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17 MONSANTO COMPANY

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF SAN FRANCISCO**

20
21 DEWAYNE JOHNSON,
22 Plaintiff,
23 vs.
24 MONSANTO COMPANY,
25 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
MOTION *IN LIMINE* NO. 30 TO
EXCLUDE CERTAIN EVIDENCE
REGARDING PLAINTIFF'S ALLEGED
MEDICAL EXPENSES**

Trial Date: June 18, 2018
Time: 9:30 a.m.
Department: TBD

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
05/24/2018
Clerk of the Court
BY: ERNALYN BURA
Deputy Clerk

1 **I. INTRODUCTION**

2 Defendant Monsanto Company (“Monsanto”) respectfully requests that this Court exclude
3 evidence of medical expenses that Plaintiff Dewayne Johnson (“Plaintiff”) did not actually incur.
4 As made clear by the California Supreme Court, the amount “billed” for a plaintiff’s medical care
5 is inadmissible for the purpose of establishing past medical expenses if the plaintiff did not
6 actually experience an economic loss in that amount. *See Howell v. Hamilton Meats &*
7 *Provisions, Inc.*, 52 Cal. 4th 541 (2011); *see also Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308
8 (2013). In a fee-for-service setting, the amounts “billed” by a medical provider show only the
9 amounts charged for a particular treatment, but that is not necessarily the amount that the medical
10 provider agreed to accept as full payment from a plaintiff and/or the plaintiff’s insurer. Thus, this
11 Court should preclude Plaintiff from presenting evidence regarding any alleged past medical
12 expenses for which he seeks damages in this lawsuit unless Plaintiff first establishes to the Court’s
13 satisfaction that he actually paid or incurred such medical expenses within the meaning of *Howell*
14 and *Corenbaum*.

15 **II. ARGUMENT**

16 “[A] plaintiff’s [medical] expenses, to be recoverable, must be both incurred and
17 reasonable[.]” *Howell*, 52 Cal. 4th at 555.¹ In *Howell*, the California Supreme Court held that a
18 personal injury plaintiff whose medical expenses are paid out-of-pocket or through insurance
19 “may recover as economic damages no more than the amounts paid by the plaintiff or his or her
20 insurer for the medical services received or still owing at the time of trial.” *Howell*, 52 Cal. 4th at
21 566. The Court reasoned that plaintiffs incur no liability for the “negotiated rate differential” – the
22 discount from the full amount billed that medical providers accept from patients and medical
23 insurers as full payment – and thus suffer no pecuniary loss in that amount. *Id.* at 555, 557. The
24 Court concluded that the full amount billed is not an accurate measure of the reasonable value of
25 medical services, *id.* at 560-62, and that evidence of medical expenses that are not actually paid
26 through insurance or otherwise (*i.e.*, expenses that are discounted or “written off” by the medical

27 ¹ This motion is directed only to the issue of whether Plaintiff actually paid or incurred the
28 medical expenses for which he seeks damages at trial. Monsanto reserves the right to assert a
lack-of-reasonableness objection to any medical expenses for which Plaintiff seeks damages.

1 provider) are not relevant on the issue of past medical expenses. *Id.* at 567. In *Corenbaum*, the
2 court extended *Howell* and held that evidence of the full amount billed is similarly irrelevant to
3 prove future medical expenses and noneconomic damages. 215 Cal. App. 4th at 1330-31,1332-34.

4 It is important to apply the principles addressed above to ensure that Plaintiff cannot seek
5 “phantom” damages at trial that are precluded by *Howell* and its progeny. Plaintiff has claimed
6 over \$974,972 in medical expenses as of February 2018. Despite Monsanto’s attempt to uncover
7 the basis for that claimed amount through written discovery, Plaintiff has failed to substantiate it.
8 *See* Declaration of Sandra A. Edwards (“Edwards Decl.”) at ¶ 40, Ex. 39 (Pl.’s Resp. to Defs.’
9 First Set of Special Interrog. at 5:1-2) (responding, without supplementing his response, that
10 “Plaintiff is in the process of gathering medical bills and tabulating special damages” in response
11 to interrogatory asking Plaintiff to identify his medical expenses). It is likely that the amount
12 claimed by Plaintiff for past medical expenses is based in large part on the total amounts “billed”
13 by various medical providers for their services. As discussed below, Plaintiff cannot substantiate
14 that he actually paid or incurred those amounts, because only a fraction of the amount that his
15 medical providers “billed” was actually paid by Plaintiff or his insurers.

