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California damages: An update

THE INSURED PLAINTIFF WHO WAS CONSIDERED "UNINSURED" FOR THE PURPOSE OF ECONOMIC DAMAGES, AND OTHER RECENT CASES THAT IMPACT DAMAGE AWARDS

This article highlights some recent case law developments concerning damages in California that affect the plaintiffs' practice.

We begin with *Pebley v. Santa Clara Organics, LLC, et al.* (2018) 22 Cal.App.5th 1266. *Pebley* involved an action brought by an injured passenger of a motor vehicle accident against the driver and the driver's employer. A jury returned a verdict awarding the plaintiff $3,644,00 in damages, including $269,000 for past medical expenses and $375,000 for future medical expenses. Although plaintiff was insured, he chose to treat with doctors and medical facility providers outside his insurance plan. As a result, the court held that plaintiff was to be considered "uninsured" for the purpose of determining economic damages.

The measure of economic damages for an uninsured plaintiff turns on the reasonable value of services rendered or expected to be rendered. In this situation, the court held that an uninsured plaintiff or a plaintiff who chooses not to use insurance may introduce the *full* billed amounts for medical services to prove the reasonable value. This decision may ultimately influence a plaintiff attorney's decision to utilize medical care services on a lien basis.

B.B. v. City of Los Angeles – Prop 51 and intentional misconduct

In *B.B. v. City of Los Angeles* (2018) 25 Cal.App.5th 115, a decedent's family brought a wrongful-death action against deputies of the Los Angeles Sheriff's Department and the County of Los Angeles after the decedent was killed following a violent struggle with the deputies. A jury returned a verdict in favor of plaintiffs in the amount of $8 million dollars for noneconomic damages. The jury attributed 40% of the fault to the decedent, 20% fault for the first

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responding deputy (Deputy Aviles), 20% fault for the second responding deputy (Deputy Beserra), and the remaining 20% fault to the remaining deputies. The trial court, relying on *Thomas v. Duggins Co. Inc.*, 139 Cal.App.4th 115 (2016), entered the judgment against deputy Aviles for the full $8 million award on the jury's finding that he *intentionally harmed the decedent*.

The Court of Appeal reversed, holding that Civil Code section 1431.2 (Prop 51) mandates allocation of the noneconomic damages award in proportion to each defendant's comparative fault, notwithstanding a jury's finding of intentional misconduct. Thus, the Court of Appeal rejected *Duggins*, finding it directly conflicted with the plain text of section 1431.2. The trial court was directed to vacate the judgment and enter a separate judgment against Deputy Aviles and the County and a separate judgment against Deputy Beserra and the County allocating noneconomic damages to each defendant and the County in direct proportion to each individual defendant's percentage of fault, as found in the jury's comparative fault determinations.

Troester v. Starbucks – wage and hour law

Troester v. Starbucks Corp. (2018) 5 Cal.5th 829 involves a California wage and hour case where plaintiff, a Starbucks employee, brought a class action against his employer, Starbucks Corp., for unpaid wages in violation of the California Labor Code. Plaintiff claimed his employer did not pay hourly wages for the four to ten minutes he spent each day to transmit sales information to corporate headquarters, activate the store alarm, exit the store, lock the front door, and walk coworkers to their cars in compliance with the employer policies. The California Supreme Court clarified that California's wage and hour statutes and regulations have not incorporated the Fair Labor Standards Act's (FLSA) de minimus doctrine and although the de minimus rule was a background principle in state law, the rule was not applicable to the employer.

The Court held that the relevant California statutes and wage orders in this case did not allow the employer to require employees to routinely work for minutes off-the-clock without compensation. Interestingly, the Court stated that it was not making a blanket ruling that the de minimis doctrine does not apply to all wage and hours claims, just the one before the Court. This case signifies a continuing trend of the California Supreme Court straying further away from federal law and rules when it comes to employment cases.

Another recent example of the Court's tendency to stray from federal rules is *Dynamex Operations West., Inc. v. Superior Court of Los Angeles County.* In that case, the California Supreme Court confirmed that the test for determining whether an individual is an employee or an independent contractor requires more stringent requirements than that of its federal counterpart.

Cuevas v. Contra Costa County – Future meds and the ACA

In *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, a patient, through his guardian ad litem, sued Contra Costa County and others for medical malpractice arising out of injuries, including a hypoxic brain injury, that he sustained in utero. The jury returned a $9.5 million verdict awarding plaintiff the present cash value of his future medical and rehabilitation care expenses. Defendants appealed the verdict, claiming the trial court erred in excluding evidence that the health insurance benefits under the Patient Protection and Affordable Care Act (ACA) would be available to mitigate plaintiffs' future medical costs.

