2nd Civil No. B236227

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

JOHN CORENBAUM, et al.,

Plaintiffs and Respondents,

vs.

DWIGHT LAMPKIN,

Defendant and Appellant,

Appeal from the Los Angeles County Superior
Honorable Ross Klein
Case No. NC053848

APPLICATION FOR LEAVE TO FILE A COURT-INVITED AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

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APPLICATION FOR LEAVE TO FILE A COURT-INVITED AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

In a November 26, 2012, letter, this Court invited various interested parties, including the Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada to file amicus curiae briefs addressing (1) whether evidence of the amount billed (but not paid) for medical expenses which under *Howell v. Hamilton Meats & Provisions Co.* (2011) 52 Cal.4th 541 (*Howell*), is irrelevant, and thus inadmissible, on the issue of past medical damages, is relevant and admissible as to (a) noneconomic damages or (b) future medical expenses and (2) to the extent that such unpaid medical bill evidence is admissible on either of those two issues what limiting instructions should be given?

The Associations are the nation's largest and preeminent regional organizations of lawyers who specialize in defending civil actions, comprised of over 2,000 leading civil defense bar attorneys in California. They are active in assisting courts on issues of interest to their members and have appeared as amicus curiae in numerous appellate cases. In particular, the Associations have been actively involved in *Howell* issues

regarding the admissibility of unpaid medical bills as damages measures in personal injury actions. The Associations appeared as amicus curiae in *Howell*, both in the Court of Appeal and in the Supreme Court, including at oral argument. They have conducted numerous, well-attended seminars on the impact of *Howell.*

In addition to representation in appellate matters and comment on proposed statutory changes, Court Rules, and jury instructions, the Associations provide their members with professional fellowship, specialized continuing legal education, and multifaceted support, including a forum for the exchange of information and ideas.

The Associations' members routinely represent clients in defending actions where unpaid medical bills are proffered as supposed evidence of either noneconomic damages or future economic medical damages. Their members have a direct interest that the law in this area be certain, practical, reasonably implemented, and correct.

Presumably, these reasons are among those why this Court invited commentary from the Associations.

No party or their counsel has paid for or drafted the attached amicus curiae brief.

It should now grant leave to file the accompanying amicus curiae brief.

Dated: January 15, 2013

Respectfully submitted,

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

INTRODUCTION

Howell v. Hamilton Meats & Provisions Co. (2011) 52 Cal.4th 541, was not so much a change in the law as a reaffirmation of simple, fundamental, common-sense principles: Detriment – the statutory damages measure – is what someone actually pays (or, in the future, will have to pay). Reasonable value is a constraint on recovery for the detriment suffered, not an expansion of it. The value of a good or service is what is actually paid for it, not the exaggerated amount that may be reflected in a wishful vendor's list price bill. Evidence, including evidence of an unpaid bill, is only relevant if it tends to prove a fact in controversy (e.g., to prove the amount actually paid or a *lesser* reasonable value amount).

Howell left open the issues that this Court has identified – the admissibility of unpaid bills on issues of noneconomic and future medical damages. It did so in the long judicial tradition of not addressing issues not specifically before the Court. But the principles that *Howell* sets out apply equally to those contexts and equally dictate that an unpaid past bill is as

speculative and conjectural on questions of noneconomic damages (which can't even be measured by the amount *paid* or the reasonable value of *economic* medical loss damages) and future medical expense detriment as they are on the economic detriment incurred for past medical services. Indeed, nothing in *Howell* undermines the long-standing, controlling Supreme Court precedent – *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 42-43 – that an unpaid bill is *inadmissible* as evidence of the reasonable value of *any* good or service, medical or otherwise.

This Court should confirm the inadmissibility of unpaid medical bills for *any* purpose in a personal injury case.

If not, substantial and severe prophylactic measures – limiting instructions, special verdict forms, liberal exclusion under Evidence Code section 352 – will be required to protect against misuse of such evidence (by juries and counsel) in areas where it clearly, as a matter of law, is irrelevant.

I. Under Controlling Precedent And Common Sense Unpaid Bills – Medical Or Otherwise – Are Not Admissible Evidence Of The Reasonable Value Of Services.

