

**JENNIFER LOUISE HAMEL, an Incompetent Person, etc., Plaintiff,
v. WILLIAM A. KEEL, Defendant and Appellant; OUTPATIENT
SURGERY CENTER, Defendant and Respondent.**

G024802

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE
DISTRICT, DIVISION THREE**

2001 Cal. App. Unpub. LEXIS 2630

October 16, 2001, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

PRIOR HISTORY: Appeal from a judgment of the Superior Court of Orange County, Theodore E. Millard, Judge. Super. Ct. No. 719947.

DISPOSITION: Reversed.

COUNSEL: The Ford Law Firm, William G. Ford III and Paul C. Cook; Greines, Martin, Stein & Richland, Irving H. Greines, Marc J. Poster and Alan Diamond for Defendant and Appellant William A. Keel.

Law Offices of Robert K. Scott, Robert K. Scott and John C. McCarty for Defendant and Respondent Outpatient Surgery Center.

JUDGES: MOORE, J. CONCUR: SILLS, P.J., ARONSON, J. *

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: MOORE

OPINION:

William A. Keel appeals from a judgment awarding more than \$ 1.65 million to respondent Outpatient Surgery Center (OPSC). The judgment was based on OPSC's motion for contribution [*2] after a jury found both parties liable on a medical malpractice claim. Keel maintains the court committed several procedural errors in granting the motion. The court actually awarded equitable indemnity under the contribution statute, a separate indemnity action pending between the parties barred any award, factual issues were determined without benefit of a trial, and OPSC's postjudgment costs were included in the award. The court had no authority to order proportionate, rather than pro rata, contribution, and we reverse.

I

FACTS

In a medical malpractice action, a jury found the parties, a physician and a surgery center, negligent, and awarded the plaintiff approximately \$ 24 million over her life, reduced to a present value of almost \$ 9.4 million. The jury apportioned liability 55 percent to Keel and 45 percent to OPSC. Although the original judgment called for periodic payments, it was subsequently amended to a lump sum cash amount. Keel then settled with the plaintiff by paying \$ 4 million in exchange for a covenant not to execute on the judgment. OPSC appealed the judgment, and we affirmed. (*Hamel v. Outpatient Surgery Center* (Feb. 25, 1998, G018968) [nonpub. [*3] opn.])

OPSC then paid the balance of the judgment and filed an action for declaratory relief against Keel (*Outpatient Surgery Center v. Keel et al.* (Super. Ct., Orange County, 1998, No. 796035)) "for contribution or partial or comparative indemnity based on Dr. Keel's comparative fault as determined by the jury in the [malpractice action]." In the first amended complaint OPSC sought "damages . . . representing the amount OPSC has paid toward the judgment in the [malpractice action] that exceeds its forty-five percent apportionment share." Keel filed an answer and cross-complaint, raising equitable defenses.

OPSC also filed a postjudgment motion for contribution in the instant case (Hamel's medical malpractice action). At a limited evidentiary hearing, set to determine the correct amount of the judgment and the portion OPSC had paid, the court refused to allow Keel to present evidence of equitable defenses. It advised that Keel could present those defenses in the pending indemnity action.

The court granted the motion for contribution using the jury's apportionment of fault, and included within the award costs incurred by OPSC after judgment. In entering its order, [*4] the court noted it was "without prejudice to the litigation of [OPSC's] separate action . . . and any cross-complaint therein including the equitable defenses raised in opposition to . . ." the contribution motion. OPSC's indemnity action was stayed by the trial court pending a decision in this appeal.

II

DISCUSSION

The issue here is whether the court had the right to order contribution, not on a pro rata basis, but proportionately, based on fault, in the percentages found by the jury. It did not, and we reverse.

The right to contribution is governed by statute. (*Code Civ. Proc.*, §§ 875- 880.) The underlying premise of contribution is a pro rata division of the judgment. *Code of Civil Procedure section 876*, subdivision (a) states that "the pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment *equally* among all of them." (Italics added.) The language of section 876 is plain and requires no interpretation. (*Lamberton v. Rhodes-Jamieson* (1988) 199 Cal.App.3d 748, 754.) "Pro rata contribution is flatly incompatible with [*5] apportionment of liability according to fault." (*Id. at p. 753.*) Indemnity, on the other hand, does not require a pro rata division. Its purpose "is to apportion losses among joint tortfeasors in proportion to their relative culpability." (*Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc.* (2001) 86 Cal.App.4th 1135, 1142.)

In granting the motion for contribution, the court stated, "I'm not really giving equitable indemnity. I'm giving contribution per the jury's allocation of fault." This award was not an equal division as required by *Code of Civil Procedure section 876*, subdivision (a).

Unlike contribution, there is no statute that provides for a determination of equitable indemnity by motion. Neither party has cited and we have not found any authority that provides for adjudication of indemnity other than by a civil action. (See, e.g., *American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 584 [party may cross-complain for comparative indemnity; *Coca-Cola Bottling Co. v. Lucky Stores, Inc.* (1992) 11 Cal.App.4th 1372, 1379 ["loss-sharing claims [*6] of multiple tortfeasors are most often completely resolved by a comparative indemnification cross-

complaint in the underlying action rather than by a postjudgment claim for contribution"].) OPSC has an indemnity action pending that will determine all the issues, as opposed to the piecemeal process we reject here.

III

DISPOSITION

That portion of the judgment for contribution is reversed. Appellant is entitled to recover his costs on appeal.

MOORE, J.

WE CONCUR:

SILLS, P.J.

ARONSON, J. *

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.