4th Civil No. G033782

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

FARMERS INSURANCE EXCHANGE, TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY; and FARMERS NEW WORLD LIFE INSURANCE COMPANY,

Plaintiffs, Cross-Defendants, Respondents And Cross-Appellants,

vs.

BARBARA L. KANODE and CAROL KANODE, as Conservator for Barbara Kanode,

Defendants, Cross-Complainants, Appellants and Cross-Respondents.

Appeal from the Orange County Superior Court
Honorable Charles Margines, Judge Presiding
Orange County Superior Court Case No. 00CC 04644

CROSS-APPELLANTS' REPLY BRIEF

PICKER, CHOW & FREISLEBEN, LLP
Lily Chow, State Bar No. 134080
Alan Freisleben, State Bar No. 82008
3333 Michelson Drive, Suite 400
Irvine, California 92612
(949) 622-8822

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert A. Olson, State Bar No. 109374
Cynthia E. Tobisman, State Bar No. 197983
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036-3697
(310) 859-7811
Attorneys for Plaintiffs, Cross-Defendants, Respondents and Cross-Appellants, Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company and Farmers New World Life Insurance Company.

INTRODUCTION

Silence.

That is the response Barbara Kanode's brief offers to most of the Farmers entities' key arguments, including their showing that Ms. Kanode's multiple conservatorships rendered her legally incapable of performing under the Agency Appointment Agreement ("Agreement"). The Farmers entities had good cause to terminate the Agreement on 30 days notice in light of Ms. Kanode's mental instability and erratic behavior. Accordingly, the trial court should have done more than grant a new trial on Ms. Kanode's claim for breach of contract; it should have entered judgment notwithstanding the verdict.

Silence also defines the response Ms. Kanode's brief offers to the Farmers entities' showing that Ms. Kanode's admitted failure to mitigate damages provided another independent reason why the trial court should have granted judgment notwithstanding the verdict on the contract claim. Indeed, Ms. Kanode conceded that she continued to be licensed and to have appointments to represent other insurance companies, yet she did not pursue work as an agent for those other companies.

These two points alone each independently required entry of judgment in the Farmers entities' favor on the contract claim, in addition to the interference claim.

Silence also characterizes the response to the protective portion of the Farmers entities' cross-appeal. In particular, Ms. Kanode's brief

provides no answer to governing law holding that where, as here, a trial court determines there is no substantial evidence to support a verdict, it is an abuse of discretion to decline to order a new trial in the alternative. Here, having concluded that no evidence supported the jury's verdict for interference with prospective business advantage, the trial court necessarily erred by failing to order an alternative new trial on that claim.

By failing to respond to any of these arguments, Ms. Kanode has effectively conceded their validity. Her brief's attempt to rebut the Farmers entities' arguments regarding the fatal flaws in the underlying verdicts fares no better. Neither the contract verdict nor the interference verdict are legally or factually tenable. Thus, judgment notwithstanding the verdict should have been granted as to the *entire* verdict.

ARGUMENT

I. THE TRIAL COURT SHOULD HAVE GRANTED JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE CONTRACT CLAIM.

This much is *undisputed*:

(1) Ms. Kanode was judicially declared to be "gravely disabled," she was under involuntary holds and hospitalizations pursuant to Section 5150 of the Welfare and Institutions Code, and conservators were appointed to take care of her.

(2) After her termination as a Farmers Agent, Ms. Kanode did not pursue work as an insurance agent for other companies even though she remained licensed and had appointments to represent other insurance companies.

(3) The Farmers entities paid—and Ms. Kanode accepted—$42,712 as the "contract value" liquidated compensation set forth in the Agreement

These facts, as a matter of law, preclude retrial of the contract claim. They require reversal of the Order denying judgment notwithstanding the verdict, with directions to enter judgment in the Farmers entities' favor on that claim.

A. Ms. Kanode's Inability To Perform Her Obligations Under The Agent Appointment Agreement Justified Terminating Her Agency For Cause On 30-Days Notice, As A Matter Of Law.

In the opening brief, the Farmers entities demonstrated that because Ms. Kanode was under court-ordered conservatorship and involuntary hospital commitment, she was unable to perform her contract as a matter of law. (Combined Respondents' Brief And Cross-Appellants' Opening Brief ["RB/XAOB"] 73-79.) Simply put, Ms. Kanode's failure to perform as a competent insurance agent afforded good cause to terminate the Agreement under the 30-day notice provision. (*Ibid*.) Indeed, an agent's inability to

perform a personal services contract is grounds for terminating that contract. (See citations cited at RB/XAOB 76.)

