S274927

IN THE SUPREME COURT OF CALIFORNIA

COUNTY OF SANTA CLARA,
Petitioner,

v.

THE SUPERIOR COURT OF SANTA CLARA,
Respondent,

DOCTORS MEDICAL CENTER OF MODESTO et al.,
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT
CASE NO. H048486

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

The County contends immunity under the Government Claims Act is not confined to tort claims for damages and that, in any event, the Hospitals' action for reimbursement under the Knox-Keene Act is such a claim. The County is wrong on both points.

First, as this Court has explained, "the immunity provisions of the [Government Claims] Act are only concerned with shielding public entities from having to pay money damages for torts." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 867 (*City of Dinuba*). In other words, "Government Code immunities extend *only* to tort actions that seek money damages." (*Schooler v. State of California* (2000) 85 Cal.App.4th 1004, 1013 (*Schooler*), emphasis added.) The County's different and more expansive view of immunity should be rejected.

Second, the Hospitals' claim for the full reimbursement to which they are entitled under the Knox-Keene Act (not necessarily the full amount billed) does not " 'sound in tort' " (*Long Beach Memorial Medical Center v. Kaiser Foundation Health Plan, Inc.* (2021) 71 Cal.App.5th 323, 338 (*Long Beach*), nor does it seek damages (*City of Dinuba*, *supra*, 41 Cal.4th at p. 867).

The County, in one of several diversions, includes in its answer an irrelevant discussion of the administrative remedies available through Valley Health Plan and the Department of Managed Healthcare (Department). Emergency healthcare

service providers (emergency providers) who contend a health care service plan (health plan or plan) underpaid the reimbursement to which the emergency providers are entitled by statute may pursue these administrative remedies. But they are voluntary and nonbinding. The Legislature did not say those remedies supplant judicial review, and the County does not assert otherwise.

For its part, the Department has repeatedly acknowledged that the Legislature has not empowered the Department to render a binding adjudication in a dispute like this one concerning the amount of reimbursement due an emergency provider in an individual case. The Department expects courts to adjudicate those disputes.

Ultimately, the substance of the Hospitals' action, rather than its form, should determine whether Government Claims Act immunities apply. The Hospitals could amend the form of their pleading to seek the same relief sought below by a petition for writ of mandate, to which the County would not be immune. The fact that the Hospitals pleaded a breach of implied-in-law contract should not work to their disadvantage.

The County responds that mandate is unavailable to control a public entity's exercise of discretion. But that argument assumes the County's duty of reimbursement is discretionary. As this Court and others have held, and as the Hospitals explained in their opening brief and explain again below, the County does not have discretion to reimburse emergency providers in any amount the County chooses. It has a mandatory duty to pay

reasonable and customary value. If the County fails to do so, the courts are fully capable of fashioning relief.

Even if the basic immunity granted by Government Code section 815 would otherwise apply, under the exception clause in section 815 ("[e]xcept as otherwise provided by statute"), the Hospitals' action for reimbursement is proper under Government Code section 815.6. That section expressly provides that public entities can be liable for violating a mandatory statutory duty. Again, the County responds that its statutory reimbursement duty ultimately is discretionary, not mandatory. In the County's view, while it must reimburse the Hospitals in *some* amount, the exact amount is totally within the County's discretion For the reasons discussed in the opening brief and as elaborated below, the Court should reject the County's position.

Finally, the County gratuitously attacks hospital pricing and billing practices generally, and these Hospitals' practices specifically. This attack appears to be a preview of the County's defense to the merits of the Hospitals' claims. But that defense is premature and irrelevant in this Court, where the only issue presented concerns application of the Government Claims Act and the threshold question whether the Hospitals can maintain their action. The Court should disregard the County's irrelevant attack, to which the Hospitals will not respond at this stage.

The Legislature expressed its intent that the Knox-Keene Act apply to *all* health plans, public and private. (Health & Saf. Code, § 1399.5.) To hold that the Act's reimbursement requirement is judicially enforceable against private health plans

only, freeing public plans to pay reimbursement in any amount they choose (as the County did in this case), would thwart the Legislature's intent. Emergency providers may not lawfully distinguish between patients who are members of private versus public health plans. The emergency providers' rights to recover for the services they render should not depend on distinctions over which they have no control.

For this reason and all those discussed in the opening brief and below, the Court should answer the issue presented in the negative: the County is *not* immune under the Government Claims Act from an action seeking reimbursement for emergency medical care provided to enrollees in the County's health plan. The Court of Appeal's contrary decision should be reversed.

LEGAL ARGUMENT

I. Government Code section 815 does not immunize the County from the Hospitals' action for reimbursement due under the Knox-Keene Act. Section 815 bars only common law tort claims for damages, which the Hospitals are not pursuing.

A. The Hospitals' claim for reimbursement is not a common law tort claim.

As explained in the opening brief, this Court and others have held the Government Claims Act immunizes public entities against common law tort claims for damages, but the immunity extends no further. The Hospitals' reimbursement action does not assert a common law tort claim for damages. (OBOM 22–29.)

The County disagrees with the Hospitals' characterizations of both the scope of the Government Claims Act and the nature of

the Hospitals' action. First, citing no supporting case, the County contends the immunities created by the Government Claims Act are not limited to tort claims but apply "to all claims for 'money or damages' other than contract claims." (ABOM 47; see ABOM 38 [asserting the Government Claims Act bars "any claims for 'money or damages' other than contract claims" unless a statute expressly authorizes the claim].) Second, the County contends the Hospitals' reimbursement action seeks "a quantum of compensatory damages." (ABOM 38; see ABOM 40–45.)

