Filed 10/8/19 Anaya v. General Equipment & Supplies, Inc. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHNNY ANAYA et al.,

Plaintiffs and Respondents,

v.

GENERAL EQUIPMENT & SUPPLIES, INC.,

Defendant and Appellant.

B291274 (consolidated with B292138)

(Los Angeles County Super. Ct. No. BC594187)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle Williams Court, Judge. Affirmed.

Liddy Law Firm, Donald G. Liddy and Paula J. Khehra; Shoop, David R. Shoop and Thomas S. Alch; Esner, Chang & Boyer, Stuart B. Esner and Steven T. Swanson for Plaintiffs and Respondents.

Horvitz & Levy, Kirk C. Jenkins and Lisa Perrochet; WFBM, John A. Kaniewski and Sadaf A. Nejat for Defendant and Appellant.

INTRODUCTION

Rolando Anaya died when he was dragged into a rock crushing machine at his employer's asphalt production plant. His children, plaintiffs and respondents Johnny, Delila, and Ezekiel Anaya,[1] brought this wrongful death action against various defendants. By the end of the trial only one defendant remained, appellant General Equipment & Supplies, Inc., the distributor of the rock crusher. Plaintiffs tried the case on the theory that the rock crusher was defectively designed because it lacked inexpensive safety features that would have prevented Anaya's death.

The jury returned a verdict in favor of plaintiffs for $30 million, finding General Equipment 70% at fault and Anaya's employer 30% at fault. General Equipment appeals the final judgment, contending: (1) the trial court erred by precluding General Equipment from introducing evidence the rock crusher complied with industry custom and practice; (2) the trial court erred by excluding evidence of Anaya's criminal history and incarceration; and (3) the jury's award was excessive as a matter of law. We disagree with General Equipment's contentions and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

General Equipment sold the rock crusher to Anaya's employer, R.J. Noble Co., and helped assemble it at its initial

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[1] Because all three plaintiffs use the surname "Anaya," we refer to them by their first names and to their deceased father as "Anaya."

location in 2005.[2] R.J. Noble bought the machine to crush asphalt for use as a base material for new roads. Anaya worked for R.J. Noble as part of a three-man crew operating the rock crusher.

The machine crushes material (in this case asphalt), which falls onto a conveyor belt that takes the crushed material away, and drops it onto another conveyor belt. A removable metal guard blocks employees from getting too near the tail pulley[3] of the first conveyor belt. When that guard is removed, no other guard nor any warning protects workers from the moving conveyor belt. Unfortunately, according to a General Equipment employee, the guard was prone to fall off "quite regularly." The machine had an emergency shut-off button (an e-stop) located in the control room of the machine, but did not include any other e-stops or fail safes in the tail pulley area of the machine.

On the date of the fatal accident, Anaya was the "ground person" responsible for keeping the area around the rock crusher clear of debris by shoveling material that came out of it. That morning, the guard was missing from the tail pulley area, but the plant equipment operator directed the crew to proceed without first replacing the guard. Plaintiffs' engineering expert, Vladislav

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[2] General Equipment variously refers to the machine as a "rock crushing machine," "asphalt crushing machine," "mobile cone crusher," and variants of those terms. As General Equipment notes, the machine is "enormous."

[3] The parties do not point to evidence in the record describing the function of the tail pulley. It does not appear to have been an issue in dispute. In his opening statement, counsel for General Equipment explained the conveyor belt had a head pulley on one end and a tail pulley on the other. The head pulley was attached to a motor. The conveyor belt traveled around the two pulleys.

Peter Petrovsky, testified Anaya was likely cleaning up near the tail pulley when his pant leg became entrapped in the conveyor belt. Anaya was dragged along the conveyor belt, crushed, and died at the scene.

Anaya's three children filed this action for wrongful death, alleging claims for products liability, negligence, and negligence per se based on violations of applicable California Occupational Safety and Health Administration (Cal-OSHA) regulations. The case proceeded only on their claims for noneconomic damages.

