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December 27, 2012

Presiding Justice Joan D. Klein  
Court of Appeal  
Second Appellate District, Division 3  
300 South Spring Street  
Second Floor, North Tower  
Los Angeles, CA 90013

**Re: *Corenbaum v. Lampkin*, Court of Appeal No. B236227;  
*Carter v. Lampkin*, Court of Appeal No. B237871  
Superior Court of Los Angeles County,  
Nos. NC03848, NC054159, NC053439**

To the Honorable Presiding Justice Klein and the Associate Justices of the Court of Appeal:

AARP submits the attached letter brief in response to the Court's November 26, 2012 request for additional briefing from amici curiae. AARP writes this letter to urge the Court to permit the admission of the amount billed for medical expenses into evidence to aid juries in calculating future medical expenses and noneconomic damages.

**CORPORATE DISCLOSURE STATEMENT OF AMICUS CURIAE AARP**

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951. Other legal entities related to AARP include AARP Foundation, AARP Services, Inc..

Legal Counsel for the Elderly, AARP Experience Corps, and AARP Financial. AARP has no parent corporation, nor has it issued shares or securities.

### **STATEMENT OF INTEREST**

AARP is a nonpartisan, nonprofit organization with a membership dedicated to addressing the needs and interests of people age fifty and older in ways beneficial and affordable to them and to society as a whole. Through education, advocacy and service, AARP seeks to enhance the quality of life for older persons and all Americans by promoting independence, dignity, and purpose. AARP advocates for equality and fairness for older persons in the courts and believes courts and juries should determine damage awards free from all forms of age bias.

### **SUMMARY OF ARGUMENT**

Jurors must be permitted to consider complete medical bills when they calculate noneconomic damages and future medical expenses. Many older people have little or no time left in the workforce, and subsequently their economic damages like lost income will be limited if they are injured by tortfeasors. Accordingly, they depend on noneconomic damages to be fully and fairly compensated for their injuries that were caused by another person's negligence. If courts do not allow juries to see the full amount billed by medical providers, as opposed to the discounted amount paid by an insurance company, jurors will not be able to accurately compute noneconomic damages. If older people can only expect minor awards, attorneys who work on a contingency fee basis will be unlikely to accept them as clients, preventing older people from obtaining justice, and reducing the deterrent effect that tort damages have on potential wrongdoers.

Although older people are especially affected when juries are not permitted to see medical bills, the best policy for people of all ages is to give juries all pertinent evidence. The

complete bill of a health care provider is the most relevant evidence in determining future medical expenses. If juries can only look at the amount an insurance company pays, which is consistently significantly less than the amount the health care provider billed, victims who are uninsured will be in better positions than those who are insured. This is because the jury will use the costly medical bills to compute the awards for uninsured people, and will use only the smaller insurance payment number to calculate the awards for insured people. To remedy these problems, juries must be permitted to see victims' full medical bills, and must have the discretion to determine the appropriate weight of that evidence.

## **ARGUMENT**

### **I. Juries should be Allowed to Consider the Total Amount Billed for Past Medical Expenses when Calculating Noneconomic Damages.**

#### **a. Importance of noneconomic damages for older people**

Older adults depend on noneconomic damages to receive full and fair compensation from anyone who has negligently injured them. With the elderly population of California expected to more than double between 2000 and 2030, it is especially important to consider how older people may be affected by this Court's decision. (California HealthCare Foundation, California Health Care Almanac: Medicare Facts and Figures (Jan. 2010) p. 3.) Because many older people have already retired or are getting ready to retire, they face a loss of future wages that is much lower than a younger person.

