S179115

COPY

IN THE SUPREME COURT OF CALIFORNIA

REBECCA HOWELL,

Plaintiff and Appellant,

v.

HAMILTON MEATS & PROVISIONS, INC.,

Defendant and Respondent.

On Review of a Published Decision by the Fourth Dist. Ct. of Appeal—Div. One
Case Number D053620 — Filed November 23, 2009
On Appeal From a Judgment After Jury Verdict and Postjudgment Order
San Diego County Superior Court — Hon. Adrienne Orfield — GIN053925

SUPPLEMENTAL BRIEF ON THE MERITS REGARDING NEW AUTHORITIES DECIDED AFTER APPELLANT'S ANSWER BRIEF [CAL. RULE OF COURT 8.520(d)(1)]

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INTRODUCTION

After appellant Rebecca Howell ("Howell") filed her Answer Brief, the First and Third District Courts of Appeal filed published opinions that decide the same question raised in the present appeal: whether the collateral source rule is violated when a personal injury victim's award of past medical expenses is reduced by the amount of noncash indemnity paid by her healthcare insurer to her healthcare provider, an amount often referred to as a "negotiated rate differential." (*Yanez v. SOMA Environmental Engineering, Inc.* (2010) 185 Cal.App.4th 1313; 111 Cal.Rptr.3d 257 ("*Yanez*"); *King v. Willmett* (2010) ___ Cal.App.4th ___; 2010 Cal.App. LEXIS 1375 ("*King*").) As did the Fourth District Court of Appeal in the present case, the *Yanez* and *King* courts held such a reduction violates the collateral source rule and is not warranted under the two decisions on which personal injury defendants, including defendant in the present case, routinely rely: *Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635 ("*Hanif*") and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 ("*Nishihama*"). As permitted by California Rule of Court 8.520(d)(1), Howell is filing this supplemental

brief to address *Yanez* and *King*.[1]

DISCUSSION

Personal injury defendants contend the difference between a healthcare provider's billed charges and the amount paid in cash to the provider by the patient's healthcare insurer is a "write off" that is not a collateral benefit and that should be deducted from an award of past medical expenses.[2] Defendants' argument has its genesis in the Third District's decision in *Hanif*, *supra*, 200 Cal.App.3d 635, but *Hanif* was never cited for any such rule until 13 years later in the First District's decision in *Nishihama*, *supra*, 93 Cal.App.4th 298. Defendants then began asserting what they call the "*Hanif*/*Nishihama* rule."

As Howell points out in her Answer Brief on the Merits and as now expressly made clear by *Yanez* and *King*, the so–called *Hanif*/*Nishihama* rule is no more than a rule of defendants' imagination. Indeed, in *Yanez* and *King* the same courts that decided *Hanif* and *Nishihama* have rejected the argument that either *Hanif* or *Nishihama* supports the reductions sought by defendants. As Justice Cantil–Sakauye's majority opinion in *King* made

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[1] As of the date of this supplemental brief, a petition for review is pending in *Yanez*. (S184846.) The *King* defendant will also likely petition for review.

[2] References in this brief to "defendants" in the plural are to defendants in general, not to defendant Hamilton Meats & Provisions, Inc.

clear. "Cases are not authority for propositions they did not consider." (*King, supra,* 2010 Cal.App. LEXIS 1375 at p. 29.)[3]

I. *Yanez* criticized *Hanif* and declined to expand it outside its limited Medi-Cal context and rejected the notion that *Nishihama* supports such expansion.

A. *Yanez* faulted *Hanif's* analysis as unreliable and not applicable beyond *Hanif's* context.

As Howell explains in her Answer Brief (pp. 48–50), *Hanif* was wrong, indeed, deeply flawed. But even if *Hanif's* result could be deemed correct on its limited facts (Medi–Cal), *Hanif* does not support a broader application to private insurance or to Medicare. *Yanez* makes the point:

> "[W]e find *Hanif* used overly broad language and the extension of its holding to private insurance by *Nishihama* and other cases is inconsistent with the collateral source rule." (*Yanez*, *supra*, 185 Cal.App.4th at p. 1326.)

