Legal

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July 12, 2018

AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW
(California Rules of Court, rule 8.500(g)(1))

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

Re: *Pebley v. Santa Clara Organics LLC*, No. S249399

We write on behalf of the League of California Cities to urge this Court to grant review of the Second District Court of Appeal's opinion in *Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal. App. 5th 1266 ("*Pebley*").

STATEMENT OF INTEREST

The League of California Cities is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League has followed the issues in *Pebley* closely. The League participated as an amicus in *Howell v. Hamilton Meats Co. & Provisions, Inc.* (2011) 52 Cal. 4th 541 (citing the League's amicus brief at p. 566). The League was also an amicus and participated in the oral argument of *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308. The undersigned counsel represented the defendant city in *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298. These are three of the seminal cases on the issues related to the measure of the reasonable value of medical care.

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PEBLEY IS AN IMPERMISSIBLE END RUN AROUND THIS COURT'S DECISION IN *HOWELL.*

Pebley raises an important question related to the holdings of *Howell* and *Corenbaum*:

> Can a plaintiff covered by medical insurance benefit from the increased cost of medical care when he or she uses doctors outside the insurance plan who have agreed with the lawyer to be paid out of a settlement or judgment?

A review of the development of the case law shows that the answer should be: No. Plaintiffs may choose their own doctors, but a strategy designed by lawyers to increase settlement values cannot shift these unnecessary higher costs onto defendants.

In *Pebley*, the plaintiff obtained medical treatment from a doctor who agreed with plaintiff's counsel to accept a lien against any tort recovery as payment. The Court of Appeal held that because the plaintiff did not seek treatment through his insurer, he should be treated as an uninsured plaintiff for purposes of determining the recovery of medical damages. *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." (52 Cal. 4th at p. 567.) As a result, the plaintiff in *Pebley* was permitted to introduce evidence of, and collect as damages, the amounts "billed" by the lien doctor, without showing how much is normally accepted by doctors as full payment for the same services.

The Court of Appeal's opinion in *Pebley* is an obvious end run around the Court's decision in *Howell.* This opinion inserts lawyers into medical decision making to maximize financial recovery without regard to the medical needs of the injured plaintiff. The opinion also creates a split of authority among published Court of Appeal opinions as to the recovery of medical damages in personal injury cases.

Applying *Howell*, numerous Court of Appeal decisions require the plaintiff to prove medical damages based on market value, not amounts billed but unpaid. Under cases following *Howell*, amounts billed by the health care provider (but not paid) are inadmissible and irrelevant to establishing past or future medical damages. (*See, e.g. Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330-1331, and *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 135.)

As stated in another Court of Appeal decision, "Our Supreme Court has endorsed a market or exchange value as the proper way to think about the reasonable value of medical services." (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050.)

Under long-standing California law, injured plaintiffs are entitled to recover the "reasonable value" of past medical services. During most of the 20th Century, California courts routinely admitted either medical bills or testimony of the full amount of those bills as evidence of the "reasonable value" of those services.

It was standard for a personal injury plaintiff to introduce her medical bills at trial and elicit a doctor's testimony that the billed amount was reasonable and necessary. (*See Latky v. Wolfe* (1927) 85 Cal. App. 332, 347 [medical bills admitted into evidence and verdict reduced on appeal to the extent that "no other testimony was offered or received to the effect that [the billed amounts] represented the reasonable value of the medical services rendered"]; *Townsend v. Keith* (1917) 34 Cal. App. 564, 565 [affirming the admission of testimony as to the amount of medical bills on the ground that "the amount paid for the services is some evidence as to their reasonable value"].)

In the past, the patient or the medical insurer usually incurred an obligation to pay the full billed amount. When supported by a doctor's testimony, the billed amount was synonymous with the "reasonable value" of the medical services.

With the advent of managed care, insurance companies began negotiating discounts for medical services, and these discounts have grown larger over the years. But hospitals and doctors for the most part did not lower the charges listed on medical bills to reflect the lower amounts actually accepted as payment in full. Hospitals and medical groups kept their billing rates at higher levels while agreeing that they would accept significantly lower amounts as payment in full – often more than two-thirds lower.