Ms. Kanode's brief does not rebut this showing.

B. Ms. Kanode's Failure To Mitigate Damages Negated Any Contract Claim, As A Matter Of Law.

The Farmers entities demonstrated in their opening brief that Ms. Kanode's contract claim fails, as a matter of law, because Ms. Kanode failed to mitigate her damages after the termination of her Farmers agency. (RB/XAOB 79-81.)

Failure to mitigate precludes a contract verdict. (*West v. Bechtel Corp*. (2002) 96 Cal.App.4th 966, 984; see also RB/XAOB 80-81.) Here, Ms. Kanode *conceded* that she did not pursue work as an agent for other insurance companies, despite the fact that she continued to be licensed and have appointments with other companies. (RB/XAOB 80-81.) This is a classic case of failure to mitigate.

Again, Ms. Kanode's brief does not proffer a competing position on this issue.

C. Ms. Kanode's Incapacity Terminated The Agency Relationship As A Matter Of Law.

Governing law dictates that the incapacity of an agent terminates the agency. (See RB/XAOB 73-77; Civ. Code, § 2355, subd. (e).) Here, it is undisputed that Ms. Kanode was judicially declared incompetent and had

conservators appointed. (RB/XAOB 73, fn. 15.) Thus, Ms. Kanode's agency ended *by operation of law* and not because of any breach of contract. This alone precludes a contract award. (See RB/XAOB 74-77.)

Ms. Kanode's brief does not contest that an agent's mental incapacity automatically terminates the contract. Elsewhere in her brief, in a section responding to the Farmers entities' assertion of instructional error, Ms. Kanode suggests that one of the conservatorship orders (Exhibit 48) did not address her competency, only her medical disability. (See Cross-Respondent's Brief ["XRB"] 16.) In light of the fact that her medical disability created psychiatric symptoms, this is a distinction without a difference.

The Welfare and Institutions Code defines "gravely disabled" as meaning that a person is suffering from a "mental disorder." (Welf. & Inst. Code, § 5008, subd. (h)(1)(A), emphasis added [the term "gravely disabled" means a "condition in which a person, *as a result of a mental disorder*, is unable to provide for his or her basic personal needs for food, clothing, or shelter"].) Here, the terms of all of the conservatorships (including the one cited by Ms. Kanode) made it clear that Ms. Kanode was "gravely disabled." (See Exhibits 48, 63, 93.) Case law confirms that "the term 'mental disorder' is limited to those disorders listed by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 282, fn. 5.) Thus, "the gravely disabled standard" necessarily "requires a causal

link between a specifically defined and diagnosed mental disorder and an inability to care for one's basic personal needs." (*Id*. at p. 285.) Someone who is "gravely disabled" by definition is not competent to handle others' important insurance affairs.

Regardless whether Ms. Kanode is competent now, she was not competent when, in January of 2000, she was subject to conservatorship. Her incapacity *while she was an Agent* for the Farmers entities terminated her agency, as a matter of law.

D. Ms. Kanode's Acceptance Of Contract Value Negates Her Contract Claim.

As discussed in the opening brief, Ms. Kanode's acceptance of the contract value satisfied the Farmers entities' contractual obligations. (RB/XAOB 53-54.) Ms. Kanode's brief responds by arguing that the "contract value" provisions of the Agreement never became operable because the Farmers entities had no right to terminate the Agreement. (XRB 17-18.)[1/] This response is contrary to the language of the Agreement, which gave either party the right to terminate their agency relationship on three months' notice. (RB/XAOB 6.) This response is also contrary to language in the Agreement providing that the contract value provisions apply "[i]n the event of termination of this Agreement." (RA 11.) It does

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[1/] Ms. Kanode's brief fails to acknowledge that Ms. Kanode cashed the contract value checks. (See RT 2531; see also RT 2550-2551, 2597, 2600 [Ms. Kanode concedes she cashed the checks].)

not matter who terminates the Agreement; the contract value provisions are applicable regardless.[2/]

Ms. Kanode's brief cites case law to the effect that a party seeking to enforce a liquidated damages provision must establish that damages were impracticable to ascertain at the time the contract was executed. (XRB 18.) The Farmers entities demonstrated that when the parties executed the Agreement, Ms. Kanode's damages *were not* ascertainable since no one knew what her income would be or how long she would be an Agent. (See RB/XAOB 60.) No evidence was submitted to rebut the Farmers entities' showing.