Yanez was even more blunt in acknowledging that *Hanif* incorrectly analyzed "the measure of tort damages for medical expenses." (*Id.*, at p. 1327.) "[T]o the extent *Hanif's* holding has been assumed to extend beyond the Medi–Cal context, *we do not find its analysis reliable.*" (*Ibid.*, italics added.)

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[3] As of the date of this supplemental brief, *King* has not been published in the Official Reports. Howell will thus cite to the pages in the LEXIS version of *King*, which is also available on WestLaw at 2010 WL 3096258.

B. *Yanez* observed that the authorities on which *Hanif* relied were inapposite.

As further explained in Howell's Answer Brief (pp. 48–50), *Hanif* incorrectly relied on an inapposite comment in the Restatement Second of Torts, i.e., comment h to section 911. *Yanez* pointed out *Hanif's* incorrect use of the Restatement. "Comment h to section 911 of the Restatement is also inapposite." (*Yanez*, *supra*, 185 Cal.App.4th at p. 1328.) Rather, the applicable Restatement provision is section 920A, which specifically deals with the collateral source rule. (*Yanez*, *supra*, 185 Cal.App.4th at pp. 1328–1329, citing Rest.2d Torts, § 920A, com. b, p. 514.)

Yanez similarly faulted *Hanif's* incorrect reliance on a "series of older cases" decided long before today's complex healthcare–pricing and insurance payment practices. (*Yanez*, *supra*, 185 Cal.App.4th at p. 1327; Answer Brief, pp. 48–49.) Moreover, the issue in those cases was whether the medical charges were unreasonably high. (*Yanez*, *supra*, 185 Cal.App.4th at p. 1327.) The cases did not deal with insurance reimbursement or the collateral source rule.

C. *Yanez* explained that *Hanif* has been overwhelmingly rejected in other jurisdictions.

Yanez corroborates that *Hanif* is outside the mainstream. "The great majority of decisions from other jurisdictions have concluded that the collateral source rule entitles tort victims to recover the full amount of reasonable medical expenses charged, including amounts written off from

their bills pursuant to contractual rate reductions or under Medicaid or Medicare." (*Yanez*, *supra*, 185 Cal.App.4th at p. 1324.)

Another out-of-state decision, filed after Howell's Answer Brief, also rejects defendants' view that a negotiated rate differential is not a collateral benefit. (*Swanson v. Brewster* (Minn. 2010) 784 N.W.2d 264, ___ [2010 Minn. LEXIS 341 at pp. *31–33] ["We conclude that the negotiated discount is unambiguously a collateral source for purposes of the collateral–source statute."].) Under Minnesota's statute governing collateral benefits, because the differential was a collateral source, it had to be deducted from the award of medical expenses. Of course, that is not the *result* sought by Howell. But the *reasoning* is apt because it refutes defendants' argument that a negotiated rate differential is not a collateral benefit.[4]

D. *Yanez* explained that *Hanif/Nishihama* does not reflect commercial reality.

Hanif's premise was that an award of damages for past medical expenses in excess of their "actual cost" would constitute overpayment.

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[4] In her Answer Brief, Howell cited a Florida decision for the same reasoning set forth in *Swanson*, *supra*, 784 N.W.2d 264, i.e., that a negotiated rate differential is a collateral benefit. (Answer Brief at p. 30, citing *Goble v. Frohman* (Fla. 2005) 901 So.2d 830, 831–833.) In *Swanson*, the Minnesota Supreme Court specifically agreed with *Goble's* analysis. (*Swanson*, *supra*, 784 N.W.2d 264, ___ [2010 Minn. LEXIS 341 at pp. *31–33].) Moreover, as in *Swanson*, the deduction of collateral benefits in *Goble* was statutorily mandated. (*Goble, supra*, 901 So.2d at p. 832, citing Fla. Stat. § 768.76 (1999).) Neither *Swanson* nor *Goble* judicially legislated the collateral source rule out of existence.

(*Hanif, supra*, 200 Cal.App.3d at p. 641.) *Yanez* explained that *Hanif's* premise does not comport with modern commercial–reality.

