



LEXSEE 2006 CAL. APP. UNPUB. LEXIS 3178

**FARMERS INSURANCE EXCHANGE et al., Plaintiffs and Appellants, v.
BARBARA KANODE, Defendant and Appellant.**

G033782

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION THREE**

2006 Cal. App. Unpub. LEXIS 3178

April 18, 2006, Filed

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PRIOR HISTORY: Appeal from a judgment and orders of the Superior Court of Orange County, No. 00CC04644. Charles Margines, Judge.

DISPOSITION: Affirmed and remanded.

COUNSEL: Law Offices of Steven R. Young and Steven R. Young for Defendant and Appellant.

Greines, Martin, Stein & Richland, Robert A. Olson and Cynthia E. Tobisman; Picker, Chow & Freisleben, Lily Chow and Alan Freisleben, ojcfor Plaintiffs and Appellants.

JUDGES: BEDSWORTH, ACTING P.J.; O' LEARY, J., IKOLA, J. concurred.

OPINION BY: BEDSWORTH

OPINION

Barbara Kanode, a former agent for Farmers Insurance Exchange and related companies ¹, appeals from the trial court's orders (1) granting a judgment notwithstanding the verdict (JNOV) on her claim against Farmers for interference with her business relationships and (2) granting a new trial on damages stemming from Farmers' alleged breach of her agency contract, after a jury had found [*2] in her favor on both claims and awarded her identical measures of economic damages. Farmers cross-appeals, arguing the court should have granted a JNOV in its favor on the breach of contract claim as well as the interference claim. We conclude the trial court ruled appropriately, affirm the orders, and remand the case for a new trial on Kanode's breach of contract claim.

¹ The Farmers entities named as parties in this case are Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company and Farmers New World Life Insurance Company. For the sake of convenience, we refer to these entities, collectively, as "Farmers."

Initially, we must note that it is the responsibility of an appellant to give the court an adequate statement of the facts necessary to analyze the issues on appeal, and to support the facts stated in her brief with appropriate citations to the record. (*Cal. Rules of Court, rule 14, subs. (a)(1)(C) & (a)(2)(C).*) Kanode's opening [*3]

brief is woefully inadequate in this regard.

Although our record in this case includes 19 volumes of reporter's transcript (for a total of 4000 pages), the statement of facts contained in Kanode's opening brief cites to that transcript only six times. She adds only two more references in the argument portion of her brief, for a total of eight references.² Numerous factual claims made in Kanode's brief, including some complete with purported quotations of oral statements, are unsupported by any reference to the record.³

2 At one other point in the argument portion of her brief, Kanode refers to the testimony of four witnesses to support her contention that Farmer's made knowing misrepresentations concerning Kanode and her agency. However, those references are accompanied by no citations to any page numbers from the reporter's transcript.

3 For example, Kanode's brief relates that at one point, when she was questioned about some missing checks, she replied "'The checks are in my car in an envelope. I was going to deposit them after seeing the doctor, but they held me at the hospital.'" This quotation is unaccompanied by any record reference.

[*4] To the extent she does support her factual claims, Kanode relies primarily upon the content of certain trial exhibits. While these are certainly part of the evidence, they represent only a small fraction of what the trial court had before it in making its decisions. To compound the problem, Kanode has mischaracterized at least one exhibit, claiming it establishes that a Farmers employee was responsible for having her arrested and taken to a mental hospital. But the document in question reflects that it was *Kanode's own father* who did so.

It is not enough for Kanode to merely tell a story while presenting us with an enormous record from a trial which spanned over two months, apparently hoping we will dive in and sort it all out. "It is counsel's duty to point out portions of the record that support the position taken on appeal. The appellate court is not required to search the record on its own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.)

Consequently, our recitation of the facts will be limited to those which are either undisputed or adequately supported, and we will consider only those arguments for which a proper factual [*5] basis has been laid.