The County is wrong on both points. Having already addressed these issues in the opening brief (OBOM 22–29), we reply only briefly here.

"Government Code immunities extend *only* to tort actions that seek money damages." (*Schooler*, *supra*, 85 Cal.App.4th at p. 1013, emphasis added.) Government Code section 815 in particular "was designed to eliminate public entity liability based upon common law tort claims." (*Lonberg v. City of Riverside* (C.D.Cal. 2004) 300 F.Supp.2d 942, 946 (*Lonberg*).)

This Court and others agree. (See OBOM 23–24; *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, 803 [Government Code section 815 "makes clear that under the [Government Claims Act], there is no such thing as common law tort liability for public entities"]; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 897 ["Under the Government Claims Act [citation], there is no common law tort liability for public entities in California"]; *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1183 (*Eastburn*)

[Government Code section 815 is concerned with public entities' "tort liability"]; *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785, fn. 2 [quoting Government Code section 815 and explaining "[t]hus, in California, all government tort liability must be based on statute"]; *Torres v. Department of Corrections & Rehabilitation* (2013) 217 Cal.App.4th 844, 850 ["there is no common law tort liability for public entities in California"]; *Haskins v. San Diego County Dept. of Public Welfare* (1980) 100 Cal.App.3d 961, 965 [in light of Government Code section 815, "[t]here is no 'common law' imposition of tort liabilities on governmental entities in California"]; *Shoval v. Sobzak* (S.D.Cal., Aug. 31, 2009, No. 09-CV-01348-H) 2009 WL 2780155, at p. *4 [nonpub. opn.] ["The [Government Claims Act] provides the exclusive scope of tort liability for government entities and employees. [Citation.] Common law governmental tort liability was eliminated by the [Act]." (citation omitted)].)

The County suggests the "Legislature's deliberate choice not to use the word 'tort' in the [Government Claims] Act" reflects a legislative determination that immunity under the Act can extend beyond torts. (ABOM 14; see ABOM 47.) This Court considered and rejected that very argument in *Kizer v. County of San Mateo* (1991) 53 Cal.3d 139. There, the Court noted that, while the Legislature avoided the word "tort," the Legislature also stated " 'the practical effect of this section [Government Code section 815] is to eliminate any common law governmental liability for damages arising out of *torts*.' " (*Id.* at p. 145, fn. 4, emphasis added.) The Court further noted that "the introductory

comment to the Tort Claims Act as a whole states that 'a statute should be enacted providing that public entities are not liable *for torts* unless they are declared to be liable by an enactment.' " (*Ibid.*, emphasis added.) The Court concluded: "Clearly, the emphasis of the Tort Claims Act is on *torts*." (*Ibid.*)

The Hospitals do not allege a common law tort claim. They allege the County violated a statutory duty, which is not a common law tort claim. (See *Lonberg, supra,* 300 F.Supp.2d at p. 946 ["Plaintiff does not allege a common law tort claim, he alleges the violation of a statute"].)

The Hospitals seek redress for the County's statutory violation under an implied-in-law contract theory, i.e., quantum meruit (vol. 2, exh. 12, pp. 293–294), which multiple courts have recognized as a proper legal theory by which to enforce a health plan's reimbursement duty under the Knox-Keene Act. (OBOM 21–22; see *Long Beach*, *supra*, 71 Cal.App.5th at p. 335 ["If a hospital or other medical provider believes that the amount of reimbursement it has received from a health plan is below the 'reasonable and customary value' of the emergency services it has provided, the hospital or provider may assert a quantum meruit claim against the plan to recover the shortfall"]; *Bell v. Blue Cross of California* (2005) 131 Cal.App.4th 211, 216 (*Bell*) [Health and Safety Code section 1371.4 does not preclude a private enforcement action on a quantum meruit theory]; *John Muir Health v. Global Excel Management* (N.D.Cal., Nov. 21, 2014, No. C-14-04226 DMR) 2014 WL 6657656, at p. *3 [nonpub. opn.] ["Several California courts have concluded that medical providers

may bring private actions for violations of [s]ection 1371.4 under" a quantum meruit theory].)

A "cause of action for breach of an implied contract does not 'sound in tort.' " (See *Long Beach*, *supra*, 71 Cal.App.5th at p. 338, citing *Newfield v. Insurance Co. of the West* (1984) 156 Cal.App.3d 440, 445.)

Indeed, the court in *Long Beach* specifically *declined* to treat a claim for underpayment of reimbursement due under the Knox-Keene Act as a tort claim. The court held that, for reasons of relevant public policy, it would not recognize a tort duty on the part of a health plan not to underpay reimbursement to an emergency provider: "The relevant policy considerations counsel against recognizing a legal duty by health plans—*compensable via a tort*—not to reimburse hospitals and other medical providers of emergency medical services at an amount less than the 'reasonable and customary value' of those services." (*Long Beach*, *supra*, 71 Cal.App.5th at p. 337, emphasis added.) The court explained that "tort 'liability . . . for purely economic losses is "the exception, not the rule." ' " (*Id.* at p. 338.) To recognize underpayment of reimbursement as a tort would upset the Knox-Keene Act's "comprehensive government regulation" of the economic relationship between health plans and emergency providers.[1] (*Long Beach*, at p. 338.)

