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Association of Defense Counsel of Northern California and Nevada

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December 19, 2016

Tani G. Cantil-Sakauye, Chief Justice
And Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-7303

**VIA FEDERAL EXPRESS**

Re: *Moore v. Mercer*
(2016) 4 Cal.App.5th 424
[Supreme Court No. S238709 (petition for review);
Court of Appeal No. C073064]
***Request for Depublication*** (Cal. Rules of Court, rule 8.1125)

Honorable Justices:

The Association of Southern California Defense Counsel and the Association of Defense Counsel of Northern California and Nevada (the "Associations") respectfully urge this Court to order *Moore v. Mercer* (2016) 4 Cal.App.5th 424 (*Moore*) depublished.

## The Associations' Interest

The Associations are two of the nation's largest and preeminent regional organizations of lawyers who routinely defend civil actions, comprised of over 2,000 leading civil defense bar attorneys in California. Their members routinely represent clients in defending actions where medical expenses are being sought as economic damages. They have a direct interest that the law in this area be certain, practical, reasonably implemented, and correct. The Associations have been actively involved in issues regarding the admissibility and use of unpaid medical bills and liens as damages measures in personal injury actions. They appeared as amicus curiae in *Howell v. Hamilton Meats & Provisions, Inc*. (2011) 52 Cal.4th 541 (*Howell*), both in the Court of Appeal and in this Court, including at oral argument. They also frequently appear as amicus curiae in cases that apply *Howell*, including this case and *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308.

No party has paid for or drafted this letter.

## Legal Backdrop

### A. *Howell*'s "Market Value" Definition Of Reasonable Value.

*Howell* recognized that billed "charges" in the medical arena are typically inflated prices that no one really ever pays at full price. It holds that a plaintiff trying to prove medical damages has a double burden of proof: "[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, emphasis in original.) Although *Howell* involved an insured plaintiff, the Court made clear that this two-pronged burden of proof governs *all* cases: "The rule that medical expenses, to be recoverable, must be both incurred *and* reasonable [citations] applies equally to those with and without medical insurance." (*Id.* at p. 559, fn. 6, emphasis in original.)

*Howell* also holds that reasonable value must be determined based on *market value*. 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.) Thus, under *Howell*, the reasonable value is "the exchange value of medical services the injured plaintiff has been required to obtain. . . ." (*Id.* at p. 562.) The measure is "the amount *paid* in *actual* transactions involving a similar subject matter. . . ." (Rest.2d Torts, § 911, subd. (2) & com. b, emphasis added.) It is "the amount of money for which the subject matter *could be* exchanged or procured if there is a market continually resorted to by traders . . . ." (*Id.*, subd. (2), emphasis added.)

*Howell* rejects the notion that there can be a "regular" price for medical services and a "litigation" price that lets others make a profit on the injured party's misfortune.

### B. The *Moore* Scenario: An Uninsured Plaintiff Secures Medical Services On Liens That Are Sold At A Substantial Discount To Third Parties.

This case, *Moore*, concerns the common circumstance where a plaintiff lacking insurance is treated by a medical provider who then sells the account-receivable lien at a substantial discount to a third-party, who then claims the full-face value of the medical bill in the lawsuit. (See, e.g., *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996 (*Uspenskaya*); *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288 (*Katiuzhinsky*); *Dodd v. Cruz* (Feb. 5, 2014, B247493) opn. ordered nonpub. June 11, 2014.)

The plaintiff was treated by medical providers who performed services, and agreed to perform future services, on a lien instead of payment from the plaintiff. The providers, in turn, sold their liens to a third-party medical finance company at a discount, which the providers accepted as payment in full for their medical services. When the defense sought to introduce evidence of the amount that the company paid to the providers as evidence of the true market value of the provider's services, the trial court excluded the evidence under Evidence Code section 352, concluding that the additional discovery and testimony required by such evidence outweighed its probative value. The Court of Appeal affirmed.

### C. *Howell*'s Application To This Lien Scenario Has Engendered Confusion And Controversy.

Even though *Howell* plainly states that its reasoning applies to *uninsured* plaintiffs, lower courts have struggled with applying its "market value" mandate in cases such as this one, where the plaintiff was uninsured, made no out-of-pocket payments and obtained medical services either on a lien or from a provider (often recommended by plaintiff's counsel) who sells the medical bills at a discount to a third party.

