Association of Defense Counsel of Northern California and Nevada

VERITAS

Association of Southern California Defense Counsel

February 2, 2018

Via Electronic Filing

Presiding Justice Lee Smalley Edmon
Associate Justice Luis A. Lavin
Acting Justice Natalie Stone
Court of Appeal of the State of California
Second Appellate District, Division Three
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

RE: *Romero v. Kaiser Foundation Health Plan, Inc. et al.*
Court of Appeal Case No. B277499
Request for Publication

Honorable Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC) and the Association of Defense Counsel of Northern California and Nevada (ADCNCN) to request that the court's opinion in this matter be ordered published pursuant to rule 8.1120 of the California Rules of Court.

ASCDC is the nation's largest and preeminent regional organization of lawyers whose practices are primarily devoted to defending civil actions, including medical negligence actions. Among ASCDC's approximately 1,100 attorney members in Southern and Central California are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts on issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice.

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including medical malpractice matters. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

Many members of ASCDC and ADCNCN defend actions involving the application of MICRA. ASCDC has appeared as amicus curiae in appeals involving application of that statutory scheme. (E.g., *Rashidi v. Moser* (2014) 60 Cal.4th 718; *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163.) ASCDC and ADCNCN often participate as amicus curiae, and also seek the publication of appellate decisions when it believes publication meets the criteria set forth in the Rules of Court and will promote the development and proper application of California law. ASCDC and ADCNCN request publication of the court's decision in this case to serve those ends.

California Rules of Court, rule 8.1105(c) states that a Court of Appeal opinion "should be certified for publication" if it meets one of various criteria. Publication of the court's opinion in this case is warranted under that rule.

First, there is ongoing controversy and public interest in the constitutionality and scope of MICRA. (See Cal. Rules of Court, rule 8.1105(c)(6) [opinion satisfies the criteria for publication where it involves a legal issue of continuing public interest].) Challenges to MICRA continue to be presented and, within days of the court's decision, at least two articles were published in the legal press (Law360 and Metropolitan News; copies attached) discussing the opinion's import in reaffirming the constitutionality of MICRA and the Supreme Court's thirty-two-year-old holding in *Roa v. Lodi Medical Group, Inc.* (1985) 37 Cal.3d 920 that MICRA does not violate equal protection. (See Cal. Rules of Court, rule 8.1105(c)(8) [opinion satisfies criteria for publication where it "reaffirms a principle of law not applied in a recently reported decision"].) Moreover, the decision provides helpful guidance concerning the principle that courts should continue to reject litigant's attempts to evade MICRA by creatively pleading claims as something other than medical malpractice notwithstanding the fact that the claims arise from a healthcare provider's professional services.

Absent publication of the court's decision, arguments concerning MICRA's constitutionality will continue to be raised and counsel will persist with efforts to plead around MICRA by characterizing plaintiff's claims as something other than medical negligence.

Second, the opinion is a critically important reminder to all California courts concerning their inherent authority and duty to review and carefully scrutinize attorney fee requests in petitions seeking approval of medical negligence settlements for minors and the disabled. (See Cal. Rules of Court, rule 8.1105(c)(6), (8).) As the court noted in its decision, such petitions involve an inherent conflict of interest for plaintiff's counsel who want to maximize their fee recovery and who may therefore neglect to mention MICRA's fee limitations in order to secure a greater fee award. Regrettably, this tactic may have become more common recent years.

Moreover, the petition and compromise approval hearing do not involve an adversary process in which opposing counsel can identify relevant MICRA authority for the court's consideration. Indeed, neither the Code of Civil Procedure nor the Rules of Court confer a right on the opposing settling party to contest a fee request presented in a minor's compromise petition, or to participate in the hearing on the petition. (See *Pearson v. Superior Court* (2012) 202 Cal.App.4th 1333, 1337 ["Neither the letter nor the spirit of [Code of Civil Procedure]

section 372 confers any right on the defendant and/or its carrier to object when the court approves or disapproves of a settlement agreement" involving a minor's compromise]; *Schultz v. Harney* (1994) 27 Cal.App.4th 1611, 1616 ["The request for and allowance of an attorney's fee in connection with the approval of a minor's compromise is generally an uncontested proceeding which does not involve litigation between adversarial parties"]; Haning, et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2017) ¶ 4:1511, p. 4-274 [settling defendant has no right to object to approval of settlement].)