The Court of Appeal agreed and held that a defendant is entitled to introduce evidence of future insurance benefits available under the Affordable Care Act ("ACA") in MICRA cases. Although this case directly impacts a plaintiff's claim for future damages in medical-malpractices cases, it may be foreshadowing further inroads as it relates to other personal injury cases. However, as the ACA is in flux and in doubt, this decision may be on very shaky ground.

Bigler-Engler v. Breg – Prop 51 and MICRA

Bigler-Engler v. Breg, Inc. (2017) 7 Cal.App.5th 276, is a case where both MICRA and Prop 51 (Civ. Code, § 1431.2) intersect. Plaintiff was a patient who sued his physician (Chao), physician's medical group (Oasis) and a manufacturer of a medical device (Breg) for medical malpractice and product liability. A jury returned a verdict awarding, among other things, $5,127,950 in noneconomic compensatory damages. The jury allocated 50% responsibility to Chao, 10% to Oasis, and 40% to Breg. Defendants appealed the verdict and found, among other things, that the noneconomic damages were excessive, reducing the noneconomic damages to $1.3 million.

The Court of Appeal thereafter informed the trial court on how to properly apply both MICRA and Proposition 51 to the reduced award since both were in play. The Court of Appeal held that courts must apply Prop 51 first and then apply the MICRA $250,00 cap on noneconomic damages. The reasoning being that Prop 51 determines a defendant's *liability* for noneconomic damages according to each defendant's fault, whereas MICRA establishes a cap on the *recovery* of such damages against certain defendants. Thus, because the applicability of MICRA's cap cannot be determined unless a defendant's liability is known, Proposition 51 logically must apply first.

The court's analysis went as follows: the reduced award for noneconomic damages was $1.3 million. Per Prop 51, the jury's apportionment of liability results in 50% to Chao ($650,000), 40% to Breg ($520,000), and 10% to Oasis ($130,000). The court held that Oasis was the only defendant subject to the MICRA cap because it was a "healthcare provider" being sued for medical malpractice, whereas Chao, albeit was also a "healthcare provider," was being sued for intentional concealment as well as

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medication malpractice. As such, the Court found that Oasis' judgment ($130,000) for noneconomic damages did not violate MICRA as it was under $250,000 and thus did not need to be further reduced. In the event that Oasis's apportionment (after applying Prop 51) was over $250,000, the court gleans it may have had to be reduced to the MICRA cap. The court's finding that Prop 51 applies before MICRA is significant for plaintiffs moving forward because, otherwise, if MICRA applied first and then Prop 51, plaintiffs' awards would be reduced substantially right off the bat regardless of each defendant's culpability.

...and more briefly

Hensley v. San Diego Gas & Electric Co. (2017) Cal.App.5th 1337 involved an action against a gas and utility company brought by homeowners whose home was damaged following a wildfire in San Diego. The Court of Appeal found that mental-distress damages proximately caused by a trespass or nuisance are recoverable as annoyance and distress damages, regardless of the personal physical presence of the owners at the time of the trespass or nuisance. In other words, in wildfire cases against a utility company, the emotional distress of fire damage is admissible to establish damages even if the homeowner was not physically present during the fire.

Nickerson v. Stonebridge Ins. Co. (2016) 63 Cal.4th 363 is an insurance bad faith case that made its way to the California Supreme Court in 2016. In that case, the Court held that *Brandt* fees (attorney fees spent to recover insurance benefits) can be included in the post-verdict review of punitive damage awards. The Court reasoned that if punitive damages are limited to a multiplier, then the court should consider the base damages as including *Brandt* fees because they are "damages" resulting from tortious breach of contract as opposed to attorney fee awards under a statute or contract.

In *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, a patient sued her surgeon and hospital for medical malpractice involving her gallbladder surgery. Plaintiff sought recovery for general damages for her loss of earning capacity due to the injuries sustained. According to Civil Code section 3283, the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving to calculate damages for loss of earning capacity. After the jury returned a verdict awarding plaintiff $730,000 for lost earning capacity, the judge granted a new trial finding the award was not supported by substantial evidence. The plaintiff appealed.

The Court of Appeal held that the jury must fix a plaintiff 's future earning capacity based on what the evidence shows is "reasonably probable" that she could have earned. The court found that evidence the patient was admitted to law schools is insufficient to establish a reasonable probability she could have become qualified and fitted to earn a lawyer's salary absent the medical malpractice in her gallbladder surgery. To support the jury's award of damages for loss of earning capacity, the court noted there needed to be evidence of the likelihood the patient would graduate from law school, her likelihood of passing the Bar, or her likelihood of obtaining a job as a lawyer. Although this case provides some guidance as to what kind of evidence is required to meet the threshold "reasonably probable" standard, it fails to establish a bright line rule when damages stop being "reasonably probable" and start being "speculative."

In *McClain v. Sav-On Drugs* (2019) 6 Cal.5th 951, customers brought a class action against retail pharmacies and the Board of Equalization to compel pharmacies to seek a refund of allegedly unowned sales taxes to refund sales tax reimbursement paid by the customers for skin puncture lancets and test strips. The trial court sustained defendants' demurrer with leave to amend and the Court of Appeal affirmed. Customers petitioned for review of the Supreme Court.

