PUBLICATION UPDATE

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California Damages: Law and Proof

Publication 80230 Release 26 June 2022

HIGHLIGHTS

This update contains recent California decisions on the following topics:

- Personal Injuries
- Injured Spouses and Parents
- Injured Children
- Proof of Nature, Extent, and Cause of Injuries
- Wrongful Death and Survival Actions
- Property Damage
- Conversion or Wrongful Detention of Personal Property
- Fraud and Deceit
- Disparagement of Title (Slander of Title and Trade Libel)
- Invasion of Privacy
- Malicious Prosecution
- False Imprisonment
- Breach of Covenant of Good Faith and Fair Dealing
- Attorney Malpractice
- Punitive or Exemplary Damages
- Contribution and Indemnity
- Review of Damage Awards

PERSONAL INJURIES

The plain language of Code Civ. Proc. § 998 and Lab. Code § 3856, read together, dictate the sequence in which those statutes should be applied. Section 998(e) states that when a plaintiff fails to obtain a more favorable judgment or award than a defendant's § 998 offer, the costs awarded to the defendant "shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be

awarded to the defendant and judgment or award shall be entered accordingly." The statute requires deduction of the defendant's postoffer costs from the plaintiff's damages award; then if the costs exceed the amount of the award, a judgment must be entered in the defendant's favor. Section 998 contemplates entry of a final judgment between the parties after its cost-shifting provisions have been applied. The cost shifting under § 998 must therefore occur before ordering payment from the judgment litigation expenses and attorney fees under Lab. Code § 3856 (*Oakes v. Progressive Transp. Servs., Inc.* (2021) 71 Cal. App. 5th 486, 504, 286 Cal. Rptr. 3d 476).

In personal injury actions, the plaintiff cannot state in the complaint the amount of damages sought (Code Civ. Proc. § 425.10(b)). If the defendant does not request a statement setting forth the nature and amount of damages being sought, the plaintiff must serve the statement on the defendant before a default may be taken (Code Civ. Proc., § 425.11(c)). If the defendant has not appeared in the action, the plaintiff must serve the statement of damages in the same manner as the summons (§ 425.11(d)(1)). A plaintiff who has obtained an order for service of process by publication is not required to apply for a second order to serve a statement of damages by publication (*Rios v. Singh* (2021) 65 Cal. App. 5th 871, 886, 280 Cal. Rptr. 3d 404).

Collins v. County of San Diego (2021) 60 Cal. App. 5th 1035, 1065–1067, 275 Cal. Rptr. 3d 290 held that the $250,000 cap on noneconomic damages applies only to trial judgments and does not apply to settlement amounts.

In a medical malpractice case in which the trial court reduced noneconomic damages from $4.25 million to $250,000 pursuant to the Medical Injury Compensation Act (MICRA), the California Supreme Court held that Civ. Code § 3333.2 applies to a physician assistant (PA) who has a legally enforceable agency relationship with a supervising physician and provides services within the scope of that agency relationship, even if the physician violates his or her obligation to provide adequate supervision. That the fact that the conduct of two PAs in failing to take adequate steps to diagnose plaintiff's daughter's condition and in failing to seek guidance from a supervisory physician could give rise to professional discipline or criminal liability did not render MICRA's cap on noneconomic damages inapplicable (*Lopez v. Ledesma* (2022) 12 Cal. 5th 848 (2022 Cal. LEXIS 1068)).

For purposes of a damages award under Civ. Code § 3333, in a personal injury suit, it was error to admit evidence of full unpaid medical bills from providers who did not accept plaintiff's insurance because the trial court did not require plaintiff to demonstrate that he actually incurred those amounts. Evidence of a medical bill is relevant to prove or disprove the paid or incurred prong of past medical damages if it can be

established the bill is actually paid or incurred. Thus, evidence of unpaid medical bills is relevant to his past medical damages only if the plaintiff can show he actually incurred those amounts (*Qaadir v. Figueroa* (2021) 67 Cal. App. 5th 790, 798, 283 Cal. Rptr. 3d 97).

