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 REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

Cases: **Page**

TABLE OF AUTHORITIES
(Continued)

Cases: **Page**

Statutes:

Other Authorities:

APPELLANT'S REPLY BRIEF

INTRODUCTION

Despite its nearly 80-page length, Gustavo Perez's Respondent's Brief never comes to terms with Fire Insurance Exchange's core arguments.

The trial court erred in directing a verdict that Fire covered the roadway tractor accident at issue. As Fire showed in its Opening Brief, and as the trial court found, the undisputed evidence was that the tractor's manufacturer *intended* that the tractor occasionally travel on public roads and equipped it *for that specific purpose.* This fact compels the conclusion that as a matter of law the tractor was "designed for travel on public roads" within the meaning of the policy exclusion.

Perez ignores this crucial, undisputed fact, and instead throughout his brief attacks a strawman argument that Fire never made — that Fire wrongly equated "designed for travel on public roads" as merely being "capable of" traveling on public roads. (E.g., RB 29, 30, 39, 41, 49-50.) If the tractor were merely "*capable* of traversing public roads," without being intended and specially equipped to do so, then Perez's arguments might be relevant.

But the undisputed evidence shows much more than that. Both the owner's manual and the instructional video direct users how to travel safely on public roads in traffic. The tractor also has standard equipment — turn signals, brake lights, slow moving vehicle sign — the *only* function of

which is to make the tractor suitable for operation on public roads. The tractor therefore was not just *capable* of travel on public roads, it was specifically *intended and adapted* for public road travel. It was "designed for travel on public roads" within the ordinary meaning of the phrase "designed for." Consequently, it was an excluded "motor vehicle" under the plain language of what is, after all, a homeowner's policy.

Even if this Court were to conclude that the trial court's policy interpretation is the better one, it does not follow that Fire's interpretation is so off the mark that it supports tort liability. Again, the Respondent's Brief simply attacks the strawman "capable of" argument instead of the legal analysis presented in the opening brief regarding vehicles intended and adapted for public road travel. Accordingly, Perez never explains why Fire's interpretation on what the trial court termed a "novel, unusual and difficult" question is outside the bounds of reason. In fact, Fire's interpretation that a vehicle specifically equipped to be "street legal" is "designed for travel on public roads" — is on its face reasonable. Fire cannot have acted in bad faith in premising its investigation on a reasonable interpretation it, in fact, held. As a matter of law, there is no basis for tort liability.

For the same reason, there can be no punitive damages. Perez accuses Fire of "despicable and fraudulent conduct," charging that it "denied coverage, *with knowledge* that it did not have a legitimate ground for doing so." (RB 2, 49, emphasis added.) But he fails to support these

accusations with any *evidence* that Fire *knew* that its policy interpretation was incorrect. In fact there was none. All the evidence suggests that Fire truly believed it adopted the correct interpretation, and it continues to so believe. Being hit with a substantial punitive damage award for taking an honestly held, nonfrivolous legal position is not only unfair, it is contrary to law.

The bottom line is that Fire did nothing wrong, and certainly nothing tortious or despicable. The judgment must be reversed with directions to enter judgment in Fire's favor. At a minimum, the tort and punitive damages portion of the award must be reversed.

ARGUMENT

I. FIRE PROPERLY DENIED COVERAGE BECAUSE THE ACCIDENT AROSE FROM THE EXCLUDED USE OF A MOTOR VEHICLE "DESIGNED FOR TRAVEL ON PUBLIC ROADS."

In its Opening Brief, Fire explained that the phrase defining an excluded motor vehicle as one "designed for travel on public roads" means, in its usual and ordinary sense, a vehicle intended and planned for public road travel and specially equipped and adapted for that purpose. (AOB 19-20.) Fire further showed that a motor vehicle designed primarily for some other purpose is still "designed for travel on public roads" within the plain meaning of the phrase "designed for" so long as that is part of its design; to conclude otherwise would effectively rewrite the clause by interlineating "primarily" before "designed for." (AOB 21-22; *Mobilease Corp. v. County of Orange* (1974) 42 Cal.App.3d 461.)

In his Respondent's Brief, Perez does not address Fire's showing. Instead, he applies the wrong standard of review, ignores Fire's core legal arguments, and misapplies settled interpretive principles governing insurance contracts.

A. So Long As Any Substantial Evidence Supports A Contrary Conclusion, The Directed Verdict Must Be Reversed.

Perez argues that substantial evidence supports the trial court's no-coverage directed verdict. (RB 21 & fn. 4.) But that is not the standard of review for a directed verdict. Given the undisputed facts here, policy interpretation should be an issue of law reviewed de novo. (AOB 18-19.) But if not, if the issue is a factual one as Perez claims, then this Court in reviewing the trial court's directed verdict, must view the evidence in the light most favorable to Fire:

> On appeal from a judgment on a directed verdict, appellate courts view the evidence in the light most favorable to appellant. All conflicts must be resolved and inferences drawn in appellant's favor; and the judgment will be reversed if there was substantial evidence . . . tending to prove all elements of appellant's case.

(*Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1521, quoting Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1994) ¶ 8:138.)

Perez's Respondent's Brief pretends this standard does not exist. Instead, he asks this Court to treat the *directed* verdict here as if it were a *jury* verdict, and asserts that is should be upheld if supported by substantial evidence. (RB 21 & fn. 4.) As *Colbaugh* makes clear, however, the precise

opposite is the case; the directed verdict must be reversed if any substantial evidence supports *Fire*. And, as explained in the Opening Brief and below, not just substantial evidence, but all the evidence, taken in context, as well as the trial court's express factual findings, support Fire's legal interpretation of the exclusion.

The issue is properly a legal one reviewed de novo; but if there is any factual element to it, the facts must be construed most favorably to Fire.

B. Perez Never Confronts Fire's Demonstration That A Vehicle Intended And Equipped For Public Road Travel Is "Designed For Travel On Public Roads."

In its Opening Brief, Fire pointed to undisputed evidence showing that the tractor was intended, planned and equipped for public road travel. Its owner's manual and instructional video showed users how to travel safely on public roads. (AOB 6-7; AA 302 & attached DVD.) It had equipment designed exclusively for public road travel in traffic. (AOB 6-7, 20.) Fire thus demonstrated that the tractor was an excluded motor vehicle because it was "designed for travel on public roads" within the plain meaning of the policy language.

