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Medical Negligence May Reduce Tortfeasor's Liability Under Proposition 51—C.A.

By KENNETH OFGANG, Staff Writer

A torfeasor is not necessarily liable for the full amount of plaintiff's damages where the injuries are aggravated by subsequent medical malpractice, the Court of Appeal for this district ruled yesterday.

Div. Seven granted a writ of mandate to homeowners Joe and Judy Henry, allowing them to present evidence—if otherwise admissible—that injuries allegedly suffered by Larry Reinink in a fall on the Henrys' property were aggravated by the negligence of emergency room doctors at Kaiser Permanente.

Presiding Justice Dennis Perluss explained that earlier cases holding the original tortfeasor jointly liable for any aggravation of the injuries that resulting from negligent medical treatment cannot survive Proposition 51. The initiative, enacted in 1986, provides that the liability of multiple tortfeasors for noneconomic damages is several and not joint, with limited exceptions.

Reinink sued in 2003 after falling over what he said was an unmarked, unlit concrete step as he was leaving the Henry home near nightfall. He had been cleaning and repairing the swimming pool and its equipment.

In his complaint, he alleged the Henrys were negligent in failing to correct a dangerous condition or warn him of it. The Henrys alleged as an affirmative defense that other tortfeasors were partially responsible for the injuries.

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The trial was scheduled to begin in July of last year before Los Angeles Superior Court Judge Alan Kalkin, who recently retired, but was delayed so that the defense could seek writ relief after the judge said he would not allow evidence of alleged substandard care received by the plaintiff at Kaiser. The Court of Appeal promptly issued an order to show cause and a stay of trial court proceedings, and yesterday it ruled that the Henrys' liability for noneconomic damages is limited to their share of the fault.

Perluss, writing yesterday for the court, cited on *Marina Emergency Medical Group v. Superior Court* (2000) 84 Cal.App.4th 435, in which the court held an emergency room physician in a medical malpractice action was entitled under Proposition 51 to introduce evidence of the plaintiff's personal physician's subsequent negligence in treating the plaintiff even though the personal physician had been voluntarily dismissed from the case.

The jurist rejected the contention that *Marina* should be limited to cases involving successive instances of medical malpractice.

"For purposes of applying the principles of comparative responsibility and apportionment of liability, it is simply not significant that the nature of the Henrys' alleged negligence may be different from that of the Kaiser emergency room doctors," the presiding justice wrote, noting that jurors "are often confronted with apportioning fault among defendants sued on different theories of liability."

Attorneys on appeal were David M. Axelrad and Karen M. Bray of Horvitz & Levy and Thomas M. Phillips, Timothy E. Kearns and Hillary Arlene Jones of The Phillips Firm for the Henrys; Gerald P. Peters for Reinink; and Steven G. Ingram for Consumer Attorneys of California as amicus supporting the plaintiff.

The case is *Henry v. Superior Court (Reinink)*, 08 S.O.S. 1239.