S179115

IN THE
SUPREME COURT OF CALIFORNIA

REBECCA HOWELL,

Plaintiff and Appellant

vs.

HAMILTON MEATS & PROVISIONS, INC.

Defendant and Respondent.

After A Decision By The Court of Appeal
Fourth Appellate District (Division One)
Case No. DO53620
(Superior Court Case GIN053925; The Hon. Adrienne Orfield)

OPENING BRIEF ON THE MERITS

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I.

INTRODUCTION

A. The Collateral Source Rule Must Be Protected

The long-standing collateral source rule must be protected. The collateral source rule should not be abolished or weakened, but rather it should be enforced and strengthened. Allowing plaintiffs to recover the windfall of what their health care insurers **paid** on their behalf does just that. Plaintiffs may recover the benefit of their thriftiness for purchasing insurance, by actually putting in their pockets what their insurers **paid** their medical care providers. While this is a no strings attached, free and clear windfall for plaintiffs, this is the law and it is just.

However, in her attempt to classify medical expenses never paid or owed by anyone as a "collateral source benefit" recoverable as damages under California law, Plaintiff-Appellant REBECCA HOWELL ("Howell") has unsheathed her sword in an aggressive campaign to dismantle the collateral source rule, leaving behind a tattered rule, unrecognizable under any California precedent. Even counsel for the Consumer Attorneys of California admits the appellate court in this action "restated" the collateral source rule. *See*, Scott Sumner, *An Explanation of the Collateral Source Rule*, DAILY JOURNAL, Dec. 4, 2009. Defendant-Respondent HAMILTON MEATS & PROVISIONS, INC. ("Hamilton") must now seek the Supreme

Court's assistance in erecting a shield around the collateral source rule to protect it from this onslaught.

Under the collateral source rule, "if an **injured party** receives some compensation for his injuries from a source wholly independent of the tortfeasor, ***such payment*** should not be deducted from the damages which plaintiff would otherwise collect from the tortfeasor." *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal. 3d 1, 6 [emphases added.] **The focus of the collateral source rule is clearly on the plaintiff** and what the plaintiff receives from independent sources, such as health insurers. **The arguments of Howell focus on everyone but herself.** The *Helfend* court forged the collateral source rule as a shield *for* plaintiffs, but now the Court needs to shield the rule itself *from* overzealous plaintiffs.

B. No Detriment To Plaintiff

A plaintiff is only entitled to recover in tort for "detriment" suffered. Cal. *Civil Code* §3281. The object of a compensatory damages award is to make plaintiff "whole." A plaintiff should not be put in a better position than if no injury had occurred. While Hamilton concedes Howell is entitled to a windfall under the collateral source rule, Howell is not entitled to a "super windfall" that would result from awarding plaintiffs phantom medical expenses never paid or owed to anyone. Fictional expenses, which amounts are neither received as "compensation" from her

health insurer nor "paid" by her or any third party on her behalf, do not constitute "detriment" under California law. Thus, plaintiff is not entitled to recover these amounts.

C. Proper Procedures Were Followed

In the underlying proceedings, the trial court correctly applied the collateral source rule to Howell's damage award, both in evidence and substance. In compliance with the evidentiary aspect of the collateral source rule, the trial court correctly excluded any mention of "insurance" in front of the jury throughout the entire trial. The jury was properly allowed to see the full amount of medical expenses to assess the extent of Howell's injuries and likely used this number as the basis for determining the amount of noneconomic damages. Thus, Howell was privy to a windfall in the noneconomic damages category as well.

The appropriate setting in which to address a reduction of the jury award to include only amounts "paid" or "compensation" received is a post-trial hearing. In a post-trial hearing, the trial court fully complied with the substantive aspect of the collateral source rule. The trial court reduced the medical damages award to the amount of "compensation" Howell received for her injuries from her health insurer. The trial court did not deduct any "payments" made by Howell or her health insurer. While this "double recovery" constitutes a windfall to Howell, Howell was rightfully

entitled to these payments pursuant to the collateral source rule and was so awarded.

D. "Negotiated Rate Differential" Is Not Damages

The newly created term "negotiated rate differential" is a fiction. It does not exist in law and it does not exist in reality. It exists only in the fertile minds of those who may unjustly benefit from it. It is not a detriment to an injured party and is not recoverable. It is a "nondetrimental variant." If the Court does not shield the collateral source rule from this affront, a slippery slope of increasingly greater and greater damage awards will ensue.

The issue of what constitutes recoverable damages under the collateral source rule most certainly would extend beyond medical expenses into other areas of damages. For example, why not let plaintiffs recover the "negotiated rate differential" between the "sticker price" of a car and what was actually **paid**? Why not let plaintiffs recover lost wages for advertised salaries, not what they were actually **paid**? Why not make the "list price" or "rack rate" the measure of all damages? Why not make fictional damages the norm and actual harm the fiction? Why stop? The answer is simple. If you do not stop at what is actually **paid**, then the only limit on fictional damages is the insatiable appetite of those who seek them.

E. No Recovery Of A "Nondetrimental Variant"

As the old English Proverb goes, "[h]e invites future injuries who rewards past ones." Such will be the case if the Court accepts Howell's attempts to profit under the guise of "compensation." Allowing plaintiffs to recover medical expenses which are a "nondetrimental variant" will have the crippling effect of increased litigation, higher insurance premiums, judicial inefficiencies, and heightened business costs. Accordingly, the Court of Appeal decision holding these phantom medical expenses to be "benefits" within the collateral source rule should be reversed. Hamilton respectfully requests the Court's assistance in upholding and protecting the integrity of the collateral source rule.

II.

ISSUES ON WHICH REVIEW HAS BEEN GRANTED

(1) Is the difference between the gross medical bills and the actual amount voluntarily accepted by the medical provider as payment in full from a plaintiff's healthcare insurer—dubbed the "negotiated rate differential" in the *Howell* decision--a collateral source under the collateral source rule?

(2) Did the trial court follow proper procedure in determining the reduction of the past medical specials portion of the verdict?

III.

RELEVANT FACTS AND PROCEDURAL HISTORY

A. Hamilton *In Limine* Motion Is Denied

Prior to trial, Hamilton filed a motion *in limine* seeking to exclude the introduction of evidence at trial of the "written off" or illusive portions of the medical bills. (1 AA 73-107.) The motion was heard on January 29, 2008 by Superior Court Judge Adrienne Orfield. (1 RT 64:17-69:6.) The court denied the motion, but specifically reserved its right to determine *post-trial* whether the written off portions of the medical bills would be deducted from the past medical expenses award. (1 RT 67:13-16.)

