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'Howell' Limit on Medical Damages Reins in Expert-Fee Shifts

Four years ago, the state Supreme Court ruled that an injured plaintiff can collect in medical damages only the amount his health insurer paid his doctors and hospitals, not the much higher amount the providers billed.

Since the court's decision in *Howell v. Hamilton Meats and Provisions Inc.*, lawyers for plaintiffs have repeatedly tried — and failed — to find some weak spot in the ruling. The effort failed again last month.

The new decision considers how to compare a pretrial settlement offer under Code of Civil Procedure Section 998 to the final judgment in a case. Under the code section, if the judgment ends up higher than the plaintiff's pretrial offer to compromise, the defense may be required to pay the plaintiff's expert witness fees and some prejudgment interest.

In *Lee v. Silveira*, the Court of Appeal in Fresno ruled it is how much providers accepted as full payment, not how much they billed, that matters in calculating the difference. Any "negotiated rate differential" between the billed and paid amounts must be deducted from the jury's verdict "before it is compared to the offer to compromise 'for the simple reason that the injured plaintiff did not suffer any economic loss in that amount,'" the court held, quoting *Howell*.

The case involved a woman seriously injured in an April 2008 accident between her car and a manure spreader. She "suffered fractures of her hips, leg, elbow and wrist and damage to associated nerves, ligaments and tendons." She made a Section 998 offer to settle for $1 million, which the defense rejected.

A jury awarded her $1,027,014, including past medical expenses of $274,514, which was the amount her doctors and hospital had billed. But those providers had accepted about 60 percent less. Deducting that "negotiated rate differential" of $165,262 from the jury verdict, brought the final judgment well under the $1 million Section 998 offer.

The plaintiff argued that she made her 998 offer before the *Howell* decision came down, at a time when the full amount billed would have been used in the judgment. That amount was what the two sides must have had in mind in making and rejecting the offer.

The appellate court noted, however, that the Supreme Court had agreed to consider the *Howell* case five months before the plaintiff's 998 offer. "Therefore, the law regarding the recovery of negotiated rate differentials was unsettled," a fact "an objectively reasonable attorney and client would have considered when evaluating the offer to compromise."

More importantly, in this case the plaintiff "did not suffer an economic loss in the amount of the negotiated rate differential," the court said. It held that damages not actually suffered or not allowed by law "must be excluded when determining whether the defendant failed 'to obtain a more favorable judgment or award'" under Section 998.

The key word from the code section is "obtain," the court declared. Here, the plaintiff never obtained a final judgment greater than her $1 million settlement offer.

MICRA Statute of Limitation Slips on Wet Hospital Floor

For 40 years, California's Medical Injury Compensation Reform Act, or MICRA, has imposed a powerful limitation on tort lawsuits against doctors and hospitals.

Besides famously capping noneconomic damages at $250,000, it also shortens the statute of limitation compared to the one used for many other injury lawsuits and sets some other restrictions.

MICRA only applies to suits against healthcare providers for professional negligence, which easily encompasses typical medical malpractice cases. But courts have divided on whether and how it applies to injuries less obviously connected to medical treatment, such as when a patient tumbles off a gurney or, as in a recent decision, slips and falls on a wet floor.

The plaintiff in *Pouzbaris v. Prime Healthcare Services* had been hospitalized for tightness in her chest. On her third day, as she was returning to bed from her room's bathroom, she fell where the floor was newly mopped. There was no warning sign or cone.

She knew at the time why she fell, but she didn't sue the hospital for almost two years. The defendant argued her lawsuit thus came well past MICRA's usual one-year statute of limitation. The plaintiff claimed, however, that the two-year statute of limitations for ordinary personal-injury negligence cases applied.

The trial court agreed with the defendant, holding that preventing patients from slipping on wet floors fell under the hospital's professional duty "to take appropriate measures for patient safety."

The Court of Appeal reversed. It noted that which statute of limitations applies to the case "depends on how the negligence is characterized. The determinative question is whether plaintiff's slip and fall occurred as a result of professional negligence, as that term is defined by [MICRA], or ordinary negligence … ."

