

WEDNESDAY, MARCH 16, 2011

LITIGATION

Herpes Verdicts May Go to High Court

Defense's appeal hinges on matching punitive and compensatory damages.

By Laura Ernde

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A multimillion-dollar verdict for a woman whose wealthy boyfriend gave her a sexually transmitted disease could be headed to the state Supreme Court, attorneys said.

An appellate ruling in the unusually large sex-tort case out of Riverside County highlights a confusing area of punitive-damages law that the justices might want to address, said punitive-damages expert Curt Cutting of Horvitz & Levy LLP.

The 4th District Court of Appeal reduced the amount of compensatory damages owed to plaintiff Patricia Behr from \$4 million to \$1.6 million.

Cutting, who isn't connected to the case, contends that the court should have reduced the \$2.75 million punitive-damages award by a comparable amount or allowed the trial court judge to decide if lower punitive damages were justified.

Instead, the appellate court didn't disturb the punitive-damages award, leaving Aussie hair care products founder Thomas Redmond liable for a total judgment of more than \$4 million, unless the state Supreme

Court intervenes. *Behr v. Redmond*, 2011 DJDAR 3795

"That approach overlooks the fact that juries are instructed to make their punitive award proportionate to the actual harm to the plaintiff," Cutting said. "The jury in this case performed this task based on an extremely inaccurate assessment of the actual harm."

Behr said Redmond never told her he had herpes when they began dating and became intimate. After Redmond disclosed that he'd been infected with the virus since 1975, he assured Behr it was safe to have unprotected sex.

Redmond's appellate attorney, Robin Meadow of Greines, Martin, Stein & Richland LLP, said no decision has been made on an appeal.

"In terms of conflict in the law, this does kind of jump out," he said.

Initially, the ruling was unpublished, meaning it could not be cited as precedent. But on Monday the court took the uncommon step of publishing the case without a request to do so, Cutting said.

Publication increases the odds for high court review because it creates precedent

that lower courts must follow.

Cutting cited two other cases in which courts either reduced punitive damages or sent the issue back to the trial court after a reduction in compensatory damages. They are *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App. 3d 1220 and *SEIU v. Colcord* (2008) 160 Cal. App.4th 362.

Behr's appellate lawyer, Paul D. Herbert of Payne & Fears LLP, disagreed that there's a split in the law on punitive damages. The state Supreme Court acknowledged that punitive damages awards aren't out of line if they're within a 1-to-10 ratio of compensatory damages. In this case, the ratio after the appellate court reduction was 1 to 1.7, he said.

Herbert also pointed out that the defense never challenged the constitutionality of the punitive damages award on appeal.

Jurors took into consideration that Redmond was worth at least \$172 million when they decided on damages.

"This is highly reprehensible conduct," Herbert said. "This man withheld this information on at least 10 separate occasions before finally disclosing to her."