16 For example, Plaintiff received medical care from Stanford Health Care (“Stanford”)
17 medical providers. Stanford charged a total of \$172,288.99 for medical services it provided to
18 Plaintiff. *See* Declaration of Kristine Grajo at ¶ 4. Plaintiff’s insurer paid a total of only
19 \$68,087.88 to Stanford for Plaintiff’s medical care, and Stanford wrote off a total of
20 approximately \$104,181.00 from the amounts it charged as contractual adjustments during these
21 same periods. *Id.* Stanford received no payments for the approximately \$104,181.00 that was
22 written off. *Id.* Because the amounts that Stanford billed and then wrote off were never paid or
23 incurred by Plaintiff, those amounts are not recoverable damages under California law and should
24 be excluded *in limine* as irrelevant.

25 Plaintiff also received medical care from various Kaiser Permanente medical providers, in
26 accordance with health insurance coverage administered by Kaiser Permanente Health Plan. If
27 Plaintiff seeks to use the amounts “billed” by Kaiser Permanente medical providers to prove his
28 damages at trial, the Court should preclude him from doing so because these amounts are

1 irrelevant. Kaiser Permanente Health Plan pays Kaiser Permanente medical providers for services
2 on a “capitated” basis. See Edwards Decl. at ¶ 41, Ex. 40 (*How Kaiser Permanente Providers Are*
3 *Paid*).² Unlike the fee-for-service model, Kaiser Permanente Health Plan’s payments to its
4 medical providers are “a set dollar amount for each member enrolled” and are not tied to any
5 particular service rendered to any particular patient or the amounts charged for those services. *Id.*
6 (noting that medical providers “receive[] this payment for each enrolled member whether or not
7 the member seeks or receives services during that month.”). In other words, the Kaiser
8 Permanente medical providers who treated Plaintiff would have received the same periodic
9 payments from Kaiser Permanente Health Plan regardless of whether they treated Plaintiff at all;
10 regardless of how frequently (or infrequently) they treated him; and regardless of the “value” or
11 type of medical care they rendered to him. Due to this absence of any link between payments
12 made to Kaiser Permanente medical providers by Kaiser Permanente Health Plan and medical care
13 rendered by Kaiser Permanente medical providers to Plaintiff, there is no way to determine how
14 much of the total amounts “billed” to Plaintiff by any Kaiser Permanente medical provider was
15 actually paid on Plaintiff’s behalf by the Kaiser Permanente Health Plan. Any payments by Kaiser
16 Permanente Health Plan to Kaiser Permanente medical providers were not tied in any way to
17 *Plaintiff’s* medical care, so Plaintiff cannot establish that any amounts shown in a Kaiser
18 Permanente medical provider’s bill were actually paid or incurred by Plaintiff. With one small
19 exception, the Court should apply *Howell* and *Corenbaum* to preclude Plaintiff from presenting
20 any evidence at trial of amounts “billed” by Kaiser Permanente medical providers.³

21 The principles discussed above also apply to any other alleged medical expenses for which
22 Plaintiff may intend to seek damages at trial for care rendered by other medical providers (not
23 Stanford or Kaiser Permanente providers). If Plaintiff cannot first establish that he actually paid or
24 incurred such medical expenses, then *Howell* and *Corenbaum* require the Court to preclude him

25 _____
26 ² This exhibit can be found on the Kaiser website at
27 https://healthy.kaiserpermanente.org/static/health/en-us/pdfs/cal/ca_how_providers_are_paid.pdf

28 ³ If Plaintiff can establish that he actually made out-of-pocket payments to Kaiser Permanente
medical providers (*e.g.*, co-pays), evidence of such payments would not be precluded by *Howell*
and its progeny.

1 from presenting evidence of such medical expenses at trial.

2 **III. CONCLUSION**

3 For the foregoing reasons, the Court should exclude evidence of any amounts billed by
4 Plaintiff's medical providers that were not actually incurred, *i.e.* paid, either by Plaintiff or his
5 insurers.

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7 Dated: May 24, 2018

Respectfully submitted,

8 FARELLA BRAUN + MARTEL LLP

9 By: 

10 Sandra A. Edwards

11 Attorneys for Defendant
12 MONSANTO COMPANY

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