Lastly, Ms. Kanode's brief fails to distinguish on-point authority—*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718—holding that the "contract value" set out in the Farmers entities' Agency Appointment Agreement sets the limit of reasonable compensatory damages for that agreement's breach. (*Id*. at pp. 739-740; see also RB/XAOB 53-54.)

II. PROTECTIVE CROSS APPEAL: THE UNDERLYING CONTRACT VERDICT CANNOT STAND.

The breach of contract verdict should not be reinstated in light of the numerous erroneous jury instructions and the excessive nature of the damage award. (RB/XAOB 82-83; see also *id*. 73-81.)

[2/] If the contract value provision does not apply, then Ms. Kanode needs to return the money she accepted as contract value.

A. Multiple Prejudicial Instructional Errors Tainted The Contract Verdict And Precluded A Fair Trial For The Farmers Entities On That Claim.

As discussed in the opening brief (RB/XAOB 52-55, 82), the trial court made multiple instructional errors relating to the contract claim, including the following:

(1) Failing to instruct the jury that Ms. Kanode's legally-declared incapacity and commensurate inability to write new policies, as a matter of law, rendered her unable to perform under the Agreement and thus was a limit on damages;

(2) Instructing the jury that a termination review board ("TRB") hearing could be a precondition to terminating the Agreement; and

(3) Failing to instruct the jury that Ms. Kanode's acceptance of the contract value could satisfy, wholly or partially, any contract breach.

Each of these errors independently makes the contract verdict unsustainable. The arguments in Ms. Kanode's brief do not dictate a contrary result.

1. The trial court erroneously failed to instruct the jury that Ms. Kanode's incapacity rendered her unable to perform under the contract.

Ms. Kanode's brief argues that there was no evidence that Ms. Kanode was incapacitated and that, therefore, the Farmers entities cannot complain about the trial court's failure to instruct the jury that her mental incapacity rendered her unable to perform under the Agreement and thus limited her damages. (XRB 15-16.)

But the undisputed evidence is that Ms. Kanode was placed under conservatorship numerous times both before and after the termination of her agency on January 26, 2000. (RB/XAOB 68-71; see also section I.C., *supra*.) In addition, Ms. Kanode was subjected to involuntary admission to the hospital under Section 5150 of the Welfare and Institutions Code for four weeks in December 1999 (RT 440, 2119). That was *before* her termination. And, in January of 2000, she was again placed back into an involuntary hold and admitted to a hospital. (RT 2514-2516, 2518, 3458.)

Ms. Kanode's January 2000 hospitalization ended when she was ordered released pursuant to a writ of habeas corpus. (RT 513, 2394.) However, Ms. Kanode's parents disagreed with the court's order releasing their daughter and wrote a letter to explain to the court that their daughter "was sick, and they shouldn't be letting somebody out of the hospital that was not capable of coming out. . . . We didn't think she was stabilized." (RT 526-527; see also RT 513-514.)

In short, the Farmers entities presented ample evidence demonstrating Ms. Kanode's lack of capacity to perform under the Agreement. The trial court should have instructed the jury appropriately.

Ms. Kanode's brief argues that the pre-termination conservatorship (Exhibit 48) did not constitute an adjudication of her competency, but rather was limited to a conservatorship for purposes of medical treatment only. (XRB 16.) As discussed above, all of Ms. Kanode's conservatorships, including those imposed before she was terminated, were necessarily adjudications that Ms. Kanode's mental disorder rendered her unable to take care of herself. (See section I.C., *supra*.)

Furthermore, the post-termination conservatorship leaves no doubt that it affected Ms. Kanode's ability to enter into contracts—it explicitly gave the conservator full powers over Ms. Kanode's financial affairs, including "[t]he power to contract for the conservatorship and to perform outstanding contracts and thereby bind the estate." (Exhibit 93.) In other words, the post-termination conservatorship is an express adjudication that Ms. Kanode was unable to handle her financial affairs. At the very least, the trial court should have instructed that the post-termination conservatorship limited Ms. Kanode's damages since she lacked the legal capacity to write policies.