In such cases, courts may proceed to evaluate and calculate a fee award in *excess* of that allowed by MICRA, because MICRA's application has not been called to their attention (as happened in this case), to the detriment of plaintiffs who need as much of the settlement funds as possible to pay for their care. Publication of the court's decision will promote the proper application of MICRA by causing courts to be mindful of their duty to apply MICRA's fee limitations when faced with a request for approval of a settlement and fee award in a medical malpractice action brought on behalf of a minor or disabled adult.

Accordingly, ASCDC and ADCNCN respectfully request that the Court issue an order directing publication of the January 19, 2018 opinion in this case.

Respectfully submitted,

HORVITZ & LEVY LLP
STEVEN S. FLEISCHMAN
KAREN M. BRAY

By: Karen M. Bray
KAREN M. BRAY

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

Enclosures
cc: See attached Proof of Service

Attachment

Law360 Article

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Calif. Appeals Court Won't Raise Fees In $2.5M Med Mal Case

By **Emma Cueto**

Law360, New York (January 22, 2018, 3:45 PM EST) -- A California appeals court refused to grant an attorney's request for a bigger piece of a $2.5 million settlement for a minor with cerebral palsy, and ruled instead that the attorney's percentage approved by the lower court might already be too high under California law.

A three-judge Second Appellate District panel remanded the case back to the trial court so that it could consider whether Nathaniel J. Friedman, who represented the minor in a suit against Kaiser Foundation Hospitals, should be allowed to receive 25 percent of Romero's award or whether the Medical Injury Compensation Reform Act of 1975 caps his percentage at 15 percent.

The court rejected Friedman's arguments that he was entitled to the 33 percent he initially requested from the trial court.

"Although Friedman now quarrels with some of the [trial] court's findings," the panel said, "his arguments do not overcome our presumption of correctness or affirmatively establish an abuse of discretion as to the [trial] court's refusal to award one-third of the settlement amount as attorney fees."

Friedman began representing the child in September 2014 in a suit alleging that doctors with Kaiser were negligent by not delivering the girl sooner, even though they knew she was at risk of developing brain damage due to lack of oxygen, according to the decision. The child was born six weeks premature and was later diagnosed with cerebral palsy, the decision said.

In March 2016, the child and Kaiser reached a $2.5 million settlement agreement, and Friedman requested $833,333, or 33.33 percent, as his portion, according to the decision. The trial court noted that the amount was larger than the more standard 25 percent and issued a tentative ruling authorizing that amount, $625,000, the decision said.

In considering Friedman's appeal, the panel rejected Friedman's argument that the trial judge was applying a local rule that should have been preempted by a state law, California Rules of Court 7.955. Not only was such a local rule never identified, the decision said, but the judge applied several factors from rule 7.955 in recalculating the award.

The panel also agreed with the trial judge's analysis, noting that the issues in the case were not unusually complex and that Friedman's firm claimed to have worked 175 hours on the case, which would have worked out to more than $4,700 per hour at his suggested percentage.

However, the panel said, the reduced amount might still be too high under California law. The judges noted that under MICRA, an attorney's contingency fee maxed out at 15 percent for any settlement over $600,000. And extra care should be taken in cases involving a minor, the court said, especially where, as in this case, the minor was not represented on appeal.

The judges also noted that the girl's mother, Luz Romero, testified on appeal that her daughter needed as much of the settlement money as possible.

Given all that, the panel said, the court should consider whether MICRA's cap on attorneys' fees applied to the case. The court rejected Friedman's arguments that the law was unconstitutional and that it was made irrelevant by a 1988 voter initiative, and ordered the lower court to consider whether the child's suit was a "pure medical malpractice" case, in which case MICRA rules would apply, or whether it also included claims not rooted in medical malpractice.

