Case No. D064315

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

GABRIEL VARELA, et al.

Plaintiffs and Respondents,

v.

MONINDER BIRDI

Defendants and Appellants.

Appeal from San Diego Superior Court
Case No: 37-2012-00090344-CU-PA-CTL
Hon. Joan Lewis

APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT

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APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT

The Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada hereby apply to file the accompanying amicus brief. The amicus brief is limited to the second issue on appeal concerning recoverable damages for future medical expenses.

The Associations are amongst the nation's largest and most preeminent regional organizations of lawyers who specialize in defending civil actions, comprised of over 2,000 leading civil defense bar attorneys in California. They are active in assisting courts on issues of interest to their members and have appeared as amicus curiae in numerous appellate cases. In particular, the Associations have been actively involved in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, and its aftermath regarding the admissibility of unpaid medical bills as damages measures in personal injury actions. The Associations appeared as amicus curiae in *Howell*, both in this Court and in the Supreme Court, including at oral argument, and in ensuing cases such as *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308. They have conducted numerous, well-attended seminars on the impact of *Howell*.

In addition to representation in appellate matters and comment on proposed statutory changes, Court Rules, and jury instructions, the Associations provide their members with professional fellowship, specialized continuing legal education, and multifaceted support, including a forum for the exchange of information and ideas.

The Associations' members routinely represent clients in defending actions where unpaid medical bills or cost estimates are proffered as supposed evidence of medical economic damages. Their members have a direct interest that the law in this area be certain, practical, reasonably implemented, and correct.

No party or their counsel has paid for or drafted the attached amicus curiae brief, in whole or in part.

This application is timely under California Rules of Court, rule 8.200(c)(1).

This Court should grant leave to file the accompanying amicus curiae brief.

Dated: December 15, 2014

Respectfully submitted,

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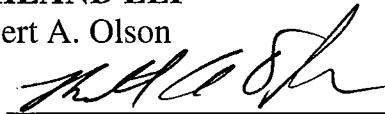
By: 
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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

INTRODUCTION

Howell v. Hamilton Meats & Provisions, Inc. (2011) 52 Cal.4th 541 stands for the basic principle that recoverable damages are measured by what goods and services *actually* cost *in the marketplace*. The same principle logically should apply to future damages; they are measured by what goods and services *actually* will cost in the future. Of course, predicting anything in the future inherently involves uncertainty. But to predict future damages, one must start from the proper premise – the *actual* cost of goods and services *in the present day marketplace.*

Some plaintiffs seek to subvert these principles in order to obtain windfall recoveries in excess of what actually will be required in the future. The hallmark of such efforts is the absence of any evidence of *market pricing*. In *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1470-1471, this Court rejected efforts to disassociate costs from market rates. It should do so as well as regards future costs and damages.

The purpose of this brief is to reiterate the framework principles that should and do govern any measure of damages.

As we explain, the fundamental principles are:

- The plaintiff bears the burden of proving damages *according to the legally defined elements.*

- A plaintiff may only recover (and must therefore prove) the *lesser* of (1) the amount actually paid (or to be paid) by the plaintiff or on the plaintiff's behalf *and* (2) the reasonable value of services.

- The reasonable value of services is measured by their *market* value. Billed amounts, customary charges, list prices, estimated "costs," etc. are not measures of market value. What matters is what providers, in fact, normally collect and accept as payment in full.

- An unpaid bill or price quote is *not* evidence of reasonable value of services where untethered to amounts actually paid.

- These principles should and do apply equally to future damages, the object of which is to predict the future *market value* of goods and services.

Plaintiffs' big pitch on appeal is that one cannot know just who may be paying medical bills in the future and so one cannot know what the amount actually paid will be. But that does not negate the "reasonable value" limitation or that reasonable value is determined by market transactions *not* the face amount of bills or supposed cost quotes, past or present. Plaintiffs have to show what the future *market value* of goods and services will be and the only way that they can do that is by starting with the present *market value* of such goods and services. Without such evidence, the plaintiffs have not proven their case.