Perez's Respondent's Brief ignores Fire's argument. Nor does it attempt to justify the trial court's apparent interlineation of a "primarily" or "overall" qualifier before "designed for." (See AOB 14, 21-23; *Mobilease Corp. v. County of Orange*, *supra*, 42 Cal.App.3d 461 [rejecting adding

"primarily" to statutory "designed for" definition].) Rather, Perez creates and attacks a strawman argument that Fire never made — that Fire wrongly equated "designed for travel on public roads" as merely being "capable of" traveling on public roads. (E.g., RB 29, 30, 39, 41, 49-50.) Perez does not cite to where in the record or in Fire's appellate brief Fire took the position that "designed for" meant "capable of." He can't, because this is not Fire's position on appeal and Fire did not deny coverage on this basis. Perez's arguments are therefore misplaced and irrelevant.

The contrast between Perez's strawman argument and the argument Fire made helps explain why Fire is correct. The tractor here is far different from an airplane landing on a public road or motorized wheelchair that Perez theorized would be absurdly excluded from coverage because both are "capable of" public road travel. (RB 29-30.) Unlike those vehicles, the tractor here *was specially equipped and intended* for public road travel. The owner's manual *instructed users how to travel on public roads*. The tractor was thus more than merely *capable* of travel on public roads, it was *intended and expected* that it travel on them and specially equipped for just such travel because the manufacturer *knew* that public road travel would be necessary as part of farming. The tractor had numerous features that served *no* function other than to allow travel on public roads — e.g., turn signals, flashing hazard lights, low beam headlights, interlocking brakes, a slow moving vehicle sign. (AOB 6; RT 453-454; AA 218, 236.) The manufacturer's owner's manual and instructional video specifically address

and contemplate travel on public roads, including everything from overtaking traffic to dimming headlights for oncoming traffic to observing traffic regulations and stopping at stop lights and stop signs. (AOB 6; AA 302.) The trial court expressly found that occasional travel on public roads was both an intended and essential function of the tractor. (RT 1076.) Perez's brief never comes to grips with the fundamental distinction between a theoretical capability and an intended function for which a vehicle is specially equipped. (See AOB 6-7, 19-20.) Perez cannot create an ambiguity by using examples that have nothing to do with the facts here. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-1265.)

Perez asserts that the testimony of an employee of the tractor's manufacturer, Wayne Powell, compels the conclusion that the tractor was not designed for public road travel.[1] (RB 21.) But Perez mischaracterizes the substance of Mr. Powell's testimony. Mr. Powell merely stated that the tractor was "*primarily* constructed for farming operations." (RT 448.) He conceded, however, that the manufacturer in designing the tractor "recognize[d] the limited need to drive a tractor on a road to perform farming operations." (RT 494; see RT 465-466, 502.) He recognized that tail-lights and other features whose sole function is for public road travel, are standard equipment. (RT 453-456, 489.) According to Mr. Powell, the

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[1/] Mr. Powell designed farm implements, not tractors. (RT 410, 413-414.) He had *no* role in designing the tractor at issue and had neither spoken with nor received information from the engineers who designed it. (RT 413-414.)

tractor was built and adapted to travel on public roads on a limited basis. (RT 495-496.) Powell's testimony thus actually *supports* Fire's interpretation.

C. Perez Fails To Controvert Fire's Showing That None Of The Three Cases Upon Which The Trial Court Relied Supports Perez's Position.

In its Opening Brief, Fire explained that the trio of cases relied on by the trial court[2] supported Fire's application of the exclusion. (AOB 23-25.) The exclusion at issue in two of these cases, *Schepler* and *Koberg*, explicitly qualified the term "designed for" with the word "principally," serving to underscore the absence of any such qualifier here. The policy exclusion in the third case, *Alpine*, like the exclusion here, contained no such qualification, and the court found it so broadly worded as to require an express *exception* for "farm machinery." (AOB 23-25.) Nothing in Perez's disjointed discussion explains how these cases, despite these fundamental distinctions, support the trial court's coverage decision. (RB 26-28; see RT 731 [Perez's counsel concedes that *Schepler* "is distinguishable on the facts"].)

For example, Perez cites *Alpine* and *Koberg* as holding that a vehicle owner's *subjective intent* concerning how a vehicle is *maintained* — an

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[2/] *Farmers Ins. Group v. Koberg* (1982) 129 Cal.App.3d 1033; *Alpine Ins. Co. v. Planchon* (1999) 72 Cal.App.4th 1316; *Farmers Ins. Exchange v. Schepler* (1981) 115 Cal.App.3d 200.

intent having nothing to do with the vehicle's design — controls. But he doesn't explain how such a test could possibly be relevant to what the vehicle was "*designed* for." (AOB 25-27.) As Fire demonstrated in its Opening Brief, both the trial court — and now Perez — ignored that *the policy language* in *Alpine* explicitly referenced how the vehicle is "*maintained"* by the owner as relevant to the application of the exclusion. No such language appears in Perez's policy. (AOB 25.) In *Koberg,* the vehicle owner's intent was relevant because he was the designer; he had adapted the vehicle for off-road use, in effect taking steps to redesign the vehicle solely for off-road use. (AOB 27.) No such steps were taken by the owner or Perez here. Since neither had anything to do with the tractor's design, their intent is irrelevant.

Schepler, *Koberg* and *Alpine* all are good law*,* but they consider materially different policies from the one at issue here. None of these cases detract from Fire's showing, based on the policy language in *this* case, that coverage was properly denied because the tractor was an excluded motor vehicle designed for travel on public roads.

D. Perez Never Addresses Fire's Showing That The Contra-Insurer Rule Is Not Implicated Because Established Interpretive Principles Resolve Any Arguable Ambiguity.

In its Opening Brief, Fire demonstrated that the trial court jumped to construing a perceived ambiguity against the insurer, without first applying

standard interpretive principles to derive the meaning of words in a contract as required by controlling Supreme Court authority. (AOB 28-29; see also *Bank of the West v. Superior Court*, *supra*, 2 Cal.4th at pp. 1263-1265.) This failure led the trial court prematurely to find an ambiguity in the phrase "designed for," which the trial court then tortured to construe against Fire. As Fire has shown, however, the phrase is not ambiguous. (See AOB 19-23.) But even if the text were reasonably susceptible of two meanings, Fire showed that the policy context and the very nature of a homeowner's policy unambiguously reflect that no reasonable insured would expect coverage for traffic accidents on public roads. (AOB 28-33.)