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[1] The County contends that, when the Government Claims Act was enacted in 1963, California courts "disfavored" quantum meruit claims, i.e., implied-in-law contract claims, against public entities. (ABOM 50–51.) The County speculates that, if the

In sum, section 815 of the Government Claims Act immunizes public entities against liability only for common law tort claims for damages. An emergency provider's claim against a health plan for breach of the plan's statutory duty to reimburse the provider for emergency services rendered is not a common law tort claim. Section 815, therefore, does not apply to immunize a public entity against liability for such a claim.

B. The Hospitals' claim for reimbursement is not a claim for damages.

Another reason why Government Code section 815 does not apply to bar the Hospitals' reimbursement action is because the Hospitals do not seek damages; they seek statutorily mandated reimbursement. (OBOM 26–29.)

The County first responds with a procedural challenge. The County asks the Court not to consider the Hospitals' argument because they did not present it below. (ABOM 33, 39.)

The County's procedural challenge should be rejected. This Court can and often does consider legal arguments not raised in the Court of Appeal when (1) the argument was raised in the petition for review, (2) it involves a purely legal issue of public importance not turning on disputed facts, (3) it has been fully briefed in this Court, and/or (4) it is pertinent to a proper

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Legislature considered such claims at all, it would have regarded them as "torts." (ABOM 51.) The County's speculation is no justification for rejecting the Hospitals' position when courts have since clarified that implied-in-law contract claims against public entities do *not* sound in tort. (*Long Beach*, *supra*, 71 Cal.App.5th at p. 338.)

disposition of the cause. (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 901 & fn. 5 ["In a number of cases, this court has decided issues raised for the first time before us, where those issues were pure questions of law, not turning upon disputed facts, and were pertinent to a proper disposition of the cause or involved matters of particular public importance"]; see, e.g., *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 215 ["we have discretion to consider on appeal purely legal issues raised in a petition for review"]; *Temple Community Hospital v. Superior Court* (1999) 20 Cal.4th 464, 469, fn. 2 [considering issue not raised in Court of Appeal where "[t]he issue is one of public importance, is presented by the case before us, and has been fully argued in this court"].)

Considering new issues (or reframing existing issues) is particularly appropriate when reviewing an order sustaining a demurrer without leave to amend, such as the order the Court of Appeal issued in this case. (*County of Santa Clara v. Superior Court* (2022) 77 Cal.App.5th 1018, 1035–1036 (*Santa Clara*); see Code Civ. Proc., § 472c, subd. (a); *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746 ["The issue of leave to amend is always open on appeal, even if not raised by the plaintiff"].)

Here, all these factors counsel in favor of this Court considering the issue whether reimbursement under the Knox-Keene Act constitutes tort damages. Not only is the issue purely legal, it was raised in the Hospitals' unanswered petition for review (see PFR 29–31) and it has now been fully briefed (OBOM

22–29; ABOM 40–45). Moreover, the issue is exceptionally important because it affects emergency providers and public health plans throughout the state and will impact the funding of California's emergency healthcare delivery system. The Court can and should consider the Hospitals' argument, which is pertinent, indeed essential, to a proper disposition of the issue this Court itself framed for review.

On the merits, the County contends the Hospitals' claim for reimbursement owed under the Knox-Keene Act is a claim for "compensatory damages." (ABOM 40–45, original formatting omitted.) The County is mistaken.

When a health plan reimburses an emergency provider for the reasonable and customary value of emergency services rendered, the health plan is not paying compensatory damages. It is fulfilling a statutory duty of reimbursement. Whether the plan pays voluntarily or under compulsion of court order should make no difference. In either case, the plan is simply fulfilling its statutory duty to reimburse the emergency provider for services rendered to plan enrollees.

City of Dinuba illustrates this point. The plaintiffs there sought to compel the public entity defendants "to perform their express statutory duty" to properly calculate and disburse tax revenues allegedly owed to plaintiffs. (*City of Dinuba*, *supra*, 41 Cal.4th at pp. 862, 867.) Citing Government Code section 814, which withholds immunity when the plaintiff is seeking relief "other than money damages" (*City of Dinuba*, at p. 867), the Court held the defendants were not immune from liability:

> [T]he immunity provisions of the Act are only concerned with shielding public entities from having to pay money damages for torts. [Citation.] Section 814 explicitly provides that liability based on contract or the right to obtain relief other than money damages is unaffected by the Act. *Plaintiffs do not seek damages; they seek only to compel defendants to perform their express statutory duty. While compliance with the duty may result in the payment of money, that is distinct from seeking damages.*

(*Ibid.*, emphasis added; see *Los Angeles County v. State Dept. of Public Health* (1958) 158 Cal.App.2d 425, 446, fn. 7 (*State Dept. of Public Health*) [an order directing a public official to pay money owed in the course of the official's statutory duties is not a "money judgment[ ]"].)

Like the plaintiffs in *City of Dinuba*, the Hospitals seek a judgment or order compelling the County to discharge its statutory duty under the Knox-Keene Act. Though such a judgment or order would eventually result in the County disbursing funds to the Hospitals, that does not make the Hospitals' action one for "damages," as *City of Dinuba* clarifies. The Hospitals are not seeking "a quantum of compensatory damages." (ABOM 38.)

The analysis in *City of Dinuba* also lays to rest the County's alternative contention that, even if the Hospitals are not seeking "damages," they are seeking "money," hence the exception to immunity recognized in Government Code section

814 does not apply.[2] (ABOM 40–43.) But the same was true in *City of Dinuba*: the plaintiffs were seeking relief in the form of money from the public entity defendants. Yet the Court held section 814 withheld immunity.