Friedman told Law360 that he strongly disagreed with the appellate court's reasoning, including its argument that MICRA was not obsolete. MICRA was passed in the 1970s as a temporary fix to perceived issues in medical malpractice cases, Friedman said. The 1988 voter initiative Proposition 103 provided a more permanent solution and therefore made MICRA irrelevant, he argued.

Friedman also said that the panel did not follow the precedent set by Gonzalez v. Chen, which was another case in which Friedman also appealed over his share of the settlement award. That case, which was decided in 2011, claimed that the minor plaintiff should have been delivered by cesarean section to prevent birth injuries and settled for $200,000, with Friedman asking for $61,000.

In that case, Friedman successfully argued on appeal that the trial court judge had been wrong to only award $50,000, with the appellate court declaring that the lower court judge's decision ran afoul of Rule 7.955.

"The judges in [the instant case] refused to follow the precedent set by Gonzalez v. Chen, in violation of long-standing rules that the courts of appeal should follow precedents," Friedman said.

The instant decision did cite Gonzalez v. Chen but used it to support its reasons for not increasing the award.

Judges Lee Smalley Edmon, Luis A. Lavin and Natalie P. Stone sat on the panel for the Second Appellate District.

Friedman represented himself.

The case is Romero v. Kaiser Foundation Health Plan et al., case number B277499, in the Court of Appeal of the State of California, Second Appellate District.

--Editing by Jack Karp.

Attachment

Metropolitan News-Enterprise Article

Metropolitan News-Enterprise

Tuesday, January 23, 2018

Page 3

C.A. Rebuffs Friedman's Attack on MICRA Attorney-Fee Limits

By a MetNews Staff Writer

Veteran health care malpractice attorney Nathaniel J. Friedman has failed to persuade the Court of Appeal for this district that the Medical Injury Compensation Reform Act of 1975—enacted in the wake of walkouts by doctors as their insurance premiums soared based on huge recoveries in tort actions—is an anachronism that should be struck down.

Although the California Supreme Court upheld MICRA in the 1985 case of *Roa v. Lodi Medical Group, Inc.,* Friedman argued that passage by voters of Proposition 103 in 1988 created "changed circumstances" by barring the insurance commissioner from approving rates that are "excessive" or "unfairly discriminatory." This, he asserted, guards against the eruption of a medical malpractice crisis in the future, "real or manufactured."

Acting Justice Natalie Stone, a Los Angeles Superior Court judge serving on assignment to the appeals court, rejected Friedman's contention in an unpublished opinion for Div. Three.

Attorney Fee Controversy

Whether MICRA is outmoded and void was raised in the later stages of the appellate court proceeding. Friedman was appealing as too low fees that Los Angeles Superior Court Judge Holly Fujie's set in connection with the compromise of a minor's claim (which requires court approval), that did not take MICRA fee limits into consideration.

Friedman wanted $833,333, pursuant to a contingency fee contract under which he was to receive a one-third recovery; Fujie limited him to one-fourth, the standard percentage, amounting to $625,000.

The judge apparently accepted Friedman's theory that MICRA—which would prescribe lower fees—did not apply given that doctors were sued for "misconduct" as well as malpractice. Fujie confined her attention to what would be a "reasonable fee," under standards set by California Rules of Court, rule 7.955, for services to a minor.

In her June 30, 2016 order, Fujie said:

"The Court has reviewed the Petition and finds the requested attorney's fees to be fair and reasonable. Counsel asserts that a total of 175 hours were spent

throughout the 18 months of litigation in this action. Nothing in Counsel's declaration suggests that the action involved any particularly novel or difficult questions or extraordinary skill and time. Even at the 25% fee, Counsel will receive an hourly rate of over $3,500.00."

CA Raises Issue

The Court of Appeal raised the question, in a letter to counsel, as to whether MICRA does, in fact, apply, and Friedman put forth his theory, publicly expressed by him in the past, that MICRA is a relic of a crisis staged by the medical profession more than four decades ago and should be judicially discarded.

