2d Civil No. B141794

IN THE COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

KERMITH SONNIER, ET AL.

Plaintiffs and Respondents,

v.

FARMERS INSURANCE EXCHANGE, ET AL.

Defendants and Appellants.

Appeal from the Los Angeles County Superior Court
Honorable Victoria Gerrard Chaney, Judge
LASC Case No. BC 195046

APPELLANT'S OPENING BRIEF

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INTRODUCTION

In the trial court, this closely contested employment case was decided by a razor-thin margin. The balance was tipped by expert testimony that never should have been admitted. And once liability was finally determined, the jury's majority descended the slippery slope to unjustifiable and excessive compensatory and punitive damages, without evidence and based on contradictory findings.

Plaintiff Kermith Sonnier is an independent casualty claims adjuster brought in on an interim basis to adjust claims in the wake of the 1994 Northridge earthquake. In this case, he asserted that he was an employee of defendant Farmers Insurance Exchange ("the Exchange") and that the Exchange violated public policy in ultimately ending his work with it because of his complaints about claims-handling practices. Only after weeks of deliberations, with repeated questions about the critical issue of employment, was the jury able to reach a verdict, and then only by the slimmest of margins. The verdict, and the ensuing judgment, however, are on their face defective.

The verdict itself is fatally inconsistent on the issue of punitive-damage liability. It finds both that the Exchange acted with *no* malice (i.e., *without* a willfully conscious disregard of plaintiff's rights and *without* intending to cause plaintiff injury), but at the same time *with* oppression (i.e., *with* conscious disregard of plaintiff's rights) and *with* fraud (i.e., *with* intention to cause plaintiff injury).

Compounding that problem, although the trial court cut the jury's $1 million emotional distress damage award in half to $500,000 (thereby cutting the overall compensatory damages by over one-third), it refused to then do what the law — and a defendant's jury trial right — requires: to order a retrial of the amount of punitive damages in which *a jury* could

determine an appropriate punitive award in light of the plaintiff's reduced compensatory damages. These facial defects in the verdict and judgment are but the tip of the error iceberg in this case.

For example, the critical liability issue was infected with undoubtedly prejudicial error. Plaintiff's claim for wrongful termination of employment was admittedly hinged on his being the Exchange's employee. He was a "storm trooper" who went from catastrophe to catastrophe — a hurricane, a flood, or an oil spill — adjusting claims on behalf of various insurance carriers, all the while pursuing other business interests. Sonnier undoubtedly had a long gig with the Exchange, adjusting claims for some 3½ years (and earning handsome compensation by any standards), but he always knew that someday the work would end. Despite his sworn testimony that he was an independent contractor, he claimed at trial that he somehow had become the Exchange's long-term employee.

The linchpin to his claim for employment was the testimony, admitted over objection, of a supposed "expert," that his relationship was not that of an independent contractor. But that "expert" had never been designated to testify on that subject. And, no wonder. He lacked even ostensible expertise about who was or was not an employee.

That erroneously admitted testimony was the focus of the jury's deliberations. It teetered for days considering and reconsidering — agonizing over — the employment issue, specifically asking that the supposed expert's testimony be reread not once, but twice. And, yet, even with the prolonged deliberations on the improper evidence, Sonnier only managed to persuade the jury by the barest of constitutionally permissible margins, 9 to 3, of the threshold fact that he was the Exchange's employee.

But the error doesn't end there. Sonnier provided only the most cursory of testimony (amounting to just over a page of transcript) that he felt generic upset and humiliation. He provided *no* evidence of *any*

physical symptom, professional treatment, or interference with sleep, work, or any other activity. Yet, the jury awarded $1 million in emotional distress damages. The trial court properly found that amount outrageously excessive. But it only partially remedied the situation by leaving standing after remittitur a still excessive $500,000. The remitted half million dollars can't be justified by the bare words that one felt upset, angry, aggravated, or humiliated. Hurt feelings alone have never been adjudged to be worth what for a majority of Americans is a life's savings.

And, he provided *no* evidence — certainly not evidence that a reasonable jury could find clear and convincing — of either fraud or oppression. At most, he claimed that the Exchange was evasive and dissembling about its reasons for ceasing to use his services. But that is not fraud. And, he provided no evidence that those who made the decision not to use his services knew that he had an employment status or rights beyond his ostensible status as an independent contractor. Without such knowledge there can have been no *conscious* disregard of his rights and, hence, no oppression.

The errors both on the face of the verdict and judgment and in the evidence are manifest. This was a closely balanced case where those errors decidedly made the difference. For all the reasons that we explain in detail below, the judgment should be reversed.

STATEMENT OF FACTS AND OF THE CASE

This appeal is based on the following facts.[1]

A. Plaintiff's Training And Experience As A Claims Adjuster.

Plaintiff Kermith Sonnier was hired in 1979 by an independent catastrophe insurance claims adjusting firm, Crawford and Company. (RT 5703-5709.) Crawford trained him as an insurance claims adjuster and sent him from catastrophe to catastrophe across the United States — hurricanes, floods, oil spills — to adjust catastrophe insurance claims and to monitor remediation on behalf of the insurers that contracted for Crawford's services. (RT 5709-5720.) Sonnier became licensed as a general insurance adjuster in Texas and Oklahoma, and he gained experience adjusting claims and supervising others. (RT 5715-5721.)

In 1993, Sonnier left Crawford and joined Pilot & Associates, another independent insurance claims adjusting firm, to help establish a

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[1] The applicable standards of review guide our recital of the evidence. With two limited exceptions, this appeal does not attack the sufficiency of the evidence to support the verdict; rather, it challenges the verdict for prejudicial evidentiary and procedural error. The two sufficiency-of-the-evidence exceptions are: (1) whether the record contains clear and convincing evidence of oppression and fraud; and (2) whether the record contains evidence sufficient to support emotional distress damages and punitive damages in the amounts awarded.

While the evidence relating to the two sufficiency-of-the-evidence arguments is appropriately stated in the light most favorable to the judgment (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881), the evidence that relates to the evidentiary error is properly stated in a balanced fashion essential to the Court's determination whether the error prejudicially affected the verdict. (See *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 422-423 [standard of review necessary to determine impact of trial court error on jury requires consideration of evidence favorable to appealing party].)

new environmental cost control division and to assist with business development for its commercial claims adjusting services. (RT 5721-5724.) For Pilot's environmental-cost-control venture Sonnier was a salaried employee, with a $3,000 monthly salary, health insurance and benefits, and paid vacations. (RT 6945-6948.) Sonnier also worked as a catastrophe claims adjuster — a "storm trooper" — for Pilot's clients. As a catastrophe claims adjuster, however, Sonnier had no commitment as to where Pilot would send him, how long he would be asked to work, or whether he would be called at all. (RT 6950-6955; see RT 7610-7612.) Along with Pilot's other independent adjusters, he entered into a written agreement with Pilot for his claims adjusting services, agreeing with Pilot that he would work "when needed and when available," he would determine the number of hours required for the assigned tasks, he would hire the staff and equipment needed to prepare the reports required for his work, and he would maintain his own insurance. (Ex. 401, App. 578; RT 6950-6955.)

B. Sonnier's Assignment To Adjust Northridge Earthquake Claims On The Exchange's Behalf.

Pilot asked Sonnier to go to Southern California to work as an adjuster following the massive January 17, 1994 Northridge earthquake. (RT 5724-5726.) He arrived on January 20, and the very next morning began working as one of a number of independent commercial claims adjusters Pilot provided to adjust claims on behalf of the Exchange and affiliated entities. (RT 5726-5730.)[2] The Exchange's contract with Pilot called for Pilot to provide it with "independent adjuster" services. (Ex. 403,

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[2] For example, Sonnier adjusted claims on policies underwritten by the Exchange's sister entity, Truck Insurance Exchange. Truck Insurance Exchange is not a party to this appeal, having obtained a $0 verdict at trial. (App. 259.)

App. 581.) The Exchange also staffed the earthquake catastrophe with its own in-house adjusters and with independent adjusters from another catastrophe claims adjusting firm, Wardlaw Claims Services. (See RT 2140; e.g., Ex. 51, App. 567.)

From January 21, 1994 until August 8, 1997 — over three and one-half years — Sonnier remained in Southern California adjusting earthquake claims. (RT 4528-4530, 5726-5729, 5751, 6396-6397.) Sonnier evaluated policyholders' earthquake loss claims, estimated the cost of covered repairs, recommended to the Exchange appropriate reserves, obtained advance payments if requested by the insured, regularly advised policyholders of the status of their claims, and determined whether and when repairs had been completed and other prerequisites met that would entitle a replacement-value policyholder to recover additional benefits. (E.g., RT 4274, 5744-5748, 7022, 7258, 7060-7063.)[3] He was considered one of the better commercial adjusters on the project by those with whom he worked at the Exchange, and he received top reviews from policyholder representatives. (RT 3344-3345, 4261-4262, 8506-8509.)

In January, 1994 Sonnier and the other Pilot and Wardlaw adjusters were instructed to identify themselves to policyholders as Farmers representatives, and for that purpose they were told to purchase items such as magnetic car-door signs, jackets, and hats with the Farmers logo, and they were advised to use calling cards and stationery that referred to them as Farmers' representatives. (RT 2182, 2196-2197, 5457-5459, 5739, 5749-5750). However, in May 1995, still more than two years before Sonnier's work ended, the Exchange instructed Pilot and Wardlaw to end that practice and to have the independent adjusters thereafter identify

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[3] In policies providing replacement-value coverage, additional benefits are provided only if and when the premises are in fact repaired or replaced. (See generally *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282.)

themselves as Pilot or Wardlaw adjusters working on the Exchange's behalf. (Ex. 51, App. 567; RT 6725-6728.)

