5th Civil No. F043931

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GUSTAVO PEREZ,

Plaintiff, Respondent and Cross-Appellant,

vs.

FIRE INSURANCE EXCHANGE,

Defendant, Appellant and Cross-Respondent.

Tulare County Superior Court, No. 01-195746
Honorable Melinda M. Reed

APPELLANT'S OPENING BRIEF

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INTRODUCTION

A tractor lumbering down a road is a common, almost archetypical, scene in farm country. In this insurance bad faith case, the insured, Gustavo Perez, borrowed a tractor. It was driven on a public road, where it was involved in a serious traffic accident when a truck ran into it. The insured demanded coverage for the accident under his homeowner's liability policy, even though it excluded liability for accidents arising from motor vehicles "designed for travel on public roads."

The undisputed facts, as found by the trial court, were that the borrowed tractor was equipped and "accessorized" for street legal travel on public roads. Its standard features included turn signals, brake lights, high- and low-beam headlights, and a convertible braking system – all designed exclusively for travel on public roads. It also had a slow-moving-vehicle sign. It was contemplated by all concerned – e.g. the manufacturer, the tractor's owner – that the tractor could and would travel on public roads. The operator's manual instructed users how to drive the tractor safely on public roads, noting that, like the accident here, one-third of all tractor-related accidents occur while traveling on public roads.

The homeowner's liability policy does not cover road-related risks. Using simple and direct language, it excludes coverage for liability arising from use of any "motor vehicle" "designed for travel on public roads." The trial court held that the exclusion did not apply because the tractor was not designed *"primarily"* for travel on public roads. Like other contracts, insurance agreements are interpreted according to the ordinary meanings of

the words used. So, too, a policy's language and context necessarily affect the insured's reasonable expectations.

The policy here nowhere uses the word "primarily" or otherwise inserts such a limitation. It excludes *any* motor vehicle "*designed* for travel on public roads," regardless of its "primary" design. It does so as part of an indisputable intent to exclude vehicular road- and travel-related risks. The tractor was indisputably designed for public road travel, even if that is not its exclusive or primary purpose. No insured could reasonably expect a homeowner's policy that excludes road risks to cover a tractor accident while traveling on a public road.

Even if the policy language can be stretched to find coverage, Fire's interpretation necessarily was a reasonable one, precluding tort liability. The trial court here deemed the coverage question "novel, unusual and difficult." Under settled law, failing to divine such a question's eventual judicial resolution cannot constitute a *tortious* breach of the insurance contract. A genuine policy interpretation dispute cannot support tort liability. That is all that there is here. The trial court itself conceded that Fire's position "may be reasonable." Fire's interpretation was confirmed by the advice of outside counsel. The trial court's contrary interpretation required inserting a word – "primarily" – that does not exist in the policy. Whether Fire's construction was right or wrong, the policy interpretation dispute was and is genuine and, therefore, no tort liability exists.

These same considerations negate any basis for punitive liability. Taking a mistaken position on a novel question of policy interpretation is a

far cry from the clear and convincing evidence of "despicable" conduct required to support punitive liability. Even if its position were somehow "objectively unreasonable," no evidence exists that Fire *knew* that its interpretation would not prevail, that it reasonably even *should* have so known, or that it consciously ignored evidence relevant under its own policy interpretation. Without such evidence there could be no punitive liability.

For these and the other reasons discussed below, the judgment must be reversed.

STATEMENT OF THE CASE

I.

THE FACTS

A. The Parties.

Plaintiff and respondent Gustavo Perez was insured under a homeowner's policy issued by defendant and appellant Fire Insurance Exchange, a reciprocal insurance exchange organized under California law. (RT 864, 213.)

B. The Fire Insurance Exchange Homeowner's Liability Policy Excluding Coverage For Motor Vehicles "Designed For Travel On Public Roads."

Perez owned a home where he kept some farm animals. (RT 836-837.) He had a homeowners insurance policy from Fire in force at the time of the accident. (RT 213; AA 176-216.)

That policy provided liability coverage to a limit of $300,000 for bodily injury or property damage. (AA 176, 190.) The insuring agreement did "*not* cover bodily injury or property damage which . . . results from the . . . use . . . of . . . *motor vehicles*." (AA 192, emphasis added.) The policy, in turn, defined "motor vehicle," in relevant part, as: "a motorized land vehicle, . . . *designed for travel on public roads*." (AA 180, emphasis added.)

This was part of a broad exclusion which also encompassed "any vehicle while being towed or carried on [such] a vehicle" and "any other motorized land vehicle designed for recreational use off public roads." (AA 180.)

The only exceptions were "a motorized golf cart while on the golf course and *used* for golfing purposes" and "a motorized land vehicle, not subject to motor vehicle registration, *used only on an insured location*." (AA 181, emphasis added.)

The policy was not designed for farming risks and would not have been issued to Perez had the agent known he kept farm animals on his property. (RT 864-866, 884.)

C. The Borrowed Tractor Collides With A Truck On A Public Road.

Perez worked at a dairy and orchard. (RT 803-804, 830-835.) He borrowed one of his employer's tractors, a Kubota 8030, with an auger attached to it, to drill some fencepost holes on his land. (RT 805, 838-839.)

Perez hired a laborer who drove the tractor over to Perez's house, crossing and traveling along Public Road 124 to get to Perez's property. (RT 840-842.) As it was getting dark, the laborer drove the tractor back to the dairy. (RT 843-844.) A semi-truck hit the tractor while the tractor was driving on or crossing Public Road 124. (RT 845; AA 3.) The laborer disappeared and was never seen again. (RT 846.)

D. The Tractor's Design.

The tractor's standard equipment includes:

- high- and low-beam headlights;
- flashing hazard lights;
- right and left turn signal lights;
- a pedal lock for interlocking the left- and right-wheel brakes "before traveling on the road." (RT 453; AA 218, 236.)

These features have no purpose other than travel on roads. (RT 453-454, 500.) The tractor also had a slow-moving-vehicle sign. (RT 422; see AA 280.) The owners manual, in a separate, bold-heading subsection, instructs on "Driving the tractor on the road." (AA 224.) For road travel, the manual instructs the driver to:

- "[o]bserve all local traffic and safety regulations;"
- use a SMV [slow-moving-vehicle] sign and the Flasher Turn Signal Lights;
- "Turn the headlights on. Dim them when meeting another vehicle";
- interlock the brake pedals together for even two-wheeled braking. (AA 224.)

The manufacturer warns that one-third of all tractor accidents occur on public roads. (RT 476; AA 289.)

Although the manufacturer advises tractor users to "stay off the highway whenever possible" (RT 477) it offers no similar advice about use on smaller public roads. The manufacturer's 10 Commandments of Tractor Safety recognizes that the tractor travel on public roads often cannot be avoided and instructs in its safe use "on public roads," addressing such things as the need for caution at controlled intersections, driving during daylight hours and staying off the road shoulder. (AA 289.)

E. The Claims Investigation.

1. The initial investigation.

Perez notified Fire of the accident, and the claim was assigned to adjuster Anneka Hall. (RT 167-168, 175; AA 169.) Hall verified that the policy was in force. (RT 213.) She interviewed Perez, who told her what he knew of the accident. (RT 180-181.) That interview was taped and a written summary was prepared. (AA 174.) The tape itself later was lost. (RT 527.) She also spoke with Burt DeJong, the owner of the borrowed tractor. (RT 185.)

Hall identified the exclusion for vehicles "designed for travel on public roads," as the critical coverage issue. (RT 193.) She interviewed Pete Terronez, a Kubota tractor dealer, and obtained a copy of the tractor owner's manual. (RT 185, 199, 203.) Terronez informed Hall that the tractor was equipped for road travel because that was common for these tractors. (RT 200.)

Hall felt that the information she received from Kubota dealer Terronez was adequate to make the design determination without contacting the manufacturer. (RT 215.) She concluded that:

> [w]hoever built and designed that tractor included permanent equipment on it that would be used solely for being driven on the road. It's my opinion, and I think most people's opinion that that is part of the design of the tractor. Those permanent attachments, the headlights, the turn signals, the taillights, that's part of the design of the tractor. So my conclusion was that the tractor was designed for travel on public roads.

(RT 207.)

Hall did not ask Perez or the owner, Burt DeJong, about the tractor's design because they did not design the tractor. (RT 214.) DeJong told his employees to avoid road travel where possible. (RT 816.) Certain of his farms were widely separated, however, and could only be reached by public road travel. (RT 815, 825, 831.) On prior occasions, Perez had driven this specific tractor on public roads. (RT 967.)

2. The initial coverage review and denial.

Hall requested authority from her supervisor, Ted Walters, to deny coverage under the motor vehicle exclusion. She reasoned that "[i]t is legal to drive a tractor on public roadways, and so [the tractor] fits . . . the motor vehicle definition." (RT 208, 209, 339; AA 165.)

Walters saw no need to investigate further (RT 345) and, based on Hall's recommendation, requested authority from *his* supervisor, Mike Smith, to deny coverage. (RT 351-353; AA 165.) Smith, the branch manager, also recommended denial, but sought approval from the regional manager, Tom Ward. (RT 218-220, 520, 794-795; AA 159.) Hall notified Perez that the investigation was in the final stages of completion but that a final decision on coverage had not been reached. (AA 156.)

Ward ultimately authorized denying coverage. (AA 155.) Fire then wrote Perez formally denying coverage, citing the motor vehicle exclusion. (AA 152-154; RT 363-364.)