If MICRA does apply, Friedman would be limited under Business and Professions Code section 6146 to "(1) Forty percent of the first fifty thousand dollars ($50,000) recovered. [¶] (2) Thirty-three and one-third percent of the next fifty thousand dollars ($50,000) recovered. [¶] (3) Twenty-five percent of the next five hundred thousand dollars ($500,000) recovered. [¶] (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars ($600,000)."

Overall, that would be less of a share of the $2.5 million settlement which Friedman secured for his client than Fujie was willing to award him.

In Friday's opinion, the appeals court left it to Fujie to determine if MICRA applies, while hinting broadly that it does.

Stone's Opinion

Friedman's contention that the state Supreme Court's decision in *Roa* upholding MICRA is abrogated by Proposition 103 "fails in the first instance because it does not negate every rational basis identified by the Supreme Court in Roa, nor 'every conceivable basis' that could plausibly justify section 6146's limits," Stone wrote.

Opponents of MICRA argued in that case that it violated equal protection because it limited what plaintiffs attorneys could obtain only in malpractice actions. The 5-4 majority said:

"The Legislature may reasonably have concluded that a limitation on contingency fees in this field was an 'appropriate means of protecting the already diminished compensation' of such plaintiffs from further reduction by high contingency fees."

Stone observed:

"The regulatory proscriptions on excessive insurance rates imposed by Proposition 103 in no way affect this rationale underlying section 6146."

2015 Opinion

The jurist also pointed to the Court of Appeal's post-Proposition 103 decision in *Chan v. Curran*, decided by the First District in 2015. That case dealt with a

different aspect of MICRA: the limitation on noneconomic damages to $250,000.

Stone said that "as the court explained in *Chan*, even after the passage of Proposition 103, the Legislature still could rationally conclude that MICRA's restrictions are necessary to ensure medical malpractice rates stay in check."

The court in *Chan* pointed out:

"While Proposition 103 may prevent insurers from unilaterally raising rates without administrative oversight, it does not prohibit rate increases that are fairly related to costs....Proposition 103, then, is concerned with actual costs, but there is nothing in the proposition, itself, that is a check on such costs. Accordingly, the measure provides no assurance medical malpractice rates would stay in check should MICRA's noneconomic damages cap be removed."

Stone declared that "we conclude *Roa* remains the controlling authority regarding the constitutional validity of MICRA's limits on attorney contingency fees in medical malpractice cases, and reject Friedman's equal protection challenge to section 6146."

Uncertainty Expressed

Div. Three's pro tem left Friedman with a slight chance of being allowed to hold onto the chunk of the settlement Fujie decided he could receive, while raising the prospect of being compelled to restore part of what he got.

The case was brought on behalf of a 9-year-old who was born prematurely—by six or seven weeks—and was diagnosed within six months as being afflicted with cerebral palsy. The suit alleges, with respect to willful misconduct, that physicians at a Kaiser hospital "were aware of the possibility of severe neurological damage to Plaintiff if she were not delivered promptly," and that "notwithstanding this knowledge," none of them "took any steps to expedite a 'crash' [caesarean] section and allowed Plaintiff to linger in utero, developing hypoxic ischemic encephalopathy to the point it became irreversible."

Stone said that under "any fair and reasonable interpretation of the complaint's allegations, the alleged failure to expedite a crash cesarean section" boiled down to an allegation of medical malpractice. She continued, however:

"Although we conclude the "Wilful Misconduct" claim, as pled, did not exempt the resulting recovery from the contingency fee limits of section 6146, we cannot determine on this record whether later developments might have supported an amended pleading to add a genuine non-MICRA claim that would have had a material effect on the settlement....Nor can we determine on this record whether Friedman obtained the requisite consent from his client before settling a non-MICRA claim (assuming such a claim was viable at the time of settlement)."

Must Hold Hearing

The opinion orders that a hearing be held to resolve these matters. It declares:

"The order awarding attorney fees is conditionally reversed and vacated and the trial court is directed on remand to determine, consistent with the principles set forth in this opinion, whether MICRA applies to this case. If the court determines MICRA does not apply and that Friedman obtained the requisite informed consent to settle a non-MICRA claim, the court shall reinstate the order awarding Friedman $625,000 in attorney fees. If the court determines MICRA does apply, the court shall vacate the prior order, enter a new order awarding attorney fees consistent with MICRA's limitations, and order disgorgement of the fees paid to Friedman in excess of the statutory limit."

