IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

D053620

GIN053925

REBECCA HOWELL,

Plaintiff and Appellant,

v.

HAMILTON MEATS & PROVISIONS, INC.,

Defendant and Respondent.

Appeal from the Superior Court of San Diego County
The Hon. Adrienne Orfield, Judge

APPELLANT'S ANSWER TO AMICUS CURIAE BRIEF BY THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES AND PERSONAL INSURANCE FEDERATION OF CALIFORNIA

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INTRODUCTION

The amicus curiae brief submitted by the Association of California Insurance Companies and Personal Insurance Federation of California adds little to the arguments and authorities already asserted by Respondent. Like Respondent, they seek to apply *Hanif v. Housing Authority,* (1988) 200 Cal.App.3d 641 to all personal injury cases, ignoring the contractual and statutorily governed relationships between patients/Plaintiffs, their health care providers and private health insurers.

Initially, they ignore the procedural, evidentiary and factual flaws in the trial record and invite the court to address the substantive law issues concerning the Collateral Source Rule. However, in doing so they ignore the meaningful difference between the terms, "paid" and "incurred" in the context of what a personal injury Plaintiff may recovery as damages for past medical specials. While acknowledging cash portion of payments from private health insurers to a health care provider to satisfy the debts incurred by patients/plaintiffs, Amicus Curiae ignores the other, "in-kind" benefits paid as part of alternative rates of payment contracts negotiated by insurers and providers.

Finally, Amicus Curiae attempts to use criminal restitution cases to support a universal limitation on all civil Plaintiffs' personal injury recovery

as to what was "paid" for past medical care.

Amicus Curiae's efforts run contrary to the factual and legal foundations of the contractual relationships between patients, insureds and health care providers, and straight into the wall of the Collateral Source Rule. A wall with it's own solid and strong foundation in California's statutory and case law. The Collateral Source Rule upholds the public policy of assuring that tortfeasors do not benefit from an injured Plaintiff's personal financial planning to protect themselves through obtaining private health insurance. The Collateral Source Rule does so through the practical application of an evidentiary bar excluding evidence of payments from collateral sources and substantive rule of law allowing an injured Plaintiff recovery of the full reasonable cost/value of past medical care. *Arambula* v. *Wells,* (1999) 72 Cal.App.4th 1006, 1015.

DISCUSSION

I.
HANIF v. HOUSING AUTHORITY SUPPORTS RECOVERY OF THE FULL AMOUNT OF PAST MEDICAL SPECIALS INCURRED

The fundamental misdirection asserted by Amicus Curiae is set forth on page 3 of their brief:

> The issue in this case is whether the defendant is liable not only for medical expenses that the Plaintiff or her insurer has paid, but for phantom "expenses" that *no one* paid or ever will pay. Those unpaid medical expenses are not really "expenses"

> at all because no one is obligated to pay them - they are the difference between what a healthcare provider agreed to accept as full payment for medical services and the larger amount that the healthcare provider quotes as the price of the services.

While correctly stating the central issue in the case, the balance is plainly wrong- both factually and legally.

As demonstrated in Appellant's opening and reply briefs, Plaintiff is legally responsible to the past medical providers for the full amount of the charges incurred. *Parnell v. Adventist Health System/West*, (2005) 35 Cal. 4th 595, 609; *Mercy Hospital and Medical Center v. Farmers Insurance Group of Companies*, (1997) 15 Cal. 4th 215; *City and County of San Francisco v. Sweet*, (1995) 12 Cal. 4th 105, 117; *Holmes v. California State Automobile Association*, (1982) 135 Cal. App. 3d 635, 638-639; California Insurance Code §10133(a). After providing medical care to a patient, health care providers do not submit "quotes as the price of services". Rather, they produce bills based on charge master rates that are applicable to all patients for whom care is provided. These bills represent a patient's debt to the provider. The exception being patients who are public benefit beneficiaries.