3. The injured truck driver sues and, at the urging of the tractor owner's insurer, Fire reconsiders its denial.

Approximately a year after the accident, the injured truck driver, Jesus Jimenez, sued Perez and the tractor's owner, DeJong. (AA 147-151; RT 371.) Two months later, counsel for DeJong's insurer, Ms. Schnitzer, requested that Fire participate in defending the lawsuit, spelling out her arguments for coverage. (AA 144-146; RT 998.)

Fire responded to both DeJong and Perez, reiterating its opinion that there was no coverage but agreeing to again "investigate this occurrence to determine the facts of the loss . . . ." (AA 140-142; RT 378-379.) Ms. Schnitzer restated her coverage argument, but offered no new relevant facts. (AA 135-136.) She also spoke directly with Walters. (RT 377.)

A week later, Fire informed Perez that although it was re-investigating "any potential for coverage which may apply to this lawsuit[,] . . . it appears that we do not owe a defense or indemnity based on the policy language . . . ." (AA 134.) It "recommend[ed] that [Perez] enter an answer to the complaint on [his] own behalf" and "hire an attorney to represent [his] interests. If it is determined that there is coverage at a later date, [Fire would] reimburse [Perez] for defense costs from the date of tender of defense." (*Ibid.*)

4. Fire's counsel advises that there is no coverage.

Within the month, Fire referred the matter to counsel specializing in insurance coverage, Tad Hoppe, for an opinion. (AA 121; RT 894-896, 889.) Fire made available its entire file. (RT 378-379.) Fire did not convey the undocumented conversation between DeJong's attorney and Walters; that conversation, however, contained no information that did not appear elsewhere in the file. (Compare AA 135-136, 144-146 with RT 1010-1012; see AA 511, 580.)

Hoppe advised Fire that no coverage existed because the tractor was a motor vehicle designed for travel on public roads. (RT 925-927; AA 117-119.) In Hoppe's view, the tractor's design was "clearly stated in the owner's manual." (RT 937.) Hoppe viewed Fire's investigation of the facts as adequate and did not believe that he needed further information to reach a definitive coverage conclusion. (RT 908-909.)

5. Fire re-confirms its coverage denial.

A week after receiving Hoppe's opinion, Walters forwarded it and recent correspondence, including that from DeJong's attorney, to Ward at the regional office. (AA 113-114; RT 613-623.) Three weeks later, Ward extended authority once again to deny coverage. (AA 110; RT 520.) Fire again notified Perez that it denied coverage. (AA 104-106.)

F. The Lawsuit Goes To Default But The Insured Obtains An Agreement Not To Execute.

Perez could not afford to hire a lawyer. (RT 859.) He nonetheless talked to a lawyer who advised him that he did not have a good defense. (RT 855-859, 969.) A default judgment was eventually entered against him for $413,000. (RT 861.) Perez then agreed to assign his insurance coverage rights to the injured truck driver in return for an agreement not to execute pending the initiation and resolution of the present lawsuit. (AA 295-297.) Perez remains liable to the extent Fire is not. (*Ibid*.)

The default judgment caused Perez sleeplessness, headaches, and stress. (RT 862.) He did not miss work; he took aspirin. (RT 970.) He still gets a little nervous when he gets letters relating to the litigation. (RT 971.)

II.

PROCEDURAL HISTORY

A. The Present Lawsuit.

Perez sued Fire. At trial he pursued theories of breach of contract and tortious breach of the covenant of good faith and fair dealing. (RT 1764.) He sought contract, tort (bad faith), and punitive damages.

B. The Coverage And Bad Faith Trial.

The trial court first tried liability and compensatory damages.

1. The trial court excludes evidence of the agreement not to execute; the insured then argues to the jury that the default judgment was "hanging over" his head.

The trial court granted Perez's motion in limine to exclude any reference to the agreement not to execute on the default judgment. (RT 87; AA 31-38 [attaching copy of agreement]; see RT 1098-1099; AA 295-297.) Having excluded the agreement from the evidence, Perez's counsel in closing argument argued that Perez suffered and continued to suffer substantial emotional distress due to the default judgment "hanging over his head." (RT 1668-1693.) The trial court denied Fire's motion for a mistrial premised on the misleading argument. (RT 1745.)

2. The trial court directs a verdict on coverage, reading into the policy exclusion a requirement that the vehicle be *primarily* designed for use on public roads.

Midway through the trial, the trial court determined that the facts were not contested concerning coverage and directed a verdict that the tractor accident on a public road was *not* excluded from coverage. (RT 1073, 1079.)

The court found undisputed that the tractor was "accessorized . . . with public street use equipment" so that it could "be occasionally used on a public road due to the nature of the farming business." (RT 1076.) It further found that "a useful tractor must have the capacity to occasionally move or travel across a public highway in order reach a field or destination intended for further use." (*Ibid*.; see also RT 1659 [Perez concedes that "sometimes (tractors) are going to have to be out on the road"].) The court also found undisputed that the tractor's owner "intended that the vehicle travel on public roads" when necessary. (RT 1076.)

On the day of the accident, "the tractor was equipped with turn signals and signage that enabled it to be driven on the public road. [The equipment is] not required . . . for off road driving or necessary for use in farming a field, but . . . required for driving on a public road." (RT 1077-1078; AA 91.) Also undisputed was that "the tractor traveled *on* the public highway for the purpose of crossing one street so as to enable the insured to

use and return the tractor to the owner on the day of the accident." (RT 1077; AA 90, emphasis added.)

Nonetheless, the trial court held that the tractor was *not* "designed for travel on public roads" within the meaning of the policy. "[R]ather than looking at the purpose for which a vehicle was designed in eliciting the meaning of the term 'designed for,'" the trial court opined that "the better approach is to view the *primary* purpose for which a vehicle is *maintained* and the term is more sensibly viewed as calling for either the subjective opinion of the insured that maintains the vehicle or an objective evaluation of how the vehicle is used by the insured." (AA 89-90 [Directed Verdict Ruling], emphasis added.)

The tractor's "overall" design was for off-road use. (RT 1076; AA 90.) Because it construed the motor vehicle exclusion as applying only if the vehicle was "*primarily*" designed for travel on public roads, the trial court found coverage. (*Id*.)

Because it found coverage, the trial court instructed the jury that Fire had breached the insuring agreement, causing $300,000 – the policy limits – plus interest in contract damages. (RT 1082.)

3. The expert testimony on the reasonableness of Fire's investigation and of its legal interpretation.

Perez's designated expert on insurance industry standards and practices testified that it was below industry standards for Fire: (1) to rely on the coverage opinion of its counsel due to his lack of knowledge about

tractors and the opinion's lack of case citation (RT 745-749); (2) not to seek declaratory relief before denying coverage (RT 695); (3) to have failed to obtain the insured's view as to the tractor's design (RT 681); and (4) to lose the tape of the interview with Perez (RT 664). He conceded, however, that it is not industry practice to underwrite the cost of a declaratory relief action on an insured's behalf, and that auto and homeowner's policies generally cover different, mutually exclusive risks. (RT 778, 782-783.)

Over Fire's objection that it constituted improper legal opinion (RT 624-625, 681, 745), Perez's expert testified that Fire's claims personnel should have known that the law, particularly *Farmers Ins. Exchange v. Schepler* (1981) 115 Cal.App.3d 200, mandated coverage. (RT 755-759.) He conceded, however, that in 40 years of insurance work he had never faced whether a farm tractor was a motor vehicle designed for travel on public roads excluded under a homeowner's liability policy. (RT 759-760.)

Fire's expert offered uncontested testimony that a tractor designed for on-road use carried a lot more risk than one designed exclusively for off-road use on a farm. (RT 1564.) In his 36 years of experience, he too had never had to confront whether a farm tractor falls within the motor vehicle exclusion of a homeowner's policy. (RT 1525.)

C. The Liability And Compensatory Damage Verdict.

By special verdict, the jury found: (1) as directed by the trial court, that Fire was liable for $389,178.08 (the $300,000 policy limit plus interest) in contract damages; (2) Fire did not reasonably rely on the advice of

counsel in declining to defend and indemnify Perez; (3) there was no "genuine dispute" as to Fire's liability under California law; (4) Fire tortiously breached the implied covenant of good faith and fair dealing resulting in $146,590.41 in economic damages (the amount by which the default judgment exceeded the $300,000 policy limit, plus interest) and $327,231.51 in non-economic (emotional distress) damages; and (5) Fire acted with oppression and malice in denying Perez policy benefits. (AA 304-306.) The parties later stipulated that Perez was entitled to $155,671.23 in so-called *Brandt* fees on the tort claim. (RT 2070-2071; *Brandt v. Superior Court* (1985) 37 Cal.3d 813.)

D. The $25 Million Punitive Damages Award.

The jury assessed punitive damages of $25 million. (RT 1932-1933.)

E. Post-Trial Motions And Remittitur Of Punitive Damages To $711,000.

Fire timely moved for judgment notwithstanding the verdict and for a new trial. (AA 309, 313, see AA 591, 593 [renewed motions].) The trial court denied the motion for judgment notwithstanding the verdict. (AA 586, 670, 673.) It conditionally granted a new trial motion as to punitive damages only, subject to Perez's consent to remitting the punitive award from $25 million to $710,732.88 – or 1.5 times the compensatory tort

award. (AA 673-674.) Perez accepted the remittitur in lieu of a new trial. (AA 660, 680.)