Kanode and Farmers entered into an agency agreement in June of 1992. The agreement provides that Kanode, acting as an independent contractor, will sell and renew insurance policies for Farmers, and service those policies by, among other things, "collecting and promptly remitting monies [*sic*] due to the Companies, receiving and adjusting claims within [her] authority, [and] notifying the Companies of all claims beyond that authority"

The agreement requires Kanode to submit to Farmers "every request or application for insurance for the classes and lines underwritten by [Farmers] and eligible in accordance with their published Rules and Manuals. All business acceptable to [Farmers] and written by the Agent will be placed with [Farmers.]" Thus, the agreement does not prohibit Kanode from selling insurance on behalf of other companies if Farmers does not offer the product, or has rejected the customer's application.

The agreement between Farmers and Kanode gives either party the unfettered right to terminate it with three months written notice to the other. Termination is allowed on shorter notice only under specified conditions. For example, [*6] termination can be effected on 30 days notice if either party breaches the agreement. And termination can be effected immediately "by mutual consent" or in the event of specified circumstances, including Kanode's "abandonment of the Agency."

The agreement also provides that in the event Farmers terminates the agency relationship, Kanode "may within ten (10) days of receiving the notice of termination request a review of the termination by a termination review board." The agreement states the board "will convene within twenty (20) days of the request by the Agent" After the board completes its review, it submits a recommendation concerning the termination to Farmers' "Executive Home Office." Farmers' "chief executive officer" has the ultimate authority to decide whether the termination was appropriate.

The agreement further specifies two measures of compensation to be paid an agent in the event of termination. It first provides, in paragraph "E": "If this Agreement is terminated, the Agent shall be entitled to first year commissions which become payable over the next twelve months following termination for Farmers New World Life business written prior to termination and payment [*7] of those commissions will be after the

completion of the twelve months. The agent shall also be entitled to new business commissions less new business chargebacks for business written prior to termination in the Companies other than Farmers New World Life." And, in paragraph "G" the agreement provides that "in the event of termination of this Agreement . . . [Farmers] will pay 'Contract Value' to the Agent or heirs in the manner hereinafter set out." The rather complex calculation of "Contract Value" follows that provision.

It appears undisputed that Kanode was a successful and satisfactory Farmers agent for several years. It is also undisputed that in 1997, Kanode began experiencing significant health problems and exhibiting (perhaps related) erratic behavior, all of which interfered to some extent with her ability to run her agency. Kanode was placed under a court-ordered conservatorship for a four-month period in 1997-1998. She was again placed under a conservatorship, on and off, for periods from January 2000 through March 2001. On March 10, 2000, the court determined Kanode was "gravely disabled" pursuant to *Welfare and Institutions Code section 5008* [*8] , *subdivision (h)*. The court appointed Kanode's mother to act as her conservator, with powers including the right to contract for the conservatorship estate. Kanode herself was expressly prohibited from entering into contracts.

Kanode was also involuntarily hospitalized, pursuant to *Welfare and Institutions Code section 5150*, for six weeks in 1997, and again for four weeks in 1999. In January of 2000, Kanode was once again involuntarily hospitalized, but later released pursuant to a writ of habeas corpus.

The parties are not particularly specific about the nature of Kanode's illness in their briefs. Farmers merely describes her symptoms, including erratic behavior and a history of involuntary confinement and conservatorships. It hints that her condition is possibly bi-polar disorder, or something akin to that. Kanode herself says almost nothing about the nature of her symptoms, but explains she suffers from Graves disease, a thyroid condition. She describes it as "debilitating" and notes it has required frequent hospitalization "sometimes against her will." She testified she suffered from a "thyroid storm" in 1997, necessitating her hospitalization in [*9] intensive care for several days. She explained that she might not have gotten "full oxygen" during that time, and acknowledged it "affected [her] mind" for some period of time

thereafter. As of the time of trial, she denied any continuing ill effects.

In 1999, because of her ongoing problems, Kanode arranged for a man named Masood Khan to run her agency during her absences. Farmers characterizes him as someone who "previously failed to complete [their] reserve agent program" and states that it "ultimately concluded [he] was unqualified to run Ms. Kanode's agency in her absence without supervision by an appointed agent."

