as to Brief

COURT OF APPEAL - SECOND DIST.
FILED
JAN 10 2013
JOSEPH A. LANE Clerk
V. GRAY Deputy Clerk

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IN THE

CALIFORNIA COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN CORENBAUM, et al.

Plaintiffs and Respondents,

vs.

DWIGHT ERIC LAMPKIN,

Defendant and Appellant

as to application

COURT OF APPEAL - SECOND DIST.
FILED
JAN 16 2013
JOSEPH A. LANE Clerk
V. GRAY Deputy Clerk

AND RELATED ACTIONS

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

Appeal from the Superior Court for Los Angeles County,
Hon. Ross Klein, Trial Judge
Case Nos. NC053848, NC054159, and NC054349

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APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF

TO: THE HONORABLE JOAN D. KLEIN, PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities and the California State Association of Counties respectfully request permission to file the accompanying amicus curiae brief, which is submitted in response to an invitation from the Court.

I. INTEREST OF AMICI

Founded in 1898, the League of California Cities ("League") is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as having such significance.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

California cities and counties have a substantial interest in the case because they receive thousands of personal injury claims and lawsuits each year. Questions concerning civil litigation procedures and tort liability are of vital interest to the member cities and counties of the League and CSAC.

The League's and CSAC's members provide public services to millions of California residents in every county, from city centers to suburbs to rural areas of the State. These cities and counties provide a wide array of services and facilities, including international airports, sea ports, public utilities, police, sheriff's and fire departments, public hospitals, health clinics, public transportation, public works, cultural and recreational facilities (including sports venues, museums, libraries, parks, theaters, and convention centers). As a result of these varied operations, California cities and counties receive thousands of personal injury claims a year and pay out substantial dollar amounts in settlements and judgments annually. California cities and counties have extensive experience with tort litigation and risk management that involves balancing public interests and benefits.

California cities and counties are interested in a tort system that fairly compensates injured persons while protecting taxpayers and citizens from undue expense. The issues raised by this case will have a significant effect on the ability of state and local government to provide vital services to all Californians.

II. HOW THE BRIEF WILL ASSIST THE COURT

This appeal raises a question left open by the California Supreme Court in its decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541: For what purpose, if any, may trial courts receive into

evidence medical bills showing charges greater than the amounts insurance or patients are obligated to pay?

The member cities and counties of the League and CSAC are involved in thousands of claims and personal injury lawsuits each year. Cities and counties are well-versed in the issues from the perspective of both tort defendants and the public interest. In addition, the League's members and its Legal Advocacy Committee have been involved in litigation concerning these issues for many years. The City and County of San Francisco (a member of both the League and the CSAC) was a party to one of the seminal cases, *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298, and the author of this amicus brief was San Francisco's appellate counsel in that case. In addition, the League submitted amicus curiae briefs to the Supreme Court in *Howell, supra,* and *Parnell v. Adventist Health System/West* (2005) 35 Cal. 4th 595.

No party or counsel for any party authored the attached brief in whole or in part or made any monetary contribution toward the preparation or submission of the brief. No person or entity other than the undersigned amici curiae and counsel made a monetary contribution to fund the preparation or submission of this brief.

Dated: January 15, 2013

NEWDORF LEGAL

By: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

AMICI CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

INTRODUCTION

There have been significant changes in how this nation pays for medical care over the past several decades. The actual cost of health care is rarely reflected in amounts billed by hospitals and doctors. True costs are set by provider contracts between insurers on the one hand and medical groups and hospitals on the other. Nearly all such contracts, as well as Medicare regulations, require service providers to accept the insurance reimbursement as "payment in full." Doctors and hospitals cannot collect anything more than the insurance payment from a covered patient. (*Parnell v. Adventist Health System/West* (2005) 35 Cal. 4th 595, 609 [holding that hospitals have no right to any part of a patient's tort recovery after the hospital has accepted an insurance reimbursement as payment in full].). The California Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541 held that an award to an injured plaintiff for past medical expenses cannot exceed the insurance payment accepted by care providers as full payment.

Nonetheless, most hospitals and doctors continue to generate medical bills based on rate schedules that are substantially higher than insurance payment amounts. The care providers realize that no one –not the patient, not the patient's medical insurer and not the tortfeasor who may have caused the injury – is liable to pay these medical bills in full.

The Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc., supra,* determined that if neither the patient nor the patient's insurer is liable for the full billed amount, the billed amount is inadmissible for

purposes of determining the amount of past medical expenses that may be awarded to the injured plaintiff. The Supreme Court left open the possibility that the full billed amount may be relevant and admissible for the jury's determination of noneconomic damages (such as pain and suffering) or future medical expenses. That is the issue on this appeal.

There is no basis in logic, common sense or the rules of evidence for the admission into evidence of the full billed amount. The admission of these inflated and "illusory" medical bills could easily confuse and mislead the jury. If the full billed amount is admitted in evidence, the jury may erroneously speculate that the injured plaintiff could be liable for this higher amount and thereby improperly increase the jury verdict. This would lead to overcompensation of tort plaintiffs.

A rule allowing the admission into evidence of the full-billed amount would let in through the backdoor evidence that the Supreme Court has directed may not come in through the front door. Among other consequences, this would unduly increase payouts to plaintiffs and their counsel at the expense of vital services to all Californians. Cash-strapped State and local governments cannot absorb greater liabilities without cutting services.

ARGUMENT

I. SINCE THE ADVENT OF MANAGED CARE AND NEGOTIATED DISCOUNTS, THE FULL CHARGED AMOUNTS ON MEDICAL BILLS NO LONGER REFLECT THE EXTENT OF TREATMENT OR INJURY.

Under long-standing California law, injured plaintiffs are entitled to recover the "reasonable value" of past medical services. During most of the 20th Century, California courts routinely admitted either medical bills or testimony of the full amount of those bills as evidence of the "reasonable

value" of those services. It was standard for a personal injury plaintiff to introduce her medical bills at trial and elicit a doctor's testimony that the billed amount was reasonable and necessary. (*See Latky v. Wolfe* (1927) 85 Cal. App. 332, 347 [medical bills admitted into evidence and verdict reduced on appeal to the extent that "no other testimony was offered or received to the effect that [the billed amounts] represented the reasonable value of the medical services rendered"]; *Townsend v. Keith* (1917) 34 Cal. App. 564, 565 [affirming the admission of testimony as to the amount of medical bills on the ground that "the amount paid for the services is some evidence as to their reasonable value"].)

In the vast majority of cases in years past, the patient and/or the medical insurer incurred an obligation to pay the full billed amount. When supported by a doctor's testimony, the billed amount was synonymous with the "reasonable value" of the medical services.

With the advent of managed care, insurance companies began negotiating larger and larger discounts for medical services. But hospitals and doctors for the most part did not lower the charges listed on medical bills to reflect the lower amounts actually accepted as payment in full. Hospitals and medical groups kept their billing rates at higher levels while agreeing that they would accept significantly lower amounts as payment in full – often two-thirds lower.[1]

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[1] In the *Howell* case, the doctors and hospitals billed $189,978.63 and the trial court determined that the amount paid by insurance was lower by $130,286.90 – a 69 percent reduction. (*Howell, supra,* 52 Cal. 4th at p.551.)

Prof. Thomas Ireland, an economist, observed that between the amounts billed and the lower amounts actually paid, "it is likely that [the amount paid] is closer to whatever proxy for 'reasonable value' or 'competitive equivalent' that we might come up with." (Thomas Ireland, *The Concept of Reasonable Value in Recovery of Medical Expenses in Personal Injury Torts* (March 2008) 14 J. Legal Econ. 87, 90.)

For similar reasons, one legal commentator called medical bills "illusory":

> Frequently, the difference between the stated charge and the reimbursement rate actually paid is extremely significant. It is therefore increasingly difficult to know what the true charges will be after they are reduced by the different reimbursement methodologies, schedules, computer programs, agreements, audits, regulations, adjustments, and pre-determined reimbursement rates.... [¶] ... Presenting [billed] charges to the jury is arguably against public policy because they represent illusory or illegal charges.

(John Dewar Gleissner, *Proving Medical Expenses: Time for a Change* (Spring 2005) 28 Am. J. Trial Advoc. 649, 650-657.)

The first California case to consider the growing discrepancy between amounts billed and amounts paid was *Hanif v. Housing Authority* (1988) 200 Cal. App. 3d 635, 639-40. As stated in *Hanif,* the measure of tort damages is based on certain bedrock principles:

> "In tort actions damages are normally awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e.,

restoring him as nearly as possible to his former position, or giving him some pecuniary equivalent."

