Filed 11/30/05 Perez v. Fire Ins. Exchange CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GUSTAVO PEREZ,

Plaintiff and Appellant,

v.

FIRE INSURANCE EXCHANGE,

Defendant and Appellant.

F043931

(Super. Ct. No. 195746)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Melinda M. Reed, Judge.

Kabateck Brown Kellner, Brian S. Kabateck, Richard L. Kellner; Stuart Chandler; Law Offices of Stephen M. Garcia and Stephen M. Garcia for Plaintiff and Appellant.

Shernoff Bidart & Darras, Michael J. Bidart and Jeffrey Isaac Ehrlich for Amicus Curiae United Policyholders.

Greines, Martin, Stein & Richland, Robert A. Olson, Michael D. Fitts; McLaughlin Sullivan, William T. McLaughlin II and Timothy R. Sullivan for Defendant and Appellant.

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Fire Insurance Exchange (Fire) appeals from a judgment awarding compensatory and punitive damages to its insured, Gustavo Perez (Perez), based on findings of breach of contract and breach of the implied covenant of good faith and fair dealing. Perez filed

a cross-appeal from the judgment, challenging only the trial court's calculation of punitive damages on a remittitur. We reverse the judgment for punitive damages, but otherwise affirm.

FACTUAL AND PROCEDURAL HISTORIES

The Accident

Perez, who was 38 years old at the time of trial, came to the United States from Mexico when he was 15 years old. He has worked as a farm laborer, in packing sheds, as a tractor driver, and now as a welder.[1] In August 1998, Perez worked for Burt DeJong, who manages a farm operation named Cottonwood Farms. The farm operation supplies feed for DeJong Dairy, which DeJong's family also owns. Perez performed agricultural work for DeJong and drove tractors.

In August 1998, Perez lived with his wife and daughter in a home on 6.3 acres, which he bought in 1995 to be near his job. Perez, who kept some goats, cows and horses on his property, decided to build a corral there for the horses. After work on August 13, 1998, he borrowed from DeJong a Kubota model M8030 tractor equipped with an auger so he could dig post holes in the ground for the corral.

A laborer who Perez hired to help him build the corral drove the tractor from the dairy to Perez's house, driving through some fields and across one public highway. After the work was completed and as it was getting dark, the laborer started to drive the tractor back to the dairy. As the laborer drove the tractor across the public highway that separated the Perez residence from the dairy, the tractor stalled. A semi-truck and trailer collided with the stalled tractor. The laborer was able to run from the tractor moments before the impact, and apparently kept on running, as he has not been seen or heard from since. The truck driver, Jesus Jimenez, allegedly suffered personal injuries.

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[1] Perez speaks some English, but preferred to use an interpreter at trial.

The Homeowner's Insurance Policy

At the time of the accident, Perez was insured under a homeowner's policy issued by Fire. The policy protected Perez's home and provided general liability coverage of $300,000 for bodily injury or property damage. As pertinent here, the policy insured Perez for "… damages which an insured becomes legally obligated to pay because of bodily injury … resulting from an occurrence to which this coverage applies." The policy defines the term "occurrence" in relevant part as "… an accident.…" The general liability coverage is subject to certain exclusions. The exclusion pertinent here is the "motor vehicle" exclusion for bodily injury resulting from the "use … of … motor vehicles." Paragraph 11(a) of the "DEFINITIONS" section of the policy defines a "motor vehicle[,]" in relevant part, as "a motorized land vehicle … designed for travel on public roads."[2]

The Claim Under the Homeowner's Policy and Fire's Handling of the Claim

On October 21, 1998, Perez submitted to Fire a claim regarding the accident, which was assigned to special claims representative Anneka Hall of the Visalia office of Farmers Insurance Group, of which Fire is a division. After receiving the claim, Hall first determined the policy was in force. On October 30, Hall spoke with DeJong about how to contact Perez. She asked DeJong if the tractor was registered with the Department of Motor Vehicles; DeJong responded that it was not. Hall did not ask

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[2] Paragraph 11 reads in its entirety: "**Motor Vehicle -** means: [¶] a. a motorized land vehicle, including a trailer, semi-trailer or motorized bicycle, designed for travel on public roads. [¶] b. any vehicle while being towed or carried on a vehicle described in 11a. [¶] c. any other motorized land vehicle designed for recreational use off public roads. [¶] None of the following is a **motor vehicle**. [¶] a. a motorized golf cart while on the golf course and used for golfing purposes. [¶] b. a motorized land vehicle, not subject to **motor vehicle** registration, used only on an **insured location**. [¶] c. any watercraft or camp, home or utility trailer *not* being towed or carried on a vehicle described in 11a."

DeJong about his intended use of the tractor or the tractor's design, and explained at trial she did not do so because he did not design it.[3]

By October 30, Hall believed there was a coverage question centered "around whether or not the tractor that was involved in this accident was designed for travel on public roadways." On November 2, 1998, Hall called Perez to inquire about the accident; she interviewed Perez with the help of an interpreter. Perez told her what he knew about the accident. She recorded the conversation and prepared a written summary. The recorded statement, however, was not transcribed and the tape is missing from the file. Hall did not recall whether she ever asked Perez about the design of the tractor or whether she told Perez of her concern about coverage.

On November 3, 1998, Hall telephoned Pete Terronez, an employee of a local Kubota dealer. According to Terronez, Hall did not ask him what the tractor was designed for; instead, she asked him what the tractor was equipped with for road travel, such as whether it had signal lights and flashers. Terronez also testified Hall did not identify herself as a claims representative from an insurance company.[4] According to Hall, Terronez told her the tractor was equipped with turn signals and lights for use on a public road, that it was very common for the tractors to be used on the road, and the tractor averaged 16 miles per hour. Terronez agreed to send Hall that portion of the operator's manual dealing with driving the tractor on the road, which Hall later received and reviewed.

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[3] At trial, DeJong testified he permitted tractor drivers to cross the public roads to get to the fields, but told them to avoid road travel whenever possible and to drive next to the road to get from one part of the property to another. The tractor came with a SMV sign, tail lights and flashers, which DeJong did not remove. Perez confirmed DeJong told tractor drivers to drive on the side of the road as much as possible.

[4] Hall testified she asked Terronez whether the tractor was designed for use on the public roadway.

Based on her conversation with Terronez and her review of the manual, Hall concluded the tractor was designed for travel on public roads. Hall, however, did not look up the definition of "designed" in any source other than the policy. At trial, Hall explained her reasoning as follows: "Whoever 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."

On November 3, 1998, Hall prepared a memorandum to her supervisor, Ted Walters, the branch claims supervisor, requesting authority to deny coverage because the tractor "qualifies as a motor vehicle and is therefore excluded under the policy. It is legal to drive a tractor on public roadways and so it fits into definition 11a under the motor vehicle definition." After receiving the memorandum, Walters neither conducted an investigation himself nor directed Hall to conduct additional investigation. Based on Hall's investigation, Walters also concluded the tractor fit the policy's definition of a motor vehicle. Consequently, he used Hall's memorandum to prepare a memorandum to Thomas L. Ward, who was the liability claims manager for the Northern California region. Walters discussed the issue with his supervisor, Mike Smith, who co-signed the memorandum.

On November 12, 1998, Walters sent the memorandum to Ward, which recommended denial of coverage and explained: "We believe that the tractor that was involved in this collision qualifies as a motor vehicle and is therefore excluded under the policy. It is legal to drive a tractor on public roadways and so it fits into definition 11a under the motor vehicle definition." In the meantime, on November 10, Smith sent Perez a reservation of rights letter notifying him the policy may not afford coverage for the

accident, citing the motor vehicle exclusion, but stating that Fire would continue its investigation.

On December 11, 1998, Ward and Mike Fry, a liability staff specialist, approved the denial of coverage and requested notification in the event DeJong sought liability coverage from Perez. The denial was communicated to Perez by letter on December 16, 1998, which stated it was Fire's "final decision." The letter claimed the tractor was a "motor vehicle" and that Fire "must deny coverage for this loss[,]" but did not explain how Fire came to that conclusion other than citing the policy language, specifically the motor vehicle exclusion. At no time before or after the denial did Fire explain to Perez how it came to the conclusion that the tractor is designed for travel on public roads, and Perez never asked for an explanation.

The Tender of the Injured Driver's Lawsuit to Fire

In August 1999, litigation in the matter of *Jimenez v. DeJong, Perez et. al.* (Super. Ct. Tulare County, No. 9-187887) ensued. Jimenez named DeJong Dairy Farms, Inc. and Perez as defendants, and asserted claims for a motor vehicle accident and general negligence, alleging Perez operated the tractor in a negligent manner and DeJong Dairy Farms negligently maintained the tractor, and as a result, the tractor stalled on State Route 63 at night, without proper lighting on the tractor or the placement of warning lights or reflectors in the roadway to warn approaching traffic of the stalled tractor, causing Jimenez's motor vehicle to collide with the tractor.

Perez became concerned about the financial ramifications of the lawsuit, since he could not afford to hire a lawyer. On November 4, 1999, Harvie Ruth Schnitzer, counsel for DeJong, tendered defense of the lawsuit to Fire and requested indemnity through a letter she sent to the Visalia branch claims office. She noted the tractor was not "designed for travel on public roads," and urged Fire to provide a defense and indemnity. The letter's purpose was to put Fire on notice of the lawsuit against Perez.

On November 15, 1999, Fire wrote Perez and Schnitzer acknowledging the tender of defense, reiterating the opinion that the tractor constituted an excluded motor vehicle, and stating the matter would be investigated subject to a reservation of rights. Fire reasoned in its letter to Schnitzer: "The mere fact that the tractor was being driven on a public roadway back to DeJong Dairy would indicate that it is designed for travel on public roadways. As you should be aware, farm machinery traveling on public roadways is a common occurrence in this area. The owner's manual also describes instructions for travel on roads as well." Fire's letter to Perez contained a similar explanation.