Eventually, in January of 2000, Farmers notified Kanode that it was terminating her agency relationship. Kanode requested a review of the termination decision by a termination review board. Although Farmers scheduled a review board hearing for March 15, 2000, Kanode's counsel could not commit to her appearance, apparently because Kanode was at that point involuntarily confined. As counsel explained: "due to [Kanode's] medical condition, at this time, I cannot guarantee that her doctors will release her from care in order to attend the TRB hearing. My vigorous [*10] efforts to obtain day pass releases have been denied." Ultimately, Farmers refused Kanode's request to delay the review board hearing until such time as she would be available to attend, and the hearing was canceled.

In connection with the termination, Farmers notified those of its insureds with policies sold or serviced through Kanode's agency that she had "felt it necessary to leave her agency" and that "her agency records are being reassigned" to other agents. Farmers also paid Kanode one month's worth of service commissions (based upon Farmers' determination she was entitled to 30-days' notice of termination), plus payment of a "contract value" calculated to be \$ 42,712.

Despite a provision in her agency agreement specifically providing that all "records of any kind (including information pertaining to policyholders and expirations) are the confidential property of [Farmers]" and further specifying that "for a period of one year following the date of payment or tender of payment the Agent will neither directly or indirectly solicit, accept, or service the insurance business of any policyholder of record in the agencies of this district as of the date of payment or tender [*11] of payment," Kanode refused to turn over her agency's records to Farmers.

Ultimately, On April 14, 2000, Farmers filed suit

against Kanode, seeking, among other things, an order compelling her to release her agency's files. On May 15, 2000, the court issued that order. Kanode filed a cross-complaint, alleging causes of action for breach of contract, interference with contractual relations and prospective economic advantage, and termination of contract in violation of public policy. The public policy cause of action, grounded on alleged violations of the Fair Employment and Housing Act (Gov. Code, §§ 2900 et seq.), and the Americans with Disabilities Act (42 U.S.C. §§ 12101 et seq.) was later adjudicated adversely to Kanode, pursuant to stipulation.

The case went to trial on Kanode's claims for breach of contract and interference. After a trial which spanned more than two months, those claims were submitted to a jury. The jury ruled in Kanode's favor, rendering a special verdict which stated that with respect to the breach of contract claim: (1) Farmers breached its agreement with Kanode; (2) Kanode did not waive or excuse the breach; and (3) Farmers' breach [*12] caused Kanode to suffer \$ 268,125 in damages. With respect to the interference claim, the jury concluded: (1) Kanode had a beneficial economic relationship with her customers; (2) Farmers knew of that relationship and disrupted it; (3) Farmers engaged in wrongful conduct other than termination of the agency agreement itself; (4) Farmers' conduct was a substantial factor in causing harm to Kanode; and (5) Kanode suffered damages consisting of \$ 268,125 in past economic damages, plus \$ 400,000 in emotional distress damages.

Farmers moved for a JNOV and a new trial. Among other things, Farmers asserted that Kanode's causes of action for interference failed as a matter of law, as Farmers could not be held liable for "interfering" with any relationship between Kanode and its own policy holders. Farmers further contended that Kanode had not established "any wrongful interference, in fact or amount, with any supposed prospective economic advantage she might have had as to non-Farmers insurance business."

As to the breach of contract claim, Farmers asserted that Kanode was limited by the terms of her agency agreement to recovery of the amounts specified therein as payable in the event of [*13] termination. In that regard, it suggested that Kanode's remaining damages could not exceed \$ 13,333, the additional amount it calculated she would have been entitled to if Farmers had accorded her a full 90 days' notice of termination. Farmers also argued

that the judicial determination of Kanode's incapacity terminated her agency relationship as a matter of law.

Despite Kanode's opposition, the court granted Farmer's motion for JNOV in part, concluding that Farmers was entitled to entry of a judgment in its favor on Kanode's tortious interference claims. The court also conditionally granted Farmers' motion for new trial on the breach of contract claim. The court expressly stated that "in ruling on the motion [for JNOV], the court necessarily resolved conflicts in the evidence in favor of responding party (Ms. Kanode) and against the moving party (Farmers); and has drawn all reasonable inferences against the moving party and in favor of responding party. (*Fountain Valley Chateau Blanc HOA vs. Department of Veterans Affairs* (1998) 67 CalApp.4th 743, 750.)"