ARGUMENT

I. The Measure Of Damages, And What Suffices To Meet It, Is A Question Of Law, Reviewed De Novo.

Preliminarily, the respondent argues that evidentiary questions are reviewed for an abuse of discretion. That's half right. Sometimes evidentiary questions are reviewed for an abuse of discretion, but if the question is the sufficiency of the evidence to meet the legally required standard, review is de novo. (See *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1468, 1472 ["*Huff*"].)

Likewise, whether evidence is *admissible* depends on whether it is relevant. Whether evidence is relevant depends on whether it tends to prove the *legally determined measure of damages.* That is a question for de novo review. (See *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1324-1333 [*Corenbaum*].) Evidence that tends to prove something other than the legal damages measure is irrelevant and inadmissible.

II. Plaintiff Bears The Burden Of Establishing The *Market* Value Of The Damages Sought.

A. *Howell's* holdings: A plaintiff may only recover the *lesser* of the amount actually paid (or to be paid) *or* the reasonable, market value of services.

In *Howell v. Hamilton Meats & Provisions Co.* (2011) 52 Cal.4th 541 ["*Howell*"], the Supreme Court clarified what has always been the law regarding medical damages, indeed, any tort economic damages. *Howell* held that the plaintiff has a double burden of proof. He must prove the

amount that he has or will actually pay in damages. *And*, he must prove the reasonable value of such damages. He may only recover the *lesser* of the two sums.

Howell is explicit in this: "[T]he 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." (52 Cal.4th at p. 556, original emphasis.) Repeatedly, *Howell* makes clear that *in all cases* there is a *double* proof burden for plaintiff:

- "[A] plaintiff's expenses, to be recoverable, must be both incurred *and* reasonable . . . ." (*Id.* at p. 555, original emphasis.)
- "To be recoverable, a medical expense must be both incurred *and* reasonable." (*Ibid.*, original emphasis, citations omitted.)
- "[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." (*Ibid.*, original emphasis, citations omitted.)

(Accord, *Corenbaum*, *supra*, 215 Cal.App.4th at pp. 1325-1326.)

Howell was not a change in the law, but a reaffirmation of simple, fundamental, common-sense principles embodied in the California Civil Code. The reasonable value constraint is imposed by Civil Code section 3359: "Damages must, in all cases, be reasonable . . . ." It independently limits recovery. (52 Cal.4th at p. 553 ["'"[R]easonable value" is a term of limitation, not of aggrandizement.' (Citation)"].) "California decisions

have focused on "reasonable value' in the context of *limiting* recovery to reasonable expenditures . . . ." (*Id.* at p. 555, original emphasis.)

Howell also addressed what "reasonable value" means. It adopts the Restatement (Second) of Torts standard: "[Restatement] section 911 articulates a rule, applicable to recovery of tort damages generally, 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." (52 Cal.4th at p. 556, emphasis added.) In determining "the exchange value of medical services the injured plaintiff has been required to obtain (see Rest.2d Torts, § 911 & com. h, pp. 476-477), looking to the negotiated prices providers accept from insurers makes at least as much sense, and arguably more, than relying on chargemaster [billed, list, or quoted] prices that are not the result of direct negotiation between buyer and seller." (52 Cal.4th at p. 562.)[1] Under the Restatement and *Howell*, the value of a good or service is what is actually paid for it, not an exaggerated, unpaid amount reflected in wishful vendor bills, quotes, or estimated "costs."

More broadly, *Howell* rejects the notion that tortfeasors should pay more than others for the same services in the non-tort context. (See *Howell*, *supra*, 52 Cal.4th at pp. 560-566 [rejecting "negotiated rate

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[1] The dissent in *Howell* argued that the market value of services should be the sole determinant of plaintiff's damages, regardless the actual amount paid. (See 52 Cal.4th at p. 562; *id.* at p. 568, Klein, J., dissenting.) *No* justice in *Howell* supported the notion that an unpaid amount *charged*, *billed or quoted* was a measure of damages or that even if paid, such amount could suffice, standing alone, to measure damages.

differential" damages construct and finding no windfall to tortfeasors in paying no more than price, in fact, charged].) There is not and should not be a "regular" price and a "litigation" price. The price that a toretfeasor owes is no more than the price that others, in fact, pay.

