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I.

INTRODUCTION

You can't always get what you want.
But if you try sometimes, you just might find,
You get what you need!

Rolling Stones--1968.

This was not just a song for a generation, it is the law in California. Appellant Rebecca Howell ("HOWELL") is entitled to what she needs to be made whole. Appellant's desire to receive more money than the damages she incurred is of course understandable. This is America. We all want more: more than we have, more than we can afford, more of what our neighbor has, more than our parents had, more than we have earned, more than we deserve, more than the law affords, more, more, more.

Fortunately, the law in California is not just for a generation and it is very clear on this point: A plaintiff is only entitled to recover in tort for "detriment" suffered. Cal. *Civil Code* §3281. Appellant neither incurred, nor risked "detriment" for medical expenses waived by her healthcare providers. Furthermore, any thinly veiled attempts by Appellant to turn the Collateral Source Rule into a sword from the shield it was intended to be, are misplaced at best.

Not only did the trial court correctly reduce the judgment by the amount of waived medical expenses, the procedure by which it did so is

approved in California and fell within the wide discretion granted to courts to prioritize and order evidence in cases. Cal. *Evidence Code* §320. The trial court painstakingly analyzed the substantive legal issues in the post-trial motion filed by Respondent HAMILTON MEATS & PROVISIONS INC. ("HAMILTON") and conducted a lengthy hearing on the matter. Counsel for Appellant acknowledged the propriety of the procedure in open court on several occasions. After extensive briefing and arguments by the parties, the trial court correctly determined the past medical expenses portion of the verdict should be reduced by the amount waived, or "written off," by two of HOWELL'S healthcare providers.[1] All other portions of the judgment remain intact, including the generous general damages award and award for future possible medical expenses.

The past medical expenses portion of the judgment was adjusted *nunc pro tunc* in accordance with the legal discretion of the trial court and prevailing case law in California. As only the written off medical expenses were deducted from the final judgment--not the amounts paid by HOWELL's medical insurer--the collateral source rule did not apply and was not violated.

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[1] HAMILTON's motion to reduce the special verdict addressed only two of HOWELL's healthcare providers, Scripps Memorial Hospital and CORE Orthopedic, because they generated the bulk of HOWELL's past medical expenses presented at trial.

The trial court correctly found there is **$130,286.90** in alleged damages which simply do not exist! No one is seeking this money, no one has paid this money, no one owes this money. It is not damages under California law. It is simply what Appellant wants. HAMILTON respectfully requests the trial court's ruling be upheld and this court just might find Appellant gets what she needs.

II.

RELEVANT FACTS AND PROCEDURAL HISTORY

A. Pre-Trial Motion *In Limine* Filed by HAMILTON To Exclude "Written Off" Medical Expenses Is Denied.

HAMILTON filed a motion *in limine* on January 17, 2008 seeking to exclude the introduction of evidence at trial of the "written off" (or waived) portions of the medical bills. (1 AA 73-107.) The motion was heard on January 29, 2008 by Judge Adrienne Orfield. (1 RT 64:17-69:6.) Judge Orfield denied the motion. However, the trial court specifically reserved its right to determine *post-trial* whether the medical expenses award would be reduced for the written off amounts. (1 RT 67:13-16.) A court has authority to prioritize and order such evidence. Cal. *Evidence Code* §§ 320, 402

HOWELL's counsel specifically proposed a post-trial procedure be employed to determine the issue, as reflected in the transcript from the *in limine* motion hearing:

> **The Court**: I see this is a post-trial issue. They're [plaintiff] entitled to put their bills in front of the jury, whatever you can actually come up with to meet your burden. We can address that post-trial.
> . . .
> **Mr. Basile [Plaintiff's counsel]**: …My proposal would be just agree to what the number for past medical bills, **and you guys can raise all the other arguments post trial**, like if the Court inquired.
> . . .
> **Mr. Tyson [HAMILTON' counsel]**: So we're clear, I assume, it's the Court's position and ruling that the jury gets to see the entire medical bills and so there's no need for us to argue that they just see the reduced one?
>
> **The Court**: Correct.
>
> **Mr. Tyson**: You handle that at post-trial Hanif motion.
>
> **The Court:** Correct.

(1 RT 67:13-16; 68:10-13, 27-28; 69:1-6 (emphasis added).)

Accordingly, the jury received evidence of the full billed amount of past medical expenses in the amount of $189,978.63. (2 RT 117:15-118:5; 3 RT 195:16-25.) As discussed below, HOWELL received a generous general damages award arguably based partially upon the jury being informed of the non-discounted amount of medical bills. The jury awarded $200,000.00 to HOWELL for *past* non-economic (general) damages. (1 AA 178, 219.)

B. HAMILTON Filed Its "*Hanif*" Motion With Supporting Evidence of "Written Off" Medical Bills

HAMILTON filed its motion titled "Post-Trial Motion to Reduce Past Medical Specials Verdict Pursuant to *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635" (hereafter referred to as "*Hanif* motion") on or about February 15, 2008. The *Hanif* motion included declarations of two personnel qualified to testify as to the amounts billed by their respective companies, the amounts written off, the zero balance of the accounts, and that the companies would not pursue HOWELL for the written off amounts in any manner. (1 AA 123-176.) [2] Through the *Hanif* motion, HAMILTON sought a reduction of the past medical expenses award in the specific amount of $130,286.90. (1 AA 123.) The hearing for the *Hanif* motion was initially scheduled for May 2, 2008, the earliest available date provided by the court clerk. (1 AA 192:19-21.)

1. Scripps Memorial Hospital Bills Reduced by $94,894.42

Evidence at trial demonstrated Scripps Memorial Hospital billed $122,841.07 for medical services provided to HOWELL. This information

[2] For Scripps Memorial Hospital, the declarant was the "Supervisor of Customer Service and Collections from Third Parties" at the hospital. For CORE Orthopedic, the declarant was the knowledgeable employee in the "Accounting Department of CHMB, a medical billing company which provides medical billing services for CORE Orthopedic Medical Center." (1 AA 132-137.)

was included in the *Hanif* motion. (1 AA 132-135; 139-146.) The Scripps Memorial Hospital bill is only six pages in length. (*Id.*)

Of this amount, HOWELL's medical insurer (Pacificare) paid $24,380.39. (1 AA 139-146, entries identified as ""HMO/PPO Payments"; 1 AA 132:25- 133:2, 23-27; 134:20-24.) Additionally, HOWELL paid $3,566.26. (1 AA 139-140 and 145-146, entries identified as "Patient Payment"; 1 AA 132:25- 133:23; 134:20-24.) The balance of the Scripps Memorial bills, amounting to **$94,894.42,** were waived or "written off" by Scripps Memorial. (1 AA 139-146, entries identified as "PPO/HMO/CMS/WC MANUAL"; 1 AA 133:4-7; 134:1-4, 26- 135:2; 135:12-18.) No lien has been asserted for this amount. (1 AA 135:12-18.) According to the declarant, supported by the submitted exhibits:

> No outstanding balance remains on Ms. Howell's account and no further collection will be pursued. Accordingly, Ms. Howell's account is considered closed.

(1 AA 135:16-18.)

2. CORE Orthopedic Medical Center Bills Reduced By $35,392.48.

Plaintiff's treating spine surgeon, Dr. Timothy Peppers, is affiliated with CORE Orthopedic Medical Center in Encinitas ("CORE"). Dr. Peppers' total bill for his treatment of HOWELL related to the accident

is $52,915.14 for the period from December 5, 2005 through August 1, 2007. (1 AA 136-137; 148-175.)

