

Appellate Reports and cases in brief

Cases of interest to members of the plaintiff's bar

By Jeffrey I. Ehrlich

Rashidi v. Moser

(2014) __ Cal.4th __, 181 Cal.Rptr.3d 59 (Cal.Supreme)

Who needs to know about this case? Lawyers litigating medical-malpractice cases in California.

Why it's important: Holds that the $250,000 MICRA cap on non-economic damages in a medical-malpractice judgment was not subject to offset based on prior settlements between plaintiff and other defendants. The court held that the MICRA cap was intended to apply to judgments, not settlements.

Synopsis: "Here we consider whether a jury's award of noneconomic damages, reduced by the court to $250,000 under MICRA, may be further diminished by setting off the amount of a pretrial settlement attributable to noneconomic losses, even when the defendant who went to trial failed to establish the comparative fault of the settling defendant. The Court of Appeal held that such a further reduction is required by the MICRA cap. We disagree."

Dr. Moser performed surgery on Rashidi to try to stop chronic nosebleeds. Moser ran a catheter through an artery in Rashidi's leg up into his nose. Tiny particles were injected through the catheter to irreversibly block certain blood vessels. The particles were manufactured by Biosphere Medical, Inc. (Biosphere Medical). When Rashidi awoke after surgery, he was permanently blind in one eye. Rashidi sued Moser, the hospital where the procedure was performed, and Biosphere Medical. He settled with the hospital for $350,000 and with Biosphere Medical for $2 million, and proceeded to trial against Moser alone. Moser presented no evidence of the hospital's fault, and the trial judge ruled that the evidence was insufficient to support instructions on Biosphere Medical's fault. The jury found that Moser's negligence caused Rashidi's injury. It awarded $125,000 for future medical care, $331,250 for past noneconomic damages, and $993,750 for future noneconomic damages. The court reduced the noneconomic damages to $250,000, conforming to the MICRA cap.

Moser sought offsets against the judgment for the pretrial settlements with Cedars–Sinai and Biosphere Medical. The court rejected this claim, finding no basis for allocating the settlement sums between economic and noneconomic losses, and noting that the jury made no finding as to the settling defendants' proportionate fault. Moser appealed, contending he was entitled to offsets against both the economic and noneconomic damage awards. He did not dispute the ruling that he had made an insufficient showing of comparative fault on the part of Cedars–Sinai or Biosphere Medical. The Court of Appeal held that offsets were required. Reversed.

The relevant MICRA provision, Civil Code section 3333.2 says:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Rashidi argues that the plain terms of section 3333.2 distinguish between "losses" and "damages." He contends he was entitled to recover his "noneconomic losses" without limitation by way of *settlement* under subdivision (a), while his recovery of "damages for noneconomic losses" at *trial* was limited to $250,000 under subdivision (b). Moser countered that subdivisions (a) and (b) of section 3333.2 are both concerned with a plaintiff's total recovery in the entire "action." He claims the Legislature used the terms "losses" and "damages" interchangeably. Moser contends that recovery should not vary depending on the number of health care provider defendants, and that permitting a plaintiff to recover more than $250,000 in noneconomic losses by settling with one defendant and going to trial with another would subvert MICRA's purpose.

The Court concluded that Rashidi's reading of the statute was the more reasonable one. Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning. Section 3333.2 clearly distinguishes between "damages," which are capped in subdivision (b) of the statute, and "losses," which are addressed in subdivision (a). "Loss" is the generic term, which includes "damage" as a subset.

The Legislature knew how to include settlement dollars when it designed limits for purposes of medical malpractice litigation reform. For example, Business & Professions Code section 6146, which imposes fee limits on MICRA cases, says that its limits apply "regardless of whether the recovery is by settlement, arbitration, or judgment...."

Copyright © 2015 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



The Court explained that neither the parties nor amici curiae directed it to anything in the legislative history of section 3333.2 that indicates an intent to include settlement recoveries in the cap on noneconomic damages. To the contrary, the Court has noted that the Legislature had jury awards in mind when it enacted the cap, and that only a collateral impact on settlements was contemplated.