The effect of managed care has been percolating through the tort system for years. The first California case to consider the growing discrepancy between amounts billed and amounts paid was *Hanif v. Housing Authority* (1988) 200 Cal. App. 3d 635, 639-40. As stated in *Hanif*, the measure of tort damages is based on certain bedrock principles:

> "In tort actions damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring him as nearly as possible to his former position, or giving him some pecuniary equivalent."

(*Hanif*, *supra*, 200 Cal. App. 3d at p.640 (quoting 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 742, p. 3137).)

The *Hanif* court cited the corollary of this principle: "A plaintiff in a tort action is not, in being awarded damages, to be placed in a better position than he would have been had the wrong

not been done." (*Ibid*. [quoting *Valdez v. Taylor Automobile Co.* (1954) 129 Cal. App. 2d 810, 821-22].)

The *Hanif* court concluded that "a plaintiff is entitled to recover up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable." (*Id*. at p. 643.)

California courts did not address the issue again until *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298. The *Nishihama* court followed *Hanif* in holding that "'when the evidence shows a sum certain to have been paid or incurred for past medical care and services, whether by the plaintiff or by an independent source, that sum certain is the most the plaintiff may recover for that care despite the fact that it may have been less than the prevailing market rate.'" (*Id*. at p.306 [quoting *Hanif*, *supra*, 200 Cal. App. 3d at p. 641].)

In *Howell,* this Court adopted the reasoning of *Hanif* and *Nishihama.* This Court held that only the amount actually accepted as payment in full was relevant and admissible to determine an award for past medical care.

THE ISSUES RAISED IN *PEBLEY* AFFECT CITIES' ABILITY TO PROVIDE ESSENTIAL GOVERNMENT SERVICES TO CALIFORNIANS.

The League's members provide public services to millions of California residents in every corner of the State, from city centers to suburbs to rural areas. These cities provide a wide array of services and facilities, including international airports, sea ports, public utilities, police and fire departments, health clinics, public transportation, public works, sports venues, museums, libraries, parks, theaters, and convention centers. As a result of these direct services to California residents and visitors, cities receive thousands of personal injury claims a year and pay out substantial dollar amounts in settlements and judgments annually. For example, the City of Los Angeles reported a "new trend of increased liability payouts" – at least $135 million last fiscal year – that forced city officials to consider borrowing money rather than cut services or dip into emergency reserves. ("L.A. needs to borrow millions to cover legal payouts, city report says," *Los Angeles Times,* Jan. 9, 2017 [http://www.latimes.com/local/lanow/la-me-ln-legal-payouts-20170109-story.html].)

California cities have extensive experience with tort litigation and risk management that involves balancing public interests and benefits. California cities need a tort system that fairly compensates injured persons while protecting taxpayers and citizens from undue expense. The issues raised by this case will have a significant effect on the ability of state and local government to provide vital services to all Californians.

A rule allowing the admission into evidence of the full-billed amount would let in through the backdoor evidence that the Supreme Court has directed may not come in through the front door. Among other consequences, this would unduly increase payouts to plaintiffs and their counsel at the expense of vital services to all Californians. Cash-strapped State and local governments cannot absorb greater liabilities without cutting services or increasing debt.

CONCLUSION

The Supreme Court in *Howell* laid the framework for deciding the admissibility of medical bills. Under *Howell*, medical bills for amounts beyond what was paid by insurance are irrelevant and inadmissible to prove the reasonable value of past medical care. *Howell* and its progeny stand for the larger principle that market rates – the amount actually paid on behalf of the vast majority of patients – is the most appropriate measure of a defendant's liability for medical damages. By allowing the admission of unpaid and inflated medical bills created by lien doctors, *Pebley* would eviscerate the *Howell* rule.

Review should be granted, and the Court should order that the decision not be citable while review is pending. (See Cal. Rules of Court, rule 8.1115(e)(3).)

No party or counsel for any party authored this letter brief in whole or in part nor made any monetary contribution toward the preparation or submission of the brief. No person or entity other than the undersigned amicus curiae and counsel made a monetary contribution to fund the preparation or submission of this letter.

Respectfully submitted,

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 630 Thomas L. Berkley Way, Suite 103, Oakland, CA 94612.

On July 12, 2018, I served true copies of the following document described as AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via the Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

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

Executed on July 12, 2018, at Oakland, California.

/s/ David B. Newdorf
DAVID B. NEWDORF

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S249399

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