THARPE & HOWELL, LLP

GENERAL LITIGATION NEWSLETTER

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This Newsletter is brought to you by Firm Partners Paul V. Wayne and Timothy D. Lake. Should you have any questions or comments about the articles presented, please feel free to contact them at (818) 205-9955, or via email to pwayne@tharpe-howell.com or tlake@tharpe-howell.com . Please note also that Tharpe & Howell recently launched the *California Business Law Report*, an online forum which addresses the rapidly increasing convergence of business and law. To remain apprised of significant developments in the business community, please be sure to visit the forum at www.commercialcounselor.com.

THE HOWELL DECISION: PRACTICAL ISSUES MOVING FORWARD

By now, we're sure you've had a chance to read some commentary on the *Howell* decision with respect to a reduction in medical bills pursuant to the *Hanif* case. We've looked over the decision and want to update you on a few practical issues relating to future case valuations as a result of the favorable ruling in *Howell*.

The *Howell* Court appears to go even further than the prior decision in *Hanif*, to the benefit of the defense. Justice Werdegar, after a relatively lengthy discussion on the background of *Hanif* and the various arguments relating to the collateral source rule, gets to the meat of the decision on page 29, making it clear that a plaintiff is not to recover damages for past medical bills in excess of the amount accepted as full payment (including the amounts paid by insurance and any deductible or co-payments made). In its decision, the Court states the amount of the bills actually paid is admissible at trial (while, in the past, gross billings were presented to the trier-of-fact with a reduction by the defense via post-trial motion). This language confirming that the amount of the bills actually paid is admissible at trial is found on page 29 of the *Howell* Opinion, wherein it states:

> "It follows from our holding that when a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial." [Emphasis added.]

While the California Supreme Court appears to be stating that evidence of the amount paid to fully satisfy a medical bill is admissible at trial, this ruling does not violate the collateral source rule as evidence that the payments were made by an insurer is still inadmissible. In this regard, the Court states in the very next sentence:

> "Evidence that such payments were made in whole or in part by an insurer remains, however, generally inadmissible under the evidentiary aspect of the collateral source rule."

The decision then indicates that the (gross) amount of the billings is *not* admissible at trial for purposes of establishing the amount of past medical expenses incurred. In this regard, the next sentence of the Opinion states:

> "Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses."

While this portion of the Court's holding (at page 29) indicates that the amount of the medical bills actually **paid** should be admitted into evidence, it further indicates that whether any such payment was made by insurance, and any (gross) amounts initially billed – would both be inadmissible. The Court then goes on to create ambiguity as to whether or not the (gross) amount of the healthcare provider billings can be admitted into evidence for other purposes. The last sentence of the paragraph setting forth the Court's opinion states:

> "We express no opinion as to its relevance or admissibility on other issues, such as noneconomic damages or future medical expenses. (The issue is not presented here because defendant, in this court, conceded it was proper for the jury to hear evidence of plaintiff's full medical bills.)"

These last two sentences of the Court's holding appear to leave open the issue of whether the (gross) amounts billed could be relevant to the issue of non-economic damages, or future medical expenses not yet incurred (such as the need for future surgery). Nevertheless, at trial, defense counsel will now likely assert that, pursuant to *Howell*, the jury can only hear **evidence of the amounts actually paid** relative to past medical bills in cases involving private health insurance, MediCare or MediCal.

It is also important to note that the Court in *Howell* also addressed the manner in which the *Hanif* reduction is to be implemented. It stated that where a jury has heard evidence of the amount accepted as full payment by a medical provider, but then awards an amount in excess of that for past medical expenses, a defendant can move for a Motion for New Trial on the grounds of excessive damages pursuant to California *Code of Civil Procedure* Section 657(5). [In the past, a *Hanif* Motion In Limine would be filed post-trial to obtain the reduction – which will no longer be necessary under *Howell*.] Instead, if a trier-of-fact awards past medical specials in an amount greater than that which was actually paid, a Motion for New Trial can simply be filed.

Moving forward, our plan is to continue pressuring plaintiffs' counsel to stipulate to limiting past medical billings to those actually paid. When necessary, we will subpoena the billing custodians to testify at trial for confirmation of the reduced amount. And if an award for past medical specials comes in for more than what was actually paid, we will have significant leverage in forcing the acceptance of a reduced amount.

