

The Morrison Law Journal
May 2015
Volume X, Edition 5

A Victory For Personal Injury Defendants In California: Court Of Appeal Rules That Negotiated Rate Differential For Medical Expenses Included In Jury Verdicts Should Be Subtracted From Judgment **Before** It Is Compared To A Rejected Offer To Compromise

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As many are aware, the California Supreme Court in Howell v. Hamilton Meats & Provisions, Inc. (2011) 52 Cal.4th 541 (“Howell”) ruled that an injured plaintiff whose medical expenses are paid by private insurance can recover damages for past medical expenses in an amount no greater than the amount that the plaintiff's medical providers, pursuant to prior agreement, accepted as full payment or, to the extent that payment is still owing, the amount that the medical providers had agreed to accept as full payment for the services provided. A question that has arisen, and has been disputed in many cases, is whether a jury verdict which includes an amount in excess of a negotiated rate for medical provider (i.e. a differential) is to be included or subtracted from a judgment before it is compared to a rejected Offer to Compromise that has previously been served by the plaintiff pursuant to Code of Civil Procedure Section 998.¹ That question has been answered by the Court of Appeal, Fifth District in Lee v. Silveira (2015) WL2374359 (“Lee case”).

The Lee case concerned a serious personal injury action involving a 2008 traffic collision when Plaintiff Lee, operating her GMC Yukon, collided with a large manure spreader that Defendant Silveira had pulled onto a road in front of her. Plaintiff suffered fractures of her hips, leg, elbow and wrist and damage to associated nerves, ligaments and tendons. Shortly before Plaintiff filed her personal injury lawsuit in April 2010, the California Supreme Court granted review in Howell. In August 2010, Plaintiff served a Statutory Offer to Compromise in the amount of \$1,000,000, which was rejected. On August 18, 2011, the California Supreme Court issued its opinion in Howell.

¹ While there is authority that evidence of undiscounted medical bills is generally inadmissible, see, Corenbaum v. Lampkin (2013) 215 Cal.App.4th 1308, there may be circumstances where such evidence will be admitted and defense counsel will be required to request a Special Verdict form which segregates medical damages. See, Greer v. Buzgheia (2006) 141 Cal.App.4th 1150.

About a year after the Howell decision was issued, a jury trial began in the Lee case. The Defendant filed a Motion in Limine requesting the Trial Court permit only the introduction into evidence of paid medical bills. The Trial Court denied the Motion, concluding that the amount of billed medical expenses was relevant to the question of reasonable past medical expenses, future medical expenses and pain and suffering. The Trial Court indicated, however, that the verdict would be reduced to reflect the amount of paid medical expenses. Counsel then stipulated that the amount of billed medicals was \$274,514.12 and the amount of paid medicals for Plaintiff was \$109,251.61. In September 2012, the jury completed a Special Verdict form awarding Lee damages totaling \$1,027,014, just in excess of the Offer to Compromise. The jury award for past medical expenses was the \$274,514.12 figure. In October 2012, the Trial Court filed a document labeled "Judgment on Jury Verdict" stating that Lee was entitled to judgment against Silveira in the amount of \$1,027,014 and that her daughter was entitled to \$1,979. It also stated the judgment was subject to amendment following a post-trial hearing concerning among other things, the stipulated reduction for Plaintiff's medical expenses.

The Defendant immediately filed a post-trial motion for reduction of the jury verdict. The Plaintiff agreed that the reduction should be made but not until after determining Lee's entitlement to prejudgment interest and expert witness fees under Code of Civil Procedure Section 998. The Trial Court initially ruled that the negotiated differential should not be deducted in comparing the Statutory Offer to Compromise and awarded over \$100,000 in expert witness fees to Plaintiff. Ultimately, however, the Trial Court reversed itself and entered a Final Judgment in the amount of \$887,098.26, which excluded the expert witness fees. Plaintiff appealed from the Judgment.

In her appeal, Plaintiff argued that, whether or not Howell applied retroactively to her Offer to Compromise, the parties' success and failure should be evaluated without regard to post offer deductions from the judgment. Plaintiff appears to have argued the Court of Appeal decision in Guerrero v. Rodan Termite Control (2008) 163 Cal.App.4th 1435 ("Guerrero") which held that, for purposes of allocating costs under Code of Civil Procedure Section 998, a plaintiff whose judgment is reduced to zero by operation of a co-tortfeasor's settlement before trial may use the gross verdict (that is, before deduction) to defeat the defendant's post trial motion to obtain expert witness fees based on a rejected Offer to Compromise from that defendant.

After considering the matter, the Court of Appeal rejected Plaintiff's argument holding that the Guerrero rule about evaluating whether a litigant obtained a "more favorable judgment" for purposes of Code of Civil Procedure Section 998 before taking certain offsets does not extend to reductions for

negotiated rate differentials because the defendant never had a liability for the negotiated differential (the Court of Appeal went on to comment that the award of \$1,027,014 was a “transitional figure”, subject to adjustment). On that basis, the Court of Appeal affirmed the Judgment in the Lee case for the lower, \$887,098.26, figure.

The holding in the Lee case will certainly provide some clarity in determining how to evaluate a Statutory Offer to Compromise which involves personal injury medical expense damages.

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