The ability of an emergency service provider to collect payment for its services under the HLA requires the existence of an underlying debt owed by the patient to the hospital, absent such a debt, no lien may attach. Thus, when an emergency service provider enters into an agreement with a health care service plan and agrees to accept a specified amount from the plan as payment in full, and then the health care plan provides it with a payment in the amount specified under the agreement, the emergency care provider may not assert a lien under the HLA against the patient's recovery from the third party tortfeasor. This is so, because, under the terms of the agreement, the patient's entire debt to the hospital has therefore been extinguished. However, emergency care providers do not have to choose between the ability to contract with health care service plans and the ability to collect higher rates for care using the HLA. If hospitals wish to preserve their right to recover the difference between usual and customary charges and the negotiated rate through a lien under the HLA, they are free to contract for this right when negotiating their contracts with health care service providers (*Dameron Hospital Assn. v. AAA Northern California, Nevada & Utah Ins. Exchange* (2022) 74 Cal. App. 5th 796, 810, 289 Cal. Rptr. 3d 551)

With regard to reimbursement for Medi-Cal benefits provided during a decedent's lifetime, property once held by the decedent and transferred to heirs by way of a revocable inter vivos trust is part of the decedent's estate and is subject to recovery under Welf. & Inst. Code, § 14009.5 (*Riverside County Public Guardian v. Snukst* (2022) 73 Cal. App. 5th 753, 760, 289 Cal. Rptr. 3d 44).

Legislative changes enacted in 2021 amended § 1430(b) to provide that for violations that occur on or after March 1, 2021, the licensee is liable for up to $500 per violation and for costs and attorney's fees, and may be enjoined from permitting the violation or violations to continue (Health & Saf. Code § 1430(b)(1)(B)). An agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive that resident's or patient's rights to sue pursuant to § 1430(b) is void as contrary to public policy. In assessing the amount of the statutory damages to be awarded under § 1430(b), the following factors shall be considered, pursuant to § 1430(b)(2):

- The nature and seriousness of each violation.
- The likelihood and severity of the risk that each violation would cause a resident to suffer indignity, discomfort, or pain.
- The efforts made by the fa-

cility to prevent each violation from occurring or to prevent future violations.

In a mesothelioma case, the jury found defendant manufacturer liable, apportioned 60% of the fault to it, and awarded, among other damages, $25 million in noneconomic damages. The Court of Appeal affirmed the judgment, finding that substantial evidence supported the award of $25 million in noneconomic damages. Medical experts testified at trial that mesothelioma is a very dreadful disease, one of the worst cancers to have, and results in patients dying in horrible pain as the disease, in essence, suffocates them (*Phipps v. Copeland Corp. LLC* (2021) 64 Cal. App. 5th 319, 343, 278 Cal. Rptr. 3d 688).

INJURED SPOUSES AND PARENTS

In *See's Candies, Inc. v. Superior Court* (2021) 73 Cal. App. 5th 66, 288 Cal. Rptr. 3d 66, plaintiffs alleged that Mrs. Ek, defendants' employee, contracted COVID-19 at work because of defendants' failure to implement adequate safety measures. They claimed that her husband, Mr. Ek, subsequently caught the disease from Mrs. Ek while she convalesced at home. He died from the disease a month later. In response to plaintiffs' complaint, which sought damages for loss of consortium, among other things, defendants filed a demurrer asserting that plaintiffs' claims are preempted by the exclusivity provisions of the Workers' Compensation Act, and are specifically barred by the derivative injury doctrine. In rejecting this argument, the appellate court noted that the mere fact that an employee's injury is the alleged cause of a nonemployee's injury does not make the nonemployee's injury logically derivative of the employee injury. Derivative injuries are the economic and intangible losses suffered by an employee's loved ones as a result of the employee's disability or death. This definition does not extend to separate physical injuries suffered by nonemployees, even when an employee's injury was part of the causal chain leading to those injuries.

