PERRY E. HANSTAD, Plaintiff and Respondent, v. TRUCK INSURANCE EXCHANGE, Defendant and Appellant.

[No. B143750. Consolidated with B145559. Second Dist., Div. Seven. Sept. 10, 2002.]

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APPEAL from a judgment of the Superior Court of Los Angeles County. Los Angeles County Super. Ct. No. BC 156849. Frank Gafkowski, Jr., Judge.

COUNSEL:
Cooper, Kardaras & Kelleher, Michael A. Branconier and Thomas M. O'Leary; Greines, Martin, Stein and Richland, Irving H. Greines, Feris M. Greenberger and Robert A. Olson for Defendant and Appellant.

Hunt, Ortmann, Blasko, Palffy & Rossell and Craig N. Rossell; Latham & Watkins and Richard A. Conn, Jr. for Plaintiff and Respondent.

WOODS, J.

Defendant Truck Insurance Exchange ("Truck") appeals from a $ 41,367,496 judgment entered in favor of plaintiff Perry E. Hanstad in his action for breach of contract and insurance bad faith. Defendant presents several arguments as to why the $ 40 million punitive [*2] damage award should either be retried or judgment entered in its favor on that issue. We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Background to The Instant Lawsuit

A. The Policy

In 1988, Hanstad agreed to lend his California general contractors license to Tri-County Builders ("TCB"), a general partnership he had formed with one of his friends, Jay DeMay. The partners understood TCB would be licensed under Hanstad's contractors license and DeMay would be its operator.
Because Hanstad contemplated playing a minimal role in TCB, he insisted DeMay obtain commercial general liability ("CGL") insurance on behalf of the partnership in order to protect both partners from certain liabilities they might incur as a result of the operation of TCB.

DeMay chose to purchase a CGL policy from Farmers Insurance and contacted one of Farmers' agents, John Ekno. DeMay informed Ekno that the policy was for TCB, a general partnership, and that Hanstad, the other partner, would contact Ekno to make sure the coverage had been obtained.

Truck, a member of the Farmers Insurance Group, issued a CGL policy (the "Policy"), which erroneously [*3] identified the insured as "JAY DEMAY DBA TRI COUNTY BUILDERS." Truck is merely a component part of the Farmers Insurance Group. Truck has no employees, offices or operations other than the policies it underwrites. With respect to all policies issued by Truck, Farmers' employees determine coverage, handle claims and deal with the insureds.

Truck provided Hanstad with a certificate of insurance. Based on the certificate, Hanstad believed TCB and both of its partners were covered by the Policy.

B. The Shafer Arbitration

In 1989, DeMay and TCB agreed to remodel the home of Dr. and Mrs. John Shafer. Hanstad had no involvement in the project. DeMay did not perform the work satisfactorily, and in 1991, the Shafers named DeMay, Hanstad and TCB as respondents in an arbitration action (the "Shafer Arbitration"). The arbitration demand included claims for fraud and conversion. DeMay hired Sam Abdulaziz, an attorney specializing in construction litigation, to represent himself, Hanstad and TCB in the Shafer Arbitration. On March 6, 1992, Abdulaziz tendered the Shafer Arbitration to Truck for defense and indemnity on behalf of all three respondents. Before electing to defend Hanstad [*4] in the Shafer Arbitration, Truck privately concluded Hanstad was not insured under the Policy. However, Truck decided to defend Hanstad along with DeMay. No one informed Hanstad of Truck's opinion about his noncoverage under the Policy, and Truck failed to reserve its rights with respect to Hanstad.

Truck's handling of DeMay was entirely different. It sent DeMay a reservation of rights letter dated May 18, 1992, applicable only to him. In that letter, Truck reserved the intentional acts coverage defense without advising DeMay of his right to independent counsel under Civil Code section n1 2860.

n1 Unless otherwise noted, all statutory references are to the Civil Code.

Although DeMay and Hanstad wanted Abdulaziz to continue to defend the Shafer Arbitration, Truck preferred to select different counsel and consulted its coverage counsel, Lance Labelle, a partner at Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, about this issue.

Labelle concluded the reservation of rights letter potentially created [*5] a conflict of interest entitling DeMay to independent counsel. Truck sent DeMay a superseding reservation of rights letter dated June 10, 1992. That letter no longer stated Truck was reserving the intentional acts defense. All references to the defense and its grounds were removed. The defense was tacitly withdrawn so Truck could take control of the defense of the Shafer Arbitration. Both reservation letters went only to DeMay.

The attorneys hired by Truck to defend Hanstad and DeMay in the Shafer Arbitration knew only a little about construction defect litigation and did a poor job. Those attorneys did not recognize the conflict of interest arising from having the same law firm represent two general partners, only one of whom had committed the bad acts.