In response, Perez does not take issue with the fact that no reasonable insured should expect a homeowner's policy to cover "ordinary" traffic accidents. Instead, he asserts, without any support or explanation, that "[t]he accident involving a farm tractor [being driven on a public road] is not an 'ordinary' automobile accident in any sense." (RB 32.)

While it was not an "automobile" accident — a semi-truck hit the tractor while the tractor was traveling on a public road — the collision was far from out of the ordinary. The tractor's manufacturer emphasized just how "ordinary" traffic accidents involving tractors are, warning users that *one-third of all fatal tractor accidents occur on public roads*. (RT 476; AA 289.) This undisputed evidence, which Perez omits from his brief, fatally undermines his claim that traffic accidents involving tractors are not "ordinary." But even if roadway tractor accidents were extraordinary, such

vehicle accidents on public roads are not what insureds would ordinarily contemplate a *homeowner's* policy would cover.

Nor can Perez controvert Fire's demonstration that, when considered in context, the homeowner's policy was carefully and explicitly drafted to exclude traffic risks. (AOB 29-30.) For instance, his reference to the "all risks" clause of the homeowner's policy (RB 32) is irrelevant. Simple logic dictates that one cannot imply coverage where it is carefully and expressly excluded. "All risks" decidedly do not include motor vehicle accidents on public roads which are specifically excluded.

Perez contends that the exclusion is ambiguous because it could have been written more broadly. (RB 33.) The law is directly to the contrary: "'[T]he fact that language could be more explicit does not render it ambiguous.'" (*California Casualty Ins. Co. v. Northland Ins. Co.* (1996) 48 Cal.App.4th 1682, 1694 quoting *Suarez v. Life Ins. Co. of North America* (1988) 206 Cal.App.3d 1396, 1406.) In any event, it is difficult to conceive of alternative wording that could more clearly delineate that Fire did not bargain for risks associated with driving on public roads in issuing the homeowner's insurance at issue.

Because no reasonable insured could expect coverage, the tractor accident was unambiguously excluded even assuming the phrase "designed for" could arguably be susceptible of two differing interpretations. But there is no reason even to go that far, as the tractor was "designed for travel

on public roads" and, hence, an clearly excluded motor vehicle within the usual and ordinary meaning of the words.

* * *

The bottom line is this: Established contract-construction principles compel the conclusion that the tractor was a motor vehicle "designed for travel on public roads" within the meaning of Perez's homeowner's policy. The traffic accident giving rise to liability was therefore not a covered risk. Fire acted within its contractual rights when it denied coverage. The judgment must therefore be reversed with directions to enter judgment for Fire on all claims.

II. TORT LIABILITY CANNOT EXIST BECAUSE FIRE'S POLICY INTERPRETATION, EVEN IF INCORRECT, AS A MATTER OF LAW IS OBJECTIVELY REASONABLE.

Perez claims that there was not even a "genuine dispute" as to coverage. (RB 38.) He ignores that even the trial judge admitted that the coverage issue was "novel, unusual and difficult." (AA 588.) Rather, he asserts that the reasonableness of Fire's *legal* analysis was properly a call for the *jury* to make, and claims that "substantial evidence" supports the jury's bad faith verdict. (RB 38.)

He is wrong on all counts. The reasonableness of Fire's *legal* interpretation of contract language based on undisputed facts was a purely legal question for the court, and not a factual one for the jury. And even if

Fire's interpretation of the "novel, unusual and difficult" contract issue turns out to be incorrect, it was certainly a reasonable and defensible one, precluding tort liability.

A. The Reasonableness Of Fire's Policy Interpretation Is A Legal Question For The Court, Not A Factual One For The Jury.

In its Opening Brief, Fire showed that there is no dispute as to the underlying facts. Indeed, the trial court directed a verdict on coverage as a *legal* question. Settled law dictates that whether a "genuine dispute" exists on a coverage question based on undisputed facts is a question of law for the court. (AOB 37-38.) Fire also demonstrated that, despite Fire's vigorous objections, the trial court erroneously sent the "genuine dispute" question to the jury, and permitted, over objection, so-called "experts" — people without legal training — to express their views on the quality of Fire's legal analysis and the meaning of the policy. (AOB 43-44; RT 624-625, 727-728, 745.)

Perez's responsive brief never addresses to Fire's demonstration of a genuine dispute. It never distinguishes or even discusses the on-point legal authority supporting Fire's arguments.[3] Perez never explains his basis for asserting that the "substantial evidence" rule should govern what is

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[3/] E.g., *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335; *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966.

essentially a legal inquiry based on undisputed facts. (RB 34.) He neglects to cite *any* authority permitting anyone but the trial judge to express opinions to the jury as to the legal reasonableness of a particular contractual interpretation.

Perez's failure to address Fire's arguments is understandable and illustrates the weaknesses of Perez's position on appeal. The law does not support his position.

B. As A Matter Of Law, A Genuine Dispute Over Coverage Interpretation Existed Precluding Tort Liability.

Fire showed in its Opening Brief that an insurer is entitled to make reasonable, even if erroneous, coverage decisions, rejecting tortured readings that might favor an insured, and that its doing so cannot support tort liability. (AOB 35-36.) Fire also demonstrated that its decision was reasonable: the coverage question Fire faced was novel; settled interpretive principles governing insurance contracts support application of the exclusion; and, the trial court itself found the question difficult. (AOB 38-39.) The tort award was therefore erroneous.

Instead of demonstrating the unreasonableness of Fire's position, Perez in his brief merely repeats his strained contractual arguments in favor of coverage. (RB 38-40.) In doing so, he attacks a strawman position that Fire never adopted. (See discussion, Section I.B., *ante*; RB 39.) But even if Perez's coverage arguments were correct, they would establish only that

Fire mistakenly denied coverage. They do not establish that Fire was *unreasonable* in doing so.

The fact is that it matters little what Fire or Perez say about the legal reasonableness of Fire's position. The parties have presented their coverage arguments. This Court has the expertise, the authority, and the *obligation* to make an independent, *de novo* legal determination of the reasonableness of Fire's position. (See AOB 38; *Morris v. Paul Revere Life Ins. Co.*, *supra*, 109 Cal.App.4th at p. 973 [reasonableness of insurer's contractual interpretation for bad faith purposes a question of law reviewed *de novo*].)