This issue has caused substantial confusion and controversy. (See, e.g., *Collateral Source Update: Proving Medical Expenses After "Corenbaum" and "Bermudez"*, http://www.callawyer.com/2015/12/collateral-source-update-proving-medical-expenses-after-corenbaum-and-bermudez [noting continuing complexity in this area]; *Medical liens: dealing with bias and character issues at trial*, www.zaretlaw.com/pdf/Liens. DealingWithBias.pdf [article in July 2015 issue of Advocate, Consumer Attorneys Association of Southern California]; *Howell is Eroded by Recent California Appellate Cases: Fully Priced Medical Expense Liens are Admissible*, www.lorberlaw.com/ howell-is-eroded-by-recent-california-appellate-cases; *Black Boarding Medical Specials in California—the Battle Wages On*, lewisbrisbois.com/newsroom/articles/black-boarding-medical-specials-in-california-the-battle-wages-on; *Seminar: Proving the Value of Present and Future Medical Bills Under Howell and Corenbaum: How to Establish "Negotiated Rate Differentials" in Medicare, Kaiser and Other Lien Cases* (Assn. of Defense Counsel of No. Cal. & Nev, http://www.adcnc.org/docs/ Howell%202014.pdf.)

Plaintiffs' attorneys frequently seek to evade *Howell*'s restrictions by advising their clients to avoid using insurance or Medi-Cal and instead to utilize doctors who will perform services on a lien—a lien that reflects the inflated medical "charges" that no one actually pays—thus maximizing the damages to be claimed at trial. And then, as occurred here, that lien is often purchased at a discount by a company seeking to profit from the litigation (generally known as a medical finance or medical factoring company),

which asserts a claim in the litigation for the full, face amount of the bills, even though it paid a much lower discounted amount that the medical providers accepted as payment in full for their services.

There is an entire industry premised on this medical-fee litigation model. (See, e.g., www.doctorsonliens.com; www.californialiendoctors.com; powerliens.com/pages/California; cherokeefunding.com/doctors; www.nelsonhardiman.com/media/SVBJ-article.pdf.)

As we now discuss, *Moore* fosters, rather than resolves, the confusion and lack of clarity in this important jurisprudential area.

## The Opinion Should Be Depublished: It Exacerbates, Rather Than Clarifies, The Confusion Over *Howell*'s Application To Uninsured Plaintiffs

### A. The Lack Of Any "Market Value" Analysis Will Engender More Confusion And Undermine *Howell*.

Despite the Opinion's lengthy recitation of case law, the bottom line is this: The Court of Appeal upheld a judgment where (a) the trial court refused to allow any evidence as to the amount paid by the medical finance company that purchased the lien, or why the doctors and the company agreed upon the particular numbers; (b) there was no evidence as to what insurers or Medi-Cal would pay in arm's length transactions for the same medical services; and (c) although several doctors and a nurse billing expert claimed their billing amounts reflected customary "charges" and were "reasonable," no evidence specifically tied that testimony to actual payments in the marketplace. (Typed Opn. 8-12.)

The Opinion never attempts to reconcile this result with *Howell*'s "market value" definition of reasonableness. Instead, it primarily focuses on whether the same appellate district's pre-*Howell* decision, *Katiuzhinsky*, *supra*, 152 Cal.App.4th 1288, is consistent with *Howell*. (Typed Opn. 2, 13-20.) The lack of any extensive "market value" analysis—the analysis *Howell* mandates—is reason alone to depublish. The limited proof upheld in this case will engender confusion and undermine *Howell*'s standard.

### B. The Confusing Evidence Code Section 352 Analysis Warrants Depublication.

The Opinion's Evidence Code section 352 analysis is another reason to depublish. The Opinion holds that the trial court properly excluded from trial, by granting plaintiffs'

motions in limine based upon section 352, evidence that the doctors' liens were purchased by, discounted to or assigned to the medical finance company. (Typed Opn. 2, 20-26.)

The trial court, however, never conducted a legitimate section 352 analysis. It assumed that the amount paid by the medical finance company in an open market transaction had *no* relevance under *Howell*. The Opinion describes how the trial court had concluded before trial—in ruling on discovery motions and *awarding sanctions against defendants*—that whatever information existed between the doctors and the finance company "would never be admitted in light of [*Howell*]," that the amount paid for the lien rights was irrelevant, and that the court could not "'imagine a more irrelevant discussion than trying to get before a jury'" evidence regarding why the doctor and the finance company agreed on any particular number. (Typed Opn. 9.) The Court of Appeal—correctly—held these discovery rulings were wrong as a matter of law and reversed the sanctions award. (Typed Opn. 29.) Yet it upheld the trial court's motion in limine ruling, claiming the trial court "carefully weighed the minimal probative value" against the "costs and distraction" of allowing such evidence. (Typed Opn. 24-25.)

