contract liabilities" to refer to the amount a plaintiff owes to any third party-provider, like a hospital, or third-party payer, like an insurer, under the plaintiff's insurance contract for his past medical care.

trial court may properly consider a prevailing plaintiff's insurance contract liabilities as part of the court's good cause and unfairness determinations under the HCAA. *Scholle v. Ehrichs*, 2022 COA 87M, ¶¶ 124–26, 519 P.3d 1093, 1115–16. We affirm the rest of the division majority's judgment and remand for the trial court to recalculate interest and enter judgment accordingly. On remand, a new good cause determination is unnecessary because (1) the trial court properly declined to consider Scholle's insurance contract liabilities; and (2) as the division majority concluded, the record supports the trial court's application of the five remaining factors, *id.* at ¶¶ 112–13, 519 P.3d at 1113.

I. Facts and Procedural History

¶3 In August 2015, Daniel B. Scholle[2] underwent elective back surgery at HCA-HealthONE, LLC, d/b/a Sky Ridge Medical Center ("the Hospital"). Drs. Ehrichs and Rauzzino performed Scholle's surgery. During surgery, Scholle's iliac vein was severed, resulting in extensive bleeding, and causing Scholle to go into cardiac arrest. The doctors eventually revived Scholle, repaired the severed vein by placing a stent, and finished the procedure. Scholle was then sent to the intensive care unit ("ICU"), where he remained for the next 100 days due to serious complications from the surgery, including an infection at the surgical site, which

[2] Scholle passed away on February 5, 2022. His wife moved for and was granted substitution into the case on March 6, 2022.

progressed to sepsis; injuries to his kidneys; an abdominal abscess; peritonitis; colon perforation; respiratory distress; stroke; foot drop; and gangrene in his toes requiring amputation. All parties agree Scholle's injuries were "catastrophic."

¶4 The Hospital billed Scholle roughly $4.1 million for his care. At the time of his injuries, Scholle had insurance coverage from three different sources. The first was from his twenty years of service in the United States military, during which he paid for benefits through the Veterans Administration/Tricare insurance program. After Scholle was honorably discharged from the military, he began working at Southwest Airlines—where he was working at the time of his injuries—during which he contributed to a self-funded Employee Retirement Income Security Act ("ERISA") program. His third source of insurance came from Medicare based on his payment of federal Social Security taxes. Together, Scholle's insurers paid the Hospital roughly $1.2 million, negotiating a nearly $3 million dollar discount to fully settle the amounts billed.

¶5 Based on his injuries, Scholle sued Dr. Ehrichs, Dr. Rauzzino, and the Hospital (collectively, "Respondents"), alleging medical negligence. Within two months of filing the lawsuit, Scholle notified his insurers as required in medical malpractice actions under section 13-64-402(1) of the HCAA. None of his insurers filed notices of subrogation into the lawsuit. *See* § 13-64-402(2) (If a third party

payer or provider has a right of subrogation, "[f]ailure to file such written notice shall constitute a waiver of such right of subrogation as to such action.").

¶6 After a five-week trial, a jury found Respondents negligent, apportioning 45% of the fault to Dr. Rauzzino, 40% to Dr. Ehrichs, and 15% to the Hospital. The jury awarded Scholle $9,292,887 in economic damages, $6 million of which it attributed to Scholle's past medical expenses.

¶7 Scholle moved to exceed the damages cap set forth in section 13-64-302(1)(b) of the HCAA, which generally limits the amount a prevailing plaintiff in a medical malpractice case may recover to $1 million. *See* § 13-64-302(1)(b). This provision of the HCAA affords a trial court broad discretion to award damages in excess of that limit if the plaintiff shows good cause that imposing the cap would be unfair. *Id.* Respondents argued that Scholle couldn't establish good cause, instead urging the court to substantially reduce the jury's award.

¶8 The trial court found that, under the totality of the circumstances, Scholle had shown good cause for lifting the cap. Specifically, the court found that:

- "credible, unrefuted evidence at trial" supported the $6 million awarded for Scholle's past medical expenses;
- it would be "fundamentally unfair" to limit Scholle's damages due to the "calamity" that occurred;
- Scholle's past medical costs imposed a "significant financial burden" on his family, as he was the primary earner and supported two minor children at home;

- as a result of his permanent injuries, Scholle was forced to take an early medical retirement and would be unable to ever work again;
- Scholle could expect to see escalating medical costs throughout his life; and
- Scholle and his family "lack[ed] the means to earn sufficient income to repay his already-incurred medical costs."

Additionally, the court observed that Scholle spent 100 days in the ICU following his surgery and was comatose during some of this time. The court also noted that Scholle was still under regular care for injuries he sustained from the surgery, including having undergone approximately twenty additional surgeries.

¶9 Respondents objected to the trial court's last finding, arguing that the court should have considered what amount of Scholle's already-incurred $6 million in medical costs he was actually going to have to pay given his insurance coverage. First, they pointed to the difference between the amount the Hospital billed Scholle, which was $4.1 million, and the amount his insurers ultimately paid on his behalf, which was just over $1.2 million. The nearly $3 million difference between the billed and paid amounts, Respondents asserted, shouldn't have been awarded to Scholle because he would never have to pay that amount.

¶10 Second, Respondents argued that the trial court erred in failing to analyze the impact of the HCAA's subrogation provision, § 13-64-402, on Scholle's obligation to repay his insurers. In Respondents' view, Scholle's insurers waived their subrogation rights when they failed to file notices of subrogation into

Scholle's case. This meant, they claimed, that Scholle wasn't going to be responsible for paying *any* of the $4.1 million the Hospital billed him, and this weighed against exceeding the HCAA's $1 million cap.

¶11 The trial court rejected the Respondents' arguments, concluding that "a deduction in the amounts paid by collateral sources from the jury's judgment is not allowed under the contract exception to the collateral source rule," which prohibits courts from reducing verdict amounts where a plaintiff has been separately compensated because of a contract. § 13-21-111.6. Further, the court explained, section 13-64-402 did not apply, given that "no third-party payors, that is collateral sources, filed the statutorily contemplated notices in this case." Thus, the court had no "obligat[ion] to determine the value of any subrogated interests which may or may not exist." Calculating interest at just over $5 million, the court entered judgment for Scholle in the amount of $14.9 million.

¶12 A split division of the court of appeals reversed in part, concluding that the trial court erred in its good cause analysis. *Scholle*, ¶¶ 126–30, 519 P.3d at 1115. The division majority agreed that "there [wa]s no question [] that the first five factors relied on by the trial court were proper, supported by the record, and sufficient to support the entry of judgment in excess of $1 million." *Id.* at ¶ 113, 519 P.3d at 1113. But the court's consideration of the sixth factor—that "the bulk of [Scholle's] costs were 'already-incurred medical costs,'" which he and his family

lacked the means to repay—was an abuse of discretion. *Id.* at ¶¶ 112, 125–26, 519 P.3d at 1113, 1115. This, the division explained, was because the court did not consider Scholle's insurers' subrogation interests, or the lack thereof, before finding good cause to exceed the cap. *Id.* at ¶¶ 124–26, 519 P.3d at 1114–15.

¶13 The division reasoned that because Scholle's insurers failed to file subrogation notices as required under section 13-64-402(2), their subrogation interests were waived. *Id.* at ¶ 117, 519 P.3d at 1113–14. In its view, such waiver was a "relevant consideration" in the court's good cause determination. *Id.* at ¶ 124, 519 P.3d at 1114. "Otherwise," the division observed, "the language of section 13-64-402(3)—requiring the entry of 'judgment in accordance with [a] finding' as to 'the amount, if any due [to a] third party payer or provider'—would have little, if any, purpose." *Id.* (alterations in original) (quoting § 13-64-402(3)).

