3d Civil No. C073064

In the Court of Appeal

OF THE

State of California

THIRD APPELLATE DISTRICT

LILLIE MOORE
Plaintiff/Respondent,

vs.

RICHARD MERCER,
Defendant/Appellant.

Appeal from Judgment of the Sacramento Co.
Superior Court; Case No. 34-2010-00081045.
Hon. David De Alba, Judge
Hon. Gerrit W. Wood, Judge

APPELLANT'S ANSWER TO AMICUS CURIAE BRIEF

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INTRODUCTION

The central premise of MedFin's *amicus-curiae* argument is that the Supreme Court's seminal decision in *Howell v. Hamilton Meats & Provisions, Inc.*[1] does not apply when MedFin—not a healthcare insurer—pays Moore's healthcare providers. But the basic principles of California law reaffirmed in *Howell* certainly apply to this appeal and MedFin. So MedFin's entire premise fails.

Additionally, MedFin incessantly repeats *ipse dixit* purported facts that are simply not in this record.[2] Indeed, MedFin's involvement with Moore and its purported transactions with Moore's healthcare providers are not in this record.

But MedFin's involvement and transactions were solely relevant to Moore's damages and should have been before the jury below. In accordance with Moore's motions, the trial court prevented Mercer from obtaining evidence of MedFin's involvement and transactions in discovery and from introducing the evidence at trial. Thus, MedFin's brief

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[1](2011) 52 Cal.4th 541.

[2]*Cf. New England Patriots Football Club, Inc. v. University of Colorado* (1st Cir. 1979) 592 F.2d 1196, 1198 n.3 ("[A]n amicus is, namely, one who, not as parties, but, just as any stranger might, for the assistance of the court gives information of some matter of law . . . rather than one who gives a highly partisan account of the facts." [citations and internal punctuation omitted]).

unintentionally supports Mercer's appeal that reversible error occurred before and at trial.

II

BASIC PRINCIPLES OF CALIFORNIA LAW REAFFIRMED IN *HOWELL* APPLIES TO MOORE AND MEDFIN

Because Moore's healthcare providers exchanged the value of their medical services for an undisclosed amount from MedFin—instead of a disclosed amount from a healthcare insurer—MedFin claims it is uniquely exempt from *Howell.* But MedFin may claim no exalted exemption for the Supreme Court's rulings.

The basic principles of California law reaffirmed in *Howell* apply to MedFin and Moore. *Howell* reaffirms that Moore may recover only reasonable damages for injuries caused by Mercer's low-speed, negligible-impact vehicle collision, which is a statutory mandate.[3]

Howell reaffirms California's basic principle that reasonable damages is the equivalent of market value, which is defined as exchange value. *Howell* relies upon the Restatement of Torts, and reaffirms that in California the "rule, applicable to recovery of tort damages generally, [is] that the value of property or services is ordinarily its 'exchange value,' that is, its market value or the amount for which it could usually be exchanged."[4]

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[3]Civil Code § 3359; *Howell*, 52 Cal.4th at 555.

[4]*Id.* at 556.

"Thus the general rule under the Restatement, as well as California law, is that a personal injury plaintiff may recover *the lesser* of (a) the amount paid or incurred for medical services, and (b) the reasonable value of the services."[5] Thus, the trial court in this case should have permitted Mercer to offer evidence relevant to the jury's determination of the lessor of:

- The market value of the medical services provided to Moore, which is the equivalent of "the amount for which [the medical services] could usually be exchanged"; or,
- The amounts Moore's healthcare providers accepted in full payment for their medical services.[6]

At trial below, however, Moore tactically chose to offer no evidence relevant to either the market value of her medical care or the amounts her healthcare providers accepted in full payment for her medical care. And in accordance with Moore's motions, the trial court prevented Mercer from obtaining in discovery—and sanctioned Mercer for trying—or offering at trial evidence relevant to the amounts Moore's healthcare providers accepted in full payment for their medical services.[7]

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[5] *Id.*

[6] *Id.*

[7] 2 App. 554–555; 1 RT 57 ("The Court: . . . There will be no reference to the fact that those services were either sold, assigned or purchased by MedFin[.]").

Instead, at trial below Moore only offered and the trial court only permitted evidence—in the form of attorney-prepared summaries—of her healthcare providers' unpaid charges to prove her damages.[8] But this evidence is irrelevant as a matter of longstanding, controlling Supreme Court authority.[9]

At trial below, Moore tactically offered, and the trial court only permitted the jury to consider, only irrelevant evidence of Moore's economic damages. But it didn't have to be that way.

Moore could have tactically offered and the trial court would have permitted the jury to consider evidence of the amounts that Moore's healthcare providers accepted from MedFin in full payment for their medical services. Then, Moore could have attempted to prove that those MedFin-paid amounts were less than the market value of Moore's healthcare services. The jury would then have had the opportunity to award reasonable damages.

But Moore tactically sought, and the trial court permitted, the jury to award damages that are unreasonable as a matter of law because the damages are based on entirely irrelevant evidence of unpaid charges. MedFin invites this Court to grant it a grand exemption from *Howell* and the basic

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[8] 1 RT 81 ("The Court . . . The only evidence the jury will hear is what was incurred or billed to the plaintiff."); 3 App. 579.

[9] *Pacific Gas & Electric Co. v. G.W. Thomas Drayage Co.* (1968) 69 Cal.2d 33, 42–43; *Howell*, 52 Cal.4th at 564 ("[A] medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value.").

principles of California law that *Howell* reaffirms to permit the result here and protect MedFin's business model. This Court should decline MedFin's invitation.