The California Supreme Court affirmed, holding that customers who have paid sales tax reimbursement on purchases they believe to be exempt from sales taxes are not authorized to file an action to compel the retailers to seek a tax refund from the California Department of Tax and Fee Administration (the Department) when there has been no determination by the Department or a court that the purchases are exempt. A customer who has paid excess sales tax reimbursement has no statutory remedy to obtain a refund directly from the Department.

In *Javor v. State Board of Equalization*, 12 Cal.3d 790 (1974), however, the Supreme Court authorized a customer suit to compel certain retailers to seek a tax refund where the Board of Equalization, upon determining that the retailers had collected excess sales tax reimbursement, had promulgated rules to provide refunds to overpaying customers. The lower courts declined to extend Javor to authorize a similar judicial remedy under the circumstances of this case. Hence, plaintiffs did not have an equitable cause of action to compel the retailers to seek a refund of sales taxes paid to the state.

Brown v. Mortensen (2019) 30 Cal.App.5th is a case of first impression brought by dental patients against the owner of a debt collection agency for violations under the Confidentiality of Medical Information Act (CMIA). After a bench trial, the trial court ruled in favor of the owner and the patients appealed. The issue on appeal was whether the California's Constitution (Article I, section 16) guaranteed the right to a jury trial for 1) nominal statutory damage claims and/or 2) claims for attorneys' fees under the CMIA. The Court held that a jury trial is guaranteed for CMIA's nominal statutory damages brought before 2013 under Civil Code section 56.36, subdivision (b)(1), but not for attorney's fees claimed under section 56.35. The Court of Appeal reversed the trial court's judgment and remained for a jury trial on both the nominal statutory damages claims and the remaining compensatory damages claim. The Court also noted that the attorneys' fee claim should be addressed, if at all, by the trial court via post-trial motions.

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In *Stratton v. Beck* (2018) 30 Cal.App.5th 901, a former employer sought judicial review of a labor commissioner's award of unpaid wages, liquidated damages, interest and statutory penalties. Following a bench trial, the trial court entered judgment for the employee and awarded plaintiff's attorneys fees. The Court of Appeal affirmed the trial court's holding that plaintiff's motion for $31,365 in statutory attorneys' fees was timely and supported by substantial evidence. The court also directed the parties to "bear their own costs of appeal."

Thereafter, the employee filed a motion seeking $114,840 for appellate attorney fees. Defendant then filed a motion to clarify the court's ruling, contending that the court's reference to "costs" included attorney fees. The trial court ruled in favor of the employee and rewarded his appellate attorney fees and denied the employer's motion to reconsider or clarify. The employer appealed.

The Court of Appeal affirmed the trial court's ruling, holding that its order directing the parties to bear their own costs did not implicitly deny appellate attorney fees to employee's counsel. It also found that the trial court did not abuse its discretion in 1) granting employees motion for appellate attorney's fees, or 2) refusing to grant employer's motion for reconsideration or clarification.

The take-aways from these decisions

Below is a brief summary of take-aways from the foregoing:

An uninsured plaintiff or a plaintiff who chooses not to use insurance may introduce the *full* billed amounts for medical services to prove the reasonable value of economic damages.

Civil Code section 1431.2 (Prop 51) mandates allocation of the noneconomic damages award in proportion to each defendant's comparative fault, notwithstanding a jury's finding of intentional misconduct in MICRA cases.

California wage and hour statutes and regulations have not incorporated the Fair Labor Standards Act's (FLSA) de minimus doctrine and therefore employees are entitled to de minimus unpaid wages.

Defendants are entitled to introduce evidence of future insurance benefits available under the Affordable Care Act ("ACA") in MICRA cases.

Courts must apply Prop 51 before applying the MICRA $250,00 cap on noneconomic damages.

In wildfire cases against a utility company, emotional distress from the fire damage is admissible to establish plaintiffs' damages.

Brandt fees can be included in the post-verdict review of punitive damage awards because they are considered "damages" resulting from tortious breach of contract.

Damages for future earning capacity must be based on what the evidence shows is "reasonably probable" that the plaintiff could have earned.

Customers who have paid sales tax reimbursement on purchases they believe to be exempt from sales taxes are not authorized to file an action to compel the retailers to seek a tax refund from the California Department of Tax and Fee Administration (the Department) when there has been no determination by the Department or a court that the purchases are exempt.

A jury trial is guaranteed for CMIA's nominal statutory damages brought before 2013 under Civil Code section 56.36, subdivision (b)(1), but not for attorney's fees claimed under section 56.35.

Trial courts have jurisdiction to award attorney fees and the trial court's order granting plaintiff's counsel's motion for attorney appellate fees was adequate.

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