Case No. C073064
(Sacramento County Superior Court Case No: 34-2010-00081045)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

LILLIE MOORE,
Plaintiff-Respondent,

v.

RICHARD MERCER
Defendant-Appellant.

On appeal from the Judgment of the Superior Court, Sacramento County
Hon. David De Alba, Trial Judge; Hon. Gerrit W. Wood, Trial Judge

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

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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 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 the Court of Appeal and in the Supreme Court, including at oral argument, and in ensuing cases such as *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308 [*Corenbaum*]. 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 are proffered as supposed evidence of medical economic damages. They routinely face situations where healthcare providers have sold their bills to third parties. 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: October 2, 2014

Respectfully submitted,

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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

The issue presented here is one that comes up frequently across the State. As we demonstrate below, a trial court wrongfully excludes or admits evidence when it (1) excludes evidence of market transactions involving the very healthcare costs at issue in the litigation, including the amount for which a provider has sold its lien to a third party, and (2) admits evidence of the face amount of "billed" charges that have not been paid (especially absent evidence that someone other than a tortfeasor will ever be called upon to pay those charges). Unhappy with the Supreme Court's decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 [*Howell*], plaintiffs and various companies which purchase unpaid medical bills in hopes of profiting from litigation (generally known as medical finance or medical factoring companies) seek to evade both *Howell*'s direct holdings and its underlying principles. But subverting controlling Supreme Court authority is not proper.

The purpose of this amicus brief is (1) to set forth the fundamental principles that govern the plaintiff's burden of proving damages, principles that should apply uniformly across varying payment arrangements and across the courts in this State – appellate and trial courts – and (2) to urge

this Court expressly to disapprove, to the extent that it allowed unpaid bills as evidence of reasonable value, its prior decision in *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288 (*Katiuzhinsky*), as contrary to controlling authority when decided and as necessarily negated after *Howell*.

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, etc. are not measures of market value. What matters is what providers, in fact, typically collect and accept as payment.
- An unpaid bill is *no* evidence of reasonable value of services.
- The price at which a medical provider sells unpaid bills on an open market is relevant, admissible evidence of the value of those services.

To the extent that *Katiuzhinsky* holds that the amount that an injured plaintiff may still owe is not *necessarily* reduced when the bill is sold to a third party, it may be reconcilable with *Howell*. But, to the extent *Katiuzhinsky* holds that the face amount of bills so purchased are admissible to prove reasonable value, *Katiuzhinsky* is wrong, at odds with controlling Supreme Court precedent both before and after it was decided and with later Court of Appeal opinions. To that extent it should be disapproved.

ARGUMENT

I. A Plaintiff Is Required To Present Admissible Evidence Of The *Market* Value Of The Damages She Seeks.

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, 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. She must prove the amount that she has or will actually pay in damages. *And*, she must prove the reasonable value of such damages. She 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: Detriment – the statutory damages measure in Civil Code sections 3281 and 3282 – is what someone actually pays (or, in the future, will have to pay). Reasonable value, a constraint imposed by Civil Code section 3359 ["Damages must, in all cases, be reasonable. . . ."], independently limits recovery for the detriment suffered, rather than expanding 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. . . ." (52 Cal.4th at p. 555, original emphasis.)

Howell also addressed what "reasonable value" means. It adopts the Restatement (Second) of Torts standard: "[Restatement] [s]ection 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, or list] prices that are

not the result of direct negotiation between buyer and seller." (52 Cal.4th at p. 562.)[1] If prices *insurers* negotiate are relevant, so too, should be prices that medical finance companies and others negotiate, particularly where the price is pre-arranged before the medical service is rendered or needed. Under the Restatement and *Howell*, the value of a good or service is what is actually paid for it, not an exaggerated amount that may be reflected in a wishful vendor's list-price bill.

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 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 business model of many of the medical-finance companies is to profit from litigation. They purchase medical liens only in instances where there is a case being litigated against an alleged tortfeasor. They attempt to arbitrage the difference between what they pay and the exorbitant and unjustifiable face amounts of bills. They seek to hold tortfeasors (who have no choice in the providers who see the plaintiff) liable not for the real market cost of the service but for an inflated amount, profiting from the difference. *Howell* rejects the notion that the law should

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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 dis. opn. of Klein, J.) *No* justice in *Howell* supported the notion that an unpaid amount *charged* was a measure of damages or that even if paid, such amount could suffice, standing alone, to measure damages.

