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May 4, 2011

Justices of the Supreme Court  
California Supreme Court  
350 McAllister Street  
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**SUPREME COURT  
FILED**

MAY - 5 2011

Frederick K. Ohlrich Clerk  
Deputy

Re: Rebecca Howell v. Hamilton Meats & Provisions, Inc.  
S.C. Case No. S179115

Dear Honorable Justices:

**SUPPLEMENTAL LETTER BRIEF**

Defendant/Petitioner Hamilton Meats & Provisions, Inc. provides the following supplemental letter brief in response to this Court's April 20, 2011 order.

**I.**

**INTRODUCTION**

Regardless which procedure is ultimately determined to be the most efficient and workable in determining past medical expenses awards, no plaintiff should ever be permitted to recover more than the actual amount paid or remain owing to medical providers. Notably, the post-trial procedure employed in the instant case was reasonable and fair. The post-trial "*Hanif*" motion satisfied due process and allowed each side to present multiple briefs, evidence, and oral arguments over the course of multiple hearings prior to the final decision by the trial judge. Neither side can complain of insufficient opportunity to present all relevant material to the trial court before its ruling.

However, Defendant is not married to the post-trial motion procedure. A pre-trial determination (or even trial-concurrent method) procedure outside the jury presence could also be employed to determine true past medical expenses. Indeed, Defendant initially sought to determine plaintiff's actual past medical expenses before trial via its *in limine* motion to exclude the gross medical bills from trial, which bills failed to account for negotiated rates between plaintiff's medical providers and her medical insurer. (1 AA 73-107.) In response, the trial court announced it would defer the decision until after trial, when the court would examine the gross bills and the actual payments made by the insurer in full satisfaction of the bills. (1 RT

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67:13-16.) The post-trial procedure was selected by the trial court in this action only in response to the application by Defendant to have the matter determined *before* trial.

To be clear, neither party was aggrieved by the post-trial procedure followed by the trial court in reaching its correct decision. The method is supported by California precedent and statutory authority. However, Defendant recognizes that a post-trial procedure may lead to unnecessary duplication of evidence, effort, and risk the artificial inflation of *non-economic* damages awards by juries. In other words, although successful and legally sustainable here, prospective cases should be encouraged to follow a pre-trial procedure that excludes the gross, overstated medical bills from evidence in the first place.

## II.

### POST-TRIAL DETERMINATION OF TRUE MEDICAL CHARGES IS PERMITTED

*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 laid the foundation for a post-trial reduction (albeit by the appellate court) of a medical specials award that exceeded the actual amount expended or incurred for past medical treatment. In *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, the full medical bills were also submitted at trial. However, the appellate court determined the plaintiff was not permitted to recover past medical expenses above those which her insurer had paid to satisfy the bills. The appellate court simply conducted a post-trial modification, rather than re-trial or other method, to "reduce the amount awarded as costs for medical care." *Id.* at 309.

Although the appellate court simply "modif[ied]" the past medical expenses award post-trial, the *Nishihama* decision focused more closely on the whether introduction of the gross medical bills at trial was prejudicial to the defendant. In finding no prejudice, the *Nishihama* court concluded remand to the trial court was unnecessary. *Id.* at 309. **The same is true here.** In sum, a post-trial, appellate modification was conducted in *Nishihama*, but not declared as the singular method for determining the proper past medical specials.

The case of *Greer v. Buzgheia* (2006) 141 Cal.App.4<sup>th</sup> 1150 confirmed in principle a *trial court* may also conduct post-trial modifications to a past medical specials award. In *Greer*, the trial court denied a motion *in limine* to preclude submission of the gross medical bills, but "made it clear that if the jury rendered an award that was excessive under [the principles of] *Hanif/Nishihama*, it would consider a **post-trial motion** to reduce the recovery." *Id.* at 1157 (emphasis added). The appellate court concluded "the [trial] court's ruling was correct." *Id.*

In addition to affirming the substantive holdings of *Hanif* and *Nishihama*, the *Greer* court impliedly affirmed the trial court's authority and stated intent to hold a post-trial motion to reduce the verdict in accordance with those cases. *Id.*

The more recent case of *Olsen v. Reid* (2008) 164 Cal.App.4th 200 also acknowledged a post-trial motion hearing in the trial court may be used to determine the true, actual medical bills recoverable by a plaintiff:

If the proper application of the collateral source rule includes reducing a verdict to the amount actually paid or incurred by the plaintiff or a collateral source such as a health plan, **a hearing is necessary and appropriate to determine the correct amount. ...** The propriety of such a hearing is not a separate issue. **If such a hearing is to be held, the trial court has the statutory authority under Evidence Code sections 320 (order of proof) and 402 (procedure for determining evidentiary matters.**

*Id.* at 217-218 (emphasis added).)