¶14 The division majority explained that the trial court's failure to account for any subrogation interests—or their absence—before entering judgment was problematic given its contemporaneous finding that "not allowing a recovery in excess of the cap would 'prevent [Scholle] from recovering funds to repay medical care he has already received.'" *Id.* at ¶ 125, 519 P.3d at 1115. But this was not so, the division concluded, because Scholle produced no evidence that he owed any third-party payers for care they paid for on his behalf. *Id.* at ¶ 126, 519 P.3d at

1115. The division thus held that the court's consideration of Scholle's inability to repay already-incurred medical costs constituted an abuse of discretion. *Id.*

¶15 In reaching this conclusion, the division majority acknowledged that the contract exception to the collateral source statute prohibits courts from *reducing damages* exceeding the HCAA's $1 million cap because a plaintiff "owes nothing further with respect to past expenses or bills." *Id.* at ¶ 123, 519 P.3d at 1114. But the division viewed this prohibition as distinct from whether a trial court could consider as part of its good cause determination "whether a plaintiff owes money to third-party providers or payers." *Id.* at ¶ 124, 519 P.3d at 1114. That is, the division saw a difference between a court reducing damages because a plaintiff owes nothing further with respect to past expenses or bills, and the court considering this same information in deciding whether to enter judgment in excess of the cap. To conclude otherwise, the division observed, would be to read the purpose out of section 13-64-402. *Id.*

¶16 The division majority next considered whether the court's abuse of discretion was harmless. *Id.* at ¶ 127, 519 P.3d at 1115. It was not, the division explained, because it perceived "the court's improper consideration of Scholle's purported repayment obligations []as a significant factor in [its] decision to allow a judgment in excess of the HCAA's damages cap." *Id.* at ¶ 129, 519 P.3d at 1115.

Thus, the division remanded the case for a reassessment of whether good cause existed to exceed the damages cap. *Id.* at ¶ 130, 519 P.3d at 1115.

¶17 Judge Berger, dissenting in relevant part, disagreed that the trial court abused its discretion by considering the sixth factor in its good cause analysis. *Id.* at ¶ 150, 519 P.3d at 1117 (Berger, J., concurring in part and dissenting in part). In his view, the contract exception to the collateral source statute "is broad and unambiguous: courts cannot reduce a verdict by any amount paid as the result of a contract." *Id.* at ¶ 152, 519 P.3d at 1118. The statute contains, he continued, "no exception for when a third party fails to file a subrogation notice under the HCAA with the trial court." *Id.* Therefore, the court properly considered Scholle's medical expenses without regard to insurance when it exercised its discretionary authority to exceed the cap. *Id.* Moreover, Judge Berger emphasized, the distinction drawn by the majority acknowledging that a trial court cannot reduce damages based on a contract benefit paid on a plaintiff's behalf, yet requiring a court to consider such payments in connection with a request to exceed the cap, was one without a difference. *Id.* at ¶¶ 153–54, 519 P.3d at 1118. In both instances, the result was the same: a reduction in the jury's award to Scholle. *Id.* "Regardless of how the majority attempts to sanitize it," Judge Berger opined, "that reduction violates the collateral source statute." *Id.* at ¶ 154, 519 P.3d at 1118.

¶18 Judge Berger acknowledged the public policy debate surrounding the contract exception and the potential for plaintiffs to receive double recovery, as well as the tension between the contract exception and the HCAA's damages cap, but ultimately concluded that "the General Assembly has spoken, and [the court's] job is to apply the statute, not create a judge-made exception because it may be better policy." *Id.* at ¶¶ 155–57, 519 P.3d at 1118.

¶19 And at the end of the day, Judge Berger concluded, any error in the trial court's good cause analysis was harmless, as the other five factors that the court considered independently supported its "quintessentially discretionary decision" to exceed the cap. *Id.* at ¶¶ 148, 160, 519 P.3d at 1117, 1118–19.

¶20 Scholle petitioned this court for certiorari review.[3] We granted that petition.

II. Analysis

¶21 We begin by explaining the standard of review and our rules of statutory interpretation. Next, we examine the relevant statutes, including the contract

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[3] We granted certiorari to review the following issue:

1. [REFRAMED] Whether the division erred in its application of both the contract exception to the collateral source rule, § 13-21-111.6, C.R.S. (2022), and the Health Care Availability Act's subrogation framework, § 13-64-402(3), C.R.S. (2022), by ordering the trial court to consider insurance contract liabilities when making findings as to whether good cause and unfairness exist to exceed the statutory damages cap.

exception to the collateral source statute, § 13-21-111.6; the HCAA's damages cap and good cause provision, § 13-64-302(1)(b); and the HCAA's subrogation provision, § 13-64-402. Then, we address the question at the heart of this case: Whether the contract exception to the collateral source statute, § 13-21-111.6, is applicable in post-verdict proceedings seeking to reduce damages in medical malpractice actions under the HCAA, § 13-64-302(1)(b). Applying the relevant statutes and caselaw, we conclude that the answer is yes. Accordingly, the trial court was correct to disregard evidence regarding Scholle's insurance contract liabilities in determining whether to exceed—as unfair—the HCAA's $1 million cap on damages.

A. Standard of Review and Rules of Statutory Interpretation

¶22 The question of whether a trial court may properly consider insurance contract liabilities in deciding if good cause exists to exceed the HCAA's damages cap based on unfairness is one of statutory interpretation. To answer this question, we must determine whether a trial court is barred from considering such evidence based on the contract exception to section 13-21-111.6, or if it is required to do so under section 13-64-402. We review such questions de novo. *People v. Perez*, 2016 CO 12, ¶ 8, 367 P.3d 695, 697. When interpreting statutes, our role is to effectuate the General Assembly's intent. *Edwards v. New Century Hospice, Inc.*, 2023 CO 49, ¶ 15, 535 P.3d 969, 973. In doing so, "[w]e give words and phrases their plain and

ordinary meaning" and read a statutory scheme as a whole, "giv[ing] consistent, harmonious, and sensible effect to all its parts." *Antero Res. Corp. v. Airport Land Partners, Ltd*, 2023 CO 13, ¶ 13, 526 P.3d 204, 208. When the statutory language is unambiguous, "our work is done," and we will apply it as written. *People in Int. of A.C.*, 2022 CO 49, ¶ 10, 517 P.3d 1228, 1234.

B. The Contract Exception to the Collateral Source Statute

¶23 "A collateral source is a person or company, wholly independent of an alleged tortfeasor, that compensates an injured party for that person's injuries." *Smith v. Jeppsen*, 2012 CO 32, ¶ 21, 277 P.3d 224, 228. At common law, the collateral source rule "allowed [plaintiffs] to recover the full damages awarded against defendants even though [they] also received compensation from collateral sources." *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1074 (Colo. 1992). The purpose of the collateral source rule is to ensure that "making the injured plaintiff whole is solely the tortfeasor's responsibility" by prohibiting the tortfeasor from "enjoying the benefits procured by the injured plaintiff." *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080, 1082–83 (Colo. 2010); *see also Quinones v. Pa. Gen. Ins. Co.*, 804 F.2d 1167, 1171 (10th Cir. 1986) ("The rule evolved around the commonsense notion that a tortfeasor ought not be excused because the victim was compensated by another source . . . .").

¶24 The common law collateral source rule could result in a plaintiff's double recovery. *See Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, ¶ 14, 276 P.3d 562, 565 (double recovery occurred because "a collateral source would cover expenses incurred as a result of a tortfeasor's negligence, and then the plaintiff could recover the expenses again from the tortfeasor in the form of damages"); *see also Gardenswartz*, 242 P.3d at 1083 ("Double recovery is permitted to an injured plaintiff because the plaintiff 'should be made whole by the *tortfeasor*, not by a combination of compensation from the tortfeasor and collateral sources.'" (quoting *Acuar v. Letourneau*, 531 S.E.2d 316, 323 (Va. 2000))); *Ronquillo v. EcoClean Home Servs., Inc.*, 2021 CO 82, ¶ 15, 500 P.3d 1130, 1134 (observing the common law collateral source rule "allowed a successful plaintiff to receive a double recovery from both the tortfeasor and the benefits provider").

¶25 In 1986, as part of a package of tort reforms intended to limit damage awards, the General Assembly abrogated the collateral source rule to a limited extent by enacting the collateral source statute, § 13-21-111.6, which provides:

> In any action by any person . . . to recover damages for a tort resulting in death or injury to person or property, the court, after the finder of fact has returned its verdict stating the amount of damages to be awarded, *shall reduce the amount of the verdict by the amount by which such person . . . has been or will be wholly or partially indemnified or compensated* for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained . . . .

(Emphasis added.)