STATEMENT OF APPELLATE JURISDICTION

The judgment finally disposes of all issues between the parties. It was entered on September 26, 2003. (AA 697.) Perez served notice of entry on October 2, 2003. (AA 695-703) Fire timely appealed on September 18, 2003 and again on October 23, 2003. (AA 677, 712; Cal. Rules of Court, rule 3(a), (c).)

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING COVERAGE (AND DIRECTING A BREACH OF CONTRACT VERDICT); THERE IS NO COVERAGE BECAUSE THE ACCIDENT AROSE FROM THE EXCLUDED USE OF A MOTOR VEHICLE "DESIGNED FOR TRAVEL ON PUBLIC ROADS."

The trial court directed a verdict that Fire breached the insurance policy by not affording coverage for the tractor accident. It held that the tractor fell outside of the policy's exclusion for motor vehicles "designed for travel on public roads." (RT 1079.) It acknowledged the undisputed fact that the tractor was designed for and intended for occasional travel on public roads. (RT 1076-1077.) It read the term "designed for," however, as meaning "designed primarily for." (RT 1079-1080.) The trial court was wrong, as a matter of law, in its policy construction and, therefore, in directing a breach of contract verdict in Perez's favor.

A. This Court Independently Reviews The Trial Court's Coverage Determination.

"While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) As with

any written instrument, interpretation of an insurance contract is primarily a judicial function. (*Cooper Companies v. Transcontinental Ins. Co.* (1995) 31 Cal.App.4th 1094, 1100, citing *Devin v. United Services Auto. Assn.* (1992) 6 Cal.App.4th 1149, 1157-1158, fn. 5.) Absent conflicting extrinsic evidence as to contract meaning (there is none here), this court reviews policy interpretation de novo. (*Ibid.*) "[T]he meaning of the policy is a question of law" giving rise to this court's "duty to independently interpret the policy language." (*Ibid.*; *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club* (2003) 109 Cal.App.4th 944, 955 ["when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract"].)

B. The Policy Unambiguously Excludes Coverage For The Tractor As A Motor Vehicle "Designed For Travel On Public Roads."

1. The ordinary meaning of "designed for travel on public roads" encompasses the tractor.

Fire's homeowner's policy *excludes* coverage for "bodily injury or property damage which . . . results from the . . . *use* . . . of . . . *motor vehicles*," defined as including any motorized vehicle "*designed* for travel on public roads." (AA 92, 180, 192, emphasis added.) The central issue here is the meaning of "designed for." As with all contracts, meaning "is to be inferred, if possible, *solely* from the written provisions of the contract. (Civ. Code, § 1639.) . . . . The 'clear and explicit' meaning . . . controls

judicial interpretation. (*Id.*, § 1638.)" (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, emphasis added.)

The common, dictionary meaning of "*designed*" is "*made* or done intentionally; *intended*; planned." (Random House Unabridged Dictionary (2d ed. 1983) p. 539, emphasis added; see also www.dictionary.com ["designed"]; see *Stamm Theaters, Inc. v. Hartford Casualty Ins. Co.* (2001) 93 Cal.App.4th 531, 539 ["'In seeking to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries'"].) "[D]esigned for" means "'[f]it, adapted, prepared, suitable, appropriate,'" "'intended, adapted, or designated,'" and "the purpose for which [something] was constructed." (*Schepler*, *supra*, 115 Cal.App.3d at p. 206.) Thus, a motor vehicle that is *designed* for travel on public roads is one *made* with features allowing for or intended for travel on public roads.

The trial court's findings on the undisputed evidence were that the tractor incorporated features intended solely to make it capable of necessary travel on public roads. (RT 1076.) The owner's manual contained a special section addressing "Driving the tractor on the road" with detailed instructions on how to drive the tractor on public roads in traffic. (AA 224.) As the trial court recognized, travel on public roads is a necessary ancillary function for a farm tractor. (RT 1076; AA 89-91.) Even the tractor's owner admitted that travel on public roads was necessary and contemplated for the tractor. (RT 815-816, 825, 831; AA 90.) Thus, the tractor was undoubtedly "designed for" travel on public roads within the ordinary meaning of that term.

2. The trial court impermissibly inserted "primarily" into the contractual phrase "designed for."

The trial court inserted the word "primarily" into the middle of the policy term, "designed for." (AA 90 ["in eliciting the meaning of the term 'designed for,' the better approach is to view the *primary* purpose for which a vehicle is maintained . . . ."].) According to the trial court, even a vehicle "designed for travel on public roads," is not excluded unless it is designed *primarily* for such travel.

But courts have no authority to insert material terms into the text of contracts and statutes. *Mobilease Corp. v. County of Orange* (1974) 42 Cal.App.3d 461, applied this principle to identical language in holding that the trial court erred by inserting "primarily" before the term "designed for" in reading a statute.

In that case, Vehicle Code section 635 defined a "trailer coach" as a vehicle "*[d]esigned for* . . . carrying persons or property on its own structure." (*Id.* at p. 465 [quoting Vehicle Code section 635], emphasis added.) In concluding that mobile, relocatable office units were not "trailer coaches" within the statute, the trial court there held that "designed for" meant the primary purpose. It found that the office units were not "trailer coaches" because they "were not designed '*primarily*' for this purpose." (*Ibid*., emphasis added.)

The appellate court reversed. The trial court impermissibly added the material term "*primarily"* before "designed for":

> [T]he only evidence before the [trial] court was that these units were *designed* to carry property (or even persons had such carriage been legally permissible), and had the capacity to carry property within their structure . . . . *There is nothing in the language of the statute which requires that any one of these design elements constitute the 'primary use' of a unit.*

(*Id*. at p. 466, second emphasis added.)

Although *Mobilease* interpreted statutory language as opposed to the contract language at issue here, the same interpretative principles apply. In both cases, "where the words are clear and free from ambiguity, a court should not add to or alter them to accomplish a purpose that does not appear on the face of" the text. (*Ibid*.; see *AIU*, *supra*, 51 Cal.3d at p. 821)

In both cases, there is no justification for interlineating "primarily" into the term "designed for." Thus, the tractor can be "designed for travel on public roads" within the policy's meaning, even though it is primarily designed for off-road farm use.

Courts across the country uniformly agree: The term "designed for" means just that, and does not mean "designed *primarily* for." (See, e.g., *Kneipp v. Herron* (1991) 76 Ohio App.3d 460, 463-464 [602 N.E.2d 371] [despite being "*primarily* used upon the farm," truck fell within policy definition of vehicle "'*designed for* use or travel on public roads,'"

emphasis added]; *North Star Mut. Ins. Co. v. Holty* (Iowa 1987) 402 N.W.2d 452, 456 [unregistered truck with auger on back used primarily on farm still "'designed for travel on public roads'"]; *Christie v. Ill. Farmers Ins. Co.* (Minn. Ct. App. 1998) 580 N.W.2d 507 [snowmobile "'designed for'" recreational use even if it could have other uses].)

Read in its ordinary sense, "designed for" does not mean "designed primarily for." As such, the tractor indisputably was "designed for travel on public roads" and, hence, an excluded, uncovered risk.

3. The cases relied on by the trial court are not to the contrary; in fact, they support Fire's interpretation.

The trial court relied on a trio of cases construing the words "designed for" in various insurance policies in reading "designed for" to mean "designed *primarily* for," (RT 1074; AA 89, citing *Schepler*, *supra*, 115 Cal.App.3d 200; *Farmers Ins. Group v. Koberg* (1982) 129 Cal.App.3d 1033; and *Alpine Ins. Co. v. Planchon* (1999) 72 Cal.App.4th 1316.) None of these cases supports the trial court's "primarily" interlineation; in fact, they support excluding coverage here.

In two of the cases, "principally" *expressly* modified "designed for" in the policies. (*Schepler, supra,* 115 Cal.App.3d at p. 202 ["automobile" defined as "a four wheel land motor vehicle designed for use *principally* upon public roads," emphasis added]; *Koberg*, *supra*, 129 Cal.App.3d 1033 [same].) This material difference in policy language should lead to different meaning. (See *Aydin Corp. v. First State Ins. Co.* (1998) 18

Cal.4th 1183, 1192; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 865.)

The use of "principally" to modify "designed for" in *Schepler* and *Koberg* strongly suggests that the unmodified term "designed for" does not inherently mean "designed *primarily* for" as the trial court here concluded. Otherwise, the word "principally" in the *Schepler* and *Koberg* policies would be redundant. (See Civ. Code, § 1858 [rule of construction to avoid redundancy].)

The third case, *Alpine Ins. Co. v. Planchon*, *supra*, 72 Cal.App.4th at p. 1318, addressed a "mobile equipment" *exception* to an "auto" exclusion. The auto exclusion applied to "'a land motor vehicle, trailer or semi-trailer *designed for travel on public roads*" – virtually identical language as that at issue here. (*Ibid*., emphasis added.) *Alpine* construed this "designed for travel on public roads" language broadly, holding that "just about anything with wheels might qualify . . . . The only clear requirement is that an auto be a 'vehicle . . . designed for travel on public roads.'" (*Id*. at p. 1322.) At the same time, the policy in *Alpine excepted* (and therefore covered) "mobile equipment." The policy defined "mobile equipment as including "'*farm machinery* . . . and other vehicles designed for use principally off public roads.'" (*Id*. at p. 1318, emphasis added.) There would have been no reason for this exception if, as posited by the trial court here, farm machinery designed principally for off-road use did not qualify as "designed for travel on public roads" in the first instance.