Fire strongly believes that the coverage arguments set forth in Section I above are correct and determinative. But, at an absolute minimum, they are reasonable legal arguments. That alone negates bad faith. (AOB 34-37.) At least one objective legal observer — the trial court — found the issue "novel, unusual and difficult." (AA 588; see AOB 39.) That more than negates any bad faith.

But even if substantial evidence review rather than this Court's de novo determination is the test (it is not), Perez cites no evidence that Fire acted *unreasonably*. The only evidence he cites is (a) supposed testimony by the manufacturer's representative, Mr. Powell, that the tractor was not designed for public road travel; (b) the tractor's "normal" travel speed of 4-7 mph; and (c) its high center of gravity and slow acceleration. (RB 38.) *He omits that Mr. Powell also testified that public road travel was essential to the tractor's function.* (RT 494, 496.) *He also omits that the 4-7 mph is*

its normal working speed "in a field" (RT 472), *that the tractor could travel 18 mph* (RT 460), *and that in any event the tractor came equipped with slow moving vehicle sign for exclusive use on a public road* (RT 500). Its slow acceleration does not exclude being designed for travel on public roads, particularly when it has been specifically adapted for that purpose. The cited evidence thus does not so conclusively preclude a design for travel on public roads for purposes of coverage as to necessarily make Fire's interpretation an unreasonable one or otherwise in bad faith. (Cf. *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652 [substantial evidence requires looking at evidence in light of the "whole record"].)

Fire could not commit a tort simply by failing to predict accurately how a court would ultimately rule. The trial court's tort judgment should be reversed even assuming Fire mistakenly denied coverage.

C. Perez Cannot Show That Fire's Reasonable Reliance On The Advice Of Counsel Did Not Negate Tort Liability.

As explained in the Opening Brief, the tortious breach award should be overturned for another, independent reason: reasonable reliance on the advice of counsel. It is undisputed that Fire obtained and relied on its independent coverage counsel's advice, given after receiving all material information, that no coverage existed for the accident because the tractor was an excluded motor vehicle. (AOB 40-41.)

Instead of providing record citations showing that Fire's reliance was somehow unreasonable, Perez responds with unsupported *ad hominem* invective aimed at Fire's coverage counsel and Fire's wholly hypothesized motives. (RB 41 ["FIE retained a captive attorney . . . to 'rubber stamp' its bad faith denial"].) But Perez does not cite any *evidence* — and there is none — to support his attack on counsel or on Fire's motives other than his self-serving assertions and the fact that coverage counsel reached a conclusion favorable to Fire and adverse to Perez. If that were the test, reasonable reliance on the advice of counsel would cease to be a defense to tort liability.

Perez faults coverage counsel for not addressing the trio of cases the trial court cited in directing a verdict finding coverage. (RB 41-42.) But coverage counsel was correct not to cite them. As Fire demonstrated in its Opening Brief, and in this brief, those cases are clearly distinguishable and do not address the issue presented in this case. (See AOB 23-25; Section I.C., above.)

In any event, the issue is *not* the sufficiency or reasonableness of counsel's analysis. It is whether Fire obtained an opinion from outside counsel (the undisputed evidence is that it did), whether the carrier, in fact, relied on that opinion (again, it is undisputed that it did), whether the carrier did anything untoward to shape that opinion (there is no evidence it did), and whether the carrier had any reason to believe that counsel had provided a biased or inadequate opinion (again, there is no such evidence, only

invective and speculation). The validity of coverage counsel's analysis is irrelevant.

Fire's reasonable reliance on the advice of counsel independently negates tort liability.

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

Fire's Opening Brief pointed to the lack of any evidence of unreasonable acts necessary to support tort liability. (AOB 41-48.) Perez responds with insults, calling Fire's claims investigation a "'farce,'" a "complete charade," and even "fraudulent." (RB 41, 42, 43.) These are strong accusations. But they are completely unsupported by the record. They do not advance Perez's defense of his tort judgment unless he can support them with citation to material record evidence. He does not and cannot.

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

Perez faults Fire for conducting an unreasonable investigation because it did not adopt his construction of the insurance policy when it adjusted the claim. (RT 658, 665-666, 671; RB 41.) As Fire showed in its Opening Brief, however, Fire's claims investigation was perfectly adequate in light of its understanding of the policy exclusion for motor vehicles

designed for travel on public roads. It is simply not bad faith to conduct an investigation consistent with the carrier's reasonable policy interpretation. Just as a court in deciding a case need not discuss facts relevant to theories it does not adopt, neither does a carrier need to investigate facts relevant to a policy construction that it reasonably does not adopt. Here, Ms. Hall, the claims adjuster, interviewed the local Kubota tractor dealer and reviewed the owner's manual, thereby discovering the tractor's pertinent on-road travel design features. (AOB 46.) Fire's investigation uncovered the material facts relevant to its reasonable insurance policy interpretation. Whether that interpretation is ultimately correct (as we believe it is) or not, an investigation premised on a reasonable, but arguably mistaken, policy interpretation cannot possibly support a tortious breach verdict. (AOB 46-47.) Under Perez's theory, a mistaken policy interpretation alone constitutes bad faith if it provides the basis (as it must) for the investigation. That is not the law.

Perez does not (indeed cannot) take issue with the logical force of Fire's position. Instead, he reiterates his argument that Fire's policy interpretation was unreasonable, and that therefore the investigation based on it was also unreasonable. Again, Perez attacks a strawman contract interpretation that Fire never adopted — that the tractor was excluded because it was merely "'capable of traversing public roads.'" (RB 41.) But, Fire denied coverage based on claims adjuster Ms. Hall's investigation showing with undisputed facts that the tractor was specially *adapted* to

travel on public roads with the *intention* that it travel on public roads, not just *capable* of public road travel, coupled with coverage counsel's advice that such a specifically adapted vehicle was excluded. (See Section I.B., above.) Nothing came to light later that would have materially altered this analysis. (See AOB 46-48.)

Nothing in Fire's investigation of the facts relevant to its reasonable coverage interpretation can support the tortious breach verdict.

