

August 28, 2015

The Honorable Tani Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-3600

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AUG 28 2015

CLERK SUPREME COURT

Re: *Ciolek v. Bermudez*
California Supreme Court No. S228186
California Court of Appeal, Fourth Appellate District, Case No. G049510
Amicus Curiae Letter In Support of Petition for Review (Rule 8.500(g))

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

The League of California Cities ("League") and the California State Association of Counties ("CSAC") (collectively "Amici") submit this letter brief in support of the Petition for Review filed by Faith Ciolek ("Petitioner"), seeking review of *Bermudez v. Ciolek* (2015) 237 Cal. App. 4th 1311 ("*Bermudez*"), a published decision by Division Three of the Fourth Appellate District of the Court of Appeal.

INTRODUCTION

The Petition for Review raises issues left open by this Court in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal. 4th 541. The present case differs from *Howell* because it involves determining the reasonable value of medical care for uninsured plaintiffs.

The Court should grant review for all of the reasons stated in the Petition, and in particular to decide two questions following the ruling in *Howell*:

1. For what purpose, if any, may the factfinder rely on unpaid medical bills to determine the reasonable value of medical services provided to an uninsured plaintiff?
2. Can an uninsured plaintiff who has paid no part of the medical bills establish the reasonable value of medical services without any evidence of the market rates for their care?

The Court in *Howell* laid the framework for deciding the reasonable value of medical services. In subsequent cases (including *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308 ["*Corenbaum*"]), the lower appellate courts have addressed the admissibility of medical bills.

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Under *Howell* and *Corenbaum*, medical bills for amounts beyond what was paid by insurance are irrelevant and inadmissible to prove the reasonable value of medical care.

The same issues arise on a daily basis as to tort victims who do not have medical insurance. With the publication of the *Bermudez* decision, there is confusing and conflicting precedent for trial courts on this issue.

As public entities and operators of some of the largest health care systems in the state, California cities and counties are interested in a tort system that fairly compensates injured persons while protecting taxpayers and citizens from undue expense. Citizens must have access to health care and receive fair compensation for harms inflicted, whether or not they have medical insurance. But courts should not adopt evidentiary and substantive rules that lead to judgments in excess of the harms actually suffered.

This decision affects the interests of public entities statewide. Accordingly, Amici ask this court to grant the Petition for Review to settle important questions of law and secure uniformity of decision in the lower courts.

INTERESTS OF AMICI

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

THE UNCERTAINTY CAUSED BY *BERMUDEZ* MAKES IT DIFFICULT FOR CITIES AND COUNTIES TO RESOLVE CASES AND EFFICIENTLY MANAGE LITIGATION.

Questions concerning civil litigation procedures and tort liability are of vital interest to cities and counties. The uncertainty caused by the conflict between *Bermudez* and *Corenbaum* and other appellate decisions does not affect only cases that go to trial. The uncertainty makes it difficult to value and resolve personal injury claims short of trial.

Amici's members provide public services (including health care through public hospitals and other health care facilities) to millions of California residents in every county, from city centers to suburbs to rural areas of the State. These cities and counties provide a wide array of services and facilities, including international airports, sea ports, public utilities, police, sheriff's and fire departments, public hospitals, health clinics, public transportation, public works, cultural and recreational facilities (such as sports venues, museums, libraries, parks, theaters, and convention centers).

As a result of these varied operations, California cities and counties receive thousands of personal injury claims a year and pay out substantial dollar amounts in settlements and judgments annually. Cities and counties have extensive experience with tort litigation and risk management that involves balancing public interests and benefits. The issues raised by this case will have a significant effect on the ability of state and local government to manage litigation and provide vital services to all Californians.

Amici's members have been involved in litigation concerning the issues raised in this case for many years. The City and County of San Francisco (a member of both the League and the CSAC) was a party to one of the seminal pre-*Howell* cases, *Nishihama v. City and County of San Francisco* (2001) 93 Cal. App. 4th 298, and the author of this amicus letter was San Francisco's appellate counsel in that case. In addition, the League submitted an amicus curiae brief to this Court in *Howell*, and the League and CSAC submitted a joint amicus curiae brief to the Court of Appeal in *Corenbaum*.

THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER UNPAID MEDICAL BILLS ARE RELEVANT OR ADMISSIBLE AS TO THE REASONABLE VALUE OF MEDICAL SERVICES.

The question of the admissibility and relevance of unpaid medical bills was not decided in *Howell*, and now the lower courts are divided. This is an issue in almost every personal injury case, whether or not the plaintiff is insured and regardless of the kind of insurance the plaintiff has. As the Court noted in *Howell*, hospital and doctors bills are misleading (or as one scholar put it, "insincere") because almost no one pays the full amounts of such bills. (*Howell*, 52 Cal. 4th at p. 561 [quoting Reinhardt, *The Pricing Of U.S. Hospital Services: Chaos Behind A Veil Of Secrecy* (2006) 25 Health Affairs 57, 63].)

With insured patients, the hospital and doctor have agreed to accept lower, negotiated rates for services as full payment without regard to the billed amounts. These rates are set in arm's length negotiations between health care providers and medical insurers. With capitated HMO plans (such as Kaiser), no medical bill of any kind is created unless the patient files a personal injury lawsuit, and the plaintiff incurs no liability for the charges on these litigation bills. With medical services provided on a lien basis (as in *Bermudez*), the doctor and medical facility negotiated to be paid out of the proceeds of litigation at the time they agreed to provide the services. In the case of a Kaiser-type plan or a lien doctor's bill, the litigation bills are not the

result of an arm's length transaction. In none of these situations is an unpaid medical bill representing "illusory" costs a reliable indication of the value of services. (See *John Dewar Gleissner, Proving Medical Expenses: Time for a Change* (Spring 2005) 28 Am. J. Trial Advoc. 649, 650-657.)