Plaintiff's 18th birthday should have been excluded in calculating when the statute of limitations period started running after tolling during minority; therefore, his claim arising from his father's death in a police shooting was timely filed on his 20th birthday. In cases in which the statute of limitations is tolled based on a plaintiff minor's age, as set forth in Code Civ. Proc. § 12, the day after tolling ends is excluded in calculating whether an action is timely filed (*Shalabi v. City of Fontana* (2021) 11 Cal. 5th 842, 280 Cal. Rptr. 3d 597, 489 P.3d 714).

INJURED CHILDREN

Legislative changes to Code Civ. Proc. § 377.34 provide that, in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or pro-

ceeding was granted a preference pursuant to Code Civ. Proc. § 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026 (Code Civ. Proc. § 377.34(b)).

PROOF OF NATURE, EXTENT, AND CAUSE OF INJURIES

Acceleration or aggravation of a preexisting industrial injury is compensable as a new separate injury, if the aggravation is reasonably attributable to the injured worker's subsequent employment (*Applied Materials v. Workers' Comp. Appeals Bd.* (2021) 64 Cal. App. 5th 1042, 279 Cal. Rptr. 3d 728).

To recover in tort, the plaintiff must prove the fact of proximately caused injury with reasonable certainty. When the fact of proximately caused injury is proven sufficiently, the measure of damages to be awarded need only be shown with the degree of certainty that the circumstances of the case permit. But where the fact of proximately caused injury is not proven with reasonable certainty, the plaintiff cannot recover regardless of how much evidence was introduced to show the measure of the recovery sought by the plaintiff (*White v. Molfetta* (2021) 64 Cal. App. 5th 628, 634, 279 Cal. Rptr. 3d 212).

WRONGFUL DEATH AND SURVIVAL ACTIONS

Legislative changes to Code Civ. Proc. § 377.34 provide that, in an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable may include damages for pain, suffering, or disfigurement if the action or proceeding was granted a preference pursuant to Code Civ. Proc. § 36 before January 1, 2022, or was filed on or after January 1, 2022, and before January 1, 2026 (Code Civ. Proc. § 377.34(b)).

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ployees, even when an employee's injury was part of the causal chain leading to those injuries.

The cap on damages applies to a physician assistant (PA) who has a legally enforceable agency relationship with a supervising physician and provides services within the scope of that agency relationship, even if the physician violates his or her obligation to provide adequate supervision. That the fact that the conduct of two PAs in failing to take adequate steps to diagnose plaintiff's daughter's condition and in failing to seek guidance from a supervisory physician could give rise to professional discipline or criminal liability did not render MICRA's cap on noneconomic damages inapplicable (*Lopez v. Ledesma* (2022) 12 Cal. 5th 848 (2022 Cal. LEXIS 1068)).

PROPERTY DAMAGE

In a case in which the California Department of Forestry and Fire Protection (CalFire) sought to recover fire suppression costs from a corporation, the Supreme Court held that Health & Saf. Code §§ 13009 and 13009.1 incorporate the common law theory of respondeat superior. To decide otherwise would misread the plain language of the statutes enacted by the Legislature, undermine the legislative history, and cast aside the goals and purposes that underpin the statutes at issue. The statutes allow CalFire to recover the taxpayer funds it spends on fighting and investigating wildfires that were caused by human negligence. A central goal of § 13009 is to reimburse agencies for the cost of firefighting. In light of that legislative objective, it would make little sense to remove one of the primary forms of corporate liability for negligence: respondeat superior (*Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2021) 12 Cal. 5th 493, 288 Cal. Rptr. 3d 1).

CONVERSION OR WRONGFUL DETENTION OF PERSONAL PROPERTY

Where a property seller wrongfully delayed release of escrow funds upon repudiating the contract, interest under Cal. Const. art. XV § 1 was available as conversion damages under Civ. Code §§ 3336, 3287 (*Greif v. Sanin* (2022) 74 Cal. App. 5th 412, 289 Cal. Rptr. 3d 484).