Counsel for Howell specifically agreed to a post-trial procedure 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 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's 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 *gross* amount of medical expenses as reflected on the medical bills in the amount of $189,978.63. (2 RT 117:15-118:5; 3 RT 195:16-25.) Howell received a generous general damages award arguably based partially upon the gross amount of the medical bills when the jury awarded $200,000 for *past* non-economic (general) damages. (1 AA 178, 219.)

B. Post-Trial "*Hanif*" Motion Filed by Hamilton

After trial by previous agreement, 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 gross amounts billed by their respective medical providers, the amounts written off or waived by the medical providers, the zero balance of the accounts,

and that neither provider would pursue Howell for the written off amounts in any manner. (1 AA 123-176.) [1]

In its *Hanif* motion, Hamilton cited California authority to reduce the *past* medical expenses award by $130,286.90, the amount written off by the medical providers of Howell pursuant to agreement with her medical insurer. (1 AA 123.) The hearing for the *Hanif* motion was initially scheduled for May 2, 2008 by the trial court. (1 AA 192:19-21.)

1. SCRIPPS MEMORIAL HOSPITAL BILLS REDUCED BY $94,894.42

Evidence at trial demonstrated Scripps Memorial Hospital billed the gross amount of $122,841.07 for medical services provided to Howell. This information was included in the *Hanif* motion. (1 AA 132-135; 139-146.)

Of this amount, Howell's health 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

[1] 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.)

Memorial bills, amounting to **$94,894.42,** was 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 or will be 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 GROSS BILLS REDUCED BY $35,392.48.

Howell's spine surgeon, Dr. Timothy Peppers, is affiliated with CORE Orthopedic Medical Center ("CORE") in Encinitas, California. Dr. Peppers' gross bill for his treatment of Howell related to the accident was $52,915.14. (1 AA 136-137; 148-175.)

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. (1 AA 137:3-7.) Contrary to Howell's allegation, **this waived or written off amount will never be sought or collected from Howell**. (1 AA 137:9-12.)

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

C. Howell Requested Continuance of the *Hanif* Motion

The original hearing date for the *Hanif* motion of May 2, 2008 provided Howell with more than 10 weeks' notice (76 days). On April 4, 2008, Howell filed an *ex parte* application to continue the *Hanif* motion and re-open discovery. (1 AA 180-189.) At that time, attorney John Rice "associated in on the case principally to handle the post-trial motion on the *Hanif* issue" for Howell. (5 RT 243:13-15.)

The *Hanif* motion was continued to May 19, 2008. (1 AA 211; 5 RT 253:23-28.) Howell acknowledged the discretion of the court to conclude the matter at one hearing, or a second hearing if necessary. (5 RT 250:1-13.)

At an April 18, 2008 *ex parte* hearing, counsel for Howell repeated his agreement with the post-trial procedure and propriety of the *Hanif* motion. (1 AA 221-0254.) Specifically, counsel stated:

> [Mr. Rice]: And I think we're going to hear the Hanif Motion . . . 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.)

D. Howell Admits Her Medical Bills are Paid in Full

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 extinguished:

> 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.)

Howell's admission of satisfaction is in accord with the declarations submitted by Hamilton in support of the *Hanif* motion, which affirmed Howell's gross medical bills for Scripps Memorial and CORE were satisfied with no remaining balances to be collected from Howell, or anyone else. (1 AA 132-175.)

Howell did not submit any evidence in the trial court to rebut the declarations and documentary evidence (medical bills and written off portions) submitted by Hamilton. It is 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 provide any evidence she faced any risk on the waived portions of the gross bills.

E. The *Hanif* Motion Was Granted By The Trial Court

The trial court heard the *Hanif* motion 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 the denial of a motion for new trial filed by Hamilton. (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. 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.)

Co-counsel for Howell (her husband, Mike Vallee), specifically agreed with the trial court on this point when he stated:

> 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 also agreed with the trial court's proposed method of modifying the judgment 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 entertained all of Howell's arguments on the issue and even accepted an additional brief on which Howell's counsel had assisted in the *Olsen v. Reid* case, *infra.* (8 RT 308:10-323:20.) At the conclusion of the lengthy oral argument, Howell's counsel voiced satisfaction with the matters submitted to the trial court:

> [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 the *Hanif* motion in full. (2 AA 553.) 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).[2] (2 AA 555-560.)

F. Howell's Motion for Reconsideration Denied, But Additional Evidence of Medical Bill Balances Requested

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 the reconsideration request, noting the *Olsen* case had been considered and determined non-consequential to the *Hanif* motion. (9 RT 336:11- 337:16.) The court even advised counsel it had read the briefs filed in *Olsen* and 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 and CORE. (8 RT 340:9- 359:22.) Howell's counsel admitted at the *ex parte* hearing: "I don't know what CORE is going to do" with regard to whether any balance was due and owing on Howell's account. (9 RT 351:7-8.) Howell provided 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.)

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

On July 15, 2008 Howell filed a Declaration of Michael Vallee (co-counsel and husband of Howell), Evidentiary and Procedural Objections, and a "Supplemental Briefing." (3 AA 571-590; 604-617.) Howell also 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.)

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 counsel 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.)

G. The Court of Appeal's Decision

On November 9, 2009, the Court of Appeal reversed the superior court's decision on the *Hanif* motion. *Howell v. Hamilton Meats & Provisions, Inc.* (2009) 179 Cal.App.4th 686 ("*Howell* decision"). The Court of Appeal held the difference between the gross billed amount and the amount accepted by Howell's health providers in full satisfaction of the bills from Howell's health insurer were a collateral source. The Court of Appeal disregarded *Hanif* and *Nishihama, infra,* as authority for their holdings that a plaintiff cannot recover more than what is actually paid to satisfy medical bills.

The Court of Appeal also disagreed with the *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, which held a trial court is authorized to use the post-verdict motion procedure to determine plaintiff's recovery of economic damages for past medical expenses. *Howell,* 141 Cal.App.4th at 820.

IV.