Per billing records for CORE for this period, the total amount "adjusted" by CORE, i.e., written off or waived, was **$35,392.48.** (1 AA 137:3-7; 148-175.) This amount was a contractual reduction agreed to between HOWELL's medical insurer and CORE Orthopedic. (1 AA 137:3-7.) Contrary to Appellant's assertion, **this waived or written off amount will never be sought, or collected, from HOWELL**. (1 AA 137:9-12.)

The combined amount written-off or waived by Scripps Memorial Hospital (**$94,894.42)** and CORE (**$35,392.48)** is **$130,286.90.** Accordingly, HAMILTON requested the trial court reduce the past medical expenses portion of the judgment by this written off amount. (1 AA 123-130.)

C. The *Hanif* Motion Was Continued Per Request by HOWELL.

The original hearing date for the *Hanif* motion of May 2, 2008 provided HOWELL with more than 10 weeks' notice (76 days). This notice period exceeded the minimum 75-day notice period required for summary judgment motions in California. *C.C.P.* §437c(a).

On April 4, 2008 HOWELL filed an *ex parte* application to continue the *Hanif* motion hearing date and re-open discovery. (1 AA 180-

189.) HOWELL claimed a sudden need to pursue discovery from her *own* healthcare providers (Scripps Memorial Hospital and CORE Orthopedic) and her *own* medical insurer (Pacificare), despite the fact she could have sought and obtained such records (as a patient and insured) at any time before or after the litigation. (1 AA 182.) This *ex parte* application marked the first appearance by counsel John Rice for HOWELL, who "associated in on the case principally to handle the post-trial motion on the *Hanif* issue." (5 RT 243:13-15.) The *ex parte* hearing date coincided with the expiration of a settlement demand previously forwarded by HOWELL on March 12, 2008. (1 AA 208.) HAMILTON filed opposing papers to the *ex parte* application on April 3, 2008. (1 AA 190-210.)

The *ex parte* hearing resulted in the trial court continuing the *Hanif* motion to May 19, 2008. (1 AA 211; 5 RT 253:23-28.) Counsel for HOWELL agreed the court had discretion to conclude the matter at one hearing or, if it wished, could entertain a second hearing. Counsel for HOWELL then proposed the following:

> [Mr. Rice for HOWELL]: That's a wise course, Your Honor. If maybe on the 25th [set for May 19, 2008 later in hearing] we set a hearing date to deal with the substantive law issues. **If after that, you determine** that a hearing should be held, then we can pick a date for that hearing, do the necessary discovery and come back and do the evidentiary side.

(5 RT 250:10-13, emphasis added.)

On another occasion prior to the *Hanif* motion hearing, counsel for HOWELL again voiced his agreement with the post-trial procedure and propriety of the motion. On April 18, 2008 HAMILTON noticed an *ex parte* hearing. (1 AA 221-0254.) During the hearing, counsel for HOWELL acknowledged:

> [Mr. Rice]: And I think we're going to hear the Hanif motion…on the 19th, I'm sorry. On the 19th, and **I think the court has approached this whole issue in a very rational way**, let's deal with the substantive-law issues.

(6 RT 259:25- 260, emphasis added.) Thus, counsel agreed the procedure followed by the trial court was not only acceptable, but "rational."

D. HOWELL Filed Her Opposition to the *Hanif* Motion

HOWELL filed her opposition to the *Hanif* motion on April 24, 2008. (2 AA 339-463.) Early in her brief, HOWELL admits her medical bills were satisfied:

> In this case, Plaintiff incurred $189,918.3 in charges the jury found were related to care necessitated by Defendant's negligence. **The bills were submitted to PacifiCare and the debts were satisfied pursuant to the contracts between Plaintiff and PacifiCare and between PacifiCare and the treatment providers.**

(2 AA 344:28- 345:3, emphasis added.)

Though the parties dispute whether the waived medical bills were ever "incurred" by HOWELL, she plainly admits all medical bills were "satisfied" pursuant to various contracts between the parties. *Id.*

HOWELL's admission of satisfaction is in accord with the declarations submitted by HAMILTON in support of the *Hanif* motion, which affirmed HOWELL's medical bills for the subject healthcare providers were satisfied and no outstanding balances (for past medical care) remained to be collected from HOWELL, or anyone else. (1 AA 132-175.)

HOWELL did not include any evidence with her opposition to the *Hanif* motion to counter the declarations and documentary evidence (medical bills and written off portions) submitted by HAMILTON. Again, it would appear to be a moot point given her admission of satisfaction of the medical expenses. Despite her presumed access and ability to obtain her *own* medical bills and medical insurance information, HOWELL failed to do so for the *Hanif* motion.

E. The *Hanif* Motion Was Heard on May 19, 2008

The *Hanif* motion was heard on May 19, 2008, some 12 weeks after it was filed by HAMILTON. (8 RT 270-335.) The hearing was lengthy and both sides were afforded extensive oral argument. *Id.* The hearing included a decision on a motion for new trial filed by HAMILTON.

The motion for new trial was denied by the court. (8 RT 272:13-17.) HAMILTON had filed a motion for new trial and a motion to set aside and vacate the judgment, based on the *Hanif* line of cases, in response to the trial court inadvertently entering judgment previously on

March 4, 2008. (1 AA 263-338; 2 AA 464-489.) The judgment was mistakenly entered after HAMILTON filed its *Hanif* motion, but prior to its hearing, thus HAMILTON preserved its procedural rights to modify the judgment accordingly. The trial court acknowledged the inadvertent entry when it stated at the 5/19/08 *Hanif* motion hearing:

> [The Court] I do understand that what happened in this matter was that the judgment, the proposed judgment, for whatever reason, was not sent to the defense for review before it got sent to the court.
>
> . . .[B]ecause of the way the that business office works, I was unaware that the Hanif motion had been filed at the time I got the judgment.
>
> . . . As I pondered the fact that the judgment was entered and we do have a Hanif motion and try to determine what's the best way to address the judgment itself, I'm thinking that the better procedure would be to leave the judgment in place now.
>
> If the defense is successful on their argument in any fashion then, and it results in a change in the judgment, we can make that change and I can *nunc pro tunc* it to the date that the judgment was initially signed.

(8 RT 271:28- 272:3; 272:7-9, 13-2.)

In response, co-counsel for HOWELL, Mike Vallee (who is also her husband), agreed with the Court:

> That seems like a fair way to do it. If there is an adjustment [to the judgment], go back to the date and adjust the interest including the judgment, that makes sense.

(8 RT 273:13-16.)

HOWELL's other counsel, Mr. Rice, also affirmed his agreement with the Court's stated intent as to the method by which the judgment could be modified pursuant to the *Hanif* motion:

> [The Court]: And does the plaintiff have any objection to proceeding in the manner in which the court has described?
>
> [Mr. Rice]: **We do not, Your Honor**. **I think that's the proper way to do it**. I think the defendant, having filed their new trial motion and identifying as a single ground for a motion for new trial, what we've been terming "the Hanif issue," I think that sort of wraps it all up.
>
> And the Court certainly does have the power to *nunc pro tunc* to revise the judgment back to the date that the judgment was first entered.

(8 RT 274:2-13, emphasis added.)

