



Cited

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## Estate of Ibarra v. Lilly

Court of Appeals of Oregon

July 27, 2011, Argued and Submitted; August 31, 2011, Filed

A146268

### Reporter

245 Ore. App. 294 \*; 263 P.3d 1053 \*\*; 2011 Ore. App. LEXIS 1210 \*\*\*

ESTATE OF MARIA REFUGIO IBARRA, by and through Leticia Ibarra, Personal Representative; JOSE IBARRA; CESAR IBARRA-ANDRADE; OTONIEL IBARRA, by and through Samantha Ibarra as guardian ad litem; and PEDRO IBARRA, Plaintiffs, and PEDRO ANTONIO IBARRA and OSCAR ORTEGA-MURILLO, Plaintiffs-Respondents, v. DENNIS MARK LILLY, individually, as authorized representative, registrant, dba M. Lilly Logging, an Oregon registered assumed business name, Defendant-Appellant.

**Prior History:** [\*\*\*1] Linn County Circuit Court. 091200. John A. McCormick, Judge.

**Disposition:** Reversed and remanded with instructions to enter a judgment that is consistent with the jury's verdict.

### Core Terms

non economic damages, economic damages, new trial, defendant's conduct, jury instructions, insignificant, deliberation, discharged, jury's, waived, motion for a new trial, granting a motion, fail to object, trial court, jury found, objected

**Counsel:** John T. Kaempf argued the cause for appellant. With him on the briefs were Brooksby Kaempf PC, Kristin L. Olson, and Bullivant Houser Bailey, PC.

Craig M. Hopkins argued the cause and filed the brief for respondents.

**Judges:** Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

### Opinion

[\*\*1053] [\*295] PER CURIAM

Plaintiffs were injured when their minivan collided with defendant's log truck. A jury found that defendant's negligence had caused the accident and returned a verdict that awarded economic damages to plaintiffs. The verdict, however, did not award any noneconomic damages. Plaintiffs objected, and the court instructed the jury to further deliberate on that point. After further deliberation, the jury found that defendant's conduct had caused plaintiffs "an insignificant injury" and, for that reason, did not award any noneconomic damages.<sup>1</sup> The court received the verdict and discharged the jury without objection from plaintiffs.

Two weeks later, plaintiffs moved for a new trial, arguing that the jury was required to award noneconomic damages as a matter of law. Specifically, plaintiffs argued that there was insufficient evidence to support the jury's determination that plaintiffs (one of whom required a metal rod in his leg because of the accident) had suffered "insignificant" injuries. The court agreed with plaintiffs, [\*\*1054] set aside the judgment, and ordered a new trial. ORCP 64 B(5) (former judgment may be set aside and a new trial granted for "[i]nsufficiency of the evidence to justify the verdict or other decision").

Defendant now appeals, arguing that, by failing to object to the verdict before the jury was discharged, plaintiffs waived the very objection that was later the basis for their motion for a new trial. Defendant is correct. We

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<sup>1</sup> Plaintiffs had requested, and the court had given, Uniform Civil Jury Instruction 70.19, which states, [\*\*\*2] in part:

"Your verdict awards economic damages, but does not award noneconomic damages. This is lawful only if you find that the defendant's conduct caused the plaintiff an insignificant injury. If you find that the defendant's conduct caused the plaintiff a substantial injury, however, then you must award a reasonable amount of noneconomic damages."

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recently addressed the same [\*\*\*3] issue in Anokhin v. Rubio, 244 Ore. App. 133, 134, P.3d (2011), another case in which a jury initially awarded economic damages but no noneconomic damages. The plaintiff objected to the verdict, and the court instructed the jury that it could not award economic damages unless it also awarded noneconomic damages. After further [\*296] deliberation, the jury awarded the plaintiff \$1 in noneconomic damages. The plaintiff did not object at that point, and the court received the verdict and discharged the jury. The plaintiff subsequently filed a motion for a new trial, arguing that the verdict was not supported by the evidence; the trial court agreed and granted the motion. We reversed:

""[B]y failing to object when the jury is present, a party waives objection to the jury's failure to accompany an award of economic damages with an award of noneconomic damages.' Building Structures, Inc. v. Young, 328 Ore. 100, 108, 968 P.2d 1287 (1998). 'Because defendants waived their objection to the verdict, they are not permitted to rely later on the same objection in seeking a new trial.' Id. at 114. It follows that the trial court erred in granting the motion for a new trial."

244 Ore. App. at 134. The same [\*\*\*4] is true here.

Reversed and remanded with instructions to enter a judgment that is consistent with the jury's verdict.

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