Next, Ms. Kanode's brief argues that the Farmers entities cannot raise lack of capacity because they failed to allege it as an affirmative defense. (XRB 16.) But the Farmers entities' incapacity argument simply

negates one of the essential elements of Ms. Kanode's breach of contract cause of action—consideration (i.e., Ms. Kanode's ability to perform her side of the contract). It need not have been alleged as an affirmative defense. (See *State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725-726 [a defendant need not separately plead a matter that "simply negates" an "essential element of a plaintiff's cause of action"].) The Farmers entities do not allege that Ms. Kanode's incapacity rendered her unable to contract in the first place, but rather that they did not breach of the Agreement given Ms. Kanode's legal incapacity to perform.

Finally, Ms. Kanode's brief argues that there was no evidence that "the jury was actually confused by any erroneous instructions, and the jury had no questions for the court during deliberations indicating confusion over the issue of capacity." (XRB 16.) But this isn't the test for prejudice. Rather, the question is whether there is a "reasonable chance, more than an abstract possibility" that defendants would have prevailed on the contract claim, had the trial court properly instructed the jury. (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, emphasis omitted; *Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 580 ["Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict'"].)

Here, the trial court failed to instruct the jury on an issue that went to the heart of Ms. Kanode's claims—her ability to perform under the Agreement. The failure of the trial court to instruct the jury regarding the

impact of having a conservator appointed—i.e., that Ms. Kanode could not contract with anyone—permitted the jury to make an inflated damages award. In effect, the error permitted the jury to conclude that Ms. Kanode was entitled to retain her agency *for years* despite her mental instability and involuntary commitment.

The prejudicial impact of the instructional error was exacerbated by plaintiff's counsel's arguments to the jury that although Ms. Kanode had a conservatorship imposed over her as well as involuntary admission to the hospital under Section 5150 of the Welfare and Institutions Code, the Farmers entities nonetheless needed to provide her with a TRB hearing before they could terminate her. (RT 3748-3750.) As discussed below, there is no evidence in the record that a TRB hearing was a precondition to terminating an Agent. (See Section II.A.2., *infra*.)

The trial court's failure to instruct the jury regarding Ms. Kanode's incapacity to perform under the Agreement requires reversal of the verdict.

2. The trial court erroneously instructed the jury that it could determine that a termination review board hearing was a precondition to terminating the contract.

A jury should not be instructed on theories unsupported by the evidence. (See *Schreefel v. Okuly* (1983) 143 Cal.App.3d 818, 828 [court acted properly by declining to give punitive damages jury instruction where evidence was insufficient to justify it]; *People v. Avena* (1996) 13 Cal.4th

394, 414-415 [evidence insufficient to support requested instruction; held, "evidence [was] too weak and insubstantial to justify a diminished capacity instruction"].)

Yet that is what happened here.

The trial court instructed the jury that if Ms. Kanode proved that the parties agreed that "the termination of the Agent Appointment Agreement was not final until she was afforded a termination review board hearing" then the jury could "consider Farmers' termination of the Agent Appointment Agreement a breach of the contract." (RT 3716.) The trial court had no evidentiary basis for so instructing the jury. (See RB/XAOB 52-53; see also *id.* 48-50, 56, 58-59.)

Ms. Kanode's brief cites as support for the instruction the testimony of one witness—Mark Petersen, the Farmers entities' Director of Agencies—which the brief paraphrases as saying that "if a Farmers agent requests a Termination Review Board, [] Farmers' practice is the termination cannot be finalized until the TRB occurs. (R.T. 2085/16-26)." (XRB 14.) Mr. Petersen's supposed testimony cannot support the erroneous instruction.

Here's why:

First, the Agreement is not amenable to the reading Ms. Kanode's brief proposes. (See RB/XAOB 58-59.) As the trial court observed: "[T]he Agent Appointment Agreement does not indicate that termination is effective only after the termination review board process has run its course,

and neither does the testimony of Mr. Peterson." (AA 320.) After citing the language in the Agreement governing terminations and the TRB process, the trial court held that "Ms. Kanode's interpretation of the contract conflict[s] with its unambiguous language" and "would lead to absurd results." (*Ibid*.) Simply put, Mr. Petersen's testimony cannot be used to impose upon the Agreement a meaning to which it is not reasonably susceptible. (*Roden v. Bergen Brunswig Corp*. (2003) 107 Cal.App.4th 620, 624 [extrinsic evidence is only admissible to support reasonably plausible interpretations of ambiguous contract language].)