The court then explained that "with respect to the cause of action for intentional interference with prospective [*14] economic relations, the court finds that there is simply no credible, substantial evidence that Farmers engaged in such conduct. Having terminated its agreement with Ms. Kanode, Farmers necessarily was obligated to refer her policyholders to other agents and to inform the clients of the change in their agents. Ms. Kanode failed to present any substantial evidence that Farmers engaged in any other conduct, let alone wrongful conduct, with the intention of interfering with her prospective economic relationship with others." The court also concluded there was "a lack of any credible evidence as to any amount of damages which Ms. Kanode sustained specifically due to this tort. Indeed, the fact that the jury assessed the identical amount as damages for both causes of action, and that it indicated that the two amounts were duplicative, strongly implies that it did not find there to be a separate wrongful act (i.e., the tort) by Farmers. In any case, the award of \$ 400,000.00 for emotional distress cannot stand as a matter of law because 'the defendant's tortious conduct has resulted only in economic injury to the plaintiff' (*Erlich vs. Menezes* (1999) 21 Cal.4th 543, 555; [*15] citation omitted)."

The court acknowledged there was substantial evidence to support the jury's determination that Farmers had committed a breach of Kanode's agency agreement, but went on to explain that it was nonetheless granting the motion for new trial "subject to the condition that the motion is denied if . . . Ms. Kanode consents to a

reduction of damages for the breach of contract cause of action to the amount of \$ 13,334.00. In ruling on this motion, the court is permitted 'to disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that of the jury. (*Fountain Valley Chateau Blanc HOA, supra*, [67 Cal.App.4th] at [p.] 751.) . . . In oral argument, when the court indicated its puzzlement regarding the amount which the jury awarded, Ms. Kanode's counsel provided what the court believes to be the most plausible answer - the jury accepted counsel's argument that the trial was, in effect, the termination review board hearing which Ms. Kanode demanded but was not given. The jury then assessed as damages what it believed Ms. Kanode would have earned from the date of termination to the date of verdict. There was no reason in logic or law [*16] for the jury to have made this determination Contrary to counsel's argument at the hearing on the motion, the [agency agreement] does not indicate that termination is effective only after the termination review board process has run its course, and neither does the testimony Not only does Ms. Kanode's interpretation of the contract conflict with its unambiguous language, such a reading of the Agreement would lead to absurd results. For example, an agent could be terminated immediately for embezzlement of money belonging to Farmers, but Farmers would be required to let him continue to operate as its agent for a period of several weeks, until Farmers' CEO and staff uphold the recommendation of the review board. [P] This court finds that Farmers' requirement that a terminated agent attend the termination review board hearing was reasonable and that Farmers afforded Ms. Kanode, through her counsel, ample opportunity to avail herself of the procedure. This court also finds that Farmers acted reasonably in calling off the hearing when Ms. Kanode's counsel indicated that her client was not available for the hearing and could not provide a date by which Ms. Kanode would [*17] be so available. Any implied finding by the jury that Ms. Kanode's termination was not final until some three and one-half years after she was given a letter of termination and that Ms. Kanode still had the right to demand a termination review board hearing is not supported by the evidence, the law, or by logic."

Finally, the court concluded that Kanode's measure of damages flowing from any breach by Farmers of the agency agreement cannot exceed the amount of compensation she would have been entitled to if Farmers had simply exercised its option to terminate the agreement without cause. On this point, the court relied upon *Martin*

v. U-Haul Co. of Fresno (1988) 204 Cal. App. 3d 396, 251 Cal. Rptr. 17, which provides that "awarding the wronged party damages which exceed those attributable to the [period of notice required for termination without cause] would place that party in a better position than that resulting if the breaching party had performed in accordance with the terms of the agreement." (*Id. at pp. 410-411.*)

I

Kanode first argues the court improperly granted a judgment notwithstanding the verdict on her claim that Farmers intentionally [*18] interfered with her relationships with her customers. She asserts the court erred by applying the wrong standard in assessing the propriety of a JNOV, as exemplified by its comment that her claims were not "credible." As she points out, "when presented with a motion for JNOV, the trial court 'cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied.' [Citations.]" (*Wright v. City of Los Angeles (1990) 219 Cal. App. 3d 318, 343, 268 Cal. Rptr. 309.*)

However, Farmers responds by pointing out the court did expressly state, the correct standard for determining a JNOV, arguing the court's reference to credibility was colloquial and descriptive, and did not demonstrate any misapplication of the law. Farmers also asserts that even if the court did apply the wrong standard, our review of a JNOV determination is essentially de novo, and that we should affirm the order in any event since Kanode has failed to establish the existence of substantial evidence in support of her claim. Farmers [*19] is correct.