In mid-1993, the Shafers obtained a $ 311,302 arbitration award jointly against Hanstad, DeMay and TCB. Another $ 25,000 in punitive damages was awarded against DeMay individually. The arbitration award chronicled pervasive acts of fraud by DeMay for which Hanstad, as DeMay's general partner, was held vicariously liable.

In September 1993, the Shafers brought an action in superior court to confirm the arbitration award. Truck again [*6] defended Hanstad and DeMay without any reservation of rights. The court confirmed the arbitration award and entered judgment against all three defendants in the amount of $ 311,302, plus an additional $ 25,000 against DeMay (the "Shafer Judgment").

C. Truck's Post-Shafer Judgment Actions

Despite being advised of the need to settle as early as October 1992, Truck made no effort to do so until January 1994, three months after the Shafer Judgment had been entered. At that time, the Shafers were willing to settle for $200,000. In order to save $ 40,000, Truck decided to do the following: First, in early 1994, Truck secretly settled with DeMay by buying back the policy for $ 35,000. Truck did so only after urging DeMay to discharge the debt in bankruptcy. In addition to surrendering the Policy, which also covered Hanstad, DeMay agreed to waive all rights he had against Truck. Truck did not advise Hanstad of its settlement with DeMay.

Next, Truck paid $ 124,900 towards satisfaction of the Shafer Judgment. However, Truck did not request a release from the Shafers and did not inform Hanstad it had paid anything or that it was not going to pay the full amount. Even though Truck knew [*7] it had waived the intentional acts defense in its second reservation of rights letter, it repeatedly represented to the Shafers it would not pay more on the Shafer Judgment because it resulted from DeMay's intentional acts.

For reasons unrelated to the Shafer Arbitration, Hanstad filed a Chapter 13 bankruptcy petition in November 1992. The Chapter 13 plan of reorganization was ongoing at the time the Shafer Judgment was entered. Because it was impossible to satisfy the large judgment within the terms of the plan of reorganization, Hanstad lost his Chapter 13 bankruptcy protection. Hanstad was forced to file a Chapter 7 bankruptcy petition in October 1993 to discharge the Shafer Judgment. Because the Shafer Judgment went unpaid for 90 days, Hanstad could not renew his contractors license. As a result, Hanstad's design firm went out of business. Without Chapter 13 protection from secured creditors, Hanstad's car was repossessed, and he, his wife and children were evicted from their home through foreclosure.

After Hanstad filed his Chapter 7 petition, and with the funds provided by Truck to satisfy the Shafer Judgment, the Shafers filed a complaint in bankruptcy court seeking to [*8] have the Shafer Judgment deemed nondischargeable as to Hanstad. When it became apparent a trial would be necessary, Hanstad sent Truck a letter dated June 20, 1995, stating "because you will not pay [the Shafer Judgment] [Dr. Shafer] will not discontinue legal action against me. . . . [P] . . . I believe that you are therefore obligated to provide legal council [sic]." Following an examination that did not include contacting DeMay, Hanstad or Truck's panel counsel in arbitration, and despite the fact it had provided Hanstad a defense in the Shafer Arbitration, Truck denied Hanstad's request for a defense on the single ground he was not insured under the Policy. Hanstad appeared at the trial in pro. per. and lost. The entire Shafer judgment, except the punitive damages, was deemed nondischargeable as to Hanstad.

The stress flowing from Truck's refusal to properly pay the Shafer Judgment aggravated Hanstad's heart condition. At one point, Hanstad was rushed to the hospital where he nearly died before being revived.

II. The Instant Action

In 1996, Hanstad filed this action against Truck alleging causes of action for breach of contract and breach of the implied covenant [*9] of good faith and fair dealing. In its answer and later by a motion for judgment on the pleadings, Truck asserted as an affirmative defense that the intentional acts defense re-

lieved it of any obligation to pay the Shafer Judgment. When Hanstad's first lawyer in this action withdrew, Truck contacted Hanstad and told him that his case lacked merit and that after Truck won, it would seek to recover litigation costs from him. Truck offered $ 15,000 to settle prior to trial.

The trial was held in three phases. The first phase determined Hanstad's coverage under the Policy and was tried to the court. The court held that Hanstad was entitled to be considered an insured under the Policy under principles of waiver, estoppel and reformation and that Truck's duty to defend him encompassed both the arbitration proceedings and the nondischargeability action in bankruptcy court. n2 The court found Truck had a duty to indemnify Hanstad for all damages suffered by the Shafers, except the punitive damages.

n2 Although Truck denied Hanstad was an insured in the first phase of trial, on appeal, it does not dispute the court's finding Hanstad was insured under the Policy.