On November 18, 1999, Schnitzer restated her coverage argument to Fire. Schnitzer noted that Perez had been deposed on November 9, and from his testimony it was clear that "at the time of the accident, the tractor was crossing the road in a perpendicular fashion …; it was not being driven down the road in one of the lanes of travel." Schnitzer concluded Fire's "position that the mere fact that something is moving on wheels on a public road makes it a 'motor vehicle designed for use on public roads' is not supported by the sworn testimony of [Perez], nor is it supported by common sense."

On November 23, 1999, Fire responded to Schnitzer's letter and informed her it could not accept defense and indemnification because "the tractor owned by [DeJong] would be considered a motor vehicle and not covered under [Perez's] policy. The tractor owned by [DeJong] has instructions in the owners manual which address the requirements for travel on public roadways." The next day, Fire wrote Perez stating that it is "investigating any potential for coverage which may apply to this lawsuit." Fire also stated, however, "[s]ince it appears that we do not owe a defense or indemnity …, we recommend that you enter an answer to the complaint on your own behalf. You may also hire an attorney to represent your interests. If it is determined that there is coverage at a later date, we will reimburse you for defense costs from the date of the tender of defense." Fire did not conduct any further investigation, as Schnitzer's letter did not change its analysis of the facts of the case. That same day, Walters wrote Ward again

recommending denial of indemnity as well as defense, based on the fact it is legal for a tractor to drive on a road.

On November 30, 1999, Fire wrote Schnitzer again, clarifying its position that the tractor qualified as a motor vehicle under the policy not only because the tractor was driven on a public roadway, but also the owner's manual instructs on how to operate the tractor on a public roadway. The letter further explained the fact the tractor was crossing the road had no bearing on its design and tractor travel on public roads in that area was common. After receiving this letter, Schnitzer called someone at Fire and asked what information or documents Fire needed to assist in its investigation. Schnitzer told the person the tractor was not being driven down the road, but instead was being driven across it, and explained how the tractor was being used by DeJong Dairy and Perez – that it was used for "farming stuff" such as field grading and crossing roads and not as a vehicle which was driven to get from Point A to Point B. Walters believed he spoke directly with Schnitzer, but did not document the conversation for the file.

Fire Seeks Advice of Counsel

In December 1999, Fire referred the matter to Fresno attorney Theodore Hoppe for a coverage opinion. A substantial part of Hoppe's practice was devoted to working for the Farmers group of companies. While Fire sent its file to Hoppe, it did not inform him of Schnitzer's conversation with someone at Fire. After getting the claims file, Hoppe obtained a copy of the tractor's owner's manual, which he relied on to conclude the tractor was a motor vehicle under the policy. Since the manual contained sections on how to drive the tractor on the highway, Hoppe concluded there were design features on the tractor that indicated "it was suitable for operation on the road."

On January 14, 2000, Hoppe wrote Fire a letter advising the motor vehicle exclusion applied because the tractor was "clearly designed to travel on public roads. Kubota states that a slow moving emblem is required when being on a road, and they recommend that you observe all local traffic and safety regulations. This, coupled with

the fact that the Kubota tractor is designed with headlights, hazard lights and an SMV emblem demonstrates that Kubota intended this vehicle to be traveling on public highways. In the Instrument Panel and Controls section, the tractor indicates that there are low beam and high beam lights available as well. There would be no need for low beam and high beam lights unless the driver of the vehicle would be encountering oncoming traffic. Thus, Kubota intended as part of its design, that the tractor would be used on public highways. For this reason, it is our opinion that the Kubota tractor would qualify as a 'motor vehicle' designed for use on public roads." Hoppe recommended that Fire send a comprehensive denial letter to Perez outlining the specific reasons why no coverage was available, as well as supplemental letters to Schnitzer's firm, outlining the applicability of the motor vehicle exclusion to Perez's liability. Hoppe believed Fire had adequately investigated the claim, so he did not recommend further investigation, except to obtain a copy of the owner's manual.

On January 19, 2000, Walters forwarded the coverage letter to Ward, along with the correspondence from Schnitzer. Walters informed Ward that he had been in contact with Jimenez's attorney and had been granted an "open extension." On February 10, 2000, Ward again authorized denial of defense and indemnity. On February 15, 2000, Fire wrote Perez and Schnitzer stating it had completed its investigation and was denying defense and indemnity based on the motor vehicle exclusion, explaining that the tractor "would be considered a motor vehicle" as evidenced by the owner's manual which addresses the requirements for using the tractor on public roadways.

The Default Judgment

Perez did not hire a lawyer because he could not afford one. However, around November 24, 1999, he did talk briefly about Jimenez's lawsuit with an attorney who told him he did not have a good case. On April 12, 2000, a request to enter Perez's default was filed, and a default judgment ultimately was entered against him in the amount of $413,000. As a result of the default judgment, he suffered headaches, loss of

sleep and worry. He could not afford a doctor, so he never saw one, nor did he miss work. He took pain medication, and the headaches and worry disrupted his relationship with his family, as the thought of the default judgment would at times cause him to "lose control." He continued to suffer nervousness when he received letters relating to the litigation.

This Lawsuit

Perez filed this action against Fire, alleging in the first amended complaint claims for breach of contract, breach of the covenant of good faith and fair dealing, and unfair business practices. At the jury trial, Perez pursued breach of contract and bad faith theories, seeking contract, tort, and punitive damages.

The Expert Testimony

At trial, Wayne Powell, a Kubota product engineer, testified the Kubota tractor was "primarily constructed for farming operations, to some degree light industrial, as well as commercial, and residential uses." Powell agreed that traveling on a public road is not included within the purposes for which the tractor was constructed. Kubota's materials recommend that tractor operators avoid travel on public roads as much as possible because, as Powell explained, the tractor "… is designed for off-road use. The tractor is slow in terms of travel as compared to a vehicle, a car. It accelerates very slowly. It stops slowly. It also has a high center of gravity, and it is not designed for high travel speeds." Powell further explained the tractors are prone to tipping or rolling over at high speeds. The tractor's top speed, without implements, is 18 miles per hour. Normal working speeds range from four to seven miles per hour.

Although Powell testified that traveling on a public road is not one of the purposes for which the tractor was constructed, he explained that Kubota recognizes the "small need to operate or drive the tractor on the road" to perform farming operations. Consequently, Kubota has installed some accessories and features on the tractor in anticipation of the possibility the tractor may be driven on the road, which includes high-

and low-beam headlights, flashing hazard lights which incorporate turn signals, interlocking brakes and a slow moving vehicle (SMV) emblem, which is reflective for night travel. The SMV sign, tail lights, and turn signals are the only items the tractor is equipped with specifically for road travel. The other features have uses on the farm. For example, the high- and low-beam headlights can also be used to find obstructions in the field and visualize crops, particularly in dusty conditions, while the interlocking brake system, which ensures the tractor stops in a straight line, is also useful for braking while driving on a lane or a gravel or dirt road. Kubota is required to put most of this equipment on the tractor to comply with state law and agricultural industry standards. Powell admitted Kubota built the tractor so it could travel on public roads on a limited basis.

The Kubota owner's manual contains a section entitled "Driving the tractor on the road." The manual instructs drivers to, among other things: "[o]bserve all local traffic and safety regulations"; make sure the SMV emblem is clean and visible, and use hazard lights as required; "[t]urn the headlights on. Dim them when meeting another vehicle"; and interlock the brake pedals to help assure straight-line stops. Kubota warns that one-third of all fatal tractor accidents occur on public roads. Kubota provides dealers with literature entitled "The Ten Commandments of Tractor Safety[,]" which warns that there is no safe place for anyone on the tractor other than the operator, so there should be no riders on it, particularly children. This literature also states that "[a]lthough tractors are not generally made for public roads, there are times when such travel cannot be avoided[,]" and instructs on its safe use while on the road, such as the need for caution at controlled intersections, driving during daylight hours and staying off the road shoulder.

Thomas Corridan, an expert on insurance company claims-handling practices, testified on Perez's behalf regarding insurance industry standards and practices, as well as the reasonableness of Fire's conduct in light of those standards. Corridan was critical of Fire's handling of Perez's claim when he first sought coverage in 1998. Specifically,

Corridan pointed out the following deficiencies, which he believed were below industry standards and therefore unreasonable: (1) Hall did not take a complete statement from DeJong regarding the accident and whether the tractor was equipped for, and used on, public roads; (2) Perez's interview tape was lost or misplaced; (3) Hall did not ask Terronez questions about the design of the tractor, such as whether the equipment on the tractor that allowed for public road travel also had an off-road use; (4) when Hall interviewed Perez, she did not tell him she was investigating a coverage issue or ask about his use of the tractor; (5) the memorandums Hall and Walters prepared did not address the issue of whether the tractor was designed for travel on public roads; (6) Ward's letter did not address whether the tractor was designed for travel on public roads, the intent or use of the tractor's owner, or Perez's statement, and Ward did not look to those areas that might prompt coverage; and (7) the letters to Perez did not advise him about the course of the investigation, Fire's coverage concerns or what was being done to address those concerns. It appeared to Corridan that instead of looking for reasons to support the proposition the tractor was not designed for travel on public roads, Hall and Walters were focusing on issues that would deprive coverage, and a reasonable inquiry would have included contacting the manufacturer.