First, the trial court did expressly state it had applied the correct standard for resolving a motion for JNOV. The court's order asserted it had "resolved conflicts in the evidence in favor of [Kanode] and against [Farmers]; and has drawn all reasonable inferences against [Farmers] and in favor of [Kanode.]" That is exactly what the court was required to do. (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs (1998) 67 Cal.App.4th 743, 750*, ["Conflicts in the evidence are resolved *against* the moving defendant and in favor of the plaintiff; all reasonable inferences to be drawn from the evidence are drawn against the moving defendant and in favor of the plaintiff."].)

Second, the court's references to "credibility" were not necessarily inappropriate. Ultimately, the issue the court must resolve is whether "substantial evidence" supports the jury's verdict. (*Paykar Construction, Inc. v. Spilat Construction Corp.* (2001) 92 Cal.App.4th 488, 493 ["A party is entitled to judgment notwithstanding the verdict only if there is no substantial evidence to support the verdict and the evidence compels [*20] a judgment for the moving party as a matter of law."]) And "substantial evidence," in turn, is defined as "evidence of ponderable legal significance, reasonable, *credible* and of solid value." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1100, citing *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633; italics added.)

Because a certain element of "credibility" is included within the consideration of whether evidence is "substantial," we cannot fault the court for referencing the concept in its assessment of whether substantial evidence existed. And we must assume that the court's references to "credible" evidence were merely that - a reflection of its application of the substantial evidence test to the facts asserted by Kanode. (*Thompson v. Thames* (1997) 57 Cal.App.4th 1296, 1308 ["We must presume that the court knew and applied the correct statutory and case law."]; *Evid. Code*, § 664.) Consequently, we cannot conclude the court erred in referring to "credibility."

In any event, it would not be sufficient for Kanode to simply establish the court applied the [*21] wrong standard in analyzing the JNOV motion. In order to justify reversal of the resulting judgment, Kanode must also demonstrate prejudice flowing from the court's alleged error. (*Cal. Const., art. VI, § 13.*)⁴ In other words, it was incumbent upon Kanode to establish on appeal that if the trial court had applied the proper standard, the motion for JNOV would have been denied.

4 Article VI, section 13 provides in pertinent part: "No judgment shall be set aside, or new trial granted, in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Since, as explained in *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68, both the trial

court and the appellate court apply the same standard in determining whether a JNOV is appropriate; i.e., "whether any substantial evidence - contradicted or uncontradicted [*22] - supports the jury's conclusion," our review is essentially de novo, and Kanode's burden is consequently fairly straight forward. She would meet her burden of demonstrating prejudice by simply pointing to substantial evidence in the record which supports her interference claim. She failed to do so.

The primary thrust of Kanode's argument is that the evidence of Farmer's conduct vis-a-vis its own policy holders is sufficient to constitute actionable interference. In Kanode's view, her relationship with those Farmers policy holders constitutes a distinct relationship, separate and apart from either Farmer's relationship with her or its relationship with those same policy holders. She is incorrect.

As established in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, a cause of action for interference with contract cannot be stated against a party to the agreement. The rationale for this rule is that parties who enter into contractual relations should be held to contract remedies in the event of disputes concerning the propriety of their conduct in connection with performance of those agreements; whereas the tort of interference, by contrast, [*23] is intended to prevent the contracting parties "against frustration by *outsiders* who have no legitimate social or economic interest in the contractual relationship. . . ." (*Id. at p. 514.*)

In this case, Farmers is hardly a stranger to the relationships formed between Kanode and her clients. To the contrary, Farmers is clearly a third party beneficiary of whatever agreements Kanode entered into with her clients, for the simple reason that she is expressly obligated to (1) sell Farmers' policies to those clients whenever possible, and (2) to service any existing policies on behalf of Farmers. "A third party may qualify as a beneficiary under a contract where the contracting parties must have intended to benefit that individual and such intent appears on the terms of the agreement." (*Harper v. Wausau Ins. Co.* (1997) 56 Cal.App.4th 1079, 1087.) Both Kanode and any client who purchased a Farmers policy from her must have understood (and thus implicitly intended) that Farmers would benefit from the transaction.