¶26 Simply put, section 13-21-111.6, which is applicable to "any [tort] action . . . to recover damages," requires a trial court to reduce a plaintiff's damages by the amount they are compensated from collateral sources. Notwithstanding that direction, however, the General Assembly retained an important component of the common law collateral source doctrine in section 13-21-111.6: the contract exception. It provides that a plaintiff's verdict "shall *not* be reduced by the amount by which [the plaintiff] . . . has been or will be . . . indemnified or compensated by a benefit paid as a result of a contract entered into and paid for by or on behalf of" the plaintiff. § 13-21-111.6 (emphasis added). Most often, this "benefit" comes in the form of insurance coverage. *See Pressey ex. rel. Pressey v. Children's Hosp. Colo.*, 2017 COA 28, ¶¶ 13–14, 488 P.3d 151, 156 (noting that the contract exception to the collateral source statute covers Medicaid benefits, "[p]rivate insurance, private disability benefits, Social Security disability benefits, and retirement benefits"), *overruled on other grounds by Rudnicki v. Bianco*, 2021 CO 80, 501 P.3d 776.[4]

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[4] In *Rudnicki*, this court overruled *Pressey* to the extent it upheld a common law rule that only allowed a minor plaintiff's parents to recover tort damages for medical expenses incurred by their unemancipated minor child. *Rudnicki*, ¶¶ 1–2, 501 P.3d at 777–78. Abandoning that rule, the court held "in cases involving an unemancipated minor child, either the child or their parents may recover the child's pre-majority medical expenses." *Id*. at ¶ 2, 501 P.3d at 778.

¶27 By enacting section 13-21-111.6, the General Assembly demonstrated its interest in "reducing tort awards and eliminating double recovery in some senses." *Gardenswartz*, 242 P.3d at 1088. Yet, by including the contract exception, the General Assembly showed it was likewise "concerned about fairness in damages awards" and ensuring that the "financial benefits of purchasing and maintaining health insurance" aren't unjustly transferred to tortfeasors. *Id.* And unlike at common law, double recovery is generally avoided under the contract exception because a plaintiff must often reimburse their insurer, i.e., the party with whom they contracted, for the cost of treatment. *Ronquillo*, ¶ 17, 500 P.3d at 1134.

C. The HCAA

¶28 The HCAA was enacted in 1988 to "assure the continued availability of adequate health-care services" for Coloradans, § 13-64-102(1), C.R.S. (2023), by "curb[ing] the increasing costs of malpractice insurance" for medical professionals and institutions. *Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 905 (Colo. 1993). The HCAA's legislative history highlights the General Assembly's concern that large medical malpractice verdicts were contributing to a rise in insurance premiums for providers, and that these costs were being passed on to patients. *See id.* at 907.

¶29 In service of these policy goals, the General Assembly included a damages cap in the HCAA. § 13-64-302(1)(b). It provides that

> [t]he total amount recoverable for all damages for a course of care for all defendants in any civil action for damages in tort brought against a health-care professional . . . or a health-care institution . . . or as a result of binding arbitration, whether past damages, future damages, or a combination of both, shall not exceed one million dollars.

Id. The statute further includes a "two hundred fifty thousand dollar[]" limit on noneconomic damages. *Id.*

¶30 Notably, it also lays out an exception: If upon good cause shown, a trial court "determines that the present value of past and future economic damages would exceed" the cap and that application of the cap would be unfair, the court may award economic damages in excess of $1 million. *Id.* It is a plaintiff's burden to establish both good cause, which is defined as a "legally sufficient reason," and unfairness, which is defined as "marked by injustice, partiality, or deception." *Wallbank v. Rothenberg*, 140 P.3d 177, 180 (Colo. App. 2006) (first quoting *Good Cause*, Black's Law Dictionary 235 (8th ed. 2004); and then quoting *Unfair*, Webster's Third New International Dictionary 2494 (1986)). The statute affords a trial court broad discretion to determine whether good cause exists to enter an award in excess of the cap. *Id.* at 180–81. To this end, a court analyzing whether good cause and unfairness exist under section 13-64-302(1)(b) is not confined to considering specifically identified factors. *Id.* Rather, the court "may exercise its discretion to consider factors it deems relevant," so long as it "consider[s] the circumstances in each case." *Id.*

D. Subrogation

¶31 The right to subrogation exists when an "insurer has paid its insured for a loss caused by a third party" and allows the insurer to "seek recovery from [that] third party," i.e., the tortfeasor. *DeHerrera v. Am. Fam. Mut. Ins. Co.*, 219 P.3d 346, 350 (Colo. App. 2009); *see also Cotter Corp. v. Am. Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 834 (Colo. 2004) (noting that subrogation allows the insurer to "'stand in the shoes'" of its insured and seek recovery from a "liable third party" (quoting *A. Copeland Enters., Inc. v. Slidell Mem'l Hosp.*, 657 So.2d 1292, 1298 (La. 1995))).

¶32 Section 13-64-402 of the HCAA creates a process in medical malpractice actions that allows "subrogation issues" to be "resolved directly in the medical malpractice action itself rather than in separate litigation." *Vitetta v. Corrigan*, 240 P.3d 322, 330 (Colo. App. 2009). That section provides:

> (1) In any action in a court or arbitration proceeding for personal injury against a health-care provider for professional negligence, the plaintiff shall, within sixty days after the commencement thereof, serve written notice thereof to the third party payer or provider of any amount paid or payable as a medical benefit pursuant to any health, sickness, or accident insurance or plan, which provides health benefits, or any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health-care services, and shall file a copy thereof with the court or arbitrator. Such service shall be made pursuant to section 10-3-107(1) or (1.5), C.R.S. [(2023)], or pursuant to the Colorado rules of civil procedure.
>
> (2) If such third party payer or provider of such benefits has a right of subrogation for such payments, it shall file with the court or arbitrator written notice of such subrogated claim, without specifying a definite

> amount, within ninety days after receipt of the notice required in subsection (1) of this section, and transmit a copy thereof to the party plaintiff. Failure to file such written notice shall constitute a waiver of such right of subrogation as to such action.
>
> (3) Before entering final judgment, the court shall determine the amount, if any, due the third party payer or provider and enter its judgment in accordance with such finding.

§ 13-64-402.

¶33 Under section 13-64-402, then, a medical malpractice plaintiff must serve written notice to any third-party payer or provider (often, their insurer) of "any amount paid or payable as a medical benefit pursuant to any health . . . insurance or plan . . . or any contract . . . to provide, pay for, or reimburse the cost" of the plaintiff's medical care. § 13-64-402(1). This notice must be served within sixty days of the commencement of any "action in a court or arbitration proceeding for personal injury against a health-care provider for professional negligence." *Id.*

¶34 The statute then contemplates that, within ninety days of the plaintiff's notice, if the third-party payer or provider has a right of subrogation, they shall file a written notice of that right, "without specifying a definite amount." § 13-64-402(2). If the payer or provider of such benefits "[f]ail[s] to file such written notice," they waive their right to subrogation "as to such action." *Id.* Finally, the statute contemplates that "[b]efore entering final judgment, the court shall determine the amount, if any, due [to] the third party payer or provider and enter its judgment in accordance with such finding." § 13-64-402(3).

¶35 With these statutory principles in mind, we turn to their application in this case.

E. Application

¶36 So, does the contract exception prohibit a trial court from considering insurance contract liabilities when determining whether good cause and unfairness exist to exceed the HCAA's $1 million cap? Scholle says yes. In his view, the division's construction of the HCAA violates the unequivocal terms of the contract exception to the collateral source statute because it uses his insurance coverage as a basis to reduce his damages. Worse, he says, the division's opinion results in bad public policy because it rewards tortfeasors, like the Respondents, with the ill-gotten gains of their negligence by allowing them to profit from a plaintiff's hard-earned insurance coverage.

¶37 Respondents don't see it that way. They contend that a court's consideration of insurance contract liabilities to exceed the cap can only result in an increase—not a reduction—in a plaintiff's damages. Thus, no violation of the contract exception exists. And, say Respondents, if a court ignores how much a plaintiff owes or doesn't owe in medical expenses when no subrogation notices are filed under section 13-64-402, the purpose of the HCAA, which is to decrease medical malpractice awards, is disregarded. Respondents end by arguing that the public policy pendulum favors their interpretation of section 13-64-402 because

their construction of the statutes minimizes windfalls to plaintiffs, thereby serving the HCAA's damage-limiting purpose. We address each argument in turn.

1. The Contract Exception to the Collateral Source Statute Is Unambiguous and Applies Here

¶38 Scholle contends that the medical bills his insurers paid on his behalf are covered by the contract exception to the collateral source statute. He argues that the division erred by considering those payments in reversing the trial court's determination that good cause existed to exceed the HCAA's damages cap. Effectively, Scholle asserts that the division majority's interpretation of the HCAA requires a trial court determining if good cause exists first, to consider collateral source payments made on a prevailing plaintiff's behalf, and second, to determine whether the plaintiff actually owes any money to that third-party. This, Scholle posits, impermissibly reduces his damages and allows Respondents, the tortfeasors who caused his injuries, to benefit from his years of paying insurance premiums. We agree.