Before trial, the trial judge excluded evidence of industry custom and practice to the extent it conflicted with Cal-OSHA regulations. She also excluded evidence of Anaya's convictions and incarcerations, reasoning "in light of the fact that the plaintiff[s] [are] waiving financial support, I am going to grant this motion in limine." She noted she would reconsider the ruling to the extent the evidence revealed Anaya's criminal past had some bearing on Anaya's relationship with his children.

At trial, Petrovsky testified "in my entire career of about 50 years, [I] never saw such a dangerous machine." He opined that while the guard around the tail pulley functions properly when attached to the machine, its design causes it to fall off over time due to vibration. When the guard was not in place, the rock crusher could still run because the machine lacked an interlock device that would have made it impossible to operate the unit with the guard missing. Petrovsky testified the cost of installing an interlock is minimal ($10 to $20) and he could not think of a good reason for the machine not to have one.

Petrovsky further testified the rock crusher was defective due to the lack of an electronic stop (e-stop). He opined that an e-stop—a cord or cable somewhere near the conveyor that if pulled would immediately cut power to the unit—was an "imperative" additional

part of the design. According to Petrovsky, if an e-stop cable had been provided it was "highly likely" Anaya would have been able to grab it and save his life. He concluded Anaya's death was "completely preventable by minimal, inexpensive safety precaution[s] taken by the defendant, General Equipment."

Trevor Moore, General Equipment's field service technician, and designated person most qualified regarding e-stops, testified the e-stop cable would cost approximately $2,000. Moore acknowledged it would "have been beneficial" to people working around the rock crusher to have installed an e-stop.

Anaya's children described their relationship with their father. Johnny, 13 years old when his father died, testified he and his father "were reconnecting" and his father "meant the world to [him] . . . . [H]e always wanted . . . the best for [his] family." Delila, 10 years old when her father died, testified when she and her brothers were not with Anaya, "he would always call us before bed and say good night and ask us how our day was and see how everything was going with us . . . [A]nd we would have a battle about who loved each other more before we . . . said goodbye." Delila also testified Anaya's visits with the children began "about 2012" (a year before the accident) "but he would always stay in contact with us. He would send us letters frequently and make sure he stayed in contact with us over the years." Ezekiel, who was 7 when his father died, testified Anaya "would always tell jokes," would "try and keep us . . . happy, no matter what" and "would make the room light up with happiness whenever he would walk in." Other family members and friends testified Anaya was a role model for his children and noted his love for them.

After the close of evidence, Plaintiffs withdrew their negligence and negligence per se claims and proceeded solely on their claim for strict liability design defect. The jury returned a verdict in favor of Plaintiffs, awarding each of the three children

$5 million for past loss of companionship from the time of their father's death to the date of the verdict, and $5 million for future loss of companionship with their father. The jury found Anaya was not negligent in connection with the accident, but his employer, R.J. Noble was. It assigned fault between General Equipment and R.J. Noble at 70% and 30%, respectively. Accordingly, the court entered judgment in favor of Plaintiffs and against General Equipment for a total of $20,250,000 — $6,750,000 per child.

General Equipment moved for a new trial and for judgment notwithstanding the verdict. The court denied both motions. General Equipment appealed from both the final judgment and from the order denying in part its motion to tax costs.[4]

DISCUSSION

I. General Equipment Does Not Demonstrate The Trial Court Abused Its Discretion By Excluding Evidence of Industry Custom and Practice Violating California Law

General Equipment contends the trial court committed reversible error by excluding evidence of custom and practice evidence inconsistent with applicable Cal-OSHA regulations. It argues (1) with respect to Plaintiffs' negligence per se claim, the evidence should have been admitted because our Supreme Court's ruling in *Elsner v. Uveges* (2004) 34 Cal.4th 915 (*Elsner*) is inapplicable; and (2) even if custom and practice evidence is irrelevant to a negligence per se claim, it was relevant to the

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[4] General Equipment fails to raise any argument in its brief challenging the costs award, however. We therefore treat it as abandoned. (*101 Holdings, Ltd. v. City of Rohnert Park* (2006) 136 Cal.App.4th 186, 193, fn. 3.)

Plaintiffs' products liability claim. We review the trial court's evidentiary ruling for abuse of discretion. (*Diamond v. Reshko* (2015) 239 Cal.App.4th 828, 841-842.) We discern none.