APPLICATION OF THE COLLATERAL SOURCE RULE IN CALIFORNIA

A. The Collateral Source Rule Must Be Protected

The long-standing collateral source rule must be protected and upheld. In California, the collateral source rule is applied to prevent 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 *Helfend*, the Supreme Court described the operation of the collateral source rule as follows:

> [I]f an **injured party** receives some **compensation** for his injuries from a source wholly independent of the tortfeasor, such **payment** should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor. [*Id.* at 6, emphases added.]

Evident from this description is the historical focus on "compensation" and "payment" to or on behalf of an "injured party" as the

key feature of an applicable collateral source. This essential characteristic of what comprises a collateral source in California springs from the earlier Supreme Court case of *Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347, where this Court described the rule as follows:

> Where a person suffers personal injury or property damage by reason of the wrongful act of another, an action against the wrongdoer for the damages suffered is not precluded nor is the amount of damages reduced by the receipt by him of **payment** for his loss from a source wholly independent of the wrongdoer. [*Id.* at 349, emphasis added.]

The rule enunciated in *Starley* rested upon citation to an even earlier Supreme Court case, *Peri v. Los Angeles Junction Railway Co.* (1943) 22 Cal.2d 111, 131 (sum *paid* to plaintiff by his insurance carrier while unable to work due to injury caused by the negligence of the defendant could not be deducted from the damages awarded to plaintiff). It is clear the collateral source rule in California originates from the principle that amounts *paid* to a plaintiff from their own insurer, or some other source independent of the defendant, shall not be deducted from a plaintiff's recovery.

There is one essential exception (among other statutory and common law exceptions described below) to the payment element, that being gratuitous benefits provided (and sometimes even paid) to a plaintiff. The rationale for applying the rule in gratuity cases is simply a decision to

benefit the plaintiff and promote charitable acts in general. *See, Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 662 and *Arambula v. Wells* (1999) 72 Cal.App.4th 1006 (promoting "charity" by holding gratuitous cash payments to plaintiff by his family-owned business to cover lost wages during his recovery were a collateral source). The principle has no application here.

In strict compliance with California's focus on the payment or compensation element of the collateral source rule, the past medical expenses portion of Howell's verdict was reduced only by the amount contractually waived, or written off, by Howell's medical providers. This amount was never subject to collection because the medical providers had previously agreed—prior to Howell's admission for services—to only recover a certain amount for the services rendered. (2 AA 344:28- 345:3).[3] The *pre-existing agreement* between Howell's medical providers and her medical insurer means Howell was never at risk for the gross amount billed by the providers.

After trial, Hamilton paid to Howell *the full amount paid* by her medical insurer to satisfy the bills. In other words, Howell was reimbursed directly for the amounts paid by the collateral source (her medical insurer)

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[3] According to Howell's counsel: "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.)

to her medical providers. While this clearly created a windfall for Howell, it is proper and consistent with the past application of the collateral source rule in California. *Hamilton neither sought nor received a reduction of this amount.* Thus, the collateral source rule was not violated in this action.

Despite already benefitting from a windfall, Howell wishes to magnify the long-established scope of the California collateral source rule to cover alleged "damages" never incurred or paid by her, her medical insurer, or anyone else. This would effectively create a "super windfall" for plaintiffs. However, no applicable authority supports such a radical change.

If the Court accepts Howell's theory, it will greatly expand the concept of economic "damages" in personal injury cases in this state. No previous authority in California, whether statutory or common law, has demonstrated an inclination to create an entirely new class of recoverable damages for speculative, gross billings by medical providers which are pre-determined by contract (in this case) to be non-chargeable, non-collectible and non-recoverable from plaintiff or her insurer. Extinguishment of such amounts is contractual, not compensatory, and thus does not implicate the collateral source rule. *Helfend,* 2 Cal.3d 1, 6. Review of relevant California authority illuminates the impropriety of Howell's position.

B. *Hanif* Confirms The Collateral Source Rule Does Not Permit Recovery for Waived (As Opposed to Paid) Medical Bills

If the collateral source rule were to allow plaintiffs to recover amounts they never paid, it would result in plaintiffs receiving compensation over the amount necessary to restore them to their pre-injury status. For the same reason, it would result in defendants being deterred in excess of the amount of deterrence that is otherwise necessary. Defendants would be penalized for a loss not incurred. The development of the *Hanif/Nishihama* reduction rule and procedure in California, as applied in this case, strikes a balance between these competing interests and restores each side to their proper status within the law of damages and punishment. We first examine *Hanif,* decided in 1988.

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]. According to the court, "'[r]easonable value' is a term of ***limitation***, not of aggrandizement." *Id.* at 641.[emphasis added]. In *Hanif,* the "reasonable value" limit was the amount actually paid by Medi-Cal to satisfy plaintiff's 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. *Restatement (Second) of Torts*, §901. 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 in our case reduced only the *past* medical expenses complied with *Hanif.* The amount was that which fully 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.").

The *Hanif* court acknowledged and complied with the collateral source rule, wherein it stated: "[T]ere is no question...that Medi-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.* at 639-640. Recovery by the *Hanif* plaintiff the amount paid by Medi-Cal to satisfy the medical bills upheld the precise scope of the collateral source rule declared in *Helfend* and its predecessor Supreme Court cases. *Anheuser-Busch, Inc. v. Starley* (1946) 28 Cal.2d 347; *Peri v. Los Angeles Junction Railway Co.* (1943) 22 Cal.2d 111.

The collateral source rule was equally respected 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 Howell's medical providers as payment in full. The medical providers would not have accepted these amounts as payment in full if they were not reasonable. Yet, Howell is trying to increase the amount of her recoverable damages by claiming a higher sum of money is more reasonable than what was accepted by the medical providers as payment in full.

The collateral source rule was not violated merely by the trial court examining *what* amount was 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 properly said "no." The absence of California law to the contrary confirms the trial court decision was correct.

C. *Nishihama* Further Establishes The *Howell* Decision Does Not Comport With The Collateral Source Rule in California

Hanif is not alone in recognizing the collateral source rule has no application to phantom medical bills in excess of amounts accepted as payment in full. The case of *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 is virtually identical to our case and provides further instruction on the contemporary issue of whether a plaintiff can recover as damages alleged expenses which are never incurred due to pre-existing contractual agreement between medical providers and a plaintiff's **private** medical insurer. *Nishihama* authoritatively said no.