¶39 This court has long recognized that a tortfeasor is prevented from benefitting from collateral source payments made on a plaintiff's behalf. Yet, by requiring that a trial court consider these very payments in medical malpractice cases, the division majority has adopted an interpretation of the HCAA that runs afoul of the contract exception to the collateral source statute because it allows the

wrongdoer to "reap the benefit of a contract for which the wrongdoer paid no compensation." *Gardenswartz*, 242 P.3d at 1083 (quoting *Acuar*, 531 S.E.2d at 323).

¶40 The medical bills Scholle's insurers paid, and the discounts they negotiated on his behalf, fall within the contract exception to the collateral source statute. Accordingly, the trial court properly disregarded those payments and discounts in determining whether application of the cap was unfair, instead appropriately focusing on Scholle's medical expenses without regard to his insurance coverage. Regardless of the possibility or even likelihood of double recovery, a different approach would undermine the General Assembly's demonstrated concerns regarding "fairness in damages awards" and its interest in ensuring that the "financial benefits of purchasing and maintaining health insurance" are not unjustly transferred to tortfeasors. *Id.* at 1088.

¶41 A review of several Colorado decisions supports our conclusion regarding the contract exception.

¶42 In *Van Waters*, a jury awarded the plaintiff firefighter $411,000 for injuries he sustained as a result of the defendant's negligence. 840 P.2d at 1072. The defendant sought to reduce that award by just over $335,000 to $76,000, the present value of the firefighter's disability benefit payments under his pension plan. *Id.* This court rejected the defendant's request, concluding that the contract exception protected the firefighter's disability benefits. *Id.* at 1075.

¶43 In reaching that conclusion, we first examined the context in which the General Assembly enacted section 13-21-111.6 and observed that it was passed "as part of a sweeping array of tort reform legislation designed to limit the amounts that plaintiffs can recover in civil actions." *Id.* at 1077. We explained, however, that the legislative history evidenced the General Assembly's "countervailing concern that a tortfeasor should not receive the benefit of an offset from payments received by the injured party" from collateral sources. *Id.*

¶44 Next, we considered the scope of the contract exception. Reading the exception broadly, we concluded that it covers all "contracts for which a plaintiff gives some form of consideration," and therefore applied to the firefighter's disability benefits. *Id.* at 1079. While acknowledging that "the general goal of section 13-21-111.6 was to limit double recoveries," we nonetheless reasoned that its application of the contract exception comported with the General Assembly's "intent not to deny a plaintiff compensation to which he is entitled by virtue" of his "own efforts," *even if* such protection resulted in a windfall to the plaintiff. *Id.* at 1078–79.

¶45 In *Gardenswartz*, an injured plaintiff's private insurer settled the medical expenses billed to the plaintiff by negotiating a discount with his providers and indemnified him for the entire amount of his medical bills. 242 P.3d at 1082. After the plaintiff prevailed in the resulting tort action, the trial court, pursuant to

section 13-21-111.6, reduced the jury's award by the amount of the discounts secured by the insurer. *Id.*

¶46 On appeal, this court held that the trial court erred by reducing the plaintiff's award on account of the discounts because the contract exception to the collateral source rule covered the "entire amount of medical services billed" to the plaintiff. *Id.* at 1085. We explained that the "collateral source rule prevents [the tortfeasor] from standing in [the plaintiff's] shoes and enjoying the same discounted medical rates as his insurance company receives." *Id.* Deciding otherwise, we reasoned, would afford a windfall to the tortfeasor. *Id.*

¶47 In both *Van Waters* and *Gardenswartz*, we acknowledged that section 13-21-111.6 was born out of the General Assembly's concerns regarding tort awards and double recoveries. *Id.* at 1088. We emphasized, however, that if these had been the General Assembly's only concerns, it would have eliminated the common law collateral source rule altogether. *Id.* It "did not go that far," we concluded; "[i]nstead, it chose to allow a plaintiff to obtain the benefit of his contract, even if the award resulted in a double recovery." *Id.*

¶48 Lastly, we look to the one appellate case in Colorado addressing the interplay between the contract exception and the HCAA. In *Pressey*, a division of the court of appeals examined whether the contract exception prohibited a trial court from considering a plaintiff's receipt of Medicaid and private insurance

benefits in determining whether the plaintiff established good cause to exceed the HCAA's cap. ¶¶ 1, 17, 488 P.3d at 154, 157.

¶49 In that case, Pressey, a newborn, suffered irreversible brain damage after experiencing cardiopulmonary arrest at birth. *Id.* at ¶ 2, 488 P.3d at 154. Pressey, by and through her conservator, sued the defendant hospital for the alleged negligence of its nurses in administering her medication which led to her injuries. *Id.* Following a verdict in her favor, the hospital contended on appeal that the trial court erred by declining to consider evidence of the benefits and private insurance available to Pressey when finding good cause to exceed the HCAA's cap. *Id.* at ¶ 6, 488 P.3d at 155. Specifically, the hospital argued "that the legislative purpose of the HCAA damages cap cannot be fulfilled if a trial court" is required to apply the contract exception (covering Pressey's benefits) to the HCAA's collateral source provision. *Id.* at ¶ 7, 488 P.3d at 155. The division rejected the hospital's arguments, concluding, for four reasons, that the HCAA's damages cap could be harmonized with the contract exception:

> First, the contract exception applies to "any action . . . to recover damages for a tort . . . to [a] person," § 13-21-111.6, and does not exclude medical malpractice actions. Second, the HCAA is silent on the application of the contract exception. Third, there is nothing on the face of either that makes them inconsistent. And fourth, our review of the case law has revealed no case in which the contract exception to the collateral source statute was found inapplicable to a post-verdict proceeding.

Id. at ¶ 18, 488 P.3d at 157.

¶50 The division also disagreed that the HCAA's purpose would be rendered meaningless if the contract exception allowed for an award to exceed the cap, reasoning that, although the HCAA entitles medical professionals and institutions to reduced liability, "they are not entitled to reduced liability based on a contract procured by or on behalf of the injured party." *Id.* at ¶ 19, 488 P.3d at 157–58.

¶51 Finally, the division rejected the hospital's argument that Pressey's presentation to the jury of the "uninsured, billed prices for her future medical needs"—rather than the amounts her insurers would actually pay—resulted in an inflated verdict, requiring the trial court to reduce it to prevent a windfall to Pressey. *Id.* at ¶ 21, 488 P.3d at 158. Consistent with *Van Waters* and *Gardenswartz*, the division concluded that "'[t]o the extent that either party receive[s] a windfall, it [is] considered more just that the benefit be realized by the plaintiff in the form of double recovery rather than by the tortfeasor in the form of reduced liability.'" *Id.* (alterations in original) (quoting *Van Waters*, 840 P.2d at 1074).

¶52 Taken together, *Van Waters*, *Gardenswartz*, and *Pressey* remind us of two key principles: (1) the contract exception to the collateral source statute applies in all tort actions, including medical malpractice actions; and (2) to the extent that either party receives a windfall due to the application of the contract exception, "[t]he General Assembly wrote the contract clause" to award it to the injured plaintiff—not the tortfeasor. *Gardenswartz*, 242 P.3d at 1085. Hence, the prospect

of a plaintiff receiving a windfall due to the plaintiff's insurance coverage has no bearing on a trial court's determination of whether good cause has been shown to exceed the HCAA's $1 million cap. The fact that neither *Gardenswartz* nor *Van Waters* was a medical malpractice case makes them no less instructive as to the application of the contract exception to medical malpractice actions under the HCAA, a class of torts. *See* § 13-21-111.6 (covering "*any* action . . . to recover damages for a tort . . ." (emphasis added)); *see also Pressey*, ¶ 19, 488 P.3d at 157–58 (noting that the policy supporting the contract exception "applies with equal force to medical malpractice claims").

2. The Division Majority's Approach Impermissibly Reduces Damages Based on Collateral Source Payments

¶53 Not so fast, say Respondents. They contend that the division's decision does not impermissibly reduce damages based on insurance payments. They assert that, because the HCAA's cap presumptively reduces a verdict exceeding $1 million, a trial court's consideration of collateral source payments and a plaintiff's potential repayment obligations plays no role in reducing a jury award exceeding the cap. In their view, it's the cap that reduces an award, not a court's consideration of collateral sources.