The downsizing of a victim's recovery of noneconomic damages and future medical expenses can ruin the deterrent effect among tortfeasors who harm older people. AARP's Public Policy Institute conducted a study that found that older people are especially at risk of preventable medical errors and injuries "because they have more severe illnesses as well as more

illnesses simultaneously (comorbidities) than younger populations do.” (Rothschild & Leape, *The Nature and Extent of Medical Injury in Older Patients* (Sept. 2000) p. 3 < [http://assets.aarp.org/rgcenter/health/2000\\_17\\_injury.pdf](http://assets.aarp.org/rgcenter/health/2000_17_injury.pdf)> [as of Dec. 26, 2012].) Another study, looking at nursing facility negligence cases (most of which involved older victims) in California, Florida, and Texas, found that 79% “of the residents suffered from multiple injuries including burns, falls, starvation, sexual abuse, and the failure of pain management.” (Rustad, *Neglecting the Neglected: The Impact of Non-economic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 *Elder L.J.* 331, 381 (2006).) In these cases, noneconomic damages make up 80% of the damages. (*Id.* at pp. 344-45.) Accordingly, if wrongdoers do not need to be concerned about paying large amounts of money in noneconomic damages, the deterrent effect of tort damages will be greatly diminished.

Victims who are confronted with many barriers to obtaining a full and fair compensation also face barriers accessing the courts to vindicate their rights if they cannot secure legal counsel. (Daniels & Martin, *The Texas Two-Step: Evidence on the Link between Damage Caps and Access to the Civil Justice System* (Winter 2006) 55 *DePaul L.Rev.* 635, 646.) Tort cases such as this one can be extremely expensive to litigate, and as a result, low-income victims, including the elderly, can only bring a case to trial if they use attorneys who work on a contingency fee basis, where the attorney is paid a percentage of the final verdict. (*Id.* at p. 646.) Lawyers who work on a contingency fee basis are unlikely to be able to represent a victim who cannot expect a large award. (Ramey, *Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California’s Elder Abuse Act* (2002) 39 *San Diego L.Rev.* 599, 611.) To reduce this effect, victims must be able to build strong cases for full noneconomic and future medical damages to which they are entitled. Otherwise, their potential damages will remain small and lawyers will

be unable to represent the victims preventing older people and other low income victims from achieving justice.

**b. Billed amount impacts *past* noneconomic damages**

In addition to helping older people, using the actual amount billed by a health care provider to calculate noneconomic damages is sound policy for people of all ages. Juries use medical bills to determine just how much pain and suffering a person might have experienced: if the billed amount is higher, the procedure and recovery may be considered by the jury to be more invasive, time-consuming, and uncomfortable for the patient. Although medical expenses are not perfect indicators of pain and suffering, they present a reasonable representation, in monetary amounts, of how much the victim has suffered. The amount of money that an insurance company pays is completely irrelevant to the task of attaching a value to a person's anguish. For example, if a patient underwent a surgery and rehabilitation for which he received a bill for \$100,000, that procedure would appear to be more invasive and painful than a bill for which an insurance company paid only \$50,000. Juries should be allowed to see both pieces of evidence to make their own decision about how to evaluate the experience of the victim.

**c. Billed amount impacts *future* noneconomic damages**

Just as medical bills are relevant in determining past noneconomic damages, they are also pertinent in calculating future noneconomic damages. As previously discussed, the actual value billed by the health care provider is a rational means through which a jury can evaluate the pain and suffering that a victim has experienced. If a victim is currently suffering from pain in a certain part of his body, and is unable to enjoy certain life activities, these factors are helpful indicators of what kind of future lost enjoyment he will suffer later in his life.

Furthermore, if a victim loses his health insurance in the future, he will be responsible for paying his medical bills. He will not be permitted to pay the small amount that the insurer has paid; instead, he will have to pay the full bill. Consequently, juries should not base awards on the discounted rates that insurance companies have negotiated with their providers. Certainly, juries should be permitted to consider both the billed amount and the discounted insurance payment and subsequently draw their own conclusions.