General Equipment's argument, frankly, is difficult to decipher or evaluate because it does not specify what evidence of industry custom and practice it would have introduced and for what purpose. Nor have we been directed to anything in the record indicating General Equipment made any proffer to the trial court of custom and practice evidence it sought to admit or its purpose in doing so. (*See In re Mark C.* (1992) 7 Cal.App.4th 433, 444 ["Failure to make an adequate offer of proof precludes consideration of the alleged error on appeal."].) Moreover, as the trial court noted in its order denying General Equipment's motion for judgment notwithstanding the verdict and motion for new trial, the jury was not asked to nor did it make a finding on whether any Cal-OSHA regulations had been violated.

In any event, we are not persuaded by General Equipment's attempt to escape Labor Code section 6304.5, as interpreted in *Elsner, supra,* 34 Cal.4th 915. In interpreting amendments to Labor Code section 6304.5, our Supreme Court held "the amendments restore the common law rule and allow use of Cal-OSHA provisions to establish standards and duties of care in negligence actions against private third parties." (*Id.* at p. 924.)[5] The Supreme Court further explained that "[u]nder the

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[5] Labor Code section 6304.5 had been amended in 1999 (before the trial in *Elsner*) to allow Cal-OSHA regulations to be used in the same way as statutes for purposes of establishing a presumption of negligence. (*Elsner, supra*, 34 Cal.4th at pp. 923-924.) But because the accident giving rise to *Elsner* took place before the amendment, and because the amendment was not retroactive, the Supreme Court held it was error in that case to

[amended] version of section 6304.5, this rule would require the exclusion of custom and practice testimony at odds with Cal-OSHA provisions." (*Id.* at p. 940.)

General Equipment contends *Elsner*'s prohibition of custom and practice evidence in conflict with Cal-OSHA requirements does not apply where, as here, Plaintiffs plead products liability and negligence theories, not just a negligence per se cause of action. But General Equipment cannot point to any language in *Elsner* limiting the general prohibition of custom and practice testimony at odds with Cal-OSHA regulations to negligence per se claims as opposed to other negligence theories. And there is no reason to impose such a limitation.

General Equipment further argues the four Cal-OSHA regulations Plaintiffs relied on did not apply to General Equipment because it was never Anaya's employer; therefore, it posits, *Elsner* is inapplicable. But the question is not whether the regulations could be used to impose direct liability on General Equipment. Rather, the issue addressed by the trial court was whether anyone (including a third party alleged tortfeasor) can introduce evidence of custom and practice that directly contradicts a Cal-OSHA regulation as a means of establishing a duty or standard of care. *Elsner* holds they cannot. (*Elsner, supra*, 34 Cal.4th at p. 940 ["[Labor Code section 6304.5] would require the exclusion of custom and practice testimony at odds with Cal-OSHA provisions."].)

Moreover, we note that contrary to General Equipment's assertion, the court did not preclude introduction of *all* evidence of industry custom and practice, but only evidence of custom and

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rely on Cal-OSHA regulations to establish a standard or duty of care. (*Id*. at p. 924.)

practice inconsistent with California law. In any event, with respect to the only claim decided by the jury – strict products liability – the court would have been within its discretion to exclude all custom and practice evidence, not just custom and practice evidence which contradicts Cal-OSHA, because it is generally irrelevant in a products liability action. In *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21 (*Kim*), our Supreme Court held evidence of industry practice may be introduced in a strict products liability action, but only for specific limited purposes. The Court explained, "under strict products liability law, a product may contain precisely the same safety features as other products on the market and still be defective. But even though evidence of industry custom and practice cannot be dispositive of the issue, it may nevertheless be relevant to . . . considering the feasibility and cost of alternative designs." (*Kim, supra*, 6 Cal.5th at p. 26.) Because the custom and practice evidence in *Kim* was admitted for the limited purpose of feasibility and cost, the court affirmed the judgment. (*Ibid.*)