¶54 Like the division majority, Respondents reason that a trial court may consider collateral sources when deciding whether there is good cause to exceed the cap. Respondents characterize the good cause determination as a decision

whether to *increase* an award. In their view, a court is only prohibited from considering collateral sources when deciding whether to *reduce* an award. *See Scholle*, ¶¶ 123–24, 519 P.3d at 1114 (noting that "a court cannot, as a matter of law, *reduce* damages in excess of the damages cap because a plaintiff" has no insurance contract liabilities, "[b]ut that is not the same as saying that whether a plaintiff owes money to third-party providers or payers isn't a relevant consideration in deciding" whether to *exceed* the cap (emphasis added)).

¶55 But that doesn't make any sense. Post verdict, Scholle wasn't asking the trial court to increase the jury's award. And he certainly wasn't asking the court to reduce the jury's award. Rather, Scholle asked the court to allow him to recover what the jury awarded him: $9,292,887 in economic damages. A reduction in the award from over $9 million to $1 million, he argued, would be unfair.

¶56 Respondents then countered with multiple reasons why the jury's damages award should be *substantially reduced, or in some respects even zeroed out*. Among other things, they argued that Scholle shouldn't benefit from the substantial difference between the amount the Hospital billed him and the amount his insurers actually paid. On appeal, Respondents switched horses, asserting that they weren't asking to reduce Scholle's damages; rather, it was the cap that effectuated the reduction. New horse aside, their initial position before the trial court lays bare that even Respondents viewed the HCAA as requiring the trial

court to determine whether to *reduce* the jury's damages award to Scholle. In any event, like Judge Berger, we think Respondents' argument draws "a distinction without a difference." *Id.* at ¶ 154, 519 P.3d at 1118 (Berger, J., concurring in part and dissenting in part).

¶57 As well, if we were to adopt the Respondents' newfound position, we would be nullifying the contract exception's application in certain circumstances—reading in an exception to an exception, if you will—without any clear direction to do so from the General Assembly. *Scholz*, 851 P.2d at 911 ("[W]e will not assume that the General Assembly intended to abolish or otherwise abrogate a preexisting law without a clear expression of its intent to do so."); *see also People v. Shores*, 2016 COA 129, ¶ 17, 412 P.3d 894, 897 ("[A] court should not read into a statute an exception, limitation, or qualifier that its plain language does not suggest, warrant, or mandate." (alteration in original) (quoting *People v. Sorrendino*, 37 P.3d 501, 504 (Colo. App. 2001))).

¶58 We are especially hesitant to read in such an exception in light of the context in which section 13-21-111.6 was enacted. The contract exception didn't simply slip through the cracks of the General Assembly's 1980s tort reform legislation. As our caselaw suggests, it was and continues to be the subject of much litigation. If the General Assembly didn't intend for it to apply to an entire class of torts, it could have said something to that effect from the get-go. Or, two years later, when

the HCAA was enacted, it could have explicitly provided that the contract exception does not apply to the good cause determination under section 13-64-302(1)(b). *Cf. Scholz*, 851 P.2d at 911 (because "the prejudgment interest statute was enacted prior to the passage of the HCAA" the court assumes "that the General Assembly was aware of [its] provisions . . . when it passed the HCAA"). Because it didn't, we apply the exception as written.

¶59 Here, there is no question that Scholle received benefits from his insurers. Recall that Scholle's insurers negotiated an almost $3 million discount to settle the $4.1 million that the Hospital billed Scholle for his care. It's settled law in Colorado that the contract exception protects such discounts. *See Gardenswartz*, 242 P.3d at 1085 ("[W]rite offs 'are as much of a benefit for which [a plaintiff] paid consideration as are the actual cash payments by his health insurance carrier to the health care providers.'" (second alteration in original) (quoting *Acuar*, 531 S.E.2d at 322)). Because the contract exception encompasses these payments and discounts, we hold that the trial court was prohibited from considering them in its good cause analysis, as this determines a plaintiff's overall recovery.

¶60 Section 13-64-402 does not convince us otherwise.

3. Section 13-64-402's Subrogation Framework Allocates Damages

¶61 Section 13-64-402 is contained in Part 4 of the HCAA, entitled "Procedures and Evidence in Medical Malpractice Actions." As this title suggests,

section 13-64-402 is a procedural mechanism to "address[] subrogation rights in medical malpractice suits." *Colo. Permanente Med. Grp., P.C. v. Evans*, 926 P.2d 1218, 1231 n.24 (Colo. 1996); *see also Mullins v. Kessler*, 83 P.3d 1203, 1205 (Colo. App. 2003) (characterizing section 13-64-402 as "creating a mechanism for insurers to assert their subrogation rights for medical benefits paid to a plaintiff"). By allowing subrogation interests to be "resolved directly in the medical malpractice action itself," this section streamlines a plaintiff's recovery of damages and an insurer's receipt of repayment. *Vitetta*, 240 P.3d at 330.

¶62 Section 13-64-402 is a damage allocation statute. It is a mechanism that allows insurers to directly assert their subrogation rights in medical malpractice cases. Once damages are awarded in a medical malpractice case, *if* a plaintiff's third-party payer or provider has filed a subrogation notice under section 13-64-402(2), the trial court is required to allocate a portion of the plaintiff's damages to that payer or provider in the amount owed to them. § 13-64-402(3). And, as the trial court correctly observed, if a payer or provider does not file a subrogation notice under section 13-64-402(2), there is no need for the court to allocate damages in such action.

¶63 Respondents invite us to "read [section 13-64-402] in conjunction with the good cause requirement" contained in section 13-64-302(1)(b), such that a trial court would necessarily consider how much money a prevailing plaintiff owes to

third-party payers or providers "when deciding whether there is good cause to exceed" the HCAA's damages cap. We decline that invitation because nothing in section 13-64-402 indicates that the General Assembly intended it to play a role in a trial court's good cause determination. Indeed, section 13-64-402 contains no reference to the damages cap or good cause determination contained in section 13-64-302(1)(b). Likewise, section 13-64-302(1)(b) notably contains no reference to consideration of subrogation interests under section 13-64-402.

¶64 Moreover, underpinning Respondents' position that the two sections must be read together is the notion that such a reading will ensure the fairest damage award is imposed against defendants. But the purpose of section 13-64-302(1)(b)'s good cause exception is to allow a trial court to exceed the $1 million cap if its application would be unfair to the *plaintiff*. *See* § 13-64-302(1)(b) (if "application of [the cap] would be unfair" to the plaintiff, "the court may award in excess" of the cap).

¶65 To be sure, section 13-64-302(1)(b) grants a trial court broad discretion in determining what constitutes good cause to exceed the cap. And, but for the contract exception to the collateral source statute, it would be *permissible* for a trial court to consider, as one relevant factor, an insurer's payments and a plaintiff's reimbursement obligation to that insurer. Except, as we've already discussed, the contract exception prohibits such consideration.

¶66 Respondents push back, arguing that section 13-64-402(3), requiring a trial court to "determine the amount, if any, due the third party payer or provider" and to "enter its judgment in accordance with such finding," would be rendered meaningless in situations like this one, where no third-party payers or providers file subrogation notices, thus waiving their subrogation rights. We disagree because, as we said, where no third-party payers or providers come forward, there is no need for a trial court to allocate damages. *See* § 13-64-402(3) ("[T]he court shall determine the amount [due to payers or providers], *if any* . . . ." (emphasis added)).

4. Balancing Competing Policy Interests Is the General Assembly's Role, Not the Court's

¶67 Finally, Respondents argue that their construction of the statutes ensures Scholle won't receive more than what he owes to his insurers for his past medical expenses, thereby serving the HCAA's damage-limiting purpose. They emphasize that, if courts aren't permitted to consider collateral source evidence in deciding whether there's good cause to exceed the cap, this will create bad public policy, "ultimately recreat[ing] the conditions that were driving health care providers out of Colorado before the passage of the HCAA." These policy arguments do not overcome the plain language of the HCAA, our caselaw regarding the contract exception to the collateral source statute, or the record in this case. In our view, these arguments are best suited for the General Assembly.