Although Government Code section 814 may suggest a difference between two forms of relief, "money" and "damages," *City of Dinuba* construed the statute, consistent with the purpose of the Government Claims Act, to refer to a single form of relief, "money damages." (*City of Dinuba*, *supra*, 41 Cal.4th at p. 867.) The plaintiffs in *City of Dinuba* were seeking money, but the Court held they were seeking "other than money damages." (*Ibid.*) Under section 814, therefore, the Government Claims Act's immunity provisions did not apply. (*Ibid.*) The Court's reading of section 814 has endured without question or legislative response for more than 15 years.

In sum, the Hospitals' reimbursement action seeks "other than money damages." (*City of Dinuba*, *supra*, 41 Cal.4th at p. 867.) For this reason as well, the immunity provided by Government Code section 815 does not apply. The County is not immune from the Hospitals' action.

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[2] Section 814 states: "Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee."

C. The County's discussion of voluntary, nonbinding administrative remedies merely confirms that the courts alone have the authority to finally adjudicate disputes over reimbursement under the Knox-Keene Act.

The issue presented is whether the Government Claims Act immunizes the County from the Hospitals' action seeking reimbursement for emergency services rendered to Valley Health Plan enrollees. The County redirects attention to the administrative remedies available to dissatisfied emergency providers and the Department's enforcement powers under the Knox-Keene Act. The County's discussion is not directly relevant to the issue presented, but the discussion indirectly proves the Hospitals' point: judicial oversight is essential.

According to the County, the Knox-Keene Act and accompanying regulations "contemplate informal dispute resolution" and regulation of health plans' reimbursement methodology, not litigation in which a factfinder might "displace the County's chosen methodology." (ABOM 44.) The County also proclaims that dissatisfied emergency providers have no "need to engage in litigation" because these informal, nonbinding and indirect avenues of potential relief are available. (ABOM 19.) The County's arguments miss the mark in several respects.

First, the Hospitals' action would not require the factfinder to "displace" any general methodology the County uses to calculate reasonable and customary value of emergency services. The factfinder would be asked only to decide whether the amount the County paid under the circumstances of *this* case satisfied the County's statutory duty. Reimbursement methodologies are

different from reimbursement decisions in particular cases. While the Department regulates "deficient reimbursement methodolog[ies]" (RJN, exh. F, p. 2) and "unjust payment pattern[s]" (Health & Saf. Code, § 1371.37), it disclaims any authority to regulate or adjudicate reimbursement disputes in particular cases such as this (pp. 24–25, *post*).

Second, the issue presented is not whether the Hospitals *need* to engage in litigation. The issue presented is whether they *can* engage in litigation against the County when the administrative remedies prove inadequate, as they did here.[3]

The County asserts that, as required by the Knox-Keene Act (Health & Saf. Code, § 1367, subd. (h)(2)), Valley Health Plan offers an internal procedure for resolving disputes over reimbursements to noncontracting providers (ABOM 19). But the County does not suggest Valley Health Plan's procedure is exclusive or binding, or that the Legislature or the Department intended it to substitute for judicial review.

The County also mentions the Department's internal dispute resolution process. (ABOM 22–23.) According to its website, the Department "has established an Emergency Services Independent Dispute Resolution Process (IDRP)," which it describes as "a fast, fair and cost-effective way to resolve claim payment disputes." (Cal. Dept. of Managed Health Care, Emergency Services Independent Dispute Resolution Process (IDRP) <https://www.dmhc.ca.gov/FileaComplaint/Provider

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[3] The Hospitals allege they pursued Valley Health Plan's internal appellate process to no avail. (OBOM 15.)

ComplaintAgainstaPlan/EmergencyServicesIndependentDisputeResolutionProcess.aspx> [as of Jan. 18, 2023], emphasis omitted.)

Administrative dispute resolution mechanisms provide undoubted benefits. Some disputes are suited to cheaper and quicker resolution in this fashion. But other disputes are not, in the same way that the widespread availability of informal mediation has not eliminated the need for courts to resolve civil disputes.

Here, the Department's procedure is voluntary and nonbinding. The Department recognizes that if either the health plan or the emergency provider is dissatisfied with the results of the process, it may need to seek relief through other "legal" means, i.e., litigation: "[The Department] feels that IDRP decisions may offer providers and payors a fast, fair and cost-effective alternative to *other* slower and more costly *legal remedies*. As such, the parties are *encouraged* to comply with the decision issued by the Emergency Services IDRP External Reviewer." (Cal. Dept. of Managed Health Care, Emergency Services Independent Dispute Resolution Process (IDRP) <https://www.dmhc.ca.gov/FileaComplaint/ProviderComplaintAgainstaPlan/EmergencyServicesIndependentDisputeResolutionProcess.aspx> [as of Jan. 18, 2023], emphasis added.)

The County quotes a trial court brief the Department filed in 2008, in which the Department described itself as " 'the exclusive enforcement agency for violations of the Knox-Keene Act.' " (ABOM 20.) If the County means to suggest the Department envisions no role for the courts in enforcing the

Knox-Keene Act's reimbursement requirement, the County is mistaken. The quoted language appeared in the context of a discussion of the Department's authority vis-à-vis other state *agencies*, not its authority vis-à-vis the courts. (RJN, exh. G, p. 21.) Elsewhere in the same brief, the Department confirmed its previously stated position (OBOM 10–11, 16–17 & fn. 3, 21, 42–43) that the courts also have a role to play:

> [Emergency] [p]roviders are already entitled to full reimbursement from health plans for all reasonable charges associated with a medical emergency and have the right to seek recovery for those charges directly from the plans *either in court* or through dispute resolution systems.

