

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TERESA BERGREN

Plaintiff and Respondent,

v.

FU-GEN, INC.,

Defendant and Appellant.

B260416

(Los Angeles County
Super. Ct. No. BC463918)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed in part and reversed in part.

Park & Lim, S. Young Lim, Jessie Y. Kim for Defendant and Appellant.

Law Offices of Edwin Pairavi, Edwin Pairavi; Benedon & Serlin, Gerald M. Serlin, Douglas G. Benedon for Plaintiff and Respondent.

Defendant Fu-Gen, Inc. appeals from a judgment entered after a jury found it liable to plaintiff Teresa Bergren for \$229,575 in compensatory damages and \$750,000 in punitive damages in this action for violations of the Labor Code and the Fair Employment and Housing Act (FEHA). Fu-Gen contends we must reverse the punitive damages award because Bergren failed to introduce sufficient evidence of Fu-Gen's financial condition at trial and therefore failed to establish Fu-Gen's ability to pay a punitive damages award. We agree with Fu-Gen's contention and reverse the punitive damages award.

BACKGROUND

Bergren filed this action against her former employer, Fu-Gen, a private investigation firm, alleging violations of the Labor Code and FEHA, wrongful termination in violation of public policy, intentional infliction of emotional distress, and other causes of action. She asserted Fu-Gen denied her meal and rest breaks, refused to pay all of her earned compensation, and failed to provide accurate itemized wage statements, among other Labor Code violations. She also asserted Fu-Gen discriminated against her on the basis of her sex, as the only female investigator, by imposing a larger workload on her than the male employees and by disallowing her to take meal and rest breaks with male employees. After Bergren filed complaints against Fu-Gen with the United States Equal Employment Opportunity Commission and the California Labor Commissioner, Fu-Gen terminated her employment and thereafter its agents harassed her by surveilling her and vandalizing her property, according to her complaint in this action.

At the conclusion of the liability phase of the trial, which lasted more than a month, the jury rendered a special verdict, finding Fu-Gen had committed violations of the Labor Code and FEHA. The jury also found Marsha Brown (a co-owner of Fu-Gen and Bergren's former supervisor) had acted with malice, oppression, or fraud.¹ The jury awarded Bergren a total of \$229,575.50 in compensatory damages, which included six

¹ Bergren named Marsha Brown as a defendant in some of the causes of action, but the jury did not find Mrs. Brown liable.

categories of Labor Code damages, past economic damages, and past and future noneconomic damages.

During the punitive damages phase of the trial, Bergren called one witness: Glenn Brown, co-owner of Fu-Gen and Marsha Brown's husband. The examination was brief. He testified Fu-Gen's yearly gross income was between \$500,000 and \$600,000. Included in that amount was approximately \$550,000 Fu-Gen earned yearly under a contract with the Los Angeles County Metropolitan Transportation Authority (Metro). Fu-Gen also worked for other clients on a case-by-case basis, including Vons Grocery Store, the Compton Unified School District, the Inglewood Unified School District, Metro's Workers' Compensation Division (separate from the contract with Metro), and Lincoln & Associates.² Fu-Gen charged these other clients an hourly rate, ranging between \$50 and \$130. Mr. Brown represented Fu-Gen earned a maximum of \$50,000 per year for its work on all cases combined, other than the Metro contract.³

Bergren's counsel inquired about a monetary settlement in a lawsuit Fu-Gen filed against the Los Angeles Community College District. Mr. Brown testified Fu-Gen received \$1 million "[s]ometime in 2013."⁴

Bergren did not introduce any documentary evidence in the punitive damages phase of the trial (e.g., tax returns, balance sheets, profit and loss statements). Her counsel did not question Mr. Brown about Fu-Gen's assets, liabilities, or expenses. When counsel asked Mr. Brown if he was involved in preparing Fu-Gen's 2013 tax

² Mr. Brown stated he could not recall the names of other entities for which Fu-Gen had performed investigations, or the number of investigations Fu-Gen had performed the previous year. Bergren's counsel represented to Mr. Brown that evidence in the liability phase of the trial demonstrated Fu-Gen had performed 100 investigations the previous year. Testimony and documentary evidence presented in the liability phase is not part of the record on appeal.

³ Bergren's counsel asked Mr. Brown: "Isn't it in fact true that [Fu-Gen] makes over a million dollars a year with all the other various contracts that you have?" Mr. Brown denied counsel's assertion.

