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COLORADO SUPREME COURT
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Certiorari to Court of Appeals, State of Colorado, Opinion Issued by Judge Fox (Navarro and Casebolt, JJ. concurs) Case No. 19CA0023; Adams County District Court, Hon. Jaclyn Casey Brown, District Court Judge, Case No. 2017CV30884

PETITIONER:
LISA MELODY FRENCH,

v.

RESPONDENT:
CENTURA HEALTH CORPORATION AND CATHOLIC HEALTH INITIATIVES COLORADO D/B/A ST. ANTHONY NORTH HEALTH CAMPUS.

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Supreme Court
Case No. 2020SC565

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Brief of Amici Curiae Supporting Petitioner, filed by:
Colorado Consumer Health Initiative (CCHI);
Colorado Center on Law and Policy (CCLP); and
Colorado Legal Services (CLS).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in these rules. The undersigned certifies that: The brief complies with C.A.R. 29(d). It contains 3,407 words, including screenshots.

s/Sean Connelly
Sean Connelly
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Identities and Interests of Amici Curiae

Amici advocate for Colorado consumers. Each amicus shares strong concern that the appeals court's decision wreaks disastrous policy: holding Petitioner and others similarly situated liable for exorbitant "chargemaster" rates (which a jury found were never agreed upon and were unreasonable) will escalate medical costs and debt.

Amici's expertise on hospital billing and consumer debt policies is important because the appeals court decided this case based on its own notions of "important policy considerations." 2020COA85 ("COA"), ¶ 31. The court wrote, "Of course, our holding is limited to the unique context of the health care system and hospital-patient contracts." *Id.* ¶ 30. Three judges' views of "policy considerations" trumped their "misgivings that the [contract] may have lacked mutual assent." *Id.* ¶ 31.

Sometimes, in other forums (particularly legislative and regulatory ones), amici will advocate affirmative policies to help consumers by furthering hospital price transparency and reasonableness. Here, however, because sound law and sound policy coalesce, amici discuss policy with a far more modest goal. They ask simply that this case be decided, as it was in the trial court, based on legal rather than on policy grounds.

Here is a general description of each amicus curiae and of its particular interest in this case:

Colorado Consumer Health Initiative (CCHI), established in 2000, helps Colorado consumers overcome structural barriers to equitable and affordable health care. It advances "the consumer voice to improve access to health care for all Coloradans by working statewide for progress toward equity, access, affordability and quality." CCHI has particular policy expertise in state-regulated health insurance products, and it was the lead proponent of state legislation prohibiting balance billing or surprise out of network bills, which took effect in 2020. In 2018, CCHI implemented a direct service program under which it has helped 1200 Colorado clients resolve over $3 million in hospital bills, claims denials, and prescription drug costs. CCHI is concerned that the appeals court's decision promotes opaque, unreasonable and unaffordable hospital billing of consumers.

Colorado Center on Law and Policy (CCLP), established in 1998, is a nonprofit organization dedicated to eradicating poverty across Colorado through research, legislation, and legal advocacy. CCLP employs its expertise in public health by advocating for legislation and rules promoting equitable access to medical services for all Coloradans; for example, during the 2021 legislative session, CCLP played an integral role in crafting legislation requiring healthcare providers to screen uninsured patients for eligibility for public health insurance programs and discounted care. CCLP is gravely concerned with the appeals court's decision because chargemaster rates, far exceeding hospitals' actual costs, are nearly impossible for consumers to uncover and discern, as shown by their computer search discussed below in footnote 1.

Colorado Legal Services (CLS) is a private, nonprofit corporation that provides high quality free civil legal assistance to indigent clients throughout the state of Colorado. CLS is the only agency in the state providing free legal services, including direct representation, to indigent civil clients in every Colorado county. CLS clients are disproportionately impacted by medical debt and are more likely to be sued by medical debt collectors. Judgments in medical debt collection lawsuits can lead to wage garnishment, bank account garnishment, and liens on consumer homes. The appeals court decision would severely limit the ability of CLS' attorneys to successfully advocate for clients in medical debt collections cases and avoid these judgments.

Statement of the Case

To receive spinal fusion surgery, Petitioner agreed to pay "all charges of the Hospital … not otherwise paid by [her] health insurance." COA ¶ 5. This was no agreed-upon price term by parties of equal sophistication: Petitioner obtained a GED at age 23 and worked as an office assistant at the time of her surgery, while the Hospital has twelve full-time employees solely responsible for dealing with health insurance, government, and private payments. Tr. 6/6/18 at 768-69, 805-06.

