A·D·C VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

April 9, 2014

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Publication of *Dodd v. Cruz* (2014) 223 Cal.App.4th 933
Case No. S217534

Dear Chief Justice and Associate Justices:

Requests to depublish this decision have been submitted by Consumer Attorneys Association of California ("CAOC") and three medical lien "factors," companies that buy healthcare providers' bills at deep discounts hoping to profit in collecting those bills. Pursuant to rule 8.1125(b) of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") and the Association of Southern California Defense Counsel ("ASCDC") oppose these requests.

Dodd was properly decided, and undoubtedly meets the standards for publication. *Dodd* applies several "existing rule[s] of law to a set of facts significantly different from those stated in published opinions" and "[i]nvolves a legal issue of continuing public interest." (Cal. Rules of Court, rule 8.1105, subd. (c).) The one sentence in the decision with which the CAOC takes issue (and most of Key Health's letter concerns) is a fair statement of the law in the context of this decision.

Interest of the Requesting Organizations

ADC-NCN is an association of almost 900 attorneys primarily engaged in the defense of civil actions. ADC-NCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally and product liability lawsuits specifically. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California. ADC-NCN has appeared as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal across the state.

ASCDC counts as members approximately 1,100 attorneys who specialize in defending civil actions 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 cases before both this Court and the Courts of Appeal, including in *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541.

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on some matters of shared interest, such as this depublication request.

Why This Decision Should Remain Published

As stated above, *Dodd* was properly decided, and meets the standards for publication. The one sentence in the decision with which the requestors most take issue is a fair statement of the law in the context of this case.

***Dodd*'s Facts And The Publication Standards**

None of the depublication letters takes serious issue with whether *Dodd*, if even arguably correctly decided, meets the standards for publication. The CAOC request does not describe the facts in *Dodd*, and none of the requests set forth the standards for certifying a decision for publication. This letter will do both.

An opinion "should be certified for publication in the Official Reports if the opinion" satisfies one or more of nine conditions. (Cal. Rules of Court, rule 8.1105, subd. (c).) The two most applicable here are:

> (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;
>
> (6) Involves a legal issue of continuing public interest.

Dodd arose in an area of "continuing public interest," namely payments for health care. (Cf. Patient Protection and Affordable Care Act (PPACA), a/k/a "Obamacare.") The particular situation in *Dodd* is increasingly common: where medical providers assign to third-party factors their rights to collect payment for medical services rendered to patients. *Dodd* applies this Court's relatively recent *Howell* decision in a new context – the right to discover for purposes of determining economic damages the amount paid by a third-party to a healthcare provider to purchase the provider's bill for services.

Dodd also involved the (presumably) rather un-common situation where the factor was a LLC whose president was the patient's attorney in the personal injury lawsuit, who had also steered the plaintiff to the particular provider. In an attempt to discover the value of the medical services provided, the defendant in the personal injury lawsuit subpoenaed the factor for information including how much it paid for the lien. The trial court quashed the subpoena and sanctioned the attorney who pursued it.

Dodd involves the application of multiple "existing rules of law" to this set of facts, which is unquestionably "significantly different from those stated in published opinions." Among those rules of law:

-- "If a nonappealable substantive ruling on a discovery matter is 'inextricably intertwined' with an appealable order directing monetary sanctions, the substantive ruling may be reviewed." (223 Cal.App.4th at p. 939.)

-- "Under the Civil Discovery Act (§ 2016.010 et seq.), the scope of permissible discovery is very broad." (223 Cal.App.4th at p. 939.)

-- "Although the superior court has discretion in granting or denying discovery motions, it is obligated to construe the discovery statutes liberally in favor of disclosure." (223 Cal.App.4th at p. 940.)

-- "The broad scope of permissible discovery under the Civil Discovery Act 'is equally applicable to discovery of information from a nonparty as it is to parties in the pending suit.'" (223 Cal.App.4th at p. 940, citation omitted.)

-- The decision supports, again in an unusual setting, the worthy and unobjectionable principle that an attorney who propounds legitimate discovery should not be sanctioned. (*Dodd* is at root a discovery case.)

-- *Dodd* also quotes directly from this Court's decision in *Howell*: "[A] plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less." (223 Cal.App.4th at p. 940, quoting *Howell*, *supra*, 52 Cal.4th at 555, emphasis in *Howell*.) Based on this quote and the other principles of law set forth above, *Dodd* reached a conclusion that the depublication requestors do not address, much less contest:

> Here, the subpoena is reasonably calculated to lead to the discovery of admissible evidence relating to the reasonable value of [medical provider] Coast's services.

> The subpoenaed documents, for example, could reveal what Coast believed was the reasonable value of its services, apart from its calculation of the expense and risk of collection. This would be at least some evidence of the reasonable value of Coast's services. (223 Cal.App.4th at p. 942.)

Dodd Correctly States The Law

The depublication requests ignore all this and focus instead on a single sentence: "The amount a health care provider bills a plaintiff for its medical services is not relevant to the amount of the plaintiff's economic damages for past medical services." (*Dodd*, 223 Cal.App.4th at 941.) CAOC argues that this is only true where, as in *Howell*, a third party has or will pay a different amount: "When a plaintiff has been treated on a lien basis and still owes the provider or a third-party lienholder the entire amount of the unpaid bill, there is no basis to exclude the lien or the bills that support it." (CAOC letter, p. 5.) But *Dodd* did not "exclude" anything. To the contrary, it *allowed* discovery into "the lien" and the evidence "that support[s] it."