B. Plaintiffs bear the burden of proving the reasonable value of damages.

Evidence Code section 500 directs that a plaintiff bears the burden of proving every element of his claim, including damages. That burden is *not* proving "damages" to some abstract standard, but requires proving damages *according to the legal standard* and proving every damages element necessary to recovery. For example, where a plaintiff seeks prejudgment interest under Civil Code section 3291, he bears the burden of establishing what portion of his overall damages are for personal injury. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 660-661.) And, *the plaintiff* bears the burden of proving the defendant's financial condition as a necessary element to recover punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119–121.)

In determining the scope of the burden of proof, "[t]he facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.), § 500, p. 431.) *Howell* establishes the substantive damages law that a plaintiff may only recover the lesser of actual payment or reasonable market value, that is what

plaintiff must prove: the *lesser* amount. A plaintiff cannot just prove one or the other.

Under *Howell* the plaintiff must prove *both* what has been or will be paid on his behalf *and* the reasonable past or future *market* value of the medical services and may only recover the lesser. He does not satisfy his burden of proof if he just proves what is or may be the greater value.

In *State Farm Mutual Automobile Insurance Co. v. Huff* (2013) 216 Cal.App.4th 1463, 1470-1471, this Court applied these principles in closely analogous circumstances. There, a tortfeasor's insurer interpleaded funds to satisfy a tort judgment in the face of competing claims between the injured underlying plaintiff and a lien-asserting hospital which had provided emergency services to the plaintiff, the bills for which remained unpaid. Under the Hospital Lien Act, the hospital was entitled to its "reasonable and necessary charges." (Civ. Code, §§ 3045.1, 3045.3.) *Huff* held that it was the hospital's burden to prove not only the amount of its charges, but also that those charges were *reasonable*.[2] (216 Cal.App.4th at pp. 1471-1472.)[3]

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[2] Because of the interpleader nature of the action in *Huff*, the hospital was technically a defendant there. Effectively though, it was a plaintiff. (See 216 Cal.App.4th at p. 1470.)

[3] *Dameron Hospital Assn. v. AAA Northern California, Nevada & Utah Ins. Exchange* (2014) 229 Cal.App.4th 559; 2014 WL 4379083, also was a Hospital Lien Act case. Because it held that the healthcare provider there had not preserved its right to pursue a lien, it did not address "whether or to what extent a hospital is limited in the amount it asserts to be its 'customary rates.' (Cf. *Howell*, *supra*, 52 Cal.4th at p. 551 [limiting

C. "Reasonable value" of damages is measured by *market* value.

Howell adopts the Restatement's "exchange value"/"market value" definition of the reasonable value of medical services. Restatement section 911 (which *Howell* explicitly adopts) defines the controlling "exchange value"/"market value" measure as "the amount *paid* in *actual* transactions involving a similar subject matter." (Rest.2d Torts, § 911(2) & comment b, emphasis added; see *Howell*, *supra*, 52 Cal.4th at p. 556.) "The 'reasonable value' of the services has been described as the 'going rate' for the services or the 'reasonable market value at the current market prices.' Reasonable market value, or fair market value, is the price that 'a willing buyer would pay to a willing seller, neither being under compulsion to buy or sell, and both having full knowledge of all pertinent facts.'" (*Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 1274 [*Children's Hospital*], citations and internal quotation marks omitted.)

That makes sense. The value of a good or service is not what a vendor or seller may claim it to be, it is what is actually paid in a fair market exchange. Thus, the value of a car that is "totaled" or a television or computer that is destroyed is not its list price, a manufacturer's suggested

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economic damages to 'any *reasonable* charges for treatment the injured person has paid or, having incurred, still owes the medical provider are recoverable as economic damages'], italics added [by *Dameron Hospital Association*].)" (*Dameron Hospital Association*, 229 Cal.App.4th at p. 566 fn. 8.)

retail price, or the price that it may be purchased for at the most expensive store in town. It is what is *normally* paid for that product or service in the marketplace. Thus, for the "totaled" car the reasonable value is not what the most expensive dealership in town will charge or quote, it is the average or mean of what is paid for the vehicle, whether that is the list price or some much lesser amount.