Consequently, as a third party beneficiary of any contracts between Kanode and her clients, Farmers had

an enforceable interest in those contracts. [*24] (*Civ. Code*, § 1559 ["A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."].) Its rights in relation to those agreements were thus governed by contractual, rather than tort, principles.

Moreover, the agreement between Farmers and Kanode expressly gave Farmers the right to terminate the agency relationship, and specifically provided that Farmers, rather than Kanode, was the owner of "records of any kind (including information pertaining to policy holders and expirations)." And finally, a court order expressly authorized Farmers to take possession of Kanode's files. Farmers simply cannot be held liable in tort for actions which were all expressly authorized by contract and court order. (See *Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal. App. 3d 648, 192 Cal. Rptr. 732.)

Kanode next argues that even if Farmers could not be held liable for interfering in her relationships with Farmers' own insureds, it could nonetheless be liable for interference with the relationships between Kanode and those clients to whom she had sold policies from *other* insurers. However, [*25] Kanode fails to cite any substantial evidence demonstrating she suffered any compensable damages stemming from that alleged interference.

The only evidence cited by Kanode on this point (in her reply brief), established merely that she was entitled to sell policies for other insurers in limited circumstances, and had done so in the past. However, when asked "what effect did that have on your being able to continue to service your other policyholders . . .?" Kanode replied "I can't reach them." When counsel immediately attempted to clarify by inquiring: "But you had business as to those [other] policies?" Kanode simply answered that Farmers' conduct had "limited [her] capability to contact the customers." She did *not* testify to any ongoing business with those policies, let alone establish any specific monetary loss associated with her inability to contact those clients. Hence, that evidence was insufficient to demonstrate that Kanode had suffered any damages as a result of Farmers' alleged interference with these relationships.

Because Kanode has failed to demonstrate that substantial evidence supports her claim that Farmers is liable for intentionally interfering with any [*26] of her client relationships, we conclude the court's order

granting the JNOV as to that claim must be upheld.

II

Kanode also challenges the court's decision to order a new trial on her claim for breach of contract. She attempts to construe that order as limited to the issue of damages, but we cannot agree. Farmers' motion was for a new trial on the entire contract claim, not just the issue of damages, and the court's order reflected that the motion was "granted."

Admittedly, the trial court's decision appears to be based largely on its disagreement with the amount of damages awarded by the jury, but that disagreement also reflected a deeper concern; i.e., what exactly was the nature of the breach committed by Farmers? As the court explained (and Kanode's counsel argued), the only reasonable explanation for the measure of damages selected by the jury was an implicit conclusion that the trial itself would operate as a substitution for the termination review board hearing provided for in Kanode's agency agreement, and that her agreement consequently remained in effect until the jury reached its verdict.

But if that were the jury's conclusion, it would necessarily follow that Farmers' [*27] failure to conduct the termination review board hearing was itself the breach of contract which gave rise to Kanode's damages - an ongoing breach that was ultimately "cured" by the trial itself. Such a determination would also explain why the jury concluded in its special verdict that Kanode's economic damages had all accrued as of the rendition of the verdict, and that she would incur no "future" damages.

In its ruling, the court *expressly* disagreed with these conclusions. It explained why, in its opinion, the termination of Kanode's agency agreement was effective even in the absence of a termination review hearing, and why Farmers was justified in canceling that hearing. Consequently, the court's new trial order questioned not only the measure of damages awarded by the jury, but also the very nature of the breach committed by Farmers. Under these circumstances, that order supported a new trial of the entire claim, not merely the issue of damages.

Turning to the merits of the order, we note that our role in reviewing a new trial order based upon a finding of either excessive damages or insufficiency of the

evidence, is limited. *Code of Civil Procedure section 657* [*28] provides in pertinent part that "on appeal from an order granting a new trial . . . upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons."