foster that model. The law allows plaintiffs to recover the reasonable market value of the services provided to them but it does not allow recovery of a litigation bonus to those who seek to capitalize on the injured party's misfortune.[2]

B. Plaintiff bears 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 her claim, including damages. A plaintiff bears the burden not of proving "damages" in the abstract, but of proving damages *according to the legal standard* and proving every damages element necessary for recovery. For example, where a plaintiff seeks prejudgment interest under Civil Code section 3291 she bears the burden of establishing what portion of her 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

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[2] Although we do not know of the specifics in this case, we are aware that:

a) In some instances the contracts between medical finance companies and providers specify the price at which the providers must bill patients and bar the providers from accepting any discounted amount from the patients or anyone on their behalf;

b) medical finance company contracts are often limited to persons who have tort claims against others; and,

c) In some instances the medical finance companies are owned, at least in part, by the lawyers representing the plaintiffs in the tort litigation.

condition as a necessary element to recover punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119-122.)

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 (2011 ed.) foll. § 500, p. 309.) Thus, because *Howell* establishes that the substantive damages law is that a plaintiff may only recover the lesser of actual payment or reasonable market value, plaintiff must prove that: the *lesser* amount. She cannot just prove one or the other.

This is no different than in an auto accident case where the plaintiff may only recover the lesser of the cost of repair or pre-damaged depreciated value of the auto (cost to replace). If a fender is damaged, the plaintiff can't just present evidence that the auto was worth $25,000 before the accident without proving what the (likely substantially lesser) cost to repair is. Nor can the plaintiff prove that accident repairs will cost $15,000 without proving what the depreciated value of her twelve-year-old, 150,000 mile car is.

The same is true with medical damages. Under *Howell* the plaintiff must prove *both* what has been or will be paid on her behalf *and* the reasonable market value of the medical services and may only recover the lesser. She does not satisfy her burden of proof if she just proves what is or may be the greater value.

State Farm Mutual Automobile Ins. Co. v. Huff (2013) 216 Cal.App.4th 1463, 1470-1471 [*Huff*], 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 that 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*.[3] (216 Cal.App.4th at pp. 1471-1472.)[4]

The only exceptions to the dual burden of proof are when the defendant concedes that (1) the actual payment (e.g., from a government program or private health insurer) is equal to or less than reasonable value or (2) that the reasonable value is equal to or less than what was actually

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[3] 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.)

[4] In *Dameron Hospital Association v. AAA Northern California, Nevada and Utah Insurance Exchange* (Sept. 4, 2014, C070475) __ Cal.App.4th ___ [2014 WL 4379083], this Court addressed 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 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.)" (*Dameron Hospital Association*, *supra*, ___ Cal.App.4th at p. ___ fn. 8.)

paid or is owed (typically, as here, with inflated lien claims). Such a concession makes evidence on the conceded issue irrelevant. (See *People v. Bonin* (1989) 47 Cal.3d 808, 849; *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 [no proof allowed on admitted facts]; Wegner et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2013) ¶ 8:947, p. 8C-125.) In the above circumstances, the only relevant evidence would be that of (1) actual payment or (2) reasonable market value, respectively.

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

As mentioned above, *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) & com. 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.)[5]

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 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, it is what is typically paid for the vehicle, whether that is the list price or some much lesser amount.

Likewise, the value of a lawyer or other professional's time or service is not what they claim as their "billing rate," or the rate that they are purporting to charge 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].)

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[5] A reasonable value is *not* a price that a buyer negotiates expecting that someone else, not the buyer, e.g., a liable tortfeasor, will have to pay. Markets are defined by a willing buyer, who in fact will be paying the price, and a willing seller, who in fact will be providing the service and receiving the price, mutually agreeing on a price.

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.

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 – medical or otherwise – are *inadmissible* to meet the plaintiff's burden of showing reasonable value of services.

A bill in the abstract has no intrinsic significance. An unpaid bill is no evidence of the reasonable value of a service. At most, it reflects what a particular party agreed to pay in a particular instance. That may be the result of an arm's length negotiation. Or, as often is the case with medical bills, there may have been no negotiation at all. It may just be one party's unilateral assertion of what it hopes to recover. Or, as is often the case with providers rendering service on a litigation lien and medical finance companies, it is a hope as to what may be recovered from a nonparty to the transaction, a potentially liable tortfeasor, who had no role in setting the price.

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, 1048, 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, emphasis added.)

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 [*Ochoa*] [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 2012) § 9.03[3][a][ii] 9-8 to 9-9.) An unpaid bill 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 the amount actually paid, which is the measure of the reasonable value of a good or service.

