Court of Appeal, Second District, Division 5, California.

GOLDX FINANCIAL SERVICES, INC., Plaintiff and Respondent,
v.
BANK OF AMERICA, Defendant and Appellant.

Nos. B144237, NC024708.

Oct. 11, 2001.

Appeal from a judgment of the Superior Court of Los Angeles County. James Wright, Judge. Affirmed.

Ivanjack & Lambirth, Janet M. Catmull, Holly A. Hayes, Timothy A. Lambirth and Joseph H. Catmull , for defendant and appellant.
The Morris Law Firm and Aaron P. Morris, for plaintiff and respondent.
GRIGNON, Acting P.J.
***1** Defendant and appellant Bank of America, N.A. appeals from a judgment after a jury trial in favor of plaintiff and respondent **GoldX** Financial Services, Inc. in this action for negligence and breach of the implied covenant of good faith and fair dealing. Bank of America contends: (1) the evidence was insufficient to support the award of damages; (2) the award of damages should be reduced to account for **GoldX's** comparative fault; and (3) the trial court erred in failing to sustain its objection to **GoldX's** improper argument to the jury. We affirm.

PROCEDURAL BACKGROUND

On November 25, 1998, **GoldX** brought this action against Bank of America, [FN1] seeking recovery for business losses suffered as a result of Bank of America's sudden closure of **GoldX's** checking accounts at two Bank of America branches. **GoldX** asserted causes of action for trade libel, conversion, breach of oral and written contract, breach of the implied covenant of good faith and fair dealing, and negligence. The case proceeded to jury trial. Nonsuit was granted in favor of Bank of America on the causes of action for trade libel and conversion, and the case was submitted to the jury on the remaining causes of action. By special verdict, the jury concluded Bank of America did not breach its contract with **GoldX**, but did breach the implied covenant of good faith and fair dealing, and was negligent. The jury found **GoldX's** total damages to be $227,162. The jury also found **GoldX** was negligent, and attributed 40 percent of the " negligence, fault, and wrongful conduct" which caused **GoldX's** damages to **GoldX**, and 60 percent to Bank of America. The trial court entered judgment in favor of **GoldX** in the amount of $227,162. Bank of America moved to set aside and vacate the judgment, on the basis that the amount awarded **GoldX** should have been reduced by 40 percent to account for **GoldX's** comparative fault. Bank of America also moved for judgment notwithstanding the verdict, on the basis that the evidence was insufficient to prove **GoldX** suffered any damages, and Bank of America had proven the defense of unclean hands as a matter of law. Both motions were denied. Judgment was entered in favor of **GoldX** in the amount of $227,162. Bank of America filed a timely notice of appeal.

FN1. **GoldX** also sued Bank of America employee Mark Campbell. Campbell successfully moved for summary judgment and is not a party to this appeal.

FACTS

GoldX performs various financial services for its customers, including payday advance loans. When a customer seeks a payday advance loan, that customer writes **GoldX** a check, not exceeding $300, which is postdated to the customer's next payday. In return for that check, **GoldX** gives the customer an immediately payable check for 85 percent of the amount of the customer's check. The remaining 15 percent is **GoldX's** fee.

In order to avoid delays associated with depositing customers' checks from different banks, **GoldX** opened checking accounts at each local bank at which its customers had accounts. Included among its many accounts were accounts at the Inglewood and La Tijera branches of Bank of America. Bank of America discovered that **GoldX** was in the payday advance business and chose to discontinue its relationship with **GoldX**. On September 30, 1998, Bank of America closed **GoldX's** Inglewood and La Tijera accounts without warning, by withdrawing **GoldX's** entire balance from the accounts. As there was no money remaining in the accounts, when **GoldX** customers attempted to deposit checks written on those accounts, they were returned for insufficient funds. On October 6, 1998, Bank of America credited **GoldX's** funds to its accounts. Bank of America subsequently closed the accounts with sufficient notice to **GoldX**.