Second, the construction of the Agreement and of Mr. Petersen's testimony urged by Ms. Kanode's brief is inconsistent with *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261. *Saeta* evaluated this exact TRB procedure and determined that a TRB hearing is *advisory* only; its recommendations regarding reinstatement of terminated agents are not binding. (*Id*. at p. 269 ["the review board had no authority to render a final and binding decision—it merely submitted its recommendation to the Executive Home Office"].)

Third, in any event, Mr. Petersen never said or suggested that Ms. Kanode had the right to remain an Agent forever in the absence of a TRB hearing. Mr. Petersen elsewhere made clear that an agent's request for a TRB hearing was something that happened *after* "the execution of the termination" had already taken place. (See RB/XAOB 58.) One

employee's remark, taken out of context, does not suffice to disregard clear language in an agreement.

The trial court's instruction was unsupported by the law or the evidence. The effect of that instruction was to tell the jury it could award damages based on *years* of commissions during which Ms. Kanode did not, and could not, work as a Farmers Agent. And the jury followed the trial court's directions—it rendered an award premised on the misguided notion that the Agreement could not be terminated unless and until Ms. Kanode showed up at a termination review board hearing, even though that hearing was advisory only and was cancelled because her counsel could not provide any assurance as to when she might be able to appear. This error would require reversal of the contract verdict.

3. The trial court erroneously failed to instruct the jury that Ms. Kanode's acceptance of the contract value could satisfy, wholly or partially, any contract breach.

The contract value payment satisfied the Farmers entities' contract obligations or, at a minimum, could offset Ms. Kanode's damages. (See section I.D., *supra*; see also RB/XAOB 53-54, 82-83.) But the trial court failed to instruct the jury that payment and acceptance of contract value could wholly or partially satisfy the contract and substitute for termination damages. That, too, constitutes reversible error.

Given the law and the facts, the trial court's erroneous failure to instruct the jury that Ms. Kanode's acceptance of the contract value satisfied any contract breach, renders the underlying contract verdict infirm.

B. The damages are clearly excessive and are unsupported by the evidence.

The underlying contract verdict is also untenable because the amount of damages the jury awarded is unsupported by the evidence. The jury awarded Ms. Kanode $268,125 in contract damages—an amount equivalent to over three years' worth of commission revenues—despite the fact that the Agreement allowed *either* party to terminate *without cause* on 90 days notice. As discussed in the opening brief, there is no possible justification for the jury's contract award. (RB/XAOB 42-62, 73-83.)

Ms. Kanode's brief offers no real defense of the contract verdict. The section of her brief discussing liquidated damages (XRB 18) cites a termination provision permitting a non-breaching party to terminate the contract on 30-days' notice if the other party breaches. (XRB 17-18.) But this ignores the at-will termination provision—the Agreement allowed either party to terminate *without cause* on 90 days notice. Accordingly, the maximum contract damages Ms. Kanode could recover were the earnings (i.e. commissions) she would have received for that 90-day period. (See RB/XAOB 45-48.)

In light of controlling law, the contract damages are clearly excessive and are unsupported by the evidence.

III. PROTECTIVE CROSS APPEAL: THE UNDERLYING INTERFERENCE VERDICT CANNOT STAND.

A. The Interference Verdict Is Unsupported By The Evidence.

As discussed in the Farmers entities' opening brief, the underlying interference verdict is infirm for all of the same reasons that the trial court's Order granting judgment notwithstanding the verdict is appropriate. (RB/XAOB 87 [citing RB 24-42].) Nothing in Ms. Kanode's brief fills the fatal evidentiary gaps in the interference claim.

Ms. Kanode's brief attempts to point to evidence carrying the burden of proving that the Farmers entities interfered with some prospective non-Farmers business. On its face, this evidence is insufficient.

In particular, the brief points to Ms. Kanode's testimony that the Farmers entities did not allow her to use its files to copy the phone numbers of its policyholders with whom she alleged she had non-Farmers business. (See XRB 2-4.) Without more, this testimony cannot establish an interference claim. Neither in Ms. Kanode's testimony, nor anywhere else in the record, is there evidence as to the *number* of policies the Farmers entities' alleged interference affected. Nor is there any evidence as to the *dollar amount* of those policies.