Not only does General Equipment fail to tell us with any specificity what evidence of industry custom and practice it believes was improperly excluded, it does not link that evidence to any relevant strict products liability inquiry, such as "the jury's evaluation of whether the product is as safely designed as it should be, considering the feasibility and cost of alternative designs." (*Kim, supra,* 6 Cal.5th at p. 26.) As our Supreme Court stated, it is incumbent upon the proponent of such evidence to do so: "We stress that while industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the

case . . . . First, the party seeking admission of such evidence must establish its relevance to at least one of the elements of the risk-benefit test, either causation or the *Barker* factors.[6] (Evid. Code, § 351.) The evidence is relevant to the *Barker* inquiry if it sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.' [Citation.] Whether the evidence serves this purpose depends on whether, under the circumstances of the case, it is reasonable to conclude that other manufacturers' choices . . . 'reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.' If the proponent of the evidence establishes a sufficient basis for drawing such a conclusion, the evidence is admissible, even though one side or the other may argue it is entitled to little weight because industry participants have weighed the relevant considerations incorrectly. The evidence may not, however, be introduced simply for the purpose of showing the manufacturer was acting no worse than its competitors. [¶] Next, even if the party seeking admission of such evidence meets this threshold burden, the trial court retains the discretion to exclude this evidence if 'its probative value is substantially outweighed by the probability that its admission will' either 'necessitate undue

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[6] The "*Barker* factors" are: "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 431.)

consumption of time' or 'create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.) And finally, if the party opposing admission of this evidence makes a timely request, the trial court must issue a jury instruction that explains how this evidence may and may not be considered under the risk-benefit test. (Evid. Code, § 355 ['When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.'].)" (*Id.* at pp. 37-38.) General Equipment fails to show it even attempted to meet – let alone did meet – its threshold burden to admit industry custom and practice evidence.

The evidence introduced at trial established the safety features lacking on the machine, an e-lock or an interlock, were inexpensive and feasible. General Equipment's president, Jerry Kern, and field service technician, Trevor Moore, both testified an e-stop was feasible and would cost about $2,000. Moore also testified it would have been beneficial to have an e-stop and when asked whether an e-stop cable presented any safety disadvantages, Moore testified he "can't think of any." Petrovsky testified the cost of installing an interlock is minimal ($10 to $20) and he could not think of a good reason for the machine not to have an interlock device installed. Gerald Fangman, a General Equipment salesman involved in the sale of the machine to R.J. Noble, testified he was aware the design posed a risk of death to the worker.

Thus, we conclude the trial court did not abuse its discretion and General Equipment suffered no prejudice.

II. The Trial Court Did Not Abuse Its Discretion By Excluding Evidence of Anaya's Criminal History

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "'[T]he trial court is vested with broad discretion in ruling on the admissibility of evidence, and its ruling will be upset only upon a clear showing that it exceeded the bounds of reason.'" (*Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022, 1040.)

The trial court granted Plaintiffs' motion in limine to preclude references to Anaya's criminal history or gang affiliation. At the hearing, the court stated: "What's important here is the . . . relationship that his family had with him. And unless there's testimony that he was [taking] his kids along with him while he was committing his crimes, I don't think it's relevant." Thus, the court concluded "in light of the fact that Plaintiff is waiving financial support, I am going to grant this motion in limine. However, if during the course of testimony it does become clear that this evidence does have some bearing on [the] relationship between the decedent and the family members, we'll revisit this." The court clarified: "You can ask them about – from their perspective what their relationship with [their] dad was and why do they think that and what is this based on, and then you can [ask] questions around that."

Plaintiffs sought only noneconomic damages at trial. Noneconomic damages in a wrongful death action are intended to compensate the decedent's family members for the "love,