The Hospital provided Petitioner an estimated price of $57,601.77 for the surgery and further estimated that after insurance, Petitioner "would only be responsible for $1336.90." COA ¶ 5. But the Hospital then imposed a vastly higher "chargemaster" bill for more than $300,000, and sued Petitioner for a post-insurance "balance of $229,112.13." *Id.* ¶ 6.

The Hospital was solely at fault for the dramatic discrepancy between estimated and actual charges. Petitioner properly presented her health benefits card to the Hospital which the Hospital scanned into its system before providing the $1,336 estimate. While at first trying to blame an illegible scan, the Hospital's own witness conceded the Hospital determined the case was out-of-network simply by looking carefully at the scanned card. *See* Tr. 6/5/18 at 501-03, 535-38, 546; Tr. 6/6/18 at 620-22, 626; Tr. 6/7/18 at 913-15.

After ruling the contract did not unambiguously adopt undisclosed chargemaster rates, the trial court held a six-day jury trial. The jury first found there was a contract, and it then turned to the price term.

The jury confirmed that the Hospital's proposed construct was not the only (or even the best) possible construct of the price term. Jurors found:

2) Does the term "all charges of the Hospital" in Section 5 of the Hospital Service Agreement mean:

A. The predetermined charges for the goods and services Defendant Lisa French received from the Hospital set by the Hospital's chargemaster? OR

B. The reasonable value of the goods and services provided to her.

ANSWER (A or B): B

CF 4981.

The jury then answered a special interrogatory about the reasonableness of the Hospital's chargemaster rates. Jurors found the chargemaster rates were *not* reasonable:

Were the predetermined rates set by the Hospital's chargemaster for goods and services Defendant Lisa French received Reasonable?

Answer (YES or NO): NO

CF 4983.

Having found the Hospital could not impose undisclosed and unreasonable chargemaster rates, the jury then decided how much of the $303,000 bill Petitioner owed on top of the $73,000 already paid. By finding she owed $766.74 (CF 4982), jurors awarded the Hospital $74,000 for services the Hospital estimated it would provide for only $58,000.

The division reversed by citing "important policy considerations." COA ¶ 31. Although nothing referenced an internal chargemaster (which the Hospital still has never provided), the division agreed with the Hospital that the agreement "unambiguously refers to a hospital's chargemaster rates." *Id.* ¶ 21; *see id.* ¶ 35 ("price term 'all charges' unambiguously referred to the Hospital's chargemaster rates").

Signaling it was deciding policy, not law, the division made an extraordinary statement that: "Of course, our holding is limited to the unique context of the health care system and hospital-patient contracts." *Id.* ¶ 30. The division's own view of "important policy considerations" caused it to "set aside our misgivings that the [contract] may have lacked mutual assent." *Id.* ¶ 31.

Argument

I. The division's ruling imposing "chargemaster" rates without mutual assent creates disastrous public policy.

A. Chargemaster rates are "highly inflated" and "virtually never" paid.

Most consumers, and likely many generalist judges and lawyers, have never heard of "chargemaster" (or "gross") rates. Fortunately, few consumers must pay them.

As the D.C. Circuit recently recognized, chargemaster rates "bear little relationship to market rates and are usually highly inflated." *Am. Hosp. Ass'n (AHA) v. Azar*, 983 F.3d 528, 531 (D.C. Cir. 2020) (quoting 84 Fed. Reg. 65524, 65538 (Nov. 27, 2019); internal punctuation omitted). They are "an artifact of the way in which Medicare used to reimburse hospitals," before Congress enacted a prospective payment system in 1983. 84 Fed. Reg. at 65538.

Steven Brill's 2013 magazine article and 2015 best-selling book exposed chargemaster abuse. *See* Brill, *America's Bitter Pill* (Random House 2015); McLean, *Mastering the Chargemaster*, 9 Pitt. J. Envt'l Pub. Health L. 1, 1-2 & nn.1-10 (2014) (discussing Brill's "seminal" 2013 *Time Magazine* article). Hospitals inflate them as "starting points" to "create greater leverage" so "the process of negotiating discounted rates for private payers results in higher rates overall." Brown, *Irrational Hospital Pricing*, 14 Hous. J. Health L. & Pol'y 11, 32 (2014).