FRAUD AND DECEIT

Punitive damages were properly awarded against a company that induced a grower to obtain more land in reliance on the company's false promise that it would buy all the peppers the grower produced, while fraudulently concealing a decision to terminate the parties' relationship; the jury unanimously found fraud by clear and convincing evidence, and the record contained substantial evidence supporting the high probability demanded by the clear and convincing evidence standard (*Huy Fong Foods, Inc. v. Underwood Ranches, LP* (2021) 66 Cal. App. 5th 1112, 281 Cal. Rptr. 3d 757).

Under California law, prejudgment interest awards following the breach of a noncontractual obligation represent the accretion of wealth which

money or particular property could have produced during a period of loss. An award of prejudgment interest pursuant to Civ. Code § 3288 runs from the date of loss of the property (*BladeRoom Group Limited v. Emerson Electric Co.* (9th Cir. 2021) 11 F.4th 1010, 1027).

Regarding established businesses, lost profits may be recovered if their extent and occurrence can be ascertained with reasonable certainty; once their existence has been so established, recovery will not be denied because the amount cannot be shown with mathematical precision. Historical data, such as past business volume, supply an acceptable basis for ascertaining lost future profits. In some instances, lost profits may be recovered where the plaintiff introduces evidence of the profits lost by similar businesses operating under similar conditions. Where an unestablished businesses is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability (*Michaels v. Greenberg Traurig, LLP* (2021) 62 Cal. App. 5th 512, 522, 277 Cal. Rptr. 3d 1).

An expert might be able to make reasonably certain lost profit estimates based on a company's share of the overall market (*Hewlett-Packard Company v. Oracle Corporation* (2021) 65 Cal. App. 5th 506, 573, 280 Cal. Rptr. 3d 21).

Awarding damages to a bank against its former chief executive officer pursuant to the tort of another doctrine without reducing the damages under the special benefit doctrine was not an abuse of discretion because the record supported a conclusion that equitable discretion did not favor such a reduction in light of the officer's intentional tortious conduct, which caused the bank to incur unnecessary legal expenses and reputational harm that outweighed any financial benefit from improper transactions (*Gateway Bank, F.S.B. v. Metaxas* (2021) 65 Cal. App. 5th 71, 89–91, 279 Cal. Rptr. 3d 779).

In limited circumstances, it is permissible for plaintiffs to recover attorney's fees as damages. A claim that the plaintiff was forced to procure the services of an attorney as a result of the defendant's fraud falls into one of these limited categories known as the "tort of another" theory. While such doctrines are sometimes described as exceptions to the general "American rule" that each party pays for their own attorney's fees, this characterization can be misleading. It is better to conceptualize these cases as claims for compensatory damages where the facts happen to permit the plaintiff to seek attorney's fees as a type of compensatory award. Attorney's fees that are recov-

erable as damages function in the same way that medical fees would be part of the damages in a personal injury action. In this context, an award of fees is not really an exception at all but an application of the usual measure of damages (*Mai v. HKT Cal, Inc.* (2021) 66 Cal. App. 5th 504, 512, 281 Cal. Rptr. 3d 255).

A property owner claiming attorney fees as damages under the "tort of another" doctrine sought to introduce redacted copies of attorney invoices only to support her testimony that she paid the billed amounts and as some evidence that the amounts were reasonable. That approach was specifically permitted by California Supreme Court case law. The trial court erred in broadly reading a Court of Appeal case to preclude both the owner's testimony and receipt of the invoices for these limited and appropriate purposes. That evidence would have satisfied the owner's prima facie burden to establish how much she paid for legal services and the reasonableness of that amount (*Mai v. HKT Cal, Inc.* (2021) 66 Cal. App. 5th 504, 522, 281 Cal. Rptr. 3d 255).