companionship, comfort, affection, society, solace, or moral support" they lost as a result of their loved one's death. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614 (*Rufo*).) General Equipment contends it should have been permitted to introduce evidence of Anaya's convictions and gang affiliations to demonstrate Anaya made choices that prevented him from participating in his children's lives. But General Equipment was permitted to, and did, cross examine witnesses concerning the amount of time Anaya spent with his children. And, in closing argument, General Equipment's counsel argued "[i]t's a simple fact Mr. Anaya was absent for most of [his] children's [lives]. Up to about a year before the accident, he just wasn't there. I'm not saying it's not – that it's good bad or indifferent. It's just a fact that he wasn't there. He didn't have much of a relationship [because] he wasn't there." The reasons for Anaya's physical absences from the children's lives, however, are of only slight relevance to the issue of how much love and moral support the children received from their father, and the trial court was within the bounds of its discretion to conclude any probative value was outweighed by potential prejudice. (*See Carr v. Pacific Tel. Co.* (1972) 26 Cal.App.3d 537, 545 [in a wrongful death action "nonsupport of his family during the 1967 incarceration could have been proved without reference to the deceased's conviction and sentence by merely inquiring as to whether he supported his dependents during 1967-1968 . . . the details are of such slight value and such great prejudicial effect that they could likely distract the jury from the main issues."].)

General Equipment's reliance on *Benwell v. Dean* (1967) 249 Cal.App.2d 345 is misplaced. There, the court stated "evidence of the nature of the personal relationship that existed

between the decedent and the beneficiaries of a wrongful death action has a bearing on the compensation for loss of society, comfort and protection, and is therefore ordinarily admissible in such an action" and the "defendant should properly be able to rebut or negate such evidence." (*Benwell, supra*, 249 Cal.App.2d at p. 350.) General Equipment was permitted to do just that by cross examining witnesses about the amount of time Anaya spent with his children. The trial judge had discretion to conclude the reason for Anaya's absences from his children's lives (i.e. incarcerations) as opposed to the fact of those absences was only slightly relevant to evaluating the relationship between Anaya and his children. And, it was not an abuse of discretion to conclude that even if there was slight probative value, it would have been outweighed by its prejudicial effect.

Nelson v. County of Los Angeles (2003) 113 Cal.App.4th 783 is distinguishable. There, the court reversed the jury's award of $2 million for noneconomic damages as excessive where the undisputed evidence demonstrated the decedent had not seen either of his parents at any time during the 20 years preceding his death. (*Nelson, supra*, 113 Cal.App.4th at pp. 793-794.) Plaintiffs, decedent's parents, did not know his address or telephone number, did not know he had been incarcerated for substantial periods of time, did not know about his medical problems, and did not know about his drug addiction. (*Id*. at p. 793.) Here, General Equipment was permitted to establish Anaya's absences, and probe the extent of the children's relationships with their father.

In any event, on cross-examination Johnny volunteered that his father was incarcerated when he was young. Accordingly, it is not reasonably probable that a result more favorable to

General Equipment would have been reached if it had been permitted to present more evidence concerning Anaya's incarcerations. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 (*Cassim*).)

III. The Jury's Award Was Not Excessive As a Matter of Law

"In a wrongful death action, the jury may award such damages as may be just under all the circumstances of the case." (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 198 (*Soto*).) "We have very narrow appellate review of the jury's determination of the amount of compensation for [the plaintiff's] loss of comfort and society." (*Rufo, supra*, 86 Cal.App.4th at p. 614.) "'The jury "is entrusted with vast discretion in determining the amount of damages to be awarded," and a reviewing court will reverse or reduce the award only "'where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice . . .'"' (*Soto, su*pra, 239 Cal.App.4th at p. 199 [internal citations omitted.].) We defer to the jury's discretion "in the absence of some other factor in the record, such as inflammatory evidence, misleading instructions or improper argument by counsel, that would suggest the jury relied upon improper considerations." (*Rufo, supra*, 86 Cal.App.4th at p. 615.)

The trial court denied General Equipment's motion for new trial, stating "there is substantial evidence to support the jury's verdict in this case, including the amount of damages awarded." Regarding damages, the court explained "Anaya's friends and family, including his three children, testified about what his loss means to the children. . . . Johnny Anaya testified about the time

he spent with his father and how his father meant the world to him. Delila Anaya testified about her relationship with her father and how the two of them would battle about who loved the other more. Johnny and Delila both testified that they had telephone contact with their father before 2012, but that since 2012 they had been in personal contact with their father on a regular basis and engaged in activities like going to church, dining out, doing homework, talking about life issues[,] enjoying the outdoors and visiting amusement parks. Ezikiel Anaya, 11 years old [at the time of trial], testified his father meant a lot to him. . . ."