(*Hanif, supra,* 200 Cal. App. 3d at p.640 (quoting 4 Witkin, *Summary of Cal. Law* (8th ed. 1974) Torts, § 742, p. 3137 [emphasis in original]).)

The *Hanif* court also cited the corollary of this principle: "A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong not been done." (*Ibid.* [quoting *Valdez v. Taylor Automobile Co.* (1954) 129 Cal. App. 2d 810, 821-22].)

The *Hanif* court concluded that "a plaintiff is entitled to recover *up to, and no more than,* the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Id.* at p.643.)

California courts did not address the issue again until *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298. The *Nishihama* court followed *Hanif* in holding that "'when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact that it may have been less than the prevailing market rate.'" (*Id.* at p.306 [quoting *Hanif, supra,* 200 Cal. App. 3d at p.641].)

The California Supreme Court in *Howell* endorsed the reasoning of *Hanif* and *Nishihama.* The Court held that only the amount actually accepted as payment in full was relevant and admissible to determine an award for past medical care. The question on this appeal is whether the full billed amount – even after *Howell* – may have relevance to the jury's

determination of some aspect of the case. As explained below, the answer is "No."

II. AMOUNTS BILLED ARE NOT RELEVANT TO PAIN AND SUFFERING AND SHOULD BE EXCLUDED FROM EVIDENCE.

Appellate courts have long struggled to provide guidance to lawyers, trial judges, and juries in determining the amount of pain-and-suffering damages. As lawyers and judges know, there is no formula or set rule for awarding non-economic 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, 512 [dis. opn. of Traynor, J. (quoting *McCormick on Damages* (1935) § 88, pp. 318-319)].)

Pain and suffering is a subjective experience that can be translated into monetary loss only with difficulty. "Every case which has considered the issue before us has emphasized the difficulty faced by a jury in attempting to measure in monetary terms compensation for injuries as subjective as pain, humiliation and embarrassment. The cases abound in broad statements such as that the matter is entrusted to the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence,' and that they are to award 'fair and reasonable compensation' and be guided by 'their observation,

experience and sense of fairness and right.' These homilies provide little assistance to the jury." (*Beagle v. Vasold* (1966) 65 Cal. 2d 166, 181 [quoting *Botta v. Brunner* (N.J. 1958) 138 A.2d 713, 719].)

Expert testimony may "undoubtedly be helpful," but it is not necessary to establish a basis for an award for pain and suffering; lay testimony suffices. (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal. 3d 889, 895.) Even in the absence of explicit evidence showing pain, the jury may infer such pain, if the injury is such that the jury in its common experience knows it is normally accompanied by pain. (*Mendoza v. Rudolf* (1956) 140 Cal. App. 2d 633, 637.) "[The] items of pain, suffering and inconvenience . . . are inevitable concomitants with grave injuries. . . . A jury may not eliminate pain from wounds when all human experience proves the existence of pain . . . ." (*Todd v. Bercini* (Pa. 1952) 92 A.2d 538, 539.)

The Court in *Duarte v. Zachariah* (1994) 22 Cal. App. 4th 1652 agreed that there was no fixed schedule for pain and suffering and stated what was, perhaps, obvious: "There is no direct correspondence between money and harm to the body, feelings or reputation." (*Id.* at p.1665.)

These judicial commentaries are distilled in the CACI jury instruction for pain and suffering, which states, in part: "No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense." (Judicial Council of California Civil Jury Instructions (2012), CACI No. 3905A.)

While the guidance as to quantifying non-economic damages is broad, and perhaps vague, that does not mean the trial is a free-for-all

where *any* evidence is admissible for purposes of setting these damages. Only relevant evidence may be admitted. (Evid. Code, § 351.) "Relevant evidence" means evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.)

There are numerous types and categories of evidence that courts have noted may be relevant to determining pain and suffering damages. These include:

1. Plaintiff's testimony. "[P]laintiff's own testimony commonly establishes his damages for pain and suffering . . . ." (*Capelouto v. Kaiser Foundation Hospitals, supra,* 7 Cal. 3d at p.895.)