The reason to submit a bill for a service (medical or otherwise) is to show the value of that service. A bill in the abstract has no intrinsic

significance. But, as we discuss, an unpaid bill is neither evidence of the value of service nor of anything else.[1]

A. Pre-*Howell* Precedent Is Clear: Unpaid Bills Are Inadmissible As Evidence Of The Reasonable Value Of Goods Or Services.

It has long been the law that the reasonable value of goods and services is not the billed, invoice, or list price amount, but the amount actually paid – the exchange value, to use the terminology employed by the Restatement Second of Torts. (See Rest.2d Torts, § 911.) That makes sense. The value of a good or service is not what a vendor or seller may claim it to be, it is what is actually paid in a fair market exchange. Thus, the value of a car that is "totaled" or a television or computer that is destroyed is not its list price or manufacturer's suggested retail price, but the price that is actually paid for it. Likewise, the value of a lawyer or other professional's time or service is not what they claim to be their "billing

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[1] For purposes of this brief, when we refer to an unpaid bill, we mean a bill for which plaintiff no longer remains liable but as to which plaintiff (or others on plaintiff's behalf) paid a different, lesser amount. We are not referring to a bill that remains outstanding and subject to collection and enforcement. (See *Howell, supra*, 52 Cal.4th at p. 557 [distinguishing *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1296, where "plaintiffs 'remain[ed] fully liable for the amount of the medical provider's charges for care and treatment'"].) In that circumstance though, the reasonable value constraint applies.

rate," but the amount that clients actually pay for their services. (See *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002-1003 [reasonableness of attorney's fees measured by *market rates*].) Medical goods and services are no different. The amount that a healthcare provider accepts as payment in full is the value (call it "exchange value" or "fair market value") for the goods and services.

Thus, long before *Howell*, it has been the law in California that an unpaid bill or charge is *not* evidence of anything – particularly not of the reasonable value of services rendered – and is *inadmissible* hearsay. "*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. [Co.]* (1968) 69 Cal.2d 33 set out [the] applicable rules. 'Since invoices, bills, and receipts for repairs are hearsay, they are *inadmissible* independently to prove that liability for the repairs was incurred, that payment was made, *or that the charges were reasonable*. [Citations.] If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony [citations], and if the charges *were paid*, the testimony and documents are evidence that the charges were reasonable. [Citations.]' (*Id.* at pp. 42-43.)" (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 87, emphasis added.)

In this, California aligns with the majority view that unpaid bills are inadmissible to show the value of a service. (2 Damages in Tort Actions (Matthew Bender 2012) § 9.03[3][a][ii] 9-8 to 9-9.) *Pacific Gas & E. Co.* remains good law. It is binding California Supreme Court precedent on the subject. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Mehr v. Superior Court* (1983) 139 Cal.App.3d 1044, 1049, fn. 3 ["Although the California Supreme Court is free to overrule its own prior decisions, the doctrine of stare decisis compels lower court tribunals to follow the Supreme Court whatever reason the intermediate tribunals might have for not wishing to do so. [Citations.] There is no exception for Supreme Court cases of ancient vintage"].)

An unpaid bill is, at most, an expression of the provider's or vendor's hope or aspiration as to how much might be received for the good or service. It is hearsay – an out of court statement proffered for the truth of the matter. And, most importantly, it does not logically tend to prove the amount actually paid, which is the measure of the reasonable value of a good or service. An unpaid bill, without more, thus, is inadmissible.

To prove the reasonable value of services, a plaintiff might submit the amount actually paid in a particular instance. Or a plaintiff might submit the amount typically accepted by the provider as payment in full. (Of course, reasonable value is only relevant if it is arguably *less than* the

amount actually paid, as the standard under *Howell* is the *lesser* of the amount actually paid or reasonable value. (*Howell*, *supra*, 52 Cal.4th at p. 556.) Those would be market-driven value milestones.

What is *not* evidence of reasonable value is an amount that a healthcare provider or any vendor *bills but does not collect. That* is not evidence of anything. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at pp. 42-43.) Even if a vendor – any vendor – labels its charges as reasonable, usual, "best available," or customary does not make it so, rather what is reasonable is an issue of actual payments, *not* on the untested face of an unpaid bill. That is especially true in an industry, such as healthcare, where bills are routinely discounted. No one would suggest that if the plaintiff's new car is destroyed the unpaid sticker price shows its value or that if plaintiff's computer were destroyed the "list price" rather than its "street" price would be the measure of value. So, too, an unpaid medical bill is not evidence of anything, other than perhaps the provider's wishful thinking.