(RJN, exh. G, p. 9, emphasis added; see RJN, exh. G, p. 18 [referring to "the available *legal* and dispute resolution options open to" a health care provider when the health plan pays less than the provider's billed charges (emphasis added)].)

The courts have agreed with the Department that its power to enforce the Knox-Keene Act is not exclusive and that private parties may seek to enforce the Act in court by bringing actions available under common law, such as claims based on implied-in-law contract, i.e., quantum meruit.[4] (See, e.g., *Coast Plaza*

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[4] The Knox-Keene Act contemplates that health plans may be held liable under legal theories not rooted in that Act. (See Health & Saf. Code, § 1371.25 ["A plan . . . and providers are each responsible for their own acts or omissions, and are not liable for the acts or omissions of, or the costs of defending, others. Any provision to the contrary in a contract with providers is void and unenforceable. Nothing in this section shall preclude a finding of

Doctors Hospital v. UHP Healthcare (2002) 105 Cal.App.4th 693, 706.)

Indeed, the courts *must* play a role because, as the Department explained to the Court of Appeal in *Bell*, the Legislature did not grant the Department authority to render a binding adjudication of a dispute between a health plan and an emergency provider over the proper amount of reimbursement:

> While the Department has the power to require a health plan to re-adjudicate claims paid pursuant to a deficient reimbursement methodology, this authority is not equivalent to rendering a judicial determination between two parties disputing over what constitutes the reasonable and customary value of a specific physician's services. . . .
>
> [¶] . . . [¶]
>
> . . .[*T*]*he Knox-Keene Act does not authorize the Department* to set specific reimbursement levels or *to exercise jurisdiction over providers by adjudicating individual payment disputes that arise between providers and health plans*. Should the Department attempt to adjudicate such claims, its decisions would not be binding upon the individual providers or upon health plans that contest the Department's authority to set reimbursement rates.

(RJN, exh. F, p. 2, emphasis added; see *Children's Hospital Central California v. Blue Cross of California* (2014) 226

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liability on the part of a plan, . . . or a provider, based on the doctrines of equitable indemnity, comparative negligence, contribution, or other statutory or common law bases for liability."].)

Cal.App.4th 1260, 1273 [In adopting California Code of Regulations, title 28, section 1300.71, subdivision (a)(3)(B), the Department "intended that reasonable value be based on the concept of quantum meruit *and that value disputes be resolved by the courts*. In fact, the [Department] has acknowledged that, unlike the courts, it ' "lacks the authority to set specific reimbursement rates under theories of *quantum meruit* and the jurisdiction to enforce a reimbursement determination on both the provider and the health plan." ' " (Emphasis added)], superseded by statute on another ground as stated in *Dignity Health v. Local Initiative Health Care Authority of Los Angeles County* (2020) 44 Cal.App.5th 144, 160–161.)

"The construction of a statute by the executive department charged with its administration is entitled to great weight and substantial deference." (*Bell*, *supra*, 131 Cal.App.4th at p. 217, fn. 8.) The County's apparent view that litigation is unnecessary—because the Department can enforce the County's duty to pay reasonable and customary reimbursement (ABOM 37; see RJN 8)—is contrary to the Department's own understanding of its authority under the Knox-Keene Act.[5]

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[5] The County also misreads the Court of Appeal's opinion to support the County's view. (ABOM 35.) The Court of Appeal merely noted the Department has authority to review providers' "dispute resolution mechanisms" and "unfair payment patterns." (*Santa Clara*, *supra*, 77 Cal.App.5th at p. 1032; see, e.g., vol. 3, exh. 26, pp. 693–694 [consent agreement concerning health plan's "payment methodology," requiring plan to adopt a "revised reimbursement methodology"].) The Court of Appeal did *not* state or hold the Department has authority to adjudicate a

Given the Department's acknowledged inability to adjudicate disputes over reimbursement, the courts must have the power to do so, unimpeded by a health plan's claim of immunity. The Knox-Keene Act applies equally to both public and private health plans. (Health & Saf. Code, § 1399.5.) Both types of plans should be subject to the same remedies in case of a dispute over statutory reimbursement. Yet the Court of Appeal's decision and the County's arguments would deny an emergency provider the right to seek judicial relief against an underpaying *public* health plan only. To allow any health plan—public or private—to determine reimbursement rates for specific emergency services without fear of regulatory or judicial scrutiny is, in the Department's words, "an invitation for abuse." (RJN, exh. F, p. 5.)

Moreover, emergency providers are required by law to render emergency services to all comers, regardless of their insurance status. (OBOM 13, 37.) Indeed, providers are barred even from inquiring about a patient's insurance status before rendering emergency services. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1018 (*Centinela*).) The provider's right to judicial review of a health plan's alleged underpayment of reimbursement should not depend on a happenstance over which the provider has no control—the type of health plan to which the emergency patient belongs.

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dispute over the amount of reimbursement in a particular case, authority the Department itself has disclaimed.

D. The Hospitals could amend their pleading to include a petition for writ of mandate, to which the County would not be immune.

As explained in the opening brief, the Hospitals could amend their pleading to include a petition for writ of mandate, against which the County would not be immune. (OBOM 29–33; Gov. Code, § 814; see *Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1493.) The substance, not the form, of the Hospital's pleading should determine whether the Government Claims Act immunizes the County from the Hospitals' action. (OBOM 29–33.)

The County responds by reprising an argument this Court and others have already rejected. The County argues that because "there is no fixed method for calculating" reasonable and customary rates (ABOM 15), the County necessarily enjoys discretion to determine the amount to reimburse the Hospitals. Based on that premise, the County disputes that the Hospitals could obtain reimbursement by a petition for writ of mandate because a writ cannot control a public entity's exercise of discretion. (ABOM 15, 63–66.)

