

I have some great news to share with my fellow plaintiffs lawyers from a recent Ninth Circuit appellate victory in a Federal Tort Claim Act motor vehicle negligence case. Before I say anything else, though, I want to give a HUGE shout out to trial counsel, Ramin Younessi, for his incredible trial victory of approx \$22M (less 15% for comparative negligence), and for trusting me with preserving it on appeal. Bottom line: we were able to not only hold onto the entire judgment, but also cross-appealed and obtained limited reversal/remand for errors that will result in recovery of *increased damages*.

For those who prefer not to read lengthy emails, here's a summary of the ruling (*Martinez-Pineda v. USA* , 2022 WL 17844680, case #: 21-55143):

- Noneconomic damages: affirmed district court's award of **\$1000/day non-economic damages for loss of consortium** to the wife of injured plaintiff (who became quadriplegic as a result of the accident); found district court erred in calculating loss of consortium on husband's post-injury life expectancy, not pre-injury. Accordingly, reversed/remanded for limited fact-finding to determine husband's pre-injury life expectancy and re-calculate wife's loss-of-consortium damages in light thereof.
- Future medical damages/reversionary trust/attorney fees: reversed trial court's decision to place future medical damages (and associated attorneys fees) into reversionary trust, instead ordering payment of all damages in lump sum
- Heightened standard of care:
 - affirmed lower court's factual determination that the movement of a military convoy of light armored vehicles at night on a public highway is inherently dangerous, and therefore, warranted application of the heightened "extreme caution" standard of care
 - affirmed lower court's reliance on military policies to establish the standard of reasonable care in FTCA case, finding the policies reflect California common law duty to exercise care in driving
- Discretionary function exception to Federal Tort Claim Act: rejected government's attempt to apply the discretionary function exception based on "public safety" policy concerns and affirmed lower court's determination that the government's conduct falls outside the scope of the discretionary function exception
- Prop 213/Civil Code section 3333.4:
 - Affirmed lower court's determination that plaintiff/wife was not the "owner" of the vehicle involved in the collision within the meaning of California Civil Code section 3333.4 (Prop 213)'s bar on recovery of non-economic damages, notwithstanding evidence of plaintiff/wife's name on the vehicle title, registration, and purchase documentation, discovery admissions of owning the vehicle, and her prior filing of an administrative tort claim for property damage to the vehicle, and therefore applying/expanding *Savnik v. Hall* (1999) 74 Cal.App.4th 733
 - Affirmed lower court's strict application of Civil Code section 3333.4 (Prop 213) to bar noneconomic damages recovery by uninsured injured plaintiff/husband/driver. (not surprising, as this issue had been added to the cross-appeal as a Hail Mary)

For those who want more details, please continue.

Effect of the decision: Although the decision was issued in December, I waited until now to discuss it because I was not sure whether the Government was going to file a petition for

rehearing or en banc review, and I wanted to make sure that the decision was final. As of Monday, because the government did not file a petition, the case is final. However, it's not a "published" opinion and therefore is not binding as official "precedent." Nevertheless, it will be citable and considered "persuasive authority" for California state and federal courts.

Why I didn't seek publication: I didn't request the decision be published because (a) unpublished, the opinion was unlikely to warrant en banc review, (b) I didn't want to provide the government with ammunition to obtain en banc review based on expanding California law, especially because there were potential adverse issues we did not want to highlight for opposing counsel or to offer additional time for counsel to discover, and (c) in the Ninth Circuit, a request for publication restarts the clock for a petition for rehearing/review, and I did not want to delay my client's ability to move forward and collect the damages his family desperately needs, since the accident occurred almost 10 years ago.

Very short factual background: Bench trial. Plaintiff Martinez was driving home from work around midnight on SR 62, when he collided into the rear of an unmarked, camouflaged, 26,000 pound Marine Corps LAV that was moving at 35 miles per hour. At that point, the Marine Corps convoy had fallen apart, and the LAV into which Martinez collided was trailing another LAV that was towing a broken LAV. (It was a mess.) Martinez's Kia Forte, traveling at 65-75 MPH at the time of collision, didn't stand a chance, and Martinez became quadriplegic. Martinez had gotten married a year earlier. His wife, plaintiff Altaiba, a 21-yr old recent immigrant who barely spoke English, and was 7.5 months pregnant, became Martinez's caretaker. Making this case even more tragic was Martinez's auto insurance had temporarily lapsed at the time of the accident, rendering him ineligible for noneconomic damages under Prop 213 (Cal Civ. Code section 3333.4). Martinez sued for negligence; Altaiba for loss of consortium.