2. Testimony of lay witnesses who observed the effects of pain and suffering on plaintiff. "The objection . . . on the ground that the witness was not an expert amounts to nothing. No principle of expert evidence is involved in the question. Nor do we consider the evidence objectionable as hearsay. Involuntary declarations and exclamations of a person's present pain and suffering are admissible as tending in some degree to show his physical condition." (*Green v. Pacific Lumber Co.* (1900) 130 Cal. 435, 440-441; *accord Willoughby v. Zylstra* (1935) 5 Cal. App. 2d 297, 300; *Muzzy v. Supreme Lodge of the Fraternal Brotherhood* (1933) 129 Cal. App. 1, 9.)

3. Medical expert and treating physician testimony describing plaintiff's condition. "Medical witnesses repeatedly testified that Kim experienced severe diarrhea and vomiting of a projectile nature, that she suffered shock and dehydration, and that she became listless and lethargic

during these attacks."(*Capelouto, supra,* 7 Cal. 3d at p. 896 (ordering a new trial on the issue of non-economic damages.)

4. The length of time to heal or recover and/or length of hospitalization. "Plaintiff was a hospital patient for three days, then confined to his bed at home for approximately one week. The resulting scar from the wound is three-quarters of an inch in width and two and three-quarters inches in length. Plaintiff testified the wound took five to six months to heal and that the healed wound bothered him while lifting and bending and that he could not sleep on his right side." (*Gallentine v. Richardson* (1967) 248 Cal. App. 2d 152, 153 [ordering new trial on grounds of inadequate jury award for pain and suffering].)

5. The number and type of broken bones or surgical procedures. "A plaintiff who is subjected to a serious surgical procedure must necessarily have endured at least some pain and suffering in connection with the surgery. While the extent of the plaintiff's pain and suffering is for the jury to decide, common experience tells us it cannot be zero." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal. App. 4th 931, 938 [holding that the jury awarded inadequate non-economic damages].) "Appellant received in the accident, in addition to a fractured left humerus and bruises from which he has fully recovered, a badly crushed right foot. He spent approximately six months in the hospital, where traction was placed on the arm, pins were inserted into the toes and traction also applied on the foot and leg. The outer and forepart of the foot eventually became gangrenous and had to be amputated (including all toes except the big toe), and five skin grafts done. The outer and anterior third portion of the foot has been amputated so that at present it extends back about one-half of the fifth metatarsal to the neck

of the fourth and third slightly upon the neck of the fourth." (*Bencich v. Market S. R. Co.* (1937) 20 Cal. App. 2d 518, 521 [ordering new trial on the grounds of inadequacy of damages for pain and suffering].)

6. Videotape of a "Day in the Life" of Plaintiff. Videotape evidence may show the plaintiff's daily activities after suffering the injuries at issue in the trial. For example, the court in *Jones v. City of Los Angeles* (1993) 20 Cal. App. 4th 436 affirmed the admission of a 20-minute videotape of plaintiff's daily activities at home since being confined to a wheelchair. "This so-called 'Day In The Life' videotape depicts Ms. Jones being moved from her bed by two attendants, being bathed, being placed in her wheelchair and shows her attempting to move around in the chair." (*Id.* at p.439.) One segment of the videotape included a close-up shot of plaintiff's face "while she is in obvious discomfort and is grimacing." (*Id.* at p.440.) The Court concluded this evidence "had substantial probative value on the extent of Ms. Jones's pain and suffering and was therefore helpful to the jury in calculating appropriate damages." (*Id.* at p.442.)

The type of evidence cited above has a "tendency in reason to prove" the amount of pain and suffering. (*See* Evid. Code § 210.) Common sense confirms that the more broken bones, the more surgeries, the longer the hospital stay, or the longer the recovery period, then the greater the pain and suffering. The same cannot be said of the arbitrary amount charged on medical bills that care providers do not expect to be fully paid.

It is understandable that advocates would like an objective number on which to base their damages argument, whether a lawyer is arguing for a higher number for plaintiff or a lower number for defendant. Common sense – the basic yard stick for measuring the reasonableness of non-

economic damages – provides no such linkage between a plaintiff's suffering and the amount billed for medical care. If anything, common sense argues for the absence of a nexus. We know from common experience that many injuries are painful even in the absence of extensive treatment and sizable bills. A broken humerus (the long upper arm bone connecting to the shoulder) may be very painful but in many instances is treated simply by immobilizing the arm in a sling. Anyone who has cracked a rib knows it is painful, and yet most fractured ribs are treated at home and heal on their own over time. (WebMD (2013) *Fractured Rib: Topic Overview* <http://www.webmd.com/a-to-z-guides/fractured-rib-topic-overview?page=2> [as of Jan. 14, 2013].)