> "Although this may be a correct inference for an uninsured individual paying directly for his or her own medical care, *it is not true of the health care financing model that has evolved in this country*, in which the cash paid or liability incurred to medical service providers is often *not* the entire consideration the providers receive in exchange for their services. As further discussed *post*, providers receive noncash, pecuniary consideration from their transactions with the patient's private insurers, which allows and induces them to accept a reduced rate for their services. *Making the amount paid or incurred for medical care an absolute ceiling on a plaintiff's recovery for past medical care ignores this reality.*" (*Yanez, supra*, 185 Cal.App.4th at p. 1328, first and third italics added.)

Yanez further discussed the reality that negotiated rate differentials—which defendants seek to have deducted from damages awards—are as much a collateral benefit to a plaintiff as is a cash payment by her insurer to her healthcare provider. "[I]f the central purpose of investing in health insurance is to be protected from having to pay large medical bills, discounted provider charges deliver part of that protection." (*Yanez, supra*, 185 Cal.App.4th at p. 1329.)

Likewise, *Yanez* rejected the notion that a negotiated rate differential is what defendants like to call a "write off," i.e., defendants' argument that the healthcare provider receives nothing more than the insurer's cash payments. Rather, the provider also obtains noncash benefits pursuant to negotiated rate differentials:

> "[T]hese contractual discounts confer significant benefits upon medical service providers in addition to just the cash received in discounted payments. In exchange for medical services, providers receive not only the insurer's payments, but also the pecuniary value of numerous additional benefits, among which are prompt payment, assured collectability, avoidance of collection costs, increased administrative efficiency, and significant marketing advantages. [¶] It is widely recognized that, by agreeing to reduced rates, providers gain significant administrative and marketing advantages, 'including a large volume of business, rapid payment, ease of collection, and occasionally advance deposits.' " (*Yanez*, *supra*, 185 Cal.App.4th at pp. 1329–1330.)

In short, as *Yanez* explains, the commercial reality of negotiated rate differentials is that they are a collateral benefit to the patient as well as compensation to her healthcare provider.

E. Healthcare pricing and healthcare insurance regulation are complex matters best left to the Legislature.

Yanez acknowledged that "The pricing of medical services is a subject of tremendous complexity, and disputes over fair pricing in the health field abound." (*Yanez*, *supra*, 185 Cal.App.4th at p. 1330.) Likewise, Justice Banke filed a concurring opinion in *Yanez* acknowledging that the determination of a plaintiff's liability for medical expenses "can turn on a combination of sometimes highly complex factors, including who or what entity provided the medical services, who or what entity paid for them, statutory and regulatory controls on providers and payors, and the contractual relationships between the providers, the plaintiff and payors." (*Yanez*, *supra*, 185 Cal.App.4th at p. 1357.)

Defendants, though, ask the Court to eviscerate the collateral source rule in a factual vacuum, with no heed to this complexity. All that defendants offer is argument. The situation is as if defendants were asking the Court to judicially legislate air–traffic–control regulation, and, worse, to do so with no factual basis, but based only on arguments.

Moreover, the issue's complexity is a matter best left to the Legislature. Healthcare industry and health–insurance industry witnesses and experts, medical associations, patient organizations, and disinterested third parties can testify—under oath, of course, and subject to questioning—to legislative committees; documentary evidence can be submitted; and the evidence can be debated. None of that can be done judicially.

F. *Yanez* rejected the argument that criminal–restitution cases have any bearing on the *Hanif* issue.

As does defendant Hamilton, the *Yanez* defendant relied on criminal–restitution cases, claiming that they have applied *Hanif*. (See, e.g., *People v. Millard* (2009) 175 Cal.App.4th 7 and *People v. Bergin* (2008) 167 Cal.App.4th 1166.) *Yanez* rejected the notion that criminal–restitution cases are relevant to whether *Hanif*, a civil case, should be extended to other civil cases. (*Yanez*, *supra*, 185 Cal.App.4th at p. 1323.)

G. *Yanez* rejected the practice of holding post–verdict "*Hanif* hearings" to decide the amount of negotiated rate differentials.

