

4th Civil No. E074226

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

MARIA CARACHURE,
Plaintiff and Appellant,

v.

CELIA ACOSTA SCOTT,
Defendant and Respondent.

Appeal from the Riverside County Superior Court
Case No. RIC1309555
The Honorable John W. Vineyard, Judge Presiding
The Honorable Irma P. Asberry, Judge Presiding

RESPONDENT'S BRIEF

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**Court of Appeal
State of California
Fourth Appellate District**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: E074226

Case Name: Maria Carachure v. Celia Scott

Please check the applicable box:

- There are no interested entities or parties to list in this Certificate per California Rules of Court, rule 8.208.
- Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1. Safeco Insurance Company of America	Insurer of Respondent
2.	
3.	
4.	
5.	

Please attach additional sheets with Entity or Person Information if necessary.

/s/ Gary J. Wax

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INTRODUCTION

How many times does a plaintiff and her counsel get to say “gotcha” and renege on their binding word? That’s the question posed by this appeal.

The issues raised in the opening brief all arise out of the first phase of a bifurcated trial, where the jury unanimously decided that defendant Celia Scott’s settlement defense barred plaintiff’s negligence-based claims. That defense centered on a pre-suit settlement offer that plaintiff made to Ms. Scott’s insurer. Plaintiff’s counsel admitted during opening statement that the policy-limits settlement demand was client-authorized. The trial court then nonsuited that particular issue—removing plaintiff’s legal authorization from the case. The jury thereafter unanimously found that Ms. Scott’s insurer had fully accepted the offer by complying with all of its conditions, making that settlement agreement a complete defense to plaintiff’s claims. The trial court later found the settlement to be in plaintiff’s best interests and approved it.

Plaintiff’s current appeal (her second) seeks to undo that settlement yet again, even though: (1) her guardian ad litem and counsel repeatedly admitted that the offer was client-authorized; (2) Ms. Scott accepted the offer; (3) her counsel expressly represented that the guardian was *not* repudiating the offer; and (4) the trial court properly exercised its inherent authority and discretion to approve the settlement. Plaintiff’s procedural complaints misconstrue the record below and lack legal support.

The opening brief now seeks to retract plaintiff's admissions to sidestep what motivated the settlement offer in the first place—her counsel's attempt to manufacture a “bad faith” claim against Ms. Scott's insurer. The practice of making a short-fuse policy-limits demand to set-up an insurance carrier for bad-faith liability in excess of policy limits is a well-known device used by plaintiffs' lawyers in personal injury cases where the defendant has a low-limit insurance policy. It's called “taking the lid off” or “opening up” the policy.

Plaintiffs' lawyers making such demands often attach multiple conditions to such offers to increase their chances of “opening up” a policy. The shorter the time limit and the more conditions a settlement offer includes, the more likely an insurer attempting to accept a demand may fail to satisfy a condition in time, opening the door to an argument that the insurer rejected the demand by failing to comply with all of its conditions.

Plaintiff's counsel employed that device here, but their bad-faith set-up attempt failed because, as the jury uncontrovertibly found, Ms. Scott's insurer complied with *all* of the offer's conditions before it expired.

The three arguments in the opening brief provide no basis for undoing the settlement or resulting judgment:

- *Proper partial-nonsuit as to plaintiff's offer-authorization.* The trial court nonsuited the issue of whether plaintiff's legal representatives authorized the policy-limits demand based on her representatives' and counsels' repeated and

unequivocal admissions that they authorized it. The opening brief posits unsupported rules that nonsuit is unavailable on an affirmative defense, and that courts cannot grant partial nonsuit on one issue or element within an affirmative defense. Neither argument finds support in the governing statute, its legislative history, or case law.

- *Proper approval of the accepted settlement.* The opening brief asserts that Ms. Scott lacked statutory authority to move for court approval. But the court did not need a motion. It exercised its independent inherent authority and discretion over guardian ad litem settlements. Substantial evidence supports the court's finding that the settlement was in plaintiff's best interests.

- *Punitive damages properly stricken.* The trial court struck plaintiff's conclusory willfulness and malice allegations because she neither alleged nor proffered any *facts* to support a despicable state of mind. She alleged only that defendant neglected to wear corrective lenses. Ms. Scott's alleged *non-willful* tortious conduct does not transform into malicious conduct through conclusory allegations, or assertions that appear nowhere in the complaint.

The trial court saw plaintiff's case for what it is, and so did the jury: a set-up attempt that failed because Ms. Scott's insurer accepted all of the conditions included in the settlement offer before it expired. The opening brief provides no valid reason to reverse. Affirmance is not only the correct result; it would finally put an end to her counsel's case-prolonging gamesmanship.

STATEMENT OF FACTS

A. The accident, the settlement demand, and defendant Celia Scott's acceptance.

1. Plaintiff's family retains the Avrek firm to pursue claims against Ms. Scott.

Plaintiff was injured in a motor vehicle accident with defendant Celia Scott. (See 2RA 727, 729-730.)¹ At the time of the accident, Ms. Scott carried automobile insurance with coverage limits for bodily injury claims of \$15,000 per person and a maximum of \$30,000 per occurrence. (2RA 733, 767; 4RT 481.)

Soon after the accident, plaintiff and her family members notified Ms. Scott's insurer, Safeco Insurance Company of America, that they had retained the Avrek Law Firm to "represent their legal rights and interests." (2RA 725; see 6RT 821-822.)