Moreover, belying the protestations in Ms. Kanode's brief about limited access to the telephone numbers in the Farmers entities' policyholder files, is the undisputed fact that Ms. Kanode was in full

possession and control of the files for *six months* following her termination. (RT 2586.) During that time, she had ample opportunity to take whatever information she believed she needed in order to conduct her alleged non-Farmers business.

The fact that the Farmers entities later restricted Ms. Kanode's access to the files (after obtaining a court order requiring Ms. Kanode to return them), cannot serve as the basis of the interference verdict. The court's Order expressly provided that the files were the "confidential property of Farmers" and precluded Ms. Kanode from thereafter reviewing or duplicating them. (RB/XAOB 35-36.) Obtaining and enforcing the Order was absolutely privileged. (*Ibid*.)

B. Having Concluded That No Substantial Evidence Supported The Interference Verdict, The Trial Court Erred By Failing To Order An Alternative New Trial On That Claim.

As discussed in the opening brief, the Farmers entities sought—and the trial court granted—a new trial as to *both* of Ms. Kanode's claims. (RB/XAOB 84-86, citing AA 320.) To the extent that order is not reflected in the later Order signed by the trial court, that is a ministerial oversight. (See RB/XAOB 84, citing RA 37A.)

Ms. Kanode's brief asserts that the Farmers entities waived this error by failing to take steps to correct the error in the trial court. (XRB 19-20.) However, as the authorities cited in Ms. Kanode's brief recognize, the court

can correct its mistakes *sua sponte*. (XRB 19, citing Code Civ. Proc., § 473.)

This Court is free to correct ministerial oversights. (Cf. *McKannay v. McKannay* (1924) 68 Cal.App. 709, 712 ["That a court of general jurisdiction has the right, regardless of lapse of time, to amend or correct clerical errors or misprisions in its records so that its records shall conform to and speak the truth, cannot be questioned"].) In any event, the Order is deemed excepted to under Code of Civil Procedure section 647 [an appealable order—e.g., an order partially granting a new trial—is deemed excepted to; no objection is necessary if at the time an order is sought a party makes its position known].)

If, on the other hand, the trial court limited its new trial grant to the contract claim only, then it was an abuse of discretion for the trial court to decline to grant a new trial, in the alternative, as to the interference claim in light of its finding that no substantial evidence supported that verdict. (RB/XAOB 84-86.) The trial judge's comments reflected his conclusion that the evidence did not support the interference verdict. (*Id*. at 86.) As a result, the trial court was duty-bound to grant a new trial in the alternative on the interference claim. (*Id*. at 84-86.) Ms. Kanode's brief offers no response to either the facts or the governing law discussed in the Farmers entities' opening brief.

C. The Interference Verdict Cannot Stand Because Prejudicial Instructional Error Allowed The Jury To Impose Interference Liability For Breach of Contract.

In any event, a new trial of the interference claim would have been required for instructional error—namely, the trial court's failure to correctly instruct the jury regarding what kind of conduct could support an interference verdict. (See RB/XAOB 87-89.)

Ms. Kanode's brief argues that when the jury expressed confusion about what act could serve as the basis of an interference claim, the trial court justifiably instructed the jury that "wrongful conduct" could be any conduct "other than the act of terminating the agency agreement with Ms. Kanode." (See XRB 6-9.)

This is wrong.

The instruction left the jury with the impression that some other contract-based act could serve as the basis for an interference verdict—i.e., that the Farmers entities could be liable for interference if they committed other contract breaches (e.g., if they undermined Ms. Kanode's policy sales, failed to give her notice of termination, failed to pay amounts due, or failed to afford her a termination review board hearing). But even if the Farmers entities committed such acts (they didn't), such conduct cannot support the interference verdict because it stems from the alleged contract breach and thus does not meet the requirement of being "independently actionable." (See RB/XAOB 31-36.)

By the same token, the jury instructions permitted the jury to impose liability if the Farmers entities committed other morally "wrongful" but not legally-actionable conduct. Again, this type of conduct cannot support an interference verdict. (See RB/XAOB 31-33.)

Ms. Kanode's brief argues that the Farmers entities waived any objection to the jury instruction because they only wanted to add the words "a specified legal wrong" to the instruction. (XRB 7.) But the language that the Farmers entities requested pinpointed the problem with the trial court's proposed instruction—that is, that the conduct supporting an interference verdict could not be some permutation of the contract breach, let alone some generic bad manners. Instead, it had to be some other separately-recognized legal wrong. That is exactly what the jury failed to learn.