During oral argument on the *Hanif* motion, HOWELL referred the trial court to "in kind benefits" and contracts between HOWELL and her medical insurer. (8 RT 293:17- 294:3.) HOWELL also referred and objected to the declarations and evidence submitted by HAMILTON in support of the *Hanif* motion. The trial court heard all of HOWELL's arguments on the issue and even accepted a brief counsel had assisted on and filed in connection with the *Olsen v. Reid* case, *infra.* (8 RT 308:10-323:20.) At the conclusion of the lengthy oral argument, the trial court and counsel for HOWELL stated the following:

> [Court]: Gentlemen, I think we have enough on the record unless you feel that something else needs to be in.
>
> [Mr. Rice for HOWELL]: I don't think so, Your Honor.

> . . .
> [Court]: I'll take the matter under submission and I will try to get you something as soon as I can.
>
> And again, depending on what I decide, then we'll determine what's next. **If I feel that if I make a decision that warrants another hearing, then I'll schedule the hearing. If I make a decision that just warrants a reduction of some type, the it will be *nunc pro tunc* to the time the judgment is filed.** [March 4.].
> . . .
> [Mr. Rice]: The only caveat is, we only briefed the substantive law issues. **But I think the argument sort of covered most of what would be in the paper anyway.**

(8 RT 334:18- 335:14; emphases added.)

The trial court issued its Minute Order dated June 10, 2008 granting HAMILTON's *Hanif* motion in full. (2 AA 553.) Accordingly, the past medical expenses portion of the verdict was reduced by the amount requested by HAMILTON, *i.e.,* the "written off" amount, of $130,286.90. (1 AA 123.) HAMILTON served and filed a "Notice of Ruling" on or about July 3, 2008, advising of the new judgment amount of $559,691.73 (*nunc pro tunc* as previously stated by the trial court).[3] (2 AA 555-560.)

F. The Trial Court Considered "Evidentiary" Matters Submitted by HOWELL

As shown above, HOWELL argued evidentiary matters such as "in kind" benefits at the *Hanif* motion hearing. Notwithstanding,

[3] This amount is exclusive of statutory costs awarded to HOWELL pursuant to *C.C.P.* §1033.5.

HOWELL noticed an *ex parte* hearing for July 11, 2008--one month after the *Hanif* decision was issued--requesting reconsideration of the trial court's decision pursuant to the *Olsen v. Reid* case, *infra*. (3 AA 561-570.)

The court denied HOWELL's reconsideration request, noting it had already read the *Olsen* case and concluded it did not affect the decision on the *Hanif* motion. (9 RT 336:11- 337:16.) The court even advised counsel it had read the briefs filed in *Olsen*, along with other authority. (9 RT 344:23- 345:8.)

The remainder of the *ex parte* appearance was devoted to HOWELL's request to submit additional "evidence" regarding whether any balances were owed on accounts with the subject healthcare providers Scripps Memorial Hospital and CORE Orthopedic. (8 RT 340:9- 359:22.) HOWELL's counsel admitted at the *ex parte* hearing: "I don't know what CORE [Orthopedic] is going to do" with regard to whether any balance was due and owing on HOWELL's account. (9 RT 351:7-8.) HOWELL had no evidence at that time of any such balance. Apparently in an abundance of caution, the trial court permitted HOWELL to file evidence, if any, on this issue. (9 RT 353:7-27.)

On July 15, 2008 HOWELL filed a Declaration of Michael Vallee (co-counsel for HOWELL), Evidentiary and Procedural Objections, and a "Supplemental Briefing." (3 AA 571-590; 604-617.) According to a Minute Order issued August 14, 2008, the preceding documents were

deemed filed as of July 16, 2008. (3 AA 618.) The Minute Order also stated: "Attorney John Rice [for HOWELL] indicates to the Court that a further hearing is not necessary and is requesting that his supplemental be filed and made a part of the record." (3 AA 618.)

Also on July 15, 2008, HOWELL filed a Declaration of Lawrence Lievense, despite specific instructions by the trial court not to do so, as it would be deemed irrelevant to the *Hanif* motion ruling. (3 AA 591-603.)

III.

LEGAL DISCUSSION

A. *Hanif* Confirms Established Principles Which Preclude Double Recovery for Waived (As Opposed to Paid) Medical Bills

A damage award for past medical expenses in an amount greater than its actual costs "constitutes overcompensation." *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 641. The maximum amount a plaintiff can recover for medical services is the amount "expended or incurred for past medical services," even if that amount "may have been less than the prevailing market rate." *Id*. at 641. Put another way, a plaintiff "cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum." *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1290.

Hanif is the applicable and prevailing authority in California on this issue. In *Hanif,* the court proceeded to the heart of the matter: What constitutes the "reasonable value" of the medical expenses a plaintiff may recover? The court concluded the *recoverable* "reasonable value" could *not exceed* "the actual amount [plaintiff] paid or for which [plaintiff] incurred liability for past medical care and services." *Id*. at 640 (emphases added). In the context of *Hanif,* the "reasonable value" of medical services recoverable by that plaintiff could not exceed the amount actually paid by Medi-Cal to satisfy the medical bills. *Id.* at 643-644.

Hanif is in accord with the purpose of an award of damages, which is to compensate the plaintiff for the loss or injury sustained as a result of the tortfeasor's actions. The object is to restore the plaintiff as nearly as possible to his former position, without placing him in a better position than he would have been if the wrong had not been done. *Hanif, supra,* 200 Cal.App.3d at 641.

The grounds on which the trial court here reduced the *past* medical expenses damages complied with *Hanif.* The amount of special damages for *past* medical expenses recoverable by HOWELL was correctly found to be that amount which actually satisfied the debt and relieved HOWELL of any liability for the excess expenses. Absent plaintiff's liability for the waived portion of medical bills, there is an absence of the required "detriment" for which a plaintiff may recover. *See, Civil Code*

§3281 ("Every person who suffers detriment …may recover from the person in fault a compensation therefor in money, which is called damages.").

As discussed more fully below, *Hanif* acknowledged the collateral source rule and complied with the rule. *Id.* at 639-640. Specifically, the court declared "there is no question…that Medic-Cal's payment for all injury-related medical care and services does not preclude plaintiff's recovery from defendant, as special damages, of the amount paid." *Id.*

The collateral source rule is equally satisfied here. HAMILTON paid HOWELL for all amounts her medical insurer paid to her medical providers for all injury-related medical care and services. The amounts equal those accepted by the HOWELL's medical providers as payment in full. The collateral source rule was not violated merely by the trial judge examining *what* amount is to be paid to HOWELL. Rather, the question resolved in *Hanif* and in our action was *whether* that amount should be "more than the actual amount [plaintiff] paid or for which [plaintiff] incurred liability for past medical care and services." *Id.* at 640. As in *Hanif,* the trial court here said "no." The absence of California to the contrary affirms the trial court decision was correct.

B. Post-*Hanif* Cases Further Establish No Double Recovery Permitted for Waived Medical Expenses.

Hanif is not alone in establishing the propriety of excluding a plaintiff from recovering waived or "written off" medical expenses. Perhaps most notable, and most closely aligned with the instant action, is *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298. *Nishihama* extended the principles of *Hanif* to cases where the waiver of medical bills were due to agreement between the healthcare provider and the *private insurer* of plaintiff, not the government.

In *Nishihama,* the plaintiff was injured when she tripped on a sidewalk maintained by the defendant, City of San Francisco. *Id.* at 301. The jury awarded plaintiff approximately $20,000 for medical care costs, including approximately $17,000 for hospital care. The amount of $17,000 was the hospital's "normal rates" billed. *Id.* at 306.