*2 **GoldX** claimed Bank of America was responsible for the business losses it suffered as a result of the six-day closure of its accounts.[FN2] **GoldX** asserted that 32 checks were returned by Bank of America and Washington Mutual [FN3] as a direct result of Bank of America's closure of the accounts on September 30, 1998. Additionally, **GoldX's** owner, testified that approximately one-third of **GoldX's** customers will immediately cash **GoldX's** checks at the bank, rather than attempt to deposit them. During the six-day period of closure, if a customer tried to cash a check written on one of those accounts, the check would simply have been dishonored by the teller and returned to the customer, without **GoldX** ever being informed the check had been rejected. Therefore, in addition to the 32 customers whose **GoldX** checks had been returned, an unknown number of **GoldX** customers (perhaps as many as 16) received checks that were dishonored. Altieri testified that **GoldX** lost nearly all of the customers who received the returned checks. The loss of customers was not immediate. Sometimes a customer who had given **GoldX** a postdated check would be unable to pay that check when it became due. Under those circumstances, the customer would obtain a second payday advance loan to cover the first. Customers caught in this "cycle" of loans would be unable to leave **GoldX** until they had paid off their obligation. Although Altieri conceded that **GoldX** was able to retain a few of the customers, he testified that "the vast majority of them within a few months stopped using our services." **GoldX** used the figure of 32 lost customers in its damage calculations, believing it to be a conservative estimate of the number of customers it lost as a result of Bank of America's conduct, on the theory that the few customers who remained with **GoldX** despite receiving returned checks were offset by the unknown customers who were lost because their **GoldX** checks were dishonored.

FN2. While it is not clear on what basis the jury concluded **GoldX** was 40 percent responsible for its damages, Bank of America introduced evidence that **GoldX** had telephoned Bank of America's customer service line and, using its customers' social security numbers and mothers' maiden names, impersonated the customers in order to obtain balance information and, in at least one instance, reverse a stop payment ordered on a check payable to **GoldX**. Bank of America asserted this conduct justified its closure of **GoldX's** accounts and also independently explained **GoldX's** loss of customers.

FN3. **GoldX** had intended to cover its Washington Mutual checks with some of the funds in its Bank of America accounts. When Bank of America withdrew the money from the accounts without giving it to **GoldX**, **GoldX** did not have the

necessary funds to deposit into its Washington Mutual account.

GoldX hired Stan Henslee, a certified public accountant, to calculate its lost profits as a result of the 32 lost customers. Henslee determined that the average number of transactions per **GoldX** customer at the two **GoldX** stores affected by the account closure was 20.95. Henslee also determined the average fee per transaction at these stores was $37.79. Therefore, Henslee determined that the lost fees from the 32 lost customers would be 32 x 20.95 x $37.79 = $25,334. Henslee reduced this number by 5.83 percent for bad debts, to reach a net loss of $23,857. Henslee then attempted to determine the number of lost customers due to bad word of mouth from the initial 32 lost customers. He reviewed reports from the Small Business Administration and Better Business Bureau and concluded that a conservative estimate would be ten lost potential customers for every dissatisfied customer. Using the same figures for average transactions, average fee per transaction, and bad debt, Henslee determined those 320 lost potential customers would have been worth $238,574. He then subtracted $35,270 to account for the extra cost to **GoldX** in labor to service those 320 new customers, resulting in a figure of $203,304 in lost profits associated with these potential customers. Adding his two figures together, Henslee concluded Bank of America's conduct caused **GoldX** $227,162 [FN4] in damages. This was the precise amount of damages the jury awarded.

FN4. The $1 error was Henslee's; it went unnoticed at trial.

***3** Henslee also introduced evidence of the lost profits from one of the two affected stores by comparing its monthly transactions with those from a similar, unaffected store. This evidence was introduced to show that Henslee's calculation was a reasonable estimate of the loss to **GoldX.**[FN5]

FN5. Further, Henslee introduced evidence that **GoldX** lost an additional $2 million, based on the decreased value of **GoldX** as a going concern. It is clear that the jury rejected this measure of damages.

DISCUSSION

Causation

Bank of America contends the award of damages must be reversed as the evidence was insufficient to show **GoldX** lost any customers. Bank of America points to its evidence that the 32 returned checks include some checks which should not be included, [FN6] and some of the identified customers who received returned checks continued to obtain payday loans from **GoldX**. Relying on *Erlich v. Etner* (1964) 224 Cal.App.2d 69, Bank of America contends **GoldX** was required to offer specific evidence that **GoldX's** customers stopped doing business with **GoldX** because of the returned checks. *Erlich* is distinguishable. That case concerned a cause of action for trade libel, in which a plaintiff must prove special damages. A trade libel plaintiff may not rely on proving a general decline in business arising from the falsehood, and must instead identify particular customers and the particular transactions of which the plaintiff was deprived as a result of the libel. (*Id.* at pp. 73-74.) But Bank of America obtained a nonsuit on **GoldX's** trade libel cause of action, and the case went to the jury on **GoldX's** causes of action for negligence and breach of the implied covenant of good faith and fair dealing. Neither of these causes of action specifically requires proof of lost customers.