The *Bermudez* court held that unpaid medical bills (including those from doctors who worked on a lien basis) were relevant to the question of the reasonable value of past medical services. In doing so, the *Bermudez* court criticized and disagreed with Court of Appeal decisions that held that unpaid medical bills are irrelevant and inadmissible on the question of the reasonable value of past medical services. (See, e.g., *Corenbaum, supra*; *Ochoa v. Dorado* (2014) 228 Cal. App. 4th 120.) The Court should grant the Petition to resolve this conflict.

THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER MARKET VALUE IS THE APPROPRIATE MEASURE OF THE REASONABLE VALUE OF MEDICAL SERVICES.

In *Bermudez*, the court concluded that an award of medical damages could be based on medical bills (no part of which had been paid) and expert testimony that the amounts were "reasonable" without reference to what doctors and hospitals in the area generally accepted as payment for the same services. By contrast, under *Howell*, an insured plaintiff may recover no more than the amount accepted as full payment by the doctor or hospital. As the Court explained in *Howell*, capping medical damages at the amount actually paid is appropriate because that is the market or exchange rate for the services provided. (See *Howell*, 52 Cal. 4th at p. 556 [quoting Rest. 2d Torts, § 911, com. h, pp. 476-477].)

The rule set out in *Bermudez* would give credence to phantom bills (which under *Corenbaum* and other cases are irrelevant and inadmissible) and could lead to excessive compensation for those injured in accidents – at the expense of taxpayers when the defendant is a public entity.

The most troubling aspect of the *Bermudez* decision is that applying different evidentiary and substantive rules for uninsured plaintiffs than for those with insurance will produce vastly disparate outcomes. It could also encourage insured accident victims to abandon their regular network of medical providers and seek treatment on a lien basis. This will not improve the quality or availability of medical care for accident victims – and arguably could worsen care. The courts should not encourage this outcome.

CONCLUSION

The League and CSAC respectfully request that the Court grant the Petition for Review of *Bermudez v. Ciolek* to resolve important questions that confront the trial courts on a daily basis and affect the vital interests of cities, counties and other public entities statewide.

Respectfully submitted,

NEWDORF LEGAL

A handwritten signature in blue ink that reads "David Newdorf". The signature is written in a cursive style and is positioned above a horizontal line.

David B. Newdorf
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES and
CALIFORNIA STATE ASSOCIATION OF COUNTIES

PROOF OF SERVICE

I, Rye P. Murphy, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. My business address is Newdorf Legal, 220 Montgomery Street, Suite 1850, San Francisco, California 94104.

On August 28, 2015, I served the attached:

AMICUS CURIAE LETTER OF LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE
ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR REVIEW

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

Robert A. Olson, Esq. Edward L. Xanders, Esq. Greines, Martin, Stein & Richland LLP 5900 Wilshire Blvd., 12th Floor Los Angeles, CA 90036 (Attorneys for the Defendant/Appellant)	Peter H. Crossin, Esq. Veatch Carlson, LLP 700 S. Flower Street, 22nd Floor Los Angeles, CA 90017 (Attorneys for Defendant/Appellant)
Dale L. Pomerantz, Esq. Brobeck, West, Borges, Rosa & Douville LLP 1301 Dove Street, Suite 700 Newport Beach, CA 92660 (Attorneys for Defendant/Respondent)	Cleidin Z. Atanous, Esq. The Law Office of Cleidin Z. Atanous 500 S. Kraemer Blvd., Ste 205 Brea, CA 92821 (Attorneys for Defendant/Respondent)
Robert T. Simon, Esq. Brad M. Simon, Esq. The Simon Law Group 34 Hermosa Ave. Hermosa Beach, CA 90254 (Attorneys for Plaintiff/Respondent)	Robert B. Gibson, Esq. Gibson & Hughes 1551 N. Tustin Ave., Suite 530 Santa Ana, CA 92705 (Attorneys for Plaintiff/Respondent)

and served the named document in the manner indicated below:

BY MAIL: I caused true and correct copies of the above document(s) to be served by mail on the above date by personally placing and sealing said document(s) in an envelope or package suitable for mailing, postage prepaid, addressed to the addressee(s) and including this firm's return address, and then, following ordinary office practice, placing said sealed envelope in the office's usual location for collection and mailing with the United States Postal Service.

BY NEXT-DAY OVERNIGHT SERVICE: I caused true and correct copies of the above document(s) to be placed within a sealed envelope or other package suitable for overnight shipment, addressed to the addressee(s) and including this firm's return address, and delivered on the date stated above to an overnight delivery service for delivery to the addressee(s) on the following business day.

BY HAND DELIVERY: I caused true and correct copies of the above document(s) to be placed within a sealed envelope or other package suitable for handling by a messenger or courier service and then caused the package to be hand-delivered by a same-day messenger service to the addressee(s) on this date.

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BY FACSIMILE: I caused true and correct copies of the above document(s) to be sent via facsimile to the addressee(s) on this date. The facsimile machine used complies with California Rule of Court 2.306 and no error was reported by the sending facsimile machine. The transmission record for this facsimile complies with California Rule of Court 2.306.

BY EMAIL: I caused true and correct copies of the above document(s) to be sent via email to the addressee(s) on this date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed August 28, 2015, at San Francisco, California.

/s/ Rye P. Murphy

Rye P. Murphy