¶68 To begin, while it's certainly possible that Scholle could end up with a windfall in this case, we can't know that for sure based on the record before us. More significantly, it's unclear whether the waiver provision in section 13-64-402(2) could preempt Scholle's federal insurer—the Veterans Administration/Tricare program—from separately asserting its subrogation rights.[5]

¶69 Further, if we adopt Respondents' position, they would be the ones ending up with a windfall. Under their theory, Scholle may not properly be awarded the $4.1 million the Hospital billed him because he does not owe the Hospital (or anyone else) that amount. And he may not properly be awarded the $1.2 million his insurers paid the Hospital on his behalf (because, in Respondents' view, the insurers waived their subrogation rights). Thus, with respect to the Hospital's charges, the Hospital would benefit to the tune of $1.2 million and Scholle would receive nothing.[6] To the extent either party receives a windfall, the General

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[5] Additionally, Respondents' argument regarding Scholle's repayment obligation (or, more specifically, his *purported* lack of repayment obligation) turns on their assertion that a waiver under section 13-64-402(2) operates as a total waiver of an insurer's subrogation rights. Scholle takes issue with that position, countering that any waiver under section 13-64-402(2) is cabined by its language limiting such waiver "as to such action," thus leaving open the possibility that his insurers will seek repayment in a separate action. We agree with Scholle.

[6] If the trial court on remand imposed the cap, Scholle's recovery for economic damages would be limited to $1 million, notwithstanding the fact that Scholle's insurers paid the Hospital $1.2 million for Scholle's medical care. Thus,

Assembly has clearly decided that allowing an injured plaintiff to benefit from their insurance contract is the lesser evil. *Gardenswartz*, 242 P.3d at 1083 ("If either party is to receive a windfall, the rule awards it to the injured plaintiff who was wise enough or fortunate enough to secure compensation from an independent source, and not to the tortfeasor . . . .").

¶70 Lastly, we address the parties' competing arguments that the other's construction of the contract exception and section 13-64-402 creates bad public policy. Without question, there are compelling public policy concerns on both sides of this case. At the end of the day, however, we think it's the General Assembly's role—not this court's—to weigh those concerns. "The wisdom and effectiveness with which the HCAA might remedy the concerns sought to be addressed are, of course, not questions which this court will entertain, for 'we do not sit as a "super legislature" to weigh the propriety of . . . legislation.'" *Scholz*, 851 P.2d at 907 (alteration in original) (quoting *Colo. Soc'y of Cmty. & Institutional Psychs., Inc. v. Lamm*, 741 P.2d 707, 712 (Colo. 1987)).

¶71 The General Assembly has spoken, and we must respect what it has said.

Respondents' reading could result in the Hospital, a tortfeasor, as Scholle puts it, "profit[ing] from rather than pay[ing] for its negligence."

III. Conclusion

¶72 We reverse the portion of the division's judgment that concludes a trial court may properly consider a prevailing plaintiff's insurance contract liabilities as part of the court's good cause and unfairness determinations under the HCAA. *See Scholle*, ¶¶ 124–26, 519 P.3d at 1115–16. In all other respects, we affirm the judgment of the court of appeals. Accordingly, we remand this case to the trial court to recalculate interest on the jury's award and enter judgment in favor of Scholle and against the Respondents. On remand, a new good cause determination is unnecessary because (1) the trial court properly refused to consider Scholle's insurance contract liabilities; and (2) as the division majority concluded, the record supports the trial court's application of the five remaining factors, *id.* at ¶¶ 112-13, 519 P.3d at 1113.

JUSTICE MÁRQUEZ, joined by **CHIEF JUSTICE BOATRIGHT** and **JUSTICE HART**, dissented.

JUSTICE MÁRQUEZ, joined by CHIEF JUSTICE BOATRIGHT and JUSTICE HART, dissenting.

¶73 I agree with the majority that the contract exception to the collateral source rule applies to medical malpractice actions. Maj. op. ¶ 52 (citing § 13-21-111.6, C.R.S. (2023) (covering "any action . . . to recover damages for a tort")). I also agree that the payments Daniel B. Scholle's insurers made on his behalf to fully settle his medical bills fall within the contract exception. *Id.* at ¶¶ 4, 40. And I agree that section 13-64-402, C.R.S. (2023), is a "damage allocation statute" that offers third-party payers a mechanism to directly assert their subrogation interests in medical malpractice cases. Maj. op. ¶ 62. But I cannot join the majority's opinion for two reasons.

¶74 My primary disagreement with the majority concerns its legal analysis of the interplay between the contract exception to the collateral source rule in section 13-21-111.6, and the good-cause/unfairness exception under section 13-64-302(1)(b), C.R.S. (2023), of the Health Care Availability Act ("HCAA"). My disagreement starts with the majority's framing of the question in this case as whether the contract exception applies in "a post-verdict proceeding under the HCAA *seeking to reduce a jury's damages award*." Maj. op. ¶ 1 (emphasis added). By framing the question incorrectly, the majority reaches the wrong result. Instead, this case asks us to determine whether a trial court may consider a medical

malpractice plaintiff's payment obligations (e.g., to a medical provider or insurer) in determining whether that plaintiff has met their burden to show good cause that applying the HCAA's statutory $1 million cap on damages would be unfair and, therefore, that the cap should be exceeded. § 13-64-302(1)(b).

¶75 In other words, the majority starts with the jury's damages award (as calculated in accordance with the contract exception to the collateral source rule) and characterizes the trial court's determination under section 13-64-302(1)(b) as "reducing" the jury's award. But that approach disregards the purpose and import of the $1 million statutory cap. The existence of the damages cap shifts the starting point of the analysis under section 13-64-302(1)(b). The question is not whether the jury's award should be "reduced." The $1 million statutory cap already does that. Indeed, applying the contract exception to finalize the jury's award post-verdict does not, and cannot, displace or override the specific statutory cap applicable in medical malpractice cases. Thus, the starting point is the cap, and the only question is whether the plaintiff can show "good cause" that the $1 million limit is "unfair" and should be exceeded in the plaintiff's case.

¶76 As the majority acknowledges, in making this determination, the court "may exercise its discretion to consider factors it deems relevant," so long as it "consider[s] the circumstances in each case." Maj. op. ¶ 30 (alteration in original) (quoting *Wallbank v. Rothenberg*, 140 P.3d 177, 180–81 (Colo. App. 2006)). Surely

this includes consideration of a plaintiff's payment obligations. In the context of this query, evidence of a plaintiff's payment obligations (if any) does not serve to "reduce" the jury's award. In fact, just the opposite is true: such information may justify exceeding the statutory damages cap by establishing that application of the cap in the plaintiff's case would be "unfair" under the circumstances.

¶77 This leads to my secondary concern with the majority's opinion: its characterization of the lower courts' decisions. The majority indicates that the trial court "declined to consider Scholle's insurance contract liabilities." Maj. op. ¶ 2. To the contrary, in its January 30, 2020, order finding good cause to exceed the $1 million cap, the trial court expressly relied, in part, on Scholle's obligations to repay his medical providers for past medical care. *Scholle v. Ehrichs*, 2022 COA 87M, ¶ 125, 519 P.3d 1093, 1115 (describing the trial court's order). The division majority was primarily concerned with the factual inaccuracy of the trial court's finding that Scholle had certain repayment obligations, observing that "Scholle did not produce any evidence that he owed any money to third-party payers or providers." *Id.* at ¶ 126, 519 P.3d at 1115. Had Scholle produced such evidence, however, the division majority recognized that the trial court could have appropriately considered his payment obligations in making the requisite good-cause/unfairness determination under section 13-64-302(1)(b). *See id.*

¶78 I point this out because the majority's inaccurate description of the division's opinion leads it to mistakenly suggest that the division concluded that the trial court abused its discretion because it "did not consider Scholle's insurers' subrogation interests, or the lack thereof, before finding good cause to exceed the cap." Maj. op. ¶ 12 (citing *Scholle*, ¶¶ 124–26, 519 P.3d at 1114–15). And based on this mistaken reading of the division's opinion, the majority holds that trial courts can *never* consider a plaintiff's insurers' subrogation interests in performing the good-cause/unfairness analysis. *Id.* at ¶ 66. That interpretation appears to strip most, if not all, meaning from section 13-64-402, the HCAA's subrogation provision—at least when a plaintiff's damages would, on their face, exceed the statutory cap.

¶79 I simply do not read the division's opinion like the majority does. Rather, consistent with my reading of the division's opinion, I would hold that section 13-64-302(1)(b) permits trial courts to consider a plaintiff's insurance contract liabilities in determining whether to exceed the cap. Unlike the majority's opinion, my approach harmonizes the contract exception with the text and purpose of section 13-64-302. It also avoids the effects of the majority's opinion on section 13-64-402. Rather than allowing the contract exception to the collateral source rule to swallow the text and purpose of the specific damages cap in the HCAA, as the

majority does today, I would give both provisions consistent and coherent effect. For these reasons, I respectfully dissent.