Corridan was also critical of Fire's handling of the tender of defense and indemnity in November 1999, and pointed out the following deficiencies, which he believed were unreasonable: (1) Fire's initial letter to Perez did not advise him their investigation showed the tractor was designed for travel on public roads; (2) despite being faced with a challenge to its position through Schnitzer's letters, Fire did not file an action for declaratory relief and instead adhered to its position without giving any consideration to an opposing view; (3) Walters's memorandum to Ward did not address the arguments for coverage that Schnitzer raised; and (4) when communicating its decision to deny defense and indemnity to Perez after receiving Hoppe's opinion letter, Fire did not explain in detail the basis for its decision.

Corridan further testified it was unreasonable for Fire to rely on Hoppe's advice. According to Corridan, after a claims adjustor receives an opinion letter from an attorney, the adjustor should thoroughly and objectively evaluate the letter, and not just accept the opinion at face value. In Corridan's opinion, this did not occur here because the opinion was premised on a narrow investigation and the claim file left a lot of questions unanswered, such as a statement from DeJong, photographs of the tractor, and Perez's understanding of his coverage and how it would affect his use of the vehicle. The opinion letter also failed to address the issues Schnitzer raised, which should have caused Fire to "act almost as a devil[']s advocate as to what that absent insured may be raising as issues and ask if those have been considered, and really to be objective and to take the position of the insured who doesn't have a voice in that issue before them." Corridan also believed the adjustor should have been concerned about Hoppe's letter because it was not focused on the issues raised by the policy, did not engage in any new analysis other than what Fire had already stated, and did not cite any cases regarding the phrase "designed for" or discuss that language. Corridan also would not rely on the attorney's opinions regarding the tractor's function unless he knew the attorney was an expert on farming, noting that nothing indicated Hoppe was such an expert. Finally, Corridan testified that before making a final decision, the adjustor should have reviewed the opinion letter with a view towards identifying whether it addressed the issue of designed for travel on public roads, and should have sent the letter back for the attorney to address that issue.

The Trial Court Decides There is Coverage

Near the close of evidence, the trial court addressed the coverage issue. With the concurrence of counsel for Perez and Fire, the trial court determined the issue of coverage was a legal question to be decided by it, rather than the jury, because it pertained to interpretation of the policy and the facts were undisputed. After hearing argument on the issue of whether there is coverage, the trial court found the term

"designed for" in the motor vehicle exclusion was ambiguous, made factual findings, and concluded "the tractor was designed for travel off road and not for travel on a public road as defined in the homeowner's policy." The trial court explained that "[i]n light of the uncontroverted evidence regarding the intent of the manufacturer, owner, and insured, the physical description of the vehicle and the use of the vehicle on the date of the accident, I determine that a clear and reasonable construction of the ambiguous phrase, … 'designed for travel on public roads,' … does not include the tractor in this case. Thus, the insured's liability arising from use of the tractor is covered by his homeowner's policy held by [Fire]."

After making the coverage finding, the trial court addressed Perez's motion for a directed verdict on the breach of contract cause of action, which he made at the outset of the hearing. Fire's counsel stated that in light of the trial court's ruling, he could not think of any reason why Perez's request for directed verdict should not be granted. After discussions about the proper measure of damages for breach of contract, the trial court concluded that since it determined the policy covered the accident, Fire had breached the policy as a matter of law, but left the issue of damages for the jury to decide.

The Jury's Verdict

In its special verdict, the jury found: (1) the total amount of damages caused by breach of the insurance contract was $389,178.08; (2) Fire did not reasonably rely upon advice of counsel in making its decision to decline to defend and indemnify Perez; (3) there was not a genuine dispute as to Fire's liability under California law; (4) Fire breached the implied covenant of good faith and fair dealing arising from the insurance contract; (5) the breach was a cause of injury to Perez; (6) the total amount of economic damages caused by the breach was $146,590.41, while the total amount of non-economic damages was $327,231.51; and (7) by clear and convincing evidence, Fire was guilty of

oppression or malice in the conduct upon which it based the finding of liability for breach of the implied covenant of good faith.[5] Following a bifurcated trial on punitive damages, the jury awarded Perez $25 million in punitive damages.[6] The parties later stipulated that Perez was entitled to attorney's fees of $155,671.23 (under *Brandt v. Superior Court* (1985) 37 Cal.3d 813) on the bad faith claim.

Fire moved for judgment notwithstanding the verdict and a new trial. The trial court denied Fire's motion for judgment notwithstanding the verdict. The trial court, however, conditionally granted a new trial solely as to the amount of punitive damages, subject to Perez's acceptance of remitting the $25 million punitive damages award to $710,732.88 (1.5 times the compensatory tort award). Perez accepted the remittitur, subject to Fire not appealing any part of the judgment. Fire appealed from the ensuing judgment, and Perez cross-appealed.

DISCUSSION

Fire's Appeal

I. Coverage Issues

Fire's first contention on appeal concerns a question of contract interpretation decided by the trial court. The question is whether the policy language "a motorized land vehicle … designed for travel on public roads" includes the Kubota tractor. The court concluded this language was ambiguous. Since the evidence was undisputed, the court, with the parties' agreement, determined it, not the jury, should decide the issue, and found the tractor was designed for travel off-road and not for travel on a public road as defined in the policy.

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[5] The verdicts were unanimous, with the exception of the economic and non-economic damage awards for breach of the implied covenant, which was 11 to 1 in favor of the damages awarded, and the finding of oppression and malice, which was 9 to 3 in favor of that finding.

[6] The jury voted 9 to 3 in favor of the $25 million punitive damage award.

The parties disagree as to the scope of the coverage issue. Fire contends this issue involves a single question of law – whether the tractor is excluded from coverage because it comes within the policy's definition of a motor vehicle, i.e. a motorized land vehicle "designed for travel on public roads" – a question of contract interpretation for our de novo review. Perez, however, contends this question was resolved in the trial court's findings of fact, and all we need do is determine whether those findings are supported by substantial evidence. The appropriate standard of review depends on whether this is actually an issue of policy interpretation or policy application.

Rules of Policy Interpretation and Standard of Review

Generally, interpretation of an insurance policy is a question of law which we review de novo. (*E.M.M.I. Inc. v. Zurich American Ins. Co.* (2004) 32 Cal.4th 465, 470 (*E.M.M.I.*).) Our Supreme Court recently restated the rules governing interpretation of insurance policies: "'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' (*id.*, § 1644), controls judicial interpretation. (*Id.*, § 1638.)"' [(*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.)]" (*E.M.M.I., supra,* 32 Cal.4th at p. 470.)

"A policy provision is ambiguous when it is susceptible to two or more reasonable constructions. [Citation.] Language in an insurance policy is 'interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract.' [Citation.] 'The proper question is whether the [provision or] word is ambiguous in the context of *this* policy and the circumstances of *this* case. [Citation.] "The provision will

shift between clarity and ambiguity with changes in the event at hand." [Citation.]' ([Citation.]) Ambiguity '"'is resolved by interpreting the ambiguous provisions in the sense the [insurer] believed the [insured] understood them at the time of formation. [Citation.] If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. [Citation.]' 'This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, "the objectively reasonable expectations of the insured."'" [Citation.] "Any ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations."' ([Citation.].)" (*E.M.M.I.*, *supra*, 32 Cal.4th at pp. 470-471.)

The law requires that "[w]ords used in an insurance policy are to be interpreted according to the plain meaning which a layman would ordinarily attach to them. Courts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807.) The question of ambiguity is a question of law. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867; *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555.) If no ambiguity exists, we need not consider the insured's reasonable expectations. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 37-38.)

As our Supreme Court has further explained, "policy exclusions are strictly construed [citations], while exceptions to exclusions are broadly construed in favor of the insured [citations]. '"[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. As we have declared time and again 'any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.' [Citation.] Thus, 'the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakable language.' [Citation.] The exclusionary clause 'must be *conspicuous, plain and clear*.'" [Citation.] This rule

applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded.' ([Citation.])" (*E.M.M.I.*, *supra*, 32 Cal.4th at p. 471.)

The interpretation of a writing is a question of law even if extrinsic evidence has been introduced, as long as the extrinsic evidence is not conflicting. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) We are not bound to accept the trial court's interpretation of a writing simply because different inferences may be drawn from uncontradicted evidence. (*Id.* at p. 866 & fn. 2.) However, "[w]hen the trial court has resolved a disputed factual issue, [we] review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed." (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Similarly, when the critical issue is the application of an insurance policy, rather than its interpretation, and different inferences may reasonably be drawn from undisputed evidence, the findings of the trier of fact are subject to substantial evidence review. (*Id.* at pp. 632-634; *Alpine Ins. Co. v. Planchon* (1999) 72 Cal.App.4th 1316, 1324 (*Alpine*).)

As stated above, the issue in this case is whether the tractor is "designed for travel on public roads" as defined in the policy. The trial court concluded this phrase is ambiguous and looked to extrinsic evidence regarding the tractor's purpose, function and use to determine the phrase's meaning. The court found the phrase could be reasonably construed to not include the tractor. Thus, we are presented primarily with the issue of the phrase's interpretation rather than its application to the evidence. Since the issue here involves interpretation of the policy, as opposed to its application, we review the trial court's decision de novo.