Under the foregoing authority (except *Olsen*, which was decided later), the post-trial procedure in this action included more than 12 weeks' notice (from filing to hearing date) for plaintiff Howell to oppose the *Hanif* motion, the acceptance and review of exhaustive briefing from the parties, and lengthy oral argument. (1 AA 211; 5RT 253:23-28; 8RT 270-335.) After the *Hanif* motion was decided, Howell filed a motion for reconsideration, "supplemental briefing" and evidence to the trial court. (3AA 571-590; 604-617.) Howell was represented by several attorneys who provided all post-trial materials to the trial court. Howell's specially retained counsel on the *Hanif* issue after trial, John Rice, told the trial court: "I think the court has approached this whole issue in a very rational way..." (6RT 259:25-260.)

Like *Nishihama*, the post-trial procedure followed in this action does not require remand. The briefing, hearings, and lengthy oral arguments entertained by the trial court permitted sufficient evidence on the issue for the court to render a ruling in conformity with the accepted principles of *Hanif* and *Nishihama*. The trial court procedure followed in this action

may be considered a model for future personal injury actions in which the gross medical bills are well in excess of the actual amounts paid in satisfaction of same.

### III.

#### GOVERNMENT CODE §985 ALSO PROVIDES GUIDANCE

The legislative branch has also provided a template for a post-trial procedure to reduce past medical specials awards. In 1987, the Legislature enacted *Government Code* §985, which modifies application of the collateral source rule in regard to government entity defendants. This statute demonstrates that in those cases involving an exception to the collateral source rule in relation to past medical expenses, a post-trial hearing may be held to determine setoff adjustments against the public entity's share of the verdict. *Id.*

The statute provides a public entity defendant may "by a motion....request a posttrial hearing for a reduction of the judgment against the defendant public entity for collateral source payments paid or obligated to be paid for services or benefits that were provided prior to the commencement of trial." *Id.*, Subdivision (b). Such post-trial motion does not occur "until after the determination of any motions for a new trial, for [JNOV], for remitter, [or for] additur...." *Gov. Code* § 985(b). Thus, the trial court is permitted time to receive and consider evidence similar to a *Hanif/Nishihama* correction. The method does not include an entirely new trial. A simple post-trial motion may be permitted, at the option of the defendant. The necessary evidence of medical bills and records of payments by insurers could be obtained and exchanged during the usual course of discovery.

Public entity defendants may avail themselves of this post-trial procedure to adjust past medical expenses awards. The procedure followed in the instant action was very similar and illustrates one example of the method which may be applied to prospective cases.

### IV.

#### ALTERNATIVELY, GROSS OR "LIST" RATE AMOUNTS NEVER OWED OR PAID TO MEDICAL PROVIDERS SHOULD BE BARRED

Given the primary thrust of Defendant's position that "virtual" or phantom medical charges do not constitute recoverable, compensatory damages, evidence of these amounts should never be admitted into evidence in the first place. The measure of medical expense damages is sometimes referred to as the "reasonable value" or "reasonable cost" of the medical services provided. *See*, CACI No. 3903A (2010). "'Reasonable value' is a term of limitation, not aggrandizement." *Hanif, supra*, 200 Cal.App.3d at 641. Here, the reasonable

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value of the plaintiff's medical care and the amount negotiated between the healthcare providers and plaintiff's insurer are one and the same.

Specific admissibility of the phantom charges (those above and beyond what is ultimately paid or owed to satisfy the gross charges) was not directly addressed by the *Hanif* court. Although the substance of the law was established (*i.e.*, a plaintiff may not recover as economic damages medical expenses not paid and never to be paid), the precise method trial courts were to follow to determine the final value was not dictated. *Hanif, supra*, 200 Cal.App.3d 635, 639-641.

*Nishihama* did discuss the admissibility issue, but from the perspective of whether prejudice occurred. The plaintiff presented evidence of about \$17,000 in medical bills for which the medical provider accepted \$3,600 as payment in full from an insurer. *Nishihama* held that plaintiff could not recover more than the \$3,600 paid by the insurer for the medical services. *Nishihama, supra*, 93 Cal.App.4th 298, 309.