I. The Contract Exception Does Not Foreclose a Court from Considering a Plaintiff's Insurance Contract Liabilities Under Section 13-64-302(1)(b)

¶80 The majority recognizes that section 13-64-302(1)(b), standing alone, permits a trial court to consider a plaintiff's insurance contract liabilities in deciding whether to allow the plaintiff's damages to exceed the HCAA's $1 million cap. Maj. op. ¶ 65. But the majority then imports the contract exception to the collateral source rule into the wholly separate analysis trial courts must perform under the later-enacted HCAA because, in its view, "the contract exception prohibits such consideration." *Id.* I disagree.

A. Section 13-64-302(1)(b) Sets the Presumptive Ceiling for Damages Under the HCAA

¶81 Section 13-64-302(1)(b) limits the total amount recoverable for all medical malpractice damages to $1 million, except if the plaintiff shows "good cause" that (1) "the present value of past and future economic damages would exceed" $1 million and (2) applying the cap would be "unfair" (the "good-cause/unfairness" exception). *See Vitetta v. Corrigan*, 240 P.3d 322, 329 (Colo. App. 2009) (explaining the good-cause/unfairness standard). This limitation on damages represents a legislative policy decision to cap *every* medical malpractice

award at $1 million. Put differently, the General Assembly has deemed $1 million a presumptively "fair" maximum award in such cases.

¶82 The legislative declaration of the HCAA supports this view. The purpose of the Act is to protect the *public* (not plaintiffs or defendants) by "containing the significantly increasing costs of malpractice insurance" to "assure the continued availability of adequate health-care services" to Coloradans. § 13-64-102(1), (2)(a), C.R.S. (2023). The legislative declaration makes clear that the "limitations of liability" in section 13-64-302(1)(b) are integral to achieving this purpose. § 13-64-102(2)(a). To protect the public, the statutory cap must serve as a meaningful limitation on damages awards.

¶83 Yet under the majority's reasoning, the cap serves little to no purpose. The majority reasons that any consideration of a plaintiff's insurance contract liabilities under section 13-64-302(1)(b) violates the contract exception to the collateral source rule because it amounts to relying on a plaintiff's contracted-for benefits to *reduce* the jury's damages award. Maj. op. ¶¶ 55–56; *see also Scholle*, ¶¶ 153–54, 519 P.3d at 1118 (Berger, J., concurring in part and dissenting in part).

¶84 But the majority is wrong to frame the question as one of whether *reducing* the jury's award would be unfair. Section 13-64-302(1)(b) makes clear that the HCAA's damages cap does not permit medical malpractice damages to exceed

$1 million in the first place. Under this provision, all damages, whether past or future damages, or a combination, shall not exceed $1 million:

> The *total amount recoverable for all damages* . . . in any civil action for damages in tort brought against a health-care professional . . . or a health-care institution . . . whether past damages, future damages, or a combination of both, *shall not exceed one million dollars* . . . ; *except* that, if, *upon good cause shown*, the court determines that *the present value of past and future economic damages would exceed such limitation* and that *the application of such limitation would be unfair*, the court may award in excess of the limitation the present value of additional past and future economic damages only.

§ 13-64-302(1)(b) (emphases added).

¶85 Instead, under the legislature's scheme, the plaintiff bears the burden to show that *applying the statutory cap* would be unfair under the plaintiff's particular circumstances. *Wallbank*, 140 P.3d at 180–81 (requiring that courts "consider the circumstances in each case" when evaluating "unfairness in the application of the cap"). In the context of this distinct good-cause/unfairness analysis, assessing a plaintiff's repayment obligations can only weigh in favor of *increasing* the plaintiff's ultimate award; if this factor does not weigh in favor of exceeding the cap (because the plaintiff has no outstanding payment obligations), then the presumptively "fair" cap applies, and the plaintiff is no worse off.

¶86 The majority maintains that this view "nullif[ies] the contract exception's application in certain circumstances . . . without any clear direction to do so from the General Assembly." Maj. op. ¶ 57. Not so. The legislature's imposition of a

$1 million damages cap in the medical malpractice context could not be clearer. Importantly, my interpretation harmonizes the interaction between the contract exception and the good-cause/unfairness exception, provided that we read our caselaw interpreting the contract exception in its proper context.

B. Applying the Contract Exception to Medical Malpractice Cases Does Not Require Adopting the Majority's Interpretation of the HCAA

¶87 The majority properly recognizes that a trial court "may exercise its discretion to consider factors it deems relevant" in determining whether to allow a plaintiff's damages award to exceed the HCAA's damages cap, provided that the court "consider[s] the circumstances in each case." *Id.* at ¶ 30 (alteration in original) (quoting *Wallbank*, 140 P.3d at 180–81). But the majority also insists that the contract exception constrains this broad discretion by precluding a trial court from considering a plaintiff's insurance contract liabilities as part of this specific analysis under section 13-64-302(1)(b) simply because the contract exception in section 13-21-111.6 generally applies in medical malpractice cases. Maj. op. ¶ 65. In my view, the majority's logic improperly collapses the distinct components of the good-cause/unfairness analysis and misapplies our contract exception case law.

¶88 First, the fact that the contract exception applies to medical malpractice cases does not compel the majority's conclusion that a court is completely prohibited

from considering a plaintiff's insurance contract liabilities in the good-cause/unfairness analysis. After a jury returns a verdict in a medical malpractice case—and upon the plaintiff's motion for damages in excess of the HCAA's cap—a court must first determine whether there is good cause to show that "the present value of past and future economic damages would exceed" the cap. § 13-64-302(1)(b). I would agree that at this stage of the good-cause/unfairness analysis, the contract exception to the collateral source rule prevents a court from considering the plaintiff's contracted-for benefits in calculating the value of the plaintiff's past and future economic damages.

¶89 But that is not the end of the inquiry. The next step requires a court to determine whether the plaintiff has shown good cause, given the totality of the circumstances, that "it 'would be unfair' to apply the $1 million limit." *Vitetta*, 240 P.3d at 329 (quoting § 13-64-302(1)(b)); *see also Wallbank*, 140 P.3d at 181. As to that question, the contract exception to the collateral source rule brings nothing to bear. At this juncture, the issue is no longer whether it would be unfair to "reduce" the jury's award. The "reduction" of the award is an automatic function of the statutory cap, which reflects the legislature's judgment regarding what is presumptively "fair" in such cases. Instead, the question under section 13-64-302(1)(b) is whether the plaintiff can show good cause to *exceed* that statutory cap. In making that assessment, a plaintiff's repayment obligations to third-party

payers or providers may very well render the cap unfair and, therefore, may justify exceeding it.

¶90 The cases the majority cites for the key principles that inform its application of the contract exception under the HCAA are simply inapposite. Neither *Volunteers of America Colorado Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010), nor *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070 (Colo. 1992), arose in the context of a medical malpractice claim. *Gardenswartz*, 242 P.3d at 1082, 1085–86 (holding, in the context of a premises liability action, that the contract exception does not permit courts to reduce judgments based on a plaintiff's insurer's discounted rates); *Van Waters*, 840 P.2d at 1079 (interpreting the contract exception to include disability payments to "protect[] benefits to which a person is entitled by virtue of that person's own efforts"). Moreover, both *Gardenswartz* and *Van Waters* were decided *after* the enactment of the HCAA; consequently, they shed no light on the legislative intent of section 13-64-302(1)(b). If anything, the more relevant precedent that existed when the legislature enacted the HCAA *limited* the scope of the contract exception in the medical malpractice context. *Colo. Permanente Med. Grp., P.C. v. Evans*, 926 P.2d 1218, 1231–32 (Colo. 1996) (holding that the contract exception does not prevent a medical malpractice defendant from offsetting awards based on amounts they have already paid as the plaintiff's insurer).

¶91 The majority also points to *Pressey ex rel. Pressey v. Children's Hospital Colorado*, 2017 COA 28, ¶ 22, 488 P.3d 151, 158, *overruled on other grounds by Rudnicki v. Bianco*, 2021 CO 80, 501 P.3d 776, which held that the contract exception precludes a court from considering Medicaid and private insurance payments in determining whether to permit damages in excess of the statutory cap in section 13-64-302(1)(b). Maj. op. ¶¶ 48–51. *Pressey*, of course, is not binding on this court. Moreover, *Pressey* primarily involved *future* medical costs that likely would be subject to rights of subrogation and reimbursement *once they accrued*, rendering the prospect of any double recovery "doubtful." ¶ 21, 488 P.3d at 158. Most importantly, I disagree with the analysis in that case because, as explained above, the starting point of the good-cause/unfairness analysis under section 13-64-302(1)(b) is not the jury's damages award but the legislature's statutory cap. Determining whether good cause exists to exceed that cap does not involve reducing a defendant's liability. If the plaintiff does not meet their burden, the statutory cap applies.

