

**RECENT DECISION FINDING ABUSE OF DISCRETION IN
GRANTING MOTION FOR GOOD FAITH DETERMINATION
(C.C.P. §877.6)**

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In Long Beach Memorial Medical Center v. Superior Court (Connors) (March 27, 2009) 09 C.D.O.S. 3930, defendant hospital petitioned the court for a writ of mandate seeking an order that the trial court vacate its determination that the settlement of co-defendant physicians was made in good faith. The court issued an order to show cause why the order on the good faith determination should not be vacated and after a consideration of the evidence issued the writ.

The court gave a lengthy description of the factual background of the case. Briefly, it involved a very tragic birth injury due to the alleged negligence of the attending perinatologist, Dr. Asrat, his employer Magella Medical Group (together the physicians), Long Beach Memorial Medical Center and Fastaff, the defendant-nurse's employer. There was testimony that Dr. Asrat had breached the standard of care and co-defendant nurses had testified that Dr. Asrat had been given information about the progress of the baby's delivery that he claims he was not given (suggesting there was probably considerable finger-pointing). There was evidence that the status of fetal monitors could be viewed by Dr. Asrat from multiple places in the hospital, though Dr. Asrat testified that had he been told about any abnormal tracings, he would have gone to see the patient. Several nurses testified they called Dr. Asrat every couple of hours to relate the status of the delivery; one testified she did not "advise" Dr. Asrat that the baby could not tolerate any more pushing because he would have been able to ascertain that himself from viewing the fetal tracings in the doctor's lounge. Eventually, a nurse asked Dr. Asrat to evaluate the patient "stat" at which point he did a "crash" c-section. The child sustained ongoing neurological damage.

Plaintiffs filed their complaint and alleged negligence and emotional distress. Plaintiff's perinatology expert testified Dr. Asrat violated the standard of care in myriad ways, not the least of which was "abandoning" the patient by leaving the room without a defined plan and failing to return to see the patient—whose delivery was considered high risk—for over three hours.

Plaintiffs calculated their damages, including lost future earnings, future care and past expenses to be in excess of \$10 million. In 2007 they made a "global" settlement demand in that amount to all defendants and indicated they would not settle with any defendants individually.

After a mediation, two tortfeasors not a party to the writ proceeding settled for \$250,000. The court indicated in its opinion that that left \$7.75 million as the remainder of the global demand.¹ Also following the mediation, the remaining parties (physician, Fastaff and the Medical Center) discussed a settlement proposal in which the “physicians would pay \$1.5 million, Fastaff would furnish \$2 million, and the hospital would supply \$4 to a global settlement, subject to a final allocation of respective contributions in binding arbitration. These conversations occurred about two weeks prior to the April 16, 2007 final status conference. Plaintiffs soon stated that unless their demand was met by April 15, 2008, their offer would be withdrawn and increased. On April 14, 2008, Fastaff agreed to pay \$2.5 million and the hospital consented to paying \$5.25 million.”

According to the decision, the hospital was under the impression that the physicians had no settlement authority. However, “*the day after*² the hospital and Fastaff reached a settlement, the physicians’ attorney contacted plaintiffs’ counsel. When plaintiffs confirmed the agreed settlement did not include them, counsel for the physicians offered plaintiffs \$200,000 as separate, additional, new money in return for a dismissal of his clients from the lawsuit.”

The court observed that “just hours” after the settlement of the hospital and Fastaff was put on the record, the hospital learned of the \$200,000 settlement by the physicians.

Six days after the physicians settled with plaintiffs for \$200,000 they made a motion for a determination of good faith settlement. In support of their motion they submitted an expert declaration that Dr. Asrat did not breach the standard of care. This was the first “testimony” by an expert on Dr. Asrat’s behalf in the litigation. Physicians pointed to this expert’s declaration as evidence they would prevail at trial on the negligence issue. The physicians also submitted a declaration by counsel indicating they had no settlement authority until two days after the other defendants had settled. Finally, they argued that the fact the hospital and Fastaff settled for \$7.75 in order to avoid going to trial did not in and of itself render their subsequent settlement of \$200,000 “bad faith.”

The hospital opposed the motion. It argued not only was the settlement amount disproportionate to Dr. Asrat’s role in the care of plaintiff—he was the only physician monitoring the patient’s care on the night of her labor—but that physicians’ attorney had engaged in bad faith tactics to avoid paying the \$1.5 million amount previously discussed among counsel for the parties. Hospital counsel pointed out that the settlement amount of \$200,000 was only 10 percent of the physicians’ liability coverage of \$2 million, while

¹ The math does not seem to add up, but I checked two versions of the advance sheets and both indicate the plaintiffs made a \$10 million global demand, after mediation two defendants settled for \$250,000, which “left \$7.75 million as the remainder of plaintiffs’ global demand.”

² All italics in this summary were used by the court in its decision.

counsel estimated Dr. Asrat was between 25 and 50 percent at fault for plaintiffs' damages. The trial court granted the motion and found the settlement was entered into in good faith.

Thereafter, the hospital timely petitioned the court of appeal for an order vacating the trial court's good faith finding. Hospital "contended the physicians' settlement was entirely disproportionate to Dr. Asrat's liability and the physicians' attorney's refusal to participate in settlement negotiations was bad faith conduct." The court issued an order to show cause.

In its discussion, the court explained the purpose and intent of CCP §877.6 is to promote equity—both the equitable sharing of costs among the parties and the encouragement of settlement. It noted the determination that a settlement has been made in good faith bars fellow tortfeasors from seeking indemnity or contribution from the settling tortfeasor. Therefore, there can only be a finding that a settlement has been made in good faith "if there has been no collusion between the settling parties and where the settlement amount appears to be within the 'reasonable range' of the settling party's proportionate share of comparative liability for a plaintiff's injuries."