DISPARAGEMENT OF TITLE (SLANDER OF TITLE AND TRADE LIBEL)

Given that slander of title is a tort claim, a slander of title claim has been held to be subject to a litigation privilege defense (*Weeden v. Hoffman* (2021) 70 Cal. App. 5th 269, 285 Cal. Rptr. 3d 262).

While a cause of action for trade libel resembles that for defamation, it differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. The plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with the plaintiff, and that as a result the plaintiff has suffered special damages. At a minimum, a trade libel cause of action requires: (1) a publication; (2) which induces others not to deal with the plaintiff; and (3) special damages (*Muddy Waters, LLC v. Superior Court* (2021) 62 Cal. App. 5th 905, 277 Cal. Rptr. 3d 204).

INVASION OF PRIVACY

False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed. To establish a false light claim based on a defamatory publication, a plaintiff must meet the same requirements as for a defamation claim. In a case involving a false light invasion of privacy claim, not striking the false light claim was error because a quoted statement taken out of context had no clear defamatory meaning and evidence of special damages was lacking (*Balla v. Hall* (2021) 59 Cal. App. 5th 652, 273 Cal. Rptr. 3d 695).

Voluntary dismissal without prejudice of a claim for unauthorized commercial use of name or likeness, for the purpose of refiling the claim in a

different jurisdiction, did not require an award of attorney fees and costs because the trial court reasonably could conclude that neither party prevailed (*Varney Entertainment Group, Inc. v. Avon Plastics, Inc.* (2021) 61 Cal. App. 5th 222, 275 Cal. Rptr. 3d 394).

MALICIOUS PROSECUTION

The tort of malicious prosecution does not have to be directed to an entire lawsuit or even to an entire cause of action. Someone may be liable for malicious prosecution for his or her active role in the malicious prosecution of only a portion of a proceeding. Where only a portion of the claim or complaint is maliciously prosecuted, the issue becomes one of proof of damages, not of liability. In the case of the assertion of a maliciously prosecuted claim with one for which there was probable cause citation, the burden of proving such an apportionment must rest with the party whose malicious conduct created the problem (*Area 55, LLC v. Nicholas & Tomasevic, LLP* (2021) 61 Cal. App. 5th 136, 275 Cal. Rptr. 3d 519).

FALSE IMPRISONMENT

Carcamo v. Los Angeles County Sheriff's Dept. (2021) 68 Cal. App. 5th 608, 283 Cal. Rptr. 3d 647, held that because a city's public intoxication ordinance conflicted with the statutory prohibition against being intoxicated in a public place under specified circumstances as set forth in Pen. Code § 647(f), the ordinance was invalid and provided no defense to a false arrest claim, even if the arresting officer believed in good faith that the ordinance was valid,

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

A wrongfully discharged employee's actual damage is the amount of money he or she was out of pocket by reason of the wrongful discharge. But both public and private employees faced with a wrongful discharge have a legal duty to mitigate damages while pursuing remedies against their former employer. Consistent with these principles, actual earnings from substitute employment are offset from lost earnings awards. The similarity or dissimilarity of the substitute employment to the prior position has no bearing on whether actual earnings, as opposed to projected earnings, are deducted from a lost earnings award. Although an employee may not be obliged to accept inferior employment, if an employee accepts employment and receives earnings, those actual earnings should be deducted from an award of past lost earnings (*Martinez v. Rite Aid Corp.* (2021) 63 Cal. App. 5th 958, 975, 278 Cal. Rptr. 3d 310).

A trial court properly dismissed condominium owners' breach of the implied covenant of good faith and fair dealing claim against a home protection company because an evaluation of the policy considerations underlying tort liability in the traditional insurance context demonstrated that home protection contracts are not sufficiently analogous to insurance to support the imposition of

tort liability (*Chu v. Old Republic Home Protection Co., Inc.* (2021) 60 Cal. App. 5th 346, 274 Cal. Rptr. 3d 528).