Thus, if anything, the three cases relied on by the trial court *support* that the tractor here was "designed for travel on public roads" within the ordinary meaning of that phrase.

4. The trial court improperly focused on subjective intent, because the test for a vehicle's design is an objective one.

In finding coverage, the trial court transformed the test of "designed for" from an objective one – what a vehicle is *objectively* capable of or intended for – to a *subjective* one based on the particular use to which an insured intended to put it or for which the insured maintained it. (See AA 89-90.) In the trial court's words, "[I]n eliciting the meaning of the term . . . 'designed for' . . . [t]he term is more sensibly viewed as calling for either *subjective* opinion of the insured that *maintains* the vehicle [as for its primary purpose] or an objective evaluation of how the vehicle is *used* by the insured." (RT 1075; AA 90, emphasis added.)

The trial court misapplied (almost verbatim) *Alpine*'s distinction between "designed for" and "maintained" or "used" (terms *not* appearing in Perez's policy):

> "*In contrast to* the purpose for which a vehicle was *designed*—an issue on which reviewing courts have been willing to reexamine independently [citations]—the primary purpose for which a vehicle is *maintained* is more sensibly viewed as calling for either the subjective opinion of the

insured that maintains the vehicle or an objective evaluation of how the vehicle is used by the insured."

(*Alpine Ins. Co. v. Planchon*, *supra*, 72 Cal.App.4th at p. 1322 [interpreting policy term "*maintained* primarily for purposes other than the transportation of persons or cargo"], first and last emphasis added.)

Under *Alpine*, the test for "maintained" or "used" is subjective and particularized to the insured; the test for "designed for" is not. The test for "designed for" is an objective one. (See *Mercury Ins. Group v. Checkerboard Pizza* (1993) 12 Cal.App.4th 495, 499 & fn. 5 [vehicle is "'private passenger automobile'" "'designed solely for the transportation of persons and their personal luggage'" despite its use as a commercial pizza-delivery vehicle].) Under that test, the tractor here was "designed for travel on public roads" because it was equipped with features which serve no other objective purpose.

The objective test is consistent with the results in *Schepler* and *Koberg*, relied on by the trial court. In *Schepler,* the insured designed and built a dune buggy. He intended to equip, license, and use it principally as a street vehicle during summer, and as an off-road vehicle in the winter. Before it was fully equipped as street legal, he drove it on a dirt road where he had an accident. (*Schepler*, *supra*, 115 Cal.App.3d at pp. 202-203.) Because the insured (who built the vehicle) *intended* that it ultimately be used on public roads, *and* had taken steps to carry out that intent, even though it was not yet street legal, the vehicle fell within the at-issue auto

policy's "automobile" definition. (*Id*. at p. 209.) The objectively measurable *purpose* of the vehicle was for on-road use.

Koberg is another dune buggy case, construing the same language as in *Schepler*, again in an auto policy. There, the insured purchased a dune buggy that had head and tail lights, but no other attributes of a street vehicle. "He registered it as an 'off-road vehicle'" and "it was his intent to use the vehicle only in off-road areas and not on freeways, public access roads or public streets. He drove the vehicle only on beaches and open desert areas and used a trailer to transport it from his house to such places." (*Koberg*, *supra*, Cal.App.3d at p. 1035.) *Koberg* held that because the insured had "formed *and made effective* his intent regarding the use of the vehicle," registering it for and limiting it to off-road use only, it could not be deemed designed for use principally on public roads. (*Id*. at p. 1036, emphasis added.) In effect, the insured in *Koberg* took steps to re-design the vehicle. Again, the vehicle had been objectively limited – through its registration, its trailering, etc. – to purely off-road use.

Here, the undisputed evidence is that the tractor was both equipped for *and* intended to undertake public road travel. By any objective measure it was "designed for travel on public roads."[1]

* * *

[1] To the extent that the test is a subjective one, directed verdict was inappropriate. Ample evidence showed that Kubota, the tractor's owner, DeJong, and Perez all subjectively contemplated that the tractor would necessarily travel on public roads on occasion. (See *Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1521 ["On appeal from a judgment on a directed verdict, appellate courts view the evidence in the light *most favorable to appellant*."].)

The ordinary meaning of the policy's motor vehicle exclusion unambiguously excludes coverage for the tractor here.

C. The Policy Broadly Excludes Coverage For Traffic-Related Risks Such As Occurred Here And In Doing So Comports With A Reasonable Insured's Objective Coverage Expectations Under A Homeowner's Policy.

Relying on *Schepler*, the trial court held "designed for" to be ambiguous. (RT 1074, AA 89; see *Schepler*, *supra*, 115 Cal.App.3d at p. 206.) As discussed above "designed for" has a concrete meaning here – adapted or objectively intended for a use. In *Schepler* the supposed ambiguity was between being "adapted for" and being "intended for" street-legal travel. (*Schepler*, *supra*, 115 Cal.App.3d at pp. 206-207.) Any such ambiguity is irrelevant here as the tractor was *both* adapted *and* intended for road travel.

In any event, *Schepler*'s ambiguity determination pre-dates the Supreme Court's holding in *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at pp. 1264-1265, that policy language cannot be ambiguous in the abstract, but *first* has to be construed in the context of the policy as a whole:

> [A] court that is faced with an argument for coverage based on assertedly ambiguous policy language must *first* attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations. In so doing, the court must interpret the language in context, with regard to its

> intended function in the policy. [Citation.] This is because "language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case . . . .

(*Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1265, emphasis added and omitted; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.*, *supra*, 5 Cal.4th at pp. 866-868.)

Although the trial court paid lip service to *Bank of the West*, in practice it ignored its analysis. It jumped immediately to "the clear rule that any ambiguities in policy language are to be resolved against the insurer," without first examining the policy context and the reasonable expectations of insured. (AA 91.) "*Only* if [the latter] rule[s] do[] not resolve the ambiguity . . . [is it] then resolve[d] . . . against the insurer." (*Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at p. 1265, emphasis added.)[2] Here, the policy context and the insured's *objectively reasonable* expectations lead to the conclusion that the policy excluded from coverage all road travel-related traffic accident risks – the exact risk that came to pass.

The exclusion for vehicles "designed for travel on public roads" composes but one element of a broad traffic-related risk exclusion

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[2] The trial court also relied on discredited *pre-Bank of the West* authority that "it is not the function of this court to determine which of several [facially] reasonable constructions of an ambiguous provision is the correct one." (AA 91.) As just discussed, the law is now otherwise. (*Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at pp. 1264-1265.)

encompassing a wide range of vehicles. For example, the policy also excludes *any* vehicle "being towed or carried on a vehicle" designed for travel on public roads. (AA 92, 180.) Conversely, *exceptions* to the exclusion cover vehicles *only* where there is *no* road traffic risk. The policy excepts (that is, covers) "a motorized golf cart *while on the golf course* and *used* for golfing purposes." (AA 181.) A second exception is for "a motorized land vehicle, *not* subject to motor vehicle registration, *used only on an insured location*." (*Ibid*., emphasis added.).

Read together, these exclusions and exceptions draw a clear distinction between *non*-traffic and *traffic*-related risks. Traffic-related risks are excluded. The exceptions – a golf cart while golfing, unregisterable vehicles used exclusively on the property itself – offer coverage only where there is *no possible* exposure to road-traffic risk. The policy as a whole makes clear that the insurer never bargained to assume road-traffic risk. (See RT 476 [the risk involved with tractors that travel on roads is significantly higher].)

Nor could a reasonable insured expect otherwise. The coverage afforded is limited by "the nature and kind of risk covered by the policy." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, 275.) The policy here is a homeowner's policy, *not* an automobile or farm policy. (Cf. *Schepler*, *supra*, 115 Cal.App.3d at pp. 200, 208 [finding coverage under an auto policy for a dune buggy intended to be driven on public roads]; RT 884 [policy would not have been issued had agent known of Perez's farm activities.)

Homeowner policies do not generally cover road risks, and no reasonable insured would so expect. "Homeowners' policies are ordinarily designed to provide . . . third party liability coverage when conduct or an accident occurring on the insured premises injures third persons. [Citation.] Where conduct occurs away from the insured premises, we perceive neither an intent to provide coverage nor a reasonable expectation of providing coverage." (*Devin v. United Services Auto. Assn.*, *supra*, 6 Cal.App.4th at pp. 1160-1161 [no reasonable expectation of coverage under homeowner's policy for injury arising out of previously owned premises].) Just as an "insured could not reasonably expect protection under an automobile insurance policy for injury which occurs from defect in a stairway" (*Gray*, *supra*, 65 Cal.2d at p. 274), so an insured homeowner does not reasonably expect that the premises-founded homeowner's policy will cover traffic accidents.

Herzog v. National American Ins. Co. (1970) 2 Cal.3d 192, is directly on point. There, the insured had a motor bike accident on a freeway. His homeowner's policy excluded coverage for motorized vehicles while "away from the premises . . . or the ways immediately adjoining" the premises. (*Id.* at p. 196.) Despite the ambiguity of "the ways immediately adjoining," the Supreme Court held that a reasonable insured would not expect coverage for traffic accidents on public roads under a *homeowner's* policy:

> The reasonable expectations of the insurer in a homeowner's policy . . . clearly do not contemplate coverage for

> automobile-related accidents which occur beyond this limited ["immediately adjoining"] area. Nor do the reasonable expectations of the insured contemplate that his homeowner's policy will provide such extended automobile coverage; other insurance, with a premium commensurate to the increased risks, is available for that purpose . . . .

