

Appellate Review

Supreme Court eliminates automatic depublication of appellate opinion upon a grant of review

By Jeffrey I. Ehrlich

Who needs to know about this rule change? All lawyers who litigate cases in California trial and appellate courts.

Why is it important? Published Court of Appeal opinions will no longer automatically be depublished and become non-citable when the Supreme Court grants a petition for review. Instead, unless the Supreme Court orders otherwise, they are citable for "persuasive value" until the Supreme Court rules. Once the Supreme Court has resolved the case, the lower court's opinion will be binding precedent (unless the Supreme Court orders otherwise) except to the extent that it conflicts with the Supreme Court's opinion.

Synopsis: Effective July 1, 2016, Rule 8.1105(e) of the California Rules of Court now reads:

(e) Changes in publication status

(1) Unless otherwise ordered under (2):

(A) An opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.

(B) Grant of review by the Supreme Court of a decision by the Court of Appeal does not affect the appellate court's certification of the opinion for full or partial publication under rule 8.1105(b) or rule 8.1110, but any such Court of Appeal opinion, whether officially published in hard copy or electronically, must be accompanied by a prominent notation advising that review by the Supreme Court has been granted.

(2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published.

The Supreme Court may also order depublication of part of an opinion in whole or in part, at any time after granting review.

Nickerson v. Stonebridge Ins. Co.

(2016) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case? Lawyers who try bad-faith claims.

Why it's important: Holds that *Brandt* fees can be included in the post-verdict review of punitive-damage awards.

Synopsis: Nickerson's policy with Stonebridge promised benefits of $350 for each day he was confined in a hospital for necessary care and treatment of a covered injury. After breaking his leg, Nickerson, who is paralyzed from the chest down, spent 109 days in a VA hospital recovering from the injury. Without consulting his physicians, Stonebridge denied coverage for all but 18 days of hospitalization. Nickerson prevailed on his bad-faith claim, receiving $31,500 in unpaid benefits, $35,000 in emotional-distress damages, and $19 million in punitive damages. After the trial, the court awarded him *Brandt* fees of $12,500. The court refused to include the *Brandt* fees in its due process review of the punitive award, and reduced the punitive award to $350,000 – ten times the emotional-distress award. The Court of Appeal affirmed.

The Supreme Court granted review on the issue of whether an award of *Brandt* fees that was made by the trial court after the verdict could be included as part of the second *BMW v. Gore* "guidepost." The Court held that, "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered."

The Court explained that due process review of punitive damages awards does not seek to regulate the jury's decisionmaking process. Although the *Gore* guideposts overlap to some extent with questions juries are generally asked to consider in fixing punitive damages awards, the question for courts applying the guideposts is not whether the jury's verdict is unreasonable based on the facts. Rather, as in other contexts in which courts review civil and criminal sanctions for constitutional excessiveness, courts applying the *Gore* guideposts make an independent determination whether the amount of the award exceeds the state's power to punish.

Because the *Gore* guideposts are designed to govern post-verdict judicial review of the amount of a jury's award, not the adequacy of the jury's deliberative process, there is no reason why a court applying the second guidepost may not consider a post-verdict compensatory damages award in its constitutional calculus. To exclude *Brandt* fees from consideration would mean overlooking a substantial and mutually acknowledged component of the insured's harm. The effect would be to skew the proper calculation of the punitive-compensatory ratio, and thus to impair reviewing courts' full consideration of whether, and to what extent, the punitive damages award exceeds constitutional bounds.

Osborne v. Todd Farm Service

(2016) 247 Cal.App.4th 84 (2d Dist., Div. 6)

Who needs to know about this case? Attorneys who try cases.

Why it's important: A cautionary tale. Affirms trial court order dismissing case as a sanction for plaintiff 's counsel's

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repeated disregard of rulings on motions in limine.

Synopsis: Osborne was a stable-maintenance worker at the Ojai Valley School. She was injured while standing on the top of a stack of hay bales. As she tried to move a bale, it gave way and caused her to fall. Todd sold and delivered the hay bale to the school. Todd produced documents indicating that it purchased hay from three suppliers in the six months before the accident. Two suppliers were from Southern California, and the third, Berrington, was located in Nevada. Osborne's complaint alleged that Berrington manufactured the bale that caused the accident, but Todd had no records to support this.

During discovery, Osborne failed to timely designate experts. The court then struck her supplemental designation as improper. Before trial, the court granted two defense motions in limine. MIL 2 precluded Osborne from testifying that she could identify the geographic origin of the hay bales by looking at the color and texture of the hay, or from offering other opinions on the way hay is cut, baled, stored, or moved. MIL 4 precluded Osborne from relating the origin of the hay bales based on hearsay statements by unidentified Todd employees. In ruling on the motion, the trial court admonished counsel not to refer to Berrington paperwork or the name "Berrington."

At trial, Osborne's counsel violated the MIL rulings in his opening statement, stating that he intended to prove that the faulty bale came from Berrington, and that his client would testify that she could tell that it came from Berrington because of its color and content. The defense's objection was sustained, and trial court told trial counsel that he had violated a prior court order.

During the direct exam of Osborne, plaintiff's counsel repeatedly violated the rulings on the motions in limine. The next day, he re-argued his objections to the MIL orders. The trial court declined to modify its rulings. When Osborne resumed testifying, her counsel asked her, "Where did that bale of hay come from?" She answered, "Berrington."

The trial court immediately excused the jury, and the defense asked for the case to be dismissed with prejudice against all defendants. The trial court granted the motion as a sanction for plaintiff's counsel's "flagrant, flagrant, misconduct." Affirmed.

The trial court did not abuse its discretion in granting the motions in limine. Osborne was not allowed to testify as an expert because her expert designation was struck, and no lay witness could offer an opinion about the origin of a bale of hay based on its color and other characteristics. It was also proper to exclude the hearsay statements about the origin of the hay because there was no showing that the delivery workers whose statements she sought to introduce were authorized to speak for Todd. And even if it had been admission against Todd, it was hearsay as to Berrington.

Nor was there error in dismissing the case as a sanction for counsel's repeated violations of the MIL rulings. "The terminating sanction was an appropriate response to appellant's repeated flagrant misconduct and consistent with the trial court's inherent authority to compel obedience to its judgments, orders and process."


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