B. If Anything, *Howell* Confirmed That Unpaid Bills Are Inadmissible To Prove The Reasonable Value Of Medical Services.

Nothing in *Howell* suggests that it was somehow sub silentio overruling *Pacific Gas & E. Co.* on the inadmissibility of unpaid bills. To

the contrary, *Howell* made clear that it was *not* addressing the admissibility of unpaid bills in the abstract:

> We express no opinion as to its relevance *or admissibility* on other issues, such as noneconomic damages or future medical expenses. (The issue is not presented here because defendant, in this court, conceded it was proper for the jury to hear evidence of plaintiff's full medical bills.)

(*Howell*, *supra*, 52 Cal.4th at p. 567, emphasis added.)

Cases, of course, do not stand for propositions not considered. (E.g., *In re Tobacco II Cases* (2009) 46 Cal.4th 298, 323; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

But what *Howell* did decide is instructive. *Howell* held that "[w]here the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (52 Cal.4th at p. 567.) In doing so, *Howell* reconfirms that Restatement Second of Torts, section 911's "exchange value" measure – that is an actual, negotiated amount paid – is the appropriate one. (*Id.* at p. 562.) The full billed amount was not relevant because it did not represent an exchange value – a real market value. (*Ibid.* & fn. 9.) Indeed, *Howell* dismissed the idea that an unpaid

medical bill, at least one at a "chargemaster" or sticker price rate, without more, represents the reasonable value of medical services:

> [M]aking any broad generalization about the relationship between the value or cost of medical services and the amounts providers bill for them–other than that the relationship is not always a close one–would be perilous.

(*Id.* at p. 562.)

The bottom line is that after *Howell* the law remains as it was before *Howell*. An unpaid bill – at least one that is never going to be paid – is not evidence of the reasonable value of a service, including of medical services. If anything, *Howell* strengthens the logic and holding of *Pacific Gas & E. Co.* The inadmissibility of an unpaid bill to show reasonable value of medical services, without more, should suffice. But, as we now discuss, even if unpaid medical bills might, in the abstract, be somehow otherwise admissible, they may well not be relevant.

II. The Reasonable Value (Let Alone The Merely Billed Amount) Of Past Medical Services Is Irrelevant To Noneconomic Harm And (With Possible Exceptions) Future Medical Care Damages.

A. Neither The Billed Amount For Nor The Reasonable Value Of Past Medical Services Has Any Reasonable Relationship To Noneconomic Harm Suffered And Should Not Be Admissible For That Purpose.

Only relevant evidence is admissible. (Evid. Code, § 350.) "The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts . . . ." (*People v. Cowan* (2010) 50 Cal.4th 401, 482, citations and internal quotations marks omitted.) As the proponent of the evidence, the plaintiff has the burden of establishing that the *economic* cost of medical services somehow has a logical connection to the amount of *noneconomic* damages plaintiff has suffered. (See Evid. Code, § 403; *People v. Pizarro* (2003) 110 Cal.App.4th 530, 542-543 & fn. 9, disapproved on another ground in *People v. Wilson* (2006) 38 Cal.4th 1237.) But, assuming for the sake of argument that there is evidence of the reasonable value of medical services (either amounts actually paid or, assuming admissibility, unpaid bills), such evidence is not, and should not be, relevant to a plaintiff's noneconomic damages.

So, how does the amount billed – but not even actually paid – tend to logically, naturally, and by reasonable inference establish the plaintiff's *noneconomic* damage (e.g., pain, suffering, loss of body function)? It doesn't. To begin with there is no consistency between the amount billed and any particular medical procedure. The amount billed for any particular service can vary greatly from provider to provider (e.g., from hospital to hospital) and from region to region. (See *Howell*, *supra*, 52 Cal.4th at pp. 561-562 & fn. 8 [noting that, for example, "chargemaster" – that is, full list price or billed – rates for a chest X-ray can vary from under $200 to over $1,300 depending on hospital or locale].) Parties suffering the same injury, for instance a broken arm, do not, and should not, have *noneconomic* damages that vary by orders of magnitude just based on their locale or what provider they saw. Yet, the idea that an unpaid bill for medical services is reflective of the extent of noneconomic injury would mean just that.