There is no factual, evidentiary or common sense basis for the argument by plaintiff that billed amounts have a "tendency in reason" to prove the value of pain and suffering. Given that the Supreme Court saw no logical connection between the amount billed and the reasonable value of the services, it is difficult to see any relevance of the amount billed to the value of pain and suffering. They are apples and oranges.

A handful of California cases have posited a connection between the amount billed and the value of a case. The Court in *Nishihama, supra,* 93 Cal. App. 4th at p.309, held that it was not reversible error to allow into evidence the full amount of bills (although the Court on appeal reduced the amount awarded for past economic damages). As explained by the *Nishihama* court:

> We therefore conclude that the trial court erred in permitting the jury to award plaintiff $17,168 instead of $3,600 for [the hospital's] services. We do not agree with the City, however,

> that this error 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.

(*Nishihama, supra,* 93 Cal. App. 4th at p. 309.)

This superficial analysis is based on a misunderstanding of which number represented the "usual rates." The *Nishihama* court described the higher amount as the amount *usually* paid for plaintiff's medical care – suggesting that the lower insurance rate was the exception. As discussed above, the opposite is true. Few (if any) patients would have paid the higher amount shown on the bills.

The *Nishihama* court provided no explanation or analysis in support of its statement. It cited no case law, treatise or law journal on this point. Nor did the Court identify any specific jury issue – such as pain and suffering – for which the jury could properly use the full billed amount as evidence. In the absence of an articulable "tendency in reason" to prove a disputed fact of consequence, the evidence is inadmissible. (Evid. Code § 350.)

Before *Nishihama,* no California court had stated that medical bills may be relevant or admissible to establish the value of pain-and-suffering damages. A few cases since have cited *Nishihama* as authority for the proposition that it was not error to admit the full amount of bills. (*See, e.g., Olsen v. Reid* (2006) 164 Cal. App. 4th 200, 204; *Greer v. Buzgheia* (2006)

141 Cal. App. 4th 1150, 1157.) Neither *Olsen* nor *Greer* cited authority other than *Nishihama.* These later cases merely recited the supposition in *Nishihama* that the full billed amount may have given the jury a "more complete picture" of plaintiff's injuries than the paid amount. (*Greer, supra,* 141 Cal. App. 4th at p.1157; *see Olsen, supra,* 164 Cal. App. 4th at p.204.)

The suggestion by the *Nishihama* court that medicals bills are relevant to the value of a case bears some resemblance to a traditional trial lawyer's rule of thumb. Trial lawyers have been known to value cases for settlement based on some multiple of medical costs. But this practice is not based on the rules of evidence or case authority. One academic author described this practice as follows:

> It is a common settlement practice to compute pain-and-suffering damages . . . as some multiple of the out-of-pocket medical and related financial expenses incurred by the plaintiff. As there is no reason why actual pain-and-suffering injuries should be related to some multiple of the plaintiff's economic loss, the practice appears to be a bargaining convention that is acceptable to all parties concerned because it ameliorates the uncertainty that each party would face if a jury were to determine the award.

(Mark 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.)

It would be circular logic to rely on an informal settlement practice as the basis for a rule of evidence. Cases should settle based on the parties'

best estimation of how a jury might apply the law to the admissible evidence in rendering its verdict. The opposite is not true. That is, juries should not base their verdicts on what a lawyer thinks is the settlement value of a case.

III. ALLOWING THE FULL AMOUNT OF MEDICAL BILLS INTO EVIDENCE WOULD BE INHERENTLY CONFUSING.

Under *Howell,* the amount of paid medical bills (but generally not the fact that insurance paid these amounts) is admissible. After hearing this evidence, if a jury improperly awards more than the amount paid by insurance for past medical expenses, the defendant's remedy is to file a motion for a new trial. (*Howell, supra,* 52 Cal. 4th at p.567.) If the Court adopts plaintiff's position on this appeal, then juries would always hear two different numbers for two different purposes: (1) the paid amount for the purpose of awarding past medical expenses; and (2) the higher billed amount for the purpose of awarding non-economic damages. This scenario would likely lead to jury mistakes, an increase in post-trial motions, manipulation of medical bills, and perhaps other unforeseen negative consequences. At a minimum, it would be inherently confusing. (*See* Evid. Code § 352 [court may exclude evidence if its admission would create a "substantial danger . . . of confusing the issues" that substantially outweighs the probative value of the evidence].)