C. Sonnier's Relationship With The Exchange.

Sonnier had no direct agreement with the Exchange; he invoiced the Exchange, always in Pilot's name, for his time; the Exchange then paid Pilot at an hourly rate negotiated between the Exchange and Pilot (Ex. 403 § 4.1, App. 583; RT 6954-6958.) Pilot paid Sonnier according to his billings, from which Pilot took a commission under its agreement with Sonnier. (RT 5779-5780, 6956-6957.) The Exchange did not withhold taxes for Sonnier; it gave him no health insurance, no overtime pay, and no paid vacations; it provided no office, computer, fax machine, copy machine, or other office equipment for Sonnier; and it provided him no secretary. (RT 6960-6963.) Lead adjusters like Sonnier hired their own assistants (Sonnier hired his son and son-in-law), although their time, too, was billed on Pilot forms to the Exchange. (RT 3043-3044, 6914.) On his tax returns Sonnier reported the net income he received from Pilot for his earthquake work as nonemployee compensation, profit from a sole proprietorship. (RT 6960-6964, 7892-7894.) In all, Pilot paid Sonnier well over $1,000,000 for his work as an independent adjuster for the Exchange from January, 1994 through August, 1997, for which Sonnier reported net income of $528,162 after deducting his expenses. (Exs. 411, 413, 415, 416, 417, App. 590-594; RT 6926-6936, 7874-7875.)[4] Sonnier gave sworn deposition testimony in late 1997 (after the Exchange ceased using his services) that he was not an employee of the Exchange, but was an independent contractor. (RT 6982-6983.)

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[4] Pilot reported its payments to Sonnier on IRS Form 1099 for 1994, 1995, and part of 1996. In mid-1996, Pilot changed its payment reports to Form W2, and began withholding taxes. (RT 6934-6935, 6956-6962, 7880-7881.)

Sonnier was already a trained adjuster when he came to California; neither he nor the other independent Pilot and Wardlaw adjusters received or needed further training from the Exchange in how to adjust claims. (RT 3051, 3090-3091, 3912-3914, 4810-4811, 5709-5725, 5765-5766, 6964-6967, 7059, 8155.) But the Exchange did need to tell Sonnier and the other adjusters their claim assignments, the Exchange's policy provisions that applied to those claims, the way in which the Exchange interpreted its policy provisions, and the way it intended to fulfill its duties under those provisions. (RT 3912-3914, 5746-5748, 5752-5755, 6989-6990.)

Sonnier's duties required him to communicate with the Exchange about reserves, to have the Exchange review his estimates, and to communicate with policyholders about the Exchange's claims determinations. Accordingly, he necessarily had frequent interactions with the Exchange's personnel about those subjects. (E.g., RT 6710, 7028-7032, 7258-7260; Exs. 23, 25, 31, 34, 42, 43, 53, App. 559-566, 568.) The Exchange was free to, and at times did, disagree with Sonnier's estimates and how he arrived at them. (E.g., 4273-4276, 7030-7031.)

D. Sonnier's Complaints About The Exchange's Claims Practices.

Although the evidence on the point was disputed, Sonnier testified that he complained to the Exchange's personnel that its handling of a number of issues was improper and unfair, all to no avail. (E.g., RT 6012, 6019, 6028-6030, 6039, 6046, 6356, 6377-6378, 6642, 6699-6700, 7021, 7032.[5]

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[5] Whether Sonnier's complaints were well-founded — whether the Exchange had actually mishandled any claim — specifically *was not among the issues tried.* (RT 2570 [evidence of bad acts or unfair claims practices is relevant only in assessing whether Sonnier complained; court: "I don't

(continued...)

E. The Exchange Stops Using Sonnier's Services As An Adjuster.

As the number of active earthquake claims diminished over time and fewer adjusters were needed, Sonnier knew that his work on the Northridge earthquake project would eventually end. (RT 6950 [initially thought the work would last about 6 months to 1 year], 7236.) In early 1997 he found more time for vacations and overseas business trips on behalf of Pilot's environmental cost control business. He left on an overseas business trip for about three weeks in mid-February 1997 (Ex. 423, App. 595), and again in July for four weeks of vacation and business development abroad. (RT 6948-6949.) In April, 1997 the Exchange told Sonnier it would continue paying for only one of his two assistants. (RT 6914.) By May, 1997 most of the other independent adjusters from Pilot and Wardlaw had been released, their open files reassigned to Sonnier or to the other remaining independent adjuster, or taken over by the Exchange's in-house staff; only Sonnier and one other independent lead adjuster (Bowman) and their respective assistants remained on the project. (Ex. 406, App. 589; RT 3071-3072, 6913-6914, 6971, 7236, 8507-8512.)

Back in mid-1996 and again in early 1997 Sonnier had foreseen the slowdown, telling the Exchange that he would like to stay on until the end of the earthquake project. (RT 6909-6911.) In Fall, 1996 the Exchange

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[5] (...continued)
want a problem with the jury thinking we're trying a bad faith case"]; RT 3753 [only relevance of Sonnier discussion about needed repairs is Sonnier's state of mind, not truth]; RT 12939 [trial court warns counsel not to argue to jury about bad faith conduct toward policyholders]; App. 174, RT 9060 [jury is instructed Sonnier engaged in protected activity if he reported "reasonably based suspicion" of improper activities]; RT 12922-12923 [trial court notes that jury had option to base liability on Sonnier's *perception* of violations by Exchange, without finding any *actual* violation].) The Exchange, therefore, was never called upon to present evidence that it *had not* mistreated policyholders.

approved a supervisor's recommendation that Bowman's and Sonnier's groups would be needed until at least the end of 1996 (Ex. 406, App. 589), and Sonnier's primary contact at the Exchange told him that he and Bowman would be the last two adjusters the Exchange would let go (RT 6911, 6915, 7038-7043, 8506-8508).[6]

On August 7 or 8, 1997, the Exchange told Sonnier to turn in his remaining files for reassignment (RT 6915-6916; see Ex. 63, App. 572); by the end of August he had finished that task (RT 6917-6918).[7] After August 1997 only Bowman, with his assistants, stayed on as an outside earthquake adjuster. (RT 3148-3150, 4532-33, 6971, 8529-8531.)

F. Sonnier's Claim Of Wrongful Employment Termination.

Sonnier sued, claiming wrongful employment termination in violation of public policy. He alleged that in reality he was the Exchange's employee and that the Exchange violated public policy by terminating that employment in retaliation for his asserted complaints about its claims handling practices.[8] His evidence to that effect was purely circumstantial.

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[6] Sonnier testified that, although admittedly he had been told that he and Bowman would be the last two independent adjusters on the project, he understood that to mean that he "was going to be holding the door for . . . Bowman to walk out." (RT 7040-7043.)

[7] The lack of advance notice to Sonnier apparently was inadvertent. By early May, 1997, the Exchange had decided that only Bowman's group would handle the diminishing adjustment duties through Pilot. Sonnier was to have been notified to return his files for reassignment. (Ex. 62, App. 569; RT 3345-3346.) But Sonnier and his immediate contact at the Exchange apparently did not learn of that plan until early August. (RT 4516-4517.)

[8] Sonnier initially alleged various causes of action and sued a number of defendants. By trial, though, the only remaining defendants were the Exchange and Truck Insurance Exchange. (App. 42, 48.) During the trial,

(continued...)

It consisted primarily of two circumstances: (1) everyone (including the supervisors to whom Sonnier said he complained about the Exchange's practices) rated Sonnier as one of the better commercial claims adjusters on the job (e.g., RT 3344-3345, 4261-4262, 5561, 8506-09; see Exs. 73, 74, 84, 85, App. 574-577); and (2) although Sonnier said he had voiced his complaints throughout 1995, 1996, and 1997, the Exchange released him after (he claimed) he had complained with increasing frequency and acrimony in 1997. (RT 7038-7039, 7811-7812.)

G. Plaintiff's Claimed Damages.

After the Exchange stopped using Sonnier's services in August 1997, he remained Pilot's salaried employee with respect to its environmental cost control project until sometime in 1998; he claimed that he only received minor claims adjusting assignments from Pilot after August, 1997, adjusting only a few small catastrophes in his home state of Pennsylvania. (RT 6948-6949, 7237-7238, 7241-7248, 9026-9027.) In December, 1997 he opened his own independent catastrophe claims adjusting business, Cost Control Services, however, and did little further work through Pilot. (RT 7247-7257.)

Sonnier's net income from claims adjusting work dropped substantially after the earthquake project in August, 1997, although he was called by the Exchange to return to California to assist with various claims that were in litigation in 1998, and he also earned substantial consulting fees from attorneys for plaintiffs in suits against the Exchange and other earthquake insurers in 1998 and 1999. (RT 7827-7835, 7874-7879, 7883-7884.)

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[8] (...continued)
Sonnier voluntarily dismissed all causes of action except his claim of wrongful termination in violation of public policy. (RT 8101-8103; see App. 41, 45.)

Sonnier testified cursorily that he felt "aggravation," "very upset," "very angry," "very disturbed," "belittled," and "humiliated" as a result of his sudden discharge. (RT 6943-6944, 7265.) He provided no evidence, though, that he suffered any physical symptom, that he required any treatment, or that he was prevented from working, sleeping, or engaging in any other activity because of any emotional upset.

H. Trial.

During trial, the critical, threshold issue was whether Sonnier was the Exchange's employee. If not, he admittedly could not prevail on his theory that his employment had been wrongfully terminated. (App. 164 [BAJI 2.60], RT 9054:6-7; see RT 6683 [trial court notes that "only if Sonnier was an employee" does the alleged wrongful conduct matter].)

