CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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DAMERON HOSPITAL ASSOCIATION v. AAA NORTHERN CALIFORNIA, NEVADA AND UTAH INSURANCE EXCHANGE 7/29/14

Hospital Lien Act (Civil Code Section 3045.3); Right to Recover Customary Billing Rates for ER Services (Balance Billing)

In July 2010, Dameron Hospital sued AAA and Allstate for damages as well as injunctive and declaratory relief. Dameron's complaint alleges it gives emergency room care to patients regardless of their ability to pay, as required by Health and Safety Code section 1317. Thus, Dameron provided emergency room services to Denise H. and Don P. which amounted to $1,724 and $3,445, respectively. After these patients were discharged from the emergency room, Dameron learned each was injured by the negligence of a driver insured by Allstate. Dameron also provided emergency room services to Rita H., Sara M., and D.S. and their emergency room bills totaled $33,831.74, $1,976, and $2,029.76, respectively. After these patients were discharged, Dameron learned they were all injured by drivers insured by AAA.

The record indicates Kaiser provided health insurance for each of these patients except Rita H. and D.S. For each of these patient's emergency room services bills Dameron served Hospital Lien Act (HLA) liens on all entities known to Dameron and who might be liable for causing each patient's injuries. And, for each of these patients, Dameron learned AAA or Allstate paid a settlement to the patient without satisfying any part of Dameron's HLA liens. Dameron filed the present action within a year of learning of the settlements and judgments.

Dameron further alleges each of the contracts with health care service plans for the patients in this case contains an "applicable rate agreement" that "preserves Dameron's HLA rights, as contemplated by the California Supreme Court in *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595." Dameron asserts it follows the same procedure in collecting on its HLA liens whenever a third party has caused injury to an emergency room patient who has coverage with a health insurer having a rate agreement contract with Dameron. Specifically, Dameron bills the full amount of the emergency room costs to the injured patient's health plan per Dameron's contract with the health plan. Dameron *also* bills the full amount of emergency room costs to the third party tortfeasor and/or tortfeasor's liability insurer by serving an HLA notice under Civil Code section 3045.3.

If the tortfeasor, tortfeasor's liability insurer, or any responsible party pays Dameron's HLA claim before the patient's health care service plan pays Dameron the negotiated rate, Dameron cancels its bill to the patient's health care service plan. However, if the patient's health plan pays the negotiated rate under the applicable rate agreement before any other responsible party pays under the HLA lien, Dameron "holds the health plan's payment in abeyance (as well as any co-payment received from the injured patient), pending resolution of Dameron's HLA claim." If Dameron recovers money on its HLA claim following payment from the patient's health care service plan, Dameron refunds the patient's copayment and then refunds the health care service plan from the proceeds of the HLA lien recovery. If there are any proceeds remaining after reimbursements to the patient and patient's health plans, Dameron keeps the remainder. In any event, Dameron does not "attempt to collect or retain more than its reasonable and necessary charges in any patient's account."

Dameron's complaint also alleges payments of settlements and judgments to patients while ignoring HLA liens "are not isolated or random events. Rather the HLA violations . . . are part of an industry-wide business strategy adopted primarily by automobile liability insurers in California . . . and by other similarly situated responsible parties under the HLA." In addition to violating the HLA, Dameron claimed the practices also violated the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.).

AAA and Allstate each moved for summary judgment, arguing Dameron could not recover anything under the HLA liens because the underlying debts had been extinguished by payments in full by the patients' health plans. AAA also argued two of the three claims asserted by Dameron were time-barred. In support of its motion, Allstate introduced the Dameron/Kaiser agreement for the provision of hospital services to Kaiser patients. The Dameron/Kaiser contract, effective January 1, 1995, provides in pertinent part:

"3. Member Billing. [¶] (a) Hospital shall look solely to Kaiser Permanente (or another responsible payer) for compensation for Hospital Services rendered to Members under this Agreement, and, except as expressly provided in this Section, Hospital agrees that in no event, including but not limited to non-payment by Kaiser Permanente, insolvency or breach of this Agreement, shall Hospital bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from, or have any recourse against any Member for Hospital Services provided pursuant to this Agreement. [¶] (b) Hospital may assert claims for compensation other than claims against Kaiser Permanente, in the following circumstances: [¶] (i) Copayments. . . . [¶] (ii) Services After Coverage Exhausted or Disallowed. . . . [¶] (iii) No benefit. . . . [¶] (iv) Regular Medicare. . . . [¶] (c) Hospital understands and agrees that surcharges against Members are prohibited and Kaiser Permanente shall take appropriate action if surcharges are imposed. "

Dameron opposed summary judgment on grounds the Dameron/Kaiser contract allowed collection of the HLA liens against AAA and Allstate. Dameron also asserted its claims against AAA were not time-barred because the hospital filed the HLA lien notices within a year of discovering the identity of the responsible payers. The trial court granted summary judgment in favor of AAA and Allstate. The trial court reasoned Kaiser's payment of an agreed-upon rate for emergency room payments extinguished the debt owing to Dameron and had the effect of also extinguishing the HLA liens. As to two of the claims against AAA, the trial court found the discovery rule did not apply to render the HLA claims timely. Dameron timely filed notices of appeal from the judgments of dismissal.