Nor is there any logical connection between the nature and extent of a plaintiff's injuries and medical bills, whether paid amounts, average or median amounts collected, or rarely-paid "list" prices. Certainly, there cannot be a presumptive such connection. Medical bills for someone killed instantly are minimal. It may cost much less to amputate an arm or a hand than to reconstruct one back to functionality. Medical bills for a hard to diagnose but relatively minor inconvenience can be substantial. A plaintiff could be knocked unconscious and after substantial medical efforts (and

billing) be revived with no lasting ill effects. Does that mean that there should be substantial noneconomic damages? Medical bills may well vary from county to county and even within a county. And, the face amount of bills may vary drastically between providers even when the amount that they have agreed to accept as payment in full is the same. (See *Howell*, *supra*, 52 Cal.4th at pp. 561-562.) Billed amounts can vary greatly from amounts typically accepted as payment in full and from the actual costs of services. (See *id.* at pp. 560-562 [noting and documenting disparities between billed amounts, on the one hand, and cost of service and amounts typically accepted as payment, on the other hand].) But the nature and extent of injuries or the consequent pain and suffering or other noneconomic damages should not vary by locale or healthcare provider. There simply is no logical connection between medical charges – especially the unpaid face amount of bills – and compensation for noneconomic injuries.

More generally, there is no logical connection between the cost of replacing or repairing something and noneconomic damages. Would the law measure the emotional injury from the loss of a pet with a replacement value? (Cf. *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1607-1608 [emotional distress damages available for intentional injury to pet].) Does the amount of medical expenses inform the loss of comfort, society and

companionship that might be suffered by a child, parent or spouse? Do funeral expenses provide a guidepost for the emotional distress from a cemetery's mix up or loss of a loved one's remains? Of course not. So why would the amount of medical bills – paid or especially unpaid and never to be paid – inform the question of a particular plaintiff's noneconomic loss? It doesn't.

Indeed, commentators have recognized that "there is no reason why actual pain-and-suffering injuries should be related to some multiple of the plaintiff's economic loss . . . ." (Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries* (1995) 83 Cal. L.Rev. 773, 787.) Nonetheless, that does not stop some from asserting that the amount of an unpaid bill could somehow be connected to the general damages (e.g., noneconomic damages, pain and suffering). *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, for example, suggested that such bills were relevant as "[s]uch evidence gives the jury a more complete picture of the extent of a plaintiff's injuries." (*Id.* at p. 1157.) It did so based on a misreading of a prior decision, *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 308.

In *Nishihama*, the plaintiff presented evidence of some $17,000 in medical bills for which the provider had accepted $3,600 as payment in full from an insurer. Accurately predicting *Howell*, *Nishihama* held that the

plaintiff could not recover as economic damages for past medical services more than the $3,600 actually paid. (*Id.* at p. 309.) The defendant City then argued that admitting the bills was prejudicial in that it might have led the jury to believe that plaintiff's injuries were *greater than* they otherwise were. *Nishihama* disagreed, holding that no *prejudicial* error resulted from introducing the full medical bills. (*Ibid.*)

Nishihama nowhere suggested that the relatively modest medical bills at issue there were admissible or relevant to the determination of the extent of the plaintiff's injuries, just that once admitted a "list" price rate was no less probative of the extent of injury than a reduced, negotiated, actually paid rate:

> We do not agree with the [defendant] City, however, that this error [in awarding as damages the amounts never paid] requires remand, because the jury somehow received a false impression of the extent of plaintiff's injuries by learning the usual rates charged to treat those injuries. There is no reason to assume that the usual rates provided a less accurate indicator of the extent of plaintiff's injuries than did the specially negotiated rates obtained by Blue Cross. Indeed, the opposite is more likely to be true.

(*Ibid.*)

Nishihama never addressed admissibility, its comments were limited to *prejudice*. *Nishihama* nowhere discussed *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at pp. 42-43, and the rule that unpaid bills are *not* admissible and are *not* evidence of the reasonable value of services. Nor did *Nishihama* discuss its basis for concluding that the face amount of a bill was a "usual" rate. That is a question of proof; just because a vendor – healthcare provider, lawyer, electronics retailer – labels a billed (and thereafter discounted) amount as "usual" or "reasonable" does not make it so.