(*Id*. at p. 197; accord *State Farm Fire & Cas. Co. v. Camara* (1976) 63 Cal.App.3d 48, 51, 55 [no reasonable expectation of coverage under homeowner's policy for dune buggy accident even though gist of claim was that insured negligently designed and built vehicle].)

Here, as in *Herzog*, no reasonable insured would expect a homeowner's policy to cover traffic accidents on public roads. The one case finding coverage for vehicles intended for travel on public roads did so under automobile policies. (*Schepler*, *supra*, 115 Cal.App.3d at pp. 200, 202.)[3]

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[3] See *Cooper Companies v. Transcontinental Ins. Co.*, *supra*, 31 Cal.App.4th at p. 1106 [resolving facially ambiguous policy term, "'hereafter required,'" to find no coverage by "interpret[ing] the language in context, with regard to its intended function in the policy"]; *Industrial Indemnity Co. v. Apple Computer, Inc*. (1999) 79 Cal.App.4th 817, 823, 827-828 [interpreting assertedly ambiguous exclusionary clause "unfair competition based upon infringement of trademark, service mark or trade name" as precluding coverage based on "the language in the context of the policy as a whole, and in light of the circumstances of the case"]; *California Casualty Ins. Co. v. Northland Ins. Co.* (1996) 48 Cal.App.4th 1682, 1691-1694 [in context of a homeowner's policy, asserted ambiguity of "watercraft with inboard . . . motor power" in "watercraft exclusion" could not reasonably create an expectation of coverage for jet-pump powered

(continued...)

Both the overall policy context and the nature of the policy confirm the ordinary meaning of the exclusionary language: No coverage is afforded for road accidents involving vehicles designed to travel on public roads, even if that is not their primary function. There is no unresolvable ambiguity.

* * *

The trial court misconstrued "designed for travel on public roads" as requiring road travel to be the vehicle's primary purpose. As a result it erred in finding coverage and in directing a breach of contract verdict against Fire. As a matter of law, there is no coverage here and judgment should be reversed with directions to enter judgment in Fire's favor on the contract claim.

II.

THERE IS NO BASIS FOR TORT LIABILITY BECAUSE FIRE'S POLICY INTERPRETATION IS OBJECTIVELY REASONABLE AS A MATTER OF LAW.

The judgment imposed not only contract liability, but tort liability for insurance bad faith as well. (AA 699.) The "absence of coverage under the insurance policy conclusively negates the insured's [tort] cause of action for

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[3] (...continued)
Waverunner accident: "[a]lthough coverage exclusions are to be strictly construed, '[w]e may not, under the guise of strict construction, rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid'"].

bad faith breach of contract . . . ." (*Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932, 943, citation and internal quotation marks omitted; accord *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36 [no insurance bad faith tort unless policy benefits due].) That no coverage was afforded, therefore, dictates that the tort judgment has to be reversed as well.

But even if Fire's coverage view ultimately does not prevail, there is no basis for tort liability. The trial court acknowledged that the coverage issue is "novel, unusual and difficult," the state of the law is evolving. (See AA 588.) No California decision addresses whether a farm tractor is "designed for travel on public roads" within the meaning of an insurance policy. Fire's interpretation is and was a reasonable one. The trial court recognized as much. (AA 91, 588 [Fire's position "may be reasonable"].) Where a genuine issue exists on a "novel, unusual and difficult" legal question, settled law dictates that a carrier cannot be held liable in tort. This is especially true where, as here, the carrier solicits and receives the advice of counsel confirming its position.

A. No Tort Liability Exists Where The Insurer's Coverage Denial Is Based On An Objectively Reasonable Interpretation.

An insurer is not strictly liable in tort every time it mistakenly denies coverage. "'The mistaken . . . withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under

California law, does not expose the insurer to bad faith liability.' [Citations.] Without more, such a denial of benefits is merely a breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 346-347, citing *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1281.) "As long as the insurer's coverage decision was reasonable, it will have no liability for breach of the covenant of good faith and fair dealing. An insurer which denies benefits reasonably, but incorrectly, will be liable only for damages flowing from the breach of contract, i.e., the policy benefits." (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 977, citing *State of California v. Pacific Indemnity Co.* (1998) 63 Cal.App.4th 1535, 1551.) Fire cannot be liable in tort if its policy interpretation "was objectively reasonable in light of the law that existed" at the time it adjusted the claim. (*Id*., *supra,* at p. 974.)

Morris, *supra,* 109 Cal.App.4th 966, is directly on point. In *Morris*, an insurer denied coverage relying on a policy provision that arguably was at odds with a statutorily-required incontestability provision. (*Id.* at p. 969.) At the time, the only published California appellate decision resolved the issue *against* the *insurer*, but several out-of-state (and unpublished California) appellate decisions adopted the insurer's view. (*Id.* at pp. 969-971.) Ultimately, the California Supreme Court, construing the identical policy language, rejected the insurer's reading. (*Id.* at pp. 970-971, citing *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368, 377.)

As a matter of law, however, the insurer was not liable in tort for asserting its ultimately unsuccessful coverage position. Although ultimately unsuccessful, that coverage position was reasonable. The one published California appellate decision to the contrary was "'without useful discussion'" and arguably "*dicta*" (*id*. at pp. 974-975, citing *McMackin v. Great American Reserve Ins. Co*. (1971) 22 Cal.App.3d 428); two unpublished California decisions and a number of published out of state cases, had adopted the carrier's position (*id*. at p. 976). As long as there was a reasonable coverage dispute, there could be no tort liability. (*Id*. at p. 977.)

Under *Morris*, carriers are not subject to tort liability for adopting reasonable policy interpretations where the law has not been definitively settled, even in the face of an arguably adverse published intermediate appellate decision:

> We cannot ignore the fact that intermediate Courts of Appeal sometimes disagree with each other on points of law, including the interpretation of statutes [and policy provisions]. . . . [N]o insurer could ever offer a rationale supporting a different result to another court without exposing itself to bad faith damages in the event it does not prevail. . . . [I]f insurers were so thoroughly discouraged from ever challenging an appellate court decision—even a bad

one—there would be little opportunity for the courts to refine the law. We cannot support such a result.

(*Id*. at pp. 975-976.)

Morris makes clear that if Fire's policy interpretation is objectively reasonable there can be no tort liability, period.

B. As A Matter Of Law, Fire's Policy Interpretation Is Reasonable, Precluding Tort Liability.

Whether Fire's policy construction is objectively reasonable is a pure legal question. Just as the meaning of a written policy provision is a question of law (absent extrinsic evidence not present here), so, too, whether a party's position on that legal question is reasonable, that is, whether a genuine policy interpretation dispute exists, is a question of law:

> Provided there is no dispute as to the underlying facts (e.g., what the parties did and said), then the trial court can determine, *as a matter of law*, whether such dispute is "genuine." In making that decision, the court does not decide which party is "right" as to the disputed matter, but only that a reasonable and legitimate dispute actually existed."

(*Chateau Chamberay*, *supra*, 90 Cal.App.4th at p. 348 fn. 7, first emphasis omitted.)[4]

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[4] See also, *Franceschi v. American Motorists Ins. Co.* (9th Cir. (continued...)

As a pure question of law, "unresolved factual issues pertaining to [the carrier's] subjective understanding of the law and its intent in shaping the law to suit its own ends" do not matter; "if the [carrier's] conduct . . . was objectively reasonable, its subjective intent is irrelevant." (*Morris*, *supra*, 109 Cal.App.4th at p. 973; see *id*. at p. 977 [an insurer "is entitled to give its own interests consideration when evaluating the merits of an insured's claim," emphasis omitted].) The trial court erroneously submitted this issue of law to the jury.

In fact, as a matter of law – an issue reviewed de novo – there can be no doubt that, at a minimum, an objectively reasonable, genuine coverage dispute exists:

- No California case – including those the trial court cited – or, to Fire's knowledge, anywhere else, holds that a farm tractor equipped and intended to travel on, and in fact traveling on, public roads is not "designed for travel on public roads" within the meaning of a homeowner's insurance policy exclusion.

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[4] (...continued)
1988) 852 F.2d 1217, 1220 [genuine dispute existed as *a matter of law* over meaning of "medical treatment" as used in policy]; cf. *Padres L.P. v. Henderson* (2003) 114 Cal.App.4th 495, 517 [determination of whether claim is legally tenable for malicious prosecution purposes is question of law for the court]; *Klein v. Oakland Raiders, Ltd.* (1989) 211 Cal.App.3d 67, 74 ["(t)raditionally the existence or absence of probable cause has been viewed as a question of law for determination by the court. (Citation.)"]; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 875 [same].

- Applicable insurance contract interpretative rules – including reference to the ordinary meaning of words, the context in the policy as a whole, and the nature and purpose of the insurance policy – as well as comparable out-of-state authority all support Fire's position.

- The trial court itself found the coverage issue "novel, unusual and difficult," recognizing that Fire's position "may be reasonable." (AA 91, 588.) Plaintiff's own coverage expert had *never* run across the issue in 40 years of insurance work. (RT 759-760.)

- The policy's plain language nowhere contains what the trial court relied on as the critical coverage qualifier – that the vehicle had to be designed "primarily" for public road travel; published California authority rejects judicial interlineation of that term in analogous circumstances. (See *Mobilease*, *supra*, 42 Cal.App.3d at p. 466.)

