CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Rashidi v Moser (10/9/13)

Offsets at Trial; Prior Settlements; Product Liability and Medical Malpractice

In April 2007, the 26 year old plaintiff went to the emergency room at Cedars Sinai Medical center with a severe nose bleed. It happened again in May 2007, and at that visit he was examined by Dr. Moser. The defendant advised plaintiff to have an operation to treat his nose bleeds. The operation involved insertion of a catheter into the plaintiff's leg and up into the nose, followed by injection of embospheres to permanently occlude blood vessels. The embospheres were manufactured by Biosphere Medical, Inc. Following the surgery, when plaintiff regained consciousness, he was blind in one eye. The condition is permanent.

Plaintiff sued Dr. Moser, Cedars Sinai and Biosphere Medical, alleging medical malpractice against Moser and the hospital, and product liability against Biosphere. He eventually settled with Biosphere for $2 million and with Cedars Sinai for $350,000. Each settlement was determined by the trial court to have been made in good faith. Trial proceeded against Dr. Moser, the sole remaining defendant. The jury found he was negligent, and that the negligence was a cause of injury to plaintiff. It awarded plaintiff $125,000 present cash value for future medical care, $331,250 for past economic loss and $993,750 for future noneconomic damages.

The court reduced the noneconomic damages pursuant to MICRA to $250,000, reducing the verdict to $375,000. Dr. Moser argued there should be an offset against the judgment based on the pretrial settlements. The trial court rejected the argument because the agreements with the settling defendants did not make any allocation of the settlement funds, those defendants did not

participate in trial, and the jury was not requested to make a finding of proportionate fault attributed to settling defendants. Moser filed a notice of appeal.

The Second District Court of Appeal, Division Four, began its opinion by turning to CCP section 877 and CCP section 1431.2. Section 877 states that a settlement with one or more tortfeasors claimed to be liable for the same tort shall reduce the claim against the others in the amount stipulated by the release, or dismissal, or in the amount of the consideration paid for it, whichever is greater.

Section 1431.2 states that each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount. The statute retains the joint liability of all tortfeasors, regardless of their share of liability, with respect to all provable expenses and monetary losses. With respect to noneconomic damages, each defendant is liable only for that portion which is commensurate with that defendant's degree of fault for the injury. (*Evangelatos v Superior Court* (1988) 44 Cal.3d 1188)

In the absence of a pretrial allocation, courts have developed a method for applying the allocation of the settlement to the jury verdict. The idea is to allocate the settlements so that they mirror the jury's apportionment of economic and noneconomic damages. (*Jones v John Crane, Inc.* (2005) 132 Cal.App.4th 990) This is done by calculating the percentage of the award attributable to economic damages in relationship to the entire award, and then applying that same percentage to the settlement. (*Espinoza v Machonga* (1992) 9 Cal.App.4th 268) This will yield the portion of the settlement attributable to economic damages, for which the non-settling defendant is entitled to an offset.

The jury awarded plaintiff $1,450,000 against Dr. Moser. Of this, $125,000 was for economic damages. The percentage of the award attributable to economic damages is 8.62 percent. Applying that percentage to the $2 million settlement with Biosphere Medical, the Justices determined that $172,400 of that settlement should be allocated to economic damages. Under section 877, Dr.

Moser is entitled to a reduction of the claim against him in that amount. Since the jury's verdict for economic damages against Dr. Moser was only $125,000, the Biosphere settlement completely offsets that portion of Moser's obligation to plaintiff. The judgment should reflect this offset.

The other settling defendant, Cedars Sinai, along with Dr. Moser, are both healthcare providers, so the calculation of the percentage of the award attributable to economic damages is different. MICRA applies to both of these defendants to limit the amount of noneconomic damages. Because MICRA applies, the noneconomic portion of the total award to be used in the percentage calculation must be reduced to $250,000. The total award for this purpose is $375,000: $125,000 in economic damages and $250,000 in noneconomic damages. The percentage of economic damages to the total is 33.33 percent. Applying that percentage to the $350,000 settlement with Cedars, $116,655 of the settlement is attributable to economic damages; the remaining $233,345 is attributable to noneconomic damages.

The DCA notes that here is the intersection of section 1431.2 and MICRA. Ordinarily, each health care provider would pay its share of the noneconomic loss, based on its portion of liability, in accordance with the several but not joint obligation for noneconomic losses under section 1431.2. (*Gilman v Beverly California Corp.* (1991) 231 Cal.App.3d 121) Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries. Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous. (*Wilson v Ritto* (2003) 105 Cal.App.4th 361) It is similarly reasonable to place the burden on a nonsettlling defendant to prove fault as to settling tortfeasors for purposes of apportioning noneconomic damages.

At trial, Dr. Moser presented no evidence that Cedars Sinai was at fault, and the court ruled he had presented insufficient evidence to support instructions on that theory as to Biosphere. The jury affirmed that Moser was negligent in the treatment of plaintiff and that the negligence was the cause of injury to him. Plaintiff argues that since Dr. Moser is the only defendant found at fault, Dr. Moser is liable for all of the MICRA reduced noneconomic damages of

$250,000. This result is consistent with the express purpose of section 1431.2, to eliminate the perceived unfairness of imposing all the damage on defendants who were found to share only a fraction of the fault. (*DaFonte v Up-Right, Inc.* (1992) 2 Cal.4th 593)

The Justices conclude that under section 1431.2, since there was no apportionment of fault to another, Dr. Moser would be liable for the entire amount of noneconomic damages, if MICRA did not apply. But MICRA does apply and it sets an absolute limit on the total amount of damages a plaintiff can recover from healthcare providers for noneconomic losses. Dr. Moser argues that the Cedars Sinai settlement which was attributable to noneconomic damages up to the MICRA maximum of $250,000, should be applied. Under that approach, plaintiff would be limited to the statutory cap, and since $233,245 of the Cedars settlement is attributable to noneconomic damages, plaintiff would recover only an additional $16,655 from Moser for noneconomic damages.

This is consistent with MICRA in which the focus is on the total amount of damages for noneconomic loss an injured plaintiff may recover from all defendant healthcare providers in a single action. This serves the purpose of MICRA: "to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums. (*Fein v Permanente Medical Group* (1985) 38 Cal.3d 137)

To the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statue must be read as an exception to the more general statute. (*Salazar v Eastin* (1995) 9 Cal.4th 836) While section 1431.2 protects any joint tortfeasor from paying more than its proportionate share of noneconomic damages, MICRA prohibits a plaintiff from recovering more than $250,000 for noneconomic damages from all healthcare providers in the same action. MICRA does not distinguish between settlement dollars and judgments; it addresses a plaintiff's total recovery for noneconomic losses. Since MICRA, with its absolute limit on total recovery of noneconomic damges from health care providers, is the more specific statute, the Justices read it as an exception to the more general limitation on liability in section 1431.2.

The judgment is modified to reflect an offset against economic damages in

the amount of $125,000 and a reduction of the noneconomic damages to $16,655. In all other respects the judgment is affirmed. The parties are to bear their own costs on appeal.