Court of Appeal, Second Appellate District
Daniel P. Potter
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Association of
Southern California
Defense Counsel

2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(800) 564-6791 • (916) 239-4082 • (916) 924-7323 – Fax
ascdc@camgmt.com • www.ascdc.org

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February 4, 2021

REQUEST FOR PUBLICATION
(Cal. Rules of Court, rule 8.1120)

Hon. Dennis M. Perluss, Presiding Justice
Hon. John L. Segal, Associate Justice
Hon. Gail Ruderman Feuer, Associate Justice
California Court of Appeal
Ronald Reagan State Building
Second Appellate District, Division Seven
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, California 90013

Re: *Powell v. Lemus*
2d Civil Case No. B296583

Dear Honorable Justices:

Pursuant to rule 8.1120(a) of the California Rules of Court, the Association of Southern California Defense Counsel ("ASCDC") respectfully requests that this Court publish its recent opinion in *Powell v. Lemus* (January 19, 2021, No. B296583) (the "Opinion").

Interest Of The Requesting Organization

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in amicus appellate matters, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC's members, and the broader legal community, regularly confront issues regarding proof of the reasonable value of medical services in personal injury cases in which its members represent defendants. Such issues arise consistently in cases defended by ASCDC members. ASCDC has been a leading advocate in this area of the law, having appeared as an amicus (in both the Court of Appeal and the Supreme Court) in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, as well as follow-on cases such as *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, and *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308. ASCDC's members have a widespread and continuing interest in the developments affecting proof of the reasonable value of medical expenses.

ASCDC's members also regularly engage in discovery and try cases. ASCDC has long taken a position favoring civility and cooperation among counsel. It regularly joins with organizations such as the Consumer Attorneys Association of Los Angeles and the American Board of Trial Advocates to present seminars seeking to foster civility. It is interested in a legal framework that supports civility and does not reward incivility or lack of cooperation among counsel.

The Opinion

The Opinion addresses an evidentiary question that arises frequently in personal injury actions: What evidence is admissible to prove reasonable value of medical services? The Opinion properly recognizes the existing law that the reasonable value of medical services is an element of a plaintiff's personal injury action. (Opn. at 15, 18.) The Opinion then validates the trial court's decision to allow an expert to measure the reasonable value of medical charges against rates paid by Medicare. The expert explained that Medicare typically pays 80% of its published reimbursement rates while the average private health plan pays about 130% of that rate. (Opn. at 15-16.) Thus, the published Medicare reimbursement rate is *a* relevant benchmark, although not necessarily the exclusive one, as to reasonableness of charges, and its admission is within the trial court's discretion. (Opn. at 16.) For this proposition, the Opinion relies on two cases, *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 1267, 1277-1278, and *Sanjiv Goel, M.D., Inc. v. Regal Medical Group, Inc.* (2017) 11 Cal.App.5th 1054, 1064-1065, neither of which is a personal injury action. (*Ibid.*)

The Opinion also affirms the trial court's decision to allow a doctor to testify for the defense over the plaintiff's objection that the defendant had not made the witness reasonably available for deposition. Although the doctor was located in Orange County, the plaintiff insisted on deposing him in Los Angeles County. The defense offered him for deposition in Orange County on several dates, but counsel for plaintiff refused to take them up on the offer. (Opn. at 8-13.)

Why Publication Is Warranted

An opinion "*should be* certified for publication in the Official Reports" if it meets any of the nine separately listed criteria in California Rules of Court, rule 8.1105(c). (Italics added.) Thus, if any of the criteria are met, the presumption is for publication. The Opinion meets at least three such criteria:

- It "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions";
- It "explains . . . an existing rule of law"; and
- It "[i]nvolves a legal issue of continuing public interest."

(Cal. Rules of Court, rule 8.1105(c)(2), (3), (6).)

The Opinion's holding regarding appropriate evidence of the value of medical services in personal injury cases should be published.

The measure of the reasonable value of medical services is the market value of such services. (*Children's Hospital Central California v. Blue Cross of California, supra*, 226 Cal.App.4th at p. 1274.) The most comprehensive and reliable source of such market information for medical services is Medicare reimbursement rates. Other payors in the market peg their reimbursements to those published rates. They are a yardstick by which to measure reasonable value. (That is not to say that the Medicare rates are the maximum that will be reasonably paid. The government gets most-favored-nation status. But they do provide an important benchmark.)

The issue of what evidence the *defense* can present in a case on the issue of reasonableness of charges (although the plaintiff has the burden of proof, the defense is still allowed evidence on the issue) comes up repeatedly in personal injury cases. Typically, a plaintiff will present a doctor whose bill or lien amount is outstanding to self-declare that whatever they charge is

reasonable. (There is a real issue as to whether such a claim has a proper foundation given that the standard is a *market* rate—what is generally paid and accepted in the market as a whole, not one provider's view of their own rates.) The defense should be allowed to present countervailing expert testimony which is based on comprehensive and reliable *objective* data, including Medicare reimbursement rates. The Opinion, in approving the trial court's allowance of such testimony, explains and applies the *Howell* reasonableness rule. (Cal. Rules of Court, rule 8.1105(c)(3).) The Opinion also rejects plaintiff's argument that, because she was not on Medicare or Medicare eligible, the Medicare testimony was inadmissible and irrelevant—an erroneous argument that ASCDC's members encounter time and time again as plaintiffs seek to limit or bar defense evidence regarding the reasonable value of medical services. Publication will provide needed guidance.