NEGLIGENT V. INTENTIONAL TORT FEASORS: CAN LIABILITY BE SPLIT?

The Nevada Supreme Court recently held that liability percentage can be apportioned between **negligent** and **intentional** tort feasors under Nevada's comparative-negligence statute NRS 41.141.

In *Café Moda, LLC v. Donny Palma, et al.*, Matt Richards and Donny Palma were patrons of Café Moda when an altercation between the two occurred and Richards stabbed Palma repeatedly. Palma then brought suit against Richards and Café Moda, pursuing an **intentional**-tort theory of liability against Richards and a **negligence** theory of liability against Café Moda.

At trial, the jury rendered a verdict in favor of Palma (finding him not comparatively negligent) and apportioned 80% of fault to Richards and the remaining 20% to Café Moda. Based upon its reading of NRS 41.141, the District Court entered a judgment against Richards and Café Moda that held each of them jointly and severally liable for 100% of Palma's damages. Café Moda appealed.

On appeal, Café Moda argued that NRS 41.141 permits liability to be apportioned between a negligent tortfeasor and an intentional tortfeasor. On this basis, Café Moda argued it could therefore not be held jointly liable for 100% of Palma's damages when it was found by the jury to only be 20% at fault. Palma, on the other hand, contended that the jury's finding of no negligence on his (Palma's) part effectively apportioned 100% of the **negligence** to Café Moda, making it jointly liable for 100% of the Judgment amount.

The Court analyzed NRS 41.141 and found that both parties presented plausible plain-language applications of the statute. After reviewing the legislative intent behind NRS 41.141 (to lessen unfairness and strike a fair balance when multiple tort feasors are involved) – it determined that Café Moda could only be held 20% liable for Palma's damages – when the jury found Café Moda to be only 20% at fault

CALIFORNIA SUMMARY ADJUDICATION: A CHANGE IN THE RULES

On January 1, 2012, new options became available to litigants wishing to summarily adjudicate specific matters in California disputes. Previously, *Code of Civil* Procedure § 437c, which governs the filing of Motions for Summary Adjudication in California courts, held that such Motions could only be granted if they would fully depose of the cause of action, affirmative defense, claim for damages, or issue of duty. However, under the newly added sections 437c(s)(1)-(7), (u) such a Motion can be granted *even if* some elements would remain in dispute. This means that, under the new rules, extraneous items can be challenged earlier-on, with a reduction in total defense time and expense.

Under §437c(s)(2)-(3), a partial summary adjudication may now only be brought upon stipulation of the parties whose claims or defenses are put at issue, AND when the court has determined that the motion will further the interest of judicial economy. Within 15 days of the court's receipt of the stipulation and declaration re judicial economy, the court will notify the parities as to whether the motion can be filed. If the court does not allow the motion, then the parties can request an informal conference with the court to permit further evaluation.

We anticipate that increased filings of Motions for Summary Judgment under these new rules may significantly expedite the litigation process. And, when a case does not settle in advance of trial, very few unresolved issues outstanding will remain in dispute.

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In The News

Firm Partner **Paul V. Wayne** has been invited to join the prestigious **Claims and Litigation Management Alliance** ("CLM"), a nonpartisan alliance comprised of insurance companies, corporations, attorneys, and risk management professionals who promote and further the highest standards of litigation management in pursuit of client defense. Mr. Wayne is an experienced trial attorney with extensive experience in all areas of civil litigation, including tort, business, medical malpractice, and hospitality law.

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Firm Partner **Timothy D. Lake** recently joined the **Coverage Litigation Committee** of the Claims and Litigation Management Alliance ("CLM"); and has also been appointed to the **Insurance Coverage Committee of the California State Bar**! Mr. Lake is Chair of the Firm's Insurance Coverage and Bad Faith Practice Group, and represents nationally recognized insurance carriers on a broad range of coverage issues and related matters.

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Tharpe & Howell recently launched the ***California Business Law Report*** – an online forum which continuously provides significant legal developments and practical advice for the business community. Please be sure to check it out at www.commercialcounselor.com!

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Tharpe & Howell has been part of the California, Arizona, and Nevada business communities for more than 35 years, providing clients with experience, judgment, and technical skills. We are committed to delivering and maintaining excellent client service and case personalized attention, and to be an integral member of each client's team.