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January 5, 2016

Honorable Tani G. Cantil-Sakauye, Chief Justice
and Associate Justices
Supreme Court of California
350 McAllister Street, Room 1279
San Francisco, California 94102

Re: *Uspenskaya v. Meline*
Third District Court of Appeal Case No. C071647
Opposition Request for Depublication (Cal. Rules of Court, rule 8.1125(b) on behalf of the Consumer Attorneys of California

Dear Chief Justice and Associate Justices:

Pursuant to California Rule of Court, Rule 8.1125(b), The Amicus Committee of the Consumer Attorneys of California (CAOC)[1] respectfully submits that the appellate decision in *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, should remain published. CAOC writes this Court in response to the request by The Association of Southern California Defense Counsel for depublication of the decision ("the Association"). This request is made as soon as feasible after learning of the Association's depublication request, owing to the holiday period between that request and today.

The Third District's decision is a well-reasoned legal analysis of an important issue "in the evolving body of case law on the calculation of reasonable medical expenses in economic damages awards." *Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 999. The decision advances the law and promotes fairness, equity,

[1] CAOC is a voluntary membership organization of approximately 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962. Its members represent consumers, businesses and individuals physically or financially harmed by various negligent or unlawful acts. CAOC has taken a leading role in preserving access to the courts, court funding, and advancing and protecting the rights of injured individuals in both the courts and the Legislature.

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and judicial economy. It arises in a case with a factual situation ubiquitous in personal injury litigation but otherwise not covered in the case law: cases in which the defendant's victim is among those without the financial resources – either generally, or through the inability to earn income due to the defendant's actions and plaintiff's injuries – to either purchase insurance, to afford the staggering deductibles and copayments now common with health coverage, or with coverage that does not afford them access to the requisite level and quality of care, and who are therefore compelled to obtain medical services through means other than through an arrangement pre-negotiated between a health plan or payor and appropriate healthcare providers.

As judicial precedent, *Uspenskaya* will minimize the risk that tort victims will be undercompensated for their economic injuries and damages that result from defendant's misconduct – exactly the purpose and intent of the civil tort justice system.

THE ASSOCIATION'S ANALYSIS INTENTIONALLY MISCHARACTERIZES THE FINANCIAL ARRANGEMENTS USED TO OBTAIN CARE HEREIN

1. The Association misconstrues this Court's decision in *Howell.*

In *Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, this Court affirmed that "[a] person who undergoes necessary medical treatment for tortiously caused injuries suffers an economic loss by taking on liability for the costs of treatment. Hence, any reasonable charges for treatment the injured person has paid or, *having incurred, still owes* the medical provider are recoverable as economic damages." *Id.* at 551 (emphasis supplied).

Howell holds, however, that when a medical provider agrees to accept an amount less than the reasonable value as payment in full by a plaintiff's health insurer, then the amount the provider accepts is the measure of damages. *Howell,* 52 Cal.4th at 555. That situation is not what is at issue in this case. Rather, Uspenskaya sought, as much as possible, and consistent with the legal imperative to mitigate their damages, to restore themselves as closely as possible to the state of health they enjoyed before defendant's wrongful conduct.

In this day and age of spiraling health insurance premiums, financially crippling deductibles and copayments, there are victims who find themselves either without health insurance; with health coverage that does not afford them access to the requisite level and quality of care; or without the income or financial means to meet the deductibles and copayments demanded by their health coverage; and who

must therefore fulfill the mitigation imperative through means other than pre-negotiated health-insured care.

In *Howell*, this Court expressly rejected the notion that any generalizations can be made about the relationship between medical bills and the reasonable value of the services the provider rendered to plaintiff. Yet the Association here seeks to do just that.

Howell does not hold the full, billed amount is never relevant to proving damages. The court held only that the billed amount and reasonable value of the provider's services are not relevant to the calculation of medical damages where – due to rates pre-negotiated between a healthcare provider and a plaintiff's health insurance plan – the plaintiff incurs a pre-negotiated rate that is something less than the full billed amount. *Howell*, 52 Cal.4thh at 555; *Corenbaum v. Lampkin*, 215 Cal.App.4th 1308, 1328, fn 9 (2013),

In *Corenbaum*, Division 3 of the Second Appellate District, extracted isolated bits of language from Howell and took a giant leap to conclude that, because charges for medical services vary widely, medical bills are irrelevant in determining the reasonable value of services. *Id.*, 215 Cal.App.4th at 1330-1331. Recently, the same three justices took another giant leap, extending Corenbaum to state a flat rule that medical bills are "not evidence of the reasonable value of services provided . . . [and] cannot support an award of damages." *Ochoa v. Dorado*, 228 Cal.App.4th 120, 139 (2014), petition for review denied.