Greer, *supra*, converted *Nishihama*'s after-the-fact no-prejudice holding into a prospective rule that medical bills and rates (presumably high, low, average, mean, median and everything in between) are admissible, at least within the trial court's discretion. *Greer* agreed with what became the *Howell* rule that such never-paid or payable bills are not evidence of the actual amount of economic medical expense damage. (*Greer v. Buzgheia*, *supra*, 141 Cal.App.4th at p. 1157.) Nonetheless, it adopted the theory that the amount of an unpaid – and never payable – bill might reflect the extent of injury.

Under *Greer*'s theory, a passenger in a train or airplane accident might introduce evidence of the cost to repair the train or airplane (or of the cost of medical care to other victims) as indicative of the plaintiff's

noneconomic injuries because it might give a more complete picture of the seriousness of the accident. Likewise, a defendant in a wrongful death case might introduce evidence of limited pre-death medical expenses to argue that damages for loss of society and care should, likewise, be limited. Neither argument makes logical sense. Any suggestion in *Nishihama* or *Greer* that medical expenses – actually paid, reasonable/usual, or billed "list"/"chargemaster" prices – may reflect the amount of *noneconomic* injury is without logical basis.

So why suggestions tying noneconomic damages to the amount of medical bills? The impulse to do so would appear to be the urge to create an objective benchmark, or really pseudo-objective benchmark, for a measure of damages that is inherently not objective. But the impulse is a fool's errand. The fact is that noneconomic damages *inherently* are not measurable by standard economic measures. Noneconomic damages are just that, damages not subject to being gauged by economic measures. This has been the subject of much commentary. (See, e.g., Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss* (2006) 55 DePaul L. Rev. 359; Geistfield, *supra*, 83 Cal. L.Rev. at p. 776 ["At present, there is no test to objectively assess the severity of a plaintiff's pain-and-suffering injury, nor is there a satisfactory method for translating this harm into the appropriate monetary award"]; see Geistfield, *supra*, 83 Cal. L.Rev. at p. 781 & fn. 21.)

The point – that noneconomic damages are *not* a function of economic loss and cannot be measured by traditional economic measures – has been recognized by leading judicial authorities. (See *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 159-160 & fn. 16 [affirming MICRA $250,000 cap on noneconomic damages as no more arbitrary than any other measure: "Thoughtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, inter alia, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such intangible injuries and that such damages are generally passed on to, and borne by, innocent consumers"]; *Beagle v. Vasold* (1966) 65 Cal.2d 166, 172 [allowing a per diem pain-and-suffering argument: "One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. *No method is available to the jury by which it can objectively evaluate such damages*, and no witness may express his subjective opinion on the matter. (Citation.) In a very real sense, the jury is asked to evaluate in terms of money a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy," emphasis added].)

No less than Justice Traynor (decrying counsel's argument to calculate damages on a per diem or per annum basis) opined on the impropriety of attempting to provide a pseudo-objective measuring stick of noneconomic damages: "It would hardly be possible ever to compensate a person fully for pain and suffering. No rational being would change places with the injured man for an amount of gold that would fill the room of the court, yet no lawyer would contend that such is the legal measure of damages. Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable. . . . *The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury.*" (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 511-512 (dis. opn. of Traynor, J.) citations and internal quotation marks omitted, emphasis added.) "Restraint and common sense" is the standard, not misleading, never-to-be-paid billing statement charges.

Attempting to use economic loss as a measure of noneconomic damages confuses the issue. It compounds the problem. It proffers a false guidepost for an analysis that necessarily is untethered to economic loss. Introducing a false guidepost creates real prejudice by affording a seductively easy quantification of what must inherently be a more

amorphous task. The prejudice is all the more when the guidepost proffered is itself fictional, not reflecting a real-world transaction or an amount actually paid in the case.

Even less justifiable is the idea proffered by some that unpaid bills should be admissible as the best means to maximize recoveries for noneconomic damages. There is no legal principle that damages should be inflated or maximized. Rather, a plaintiff is entitled to the *proper* amount of damages, economic and noneconomic. And, concomitantly, defendants are entitled not to be liable for more than is appropriate. There is no legal principle either to maximize or minimize damages. The legal principle is that damages should be appropriate and measured by relevant evidence, not by irrelevant or speculative evidence.