The plaintiff was insured by private medical insurance provider, Blue Cross, which had a contract with the hospital. Under the contract, the hospital agreed Blue Cross would pay reduced rates for certain medical services to Blue Cross members and the hospital would accept Blue Cross's payment as payment in full for those services. *Id.* Accordingly, the hospital accepted $3,600 as payment in full for the $17,000 in expenses billed. *Id.* at 306-307.

The *Nishihama* court held that due to the contract between Blue Cross and the hospital, the plaintiff was obligated to pay the provider only $3,600. Citing *Hanif,* the court found plaintiff was entitled to the reduced amount of $3,600 for past medical expenses—not the $17,000 billed--because it represented a "sum certain to have been paid or incurred for past medical care and services." *Id.* at 306.

The unanimous ruling in *Nishihama* remains good law. It was decided in 2001, long after *Helfend v. Southern California Rapid Transit Dist.* (1978) 2 Cal.3d 1 (discussed below) and the establishment of the collateral source rule. Moreover, its reliance on *Hanif* was proper, as the Supreme Court later specifically let *Hanif* stand along with the possibility that *Hanif* applies outside the Medicaid context, which *Nishihama* so holds. *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, 611, fn.16.

Not only did *Nishihama* affirm *Hanif,* it extended the principle that a plaintiff should not recover more than actually paid to satisfy medical expenses to cases in which *private insurers* satisfy medical bills with a reduced amount. By doing so, *Nishihama* is in alignment with California statutes pertaining to detriment and the requirement of actual suffering for same before recovery. *Civil Code* §§ 1431.2(b)(1), 3281, 3282 and 3333. As a result, HOWELL's position that *Hanif* and its

progeny should be, or somehow is, limited to the context of a governmental "insurer" is without merit.

As an aside, the hospital lien asserted in *Nishihama* was a secondary issue and does not undermine the decision. Indeed, *Nishihama* is consistent on this issue with the Supreme Court in *Parnell, supra,* requiring that a collectible lien under the "Hospital Lien Act" be supported by an underlying debt by the patient. *See, Nishihama,* 93 Cal.App.4th 298, 307 and *Parnell,* 35 Cal.4th 595, 609. Similarly, a claim by HOWELL for recovery of medical expenses must be supported by an underlying debt by HOWELL to the healthcare provider. *Nishihama, supra,* 93 Cal.App.4th 298, 309. Based on the foregoing, the trial court did not abuse its discretion in following *Nishihama* and granting the *Hanif* motion filed by HAMILTON. *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1294. Accordingly, the decision should be affirmed.

C. Other Authority Affirms *Hanif* And Its Principles

Other cases confirm the viability and application of the principles established in *Hanif.* For example, the Third District in *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150 recognized the propriety of both *Hanif* and *Nishihama* for reducing medical specials verdicts. In *Greer,* the trial court denied the defendant's *in limine* motion to exclude evidence *at trial* of medical expenses that exceeded the amount paid on plaintiff's

behalf to his medical providers. However, the trial court stated its intention to "entertain" a post-trial motion by defendant to reduce the verdict if defendant provided evidence of reduced payments in satisfaction of the medical bills. *Id.* at 1154.

In examining the trial court's denial of the *in limine* motion, the appellate court noted the trial court had "informed defense counsel that … a post-verdict reduction of the jury's award of medical expenses might be justified" and the trial court had "made it clear that if the jury rendered an award that was excessive under *Hanif/Nishihama*, it would consider a post-trial motion to reduce the recovery." *Id.* at 1157. While concluding full medical expenses may be admitted *at trial,* the unanimous appellate court in *Greer* confirmed:

> *Nishihama* and *Hanif* stand for the principle that it is error for the plaintiff to *recover* medical expenses in excess of the amount paid or incurred. . . . Thus the trial court did not abuse its discretion in allowing evidence of the reasonable cost of plaintiff's care **while reserving the propriety of a *Hanif/Nishihama* reduction until after verdict.**

Greer, 141 Cal.App.4th 1150, 1157 (bold emphasis added).

Although *Greer* affirmed the propriety of a post-verdict *Hanif/Nishihama* motion, the special verdict form in *Greer* combined "lost earnings" and "medical expenses" on the "past economic loss" line amount. Thus, the appellate court concluded it would be "impossible to calculate a *Hanif/Nishihama* reduction" in that case. *Id* .at 1158. Due to the defective

special verdict form, the court ruled the defendant "forfeited" the right to assert a *Hanif/Nishihama* error on appeal. *Id*.[4]

Unlike *Greer,* we have no such defects with our special verdict form. (1 AA 118-119.) Despite the procedural errors by the *Greer* defendant, the principles in *Hanif* and *Nishihama* were soundly affirmed.

One year later in *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, the Third District again unanimously recognized *Hanif* and *Nishihama* for their holdings and application. The first line in the *Katiuzhinsky* opinion specifically cites the rule established in *Hanif* and *Nishihama* as follows: "An injured plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum." *Id.* at 1290. The court affirmed the rule as the backdrop for its decision when it declared: "We shall conclude that the trial court did not correctly apply *Hanif* and *Nishihama*." *Id.* at 1291. Thus, *Katiuzhinsky* affirmed *Hanif* and *Nishihama* as the underlying and established authority against which the facts of its case were compared and analyzed.

Specifically, some of the healthcare providers in *Katiuizhinsky* sold their accounts to a third party at a discount. *Id* at 1290. Although the medical providers wrote off the balance of the accounts, *the*

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[4] Another procedural defect in *Greer* was the hearing on defendant's *Hanif* motion occurred after the defendant filed his notice of appeal, thus the trial court was divested of jurisdiction.

plaintiff remained liable to the third party for the full amount of the bills under the arrangements. *Id.* The continuing liability of the plaintiff for the whole amount of the medical bills was the "crucial" factor that distinguished the case from *Hanif* and *Nishihama*. *Id.* at 1296. As a result, recovery by the plaintiff in *Katuizhinsky* of the fully billed amounts did *not* constitute overcompensation. *Id* at 1296. In addition, the trial court had excluded evidence of the full amount medical bills at trial, which also distinguishes the case from *Hanif, Nishihama,* and our case. *Id.* at 1295-1296.

Unlike *Katuizhinsky,* HOWELL is not liable for the bills waived by her healthcare insurer. (1 AA 131-175.) In addition, HOWELL's total medical expenses were presented to the jury at trial, not just the discounted amount. Although the unique facts in *Katuizhinsky* distinguish its application from our case, the case makes clear *Hanif* and *Nishihama* are the proper authority by which a special damages claim for past medical expenses may be reduced after trial where portions of said expenses have been waived or written off.

D. HOWELL Did Not Suffer "Detriment" For Waived Expenses

California *Civil Code* §3333 provides the measure of damages in tort cases is "the amount which will compensate for all the *detriment* proximately caused thereby…." (Emphasis added.) "Detriment"

is defined in *Civil Code* §3282 as "a loss or harm suffered in person or property."

Civil Code §3281 further clarifies one must actually "suffer[] detriment" before recovery can be obtained in the form of "money, which is called damages." Finally, *Civil Code* §1431.2(b)(1), which addresses the several liability of tort defendants, defines "economic damages" as "objectively verifiable monetary *losses* including medical expenses," among other *verifiable losses* to the tort claimant. (Emphasis added.) *See also, Emerald Bay Community Ass'n v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, 1093-94 ("Tort damages are the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.").