2. Fire adequately communicated with the insured concerning the basis for the denial of the claim; alternatively, any communication delay did not result in a wrongful denial or cause any damages.

Although not argued to the jury, Perez claims in his Respondent's Brief that Fire acted in bad faith because it did not adequately communicate with him during the adjustment of his claim. (RB 42-43.) He is mistaken as a matter of fact and of law.

As a matter of fact, Fire *did* regularly communicate with Perez concerning the basis for denying his claim. The first thing Ms. Hall, the claims adjuster, did after reviewing the file was to contact Perez and obtain the facts from him. (RT 175-176, 180, 196.) As Fire was considering the claim, Ms. Hall so informed Perez. (RT 231; AA 169.) When Fire decided to deny coverage, it promptly informed Perez of the precise basis for denial. (RT 233; AA 152-154, 166-167.) After suit was filed against Perez, Fire

notified him that it was again investigating any potential for coverage. (AA 134.) When coverage was again denied, Fire promptly informed Perez of the precise basis for denial. (AA 104-106.) As a matter of law, Fire owed no duty to do anything more.

Perez complains that the denial letter was "cloaked with [*sic*] legalistic language" that he, with limited English proficiency, would not understand. (RB 42.) But there is no evidence Perez didn't know English; in fact he testified at trial in English. (RT 832-868.) He also had consulted a lawyer. (RT 855-857.) And Perez cites no authority for the proposition that an insurer has an affirmative duty to investigate and ascertain the linguistic skills of each insured or be held liable in tort. There was nothing deceptive about Fire's denials. They were clear that Fire denied coverage and they explained why. Perez may have been disappointed, but he was not misled.

3. The misplaced interview tape did not constitute evidence of bad faith and in any event was irrelevant to the coverage determination.

Perez also argues, without one citation to the record, that the mere fact that Fire adjusters misplaced a tape of the initial interview with Perez makes its denial of the claim tortious. (RB 43.) But Perez fails to address Fire's demonstration in its Opening Brief that there was no testimony from Perez — or any other evidence — that anything on the tape was not in the

written summary that Fire had made or that would have made a difference in the coverage determination. (AOB 48.) Nor does Perez offer any evidence that the loss of the tape was more than a mere inadvertence. Its loss thus cannot support tort liability.

4. Perez concedes that Fire had no legal obligation to first seek declaratory relief before it denied coverage.

At trial, the trial court admitted, over objection, evidence that Fire's failure to obtain declaratory relief before it denied coverage was unreasonable claims handling amounting to bad faith regardless of the reasonableness of Fire's investigation. (RT 694-695, 697-698.) In closing argument to the jury, Perez's trial counsel emphasized this purported failure. (RT 1680-1681.)

In its Opening Brief, however, Fire showed that it has no such obligation under settled law and demonstrated the prejudicial effect of the admission and argument of this evidence. (AOB 45-46.) Perez effectively concedes the point on appeal by failing to provide any argument or authority to the contrary. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issue not discussed on appeal waived].)

On this basis alone, the bad faith verdict must be reversed.

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

Failing to point to any evidence that Fire's investigation was inadequate given Fire's policy interpretation, Perez proffered his purported expert's testimony that Fire acted unreasonably in accepting its coverage counsel's policy interpretation (which confirmed its own) because, the expert asserted, counsel's legal analysis was deficient. (RT 722-725, 746, 749-750.) As Fire demonstrated in its Opening Brief, however, the only legal expert in the courtroom with the authority to advise the jury on legal matters was the trial judge; the trial court abused its discretion in admitting supposed expert testimony as to the reasonableness of Fire's (and its coverage counsel's) legal interpretation of the policy. (AOB 43-45.) Expert testimony proffered by Perez as to what legal analysis was relevant and what Fire adjusters should have known about the law relating to policy interpretation, thus, should have been excluded and cannot support the tort judgment. (*Ibid.*)[4]

In response, Perez does not appear to take issue with the legal principle that a lay expert cannot give testimony on what a policy legally requires. Instead, he claims that the testimony related only to "the custom

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[4/] At the same time, the trial court barred Fire from introducing evidence placing the coverage afforded by the homeowner's policy in the context of other available or relevant coverage, a context which would have led a reasonable insurer to believe that no coverage was afforded for the tractor under a homeowner's policy. (See RT 101, 884-889.)

and practice of claims handling in the insurance industry," and "whether [Fire's] claims handler comported with industry practice in the method by which she reached her conclusion." (RB 43-44.)

So who is right? Here is what Perez's expert told the jury:

A. The adjuster should have been "concerned about . . . *the analysis being provided by the attorney*." (RT 723, emphasis added.) According to Perez's expert, the adjuster should have known that the factors the attorney identified were "appropriate to review and raise . . . but not conclusive to the [coverage] questions." (RT 724.)

B. The crucial coverage question of "whether or not the tractor fell within the definition of [the] policy for a motor vehicle" turned on "the intent of the owner." (RT 659.) Accordingly, it was unreasonable for coverage counsel's legal opinion not to address "[t]he intent or use of the owner of the vehicle." (RT 681.)

C. Fire's *coverage counsel's legal analysis* was inadequate because the "analysis [failed to refer] to the

phrase 'designed for,' which is the policy language" and did not provide "case analysis." (RT 747, 748.)

That is legal opinion pure and simple cloaked in the guise of "insurance industry standards." Because the trial court admitted these as "expert" opinions, the jury could — and seemingly did — accept them as necessarily true. The trial court prejudicially abused its discretion and abdicated its judicial role in allowing the legal issue of the reasonableness of Fire's policy interpretation to be hijacked by a lay "expert."

At a minimum, therefore, Perez's bad faith claim must be reversed and remanded for a new trial on this independent ground.

* * *

The bottom line is that Fire acted reasonably throughout. There is no evidentiary or legal basis for tort damages. The judgment must be reversed with directions to enter judgment in Fire's favor on the tort bad faith claim, even assuming a contractual breach. At a minimum, retrial of the tort claim is required because of clear, prejudicial evidentiary errors. Any defect in the tort judgment will require reversal of punitive damages as well.

III. PEREZ OFFERS NO EVIDENCE TO SUPPORT PUNITIVE LIABILITY.

This Court need only consider punitive liability if it determines that Fire not only breached the insuring agreement by having mistakenly denied

coverage, but did so unreasonably and tortiously. Because there was no underlying breach, much less an unreasonable, tortious one, this Court need not even reach the issue. But even if it does reach the issue, no evidence exists of the conscious, deliberate and despicable conduct or evil motive legally necessary to support punitive liability.

