Filed 7/24/02 (opn. on rehearing)

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PAUL E. MCMEANS et al., Plaintiffs and Appellants, v. SCRIPPS HEALTH, Defendant and Respondent.	D035486 (Super. Ct. No. 722004)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas R. Murphy, Judge. Affirmed in part and reversed in part.

Blumenthal, Ostroff & Markham, Sheldon A. Ostroff, David R. Markham and Michael D. Marchesini for Plaintiffs and Appellants.

Friestad & Giles and Deborah Giles for Defendant and Respondent.

Manatt, Phelps & Phillips, Barry S. Landsberg and Harvey L. Rochman for Catholic Healthcare West as Amicus Curiae on behalf of Defendant and Respondent.

Paul E. McMeans, Joseph P. Denny, and Mary Ann Shaul, as class representatives (Class members), appeal from a judgment granting summary judgment in favor of Scripps Health, Inc. (Scripps) and Medical Liability Recoveries, Inc. (MLR) and denying their motion for summary adjudication.[1] The Class members are patients who were treated at hospitals operated by Scripps for injuries caused by third parties, who the Class members had sued. The Class members were insured by medical insurance carriers, some of whom had entered into contracts with Scripps that specified fixed charges agreed to in advance for covered services. Class members and/or their medical insurance carriers paid Scripps for services provided to Class members. MLR on behalf of Scripps then placed liens on the judgments or settlements Class members received from the third parties or their liability insurance carriers under California's Hospital Lien Act (HLA), Civil Code sections 3045.1 through 3045.6.[2] In each case, the liens were greater than the amounts Scripps had been paid by the Class members or their medical insurance carriers.

Class members filed this class action against Scripps on July 1, 1998. The operative complaint is the third amended complaint, filed on October 18, 1999, which contains causes of action for unfair business practices, violation of the consumer legal remedies act, trespass to chattels, breach of contract, negligence, accounting, unjust enrichment, declaratory relief, mandatory injunction and prohibitory injunction.

---

1 MLR is in bankruptcy. In accordance with the court's orders of June 11, 2001 and July 24, 2002, the appeal is stayed as to MLR under section 362 of the Bankruptcy Code (11 U.S.C. § 362) and we sever MLR from the appeal.

2 All further statutory references are to the Civil Code unless otherwise specified.

Class members contend the court erred in granting summary judgment for Scripps because Scripps placed section 3045.1 liens on Class members' recovery although Class members owed no debts to Scripps. Class members also contend the court should have granted their motion for summary adjudication of Scripps's affirmative defense that it was privileged to assert the HLA liens under section 47, subdivision (b)(2) and of their cause of action for declaratory relief. We reverse the order granting summary judgment in favor of Scripps. We affirm the court's denial of Class members' motion for summary adjudication of Scripps affirmative defense of the section 47, subdivision (b)(2) privilege. We affirm in part and reverse in part the court's denial of Class members' motion for summary adjudication of their cause of action for declaratory relief.

FACTUAL AND PROCEDURAL HISTORY

In November 1996 McMeans was injured in an automobile accident caused by an uninsured third party and was treated at Scripps Mercy Hospital. As a result of his accident, McMeans suffered pain in his ribs that interrupted his sleep and prevented him from sitting, standing, driving and bending. Because he could not work for a period, he sustained lost income of $6,250. McMeans settled his claim for $35,500, the uninsured motorist limits of the Farmers Insurance policy that covered the car in which McMeans was a passenger.

At that time of his treatment, McMeans was insured under a preferred medical provider insurance plan issued by Aetna Life Insurance Company (Aetna) and Scripps

Mercy Hospital was a participating health provider under the Aetna plan. Although Aetna paid Scripps Aetna's share of the contract rate for McMeans's treatment and Farmers Insurance paid McMeans's share of the contract rate, MLR asserted a lien on behalf of Scripps in the amount of $4,298.86 against McMeans's settlement.

In June 1998 Shaul was injured in an automobile accident and underwent surgery at Scripps Memorial Hospital, consisting of open reduction internal fixation of her medial malleolus and right talus, and bone grafting of her right talus. As a result, she was totally disabled for about six months and lost income of about $60,000. She continues to have chronic right leg and ankle pain, which may require additional medical treatment. Shaul has incurred out-of-pocket expenses of about $5,000 for therapy, orthotic devices, and chiropractic treatment.

In June 1998 Shaul was insured under Sharp Health Plan, a managed care plan, which had no contract with Scripps Memorial Hospital. Sharp Health Plan paid Scripps for Shaul's treatment and Shaul paid a $100 copayment. Shaul settled with the third party tortfeasor for $100,000, the liability insurance policy limits of the tortfeasor. MLR filed a lien on behalf of Scripps in the amount of $6,168.17 "upon any damages which a claim of action has been brought or will be brought."

In April 1996 Denny was injured in an automobile accident and sustained multiple head, neck, shoulder and knee injuries. He later had neck surgery at Scripps Memorial Hospital, which consisted of an anterior cervical discectomy and fusion. Denny was disabled for several months, resulting in net lost wages in excess of $4,000. As a result of his injuries, Denny continues to suffer limited movement in his neck and chronic pain.

He can no longer participate in activities he used to enjoy, such as hiking, bicycling, and physical education with his students. Denny received $100,000 in settlement.

At the time of surgery, Denny was insured under the CaliforniaCare HMO plan of Blue Cross of California and Scripps Memorial Hospital was a participating health provider under that plan. Blue Cross paid Scripps for its services and Denny paid the applicable copayments or deductibles. Nine days after Denny's settlement, MLR filed a lien on behalf of Scripps for $13,790.38 on Denny's recovery from the tortfeasor.

In April 1999 the trial court certified Class members' lawsuit against Scripps as a class action "to include as class plaintiffs all persons who: [1] were injured in accidents and thereafter treated at hospitals operated by ScrippsHealth ('Scripps'); [2] were insured under individual or group medical insurance plans, including but not limited to Health Maintenance Organization plans, Preferred Provider Organization plans and /or Managed Care plans; [3] whose medical insurers have contracted with Scripps in which Scripps agreed to provide covered services for the insurer's policyholders/beneficiaries at negotiated discounted rates; or alternatively, pursuant to the Knox-Keene Health Care Service Plan Act of 1975, the payments received by Scripps based on pre-determined rates from the patient's insurer (plus any applicable co-pay or deductible) constitute full payment; [4] whose bills at such negotiated discounted rates or pre-determined rates have been paid; and [5] against whom Scripps within the last four years either directly, or through the action of Medical Liability Recoveries, Inc. or any other agent of Scripps, has asserted a lien under Civil Code section 3045.1 demanding payment of the difference

between the negotiated discounted rate or pre-determined rate and Scripps' ordinary full charge for the covered service."

On May 21, the court denied Scripps's motion for judgment on the pleadings, which asserted that each cause of action was barred by the litigation privilege. (§ 47, subd. (b)(2).) On September 2, the court denied a renewed motion for judgment on the pleadings.

The parties then agreed to file cross-motions for summary adjudication and summary judgment. Class members filed a motion for summary adjudication of Scripps's thirteenth affirmative defense, the privilege conferred under section 47, subdivision (b)(2), and the eighth cause of action for declaratory relief. Scripps filed a motion for summary judgment. On February 23, 2000, the court granted Scripps's motion for summary judgment and denied Class members' motion for summary adjudication.

DISCUSSION

I. *Summary Judgment and Summary Adjudication*

Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. c.) We review de novo the trial court's decision to grant summary judgment and are not bound by the trial court's stated reasons or rationales. (*Hersant* v. *Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.) Further, we review issues of statutory interpretation de novo. (*Heavenly Valley v. El Dorado County Bd. of Equalization* (2000) 84 Cal.App.4th 1323, 1334.) The appellate rules applicable to review of summary adjudication are the same as applicable to summary judgment.

II. *Hospital Lien Act (HLA)*

Section 3045.1 provides: "Every person, partnership, association, corporation, public entity, or other institution or body maintaining a hospital licensed under the laws of this state which 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 . . . to the extent of the amount of the reasonable and necessary charges of the hospital . . . , in which services are provided for the treatment, care, and maintenance of the person in the hospital or health facility affiliated with the hospital resulting from that accident or negligent or other wrongful act." Section 3045.1 creates a "statutory nonpossessory lien . . . in favor of a hospital against third persons liable for the patient's injuries." (*Mercy Hospital & Medical Center v. Farmers Ins. Group of Companies* (1997) 15 Cal.4th 213, 217 (*Mercy*).) The lien "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*." (*Ibid.*, italics added.)

Scripps contends section 3045.1 creates a direct obligation between the tortfeasor and the hospital in the amount of the hospital's reasonable charges and the amount of its lien is not based on or limited by the injured patient's debt to the hospital. Scripps bases its contention on section 3045.3, which requires the hospital to give notice of its lien to only the tortfeasor and the tortfeasor's insurer; section 3045.4, which requires the

tortfeasor to pay the hospital directly; and section 3045.5, which gives the hospital a cause of action to enforce its lien against the tortfeasor, not against the injured patient. However, these provisions define who shall pay the hospital, but do not define from whose property the payment is made.

Class members contend they and/or their medical insurance carriers have paid Scripps in full for its services and, by placing a lien on their recoveries, Scripps seeks amounts greater than the amounts Scripps agreed to accept for its services. In addressing issues raised by Class members, we initially note, notwithstanding the class certification, the contracts between Class members and their medical insurance carriers and between Scripps and the medical insurance carriers differ substantially. Because of the different contract provisions we conclude Scripps wrongfully placed a lien on the recovery of one of the class representatives but rightfully placed a lien on the recovery of the other two class representatives.

The issues raised in this appeal were recently addressed in *Nishihama v. City & County of San Francisco* (2001) 93 Cal.App.4th 298, 306-309 (*Nishihama*). We find the reasoning of *Nishihama* compelling and elect to follow it:

"Even if the HLA contemplated an independent right in the hospital, the extent of that right would be defined by any contract between the injured party or her insurer and the health care provider. Civil Code section 3045.4 accordingly provides that the third party 'shall be liable to the [health care provider] 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.' (Italics added.) The amount that a hospital is

entitled to receive as payment necessarily turns on any agreement it has with the injured person or the injured person's insurer." (*Nishihama, supra,* 93 Cal.App.4th at pp. 307-308.)

The patient's debt to the hospital is the foundation for the hospital's right to a lien. (*Nishihama, supra,* 93 Cal.App.4th at p. 308.) The "reasonable and necessary charges," then, are the amounts charged to the patient or the patient's insurance carrier. The HLA does not give hospitals a cause of action against tortfeasors; it allows hospitals to place a lien on the *patient's* recovery from the tortfeasor. The amount of the lien is the "reasonable and necessary charges" for the patient's treatment. (§ 3045.1.) However, if the agreed charges have been paid, the hospital has no amount, reasonable or otherwise, it may seek from a third-party tortfeasor.

Although Scripps contends it seeks payment from tortfeasors, the payments ultimately come from the Class members. Under California law, the amount a personal injury plaintiff can recover for medical services is limited to the amount that has been paid or incurred for those services, even if that amount is less than the market rate or reasonable value of the services. (*Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 641.)

In the cases involved in Class members' class action, the amounts Class members can recover from the tortfeasors are based on Class members' medical insurance contracts and the contracts those insurance carriers negotiated with Scripps. If Scripps's liens exceed these amounts, then Scripps collects more from the Class members' judgments or settlements than the Class members are legally entitled to recover from the tortfeasor for

medical expenses. In effect, the amount Scripps collects in excess of its agreed rate is funded by a portion of Class members' judgments or settlements attributable to lost wages or to pain and suffering. We conclude Scripps's "lien rights do not extend beyond the amount it agreed to receive from [Class members' medical insurance carriers] as payment in full for services provided to [Class members]." (*Nishihama, supra,* 93 Cal.App.4th at p. 307.)

We also reject Scripps's contention that the legislative history of section 3040, enacted in September 2000, authorizes it to place a section 3045.1 lien for its usual and customary charges regardless of its contractual arrangements. Section 3040 limits the lien rights of medical providers to the amount they actually paid for the health care, but specifically exempts hospitals pursuing section 3045.1 liens. (§ 3040, subd. (g)(3).) The Consumer Attorneys of California argued to the Legislature that section 3040 should apply to hospital liens and provided the Legislature with a copy of *Satsky v. United States of America* (S.D.Texas 1998) 993 F.Supp. 1027, 1029 (holding that a hospital could not place a lien on a patient's recovery under a Texas statute similar to section 3045.1 because the statute "was clearly not intended to overcompensate hospitals that accept patients who do have the ability to pay, nor to provide a windfall for hospitals who feel aggrieved by the circumscription of hospital charges by insurance plans").

The fact that section 3040 places no express limit on a hospital's lien rights is not determinative of whether those lien rights were already limited under the HLA. Further, subsequent legislation is, at best, an unreliable gauge of legislative intent. (*United States v. Price* (1960) 361 U.S. 304, 312 [recognizing that "the views of a subsequent Congress

form a hazardous basis for inferring the intent of an earlier one"].) For similar reasons, we do not place much weight on other statutory liens that purportedly exist in the absence of an underlying debt. The unique nature of a hospital lien under the HLA makes those comparisons questionable. We conclude the amount of an HLA lien may not exceed the amount the patient is indebted to the hospital.

III. *Insurance Contracts*

The provisions of Class members' medical insurance contracts and the contracts Scripps entered into with those medical insurance carriers determine whether the HLA liens are authorized. Based on the contracts of the three class representatives, we conclude Scripps was not entitled to place a lien on McMeans's recovery, but was entitled to place liens on the recoveries of Shaul and Denny.

A. *McMeans*

The Aetna insurance plan that covered McMeans provides that if a third party is liable for a patient's injury, Aetna shall be subrogated to the patient's recovery to the extent of the benefits Aetna paid. McMeans was treated at Scripps Mercy Hospital. The contract between Scripps Mercy Hospital and Aetna provides in part: "In no event . . . shall any Member be liable to Hospital for any sums owed to Hospital by the applicable Payor. In addition, neither Hospital nor its agents, trustees, or assignees shall maintain any action at law against a Member to collect sums owed by the applicable Payor; provided, however, that Hospital may collect from Members co-payments, coinsurance or deductibles for Covered Services, or amounts due for non-Covered Services. Amounts for non-Covered Services may be charged at Hospital's usual and customary charges."

This agreement provides that Scripps may not collect payment from patients insured by Aetna, other than copayments or deductibles, unless the service provided to the patient is not covered under the insurance agreement. This agreement allows Scripps to bill at its usual and customary rate only for services not covered under the patient's insurance agreement. Because the services Scripps provided to McMeans were covered under McMeans' medical insurance policy with Aetna, Scripps was not entitled to place a lien for its reasonable and necessary charges on McMeans's recovery in excess of the agreed amount.

We are not persuaded by Scripps's contention the services McMeans received were not covered because the Aetna insurance policy provides that Aetna has the right to recover the benefits Aetna paid from third party tortfeasors. This portion of the policy does not provide that those services are not covered by the agreement; it merely provides that Aetna will be reimbursed from any future recovery.

Scripps also contends it may collect its reasonable and necessary fees from a third party tortfeasor under the "Coordination of Benefits" (COB) section of its agreement with Aetna, which provides: "Hospital shall be entitled to all COB recoveries relating to Covered Hospital Services. Hospital shall make a reasonable effort to seek reimbursement for Covered Hospital Services under other third party coverages when applicable. . . . For per diem or discount off charges payments, in the event that Payor is the secondary carrier under the coordination of benefits rules, Payor shall be required to pay Hospital the difference between Hospital's full customary charges and the amount

collected by Hospital from third party payors, but in no event to exceed the amount the Payor is required to pay if it were the primary carrier."

We are not persuaded by this contention. Coordination of benefits is a term used when there is duplicate medical insurance coverage. (*Kaiser Foundation Health Plan, Inc. v. Lifeguard, Inc.* (1993) 18 Cal.App.4th 1753, 1757.) The term "coverage" is normally used to refer to insurance coverage. For instance, Insurance Code section 10270.98 states in part: "Group disability policies may provide, among other things, that the benefits payable thereunder are subject to reduction if the individual insured has any other *coverage* (other than individual policies or contracts) providing hospital, surgical or medical benefits, whether on an indemnity basis or a provision of service basis, resulting in such insured being eligible for more than 100 percent of the covered expenses." (Italics added.) The reference to "coverage" is a reference to other insurance coverage. A tort obligor does not provide insurance coverage. Additionally, although the contract does not expressly define the term "third party payor," it reasonably contemplates an institutional payer, such as another insurance company or Medicare. (See *Palumbo v. Myers* (1983) 149 Cal.App.3d 1020, 1030-1034 [a settling third party tortfeasor is not a "third party payer" as the term is used in Welfare and Institutions Code section 14019.4].) Therefore, this contract provision does not change our analysis.

Scripps relies on *Swanson v. St. John's Regional Medical Center* (2002) 97 Cal.App.4th 245 (*Swanson*). The court in *Swanson* held a hospital's filing of liens is not an unfair business practice, an issue not raised in this appeal. The *Swanson* court did not address contracts between hospitals and insurers that might prohibit a lien. (*Id.* at p. 251,

fn. 5.) Further, to the extent the analysis of the HLA in *Swanson* differs from the analysis in *Nishihama*, we find the reasoning of *Nishihama* more compelling.

B. *Shaul and Denny*

Shaul was enrolled in the Sharp Choice plan, which had no contract with Scripps Memorial Hospital. Therefore, Scripps may place an HLA lien on Shaul's recovery for the "reasonable cash value of the benefits" it provided to Shaul.

Denny's CaliforniaCare contract with Blue Cross does not provide benefits for the medical treatment of injuries caused by third parties. Under the heading "Reimbursement for Acts of Third Parties," the CaliforniaCare disclosure form states in part: "No benefits will be provided under this plan for medical care for, or received in connection with, any illness, injury, or condition for which a third party may be liable or legally responsible by reasons of negligence, an intentional act or breach of any legal obligation. But benefits will be provided under this plan subject to the following: [¶] 1. CaliforniaCare and your medical group will automatically have a lien to the extent of benefits provided, upon any recovery, whether by settlement, judgment or otherwise, that you receive from the third party, the third party's insurer, or the third party's guarantor. The lien will be for the *reasonable cash value of the benefits* provided by your medical group or by us under this plan for the treatment of the illness disease, injury or condition for which the third party is liable. . . ." (Original italics omitted; italics added.)

The Ninth Circuit interpreted a similar provision in another Blue Cross contract[3] and held the following: "The contract excludes Blue Cross from liability for injuries tortiously caused by third parties, and provides an *exception* for benefits which will be advanced in anticipation of possible future recovery. Once recovery has been made, the conditions of the exception no longer exist and the exclusion remains." (*Qualls v. Blue Cross of California, supra,* 22 F.3d at p. 845, original italics.) Under the CaliforniaCare plan, Blue Cross does not provide benefits for medical care for injuries caused by a third party tortfeasor; it merely advances money.

Because Denny was injured by a third party tortfeasor, his medical services were not covered under the CaliforniaCare plan. Blue Cross merely advanced payment to Scripps on Denny's behalf. The contract between Scripps and Blue Cross does not limit the amount Scripps may charge for the medical services it provided to Denny. Instead, under the CaliforniaCare plan, Scripps may place a lien for the "reasonable cash value of the benefits" it provided.

Although Scripps has shown it has a contractual right to place a lien on the recoveries of Shaul and Denny, Scripps has not met its burden of proof that the liens are

---

3 "Blue Cross relied on Section Seven AA of the policy which excluded coverage for '[a]ny illness, injury or other condition for which a third party may be liable or legally responsible by reason of negligence, an intentional act or breach of any legal obligation on the part of such third party. Nevertheless, Blue Cross will advance the benefits of this Agreement to the Member subject to the following: . . . Blue Cross will automatically have a lien, to the extent of benefits advanced, upon any recovery, whether by settlement, judgment or otherwise, that the Member receives from the third party . . . .' " (*Qualls v. Blue Cross of California* (9th Cir. 1994) 22 F.3d 839, 842.)

for "reasonable and necessary charges." (§ 3045.1.) The reasonable value and necessity of Scripps's services are questions of fact. Although the amount paid or incurred for hospital services is some evidence as to its value, we also require evidence of the value and necessity of the professional services of the physicians and the hospital. (*Guerra v. Balestrieri* (1954) 127 Cal.App.2d 511, 520; *Harris v. Los Angeles Transit Lines* (1952) 111 Cal.App.2d 593, 598 (*Harris*).) Typically, a physician testifies as to these issues. (See *Harris, supra,* 111 Cal.App.2d at p. 598.) Scripps produced a declaration by Clelia Ki-Ki Barbeau, president and CEO of MLS. She declared, "The lien asserted . . . is the difference between the payment from the insurer and the actual *reasonable* and customary charges incurred by the patient." (Italics added.) Class members objected to this evidence under Evidence Code section 702. The court did not rule on the objection. Under *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1420, we "presume[] on appeal that a judge has not relied on irrelevant or incompetent evidence." Accordingly, we presume the court sustained the objection as to Barbeau's use of the word "reasonable." Barbeau had no personal knowledge of the reasonable value of the medical services Scripps provided to Shaul or to Denny. Further, Scripps introduced no evidence that its services were necessary. Accordingly, Scripps has produced no admissible evidence that the amount of the liens on the recoveries of Shaul and Denny were reasonable. Therefore, summary adjudication of the amount of the debts of Shaul and Denny to Scripps is inappropriate.

Because Scripps was not entitled to place a lien on McMeans's recovery and because there are triable issues of fact as to the reasonable value of the services Scripps provided to Shaul and Denny, the court erred by granting summary judgment.

IV. *Section 47, Subdivision (b)(2)*

Class members contend the court erred by denying their motion for summary adjudication of Scripps's thirteenth affirmative defense, the privilege conferred by section 47, subdivision (b)(2). Class members contend this privilege does not apply because Scripps's actions were not communicative and were not connected to litigation.

The privilege conferred by section 47, subdivision (b)(2), bars all tort causes of action, other than malicious prosecution, based on conduct protected by the privilege. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 215-216.) The principal purpose of the privilege is to afford litigants and witnesses freedom of access to the courts without fear of being subsequently harassed by derivative tort actions. (*Id.* at p. 213.) "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action." (*Id.* at 212.) "Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Ibid.*)

We are not persuaded by Class members' contention that the filing of liens on behalf of Scripps was not connected with any litigation. "If the publication has a

reasonable relation to the action and is permitted by law, the absolute privilege attaches." (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 381.) A federal court held that a lien for the treatment of a Medi-Cal patient filed under Welfare and Institutions Code section 14124.791 was sufficiently related to the claims in the Medi-Cal patient's personal injury action to support intervention as of right. (*Ghazarian v. Wheeler* (C.D.Cal. 1997) 177 F.R.D. 482, 486-487.) The court relied upon two cases that allow intervention by the holder of a protectable statutory lien interest because, in part, "this interest relates to a cognizable legal interest in any monetary proceeds resulting from a settlement or judgment in the action." (*Id.* at p. 487, relying upon *Diaz v. Southern Drilling Corp* (5th Cir. 1970) 427 F.2d 1118, 1124 [tax lien] & *McDonald v. E.J. Lavino Co.*, (5th Cir. 1970) 430 F.2d 1065, 1071 [insurance provider's lien under workers compensation law].) Similarly, a hospital filing a section 3045.1 lien has an interest to be adjudicated in an injured person's personal injury lawsuit because if the injured person does not prove the third party's liability, the hospital's lien loses all value. The publication of the notice of lien is reasonably related to the personal injury action because it informs the tortfeasor and/or the tortfeasor's insurance provider that the amount of the lien, unless a smaller amount is prescribed by section 3045.4, must be paid directly to the hospital. Therefore, Scripps's liens were filed in connection with the tort actions brought by Class members.

We also are not persuaded by Class members' contention that Scripps's lien filings are not protected by the privilege because Scripps engaged in a tortious course of conduct that incidentally included the publication of the lien. Class members claim their injuries are caused, not by the imposition of the lien, but by the wrongful collection process.

Class members rely upon *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 345 (*LiMandri*), in which we held a privileged communication does not shield a defendant from liability for a wrongful course of conduct that incidentally includes the communication. In *LiMandri*, an attorney had a fee agreement granting him a portion of the clients' recovery. (*Id.* at p. 334.) The defendant allegedly interfered with that contractual relationship by arranging a loan to the clients secured by the same recovery and filing a notice of lien in the lawsuit asserting the lender's security interest in the recovery. (*Id.* at p. 345.)

This case is distinguishable from *LiMandri*. The security interest in *LiMandri* was created by executing documents; filing the notice of lien was merely incidental to the creation of the security interest. (*Id.* at pp. 342, 346.) In contrast, the HLA requires a hospital to send notice of the HLA lien to the third party and his liability insurance carrier. (§ 3045.3.[4]) Further, the course of tortious conduct in *LiMandri* included executing the security interest, refusing to concede the superiority of the attorney's lien, and inducing the clients to breach their fee agreement with the attorney. (*Id.* at p. 345.) In contrast, the wrongful conduct Class members have identified here is Scripps's overcharging them by noticing liens.[5] The act of overcharging is the same act as the

---

4 Section 3045.3 provides in part: "A lien shall not be *effective*, however, unless a written notice . . . is delivered . . . to each person, firm, or corporation known to the hospital and alleged to be liable to the injured person for the injuries sustained . . . . (Italics added.)

5 Class members appear to contend Scripps engaged in a tortious course of conduct because Scripps published the liens in bad faith. There is no evidence Scripps published

assertion of the lien on Class members' recoveries. Labeling the assertion of a lien as an attempt to overcharge Class members does not change its nature as a communicative act.

The privilege conferred by Civil Code section 47, subdivision (b)(2), applies and bars certain of Class members' causes of action against Scripps. The privilege does not, however, bar the eighth cause of action for declaratory relief. (*Wilton v. Mountain Wood Homeowners Assn.* (1993) 18 Cal.App.4th 565, 571.)

Scripps contends the section 47(b)(2) privilege bars all of Class Members' causes of action except the action for declaratory relief. Because the issue of which causes of action are barred by the privilege was not raised in the trial court and has not been extensively briefed, we decline to address it. (See *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 5-6.)

V. *Declaratory Relief*

Class members contend the court erred by denying their motion for summary adjudication of the cause of action for declaratory relief. In the motion for summary adjudication of the eighth cause of action, Class members asked the court for a judicial declaration that (1) Scripps's collection practices and the assertion of liens in favor of Scripps is unlawful and (2) Class members are not indebted to Scripps for the amounts asserted in the liens.

---

the liens in bad faith. At the time Scripps filed the liens, no California appellate court had decided the issue posed by this appeal, and several trial courts had enforced Scripps's liens.

A party may bring an action for declaratory relief under Code of Civil Procedure section 1060, which provides in part: "Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court . . . for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract." A declaratory relief action may be brought on behalf of a class, *Serrano v. Priest* (1971) 5 Cal.3d 584, 618, and may be used to determine the construction of a statute, *Lane v. City of Redondo Beach* (1975) 49 Cal.App.3d 251, 255, as well as the rights and duties of the parties under a contract.

As discussed above, the lien Scripps placed on McMeans's recovery was not authorized because McMeans owes no debt to Scripps. Therefore, we reverse the court's denial of Class members' motion for summary adjudication of the declaratory relief cause of action as to class representative McMeans. On the other hand, Scripps's assertion of a lien on the recoveries of Shaul and Denny was authorized. Accordingly, we affirm the court's denial of Class members' motion for summary adjudication of the declaratory relief cause of action as to class representatives Shaul and Denny.

DISPOSITION

In accordance with this court's orders of June 11, 2001 and July 24, 2002, this appeal is stayed as to MLR under title 11 United States Code section 362 and MLR's appeal is severed from that of Scripps.

The court's grant of summary judgment in favor of Scripps is reversed. The court's denial of Class members' motion for summary adjudication of Scripps's defense of privilege under section 47, subdivision (b)(2) is affirmed. The court's denial of Class members' motion for summary adjudication of their eighth cause of action for declaratory relief is reversed as to class representative McMeans, but affirmed as to class representatives Shaul and Denny. Class members and Scripps to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.