[*10]
The second phase addressed the issues of breach of contract and bad faith and whether there was any malice, oppression or fraud. The jury was not asked to find whether any Truck officer, director or managing agent committed or ratified the particular conduct the jury had determined constituted malice, oppression or fraud. The court decided as a matter of law that anyone who made a determination to grant or deny coverage or to grant or deny a defense was a managing agent. The jury determined Truck was liable for breach of contract and breach of the implied covenant. The jury determined by clear and convincing evidence that punitive damages were warranted because Truck had committed malice, oppression and fraud against Hanstad. The jury awarded Hanstad $ 239,176.20, plus accrued interest, on the breach of contract claim; $ 1,397,797, plus accrued interest, as economic damages on the bad faith claim; and $ 500,000 for physical or emotional injuries (i.e., for noneconomic damages) on the bad faith claim. Those amounts totaled $ 2,136,973.20.

The third phase involved the amount of punitive damages. Over Truck's objections, the court admitted evidence not only of Truck's net worth, but [*11] also of the net worth of other insurance exchanges marketed under the Farmers Insurance Group. Even though the jury voted unanimously to award punitive damages in some amount, the vote on the award of $ 40 million was 9-3.

Hanstad had asked the jury to award twice the $ 239,176.20 amount (as damages for breach of contract and as an element of economic damages for bad faith). Hanstad made an election of remedies in favor of the tort cause of action, and the contract claim dropped from the case. Judgment was entered on May 19, 2000. The judgment initially stated Hanstad was to recover from Truck the sum of $ 41,897,797; which total reflects Hanstad's damages as a result of his election of tort remedies.

Truck moved for new trial and for judgment notwithstanding the verdict. In its motions, Truck showed the economic damage award on the bad faith claim exceeded the amount Hanstad had requested by over half a million dollars. Hanstad agreed to a $ 530,301 reduction in those damages. Subsequently, the court denied Truck's motions.

An amended judgment was filed on July 19, for $ 41,367,496, plus costs, for a total of $ 41,396,768, plus post-judgment interest accruing effective July [*12] 19. The judgment was amended again on September 19. That amendment, entered nunc pro tunc as of May 19, awarded $ 41,367,496, plus prejudgment interest from May

3-19, in the amount of $ 882.56, for a total of $ 41,368,378.56, plus 10 percent post-judgment interest on that sum from May 19 forward, plus costs.
Truck filed timely notices of appeal from the judgments and certain post-judgment orders. n3

n3 Hanstad's cross-appeal was dismissed by stipulation of the parties.

DISCUSSION

I. Brandt Attorney's Fees

The jury awarded Hanstad attorney's fees of $ 404,000 pursuant to Brandt v. Superior Court (1985) 37 Cal.3d 813. n4, 210 Cal. Rptr. 211, 693 P.2d 796 Truck contends that award was improper because Hanstad did not prove the amount of fees he actually owed his counsel and because he did not limit his request to those fees incurred in obtaining his contract recovery.

n4 Hanstad's stipulated reduction of the economic damages did not affect the $ 404,000 in Brandt fees.

[*13]
Hanstad contends Brandt fees are not limited to the amount of fees actually incurred and are not affected by the fact the plaintiff had no obligation to pay the fees. Hanstad suggests that the fees can be determined using the lodestar method and that the entire amount is recoverable. Moreover, Hanstad posits that as the issue of fees was raised in a new trial motion, the question is whether the court abused its discretion when it denied the motion. Hanstad is incorrect in several respects.
The issue before this court is one of law, i.e., how to determine (or prove) the amount of Brandt fees, and, as such, it is reviewed de novo. (Cf. Crocker National Bank v. City and County of San Francisco (1989) 49 Cal.3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278.)

In Brandt, the Supreme Court held that when an insurer tortiously withholds benefits, attorney's fees, reasonably incurred to compel payment of the policy benefits, were recoverable as an element of the damages resulting from such tortious conduct. (Brandt v. Superior Court, supra, 37 Cal.3d 813, 815.) The court observed, "The attorney's fees are an economic loss - damages - proximately [*14] caused by the tort. These fees must be distinguished from recovery of attorney's fees qua attorney's fees, such as those attributable to the bringing of the bad faith action itself." (Citation omitted.) (Id., at p. 817.) The court compared such fees to the recovery of medical fees in a personal injury action. (Ibid.) Moreover, the court emphasized it was not dealing with the measure and mode of compensation of attorneys, but with damages wrongfully caused by the insurer's improper action. (Ibid.)