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 from 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 correctly 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 gross billed amount--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 intact. *Nishihama* was decided in 2001, long after *Helfend* limited the established scope of the collateral source rule to payments and compensation. Moreover, *Nishihama's* reliance on *Hanif* was proper, as the Supreme Court later permitted *Hanif* to stand along with the possibility that *Hanif* applies outside the Medicaid context, which *Nishihama* so holds. *See, Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, 611, fn.16.[4]

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[4] A unanimous Supreme Court in *Parnell* limited the recovery by a hospital under the Hospital Lien Act ("HLA") to the amount the

Not only did *Nishihama* affirm *Hanif,* it reaffirmed the tort damages principle that a plaintiff should not recover more than actually paid to satisfy medical expenses to cases in which *private insurers* satisfy gross medical bills with a lesser 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 (discussed below). 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.

Based on the foregoing, the trial court did not abuse its discretion in following *Nishihama* and *Hanif* by distinguishing the collateral source rule from the gross bills for which *no one* faced liability. *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1294. Accordingly, the *Howell* decision should be reversed and the trial court decision be reaffirmed.

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hospital accepted from the plaintiff's medical insurer. *Nishihama* is consistent on this issue with *Parnell,* requiring that a collectible lien under the HLA be supported by an underlying debt by the patient. *See, Nishihama,* 93 Cal.App.4th 298, 307 and *Parnell,* 35 Cal.4th 595, 609. The "underlying debt" in *Parnell* was the amount accepted by the hospital as payment in full. Similarly, a claim by Howell for recovery of medical expenses must be supported by an underlying debt to her healthcare provider. Once Howell's health insurer satisfied her gross medical bills for a sum certain, there was an "absence of debt" and nothing (above the collateral source insurance payments) for Howell to recover from Hamilton for past medical expenses.

D. Additional California Case Law Affirms *Hanif* And Its Principles Are Consistent With The Collateral Source Rule

Hamilton followed the collateral source rule and seeks nothing more than its protection as previously approved in California courts. For example, the Third District in *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150 recognized the propriety of both *Hanif* and *Nishihama* for modifying past medical specials verdicts to conform to amounts **actually paid** by medical insurers. The trial court in *Greer* stated its intention to "entertain" a post-trial motion by defendant to modify the verdict if defendant provided evidence of reduced payments in satisfaction of the medical bills. *Id.* at 1154.

The appellate court in *Greer* noted the trial court "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 agreeing gross medical bills may be admitted *at trial,* the unanimous *Greer* court 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, making it impossible for the court to calculate the limited "Hanif/Nishihama reduction." *Id* at 1158. The defective special verdict form in *Greer* led the appellate court to conclude the defendant "forfeited" the right to assert a *Hanif/Nishihama* error on appeal. *Id.*[5] In other words, but for the defective verdict form, modification of the past medical specials award to reflect actual amounts paid by plaintiff's medical insurer, rather than the gross billed amounts, would have been entertained and determined in accordance with *Hanif* and *Nishihama* in *Greer.*

Unlike *Greer,* our special verdict form delineated past medical specials from other damages. (1 AA 118-119.) This permitted the trial court to readily determine the portion of past medical specials award subject to the *Hanif/Nishihama* rule.

One year after *Greer,* the Third District unanimously recognized the propriety of *Hanif* and *Nishihama* in *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288. The opening sentence 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

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[5] 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.

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. By doing so, *Katiuzhinsky* affirmed *Hanif* and *Nishihama* as the 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 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 gross 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 *Katiuzhinsky* of the gross amounts did *not* constitute overcompensation. *Id* at 1296. The trial court in *Katiuzhinsky* also excluded evidence of the gross medical bills at trial, which also distinguished the case from *Hanif, Nishihama,* and our case. *Id.* at 1295-1296.

The facts of *Katiuzhinsky* also distinguish it from our case. Howell is not liable for the excess and illusive medical bills that were contractually voided by her medical providers. (1 AA 131-175.) Nor were the medical

bills sold by her providers to some third party, which could have otherwise rendered Howell still liable for them. Moreover, unlike *Katiuzhinsky,* Howell's gross medical bills were presented to the jury at trial, not just the amount paid in satisfaction. Although the unique facts in *Katiuzhinsky* do not align with ours, its holding affirms the *Hanif/Nishihama* rule that past medical specials awards are limited to the actual amounts paid in satisfaction by an outside source.

V.

THE LEGISLATURE HAS DIRECTED THE COURTS TO CONSIDER NOT ONLY THE INTERESTS OF PLAINTIFFS AND DEFENDANTS, BUT ALSO THE INTERESTS OF THE SOURCES OF PLAINTIFFS' COLLATERAL BENEFITS

Justice Fybel declared in his concurring opinion in *Olsen v. Reid* (2008) 164 Cal.App.4th 200, 215: "The principles explained and applied in *Nishihama* and *Hanif* are soundly based on California statutes—*Civil Code* section 3281, 3282, 3333, AND 1431.2, subdivision (b)(1)—and the *Restatement Second of Torts,* section 911, comment h." Accordingly, the justice declared "the collateral source rule was followed" in *Hanif* and *Nishihama. Id.* An examination of these legislative enactments demonstrate the fact the collateral source was followed by the trial court in our action as well.

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." (Emphasis added.)

Civil Code §3281 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 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.").

The "nondetrimental variant" portion of past medical bills Howell seeks to recover were contractually void and non-collectible *prior* to the moment Howell obtained medical services. The voluntary agreements between Howell's medical providers and her medical insurer mandated the providers accept certain sums in payment in full satisfaction of whatever dollar figures the providers placed on their bills. Whether the medical providers bill $100 or $5 for a single Tylenol tablet, the pre-existing

payment schedule agreed to by Howell's medical providers was the final word on the matter. Thus, Howell was never exposed to the randomly billed amount upon receipt of the medical services.

Having never been exposed to the risk for amounts in excess of what her medical providers contractually agreed to accept as payment in full, Howell cannot claim she "suffered" a "loss or harm" for such amounts. The illusive portion of the medical expenses does not fall within the definition of "detriment" in *Civil Code* §3282. Moreover, the lack of any suffering for the "nondetrimental variant" portion of the bills precludes the ability to recover "money" for such fictional amounts. *Civil Code* §3281.[6]

Per these California statutes, Justice Fybel concluded *Hanif* and *Nishihama* 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.