Alleged medical expenses that are waived or "written-off" by healthcare providers, and therefore are non-payable by the plaintiff, do not constitute "detriment." If never liable for the waived portions of medical bills, HOWELL cannot logically claim she "suffered" a "loss or harm" for those amounts. The waived portion of the medical expenses does not fall within the definition of "detriment" in *Civil Code* §3282. The lack of any suffering for the waived amounts also denies HOWELL the ability to recover "money" for such fictional amounts. *Civil Code* §3281.

The plainly worded statutes above were key to the concurring opinion of Justice Fybel in *Olsen v. Reid* (2008) 164 Cal.App.4th 200.

Justice Fybel confirmed the efficacy and propriety of *Hanif* and *Nishihama.* Justice Fybel wrote in part: "The principles explained and applied in *Nishihama* and *Hanif* are soundly based on California statutes—*Civil Code* sections 3281, 3282, 3333, AND 1431.2, subdivision (b)(1)—and the *Restatement Second of Torts,* section 911, comment h." *Id.* at 215. He then concluded both cases were correct in their findings for "limiting recovery by an injured plaintiff to the amount of *actual damages incurred,* as required by California statutes and as recognized by the Restatement Second of Torts." *Id.* at 216. Accordingly, HOWELL is not entitled to recover those portions of her medical bills waived or written off by her healthcare providers.

E. Criminal Restitution Cases Affirm *Hanif* and *Nishihama* As Prevailing Authority For The Exclusion of Waived Medical Expenses

The *Hanif/Nishihama* rule is applied in criminal restitution cases as well, further establishing its role as foundational authority to be addressed in all cases involving attempted recovery for waived medical expenses. In the recent case of *People v. Bergin* (2008) 167 Cal.App.4th 1166, the unanimous panel ruled as follows:

> [T]here is no reason why the *Hanif* principle—that 'an award of damages for past medical expenses in excess of what the medical care and services actually cost constitutes

> overcompensation'[citation]-- should not be applied in a criminal restitution case.

Bergin, 167 Cal.App.4th 1166, 1171-1172.

In *Bergin,* the convicted drunk driver defendant was ordered, as a condition of probation, to pay restitution to the victim in the amount of $36,900.30 for medical expenses. *Id.* at 1168. That figure was the amount which the victim's medical providers accepted as payment in full from the victim's healthcare insurer. The amount was highly discounted from the original bill of $138,667.03 for medical expenses. *Id.*

The crime victim in *Bergin* also filed a civil action against the defendant, in which she obtained a judgment of just over $90,000. Of that amount, $36,744.24 was for medical expenses (the approximate amount accepted by the health care provider as payment in full from the victim's healthcare insurer). *Id*. at 1168. The *Bergin* opinion acknowledged without criticism the civil trial court reduced the jury award of $129,000 for medical expenses down to $36,000 "in accordance with *Hanif." Id.*

The criminal trial court then followed suit at the subsequent restitution hearing, ordering the criminal defendant to pay only the amount which the medical providers accepted as full payment from the insurance company. *Id.* at 1169. Referencing *Penal Code* §1202.4(f), the appellate court concluded the criminal court "fully complied with the statute's mandate to 'order full restitution' of [the victim's] 'economic loss as a

result of [the defendant's] conduct.'" *Id.* at 1169. The court then determined the only question was whether the victim "incurred any economic loss" for medical expenses beyond the $36,000 the trial court ordered the defendant to pay her. *Id.* at 1170. The court affirmed the criminal court's order for the reduced amount, noting the healthcare providers agreed to accept as payment in full the reduced amounts Blue Cross (a private insurer) paid on the victim's behalf. *Id.*

Though a criminal case, *Bergin* affirmed *Hanif* and its rule limiting recovery by a plaintiff to amounts paid by a medical insurer in full satisfaction of medical bills, regardless whether a government payor or private insurer. *Id.* at 704. In closing, the *Bergin* court properly found "neither [the victim] nor her insurers incurred any economic loss beyond the amount identified in the trial court's restitution order" and, accordingly, the court found it "**impossible to see any basis for concluding the [victim] has not been '100 percent compensated' by the payment of the amount specified in the trial court's order**." *Id* at 1172 (emphasis added.) Notwithstanding the state constitutional requirement that criminal courts make victim restitution orders which are punitive in nature (to "impress upon a criminal offender that he must accept responsibility for his crime"), the *Hanif* /*Nishihama* rule is applied in crime restitution proceedings. *Cal. Const.,* art. I, §28; *People v. Clifton* (1985) 172

Cal.App.3d 1165, 1168; *People v. Bergin, supra,* 167 Cal.App.4th 1166, 1171.

As shown, criminal defendants convicted of heinous crimes such as murder or drunk driving are not liable for medical expenses waived by the victim's healthcare provider pursuant to *Hanif* and *Nishihama*. Surely, *civil* defendants such as HAMILTON, who are neither charged nor guilty of any criminal activity associated with the plaintiff's injuries, can be deemed worthy enough to also benefit from the *Hanif/Nishihama* rule in the final analysis of damages calculations. To deny such defendant the same benefit afforded to criminals who kill or maim their victims would violate all notions of justice and equal protection under the law. Therefore, the trial court decision to reduce the past medical expenses for the waived amounts should be affirmed.

IV.

PLAINTIFF HAS NOT PROVIDED AUTHORITY TO CONTRADICT THE *HANIF* AND *NISHIHAMA* RULINGS IN CALIFORNIA

According to *Hanif,* a damage award for past medical expenses in an amount greater than its actual cost "constitutes overcompensation." *Hanif, supra,* 200 Cal.App.3d at 641. HOWELL tries to circumvent this established doctrine by invoking the collateral source rule and various cases from California and other states. In the end, the effort falls short due to the lack of precedential value and application.

For example, HOWELL opens her appellate argument by citing *Holmes v. California State Automobile Assoc.* (1982) 135 Cal.App.3d 635. However, *Holmes* was decided on facts not relevant to the situation here and therefore is misplaced in this action.

In *Holmes,* the plaintiff's *own* automobile insurer sought to be relieved of its *contractual* duty under the policy to pay hospital bills incurred by the plaintiff. The carrier's position rested on the fact the medical bills had been paid and satisfied by Medicare. *Id.* at 637. The plaintiff's automobile policy obligated the carrier to "pay all reasonable medical expenses **incurred** by the insured" arising from an automobile accident. *Id.* (Emphasis added.) Because the insured was a Medicare recipient, her hospital bills were "paid directly to the hospital" by Medicare. *Id.* When the insured submitted the same bills to her automobile carrier for reimbursement, the carrier denied payment based on the argument the insured had not "incurred" the bills as required under the terms of the auto policy because of the satisfaction of the bills by Medicare. *Id.*

The "central question" in *Holmes* was whether the plain contractual language in the automobile policy required payment to the insured under those circumstances. *Id.* In *Holmes,* no analysis was performed regarding the application or non-application of the collateral

source rule. No analysis was performed whether a *judgment* could be reduced by an amount of waived or written-off medical expenses.

Rather, the *Holmes* court reasoned the legislative underpinning of Medicare requires payment by the government only for expenses which are "incurred" by a patient. *Id.* at 639. Because Medicare in fact paid the bills, it was axiomatic the plaintiff was deemed to have "incurred" the hospital expenses. By extension, it was reasoned the plaintiff "incurred" the bills within the meaning of the automobile policy language. Accordingly, the auto carrier was required, contractually, to pay the insured for the hospital expenses. *Id.* at 639. *See also, Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1077 ("[A]n insured is entitled to receive compensation in accordance with the policy terms, and an insurer cannot reduce the amount recoverable merely because [the insured] has collateral contracts or relations with third persons which relieve him wholly or partly from the loss against which the insurance company agreed to indemnify him.").