In any event, *Howell* makes clear that the amount paid or owed as payment in full is not the only limit on economic damages. (*Howell, supra*, 52 Cal.4th at p. 555; accord *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1325.) Rather, a plaintiff also bears the burden of showing that the damages are *reasonable* as measured by the "exchange value" of the services. (52 Cal.4th at p. 334.)

The requestors' argument that unpaid bills determine the value of services rendered is inconsistent with accepted law. "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." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage & Rigging Co., Inc.* (1968) 69 Cal.2d 33, 42-43.) An unpaid medical bill is no different than the sticker price on a car or the price on the back of a hotel room door. It says nothing about the actual, market or exchange value of the good or service.

The CAOC letter also chides *Dodd* for disagreeing with a prior Court of Appeal case, *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, "to the extent it held that the amount the plaintiffs' health care providers 'billed' or 'charged' was admissible to prove the reasonable value of the medical services provided." (*Dodd*, 223 Cal.App.4th at p. 943, fn. 5.) First, *Katiuzhinsky* did not address discovery, so *Dodd*'s cautionary "to the extent" is not a ground for this Court to depublish. Second, *Katiuzhinsky* both predates *Howell* and is at odds with both *Corenbaum* and, more fundamentally, this Court's precedent in *Pacific Gas & E. Co. v. G. W. Thomas Drayage & Rigging Co., Inc.* Indeed,

Howell itself remarked on the unreality of the face amount of healthcare bills and the "standard" "chargemaster" rates. (*Howell*, 52 Cal.4th at pp. 560-562; *id.* at p. 561 ["Nor do the chargemaster rates . . . necessarily represent the amount an uninsured patient will pay].) *Katiuzhinsky*'s language is also out of step with the post-*Howell* decision in *State Farm Mutual Automobile Insurance Co. v. Huff* (2013) 216 Cal.App.4th 1463, which held under the Hospital Lien Act that a healthcare providers' authenticated, "standard" bill was insufficient to establish that its charges were reasonable. It is *Katiuzhinsky*, not *Dodd*, which is out of step with the law.

Depublication requestor Key West argues that because insurance is not involved, *Howell* does not apply and *Dodd* is therefore ill-founded: "The amount for which MedFi purchased the lien is not relevant because the plaintiff remains liable for the full amount of the medical services." (Key West letter, p. 7.) But *Howell* did not purport to decide the measure of damages only in insurance cases, and *Dodd* is not addressed to plaintiff's liability. The *Dodd* discovery was sought to determine the reasonable value of the services. As *Howell* recognized, Civil Code sections 3281, 3282 and 3333 establish that the amount actually paid *and* reasonable value are two independent ceilings on recovery. "To be recoverable, a medical expense must be both incurred *and* reasonable." (52 Cal.4th at p. 555, original emphasis, citation omitted.) *Dodd* recognized that a market transaction for an obligation is relevant to the value of the services underlying that obligation – perhaps particularly so here, given the lack of independence among the provider, plaintiff's counsel and the lienholder.

The depublication requestors do not quarrel with the result in this case – reversing the sanctions order against the attorney who pursued this perfectly legitimate subpoena, and reversing the order quashing the subpoena. Instead, by focusing on a single nondispositive sentence out of context, each requestor "takes that throwaway dictum … and builds a castle upon it." (*Metropolitan Life Ins. Co. v. Glenn* (2008) 554 U.S. 105, 128 [Scalia, J., dissenting].)

Dodd is completely compatible with *Howell*. Indeed, ADC-NCN and ASCDC believe that it is compelled by *Howell*'s reasoning. But parties will be free to contest in later cases how *Dodd* might apply to admissibility of evidence at trial, *Dodd* being a discovery decision. *Dodd* is certainly not undermining any rule this Court set forth in *Howell*.

Dodd was rightly decided on the merits. It should remain published and citable, where it may serve as a beacon into hidden and sometimes shady practices, including post-*Howell* efforts to inflate medical damages.

Dodd Properly Addressed The Discovery Motion Merits

Several of the depublication requestors suggest that *Dodd* somehow changes the law and will open up a floodgate of discovery-based interlocutory appeals. The claims are overstated given what *Dodd* says on its face. *Dodd* recognizes that a nonappealable substantive ruling on the discovery matter has to be "inextricably intertwined" with an appealable sanctions order to be reviewed on the sanctions appeal. (223 Cal.App.4th at p. 939.) It then finds that the rulings here were "inextricably intertwined" because the attorney was sanctioned for bringing the discovery motion: "If the superior court erroneously quashed the subpoena, there was simply no basis for monetary sanctions." (*Ibid.*) That analysis correctly applies, not changes, existing law. *Dodd* rejects, as unsupported by the evidence and the overall record, the same arguments raised in the letters requesting depublication that sanctions would have been proper here even had the superior court not quashed the subpoena. (*Ibid.*) That straightforward evidentiary analysis does not "open the floodgates" nor change the existing standard.

Conclusion

The Court of Appeal's decision was correct, and applies multiple established principles of law in a factual setting that differs from prior reported cases but which may represent a "wave of the future" in an area of continuing public interest, payment for health care. ADC-NCN and ASCDC request that this decision remain published.

Respectfully submitted,

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PROOF OF SERVICE

Dodd v. Cruz (2014) 223 Cal.App.4th 933
Case No. S217534

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP, 275 Battery St., San Francisco, CA 94111. On the date below, I served the within documents:

Letter to Supreme Court of California Re Continued Publication

Via U.S. Mail: By placing the document(s) listed above in a sealed envelope, with postage thereon fully prepaid, in United States mail in the State of California at San Francisco, addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 10, 2014 at San Francisco, California.

Eileen Spiers

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