A. For Punitive Liability To Attach, Perez Had To Present Evidence That Could Clearly And Convincingly Show That Fire *Knew* That It Was *Wrongfully* Denying Him Policy Benefits.

Fire explained in its Opening Brief that any punitive award must be supported by clear and convincing evidence of an evil motive, evidence that Fire affirmatively *intended* to deny benefits to which it *knew* its insured was entitled. Absent such evidence, no punitive damages award can stand. (AOB 49-52.)[5]

In his responsive brief, Perez does not take issue with this standard. Rather, he claims he met it. (See RB 49 ["There was more than sufficient evidence to support the jury's conclusion that [Fire] denied coverage, *with knowledge* that it did not have a legitimate ground for doing so," emphasis

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[5/] See *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 328-329 [a "'highly culpable state of mind'" required]; *Tomaselli v. Transamerica Insurance Co.* (1994) 25 Cal.App.4th 1269, 1287 [defendant must act "with intent to vex, injure, or annoy, or with a conscious disregard of plaintiff's rights"]; *Shade Foods, Inc. v. Innovative Products Sales and Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891-892 [same].

added].) The absence of any evidence in the record to support this claim could not be clearer.

Perez accuses Fire of presenting a "one-sided and biased interpretation of the facts," "slanted in [its] favor." (RB 48.) Not so. The facts relevant to the coverage decision are essentially undisputed. Punitive liability in this case hinges on whether, given the undisputed facts about the tractor, there is evidence that Fire *actually knew* that it was wrongfully denying coverage — that is, that it *knew* that the motor vehicle exclusion was inapplicable.

There is no such evidence. Perez certainly cites none.

B. Perez Cites No Evidence Warranting Punitive Liability.

According to Perez, the clear and convincing evidence that Fire *actually knew* at the time that it was wrongfully denying coverage consists of the following:

1. A tractor manufacturer representative, Mr. Powell, testified *at trial* that the tractor was not designed for travel on public roads (RB 49);
2. Fire's position, in Perez's view, is "facially absurd" (RB 49);
3. Fire's construction is contrary to the ordinary and popular sense of the words "designed for travel on public roads" (RB 49);

4. A layman would never conclude that a farm tractor is designed for travel on public roads (RB 50);
5. Fire's construction creates an "absurd result" (RB 50);
6. Fire's construction runs counter to the rule strictly construing exclusion clauses against the insurer (RB 50);
7. Fire's construction turns a "blind eye upon any reasonable construction that would support coverage" (RB 50); and
8. Not a single case interprets "designed for" to mean "capable of" (RB 50).

This "evidence" is nothing more than mere argument, much of it addressing a strawman. There is not one iota of evidence, much less evidence that could meet a clear and convincing threshold, that Fire *knew* or even suspected that its policy interpretation would ultimately be found erroneous. None of the evidence even inferentially says anything about Fire's state of mind. Perez failed to elicit any such evidence when he examined Fire adjusters and employees and obtained the claims file.

Nothing in the trial record even hints that Fire did not sincerely believe in its policy interpretation. If anything, the opposite is true. (RT 206-207, 217, 551 [Fire adjusters stating basis for their belief that tractor an excluded motor vehicle].)

There is no evidence of even the sort of "negligent," "overzealous," "legally erroneous," or "shoddy" or "witless" claims handling (including the failure to follow up on information provided by the insured), "patently untenable" coverage positions based on advice of counsel, or "careless disregard for the rights of [the] insured and an obstinate persistence in an ill-advised initial position," that have repeatedly been held insufficient to justify punitive damages in insurance bad faith actions. (*Shade Foods, Inc.*, *supra*, 78 Cal.App.4th at p. 82; *Tomaselli*, *supra*, 25 Cal.App.4th at p. 1288; *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.*, *supra*, 4 Cal.App.4th at pp. 328-329; see AOB 49-52.)

Adopting a policy interpretation that Fire believed was correct, even if erroneous or unreasonable on an issue that the trial court termed "novel, unusual and difficult," does not begin to rise to the level of despicable, criminal-like behavior necessary to support punitive damages. (See AOB 49-52.) As a matter of law, the punitive award cannot stand.

IV. THE DAMAGES AWARD IS CONTRARY TO LAW.

A. A New Trial Is Required Because The Trial Court Prejudicially Abused Its Discretion In Excluding The Agreement Not To Execute On The Default Judgment, Resulting In An Inflated Damages Award For Perez's Emotional Distress.

In its Opening Brief, Fire explained how the trial court prejudicially abused its discretion when it granted Perez's motion to exclude from evidence third-party plaintiff Jimenez's agreement not to execute against Perez until Fire's liability to Perez is determined and then allowed Perez to argue that the judgment remained over his head. (AOB 53-55.) This improper exclusion permitted Perez's counsel to mislead the jury into believing that Perez suffered severe emotional stress from having a judgment "'hanging over his head,'" when in reality Perez faced liability only if Fire was held *not* responsible for Perez's liability. (*Ibid*.) As a direct result, the jury awarded Perez almost a third of a million dollars for emotional distress. (AA 304-306.)

In his brief, Perez simply pronounces that had the agreement been admitted, "it would not have changed anything." (RB 56.) Not so. Its exclusion changed *everything*. Had it been admitted, Perez would not have been able to argue that the judgment was hanging over his head. Had he so argued, Fire would have told the jury the truth — that Perez would be liable to pay *only* if Fire was determined not to be responsible. The core of

Perez's emotional distress argument would be diluted, if not destroyed. There is no question that its exclusion was prejudicial.

Perez argues that this Court should disregard this injustice because Fire purportedly did not oppose exclusion of the agreement not to execute. (RB 55.) Not so. "[A] ruling sustaining . . . an objection to evidence" is, by statute, *automatically* deemed excepted to. (Code Civ. Proc., § 647.) As spelled out in Fire's Opening Brief, a party need not provide a separate offer of proof as to the excluded evidence where, as here, the evidence is clearly identified and placed before the court in an in limine motion, making futile any attempt to introduce it later. (AOB 53-54, fn. 7.) In any event, once it came to light that Perez's counsel would take advantage of the absence of the agreement to falsely argue to the jury that the judgment was hanging over Perez's head, Fire promptly, but unsuccessfully, moved for mistrial. (*Ibid.*) The issue is well preserved for appeal.