Interpretation of "Designed for Travel"

The parties disagree about the interpretation of the phrase "designed for travel on public roads." Fire contends the phrase is not ambiguous and argues the tractor clearly

fits within the definition of motor vehicle because it is specially equipped with features that allow it to legally travel on public roads, such as tail lights and a SMV emblem, and Kubota's literature instructs on public road use. Underlying this argument is the assumption that a vehicle is "designed for travel on public roads" when the manufacturer adapts a vehicle so it could be legally driven on public roads and instructs its purchasers on how to do so. Perez contends the tractor is not a vehicle "designed for travel on public roads" because the tractor is designed for off-road and farm use, and not for public road travel due to its high center of gravity, slow acceleration, and slow speed. While Perez recognizes the tractor is specially accessorized with features that allow it to be legally operated on a public road, he points out the manufacturer only included these features to enable the tractor to fulfill its purpose of off-road farming by allowing the tractor to occasionally move or travel across a public highway in order to reach a field or destination of intended use. Underlying this argument is the assumption that a vehicle is not "designed for travel on public roads" when, looking at the vehicle as a whole, including the manufacturer's and owner's intent regarding its purpose and use, the vehicle's purpose does not include public road travel.

Fire argues its interpretation is the only reasonable one and urges us to employ an objective test when determining whether the tractor is designed for public road travel. Fire argues that under that test, the mere fact the tractor is equipped with features which serve no other objective purpose than public road travel, namely the tail lights, turn signals and SMV emblem, shows it was designed for that purpose.[7] What Fire appears not to appreciate is whether a vehicle is "designed for travel on public roads" may not be immediately obvious. For example, in *Farmers Insurance Exchange v. Schepler* (1981)

[7] The evidence shows the only features that serve no objective purpose other than public road travel are the SMV emblem, tail lights and turn signals; the other features that are useful for driving on public roads, such as high- and low-beam headlights and interlocking brakes, also serve a purpose in farming operations.

115 Cal.App.3d 200 (*Schepler*), the trial court was presented with the issue of whether a dune buggy, which the insured was building from a kit, was an automobile under the insured's automobile insurance policy that defined an automobile as "a four wheel land motor vehicle designed for use principally upon public roads," so as to require the insurance company to defend and indemnify the insured in a lawsuit stemming from an accident involving the dune buggy. (*Schepler*, *supra*, 115 Cal.App.3d at pp. 202-203.) Although the dune buggy did not have all the equipment required for public road travel, the trial court concluded following a bench trial that the dune buggy fell within the definition because the insured had equipped the dune buggy with some parts, such as headlights, tail lights, and brake lights, which were required for driving on a public road, *and* the insured testified he intended to use the vehicle on the public road. (*Id.* at p. 204.)

The appellate court affirmed, concluding the mere fact the dune buggy was not qualified to operate lawfully on public roads did not mean it was not designed for such use. The court noted the term "designed" can have different meanings: "One meaning of the term 'designed' is '[f]it, adapted, prepared, suitable, appropriate.' (Black's Law Dict. (4th ed. 1951) p. 534, col. 1.) However, that same source states another meaning, as follows: '[i]ntended, adapted, or designated.' (*Ibid.*) The phrase 'designed for' is commonly employed to designate the purpose for which an item of personal property is constructed." (*Schepler*, *supra*, 115 Cal.App.3d at p. 206.) The court held that, in light of the trial court's finding that the insured, as the manufacturer of the dune buggy, intended to design the vehicle principally for use on public roads, which was evidenced by his installation of some parts that were required for legally driving on the public road, it was not unreasonable for him to expect the policy covered his operation of the dune buggy. (*Id.* at p. 209.)

Following *Schepler*, another appellate court held that when the owner is not the manufacturer, "a vehicle is '"designed for use principally on public roads"' when it is the intent of the owner that the vehicle be so used *and* the vehicle is adapted for such use."

(*Farmers Insurance Group v. Koberg* (1982) 129 Cal.App.3d 1033, 1037 (*Koberg*).) Thus, the court concluded that an automobile policy which covered vehicles "designed for use principally upon public roads" did not provide coverage for a dune buggy accident when its owner said he did not intend to use the vehicle for any purpose other than off-road use and the vehicle was so registered, equipped and used, and affirmed the trial court's grant of summary judgment in the insurance company's favor. (*Ibid.*)

In each of these cases, the court essentially looked to the totality of the circumstances – both the manufacturer's or owner's expressed statements about the intended design of the vehicle and whether there was an objective manifestation of that intent – to determine the purpose for which the vehicles were designed. While in some cases it may be so apparent that a vehicle has been "designed for travel on public roads" that it can be characterized as a "motor vehicle" as a matter of law, as in *Mercury Ins. Group v. Checkerboard Pizza* (1993) 12 Cal.App.4th 495, in which the court found obvious that a Chevrolet Corsica was "'an automobile designed solely for the transportation of persons and their personal luggage'" (*Id.* at p. 499 & fn. 5), this is not such a case.

As the *Schepler* court stated, the phrase "designed for" can have multiple meanings. Fire asserts the appropriate meaning in this case is adapted, while Perez contends the appropriate meaning is the purpose for which the vehicle is constructed. Fire does not disagree with Perez's interpretation. Instead, it contends that the tractor was constructed for two purposes – off-road use *and* public road travel – as evidenced by the features placed on the tractor solely for road travel and the sections in Kubota's literature explaining how to travel on roads. Fire argues Perez's interpretation of the term "designed for" is not reasonable because it interjects the words "primary" or "solely" into the term "designed for."

In the context of this case, however, we do not agree that Perez's interpretation necessarily leads to such a result. This is because the undisputed evidence established the

manufacturer constructed the tractor for farming operations, light industrial, commercial and residential off-road uses, and not for public road travel. The tractor could not safely be driven on public roads due to its slow speed in comparison to other vehicles traveling on the road, its slow acceleration and stopping, and its high center of gravity. The manufacturer, however, recognized the tractor would be used on public roads, so it installed safety features, as mandated by industry standards and state laws, that made travel on roads safer and legal, and cautioned purchasers about safe road travel. The addition of these safety features and instructions did not change the nature or design of the tractor – the tractor remained a vehicle designed for off-road use.

While we recognize that a vehicle may have more than one purpose, which might include public road travel, based on the evidence presented here, the tractor's purposes were for off-road use, not public road travel. Merely because the manufacturer anticipated a foreseeable use of the tractor, i.e. public road travel, and installed equipment that made that use safer, does not mean the tractor was constructed for the purpose of public road travel. Although many farmers may drive their tractors on public roads, this is not the tractor's intended purpose. Tractors are not like automobiles, trucks, buses or motorcycles which are clearly designed for travel on public roads. Knowing that some consumers may nonetheless operate tractors on public roads, as for instance between one farm field and another, the manufacturer placed features on the tractor to make such use safe and legal. While Fire contends placing these features on the tractor shows the manufacturer's intent that the tractor travel on public roads, the evidence shows the manufacturer recommended public road travel be avoided as much as possible, and only placed these features on the tractor to allow for safe road travel.

Fire argues an insured would not reasonably expect coverage for the tractor accident because both the policy context and the insured's "objectively reasonable expectations lead to the conclusion the policy excluded from coverage all road travel-related traffic accident risks - the exact risk that came to pass." Fire points out the motor

vehicle exclusion not only applies to motorized land vehicles designed for travel on public roads, but also vehicles being towed or carried on vehicles designed for travel on public roads and motorized land vehicles designed for recreational use off public roads, and excepts from the exclusion motorized golf carts while used on the golf course for golfing purposes and motorized land vehicles not subject to motor vehicle registration used only on an insured location. Fire argues these exclusions and exceptions draw a clear distinction between non-traffic and traffic-related risks, and exclude only traffic-related risks. While this distinction may be true with respect to vehicles that fit the policy motor vehicle definition, no such exclusion exists for vehicles that are either not designed for travel on public roads or not designed for recreational use off public roads. Nothing in the policy precludes coverage for road accidents involving those vehicles. If Fire wished to exclude all traffic-related risks, it could have done so, such as by excluding coverage for all motorized land vehicles regardless of design or use. That it did not do so supports the conclusion an insured reasonably would expect coverage for accidents involving vehicles such as the tractor that are not "motor vehicles" under the policy, regardless of whether the accidents occurred on the insured property or a public road.

Fire next contends a reasonable insured would not expect coverage for traffic accidents under a homeowner's policy. While this may be true with respect to typical traffic accidents involving vehicles that a reasonable insured would conclude are designed for public road travel, such as automobiles or trucks, it is not true with respect to farm tractors that a reasonable insured would conclude are not vehicles designed for public road travel. Although, as Fire points out, the personal liability provisions of a homeowner's insurance policy generally apply to accidents in and around the home (*Herzog v. National American Ins. Co.* (1970) 2 Cal.3d 192, 197 (*Herzog*)), it is also true that the policy "generally covers the named insured for *all* personal liability not falling within specific exclusionary provisions of the policy." (*State Farm Mut. Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 99, fn. omitted; see also *Herzog*, *supra*, 2 Cal.3d at p.

197, fn. 2 ["We recognize, of course, that the personal liability provisions of a homeowner's policy also provide[] coverage for certain accidents occurring away from the home."]) Having only excluded from coverage liability arising from the use of motorized vehicles designed for travel on public roads, a reasonable insured would certainly expect coverage for traffic accidents involving vehicles, such as the tractor here, that are not motor vehicles as defined in the policy.

Fire asserts its interpretation of the exclusion, that a vehicle is designed for travel on public roads when it is equipped so it may legally do so, is the only reasonable interpretation. We disagree, since in this context it would lead to absurd results. If we accept Fire's interpretation, then a tractor that does not have tail lights, turn signals, or a SMV emblem would be covered under the policy. Although such a tractor would still be capable of traveling on a public road, it would not be equipped to legally do so. To provide coverage in that situation, where the tractor presents a risk of harm greater than the tractor at issue here, which is equipped to make road travel safer, is nonsensical. Under Fire's interpretation, by placing these same features on a forklift, the forklift would be transformed into a vehicle "designed for travel on public roads." The forklift, however, would remain a vehicle not designed for, and indeed unsafe for, public road travel. It is unlikely a reasonable insured would interpret the policy to exclude coverage for vehicles not generally designed for, or unsafe to, travel on public roads only because the manufacturer has placed safety features on it knowing that it will occasionally do so.