In support of his claim to have been an employee, Sonnier proffered — and the trial court admitted over the Exchange's objection — the testimony of James Corridan, a professional insurance litigation consultant, as a supposed expert. Corridan had been identified in Sonnier's pretrial expert witness disclosure statement, but only as an expert in "policy coverage, claims handling, and litigation of bad faith issues." (RT 6663-6664.) Nonetheless, because the issue had "come up" in his deposition, the trial court permitted him to testify about the employment issue. Notwithstanding the Exchange's objection, he testified that the Exchange exercised "all of the control," and had "heavily structured" control, over Sonnier. (RT 7614-7615.) Further, Corridan referred to the declarations of another outside adjuster and the Exchange's trial counsel in another case (Lewis and Michel), submitted in an unrelated case, as "pretty conclusive" of Sonnier's status as the Exchange's employee. (RT 7614-7615.)[9]

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[9] The Lewis and Michel declarations had been submitted in connection (continued...)

I. The Verdict, Judgment, And Appeal.

After lengthy deliberations in which it repeatedly asked questions about and revisited the evidence on the employment issue, including *twice* asking that Corridan's testimony be reread, the jury split 9 to 3 in Sonnier's favor on the employment and compensatory damages issues, awarding economic damages of $458,000 and noneconomic damages of $1 million solely against the Exchange. (App. 256-257; RT 12611-12645.)[10]

The jury found by a margin of 10 to 2 *no malice* on the Exchange's part, but at the same time found oppression and fraud. (App. 257.) After a brief second phase (RT 12967-12968), the jury awarded punitive damages against the Exchange of $9 million, again by a margin of 9 to 3. (RT 13501-13504.)

Notice of entry of judgment was given March 22, 2000. (App. 263.) The Exchange moved for judgment notwithstanding verdict and for a new trial asserting, among other grounds, lack of evidence to support punitive liability and excessiveness of both the emotional distress and punitive damages. (App. 275, 278, 310.) The trial court denied the Exchange's motion for judgment notwithstanding the verdict. (App. 523, 525.) It also rejected all of the grounds in the Exchange's motion for new trial, except that it expressly found the jury's award of noneconomic damages to be excessive. (App. 535.) It granted a new trial conditional upon Sonnier's agreement to a reduction of emotional distress damages from $1 million to

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[9] (...continued)
with a discovery dispute in the other case and argued that the adjuster should be considered the Exchange's "special employee" for purposes of attending a deposition. (RT 3426-3427, 7502-7520, 7536-7547.) The trial court had allowed the declarations to be read to the jury but had ruled that it would be unduly prejudicial to allow them to be admitted. (RT 3372-3390, 7524-7526, 7530.)

[10] As noted, the jury awarded $0 against defendant Truck Insurance Exchange. (App. 259.)

$500,000. (App. 523, 525, 538.) Sonnier accepted the reduction on May 16, 2000. (App. 539.) The trial court entered a May 25, 2000 minute order directing change of the judgment to reflect the remitted amount. (App. 545.)[11]

The Exchange timely appealed on May 19, 2000 from the judgment and the May 15, 2000 denial of its motion for judgment notwithstanding the verdict. (App. 542; Code Civ. Proc., § 904.1, subds. (a)(1) & (2); Cal. Rules of Court, rule 3(a).)[12]

ARGUMENT

I.

THE TRIAL COURT DENIED THE EXCHANGE A FAIR TRIAL BY IMPROPERLY ADMITTING PURPORTED EXPERT TESTIMONY ABOUT SONNIER'S STATUS AS AN "EMPLOYEE."

The critical, threshold liability issue was whether Sonnier was the Exchange's employee. On that issue, the jury was closely divided. What tilted the scales was the so-called "expert" testimony that plaintiff proffered, expert testimony that should never have been admitted.

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[11] The judgment as amended was entered for a total of $9,863,000, representing $458,000 economic damages, $500,000 noneconomic damages, and $9 million punitive damages, less a $95,000 offset from a previous settlement. (App. 545.)

[12] The Exchange filed a second, precautionary, notice of appeal on November 6, 2000 (App. 556), to address the trial court's post-appeal, May 25 minute order (App. 545), directing that the judgment be amended to reflect the plaintiff's pre-appeal, May 16 consent to remittitur. That second, precautionary notice of appeal, filed within 180 days of May 25, was also timely. (Cal. Rules of Court, rule 2(a)(3).) The appeals have been consolidated.

Over objection, the trial court permitted the jury to hear the opinion testimony of Thomas Corridan, a professional insurance litigation consultant, to the effect that *he* thought that the Exchange exercised control amounting to an employment relationship, and that *he* found the Michel and Lewis declarations nearly dispositive. The trial court's admission of this testimony was improper for two independent reasons. First, as the trial court found, Sonnier's pre-trial expert witness disclosure had not identified the employment relationship as a subject about which Corridan was to testify. Under controlling authority, for that reason alone the trial court abused its discretion in permitting him to testify on that subject. Second, even had he been properly designated, Corridan had no business testifying on the subject because he had no expertise beyond what a lay juror could deduce independently.

In light of the close verdict, the divided evidence, and the jury's express revisiting of the issue and of Corridan's testimony, it is clear that the error prejudiced the Exchange.

A. The Trial Court Erred In Admitting Corridan's Expert Testimony Over The Exchange's Objections.

1. As Corridan had never been designated to testify as an expert on employment issues, allowing him to do so violated Code of Civil Procedure section 2034.

Code of Civil Procedure section 2034 requires parties to disclose the topics about which their proffered experts will testify. (Code Civ. Proc., § 2034, subd. (f)(2)(B) [disclosure must include "brief narrative statement of the general substance of the testimony that the expert is expected to give"].) It does so to afford the opposing party fair notice of what subject areas it should *fully* explore in deposition, as to which it should investigate

and obtain opposing or impeaching experts or other evidence, and as to which it can expect expert testimony at trial. (*Bonds v. Roy* (1999) 20 Cal.4th 140, 146-147.) The law is now well settled that if the expert's narrative statement does not identify a particular area of testimony *he may not testify in that respect.* (*Id.* at pp. 148-149 [expert to one subject could not testify on another].)

There is a single, statutorily-mandated mechanism by which a party may obtain an expert's testimony on a subject not detailed in the disclosed narrative statement — seeking and obtaining leave to amend the expert's declaration:

> "If a party wishes to expand the scope of an expert's testimony beyond what is stated in the declaration, it must successfully move under subdivision (k) for 'leave to . . . amend that party's expert witness declaration . . . .'" (*Bonds v. Roy, supra,* 20 Cal.4th at p. 145; see also *Richaud v. Jennings* (1993) 16 Cal.App.4th 81, 90-91 [party desiring to call undesignated expert witness must first move to augment expert witness list under subdivision (k)].)

It is undisputed here that Sonnier's expert witness disclosure statement never so much as hinted that Corridan was an expert in employment relationships, or that he would offer any opinion about employment issues (i.e., whether Sonnier or anyone else was the Exchange's employee). (RT 6681 [Sonnier does not dispute that Corridan designation "doesn't even say what he is going to testify to. It just says he is an expert in policy coverage, claims handling, and litigation of bad faith lawsuits"]; App. 50, 54-55; see Code Civ. Proc § 2034, subds. (j)(1) & (2)].) Sonnier never mentioned employment issues as a potential topic for expert testimony until late in the trial, on the eve of Corridan's testimony,

when he for the first time came up with a laundry-list offer of proof of a dozen or so topics on which he wished to have Corridan testify. The trial court expressly found that issues about Sonnier's employment were "not stated under the [Code of Civil Procedure section] 2034 declaration as it relates to Mr. Corridan . . . ." (RT 6688.)

Sonnier made no motion to amend as required by section 2034, and the trial court granted none. Nor could it have. Sonnier failed to supply the trial court with facts that would have permitted it to make the required findings. (Code Civ. Proc., § 2034, subd. (k) [requiring "exceptional circumstances" and affirmative trial court findings that party either acted reasonably or as a result of mistake, inadvertence, surprise, or excusable neglect in failing to provide the required designation *and* that party *promptly* sought to amend expert designation after first deciding to offer the additional testimony].) Nothing in the record could support the statutorily required findings; and even if it could, the trial court did not impose the statutorily required conditions. (Code Civ. Proc. § 2034, subd. (k); *Bonds v. Roy, supra,* 20 Cal.4th at p. 144, fn. 3.)

Having recognized that Corridan was not properly designated as an expert witness on employment issues and having before it neither a motion to amend nor facts justifying amendment of Corridan's expert declaration, the trial court allowed him to testify on those issues for a reason that the statute does not sanction: that the subject of employment had "come up" when the Exchange deposed Corridan:

> "Although not stated under the 2034 declaration as it relates to Mr. Corridan, questions were asked about employment — I don't know if custom and practice was the right word — but that did come up during the deposition, so defendants were on notice." (RT 6688-6889.)

Whether an undisclosed subject matter "came up" at a deposition, however, is not among the statutorily identified bases upon which a trial court is authorized to admit expert testimony on subjects not contained in the expert declaration. And for good reason.

Whether through cautious preparation, a search for impeaching facts, or even just uncertainty, wise counsel often — indeed, almost invariably — explore an expert's thoughts on numerous tangents that are not the subject of the expert's designated testimony at trial, even subjects that the party believes to be plainly inadmissible. That practice does not and should not expand the scope of what the expert may testify on. Counsel's exploration of a witness's opinions about matters not specified to be the subject of that witness's testimony provides no notice that the opposing party intends to *call* that witness to express an expert opinion on that subject. If that were the case, parties would constantly have to be searching for, and filing supplemental designations for, new experts based on every offhand comment at deposition. To the contrary, given subdivision (k)'s express requirement of *prompt* amendment to declarations to expand anticipated expert testimony, a party properly presumes that the proffering party's failure to amend the expert's declaration to encompass new subjects that "come up" at deposition means that the proffering party does *not* intend to offer the deposed expert's opinions on those subjects.

It would be a pernicious rule, and a patent violation of the statutory scheme, if the permissible scope of an opposing expert's testimony were to somehow expand to encompass all subjects *mentioned* during deposition. The mention of undisclosed topics at an expert's deposition would override the statutory requirements of Section 2034, subdivision (k), and the Legislature's carefully detailed permissible procedures and grounds for a belated amendment.