In light of the "judge-made" collateral source rule in California and the relevant statutory definitions of damages, the attempt by Howell to

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[6] This application is further supported by *Restatement (Second) of Torts,* §911 (comment h), which states in pertinent part: "When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, *he can recover no more than the amount paid,* except when the low rate was intended as a gift to him." (Emphasis added.)

transform the collateral source rule to cover non-collectible and illusive medical bills represents the overreaching campaign by plaintiffs, or perhaps more correctly, their lawyers. *Olsen, supra,* 164 Cal.App.4th 200, 213. The payment for such fallacious "bills" goes directly to their pockets. No one else is served by the corruption of the collateral source rule, most noticeably the providers of medical services who would recover nothing from the inflated damage awards.

VI.

OTHER LEGISLATIVE ENACTMENTS DEMONSTRATE THE LIMITED NATURE OF THE COLLATERAL SOURCE RULE IN CALIFORNIA

A. Medical Malpractice Claims Are Not Subject To The Collateral Source Rule

The collateral source rule in California is not endowed with limitless capacity. Nor is it a principle applied to every situation in which an injured plaintiff may find him or herself. For example, just five years after the California Supreme Court's decision in *Helfend, supra,* the Legislature enacted *Civil Code* §3333.1 as part of the Medical Injury Compensation Reform Act. In doing so, the Legislature permitted the potential abolishment of collateral source rule in actions for personal injuries against medical provider by allowing the defendant to introduce evidence of a

collateral source such as health or disability insurance benefits. It also allows the trier of fact to consider this alternate source of recovery in computing the damages to be awarded. *Seariver Maritime, Inc. v. Industrial Medical Services, Inc* (N.D. Cal. 1997) 983F.Supp. 1287, 1301.

Section 3333.1 "does not preclude recovery of such damages; rather, it allows the jury to decide how to apply the evidence in calculation of damages. As such, the fact that all medical expenses may have been paid from a collateral source...does *not* stand for the proposition that a plaintiff has suffered no recoverable damages...." *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 506.

Multiple reasons are provided for the potential limitation on recovery of damages covered by a collateral source in medical malpractice actions. The bottom line, however, is the near complete abrogation of the rule in such cases, regardless of whether plaintiffs secured medical insurance on their own. There is no question the collateral source rule is subject to being discarded in California when reasonable circumstances exist.

Despite the potential abolition of the rule in medical malpractice cases, Hamilton never sought to deny Howell the benefit of the collateral source rule. The rule was recognized and applied fully in the trial court. Hamilton merely seeks to confirm the trial court decision which held the amount billed in *excess* of what Howell's medical insurer paid in full

satisfaction for the medical services falls outside the California collateral source rule. Notions of justice and equity are honored by application of the rule in this context.

B. Government Code §985 Permits Reduction Of Judgments For Collateral Source Payments

California *Government Code* §985 modifies application of the collateral source rule in regard to government entity defendants. This statute demonstrates that in those cases, the most obvious way to deal with the problem of overcompensation to a plaintiff due to the collateral source rule is to permit a post-trial hearing to determine setoff adjustments against its share of the verdict. *Id.*

As used in Section 985, a "collateral source payment" includes benefits paid or owing for services provided plaintiff before commencement of trial under a private insurance policy (medical, disability, etc.) or government benefits program (Medi-Cal, county health care). *Gov. Code* §985(a) (1), (f) (1) & (2). The government entity however has a right to "adjustment" of the verdict to reflect the collateral source benefits. Such adjustment is obtainable by way of noticed motion for a post-trial hearing for a reduction. *Gov. Code* §985(b). After the appropriate adjustments and set-off are made in favor of the entity

defendant, all collateral source subrogation and lien rights terminate. *Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 308.

Again, a statutory limitation on the application and effect of the collateral source rule has been determined to be necessary to avoid an injustice to a defendant under certain circumstances. Thus, the collateral source rule is not applied equally in all circumstances when personal injury plaintiffs seek redress. Exceptions to its broad application are at times necessary and proper.

C. The California Judiciary Also Defines The Limits Of The Collateral Source Rule

The Legislature is not the only branch of state government which decides the scope and application of the collateral source rule in California. The courts also have full authority to weigh in on this judicially-created doctrine.

For example, the rule is held inapplicable in uninsured motorist ("UM") benefits cases. *Waite v. Godfrey* (1980) 106 Cal.App.3d 760. Despite the purchase of UM coverage by a plaintiff, UM benefits received by the plaintiff in the same case are offset against recovery against other defendants, denying the plaintiff a double recovery.

In *Waite,* the plaintiff was rear-ended by another vehicle while she was stopped. The car that hit plaintiff was allegedly hit by another car,

which fled the scene. Plaintiff recovered $12,000 of UM benefits from her *own* auto insurer and a $20,000 verdict against the other defendant at trial. The issue on appeal was whether the UM proceeds should be characterized as a collateral source under *Helfend, supra,* and hence not available as a set-off to the defendants involved in the same collision as joint tortfeasors.

The appellate court determined the UM benefits were not a collateral source. There was no dispute the UM proceeds were paid to plaintiff from her own carrier--under an insurance policy purchased and paid for by plaintiff—thus "from a source wholly independent of the wrongdoer." *Anheuser-Busch, Inc. v. Starley, supra,* 28 Cal.2d 347, 349. However, the *Waite* court recognized the limitations of *Helfend,* wherein that decision "concedes the collateral source rule is unpopular in some jurisdictions and that it might not be appropriate in a myriad of possible situations." *Waite, supra,* 106 Cal.App.3d 760. The court then distinguished the remaining defendants from the unidentified motorist who precipitated the UM portion of the claim and determined the policy reasons behind *Helfend* did not apply to render UM benefits a collateral source. Thus, the plaintiff's recovery in *Waite* was reduced from $20,000 to $8,000 to reflect the $12,000 offset for the UM payment.

California courts can determine the parameters of the collateral source rule and, where appropriate, determine it does not apply at all to an element of damages. Being a judicially-created doctrine in California, the

fate of the collateral source rule rests in the hands of the judiciary. The Legislature need not be the final arbiter of when and where it applies.