The court pointed out that a settling tortfeasor's liability for indemnity to joint tortfeasors is a significant issue and should be "*an important consideration for the trial court in determining whether to approve a settlement by an alleged tortfeasor.*" While the trial court does have discretion in ruling on a motion for good faith determination, such discretion "is not unlimited and should be exercised in view of the equitable goals of the statute, in conformity with the spirit of the law and in a manner that serves the interests of justice. (Cite). The party asserting lack of good faith bears the burden of proof. (Cite) That party must show that the settlement is so far 'out of the ballpark' as to be inconsistent with the equitable goals of section 877.6." (Cite)

A "settling party's proportionate liability is one of the most important factors" in determining whether a settlement was made in good faith. In this case, the hospital contended the "physician's \$200,000 settlement—representing 2 percent of plaintiffs' \$10 million damages estimate—was so far out of the 'ballpark' it was not even in the parking lot." The court found physicians' claim—that the settlement was reasonable because Dr. Asrat had no liability and their settlement amount represented a "nuisance value" intended to avoid the costs of trial—"unavailing."

Among the reasons the court cited for its conclusion the settlement was not made in good faith included: Dr. Asrat's expert only offered a declaration after the time of the settlement and in support of the good faith determination motion—his opinion did not play a part in convincing plaintiffs that Dr. Asrat bore no liability; the payment of \$200,000 by the sole physician in charge of plaintiff's high risk delivery is wholly

disproportionate to the \$10 million settlement; Physician's counsel "admitted" in settlement discussions that the physicians' share of liability was actually around \$1.5 million;³ "the physicians' settlement is simply not defensible in view of their financial condition and policy limits."

The court stressed, though, that the most important consideration before it was issue of indemnification and the "settlor's potential liability for indemnity to the other alleged tortfeasors." The court found the record showed conduct by physicians' counsel conducted after the mediation in which all parties participated "was designed to benefit the physicians at the expense of the interests of the hospital and Fastaff."

In language that should serve as a cautionary tale to any defendant who intends to (or should) settle but wants to hold out from participating in a global settlement in the hopes of "playing hardball" and possibly securing a "better deal" on his own, the court said:

"the timing of the physicians' offer, outlined above, suggests only one result, namely, that the physicians' reason for entering into the settlement with plaintiffs was to cut off the hospital's and Fastaff's right to indemnity from the physicians.... Plaintiffs' counsel indicated that plaintiff accepted the physicians' \$200,000 offer because plaintiffs were not enthusiastic about proceeding to trial against the physicians alone, and they had already obtained the amount demanded for settlement. Hence, by the time the physicians' counsel contacted plaintiffs' attorney to make an offer in settlement, *the physicians' liability exposure to the hospital for indemnity was far greater than their potential exposure to plaintiffs for negligence*. The true value in the settlement to the physicians, then, was not the dismissal of claims as to them, but rather the dismissal of the indemnity claims of the hospital and Fastaff. When a joint tortfeasor 'enters into a disproportionately low settlement with the plaintiff solely to obtain immunity from the cross-complaint, the inference that the settlement was not made in good faith is difficult to avoid.' To immunize the physicians from the indemnity claims of the hospital and Fastaff under these circumstances, where Dr. Asrat was the sole physician responsible for the care of plaintiff during her labor and delivery, serves neither the goal of encouraging settlement *among all interested parties* nor the goal of equitably allocating costs among multiple tortfeasors. (Cite) If section

³ The court observed that statements made and materials used during mediation are confidential and may not be used after the mediation ends. However, it noted that it "may consider oral statements of the settlement terms." In addition, it pointed out that the "record of negotiations conducted *after* mediation concluded indicates here that the physicians' settlement with plaintiffs was designed to benefit the physicians at the expense of the interests of the hospital and staff. (Cite) It was the physicians' attorney who, during discovery, indicated the willingness to explore the possibility of the parties contributing to a global settlement and later arbitrating the relative allocation of contributions." Still, the suggestion the attorney "admitted" the physicians' liability was around \$1.5 million seems a stretch.

877.6 is to serve the ends of justice, it must prevent a party from purchasing protection from its indemnification obligation at bargain-basement prices.”

The appellate court found the conclusion “inescapable” that the physician’s settlement offer was purely tactical, did not “reflect the cooperative decision-making among all interested parties that is one of the aims of settlements” and should not have been found to have been entered into in good faith by the trial court. Because the court felt the trial court abused its discretion in determining the settlement was made in good faith, the trial court was ordered to vacate its decision.

This is a very interesting opinion. It is unfortunate that the evidence against Dr. Asrat seems to be so profound, as you will see if you read the entirety of the opinion. There was certainly a lot of finger-pointing among the doctor and nursing staff. It just did not seem plausible that he would be defended if he went to trial in this case, which I think the court found compelling. However, finding that counsel acted in bad faith by not participating in a global settlement for which they apparently had no authority and later securing a “bargain-basement” deal because plaintiffs did not want to go to trial against the doctors alone, seems a bit extreme. As is clear from the opinion, though, a number of different factors were at play that when taken together led the court to its conclusion.

As a practical matter, an unanticipated result of this decision could be that co-defense counsel become reluctant to candidly discuss the value of a case, and their clients’ relative liability, for fear of having numbers thrown back at them at the time of a good faith determination hearing. One can see how the physicians’ counsel in this case could have been brainstorming with his co-counsel about a theoretical value of the case and apportionment of liability—perhaps without any authority from the carrier—and the next thing he knows he not only does not have authority to settle, but has co-counsel telling the court that he “admitted” his client was liable in “x” amount. This decision could end up stifling discussions about settlement among co-defendants unless they are in a confidential mediation.