The court concluded: "The fees recoverable, however, may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable." (Brandt v. Superior Court, supra, 37 Cal.3d 813, 819.) Furthermore, as these fees are recoverable as damages, the determination of recoverable fees must be made by the trier of fact unless the parties stipulate otherwise. (Ibid.)
In contrast, the lodestar method "'is produced by multiplying the number of hours reasonably expended [*15] by counsel by a reasonable hourly rate. Once

the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative "multiplier" to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and contingent risk presented.'" (Thayer v. Wells Fargo Bank (2001) 92 Cal.App.4th 819, 833.) Respondent cites a number of cases applying the lodestar method; those cases are inapposite as they involved an award of attorney's fees under a contract or statute.

The lodestar method is used to determine reasonable attorney's fees qua fees whereas under Brandt, attorney's fees are awarded as damages. Thus, under Brandt, the focus is not on the reasonable value of the attorney's services nor on how much effort the attorney devoted to the case, but on how much the plaintiff owed his attorney. In the case at bar, Craig Rossell, Hanstad's attorney, testified as to the total amount of fees and costs reflected on invoices n5 from August 1998 through March 2000 -- the fees were $ 258,587, and the costs were $ 97,784. Rossell also testified $ 50,900 [*16] in fees were incurred after March. The total of those amounts is $ 407,271. Hanstad resisted Truck's efforts to introduce into evidence the contingency fee agreement between himself and his attorneys.

n5 The invoices were not admitted into evidence, but the court ruled the amounts (totals) were admissible.

Although Rossell testified about his hourly rate, he did not testify about the number of hours expended on the case. The amounts mentioned included costs as well as fees. Rossell testified that all of the entries on the invoices reflected time spent on the bad faith claim and that in billing for time spent for representation on the bad faith claim, he used everything developed for the contract claim. However, Rossell did not testify whether additional time was spent on the bad faith claim or whether that time was included in the fees claimed. Rossell's testimony amounted to what counsel would like to recover, not what Hanstad was obligated to pay.

Hanstad urges that there is no exception to the use of the [*17] lodestar method for Brandt fees because in Campbell v. Cal-Gard Surety Services, Inc. (1998) 62 Cal.App.4th 563, 572, although the plaintiff was awarded $ 2,500 on her breach of contract claim, she was awarded attorney's fees of $ 13,010 attributable to that cause of action. Hanstad posits that means the lodestar method was used as otherwise the plaintiff would only have recovered one-third of the contract award. Hanstad indulges in speculation. The court noted that at trial, the plaintiff had documented her attorney's fees; how she documented them is not stated; and the defendant did not challenge the reasonableness of the amount. (Ibid.) In any case, Campbell did not address the issue of whether the lodestar method might be used to determine the amount of Brandt fees. (See Aero-Crete, Inc. v. Superior Court (1993) 21 Cal.App.4th 203, 212 ["It is fundamental that a case is not authority for a proposition not considered and decided."].) Brandt fees are more analogous to those available under Code of Civil Procedure section 1036, which provides that in an inverse condemnation action, a plaintiff is entitled to "reasonable costs, [*18] disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of that proceeding."

In Andre v. City of West Sacramento (2001) 92 Cal.App.4th 532, an inverse condemnation case, the court reversed the order awarding attorney's fees because the plaintiff had not introduced any evidence demonstrating the amount of attorney's fees actually incurred, the ceiling to any fees award, and remanded to the trial court to determine whether the plaintiff had actually incurred any attor-

ney's fees. (Id., at pp. 537-539.) The plaintiff in Andre argued that the fees she sought were reasonable and necessary and that her contingency fee agreement did not have to be disclosed. (Id., at p. 534.) Similarly, at trial, Hanstad argued he was entitled to the fair value of fees incurred and prevented his contingency fee agreement from being introduced by Truck. (See Heppler v. J.M. Peters Co. (1999) 73 Cal.App.4th 1265, 1296 [even in awarding a reasonable fee, a court may consider a contingency fee agreement]; see also Marre v. U.S. (5th Cir. 1994) 38 F.3d 823, 828-829 [*19] [the court concluded that because a federal tax statute limited attorney's fees to those actually incurred, the plaintiff taxpayer was limited to the amount owed under the contingency fee agreement].)

In Trope v. Katz (1995) 11 Cal.4th 274, 280, 902 P.2d 259, the court discussed attorney's fees under section 1717, which provides for fees "incurred to enforce" a contract. The court reasoned "to 'incur' a fee, of course, is to 'become liable' for it (Webster's New Internat. Dict. (3d ed. 1961) p. 1146), i.e., to become obligated to pay it." (Emphasis deleted.) (Ibid.) The court noted "the usual and ordinary meaning of the words 'attorney's fees,' both in legal and in general usage, is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation." (Ibid.) Furthermore, "Damages may be compensatory or punitive according to whether they are awarded as the measure of actual loss suffered or as punishment for outrageous conduct and to deter future transgressions." (Black's Law Dist. (6th ed. 1990) p. 390, col. 1.) Accordingly, though not expressly stated, we conclude Brandt fees must be fees actually incurred [*20] as they are designed to compensate an insured for damages in the form of legal fees incurred. n6 Hence, such fees cannot exceed the amount the insured must pay under a contingency fee agreement for obtaining the benefits of the policy. n7