The trial court abused its discretion by permitting Corridan to testify in violation of Code of Civil Procedure section 2034's strict limits and procedures. As we explain below, even if it had not, admitting Corridan's testimony was still error.

2. Corridan had no basis to testify as an "expert" on the question whether Sonnier was the Exchange's employee.

Even had he been properly designated to testify on employment issues, the admission of Corridan's opinion testimony was still error.

Corridan (who nowhere even purported to be an expert on employment) had no more basis to reach any opinions on the factors relevant to Sonnier's employment status than the lay jurors did. (See, e.g., Evid. Code, § 801 [lay witness may not testify as to opinions].) He did not even draw his opinions from the totality of the evidence before the jury on the employment issue; he was unaware of most of it. (E.g., RT 7600-7601 [he only saw excerpts of Lewis's and Michel's depositions and "a page or two" of Sonnier's deposition], 7601 [he did not see depositions of Hurst, Halleran, Price, Measles, etc., nor any trial testimony], 7612 [did not see Sonnier's agreement with Pilot, or Pilot's agreement with the Exchange], 7616 [was not aware that Sonnier testified he was not employee].) He simply gave his own, half-informed opinions, reinforced by the fact that the trial court labeled him an "expert." (RT 7580-7582; see App. 162.)

And there was more. Corridan testified that one item of evidence — the Lewis declaration alone — was "pretty conclusive to me" that Sonnier was an employee. (RT 7614.) In effect, Corridan told the jury to disregard the evidence as a whole — most of which Corridan had not heard — and to focus instead on one piece of evidence.

The Exchange properly objected that Corridan had no basis or foundation to testify on this subject at all, but to no avail:

> "[W]hether this witness thinks certain things indicate that control was exerted over Mr. Sonnier is not the proper subject matter for expert testimony. That's a question of fact for the jury. . . ." (RT 7569-7570.)

> "[T]his jury doesn't need an expert to tell them whether or not there was control." (RT 7573.)

And it objected to the ensuing testimony as well:

> "Q: What independence did these adjusters have in adjusting claims?
>
> "[The Exchange's counsel]: Objection . . . lacks foundation"
>
> "The Court: Overruled."
>
> . . . .
>
> "A: *I* didn't see any. *I think* it's pretty heavily structured." (RT 7615, emphasis added.)

The law condemns precisely this sort of pseudo-expert testimony, in which a supposed expert simply relays his personal impression of what legal conclusions should be drawn. Expert opinion is admissible *only* if it relates to a subject that is sufficiently beyond common experience and would assist the trier of fact. (Evid. Code, § 801, subd. (a).)

> "Expert opinion is *not admissible* if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. (*In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1121 [expert opinion about who molested child not admissible].)" (*People v.*

Torres (1995) 33 Cal.App.4th 37, 45, emphasis added [improper to allow police officer to express opinion as to whether under facts of the case a crime had occurred].)

It was the jury's task to decide from the evidence — *all* the evidence, not just the limited facts Corridan was aware of— whether the facts sufficed to establish that Sonnier was the Exchange's employee. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 [expert may not be permitted to usurp the jury's function]; *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841 ["'the manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion'"]; *Ferreira v. Workmen's Comp. Appeals Bd.* (1974) 38 Cal.App.3d 120, 124-126 [error to admit expert testimony as to responsibility for industrial injury].)

Ferreira, supra, 38 Cal.App.3d 120, is directly on point. There the Court of Appeal held inadmissible the opinion of a doctor for a worker's compensation insurer that "'[t]he responsibility for [the plaintiff's injury] is, in our opinion, his own and not the responsibility of the employer or his workmen's compensation insurance carrier'" and that plaintiff's injury "'was not an industrially related injury.'" (*Id.* at p. 124.) It did so because "these statements are clearly legal conclusions and not medical opinions and [can] not constitute substantial evidence. [Citation.] The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion. [Citation]." (*Id.* at pp. 125-126.)

But that is all that Corridan's testimony did. He simply took isolated facts (not even being familiar with all of the evidence) and declared, ipse dixit, that under his view of the facts and the law Sonnier was an employee. *That* was improper. The evil with such unwarranted expert opinions is not just that they are not helpful to the jury, by that they are "too helpful."

(*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183.) Under the aura of an expert they tell the jury what its decision should be. "Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." (*Ibid.*, quotation marks simplified; accord, *People v. Torres*, *supra*, 33 Cal.App.4th at p. 47; *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 767-768 [admission of expert testimony on the value of plaintiff's loss of enjoyment of life, so-called hedonic damages, is improper and constitutes reversible error].)

The trial court apparently relied as justification for admitting Corridan's testimony on the fact that whether a job is *usually done in the area* by a specialist without supervision is one indicia that might suggest the *absence* of an employment relationship. (RT 7575-7577; see RT 9057, App. 168.) But the admission of Corridan's testimony cannot be justified on that basis. True, Corridan in part compared how the Exchange used independent outside adjusters in handling Northridge earthquake claims to *other* insurers' more hands-off use of outside adjusters in handling *other* catastrophes. (E.g., RT 7585-7597.) But his testimony was not limited to that topic. (E.g., RT 7615 [asserting his opinion in absolute terms that the Exchange's adjusters had no independence in adjusting claims].) Nor (as the trial court itself commented) is there any indication that *this* topic was discussed in Corridan's deposition, so the Exchange truly had *no* notice that it would be facing such intra-industry comparisons.

In any event, as the Exchange objected (RT 7573), even testimony on that limited topic simply was not relevant. If others in an industry typically act in the role of an employer of persons performing similar duties, that might suggest that a defendant exercising *lesser* control has the power of an employer but simply has chosen not to exercise it. But the reverse is not true. That others in an industry typically exercise *less* control

doesn't suggest that the control exercised in this instance amounts to an employment relationship. To give an example, some hospitals may give no direction as to how patients are to be treated in their emergency rooms, but that fact does not suggest that if a hospital does give directions there is an employment relationship; that question stands or falls on the nature of the particular hospital's control, *not* on the lesser control some other institution might exercise. (See *Cilecek v. Inova Health System Services* (4th Cir. 1997) 115 F.3d 256 [as a matter of law, emergency room physician was independent contractor, not employee, despite the fact that hospital established treatment procedures for emergency room].)

The trial court abused its discretion when it allowed Corridan to testify — as an expert no less — on a subject on which he was no more qualified to express an opinion than the jurors. Whatever knowledge he had about how little control other insurers chose to exert over other claims adjusters in other catastrophes (knowledge he apparently did *not* reveal at deposition) had no bearing on whether the Exchange treated Sonnier as an employee.

As we discuss below, the error in admitting Corridan's testimony turned out to be crucial; it indisputably prejudiced the Exchange.

B. The Improperly Admitted Evidence Unquestionably Prejudiced The Jury's Deliberations On A Critical Factual Issue.

Corridan's improperly-admitted testimony unquestionably not only could have, but *did*, impact the outcome of the jury's deliberations on the employment issue. That is the prejudice.

Error is reversible if it "'*seems probable*' that the error 'prejudicially affected the verdict.'" (*Soule v. General Motors Corp., supra,* 8 Cal.4th at p. 580, citations omitted, emphasis added; see *Kelly v. New West Federal*

Savings (1996) 49 Cal.App.4th 659, 677 [same re evidentiary error].) The Supreme Court "ha[s] made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis added, citing *People v. Watson* (1956) 46 Cal.2d 818, 837; see *Strickland v. Washington* (1984) 466 U.S. 668, 693-694 [104 S.Ct. 2052, 2068, 80 L.Ed.2d 674] ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].) Here, the probability of a different outcome is more than just reasonable; it is all but undeniable.

The trial court twice instructed the jury that Corridan was an expert with special knowledge, skill, experience, training, or education, whose testimony could not be lightly disregarded. (RT 7581, 9053, App. 162; see *Soule, supra*, 8 Cal.4th at p. 570 [instructions to jury show prejudice].) And the critical impact of Corridan's testimony on the jury is crystal clear from its long deliberations and the questions it posed to the trial court.[13] (See *Soule, supra*, 8 Cal.4th at p. 570 [jury's focus on erroneous portion of record shows prejudice].) Its deliberations were close from the outset and on no issue so close as the critical question whether Sonnier was the Exchange's employee:

- The jury requested that *Corridan's* specific testimony be reread, not once, but *twice*. (RT 9932-9933; see RT 10201-10212.)

- The jury also requested the rereading of testimony relating exclusively to the employment issue (testimony of Lewis and Michel) on which Corridan had specifically relied for his opinions. (RT 9601-9603;

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[13] The jury's deliberations were long by any standard, covering all or part of 12 days (RT 9601-9602, 9901-9902, 10209, 10501, 10812, 11101, 11401, 11701, 12001, 12302), eventually resulting in a verdict two weeks after deliberations began (RT 12611).

RT 9901-9905.) Plaintiff's counsel conceded that "this jury is very interested in what they [Lewis and Michel] had to say" and that the jury had demonstrated "massive concerns" on the employment subject. (RT 9919, 9938, 10210-10212; see also RT 9920-9921 [the trial court concurs].)

• The jury asked the court questions focusing on the employment issue. It asked whether (as Corridan's testimony suggested) the statements in Lewis' declaration apply to Sonnier; whether (as Corridan's testimony suggested) they constituted admissions by the Exchange; whether they were a "precidence [*sic*]"; and whether the court would "explain the meaning of borrowed servant & precidence [*sic*] & give an eample [*sic*]." (RT 9932-9933.)[14] The trial court noted that the jury's inquiries related "from what I can see, to Question number 1, is Mr. Sonnier an employee?" (RT 9903.)

• A juror had to be dismissed for consulting a law dictionary and a law school computer about the meaning of "borrowed servant" and "precedence." (RT 9905-9918.)