The contractual context of *Holmes* case is markedly different from our situation. HAMILTON has no contract with HOWELL promising to pay all bills "incurred." The contractual and quasi-fiduciary relationship that exists between insurer and insured does not exist here. *Vu v. Prudential Property & Cas. Ins. Co.* (2001) 26 Cal.4th 1142, 1151. Rather, the relationship between HOWELL and HAMILTON is governed by

general tort law in California. This arena does not include an obligation for a tortfeasor to reimburse an injured party for items never suffered or actually incurred.

The *Holmes* court refers to cases from "other state courts" which have "similarly interpreted the term 'incurred' in the context of insurance contract." *Id.* at 639. The *Holmes* court closed its analysis by citing another California case in which an insurance contract was found "not ambiguous" and "may appropriately be interpreted to mean that the insurer 'intended to pay for medical expenses incurred…whether or not the insured was legally obligated to pay them.'" *Id* at 640 [citing *Feit v. St. Paul Fire, etc. Ins. Co.* (1962) 209 Cal.App.2d Supp. 825, 828.) *Holmes* clearly demonstrates it is limited to the determination of the meaning of the term "incurred" in the context of certain insurance policies.

In contrast to the auto carrier in *Holmes*, HAMILTON does not dispute HOWELL is entitled to recover for medical bills in the amount *paid* by her healthcare insurer. *Holmes, supra,* 135 Cal.App.3d at 638-639. No deduction is sought for what her carrier paid, thus the collateral source rule does not come into play. *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1 (discussed below). Rather, HAMILTON seeks only to withhold reimbursement for those amounts actually waived by HOWELL's medical providers, amounts for which she will never be liable.

Thus, the *Holmes* opinion is instructive on the meaning of the term "incurred" in the context of automobile insurance policies. It is not instructive, nor applicable, to the issue of whether HAMILTON is responsible to over-compensate HOWELL for medical bills never paid nor incurred by anyone.

V.

THE TRIAL COURT RULING DOES NOT VIOLATE THE COLLATERAL SOURCE RULE

A. Scope of Collateral Source Rule

The collateral source rule neither applies, nor is offended, by the trial court ruling on the *Hanif* motion. In California, the collateral source rule concerns itself with preventing a defendant from receiving the benefit of amounts *paid* on behalf of a plaintiff by a third party, most commonly the plaintiff's insurance carrier. *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6. In stark contrast, the economic damages portion of HOWELL's verdict was reduced only by the amount waived, or written off, by HOWELL's healthcare providers. HOWELL was paid in full for the amounts paid by her medical insurer. HAMILTON sought no reduction or credit for the paid amounts. Thus, the collateral source was not triggered, nor violated in this action.

B. No California Authority Provides Waived Medical Expenses Constitute Collateral Source Benefits

Hanif and *Nishihama* are valid, controlling authority for excluding written off medical bills from recovery. HOWELL has provided no California authority for the proposition that written off medical bills may be considered a "collateral source" recoverable by a plaintiff.

Indeed, *Hanif* and *Nishihama* both acknowledge the collateral source rule and demonstrate its irrelevance to written off medical bills, as opposed to amounts paid by an insurance carrier or other source. *See, Hanif, supra,* 200 Cal.App.3d 635, 639-641 (plaintiff's recovery for Medi-Cal's payment for injury-related care and services "follows from the collateral source rule…which is not an issue in this case") and *Nishihama,* 93 Cal.App.4th 298, 306-307 (plaintiff entitled to recover from defendant tortfeasor the reasonable value of medical services rendered to plaintiff, "including the amount paid by a collateral source," but such recoverable amount does not include the amount of the discount agreed to by the healthcare providers and plaintiff's medical insurer). In an attempt to refute this authority, HOWELL only produces foreign case law, none of which is binding or applies herein.

HOWELL relies heavily on the Florida decision of *Goble v. Frohman* (2005) 901 So.2d 830. However, *Goble* turned exclusively on that court's interpretation of the meaning of the phrase "collateral sources"

found within a Florida statute. *Id.* at 831-832. No similar statute exists in California.

The Florida statute analyzed in *Goble* specifically permits a "collateral source" to be used as an offset against a larger jury verdict for the total billed amount. *Id.* at 832. The focus on the Florida statute in the *Goble* court's conclusion is evident, as the court was eager to satisfy the **Florida Legislature's** "intent to reduce 'the litigation costs that arise when insurers are required to pay damages beyond what the injured party actually incurred.'" *Id.* at 832. The *Goble* court specifically approved the lower court's written opinion, which also stated "the allowance of a windfall would undermine the *legislative purpose* of controlling liability insurance rates because 'insurers will be sure to pass the cost for these *phantom damages* on to Floridians.'" *Id.* (Emphases added.)

After looking solely to the Florida statute, the majority *Goble* opinion then concludes, without any meaningful analysis whatsoever, "that the contractual discounts fit within the *statutory* definition of collateral sources." *Id.* at 833. In sum, *Goble* is inapplicable on its facts and is not binding authority.

Interestingly, the "specially concurring" opinion in *Goble* recognized *Hanif* as the standard in California for limiting damages for medical expenses to those actually incurred by the plaintiff. *Id.* at 834. Other states with similar common law rules limiting damages for medical

expenses to the discounted amounts were also cited, including Kansas, Louisiana, and Pennsylvania. *Id.* at 834.

Although *Goble* does not apply to the instant action, its characterization of healthcare provider discounts as "phantom damages" certainly rings true here. *Id.* at 832, 833. Such "damages," if that term may even be applied loosely, are indeed phantom, for they never constitute any detriment to the plaintiff. *Civil Code* §§ 3282, 3333.

Another foreign case relied on by HOWELL comes from Virginia, *Acuar v. Letourneau* (2000) 260 Va. 180. *Acuar* focused on the evidentiary issue of whether the trial court properly permitted evidence of "written off" medical expenses to the jury. *Id.* at 183. The court determined it was incorrect for the jury to receive such evidence. A new trial was ordered as the result of an unrelated prejudicial admission of an accident report at the original trial. *Id.* at 188. Since a new trial was already ordered, the appellate court ruled the plaintiff may present evidence of the full amount of the reasonable medical expenses, without reduction for the written off amounts. *Id.* at 193.

As discussed below, the jury in this action never received evidence of HOWELL's medical insurer, or the amounts waived by HOWELL's medical providers. Only the judge received such evidence post-trial and after the jury's dismissal from the case. Accordingly, the

evidence-focused opinion in *Acuar* has no relevance to the facts in the case at bar.

Plaintiff includes a Hawaii case titled *Bynum v. Magno* (2004) 101 P.3d 1149 in her "Compendium of Foreign Authorities," but makes no reference to the case in her opening brief. The lack of incorporation is not surprising, for the 3-2 split decision specifically purports to rely on its state's "own case law," which directly conflicts with *Hanif* . *Id.* at 1155-1156. *Bynum* specifically held a plaintiff's recoverable medical expenses in Hawaii are not limited to the amount paid by Medicare and Medicaid. *Id.* at 1162. This flatly contradicts *Hanif* and is therefore not authority for our action. *Hanif, supra,* 200 Cal.App.3d at 643-644 (the "reasonable value" of medical services recoverable could not exceed the amount actually paid by Medi-Cal to satisfy the medical bills).