The case is *Romero v. Kaiser Foundation Health Plan*, B277499.

Friedman represented himself. No brief was filed on behalf of the child, Bianca Romero, but her mother, Luz Romero, was permitted to address the panel at oral argument and spoke of the need for as much of the settlement as possible to be devoted to Bianca's medical care.

Consistent Critic

For years, Friedman has been a vocal opponent of MICRA. An opinion piece by him, "Medical Malpractice Crisis No Longer Exists—Neither Should MICRA," appears in the Nov. 20, 2014 issue of the MetNews.

In a Sept. 15, 2014 unpublished opinion, the Fourth District's Div. Two upheld a trial court order reducing Friedman's fees to conform to MICRA limits, saying:

"Friedman argues that the purpose in enacting MICRA was to address the medical malpractice crisis and protect California's health care delivery system by reducing the cost of medical malpractice insurance. Citing a 2007 Los Angeles Times article, Friedman maintains that there is no longer a medical malpractice crisis in California and therefore no remaining justification for relying on *Roa's* holding that section 6146 is constitutional. However, Friedman has not established there is no longer a rational basis for adhering to section 6146. Even assuming medical malpractice litigation has decreased since enactment of MICRA in 1975, this does not necessarily establish that the need for MICRA no longer exists. Any decrease can also be viewed as supporting the proposition that MICRA has been an effective deterrent to medical malpractice litigation and suggests that, if MICRA provisions, such as section 6146, were eliminated, medical malpractice litigation would increase."

The appeals court affirmed an order that Friedman disgorge to a minor $58,583.33 in fees he collected in excess of MICRA limits, and eventually he complied.

State Bar Discipline

His refusal to obey the trial court order in the case, his nonpayment of a $1,500 sanction imposed upon him, and failure to report the sanction to the State

Bar resulted in the State Bar Court on Nov. 27, 2015 suspending him from practice for 60 days and placing him on two years' probation.

A July 21, 2011 published Court of Appeal opinion by this district's Div. One, in *Gonzales v. Chen*, was concerned with Friedman invoking, rather than disputing, the fee amounts set forth in §6146. The case involved the compromise of a minor's claim.

Friedman argued that he should have been awarded the full amount contained in the schedule. Then-Presiding Justice Robert M. Mallano (now retired) wrote:

"We reject Friedman's assertion that he is automatically entitled to the maximum contingency percentages allowed under MICRA, assuming he used them in his retainer agreement...MICRA establishes caps on a recovery, not guarantees."

Mallano went on to say:

"To be blunt, a victory for Friedman would come at the expense of the minor."

Although Stone cited *Chen* for the proposition that state rule 7.955, setting forth factors to be considered in approving compromises of minors' claims, prevails over a local rule, she did not discuss the implications of Mallano's edict that "the trial court must redetermine the award of attorney fees under California Rules of Court, rule 7.955, not a local rule or MICRA."

There is no indication in the opinion as to whether Fujie relied upon Chen for the proposition that, in determining the reasonableness of the compromise of a minor's claim, MICRA is to be ignored.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On February 2, 2018, I served true copies of the following document(s) described as **REQUEST FOR PUBLICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 2, 2018, at Burbank, California.

Jill Gonzales

SERVICE LIST

Romero v. Kaiser Foundation Health Plan, Inc. et al.
Case No. B277499

Bianca Romero 13212 Kootenay Street Victorville, CA 92395	Plaintiff and Respondent **In Pro Per** *Via TrueFiling*
Robert Lowell McKenna Carroll, Kelly, Trotter Franzen & McKenna 111 West Ocean Blvd., 14th Floor Long Beach, CA 90802-4646	Counsel for Defendant **Kaiser Foundation Health Plan Inc.** *Via U.S. Mail*
Nathaniel J. Friedman A Professional Corporation 8500 Wilshire Blvd., Suite 910 Beverly Hills, CA 90211	Appellant **In Pro Per** *Via TrueFiling*