In any event, the instruction was deemed excepted to; the instruction was not merely misleading and confusing, it misstated the law. (Code Civ. Proc., § 647 [instructions are automatically deemed excepted to]; see also *Lund v. San Joaquin Valley R.R.* (2003) 31 Cal.4th 1, 7.)

Ms. Kanode's brief argues that the instruction was correct since the only contract breach she alleged was the termination of her agency. (XRB 8.) This ignores the fact that many of the alleged wrongful acts Ms. Kanode's counsel asserted both in the complaint and in argument to the jury arose under the contract and thus cannot, as a matter of law, have formed the basis of the interference verdict.

For example, in her complaint, Ms. Kanode alleged that the Farmers entities acted wrongfully by "discourag[ing] and attempt[ing] to prevent [her] from hiring a replacement agent," by sending a letter to the Farmers policyholders advising them that she had left her agency, by failing to provide her with "required administrative remedies," and by failing to pay her "the contractual benefits and fees due to her." (AA 4-5.)

At trial, Ms. Kanode's counsel reiterated these arguments. He told the jury that the Farmers entities "engage[d] in wrongful conduct, other than the allegedly wrongful termination of the Agent Agreement with Kanode" by doing "something wrong beyond the termination." (RT 3771-3772; see also RT 3749-3750, 3756, 3765 [Kanode did not get a TRB hearing]; 3755 [contract value calculation incorrect]; 3742 [Kanode prevented from hiring Khan].)

All of these alleged acts were part and parcel of the Farmers entities' contractual relationship with Ms. Kanode and its termination. None were independently wrongful as required by governing law. (See RB/XAOB 33-36.) Yet, under the instruction given, the jury could have used any of these *contract-based* acts as the grounds for imposing interference liability. Such a result is not legally sound and should not stand.

Next, Ms. Kanode's brief argues that the damages award did not overlap because the jury awarded "$268,000" (sic; $268,125) for the contract claim and "$768,000" (sic; $668,125) for the interference claim. (XRB 8.) This is disingenuous in light of plaintiff's counsel's concession

that the interference verdict's economic damages award *duplicated* the contract award. (RT 3774-3775 [telling the jury that if Ms. Kanode "win[s] on contract, all she should get on this cause of action (interference) is mental suffering. That doesn't overlap the contract"], RT 3837-3838 [same; plaintiff's counsel asks the jury to award contract damages and then to tack on emotional distress damages pursuant to the interference claim].)

Moreover, the special verdict form makes it clear that the economic awards for breach of contract and interference were the *same* money. The jury awarded $268,125 for breach of contract. (AA 56.) It awarded $268,125 in economic damages for interference with prospective economic advantage. (AA 58.) And, it awarded $400,000 for emotional distress on the interference claim. (*Ibid*.) Yet, on the last page of the special verdict, the amount of total damages is $668,125. (AA 59.)

There is no real doubt that the jury awarded the same money for the two claims—a strong indication that the jury confused the two. (See RB/XAOB 37, 89.)

CONCLUSION

The contract verdict cannot stand because of numerous legal defects, including Ms. Kanode's legal incapacity to perform and her acceptance of contract value. The verdict also suffers from a failure of proof—the absence of evidence of mitigation—and instructional error. Accordingly, this Court should direct entry of judgment in the Farmers entities' favor on the contract claim.

DATED: December __, 2005

PICKER, CHOW & FREISLEBEN, LLP
Alan Freisleben
Lily Chow

GREINES, MARTIN, STEIN & RICHLAND LLP
Robert Olson
Cynthia Tobisman

By: _____
Cynthia Tobisman
Attorneys for Plaintiffs, Cross-Defendants, Respondents and Cross-Appellants, FARMERS INSURANCE EXCHANGE, TRUCK INSURANCE EXCHANGE, FIRE INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY AND FARMERS NEW WORLD LIFE INSURANCE COMPANY

CERTIFICATION

Pursuant to California Rules of Court, Rule 14, I certify that this **CROSS-APPELLANTS' REPLY BRIEF** contains 4,968 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: March 9, 2011

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Cynthia E. Tobisman

TABLE OF CONTENTS

TABLE OF CONTENTS

(continued) Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

(continued)