In some cases, juries might award excessive amounts for past medical expenses based on the apparently conflicting evidence. Assuming that the trial court allowed the jury to use a special verdict form that required the jury to separately list past medical damages, this error could be corrected by granting a new trial. But the Courts should not adopt a rule

that would foreseeably require the filing of many more motions for a new trial.

In addition, it would not always be apparent if the jury had been confused and erred in rendering its verdict. For example, if a jury erroneously speculated that the plaintiff would be liable for the full amount of the medical bills in evidence, it might award the difference between the paid amount and the billed amount in the form of additional non-economic damages or future damages. In this situation, the inflated damages on another line would be impossible to detect from the face of the jury verdict form.

In addition, under the current billing practices, the billing schedules of doctors and hospitals are arbitrary in that the billed amounts currently have no effect (in most cases) on actual payments. Doctors and hospitals could increase or lower the billed amounts without any effect on the payments by insurance. It could not be ruled out that billed amounts might occasionally be increased by sympathetic doctors who wished to benefit their patients at no apparent cost to themselves. Thus, plaintiff's proposed rule creates an opportunity for manipulation and exploitation. It would imbue these "illusory" bills with a legal significance that was never intended or contemplated.

IV. THE COURT CANNOT DECIDE ON THIS RECORD WHETHER PAST MEDICAL BILLS IN THIS CASE WERE RELEVANT TO FUTURE MEDICAL EXPENSES.

Unlike pain and suffering, future medical expenses cannot be awarded in the absence of medical evidence that such damages are reasonably certain to occur. (*Mendoza v. Rudolf, supra,* 140 Cal. App. 2d at

p.637.) In some cases, an expert's testimony might lay a proper foundation for showing that past medical bills would be relevant to future medical expenses. Past medical bills might be relevant to future medical expenses based on a showing that (1) the past medical bills were for substantially similar services as plaintiff will require in the future; and (2) plaintiff would likely incur future medical costs that bear a close relationship to the billed amount of past medical bills. However, the trial record in this case was incomplete because amounts actually paid had been excluded from trial.

Howell mandates that only amounts actually paid are admissible to show past medical expenses. Based on the same reasoning, future medical damages cannot be proven based on evidence that a certain amount had previously been billed (but not paid) for the same procedure. In this case, the trial court granted plaintiff's pre-trial motion *in limine* for an order precluding "the introduction of any reference to or evidence of [p]laintiff's health insurance and any collateral source payments made." In the absence of evidence of the amount actually paid for specific procedures performed in the past, the record in this case regarding both past and future medical damages related to those procedures is incomplete. Thus, the Court cannot evaluate whether the evidence of past medical bills was in fact relevant to the issue of future medical damages.

CONCLUSION

The Supreme Court in *Howell* laid the framework for deciding the admissibility of medical bills. Under *Howell,* medical bills for amounts beyond what was paid by insurance are irrelevant and inadmissible to prove the reasonable value of past medical care. There are many types of evidence relevant to valuing pain and suffering. Common sense, however, shows us *no* connection between the amount of the medical bill and the extent of pain and suffering or other non-economic damages. Because the admission of medical bills creates a serious risk of confusing juries, such evidence should be excluded.

Dated: January 15, 2013

NEWDORF LEGAL

By: _____
DAVID B. NEWDORF

Attorneys for Amici Curiae
League of California Cities and
California State Association of
Counties

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of court, Rule 8.204(c)(1), I certify based on the "Word Count" feature in my Microsoft Word 2007 software, this brief contains 6,390 words including footnotes.

January 15, 2013.

DAVID B. NEWDORF

PROOF OF SERVICE

I, **SHAWN P. MCMURRAY**, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at Newdorf Legal, 220 Montgomery Street, Suite 1850, San Francisco, California 94104.

On January 15, 2013, I served the attached:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF; AMICI CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

and served the named document in the manner indicated below:

☒ **BY MAIL**: I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the Mills Building, 220 Montgomery Street, Suite 1850, San Francisco, California 94104, for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE:** I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

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

Executed January 15, 2013 at San Francisco, California.

Shawn P. McMurray

SHAWN P. MCMURRAY

SERVICE LIST

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