FN6. For example, some of the 32 identified checks were duplicates, and one was written on a Bank of America account which was not improperly closed.

Relying on *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 301-302 and *S.C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 536, Bank of America contends the evidence is insufficient because **GoldX** failed in its burden to provide the "best evidence available" of lost profits. "Lost anticipated profits cannot be recovered if it is uncertain whether any profit would

have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. [Citation.] It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. [Citations.] The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits." (*S.C. Anderson, Inc. v. Bank of America, supra,* 24 Cal.App.4th at p. 536.) The plaintiff is "not required to establish the amount of its damages with absolute precision, [but is] only obliged to demonstrate its loss with reasonable certainty." (*Id.* at pp. 537-538.) Bank of America asserts this burden obligated **GoldX** to provide testimony from the lost customers, rather than to offer Altieri's testimony, expert testimony, and documentation of a decline in business. We disagree. The rule of *Warner Constr. Corp.* and *S.C. Anderson, Inc.* requires a plaintiff to produce evidence of underlying facts to support an award of lost profits, such as annual profitability before and after the defendant's misconduct, or expert analysis of the damages. (See *Warner Constr. Corp. v. City of Los Angeles, supra,* 2 Cal.3d at p. 302.) This is precisely the evidence produced by **GoldX**. The rule does not provide that the fact of lost profits cannot be proven by reasonable inferences. (See *S.C. Anderson, Inc. v. Bank of America, supra,* 24 Cal.App.4th at p. 539 & fn. 12.)

***4** Altieri repeatedly testified that most of the customers who received returned checks were lost by **GoldX** and further showed a loss of transactions at the affected store. Many of the customers' names were written on the returned checks. Causation may reasonably be inferred from this evidence. Bank of America attempted to refute this evidence with testimony of a few individuals who continued to do business with **GoldX** and argued that Altieri's testimony was impeached and without foundation. The jury disagreed. Altieri's testimony, if believed, was sufficient to support an award of damages in some amount. Bank of America's true contention is that the damages are excessive.

Excessive Damages

On appeal, Bank of America contends the award of damages must be reversed as unsupported by the evidence.

The contention that damages are excessive cannot be raised for the first time on appeal, but must be presented to the lower court on a motion for new trial. A motion for judgment notwithstanding the verdict is not sufficient. A court cannot grant judgment notwithstanding the verdict merely because damages were excessive. That issue must be raised by a motion for new trial. (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918-919; contra *Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 581, fn. 3.) "[W]here the ascertainment of the amount of damage requires resolution of conflicts in the evidence or depends on the credibility of witnesses, the award may not be challenged for inadequacy or excessiveness for the first time on appeal. To permit a party to do so without a motion for new trial would unnecessarily burden reviewing courts with issues which can and should be resolved at the trial court level." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.) Bank of America is therefore precluded from challenging the excessiveness of the award because of its failure to move for a new trial.

Comparative Fault

The jury calculated **GoldX's** damages at $227,162 on causes of action for breach of the implied covenant and negligence. The jury found **GoldX** to have been responsible for 40 percent of its damages, but the trial court did not reduce the award by 40 percent, reasoning that comparative fault does not apply to contract causes of action including breach of the implied covenant of good faith and fair dealing. Bank of America contends the trial court erred in failing to reduce the amount awarded by 40 percent.

Damages for breach of the implied covenant of good faith and fair dealing are generally limited to contract damages. (*Kransco v. American Empire*

Surplus Lines Ins. Co. (2000) 23 Cal.4th 390, 400.) Contractual breaches are generally excluded from comparative fault allocations. (*Id.* at pp. 402-403.) Bank of America concedes that damages awarded for breach of the implied covenant of good faith and fair dealing are exempt from comparative fault principles under current authority, but invites us to extend comparative fault to cases such as this, in which the breach of the implied covenant could be seen as the negligent performance of a contract for services. We decline to do so.

GoldX's Argument to the Jury

***5** In the course of **GoldX's** attorney's argument to the jury, Bank of America's counsel objected repeatedly. Bank of America contends the trial court erred in failing to sustain one of its objections, specifically, its objection to **GoldX's** argument inviting the jury to put itself in the shoes of **GoldX**.