Mere errors by an insurer in discharging its obligations to its insured does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been unreasonable. So long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake. A claim for bad faith based on a wrongful refusal to settle requires proof the insurer unreasonably failed to accept an offer. Simply failing to settle does not meet this standard. A facially reasonable demand might go unaccepted due to no fault of the insurer, for example if some emergency prevents transmission of the insurer's acceptance (*Pinto v. Farmers Ins. Exchange* (2021) 61 Cal. App. 5th 676, 276 Cal. Rptr. 3d 13).

Only one with the right to sue an insurance company for contract damages for breach of the insurance policy can also sue the insurance company for tort damages for breach of the covenant of good faith (*Wexler v. California FAIR Plan Assn.* (2021) 63 Cal. App. 5th 55, 277 Cal. Rptr. 3d 398).

ATTORNEY MALPRACTICE

An expert declaration on damages, submitted in opposition to a motion for summary adjudication, was admissible in part under Evid. Code §§ 801(b) and 802, in a legal malpractice action alleging inconsistencies in contractual terms because the expert witness relied on data from an established business to calculate lost profits, although anticipated profits from a later period were based on an unsupported assumption and profits from a failed deal were correctly excluded as speculative. Summary adjudication was inappropriate because causation and damages were shown, a triable question of fact existed as to the nature and extent of misconduct alleged to constitute unclean hands, and timeliness under Code Civ. Proc. § 340.6(a) depended upon factual findings as to whether acts were tangential to prior representation or demonstrated continuous representation (*Michaels v. Greenberg Traurig, LLP* (2021) 62 Cal. App. 5th 512, 277 Cal. Rptr. 3d 1).

In the legal malpractice context, the elements of causation and damage are particularly closely linked. The plaintiff must prove, by a preponderance of the evidence, that but for the attorney's negligent acts or omissions, he or she would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of the attorney's negligence,

the client cannot establish a cause of action for malpractice. In legal malpractice claims, the absence of causation may be decided on summary judgment only if, under undisputed facts, there is no room for a reasonable difference of opinion (*Knapp v. Ginsberg* (2021) 67 Cal. App. 5th 504, 282 Cal. Rptr. 3d 403).

Regardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of the defendant's own perfidy. The fact that nonnegligent counsel could have done better may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole. Where guilt is conceded, a defendant's own criminal act remains the ultimate source of the defendant's predicament irrespective of counsel's subsequent negligence. Any harm suffered is not only because of attorney error but principally due to the client's antecedent criminality. The paradigm of "but for" causation in civil malpractice cases is inapplicable in the context of malpractice by criminal defense counsel. Unlike a civil matter where the damage done by an attorney's negligence can only be recovered through a legal malpractice claim, a criminal defense lost through an attorney's negligence can be corrected by postconviction relief. Indeed, given the availability of postconviction relief, it is inimical to sound public policy to afford a civil remedy, which in some cases would provide a further boon to defendants already evading just punishment (*Genis v. Schainbaum* (2021) 66 Cal. App. 5th 1007, 281 Cal. Rptr. 3d 484).

PUNITIVE OR EXEMPLARY DAMAGES

Accidentally harmful conduct cannot provide the basis for punitive damages under California law (*King v. U.S. Bank National Association* (2020) 53 Cal. App. 5th 675, 266 Cal. Rptr. 3d 520).

Under California law, party cannot collect punitive damages for breach of contract awards (*BladeRoom Group Limited v. Emerson Electric Co.* (9th Cir. 2021) 11 F.4th 1010).

A plaintiff must present evidence that some officer, director, or managing agent responsible for corporate policy, or a multitude of managing agents, had the requisite state of mind to support an award of punitive damages against a corporation. A plaintiff can satisfy the managing agent requirement for punitive damages through evidence showing the information in the possession of the corporation and the structure of management decisionmaking that permits an inference that the information in fact moved upward to a point where corporate policy was formulated. These inferences cannot be based merely on speculation, but they may be established by circumstantial evidence, in accordance with ordinary standards of proof. It is difficult to imagine how corporate malice could be shown in the case of a large corporation except by piecing together knowledge and acts of the corporation's multitude of managing agents. (*Morgan v. J-M Manufacturing Co., Inc.* (2021) 60

Cal. App. 5th 1078, 1090–1091, 275 Cal. Rptr. 3d 349).