A patient with the foresight, protects himself/herself by purchasing health insurance and thus indemnity for the charges they incurred for health care, subject to coverage, co-pays and deductibles. This insurance is part of

the patient private financial planning. *Valley Bank of Nevada v. Superior Court,* (1975) 15 Cal. 3d 652, 656; *Britt v. Superior Court,* (1978) 20 Cal. 3d 844,856.

Health insurance companies meet their indemnity obligations to their insureds by negotiating alternative rates of payment contracts with health care providers. These contracts often call for cash payments that are less than the full charged amounts, but also include other consideration ("in-kind benefits") paid to the health care provider's to obtain lower cash payments. While health care providers and private health insurers may negotiate freely between themselves as to the cash and "in-kind" considerations to be paid by the health insurer to discharge the patient/insured's debt, the patient must first incur the charges before any debt to the provider or indemnity obligation of the insurer arises. California Insurance Code §10133(a).

In the context of relationships between the patient, insurer and provider, Amicus Curiae's claim that a Plaintiff does not incur the full charges/bills by a provider is fallacious. Equally false is the contention that the difference between the cash payments and full charges are "phantom expenses that no one will ever pay". To the contrary, these amounts are paid fully as part of the negotiated alternative rate of payment contracts.

California law is clear that there is a meaningful difference between the terms "paid" and "incurred" in the context of the recovery in personal injury actions. For instance, a prevailing party in a civil action is entitled to recover certain costs. California Code of Civil Procedure §1055.5 (c)(1) states explicitly that, "Costs are allowable if incurred, whether or not paid". The same is true in the recovery of past medical specials in a tort case, a Plaintiff may recover the full costs of the charges incurred, so long as they are reasonable, without regard to whether they have been paid or not. *Helfend v. Southern Cal. Rapid Transit Dist.*, (1970) 2 Cal.3d, 1, 11-12; *McKinney v. California Portland Cement Company*, (2002) 96 Cal. App. 4th 1214; *Smock v. State of California*, (2006) 138 Cal. App. 4th 883; *Arambula v. Wells*, (1999) 72 Cal. App. 4th 1006.

Hanif v. Housing Authority stands for this same proposition. A Plaintiff may recover in past medical damages what was "paid or INCURRED" *Hanif*, supra, at 640; *(emphasis added)*. Because the Plaintiff in *Hanif* was a Medi-Cal beneficiary, she had not incurred any debt for the medical care received as a matter of law. (Welf. & Inst. Code, § 14124.70 et seq.; 42 C.F.R. 447.15). As such, her recovery against the tortfeasor responsible for the injury was limited to what was paid by Medi-Cal. Where the Plaintiff actually incurs debts for the past medical care claimed,

their recovery has no such limits. [1]

To the contrary, as a matter of substantive law, Plaintiff may recover the full cost of the medical care, subject to it being reasonable, while evidence of any payments to providers by private health insurers are excluded. These are the two prongs of the Collateral Source Rule. *Helfend* at 11-12; *Arambula v. Wells*, at 1015. The Collateral Source Rule supports the strong public policy of holding tortfeasors responsible for the full extent of the damages they cause. *Bush v. Superior Court*, (1992) 10 Cal. App. 4th 1374, 1387, citing *Helfend, supra*, 2 Cal. 3d at 10-14, and *Philip Chang & Sons Associates v. La Casa Novato*, (1986) 177 Cal. App. 3d 159, 170.

Amicus Curiae's effort to shift the benefit of Plaintiff's purchase of private indemnity insurance to the tortfeasor, while simultaneously limiting a Plaintiff's recovery to only the cash portion of the collateral payment should be soundly rejected.

II.

CRIMINAL RESTITUTION RECOVERY DOES NOT IMPLICATE THE COLLATERAL SOURCE RULE

Amicus Curiae seeks support in two recent cases addressing victim restitution in criminal proceeding, *People v. Millard* , (Jun 22, 2009) 175

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[1] The exception being government entity cases in which the court is provided discretion to reduce the verdict for past medical bills by what was paid by collateral sources to satisfy the debts incurred if the court finds such a reduction equitable. C.C.P. §998.

