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August 15, 2016

VIA ELECTRONIC FILING

Hon. Harry E. Hull, Jr., Acting Presiding Justice
Hon. M. Kathleen Butz, Associate Justice
Hon. Elena J. Duarte, Associate Justice
California Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, California 95814-4719

RE: ***Frisk v. Cowan***
[Case No. C077975]
Request For Partial Publication

Dear Honorable Justices:

The Association of Southern California Defense Counsel (the Association) requests that the court publish its recent opinion in this case with the exception of subsection 3.0 (the remedy section).

The Association, with this Court's approval, submitted an amicus curiae brief in this appeal in support of the appellant. It did so because the appeal involves issues that are extremely important to the Association's members—how to properly calculate medical damages, and what evidence can be presented to prove such damages under *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*) and its progeny.

The Association is the nation's preeminent regional organization of lawyers who specialize in defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. It members routinely represent clients in defending actions where medical expenses are being sought as economic damages. Its members have a direct interest that the law in this area be certain. That is why the Association appeared as amicus curiae in this case, and why it appeared as amicus curiae in *Howell* and in *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308. And it is also why the Association requests publication of the opinion.

The opinion readily meets publication standards.

The opinion provides a comprehensive, case-by-case analysis of the "evolving case law in the area of medical damages" (Typed opn. 7), starting with *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 and ending with this District's recent decision in *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996 (Typed opn. 7-15). The opinion thus "[m]akes a significant contribution to legal literature by reviewing . . . the development of [the] common law rule[s]" in this area. (Cal. Rules of Court, rule 8.1105(c)(7).) And its analysis of medical-damages evidence undoubtedly "[i]nvolves a legal issue of continuing public interest." (*Id.*, rule 8.1105(c)(6).)

More significantly, the opinion also "[e]stablishes a new 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)(1)(2).) Because *Howell* involved an *insured* patient whose bills were paid by a medical insurer, plaintiffs often try to avoid or limit *Howell*'s mandate in cases where, as here, the plaintiff is *uninsured*. The limited published precedent regarding uninsured plaintiffs has engendered the sort of confusion that occurred here, where the trial court—as the opinion holds—let the plaintiff rely on expert testimony that contravenes *Howell* and excluded defense evidence that should have been permitted. Publishing the opinion will provide needed clarity.

Bermudez v. Ciolek (2015) 237 Cal.App.4th 1311, concluded that "the measure of damages for *uninsured* plaintiffs who have not paid their medical bills will usually turn on a *wide-ranging inquiry* into the reasonable value of medical services provided . . . ." (*Id.* at pp. 1330-1331, italics added.) But *Bermudez* never fully explicated what evidence falls within that inquiry, because the defendant never objected to the plaintiff's expert nor sought to introduce the type of medical-payment evidence the defense proffered here. (*Id.* at pp. 1339-1340.) Similarly, *Uspenskaya v. Meline* (2015) 214 Cal.App.4th 996, adopted *Bermudez*'s "wide-ranging inquiry" but the case only addressed third-party lien amounts.

The opinion, if published, will plug multiple gaps regarding what evidence properly falls within this "wide-ranging inquiry." Among other things, publication will clarify that *even in cases where the plaintiff is uninsured*:

- Courts still "are bound by existing precedent which indicates that the basis for determining the reasonable value of medical services is its market value—that is, the amount sought *and paid* for the service. (*Howell*, *supra*, 52 Cal.4th at pp. 555-556.)" (Typed opn. 18, italics in opinion.)

- Courts must let defendants introduce evidence "of the amounts paid on behalf of insured persons." (Typed opn. 19.) "[I]t is entirely possible the reasonable value of medical services is more closely reflected in the negotiated rates paid by private insurers or even through government benefits programs than in

amounts charged for services," and therefore defendants "must be permitted to present evidence that the amount billed is not the reasonable value of services, and that some lesser amount actually paid would reflect the exchange or market value of those services." (*Ibid*)

- Expert opinion that "charges" billed to the plaintiff for medical services fall within the range of reasonable, customary charges is not proof of reasonable value and, thus, should be excluded. (Typed opn. 17-18.)

Absent publication of the opinion, the sort of evidentiary errors the trial court made here will re-occur in other cases, triggering erroneous jury awards, more appeals, a waste of judicial resources, and potentially disparate results on the same facts. Publication will bring needed clarification on these important issues—issues that impact thousands of cases.

The Association does not request publication of section 3.0. That section solely discusses whether the trial court's evidentiary errors regarding medical damages would warrant a new trial on more than just medical damages. (Typed opn. 20-23.) Section 3.0 discusses no law. It is simply a fact-specific "prejudicial error" analysis that focuses on what each party specifically argued to the jury. It therefore does not meet the standards for publication. (Cal. Rules of Court, rule 8.1105(c).)

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Accordingly, the Association respectfully urges this Court to publish its July 26, 2016 opinion, with the exception of section 3.0.

Respectfully submitted,

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cc: Proof of Service

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 August 15, 2016, I served the foregoing document described as: **LETTER TO COURT OF APPEAL** on the parties in this action by serving:

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(X) BY ELECTRONIC MAIL: I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Court of Appeals, Third District by using the TrueFiling system. I certify that all participants in the case are registered TrueFiling users and that service will be accomplished by the TrueFiling system.

Executed on August 15, 2016, 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.

Anita F. Cole