The County's premise—that it enjoys total discretion to reimburse the Hospitals in any amount it chooses—is false. A health plan "does not have 'unfettered discretion to determine unilaterally the amount it will reimburse a noncontracting provider.' " (*Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 508 (*Prospect*).) Rather, the health plan has a duty to pay "the reasonable and customary value" of the emergency services. (Cal. Code Regs., tit.

28, § 1300.71, subd. (a)(3)(B).) When the health plan fails to do so, a court is fully capable of determining what that "reasonable and customary value" is, as courts routinely do in other contexts. (See, e.g., Code Civ. Proc., § 2034.470 [empowering court to determine reasonable expert witness deposition fee based on specified factors, including "the ordinary and customary fees charged by similar experts for similar services within the relevant community"].)

Indeed, the law is settled that an emergency provider *can* seek a judicial determination of the reasonable and customary value of its services when a *private* health plan has underpaid reimbursement. (OBOM 20–22.) In those cases, courts do not "step into the [health plan's] shoes to supplant its discretionary determinations." (ABOM 62.) Rather, courts determine and enforce the health plan's statutory obligation. Nor do courts "usurp the [Department's] regulatory role in determining whether a plan has adequately complied with the Reimbursement Regulation." (ABOM 65.) As previously explained, the Department's regulatory role does not include the power to adjudicate a dispute between a health plan and an emergency provider over the amount of reimbursement. (See *ante*, pp. 24–25.) Courts would play the same role in deciding actions brought against public health plans.

Courts have issued writs of mandate to compel a public agency to recalculate sums owed the petitioner under a statutory scheme. (See, e.g., *Los Angeles County v. Riley* (1942) 20 Cal.2d 652, 653–654, 660–662 [issuing writ of mandate compelling state

official to recalculate credits owed to county under statutory scheme governing aid to needy children]; *State Dept. of Public Health*, *supra*, 158 Cal.App.2d at pp. 432–433, 447 [affirming writ of mandate in dispute over amounts payable by state to subsidize county's cost of treating tuberculosis patients].)

The County cites *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13–14, fn. 6, for the proposition "that mandamus cannot be used as a vehicle for seeking 'damage[s] predicated on acts for which the Government Code provides immunity.' " (ABOM 66.) That is not what *Hensler* said. In the passage to which the County refers, *Hensler* was explaining the Court's holding in *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508: "We held that the plaintiff could not add a tort claim for damage predicated on acts for which the Government Code provides immunity . . . ." (*Hensler*, at p. 14, fn. 6.) In other words, a plaintiff cannot circumvent the Government Claims Act by "add[ing]a tort claim for damage" to a petition for writ of mandate. But that rule would not apply here. The Hospitals did not plead a tort claim for damage, and they do not intend to add one to their complaint. (OBOM 22–29; *ante*, pp. 10–19.)

The prospect that the Hospitals, if successful, would recover additional reimbursement, in the form of money, from the County would not preclude the Hospitals from proceeding by a petition for writ of mandate: "[M]andamus may be brought to start the chain of action designed to compel a ministerial duty by a public officer, even if the ultimate goal may be recovery of a sum of money." (*Holt v. Kelly* (1978) 20 Cal.3d 560, 565, fn. 5.)

II. Alternatively, Government Code section 815.6 authorizes an action against the County for statutory reimbursement.

Government Code section 815 provides that a public entity is not liable for an injury "[e]xcept as otherwise provided by statute." As explained in the opening brief, Government Code section 815.6 is a statute that "otherwise provides" within the meaning of section 815. Accordingly, if this Court concludes section 815 would otherwise immunize the County from the Hospitals' reimbursement action, the Court should further hold that section 815.6 controls over section 815 and expressly authorizes a private right of action to enforce the County's statutory duty of reimbursement. (OBOM 33–38.)

The County devotes a section of its brief (ABOM 52–56) to an argument that "the Knox-Keene Act does not provide a private right of action" (ABOM 52, original formatting omitted) and thus does not "otherwise provide" for the County's liability within the meaning of the exception clause in Government Code section 815. The County cites *Eastburn*, *supra*, 31 Cal.4th at page 1183, in which this Court commented on the exception clause: "As previously noted, '[a] public entity is not liable for an injury,' '[e]xcept as otherwise provided by statute.' (Gov. Code, § 815.) In other words, direct tort liability of public entities must be based on a specific statute declaring them to be liable, or at least creating some specific duty of care."

Whether the Knox-Keene Act provides a private right of action is beside the point. The Hospitals do not purport to allege a private right of action under the Knox-Keene Act. Rather, they

seek to enforce the County's statutory duty by alleging a claim for breach of the implied-in-law contract that arose between the parties under the Knox-Keene Act and its regulations when the Hospitals, as required by law, rendered emergency services to enrollees in the County's health plan.

Eastburn confirms that the exception clause in Government Code section 815 applies when "a specific statute declar[es] [public entities] to be liable." (*Eastburn*, *supra*, 31 Cal.4th at p. 1183.) Government Code section 815.6 does exactly that. It states: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, *the public entity is liable* for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."[6] (Gov. Code, § 815.6, emphasis added.)

"*It is* [*Government Code*] *section 815.6, not the predicate enactment, that creates the private right of action.*" (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499–500.) Thus, it doesn't matter for present purposes whether the Knox-Keene Act also creates a private right of action.