Under Civil Code section 1431.2 (Proposition 51), defendants are jointly and severally liable for economic damages, but only severally liable for noneconomic damages in proportion to their degree of fault. Allowing the proportionate liability rule of section 1431.2 to operate in conjunction with the cap on damages imposed by section 3333.2 enhances settlement prospects. If nonsettling defendants were assured of an offset against noneconomic damages regardless of their degree of fault, an agreement with one defendant would diminish the incentive for others to settle. Conversely, if all defendants are responsible for their proportionate share of noneconomic damages, settlements are encouraged. Nonsettling defendants must weigh not only their exposure to liability for noneconomic damages within the limits imposed by section 3333.2, but also the prospect of having to prove the comparative fault of settling defendants in order to obtain a reduction under section 1431.2.

> We conclude that the cap imposed by section 3333.2, subdivision (b) applies only to judgments awarding noneconomic damages. Here, the cap performed its role in the settlement arena by providing Cedars-Sinai with a limit on its exposure to liability. Had Moser established any degree of fault on his codefendants' part at trial, he would have been entitled to a proportionate reduction in the capped award of noneconomic damages. The Court of Appeal erred, however, in allowing Moser a setoff against damages for which he alone was responsible.

Safari Associates v. Superior Court

(2014) 231 Cal.App.4th 1400 (Fourth Dist., Div. 1)

Who needs to know about this case? Lawyers attempting to convince reviewing courts to alter or correct arbitration awards.

Why it's important: Shows the deferential review given to arbitral awards; holds that an arbitrator's reliance on the definition of "prevailing party" in Civil Code section 1717 instead of the one contained in the parties' contract is not an act in excess of the arbitrator's powers, but is instead an unreviewable legal error.

Synopsis: Alan Tarlov was the former managing general partner of Safari Associates. They entered into a release agreement to resolve certain claims relating to Tarlov's management. Their release contained an arbitration provision, which itself included a specific definition of "prevailing party" for the purposes of an award of attorney's fees by the arbitrator. The arbitrator awarded Safari fees, but determined that Civil Code section 1717 trumped the definition of "prevailing party" in the arbitration agreement, and determined who the prevailing party was based on the statute. Tarlov filed a petition in the Superior Court to modify or correct the award under Code of Civil Procedure section 1286.6, subd. (b), on the ground that the arbitrator had exceeded his powers in awarding fees based on the Civil Code definition instead of the parties' agreement. The trial court entered an order correcting the award and remanded the matter to the arbitrator for further proceedings. Safari filed a writ petition, which the Court of Appeal granted.

Gueyffier v. Ann Summers, Ltd. (2008) 43 Cal.4th 1179, 1184, explains that an arbitration agreement contemplates that the arbitrator will have the power to decide the case, and inherent in that prospect is the possibility that the arbitrator may err in doing so." But there is an exception to the general rule assigning broad powers to the arbitrator – when the parties have in the contract or in their arbitration submission explicitly and unambiguously limited the arbitrator's powers.

The arbitration provision in this case expressly provided that the arbitrator is empowered to award attorney fees to the prevailing party in the arbitration. Further, the record demonstrated that Safari and Tarlov extensively briefed and argued the attorney fees issue in the arbitration, including whether the arbitrator should apply the definition of prevailing party specified section 1717, or instead, the definition of prevailing party contained in the Agreement. "Having submitted the fees issue to arbitration, Tarlov cannot maintain the arbitrator exceeded its powers, within the meaning of section 1286.6, subd. (b) by deciding it, even if the arbitrator decided it incorrectly."

The court rejected Tarlov's argument that the definition of "prevailing party" in the contract was a contractual limitation on the arbitrator's powers. "[I]f if the parties in this case had intended to attempt to limit the arbitrator's *power* to apply a definition of prevailing party other than the definition contained in the Agreement, they could have used language evincing such an intent." However, absent such language, we may not construe the provision in the Agreement defining the term "prevailing party," as being an explicit and unambiguous limitation on the arbitrator's powers.

Short(er) takes:

Removal; Class Action Fairness Act (CAFA); amount-in-controversy; pleading requirements: *Dart Cherokee Basin Operating Co. LLC v. Owens* (2014) __ U.S. __, 135 S.Ct. 547 (U.S. Supreme)

Owens filed a putative class action against Dart asserting that it had underpaid the putative class royalties under certain oil and gas leases. Dart removed under CAFA, asserting in its removal notice that the class had more than 100 members, the parties were minimally

Copyright © 2015 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



diverse, and that the amount in controversy totaled $8.2 million, well in excess of CAFA's $5 million limit. Owens moved to remand, asserting that the removal notice was insufficient because it failed to include any evidence showing that the amount in controversy exceeded $5 million. The district court granted remand. Dart petitioned the 10th Circuit for permission to appeal, as CAFA allows. The 10th Circuit panel denied review in a 2-1 order; an evenly divided 10th Circuit denied Dart's petition for en banc review. Dart obtained certiorari in the U.S. Supreme Court. Reversed.

