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PERSPECTIVE

Attorneys hope to use \$50M award to challenge MICRA cap

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The \$50 million verdict a Fresno jury awarded a man who suffered brain injuries will be reduced by \$30 million due to a law limiting noneconomic losses in medical malpractice suits, the plaintiff's attorneys said Thursday, vowing to fight the reduction.

The defendant ambulance company said it will appeal the entire verdict, insisting its employees gave the patient proper care, but the plaintiffs' attorneys said that might give them another chance at defeating the damages cap.

Warren Paboojian and Daniel R. Baradat of Baradat & Paboojian Attorneys won the \$50 million award for mortgage broker Nicholas Merlo, 39, and his wife Kaci last week and said they expect it to be substantially reduced by the judge under a section of the Civil Code.

The jury found American Ambulance staff caused Merlo's brain injuries by making mistakes with the breathing tube and driving him to a hospital 5 miles farther than needed.

The jury awarded Merlo \$20 million in past and future economic damages, plus \$20 million in noneconomic damages and \$10 million in lost consortium damages to his wife. However, bound by California Civil Code Section 3333.2., Judge Kristi C. Kapetan is expected to reduce the noneconomic and consortium awards to \$250,000 each, according to the plaintiffs' attorneys.



Courtesy of Baradat & Paboojian Inc.

From left, Warren Paboojian and Daniel R. Baradat of Baradat & Paboojian Inc. in Fresno

In 1975, the Medical Injury Compensation Reform Act, or MICRA, was enacted to encourage doctors to keep practicing in California. The code section states: "In no action shall the amount of damages for noneconomic losses exceed" \$250,000. Plaintiffs have made several unsuccessful attempts in the Legislature and at the ballot box to get the cap changed.

Baradat called the code section "draconian" and said it needs to be updated to account for inflation.

"A lot of states have something like this, but they've indexed it for inflation," he said. "\$250,000, went

a lot further in 1975 when they enacted this Civil Code section. The plaintiffs' bar has tried to overcome it many times but is always unsuccessful because the insurance companies and the medical societies oppose it."

Responding via email Friday, American Ambulance's general counsel Erik S. Peterson said the company would appeal the award.

"This is a very sad situation," Peterson wrote. "Our paramedics treated Mr. Merlo like they would any patient, using their training and procedures to do everything they could to improve his declin-

ing condition. Despite their efforts and the efforts of hospital staff, he suffered a very serious injury. Unfortunately, we will have to appeal the verdict."

Paboojian said American Ambulance's appeal will open the door for his team to fight the award cap on cross appeal. He said he hopes a persuasive argument that the company was grossly negligent would convince an appellate court to take another look at the damages cap.

"The courts have routinely upheld it," Paboojian said. "However, this is a gross negligence standard and we're hoping that given the fact that it's gross negligence, the appellate court will look at this differently."

In March 2018, Merlo was undergoing endoscopy surgery in a nonemergency hospital when his breathing became erratic and needed to be transferred, Baradat said.

On Tuesday, the jury found the ambulance company and its staff were fully liable for Merlo's injuries after they removed his intubation tube and weren't able to reinsert it while transporting Merlo. They also found Fresno Dr. Eric Graham, who treated and diagnosed Merlo, was not liable for Merlo's injuries. *Nicholas R. Merlo v. American Ambulance*, 18CECG3026. (F.C. Sup. Ct., filed Aug. 13, 2018).

Fresno attorney Adam B. Stirrup of Baradat & Paboojian also represented Merlo in the litigation. ■

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