Appellate Reports

Defendant claims excessive verdict and that plaintiff counsel improperly pre-conditioned and engaged the passions of the jury, but Court affirms wrongful death awards totaling $45 million

By Jeffrey I. Ehrlich

Fernandez v. Jimenez

(2019) __ Cal.App.5th __ (Second Dist., Div. 3.)

Who needs to know about this case? Lawyers handling wrongful-death cases
Why it's important: Affirms jury's award of wrongful-death damages of $11,250,000 to each of decedent's four children.

On June 16, 2012, defendants Elba Jimenez and Maria Rodriquez, who lived together, attended a party. Rodriquez saw Jimenez drink at least three shots of tequila. Jimenez drove Rodriguez in Rodriquez's car to her mother's house, where Rodriquez had left her second car. Jimenez refused to give Rodriguez the keys to the car and drove away. Soon thereafter, a police officer noticed Jimenez driving erratically. She evaded the police, exited the freeway, and crashed into a taco truck, where Claudia Fernandez, a 38-year-old single mother of four was buying food. Jimenez killed Claudia and one other person. She was convicted of second-degree murder for those deaths.

Claudia's children were 22, 14, 12, and 10 when she died. Her oldest, Rachel, obtained custody of her siblings and raised them after their mother's death. At trial, the jury awarded each child $5,625,000 in past non-economic damages and $5,625,000 for future non-economic damages, for a total verdict of $45 million. The trial court (Hon. Malcolm Mackey) denied the new-trial motion and left the verdict undisturbed. On appeal, the defense argued it was excessive. Affirmed.

In a wrongful death action, "damages may be awarded that, under all the circumstances of the case, may be just." (Code Civ. Proc., § 377.61.) A plaintiff in a wrongful death action is entitled to recover damages for his or her pecuniary loss, "which may include (1) the loss of the decedent's financial support, services, training and advice, and (2) the pecuniary value of the decedent's society and companionship." The plaintiff may not, however, recover for the grief or sorrow attendant upon the death of a loved one, or for his or her sad emotions and for the sentimental value of the loss. "Factors relevant when assessing a claimed loss of society, comfort, and affection may include the closeness of the family unit, the depth of their love and affection, and the character of the deceased as kind, attentive, and loving." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 721.)

The amount of damages to be awarded is a question of fact committed, first to the discretion of the trier of fact, and then to the discretion of the trial court on a motion for new trial. An appellate court gives great weight to the determinations of the jury and the trial court. The amount to be awarded is 'a matter on which there legitimately may be a wide difference of opinion. There is no fixed standard by which an appellate court can determine whether a jury's award for this intangible loss of comfort and society is excessive. In the absence of some factor in the record such as inflammatory evidence, misleading instructions or improper argument by counsel that would suggest the jury relied upon improper considerations, appellate courts usually defer to the jury's discretion. The fact that the verdict is very large does not alone compel the conclusion the award was attributable to passion or prejudice. In assessing a claim that the jury's award of damages is excessive, a reviewing court does not reassess the credibility of witnesses or reweigh the evidence. It considers the evidence in the light most favorable to the judgment, accepting every reasonable inference and resolving all conflicts in its favor.

Defendants contended that an award of $11,250,000 to each plaintiff shocks the conscience when compared to other verdicts. Comparing verdicts, however, is of limited utility. The various cases cited by the defense are of marginal use in evaluating whether $11,250,000 to each of Claudia's four children is excessive. None of the cases or the ones the parties cite involve the murder of a loved and loving single mother, whose death has made orphans of four children, three of whom were then minors. The undisputed evidence is that each child was individually close to Claudia and that they were a tight-knit family unit. "We cannot conclude that, on these facts, the verdict shocks the conscience."

The fact that plaintiff's counsel asked potential jurors in voir dire whether they would be able to award "hundreds of millions of dollars, collectively" for his

clients, was not improper preconditioning of the jury. Nor was it improper for plaintiff's counsel to say in voir dire that the jury should not consider the defendant's ability to pay a judgment. Moreover, even if informing prospective jurors that plaintiffs were seeking hundreds of millions of dollars and that jurors should not consider defendants' financial circumstances was error, it was not prejudicial.

The trial court granted a motion in limine to prevent the plaintiff from introducing Jimenez's 2005 DUI conviction. At trial, plaintiff's counsel asked Rodriquez if she had ever been a passenger in a car driven by Jimenez while Jimenez was intoxicated. Rodriguez said she had not. When plaintiff's counsel then asked, "Not even in 2005?" Defense counsel objected, citing the in limine ruling, and the trial court sustained the objection. Plaintiffs' counsel then moved to impeach and asked the question again. Rodriguez now answered, "Yes, now I remember." She also answered yes, that Jimenez had been convicted of a DUI based on the incident.