Governing law requires courts to choose (applying applicable interpretative rules) between conflicting arguably reasonable policy constructions; competing reasonable interpretations create genuine disputes. (E.g., *Bank of the West v. Superior Court, supra,* 2 Cal.4th at pp. 1264-1265; *Cooper Companies v. Transcontinental Ins. Co., supra,* 31 Cal.App.4th at pp. 1101-1106; *Morris*, *supra*, 109 Cal.App.4th at pp. 974-

976 [genuine dispute existed between competing reasonable policy constructions].)

No matter how this Court determines the coverage issue, the fact remains that Fire's coverage interpretation was and is objectively reasonable. A genuine dispute exists as to the application to farm tractors of a homeowner's policy's exclusion of vehicles "designed for travel on public roads." Under established law, there can be no tort liability.

C. Fire's Reasonable Reliance On The Advice Of Counsel Also Negates Any Tort Liability.

A carrier's reliance on the advice of adequately informed independent counsel negates any tort liability. This is so "even if the advice it received is ultimately unsound or erroneous." (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725.) It makes no difference that other counsel representing the insured, or some other party with an axe to grind, disagrees. (Croskey et al., Calif. Practice Guide, *Insurance Litigation* (The Rutter Group 2003) § 12:489 [rejection of insured's counsel's advice is not probative of bad faith].)

Here, there was no dispute that Fire's counsel advised Fire that there was no coverage, that counsel was truly independent, and that Fire relied upon that advice in making its final coverage determination. (RT 801, 889, 959-960, 1029-1031.) These *undisputed* facts preclude any tort liability.

Perez argued that Fire could not justifiably rely on its coverage counsel's opinion because Fire supposedly had not given its counsel all the

available material information. (RT 1683.) No evidence supports this assertion. The undisputed evidence was that Fire provided its coverage counsel with its full claims file. (RT 615.)

Perez claimed that Fire failed to relate the content of one phone conversation between the tractor owner's attorney and Fire's branch claims supervisor. But *no material new facts* were communicated in that conversation. The attorney merely (1) asked how long Fire's investigation would take; (2) reiterated her written offer to provide any additional information or documents required; (3) asked if Fire had issued an auto policy to Perez; (4) reiterated her written assertion that the tractor was simply crossing the road when the accident happened; (5) reiterated her written assertion that the owner used the tractor only for "farming stuff"; and (6) repeated legal argument she had already made in a prior letter. (Compare RT 1010-1012 with AA 135-136, 144-146.) Fire's coverage counsel had already considered and responded to these very points. (AA 122-123.)

The tort claim should never have gone to the jury. The undisputed advice-of-counsel evidence negated liability as a matter of law. For this independent reason, Fire cannot be liable in tort.

D. There Is No Admissible Evidence Of Materially Unreasonable Conduct By Fire.

Even absent a genuine legal issue and reliance on counsel's independent advice, no admissible evidence supports tort liability. Breach

of the covenant of good faith and fair dealing requires a plaintiff to show more than that the carrier reached a mistaken coverage result:

> [The *evidence* must] show that the conduct of the defendant . . . [was] prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.

(*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395; accord, *Chateau Chambery*, *supra*, 90 Cal.App.4th at p. 346; *State Farm Fire & Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1105.)

There is *no* such evidence here.

Perez proffered supposed expert evidence of tortious conduct consisting of (1) an unreasonable policy interpretation (RT 704-705); (2) failing to obtain judicial declaratory relief before denying coverage (RT 695, 1618); (3) failing to adequately investigate the facts relevant under *Perez's* policy interpretation (RT 671); and (4) misplacing a tape recording of an interview of Perez for which a summary had already been prepared. (RT 664.) None of this evidence suffices. It was either wholly inadmissible, mistakenly premised, or immaterial.

1. The "expert" testimony as to the reasonableness of Fire's legal position was inadmissible and prejudicial.

Perez sought to show that Fire's policy interpretation was not just mistaken, but was unreasonable, through purported expert testimony that Fire's claims personnel should have known that the law mandated coverage. (RT 746-748.) As discussed above, the reasonableness of Fire's legal position is a question of law; it should not have been the subject of testimony, expert or otherwise. Fire repeatedly, unsuccessfully objected to such "expert" testimony as improper legal opinion. (RT 624-625, 727-728, 745.) It should have been excluded. Its admission was an improper and prejudicial usurpation of the trial court's law-giving function.

"There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) "[T]he calling of lawyers [or in this case a *non*-lawyer] as 'expert witnesses' to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more than a modern day 'trial by oath' in which the side producing the greater number of lawyers able to opine in their favor wins. [Citation.]" (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 842.) "Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal

standards." (*Burkhart v. Washington Metro. Area Transit Auth.* (D.C. Cir. 1997) 112 F.3d 1207, 1213.)

In the context of insurance disputes, "the meaning of the [insurance] policy is a question of law about which expert opinion testimony is inappropriate. [Citations.]" (*Cooper Companies v. Transcontinental Ins. Co.*, *supra*, 31 Cal.App.4th at p. 1100.)[5] Perez's expert testified about what case law was relevant and what claims personnel should have understood about that case law. (RT 681, 722-723, 745-749.) In doing so, he undoubtedly was expressing a purely *legal* opinion. It was the trial court's – not some supposed lay expert's – responsibility to determine and instruct the jury not only on the meaning of the policy language but also on the reasonableness of – the existence of a genuine legal issue or the probable cause as to – Fire's legal position. (*Williams v. Coombs* (1986) 179 Cal.App.3d 626, 638 ["To the extent that the (expert) declarations expressed an opinion on the legal question of probable cause, they were inadmissible as improper expert opinion"] disapproved on other grounds in *Sheldon Appel Co. v. Albert & Oliker*, *supra*, 47 Cal.3d 863; *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 582.)

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[5] Accord, *Devin v. United Services Auto. Assn.*, *supra*, 6 Cal.App.4th at p. 1158, fn. 5; see also *National Auto. & Cas. Ins. Co., Inc. v. Steward* (1990) 223 Cal.App.3d 452, 459 [expert opinion inadmissible as irrelevant to the court's task of judicial construction of insurance policy]; *Suarez v. Life Ins. Co. of North America* (1988) 206 Cal.App.3d 1396, 1406-1407 [plaintiff properly barred from introducing 'expert' evidence of 'industry standard' in interpreting policy language].

(The "expert's" critique of coverage counsel's legal opinion was equally inadmissible. It was also irrelevant as lay insurance claims personnel are entitled to rely on counsel's opinion even if unsound.)

This improperly admitted expert testimony cannot support tort liability. Its admission was undoubtedly prejudicial. It went to the heart of the matter – whether Fire had a reasonable basis for its legal position. It independently requires reversal.

2. As a matter of law, a carrier acts reasonably in denying coverage when there is a plausible basis to do so and is not required to first seek declaratory relief.

Perez's expert also opined that Fire committed bad faith by failing to file a declaratory relief action. But the *law* says otherwise. *Morris v. Paul Revere Insurance* directly holds that a carrier has no duty to file a declaratory relief action to resolve a coverage question:

> Morris argues that [the insurer's] bad faith is demonstrated by the fact that it discontinued his . . . payments prior to obtaining any ruling on its [coverage] defense, rather than continuing payments under a reservation of rights while pursuing a declaratory relief claim. He contends it was the preferred practice in the industry for insurers to simply reserve their rights while litigating coverage issues . . . . Morris offers no authority for his assertion that the failure to

> continue payments under a reservation of rights can constitute bad faith even if the coverage denial was reasonable, and we find it unpersuasive.

(109 Cal.App.4th at p. 977.)

3. Fire owed no obligation to investigate facts relevant to a policy construction that it reasonably did not adopt.

Next, Perez claimed that Fire conducted an unreasonable investigation to the extent that it did not investigate all of the facts relevant to *Perez's* coverage interpretation. (RT 658, 665-666, 671.) But Fire *did* investigate the claim within the framework of *its* understanding of the plain meaning of the "designed for travel on public roads" exclusion. The adjuster contacted the tractor manufacturer's representative and obtained a copy of the tractor's operating manual. (RT 288, 292.) Both confirmed what the trial court found and what is not in dispute, that the tractor is equipped and necessarily intended to travel on public roads. That sufficed under Fire's interpretation of the relevant policy language. Perez's claim is that Fire did not investigate facts relevant to a policy interpretation that it did not hold. That cannot be unreasonable.

For example, Perez's expert complained that Fire unreasonably failed to interview the tractor's owner – DeJong – about his *subjective* intent as to how the tractor would be used. (RT 681.) But under Fire's view of coverage, correct or mistaken, the owner's subjective intent and the

tractor's actual use were irrelevant. (See *Mercury Ins. Group v. Checkerboard Pizza*, *supra*, 12 Cal.App.4th at p. 499 & fn. 5.) An investigation that comports with a carrier's reasonable coverage interpretation necessarily is also reasonable. A carrier need not investigate facts that are only relevant to a policy interpretation that it does not hold.

Not surprisingly, there is *no* evidence that interviewing DeJong would have made any difference to Fire's coverage determination. At trial, DeJong merely confirmed what Fire had otherwise determined – that the tractor was equipped to travel on public roads and had to do so on occasion, even though that was to be avoided if possible. (RT 816, 825, 831.) That is the same factual scenario revealed by Kubota and which DeJong's carrier's counsel had related. (RT 201, 214, 310-312, 330, 332, 1011.) That is the same factual scenario that formed the basis for Fire's coverage decision.