n6 In Brandt, the court analogized the attorney's fees recoverable in a bad faith insurance action to fees recoverable for obtaining a release from confinement in an action for false arrest. (Brandt v. Superior Court, supra, 37 Cal.3d 813, 818.) In Nelson v. Kellogg (1912) 162 Cal. 621, 623, 123 P. 1115, the false arrest case cited in Brandt, the court noted such fees might be recovered as special damages if incurred, but not paid.

n7 As Brandt stated the fees must be reasonably incurred (Brandt v. Superior Court, supra, 37 Cal.3d 813, 815), there seems to be grounds for awarding less than the amount set forth in the contingency fee agreement.

Truck urges this court to enter judgment in its favor on [*21] the Brandt fees issue under Slottow v. American Cas. Co. (9th Cir. 1993) 10 F.3d 1355, 1362. In Slottow, the circuit court affirmed the district court's decision to not award Brandt fees because the plaintiff had made no effort to segregate its litigation expenses. (Ibid.) Because we are reviewing an award of Brandt fees and it is clear Hanstad was entitled to Brandt fees, we decline to follow Slottow. Citing Cassista v. Community Foods, Inc. (1993) 5 Cal.4th 1050, 1066, 856 P.2d 1143, Truck also argues judgment in its favor should be entered as Hanstad had the chance to prove the fees and failed to do so. However in Cassista, the court noted a particular requirement needed to establish a prima facie case of employment discrimination had been relatively settled at the time of trial and the plaintiff was on notice of the importance of the evidence through the defendant's motions. (Ibid.) In the case at bar, there seems to be no published case establishing the necessity of adducing proof of a contingency fee agreement in order to prove Brandt fees.

Hence, we remand to the court with directions for a jury (or the [*22] court if

the parties so stipulate) to consider the contingency fee agreement and determine if Hanstad actually incurred any attorney's fees. Moreover, in order to recover Brandt fees, Hanstad will have to prove any fees actually incurred were incurred to recover the benefits of the Policy and not to pursue his bad faith claim.

II. Punitive Damage Award

A. Section 3294

Truck contends the punitive damage award should be dismissed because the Legislature has precluded punitive damages in insurance bad faith actions by the plain language of section 3294, which provides in pertinent part: "In an action for breach of an obligation not arising from contract . . . the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

Truck reasons that under section 3294, punitive damages are available only for breaches "not arising from contract" and that as a bad faith claim requires the existence of contract, it arises from a contract. (Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal.4th 1, 36, 900 P.2d 619 [The implied covenant of good faith and fair dealing "is based on the contractual relationship [*23] between the insured and the insurer."]; Harris v. Lammers (2000) 84 Cal.App.4th 1072, 1076 ["The phrase 'arising out of' has a well-established legal meaning. Numerous cases have ruled that it refers to origin, such as whether something grows out of or flows from an event."].)

One practice guide notes: "Earlier cases involving an insurer's breach of the implied covenant declined to allow punitive damages on the theory that such claims were obligations 'arising from contract.' [P] However, once it was established that breach of the implied covenant sounds both in contract and in tort, courts soon held that a tortious breach of the implied covenant could support an award of punitive damages against the insurer if the other requirements for a punitive damage award (i.e., 'oppression, fraud or malice') were met." (Citations omitted.) (Croskey, et al., Cal Practice Guide: Insurance Litigation (The Rutter Group 2001) § 12:20; see cases cited therein, e.g. Silberg v. California Life Ins. Co. (1974) 11 Cal.3d 452, 462-463, 113 Cal. Rptr. 711, 521 P.2d 1103; Neal v. Farmers Ins. Exchange (1978) 21 Cal.3d 910, 922-923, 148 Cal. Rptr. 389, 582 P.2d 980; [*24] see also Cates Construction, Inc. v. Talbot Partners (1999) 21 Cal.4th 28, 43-44, 980 P.2d 407 [court acknowledged tort remedies, including punitive damages, were available for breach of the implied covenant in cases involving insurance policies even though such breaches were usually limited to contract remedies and discussed the policy reasons for the difference]; Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 819-821, 169 Cal. Rptr. 691, 620 P.2d 141 [court discussed the special relationship between the insurer and the insured and the public policy reasons supporting punitive damages in an insurance bad faith action]; Dalrymple v. United Services Auto. Assn. (1995) 40 Cal.App.4th 497, 514 ["'Under appropriate circumstances, tort liability may still be imposed for the insurer's misconduct apart from performance of its contract obligation.'"]; Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 106-107, 214 Cal. Rptr. 883 [Noting that California cases had not allowed punitive damages when the complaint was based only on a contract theory, the court observed "when the action proceeds under [*25] alternate tort theories in addition to a contract action, then punitive damages may be awarded under the alternative tort theory."].)