"In evaluating claims of misconduct, '[e]ach case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control[ ] of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.' [Citation.]" (*Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 178.)

The context of the challenged objection is as follows:
"**[GoldX's** Counsel]: Bank of America is saying your safety means nothing, we can take your money with impunity, for no reason, and not give it back to you, and just because they say something is legal under federal law doesn't mean it's legal under the covenant of good faith and fair dealing. [¶] Maybe the federal law does say they can hold-
"[Bank of America's Counsel]: Objection, your Honor.
"The Court: Overruled.
"**[GoldX's** Counsel]: Maybe the federal rules say they can hold [**GoldX's** money for] five days. That doesn't mean it's reasonable to do so if you're disrupting the business to the extent they were disrupting this business. [¶] Put yourself in the shoes of **GoldX**. [¶] **GoldX** is a company, not an individual-
"[Bank of America's Counsel]: Objection, your Honor. [¶] The jury can't do that, put themselves in the shoes, the golden rule.
"The Court: Rephrase your statement, counsel.
"**[GoldX's** Counsel]: I'm not sure I can. [¶] Can I ask them to imagine themselves-[¶] I'm not asking for them to calculate damages, your Honor.
"The Court: Proceed.
"**[GoldX's** Counsel]: Imagine if you wrote all of your checks at the beginning of the month, wrote your checks-
"[Bank of America's Counsel]: Same objection.
"The Court: Counsel, I don't want any interruptions. [¶] You may continue.
"**[GoldX's** Counsel]: Thank you. [¶] Imagine you wrote your check to the power company, you wrote a check to the mortgage company, you wrote a check to your babysitter, your preschool, whatever, and you wake up and you find out that Bank of America or some other bank has just taken your money, think of the impact. [¶] Think of what Mr. Altieri went through. You're desperate, because all of a sudden these checks are coming back, you're feeling humiliated because all these checks are bouncing. You call your bank and you say why did you take my money, they say because we can. [¶] Then you get access to their internal documents, you find out they took your money because they don't like the job you have. I'm not exaggerating here. That's exactly what this document says.... The internal document says they closed it because they are in the payday advance business, the same thing as saying you don't like the job you have. [¶] Then you finally get so fed up with them you sue them. They come to court and they say forget what all of our internal documents say, we closed your account because you were asking our tellers to do something they are permitted to do, or as Bank of America is saying, we closed your account because an anonymous phone call came in that we never investigated that said you were up to something wrong. [¶] Would you be outraged? [¶] I think you should be outraged. [¶] What they did breaches the implied covenant of good faith and fair dealing."

*6 Bank of America contends **GoldX's** argument was improper in that it asked the jury to put itself in **GoldX's** shoes and award damages for the humiliation and outrage experienced by Altieri. We disagree. **GoldX** specifically indicated its argument was not directed to the issue of damages. Instead, **GoldX** was arguing that Bank of America breached the covenant of good faith and fair dealing by closing **GoldX's** account without notice, simply because of the business **GoldX** was in, without any regard for the effect this would have on **GoldX**.

Even if the trial court's overruling of the objection was error, it was harmless. The challenged statement was not a major theme of **GoldX's** argument to the jury, and took up less than 2 pages of 19 pages of a rebuttal argument, and followed an opening argument of 59 pages. Moreover, it is inconceivable that the jury was prejudiced by this argument to improperly award emotional distress damages to **GoldX**. The jury awarded **GoldX** the precise amount of economic damages calculated by Henslee; there were no damages for humiliation or emotional distress included in this figure.

DISPOSITION

The judgment is affirmed. Bank of America is to pay **GoldX's** costs on appeal.

NOT TO BE PUBLISHED.

We concur: ARMSTRONG, J. and WILLHITE, J. FN*

FN* Judge of the Superior Court for the Los Angeles Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Cal.App. 2 Dist.,2001.
Goldx Financial Services, Inc. v. Bank of America
Not Reported in Cal.Rptr.2d, 2001 WL 1219238 (Cal.App. 2 Dist.)

Briefs and Other Related Documents (Back to top)

• 2001 WL 34132411 (Appellate Brief) Appellant's Reply Brief of Bank of America, N.A. (Jul. 23, 2001) Original Image of this Document (PDF)
• 2001 WL 34148700 (Appellate Brief) Respondent's Opening Brief (Jun. 18, 2001) Original Image of this Document (PDF)
• B144237 (Docket) (Aug. 15, 2000)

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