Last year, the American Hospital Association (AHA) finally conceded that chargemaster rates "are virtually never what hospitals ultimately receive as payment" but merely are a "system of accounting and billing for historical and legal reasons." AHA Br., *AHA v. Azar*, No. 20-5193 2020 WL 4039043, *7 (D.C. Cir. Opening Brief filed July 17, 2020). Hospitals "often argue" their inflated rates do "not matter because no one really pays chargemaster prices." Nation III, *Hospital Chargemaster Insanity: Heeling the Healers*, 43 Pepp. L. Rev. 745, 748 (2016).

B. The ruling promotes: (1) high hospital costs; (2) price discrimination; (3) surprise medical bills; and (4) bankrupting medical debt.

Four policies are clear, and the division's ruling defies each. First is the national policy "to lower healthcare costs." *AHA v. Azar*, 983 F.3d at 535 (citing 42 U.S.C. § 300gg-18(e), entitled "Bringing down the cost of health care coverage"). Second is the broader policy against "predatory price discrimination." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993). Third is the policy against surprise medical billing, under the "No Surprises Act" taking effect in 2022. *See* Pub. L. 116-260, Div. BB, Title I, § 104(a), 134 Stat. 2824 (Dec. 27, 2020), codified at 42 U.S.C. §§ 300gg-131 & 300gg-132 (among other places), discussed in Johnson, *Crushed by COVID*, 125 Penn St. L. Rev. 453, 460 n.38, 474 n.100 (2021). Fourth is the policy against skyrocketing bankruptcies caused by medical debt.

First, the ruling increases health care costs by endorsing "phony [rates], having no relationship to either costs or value," that are "practically the definition of unreasonable charges." Griffin, *Fighting Overcharged Bills from Predatory Hospitals*, 51 Ariz. St. L.J. 1003, 1007 (2019) (first quote); Alp, *Imprecision's Terrible Toll*, 43 U. Dayton L. Rev. 373, 374-75 (2018) (second quote). It would be one thing if a contract expressly required such unreasonably high rates. But the "mind-boggling complexity, [and] opacity" of chargemaster rates shrouds them with "great mystery." Brown, *Irrational Hospital Pricing*, 14 Hous. J. Health L. & Pol'y 11, 14 (2014) (first quote); Gulick, *A Systems Thinking Approach to Health Care Reform*, 21 DePaul J. Health Care L. 1, 50-51 (2019) (second quote).[1]

Second, the ruling promotes discriminatory pricing, holding vulnerable consumers liable for the highest of all possible charges. By "actively requesting different prices of different consumers," hospitals engage in "price discrimination."

[1] To illustrate how even the most sophisticated Colorado consumer could not discern the rates that will be demanded under a chargemaster, attorneys for Amicus CCLP tried to calculate the rates for a hypothetical patient who agreed to receive a "clot-busting catheter" during a procedure at UCHealth Broomfield Hospital. That patient could not possibly calculate the chargemaster rates because there are dozens of options for "STERILE SUPPLES – CLOT-BUSTING CATHETER" ranging from $369.21 to $47,007.44. UCHealth Broomfield Hospital Price Index, UCHealth, https://search.hospitalpriceindex.com/hpi2/hospital/BroomfieldHospital/8085or (search "STERILE SUPPLIES - CLOT-BUSTING CATHETER") (search performed June 23, 2021).

Berke, *Drive-by-Doctoring*, 42 Am. J.L. & Med. 170, 182 (2016). This is not merely an abstraction: "Oppressive chargemaster charges result in discrimination against minorities who are more likely to be uninsured, out-of-network, and have medical conditions that lead to increased exposure to chargemaster charges." Griffin, *supra*, 51 Ariz. St. L.J. at 1041.

Third, the ruling endorses surprise billing. Here, as in other recent cases, opaque chargemaster rates shocked a patient. *See* Hyman, Ippolito & Silver, *Surprise Medical Bills*, 108 Geo. L.J. 1655 (2020). Among the "outrageous" examples cited in that 2020 Georgetown article was one "woman who had spinal surgery and got a surprise bill of $101,000." *Id.* at 1657-58. This case is even worse: for spinal surgery that the Hospital said it would perform for $58,000 (of which Petitioner would owe just $1,300), the Hospital billed more than $300,000 and demanded that Petitioner personally pay $229,000.