⁴ The punitive damages phase of the trial occurred on July 25, 2014.

returns, he responded negatively, explaining he was ill and not working at that time. Mr. Brown stated he believed Mrs. Brown had assisted in the tax return preparation. Bergren did not call Mrs. Brown as a witness in the punitive damages phase of the trial.

On cross-examination, Mr. Brown testified Fu-Gen's net worth was "zero." He represented that Fu-Gen allocated 90 percent of the \$550,000 it earned yearly under the Metro contract to employee expenses and overhead. He denied Fu-Gen owned real estate or "substantial fixtures or machinery or equipment." Regarding the \$1 million settlement, Mr. Brown stated half went to attorney fees, and the Browns used the rest to repay loans and medical expenses resulting from Mr. Brown's June 2012 liver and kidney transplants.

On redirect examination, Mr. Brown testified Fu-Gen had been a zero-net-worth company since 2011, when he stopped working. He stated he could not recall what Fu-Gen earned before 2011.

Bergren's counsel urged the jury to award Bergren \$1.4 million in punitive damages, asserting Fu-Gen's annual income was more than \$1 million. Fu-Gen's counsel argued the jury should decline to award punitive damages because Bergren failed to prove Fu-Gen's "worth," and therefore failed to satisfy her burden of proof.

The jury returned a special verdict finding Mr. and Mrs. Brown, as officers, directors, or managing agents of Fu-Gen, and acting on the company's behalf, engaged in conduct with malice, oppression, or fraud. The jury awarded Bergren \$750,000 in punitive damages.

In post-trial motions, Fu-Gen challenged the punitive damages award, arguing Bergren failed to present sufficient evidence of Fu-Gen's net worth. Bergren opposed the motions. After hearing oral argument, the trial court issued an order denying Fu-Gen's motions, stating in pertinent part: "A careful review of the transcript of Mr. Glenn Brown's testimony, as suggested by counsel, shows sufficient evidence to support the jury verdict as to FU-GEN's financial condition and ability to pay, and more so in light of the entire record of the case. Despite the fact that he is one of the two founders of FU-GEN and its CEO he gave evasive answers as to its financial condition. There were

many times he answered ‘I don’t recall’ to matters that he should have intimate knowledge given his position and relationship to FU-GEN.”

On October 3, 2014, the trial court entered judgment in favor of Bergren and against Fu-Gen. On December 2, 2014, Fu-Gen filed its notice of appeal from the judgment.

DISCUSSION

Bergren’s Challenge to the Notice of Appeal

In the respondent’s brief, Bergren asserts “this appeal must be dismissed” because Fu-Gen appealed from the original judgment and not the first amended judgment. We disagree with Bergren’s assertion.

On November 7, 2014, the trial court granted Bergren’s ex parte application to amend the judgment to add Glenn Brown, Marsha Brown, and Supreme Solutions International (Fu-Gen’s new corporate name) as judgment debtors, jointly and severally liable for the judgment, as Fu-Gen’s alter egos. On December 1, 2014, the court entered the first amended judgment in favor of Bergren and against Fu-Gen and its alter egos in the amount of \$1,535,339.10, the same amount listed in the original judgment. On December 2, 2014, presumably before Fu-Gen received notice of entry of the first amended judgment,⁵ Fu-Gen filed its appeal from the original judgment. None of the judgment debtors filed a notice of appeal from the first amended judgment.

To determine if Fu-Gen’s appeal from the original judgment is effective, we consider whether Fu-Gen could have achieved the requested relief from the original judgment or only from the amended judgment. “[I]f a party can obtain the desired relief from a judgment before it is amended, he must act—appeal therefrom—within the time allowed after its entry. If the amendment materially and in a substantial respect affects the judgment and the rights of a party against whom it is rendered, and a party desires relief therefrom, he must appeal from the corrected judgment” (*Stone v. Regents of*

⁵ Bergren filed a notice of entry of the first amended judgment on December 4, 2014. The record does not indicate the date Bergren served the notice on Fu-Gen.

University of California (1999) 77 Cal.App.4th 736, 744, quoting *George v. Bekins Van & Storage Co.* (1948) 83 Cal.App.2d 478, 481.)

Under the original judgment, Fu-Gen was liable to Bergren for \$1,535,339.10, including \$750,000 in punitive damages. Under the amended judgment, Fu-Gen is liable to Bergren for the same amounts. The amendment does not alter Fu-Gen's challenge to the punitive damages award on appeal. Her notice of appeal from the original judgment is effective.