As explained in the Hospitals' opening brief (see OBOM 34–38), Government Code section 815.6 applies here and creates a private right of action against the County to enforce its

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[6] The County agrees the Hospitals are seeking redress for an "injury" as that word is used in Government Code section 815.6. (ABOM 51.)

mandatory duty to reimburse the Hospitals for emergency services rendered.

Repeating an argument accepted by the Court of Appeal (*Santa Clara*, *supra*, 77 Cal.App.5th at p. 1030), the County contends Government Code section 815.6 does not apply here because, by its terms, it applies only when the public entity's statutory duty is mandatory. (ABOM 58–62.) According to the County, its statutory duty of reimbursement is not mandatory but "involves the exercise of discretion" and is therefore unreviewable in court: "[J]uries and courts cannot step into the County's shoes to supplant its discretionary determinations . . . ."[7] (ABOM 62.)

In the opening brief, the Hospitals addressed and refuted the County's mistaken argument concerning the nature of its statutory duty, whether mandatory or discretionary. (See OBOM 35–38.) Among other flaws, the County's argument is inconsistent with this Court's decision in *Prospect*, *supra*, 45 Cal.4th 497, 508, where the Court implicitly rejected the proposition that the health plan enjoys unreviewable discretion

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[7] The County implies that judicial review would be superfluous because the Department's "regulatory oversight and enforcement role" sufficiently check any abuse of discretion in calculating reimbursement. (ABOM 62.) As explained above, however, the Department lacks the power to disapprove or change the health plans' reimbursement calculation in any individual case. (See *ante*, pp. 24–25.) Thus, if judicial review is unavailable, an emergency provider dissatisfied with a public health plan's reimbursement calculation is left with two unsatisfactory options: take it or leave it.

to unilaterally determine the amount of reimbursement payable. (See OBOM 37–38.)

The County cannot credibly deny it has a mandatory duty to pay noncontracting emergency providers the reasonable and customary value of the emergency services rendered.[8] Therefore, to avoid application of Government Code section 815.6, the County artificially bifurcates its duty: while it may have a mandatory duty to reimburse emergency providers in *some* amount, it enjoys *discretion* to set the amount in any particular

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[8] "[H]ealth care service plans have *a mandatory duty* to pay for emergency medical services under [Health and Safety Code] section 1371.4, subdivision (b)." (*Calif. Emergency Physicians Med. Group v. PacifiCare of California* (2003) 111 Cal.App.4th 1127, 1131, emphasis added, disapproved on another ground in *Centinela*, *supra*, 1 Cal.5th at p. 1014, fn. 10); see Health & Saf. Code § 1371.4, subd. (b) ["A health care service plan . . . *shall reimburse* providers for emergency services and care provided to its enrollees, until the care results in stabilization of the enrollee" (emphasis added)]; *id.*, § 1371, subd. (a)(1) ["A health care service plan . . . *shall reimburse* claims or a portion of a claim, . . . as soon as practicable, but no later than 30 working days after receipt of the claim by the health care service plan . . . ." (emphasis added)]; Cal. Code Regs., tit. 28, § 1300.71, subd. (a)(3) [" 'Reimbursement of a Claim' " means "the payment of the reasonable and customary value for the health care services rendered"]; *YDM Management Co., Inc. v. Sharp Community Medical Group, Inc.* (2017) 16 Cal.App.5th 613, 624 ["the Knox-Keene Act imposes a requirement that health care service plans *must reimburse* a provider who has provided emergency services or care to a health care service plan's enrollee" (emphasis added)]; *id.* at p. 625 [when the emergency provider has no contract with the health plan, the plan "*must* reimburse" the provider "for 'the reasonable and customary value' of emergency services provided to the plan's enrollee"].)

case because "there is no 'mandatory' methodology for calculating reimbursement rates for emergency services." (ABOM 61.)

The court in *Bell* properly rejected that argument: "Although we agree that Blue Cross's reimbursement obligation is not tied to a specific amount (Medicare or anything else), we do not agree that Blue Cross has unfettered discretion to determine unilaterally the amount it will reimburse a noncontracting provider . . . . [¶] . . . [¶] . . . *[T]he duty to reimburse must be read as a duty to pay a reasonable and customary amount for the services rendered*." (*Bell*, *supra*, 131 Cal.App.4th at p. 220, emphasis added.) The court correctly observed that if a health plan could unilaterally determine the reimbursement rate without judicial oversight, "the emergency care providers could be reimbursed at a confiscatory rate that, aside from being unconscionable, would be unconstitutional." (*Ibid.*)

Indeed, under the County's view of its discretion, it could decide that the reasonable and customary value of the emergency services the Hospitals provided was, say, $1,000, rather than the $144,000 the Hospitals billed—and no court could review that decision.

The reasoning in *Bell* tracks the courts' reasoning in cases discussing a related issue, public employees' immunity for "discretionary" acts under Government Code section 820.2.[9] (See

[9] Government Code section 820.2 states: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was

Creason v. Department of Health Services (1998) 18 Cal.4th 623, 633 (*Creason*) [cases involving claimed immunity for discretionary acts under section 820.2 "obviously are instructive in determining whether 'mandatory acts' liability should be imposed" under Government Code section 815.6].)