D. Criminal Restitution Cases Affirm Hypothetical Medical Bills Are Not a Collateral Source Recoverable by Crime Victims or Civil Plaintiffs

In 1982, California voters passed Proposition 8 which gave all crime victims the constitutional right to receive restitution from the offender convicted of committing a crime against them. *Cal. Const.,* Art. 1, §28(b). "Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss." *Id.,* §28(b)(13)(B).

The purpose of restitution orders is three-fold: (1) to rehabilitate the offender; (2) deter future criminal behavior, and; (3) "make the victim whole by compensating him for his economic losses." *In re Anthony M.* (2008) 156 Cal.App.4th 1010, 1017 (citation omitted). The restitution order must be in an amount sufficient to *fully reimburse* the victim for economic losses, "without regard to potential reimbursement from a third party insurer." *Id.* at 1017, citing *People v. Birkett* (1999) 21 Cal.4th 226, 246.

Thus, criminal restitution orders comply with the collateral source rule as heretofore defined in California.[7]

Specifically, the *Hanif* rule has been applied by courts to ensure non-recoverable, hypothetical medical bills fall outside the collateral source rule and outside restitution orders. Convicted criminals who rape, murder and maim pay no more to their victims for medical bills than what the victims' own medical insurers pay to satisfy the bills. *In re Anthony M., supra,* 156 Cal.App.4th at 1018, 1019. Thus, the convicted criminal in *In re Anthony M.*--who shot his friend in the head--was ordered to pay no more in restitution for the victim's medical bills than the amount accepted from the victim's medical providers from Medi-Cal to satisfy the bills. *Id.* at 1019-1020.

The cap on recovery is not limited to cases in which government benefits satisfy the bill. In *People v. Bergin* (2008) 167 Cal.App.4th 1166, the unanimous appellate court ruled as follows:

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[7] *Penal Code* §1202.4(f) provides that crime victims in California shall receive restitution from convicted defendants for "economic loss" suffered "as a result of the defendant's conduct...." The "dollar amount" of the restitution must be "sufficient to *fully reimburse* the victim for every determined economic loss as the result of the defendant's criminal conduct," including "medical expenses." Section 1202.4(f)(3)(B) (emphasis added).

Welfare & Institutions Code §730.6(h), the corresponding statute for restitution to victims of crimes committed by minors, also requires the restitution be sufficient to "fully reimburse" the victim for all economic loss occasioned by the crime. Application of *Hanif* and *Nishihama, supra,* is consistent with these legislative requirements.

> [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 to pay restitution to his victim of almost $37,000 for medical expenses, which was the amount the victim's medical providers accepted as payment in full from the victim's private medical insurer, Blue Cross. *Id.* at 1168. The amount was much less than the gross medical bill of $138,667.03. *Id.*

The *Bergin* crime victim also filed a civil action against the criminal and obtained a judgment of just over $90,000, of which nearly $37,000 was for medical expenses (again, the amount accepted by her medical provider as full payment from Blue Cross). *Id.* at 1168. The *Bergin* opinion acknowledged without criticism the civil trial court's modification of the jury award from $129,000 for past medical expenses to $37,000 "in accordance with *Hanif.*" *Id.*

The criminal trial court 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 $37,000 the trial court ordered the defendant to pay her. *Id.* at 1170. The court affirmed the criminal court's order for only the amount accepted by the medical providers from Blue Cross as payment in full. *Id.*

Bergin affirmed *Hanif* and the fact hypothetical medical bills which are non-pursuable by a medical provider are not a collateral source. *Id.* at 704. 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.) *See also, People v. Millard* (2009) 175 Cal.App.4th 7 (review denied Oct. 14, 2009) (trial court ordered a convicted drunk driver to reimburse the victim for medical bills in the amount actually paid to the victim's medical providers by victim's medical insurer, not the gross billed amount).

California's most violent criminals enjoy the *Hanif/Nishihama* rule when it comes to paying restitution to their victims. In contrast, the *Howell* decision mandates that civil tortfeasors--guilty of nothing more than simple negligence in the case of Hamilton--must pay for all inflated, fallacious

medical bills submitted by a plaintiff, regardless of what amount was accepted in full satisfaction of the bills by medical insurers. Surely, the *Hanif/Nishihama* rule should apply equally to *civil* defendants such as Hamilton, who are neither charged nor guilty of any criminal activity associated with a plaintiff's injuries, in the final analysis of damages calculations. The incongruity of these position screams for reversal of the *Howell* decision and a return to sanity in the damages arena.

Applying the *Hanif/Nishihama* rule differently to civil defendants than to criminals who kill or maim their victims would violate all notions of justice and equal protection under the law. Therefore, the *Howell* decision should be reversed.

VII.

PUBLIC POLICY MILITATES AGAINST EXPANDING THE COLLATERAL SOURCE RULE TO INCLUDE NON-INCURRED MEDICAL BILLS

A. Reversal Of The *Howell* Decision Will Not Discourage The Purchase of Health Insurance By Individuals

Persons with health insurance who receive treatment from medical providers that have negotiated rates with medical insurers receive certain financial benefits, including "reduced copayments, reduced deductibles [and] premium discounts." *Health & Safety Code* §1395.6(b) (2) (A).

Howell apparently received these benefits despite the trial court order which modified the past medical specials award. Howell is in no better or worse position than before the accident with respect to medical expenses related to her injuries.

Arguments that plaintiffs with health insurance are in a worse position than uninsured plaintiffs if hypothetical bills are not considered a collateral source fail to take into account the multiple levels of benefits enjoyed by an insured plaintiff. Most importantly, insured plaintiffs are never exposed to risk of payment for the inflated portion of medical bills over and above the amount satisfied by their medical insurer. *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, 598. Application of the traditional collateral source rule in like manner by the trial court does not expose plaintiffs to unsatisfied medical bills.

The primary justification for the collateral source rule, in theory at least, is to encourage people (*i.e.,* potential plaintiffs) to maintain insurance for personal injuries and other happenings. *Helfend, supra,* 2 Cal.3d 1, 9-10. Along these lines, theoretically, allowing people (*i.e.,* potential plaintiffs) to recover the "written off" amount that their insurers achieve in negotiations with health care providers will further encourage people to acquire health insurance. There is little evidence to support the theory.

Common sense suggests that people do not consider such things until they have been injured. It is absurd to believe one would simply

forego health insurance for the sole reason of a potential "litigation windfall" in the future. There is an infinitesimally low probability the potential health insurance consumer would become eligible for such a windfall due to the number of factors that would have to occur.