Fourth, the inevitable result in these fraught times will be more bankruptcy filings by Colorado medical consumers. Already, "unpaid medical bills are the primary cause of U.S. bankruptcies" and "[e]ven outside of the bankruptcy context, there is much evidence of medical indebtedness, including among insured patients." Epstein, *Price Transparency and Incomplete Contracts in Health Care*, 67 Emory L.J. 1, 36 (2017).

C. No countervailing policy justifies the ruling.

The division ignored all these pro-consumer policies despite invoking pro-hospital "policy considerations" "limited to the unique context of the health care system and hospital-patient contracts." COA ¶¶ 30-31. It could not "fault the Hospital for charging French its chargemaster rates" because it "would be impractical for a court to attempt to resolve the complexity of the health care system by imposing a reasonableness requirement" here. *Id.* ¶¶ 25-27.

As a matter of contract law, the "complexity" of health care billing should hurt, not help, hospitals seeking to charge unreasonably high rates to a small fraction of their least powerful consumers. Contract law's "essential" requirement is a "manifestation of mutual assent by the parties." Restatement (Second) of Contracts § 18 (1981). The legal burden of "more carefully" describing essential contract terms is on the drafter (typically the "stronger" party) who has "reason to know of uncertainties." *Id.* § 206 cmt. a. Hospitals seeking to impose unreasonable chargemaster bills, however, leave these price terms "intentionally vague." Berke, *supra*, 42 Am. J.L. & Med. at 177. They do not provide informed consent that consumers are agreeing to the highest possible rates paid by only a small fraction of hospital patients.

The division rejected a reasonable price requirement, which it called an "impractical" way "for a court to attempt to resolve the complexity of the health care system." COA ¶ 27. But neither Petitioner nor anyone supporting her asked courts to "resolve" systemic issues. All they asked, and all the trial court and jury did, was to use standard contract law to construe the terms of one agreement. The division, in contrast, took upon itself the power to impose broad policy judgments in a misguided "attempt to resolve the complexity of the health care system." *Id.*

There is nothing "impractical" in deciding whether parties contracting for hospital services agreed to reasonable rather than unreasonable price terms and, if the former, the amount of those reasonable charges. As recently explained by the U.S. Department of Health and Human Services:

> [M]any state[] courts have had to grapple with hospital charging systems in order to judge whether a given set of charges was reasonable. *There are several potential metrics for assessing reasonableness of a hospital's charge in a given case as an alternative to the chargemaster (gross) rates* described above.

84 Fed. Reg. at 65538 (emphasis added).

Having jettisoned contract law for policy, the division could not "fault the Hospital for charging French its chargemaster rates." COA ¶ 27. But a jury could attribute lots of "fault" to a hospital that estimated Petitioner would owe little more than a thousand dollars but then demanded she personally pay $229,000.

II. The trial court and jury properly applied common law to resolve a contract dispute.

While many commentators advocate pro-consumer reforms to address chargemaster abuses, sometimes a "solution" may just be "the common law of contracts." Nation III, *Healthcare and the Balance-Billing Problem: The Solution is the Common Law of Contracts*, 61 Vill. L. Rev. 153, 175-85 (2016); *see also* Nation III, *Contracting for Healthcare*, 124 Dick. L. Rev. 91 (2019). Here, common law proved up to the task: Colorado jurors, correctly instructed by a Colorado judge, applied standard contract law principles to resolve a price dispute.

This case raised questions answerable by contract law. Was an agreement to pay hospital "charges" too indefinite, thereby implying reasonable payment terms? *See* Restatement (Second) of Contracts §§ 33 cmt. e & 204 cmt. d (1981); *Larson v. Am. Nat'l Bank of Denver*, 484 P.2d 1230, 1232 (Colo. 1971). Or, if definite enough, how were "charges" to be measured: by some never-referenced chargemaster or by reasonableness? *See* Nation III, *supra*, 61 Vill. L. Rev. 153, 169.

Colorado jurors were told to use contract tools to answer these questions. *See* CF 4929-41. They first found there was an agreement to pay charges. CF 4981 (Answer 1). They then found the agreement did not adopt "predetermined charges … set by the Hospital's chargemaster" but contemplated the "reasonable value of the goods and services provided to" Petitioner. *Id.* (Answer 2).