District Court's ruling: The court assigned 75% liability on the government for failing to comply with military policies requiring use reflective tape or warning signs on the subject LAV, which traveled at 35 MPH on the sparsely populated so-called "highway of death" at midnight with overly dim tail lights. It assigned an additional 10% liability on the government for independent acts of negligence, including: deciding to start the convoy sometime between 9:00 and 10:00 a.m. rather than at dawn; traveling for more than 15 hours; having a "fragmented" convoy as a result of "predictable" vehicle breakdowns; and failing to suspend the road march after nightfall. The court assigned 25% liability to Martinez for failing to take any precautionary steps to avoid driving into the LAV, which it reduced to 15% unless and until the appellate court reversed its decision regarding the discretionary function exception. The court had previously granted partial summary judgment barring Martinez from recovering non-economic damages. Over plaintiffs' (and counsel's) objections, the court ordered Martinez's medical damages be placed in a reversionary trust to be paid on a schedule over the course of Martinez's post-injury expected average lifespan. To avoid violating inadvertently violating FTCA's cap on attorney fees (e.g., if Martinez predeceased his receipt of full damages), the court included the percentage of attorney fees connected to medical damages in the reversionary trust.

Overview of government's appellate claims:

1. The government challenged the court's application of the heightened standard of review for inherently dangerous activities rather than the basic reasonably prudent person standard. It reasoned the court improperly considered the military nature of the vehicle convoy and vehicle instead of the civilian similar circumstances equivalent, as Federal Tort Claim Act necessitates. Under the similar circumstances analysis, the government claimed the LAV did not satisfy California Vehicle Code dimensions for an oversized or

overweight vehicle, so an ordinary standard of care should have been applied. It argued military guidelines are not determinative of the standard of reasonable care.

2. The government also challenged the court's findings of 7.5% (it did not challenge 2.5% of the award) additional negligence based on acts it claimed were protected under the discretionary function exception. It claimed both prongs of the test were satisfied: (a) the court's additional negligence findings failed to prescribe a mandatory directive (thus making the acts discretionary); and (b) the execution of a military road march on a public highway is susceptible to broad policy considerations related to "national security and public safety."
3. Because of the lack of insurance at the time of the accident, under Prop 213/Civ. Code section 3333.4, the "owner" of the Kia Forte was barred from recovering any non-economic damages. The government claimed the court erred in concluding Altaiba did not own the vehicle within the meaning of that statute, relying on evidence that the vehicle was purchased by both of them and all of the purchase documentation was signed by both, the plaintiffs jointly obtained the car loan, and the vehicle was registered in the name of both plaintiffs, Altaiba filed a claim for property damage to the vehicle, and she admitted she was an owner in a discovery response. The government asserted the court erred in permitting Altaiba to withdraw her discovery admission that she owned the vehicle, and the approx \$9M loss of consortium award to Martinez's wife was reversible error.

Overview of plaintiffs' response to government's appellate claims:

1. The court's factual findings that the military convoy constituted an "inherently dangerous" activity was supported by the record. Additionally, the government incorrectly asserts the court's findings were predicated solely upon the Marines' failure to follow their own rules and regulations. More, under a private person/ similar circumstances analogy, even if the subject LAV was not itself "oversized," it was acting in the capacity of a pilot car, which under CA law, required certain signage.
2. The court correctly found the discretionary function exception inapplicable because the various violations were each tied to mandatory language contained in the Marines' regulations/policies. But even if the court disagrees, any discretion was not tied to "national security." At the time of the accident, the LAV was participating in an administrative, non-combat, non-tactical transport over non-hostile, civilian, United States roads.
3. "Ownership" within the meaning of section 3333.4 is a factual question to be determined in consideration of the totality of the circumstances. Here, the record showed Altaiba had recently come from a male dominated country (Jordan) in which a wife signs papers when her husband tells her to do so; she couldn't read any of the papers she signed; she did not have a driver's license and had never driven a vehicle; she was explicitly excluded from the insurance policy as a non-driver; and her discovery admission that she "owned" the vehicle was not an admission of ownership within the meaning of 3333.4, and boilerplate language preceding her answer objected that the RFA called for a legal conclusion, and her answers were made subject to and without waiving the objection.