Fire contends *Alpine*, *supra*, supports a conclusion the tractor was "designed for travel on public roads." In that case, the issue was whether a standard pick-up truck modified with a hydraulic scissors-lift, which had toppled over when the bed was raised causing a chain reaction which led to a house burning down, was an "auto" or "mobile equipment" for purposes of a commercial general liability policy. (*Alpine*, *supra*, 72 Cal.App.4th at p. 1318.) The policy excluded from coverage any "auto," which was defined as "a land motor vehicle, trailer or semi-trailer designed for travel on public

roads, including any attached machinery or equipment." (*Ibid.*) The policy, however, excluded "mobile equipment" from the definition of "auto," and contained various definitions of "mobile equipment," the pertinent ones being "farm machinery, forklifts and other vehicles designed for use principally off public roads" and vehicles "maintained primarily for purposes other than the transportation of persons or cargo." (*Id.* at pp. 1318-1319.) Following a bench trial, the court found the truck was covered under the policy because it qualified as mobile equipment. (*Id.* at 1320.)

The appellate court affirmed, concluding the issue of whether the truck was maintained primarily for purposes other than transportation of persons or cargo involved application of the insurance policy, rather than its interpretation, and therefore was an issue of fact subject to substantial evidence review. (*Alpine*, *supra*, 72 Cal.App.4th at pp. 1322-1324.) In so concluding, the court noted that "just about anything with wheels might qualify as an 'auto.' The only clear requirement is that an auto be a 'vehicle … designed for travel on public roads.'" (*Id.* at p. 1322.) The court further noted that while reviewing courts have been willing to independently reexamine the issue of whether a vehicle was designed for a particular purpose, whether a vehicle is excepted from the auto exclusion because it fits the definition of "mobile equipment" necessarily involves a factual inquiry regarding the primary purpose for which a vehicle is maintained. (*Ibid.*)

Fire asserts that because the policy in *Alpine* specifically excluded farm machinery from the definition of "auto," it must be a vehicle "designed for travel on public roads." This is not necessarily so, however, because the insurance company may only have listed the farm machinery to make clear it was covered under the policy, particularly in light of the fact the policy was a commercial one. Fire also points to the language in *Alpine* where the court noted that almost "anything with wheels *might* qualify as an 'auto[,]'" (*Alpine*, *supra*, 72 Cal.App.4th at p. 1322), arguing the exclusion here should be broadly interpreted. This statement, however, has no bearing on the issue before us, since the

Alpine court was not deciding the definition of the phrase "designed for travel on public roads."

We recognize the fact that a word carries multiple meanings does not by itself render it ambiguous. (*E.M.M.I., supra*, 32 Cal.4th at p. 472.) The context in which the words "designed for" appears in this policy and under the circumstances of this case, however, renders its meaning ambiguous. Although the words "designed for" are the main culprits for this ambiguity, the ambiguity is exacerbated by the use of the word "travel," which itself can have multiple meanings ranging from "the trips, journeys, tours, etc. taken by a person or persons" to "passage or movement of any kind." (Webster's New World Dict. (Third Coll. Ed. 1988) p. 1423.) Taking the whole phrase together, "designed for travel on public roads" could mean either designed for short trips on public roads or designed for a journey. Presented with those alternatives, we do not believe a reasonable insured would construe the motor vehicle exclusion to apply to a vehicle solely because it is equipped to legally travel on public roads for limited distances and not able to travel with the flow of traffic. Had the insurer intended the phrase "designed for travel" to apply to vehicles solely because they were equipped with features allowing for legal public road travel, it could and should have made this intention clear to the insured, for example by defining the meaning of that phrase in the context of the policy language. This burden rests squarely with Fire, as the insurer. (*E.M.M.I., Inc., supra*, 32 Cal.4th at p. 473.)

Since we find the motor vehicle exclusion ambiguous, we must resolve the ambiguity in the insured's favor, consistent with the insured's reasonable expectations. (*E.M.M.I., supra*, 32 Cal.4th at p. 473.) As discussed above, it is reasonable for an insured to expect coverage of the tractor accident. Moreover, given the broad coverage language of the homeowners' policy, an insured would have a reasonable expectation that coverage would be provided in this context – when a farm tractor the insured borrowed to dig holes on the insured premises is hit while crossing a road. To construe

the motor vehicle exclusion to apply to any vehicle equipped to be driven legally on public roads, regardless of its actual design and purpose, would upset the insured's reasonable expectations. The broad coverage language – providing coverage for all losses except those expressly excluded – along with the ambiguous language in the exclusionary provision, does not support this construction.

In sum, construing the ambiguous language in Perez's favor, in a manner consistent with his reasonable expectations, and keeping in mind that exclusionary provisions are narrowly interpreted, we hold that under the facts of this case, the motor vehicle exclusion does not apply, so the tractor accident is a covered event under the policy.

II. Tort Liability

Fire next contends the jury's verdict on the cause of action for breach of the implied covenant of good faith and fair dealing must be reversed because (1) as a matter of law, its coverage denial was based on an objectively reasonable interpretation of the policy, resulting in a genuine good faith dispute over the policy's meaning; (2) as a matter of law, it reasonably relied on advice of counsel; and (3) there is no admissible evidence it engaged in materially unreasonable conduct. Fire asserts the trial court erred in submitting the issues of genuine dispute and advice of counsel to the jury, therefore we should review those issues under a de novo standard of review.[8]

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[8] Although Fire claims in its reply brief the trial court sent the genuine dispute issue to the jury over its "vigorous objections," it does not cite to anywhere in the record where it so objected; neither does it cite to anywhere in the record showing an objection to the submission of the issue of advice of counsel to the jury. On this ground alone, we may treat the issue of the court's submission of these matters to the jury as waived. (See *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205 [party's duty to support arguments in briefs by appropriate reference to record]; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283 [reviewing court not called upon to make independent search of record].) We do so here.

General Principles

Like other contracts, insurance policies impose on each party an implied duty of good faith and fair dealing which "'imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose.'" (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 345 (*Chateau Chamberay*); *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 879 (*Shade Foods*).) Generally, "the standard of good faith and fairness calls for consideration of the reasonableness of the insurer's conduct in denying coverage." (*Ibid.*, fn. omitted.) An insurer's erroneous interpretation of an insurance contract does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been unreasonable or without proper cause. (*Ibid*; *Chateau Chamberay, supra*, 90 Cal.App.4th at p. 347.) When there is a genuine issue with an insured as to the insurer's liability under the policy, the insurer cannot be liable for bad faith even though it might be liable for breach of contract. (*Chateau Chamberay, supra*, 90 Cal.App.4th at p. 347; *Dalrymple v. United Services Auto. Assn.* (1995) 40 Cal.App.4th 497, 520.)

A breach of the implied covenant also may be based on an insurer's breach of its duty to defend the insured. (*Shade Foods, supra*, 78 Cal.App.4th at p. 881; *Campbell v. Superior Court (Farmers Ins. Co.)* (1996) 44 Cal.App.4th 1308, 1319 (*Campbell*).) "The broad scope of the insurer's duty to defend obliges it to accept the defense of 'a suit which *potentially* seeks damages within the coverage of the policy ….' [Citations.] A breach of the duty to defend in itself constitutes only a breach of contract [citation], but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. [Citations.] On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.'

[Citation.]" (*Shade Foods*, *supra*, 78 Cal.App.4th at p. 881; see also *Campbell*, *supra*, 44 Cal.App.4th at p. 1321.)

Since the duty to defend arises when a claim is made against the insured that "*potentially* seeks damages within the coverage of the policy" (*Gray v. Zurich Ins. Co.* (1966) 65 Cal.2d 263, 275 (*Gray*)), the duty to defend is broader than the duty to indemnify. (*Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1081.) It arises immediately upon tender of defense and continues until the underlying lawsuit is concluded or until the insurer conclusively demonstrates there is no potential for coverage. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) The duty to defend "must be determined on the basis of facts available to the insurer at the time the insured tenders the defense." (*Shade Foods*, *supra*, 78 Cal.App.4th at p. 881.) If the policy is ambiguous, an insurer has a duty to defend when the "the insured would reasonably expect the insurer to defend him or her against the suit based on the nature and kind of risk covered by the policy, or when the underlying suit potentially seeks damages within the coverage of the policy." (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 869.)

Breach of the Implied Covenant

The jury in this case was instructed that to recover damages based upon the claim of breach of the implied obligation of good faith and fair dealing, Perez had to prove, among other things, that Fire "failed to deal fairly and in good faith with [Perez] by unreasonably withholding payment of the claim and/or by unreasonably failing to defend [Perez]." The jury was further instructed that the factors to consider in determining whether Fire breached the implied covenant included: "Failure to investigate a claim thoroughly; [¶] Failure to evaluate a claim objectively; [¶] Using improper standards to deny a claim; [¶] Unduly restrictive interpretation of policy or claim forms to deny or withhold benefits." The special verdict form asked the jury to determine whether Fire

"breach[ed] the implied covenant of good faith and fair dealing arising from the insurance contract?" The jury answered "yes."