Finally, General Equipment contends the jury's award of $30 million in noneconomic damages was excessive as a matter of law. It premises its argument on four statements made by Plaintiffs' counsel in closing argument, which it contends "excite[d] the jury's passion and prejudice against General Equipment" and "inject[ed] improper considerations into their deliberations." Its counsel objected only to the last of the statements. The first statement allegedly "improperly invited an award designed to ensure community safety" because counsel argued the jury sets "standards for safety, not them, not some third party, not some paid expert. It's up to you to decide what's safe in your community . . ." The other three statements referenced figures for the jury to consider to purportedly "'anchor' the award to those irrelevant numbers": (1) "Let's talk about the value that our society brings on things. Here's a guy [presumably referring to a photo of a professional baseball player] [who] throws a ball 100 miles an hour. [¶] This is his last, [sic] worth was two-hundred million. Why is he paid that much? Because he's valuable to his team in the same way Rolando was valuable to his family;" (2) "This is the aircraft that Mr. Petrovsky was

talking about that our government says we want our pilots to bail out [of] safely [before] a 200-million dollars [sic] aircraft goes down. That's the value our government puts on human life in this country;" and (3) "And they said give them a million dollars today?[7] Maybe 40 years ago that would be appropriate. That's 100 of [their] machines, the number that you should award is a hundred of their machines?" At this point, counsel for General Equipment said, "Well, your honor, this is improper argument." He did not seek a sidebar conference to explain what he thought was improper about the argument, or to ask for any admonition. The trial court overruled the objection.

In failing to object to the first three statements, General Equipment waived its contention the statements were improper. (*See Soto, supra,* 239 Cal.App.4th at 200 ["'Generally, an appellant forfeits the right to attack error by expressly or impliedly agreeing at trial to the procedure objected to on appeal.' [Citation.] By remaining silent during plaintiffs' counsel's zealous closing argument, [defendant] forfeited any right to challenge the remarks as improper or inflammatory at this juncture."]); *Neuman v. Bishop* (1976) 59 Cal.App.3d 451, 468 fn. 3 ["'Generally a claim of misconduct is entitled to no consideration

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[7] This statement was part of Plaintiffs' rebuttal closing and apparently was a reference to the defense closing argument. In the defense closing argument, counsel for General Equipment said "A reasonable amount of compensation is appropriate. I would agree with that. I would recommend to all of you, if you find liability and you get [to the] issue of damages, then you give each of the children a million dollars. That's not going to create any huge change in their life [sic], but will provide some compensation [$]500[,000] for the past, [$]500[,000] for the future. We think that's appropriate compensation for this."

on appeal unless the record shows a timely and proper objection and a request that the jury be admonished [Citations.] The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial . . . ."'].) The fourth statement to which General Equipment did object appears to simply question General Equipment's view of the appropriate damages figure, and make a largely incomprehensible factual comparison of the award plaintiffs' counsel was requesting ($45 million) to the cost of rock crushing machines (approximately $450,000 each). In any event, General Equipment's counsel's "improper argument" objection lacked specificity and did not include a request that the judge admonish the jury; therefore, we also deem that objection waived. (*See e.g. People v. Simon* (1989) 208 Cal.App.3d 841, 849 ["Failure to timely and specifically object is deemed a waiver (Evid. Code, § 353) which precludes raising the alleged misconduct on appeal."].)

Even if General Equipment did not waive its contention by failing to object, we are not persuaded General Equipment was prejudiced by any statement made during closing argument. As noted above, the damages award was supported by substantial evidence. The court expressly instructed the jury that what the parties say in closing argument is not evidence. Absent some contrary indication in the record, which is not present here, "we presume the jury follows its instructions [citations] 'and that its verdict reflects the legal limitations those instructions imposed' [citation]." (*Cassim, supra,* 33 Cal.4th at pp. 803-804.)

DISPOSITION

The judgment is affirmed. Plaintiffs are awarded their costs on appeal.

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CURREY, J.

WE CONCUR:

MANELLA, P. J.

WILLHITE, J.