All of the other claimed investigation failures (e.g., failing to reverse course after hearing from Ms. Schnitzer, failing to afford coverage upon receiving documentation [the 10 Commandments of Tractor Safety] stating that "tractors are not generally made for public roads" but acknowledging that "there are times when such travel cannot be avoided" and instructing on how to so travel safely (AA 289), etc.) suffer the same defect. They are all premised on Fire failing to adopt Perez'scoverage interpretation. If Fire's coverage view was reasonable, then its failure to investigate facts relevant to a differing coverage interpretation was also reasonable as a matter of law.

4. The misplaced interview tape was irrelevant to the coverage determination.

Finally, Perez criticized Fire for losing the tape recording of his statement. Unreasonable or not, that conduct could not possibly have been material. Fire had the substance of the conversation in a written summary. (AA 174.) There is *no* evidence that there was anything on the tape that was not on the summary or that would have made one whit of difference to Fire's coverage determination.

* * *

In sum, there is *no* evidence that Fire failed to do anything required of it or that would have made a difference in its coverage decision given its policy interpretation. If Fire's policy interpretation was objectively reasonable, if there was a genuine dispute as to the meaning of the policy language, then nothing about Fire's claims handling independently suggests a "conscious and deliberate act [to] unfairly frustrate[]" the insured's reasonable expectations or otherwise going beyond "an honest mistake, bad judgment or negligence."

There is no basis – legal or evidentiary – for tort liability here.

III.

NO SUBSTANTIAL EVIDENCE, MUCH LESS CLEAR AND CONVINCING EVIDENCE, SUPPORTS PUNITIVE LIABILITY.

Even were Fire's coverage decision not only wrong, but also so unreasonable as to justify tort liability, the imposition of punitive liability goes beyond the pale. There is *no* evidence here that comes close to the clear and convincing evidence of despicable conduct necessary to support a finding of punitive damages.

Punitive liability is unjustified without "'[d]espicable conduct' [which] is . . . 'so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.' Such conduct has been described as '[having] the character of outrage frequently associated with crime.'" (*Tomaselli*, *supra*, 25 Cal.App.4th at p. 1287, citations omitted.)[6] It requires a "distinct and far more stringent standard" of misconduct than for bad faith tort liability: clear and convincing evidence of oppression, fraud or malice. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 890.) The issue is "whether the record contains 'substantial evidence *to support a determination by clear and convincing*

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[6] The wrongful acts "must not only be wilful, in the sense of intentional, but . . . must be accompanied by some aggravating circumstance, amounting to malice . . . [which] implies an act conceived in a spirit of mischief," "evil motive," or "criminal indifference towards the obligations owed to others." (*Gombos v. Ashe* (1958) 158 Cal.App.2d 517, 526-27, disapproved on other grounds in *Taylor v. Superior Court* (1979) 24 Cal.3d 890.)

evidence.'" (*Id*. at p. 891, emphasis added, citations omitted.) The evidence must be capable of being "'"so clear as to leave no substantial doubt" and "sufficiently strong to command an unhesitating assent of every reasonable mind."'" (*Tomaselli*, *supra*, 25 Cal.App.4th at pp. 1287-1288, citations omitted.)

In the context of insurance coverage determinations, even a decision so unreasonable as to warrant tort liability for bad faith does not, alone, suffice for punitive damages. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922; *Tomaselli*, *supra*, 25 Cal.App.4th at pp. 1286-1288; *Shade Foods, Inc.*, *supra*, 78 Cal.App.4th at p. 891.) Where, as here, the "record . . . presents a close case with regard to the sufficiency of the evidence of bad faith [it] will inevitably provide a tenuous basis for supporting an award of punitive damages, since both the bad faith and punitive damage findings rest on inferences to be drawn from the same evidence." (*Shade Foods, Inc.*, *supra*, 78 Cal.App.4th at p. 893.)

These principles mean that it is *not* enough for Fire to have been unreasonable in its coverage decision or investigation. Yet to justify punitive liability Perez argued that: "Non-intentional conduct comes within the definition of malicious acts punishable by the assessment of punitive damages." (AA 490.) That is wrong.

Tomaselli, *supra*, 25 Cal.App.4th at pp. 1287-1288, and *Shade Foods, Inc.*, *supra*, 78 Cal.App.4th at p. 879, are directly on point. In *Tomaselli*, an insurer completely failed to follow up on leads the insured provided; took an unnecessary deposition of the insured; relied on an

endorsement which it never delivered to the insured; and completely failed to communicate with him. The court held that this conduct could be "negligent," "overzealous," "legally erroneous," and even "callous," and more than justified tort liability. (*Tomaselli*, *supra*, 25 Cal.App.4th at p. 1288.) But *not* punitive liability. There was "nothing done . . . which could be described as evil, criminal, recklessly indifferent to the rights of the insured, or with a vexatious intention to injure. There is simply no evidence supporting a punitive damages award." (*Ibid.*) "Shoddy" or "witless" claims handling, including the failure to follow up on information provided by the insured or a "patently untenable" defense based on advice of counsel does not justify punitive damages. (*Ibid.*; see also *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576; *Beck v. State Farm Mut. Auto. Ins. Co.* (1976) 54 Cal.App.3d 347, 355; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306.)

In *Shade Foods, Inc.,* the carrier obstinately persisted in an ill-advised initial coverage position, refusing to reconsider a coverage denial. As in *Tomaselli*, the carrier failed to conduct a meaningful investigation. (*Shade Foods, Inc.*, *supra*, 78 Cal.App.4th at p. 882.) As in *Tomaselli*, this conduct amply justified tort liability. (*Id.* at pp. 881-883.) But it did not justify punitive damages. "[T]he jury could reasonably perceive a careless disregard for the rights of its insured and an obstinate persistence in an ill-advised initial position. " (*Id.* at p. 892.) But that sort of conduct "falls within the common experience of human affairs, both with respect to its

careless initial evaluation and its stubborn persistence in error." (*Ibid*.) As such, it does not support punitive liability. (*Ibid*.)

Fire's conduct here, even viewed in the worst possible light, is far less egregious than that in either *Tomaselli* or *Shade Foods, Inc.* Fire investigated and obtained the key facts relevant to coverage. Even the trial court conceded that "the issue of coverage in this case is novel, unusual and difficult." (AA 588; see *Shade Foods, Inc*., *supra*, 78 Cal.App.4th at p. 892 ["extreme complexity of the coverage issues" weighed against punitive liability].) Unlike *Shade Foods, Inc*. and *Tomaselli,* Fire revisited its coverage determination when asked to do so and sought a coverage opinion from outside counsel.

This conduct was not even unreasonable, much less "despicable." *Tomaselli* and *Shade Foods, Inc*. mandate reversal of punitive liability as a matter of law.

IV.

THE DAMAGES AWARD IS CONTRARY TO LAW.

A. The Trial Court Prejudicially Abused Its Discretion In Excluding The Agreement Not To Execute On the Default Judgment, An Agreement That Negates Perez's Emotional Distress.

The jury awarded Perez $327,231.51 for emotional distress, having been told that a large default judgment was "hanging over his head." (AA 305; see RT 1668.) The trial court, however, precluded the jury from learning that the third-party claimant had agreed not to execute against Perez pending this litigation and to the extent that the default judgment was Fire's responsibility. This fact was critical. Its exclusion was highly prejudicial error going to the heart of the emotional distress award.

By in limine ruling, the trial court barred evidence of the agreement not to execute (brokered by their common attorney, Stuart Chandler). Under that agreement Perez is protected from paying a penny until the conclusion of this litigation; Perez is then at risk only as to amounts that are *not* Fire's responsibility. (AA 295-297.) Thus, Perez long ago became completely protected from any liability that flowed from Fire's conduct.

Perez argued that the agreement was "irrelevant," that its probative value was "minimal," and that its admission would unfairly prejudice him. (AA 32-33.)[7] He was wrong on all counts. The agreement is critically

[7] The motion in limine tendered the agreement, making a formal offer of proof unnecessary as "the substance and purpose of the testimony (continued...)

probative of Perez's emotional distress. In closing argument his counsel misleadingly argued that Perez suffered emotional distress from "this massive judgment hanging over his head *all these years* . . . ." (RT 1668, emphasis added.) Counsel further told the jury that "[h]e's got all the distress suffering [sic] he has to go through because of *having this huge judgment over his head*. . . ." (RT 1693, emphasis added; see RT 1661.)

That simply was not true. The excluded agreement meant that the judgment hung over Fire's – not Perez's – head to the extent Fire is responsible for it. Perez remains exposed only if there is no coverage or, as to amounts exceeding policy limits, if Fire acted reasonably. In those events, Fire did not act tortiously and is not responsible for any distress Perez may have suffered. Fire could not make these critical points because the trial court had excluded the agreement. The trial court abuses even its broad discretion under Evidence Code section 352 when it excludes evidence central to a material element of a claim. (*People v. Cegers* (1992) 7 Cal.App.4th 988, 1001.)

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[7] (...continued)
[was] made known to the court through a motion *in limine*." (Cal. Practice Guide, *Civil Trials And Evidence* (Rutter Group 2003) p. 8G-30, § 8:3430, citing *Delta Dynamics, Inc. v. Arioto* (1968) 69 Cal.2d 525, 527-528, fn. 1; see RT 87 [agreement and its content and purpose placed before court]; see RT 1098-1099, AA 35-38 [agreement marked as an exhibit for identification].) The in limine ruling rendered futile any attempt to introduce the agreement or to cross-examine based on its existence. (See Evid. Code, § 354, subd. (b), (c) [mistrial motion upon Perez's exploitation in closing argument of the agreement's exclusion]; RT 1742-1743, RT 1745 [denying mistrial].)