¶92 Finally, the majority erroneously reasons that the legislature's failure to explicitly provide that the contract exception does not apply to the good-cause/unfairness determination under the HCAA means that the contract exception to the collateral source rule in section 13-21-111.6 must prevail. Maj. op. ¶ 58. The majority fails to recognize that the later-enacted provisions of the HCAA

specifically governing medical malpractice actions should control here. *See Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 908 (Colo. 1993) (holding that a generally applicable cap on noneconomic damages did not apply in medical malpractice cases subject to the later-enacted, lower damages cap in the HCAA); *cf. Jenkins v. Panama Canal Ry. Co.*, 208 P.3d 238, 242 (Colo. 2009) (explaining that the more specific statute prevails—regardless of when it was enacted—unless the legislature "manifestly intends" for the general statute to prevail); § 2-4-206, C.R.S. (2023) (stating that when statutes are irreconcilable, "the statute prevails which is latest in its effective date"). The legislature enacted section 13-64-302(1)(b) two years after it enacted the contract exception to the collateral source rule. And the HCAA's damages cap and good-cause/unfairness exception, which apply only in medical malpractice cases, are undoubtedly more specific than section 13-21-111.6, which applies broadly to all "tort[s] resulting in death or injury to person or property." § 13-21-111.6; *see Scholz*, 851 P.2d at 907–08 (comparing the HCAA's cap for noneconomic damages to the broadly applicable limitations in section 13-21-102.5, C.R.S. (2023), and concluding that the HCAA is more specific). Accordingly, the proper resolution of any irreconcilable conflict between the HCAA's damages cap and the contract exception is to give full effect to the HCAA.

¶93 The majority leaps over the text and purpose of the HCAA, fails to consider how both statutes can be read consistently, and improperly resolves the conflict it

identifies. Because I perceive a narrower path forward—one that protects the contract exception while effectuating the HCAA's intent—I would hold that trial courts have the discretion to consider a plaintiff's insurance contract liabilities in determining whether applying the HCAA's damages cap would be unfair.

II. The Majority's Mischaracterization of the Division's Opinion Leads it to Strip Meaning from Section 13-64-402

¶94 My second concern with the majority's opinion is its potentially damaging effects on the application of section 13-64-402, the HCAA's subrogation provisions. As explained above, the majority's misconception of the division's opinion leads it to conclude that a trial court cannot consider a plaintiff's insurers' subrogation interests in performing the good-cause/unfairness analysis. Maj. op. ¶ 12. Specifically, the majority explains that a trial court need not *allocate* damages in accordance with section 13-64-402 *unless* third-party payers or providers file subrogation notices under section 13-64-402(2). Maj. op. ¶ 62. I agree. However, that does not mean that the contract exception precludes a trial court from considering the presence or absence of such notices (or repayment obligations generally) in determining whether to permit a damages award in excess of the statutory cap. Rather, a proper reading of section 13-64-402 supports the conclusion that considering what a plaintiff owes third-party payers as part of this analysis does not run afoul of the contract exception.

¶95 Section 13-64-402 diverges from the typical tort claim in that it affords third-party payers the opportunity to pursue their subrogation interests as part of the medical malpractice proceeding itself,[1] *Vitetta*, 240 P.3d at 330, rather than seeking reimbursement from the plaintiff after the fact, *see Ronquillo v. EcoClean Home Servs., Inc.*, 2021 CO 82, ¶ 17, 500 P.3d 1130, 1134–35 (stating that subrogation policies typically obligate plaintiffs to reimburse third-party payers). After third-party payers raise their separate interests but "[b]efore entering final judgment, the court shall determine the amount, if any, due the third party payer or provider and enter its judgment in accordance with such finding." § 13-64-402(3). When the present value of a plaintiff's past and future economic damages exceeds the statutory cap, the only opportunity a trial court has to apply section 13-64-402(3) would appear to be during its good-cause/unfairness analysis.

¶96 As explained above, the good-cause/unfairness analysis can only *increase* a plaintiff's damages award. Therefore, the contract exception does not preclude a trial court from relying on the very evidence section 13-64-402(3) requires the court to consider in determining whether good cause exists to exceed the statutory cap.

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[1] More specifically, a third-party payer's failure to seek subrogation under section 13-64-402 "constitute[s] a waiver of such right . . . as to such action." § 13-64-402(2). The majority opines that this provision would still permit third-party payers to seek subrogation in separate actions and suggests that the mere possibility that such claims exist supports its overall holding. Maj. op. ¶ 68 n.5. I see no need to address the scope of section 13-64-402(2) in this case.

Nor should it preclude a court from relying on the *absence* of such evidence, contrary to the majority's suggestion. Maj. op. ¶ 66. Again, the legislature has placed the burden on the plaintiff to prove good cause and unfairness justifying an award in excess of the statutory cap. Where the plaintiff has no evidence of outstanding payment obligations, a trial court should not be forced to put a thumb on the scale in favor of the plaintiff by assuming that such obligations exist; if anything, the plaintiff should be held to their burden to establish good cause and unfairness.

¶97 The majority views this approach as contrary to the General Assembly's preference for affording any windfall that results from a tort action to injured plaintiffs rather than defendants. *Id.* at ¶ 69. But the purpose of section 13-64-402 is to avoid forcing *third-party payers* to suffer financial loss at the hands of a medical malpractice defendant. *See Vitetta*, 240 P.3d at 330–31 (explaining that recovery under section 13-64-402 "properly allowed" an insurance company "to recover its prior payments on behalf of plaintiffs from defendants"); Second Reading of S.B. 88-143 on the S. floor, 56th Gen. Assemb., 2d Sess. (Feb. 25, 1988) (statements of Sen. Strickland, explaining that the purpose of section 13-64-402 is to ensure that "dollars paid out by [a plaintiff's] insurance company would be recoverable from" the defendant's insurer and "would not be an expense that [the plaintiff's] insurance company had to bear"). It has nothing to do with the relationship

between plaintiffs and defendants; rather, section 13-64-402 is about the relationship between defendants and a plaintiff's *insurance company* (or comparable third-party payer). Nevertheless, the majority's approach means that a third-party payer's decision not to exercise its subrogation rights both penalizes the defendant, and affords double recovery to the plaintiff—despite the well-established principle that subrogation frameworks *avoid* double recovery, even under the contract exception. *Van Waters*, 840 P.2d at 1080–81 (Rovira, J., specially concurring) (explaining that subrogation policies are "consistent with the legislative intent underlying section 13-21-111.6").

¶98 That is not how the HCAA works. The HCAA does not seek to penalize defendants or reward plaintiffs. At most, the HCAA's subrogation provision exists to avoid penalizing third-party payers. A third party's failure to take advantage of section 13-64-402 should affect neither a plaintiff's recovery amount nor a defendant's obligations to the plaintiff; it should only preclude a third-party from recovering on its subrogation claim, at least under the HCAA.

III. Conclusion

¶99 I cannot agree that the contract exception to the collateral source rule forbids a trial court from considering a medical malpractice plaintiff's repayment obligations under an insurance contract in determining whether the plaintiff has shown good cause that applying the HCAA's damages cap would be unfair.

Rather, consistent with the text and purpose of the HCAA, a trial court has the discretion to consider such benefits as one factor, among any others it deems relevant, in performing this analysis.

¶100 To be sure, my interpretation would not necessarily affect the outcome of this case on remand to the trial court. The trial court's re-evaluation of good cause and unfairness—even excluding the inaccurate assumption that Scholle owed his providers—might well yield the same result. My broader point is that a trial court *may* consider a plaintiff's contracted-for benefits in evaluating the unfairness prong. This does not mean that the court *must* consider those benefits, or that the court must give those benefits special weight. It merely adds to the factors the court may consider in exercising its discretion to award damages in excess of the HCAA's cap. I agree with the majority that "[t]he General Assembly has spoken, and we must respect what it has said." Maj. op. ¶ 71. In holding otherwise, the majority improperly constrains trial courts' discretion and robs the HCAA's damages cap of its intended purpose.

¶101 I respectfully dissent.