Certainly, the nature and severity of an injury can be relevant to the amount of pain and suffering endured, as may be what medical treatment is or can be provided (e.g., if the pain can be alleviated or mitigated by medication or other corrective or palliative measures). But the *cost* of treatment says nothing about the nature of the injury or the pain-inflicting aspect of it. It can be very expensive to maintain someone in a coma, but they may be feeling no pain at the time. Inexpensive palliative measures may be provided but afford no real remedy for a true loss of function (e.g., loss of mental capacity, sterility, or loss of taste or sexual function).

But even if cost of medical treatment could be a measuring stick, the relevant yardstick would not be an unpaid bill, an amount with no necessary connection with reality. It would be what the *actual* treatment cost was or, at most, what the *reasonable value* of such medical treatment might be. It is not what the unpaid, "list" or "chargemaster" price of the service might be without any evidence that such a price is what is, in fact, *usually* paid.

Evidence of an amount of medical bills that, in fact, are not payable simply is not relevant to any noneconomic damages issue in a personal injury case and should not be considered for any such purpose, period.[2]

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[2] An offhand remark in *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 11, that "the cost of medical care often provides both attorneys and juries in tort cases with an important measure for assessing the plaintiff's general damages" is not to the contrary. *Helfend* was considering a bill that had been fully paid by a collateral source. It did not address or consider *unpaid* bill amounts. Nor did it address *Pacific Gas & E. Co.* Indeed, the comment is dicta directed at a wholly different issue – whether a jury should be told that a plaintiff incurred no net medical bills by virtue of collateral source payments. Cases, and particularly dicta in cases, are not authority for propositions not considered. (E.g., *Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278; *Ginns v. Savage*, *supra*, 61 Cal.2d at p. 524, fn. 2.)

B. Otherwise Admissible Evidence of the Reasonable Value Of Past Medical Services Might Be Relevant To Future Damages But Only If A Plaintiff Can Make A Nonspeculative Preliminary Showing That Future Actual Amounts To Be Paid Are Consistent With The Reasonable Value Of Past Medical Services.

The next question is whether past unpaid bills can be relevant to what *future* medical damages might be. Again, they are not. Again, *Howell* is instructive. The centerpiece of *Howell*'s analysis is that a plaintiff's recovery is statutorily limited to the "detriment" suffered, defined as the amount of actual pecuniary loss or harm. (52 Cal.4th at pp. 548, 551, 553 citing Civ. Code, §§ 3281 & 3282.) Translated into the realm of *future* damages, that means that a plaintiff's future medical damages are limited to the detriment that the plaintiff *will* suffer, that is, the actual, pecuniary amounts that the plaintiff will have to pay. And, of course, the same reasonableness limitation applies to future damages as applies to past damages. (*Id.* at p. 555; Civ. Code, § 3359.) Thus, in parallel with *Howell* as regards past damages, the measure of future damages is the *lesser of* the amount that, in fact, *will be* paid in the future or the reasonable value of services in the future.

Undoubtedly, predicting the amount that *will be* paid in the future is more difficult than establishing an amount that has been paid in the past.

But proof of a nonspeculative amount of damages according to the appropriate standard (the lesser of what will be paid or of reasonable value) is the plaintiff's burden under Evidence Code section 500. It is the *plaintiff's* burden to prove the *lesser* of amounts actually to be paid or the reasonable value of *future* services. (See, e.g., *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660-661 [plaintiff has burden of proving damages portion constituting personal injury damages for prejudgment interest purposes]; *Adams v. Murakami* (1991) 54 Cal.3d 105, 120-121 [plaintiff has burden of proving the state of defendant's finances to support punitive damages].)

The best indicator of the amount the will be paid is the amount that has been or is being paid. If the plaintiff currently has health insurance, it should be plaintiff's burden to establish (for example, in an Evidence Code section 402 hearing) that the plaintiff will not continue to benefit from health insurance or equivalent coverage which will pay in the future at a reduced negotiated rate. (See Evid. Code, § 402 [allowing for hearing outside presence of jury "[w]hen the existence of a preliminary fact [necessary to evidence's admissibility] is disputed"].) Where "[t]he relevance of the proffered evidence [e.g., unpaid past bills] depends on the existence of [a] preliminary fact," e.g., that the bills reflect amounts that, in fact, will be paid in the future or the reasonable value of future services, "[t]he proponent of the proffered evidence has the burden of producing

evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact . . . ." (Evid. Code, § 403, subd. (a) & (a)(1).)