C. Public Policy Supports Broad Application of the *Hanif* Principles.

Though California does not have a collateral source statute like Florida (examined in *Goble, supra)*, which explicitly permits reduction of damage awards by the amounts "which have been paid for the benefit of the claimant…from all collateral sources," the policy grounds for such statute do exist in California. *Goble,* 901 So.2d 830, 832.

For example, excluding waived medical costs as recoverable "damages" helps reduce litigation costs that would otherwise increase when insurers are required to pay damages beyond what the injured party actually incurred. *Goble, supra,* at 832. Controlling rising liability insurance rates is an established goal in California. *Id. See also, Cal. Insurance Code* §§ 1861.01, *et seq.* and *Wolfe v. State Farm Fire & Cas. Ins. Co.* (1996) 46 Cal.App.4th 554, 564 (Prop. 103 enacted to "ensure that insurance is fair, available, and affordable for all Californians.").

Reduced liability insurance costs result in lower premiums for the purchasing public. Conversely, mandating liability insurers to pay for *voluntarily* waived medical expenses adds to the overall cost borne by liability insurers and, ultimately, the public who purchases such policies. Thus, affirming *Hanif* and *Nishihama* herein serves the public policy of reducing insurance costs, reducing litigation costs, and defining the realistic damages "incurred" by plaintiff HOWELL. *Civil Code* §3333.

Moreover, mandating payment of such non-existent "damages" by liability carriers does nothing to lower *medical* insurance premiums. Medical insurers typically seek reimbursement from plaintiffs the amount paid by the insurer to satisfy the medical bills. The source of such reimbursement is typically the settlement or judgment paid by the defendant's liability carrier. Thus, the net result is neutral from the

perspective of the medical insurer, which may receive reimbursement in whatever amount was paid to satisfy the bill.

D. The *Helfend* Case Cannot Be Stretched to Apply Here.

HOWELL relies most heavily on *Helfend v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 1 in support of her argument that the waived medical expenses constitute a collateral source to which she is entitled. Upon examination, *Helfend* falls far short in its facts and law to qualify its application to our case.

Helfend decided the narrow issue of whether it was proper for the trial court to exclude evidence that plaintiff's medical bills were partially *paid* by a collateral source. *Helfend,* 2 Cal.3d at 6, 17. The Supreme Court determined the collateral source rule applied to the *paid* amounts by plaintiff's insurer and, therefore, affirmed the trial court's decision to preclude *evidence* of such payment *at trial*. *Id.* at 13-14.

The *Helfend* court went out of its way to limit the scope of its ruling: "We expressly do not consider or determine the appropriateness of the [collateral source] rule's application in the myriad of possible situations which *we have not discussed or which are not presented by the facts of this case*." 2 Cal.3d at p. 6, fn. 3 (Emphasis added). "Cases are not authority for propositions not considered." *In re Marriage of Cornejo* (1996) 13

Cal.4th 381,388. The glaring absence of certain "propositions" in *Helfend* undermine its alleged relevance to our situation.

Specifically, the Supreme Court identified the narrow issue to be determined in *Helfend* as follows:

> We must decide whether the collateral source rule applies to tort actions involving public entities and public employees in which the plaintiff has received benefits from this medical insurance coverage."

Helfend, 2 Cal.3d at 6. The "benefits" received in *Helfend* were actual payments made by plaintiff's medical insurer to his healthcare providers. *Id.* at 5.

Helfend did not examine whether amounts "written off" by healthcare providers pursuant to contracts with medical insurers are subject to the collateral source rule. Nor did *Helfend* examine whether a plaintiff may recover the "written off" portion of medical bills. Because the only reduction in HOWELL'S verdict was that amount "written off" by HOWELL's healthcare providers, *Helfend* does not apply.

We note *Hanif* specifically refers to *Helfend. Hanif* first acknowledges *Helfend* and its standing for the collateral source rule, then properly holds the collateral source rule "is not an issue" in determining waived medical expenses for which a plaintiff is not liable may not be recovered by a plaintiff. *Hanif,* 200 Cal.App.3d at 639-641. *Nishihama* similarly recognized the collateral source rule and found it inapplicable,

though the opinion does not mention *Helfend* by name. *Helfend,* 93 Cal.App.4th at 306.

E. Other Collateral Source Case Law Cited by HOWELL Fails to Directly Apply.

The *gross* amount of $189,978.63 for past medical expenses was submitted to the jury at trial. HAMILTON has never sought to reverse the submission of such evidence. This is a critical distinction from the collateral source rule cases relies upon by HOWELL, which focus on the evidentiary aspect of the collateral source rule, *i.e.,* whether *evidence* of insurance or collateral source payments should be submitted to a court or jury.

For example, plaintiff cites *Lund v. San Joaquin Valley Railroad* (2003) 31 Cal.4th 1, 8-10. *Lund* determined whether the plaintiff could submit evidence he was not eligible for workers' compensation benefits. HOWELL also cites *Smock v. State of California* (2006) 138 Cal.App.4th 883, 888, which determined whether it was proper to exclude evidence of *payments* by an insurer. HOWELL also relies on *McKinney v. California Portland Cement Co.* (2002) 96 Cal.App.4th 1214, in which the court determined evidence of plaintiff's pension benefits could be submitted into evidence.

None of these cases determined the issue involved here, which is whether HOWELL may recover the amounts "written off" by her healthcare providers and for which she faces no liability. These cases do not prevent a reduction of the verdict by the corresponding amount of write offs.

HOWELL also refers often to *Arambula v. Wells* (1999) 72 Cal.App.4th 1006 in her general discussion of the collateral source rule. *Arumbula,* decided before *Nishihama,* made clear its holding was "to promote the charitable impulse." *Id.* at 1008. The case did not deal with written off medical expenses or their recovery by a plaintiff.

Arambula held gratuitous cash payments made to the plaintiff by his family-owned business to cover lost wages during his recovery from accident-induced injuries fell within the collateral source rule, and thus were recoverable from the defendant. *Id.* at 1014. The holding rested upon the worthy goal of promoting "gratuitous payments (including moneys to cover lost wages) by family or friends to assist tort victims through difficult times," because "charity begins at home" and "there it should stay." *Id.* at 1008.[5] That is all well and good, but has nothing to do with the instant case.

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[5] *Arambula* specifically cites *Hanif, supra.* However, *Hanif* is cited for the portion of that holding related to allowing monetary recovery by a minor plaintiff for gratuitous in-home care provided by plaintiff's

Here, recovery by plaintiff for the written off portion of the medical bills would not promote the worthy goal of "charity" envisioned by *Arambula.* According to HOWELL, the practice of writing off medical expenses is the result of agreements between medical providers and medical insurers, not the plaintiff. However, plaintiffs receive medical treatment and services regardless of write offs agreed to by their medical insurers and medical providers. In addition, the waived medical expenses are something which plaintiff never received, in contrast to the gratuitous salary payments actually paid to plaintiff in *Arambula.*

In sum, if *Hanif* and *Nishihama* were ignored, and payments were mandated by a tortfeasor (or his liability insurance carrier) for written off medical expenses, the benefit of such payments would not flow to the medical provider or the medical insurer who voluntarily created the discount scenario. Nor does it promote charity from "home" or other gratuitous behavior. The purported benefits which accrue to healthcare providers and medical insurers (as argued by HOWELL but for which no evidence was properly submitted to the trial court) remain undisturbed when the written off amounts are excluded from recovery for special damages, in accordance with *Hanif* and *Nishihama*. Thus, *Arambula* and its reference to foreign authority have no bearing on this action.