Evidence that an employer offered a pretextual explanation to justify its wrongful termination may support a finding of malice or oppression, for purpose of determining whether punitive damages award granted to employee is excessive (*Rubio v. CIA Wheel Group* (2021) 63 Cal. App. 5th 82, 277 Cal. Rptr. 3d 450).

Under California law, whether a defendant is aware of the probable dangerous consequences of its conduct and it willfully fails to avoid such consequences, as required for award of punitive damages, can be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. Cal. Civ. Code §§ 3294(a), 3294(c)(1) (*Hardeman v. Monsanto Company* (9th Cir. 2021) 997 F.3d 941.

The reprehensibility factor, for purposes of evaluating the size of punitive damages awards, may be present where the defendant has indifferently or recklessly disregarded the health and safety of the plaintiff alone (*Contreras-Velazquez v. Family Health Centers of San Diego, Inc.* (2021) 62 Cal. App. 5th 88, 106, 276 Cal. Rptr. 3d 358).

When employee is a relatively low level one, she will certainly be financially vulnerable, for purposes of determining whether employer's conduct was reprehensible, and thus whether punitive damages award granted to employee was excessive (*Rubio v. CIA Wheel Group* (2021) 63 Cal. App. 5th 82, 277 Cal. Rptr. 3d 450).

The function of deterrence will not be served if the wealth of the defendant allows him or her to absorb the award with little or no discomfort. On the other hand, the purpose of punitive damages is not served by financially destroying a defendant (*Contreras-Velazquez v. Family Health Centers of San Diego, Inc.* (2021) 62 Cal. App. 5th 88, 276 Cal. Rptr. 3d 358).

In the end, what is required in measuring punitive damages award is evidence of the defendant's ability to pay the damage award (*Rubio v. CIA Wheel Group* (2021) 63 Cal. App. 5th 82, 277 Cal. Rptr. 3d 450).

Under California law, consideration of the amount of compensatory damages awarded, as factor used to award punitive damages, helps balance punitive damages award with actual harm that is caused (*BladeRoom Group Limited v. Emerson Electric Co.* (9th Cir. 2021) 11 F.4th 1010).

In *Contreras-Velazquez v. Family Health Centers of San Diego, Inc.* (2021) 62 Cal. App. 5th 88, 108–110, 276 Cal. Rptr. 3d 358, the court affirmed a 2 to 1 ratio when resulting award with costs and fees was about $4 million and net worth of defendant was reported as $213 million. The court noted that when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. A lesser ratio may also be

warranted where the compensatory damages award appears to contain a punitive element—for example, a substantial award of emotional distress damages. Ultimately, the precise amount of an award must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

In *Rubio v. CIA Wheel Group* (2021) 63 Cal. App. 5th 82, 91–93, 277 Cal. Rptr. 3d 450, the court of appeal affirmed a punitive damages award of $500,000 against a company even though the plaintiffs were awarded only $15,057 in compensatory damages. The plaintiffs in that case were the surviving family members of a woman who had filed a lawsuit for wrongful termination against the company before she died of cancer. The trial court determined punitive damages were warranted, found the deceased woman's noneconomic damages to be in the $100,000 to $150,000 range but not recoverable by plaintiffs after her death due to the provisions of Code of Civ. Proc. § 377.34 (as it existed prior to its 2021 amendment), and awarded punitive damages in the amount of $500,000 against the company. The court of appeal agreed and upheld the punitive damages award based on an estimated 3.5 to 1 ratio between those punitive damages and the actual and potential compensatory damages caused by the defendant's misconduct.

Few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process (*Huy Fong Foods, Inc. v. Underwood Ranches, LP* (2021) 66 Cal. App. 5th 1112, 1128, 281 Cal. Rptr. 3d 757).