For all the jury's deliberations — as much as 1½ weeks devoted to the employment issue alone, Sonnier's counsel estimated (RT 13838) — the outcome still could not have been closer. It concluded that Sonnier was the Exchange's employee by only the scantiest of margins, the minimum required 9 jurors to 3. (RT 12615, 12619-12620; see *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at pp. 570-571 [closeness of verdict is factor showing prejudice].)

The razor-thin verdict margin, and the jury's difficulty in achieving even that, is not surprising given the weight of the evidence on the employment issue. (See *ibid.* [conflict of evidence on critical issue shows prejudice].) Absent Corridan's erroneously admitted testimony, the evidence tilted heavily in favor of no employment relationship. Very

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[14] The jury had been instructed that Sonnier could be an employee if he was a "borrowed servant." (App. 169.)

substantial factors indicated that Sonnier was *not* the Exchange's employee. When Pilot sent him to adjust claims for the Exchange on the Northridge earthquake catastrophe, Sonnier was already trained and experienced at catastrophe claims adjusting, a distinct and skilled occupation; the Exchange did not train him (or any of the independent adjusters) in claims adjusting. (RT 6964-6967.) Sonnier was independently licensed in his profession in Oklahoma and Texas. (RT 5720-5721.) He and the Exchange had both unquestionably intended from the outset that the engagement would be indefinite and temporary — 6 months to a year at most — not permanent. (RT 6949-6950, 6970-6971, 7236.) He determined for himself his own working schedule and that of his assistants. (RT 6967-6969, 6972.) He did not work exclusively for the Exchange, periodically leaving Southern California to attend to and pursue other business. (RT 6948-6949.) He supplied his own tools — computer, software, fax machine, copy machine, telephone, business cards, logo attire — hired his own secretary, and rented his own office space. (RT 6962-6964, 6975.) He selected his own assistants. (RT 6914.) He was not paid by the Exchange as an employee — indeed he was not paid by the Exchange at all — and he did not report his adjusting income as employee income. (RT 6958-6961.) Before he filed his suit (but after he was instructed by the Exchange to turn in his files) he testified under oath that he had never considered himself to be its employee. (RT 6982.) (See *Southwest Research Institute v. Unemployment Ins. Appeals Bd.* (2000) 81 Cal.App.4th 705, 708-710 [factors that show, as a matter of law, that gasoline tester was not an employee include that tester worked in the field according to his own schedule, without direct supervision, while maintaining other employment, even where his work had to be done according to strict guidelines].)

The jury hung for more than a week deliberating the employment issue, asking the meaning of the evidence, *twice* relistening to Corridan's testimony and reviewing much of the evidence upon which he had relied as well. The evidence was strongly in the Exchange's favor on the employment issue and the jury only narrowly concluded that Sonnier carried his burden of proof on that issue. Without that testimony it surely would have fallen short of the 9 votes needed to reach a verdict. The admission of improper evidence on the critical employment issue plainly tipped the hairline balance in the jury's long and troubled deliberations. The judgment should be reversed.

II.

THE RECORD CONTAINS NO CLEAR AND CONVINCING EVIDENCE OF EITHER FRAUD OR OPPRESSION, ESPECIALLY IN LIGHT OF THE JURY'S NO-MALICE FINDING, AND THEREFORE DOES NOT SUPPORT PUNITIVE DAMAGE LIABILITY.

Regardless of whether the evidence might support liability for compensatory damages, punitive damages require additional, greater evidence and findings. For punitive damages to be awarded at all, there must be evidence rising to a clear-and-convincing standard of either malice, fraud, or oppression. (Civ. Code, § 3294, subd. (a).) Here, the jury specifically determined that the Exchange did not act with malice. (App. 257, RT 12613.) That determination must be as credited just as any determination that favors the plaintiff. (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1346.) As Sonnier did not cross-appeal, it is conclusive on the issue.

That leaves the elements of fraud and oppression. But there is *no* evidence that could justify either finding, let alone evidence that might be

clear and convincing on those two subjects. Even assuming for the purpose of this argument that Sonnier was an employee, there is no evidence that those at the Exchange responsible for Sonnier's release *actually knew* (or even suspected) that he was an employee. Without such knowledge, they could not possibly have been in "conscious disregard" of his rights, an essential feature of oppression. Nor is there *any* evidence that the Exchange *intended* to deprive Sonnier of anything, an essential element of any fraud finding.

Certainly nothing in the record rises to the level of the requisite clear and convincing evidence on either of these two issues. (Civ. Code, § 3294; RT 9066-9067.) Whether reviewing leave to plead punitive damages, a directed verdict, a JNOV motion, or the sufficiency of evidence on appeal, a reviewing court "must inquire whether the record contains 'substantial evidence to support a determination by clear and convincing evidence . . . .' (*Tomaselli v. Transamerica Ins. Co.* [(1994)] 25 Cal.App.4th [1269,] 1287.)" (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891-892; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60-61; *Stewart v. Truck Ins. Exchange* (1993) 17 Cal.App.4th 468, 481-482.) Such "'[c]lear and convincing' evidence requires a finding of high probability. . . . requiring that the evidence be 'so clear as to leave no substantial doubt'; 'sufficiently strong to command the unhesitating assent of every reasonable mind.' [Citation.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 919, quotation marks simplified; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., supra*, 78 Cal.App.4th at p. 891.) Conjecture, speculation, and even broad inference will not do.

Because the jury found that the Exchange acted without malice, and there is no evidence that could clearly and convincingly show fraud or oppression, the punitive damage award must be reversed.

A. The Record Does Not Show Clear And Convincing Evidence Of Oppression Because There Is No Evidence That Those Responsible For Sonnier's Release Knew That He Was An Employee.

The essential element of oppression is that the defendant must have acted "in *conscious disregard* of the rights" of the plaintiff. (Civ. Code, § 3294, subd. (c), emphasis added.) As discussed above, the critical element of Sonnier's rights in this instance was his status as an employee. For those who discharged Sonnier to have acted in *conscious* disregard of his rights, therefore, they had to have *actually known or suspected* that he was the Exchange's *employee*.

The jury identified Messrs. Brooks, Hurst, and Halleran as the managing agents responsible for Sonnier's discharge. (App. 258, RT 12618.) But did Brooks, Hurst, or Halleran know or even suspect when they ended the Exchange's relationship with Sonnier that he was the Exchange's employee? Nothing in the record remotely suggests that they did.

Sonnier presented *no* evidence, let alone evidence that could be considered clear and convincing, that Brooks, Hurst, or Halleran (or anyone else in the chain of command) understood Sonnier to be anything other than an independent contractor supplied by Pilot, whose contract could be terminated at any time for any reason. (E.g. RT 2197.) On its face, that was the ostensible nature of Sonnier's relationship with the Exchange. Indeed, even Sonnier did not suspect at that time that he was an employee.[15] For more than a week the jury had to pour over almost two months of evidence before concluding by a bare 9 to 3 margin that Sonnier was the

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[15] Sonnier denied under oath on August 26, 1997, a few weeks after the Exchange told him to turn in his files, that he *ever* considered himself to be an employee of the Exchange (RT 6982), and testified he believed at the time that he was telling the truth (RT 6983).

Exchange's employee. (RT 12619-12620.) Given the complexity of the circumstances here, it simply is impossible to infer that Brooks, Hurst, Halleran, or anyone else at the Exchange knew (or even suspected) that in terminating the Exchange's independent contractor relationship with Sonnier they would be interfering with his rights as an employee.

Brooks, Hurst, Halleran, and others might have been *wrong* in believing that Sonnier was an independent contractor whom they had unbridled discretion to release. But their error is not evidence that they *consciously* knew or suspected that they were interfering with his rights as an employee. If Brooks, Hurst, and Halleran did not *actually know or suspect* Sonnier's status as an employee when they terminated the Exchange's relationship with him, they acted at most in *unconscious* disregard of his rights. That does *not* suffice to support punitive damage liability. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, *supra*, 78 Cal.App.4th 847 [in light of complexity of issue, evidence insufficient to support punitive damages where actions of carriers denying claim were unfair, misleading, and reflected careless initial evaluation and stubborn persistence in error, but no evidence that defendants actually knew or suspected that they were interfering with plaintiffs' rights].) Indeed, deciding to no longer do business with someone thought to be an independent contractor is not so outside "the common experience of human affairs" as to be "despicable." (*Id.* at p. 892.)[16]

Without *some* arguably clear and convincing evidence that they knew or actually suspected that Sonnier was an employee with rights beyond those of an independent contractor, neither Brooks, Hurst, nor

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[16] Like the requirement of "conscious disregard" of others' rights, the statutory requirement that the conduct be "despicable" is a further "substantive limitation on punitive damage awards." (*College Hospital, Inc. v. Superior Court, supra,* 8 Cal. 4th at p. 725; Civ. Code, § 3294, subd. (c).)

Halleran could possibly have been in *conscious* disregard of those rights in deciding to end the Exchange's relationship with him. The jury therefore had no basis upon which to find oppression.

B. The Exchange's Provision Of Evasive Reasons For Terminating Its Relationship With Sonnier Does Not Amount To Fraud.

Just as "conscious disregard" is an essential element to prove oppression, a misrepresentation or concealment made with an "intent[] . . . [to] depriv[e] [the plaintiff] of property or legal rights or otherwise causing injury," is essential to prove fraud. (Civ. Code, § 3294, subd. (c)(3); see App. 189, RT 9067.) The misrepresentation or concealment, thus, must be the means by which the plaintiff is injured; in other words, the defendant must intend that the plaintiff rely, and the plaintiff must have relied, upon the defendant's deceit.

Plaintiff's sole fraud theory here, adopted by the trial court over the Exchange's objection, was "based on the argument that the agents of defendant arguably deceived Mr. Sonnier and/or concealed a material fact *as to their reasons for terminating him.*" (RT 8742, emphasis added; see RT 8739-8742.) In effect, plaintiff's claim of fraud is that the Exchange was evasive or not forthcoming about the true reasons for terminating its relationship with him.