The rationale for discretionary act immunity is "to ensure 'judicial abstention in areas in which the responsibility for *basic policy decisions* has been committed to coordinate branches of the government.' " (*Nunn v. State of California* (1984) 35 Cal.3d 616, 622 (*Nunn*); see *ibid.* ["immunity attaches to quasi-legislative policy decision-making areas which are sufficiently sensitive to justify blanket immunity"]; *Creason*, *supra*, 18 Cal.4th at pp. 633–634 [same].) On the other hand, " 'operational' or 'street level' " decisions, i.e., decisions that implement or apply the established policy in individual cases, do not warrant immunity: " 'Discretionary immunity obtains if the action challenges the authorized prescription by legislative or executive-level management of institutional rules or decisions calculated to affect persons generally, *rather than ad hoc decisions intended to apply such general rules or policies to specific individuals or factual events*.' " (*Creason*, at pp. 633–634, quoting Cal. Government Tort Liability Practice (Cont.Ed.Bar 3d ed. 1992) General Liability and Immunity Principles, § 2.119, p. 225, emphasis added.)

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the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

Here, the Legislature's basic policy decision is enshrined in section 1371.4 of the Knox-Keene Act, which requires health plans to reimburse emergency providers for emergency services rendered. (Health & Saf. Code, § 1371.4.) The Department's second-level policy decision is enshrined in the governing regulation, which provides that the required reimbursement must be based on the reasonable and customary value of the services and enumerates factors that should go into that determination. (Cal. Code Regs., tit. 28, § 1300.71, subd. (a)(3)(B).)

The County's decision in this case to reimburse only about 20 percent of the total amount the Hospitals billed for emergency services was a "street-level" decision, i.e., an ad hoc decision intended to apply the basic policy " 'to specific individuals or factual events.' " (*Creason*, *supra*, 18 Cal.4th at pp. 633–634.) The County's calculation of reasonable and customary value for the particular services the Hospitals rendered is not a basic policy decision, nor is it a decision "sufficiently sensitive to justify blanket immunity." (*Nunn*, *supra*, 35 Cal.3d at p. 622.)

The County also points out that Government Code section 815.6 affords the public entity a defense if it can establish it "exercised reasonable diligence to discharge [its] duty." (Gov. Code, § 815.6; see ABOM 60, fn. 15.) The County is free to raise that defense, and the court may consider it. But the parties first need to be in court, which cannot happen if the County is immune from the Hospitals' action.

III. The County's critique of hospital pricing and billing practices is irrelevant to the issue presented.

The County devotes approximately six pages of its answer to a critique of hospital pricing and billing practices (ABOM 25–30; see also ABOM 68 ["ruinous pricing and billing practices"]), including a targeted attack on the Hospitals and their parent company for allegedly excessive billings (ABOM 26–28, 44–45 ["grossly inflated charges"]). To support its critique, the County requests judicial notice of regulatory disclosures that supposedly reflect the Hospitals' billed charges and costs during the years at issue. (RJN, exhs. I-L.) Oddly, the County disclaims any reliance on these disclosures "for the truth of the matter asserted" but offers them purportedly to show the Hospitals' calculations of their billed charges and costs. (RJN 13.) In other words, despite the disclaimer, the County relies on these disclosures for the truth of the matter asserted.

Whatever the purpose of the County's request, the Hospitals cannot possibly defend themselves against accusations of excessive billings because no pertinent record has been made. This case has yet to advance beyond the pleading stage. Assuming this Court reverses and allows the Hospitals to seek relief in court, the County can then attempt to justify how it calculated the reimbursement amount. Whether that effort properly involves a broader discussion of hospital costs and billing practices may be decided by the superior court. At the

moment, however, the County's allegations are premature and a distraction.[10]

The case before this Court raises no issue of hospital pricing or billing practices, which are "already highly regulated." (ABOM 29.) The issue presented is whether the County is immune from a lawsuit asking the *court* to adjudicate the reasonable and customary value of emergency services rendered by the Hospitals to enrollees in the County's health plan. Judicial oversight minimizes or eliminates the risks of both excessive billings by emergency providers and underpayment of reimbursement by health plans.

The Hospitals' calculations of their billed charges and costs have no conceivable relevance to the immunity issue before the Court. The County is simply previewing a defense it will, presumably, raise if its immunity claim fails and the Hospitals are permitted to seek a judicial determination of the reasonable and customary value of their emergency services.

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[10] Elsewhere in its brief, the County informs us that "courts have rebuffed parties' efforts to rely on evidence of costs in actions for reimbursement for emergency services." (ABOM 45.) If so, the County's purpose for seeking judicial notice of the Hospitals' alleged costs appears to be to inflame rather than to inform.

CONCLUSION

For the foregoing reasons and those discussed in the opening brief, the Court of Appeal's decision should be reversed. The Government Claims Act does not immunize the County from the Hospitals' action, which should be permitted to proceed.

February 1, 2023

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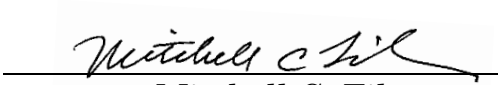
By: 
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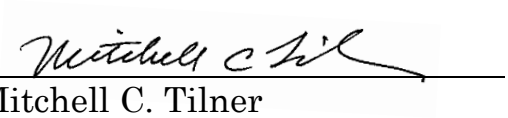

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PROOF OF SERVICE

County of Santa Clara v. The Superior Court of Santa Clara (Doctors Medical Center of Modesto et al.)
Case No. S274927

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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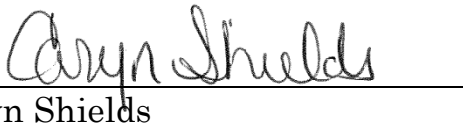

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S274927**
Lower Court Case Number: **H048486**

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2/1/2023

Date

/s/Caryn Shields

Signature

Tilner, Mitchell (93023)

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