The Third District Court of Appeal began by stating that Dameron's right to recover its customary rates for emergency room services from third party tortfeasors and their liability insurers depends on whether the hospital's HLA liens are extinguished when accepting payments by the emergency room patients' health care service plans. It explained that the HLA provides a hospital with a statutory lien against any judgment, settlement, or compromise paid by a third party tortfeasor or tortfeasor's liability insurer to a patient who received emergency room care. (*Parnell*, at p. 598; Civ. Code, § 3045.2.) Civil Code section 3045.1 states a hospital that "furnishes emergency and ongoing medical or other services to any person injured by reason of an accident or negligent or other wrongful act . . . shall, if the person has a claim against another for damages on account of his or her injuries, have a lien upon the damages recovered, or to be recovered, by the person, or by his or her heirs or personal representative in case of his or her death to the extent of the amount of the reasonable and necessary charges of the hospital."

For the HLA lien to become effective, the hospital must serve written notice of "the amount claimed as reasonable and necessary charges" on each person or entity "known to the hospital and alleged to be liable to the injured person . . . for the injuries sustained prior to the payment of any moneys to the injured person." (Civ. Code, § 3045.3.) The HLA notice must also be served on any known liability insurers responsible for the actions of the alleged tortfeasors. However, the hospital need not provide notice of the HLA lien to the emergency room patient. (*Parnell*, at p. 601.)

Tortfeasors and their liability insurers are required to satisfy the HLA lien at the same time as they pay any money to the emergency room patients. As the *Parnell* court explained, "If the tortfeasor pays the injured person 'after the receipt of the notice as provided by Civil Code Section 3045.3, without paying to the' hospital 'the amount of its lien claimed in the notice, or so much thereof as can be satisfied out of 50 percent of the moneys due under any final judgment, compromise, or settlement agreement,' then the tortfeasor 'shall be liable to the' hospital 'for the amount of its lien claimed in the notice which the hospital was entitled to receive as payment for the medical care and services rendered to the injured person.' (Civ. Code § 3045.4.)" (*Parnell*,at pp. 601-602.) This statutory penalty payment to the hospital does not come from recovery of funds paid to

the injured patient, but must be paid separately by the tortfeasor or tortfeasor's liability insurer. (*Mercy Hospital & Medical Center v. Farmers Ins. Group of Companies* (1997) 15 Cal.4th 213, 221.)

The HLA creates a statutory lien that "is 'nonconsensual' and 'compensates a hospital for providing medical services to an injured person by giving the hospital a direct right to a certain percentage of specific property, i.e., a judgment, compromise, or settlement, otherwise accruing to that person. (*Parnell*, at p. 602.) The typical dependence of a lien on an underlying debt led the *Parnell* court to conclude payment of the underlying debt –- such as by an injured patient's health plan –- extinguished the hospital's HLA lien. Thus, a hospital's acceptance of "payment in full" from a health care service plan relieved the third party tortfeasor and his or her liability insurer from any further payment under the HLA. However, the *Parnell* court noted hospitals *could* contractually preserve the right to recover their usual and customary rates from tortfeasors and their liability insurers. *Parnell* states that "if hospitals wish to preserve their right to recover the difference between usual and customary charges and the negotiated rate through a lien under the HLA, they are free to contract for this right."

In holding California hospitals may contractually reserve the right to recover their customary billing rates from third party tortfeasors, the *Parnell* court cited the example of *Andrews v. Samaritan Health System* (Ct.App. 2001) 36 P.3d 57, 61. Notably, the patients in *Andrews* did not have their recoveries from third party tortfeasors reduced by the hospitals' ability to recover their customary charges when the patients' health plans paid only a negotiated rate because "in their various personal injury suits, plaintiffs all quantified their damages by including the hospitals' full charges for medical services, rather than the discounted amount paid by their insurers." (*Andrews*, at p. 59.) **Taken together, *Parnell* and *Andrews* allow for statutory medical liens to recover customary billing rates for emergency room services *if* the hospital has an express contract with the health care service plan to that effect.**

AAA and Allstate argue *Parnell* is no longer valid authority for the proposition that hospitals can contractually reserve the right to recover their customary rates even after being paid the negotiated rate by injured patients' health plans. In so arguing, AAA and Allstate rely on the Knox-Keene Health

Care Service Plan Act of 1975 (Knox-Keene Act) (Health & Saf. Code, § 1340 et seq.) and the California Supreme Court's subsequent decisions in *Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497 and *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. The Third DCA Justices concluded these authorities do not undermine *Parnell's* holding that hospitals may contractually preserve their right to recover their customary rates from third party tortfeasors and their liability insurers.