But that is not fraud. In *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, the Supreme Court directly held that providing evasive, incorrect, or even intentionally deceitful reasons to an employee for his or her discharge is *not* fraud: "[N]o independent fraud claim arises from a misrepresentation aimed at termination of employment." (*Id.* at p. 1185; see *id.* at p. 1184 [it is not fraud where an employer "simply employed a falsehood to do what it otherwise could have accomplished directly" in firing an employee].)

For the same reason oppression was not shown, there is *no* evidence that anyone at the Exchange *intended* to deprive Sonnier of legal or property rights that they knew or thought he possessed: Brooks, Hurst, Halleran, and any other Exchange actors could not possibly have harbored an intention to deprive Sonnier of his rights as an employee when they did not even know that he was an employee.[17]

The evidence here simply does not rise to the level of evidence "'of a different dimension'" necessary to support the award of punitive damages. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., supra,* 78 Cal.App.4th at p. 890.) Sonnier showed at most that his discharge was wrongful. He presented no evidence that Brooks, Hurst, or Halleran, those at the Exchange responsible for his discharge, acted with oppression or fraud in discharging him. That missing evidence was essential to his proof. (*Id.* at p. 893.) Sonnier having had an opportunity to prove his case and having failed to do so, the judgment must be reversed with directions to enter judgment in the Exchange's favor on punitive liability. (*Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 625-626; *McCoy v. Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1663-1664.)

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[17] That the Exchange's stated reasons may have been evasive does not prove an intent to injure, certainly not by clear and convincing evidence. Disbelief of evidence is not affirmative proof of a contrary fact. (*Pereyda v. State Personnel Board* (1971) 15 Cal.App.3d 47, 51-52 [disbelief of testimony that alcohol containers were empty when transported does not provide affirmative evidence that they contained alcohol at that time]; see *Eramdjian v. Interstate Bakery Corp.* (1957) 153 Cal.App.2d 590, 602 ["'A legal inference cannot flow from the nonexistence of a fact; it can be drawn only from a fact actually established. [Citations.] It is axiomatic that 'an inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork'"].)

C. At A Minimum, The Punitive Liability Findings Of Oppression And Fraud Are Irreconcilably Inconsistent With The Jury's Concurrent No-Malice Finding.

Even were there evidence that could be considered clear and convincing evidence of oppression or fraud, the punitive liability determination would *still* have to be reversed. The findings on the various bases for punitive damages are irreconcilably inconsistent. The jury here specifically found that the Exchange did *not* act with malice. (RT 12638-12639.) To make that finding the jury necessarily found that the Exchange (1) did *not* "intend[]. . . to cause injury to the plaintiff" *and* (2) did *not* engage in "despicable conduct . . . with a willful and conscious disregard for the rights of others." (App. 189; Civ. Code, § 3294, subd. (c)(1).)[18]

By contrast, and inconsistently, the jury's "oppression" finding requires "despicable conduct . . . in conscious disregard of [another] person's rights." (App. 189; Civ. Code, § 3294, subd. (c)(2).) Either the Exchange acted in conscious disregard of Sonnier's rights (the oppression finding) or it did not (the malice finding). Both circumstances could not obtain simultaneously.

Likewise, the fraud finding requires an "intention on the part of the defendant of . . . depriving a person of property or legal rights or otherwise causing injury." (App. 189; Civ. Code, § 3294, subd. (c)(3).) Here too, either the Exchange intended to deprive Sonnier of some property or legal right or to cause him injury (the fraud verdict) or it did not (the malice verdict). (App. 189, RT 9067; RT 12625-12627.) Here too, both cannot obtain at the same time.

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[18] Because malice is defined in the disjunctive, either an intent to injure *or* a willful and conscious disregard of others' rights, a finding of *no* malice equates to a finding that neither element is present.

Where a jury returns inconsistent verdicts, a new trial is required. (See *Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1186.) "[A] factfinder may not make inconsistent determinations of fact based on the same evidence." (*Cavallaro v. Michelin Tire Corp.* (1979) 96 Cal.App.3d 95, 101.)

The recent decision in *Shaw v. Hughes Aircraft Co.*, *supra*, 83 Cal.App.4th 1336, a wrongful termination case, is directly on point. There the jury simultaneously found that the employer did *not* breach the employment contract in firing the plaintiff and that the employer nevertheless breached the covenant of good faith and fair dealing in firing the plaintiff. After first noting that the plaintiff "is no more entitled than [the defendant] to have the favorable verdict credited and the unfavorable one disregarded" (*id.* at p. 1346), the Court of Appeal held these two findings fatally inconsistent:

> "The jury's finding that there was no breach of contract implies it believed Shaw was an at-will employee. The other possibility, that Hughes had cause to dismiss Shaw, is refuted by the wrongful termination verdict; the determination that Shaw was fired as a whistle-blower, and not for sexual harassment, necessarily means the jury felt that Hughes did not have good cause to rid itself of Shaw. Yet the finding that Hughes acted in bad faith implies the jury believed Shaw could only be dismissed for cause. The upshot is findings that are irreconcilable: that Shaw was an at-will employee and that he was not." (*Id.* at p. 1345.)

And so it is here. Either the Exchange acted in conscious disregard of Sonnier's rights and with an intent to deprive him of rights and property and otherwise to injure him (the oppression and fraud verdicts) or it did not

(the no-malice verdict). All three verdicts cannot be simultaneously true. (See also *Lambert v. General Motors, supra,* 67 Cal.App.4th at p. 1186 [special verdict that an automobile had no design defect but that the manufacturer was negligent in designing the car fatally inconsistent: "If the design of the Blazer was not defective, General Motors could not be deemed negligent. The jury could not have concluded that General Motors negligently designed the Blazer and at the same time conclude that it was not defective. [Citation.] Therefore, the inconsistent verdicts are irreconcilable"].)

Thus, even if the evidence could plausibly suffice to constitute clear and convincing proof of oppression or fraud, i.e., of a conscious disregard of Sonnier's rights or an intent to deprive him of those rights (it doesn't), the punitive-liability finding would still have to be reversed.

And if the punitive-liability finding is reversed, the entire judgment should be reversed for retrial. *Liodas v. Sahadi* (1977) 19 Cal.3d 278 requires a full retrial as to any issue "substantially inseparable" from the issue to be retried. (*Id.* at p. 286.) A second jury will not be able to separate the "conscious disregard" and "intent to cause injury" issues from the underlying question whether the conduct was wrongful in the first trial.[19]

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[19] In *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, the Supreme Court held that an appellate court has discretion to order a retrial limited to the *amount* of punitive damages where new jury can redetermine the amount of punitive damages without revisiting whether malice, fraud, or oppression existed. (*Id.* at p. 776.) But *Torres* does *not* address the situation here, where a new trial is necessary on *liability* for punitive damages. In that circumstance, *Liodas v. Sahadi, supra,* 19 Cal.3d 278, is the controlling authority.

III.

THE DAMAGES ARE EXCESSIVE.

Even if the liability determinations could stand, the damages awarded, both compensatory and punitive, are excessive as a matter of law.[20]

A. The Half-Million Dollar Emotional Distress Award Is Excessive Given The Absence Of Evidence That Plaintiff Suffered Anything Beyond Hurt Feelings.

Sonnier's evidence, construed most favorably to him, does not begin to show anything justifying the jury's $1,000,000 award, nor even the half that amount that the trial court allowed. Even viewed most favorably to Sonnier, the evidence shows no more than that Sonnier experienced aggravation and hurt feelings.

According to Sonnier (the only witness on the subject), until trial the primary emotion he felt resulting from the events at issue was "aggravation." (RT 7265.) At trial he amplified only slightly: he felt "very upset," "very angry, depressed" "humiliated," "disturbed," and "belittled" by the way he was asked to turn in his files on short notice, and because he could no longer support his mother, father, and kids as he had done. He said that those feelings continued. (RT 6943-6944.)

That's it. That is the *totality* of the evidence on Sonnier's claimed emotional injury, a page worth's of testimony.

Sonnier did not otherwise quantify the extent of his damages, nor their duration. He claimed no overt symptoms or physical manifestations, past, present, or future. No impairment, however brief, of his ability to work, to enjoy life, or otherwise to engage in ordinary activities. No

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[20] As required, the Exchange raised the excessiveness of the damages by motion for new trial. (Code Civ. Proc., § 657; App. 275.)

therapy or other treatments of any kind. No impact on his family or other relationships. No out of pocket medical or incidental expenses, past or future. Not so much as an aspirin. And no indication that his "distress" would endure at all, let alone long into the future. Nothing.

Although there may be no absolute standard by which to measure mental anguish, it is not the rule, nor should it be, that an award for emotional distress (or anything else) requires no evidentiary support at all: "emotional distress is a form of actual damage and must be *proved* as any other actual damage." (*Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 16, emphasis added; accord, *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 931 [emotional injuries, like physical injuries, require proof].)

That is especially true here, where the award not only lacks support in the evidence, but greatly exceeds reasonable compensation for the injuries it supposedly redresses. Sonnier offered no evidence comparable by any stretch to that found to be inadequate or barely sufficient in other cases. (See, e.g., *Merlo v. Standard Life & Acc. Ins. Co., supra,* 59 Cal.App.3d at pp. 17, 22 [evidence that plaintiff lost his home and was rendered "sobbing, miserable, and depressed" by tortious conduct is sufficient to support sizable emotional distress award, but not sufficient "to support an award for emotional distress in an amount anything like $250,000"]; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 821 [evidence supports emotional distress award of $450,000 where plaintiff victim of racial discrimination in employment was diagnosed in need of psychological treatment, and evidence showed he was suffering from emotional distress "that significantly altered his ability to enjoy life and to engage in ordinary activities, that interfered with his family life, and that included fear of physical harm from coworkers"]; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 986, 997,

disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [emotional distress award of $662,000 is supported by evidence that victim of overt workplace sexual harassment suffered from past and future headaches, dizziness, vomiting, diarrhea, weight loss, sleep disturbances, teeth grinding, a facial twitch, crying spells and depression]; *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1294 [evidence of plaintiff's resulting disability, psychotic disorder, and need for long-term medication and treatment supports general damages of $1,102,000 for racial harassment].)