First, one has to suffer serious personal injuries from the acts of a tortfeasor. Second, sufficiently high medical bills must be issued in connection with the personal injury medical treatment to outweigh the benefits of health insurance coverage for treatment of non-litigation matters, such as disease, check-ups, etc. Third, one must prove clear liability against the tortfeasor. Fourth, the tortfeasor must have sufficient liability insurance coverage or assets to cover the high medical bills incurred in the personal injury case. Such analysis and planning by the average citizen is non-existent. No evidence has been submitted by Howell that a single person in California has refused to purchase health insurance due to such factors or analysis.

The absurdity of the argument is compounded by the fact the purposely uninsured person will be personally liable for *all* medical bills he or she incurs outside the *possible* future personal injury litigation. To make financial sense to forego medical insurance, the cumulative medical bills for health care received over the years by the uninsured individual must amount to less than the waived fees by medical providers in a speculative future personal injury action. It defies reason to believe even one person

considers this scenario when deciding whether or not to purchase health insurance.

Health insurance does more than cover the cost of routine medical services. It also provides peace of mind by protecting against financial ruin in the event of serious disease or similar incident that would generate enormous medical bills. These considerations outweigh any alleged disincentive to purchase health insurance based on the unlikely chance of receiving a larger medical specials award as an uninsured plaintiff in a future personal injury action. Thus, retaining the collateral source rule as traditionally applied in California will have no impact on an individual's decision to purchase healthcare insurance.[8]

B. Public Policy Supports Application of the *Hanif/Nishihama* Rule

Public policy supports maintaining the traditional collateral source rule in California and precluding non-incurred medical bills in excess of the amounts paid by plaintiffs' insurers. Excluding the contractually waived medical costs as recoverable "damages" helps reduce litigation costs that would otherwise increase when insurers are required to pay damages well beyond what the injured party actually incurred.

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[8] The public policy of enforcing the collateral source rule to promote the purchase of health insurance by individuals appears to be moot in light of the recent passage of the federal healthcare legislation. Reportedly, the new law will *require* all Americans "to carry health insurance or pay a penalty." Noam N. Levey, *Congress Passes Final Piece of Healthcare Legislation*, LATIMES.COM, March 25, 2010.

Controlling rising liability insurance rates is an established goal in California. *See,* 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 insurance-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. According to a 2008 U.S. Tort Liability Index Study, California ranked second in the nation for largest jury awards in 2006. Lawrence J. McQuillan & Hovannes Abramyan, U.*S. Tort Liability Index 2008 Report* 14 (March 2008). The average person pays for lawsuit abuse in many ways: higher product prices, higher insurance premiums, higher taxes, reduced access to health care, lower wages, lower returns on investments in capital and land, and less innovation.

The gross amount (a hospital's list price) does not reflect what hospitals expect to recoup for a given service. Instead, the prices are the hospital's initial bargaining position from which insurers negotiate down. Joseph Goldstein, *Exerting Their Patients,* ABA JOURNAL, May 1, 2009. As such, the "full" price is particularly unreliable measure of damages and should not constitute the basis for a medical specials award. The payment

of such imaginary damages by defendants and/or their liability insurers would unnecessarily add to the costs of lawsuits in this state.

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 for 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.

Finally, the medical providers themselves would not benefit from the expansion of the collateral source rule promoted by Howell. The purpose of the campaign by the plaintiffs' bar to expand the collateral source rule is not to reimburse the doctors and hospitals for the services provided to plaintiffs. Rather, it is to provide a double windfall to plaintiffs and their attorneys above and beyond the windfall already received for reimbursement of collateral source amounts covered by medical insurers. Plaintiffs and their attorneys pocket the double windfall money. None is distributed to the healthcare providers.

Thus, confirmation of *Hanif* and *Nishihama* and reversal of the *Howell* decision would serve the public policy of reducing insurance costs,

reducing litigation costs, and defining the realistic damages "incurred" by Howell and other plaintiffs in her situation. *Civil Code* §3333.

For these reasons, public policy is best served by rejecting the grossly expanded version of the collateral source rule urged by Howell.

C. Modification Of The Collateral Source Rule Will Create Chaos In The Determination Of Compensatory Damages

If Howell's version of the collateral source were adopted, an ever-expanding slippery slope would be created that would require constant appellate court intervention to reign in runaway damage claims. For example, when an insured's vehicle is damaged, should he or she get to recover and pocket the difference between the insurer's negotiated body shop repair rate and what the body shop would charge a walk-in customer? According to Howell, the difference for the insured plaintiff should be recoverable, despite the absence of any debt or payment for the difference by anyone.

Similarly, if an insured plaintiff is forced to defend a lawsuit, are his or her damages in a bad faith lawsuit the *Civil Code* §2860 rate that their independent counsel agreed to accept to represent the plaintiff, or does the plaintiff get to claim and recover as additional damages the difference between the maximum hourly rate said counsel is able to charge another

private client and what was charged the plaintiff? Following Howell's arguments, the extra recovery should be permitted.

Other than the pure gratuity cases, a plaintiff's recovery of *more* than the amount "paid" to satisfy past medical bills violates the collateral source rule and principles of compensatory damages in California. Adopting Howell's version of the collateral source rule would render it a tool to leverage higher damage awards based upon any imaginary or inflated damages plaintiffs could manufacture. "Reasonable value" would be subsumed by whatever dollar amount any repair facility, hospital, therapist, doctor or other service provider places on their bills, whether tied to realistic charges or not.

In the medical arena, it is well known charges vary widely and are not tied to a consistent reasonable standard. "Charges nationally are about double hospitals' costs of providing services." Julie Appleby, *Hospitals Sock Uninsured With Much Bigger Bills*, USA TODAY, February 24, 2004 (quoting Glenn Melnick, Professor of Health Care Financing at USC). "The typical range of discounts nationwide (among private insurers) might be around 45% to 50% on hospital services." *Id.* (quoting John Bowerline, actuary with Milliman USA). From these statements, it appears the insurers' payments more accurately reflect the true cost of hospitals' services.