California hospitals are required to provide emergency care without regard to the injured patient's ability to pay. (Health & Saf. Code, § 1317, subd. (d).) The treating hospital may require only that "the patient or his or her legally responsible relative or guardian . . . execute an agreement to pay therefore or otherwise supply insurance or credit information promptly after the services are rendered." The Knox-Keene Act requires health plans to reimburse hospitals for emergency care even if the hospital is not included in the health care service plan's network. (Health & Saf. Code, § 1371.4, subds. (a) & (d).)

The Knox-Keene Act also includes the following patient-protection provisions: "(a) Every contract between a plan and a provider of health care services shall be in writing, and shall set forth that in the event the plan fails to pay for health care services as set forth in the subscriber contract, the subscriber or enrollee shall not be liable to the provider for any sums owed by the plan. [¶] (b) In the event that the contract has not been reduced to writing as required by this chapter or that the contract fails to contain the required prohibition, the contracting provider shall not collect or attempt to collect from the subscriber or enrollee sums owed by the plan. [¶] (c) No contracting provider, or agent, trustee or assignee thereof, may maintain any action at law against a subscriber or enrollee to collect sums owed by the plan." (Health & Saf. Code, § 1379 (Section 1379).)

The DCA rejected the contentions of AAA and Allstate that section 1379 insulates them from balance billing by hospitals. Section 1379 does not mention balance billing, third party tortfeasors, or liability insurance companies. Instead, the statute mentions only health care service plans, providers of medical care, and patients. The Justices explained that the clear import of section 1379 is to

protect *patients* with health care service plan coverage from any collection attempts by providers of such medical care as emergency room services.

Section 1379's patient protections were examined by the California Supreme Court in *Prospect*, which involved billing disputes between health care service plans and emergency room physicians with whom they did not have preexisting contractual relationships. The *Prospect* court concluded the Knox-Keene Act precludes any attempt to bill *patients* for the amount exceeding the negotiated rate paid by health care service plans. Instead, the health care service plans and emergency room physicians are required to resolve their billing disputes without injecting their patients into the process.

The California Supreme Court's decision in *Prospect* does not mention its earlier case of *Parnell.* The Justices reason that this omission is explained by the fact *Prospect* did not involve any claim of recovery against third party tortfeasors or their liability insurers. "An opinion is not authority for a point not raised, considered, or resolved therein." (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57.) Thus, they conclude nothing in *Prospect* abrogates *Parnell's* holding that hospitals may contract with health care service plans to preserve rights to recover customary billing rates via HLA liens against third party tortfeasors.

The Third DCA also rejected AAA's argument that the California Supreme Court's decision in *Howell*, overruled its earlier statement in *Parnell* that hospitals may contract with health care service plans to preserve the right to balance bill third party tortfeasors. *Howell* addressed whether a *patient* could recover the customary billing rate from a tortfeasor, whereas this case involves a claim *by the hospital* against tortfeasors and their liability insurers. In every instance in which *Howell* articulated its holding, the Supreme Court noted the hospital in that case agreed the negotiated rate constituted payment in full.

Rather than overruling *Parnell*, the Supreme Court in *Howell* repeatedly cited its earlier decision with approval. In each of the four instances in which *Howell* cited *Parnell*, the California Supreme Court expressly noted *Parnell* involved a situation in which the hospital accepted a negotiated rate as payment in full. In short, *Howell* does not overrule the *Parnell* court's statement that hospitals have the ability to enter into agreements with health care service plans

that preserve the right to recover customary rates from tortfeasors for emergency room care provided.

Also, the Justices were not persuaded by AAA that its interpretation of *Howell*, was confirmed in *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308. AAA argues *Corenbaum* stands for the proposition that "the tortfeasor, and by extension his or her insurer, is not liable for the delta between what the hospital 'charged' and what it accepted from the health insurer." AAA overstates the scope of decision in *Corenbaum*. The *Corenbaum* court expressly noted that: "As in *Howell*, the medical providers who treated plaintiffs . . . accepted, pursuant to prior agreements, less than the full amount of their medical billings as payment in full for their services." As in *Howell*, the decision in *Corenbaum* did not involve any action by the hospital against the third party tortfeasor or tortfeasor's liability insurer.