Independent of the multiple other bases for reversal described by Fire, this prejudicial evidentiary exclusion alone requires reversal and remand for new trial as to compensatory damages.

B. Perez Fails To Show How Fire's Conduct Caused The Excess-Of-Policy-Limits Judgment.

In its Opening Brief, Fire applied basic tort principles of causation to demonstrate that, without notice and an opportunity to settle litigation brought against its insured, it cannot be liable for the resulting default

judgment in excess of policy limits. (AOB 56-59.) That portion of the judgment must therefore be reversed.

Perez asserts that the Second District's decision in *Amato v. Mercury Casualty Co.* (1997) 53 Cal.App.4th 825 ("*Amato II*") holds to the contrary. (RB 56-58.) But it did not so hold. In *Amato II* the insurer actually *did* have an opportunity to settle and unreasonably refused to do so. (AOB 57 [citing *Amato II*, *supra*, 53 Cal.App.4th at pp. 829, 838].) Under *those facts* liability for the entire judgment was proper, as the insurer's refusal to defend *and* settle resulted in the default judgment.

But *Amato II* does not govern where, as here, the insurer had *no* opportunity to settle. Any broad statement in *Amato II* — unnecessary to the decision there — that could be construed to create a rule under these *different* facts is clearly dicta. "The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum . . . . The statement of a principle not necessary to the decision will not be regarded either as a part of the decision or as a precedent. . . ." (*People v. Squier* (1993) 15 Cal.App.4th 235, 240, internal quotation marks and citations omitted; see Black's Law Dictionary (7th ed. 1999) at p. 465 ["gratis dicta" defined as "a court's stating of a legal principle more broadly than is necessary to decide the case"].)[6]

[6/] *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220 similarly does not support Perez. (RB 57.) The *Samson* court held that "[w]hen, in addition to refusing to defend, the insurer *also rejects a reasonable settlement offer within policy limits*, it may become obligated to pay more (continued...)

Even if *Amato II* could be construed to govern in this case despite the different factual situation, its holding would run counter to one of the most elementary principles of tort liability — proximate causation. As Fire pointed out in its Opening Brief, it is pure speculation to guess whether the underlying plaintiff, Mr. Jimenez, would have settled for policy limits. Even Perez's lawyer told him he had no case. (AOB 57-59.) Without the opportunity to respond to any settlement offer, it is unfair to hold Fire responsible for an excess-of-policy-limits judgment when there is no evidence that a settlement within policy limits was ever possible.

Perez in his Respondent's Brief avoids confronting the merits and rationale of Fire's argument. Instead, he claims Fire waived the right to make this argument on appeal because it did not formally object to a jury instruction. (RB 57.) But Fire *did* unsuccessfully object on precisely the same grounds it now raises on appeal. (RT 1882-1894.) In any event, the error is, by statute, automatically preserved for appeal, without the necessity of a formal objection. (See Code Civ. Proc., § 647; *Lund v. San Joaquin*

[6/] (...continued)
than its policy limits." (30 Cal.3d at p. 237, emphasis added.)

Nor does *State Farm Mutual Automobile Ins. Co. v. Allstate Ins. Co.* (1970) 9 Cal.App.3d 508, help Perez. (RB 58.) In that case, the insurer had an opportunity to settle case, but it punted to another insurer, who wrongfully refused to settle. (9 Cal.App.3d at pp. 530-531.) Indeed, the court in that case emphasized the need for a factual determination of causation, and remanded for that very purpose. (*Id.* at p. 531.)

Valley R.R. (2003) 31 Cal.4th 1, 7 [party may challenge an erroneous instruction without objecting at trial].)

The bottom line is that Perez never presented any evidence that Fire proximately caused Perez to suffer damages in excess of policy limits. Thus, even if the tortious breach verdict is upheld, the damages must be remitted for lack of proof of causation in the amount of the $146,590 awarded above policy limits. (See AOB 56.)

CONCLUSION

The tractor indisputably was intended and specially equipped to travel on public roads, falling squarely within the usual meaning of a vehicle "designed for travel on public roads." Even if this Court disagrees, Fire's interpretation was objectively reasonable. That alone precludes *any* tort liability. And, Perez presents *no* evidence that Fire knew it wrongly denied him benefits as is required to support a punitive liability.

For all the above reasons as well as those in the Opening Brief, the judgment should be reversed with directions to enter judgment in favor of Fire Insurance Exchange. At a minimum, a new trial is required.

CROSS-RESPONDENT'S BRIEF

INTRODUCTION

Perez cross-appeals from the amount of remittitur the trial court offered and he accepted as to punitive damages. This Court need not consider Perez's cross-appeal because no basis for punitive liability exists. But if it does, the trial court's exercise of its independent judgment as to the remittitur amount is unreviewable and should be summarily affirmed. This court has no power to second guess the trial court's independent judgment as to what on remittitur is a fair and reasonable punitive amount.

Perez does *not* challenge the trial court's finding that the jury's $25 million punitive damages award was excessive. Rather, he asks this Court to substitute its own judgment for the trial court's judgment as to an appropriate remittitur amount and order the trial court to sweeten the deal. But that is not a proper role for this Court.

The statute governing the remittitur process explicitly allots to the trial court, not appellate courts, the sole discretion to exercise "independent judgment" to determine a "fair and reasonable" amount for a party to accept in lieu of a new trial, if it chooses to offer a remittitur at all. (Code Civ. Proc., § 662.5.) That statutory allocation of powers recognizes that this Court is not institutionally suited to second-guess the trial court's determination of this fact-intensive inquiry. The record shows that the trial

court exercised its independent judgment in setting the remittitur amount. There is nothing more for this Court to review regarding this issue.

Even if this Court had broad power to review the remittitur in the manner that Perez advocates, the remitted amount was, if anything, still exceedingly generous to Perez. Indeed, for the reasons set forth in sections II and III of Fire's Reply Brief, the evidence did not even merit a tort award, much less a punitive one.

Because no punitive award was warranted, this Court need not even consider Perez's cross-appeal. But if it does, the trial court's remittitur order should be affirmed because the trial court exercised independent judgment and that is all that is required of it. In any event, the remittitur amount was, if anything, more than fair and reasonable to Perez.

