Nos. A143440 & A144041

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

B.C.,

Plaintiff and Respondent,

vs.

CONTRA COSTA COUNTY,

Defendant and Appellant.

Appeal from the Contra Costa County Superior Court
Case No. MSC-9-01786
Honorable Steven K. Austin, Judge

APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT CONTRA COSTA COUNTY

PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT/APPELLANT CONTRA COSTA COUNTY

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

Pursuant to California Rules of Court, rule 8.200(c)(1), the Association of Southern California Defense Counsel (ASCDC) respectfully requests leave to file an amicus brief supporting the position of defendant and appellant Contra Costa County.

ASCDC is the nation's preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members and has appeared as amicus curiae in numerous appellate cases. In addition to representation in appellate matters and comment on proposed statutory changes, Court Rules and jury instructions, ASCDC provides its members with professional fellowship, specialized continuing legal education, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC members routinely represent clients in defending actions where medical expenses are being sought as economic damages. A substantial number of ASCDC members defend matters subject to the Medical Injury Compensation Reform Act ("MICRA"). They have a direct interest that the law in this area be certain, practical, reasonably implemented, and correct. The ASCDC has been actively involved in issues regarding medical expense damages. ASCDC appeared as amicus curiae in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*), both in the Court of Appeal and in the Supreme Court,

including at oral argument. It also appeared as amicus curiae in *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, a *Howell* case. It also has conducted numerous, well-attended seminars on the impact of *Howell*.

Counsel for ASCDC has reviewed the briefing in this matter. Defendant and appellant Contra Costa County has been represented by quality appellate counsel. ASCDC does not intend to repeat detailed legal arguments ably made. It believes, however, that it can provide an important broader perspective going beyond the facts of this particular case. No party has funded this amicus brief nor has any party drafted it. It is solely the work of counsel representing ASCDC.

For all these reasons, ASCDC respectfully requests that it be granted leave to file the accompanying Amicus Curiae Brief of the Association of Southern California Defense Counsel in Support of Defendant and Appellant Contra Costa County.

Dated: June 17, 2016

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson

By: 
Robert A. Olson

Attorneys for Prospective Amicus Curiae Association of Southern California Defense Counsel

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT/APPELLANT CONTRA COSTA COUNTY

Evidence Of Future Potential Collateral Sources Should Be Admissible Under Civil Code Section 3333.1 In An Action Against A Healthcare Provider

All damages must be reasonable. (Civ. Code, § 3359.) That is one of the underlying principles of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555-556 (*Howell*). In *Howell*, the California Supreme Court recognized what anyone who has ever received a medical bill already knows—the amounts "charged" for medical services are often a "sticker price" that no one actually pays. If you have insurance or some other collateral payment source, the price drops substantially to a negotiated rate.

Howell precludes a plaintiff from obtaining damages for medical expenses based on the fiction of a particular party paying sticker prices. It sets forth a controlling, straight-forward damages standard that governs in *all* contexts—whether the plaintiff is insured or uninsured: Plaintiffs may recover *the lesser* of (a) the amount paid or incurred for medical services (or to be paid/incurred, as to future expenses), and (b) the reasonable value of the services. The *plaintiff* must prove *both* elements, not just the higher value. And "reasonable value" is not just some amorphous concept. *Howell* defines "reasonable value" as the reasonable *market* value of services. *Howell* opts for realism—what happens in the real world—over artificial constructs that inflate damages based on fictions that don't apply in the particular case.

Howell is expressly consistent with the collateral source rule. (*Id.* at pp. 554-567.) That's because the actual amount paid measures the value of services rendered, the damages measure, regardless whether from a collateral source. The collateral source rule remains in full force. That the payment is made by a third-party (typically an insurer or government program) is *not* admissible in the normal case. So if a provider billed $5,000 but accepted $1,000 as payment in full from a health insurer, the plaintiff could recover the $1,000 even though it was paid by a collateral source (the health insurer). And, typically, the fact that the payment was made by a collateral source is inadmissible. (*Id.* at p. 552.)[1]

The collateral source rule is different for claims against healthcare providers. Under Civil Code section 3333.1, a part of MICRA, a healthcare-provider defendant can introduce and a jury can consider the collateral source nature of payments in order to reduce damages. But the rules for determining what reasonable damages are should not differ.