Likewise, the value of a lawyer's or other professional's time or service is not what he or she may claim as a "billing rate," quoted rate or the rate purportedly charged this one client in this one instance, but it is the rate that clients normally, actually pay professionals of similar expertise for comparable services. (See *Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993, 1002-1003 [reasonableness of attorney's fees measured by market rates].)

Medical goods and services are no different. The amount that healthcare providers normally accept in the marketplace as payment for their services is the value ("exchange value" or "market value") for the goods and services. This is particularly true where the plaintiff may well *not* be the person ultimately paying future bills either because he will have health insurance or because he recovers damages from a tortfeasor to do so. There is and can be no showing by a plaintiff of the necessary reasonable value of medical services without reference to *market* pricing and transactions.

D. Unpaid bills, charges, or price quotes – medical or otherwise – are inadmissible and are not evidence of reasonable value.

A bill or price quote in the abstract has no intrinsic significance. An unpaid bill or quoted amount is not evidence of the reasonable value of a service. It may just be one party's unilateral assertion of what it hopes to be paid. It does not necessarily reflect an arm's length negotiation. Unless there is evidence that the billed or quoted amount is regularly paid, it is evidence of nothing.

The longstanding, *controlling* Supreme Court authority is clear: An unpaid bill is *not* evidence of reasonable, market value. "*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. [Co.]* (1968) 69 Cal.2d 33 ["*Thomas Drayage*"] set out [the] applicable rules. '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*. [Citations.] If, however, a party testifies that he incurred or discharged a liability for repairs, any of these documents may be admitted for the limited purpose of corroborating his testimony [citations], and *if the charges were paid*, the testimony and documents are evidence that the charges were reasonable. [Citations.]' (*Id.* at pp. 42-43.)" (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 87, emphasis added.)

Thomas Drayage remains good law. It is binding California Supreme Court precedent on the subject. (See *Auto Equity Sales, Inc. v.*

Superior Court (1962) 57 Cal.2d 450, 455; *Mehr v. Superior Court* (1983) 139 Cal.App.3d 1044, 1049, fn. 3 ["Although the California Supreme Court is free to overrule its own prior decisions, the doctrine of stare decisis compels lower court tribunals to follow the Supreme Court whatever reason the intermediate tribunals might have for not wishing to do so. [Citations.] There is no exception for Supreme Court cases of ancient vintage"].)

Howell confirms the *Thomas Drayage* view: "With so much variation, making any broad generalization about the relationship between the value or cost of medical services and the amounts providers bill for them–other than that the relationship is not always a close one–would be perilous. [¶] . . . *it is not possible to say generally that providers' full bills represent the real value of their services*, nor that the discounted payments they accept from private insurers are mere arbitrary reductions." (*Howell, supra*, 52 Cal.4th at p. 562, italics added.) "[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*." (*Id.* at p. 564.) The same is true of list or quoted prices, or, in the vernacular of certain healthcare providers, "chargemaster" rates; they are not a proper measure of damages. (*Id.* at 561.)

Other recent case law confirms that unpaid bills are *inadmissible* and *irrelevant* to the question of the reasonable value of services, that is, market rates. (*Corenbaum, supra*, 215 Cal.App.4th at p. 1326 ["the full amount billed by medical providers is not an accurate measure of the value of medical services"], 1327 fn. 8 [following *Thomas Drayage*]; *Ochoa v.*

Dorado (2014) 228 Cal.App.4th 120, 134-139 [unpaid bill inadmissible on reasonable value issue].)