Based on its survey of decisional authority following the Supreme Court's unanimous decision in *Parnell*, the Third District Court concludes no case undermines *Parnell's* guidance to hospitals that they may preserve the right to recover from a third party tortfeasor the differential between the negotiated rate paid by an injured patient's health care service plan and the customary rate billed for the emergency room services. Additionally, the Legislature has not changed how the HLA statutory lien operates either in substance or procedure since the *Parnell* court examined the HLA statutory scheme. In short, *Parnell* remains valid insofar as it allows hospitals to contract for a reservation of rights to recover from tortfeasors the differential between the negotiated and the usual and customary rates for emergency room services provided.

Having concluded Dameron had the prerogative under *Parnell*, to enter into a contract to preserve its billing rights against third party tortfeasors liable for injuries to its emergency room patients, the Justices next considered whether the Dameron/Kaiser contract actually preserved such rights. Dameron contends its contract with Kaiser suffices to allow it to pursue its customary billing rate from third party tortfeasors who injure Kaiser-covered patients.

Here, the Dameron/Kaiser contract was entered into in 1995, a decade before the California Supreme Court issued its decision in *Parnell*. The contract

does not expressly reserve to Dameron a right to recover its customary billing rates for emergency room services from anyone. The Dameron/Kaiser contract does not mention HLA liens, third party tortfeasors, or liability insurers for third party tortfeasors. Instead, the contract sets forth the reciprocal obligations of Dameron to provide emergency medical services and Kaiser to pay negotiated rates for those services. Rather than reserving the right to recover the entirety of the customary charge from third party tortfeasors, the Dameron/Kaiser contract states payment of the negotiated rates constitutes payment in full.

This contract provision does not reserve to Dameron any right to recover additional payments from any other person or entity. Moreover, it imposes on Kaiser no obligation to assist or take any other action to help Dameron recover its customary charges from any third party tortfeasor or liability insurer. And, there is no mention of HLA liens. To escape this express agreement to accept the negotiated rate as "payment in full," Dameron looks to the "Member Billing" section of the contract. Specifically, Dameron points to language stating that "Hospital shall look solely to Kaiser Permanente (*or another responsible payer*) for compensation for Hospital Services rendered to Members under this Agreement."

Dameron argues the italicized language renders this contract provision sufficiently ambiguous to allow extrinsic evidence to prove that "another responsible payer" includes tortfeasors and their liability insurers. A contract is ambiguous when it contains language that is reasonably susceptible to more than one meaning. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.) For several reasons the Justices find the contract's reference to "another responsible payer" cannot reasonably be construed to refer to third party tortfeasors or their liability insurers.

First, the reference to another responsible payer is qualified by the restriction that Dameron is limited to "compensation for Hospital Services rendered to Members *under this Agreement*." The purpose of the Dameron/Kaiser contract is to agree upon negotiated billing rates and to insulate patients covered by Kaiser from charges beyond their individual copayment responsibilities. Under this agreement, there is no mention of customary billing rates or HLA liens. Second, the paragraphs immediately following language cited by

Dameron serve to limit Dameron's "claims for compensation" to copayments, services after coverage is exhausted or disallowed by Kaiser, instances in which the patient turns out to have no Kaiser coverage at all, and "regular Medicare." Even if the meaning of "another responsible payer" were ambiguous, these paragraphs preclude any interpretation of the phrase to include third party tortfeasors or their liability insurers.

Third, any interpretation of "another responsible payer" as including third party tortfeasors would create a conflict with the portion of the Dameron/Kaiser contract in which Dameron has agreed to accept the negotiated rates "*as payment in full for Covered Services*, irrespective of the cost to Dameron of providing such services." The DCA rejects this interpretation as introducing an unnecessary internal inconsistency into the Dameron/Kaiser contract. "It is a cardinal rule of construction that a contract is to be construed as a whole, effecting harmony among and giving meaning to all the parts thereof. (Civ. Code, § 1641.)" (*People ex rel. Dept. of Parks and Recreation v. West-A-Rama, Inc.* (1973) 35 Cal.App.3d 786, 793.)

Fourth, Dameron's assertion of the ability to collect customary rates from other parties would have the effect of imposing new duties on Kaiser that are not otherwise spelled out in the contract. Instead, a contract extends only to those things which it appears the parties intended to contract. The Appellate Court's function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted. The Justices state that they do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there. (*Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 58-59.)

Although *Parnell* allows Dameron to contractually reserve the right to recover its customary billing rate for emergency room services for Kaiser patients and caused by third party tortfeasors, Dameron has not done so in this case. The judgment is affirmed. Each party shall bear its own costs.