But the trial court admittedly had a mistaken view of the law as to relevance. A court cannot properly exercise discretion when it misapprehends the law being applied. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) The Court of Appeal's conclusion that the trial court properly weighed probative value and prejudice even though it misconstrued probative value creates confusion and uncertainty as to the review of any section 352 ruling. This topsy-turvy approach to section 352 will engender confusion, not clarity.

The Opinion's section 352 analysis is confusing and erroneous on another front. The Opinion describes *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, another post-*Howell* case, as supportive. (Typed Opn. 20.) But *Bermudez* did not uphold the exclusion of such evidence; to the contrary, it held 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 . . . ." (237 Cal.App.4th at pp. 1330-1331, emphasis added.) The Opinion's section 352 analysis improperly circumscribes that required wide-ranging inquiry by letting trial courts exclude evidence that can be very probative. For example, evidence that the finance company purchased liens at a 75% discount could lead a reasonable juror to find that the full face-value of a lien does *not* reflect market value and that the finance company simply sought to profit on the gap between inflated charges and actual market value.

In fact, the Opinion's comments indicating such evidence has little value seemingly rest on the fact that the trial court erroneously barred discovery on these issues, forcing speculation about what any evidence *might* have shown. For example, the Opinion describes the probative value of what the finance company paid as "minimal" because the amount "*may* reflect" the company's tolerance for risk without any reflection on the value of the medical services. (Typed Opn. 22, emphasis added.) Yet the Opinion elsewhere indicates the evidence could be *very relevant*; it recognizes that (a) the agreement between a doctor and the finance company "could reveal what the doctor believed was the reasonable value of his services, apart from his calculation of the expense and risk of collection"; (b) the defense expert "could base an opinion on reasonable value in part on the amount [the doctor] accepted from [the finance company] as full payment for his services"; and (c) the agreement with the finance company may have information "as to whether plaintiff remains responsible for 100 percent of the billed amount." (*Ibid.*)

The latter evidence can be crucial to a defendant's ability to challenge damages in a lien case; and if *Howell* is applied properly, it should be central to *the plaintiff's* burden of proof. Yet the Opinion allows such evidence to be excluded under a section 352 analysis where the trial court could never have properly weighed anything given its erroneous discovery rulings. The confusing, and at times facially inconsistent, section 352 discussion warrants depublication. Otherwise, the Opinion could cause trial courts to exclude evidence that can and should be admitted under a proper application of *Howell*'s "market value" standard.

### C. The Third District's Inconsistent Approach To Publishing *Howell* Related Opinions Is Another Reason To Depublish.

The appellate district that decided this case, the Third District, has recently been inconsistent in its publishing of *Howell*-related cases that involve uninsured plaintiffs who secured medical services on a lien. It has opted to publish opinions that favor plaintiffs, such as this case and *Uspenskaya*, *supra*, 241 Cal.App.4th 996, yet refused to publish cases that favor the defense, such as *Frisk v. Cowan* (2016) 2016 WL 3999764 (*Frisk*). (*See C.A. Takes Pro-Plaintiff View on Proof of Medical Damages,* www.metnews.com/articles/2016/moore102416.htm [commenting on *Moore*].)

In *Frisk*, for example, the trial court precluded the defense from introducing evidence of the amounts private insurers and government programs would pay for the uninsured plaintiff's medical services and also allowed plaintiffs' expert to opine that the medical lien fell within the range of reasonable medical "charges." The Third District reversed and remanded for a new trial, making *Howell*-related pronouncements of great

importance to the defense bar, and arguably at odds with *Moore*: (a) that even when the plaintiff is uninsured, "the basis for determining the reasonable value of medical services is its market value—that is, the amount sought *and paid* for the service"; (b) that the trial court erred in excluding defendants' evidence of amounts paid on behalf of *insured* persons, because "it 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 (c) that the opinion of plaintiffs' expert about reasonable "charges" was not proof of reasonable value and should have been excluded. (2016 WL 3999764 at *9-10, emphasis in original.) But the Third District refused to publish, despite multiple publication requests.

The refusal to publish *Frisk*, coupled with publication of this case, leaves an incomplete, skewed view of *Howell*'s application to uninsured plaintiffs. That is yet another reason to depublish this case.

**Conclusion**

For all these reasons, the Associations request that the Court order this case depublished.

Respectfully submitted,

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See attached 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 December 19, 2016, I served the foregoing document described as **DEPUBLICATION REQUEST TO CALIFORNIA SUPREME COURT BY ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND THE ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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Executed on December 19, 2016, 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

ANITA F. COLE