In deeming unpaid bills irrelevant and inadmissible to show the reasonable value of a service, California law is in line with the majority view. (2 Damages in Tort Actions (Matthew Bender 2014) § 9.03[3][a][ii] 9-8 to 9-9.) An unpaid bill or price quote is an expression of the provider's or vendor's hope or aspiration as to how much it might receive or collect for the good or service. It is hearsay - an out of court statement proffered for the truth of the matter. And, most importantly, it does not logically tend to prove either the amount actually paid or market value, which is the measure of the reasonable value of a good or service. The same is true of list or quoted prices generally. They are no different than an unpaid bill or the sticker price on a vehicle. It may be the seller's first offer, but it is not necessarily what the actual market price is. That is especially true when it comes to medical bills, where prices were routinely discounted. (See *Howell*, *supra*, 52 Cal.4th at p.562.)

An unpaid bill, a likely charge, a listed cost, a price quote thus are all both inadmissible and irrelevant. To prove the reasonable value of services, a plaintiff might submit evidence of the amounts normally accepted as payment in full by comparable providers for the same services. That would be a market-driven value milestone. What is not evidence of reasonable value is an amount that a healthcare provider or any vendor bills, charges, or quotes as the cost of a service but has not collected or does not usually collect.

E. Testimony as to "standard," "customary" or abstractly "reasonable" charges, costs or bills untethered to market value is inadmissible, irrelevant, and insubstantial as to the reasonable value of medical services (or any other tort damages).

Sometimes plaintiffs seek to avoid the reasonable *market* value standard by proffering generic testimony that the *bills*, *quoted prices*, or *charges* are "reasonable" in an abstract sense or what a future "cost" or "charge" supposedly will be. Sometimes this testimony is proffered by the providers or vendors themselves, sometime is it proffered by third-party "experts." But testimony untethered to exchange or market values – what is actually paid for and accepted as payment for services – is irrelevant.

Huff, 216 Cal.App.4th 1463, directly so holds. There, a hospital seeking to enforce a statutory lien, proffered its bill "based on standard rates applicable to all patients." (*Id.* at p. 1467.) *Huff* rejected this as insufficient to show reasonable value: "the bill itself was based on the District's standard charges and thus 'is not an accurate measure of the value of medical services.' [Citation.]" (*Id.* a p. 1472.)

Howell itself makes clear that "standard" charges are irrelevant. It rejects so-called "chargemaster" or sticker price rates as representing the reasonable value of medical services: (*Howell*, *supra*, 52 Cal.4th at p. 562.)

That a vendor – any vendor – labels its (past or future) charges "reasonable," "usual," "standard," "best available," or "customary" does not make them so; rather, the amount that is reasonable is determined by actual payments tendered and accepted (in the past) or as projected into the

future. The face of an unpaid bill or price quote does not reflect *market* value. No one would suggest that if the plaintiff's new car or computer is destroyed an unpaid sticker price shows its value. Likewise, if the list price of a medical van that a plaintiff needs is $50,000, but it is routinely purchased for $30,000, its expected future value when it has to be replaced in five or seven years is $30,000, *not* $50,000, adjusted for inflation and discounted to present value. There is no reason why a surgery charge or any other expense should be treated differently. The present *market* value is what needs to be adjusted (for inflation, market cycles, advances in technology, etc.) to determine a future *market* value.

A medical bill, charge or price quote cannot be "reasonable" in the abstract. It can only be reasonable measured against a present *market* value or a predicted future market value, that is, against actual payment transactions in the marketplace.

These same rules apply equally to supposed "experts," be they the providers themselves or third parties. An expert's testimony is only as good as the basis that the expert relies on. "'[T]he matter relied on must provide a reasonable basis for the particular opinion offered . . . .'" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770, citation omitted.) "'[E]xpert opinion is worth no more than the reasons upon which it rests.'" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117, quoting *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 523-525.) " [E]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any

opinion within the area of expertise." (*Ibid.*, citations omitted.) " [W]hen an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value . . . . [] [A]n expert's conclusory opinion that something did occur, when unaccompanied by a reasoned explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury." (*Ibid.*)[4]

A provider's or expert's pronouncement that a bill or charge is "reasonable" with no reference to or basis in exchange or market value is inadmissible and irrelevant. The testimony must relate to actual *paid* transactions or what will actually be paid in the future. Extrapolating unpaid bills, price quotes, or list prices into the future is improper.