## **II. Future Medical Expenses Must be Informed by Amount Billed.**

The actual amount of the bill presented by a medical provider is the most pertinent evidence when considering how to calculate future medical expenses. An insurance company's payments are irrelevant in computing future medical expenses, because what the insurer pays the provider cannot be used to predict what not yet identified health care providers will bill for future care. Conversely, the amount a hospital and other health care providers actually bill is the most convenient and efficient evidence of what the future costs for the victim's care will be. If a victim loses his health insurance in the future, he will be liable for the entire billed amount and not the negotiated rate worked out between an insurance company and a provider. For jurors to accurately determine future medical expenses, the court must permit them to consider the victim's total medical bills.

A victim who was responsible enough to purchase health insurance should not be punished for his foresight. (Wolf, *How Health Insurance Affects Damages in a Personal Injury Action* (2008) 31 L.A. Law 21, 23.) Yet, this is exactly the result that the Appellant-Petitioner is seeking to effectuate. As demonstrated by the case at bar, when one plaintiff has health insurance and the other does not have it at the time of the injury, it is not rational to base future medical expenses on anything other than the total amount the health care providers billed for

both victims' care. Otherwise, one victim's damages are based on a discounted negotiated amount paid by an insurance company and the other victim's damages are based on the much larger, full amount billed by the health care provider.

The most accurate indicator of what certain procedures and treatments will cost in the future is to look at how much health care providers valued the past care without consideration of the discounted rate that the insurer paid. Allowing juries to have access to the full amount billed by a health care provider as well the amount an insurer paid ensures that juries award similar damages to similarly situated people. Insurers negotiate with health care providers to pay a lower rate, in exchange for the insurance company's clients and quick payments. (Sumner, *The Real Cost of Insurance Premiums*, S.F. Daily J. (Dec. 4, 2009).) Accordingly, the amount that different insurance companies pay towards similar medical bills could vary greatly, and if juries are not permitted to see gross medical expenses, they could award similarly situated people vastly different amounts of money. (Rallo, *Insurance Write-Offs and the Collateral Source Rule* (2002) 38 Trial 42, 50.)

### **III. Recommended Jury Instructions**

#### **a. Past and Future Noneconomic Damages**

When calculating past and future noneconomic damages, the court should instruct the jury to consider all relevant evidence. The full medical bills reflecting the bills that a victim would receive if he had no insurance are relevant in determining noneconomic damages. Jurors should have the benefit of knowing the full amount billed, but they may have the discretion to choose how to weigh that evidence against any other relevant evidence, including evidence reflecting the amount an insurer paid to resolve that bill.

**b. Future Medical Expenses**

When determining the appropriate damage awards for future medical expenses, juries should be instructed that they must consider the full medical bills reflecting the actual bills that a victim would receive if he had no insurance. Complete medical bills offer convenient evidence to efficiently calculate future medical expenses, but jurors may weigh that evidence against any other evidence that they believe is relevant, including what an insurer paid to resolve that bill. In addition, juries should be instructed to consider the likelihood that a victim will be without insurance in the future when they calculate future medical expenses.

**CONCLUSION**

The complete medical bills provide juries with the best evidence with which they can calculate appropriate awards. Older people and low income people of all ages rely on noneconomic damages to be fully and fairly compensated for their injuries. If these victims receive only a minimal amount in damages, their access to court and justice will be greatly diminished. Insurance payments are a discriminatory way to calculate future medical expenses, as they do not reflect the actual cost of the medical treatment. Basing damages on insurance payments could lead to great disparities in awards between people who do and do not have health insurance. Accordingly, plaintiffs must be permitted to introduce the full amount billed by health care providers into evidence.

Respectfully submitted,

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I, Michelle Ryan, am employed in Washington D.C.. I am over the age of 18 years and am not a party to the within action. My business address is 601 E. Street, NW, Washington, D.C. 20049. On December 27, 2012, I caused the foregoing documents to be served on the parties by overnight mail. Amicus Curiae Letter of AARP to be served on the interested parties in this action as follows:

by placing  the original  a true copy thereof enclosed in sealed envelopes addressed.

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