When a plaintiff invokes federal-court jurisdiction, the plaintiff's amount-in-controversy allegation is accepted if made in good faith. Similarly, when a defendant seeks federal-court adjudication, the defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court. If the plaintiff contests the defendant's allegation, § 1446(c)(2)(B) instructs: "[R]emoval ... is proper on the basis of an amount in controversy asserted" by the defendant "if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds" the jurisdictional threshold. This provision, added to § 1446 as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA), clarifies the procedure in order when a defendant's assertion of the amount in controversy is challenged. In such a case, both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied.

"In sum, as specified in § 1446(a), a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation."

Punitive damages; Title VII sexual harassment claims; $300,000 limit; due process, *State of Arizona v. ASARCO LLC* (9th Cir. 2014 __ F.3d__) (en banc).

Angela Aguilar worked at ASARCO's Mission Mine Complex. She alleged that she was subjected to sexual harassment as an employee. Both Aguilar and the State of Arizona filed lawsuits against ASARCO based on Aguilar's sexual-harassment claims. The suits were removed to federal court and tried. The jury awarded her no compensatory damages, but $1 in nominal and $868,750 in punitive damages. The district court reduced the award to $300,000, which is the cap contained in 42 U.S.C. § 1981a(b)(3)(D). In a 2-1 opinion a Ninth Circuit panel reduced the award to $125,000. The court then took the case en banc. ASARCO argued that the "ratio" between the punitive award and the $1 damage award was unconstitutionally excessive and violated its due process rights. The en banc court held otherwise.

Title VII clearly states the type of conduct and "mind-set" that a defendant must have to be found liable for punitive damages. It also caps the total amount of damages, including punitive damages, based on the size of the employer. The cap tops out at $300,000 for employers having more than 500 employees, like ASARCO, and drops down to as low as $50,000 for employers with more than 14, but fewer than 101, employees.

These two aspects of the statute address the Supreme Court's concern in *BMW v. Gore* that defendants be on notice of what conduct might make them liable for punitive damages and the extent to which they might be held liable. Moreover, the statute dramatically reduces the chance of random, arbitrary awards, because the statute articulates the degree of culpability that a defendant must have before being subject to liability and restricts damages awards to a range between $0 and $300,000.

Gore's ratio analysis has little applicability in the Title VII context because § 1981a governs punitive damages. When a statute narrowly describes the type of conduct subject to punitive liability, and reasonably caps that liability, it makes little sense to formalistically apply a ratio analysis devised for unrestricted state common law damages awards. That logic applies with special force here because the statute provides a consolidated cap on *both* compensatory and punitive damages. By establishing a consolidated damages cap that includes both specified compensatory and punitive damages, Congress supplanted traditional ratio theory and effectively obviated the need for a *Gore* ratio examination.

Appeals; disentitlement based on failure to comply with court orders: *Gwartz v. Weilert* (2014) __ Cal.App.4th __ (Fifth Dist.)

Under the doctrine of "disentitlement," an appellate court has equitable power to dismiss an appellant's appeal based on the appellant's refusal to comply with trial court orders. Gwartz purchased real property from Weilert and his wife, and then sued them for fraud. Gwartz prevailed, obtaining a judgment in excess of $1.5 million. As part of Gwartz's efforts to collect the judgment while the appeal by Weilert was pending, Gwartz obtained an order directing Weilert to turn over assets to Gwartz, and prohibiting Weilert from making any transfer or concealment of assets. After Gwartz determined that Wielert had made numerous transfers in violation of the trial court's order, he moved to dismiss Wieilert's appeal. Motion granted.

The appellate court noted that there were at least 13 transfers, totaling $285,000, from Weilert's bank account to other entities he controlled during the period the order was in effect. Wielert's opposition to the motion to dismiss the appeal did not dispute that the transfers were made. The court did not find that his contention that the transfers had been made in good faith were convincing, since Weilert failed to support that contention with any factual explanation.

Copyright © 2015 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. His practice emphasizes appellate support for the Southern California trial bar and insurance bad-faith litigation. He is editor-in-chief of* Advocate, *the Journal of Consumer Attorneys Associations for Southern California.*


Ehrlich

Copyright © 2015 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**