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MONSANTO COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

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

I. INTRODUCTION

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

II. ARGUMENT

"[A] plaintiff's [medical] expenses, to be recoverable, must be both incurred and reasonable[.]" *Howell*, 52 Cal. 4th at 555.[1] In *Howell*, the California Supreme Court held that a personal injury plaintiff whose medical expenses are paid out-of-pocket or through insurance "may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." *Howell*, 52 Cal. 4th at 566. The Court reasoned that plaintiffs incur no liability for the "negotiated rate differential" – the discount from the full amount billed that medical providers accept from patients and medical insurers as full payment – and thus suffer no pecuniary loss in that amount. *Id.* at 555, 557. The Court concluded that the full amount billed is not an accurate measure of the reasonable value of medical services, *id.* at 560-62, and that evidence of medical expenses that are not actually paid through insurance or otherwise (*i.e.*, expenses that are discounted or "written off" by the medical

[1] This motion is directed only to the issue of whether Plaintiff actually paid or incurred the 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.

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

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

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

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

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

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

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

[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.

from presenting evidence of such medical expenses at trial.

III. CONCLUSION

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

Dated: May 24, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY