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Leung v Verdugo Hills Hospital 8/23/12

Common Law Release; Denial of "Good Faith" Settlement; Set-off with Contribution

Plaintiff suffered irreversible brain damage six days after his birth. He sued his pediatrician and the hospital in which he was born. Before trial, plaintiff and the pediatrician agreed to a settlement of \$1 million, the limit of the doctor's malpractice insurance coverage. The pediatrician then petitioned the trial court for a determination that the written settlement agreement met the statutory requirement of having been in "good faith," seeking to limit his liability to the amount of the settlement. The trial court denied the motion, finding the settlement to be grossly disproportionate to the amount a reasonable person would estimate the doctor's share of liability would be. (Tech-Bilt, Inc. v Woodward-Clyde & Associates (1985) 38 Cal.3d 488) Plaintiff and his doctor elected to proceed with the settlement.

At trial, the jury found both the doctor and the hospital negligent. The jury awarded plaintiff \$250,000 in noneconomic damages; \$78,375.55 for past medical costs; \$82,782,000 for future medical costs; and \$13.3 million for loss of future earnings. The jury apportioned negligence as follows: 55% to the pediatrician, 40% to the hospital, and 2.5% each to the plaintiff's parents. The judgment stated that subject to a setoff of \$1 million, representing the amount of settlement with the pediatrician, the hospital was jointly and severally liable for 95% of all economic damages awarded to plaintiff. Defendant hospital appealed. The Court of Appeal agreed with defendant hospital that under the common law release rule, plaintiff's settlement with, and release of liability claims against, defendant pediatrician also released non-settling defendant hospital from liability for plaintiff's economic damages. The California Supreme Court granted review.

Traditionally, the common law rule held that a plaintiff's settlement with and release from liability of one joint tortfeasor also releases from liability all other joint tortfeasors. The rationale is that there can be only one compensation for a single injury and because each joint tortfeasor is liable for all of the damage, any joint tortfeasor's payment of compensation in any amount satisfies the plaintiff's entire claim. With a high potential for harsh results, the California courts have held that a plaintiff who settled with one of multiple tortfeasors could, by replacing the word "release" in the settlement with the phrase "covenant not to sue," and by stating that the agreement applied only to the parties to it, preserve the right to obtain additional compensation from the non-settling joint tortfeasors.

Nevertheless, the Supreme Court noted that the distinction between a release and a covenant not to sue was entirely artificial. (*Pellet v Sonotone* (1945) 26 Cal.2d 705) Criticism led to the Legislature enacting Code of Civil Procedure section 877, to modify the common law release rule and provide that a "good faith" settlement and release of one joint tortfeasor, rather than completely releasing other joint tortfeasors, merely reduces, by the settlement amount, the damages that the plaintiff may recover from the non-settling joint tortfeasors, and that such a good faith settlement and release discharges the settling tortfeasor from all liability to others. (CCP section 877 (a) and (b).) Here, the settlement was not made in good faith, and this statute does not apply.

Defendant Hospital contends that in enacting CCP section 877, the Legislature meant to preclude further development of the law of settlements involving joint tortfeasors, thus precluding any change to the common law release rule. Justice Kennard, writing for the Supreme Court, pointed out that adherence to the rule would relieve the defendant hospital from any liability for plaintiff's economic damages, even though the jury apportioned 40% of the fault to the hospital and calculated plaintiff's economic damages at roughly \$15 million (present value). The common law release rule would limit plaintiff to the \$1 million recovery from defendant pediatrician, working a harsh result. The rationale for the rule assumes that the amount paid in settlement to a plaintiff in return for releasing one joint tortfeasor from liability always provides full compensation for all of the plaintiff's injuries, and that therefore anything

recovered by the plaintiff beyond that amount necessarily constitutes a double or excess recovery.

It is recognized that no perfect method exists for apportioning liability among a plaintiff, a settling tortfeasor, and a non-settling tortfeasor. Three alternative approaches have developed. (Restatement 2d Torts, section 886A) Under the first approach, money paid by the settling tortfeasor is credited against any damages assessed against the non-settling tortfeasors, who are allowed to seek contribution from the settling tortfeasor for damages they have paid in excess of their equitable shares of liability. This is the “setoff-with-contribution” approach. The second approach allows non-settling tortfeasors a credit in the amount paid by the settling tortfeasor, but no contribution from the settling tortfeasor. This is the “setoff-without-contribution” approach. The third approach subtracts from the damages assessed against the non-settling tortfeasors the settling tortfeasor’s proportionate share of liability, rather than the amount paid in settlement. This is the “proportionate-share” approach.

The Supreme Court then inquired, which of these three approaches should apply in the case of a settlement which is judicially determined not to meet CCP section 877’s good faith requirement? Justice Kennard noted that the second approach, the setoff-without-contribution, is not a candidate, because this is the apportionment method adopted by the Legislature for settlements made in good faith. (CCP sections 877, 877.6(c).) Good faith has been defined, of course, under *Tech-Bilt*, and its progeny. Of the two remaining alternatives, setoff-with-contribution and proportionate-share, non-settling defendant hospital argues that the Court should adopt the latter. Plaintiff, however, prefers the setoff-with-contribution approach. To decide, the Court will evaluate the practical implications for tort cases, the consistency of each with established legal principles, and their likely effect on the public policy to promote settlement and on the interests of judicial economy.

Under the setoff-with-contribution approach the settlement has no or little practical effect on the defendants’ ultimate liabilities or the plaintiff’s ultimate recovery, nor is the resulting apportionment inconsistent with either the comparative fault principles or the rule of joint and several liability. Without the settlement, each tortfeasor is, under the principle of joint and several liability,

fully liable for all of the plaintiff's damages less only the amount of fault attributed to the plaintiff. If another joint tortfeasor is for any reason unable to satisfy its share of liability, the remaining tortfeasors are still liable for all the economic damages awarded to the plaintiff, even though the amount exceeds their proportionate shares of liability.

With the settlement, under the setoff-with-contribution approach, the liability exposure of joint tortfeasors is not affected. The plaintiff may recover damages less the settlement amount and the amount of the plaintiff's own fault. The non-settling tortfeasors may then seek contribution from the settling tortfeasor for any amount they must pay to the plaintiff in excess of their proportionate shares of liability. If the settling tortfeasor is unable to fully discharge its share of liability, each non-settling tortfeasor, consistent with the rule of joint and several liability, remains liable for the difference. The result is the plaintiff receives compensation from the settlement, and from the suit against the non-settling tortfeasors, and the non-settling tortfeasors may sue the settling tortfeasor for contribution up to the amount of their proportionate share of liability. The only practical difference is that the settling tortfeasor may pay twice, both for the settlement and to the non-settling tortfeasors as contribution in a subsequent cross-complaint or separate action.

Under proportionate-share apportionment, the plaintiff's total recovery for economic damages is limited to the settlement amount plus the proportionate shares of the non-settling tortfeasors. If the settlement payment turns out to be less than the settling tortfeasor's proportionate share, as determined by the court or jury, the plaintiff may not recover the difference from any of the other tortfeasors and is thus precluded from obtaining full compensation. The settling tortfeasor's liability is determined not by its proportionate share, but only by the amount of its settlement. Because the non-settling tortfeasors' liability to the plaintiff for economic damages cannot exceed their proportionate shares, their liability is not joint and several, but several only.

Considering these practical applications of the two available apportionment approaches and their consistency with basic tort principles, the Court favors adoption of the setoff-with-contribution alternative over the proportionate-share alternative. It does not change the respective position of the

parties and is consistent with comparative fault principles and the rule of joint and several liability.

The Court next examined the merits of the two approaches in regard to promoting the policy of settling a case before trial. (*Cassel v Superior Court* (2011) 51 Cal.4th 113) That public policy's goals are not necessarily satisfied in all pretrial settlements. Good faith settlements are to be encouraged, but settlements not in good faith are not similarly treated. By indicating that only good faith settlements preclude a non-settling tortfeasor's contribution action against the settling tortfeasor, the Legislature made clear that settlements not made in good faith should be discouraged. The public policy of encouraging good faith pretrial settlements is furthered by the setoff-with-contribution approach, but not by the proportionate-share approach.

The setoff-with-contribution approach does not change the respective liabilities of the joint tortfeasors. It thus provides no incentive for them to enter into a settlement that is not in good faith. By contrast, the proportionate-share approach would encourage settlements not made in good faith: by limiting the liability of the settling tortfeasor (liable only for the settlement amount regardless of liability share), and by limiting the liability of the non-settling tortfeasor (no longer liable for the settling tortfeasor's proportionate share of economic damages). Consequently, for settlements not made in good faith, the setoff-with-contribution is superior in furthering the goal of encouraging settlements.

With respect to promoting judicial economy, the Court concluded that neither method is better than the other. The liability of all parties can be determined in a single action. On balance then, the Supreme Court holds that the setoff-with-contribution approach is preferable to the proportionate-share approach. When a settlement with a tortfeasor has judicially been determined not to have been made in good faith, (1) non-settling joint tortfeasors remain jointly and severally liable, (2) the amount paid in settlement is credited against any damages awarded against the non-settling tortfeasors, and (3) the non-settling tortfeasors are entitled to contribution from the settling tortfeasor for amounts paid in excess of their equitable shares of liability. The common law release rule is no longer to be followed in California, and therefore defendant hospital remains jointly and severally liable for plaintiff's economic damages.

The Court of Appeal's judgment must be reversed.

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