In *Howell* the majority rejected the dissenting opinion as it was based on what the majority considered broad generalizations that disregard the "complexities of contemporary pricing and reimbursement patterns for medical providers," *Howell*, 52 Cal.4th at 560. "Hospitals are generally faced with competing objectives of balancing budgets, remaining competitive, complying with health care and regulatory standards, and continuing to offer needed services to the community." *Id.* A provider's "charges are set within the context of hospitals' broader communities, including their competitors, payers, regulators, and customers." *Id.*

This Court did not hold that hospital bills never have a relationship to reasonable value of the services they render. To the contrary, the court warned that "making any broad generalization about the relationship between the value or cost of medical services and the amounts providers' bill for them—other than that the relationship is not always a close one—would be perilous." *Howell*, 52 Cal.4th at 562 (emphasis added). The necessary corollary is that, in a case involving healthcare that falls outside of pre-negotiated contractual rates between health plans and medical providers, the medical provider's bill – the debt incurred by the injury victim – remains at least one form of evidence of the reasonable value of the medical

services obtained. See *Guerra*, 127 Cal.App.2d at 520; *Harris*, 111 Cal.App.2d 593, 598 (1952).

The Third District's decision will not cause confusion about the admissibility of medical bills and their relevance to the issue of reasonableness.

In claiming that *Uspenskaya* "unreasonably suggests that bill amounts for medical services are admissible as reflective of the reasonable value of those services," (AL, p. 2) the Association is tilting at windmills – a position the court of appeal didn't adopt.

The court of appeal could not have been clearer: "Because of the stipulation, *there is no dispute here about whether the billed amounts reflect the reasonable value of the medical treatment* plaintiff received." *Uspenskaya* at 1006, fn. 10.

The specific question *Uspenskaya* answers is whether the amount a factoring company – MedFinManager, LLC (the very company involved in *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288) – paid to acquire the receivables and concomitant lien rights from the plaintiff's providers are per se relevant and admissible, by themselves, as the only evidence a defendant submits to establish the unreasonableness of the medical expenses the plaintiff incurred. Recognizing the difference between MedFin's purchase of an asset and an insurers payment for medical services, the court concluded that "MedFin's purchase price represents a reasonable approximation of the *collectability of the debt* rather than a reasonable approximation of the *value of the plaintiff's medical services.*" *Uspenskaya* at 1003. In other words, the factoring company's payment is inapposite to the question of the reasonable value of medical services.

As the court expressly acknowledged the limitation of its holding, there is no significant risk that the *Uspenskaya* decision will create confusion over the law as it relates to the relevance and admissibility of unpaid medical bills.

***Uspenskaya* satisfies publication standards**

Uspenskaya satisfies several of the Standards for Certification for publication enumerated in California Rules of Court, Rule 8.1105:

- Rule 8.1105(c)(3) – "explains . . . with reasons given, an existing rule of law," the right to be compensated for economic damages, such as medical expenses;

- Rule 8.1105(c)(4) – "advances a clarification of" Civil Code Section Civ. Code, § 1431.2, subd. (b)(1);

- Rule 8.1105(c)(6) – "involves a legal issue of continuing public interest," to wit: "A person who undergoes necessary medical treatment for tortiously caused injuries suffers an economic loss by taking on liability for the costs of treatment." *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, at p. 551; and the collateral source rule;

- Rule 8.1105(c)(7) – "makes a significant contribution to legal literature by reviewing the development of a common law rule," again, the collateral source rule's development and expression; and

- Rule 8.1105(c)(8) – "reaffirms a principle of law [the collateral source rule] not applied in a recently reported decision." While the collateral source rule has been applied to a variety of collateral benefits in recent years, it has not been analyzed or applied with respect to medical factoring companies since *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, and specifically had not been analyzed with respect to continuing medical debt since *Howell* at the Supreme Court level, and *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311 (2015) (modified with regard to a footnote reference at 238 Cal.App.4th 582) at the appellate court level.

Based on the foregoing, the CCTLA respectfully requests that the Court deny the Association's request to depublish the *Uspenskaya* decision.

RESPECTUFULLY SUBMITTED,
Consumer Attorneys of California

SUMNER LAW
SCOTT H.Z. SUMNER

PROOF OF SERVICE

I am employed in the County of Contra Costa, State of California. I am over the age of 18 and not a party to the within action; my business address 1299 Newhill Place, Suite 202, Walnut Creek, California 94596.

On **January 7, 2016**, I served the within document described as:

CAPITOL CITY TRIAL LAWYER'S LETTER IN OPPOSITION

on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes to be delivered, addressed as set forth in the attached service list with postage paid thereon and depositing them with the United States Postal Service at Walnut Creek, California.

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

Executed on January 7, 2016 at Walnut Creek, California.

Cynthia A. Bird

CYNTHIA A. BIRD

USPENSKAYA v. MELINE
Case Number S231461

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