The court discussed four earlier cases, which all involved a patient rolling off a bed, gurney or X-ray table. The more recent cases agreed that the definition of professional negligence "focuses on whether the negligence occurs in the rendering of professional services." Keeping an ill or sedated patient secured is part of professional services, the later cases said. But, as an early case concluded, protecting them from a collapsing chair or falling chandelier may not be.

The appellate court agreed with the most recent opinion that the distinction between professional services and other services is not how much skill a particular service requires. Even menial tasks, such as positioning an X-ray table, can be part of a professional service.

But in this case, the appellate court held, "mopping the floor and putting a warning sign up did not occur during the rendering of such services." Therefore, the "plaintiff sufficiently alleged facts to support an ordinary negligence claim so as to bring her action within the two-year limitations period."

Liability Release of Whole World Is Possible, but Watch Out

Most lawsuits over accidental injuries end with a settlement. Often, though not always, the defendant pays some amount of money to the plaintiff. Virtually always, the plaintiff, in return, signs a contract abandoning any claims of liability against the defendant.

Under standard practice, that contractual “general release” of liability lists not just the defendant or defendants named in the plaintiff’s lawsuit, but anybody else who might possibly be blamed for the injury. In fact, many general releases go much further and declare they release all other persons or entities from future claims of liability — basically, the whole world.

Some courts have been wary of enforcing these “global” releases too freely to block actions against defendants potentially at fault but not named in the previous action. Even when they do enforce the releases, the courts raise cautions.

Consider one recent decision by a California Court of Appeal called *Cline v. Homuth*. A teenage driver with a provisional license struck and seriously injured a man on a motorcycle. Although the motorcyclist claimed damages of more than $1 million, he settled with the teen and the youth’s parents for their policy limit of $100,000.

Next, the motorcyclist tried to sue the young driver’s grandmother, who had been riding along supervising him. But the trial court granted the grandmother’s motion for summary judgment, and the appellate court agreed. The courts relied on the global release the plaintiff had signed releasing “any other person, corporation, association, or partnership responsible in any manner or degree” for the accident.

On appeal, the basic issue was whether the plaintiff and defendants intended the general release contract to apply to the grandmother.

“It is consistently clear … that the law permits a plaintiff who opposes enforcement of a general release by a third party to offer extrinsic evidence as to the circumstances surrounding negotiation and signing of the release to attempt to show that releasing ‘any other person,’ meaning everyone, does not comport with the parties’ intent,” the appellate court noted.

The grandmother did present some evidence that the motorcyclist’s attorney understood the release to cover “the world,” including her. The plaintiff and his attorney countered that they never would have accepted the release if they believed it protected the grandmother.

However, they never told anybody that. Their “evidence of undisclosed subjective intent … is insufficient to establish that the parties intended that [the grandmother] be excluded from the release,” the court held.

In a rare step, the author of the court’s opinion, Justice Elena J. Nicholson, added a three-paragraph concurring opinion to warn lawyers against the risks of overly broad releases. Those “all other persons” releases “raise policy concerns as to fairness,” Nicholson said.

A plaintiff eager for settlement may not pay much attention to what he signs and so “give up rights he did not mean to give up, with resulting unfortunate consequences.”

Therefore, Nicholson concluded, attorneys for plaintiffs should study releases carefully and “advise their clients not to sign releases that appear to bar claims the client does not intend to give up.”

Barry L. Rodolff

The founder and president of The Rodolff Law Firm, APC, Barry L. Rodolff, is a highly experienced lawyer who has been assisting clients faced with civil litigation for more than two decades. Mr. Rodolff developed his skills with two well-respected defense firms, Schell & Delamer, and Haight, Brown & Bonesteel. He also worked in-house at Travelers Insurance Company, representing a variety of insured companies in many types of litigation. His clients have ranged from small businesses to multinational corporations. Mr. Rodolff brings extensive experience and knowledge in the defense of litigation involving premises liability, business, product liability, personal injury, employment, construction defect, and intentional torts.

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