Although the Legislature amended section 3294 subsequent to those decisions

(other than Cates and Dalrymple), it did not change the wording of the section to prohibit punitive damages in insurance bad faith actions. (See White v. Ultramar, Inc. (1999) 21 Cal.4th 563, 576-577, 981 P.2d 944.) Given that history, we decline the invitation to hold the Legislature intended to preclude punitive damages in insurance bad faith cases.

B. Managing Agent

Truck contends the entire bad faith action must be retried because the court usurped the jury's role on the managing agent issue. Pursuant to section 3294, subdivision (b), punitive damages cannot be imposed against a corporation unless "the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation."

In resolving a conflict among the Courts of Appeal as to the meaning of "managing agent" in section 3294, the Supreme Court concluded: "The Legislature [*26] intended the term 'managing agent' to include only those corporate employees who exercise independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (Emphasis added.) (White v. Ultramar, Inc., supra, 21 Cal.4th 563, 566-567.)

Punitive damage liability against a corporation is limited to those cases where the malicious conduct is by "those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy." (White v. Ultramar, Inc., supra, 21 Cal.4th at p. 573; see also Cruz v. HomeBase (2000) 83 Cal.App.4th 160, 163 ["A corporation is not deemed to ratify misconduct, and thus become liable for punitive damages, unless its officer, director, or managing agent actually knew about the misconduct and its malicious character. A 'managing agent' is an employee with authority to establish corporate policy, that is, the broad principles and rules of [*27] general application which govern corporate conduct."].)

"'The entire basis of the doctrine of vindictive [punitive] damages is that the person, himself, who is sued has been guilty of recklessness or wickedness which amounts to a criminality that should be punished for the good of society, and as a warning to the individual; but to award such damages against the master for the criminality of the servant is to punish a man for that of which he is not guilty.'" (Emphasis deleted.) (White v. Ultramar, Inc., supra, 21 Cal.4th 563, 569.)

At trial, seven Farmers' employees testified about the handling of Hanstad's claim. n8 Hanstad requested instructions, i.e., BAJI Nos. 14.73 and 14.74 (1994 ed.), on the role of a managing agent and proposed a special verdict asking the jury, "Do [you] find by that an officer, director or managing agent of the defendant committed the conduct which you found to be the result of oppression, malice or fraud?"

N8 Truck had no employees, offices or operations other than underwriting the policies assigned to it by Farmers. Thus, the only way Truck could take any action was through Farmers' employees who acted on behalf of Truck. (Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, 1328 ["An agent is a person authorized by the principal to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal."].) Thus, those seven employees were agents, but not necessarily managing

agents, of Truck.

[*28]
Although the court referred to the White case, it decided the managing agent issue was a question of law, ruling that anyone "who could make a determination by the company to cover or deny coverage or to deny a defense or grant a defense is a managing agent under the cases." The court opined that those people had substantial authority. Consequently, the court gave no jury instructions on the managing agent issue, and the special verdict failed to elicit any managing agent finding.

In White, the court noted the mere ability to hire and fire employees did not render a supervising employee a managing agent under section 3294. (White v. Ultramar, Inc., supra, 21 Cal.4th 563, 566-567.) Similarly, the ability to grant or deny coverage or a defense might or might not make an agent a managing agent depending upon the degree of discretion and independent authority given to a particular employee. (See also discussion and examples in Croskey, et al., Cal. Practice Guide: Insurance Litigation, supra, § § 13:272--13:278.) It is that discretion and independent authority which is the means by which a managing agent promulgates corporate policy.

In response, Hanstad [*29] argues the court's determination Truck acted through managing agents was a question of law as the undisputed evidence permitted only one conclusion, i.e., that Truck's tortious conduct was approved of and accomplished by managing agents. (Golden West Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956, 171 Cal. Rptr. 95.)
Both parties argue the evidence they claim supports a finding that Lori Reilly, the person the parties concede had the most authority and responsibility, was or was not a managing agent as a matter or law. That evidence demonstrates why the question was one of fact for the jury to decide. Furthermore, the jury did not answer the question of whether it was a managing agent who had committed the wrongful acts. We are not reviewing the findings of a jury to determine if substantial evidence supports those findings; rather, we are reviewing the effect of a mistake of law.

In Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal.App.4th 949, 960-962, the court struck a punitive damage award because the jury had not been requested to and had not made the necessary factual findings for a fraud or [*30] other tort cause of action to support that award. The court concluded that the fact the evidence might support a finding did not constitute a finding and reasoned that without an actual verdict by the jury, instructions and evidence could not support the punitive damage award. (Id., at p. 961.) The court declined to remand the matter for a new trial because the jury's failure to arrive at a verdict had been invited by the plaintiff who had proposed an erroneous special verdict and had opposed the defendant's attempts to clarify the erroneous special verdict. (Id., at p. 960, fn. 8.) In the case at bar, despite the efforts of Hanstad to have the jury determine the managing agent issue, the error was invited by the court.

"'The trial court may not . . . usurp the jury's ultimate factfinding power.'" (Cf. People v. Hawkins (1995) 10 Cal.4th 920, 948, 897 P.2d 574 disapproved on another point in People v. Blakeley (2000) 23 Cal.4th 82, 89, 999 P.2d 675.) As the questions of whether any managing agent handled Hanstad's claim and whether such person committed the wrongful acts were for the trier of fact to decide, it was [*31] error not to submit the issues to the jury. (Haycock v. Hughes Aircraft Co. (1994) 22 Cal.App.4th 1473, 1491.)

Truck further contends that judgment in its favor should be entered on the punitive damages award because Hanstad did not introduce evidence any person with authority to establish (i.e., promulgate, not merely implement) corporate policy committed the wrongful acts as a plaintiff must prove every essential element of his case. (Evid. Code, § 500; Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 654.) Truck did not object to the court deciding the managing agent issue as a matter of law nor raise the erroneous managing agent decision in either its motion for new trial or motion for judgment notwithstanding the verdict. (See In re Aaron B. (1996) 46 Cal.App.4th 843, 846 ["'[A] party is precluded from urging on appeal any point not raised in the trial court. Any other rule would "'"permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, [*32] if favorable, and which he may avoid, if not."'"'" (Citations omitted.)].) Accordingly, we decline to grant relief not first sought in the trial court and will remand the matter to the superior court with directions to grant a new trial on the issue of punitive damages.

In directing a new trial on punitive damages, we need to address some other concerns with the award.

C. Net Worth of Other Companies

Truck contends the punitive damages award must be reversed because the court allowed evidence of, and argument on, the net worth of other companies. Over Truck's objection, the court allowed Henry Stotsenberg, Hanstad's expert forensic CPA, to present evidence not only of Truck's financial condition, but also of the interrelationship of the various exchanges with which Truck had entered into pooling agreements, as well as the relationship of those entities with their ultimate owner (Farmers), and of the net worth of one and all. Even though the evidence indicated Truck's own net worth was about $ 400 million, the jury was told that the net worth of the property and casualty group of which Truck was a member was $ 4.5 billion, that the collective exchanges had surplus dollars ranging [*33] from between $ 2.6 billion and $ 5.2 billion, and that Truck's pooling arrangements would result in Truck itself paying only a small percentage of any punitive damage award assessed against it.

Hanstad had the burden of establishing Truck's financial condition. (Adams v. Murakami (1991) 54 Cal.3d 105, 119, 123, 284 Cal. Rptr. 318, 813 P.2d 1348.) A parent corporation's financial condition may be considered under the alter ego doctrine; however, alter ego was not pled or litigated not was any decision requested on that theory in the instant case. (See Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal.App.4th 1269, 1284-1286.) Absent litigation of alter ego, such proof is irrelevant. (Id., at pp. 1285-1286.)

One practice guide, which discusses pooled insurance groups and specifically mentions Farmers Insurance Group, comments: "Although there is no known authority on point, it can be argued that where earnings and assets are pooled, the pooled net worth of the group should be considered for punitive damages purposes, rather than just the net worth of the insurer on the risk . . . provided all members of the group are parties to the [*34] action." (Emphasis deleted.) (Croskey, et al., Cal. Practice Guide: Insurance Litigation, supra, § § 13:290.3--13:290.4.) Hanstad did not join the other members of the pooling groups as defendants.

Accordingly, as Hanstad did not establish a foundation for the admission of the pooling agreements or the net worth of the other companies, that evidence was

irrelevant and not admissible. (Evid. Code, § 350; cf. People v. Crittenden (1994) 9 Cal.4th 83, 132, 885 P.2d 887 ["The trial court . . . lacks discretion to admit irrelevant evidence." (Citations omitted.)].) Given our holding on the need to have the jury try the managing agent issue, we need not decide whether this error by itself was harmless or reversible.

D. Ratio

Truck contends the punitive damage award must be reversed because the ratio between it and the compensatory damages was not determined by the jury and because it was unconstitutionally excessive. Such contentions are reviewed de novo. (Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424, 436, 149 L. Ed. 2d 674, 121 S. Ct. 1678.)