Where (as typically is the case) the defense stipulates that an actually paid, arm's-length negotiated rate is no more than the reasonable value of service, the plaintiff, as the proponent of an alternative measure, has the burden to establish the existence of the preliminary fact (absence of continuing insurance coverage) necessary to establish the relevance of tendered evidence (i.e., an alternative measure of medical costs).

The availability of continuing coverage for health expenses at negotiated reduced rates is not limited to existing health insurance. Insurance continuation rights exist under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and the Health Insurance Portability and Accountability Act (HIPAA) (e.g., 42 U.S.C. §§ 300gg, 300gg-1, 300gg-41, 300gg-42) and Cal-COBRA (Health & Saf. Code, §§ 1366.20, et seq.; see also Health & Saf. Code, §§ 130301, et seq. [implementing HIPAA/COBRA in California]). In addition, California has statutory programs for the purchase of medical insurance by persons who otherwise are unable to obtain it. (E.g., Ins. Code, §§ 12700, et seq.) And, federal law, the Affordable Care Act, now requires all persons to have health

insurance in the future, subject to a tax penalty if they do not. (See generally *National Federation of Independent Business v. Sebelius* (2012) ___ U.S. ___, 132 S.Ct. 2566.)

Given this landscape, before a plaintiff can present evidence of "list" prices as indicative of future damages, a plaintiff needs to establish – typically in an Evidence Code section 402 hearing – the predicate fact that he or she will be paying such "list" prices in the future and not a discounted price.

But even if a plaintiff could establish that, a past billed and unpaid amount would still not necessarily be relevant. That standard is the *lesser* of the amount actually to be paid *or* the reasonable value of services. The unpaid but billed amount is not necessarily the reasonable value of services. The reasonable value of services is a matter of proof independent of what a billed but unpaid amount might be. Unless the plaintiff can make a preliminary fact showing that an unpaid past billed amount equates to a *future* reasonable value of services, such evidence is irrelevant. Certainly *Howell*, without more, does not equate an unbilled amount to the reasonable value of services.

The bottom line remains the same. Absent a preliminary factual showing that a past unpaid bill, in fact, reflects an amount that will be actually paid in the future *and* will not exceed the reasonable value of

future services, past unpaid bills are irrelevant to future medical expense damages.

C. If Evidence Of Other Than Amounts Actually Paid For Medical Services Is Admitted, The Defense Is Entitled To Limiting Instructions And A Special Verdict Detailing Damages Elements.

As discussed above, there is no reason ever to admit evidence of unpaid bills – for medical services or otherwise. But if this Court disagrees, at a minimum, ameliorative steps must be taken. Depending on the evidentiary theory that this Court might allow, those steps should include:

- A limiting instruction (both at the time of admission and as part of the jury instructions at the close of the case) that the amount of an unpaid bill *cannot* be considered in awarding past (or future) economic damages. (Evid. Code, § 355 ["When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly"].)

- A limiting instruction that the amount of an unpaid bill does *not* represent the reasonable value of either past or future medical service.

(*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at pp. 42-43.)

- A limiting instruction that the amount of an unpaid bill is being offered only to show the extent of the injury suffered and *not* as a means of quantifying, measuring or valuing the noneconomic damages (e.g., pain and suffering) that may flow from such injury. It is solely for the jury to *value* any injuries proven.[3]

- An order that counsel is not to argue any evidence admitted for a limited purpose as relevant to any other purpose.

- Given the danger of the misuse of unpaid bill evidence for an improper purpose, it should be the burden of the plaintiff, as the proponent of the evidence and the party bearing the substantive burden of proof, to obtain *separate* special verdicts as to each separate damages element, i.e., past medical damages, past other economic damages, future medical damages, future other economic damages, past noneconomic damages, and future noneconomic damages. These are separate elements of the plaintiff's case as to which the plaintiff should bear the burden of obtaining the necessary findings. (See *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 326 [battery plaintiff's burden to obtain finding of "no consent" at all

[3] As these limiting instructions indicate, even if admissible – it should not be – unpaid bill evidence has *at most* extremely limited relevance and the jury should be so instructed.

rather than just finding of "no informed consent"]; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949 [failure to obtain special verdict finding on fraud negates award of punitive damages]; *Fuller-Austin Insulation Co. v. Highlands Ins. Co.* (2006) 135 Cal.App.4th 958 [failure to find bankruptcy plan's reasonableness].) If various damages are to have different measures, they are different elements and should require separate findings. Contrary to *Greer v. Buzgheia*, *supra*, 141 Cal.App.4th 1150, it should be the plaintiff's burden to obtain the necessary, separate findings. One thing is clear, though, whoever's burden it is in such a circumstance, a special verdict will be required and a general verdict would be inappropriate.