Cal, App.4th 7 and *People v. Bergin* (2008) 167 Cal. App.4th 116. Neither case reached the central issues presented in this case - the meaningful difference between the terms "paid" and "incurred", the contractual relationships between patients/plaintiffs, health insurers and health care providers, and the application of the evidentiary and substantive prongs of the Collateral Source Rule.

In *Bergin*, the court relied upon *Hanif, supra*, to support limiting a criminal victim's restitution to what was "paid" by his health insurance to providers for necessary medical care, rather than the total billed charges. *Bergin, supra,* at 171-172. However, there was no discussion of *Hanif's* context as an unearned public benefit case, nor the holding in *Hanif* that recovery of past medicals is not limited to what was "paid", but in the alternative includes medical expenses "incurred". There is no discussion of the contractual relationships between the victims/patients, health insurers and health care providers and that providers receive more than just cash payments under alternative rates of payments contracts negotiated between insurers and providers. There is no discussion of either the evidentiary or substantive law prongs of the Collateral Source Rule.

In *People v. Millard, supra*, this court also limited a victim's restitution to what was "paid" by his private health insurance, relying on

Bergin, supra, and it's citation to *Hanif, supra.* Both *Millard* and *Bergin, supra,* also cite to *In re Anthony M* (2007) 156 Cal. App.4th 1010, a case involving victim restitution in a juvenile offender proceeding. The trial court there was found to have erred by awarding victim restitution for medical expenses in excess of the amount actually paid by Medi-Cal. (*Id.* at 1172). *In re Anthony*, like *Hanif*, was a case involving public benefits (Medi-Cal). As a matter of law the patient/victim incurred no debts for the medical care received (Welf. & Inst. Code, § 14124.70 et seq.; 42 C.F.R. 447.15) and there was no dispute over what the health care providers received as 'payment" from Medi-Cal. Thus, limiting recovery to what was "paid" was proper.

Apparently, the parties in *Bergin* and *Millard* did not raise the issues of *Hanif's* distinguishing public benefit cases from those in which the patient/victim actually incurs debts for medical care. It is a basic tenant of law that, "Cases are not authority for propositions not considered." *People v. Banks*, (1959) 53 Cal. 2d 370, 389; *Peterson v. Lamb Rubber Co.*, (1960) 54 Cal. 2d 339, 343 (a decision has no value as precedent as to an undisputed, unchallenged proposition).

Similarly, there was no dispute in *Bergin* or *Millard* as to what was "paid" by the victim health insurer's for medical services. In this case, the

issue is disputed and central to resolving the questions presented. Appellant contends that the alternative rates of payment contracts between insurer and providers call for payments of both cash and other in-kind benefits - which constitutes value to the health providers equal to the full charges incurred. Respondent has proffered no evidence to the contrary.

If a finder of fact concludes than what was "paid" by a health insurer to a health care provider to discharge the medical expense debt includes consideration (cash and in-kind benefits) totaling the full charged amounts, than recovery of the full charges is consistent with the holding of both *Bergin* and *Millard* that a victim may recover the total of what was actually paid. *Bergin, supra,* at 1170-1172, *Millard, supra,* at 28-29.

It is also notable that in victim restitution hearing, the trial judge has broad discretion in fixing the amount. *People v. Baker*, (2005) 126 Cal. App.4th 463, 470. Thus, in *People v. Hove* ,(1999) 76 Cal. App. 4th 1226, the court upheld a trial court's award of the full billed medical expenses, although the victim was a Medi-Cal beneficiary and the court recognized that he therefore had not incurred any personal liability for these debts. *Hove, supra,* at 1268, 1272-1273. The trial court exercised its discretion in determining the amount of restitution, taking into account the fact that the victim was in a vegetative state and the future costs of care would far

exceed the restitution ordered. *Id* at 1274-1275.