An unpaid bill, thus, is both inadmissible and irrelevant. To prove the reasonable value of services, a plaintiff might submit evidence of the amounts typically 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 but has not collected or does not typically collect.

E. Testimony as to "standard," "customary" or abstractly "reasonable" charges 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 (as appears may have been the case here) plaintiffs seek to avoid the reasonable market value standard by proffering generic testimony that the *bills* or *charges* are "reasonable" in an abstract sense. Sometimes this testimony is proffered by the providers or vendors themselves, sometimes 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 sufficient 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.* at 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: "[M]aking 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." (*Howell*, *supra*, 52 Cal.4th at p. 562.)

That a vendor – any vendor – labels its charges "reasonable," "usual," "best available," or "customary" does not make them so; rather, the amount that is reasonable is determined by actual payments tendered and accepted. The face of an unpaid bill does not reflect *market* value. That is especially true in an industry, such as healthcare, where bills are routinely discounted. No one would suggest that if the plaintiff's new car or computer is destroyed an unpaid sticker price shows its value. So, too, a medical bill or charge cannot be "reasonable" in the abstract. It can only be reasonable when measured against *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.*)[6]

A provider 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. 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* bills. (*Id.* at pp. 1331-1332.) To be relevant, an expert's testimony must be based not on what is being *billed* in the marketplace, but on what is being *paid*. Thus, an expert's testimony that this is a reasonable or standard "bill" or "charge" does not address the

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[6] 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).

necessary standard. The relevant question is what is typically being *paid* for the service.

Healthcare providers rendering services in return for a litigation lien present further issues. What matters is not the amount that the provider might collect in some particular instance, but what *on average* the provider collects. That is the reasonable market value of services.

A tortfeasor who injures a plaintiff should not be liable for the contingent risk that a lienholder may accept (and the corresponding premium that the lienholder may charge) to account for other injured parties who may *not* be successful. in litigation. A tortfeasor is no more liable for a healthcare provider's (or medical-finance company's) litigation risk than it is for providing the injured party with a windfall or paying her attorney's fees. A lien purchaser is no more entitled than a provider or plaintiff to rely for "reasonable value" on the face amount on an unpaid bill, an amount that the plaintiff may never have negotiated. That's especially true if the lienholder is looking for payment entirely or primarily from an alleged tortfeasor who had nothing to do with the price negotiation, rather than from the plaintiff.

F. The price for which a medical provider sells unpaid bills on an open market is relevant, admissible evidence of the value of those services and of the plaintiff's ability to mitigate damages.

The flip side of inadmissible unpaid bills or charges is that actual market transactions *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 ["*Children's Hospital*"], 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, emphasis added.)

In proving market value "relevant evidence would include the full range of fees that [provider] both charges and accepts as payment for similar services. The scope of the rates accepted by or paid to [the provider] by other payors indicates the value of the services in the marketplace. From that evidence, along with evidence of any other factors that are relevant to the situation, the trier of fact can determine the reasonable value of the particular services that were provided, i.e., the price that a willing buyer will pay and a willing seller will accept in an arm's length transaction." (*Children's Hospital, supra*, 226 Cal.App.4th at p. 1275.)

What a third-party medical-finance company pays a provider (and the provider accepts as full payment *to it*) is evidence "of the rates accepted by or paid to [the provider] by other payors." (*Children's Hospital*, *supra*, 226 Cal.App.4th at p. 1275.) Especially where (as may be the case here) there is a pre-negotiated deal between the provider and the medical finance company, the price paid to and accepted by the provider indicates what a "willing buyer will pay and a willing seller will accept in an arm's length transaction." (*Ibid.*)

Children's Hospital suggests that the unpaid bill is also admissible on the subject of reasonable value. (226 Cal.App.4th at p. 1275.) At the same time it notes that "market value is not ascertainable from [the provider's] full billed charges alone. '[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. (*Howell*[, *supra*,] 52 Cal.4th [at p.] 564.)" (*Ibid.*) *Children's Hospital* does not discuss the contrary holdings in *Thomas Drayage*, *Corenbaum*, and *Huff* on that point.

Instead, it relies on offhand 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 noncontracted health plan or health insurer and is rooted in a specific regulation governing such claims – Cal. Code Regs., tit. 28, § 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.*

The cognate to the plaintiff's burden to show *reasonable* market value of damages is that the plaintiff has a duty to mitigate damages suffered. If *these* providers are willing to accept the amount paid by a medical finance company (especially as a pre-arranged rate) as payment for their services, that suggests that other similar providers would accept payments in that amount as well directly from or on behalf of the plaintiff. If so, the plaintiff may have failed to mitigate her damages by not going to such other providers. The defense should, at least, be allowed to present evidence of the lien transaction to make that point.