Fire contends there is no admissible evidence it engaged in materially unreasonable conduct when it denied coverage of Perez's claim. Fire ignores, however, that the jury was also instructed that breach of the duty to defend can constitute breach of the implied covenant when the breach is unreasonable, and the question on the special verdict allowed for a finding of breach based on either unreasonably withholding payment of the claim or unreasonably failing to defend Perez. We presume the jury followed the trial court's instructions and properly applied them to the facts it found based on the evidence presented at trial. (*Linden Partners v. Wilshire Linden Associates* (1998) 62 Cal.App.4th 508, 523 ["Jurors are presumed to have understood instructions and to have correctly applied them to the facts as they find them"].) Thus, even assuming Fire is correct that there is no evidence to support a finding that it breached the implied covenant when it denied coverage, because the jury was properly instructed that it could find a breach if it found Fire was unreasonable when it denied Perez a defense, the judgment must be affirmed if substantial evidence supports that finding. (See, e.g. *Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153-1154 ["'Where several counts or issues are tried, a general verdict will not be disturbed by an appellate court if a single one of such counts or issues is supported by substantial evidence and is unaffected by error, although another is also submitted to the jury without any evidence to support it and with instructions inviting a verdict upon it.'"].) Although the jury issued a special verdict rather than a general one, we believe the same principle applies where the special verdict question at issue can be resolved on either of two theories – we must affirm if substantial evidence supports either theory. (See *Clark Equipment Co. v. Wheat* (1979) 92 Cal.App.3d 503, 529 [where both contract and fraud legal theories are submitted to the jury, verdict will be sustained if supported by either theory].)

Fire does not assert any argument that a jury finding of breach of the implied covenant based on unreasonable failure to defend Perez is not supported by substantial evidence or should be reversed as a matter of law. We need not consider points unsupported by legal analysis or authority. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3.) "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived [forfeited]. [Citations.]" (*Badie v. Bank of America, supra,* 67 Cal.App.4th at pp. 784-785.) Having failed to make any reasoned argument, or cite to any authority, that a finding that Fire breached the implied covenant when it unreasonably failed to defend Perez is not supported by substantial evidence, we may treat this issue as waived.

Even assuming the issue is not waived, substantial evidence supports a jury finding that Fire unreasonably failed to defend Perez. An insurer's actions in failing to consider evidence supporting coverage, and maintaining a consistent and inflexible position with the insured can amount to bad faith. (*Shade Foods*, *supra*, 78 Cal.App.4th at p. 883.) Here, even if Fire's interpretation of the motor vehicle exclusion was reasonable, it was unreasonable for Fire to fail to recognize the possibility that the tractor is a vehicle *not* designed for travel on public roads. Instead of seriously considering Schnitzer's arguments on the issue and investigating the matter further, Fire maintained its position the tractor was not covered and dismissed Schnitzer's arguments out of hand. As Perez's insurance expert testified, it was unreasonable for Fire to adhere to its position without giving any consideration to an opposing view.[9] Our analysis of coverage in

[9] Perez's expert also testified it was unreasonable for Fire not to file a declaratory relief action. Fire contends this conduct cannot be considered unreasonable, citing to *Morris v. Paul Revere Ins. Co.* (2003) 109 Cal.App.4th 966, 977. *Morris*, however, dealt with a different issue – whether bad faith can be demonstrated when the insurer discontinues disability payments to the insured, rather than continuing payments under a reservation of rights while pursuing a declaratory relief claim. (*Ibid.*) That case has no

section I reveals that, while Fire could raise certain arguments against coverage, it could not reasonably maintain there was no potential for coverage under the policy, given the facts here and the fact Perez would reasonably expect a defense in this case. Although Fire was not required to reverse its coverage decision, it still was required to evaluate whether a potential for coverage existed.[10] Its failure to do so provides substantial evidence to support the jury's finding it breached the implied covenant of good faith and fair dealing.

Genuine Issues Regarding Coverage

Fire argues since its interpretation of the policy was reasonable, a genuine dispute regarding liability existed as a matter of law and it cannot be liable for breach of the implied covenant. Fire also asserts it had no obligation to investigate facts supporting another policy interpretation. Fire, however, confuses its duty to indemnify with its duty to defend. Assuming there were genuine issues regarding coverage at the time of tender, all Perez needed to show was a *potential* for coverage to be entitled to a defense. This means Fire was obligated to defend Perez if he could show there was *any chance* the tractor was not a vehicle designed for travel on public roads. Through Schnitzer's letters and telephone call, Fire should have been aware of another possible interpretation of the phrase "designed for travel on public roads" – that it could mean the tractor's purpose, not just whether it was legally equipped for travel on public roads. Given the ambiguity

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bearing on the issue of whether such conduct is unreasonable with respect to bad faith breach of the duty to defend.

[10] The case Fire cites in its letter brief, *CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, in which the court held the insurer could not be liable for bad faith breach of the insurance policy when its coverage decision was objectively reasonable, has no application here because it involved the issue of the bad faith breach of the duty to indemnify, not the duty to defend. (*Id.* at pp. 286-287, 291-292.) We note that, unlike Fire, the insurer in that case recognized the potential for coverage and provided a defense to the insured with a reservation of rights, despite its belief that the policy did not provide coverage for the claim at issue. (*Id.* at p. 279.)

in the policy, Fire was obligated to defend Perez if he reasonably expected coverage. As discussed in section I above, a reasonable insured in Perez's situation would have such an expectation. Fire, however, never truly considered whether there was a potential for coverage under the policy.

While Fire claims there was a genuine issue of law regarding *coverage* under the motor vehicle exclusion, it does not raise any issue regarding whether there was a genuine issue of law regarding the *duty to defend* under that exclusion. Having failed to raise the argument, we need not consider it. (*Badie v. Bank of America, supra,* 67 Cal.App.4th at pp. 784-785.) Even if we do consider the issue, there was sufficient evidence from which a jury could find Fire's inflexible position went beyond a genuine dispute over whether it had a duty to defend Perez given that Fire refused to even acknowledge there was a dispute. Instead, Fire consistently maintained its position that a tractor is designed for travel on public roads even in the face of a challenge to that position. The jury could properly find the dispute over the duty to defend was not genuine.

Advice of Counsel

Fire next claims bad faith liability is precluded because it reasonably relied on advice of counsel when it denied Perez coverage. This defense is available to an insurer facing liability for breach of the covenant of good faith and fair dealing if it can prove the alleged breaches were a result of good faith reliance on counsel's advice. (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725 (*State Farm*).) The jury was instructed here that an insurer acts reasonably when it acts on advice of counsel, even if that advice was wrong, so long as it actually acted on that advice, fully disclosed the facts to the attorney or the attorney initiated the advice based on familiarity with the case, it relied on the advice in good faith, and the insurer was not so knowledgeable as to the legal standards involved that it knew the advice was erroneous. The jury rejected this defense when it answered "no" to the question asked on the special

verdict form: "Did [Fire] reasonably rely upon advice of counsel in making its decision to decline to defend and indemnify [Perez]?"

Fire argues the only reasonable interpretation of the evidence conclusively establishes the elements of the defense, therefore it cannot be liable for breach of the implied covenant as a matter of law. We disagree that the evidence is so clear-cut. On this record, a jury reasonably could conclude that Fire did not actually act on advice of counsel, since it denied coverage more than a year before counsel's advice was sought on the basis that the tractor was legally equipped to travel on public roads; Fire maintained that same position when responding to Schnitzer after she tendered the lawsuit to Fire; before counsel was retained, it had already written Schnitzer, telling her it could not accept defense and indemnification on the same basis, and had also written Perez, telling him it appeared Fire did not owe him defense or indemnity; and although Fire told Perez it was investigating whether a potential for coverage existed, it never did so because Schnitzer's letter did not change its analysis of the facts of the case. From this evidence, the jury could infer that from the outset, Fire was intent on looking only at its own view of the motor vehicle exclusion despite its continuing duty to look for potential coverage, and it only retained an attorney to review the matter in the hope it would avoid a later bad faith claim.

Moreover, the attorney's opinion letter discussed coverage issues, but not the duty to defend. The opinion did not even discuss the potential for coverage or address an opposing viewpoint regarding whether the tractor was designed for travel on public roads. Perez's expert testified the claims adjustor should have reviewed the letter objectively and should have noted that it failed to address the issues Schnitzer raised, did not focus on the issues raised by the policy, did not engage in any new analysis, did not cite any cases that discussed the "designed for" policy language and did not discuss that language. A jury certainly could conclude from the evidence that Fire did not reasonably rely on the advice of counsel when it denied a defense to Perez.

If we were to accept Fire's argument that merely seeking a coverage opinion before making a final coverage decision conclusively negates a finding of bad faith, an insurer could always escape bad faith liability merely by seeking advice of counsel *after* having maintained an unreasonable position on its duty to defend. Advice of counsel, standing alone, does not provide a shield from bad faith liability. When the evidence supports a jury determination that an insurer has not treated its insured fairly and its legal advice is questionable, a finding of bad faith will stand. (*State Farm*, *supra*, 228 Cal.App.3d at p. 725 ["Good faith reliance on counsel's advice simply negates allegations of bad faith and malice as it *tends* to show the insurer had proper cause for its actions." (italics added)].)

Admissibility of Expert Testimony

Fire contends the court abused its discretion in admitting some of Perez's insurance expert's testimony, arguing it constitutes inadmissible legal opinion on the reasonableness of Fire's legal position. Fire characterizes the testimony as being to the effect that "Fire's claims personnel should have known that the law mandated coverage," and was "about what case law was relevant and what claims personnel should have understood about that case law."

We review a ruling admitting or excluding evidence for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) A trial court has broad discretion in ruling on the admissibility of evidence. (Evid. Code, § 352; *People v. Williams*, *supra*, 16 Cal.4th at p. 196; *People v. Karis* (1988) 46 Cal.3d 612, 637; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) An abuse of discretion is established only where there is a clear showing the ruling exceeded the bounds of reason under all the circumstances. (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272; *People ex. rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.)