III

MEDFIN'S RELIANCE ON FACTS NOT IN THIS RECORD PROVES THAT THE TRIAL COURT REVERSIBLY ERRED BY NOT PERMITTING THE JURY TO CONSIDER EVIDENCE RELEVANT TO DETERMINING REASONABLE DAMAGES

At the trial below, the jury was charged with awarding reasonable damages for Moore's injuries caused by a low-speed, negligible-impact vehicle collision. Facts not in this record that MedFin relies upon here prove that the trial court did not permit the jury to consider evidence relevant to the jury's damage award. For brevity, a mere sampling follows.

MedFin blithely asserts that Moore "was not insured and could not pay the cost of medical services her injuries required."[10] But this record contains nothing about whether Moore qualifies for private or public coverage. From a purported lien agreement that Moore provided to oppose Mercer's subpoena of her medical-treatment records, the trial court only knew that Moore contractually agreed to "not submit any of [her] medical bills . . . to any private . . . or government sponsored health plan[.]"[11]

Had the jury learned of this lien agreement, Mercer would have introduced evidence of what a private or public health

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[10] *Amicus* Brief (AB) 2.

[11] 1 App. 74.

plan would have paid Moore's healthcare providers. Mercer then could have argued that these amounts were the reasonable value of Moore's economic damages. The trial court would then have instructed the jury under *Howell* that these amounts were evidence of reasonable damages.[12] But, Moore moved to exclude this evidence because it would "confuse the jury or discredit plaintiff's attorneys or doctors."[13] The trial court dutifully excluded this evidence.[14]

MedFin represents, "[Moore's] providers sold their accounts to a third party, MedFin, at a discount."[15] But the trial court prevented Mercer from obtaining evidence substantiating MedFin's purchases of the providers' accounts in discovery and then excluded evidence of the purchases at trial. MedFin does not offer any explanation as to how the evidence of the amounts it paid to Moore's providers is not evidence relevant to the market/exchange value of the providers' services.

Since Moore's healthcare providers accepted MedFin's payments in full payment for their services in an arms-length, business transaction, evidence of the MedFin transactions were directly relevant to the healthcare services'

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[12] *Howell*, 52 Cal.4th at 562 ("[L]ooking to the negotiated prices providers accept from insurers makes at least as much sense, and arguably more, than relying on [the] chargemaster [billed or charged] prices that are not the result of direct negotiation between buyer and seller.").

[13] 2 App. 219.

[14] 1 RT 81 ("The Court: Correct, the only evidence the jury will hear is what was incurred or billed to the plaintiff.").

[15] AB 2.

market/exchange value under *Howell.* So the trial court erred in preventing the jury from considering this relevant evidence.

MedFin stridently asserts, "Here, plaintiff . . . is contractually liable for the full charges for medical services she received[.]"[16] But these purported contracts are not in this record. Moore successfully persuaded the trial court to prevent Mercer from obtaining the contracts in discovery and to prevent the jury from considering the contracts at trial. Moore admits that her contractual liability is contingent upon her "recover[ing] enough to pay the full amount of the bills."[17]

MedFin uses its a*micus curiae* opportunity to play semantic games with its arms-length business transactions with Moore's healthcare providers. But no matter how MedFin parses its involvement, there is no doubt that the amounts it paid Moore's providers is relevant to prove the fair-market value of the providers' services.

Mercer was palpably prejudiced by the trial court's refusal to permit Mercer from offering the relevant evidence of MedFin's entire involvement and commenting upon it at trial. The judgment should be reversed.

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[16]AB 8.

[17]RB 19.

IV

CONCLUSION

MedFin's business model is not entitled to a grand exception from the general principles of California law as reaffirmed in *Howell*. The amounts that Moore's healthcare providers accepted from MedFin in full payment for their medical services is relevant evidence of the market value of those services—just as though Moore's healthcare providers accepted the amounts from healthcare insurers instead.

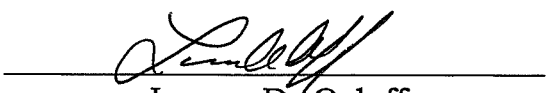
The amounts Moore's healthcare providers accepted from MedFin is the exchange value for their medical services. Under *Howell*, that evidence is relevant and admissible to prove Moore's damages. Since the trial court prevented Mercer from obtaining, and the jury from considering, this relevant evidence, the judgment should be reversed.

WORD-COUNT CERTIFICATE

(Cal.R.Ct. 8.204(c)(1))

This brief's text contains 1,625 words, as counted by the Microsoft Office Word 2013 word-processing program used to generate the brief.

DATED: December 8, 2014



Lance D. Orloff

PROOF OF SERVICE BY MAIL

State of California)
) ss.
County of Orange)

I am a citizen of the United States and a resident of or employed in the city of Irvine, County of Orange; I am over the age of eighteen years, and not a party to the within action; my business address is 2030 Main Street, Suite 1600, Irvine, California 92614.

On December 8, 2014, I caused the within **Appellant's Response To Amicus Curiae Brief** in re: *Moore v. Mercer* in the Court of Appeal of the State of California, Third Appellate District, Civil No. C073064, on all parties interested in said action, by placing one true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Irvine, California, addressed as follows:

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on December 8, 2014 at Irvine, California.

Norma Reeves