In *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412, the Supreme Court explained that when reviewing the validity of the reasons stated by the court, we must sustain the order on appeal "unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.] Moreover, 'an abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached' [Citation.] In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of [*29] the [new trial] order.' [Citation.]"

In this case, of course, the trial court was commendably specific about its doubts regarding the jury verdict. As the court explained, it was concerned the jury had interpreted the agreement as not allowing any "termination" until after the conclusion of the termination review hearing requested by Kanode. As no such review had been completed here, the court believed the jury had implicitly concluded that no termination had ever been effected, and awarded Kanode, as damages, all the commissions she would have earned as a Farmers agent until the time of trial. The court's theory, which was based upon an argument offered by Kanode's own counsel (one which Kanode continues to assert on appeal), is certainly plausible.

Moreover, in the absence of evidence that the parties had discussions concerning the mechanics of the termination provision contained in the agency agreement at the time they entered into it, our interpretation of that provision is an issue of law, not fact. (*Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1448.) And our interpretation is consistent with that of the trial court.

The language [*30] in the agreement treats a

termination by Farmers as complete upon the expiration of the applicable notice period, without conditions. Moreover, the agreement's characterization of the role of a termination review board supports that view: it is the board's duty to review "the termination," rather than "the proposed termination." While it is clear that Farmers' CEO has the authority to void an agent's termination, or to simply order an agent's reinstatement, there is nothing in the agreement suggesting that the initial decision to terminate is not immediately effective. Consequently, Farmers' notice of termination of the agency agreement was effective when received by Kanode, and the actual date upon which the termination became effective was not dependent upon whether Kanode was afforded a termination review board hearing.

Kanode contends there are several additional problems with the court's new trial order. Those assertions can be disposed of in short order. First, Kanode asserts the conditional aspect of the new trial order, which offered her the option of accepting a reduction in her damages in lieu of a new trial, somehow operated as a disguised JNOV, and was improper because [*31] the court purportedly "decided as a matter of law Ms. Kanode can only recover \$ 13,334.00 on the breach of contract claim, disregarding contradictory evidence." Kanode is incorrect, for the simple reason that the proposed reduction in damages was merely *an option* offered to her. She was in no way obligated to accept it, and as long as the court's new trial order was otherwise appropriate, she cannot have been prejudiced by having been offered that option.

Moreover, the court acted entirely appropriately in explaining why, based upon its own assessment of the evidence introduced at this trial, it believed Kanode would be entitled to recover no more than \$ 13,334 in additional damages under the terms of her agency agreement. The court may have been incorrect (as Kanode contends it was) but as no judgment was entered for that amount, we need not consider the point here.

Our role at this juncture is limited to assessing the propriety of the new trial order; we cannot adjudicate the ultimate merits of the contract dispute. If Kanode disagrees with the trial court's current assessment of her contract claim, she is free to proceed with a new trial, and to assert whatever claims and [*32] make whatever factual record she deems appropriate during that new trial. If Kanode is dissatisfied with the judgment rendered

after that new trial, we will address her objections then. We certainly cannot, at this point, direct what the outcome of that proposed new trial ought to be.

Kanode next asserts the trial court's new trial order was based solely on the judge's "personal opinion," which is insufficient to justify the decision. We disagree. The court made clear its decision was based upon an analysis of the measure of damages awarded by the jury, and the fact that measure equaled the total earnings Kanode would have expected to make had her contract not been terminated until the conclusion of trial. The court also analyzed the language of the contract, both as it pertained to Farmers' right of termination, and the means of effecting that right. The issues raised by the court constituted valid points justifying its decision to order a new trial, and were certainly not mere "personal opinion."

Finally, Kanode asserts, in rather confusing fashion, that the trial court's analysis of the proper measure of damages to be awarded in this case was necessarily incorrect, because the [*33] provisions in the agency agreement specifying the measure of compensation to be paid were not applicable under the facts proved. This contention is frankly irrelevant. As long as the court's rationale for discarding the jury's measure of damages was supported by some evidence - and we have already explained that it was - then the court's new trial order must be affirmed, and the ultimate validity of the court's own analysis of the damages issue is immaterial at this point. Kanode can argue that issue when, and if, the court imposes its measure of damages upon her in a future judgment.