In addition, it should be clear that the trial court retains the right to exclude, under Evidence Code section 352, unpaid bill evidence on the ground that its potential prejudicial impact outweighs its limited relevance. The greater the difference between an unpaid "list" or "chargemaster" amount and the amounts actually paid or on average paid for the particular service, the greater the potential prejudice and the more limited the potential relevance. Given the likelihood, as discussed above, of such evidence being misused to quantify noneconomic damages, the potential for prejudice in this context is elevated.

The greater the chance that evidence admitted for one purpose may be used for another (indeed, it would be improper for counsel to argue the evidence beyond its limited, properly admitted purpose), the greater the justification for excluding it as more prejudicial than probative: "If the point to prove which the evidence is competent can just as well be proven by other evidence, or if the evidence is of but slight weight or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points. . . . This would emphatically be true where there is good reason for believing that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent." (*Adkins v. Brett* (1920) 184 Cal. 252, 258-259.)

The need for section 352 relief would be all the greater because the at most tangentially relevant unpaid bill would open the door to the undue consumption of time. Whenever a plaintiff introduces an unpaid bill, the defense must be entitled to introduce evidence that the bill does not reflect reasonable value (e.g., because it exceeds the amount typically accepted as payment in full) or the amount that will actually be paid. The defense will further be entitled to show that the unpaid bill amount is premised upon the plaintiff not mitigating damages by taking simple steps – e.g., exercising COBRA rights, taking advantage of group health options, including

participating in available government sponsored plans – that would substantially reduce the cost of future care. (see CACI 3930 & cases cited in commentary [duty to mitigate]; *Valle de Oro Bank v. Gamboa* (1994) 26 Cal.App.4th 1686, 1691 & fn. 5 [same].) At most tangential relevance, large prospect of prejudice, undue consumption of time on whether the unpaid bill even reflects actual or reasonable past or future medical costs; all this adds up to that section 352 in many, if not most, cases will require exclusion.

Prophylactic measures are especially important because *Howell* rejects the let-all-the-evidence-in-and-have-the-trial-court-clean-it-up-after-the-fact approach. *Howell* rejects the so-called "nonstatutory 'Hanif motion' [as] unnecessary." (52 Cal.4th at p. 567.) Rather, the only remedy for the potentially overly broad admission of medical bills beyond the amounts, in fact, paid, would be a new trial motion (or perhaps one for partial judgment notwithstanding the verdict). (*Ibid.*) Thus, properly limiting the evidence proffered is essential both to fairness to the defendant and to the efficient functioning of the trial system.

CONCLUSION

An unpaid bill does not reflect either the actual, arm's length market price for or the reasonable value of a good or service – medical or any other. *Howell* so held. Controlling Supreme Court precedent – *Pacific Gas & E. Co.* – is that it is inadmissible on the issue of the value of services (medical or otherwise) rendered. Even less so, can such an unpaid bill be a relevant benchmark for logically unrelated noneconomic damages. Absent a preliminary showing by its proponent that a *past* unpaid bill is what, in fact, future services are going to cost (e.g, that there will not be available lesser negotiated or discounted rates or a lesser future reasonable value), an unpaid bill is doubly inadmissible as well as to future economic damages.

This Court should confirm that unpaid medical bills are as inadmissible in personal injury actions as unpaid bills are inadmissible in actions generally.

Dated: January 15, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, that the **APPLICATION FOR LEAVE TO FILE A COURT-INVITED AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA & NEVADA** and **AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA** contains **6,992** words, not including the tables of contents and authorities, the caption page, signature blocks, the proposed order, or this Certification page.

Dated: January 15, 2013

Robert A. Olson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 15, 2013, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE A COURT-INVITED AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA & NEVADA and AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with this office's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on January 15, 2013, at Los Angeles, California.

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

ANITA F. COLE

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