The motion in limine did not preclude this evidence. Once Rodriguez denied ever having driven with an intoxicated Jimenez, the conviction no longer was the issue; Rodriguez's credibility was the issue. Jimenez's conviction and that Rodriguez was with her during the events underlying the conviction directly spoke to that issue.

Rodriguez also argued that plaintiffs improperly engaged the passions of the jury by setting a theme of punishment in opening statement and in closing argument. In his opening statement, counsel explained that Rodriguez negligently let Jimenez drive Rodriguez's car, knowing that Jimenez was drunk. However, Rodriguez "wants to wash her hands of the death of these people." Counsel continued that Rodriguez denied responsibility for giving her car to Jimenez, but Rodriguez nonetheless bore responsibility for Claudia's death and "cannot wash her hands." Counsel repeated that refrain in his closing statement.

Viewing counsel's statements in the context of his whole argument, he was arguing that Rodriguez bore responsibility for Claudia's death, and hence could not "wash her hands" and escape paying damages. He was not arguing that Rodriguez should be punished.

Insurance, duty to defend, employment-practices coverage, cost-reimbursements

***Southern Cal. Pizza Co. v. Certain Underwriters at Lloyd's London* (2019) __ Cal.App.5th __ (Fourth Dist, Div. 3.)**

Plaintiff owns and operates over 250 Pizza Hut and Wing Street restaurants. Defendant provided to plaintiff an employment practices liability insurance policy, which covered certain losses arising from specified employment-related claims brought against plaintiff. An endorsement added to the policy included an exclusion (the "wage and hour exclusion"), which said, "This Policy does not cover any Loss resulting from any Claim based upon, arising out of, directly or indirectly connected or related to, or in any way alleging violation(s) of any foreign, federal, state, or local, wage and hour or overtime law(s), including, without limitation, the Fair Labor Standards Act; however, we will pay Defense Costs up to, but in no event greater than $250,000 for any such Claim(s), without any liability to us to pay such sums that any Insured shall become legally obligated to pay...."

After being named a defendant in a putative class action lawsuit alleging violations of a variety of Labor Code provisions, plaintiff sought coverage under the Policy. Defendant largely denied coverage, stating that the alleged violations fell within the wage and hour exclusion. It, however, provided $250,000 in defense cost coverage as specified in the exclusion. Plaintiff's lawsuit seeking additional coverage was dismissed on demurrer, based on the wage and hour exclusion. Reversed.

Using the ordinary meanings of the words, the phrase "wage and hour ... law(s)" refers to laws concerning duration worked and/or remuneration received in exchange for work. In addition to seeking recovery of wages – claims that fall within the wage and hour exclusion – the underlying lawsuit also alleged plaintiff failed to fully reimburse its delivery drivers for necessary business-related expenses they incurred while doing their job, including travel for required training, mileage driven for deliveries and cell phone usage. Among the relief requested was reimbursement due on those expenses, plus interest, pursuant to Labor Code sections 2800 and 2802. Plaintiff contends the trial court erred in concluding such a claim falls outside the scope of the Policy's general coverage, or alternatively, within the scope of the wage and hour exclusion. The court agreed.

Both sections 2800 and 2802 require an employer to indemnify its employee for certain losses or expenditures under specified circumstances. Neither statute mentions wages or hours, nor do they appear in the parts of the Labor Code titled "compensation" or "working hours." While not determinative of the question before us, this observation supports the notion that one would not expect them to be considered wage or hour laws in the absence of an express indication otherwise.

Lending further credence is the function of, and the purpose underlying, each statute. Disbursements for losses and work-related expenditures are not payments made in exchange for labor or services. The former protects employees from an employer's lack of reasonable care and diligence as well as ensures employers are "bear[ing] all of the costs inherent in conducting [their] business[es]" (In re Acknowledgment Cases (2015) 239 Cal.App.4th 1498, 1506.) And the latter prevent[s] employers from passing their operating expenses on to their employees. Given section 2802's language, function and purpose, it is unsurprising our Supreme Court previously characterized claims seeking reimbursement of business expenses as "nonwage"

claims. For these reasons, we hold the claim in the underlying lawsuit brought pursuant to sections 2800 and 2802 falls outside the scope of the wage and hour exclusion.

The claim was potentially covered under the policy because the Policy covers as "Inappropriate Employment Conduct." The two categories of conduct listed in the Policy to which it directs our attention are the following: (1) "any failure to adopt, implement, or enforce employment related policies or procedures"; and (2) "any other employment related workplace tort."

Taking the latter first, as we find it determinative of the issue, we agree the claim at issue likely qualifies as an employment-related workplace tort. In the ordinary sense, "[a] tort is defined to be 'any wrong, not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer.'" (*Denning v. State* (1899) 123 Cal. 316, 323, 55 P. 1000.) Here, the wrong alleged (failure to reimburse business expenses) is not grounded in the breach of a contract, and the Legislature enacted a statute which gives the injured party (an employee) a remedy against the wrongdoer (an employer).


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