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Recovery In A Personal Injury Lawsuit: What Is Admissible At Trial?

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Commentary

Recovery In A Personal Injury Lawsuit: What Is Admissible At Trial?

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[Editor's Note: The author is an Associate with Gray • Duffly, LLP in Encino, Calif. Visit www.graydufflylaw.com for more information. Copyright 2012 by Rene Faucher. Replies to this commentary are welcome.]

In 1998, an Appellate Court first described limitations on what medical expenses a personal injury plaintiff could recover. A number of court decisions have been rendered since then describing what evidence is admissible at trial on this issue. This is the story of *Hanif* and its progeny.

In *Hanif v. Housing Authority of Yolo County* (1988) 200 Cal. App. 3d 635, the Third Appellate Court of Appeal held that a plaintiff's recovery of medical expenses was limited to the amount actually paid by Medi-Cal (California's Medicaid), where the plaintiff was never in any danger of becoming liable for the full medical bill. The First Appellate District Court of Appeal decided in *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298 that the plaintiff's recovery for medical treatment was limited to the amount that their private health care insurer paid to the medical provider and not the amount billed by the provider under its customary rates.

The question of whether federal Medicaid law, which limits healthcare provider reimbursement, preempts California statutes permitting medical providers to obtain liens for the full charges for services against personal injury claims, judgments, or settlements of Medi-Cal beneficiaries was considered by the Supreme Court in *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798. The Court held that state law was preempted and because the provider may no longer assert a lien for the full cost of its services, the Medi-Cal beneficiary

may only recover the amount payable under Medi-Cal as his or her medical expenses in an action against a third-party tortfeasor.

In 2006, the Third Appellate District addressed the scenario where the medical bills were paid for by the plaintiff's employer and what was actually admissible at trial. The *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150 decision explained that the plaintiff was entitled to admit into evidence the full amount of the usual and customary billing as a basis for the jury to make the assessment of general damages (pain and suffering). The court then reserved the decision on the propriety of a reduction until after the verdict. This opinion also described procedural requirements including the request for a special verdict form separating out all of the elements of the plaintiff's economic loss, including a separate entry for the plaintiff's past medical expenses, to effectively segregate these elements of damages so the reduction of damages are preserved for post-trial determination.

The intervention of a third party in purchasing a medical lien does not prevent the plaintiff from recovering the amounts billed by the medical provider for care and treatment. This was the opinion of the Third Appellate District in *Katiuzhinsky v. Perry* (2007) 152 Cal. App. 4th 1288 as long as the plaintiff legitimately incurs those expenses and remains liable for their payment. The court distinguished *Hanif/Nishihama* because, in the *Katiuzhinsky* case, the plaintiff remained fully liable for the amount of the medical provider's charges for care and treatment.

On August 18, 2011, the California Supreme Court addressed the issue of whether a plaintiff can recover

the amount of the healthcare provider's bills or the amount paid by the health insurer in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. The Court concluded that the plaintiff could only recover the amount paid by the health insurer pursuant to its prior agreement with the healthcare provider. What is not clear from the *Howell* decision is whether a plaintiff can admit into evidence the full amount of the healthcare provider's bills as opposed to the lower amount paid by the plaintiff's insurance company.

In *Howell*, the defendant moved in limine to exclude evidence of medical bills that neither the plaintiff nor the health insurer had paid. The trial court denied the motion ruling that the plaintiff could present the full medical bills to the jury and any reduction to reflect payment of reduced amounts would be handled through a post-trial *Hanif* motion. The Supreme Court stated: we have seen, a medical care provider's billed price for particular services is not necessarily representative of either the cost of providing those services or their market value. The Supreme Court explained that evidence of that amount (actually paid) is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial. The decision went on to say that the evidence of the full billed amount is not itself relevant on the issue of past medical expenses. We express no opinion as to its relevance or admissibility on other issues, such as non-economic damages or future medical expenses. (The issue is not presented here because the defendant, in this Court, conceded it was proper for the jury to hear evidence of plaintiff's full medical bills.) Significantly, this decision does not expressly overrule the *Greer* opinion.

Plaintiff's counsel may attempt to admit the full medical bills into evidence as a way to show the severity of the plaintiff's injuries, the significance of the medical care or possibly corroborating the expert's projections of future medical care costs. The defense's opposition should indicate that the plaintiff must lay a sufficient foundation for a claim the full medical bills actually reflect the reasonable cost of medical care. The plaintiff's medical expert may try to establish the

reasonableness of the full bills but as the *Howell* opinion discusses in great detail, the full bills may just be numbers pulled from the air. The defense may request a medical expert's opinion that the full medical bill is fair and reasonable, and subject to a hearing outside the presence of the jury and the court's determination the expert has sufficient knowledge to such an opinion.

In the first appellate decision since the Supreme Court decided *Howell*, the Fifth Appellate District decided *Sanchez v. Strickland* (2011) 200 Cal. App. 4th 758 and concluded that *Howell* does not extend to amounts gratuitously written off by a medical provider and are therefore recoverable. The opinion also gives a good description of how to calculate a reduction in a verdict because the employer's negligence commonly referred to as the *Witt v. Jackson* offset generally stated as multiplying the workers' compensation benefits by the percentage of the jury verdict attributable to economic damages.

In the latest decision on the issue of recoverable medical expenses, the Second Appellate District applied *Howell* to Workers' Compensation payments of medical bills in *Sanchez v. Brooke* (March 8, 2012) 204 Cal. App. 4th 126. This opinion restricted recovery to the amount of the bills paid. This decision is also based on Labor Code 4600 which prohibits attempts to seek payment from the injured worker for medical treatment above the reasonable fee established by the fee schedule.

Therefore, a plaintiff can only recover the amount of the medical bills actually paid by Medi-Cal (*Hanif* and *Olszewski*), private insurance (*Nishahama* and *Howell*), the employer (*Greer*) and Workers' Compensation (*Sanchez v. Brooke*). Only the amount of the medical bills actually paid are admissible unless the plaintiff can convince the court the full medical bill is admissible for another purpose (*Howell*). The plaintiff is not prevented from recovering the entire medical bill that remains due and payable even if the lien was sold to a third party (*Katiuzhinsky*) or if the bill was gratuitously written off (*Sanchez v. Strickland*). ■

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