Was this abuse of discretion prejudicial? Absolutely. Fire was deprived of the ability to present a factually undisputed defense to Perez's emotional distress claim. Perez's counsel heavily exploited the advantage in closing argument. He argued that a "fair number" to award Perez for the economic distress "*for him going through this judgment hanging over his head*" would be in the range of $300,000. (RT 1693-1694, emphasis added.) The jury awarded slightly more than that, suggesting that the "hanging over his head" element was a substantial motivating force.

By contrast, absent the unmitigated evidence of the default judgment, there was little, if any, evidence of substantial emotional distress. Perez lost some sleep and had headaches for which he did nothing but take some aspirin. (RT 862, 970.) He gets a little nervous when he gets letters related to the litigation. (RT 971.) He never missed work, never saw a doctor, and never talked to a counselor about it. (RT 970-971.) This evidence taken alone hardly supports almost one-third of a million dollars in emotional distress damages. Perez's counsel in closing argument did not bother to mention it. His sole plea for emotional distress damages was the factually inaccurate assertion that Perez had the judgment "hanging over his head."

The emotional distress damage award must be reversed.

B. There Is No Evidence That Fire's Conduct Caused The Excess-Of-Policy-Limits Judgment.

The judgment awards $146,590 as tort economic damages. (AA 305; RT 861, 1754.) This represents the amount ($113,000) by which the default judgment exceeded the $300,000 policy limit, plus interest.

The longstanding rule is that "[w]here there is no opportunity to compromise the claim and the only wrongful act of the insurer is the refusal to defend, the liability of the insurer is ordinarily limited to the amount of the policy plus attorneys' fees and costs." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659; accord *Hogan v. Midland National Ins. Co.* (1970) 3 Cal.3d 553, 564-566 [same; held, carrier that wrongfully refused to defend only liable for the covered portion of the judgment, expressly "reject(ing)" argument that "as the consequence of (the carrier's) wrongful refusal to defend . . . it is liable for the entire judgment against (its insured) . . . ."].) "'The decisive factor in fixing the extent of [the insurer's] liability is not the refusal to defend, it is the refusal to accept an offer of settlement within policy limits.'" (*Johansen v. California State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 17, quoting *Comunale*].)[8]

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[8] See *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 237 ["When, *in addition to refusing to defend*, the insurer *also* rejects a reasonable settlement offer within policy limits, it may become obligated to pay more than its policy limits," emphasis added]; *San Jose Production Credit Assn. v. Old Republic Life Ins. Co.* (9th Cir. 1984) 723 F.2d 700, 703-704 ["California courts have consistently treated an insurer's refusal to defend as a breach of contract rather than a breach of the implied covenant. (Citations.) Thus, Old Republic's refusal to defend, without more, amounted only to a breach of contract, not a breach of the implied

(continued...)

The reason for this rule is that "it cannot be said that . . . a judgment in excess of the policy limits was *proximately caused* by the insurer's refusal to defend." (*Comunale*, *supra*, 50 Cal.2d at pp. 659-660, emphasis added.) There is *no* evidence in this record of any opportunity to compromise the claim against Perez within policy limits. There is *no* evidence of what judgment or settlement would have been obtained had Perez been defended. Tort damages are, thus, limited to the policy limits plus the insured's defense expenses (and potentially *Brandt* fees).

Amato v. Mercury Casualty Co. (1997) 53 Cal.App.4th 825 (*Amato II*) purports to create an exception to the established rule for default judgments. But *Amato II*'s purported exception is both dicta and wrong.

It is dicta because in *Amato II* the record was that the carrier, in fact, refused to settle *in addition to* refusing to defend: "Here, Mercury was given ample notice of the action and on two occasions declined settlement proposals." (*Id*. at p. 838; see also *id*. at p. 829 ["Mercury also refused Sutton's offer to settle for the policy limit of $15,000"].)

It is wrong because proximate cause remains an element of an insured's claim whether the detriment the insured suffers is the result of a litigated judgment or a default. (Cf. *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 315 [proximate cause remains an element of

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[8] (...continued)
covenant"]; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.* (1970) 9 Cal.App.3d 508, 528 ["No California case holds the insurer to liability for the amount of the judgment exceeding the policy limit where its only wrong is breach of the duty to defend"].

insurance bad faith tort even where carrier wrongfully refuses to settle; insured's ultimate punitive liability not proximately caused by failure to accept settlement offer].)

To establish proximate cause, an insured has to show that he suffered a worse result than if the carrier had lived up to its obligations. Where the carrier refuses a reasonable offer to settle within policy limits and an excess-of-limits judgment occurs, causation is evident. But nothing suggests that an insured need not or cannot show proximate causation where there is no offer to settle and a default obtains. It is pure speculation to assume that had a defense been afforded the insured would have obtained a better result. The law has a well-recognized mechanism for establishing in a non-speculative or conjectural manner that a party would have obtained a better result had a trial been held (or had counsel been more fully funded, etc.): a trial-within-a-trial. (E.g., *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240-1241 [trial-within-a-trial requirement applies to transactional legal malpractice claims as much as to litigation malpractice claims]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820 [malpractice by accountant expert]; *Travelers Ins. Co. v. Lesher* (1986) 187 Cal.App.3d 169, 197 [action against insurer for wrongful last-minute withdrawal of defense], disapproved on other grounds in *Buss v. Superior Court* (1997) 16 Cal.4th 35.)

Amato II suggested that the trial-within-a-trial approach should apply only to professional malpractice actions. (53 Cal.4th at p. 837.) But the requirement of non-speculative proximate cause is not limited to

professional malpractice claims. (See *PPG Industries, Inc. v. Transamerica Ins. Co.*, *supra*, 20 Cal.4th 310.) Had the same default result occurred because counsel representing Perez failed to answer or stonewalled on discovery, a trial-within-a-trial would be required. Proof of proximate cause cannot depend on when the defendant is in the follow-on action. Just such trial-within-a-trial causation was required in a comparable situation in *Travelers Ins. Co. v. Lesher*, *supra*, 187 Cal.App.3d 169, 197: "[The insured's] theory that he would have prevailed at trial in the underlying action if a proper defense had been provided was analogous to the theory of damage in an attorney malpractice case," requiring trial-within-a-trial proximate cause proof.

That is this case here. To recover more than policy limits, Perez had to prove that but for Fire's conduct he would have obtained a better result in the underlying action. That is by no means an open-and-shut proposition in this case. There is *no* evidence that the injured driver *ever* expressed a willingness to accept, much less propose, a reasonable settlement within policy limits. It is mere speculation that he would have done so. Perez conceded that a lawyer he consulted told him he did not have a good defense. (RT 969.)

Perez having failed to bear his burden of proof on proximate cause, the judgment as to excess-of-policy-limits economic damages should be reversed with directions to enter judgment on that damages element in Fire's favor.

C. If The Emotional Distress Or Excess-Of-Policy-Limits Damages Are Reversed, The Punitive Damages Must Be Reversed As Well.

One of the guideposts for the appropriateness of any punitive damage award is the amount of compensatory damages. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 424-426, 123 S.Ct. 1513, 1524 [155 L.Ed.2d 585]; see CACI 3949, subd. (b).)

If the compensatory damages are substantially revised, the punitive amount has to be revisited. (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 284; *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190.) The remitted punitive award is 1.5 times the compensatory damages. If that ratio is to be maintained, the punitive award has to be revisited if the compensatory award is revised.

CONCLUSION

Fire Insurance Exchange was correct in determining that no coverage was afforded for this roadway traffic accident. As a matter of law, the tractor indisputably was equipped and intended to travel on public roads; it was "designed for travel on public roads" within the meaning of Fire's homeowner's policy exclusion. At the very least, there was a legitimate, genuine legal dispute over the policy's interpretation that precludes *any* tort liability.

For these and all of the above reasons, the judgment should be reversed with directions to enter judgment in Fire Insurance Exchange's favor. In the alternative, the judgment should be reversed on the claims for tortious breach of the implied covenant of good faith and fair dealing and for punitive damages with directions to enter judgment in Fire Insurance Exchange's favor on each claim. At a minimum, the judgment's tort-liability determination and emotional distress damages should be reversed for prejudicial evidentiary error; the award of excess-of-policy-limits damages should be reversed with directions to enter judgment in Fire Insurance Exchange's favor for plaintiff's failure to prove causation.

Dated:

McLAUGHLIN SULLIVAN
William T. McLaughlin II
Timothy R. Sullivan

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson
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By: _____
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Attorneys for Appellant and Cross-Respondent Fire Insurance Exchange

CERTIFICATION

Pursuant to California Rules of Court, Rule 14(c), I certify that this **APPELLANT'S OPENING BRIEF** contains **13,467** words, not including the tables of contents and authorities, the caption page, and this Certification page.

Dated:

Michael D. Fitts

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 5700 Wilshire Boulevard, Suite 375, Los Angeles, California 90036-3697.

On , I served the foregoing document described as: **APPELLANT'S OPENING BRIEF** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED MAILING LIST

I deposited such envelope(s) in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on , at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

ANITA F. COLE

PEREZ v. FIRE INSURANCE EXCHANGE
[Case No. F043931]

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