The jury's findings had ample evidentiary support. A Hospital witness testified Petitioner was never given chargemaster rates and could not have understood them regardless, so all she could do was rely on the Hospital's much lower estimate. Tr. 6/5/18 at 470, 500, 504, 514-15. Indeed, as the trial judge explained in denying the Hospital's JNOV motion, "the Hospital's own witnesses" testified that "at the time of contracting" the "Hospital also believed the estimate reflected [Petitioner's] obligation." CF 7974.

The trial judge thus was correct to deny the Hospital's JNOV motion. The Hospital could appeal only that JNOV denial and not any pretrial order rejecting its contention that the contract unambiguously adopted chargemaster rates. *See Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1250 (Colo. 1996) ("propriety of a summary judgment denial is not appealable after a trial on the merits regardless of whether the denial is premised on a point of law or material issues of fact"). And while orders on JNOV motions are reviewed de novo, reviewing courts (like trial courts) "must consider all the facts in the light most favorable to the nonmoving party and determine whether a reasonable jury could have found in favor of the nonmoving party." *State Farm Mut. Auto. Ins. Co. v. Goddard*, 2021 COA 15, ¶ 26. Such motions are "not favored." *Rocky Mntn. Hosp. & Med. Serv. v. Mariani*, 916 P.2d 519, 526-27 (Colo. 1996).

The division disregarded all the evidence (including from the Hospital's own witnesses) supporting the jury's findings, by reasoning that "an unambiguous contract [cannot] be made ambiguous by extrinsic evidence." COA ¶ 19 (citing *Am. Fam. Mut. Ins. Co. v. Hansen*, 2016 CO 46, ¶ 27). To reject that reasoning, this Court need not re-enter the thicket of when or whether Colorado courts "no longer apply a rigid 'four corners'' rule' to contracts" to preclude extrinsic evidence creating ambiguity. *See Matter of Water Rights of Mike and Jim Kruse P'ship*, 2021 CO 6, ¶ 31 (recognizing but not resolving tension between *Hansen* case cited by division, and *Dill v. Yamasaki Ring, LLC*, 2019 CO 14, ¶ 39; and *E. Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 974 (Colo. 2005)).

This reasoning overlooked that the chargemaster itself was extrinsic, as the "document signed by [Petitioner] is devoid of any reference to the Hospital's chargemaster and does not define the meaning of 'all charges.'" CF 2156. Nothing "*on the face of the contract*" unambiguously required Petitioner to pay chargemaster rates. COA ¶ 19 (emphasis added). Indeed, the face of the contract does not reveal that a chargemaster even exists, much less that there was an unambiguous commitment to pay the unreasonable prices set by that unreferenced internal document. The lack of any such express reference makes logical sense given that not even the Hospital anticipated it would be billing chargemaster rates.

III. The division's ruling creates bad law on top of bad policy.

Common law courts should not create industry-specific policies. Of course, common law embodies "policy" judgments. *Gregory v. Ashcroft*, 501 U.S. 452, 466 (1991) (quoting O. Holmes, *The Common Law* 35–36 (1881)). But absent clear policy overriding contract law, *e.g.*, *Boles v. Sun Ergoline, Inc.*, 223 P.3d 724, 726 (Colo. 2010), those judgments should be drawn from broad principles equitably applied—not from policies limited to favored industries.

The division's reversal of an eminently sound legal judgment rested not on general contract law but on "policy" grounds "limited to the unique context of the health care system and hospital-patient contracts." COA ¶¶ 30-31. The division held that, unlike lawyers and other professionals, hospitals need not bill reasonably because it "would be impractical for a court to attempt to resolve the complexity of the health care system by imposing a reasonableness requirement." COA ¶ 27.

These misguided policy judgments cannot justify overturning the case-specific finding of a jury, correctly instructed to apply general principles of contract law, that Petitioner agreed to pay the Hospital's reasonable charges rather than unreasonable rates drawn from an undisclosed "chargemaster." For the Hospital to overturn that jury finding, it should have made a better record, written a better contract—or better still, billed reasonably.

Conclusion

The Court should reverse the court of appeals and affirm the trial court's judgment.

Respectfully submitted,

s/Sean Connelly
Sean Connelly, #33600
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

On this 25th day of June 2021, I electronically filed this *Amici Curiae* Brief via Colorado Courts E-Filing, which will serve as notification of such filing to all persons registered in this case.

s/ Sean Connelly
Sean Connelly