* * *

The bottom line is that, unless the defendant concedes one or the other prong, a plaintiff must prove *both* the actual fees paid or to be paid for medical services *and* the reasonable market value of such services. She may only recover the lesser amount. The face amount of a bill is irrelevant to prove reasonable market value and so, too, are generic, abstract pronouncements that a bill is "reasonable." Amounts paid in free market transactions for such services, including the amounts paid to purchase a lien, however, *are* admissible and highly relevant.

II. *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, Must Be Disapproved To The Extent That It Holds That Unpaid Medical Bills – Whether Sold To Others Or Not – Are Admissible Evidence Of The Reasonable Value Of Services.

In cases such as this, medical-finance companies often seek to rely on this court's pre-*Howell* decision in *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288. *Katiuzhinsky* held that (1) the amount paid by someone (e.g., a medical-finance company) to purchase a provider's lien does not *cap* the plaintiff's recovery and (2) that the amount of the unpaid bills was admissible to prove the reasonable value of services rendered. (*Id.* at p. 1291.) We have no quarrel with the first holding, but the second holding is flat wrong and cannot survive *Howell.*

Katiuzhinsky did not decide the other issue present here, whether the amount paid by the medical-finance company to purchase a provider's lien is admissible as to the reasonable market value of services: "Nothing in our decision should be taken to mean that evidence a health care provider subsequently sold its bill to MedFin is inadmissible. That issue is not before us and we do not address it." (152 Cal.App.4th at p. 1298.)

Without citation of any authority, *Katiuzhinsky* opined that "[p]laintiffs should have been permitted to present evidence of the amounts charged to and incurred by them, and to argue to the jury that these amounts represented the reasonable value of the medical services provided." (152 Cal.App.4th at p. 1298.) Nowhere does *Katiuzhinsky* discuss *Thomas*

Drayage's controlling holding that an unpaid bill is inadmissible as to the reasonable value of services.

And, later cases – including the controlling *Howell* decision – reject *Katiuzhinsky*'s premise. *Howell* holds that "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*. . . ." (52 Cal.4th at p. 562, emphasis added.) Adopting the Restatement, *Howell* holds "reasonable value" to mean an exchange or market value. *Huff*, too, rejects unpaid, even "standard" or "customary" charges as a permissible measure of reasonable market value. And, most recently, in *Ochoa*, the Second District expressly disagreed with *Katiuzhinsky* on this very point. (228 Cal.App.4th at p. 138 ["We find the reasoning in . . . *Katiuzhinsky, supra*, 152 Cal.App.4th 1288, unpersuasive and decline to follow (that) opinion() on this point. For the reasons stated in *Howell, supra*, 52 Cal.4th 541, and *Corenbaum, supra*, 215 Cal.App.4th 1308, we conclude that an unpaid medical bill is not an accurate measure of the reasonable value of the services provided"].)

To the extent that *Katiuzhinsky* holds that the amount of an unpaid medical bill – whether sold to a third-party or not – is admissible to prove the reasonable value of services rendered, it should be disapproved.

CONCLUSION

This Court should hold:

1) The plaintiff bears the burden of proving (unless one prong or the other is conceded by the defense) *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) Unpaid medical bills are neither admissible nor relevant as to the reasonable market value of services;

4) Amounts paid in market transactions (including pre-negotiated arrangements) by third parties to acquire from providers the right to enforce their bills is relevant to both the reasonable market value of services and to whether the plaintiff reasonably mitigated damages;

5) *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, should be disapproved to the extent that it holds that the amount of an unpaid medical

bill – whether sold to a third-party or not – is admissible to prove the reasonable value of services rendered.

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, Rule 8.204, subdivision (c)(1) & (4), I certify that this **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA SUPPORTING APPELLANT**, contains **5,773** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: October 2, 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 October 2, 2014, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA SUPPORTING APPELLANT** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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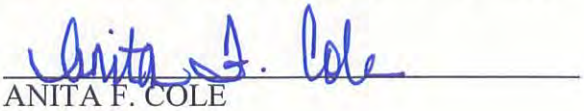
I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with this office's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day 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 October 2, 2014, at Los Angeles, California.

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



ANITA F. COLE