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parent, not the written off medical bills issue. *Arambula,* 72 Cal.App.4th at 1011.

F. HOWELL Received the Benefit of the Full Medical Bills At Trial And Possible Impact on the General Damages Award.

Notwithstanding the irrelevance of *Helfend* to the issue of waived or written off medical expenses, the Supreme Court's encouragement of submitting full medical bills to the jury for potential assistance in calculating general damages was satisfied in our case. This provides yet another reason to affirm the trial court's decision reducing the medical specials verdict post-trial.

Helfend noted the collateral source rule "performs entirely necessary functions in the computation of damages," as "the cost of medical care often provides both attorneys and juries in tort cases with an important measure for assessing the plaintiff's *general damages*." 2 Cal.3d at 11 (emphasis added). Thus, while medical bills may be submitted to the jury for review, the court may preserve its right to reduce the medical expenses portion of the judgment after trial to the amount accepted by the healthcare provider as payment in full.

Nishihama illustrates this two-step procedure in action. The *Nishihama* court permitted evidence of the full amount of the medical bills at trial. The past medical expenses portion of the judgment was later reduced post-trial to the discounted amount accepted by the plaintiff's healthcare providers as full payment from Blue Cross. *Nishihama,* 93 Cal.App.4th at 309. *Nishihama* opined that allowing *evidence* of the total

medical expenses helped provide a more accurate picture "of the extent of plaintiff's injuries than did the specially negotiated [or reduced] rates obtained by Blue Cross." *Id.* Accordingly, the *Nishihama* plaintiff presumably reaped a larger general damages award due to the submission of all medical bills at trial, but was properly prohibited from obtaining a double recovery for the actual written off medical bills.

Though not sought by HAMILTON, this aspect of *Helfend* and *Nishihama* is satisfied here as well. (1 AA 73-107.) The jury awarded plaintiff $200,000 for "past *non*-economic loss," including "physical pain, mental suffering, loss of enjoyment of life," etc. (1 AA 119, 178.) This large award may be partially the result of the total past medical expenses having been submitted to the jury, in the amount of $189,978.62. (1 AA 119; 178.) Therefore, plaintiff received the full benefit of the past medical expenses to the extent they may have been referenced by the jury to calculate the large general damages award. Accordingly, neither *Helfend* nor *Nishihama* are offended on this point.

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VI.

THE PROCEDURE BY WHICH THE SPECIAL VERDICT WAS REDUCED WAS PROPER AND CONSENTED TO BY APPELLANT

A. The Post-Trial Procedure to Reduce the Past Medical Expenses Portion of the Verdict Is Specifically Authorized in California

HOWELL specifically agreed to, and recommended, a post-trial procedure to determine whether the past medical expenses verdict should be reduced. As a result, HOWELL cannot complain the procedure was employed by the trial court. More importantly, California case law makes it clear an award for past medical expenses may be reduced *after* trial by either the trial court or a reviewing court.

In *Nishihama, supra,* the Appellate Court concluded the trial court "erred" in permitting the jury to award plaintiff the full medical bills rather than the discounted amount accepted by the healthcare providers as payment in full. 93 Cal.App.4th 298, 309. Accordingly, the Appellate Court "simply modif[ied] the judgment to reduce the amount awarded as costs for medical care." *Id.*

The case of *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150 confirmed the trial court can make such modifications as well. In *Greer,* the trial court denied a motion *in limine* to preclude submission of the non-discounted medical bills, but "made it clear that if the jury rendered an award that was excessive under *Hanif/Nishihama*, it would consider a post-trial motion to reduce the recovery." *Id.* at 1157. The Appellate Court concluded "the court's ruling was correct." *Id.* In affirming not only the

substantive holdings of *Hanif* and *Nishihama,* the *Greer* court specifically affirmed the trial court's authority and intent to hold a post-trial motion to reduce the verdict in accordance with those cases. *Id.* As discussed above, the post-trial motion in *Greer* was doomed as the result of procedural defects, which had no relation to the *Hanif/Nishihama* rule. *Id.* at 1153, 1156.

The recent case of *Olsen v. Reid, supra,* also confirms a post-trial hearing in the trial court is proper on the *Hanif/Nishihama* issue, wherein it stated:

> 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) to hold the hearing.**

Olsen, 164 Cal.App.4th at 217-218 (emphasis added).)

As shown above, not only does California authority permit the post-trial motion that occurred in this case, HOWELL specifically consented to and agreed with the procedural course taken by the trial court. (1 RT 67:13-16; 68:10-13, 27-28; 69:1-6. 6 RT 259:25- 260:1-3. 8 RT 273:13-16; 274:2-13.) Accordingly, the trial court decision can be

confirmed as one which followed precedential protocol for such a determination.

B. HAMILTON Objects to the Defective and Improperly Submitted Post-Hearing Matter By HOWELL

The record submitted by HOWELL to this Court contains irrelevant, defective material that should not be considered for any purpose. (3 AA 571-617.) No hearing was conducted on said material at the specific request of HOWELL's counsel. (3 AA 618.) HAMILTON objects to the extraneous material as follows:

1. Declaration of Michael Vallee

Paragraph 4 (3 AA 572:7-12): The entire paragraph, which refers to a purported telephone conversation between Mr. Vallee and someone only identified as "Mario," is hearsay, irrelevant, and lacks foundation. *Evidence Code* §§ 350, 1200. Notwithstanding, Mr. Vallee notes he was advised HOWELL has a "zero balance" at Scripps Memorial Hospital. (3 AA 572:7-8.)

Paragraph 5 (3 AA 572:13-17): The entire paragraph, which refers to a purported telephone conversation between Mr. Vallee and a person from CORE Orthopedic, is hearsay, irrelevant, and lacks foundation. The

conclusion regarding the billing records (3 AA 572:16-17) is speculation and lacks foundation.

2. Letter From Michael Vallee to CHMB Dated 7/14/08 (3 AA 574)

The letter is hearsay and irrelevant.

3. Purported Bills (3 AA 577-585)

The document not authenticated, lacks foundation, and is irrelevant. Moreover, it purports to reflect bills incurred after the conclusion of trial in this matter. (3 AA 577.) HOWELL was awarded, and has been paid, $150,000.00 for "future economic damages" including medical expenses. (1 AA 178; 219.)

4. Declaration of Lawrence Lievense (3 AA 591-603)

This declaration is irrelevant, hearsay, and was submitted by HOWELL contrary to the instruction of Judge Orfield. (9 RT 349:4-23; 350:7-22; 355:19- 356:3; 359:6-20.)

5. Plaintiff's Supplemental Briefing (3 AA 608-617)

This filing is irrelevant and was not heard at the trial court. The arguments rely upon hearsay (3 AA 610:12-26). A separate portion

also relies upon hearsay and irrelevant testimony from declarant Lawrence Lievense regarding fictional "in kind" benefits. (3 AA 613:15- 616:2.)

VII.

CONCLUSION

A plaintiff cannot recover for phantom damages never incurred. HOWELL has been fully compensated for both past and future medical expenses. To pursue and recover more than the amount actually paid for medical services is little more than a fraud on the court, society, and the insurance premium-buying public. Accordingly, the trial court decision reducing the judgment by $130,286.90 should be affirmed.

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Respectfully submitted,

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