Neither *Bergin*, nor *Millard* are inconsistent with the outcome advocated by Appellant. Acknowledging that where providers enter into alternative rates of payment contracts with health insures, the providers receive full value (cash and in-kind benefits) in satisfaction of the debts incurred by patients, affirms public policy interest of extending health insurance coverage to as many members of the public as possible. California Health & Safety Code §1342.6; California Insurance Code §10133.6, 10133(b).

The Collateral Source Rule, which is not addressed in either *Bergin* or *Millard* , works to assure that personal injury victims see the benefit of their financial investment in health insurance and that tortfeasors do not get the benefit of these efforts. *Bush v. Superior Court*, (1992) 10 Cal. App. 4th 1374, 1387, citing *Helfend, supra*, 2 Cal. 3d at 10-14, and *Philip Chang & Sons Associates v. La Casa Novato*, (1986) 177 Cal. App. 3d 159, 170.

Unlike victim restitution proceedings, in personal injury cases, the court does not exercise discretion to determine what medical expenses a Plaintiff can recover. The court does not have discretion to apply the Collateral Source Rule selectively nor balance a victims need for future care against how much is awarded for past specials. The application of the

holdings in *Bergin* and *Millard* should not be extended beyond the context of victim restitution proceedings.

III.

LIMITING EVIDENCE AT TRIAL TO WHAT WAS "PAID" IN CASH, WHILE EXCLUDING EVIDENCE OF OTHER FORMS OF PAYMENT AND THE TOTAL REASONABLE VALUE OF THE PAST MEDICAL COSTS WOULD BE ERROR

Amicus Curiae advocates adoption of a blanket rule to limit the evidence at trial to solely what was paid in cash by private health insurers to providers, to the exclusion of all other evidence. (Amicus Curiae Brief, 13-17). Such an effort is misguided.[2]

This position has been addressed and rejected by several courts, most recently in *Olsen v. Reid,* (2008) 164 Cal.App.4th 200.

> Reid cross-appeals, arguing it was error for the trial court to permit the jury to hear evidence of the full measure of *Olsen's* medical damages. We squarely reject this argument. Even the cases holding that a Plaintiff is entitled to the lesser amount of damages - those incurred rather than billed (and we do not decide that Reid was entitled to such a hearing) - have approved of the jury hearing evidence as to the full amount of Plaintiff's damages. "There is no reason to assume that the usual rates provided a less accurate indicator of the extent of Plaintiff's injuries than did the specially negotiated rates obtained by Blue Cross. Indeed, the opposite is more likely to be true." (*Nishihama, supra,* 93 Cal.App.4th at p. 309; see also *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1157 [46 Cal.Rptr.3d 780].) We therefore find no

[2] This argument was never raised by Respondent in the trial court, nor in Respondent's brief. There is no cross-appeal by Respondent.

abuse of discretion in the trial court's denial of the motion.

Olsen, supra, at 204. See also, *Katiuzhinsky v. Perry*, (2007) 152 Cal.App 4th 1288, 1295-1296 ["Thus, regardless of whether Defendants were entitled to a *Nishihama*-type reduction of the medical damage award, there was no basis in law to prevent the jurors from receiving evidence of the amounts billed, as they reflected on the nature and extent of Plaintiffs' injuries and were therefore relevant to their assessment of an overall general damage award"].

The universal rejection of this approach is not surprising. Limiting evidence and recovery in personal injury cases to what was paid in cash by collateral private health insurers to satisfy a Plaintiff's medical debts would dramatically change the carefully constructed substantive and procedural laws governing personal injury recoveries, including:

- Rendering both the procedural and substantives prongs of the Collateral Source Rule meaningless;
- Rendering the substantive law governing recoverable past medical specials set forth in CACI 3903A meaningless; [Plaintiffs are entitled to recover the "reasonable cost" of the past medical services provided to them as the result of a tortfeasor's negligence.];