Fire first challenges testimony that, in the expert's opinion, it was unreasonable for Ward to write a two-sentence letter granting authority to deny coverage in December 1998 after receiving Walter's recommendation because "[t]here were many issues that demanded to be answered. [¶] … For example, the design issue, that is not addressed. The intent or use of the owner of the vehicle. Where is the statement taken from Mr. Perez, I would like to see that. There is a need to inform and to question the decision or recommendation to deny coverage based on something that isn't appropriate, such as the mere fact that the vehicle was on a public road, that is not the basis for the proper denial in this case." Fire objected to the testimony "about the basis for improper denial" on the grounds (1) it was not proper expert testimony, to which the court responded "[i]t is … his opinion, qualified in that regard[,]" and (2) it was a legal issue, which objection the court overruled.

Fire also challenges the expert's testimony that an insurance adjustor evaluating terms defined in the policy, like the term "motor vehicle," does not usually look beyond the policy for some other definition of the term, "[b]ecause the policy definitions will apply unless they are contrary to public policy, but in the absence of that they don't have to look any further. They are obliged to use the definitions contained in the policy and known to their insured." Fire moved to strike the portion of the answer regarding policy definitions being contrary to public policy as a legal opinion or interpretation, which the court overruled. The expert also testified, without objection, that he believed an adjustor reviewing the attorney's opinion letter would be concerned about the analysis in the letter because "it is not directed, it is not focused on the issues that are raised by the policy," and while it would be appropriate for the attorney to cite the section from the manufacturer's instruction manual regarding road travel, it would "not be conclusive to the questions."

Finally, Fire cites to the expert's testimony that he did not identify in the attorney's analysis any identification or reference to the phrase "designed for[,]" which is

the policy language, and if he were an insurance claims representative looking to the lawyer for guidance on this specific exclusion, he "would look for a treatment of the language that I am citing in my policy as a basis for my decision." Fire objected to the questions that elicited this testimony on grounds of improper subject for expert testimony and called for legal opinion, both of which the court overruled.

Fire argues the court abused its discretion in admitting all of this testimony because it allowed "the legal issue of the reasonableness of Fire's policy interpretation to be hijacked by a lay 'expert.'" We disagree. The first cited testimony had nothing to do with the reasonableness of Fire's policy interpretation; instead, the expert merely stated that when the original decision denying coverage was made, the adjustors should have asked about the owner's intent and use of the tractor, and the mere fact the tractor was driving on the road was an improper basis for denying the claim, a position Fire implicitly agrees with on appeal as it asserts it did not deny coverage merely because the tractor was capable of being driven on the road. The trial court reasonably could conclude that the testimony was not a legal opinion.

The remaining testimony is regarding what the adjustor should have been concerned about when reviewing the attorney's opinion letter. This testimony certainly was relevant to whether Fire reasonably relied on advice of counsel when it refused the tender of defense and indemnity, as it concerned what an adjustor would look for when reviewing the coverage letter in this case. Whether an insurer reasonably relied on advice of counsel is a question of fact for the jury. (See, e.g., *George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 813 [jury finding that insurer did not rely on the advice of counsel in malicious prosecution case is reviewed for substantial evidence].) What an insurance adjustor should do when reviewing a coverage opinion is certainly helpful to the trier of fact, who is generally unfamiliar with insurance practices and procedures, and therefore a proper subject of expert testimony. (See *People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on another ground by

People v. Mendoza (2000) 23 Cal.4th 896, 914.) The trial court reasonably could conclude the testimony here was admitted for that purpose. There was no abuse of discretion.

III. Compensatory Damages

Fire asserts two arguments with respect to the compensatory damages the jury awarded as economic and non-economic damages for breach of the implied covenant of good faith and fair dealing. Fire contends the award for non-economic damages must be reversed because the trial court abused its discretion in excluding an agreement between the injured truck driver, Jimenez, and Perez, that Jimenez would not execute the default judgment during the pendency of this litigation. Fire argues the award for economic damages must be reversed because damages are limited to the policy limit plus the insured's defense expenses. We address each argument in turn.

Non-Economic Damages

Before trial, Perez filed an in limine motion to exclude evidence of a written agreement between Jimenez and Perez, in which Jimenez agreed to postpone execution on the default judgment in exchange for a lien on the proceeds of this litigation. Perez argued the agreement was irrelevant to the issues in the case and, in any event, should be excluded under Evidence Code section 352 because its prejudicial value was great while its probative value was minimal. During the hearing on the in limine motions, the court addressed this motion, stating: "As indicated yesterday off the record, no opposition by [Fire], that in limine is granted."

During closing argument, Perez's counsel told the jury that if they concluded Fire's conduct was in bad faith, they would be "in a position to make an award to Mr. Perez which I would submit make him whole and would include the full amount. [¶] The default judgment would include compensating him for having this massive judgment hanging over his head all of those years …" Counsel also told the jury: "[Perez's] got a default judgment against him in excess of his policy limit. He's got all the distress

suffering he has to go through because of having this huge judg[]ment over his head on a policy that provided him coverage that they would [n]ever acknowledge." Fire's counsel later moved for a mistrial based on these arguments, contending the court erroneously excluded evidence of the lien. The court denied the motion.

Fire now contends the court abused its discretion when it excluded the agreement during the in limine hearing because the agreement was relevant and probative of Perez's emotional distress. It asserts the agreement shows that Perez was "protected from paying a penny until the conclusion of this litigation; Perez was then at risk only as to amounts that are *not* Fire's responsibility." Fire argues had the agreement been admitted, there would be little, if any, evidence of substantial emotional distress and no evidence it was responsible for any distress Perez may have suffered.

Fire's failure to oppose the motion, however, is fatal to its claim, since by its conduct, Fire acquiesced in the ruling it now attacks. "Such agreement constitutes a waiver of the issue, since appellant and counsel acquiesced in and contributed to any such error. [Citation.]" (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742-743, [citing 9 Witkin, California Procedure (3d ed. 1985) §§ 305-308, pp. 316-318]"; see also *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167 (*Telles*) ["Under the doctrine of waiver, a party loses the right to appeal an issue caused by affirmative conduct or by failing to take the proper steps at trial to avoid or correct the error. [Citation]."") Moreover, we note that "under the doctrine of invited error, a party is estopped from asserting prejudicial error where his own conduct caused or induced the commission of the wrong." (*Ibid.*)

Since Fire acquiesced in the court's exclusion of the agreement, its arguments that it did not waive the issue are without merit. Fire first cites to Code of Civil Procedure section 647, which lists matters which are "deemed excepted to[,]" including "a ruling sustaining or overruling an objection to evidence." The problem with this assertion is that since Fire did not object to exclusion of the agreement, the court did not rule on the

agreement's admissibility. Fire next asserts the issue was preserved because it did not need to provide a separate offer of proof, since the written agreement was fully set out in the record. Even if an offer of proof was unnecessary, however, by not opposing the motion, Fire essentially agreed that the evidence be excluded.

Finally, for the first time in its reply brief, Fire asserts it preserved the issue by making the motion for mistrial. Fire, however, did not argue in its opening brief that the trial court erred in denying the mistrial motion. We do not consider arguments raised for the first time in a reply brief. (*City of Costa Mesa v. Connell* (1999) 74 Cal.App.4th 188, 197; *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322.) To the extent Fire is contending a mistrial motion made during closing arguments somehow constitutes opposition to an in limine motion to exclude evidence that it did not oppose before trial, it does not cite any authority to support that contention. To that extent, we may treat the argument as waived. (See *Akins v. State of California* (1998) 61 Cal.App.4th 1, 50 [contention waived by failure to cite legal authority]; *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [a point asserted by appellant without argument or authority need not be discussed by reviewing court]; see also Cal. Rules of Court, rule 14.)

In sum, Fire has waived any review of the trial court's decision to exclude evidence of the written agreement between Jimenez and Perez.

Economic Damages

Fire also contends the $146,590.41 economic damage award for breach of the implied covenant, which represents the amount of the $413,000 default judgment over the $300,000 policy limit, plus interest, must also be reversed because tort damages in refusal to defend cases are limited to the policy limit plus the insured's defense expenses. We disagree.

The general rule is that "an insurer that wrongfully refuses to defend is liable on the judgment against the insured." (*Gray, supra*, 65 Cal.2d at p. 279; see also *Samson v. Transamerica Ins. Co.* (1981) 30 Cal.3d 220, 237; *Amato v. Mercury Casualty Co.*

(1997) 53 Cal.App.4th 825, 833 (*Amato*).) It is no defense that the ultimate judgment against the insured is not necessarily rendered on a theory within the policy's coverage. (See *Gray*, *supra*, 65 Cal.2d at pp. 279-280; *Amato*, *supra*, 53 Cal.App.4th at p. 833.)[11] The insured is not required to prove the judgment either would not have occurred or would have been less but for the insurer's wrongful failure to defend: "Such a theory … would impose upon the insured 'the impossible burden' of proving the extent of the loss caused by the insurer's breach." (*Gray*, *supra*, 65 Cal.2d at p. 280.)

The *Gray* rule applies equally to default judgments: "When the insurer refuses to defend and the insured does *not* employ counsel and presents *no* defense, it *can* be said the ensuing default judgment is proximately caused by the insurer's breach of the duty to defend." (*Amato*, *supra*, 53 Cal.App.4th at p. 834.)[12] Thus, "where an insurer tortiously breaches the duty to defend and the insured suffers a default judgment because the insured is unable to defend, the insurer is liable for the default judgment, which is the proximate result of its wrongful refusal to defend." (*Id.* at p. 829.)