For this reason, *Corenbaum*, *supra*, 215 Cal.App.4th 1308, holds that an expert cannot testify as to the value of future medical needs and services based on *unpaid* past bills. (*Id.* at pp. 1331-1332.) To be relevant, an expert's testimony must be based *not* on what is being *billed* in the

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[4] E.g., *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 776-777 (expert opinion that security guards would have prevented assault); *Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 530 (expert's conclusion that officers must have used excessive force unsupported by any reasoning); *Jennings*, *supra*, 114 Cal.App.4th at p. 1118 (hypothetical scenarios as to medical causation in medical malpractice case insufficient); *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136 (expert's approach did not constitute substantial evidence of fair market value where expert ignored more comparable transactions to formulate theory based on a more remote transaction).

marketplace, but on what is being *paid*. Thus, an expert's testimony that this is a reasonable or standard "bill," "charge," "list price", or "cost" does not address the necessary standard.

The same is true for an expert's claim as to what the future price of a good or service will be. That claim must be measured by what will be paid *in the marketplace* in the future. The relevant question is what is typically being or going to be *paid* for the service. The relevant extrapolation is from currently paid *market* prices.

The flip side of inadmissible unpaid bills or charges is that actual market transactions (e.g., the TriCare payments in this case) *are* admissible to prove reasonable market value. The Fifth District's recent decision in *Children's Hospital Central California v. Blue Cross of California* (2014) 226 Cal.App.4th 1260, 1275-1276, is on point. There, a hospital providing emergency care sought to collect on a statutory lien as against a noncontracting health insurer. The "[h]ospital was required to demonstrate the reasonable value, *i.e., market value*, of the post-stabilization care it provided. This market value is not ascertainable from [h]ospital's full billed charges alone." (*Id.* at p. 1275 citing *Howell*, 52 Cal.4th at p. 564, emphasis added.)

Children's Hospital suggests that the unpaid bill is also admissible on the subject of reasonable value. (*Ibid.*) But it does not discuss the contrary holdings in *Thomas Drayage*, *Corenbaum*, and *Huff* on that point. Instead it relies on language in *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 505. (*Children's*

Hospital, *supra*, 226 Cal.App.4th at p. 1275.) *Prospect Medical*, in turn, did not discuss *Thomas Drayage*'s holding on the issue. Rather, *Prospect Medical*'s statement is limited to claims (as in *Children's Hospital*) by a provider against a noncontracting health plan or health insurer and is rooted in a specific regulation governing such claims – California Code of Regulations, title 28, section 1300.71, subd. (a)(3)(B). (*Prospect Medical*, *supra*, 45 Cal.4th at p. 505.) That particular regulation mentions "the fees usually charged by the provider." (*Ibid.*) Such charged fees, however, are *not* relevant, indeed are inadmissible, in the normal tort case, as here, under *Thomas Drayage* and *Howell*.

To the extent that *Children's Hospital* requires evidence of market values and rejects "full billed charges" it is correct; to the extent that it suggests that an unpaid bill is relevant, it is wrong. The bottom line though is that the standard, whether for past or future bills, is to provide evidence of actual or anticipated *market* rates.

F. Howell's principles apply as much to future damages as to past damages.

Howell's principles are generic. They are not limited to any particular type of damage or any time span. They should and do apply equally to both past and future damages. If, for example, a plaintiff is insured under a program (such a TriCare) with lifetime eligibility, it is proper to assume that the amounts paid under that program will be the actual amounts paid in the future. A plaintiff owes a duty to mitigate

damages. (E.g., *Luttrell v. Island Pacific Supermarkets, Inc.* (2013) 215 Cal.App.4th 196.) He can't forego the ability to obtain future treatment at reduced cost just to inflate his damages.

But even if future health insurance is uncertain, a plaintiff is still bound by the reasonable value constraint. He cannot just take unpaid charges, bills, or price quotes and claim that those will be his medical expenses in the future. Rather, he needs to project what the *future market value* of those services will be. That is what *Corenbaum* directly holds, and properly so. Extrapolating from a spurious starting point inevitably leads to an inappropriate result.