Sonnier's evidence, by contrast, is limited to generic assertions of hurt feelings, aggravation, and humiliation. This is not surprising. The fact that Sonnier's work with the Exchange came to an end was not unexpected. The Northridge earthquake work had lasted years longer than he or anyone else had initially expected and he knew all along that it would come to an end. (RT 7611 ["storm troopers" know work on a catastrophe will not continue indefinitely], 8128 [earthquake work was initially anticipated to last 6 months to one year].) Sonnier's compensable distress therefore cannot include the fact that his work with the Exchange came to an end, as he knew all along that it would. What he is left with is anger at the *timing* of and supposed reason for the end of his work with the Exchange. But that is not such a self-evidently life-altering experience that a six-figure award is supported even without evidence of any actual impact on him.

Sonnier's damages must be proportionate to the distress he suffered, and he is entitled to no damages at all for merely minor upsets; even where emotional distress is intentionally inflicted, a plaintiff may recover only for "severe" emotional distress. (E.g. *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1004 ["severe" emotional distress must be of substantial or enduring quality].) "Severe emotional distress means 'emotional distress of such substantial quantity or enduring quality that no

reasonable man in a civilized society should be expected to endure it.'" (*Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 231.) Sonnier offered no evidence that the humiliation and aggravation he professed to have felt was substantial or enduring at all, let alone "of such . . . quality that no reasonable man in a civilized society should be expected to endure it." (See *People v. Ewing* (1999) 76 Cal.App.4th 199, 210-212 [evidence of short-term fear and sleepless nights is insufficient as a matter of law to prove "substantial" emotional distress, let alone to meet higher requirement for proof of "severe" emotional distress; "Without evidence as to the severity, nature or extent of a victim's emotional distress, the burden of proof is not met"]; cf. *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1283, 1294 [8 year course of racial discrimination in employment leading to emotional breakdown and disability, headaches, chest pains, loss of appetite, memory, and sexual drive, nightmares, nocturnal screaming, attempted suicide, and major depressive disorder with psychotic features and requiring future medication and possible hospitalization, is sufficient evidence of "severe" emotional distress].)

The trial court properly concluded that Sonnier's exceedingly cursory evidence could not begin to justify the jury's $1,000,000 emotional distress award. (App. 525, 535.) Plaintiff has agreed, accepting the trial court's proffered remittitur and not cross-appealing from the remitted judgment. (App. 539.) But the same paucity of evidence of any substantial severity or duration for Sonnier's claimed emotional upset equally fails to support even the reduced $500,000 award.

One-half million dollars is an amount that represents years or decades of struggle for all but the wealthy in our society to realize, let alone amass. Nothing prevented Sonnier from presenting evidence of severe emotional injury of severity and long duration to justify such an award here,

if he had such evidence to present. Instead he offered only a few words about generic upset, without even a testimonial description of its impact or duration. Although a mere whisper of the word "vermouth" is said to be enough for a fine martini, more than a mere whisper of the words "angry," "depressed," and "humiliated" should be required to support an award amounting to 100,000 fine martinis. Conduct resulting in similar or more serious emotional impact regularly justifies only far smaller awards.[21] Sonnier's few words about his generic hurt feelings simply do not support an award of the magnitude here.

Because Sonnier did not meet his burden to show some severe emotional distress, the non-economic damages should be struck in their entirety; at a minimum, they should be reduced or retried.

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[21] E.g., *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418 ($200,000 noneconomic damages for wrongful discharge from permanent employment for reporting violation of federal contracting safety requirements); *Satrap v. Pacific Gas & Electric Co.* (1996) 42 Cal.App.4th 72 ($225,000 noneconomic damages for wrongful discharge from permanent employment for reporting illegal discrimination); *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793 ($100,000 noneconomic damages for wrongful discharge from permanent employment for reporting racial discrimination).

B. The Exchange Is Entitled To Have *A Jury* Determine The Proper Amount Of Punitive Damages Based On The Actual, Substantially Reduced Compensatory Damages.

In any event, at a minimum, the trial court's reduction of the emotional distress damages requires that a new jury redetermine the appropriate amount of punitive damages and relationship between punitive and compensatory damages. The relationship of punitive to compensatory damages is a critical factor in the punitive damages assessment. (E.g., *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 580-581 [116 S.Ct. 1589, 1601-1602, 134 L.Ed.2d 809]; *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 421-429 [conc. opn. of Brown, J.]; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 ["Another relevant yardstick is the amount of compensatory damages awarded"].)

The *jury* properly is instructed that *it* is to take the relationship with the compensatory damage award into account in fixing the amount of punitive damages. (BAJI 14.72.2; App. 243.)

> "California has long followed the rule that punitive damages must bear a reasonable relation to the actual injury suffered. [Citations.] The proper proportion punitive damages should bear to the injury suffered is also a question for *the jury* to determine . . . ." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602-1606, emphasis added [reversing judgment for failure to instruct jury to take reasonable relationship into account].)

(See also *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 16 [111 S.Ct. 1032, 1042, 113 L.Ed.2d 1] ["nothing is better settled than that, in . . . actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their

verdict," citation and quotation marks omitted]; *Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co,.* (4th Cir. 1991) 938 F.2d 502, 507 (en banc) ["An assessment by a jury of the amount of punitive damages is an inherent and fundamental element of the common-law right to trial by jury"].)

As defendant, the Exchange had as much of a right to a *jury* determination of this critical issue as plaintiff did. (Cal. Const., art. I, § 16 ["Trial by jury is an inviolate right and shall be secured to all"]; *Gagnon, supra*, 211 Cal.App.3d at pp. 1602-1603 [*defendant* entitled to jury instruction on reasonable relationship]; *Haines v. Parra* (1987) 193 Cal.App.3d 1553, 1560-1561 [even where defendant stands criminally convicted of fraud, defendant is entitled to have a *jury*, not the court determine amount, if any, of punitive damages].)

Accordingly, a substantial change in the compensatory damage award necessarily requires retrial of the punitive award. Thus, "[e]xemplary damages must be redetermined" where a new trial is granted for compensatory damages. (*Liodas v. Sahadi, supra,* 19 Cal.3d at p. 284 ; see also *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190 [punitive damage claim must be retried because of change in proportion compared to compensatory damages]; *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 541-542 [jury cannot determine reasonable relationship between punitive and compensatory damages without considering amount of compensatory damages]; cf. *Adams v. Murakami* (1991) 54 Cal.3d 105 [remanding for *jury* redetermination of punitive amount where evidence of defendant's financial worth lacking].)

Liodas v. Sahadi, supra, is directly on point and controlling. There, the jury improperly was instructed only on the measure of damages for fraud by a fiduciary and was not alternatively instructed as to the measure of damages for ordinary fraud. Accordingly, the *amount* of compensatory

fraud damages had to be revisited. This, the Supreme Court held, required that punitive damages be retried as well for the precise reason advanced here — the jury had to reassess a reasonable relationship between compensatory and punitive damages:

> "The trial court . . . properly granted a new trial on the issue of compensatory damages. Exemplary damages must be redetermined as well, as 'it would be improper and premature to assess such damages until or concurrently with the assessment of the actual damages' and 'exemplary damages must bear a reasonable relation to actual damages' even though no fixed ratio exists to determine the proper proportion." (19 Cal.3d at p. 284, citations and internal quotation marks omitted.)

Even more recently, Division Four of this Court recognized that where the compensatory damage award is excessive, the punitive award must be retried as well:

> "We cannot, however, simply reduce the [excessive compensatory] damages and modify the award on the fraud cause of action at this stage. Because the jury was misled about the amount of compensatory damages it could award, its punitive damage award is suspect." (*Auerbach v. Great Western, supra*, 74 Cal.App.4th at p. 1190.)

Here, the jury found by the narrowest possible majority that what it mistakenly believed were appropriate compensatory damages of $1.458 million deserved a punitive award of $9 million — just over 6 times the compensatory damages. But when the trial court reduced the compensatory damage award by $500,000 from $1.458 million to $958,000, *the court*

changed the ratio — the jury-determined reasonable relationship — between the compensatory and punitive awards. The ratio and relationship that the jury found appropriate, just over $6 of punitive damages for each $1 of compensatory damages, grew by more than 50 percent to almost $9.40 of punitive damages for each $1 of compensatory damages. That change is "substantial" by any measure.

The jury evaluated the need for punitive damages in the context of compensatory damages that (unbeknownst to it at the time) the trial court would find to be excessive. It surely would have blinked if it had known that the ratio between compensatory and punitive damages — one of the significant factors in determining the amount of punitive damages — was actually to be radically different than it supposed. Because the reduction in compensatory damages throws "the punitive damages . . . out of proportion to the actual damages suffered by the [plaintiffs], the punitive damage claim will have to be retried." (*Auerbach v. Great Western Bank, supra,* 74 Cal.App.4th at p. 1190; *Gagnon v. Continental Casualty Co., supra,* 211 Cal.App.3d at p. 1605 [error is prejudicial if jury cannot assess whether its award of punitive damages bears reasonable relation to compensatory damages].)

When the plaintiff consented to reduce by half his award for noneconomic damages, and thereby his total compensatory damages by about one-third, the relationship between compensatory and punitive damages changed drastically. A new trial of punitive damages is required in order to afford a jury the fair opportunity to determine the appropriate award in light of the factors — including the relationship to the *actual* damages — that the law deems relevant.