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[11] An insurer may, however, raise the defense of noncoverage when it was not possible the judgment was rendered on a covered theory, such as when issues relating to the defense were not raised in the underlying suit or the judgment was expressly rendered on a theory of liability outside the policy. (See *Hogan v. Midland Nat. Ins. Co.* (1970) 3 Cal.3d 553, 564-566; *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500, 514 fn. 15.)

[12] Since it is undisputed that Perez did not and could not afford to employ counsel to defend him, Fire's reliance on *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659-660, is misplaced. In *Comunale*, the court noted that "if the insured *has* employed competent counsel to represent him, there is no ground for concluding that the judgment would have been for a lesser sum had the defense been conducted by insurer's counsel, and therefore it cannot be said that the detriment suffered by the insured as the result of a judgment in excess of the policy limits was proximately caused by the insurer's refusal to defend." (Italics added.) In contrast, Perez's inability to employ counsel provides grounds for concluding the entire amount of the default judgment was proximately caused by Fire's refusal to defend.

Fire argues that *Amato* was wrongly decided, and we should instead apply the rule in *Travelers Ins. Co. v. Lesher* (1986) 187 Cal.App.3d 169, disapproved on another point by *Buss v. Superior Court* (1997) 16 Cal.4th 35, 50, footnote 12. In *Lesher*, the plaintiff contended he would have prevailed at trial but for his insurer's failure to conduct his defense with due care. (*Id.* at p. 187.) Analogizing the claim to one for professional malpractice, the court concluded the plaintiff should have been required to prove the extent to which the judgment resulted from the insurer's negligent defense, and not from the underlying merits of the case. (*Id.* at pp. 197-198.) This rule derives from the prima facie element of professional negligence that requires a plaintiff to prove the extent of "'actual loss or damage resulting from the professional's negligence.'" (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 833.) The tort of bad faith, however, is not predicated on professional negligence, and for this reason subsequent appellate courts have held the *Lesher* "trial-within-a-trial" rule inapplicable where the judgment against the insured has resulted not "upon negligent malpractice of a defense actually undertaken," but on the bad faith failure to provide any defense at all. (*Amato, supra*, 53 Cal.App.4th at p. 837; see *MacGregor Yacht Corp. v. State Comp. Ins. Fund* (1998) 63 Cal.App.4th 448, 458.)

We agree with this distinction. In a bad faith action, the insured is relieved of proving the extent of damages "in order to remove the insurer's incentive to strategically disavow responsibility for the insured's defense 'with everything to gain and nothing to lose.'" (*Gray*, [*supra*, 65 Cal.2d at p. 279].) (*Pershing Park Villas Homeowners Assoc. v. United Pacific Ins. Co.* (9th Cir. 2000) 219 F.3d 895, 902.) "By contrast, an insurer that actually undertakes a defense has no similarly powerful strategic incentive to conduct the defense negligently." (*Ibid.*)

Fire also contends the *Amato* rule does not apply here because the insurer in that case refused to settle the claim as well as refused to defend, and in this case Fire had no opportunity to settle the claim within policy limits. (*Amato, supra*, 53 Cal.App.4th at

pp. 829, 838.) The *Amato* decision, however, was not premised on the refusal to settle, but rather on the refusal to defend. (*Id.* at p. 829.) The court only noted that the insurance company had declined settlement offers to show that it had ample notice of the action and therefore "could hardly have been surprised that the claim proceeded to a default judgment." (*Id.* at p. 838.) Moreover, we note that while Fire claims it had no opportunity to settle this case within policy limits, Fire's own claims file shows that it estimated the value of this case at $35,000 when coverage was first tendered in 1998, and $50,000 when defense was tendered in 1999, which amounts are both well within the policy's $300,000 limit.

There was no error with respect to the award of economic damages.

IV. Punitive Damages

Fire claims the punitive damage award cannot stand because there was insufficient evidence of despicable conduct necessary to support the jury's findings of oppression and malice. We agree.

Civil Code section 3294 provides a plaintiff may recover punitive damages by presenting clear and convincing evidence that the defendant was guilty of oppression, fraud, or malice. Only the elements of oppression and malice are at issue here, since the special verdict form asked the jury to consider whether there was clear and convincing evidence of oppression and malice, which the jury found to exist, but did not ask whether there was clear and convincing evidence of fraud.

"Malice" as defined by statute is "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1).) "Oppression" is defined as "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) The jury was instructed, in accordance with BAJI No. 14.72.1 (9th ed. 2002) that "despicable conduct" means "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.' [Citation.]" (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.) With the exception of conduct which the defendant intends to cause injury to the plaintiff, which can support a finding of malice, both malice and oppression require a finding of despicable conduct.

Fire asserts that our review of the sufficiency of the evidence to support the award of punitive damages must take into account the clear and convincing standard of proof for punitive damages. Fire relies on *Shade Foods*, *supra*, 78 Cal.App.4th at p. 891, in which the court gave this explanation of the standard for appellate review of punitive damages: "In this appeal, the jury award of punitive damages must be upheld if it is supported by substantial evidence. [Citations.] As in other cases involving the issue of substantial evidence, we are bound to 'consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment.' (9 Witkin, Cal. Procedure, *supra*, Appeal, § 359, p. 408.) But since the jury's findings were subject to a heightened burden of proof, we must review the record in support of these findings in light of that burden. In other words, we must inquire whether the record contains 'substantial evidence to support a determination by clear and convincing evidence ....' [Citation.]" (Original emphasis.)

To the extent *Shade Foods* suggests we must apply a more stringent standard than the normal substantial evidence rule, we disagree. Our Supreme Court repeatedly has held that burdens of proof are for the guidance of the trier of fact and do not enter into our review of the sufficiency of the evidence. In *Crail v. Blakely* (1973) 8 Cal.3d 744, 750, the court stated that the clear and convincing standard "was adopted ... for the edification and guidance of the trial court, and was not intended as a standard for appellate review. 'The sufficiency of evidence to establish a given fact, where the law

requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' (*Nat. Auto. & Cas. Co. v. Ind. Acc. Com.* [(1949)] 34 Cal.2d 20, 25; see *Viner v. Untrecht* [(1945)] 26 Cal.2d 261, 267; *Beeler v. American Trust Co.* [(1944)] 24 Cal.2d 1, 7; *Steinberger v. Young* [(1917)] 175 Cal. 81, 84-85 [contract to make a will].)"

When the evidence is attacked as being insufficient to support the verdict, our review "begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429.)

While the record reveals that Fire was unreasonable in its assumption that a tractor that is legally equipped to travel on public roads is necessarily designed for travel on public roads, and should have recognized a possible alternative construction of that phrase which would support a potential for coverage under the policy, Fire's conduct was not despicable. The issue of coverage is not as clear cut as Perez contends. Although there are published appellate court cases that discussed or mentioned the "designed for" language, such as *Schepler*, *Koberg*, and *Alpine*, none of them involve an interpretation of that phrase in the context of a homeowner's policy. Even Perez's insurance industry expert could not recall having one case involving coverage issues related to a farm tractor such as the one involved in this case. While Fire should have recognized another interpretation of the "designed for" phrase was possible in light of Schnitzer's letters, those letters do not mention these cases or provide any case analysis that would put Fire on notice of them.

Perez complains the claims handling was a "farce," as Fire's investigation focused solely on obtaining facts to support Fire's interpretation of the policy, Fire did not

reasonably rely on advice of counsel, Fire has never paid any part of Perez's claim despite "the fact that additional information was revealed during the litigation of the underlying action that must have prompted [Fire] to realize that it had absolutely no justification for its denial of coverage and a defense to Perez," and Fire failed to keep Perez informed of the investigation or the grounds for its denial of coverage or defense. There is no evidence in the record, however, from which a jury could infer that Fire's employees did not sincerely believe in Fire's interpretation of the policy, or that any employee knew there was coverage, yet persisted in denying defense or indemnity. Moreover, while the jury could conclude Fire did not reasonably rely on advice of counsel, Fire *did* in fact seek such advice. (See *Tomaselli*, *supra*, 25 Cal.App.4th at p. 1288 [insurer's retention of outside counsel to investigate a questionable case not malicious, even if counsel had a reputation for digging up reasons to deny coverage].) Although Fire's letters to Perez are not a model of clarity and fail to explain precisely how Fire concluded the tractor was a motor vehicle, Fire did advise Perez prior to the final decision denying coverage in 1998 that the policy may not afford coverage under the motor vehicle exclusion, continued to apprise Perez of the status of Schnitzer's tender of defense and indemnity, even though Perez never tendered the defense or contacted Fire himself, and did mention in denying defense and indemnity in 2000 that its decision was based in part on the owner's manual.

In sum, there is simply no evidence that Fire intended to deny benefits which it knew it was required to provide, intended to injure Perez, or engaged in contemptible conduct. Although its conduct may have been unreasonable and negligent, it "falls within the common experience of human affairs, both with respect to its careless initial

evaluation and its stubborn persistence in error." (*Shade Foods*, *supra*, 78 Cal.App.4th at p. 892.)[13]

Since we reverse the award of punitive damages for lack of evidence, we do not address Perez's contentions in his cross-appeal regarding the amount of punitive damages.

DISPOSITION

The portion of the judgment awarding punitive damages to Perez is reversed. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

_____
Gomes, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Wiseman, J.

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[13] The case Perez relies on, *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, disapproved on another ground in *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1182, does not support a finding of substantial evidence to support oppression or malice in this case. In that case, the insurer was found liable for both bad faith denial of coverage and fraud. The court found the award of punitive damages supported by substantial evidence of intentional fraud. (*Id.* at pp. 1045-1046, 1050-1051.) In contrast here, punitive damages are based not on fraud, but on oppression and malice.