California courts have recognized that punitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter, and that the likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight. Where reprehensible conduct remains to be punished and deterred, a multiplier of four times the compensatory damages does not exceed the state's power to punish (*Pilliod v. Monsanto Company* (2021) 67 Cal. App. 5th 591, 282 Cal. Rptr. 3d 679).

CONTRIBUTION AND INDEMNITY

Although a defendant cannot escape liability simply because it cannot be determined with medical exactitude the precise contribution that exposure to fibers from defendant's products made to plaintiff's ultimate contraction of asbestos-related disease, all joint tortfeasors found liable as named defendants will remain entitled to limit damages ultimately assessed against them in accordance with established comparative fault and apportionment principles. The defendant may reduce its own comparative fault by pointing the finger at other tortfeasors, including those who are not party to the case (*Phipps v. Copeland Corp. LLC* (2021) 64

Cal. App. 5th 319, 278 Cal. Rptr. 3d 688).

In *The Travelers Indemnity Co. of Connecticut v. Navigators Specialty Ins. Co.* (2021) 70 Cal. App. 5th 341, 285 Cal. Rptr. 3d 289, the trial court erred in sustaining defendants' demurrers to plaintiff's equitable contribution and equitable indemnity causes of action. Plaintiff's allegation that it had no duty to defend an insured was not a factual allegation, but rather was an allegation as to what it believed to be the legal effect of its recent discovery of a purportedly backdated subcontractor agreement. Thus, there was no merit to defendants' contention that plaintiff should be prevented from alleging contradictory and antagonistic facts as to whether it had a duty to defend the insured. Plaintiff's third amended complaint properly stated a cause of action for equitable indemnity because it alleged that defendants were primarily and/or exclusively liable for the insured's defense costs, and thus in equity were required to reimburse plaintiff for their equitable share of said defense costs.

REVIEW OF DAMAGE AWARDS

It was reasonably probable defense counsel's improper arguments about alcohol evidence in a personal injury case arising from a motor vehicle accident unfairly influenced the jury's evaluation of evidence and arguments about intoxication. The trial court did not abuse its discretion in concluding that the misconduct was prejudicial and likely caused the jury to give an inadequate award of compensatory damages and to fail to reach the issue of punitive damages, and that it warranted a new trial on causation and damages (*Jackson v. Park* (2021) 66 Cal. App. 5th 1196, 281 Cal. Rptr. 3d 634).

The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. All presumptions are in favor of the decision of the trial court. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury. In making this assessment, the court may consider, in addition to the amount of the award, indications in the record that the fact finder was influenced by improper considerations, including inflammatory evidence, misleading jury instructions, improper argument by counsel, or other misconduct (*Qaadir v. Figueroa* (2021) 67 Cal. App. 5th 790, 816, 283 Cal. Rptr. 3d 97).

In an asbestos case, the jury concluded that plaintiff was exposed to asbestos from products that defendant sold, and that defendant was partly (45 percent) responsible for the employee's mesothelioma. The jury awarded a total of $15,270,501 in compensatory damages. The jury

also concluded that defendant acted with malice, oppression, or fraud, and awarded an additional $15,000,000 as punitive damages. On appeal, the court found that the jury's punitive damage award was not supported by substantial evidence. The court reviewed the record for evidence from which the jury could have concluded that an officer, director, or managing agent—someone responsible for defendant's corporate policy—had the requisite state of mind to support a punitive damage award, and found none. The court opined that it may be that defendant's officers, directors, and managing agents acted with the requisite state of mind to support an award of punitive damages in an appropriate case, and that a plaintiff may be able to provide evidence at trial to piece together knowledge and acts of a multitude of defendant's managing agents. But that did not happen here (*Morgan v. J-M Manufacturing Co., Inc.* (2021) 60 Cal. App. 5th 1078, 1091, 275 Cal. Rptr. 3d 349).

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