Abuses also run rampant in the healthcare system. Notable are examples of surgical screws at $1,750 *each*, or $129 for a "mucous recovery system" (*i.e.,* box of tissues). *See* Wyatt Andrews, *Huge Medical Bills You Shouldn't Pay*, CBS NEWS/BUSINESS WEEK, Aug. 29, 2008; Peter Davidson, *10 Ways To Avoid Outrageous Hospital Charges*, MSN MONEY, September 16, 2006. Even if specific charges are not this exorbitant, a noted financial columnist wrote "Hospital bills are notorious for being riddled with mistakes." Liz Pulliam Weston, *How to Survive Your Hospital Bills*, MSN MONEY, March 19, 2007.

"A cause of action is not a lottery ticket." *Bush v. Superior Court* (1992) 10 Cal.App.4th 1374. However, given the randomness of medical charges and poor accuracy of bills, a plaintiff would do well, under Howell's theory, to shop for hospitals and medical providers that charge exorbitant fees for their services. If a plaintiff is "lucky" enough to be treated by a medical provider that charges hyper-inflated prices and issue error-prone bills, she would be permitted to recover such charges *regardless* of what the provider accepts from an insurer as payment in full satisfaction for the services. This makes little sense and needlessly punishes defendants, who have no say in which medical providers plaintiffs select.

Each of the foregoing examples demonstrate the confusion and inequity that would be injected into special damage awards, should the

collateral source rule be corrupted beyond its prior application in California. Accordingly, the *Howell* decision should be reversed.

VIII.

HOWELL RECEIVED THE BENEFIT OF THE GROSS MEDICAL BILLS AT TRIAL PER *HELFEND* AND *NISHIHAMA*

In *Helfend, supra,* the Supreme Court 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*." *Helfend,* 2 Cal.3d at 11 (emphasis added). This principle was followed in *Nishihama*, 93 Cal.App.4th at 309 (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.").

Howell obtained the same benefit. The jury received evidence of the gross amount of past medical expenses in the amount of $189,978.63. (2 RT 117:15-118:5; 3 RT 195:16-25.) Arguably, Howell received a generous past general damages award of $200,000 based partially upon the gross amount of the medical bills. (1 AA 178, 219.) Thus, she cannot complain the jury award was diminished in any respect per the evidence submitted at trial.

IX.

THE TRIAL COURT'S POST-TRIAL PROCEDURE FOR DETERMINING THE PAST MEDICAL SPECIALS AWARD IS SANCTIONED IN CALIFORNIA

While gross medical bills may be submitted to the jury for review, trial courts may preserve its right to reduce the past medical specials portion of the judgment after trial to the amount accepted by the healthcare provider as payment in full. Of course, *Hanif* laid the foundation for a post-trial reduction (by an appellate court) of a medical specials award that exceeded the actual amount expended or incurred for past medical specials. *Hanif, supra,* 200 Cal.App.3d 635, 643-644. The appellate court in *Nishihama* similarly conducted a post-trial modification of the medical specials award to reflect the actual amount paid by the private insurer in that case. *Nishihama, supra,* 93 Cal.App.4th 298, 309.

The case of *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150 confirmed a *trial court* can also make such modifications. 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 [trial] 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 more recent case of *Olsen v. Reid, supra,* also confirms a post-trial hearing in the trial court is proper to implement the *Hanif/Nishihama* rule, 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.**

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.) The post-trial procedure employed in the trial court included more than 12 weeks' notice (from filing to hearing date) for Howell to oppose the *Hanif* motion filed by Hamilton, the acceptance and review of exhaustive

briefing from the parties, and lengthy oral argument. (1 AA 211; 5RT 253:23-28; 8RT 270-335.) After the *Hanif* motion was decided, Howell filed a motion for reconsideration, "supplemental briefing" and evidence to the trial court. (3AA 571-590; 604-617.) Howell was represented by several attorneys who provided abundant argument, briefs and other material to the trial court on behalf of Howell. Exceeding patience and diligence was displayed by the trial court on the matter. Indeed, Howell's specially retained counsel on the *Hanif* issue, John Rice, told the trial court: "I think the court has approached this whole issue in a very rational way..." (6RT 259:25- 260.)

Howell cannot complain of the procedure followed by the trial court. The authority cited above makes it clear an award for past medical expenses may be reduced *after* trial by either the trial court or a reviewing court. Accordingly, the trial court procedure followed in this action was proper and is a model for the method by which the *Hanif/Nishihama* rule should function.

X.

CONCLUSION

Personal injury plaintiffs in California already enjoy a windfall when they are reimbursed for medical bills paid for by a collateral source, such as their medical insurers. Such is the application of the collateral source rule

in California and is the application honored by the trial court and Hamilton in this action.

Expansion of the collateral source rule to cover illusory medical bills never incurred or owed by anyone must not be allowed. This "nondetrimental variant" does not represent a "payment" made or "compensation" received, as required by *Helfend*. Extending the scope of the rule would violate the principles of compensatory damages in California and enrich plaintiffs and their attorneys for "damages" never realized. Howell was made whole when she recovered the amount paid by her medical insurer for full satisfaction of her medical gross medical bills. The law and justice demand nothing more. 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 liability insurance-purchasing public.

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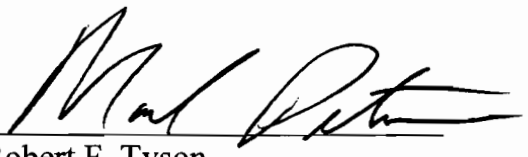
Accordingly, defendant Hamilton respectfully requests reversal of the *Howell* decision in its entirety. Hamilton also requests reinstatement of the trial court order which properly awarded $59,691.73 in past medical specials to Howell.

Dated: April 8, 2010

Respectfully submitted,

TYSON & MENDES, LLP

By: 

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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that this Opening Brief On The Merits contains 12,287 words, not including the table of contents and authorities, the caption page, or this Certificate page.

Dated: April 8, 2010

Mark T. Petersen, Esq.

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

PROOF OF SERVICE

I, the undersigned, declare that I am over the age of 18 years and not a party to the within action or proceeding. I am employed in and am a resident of San Diego County where the mailing occurs; and my business address is 5661 La Jolla Blvd, La Jolla, CA 92037.

On April 8, 2010, I caused to be served the following document(s):

OPENING BRIEF ON THE MERITS

on the interested parties in this action by:

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Claudia Gonzalez

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Howell v. Hamilton Meats & Provisions, Inc., et al.

California Superior Court Case No.: S179115
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