- Rendering the requirement that the cost of past medical expenses be proved, "reasonable", moot. In fact, such evidence would have to be excluded since it does not evidence the amount paid in cash by the health insurer. "Reasonable costs/value" is a measure of the dollar value for the health care services in the community in which they are rendered. These costs are set forth in provider charge masters of rates. No health care provider or qualified expert will testify that the cash payments by an insurer's represent the "reasonable cost/value" of the health care provided because this is simply not true;
- In adjusted rates of payment contracts in which a health care provider negotiates for the right to "balance bill" for additional cash, for instance through perfecting a hospital lien pursuant to California Civil Code §3045 [as implicitly approved of in *Parnell v. Adventist Health System/West*, (2006) 35 Cal.4th 595, 611], a Plaintiff's recovery would be subject to a lien for amounts that he/she was precluded from recovering from the tortfeasor; and
- Creating disparate classes of Plaintiffs in personal injury

> cases, depending on whether a Plaintiff has private health insurance or not. A Plaintiff not eligible for public benefits with no health insurance would recover the full cost of the medical expenses, [Even if such a patient negotiated a discounted rate, this rate could not be used, "for any other purpose" as a matter of statutory law. Bus. & Prof. Code § 657(C)]. Whereas a Plaintiff with health insurance would recover only an amount equal to the cash portion of the payments made by his insurance carrier. Such a result would raise serious due process and equal protection concerns.

In her concurring opinion in *Olsen v. Reid*, (2008) 164 Cal.App.4th 200, Justice Fybel made clear the dramatic shift that will follow if the court upholds a result advocated by Respondent and Amicus Curiae:

> In the modern medical setting, paperwork abounds. There are a variety of private, public, and supplemental insurance requirements and conditions, a range of negotiating groups, copayment requirements, provider agreements, contractual and statutory liens, subrogation claims, reimbursement provisions, and statutory rights, both state and federal, that surround every visit to a doctor or hospital. Phrases such as "network," "nonnetwork" and "balance billing" are increasingly used. This complicated and delicate scheme includes legislation specifically designed to work within the Collateral Source Rule (see, e.g., Civ. Code, §3333.1;

> Gov. Code,§985, subd. (f)), while at the same time re16cognizing that the measure of damages "is the amount which will compensate for all the detriment proximately caused." (Civ. Code, §3333). Disastrous anti-consumer consequences could result if a court were to issue an opinion contrary to the legislative scheme which now surrounds a rule which was originally judge-made.

Olsen, supra, at 212-213.

"If other modifications or limitations to... [the Collateral Source Rule] ... are warranted, their creation is best left to the Legislature." *Smock* v. *State of California,* (2006) 138 Cal.App.4th 883, *Helfend, supra*, at 13; *Olszewski v. Scripps Health,* (2003) 30 Cal.4th 798, 827.

CONCLUSION

Like in *Olsen*, the trial record in this case does not support the court's reduction of the jury's verdict for past medical expenses, which can be reversed and remanded based upon evidentiary, factual and/or procedural grounds. The court need not reach the substantive law issues.

However, should the court reach the substantive law issues, the time has come to make clear that the Collateral Source Rule, it's procedural and substantive law prongs and public policy, is indeed the law in California. *Hanif's* limitation of recovery in public benefit cases should

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not be extended beyond that context.

Dated: August 18, 2009

Respectfully submitted,

By: _____
John J. Rice
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CERTIFICATE OF COMPLIANCE PURSUANT TO THE

CALIFORNIA RULES OF COURT, RULE 8.204(c)

Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing brief is proportionally spaced, has a typeface of 13 points, is double-line space, and based upon the word count feature contained in the world processing program used to produce that brief (Word Perfect version 12), contains 3928 words.

Dated: August 18, 2009

John J. Rice

Rebecca Howell v. Hamilton Meats & Provisions, Inc., et al.
Court of Appeal of the State of California, Fourth Appellate District,
Division One, Case No.: D053620
SDSC Case No: GIN053925

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I, Kathy Aragon, am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 2333 First Avenue, Suite 201, San Diego, California 92101. On August 18, 2009, I served the foregoing document(s) described as:

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__X__ (STATE) I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 18, 2009, at San Diego, California.

Kathy Aragon