Howell's rule of reality, means that the goal for determining future damages should be what reasonable amounts will actually be required for future medical services. Admittedly, forecasting future expenses is not easy. Parties may not know with certainty what the progress of an injured plaintiff's condition will be. No one will know what future medical advances or technologies may be developed. No one will know with certainty what the future cost of medical services will be. But that does not

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[1] That a collateral source *payment* is typically inadmissible, does not mean that the availability of a collateral source, such as a health insurer, should be inadmissible in other circumstances, such as where the plaintiff avoids using available collateral source benefits in an attempt to inflate damages.

mean that the law, therefore, bars a plaintiff from recovering anything. (See *J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 341-343; CACI 3903A ["To recover damages for future medical expenses, [the plaintiff] must prove the reasonable cost of reasonably necessary medical care that [he or she] is reasonably certain to need in the future"].)

But just as a *plaintiff* should not deprived of the opportunity to prove a case for future damages just because no one can ever say that the future is certain, so, too, a *defendant* should not be deprived of the opportunity to prove what collateral sources will be available in the future to *reduce* such damages. In the normal case, the fact that a collateral source will be making the payment should not be admissible. But available collateral source payment levels, that is, that healthcare providers routinely accept from collateral sources as payment in full less, typically much less, than they accept from privately paying parties, should be taken into account.

That is what *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308 (*Corenbaum*) held in extending *Howell* to future, yet-to-be-paid medical expenses. It recognized that *Howell*'s analysis compels the conclusion that the full amount billed for past medical services is not relevant to determine the reasonable value of both past *and* future medical services, and that billed amounts cannot support an *expert's* testimony as to the reasonable value of future medical expenses. (215 Cal.App.4th at pp. 1330-1332.) Only what is typically *paid* and accepted as payment in full reflects the reality of the reasonable market value of services.

Corenbaum is completely in keeping with *Howell*'s teaching that what matters is the *reality* of medical service payments, not some convenient fiction.

And, if the *value* of future medical services should be judged according to realistic projections about whether collateral sources will be available to make those payments, then in the MICRA/Civil Code section 3333.1 context, whether future medical expenses are likely to be offset by collateral sources available in the future should be too. Can one predict with certainty that such collateral source benefits will be available in the future? No, no more than one can predict with certainty what the injured plaintiff's future medical needs and expenses will be. But the object—under *Howell* and Civil Code sections 3333.1 and 3359—is to reach the *best* estimate of what the injured party's medical expenses, *net of collateral source payments*, will be in the future.

Can one make predictions about what collateral sources might be available in the future? Yes. As with future medical condition, treatment and expense, such projections are necessarily an extrapolation from the present. But we *know* from the present that a number of collateral sources *have been available* to parties injured in the past. They include governmental programs and private insurance available without regard to pre-existing conditions. For example, insurance continuation rights exist under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and the Health Insurance Portability and Access 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 now, federal law, the Patient Protection and Affordable Care Act, requires all persons to have health insurance, subject to a tax penalty if they do not. (See generally *National Federation of Independent Business v. Sebelius* (2012) 567 U.S. ___, 132 S.Ct. 2566.) Participating health insurers must accept all applicants, regardless of pre-existing conditions. (E.g., 42 U.S.C. §300gg-1(a).)

A plaintiff, of course, will always be free to argue and present evidence that a particular collateral source will *not* be available in the future or of the amount of his or her offsetting expense in obtaining such collateral source payments. (See Civ. Code, § 3333.1, subd. (a) ["the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence"].) But that is the way the issue should play out. It should be a contest of adversary positions based on admissible evidence, not allowing one side to argue about what is reasonably predictable about the future and barring the other side from making equivalent arguments.

The bottom line is that juries will be within their rights to project that a particular injured plaintiff may have collateral source benefits available in the future. If so, both Civil Code section 3333.1 and *Howell*'s realistic world view dictate that potential *future* collateral source benefits should be

admissible. That view is consistent with jurors determining what have been the *actual* medical expenses incurred have been (as *Howell* requires), and by extension, what the *actual* (per *Howell* and *Corenbaum*) *net* (per section 3333.1) medical expenses an injured plaintiff proceeding against a healthcare provider defendant *will* incur in the future.

CONCLUSION

This Court should hold that evidence that an injured party may have collateral sources available to pay medical expenses in the future should be admissible under Civil Code section 3333.1 in an action against a healthcare provider.

Dated: June 17, 2016

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson

By: _____
Robert A. Olson

Attorneys for Prospective Amicus Curiae Association of Southern California Defense Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT CONTRA COSTA COUNTY** and **PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF DEFENDANT/APPELLANT CONTRA COSTA COUNTY** contains **1,417** words, not including the tables of contents and authorities, the caption page, or this Certification page.

Dated: June 17, 2016

Robert A. Olson