Moreover, as this Division explained in *ECC Const., Inc. v. Oak Park Calabasas Homeowners Ass'n* (2004) 122 Cal.App.4th 994, 1003, footnote 5, "a notice of appeal is to be liberally construed in favor of its sufficiency [Cal. Rules of Court, rule 8.100(a)(2)], and its sufficiency may be upheld if respondents have not been misled or prejudiced thereby [citation]. We may construe defendant's notice of appeal to include the amended judgment, and we do so. Plaintiff does not claim any prejudice will result if we do so."

Punitive Damages Award

Fu-Gen contends the award of punitive damages is improper because Bergren introduced insufficient evidence establishing Fu-Gen's financial condition. We agree and reverse the award.

A "punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 112 (*Adams*)). We may not affirm a punitive damages award that is excessive. "[T]he function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) Appellate review of a punitive damages award is ineffective "unless the trial record contains meaningful evidence of the defendant's financial condition." (*Adams, supra*, 54 Cal.3d at p. 109.)

Our Supreme Court has declined "to prescribe any rigid standard for measuring a defendant's ability to pay." (*Adams, supra*, 54 Cal.3d at p. 116, fn. 7.) "[E]vidence of a defendant's income, standing alone, is wholly inadequate" as a measure of ability to pay. (*Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1064 (*Lara*)). "Normally, evidence of

liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.” (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680 (*Baxter*).

“Plaintiff bears the burden of proof” on a claim for punitive damages. (*Baxter, supra*, 150 Cal.App.4th at p. 680.) We review the award of punitive damages for substantial evidence. (*Id.* at p. 679.)

Bergren did not satisfy her burden of proving Fu-Gen had the ability to pay a punitive damages award, regardless of amount. Mr. Brown’s testimony in the punitive damages phase of the trial did not constitute “meaningful evidence” of Fu-Gen’s financial condition. Bergren’s counsel failed to question Mr. Brown about Fu-Gen’s expenses and liabilities. Merely asking Mr. Brown about Fu-Gen’s income and a monetary settlement is insufficient to establish Fu-Gen’s financial condition. Such evidence did not show whether Fu-Gen spent more than it earned. Bergren did not ask Mr. Brown to produce any documents at trial. Nor did Bergren request to conduct discovery about Fu-Gen’s financial condition after establishing a *prima facie* case for punitive damages.

Bergren claims we must affirm the punitive damages award because Fu-Gen failed to include evidence from the liability phase of the trial in the record on appeal. She notes “Fu-Gen’s company profile” was an exhibit at trial. She also represents Mrs. Brown testified in the liability phase that Fu-Gen netted \$100,000 per year from the Metro contract, and Mr. Brown testified about all of Fu-Gen’s clients and the amounts they paid. Additional evidence about Fu-Gen’s income, however, without corresponding evidence of Fu-Gen’s expenses and liabilities, would not satisfy Bergren’s burden to establish Fu-Gen’s ability to pay. A company profile would not list Fu-Gen’s expenses and liabilities, and Bergren does claim otherwise.

Bergren also argues Fu-Gen is estopped from challenging the punitive damages award because Mr. Brown “gave evasive and nonresponsive answers regarding Fu-Gen’s finances,” thereby preventing Bergren from establishing Fu-Gen’s financial condition. Even if Mr. Brown had answered all questions about Fu-Gen’s income with specific dollar amounts, Bergren’s evidence of Fu-Gen’s financial condition would have been

insufficient to demonstrate ability to pay a punitive damages award. Bergren’s counsel asked no questions about expenses or liabilities. Bergren made no attempt to introduce evidence other than Fu-Gen’s income (and the monetary settlement), which “is wholly inadequate” as a measure of ability to pay. (*Lara, supra*, 13 Cal.App.4th at p. 1064.)

The evidence Bergren introduced regarding Fu-Gen’s financial condition was insufficient to sustain a punitive damages award of any amount. “When a punitive damages award is reversed based on the insufficiency of evidence, no retrial of the issue is required” where the defendant “had ‘a full and fair opportunity to present [her] case for punitive damages.’” (*Baxter, supra*, 150 Cal.App.4th at p. 681.) Bergren had the opportunity to present evidence establishing Fu-Gen’s ability to pay. She made no attempt to introduce documentary evidence disclosing Fu-Gen’s financial condition (tax returns, bank statements, employee payroll documents, etc.). She is not entitled to a second chance to make her case.

DISPOSITION

The punitive damages award is reversed. In all other respects, the judgment is affirmed. Fu-Gen is entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

WE CONCUR:

ROTHSCHILD, P. J.

JOHNSON, J.