ARGUMENT

I. This Court's Authority To Review The Trial Court's Choice Of An Appropriate Remittitur Is Extremely Circumscribed; So Long As The Trial Court Exercised Independent Judgment And Determined What It Considered To Be A Fair And Reasonable Remittitur, Its Order Must Be Affirmed.

Perez makes lengthy jury arguments in his cross-appeal brief in an attempt to convince this Court to independently judge the remitted punitive amount set by the trial court as too low. What he doesn't mention is the relevant statutory standard of appealable review. Under that standard, this

Court has no authority to second guess the trial court's exercise of its independent judgment sitting as a trier of fact when selecting an appropriate remittitur.

By statute, the Legislature has allotted to the trial court "*in its discretion* . . . (b) . . . [to] condition [denying a new trial] motion . . . [on] the party in whose favor the verdict has been rendered consent[ing] to a reduction of so much thereof *as the court in its independent judgment determines from the evidence to be fair and reasonable.* (Code Civ. Proc., § 662.5, emphasis added.) The statute plainly states that it is the trial court, and not any appellate court, which exercises its "independent judgment" and determines for itself what is a "fair and reasonable" remittitur amount.

Where, as here, the Legislature has delineated the proper division of authority between trial and appellate courts, especially as regards new trial procedures, the judiciary is powerless to alter it. "'The power of the [L]egislature [in] specifying procedural steps for new trials is exclusive and unlimited . . . . [T]he judiciary, in its interpretation of legislative enactments may not usurp the legislative function by substituting its own ideas for those expressed by the [L]egislature.'" (*Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, 550, fn. 5, quoting *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 905, fn. 5.) So long as the record reflects that the trial court actually exercised its independent judgment and came to an amount that it subjectively

considered to be fair and reasonable, there is nothing for this or any appellate court to review.

Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, is on point. *Grimshaw* rejected plaintiff's contention, as here, that a remitted punitive damages amount was insufficient. The appellate court acknowledged that the evidence "might have persuaded a different fact finder that a larger award should have been allowed to stand." (*Id*. at p. 823.) But the trial judge sits as "an independent trier of fact" when she selects a remittitur. (*Ibid*.) The court found the trial court weighed the evidence and produced what the trial court decided "was a 'fair and reasonable' award." (*Ibid.,* emphasis added.) That is the extent of the permissible appellate review. That the trial court did not take into account all possible factors governing punitive awards is irrelevant. (*Id.* at p. 824.) So long as the trial court exercises independent judgment and reaches a result that *it* subjectively finds to be fair and reasonable, there is nothing for an appellate court to review. If those two procedural conditions are met — if the trial court in fact exercises the discretion allotted to it — there can be no "manifest and unmistakable abuse of discretion" necessary for reversal. (*Id.* at p. 823.)

Perez never discloses appellate courts' extremely limited role under *Grimshaw* and Code of Civil Procedure section 662.5, subdivision (b). To the contrary, his jury arguments rest on the assumption that this Court may sit as an independent trier of fact and second-guess the trial court's

determination of fair and reasonable damages. But this Court has no power to substitute *its* independent judgment for that of the trial court.

In claiming that the standard of review is *de novo* (RB 62-63) Perez mixes apples and oranges. The cases he cites address the purely legal question whether a particular punitive damages award is unconstitutionally *excessive* as a matter of law. *None* address the amount of a remittitur. They address whether a jury verdict is too high. They have nothing to do with Perez's jury arguments that the trial court set the remittitur too *low*.

In sum, Perez's cross-appeal presents no issue for appellate review.

A. Perez's Cross-Appeal Is Utterly Meritless, As The Trial Court Exercised Its Independent Judgment to Determine A Fair And Reasonable Amount.

There can be no dispute that the trial court properly carried out her function under Code of Civil Procedure section 662.5. Her order conditionally granting a new trial and setting a remittitur amount reflects that she exercised independent judgment. (AA 586-590.) She considered the evidence, sitting as a trier of fact. She determined that, to her, just over $710,000 was a fair and reasonable amount. (AA 586-590.) She selected a figure that, if anything, was overly generous to Perez given the total lack of evidence of conduct warranting a punitive liability. Given that a fact finder is free to impose $1 or $0 as a fair and reasonable punitive amount, it is

impossible to say that the trial court could not have subjectively found over $710,000 to be fair and reasonable.

In any event, the result the trial court reached falls well within the range of what might be a "fair and reasonable" punitive award assuming such an award was legally permissible. The injury here is purely financial. The supposedly wrongful misconduct is hardly egregious. The punitive amount arrived at by the trial court is a one and one-half times multiple of the tort compensatory award other than attorneys fees.

Perez quibbles with the trial's calculation. But there was no mistake. The trial court calculated *its* multiple based on tort damages not including contract amounts or attorneys fees. That is a rational approach. (See *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1084 [calculating punitive ratio based only on tort, not contract, damages]; *Campbell v. State Farm Mut. Auto Ins. Co.* (Utah 2004) 98 P.3d 409, 419-420 [attorney's fees award excluded in calculating ratio].)

In any event, the ultimate test for the trial court was whether the amount it arrived at struck it as a fair and reasonable punitive amount. There is no doubt that it did, assuming a punitive award is legally permissible in this case. There was no abuse of discretion by the trial court in so concluding. Having exercised its independent judgment to reach an amount that it viewed as fair and reasonable, there is no possible abuse of discretion by the trial court.

CONCLUSION

This Court need not reach the question of the appropriateness of the trial court's selection of a remitted punitive damages award because, as Fire explained in its briefing on the main appeal, no punitive damages should have been awarded at all. But even if some award were appropriate, the trial court acted within the broad discretion allotted to it. It exercised independent judgment and it determined an amount it found to be fair and reasonable. Having done so, this Court is without authority to disturb its exercise of discretion on appeal. In the event the issue is reached, this Court should affirm the trial court's remittitur order on Perez's cross-appeal.

DATED: February 7, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 14(c)(1) of the California Rules of Court, I certify that the attached **APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF** is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block and this certificate, it contains **9,196** words.

DATED: February 7, 2005

Robert A. Olson

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 February 25, 2005, I served the foregoing document described as: **APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S 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 February 25, 2005, 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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