Overview of plaintiffs' cross-appellate claims:

1. The court erred in placing Martinez's medical damages and associated attorney fees in a reversionary trust. There is no authority in California law outside of the medical malpractice context for doing so, and in the jurisdictions that have permitted it, there were protections in place so that neither side received a windfall, all of which were

disregarded here. Instead, all of the damages should be paid in lump sum reduced to present value.

2. The court erred in calculating Altaiba's loss of consortium damages using Martinez's post- rather than pre-injury life expectancy.
3. The court erred in denying Martinez entitlement to non-economic damages. Based on language in cases interpreting the statute, Civil Code section 3333.4 carries a scienter requirement, which was lacking here because Martinez was unaware he was uninsured at the time of the accident. Alternatively, the court should certify the question of the scienter requirement to the California Supreme Court, since the issue is unsettled under California law.

Overview of the government's response to cross-appellate claims:

1. The government claimed in the absence of a reversionary trust, if Martinez predeceases his average life expectancy under which the medical damages were calculated, his family would receive a windfall. It cited a bunch of cases in the med mal context and other jurisdictions that were distinguishable.
2. The government argued that the court was not under any obligation to tie its non-economic damages of \$1000/day to a specific life expectancy at all, let alone Martinez's pre-injury life expectancy. Further, Martinez's pre-injury life expectancy is an unresolved disputed factual issue. It also argued the court did not clearly err in awarding nearly \$9M for noneconomic damages, as other examples of loss of consortium verdicts were significantly lower.
3. Arguing the plain language of section 3333.4 does not contain a scienter requirement, the government contended under a strict application of the statute, Martinez was properly barred from non-economic damages.

Trial Judge: Judge Keller, Central District of CA

Appellate Judges: Judge Wardlaw, Judge Fletcher, and Judge Kennelly (sitting by designation from Northern Dist. of Illinois)

Some additional reflections:

This case had a host of problems but really sympathetic plaintiffs. Judge Keller did seem to bend over backwards to try to find Altaiba was not the owner of the vehicle, and was entitled to non-economic damages. It looks like his huge non-economic damages award was also a bit inflated to compensate for the fact that Martinez was unable to recover any, though the judge never said that and the record definitely supports such a large recovery. It is so frustrating that Martinez would have received an additional approx \$15M in non-economic damages had he not been barred by section 3333.4. His policy had lapsed two months prior to the accident. In any event, this decision can be cited when trying to justify significant loss of consortium damages. Case law is all over the place with such damages, and it helps to have some good examples to offer judges of the high end.

Understanding the gut wrenching facts in this case, the government's opening brief was a masterpiece at avoiding them. They raised issues of law, divorced from the ample evidence of pain and suffering the plaintiffs have and will continue to endure. My goal from the outset was to humanize the case in our briefs (while not crossing the line of focusing on legally irrelevant and purely sympathetic facts).

The appellate judges all appear to have been Clinton appointees and extremely sympathetic to our clients. I know some judges tend to be sympathetic to government entities. I like to believe this victory would be the result in any panel, but that's probably not the case, and

it's entirely the luck of the draw which judges constitute the panel for any particular case. I didn't know the panel when drafting the briefs though.

I am convinced implicit bias had a significant role in the government attorney's request for, and the court's decision to place Martinez's future medical damages into a reversionary trust. One of the justifications offered by both was the concern that in the absence of periodic payments, Martinez would risk squandering the lump sum and not have sufficient funds for his future care. There was no factual basis for this concern whatsoever. Though he lost control over his body, there was no evidence of any mental impairment. There was no evidence that he had ever struggled with gambling or drugs or anything that might suggest the money would be spent on anything other than his future medical care, the estimated cost of which was significant. In addition to ignoring what Martinez wanted for himself, the government's argument implied that Martinez was neither sufficiently competent or trustworthy to protect and manage a lump sum judgment over the course of his life, with whatever financial advisors and professionals he chooses. I took a bit of a risk in calling out the government and trial judge for this paternalistic and condescending reasoning, but I think we have an obligation to our profession to shine a light on bias however and whenever we encounter it.