Generally, an award of punitive damages will be reversed as excessive [*35] only when the entire record viewed most favorably to the judgment indicates the award was so grossly disproportionate as to raise the presumption it was rendered as the result of passion and prejudice. (Neal v. Farmers Ins. Exchange, supra, 21 Cal.3d 910, 927-928.) The factors an appellate court considers in assessing if a punitive damage award was excessive are the nature of the defendant's acts, the amount of compensatory damages awarded, and the wealth of the defendant. (Id., at p. 928; see also Adams v. Murakami, supra, 54 Cal.3d 105, 110-111; BMW of North America, Inc. v. Gore (1996) 517 U.S. 559, 574-585, 134 L. Ed. 2d 809, 116 S. Ct. 1589 [considered the factors of the degree of reprehensibility of the defendant's conduct, the ratio between the plaintiff's compensatory damages and the amount of the punitive damages and the difference between the punitive damages and the civil or criminal sanctions that could be imposed for similar misconduct].)

In the instant case, the jury originally awarded compensation totaling $ 2,136,973.20. Hanstad elected tort remedies, and the compensation award was reduced [*36] by a duplicate award of $ 239,176.20 for a total compensation award of $ 1,897,797. After Truck filed a motion for new trial, Hanstad agreed to a further reduction of $ 530,301 for a total compensation award of $ 1,367,496. When the jury awarded punitive damages of $ 40 million, the ratio to the compensatory damages award was 18.72 to 1. After the two reductions, the ratio between the compensatory and punitive damages was 29.25 to 1. (Gagnon v. Continental Casualty Co. (1989) 211 Cal. App. 3d 1598, 1602, 260 Cal. Rptr. 305 ["The proper proportion punitive damages should bear to the injury suffered is also a question for the jury to determine."].)

Courts have rejected challenges to punitive damage awards based on a change in the ratio; instead focusing on whether the punitive damage award bore a reasonable relationship to its principal purpose of punishment and deterrence. (See e.g., Weeks v. Baker & McKenzie (1998) 63 Cal.App.4th 1128, 1166-1167; Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 711-713, 201 Cal. Rptr. 528.) However, as indicated in this opinion, there is a possible further reduction in the compensatory award [*37] because of the error in determining the amount of Brandt fees. Moreover, the financial evidence was not limited to evidence of Truck's financial condition. Thus, there are problems with two of the three factors used to assess whether a punitive damage award was excessive.

In Liodas v. Sahadi (1977) 19 Cal.3d 278, 284, 137 Cal. Rptr. 635, 562 P.2d 316, the Supreme Court upheld the trial court's grant of a new trial on the issue of compensatory damages and reasoned: "Exemplary damages must be redetermined as well, as 'it would be improper and premature to assess such damages until or concurrently with the assessment of the "actual damages" and 'exemplary damages

must bear a reasonable relation to actual damages' even though no fixed ratio exists to determine the proper proportion." (Citations omitted.) In Auerbach v. Great Western Bank (1999) 74 Cal.App.4th 1172, 1190, because the jury had been misled as to the amount of the compensatory damages it could award, the Court of Appeal concluded: "Because the punitive damages are out of proportion to the actual damages suffered by the Auerbachs, the punitive damage claim will have to be retried." Again, [*38] we need not decide whether there was a miscarriage of justice such that the punitive damages would have to be retried based solely on the change in ratio. In addition, as the punitive damage claim needs to be retried, we also need not address Truck's contention the ratio was unconstitutionally excessive as a matter of law.

Finally, citing Liodas, Truck suggests the entire bad faith case must be retried because bad faith liability and compensatory and punitive damages are inextricably intertwined. In Liodas, the court held a complete new trial was required as it was not possible to determine on what basis the jury had found liability. (Liodas v. Sahadi, supra, 19 Cal.3d 278, 285-286.) We see no reason to give Truck a second bite of the apple. A jury has already determined Truck acted in bad faith (i.e., unreasonably) and determined the appropriate amount of compensation for that breach. The only compensatory damage item to be resolved on retrial is the redetermination of the Brandt fees. Accordingly, we will not order retrial of the entire bad faith action; only of the punitive damages award, including whether a managing agent committed the qualifying [*39] act/acts of oppression, fraud or malice. (See Torres v. Automobile Club of So. California (1997) 15 Cal.4th 771, 781-782, 937 P.2d 290.)

DISPOSITION

The portion of the judgment awarding Brandt fees is reversed with directions for a new trial to determine the amount of Brandt fees to which Hanstad is entitled. The portion of the judgment awarding punitive damages is reversed with directions for a new trial on that award in accord with the views expressed herein. In all other respects, the judgment is affirmed. Truck to recover costs on appeal.

WOODS, J.

We concur:
LILLIE, P.J.
PERLUSS, J.