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OUR QUARTERLY NEWSLETTER

## Recent Decision regarding Separate MICRA Caps in Wrongful Death Cases

Ng v. Superior Court (Los Alamitos Medical Center, Inc.) (Fourth Appellate District, Case No. G064257, 1/29/25)

This lawsuit arose out of the death of plaintiff's decedent after a G-tube was inserted into the wrong location of his body by a physician during a visit to the emergency room in December 2022. Subsequent providers failed to perform tests to confirm that the tube had been placed in the correct location. Until the error was discovered, the decedent had been continually fed through his G-tube which caused him to develop sepsis and die roughly three months after his hospital admission. The complaint alleged two causes of action (1) wrongful death, in Ng's individual capacity; and (2) medical malpractice, as a survivor action in Ng's capacity as a successor in interest to the decedent. Ng requested two separate MICRA caps for noneconomic damages based on the wrongful death claim and the medical malpractice claim. Defendant Medical Center brought a motion to strike the language in plaintiff's complaint seeking noneconomic damages for both claims.

The court concluded that the plaintiff can seek two MICRA cap awards under Civil Code section 3333.2 because a wrongful death claim and a survival claim—even when premised on the same alleged medical malpractice—are separate and distinct claims. The court discussed the recent amendment to Code of Civil Procedure section 377.34, which authorized a decedent's personal representative or successor in interest to recover noneconomic damages under Civil Code Section 3333.2. Prior to this amendment, the \$250,000 MICRA cap only applied to claims for wrongful death based on medical malpractice, not survival causes of action (because damages for "pain and suffering" were not available in a survival action). The new language of section 377.34 that was effective on January 1, 2022, now allows for the recovery of damages for a decedent's "pain, suffering, or disfigurement" in survival actions filed between January 1, 2022, and January 1, 2026. The court also discussed the amendment to Civil Code section 3333.2 effective January 1, 2023, that raised the \$250,000 cap on noneconomic damages in medical malpractice claims involving wrongful death. In the court's opinion, both of these amendments raised the question of whether a survival claim is subject to a separate MICRA cap.

The court found *Atkins v. Strayhorn* (1990) 223 Cal. App. 3d 1380, instructive. This case held that under Civil Code section 3333.2, husband and wife plaintiffs suing in one action could each recover a MICRA cap for their separate claims, the husbands' action for negligence and the wife's action for loss of consortium, both of which stemmed from the same incident of medical malpractice. The court premised its holding on the fact that the wife's separate action for loss of consortium involved an "injury ... personal to her."

The court used the same rationale in this case, finding that the operative question was whether there were separate claims such that they are entitled to separate MICRA caps in a wrongful death and survival claim. The court determined that a survival claim is "a separate and distinct cause of action which belonged to the decedent before death but, by statute, survives that event." The court then drew a distinction between a survival action a wrongful death claim, with the court reasoning that California's wrongful death statute "creates a *new cause of action* in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained had he survived." Based on this analysis, the court held that wrongful death and survival causes of action are "separate and distinct" claims subject to separate MICRA caps. However, the court noted that a wrongful death claim *may not* include any damages recoverable as part of a survival claim, and the claims may be tried separately.

It is important to note that this holding is likely inconsistent with the legislative intent behind amending section 377.34. SB 447 which amended section 377.34 to allow for survivor actions to recover noneconomic damages, was enacted with the intent to grant a remedy of noneconomic damages to the decedent's representative or successor in interest when defendants engage in "nefarious" and "manipulative" tactics to delay trial in litigation until a time that the plaintiff dies. Further, analysis prepared by the Senate Judiciary Committee, who added the provision that this amendment will last until January 1, 2026, suggests this statute was amended to allow for a temporary exception to the general rule prohibiting noneconomic damages to address the delays in judicial proceedings caused by COVID-19. This was premised on the idea that but for these delays, the plaintiff would have survived to collect "pain and suffering" damages, and the pandemic should not bar their recovery. It is unclear whether the Legislature will extend the January 1, 2026, expiration date.

- Christopher Blackburn & B. Thomas French



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