On the issue of admissibility of the full, gross medical bills, *Nishihama* focused on whether such introduction constituted prejudicial error. *Id.* The defendant there argued the gross medical bills were prejudicial because they might have led the jury to believe plaintiff's injuries were greater than they actually were. *Nishihama* rejected that argument and held the gross or "list" price rate was no less probative of the extent of injury than a reduced, actually-paid rate. *Id.* Therefore, *Nishihama* never directly addressed *admissibility*, but rather, *prejudice*. It does not stand for the proposition that the gross, non-negotiated rates for medical services must be admitted at trial.

*Greer v. Buzgheia, supra*, 141 Cal.App.4th at 1157 took the issue a step further and issued a rule that medical bills and rates are admissible within the court's discretion. On the substantive issue, *Greer* agreed with *Hanif* and *Nishihama* that the amounts above and beyond what an insurer paid for satisfaction of the "bills" are *not* evidence of the actual amount of past medical expenses. *Id.* The court then suggested, however, that gross, non-negotiated medical bills were relevant at trial because they may "give[] the jury a more complete picture of the extent of a plaintiff's injuries." *Id.* Deeper analysis of this conclusion reveals its weakness and, in turn, the error in admitting gross medical bills in the first place.

For example, one who is killed instantly may have minimal medical bills, if any. On the other hand, one may incur very minor soft tissue injuries but the circumstances of an accident commonly leads emergency medical providers to conduct multiple scans and other expensive tests to ensure the absence of potential serious conditions. Some relatively minor

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conditions may be very hard to diagnose and entail extensive and expensive testing. Charges for medical procedures also vary from location to location, even within close proximity. What these examples demonstrate is there no logical connection between the medical charges (including gross charges) and compensation for *non-economic* injuries.

The exclusion of non-negotiated medical charges from trial avoids the potential duplication of evidence after conclusion of trial and delay of final judgments. Perhaps most importantly, admission of such evidence to the jury may unfairly inflate *non-economic* damage awards by juries, whether consciously or not. Trial courts may exclude irrelevant evidence under *Evidence Code* § 352 from the outset. This authority should be exercised with respect to the non-negotiated, gross medical bills to reduce the chance of prejudicing personal injury defendants and misguiding juries in formulating general damage awards.

The procedures by which trial judges may consider the actual, final medical charges recoverable by plaintiffs are varied, whether by *in limine* motion or other motions to exclude brought earlier before trial. Disclosure of medical bills and evidence of the actual amounts paid by health insurers should be permitted during the normal course of discovery as relevant material. *Code of Civil Procedure* §2017.010. Full disclosure and presentation of such material to the trial court, which can then weed out the excess charges that were never collected or paid, will ultimately lead to the accurate determination of past medical expense damage awards.

It should take little court time to establish the amount that a healthcare provider accepted from a healthcare insurer as payment in full for a plaintiff's medical services. It is a documented fact that should rarely be disputed and reasonable attorneys would be able to stipulate to the amount in most cases. In the unusual cases where the parties dispute the amount, the parties may agree to have the question decided by the court.

In the relatively few cases in which the parties neither stipulate to the amount nor agree to the court determining the amount, the full medical charges could still go to the jury. However, in those instances the **jury should hear evidence of the amount paid to satisfy the gross medical bills**. Such evidence under these circumstances would be extremely probative and therefore admissible upon a "persuasive showing." *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 733.

V.  
CONCLUSION

The post-trial procedure employed in this case to determine the proper amount of recoverable past medical expenses did not violate due process or equity. The trial court's conclusion was correct based upon principles of recoverable economic harm and the proper measure of damages. The trial court's decision should therefore be affirmed.

Notwithstanding, the post-trial process was lengthy and placed the burden upon Defendant to demonstrate the true scope of an element of damages. Thus, a pre-trial procedure should be urged for all prospective cases in which the courts may exclude from evidence the phantom, excess amounts never paid nor owed.

In most cases, the parties should be able to stipulate to the amount of recoverable past medical expenses according to the established principles in *Hanif, Nishihama* and other cases. If the parties cannot agree and the trial court does not exercise its discretion to exclude the phantom evidence, defendants must be permitted to admit at trial the amounts paid in satisfaction of medical charges so that jurors will have an accurate evidence of the true, reasonable value of the medical charges.

Respectfully submitted,



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1 Rebecca Howell v. Hamilton Meats & Provisions, Inc., et al.  
2 California Superior Court Case No.: S179115  
3 Division One, Case Number: D053620  
4 SDSC Case Number: GIN053925

5 PROOF OF SERVICE

6 I, the undersigned, declare that I am over the age of 18 years and not a party to the  
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9 On May 4, 2011, I caused to be served the following document(s):

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3 California Superior Court Case No.: S179115

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