As explained in Howell's Answer Brief (pp. 61–71), post–verdict hearings at which trial judges decide the amount of negotiated rate differentials and then reduce the jury's award by those amounts are statutorily and constitutionally improper. *Yanez* agreed. The practice "that has developed in the trial and appellate courts of this state—holding postverdict *Hanif* hearings in which the trial court hears evidence of the discounted amounts paid by private insurers and reduces the jury's verdict—lacks a sound foundation as a matter of law or policy." (*Yanez*, *supra*, 185 Cal.App.4th at p. 1331.)

II. *King* also declined to apply *Hanif/Nishihama* outside the Medi–Cal context.

Shortly after *Yanez*, the Third District, which decided *Hanif*, issued its decision in *King*, *supra*, ___ Cal.App.4th ___ 2010 Cal.App. LEXIS 1375. As in *Yanez*, the *King* court declined to apply *Hanif* outside its limited, Medi–Cal context.

A. *King* shows why the issue is best left to the Legislature.

King explained that, when it has seen fit to do so, the Legislature has limited the collateral source rule. (*King*, *supra*, 2010 Cal.App. LEXIS 1375 at pp. *19–24.) As discussed in Howell's Answer Brief (pp. 21–25), the Legislature enacted Government Code section 985 ("section 985"), which

applies to public–entity defendants, and Civil Code section 3333.1 ("section 3333.1"), which applies to healthcare–provider defendants. Similar deference should be shown to the legislative prerogative in this case, even more so because defendants seek to eviscerate the collateral source rule for all cases, not just for narrowly defined classes of defendants or actions, and because of the complexity of healthcare pricing and health insurance.

Moreover, as *King* correctly explained, the enactment of sections 985 and 3333.1 reflects the Legislature's considered determination to limit the collateral source rule in two situations—*but no further*. (*King*, *supra*, 2010 Cal.App. LEXIS 1375 at p. *23.) To adopt the broader rule advocated by defendants—i.e., a rule for all cases—would thus be to usurp the Legislature's prerogative. For example, when the Legislature enacted the Medical Injury Compensation Reform Act of 1975 ("MICRA") for actions against healthcare providers, the Legislature capped noneconomic damages at $250,000. (Civ. Code, § 3333.2, subd. (b).) To judicially expand the provisions of section 985 and 3333.1 to all actions would be no different than judicially expanding MICRA's $250,000 cap to all tort actions.

As *King* also explained, to adopt defendants' rule would create a "strange anomaly." (*King*, *supra*, 2010 Cal.App. LEXIS 1375 at pp. *23–24.) Under section 985, which applies to public entities, a reduction based

on a negotiated rate differential is discretionary. But under the judicial rule sought by defendants, such reduction would be mandatory in favor of all private defendants. (*Ibid.*) "Thus, the public defendant would not be assured of a reduced award, but the private defendant would be. It is seriously questionable whether the Legislature intended such a result." (*Ibid.*)

B. *King* rejected the notion that *Hanif* or *Nishihama* created or supports the rule advocated by defendants.

King extensively analyzed *Hanif* and *Nishihama*, as well as *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, a decision that defendants tout as part of a perceived trilogy. (*King*, *supra*, 2010 Cal.App. LEXIS 1375 at pp. 24–31.) *King* explained that *Hanif* did not purport to decide whether its holding should apply to private insurance or Medicare. (The *Hanif* plaintiff's medical expenses were paid solely by Medi–Cal.)[5] *Nishihama* was an action against a public entity, so the action was governed by section 985. And *Greer* was decided on the ground the defendant had forfeited any possible claim to a so-called *Hanif* reduction, so any language in the *Greer* opinion that might seem to favor a *Hanif* reduction was dicta. Thus, *King* correctly concluded that "*Hanif*, *Nishihama*, and *Greer* do not

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[5] Similarly, in her concurring opinion in *Yanez*, Justice Banke noted that "*Hanif* is a rather unique case." (*Yanez*, *supra*, 185 Cal.App.4th at p. 1347 [conc. opn. of Banke, J.].)

provide governing authority for the question directly present in this case." (*King*, *supra*, 2010 Cal.App. LEXIS 1375 at p. *31.)