C. The Punitive Award — Over Nine Times Sonnier's Reduced Compensatory Damages — Is Excessive In Any Event.

Even if the punitive award here did not have to be redetermined because of the inconsistent jury verdicts and the post-verdict reduction in compensatory damages, it would still have to be reversed because it is excessive as a matter of law under any objective standard consistent with fair notice, due process, and equal protection. (Cal. Const., art. I, § 7, subd. (a); U.S. Const., 5th and 14th Amends.; *Lane v. Hughes Aircraft Co., supra,* 22 Cal.4th at p. 421-422 [conc. opn. of Brown, J.] [to be consistent with due process and equal protection there must be objective guideposts to review excessiveness of punitive damage awards].) "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." (*BMW of North America, Inc. v. Gore, supra,* 517 U.S. at p. 574 [116 S.Ct. at p. 1598].)

That the punitive damage award is over nine times greater than the plaintiff's aggregate compensatory damages, both economic and noneconomic (itself still inflated), alone indicates that it is excessive. As two justices of the Supreme Court have observed, "in the case of large awards, punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstances clearly evident in the record." (See *Lane v. Hughes Aircraft Co., supra,* 22 Cal.4th at p. 429 [conc. opn. of Brown, J.] [punitive awards of 11.6 and 5.6 times substantial actual damages in employment discrimination and retaliatory discharge case would be excessive]; see *Pacific Mut. Life Ins. Co. v. Haslip, supra,* 499 U.S. at pp. 23-24 [111 S.Ct.

at p. 1046] [4 to 1 ratio of punitive to compensatory damages is "close to the line" imposed by federal due process limitations].)[22]

Nor can it be said that the Exchange had the constitutionally-required fair notice that it would be subjected to a $9 million punitive award — over nine times any compensatory damages — for a wrongful employment decision. Comparable civil and criminal penalties for similar conduct provide the recognized benchmark for the provision of the constitutionally required fair notice to a defendant as to its prospective punitive liability. (*BMW of North America, Inc. v. Gore, supra,* 517 U.S. at p. 584 [116 S.Ct. at p. 1603]; *Lane v. Hughes Aircraft Co., supra,* 22 Cal.4th at pp. 425-426 [conc. opn. of Brown, J.].)

Almost without exception, such statutory remedies are limited to treble damages — i.e., no more than *double* the monetary loss.[23] Labor Code section 1103 addresses conduct that is particularly analogous to plaintiff's claim here. It sets the appropriate monetary punishment for an

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[22] California cases with high ratios of punitive to compensatory damages almost always involve only small compensatory awards. (E.g., *Finney v. Lockhart* (1950) 35 Cal.2d 161, 162-163 [2000:1 ratio, but only $1 in compensatory damages]; *Wetherbee v. United Ins. Co. of America* (1971) 18 Cal.App.3d 266 [200:1 ratio, $1,050 in compensatory damages]; *Moore v. American United Life Ins. Co.* (1984) 150 Cal.App.3d 610 [83:1 ratio but $30,000 in compensatory damages]; *Neal v. Farmers Ins. Exchange, supra,* 21 Cal.3d 910 [74:1 ratio but less than $10,000 in compensatory damages and substantial injury for which no damages were recoverable].)

[23] *Lane v. Hughes Aircraft Co., supra,* 22 Cal.4th at pp. 425-426 (conc. opn. of Brown, J.) (noting 30 examples; "we are unable to find any context in which [a statute] has mandated a *greater* multiplier than three, notwithstanding the egregiousness of the wrong," original emphasis); see, e.g., Bus. & Prof. Code, §§ 17537.4 (unlawful advertising), 21140.4 (violations of regulations governing fuel franchises); Civ. Code, §§ 1812.9 (willful violation of laws governing retail installment sales), 1947.10 (evictions based on fraudulent intent to occupy), 3345 (unfair or deceptive practices against senior citizens or disabled persons); Lab. Code, § 206 (failure to pay certain wages).

employer's prohibited retaliation against its employee for reporting any violation of a state or federal rule or regulation (Lab. Code, § 1102.5) — exactly what Sonnier claimed here — at $5,000. Regardless whether section 1103 may set an absolute ceiling, it helps define the ballpark of what notice the Exchange could reasonably be expected to have had of its penalty exposure for the conduct at issue here. That ballpark does not begin to include a $9 million penalty amounting to almost nine and one-half times any compensatory award. By any measure that takes into account comparable statutory provisions, the punitive award in this case is astronomically out of line.

Nor could awards in other, similar cases have provided the Exchange with notice of its exaggerated punitive exposure. Indeed, affirmed awards of punitive damages in other retaliation contexts with similar compensatory awards and large corporate defendants uniformly demonstrate that the award here is far out of line. (E.g., *Roberts v. Ford Aerospace, supra,* 224 Cal.App.3d 793 [retaliation for complaint about racial discrimination; $90,000 economic award, $100,000 noneconomic award, $750,000 punitive award]; *Holmes v. General Dynamics, supra,* 17 Cal.App.4th 1418 [retaliation for complaining about violation of federal contracting requirements; $106,000 lost wages, $200,000 emotional distress, $500,000 punitive damages]; *Satrap v. Pacific Gas & Electric, supra,* 42 Cal.App.4th 72 [retaliation for discrimination complaint; $48,750 economic damages, $225,000 noneconomic damages, $250,000 punitive damages]; *Lane v. Hughes Aircraft Co., supra,* 22 Cal.4th 405 [reversing on other grounds this Court's reduction, in race discrimination and retaliatory discharge case, of punitive damages to $2.83 million and $5 million on top of compensatory awards of $3.425 million and $6.095 million, a less than 1 to 1 ratio].)

Nor is the conduct claimed here of a type that would suggest that the fair-notice, due-process, and equal-protection rules governing the allowable

size of punitive-damages awards might be relaxed. The appropriate measure for whether an enhanced punitive award is justified by extraordinarily evil conduct, is a comparison not to blameless conduct, but "*in light of the types of misconduct that will support punitive damages . . . .*" (*Adams v. Murakami, supra,* 54 Cal.3d at p. 111, fn. 2, emphasis added; see *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952, disapproved on other grounds in *Adams v. Murakami, supra,* 54 Cal.3d at pp. 115-116 [finding continued sale of surgical implant knowing it would cause excruciating pain to hundreds of mostly elderly arthritic patients less despicable, and hence less deserving of elevated punishment, than marketing of vehicle that management knew would result in fiery deaths].) The conduct claimed here — wrongful termination of employment in violation of public policy[24] — is certainly far less reprehensible than the conduct in many other California cases in which punitive damages have been imposed.[25]

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[24] The trial court specifically instructed the jury *not* to consider what Sonnier asserted to be underlying claims-handling abuses in assessing punitive damages. (App. 244.) The issue whether Sonnier's complaints about the claims-handling on particular files were well-founded was *not* litigated in this case; that issue therefore cannot justify the punitive award.

[25] E.g., *Rufo v. Simpson* (2001) 86 Cal.App.4th 573 (affirming $25 million punitive award, approximately three times compensatory damages, for double murder, i.e., where the factors of reprehensibility and harm inflicted "have the greatest weight legally possible"); *Greenfield v. Spectrum Investment Corp.* (1985) 174 Cal.App.3d 111, disapproved on other grounds in *Lakin v. Watkins Associated* (1993) 6 Cal. 4th 644 (nationwide car rental company ratified and covered up employee's physical assault on customer; plaintiff severely beaten and sustained fractures, was disabled from work for six months and sustained permanent painful neck injury; punitive damages: $400,000); *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 846-848, 851-852, 869, 875 (affirming reduction of $10 million punitive award to $1 million, where large corporate defendant consciously disregarded known health risk to

(continued...)

This jury was swayed to make an excessive compensatory award, as the trial court found; there is no reason to doubt that its punitive award was swayed by the same improper influences.

Juries' traditional discretion over the amount of punitive damages does not justify the sort of caprice and arbitrariness, so inconsistent with the judgments made by the Legislature and other juries that have faced analogous circumstances, illustrated here. The $9 million punitive damage award is excessive, and should be reversed.

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[25] (...continued)
thousands of women by marketing tampons prone to cause potentially fatal toxic shock syndrome); *Vossler v. Richards Manufacturing Co., supra,* 143 Cal.App.3d at p. 966 (defendant's continued sale of surgical implant knowing it would cause excruciating pain to hundreds of mostly elderly arthritic patients held still less reprehensible than conduct in *Grimshaw* involving marketing of vehicle that management knew would result in fiery deaths); *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 821, 822 (affirming reduction of $125 million jury award to $3.5 million where corporate defendant's conduct threatened mayhem and death to thousands of people).

CONCLUSION

The jury was so finely balanced on the threshold issue in this case, whether Sonnier was even the Exchange's employee, that it wrestled with that issue alone for days and listened to the testimony about it over and over. Only because the plaintiff was improperly permitted to present inadmissible expert opinion testimony was the issue even that close, let alone resolved in Sonnier's favor.

Without that error there would have been no judgment in Sonnier's favor at all, let alone the excessive and unjustified compensatory and punitive awards challenged in this appeal. The punitive award is unsupported by clear and convincing evidence and should be stricken outright. And the trial court's reduction of compensatory damages, alone requires that the punitive award be reversed and retried. The $9.9 million judgment based on the demonstrated errors should be reversed. The punitive award should be stricken and the case remanded for a fair trial under the law.

Dated: March 8, 2001

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 9601 Wilshire Boulevard, Suite 544, Beverly Hills, California 90210.

On March 8, 2001, I served the foregoing document described as **Appellant's Opening Brief and 3 Volumes of Appellant's Appendix (under separate cover)** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Law Offices of Stephen C. Ball
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Clerk to the
Honorable Victoria Gerrard Chaney (brief only)
Los Angeles County Superior Court
111 North Hill Street
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Clerk (5 copies-delivered by hand) (brief only)
California Supreme Court
300 South Spring Street, 2nd Floor
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I caused such envelope to be deposited in the mail at Beverly Hills, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on March 8, 2001, at Beverly Hills, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Anita McTyre