Although the Opinion cites two cases, *Children's Hospital Central California, Inc.* and *Sanjiv Goel, M.D., Inc.*, as permitting evidence of Medicare reimbursement rates to show the reasonable, market value of medical services, neither was a personal injury case where an injured party sought payment for bills incurred with a third-party medical provider. Rather, both cases involved medical providers seeking payment for their services directly from an obligated party, *not* from a tortfeasor. The Opinion, thus, applies an existing rule to a significantly different factual circumstance. (Cal. Rules of Court, rule 8.1105(c)(2).) This is especially important because there is no CACI instruction addressing how to measure the reasonable value of medical services in the personal injury context.

It is hard to overestimate how often the issue of reasonable value of medical services comes up in personal injury litigation these days. A great number of personal injury cases today come with oversized medical bills by doctors providing services on a lien or otherwise offering "private pay" services. Post-*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266—which allows plaintiffs to forsake their existing medical coverage and to be treated as if they are uninsured—many plaintiffs, on the recommendation of their attorneys, opt for lien or private pay medical services at inflated rates. Indeed, the ubiquitous plaintiffs' counsel media advertisements almost always mention finding the client medical care, which is code for having the injured party forsake his or her medical coverage in

favor of exaggerated lien or private pay bills. The reasonable value of those services, which are often billed at five to ten *times* the going market rate, is always at issue. ASCDC members face this issue day in and day out in a multitude of cases. Excessive claimed medical bills in personal injury cases are epidemic. The defense bar needs to be able to present evidence showing that the bills or liens are excessive, and it needs *published precedent* to cite to when, as occurred in this case, the plaintiff seeks to keep out the defense evidence or claims its admission constituted error. The Opinion addresses an important concern of widespread public interest in the personal injury arena. (Cal. Rules of Court, rule 8.1105(c)(6).) For that reason, too, the Opinion should be published.

The Opinion's holding encouraging civility and cooperation in discovery should be published.

The Opinion also makes an important contribution to civility. Civility declines when the judicial system rewards hardball tactics and intransigence. Civility is encouraged when courts refuse to reward such tactics and gambits. The Opinion here, if published, will foster civility because it supports a trial court's recognition that one party was attempting to be cooperative while raising a simple, reasonable concern during discovery—the location of a busy doctor's deposition—and the other party was seeking to obtain an advantage through intransigence.

Civility—cooperation and accommodation—among the Bar is a matter of utmost public importance. The State Bar has civility guidelines. Section 6 of those guidelines addresses accommodations in scheduling. That includes the location of a deposition. The oath that new attorneys take now includes acting with "dignity, *courtesy*, and integrity." (Italics added.) The Opinion affirms the trial court's proper exercise of discretion not to bar a witness at trial where the reason a pretrial deposition never occurred was because the party requesting the deposition played games with scheduling. Here, plaintiff's counsel intransigently insisted on a single date, in Los Angeles, and refused to consider alternative dates in Orange County. By not condoning such tactics, the trial court's ruling and this Court's affirmance address a matter of great public interest and importance. (Cal. Rules of Court, rule 8.1105(c)(6).)

Publication will promote civility. It will communicate to trial courts that they need not reward intransigent or uncivil behavior. And it will communicate to the Bar that there is real risk of adverse consequences in failing to act civilly toward an opposing counsel, opposing party, or opposing witness.

Conclusion

For all these reasons, ASCDC respectfully urges this Court to publish its Opinion.

Respectfully submitted,

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

By: /s/ *Robert A. Olson*
Robert A. Olson

ROBERT A. OLSON (SBN 109374)
EDWARD L. XANDERS (SBN 145779)
Greines, Martin, Stein & Richland LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
Telephone: (310) 859-781

cc: See Attached Service List

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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 February 4, 2021, I hereby certify that I served the foregoing document described as **ASCDC'S REQUEST TO PUBLISH OPINION** on the parties in this action by serving:

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Executed on February 4, 2021 at Los Angeles, California.

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

/s/ Monique N. Aguirre
Monique N. Aguirre

SERVICE LIST

<u>Via Truefiling</u>

John T. Farmer (SBN 89168)
Joyce R. Dondanville (SBN 176926)
Farmer Case & Fedor
402 West Broadway, Suite 1100
San Diego, California 92101
T: (619) 338-0300 / F: (619) 338-0180
E: jfarmer@farmercase.com

Steven S. Fleischman (SBN 169990)
Yen-Shyang Tseng (SBN 282349)
Horvitz & Levy
3601 West Olive Avenue, 8th Floor
Burbank, California 91505
T: (818) 995-0800
F: (844) 497-6592
E: sfleischman@horvitzlevy.com
E: ytseng@horvitzlevy.com

Attorneys for Defendant and Respondent Dolly G. Lemus

<u>Via U.S. Mail</u>

Xavier A. Powell
P.O. Box 83561
Los Angeles, California 90083

In Pro per, Plaintiff and Appellant