In any event, we would not agree with Kanode's argument as expressed at this point. In a nutshell, she contends Farmers would have had no right to terminate the agency agreement, because it was Farmers, and not she, which was found to be in breach of that agreement. Without any right to terminate, she continues, Farmers could not have properly invoked the contractual provisions specifying the measure of compensation to be paid the agent in the event of such termination (which provisions Kanode attempts to characterize as "liquidated damages" clauses).

However, Kanode's analysis fails, because Farmers' [*34] right to terminate the agency agreement was not dependent upon any determination of breach, or lack thereof. While the agreement did allow either party to terminate the agreement on 30-days notice in the event of

breach by the other party, it also specified that either party could terminate, with no specification of cause, on a 3-month notice. Thus, Farmers' right to terminate the agreement did not depend upon establishing any breach by Kanode. Instead, the existence of such a breach would affect only the period of notice to be applied in determining the termination's effective date.

And of course, the agreement's compensation provisions, specifying the payments to be made to an agent in the event of termination, expressly apply to any "termination," including both a 30-day notice of termination for breach, and a 3-month notice of termination. Moreover, those provisions do not, as Kanode suggests, establish "liquidated damages." Liquidated damages are created when parties attempt to establish, by agreement, a set measure of damages to be paid in the event of a contract *breach*. (*Civ. Code*, § 1671.) In this case, the compensation provisions applied without [*35] regard to any breach, and appear to operate instead as an agreed-upon method for valuing the agent's interest in her ongoing business.

Because Kanode has failed to demonstrate any significant flaw in the trial court's order requiring a new trial of her breach of contract claim, that order is affirmed.

III

Lastly, Farmers asserts, by way of cross-appeal, that the trial court erred when it refused to grant Farmers' motion for a JNOV on Kanode's breach of contract claim as well as her interference claim. Farmers asserts it was entitled to judgment on the breach of contract claim as a matter of law, because the undisputed evidence demonstrated that between the years 1997 and 2000, Kanode had been repeatedly adjudicated by the probate court to be "gravely disabled" and in need of a conservator. According to Farmers, such a determination establishes conclusively that Kanode was incapable of fulfilling her obligations in connection with her agency agreement.

While we admit the assertion has strong appeal, we must nonetheless reject it as the basis of a JNOV. There is substantial evidence in the record which casts some doubt on Farmers' claim.

First and foremost, there is the fact that [*36] Kanode's initial conservatorship was imposed for a

four-month period during 1997 and 1998, yet her agency survived. There is also evidence demonstrating that Farmers itself actually had significant knowledge regarding the extent of Kanode's mental problems from the beginning. Trial exhibits demonstrate that beginning in 1997, Farmers was aware she was experiencing both "physical and mental problems" and had been involuntarily confined in mental hospitals. Yet Farmers did not begin its efforts to terminate Kanode's agency agreement until late in 1999.

These facts and evidence give rise to inferences that (1) Kanode's legal incapacity, as demonstrated by her 1997 conservatorship, did not *necessarily* doom her agency business; and (2) that Farmers itself did not believe that Kanode's mental problems, including involuntary confinements in mental hospitals for indeterminate periods of time, actually rendered her incapable of fulfilling her agency obligations, at least not between 1997 and 1999.

And finally, there is also evidence that Farmers acquiesced in allowing Kanode's agency to be run by other employees during her periods of incapacity. If such an option were the accepted practice [*37] for Farmers'

agents (and Kanode claims it is), then Kanode could arguably have ensured the fulfillment of her agency obligations by simply continuing to arrange for others to carry out her contractual obligations during any period she was deemed personally unable to do so.

In light of these points, we cannot say that the evidence establishing Kanode's history of involuntary hospitalizations and conservatorships necessarily established she was legally incapable of fulfilling her contractual obligations under the agency agreement.

The posttrial orders are affirmed, and the case is remanded for a new trial on Kanode's claim for breach of contract. The parties are to bear their own costs on appeal.

BEDSWORTH, ACTING P.J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.