Rather, plaintiff's burden is to establish what current *market prices* are and to then project those market prices into the future (e.g., by accounting for inflation, for medical advances, for greater efficiency and then discounting to present value). Thus, whether the plaintiff *sought* damages for past medical services is irrelevant. Plaintiff has to establish the current *market* value of such services in order to have any viable basis to project the future market value of services, which is the required standard under *Howell*.

At a minimum, whatever the plaintiff's burden (it is to establish market rates), a defendant has the right to show what the future market value will be based on projecting current *market* values. Thus, current market values – amounts actually paid in arm's length transactions for

goods and services – are *always* admissible, regardless whether a plaintiff is seeking past damages or not.[5]

CONCLUSION

This Court should hold:

1) The plaintiff bears the burden of proving *both* the amount actually paid or owed for medical services *and* the reasonable market value of such services;

2) The reasonable value of medical services means their market value;

3) These principles apply equally to future damages such that the plaintiff must prove the likely future *market* value of the goods and services at issue;

4) Unpaid medical bills, charges or price quotes are neither admissible nor relevant as to the reasonable market value of services, whether past, present or future;

5) The starting point for proving future market value of services is the present *market value* of such services, *not* unpaid bills, charges, quoted costs or estimates, etc.;

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[5] Current or past amount accepted by providers as payment in full can be introduced without mentioning that insurers paid them, e.g.: "How much was accepted by the provider as payment in full for that surgery?" "What is the average amount that the provider has accepted over the last year as payment in full for that surgery?"

6) At a minimum, a *defendant* is entitled to introduce evidence of current *market* transaction prices to establish the market value of services that might be extrapolated into the future.

Respectfully submitted,

GORON & REES
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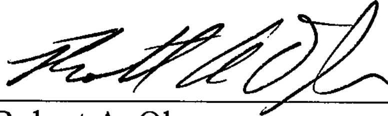
Robert A. Olson

By: 
Robert A. Olson
Attorneys for Prospective Amicus Curiae Association of Southern California Defense Counsel and Association of Defense Counsel of Northern California and Nevada

CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT** contains 4,509 words, not including the caption pages, the application for leave to file the Amicus Curiae Brief, the tables of contents and authorities, the signature blocks, or this Certification page.

Dated: December 15, 2014

Robert A. Olson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 **December 15, 2014**, I served the foregoing document described as: **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF APPELLANT** on the parties in this action by serving:

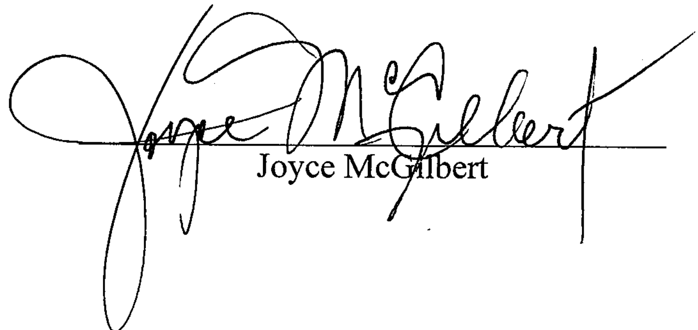
SEE ATTACHED SERVICE LIST

(X) By Envelope - by placing () the original (X) a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on **December 15, 2014**, at Los Angeles, California.

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



Joyce McGilbert

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Varela et al. v. Birdi et al.
San Diego Superior Court No.: 37-2012-00090344
Court of Appeal No.: D064315 (Consolidated w/ D065631)

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Office of the Clerk California Court of Appeal Fourth Appellate District, Division One 750 B Street, Suite 300 San Diego, California 92101-8189 Electronic Copy plus original + 4 copies by FedEx **(Electronic Service per Cal. Rules of Court, rule 8.212(c)(2))**	Hon. Joan Lewis San Diego Superior Court, Hall of Justice 330 W. Broadway, Dept. C-65 San Diego, CA 92101 Telephone: (619) 450-7065 Trial Court Judge - Case No.• 37-2012-00090344