C. *KING* SHOWS WHY HOWELL DID NOT WAIVE HER OBJECTION TO A POST–VERDICT *HANIF* HEARING.

As does defendant Hamilton in the present case, the *King* defendant argued that the plaintiff had somehow consented to a post–verdict *Hanif* hearing.[6] *King* roundly rejected the argument. (*King*, *supra*, 2010 Cal.App. LEXIS 1375 at pp. 11-12.) As here, the *King* trial court told the defendant it could raise the *Hanif* issue in a post–verdict motion. (*Id.*, at p. 11.) The plaintiff agreed to let the issue wait for post–verdict arguments. (*Ibid.*) The Court of Appeal held this was *not* a waiver of plaintiff's objection to a *Hanif* hearing or reduction. (*Id.*, at pp. 11–12.) It was merely an agreement to defer arguments until after the verdict. So too here.

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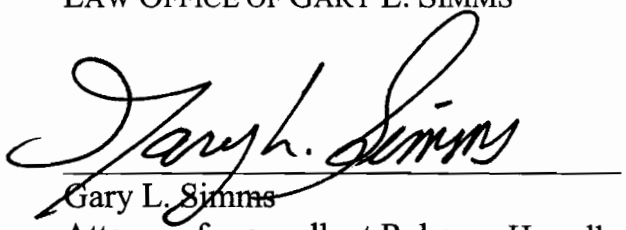
[6] As noted above (p. 9), *Yanez* held that such hearings are not authorized. (*Yanez*, *supra*, 185 Cal.App.4th at p. 1331.

CONCLUSION

The same courts that decided *Hanif* and *Nishihama*—as well as the Fourth District in this case—have made clear that the so–called "*Hanif/Nishihama* rule" was always a fiction, found only in the minds of tortfeasors. *Yanez* and *King* also make clear why the courts should not create such a rule. To do so would violate the collateral source rule. And if that is to be done, it is best left to the Legislature.

Dated: August 23, 2010.

Respectfully submitted,
LAW OFFICE OF GARY L. SIMMS



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CERTIFICATE OF WORD COUNT
RULE 8.204(C)(1)

I am counsel of record in this appeal for plaintiff and appellant Rebecca Howell. Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the text of the foregoing Supplemental Brief, including section headings, and footnotes, is 2,799 words, as calculated by the Microsoft Word™ computer program with which this brief was created, and I hereby certify that the text, headings, and footnotes are in proportionately spaced Times New Roman 13–point font.

Dated: August 23, 2010.

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♦ CERTIFICATE OF SERVICE ♦

Rebecca Howell v. Hamilton Meats & Provisions, Inc.
S179115

I, the undersigned, declare as follows:

I am employed in the County Yolo, State of California by The Law Office of Gary L. Simms. I am more than 18 years of age. I am not a party to this action. My business address is 2050 Lyndell Terrace—Suite 240; Davis, California 95616.

On August 23, 2010, I served true and complete copies of the attached **SUPPLEMENTAL BRIEF ON THE MERITS REGARDING NEW AUTHORITIES DECIDED AFTER APPELLANT'S ANSWER BRIEF [CAL. RULE OF COURT 8.520 (d)(1)]** on the following attorneys of record by placing true and complete copies of that document in sealed envelopes addressed as follows, with United States Postal Service postage prepaid, and depositing those sealed envelopes in the United States mail in Ashland, Oregon.

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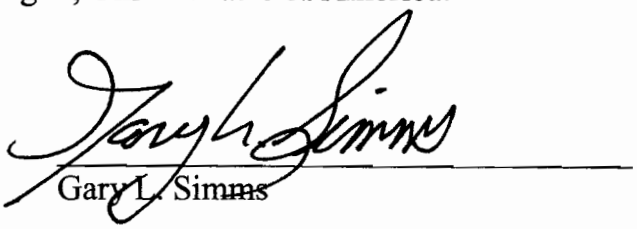
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I signed the original of this Certificate of Service on August 23, 2010, in the City of Ashland, County of Jackson, State of Oregon, United States of America.



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