ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

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April 3, 2019

Presiding Justice Tricia A. Bigelow
and Associate Justices
Second Appellate District, Division Eight
California Court of Appeal
300 South Spring Street
Los Angeles, CA 90013-1213

Re: *Stokes et al. v. Muschinske*
Court of Appeal No. B280116
Request for Publication of March 14, 2019 Opinion

Honorable Justices:

The Association of Southern California Defense Counsel (the Association) respectfully requests that the court publish its recent opinion in this case. The opinion's analysis of the collateral source rule readily meets the publication standard.

The Association's interest

The Association is the nation's largest and most preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. Its members routinely represent clients in defending actions where medical expenses are being sought as economic damages. The Association has appeared as amicus curiae in numerous cases involving the proper standard for measuring past and future medical damages, including *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*), *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, *Moore v. Mercer* (2016) 4 Cal.App.5th 424, and *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163. The Association has presented numerous seminars on *Howell* issues.

The Association's members frequently encounter the type of arguments that the plaintiff raised here—contentions or objections that the collateral source rule bars defense evidence regarding the reasonable value of medical services, including evidence regarding the amounts insurers or government services (including Medicare)

typically pay for medical services. Its members have a direct interest that the law in this area be certain. *Published* precedent furthers that goal.

Why publication is warranted

Publication of the opinion will help clarify the proper scope and application of the collateral source rule. Under that rule, "'If an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.'" (*Howell*, *supra*, 52 Cal.4th at p. 551.) The rule "has an evidentiary as well as a substantive aspect. Because a collateral payment may not be used to reduce recoverable damages, evidence of such a payment is inadmissible for that purpose." (*Id.* at p. 552.)

The collateral source rule has engendered much confusion, confusion evidenced by *Howell*'s procedural history. In *Howell*, after a jury awarded the amounts billed by medical providers as medical damages, the defendant moved to reduce the award to the amount the providers accepted from plaintiff's insurer as full payment; plaintiff argued that the "reduction of the medical damages would violate the collateral source rule." (52 Cal.4th at p. 550.) The trial court reduced the award, but the Court of Appeal "reversed the reduction order, holding it violated the collateral source rule." (*Ibid.*) The Supreme Court then reversed the Court of Appeal, finding there was no violation of the collateral source rule. (*Id.* at p. 568.)

Howell held that "an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial" and that this holding does *not* "abrogate or modify the collateral source rule." (*Id.* at p. 566.) *Howell* explained that evidence of the amount accepted as full payment is admissible and relevant to "prove the plaintiff's damages for past medical expenses" without violating the collateral source rule, but "[e]vidence that such payments were made in whole or in part by an insurer remains . . . generally inadmissible under the evidentiary aspect of the collateral source rule." (*Id.* at p. 567.)

Because the line between these two concepts is not always clear, the confusion and debate over the collateral source rule has continued after *Howell*.

Even though evidence of amounts typically paid by insurers or government entities is plainly relevant to determining the reasonable value of medical services, some plaintiffs continue to contend (as the plaintiff here did) that that *any* mention of insurance or government (Medicare, etc.) reimbursement payments violates the collateral source rule, even if the evidence is being used to establish the reasonable value of services, as opposed to showing specific payments were made to the specific plaintiff.

Publication of the opinion's discussion of the collateral source rule will provide needed guidance for trial courts and litigants. Because the plaintiff in this case is 65 years old and Medicare-eligible, the plaintiff moved to strike "any reference to future availability of Medicare benefits, to preclude any further reference to Medicare pursuant to the collateral source rule, and to instruct the jury not to consider future Medicare benefits in assessing costs of future care." (*Stokes et al. v. Muschinske* (Mar. 14, 2019, B280166) ("Typed opn.") at p. 18.) After that request was denied, plaintiff argued on appeal that various references to Kaiser and Medicare at the trial violated the collateral source rule and compelled reversal. In disagreeing, this Court explained:

- Various references to "Kaiser and Medicare, as well as the single reference to Social Security, merely provided context and background information on [plaintiff's] past treatment at Kaiser *and on some aspects of [defendant's] experts' calculation of past and future reasonable medical expenses*. They were helpful *and even necessary* to the jury's understanding of the issues. [Plaintiff] has not shown the court abused its discretion in admitting these references to assist the jury's understanding of the facts." (Typed opn. 19-20, italics added.)

- Certain questions posed to plaintiff's life care-planner implicating payments by Medicare and Kaiser insurance "did approach the line between permissible background information and reference to collateral sources"; in any event, however, there was no showing of prejudice. (Typed opn. 20.)

- Although jurors might have inferred that plaintiff "had Kaiser insurance that may have covered his past treatment," there was no "evidence of any *specific* insurance payments, and there is nothing to suggest the jury reduced his damages award by some unidentified amount simply because he had insurance coverage." (Typed opn. 20, original italics.)

- "Likewise, for the Medicare references, [plaintiff] does not point to any evidence of deductions for *specific* future Medicare payments, and nothing suggests the jury subtracted unidentified future Medicare coverage in assessing future medical expenses." (Typed opn. 21, italics added.)

Absent publication, the type of confusion that occurred in this case is destined to recur again and again, triggering more appeals and a waste of judicial resources. Publication will provide needed guidance on the lines between what evidence falls outside the collateral source rule and what evidence does not. The case law on this issue is sparse. Publication is therefore warranted as the opinion "[i]nvolves a legal issue of continuing public interest," "explains . . . an existing rule of law," and "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." (Cal. Rules of Court, rule 8.1105(c)(2), (3), & (6).)

Accordingly, the Association respectfully urges the Court to publish its March 14, 2019 opinion. The Association takes no position as to whether the Section I "juror misconduct" discussion should be published. Regardless whether the entire opinion is published or Section I is left unpublished, Section II's discussion of the collateral source rule warrants publication.

Respectfully submitted,
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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 April 3, 2019, I served the foregoing document described as: **REQUEST TO PUBLISH** on the parties in this action by serving:

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(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on April 3, 2019, at Los Angeles, California.

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

/s/ Monique N. Aguirre
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