2. Pre-suit, the Avrek Firm makes a policy-limits settlement demand.

On October 14, 2011, the Avrek firm sent Safeco a short-fuse policy-limits settlement offer/demand. (2RA 727-728; 6RT 857.)

The demand letter offered to settle plaintiff Maria Carachure's bodily injury claims for the \$15,000 policy limits: "As you are aware the above referenced incident caused severe

¹ "2RA" refers to Volume 2 of the Respondent's Appendix.

and permanent injuries to Ms. Carachure resulting in hospitalization.... Based on Ms. Carachure's catastrophic injuries we are demanding settlement in the amount of your insured's policy limits, \$15,000." (2RA 727.)²

The letter included four conditions to accept the offer:

- (1) Confirm the policy limit and its acceptance of the demand by October 24, 2011 at 5:00 p.m.;
- (2) Furnish a copy of the complete insurance policy for Ms. Scott, who was both the driver and vehicle owner;
- (3) Promptly provide a form release of all claims;
- (4) Provide a declaration disclaiming any additional insurance coverage.

(Ibid.)

The letter threatened Safeco with insurance bad-faith liability for failing to accept the demand. *(Ibid.)*

3. Safeco accepts the offer on Ms. Scott's behalf.

Safeco's adjuster telephoned the Avrek Firm on October 21, 2011 and accepted plaintiff's settlement offer, including all four of the offer's conditions. (3RT 454-459; 4RT 478-480, 512, 558.) He expressly told Esli Frias at the Avrek firm that he had accepted

² The letter separately offered to settle plaintiff's family members' emotional distress claims for \$15,000. *(Ibid.)*

all of the offer's terms. (4RT 478.) And, Ms. Frias acknowledged the acceptance of the offer's terms. (4RT 479, 500-501, 512.)

Later that day, the adjuster confirmed that agreement in an email message to Ms. Frias at the Avrek firm. (2RA 732; 4RT 478-479.)

Three days later, on October 24, 2011, the adjuster reconfirmed that the parties already had a settlement agreement regarding plaintiff's claims, this time sending the Avrek attorney a letter "follow[ing] up on" the October 21 discussions in which "we settled [plaintiff's] claim for the policy limit of \$15,000.00." (2RA 761.)

By the offer's October 24, 2011 deadline, Safeco had complied with all four conditions:

1. *Confirming the Policy Limit.* The adjuster's October 21, 2011 email confirmed Ms. Scott's "policy limit of \$15,000.00" in writing. (2RA 732.)
2. *The Insurance Policy.* The adjuster attached a copy of Ms. Scott's insurance policy and its declarations page to his initial October 21, 2011 acceptance email. (2RA 733-756.)
3. *Ms. Scott's No-Other-Insurance Declaration.* In his initial email, the adjuster asked the Avrek firm to send him the requested "declaration of no other insurance and not in course of employment agency for [him] to have [Ms. Scott] execute and return to your office." (2RA 732.) The Avrek firm did so, attaching a copy of the draft policy Declaration "for [Ms. Scott] to sign." (2RA 757; see 4RT 484-485.) Three days later, on

October 24, 2011, the adjuster returned her signed declaration to the Avrek firm. (2RA 767; 4RT 489-490.)

4. *The Release Form.* On plaintiff's behalf, the Avrek firm asked Safeco to "forward" a "Release of All Claims as soon as possible." (2RA 757.) Safeco did so, on October 24, 2011, providing a proposed release for the Avrek Firm's review. (2RA 760-766.)

Over the next several months, Safeco's adjuster exchanged multiple letters and emails with the Avrek firm, and not once did the Avrek firm disclaim that they had reached a settlement. (See 2RA 772-789; 4RT 479-498, 501-502, 520, 523-524, 535-541, 562-563.) To the contrary, in July 2012, the Avrek firm represented that plaintiff had agreed to sign the release. (2RA 786.)³

B. Plaintiff's counsel reneges: Ten months after Ms. Scott's carrier accepts the offer, the Avrek firm reverses course and disavows the settlement.

After several months, Safeco's adjuster stopped hearing responses from the Avrek firm to his status-request emails and letters. (2RA 787-789; 4RT 539, 551.) Then, in September 2012, the Avrek firm reversed course and claimed that no settlement had ever been reached. (2RA 790-791; 4RT 516; see 2RA 799.)

³ Nothing in the record suggests that Safeco's adjuster was aware at the time of plaintiff's incompetency. Her mental state was ascertained and stipulated to after discovery, following plaintiff's first appeal. (1AA 217; 2RT 246-249.)

The Avrek firm, by letter “present[ed] a new policy limit demand” that Safeco pay “\$30,000 (\$15,000 for [plaintiff] and \$15,000 to be disbursed between the remaining three claimants).” (4RT 542; 2RA 790.) The about-face surprised the adjuster because the earlier email from the Avrek firm “indicated that there was a signed release on the way for [plaintiff]” (4RT 549.) So, he responded that a \$15,000 settlement of plaintiff’s claims had already been reached. (2RA 797-798; see also 4RT 551 [adjuster intended this letter to remind plaintiff’s counsel that there was “a settlement for Ms. Carachure”].)

In November, the Avrek firm asserted that its second settlement demand had expired on September 27, 2012, and that Safeco’s failure to comply opened up the policy. (2RA 795-796.) For the first time, the Avrek firm contended that the previously negotiated and agreed-upon release was “not acceptable to” it and was “not bargained for”; it claimed that there had been no settlement of plaintiff’s claims. (*Ibid.*; see 4RT 562.)

PROCEDURAL HISTORY

A. The lawsuit and the trial court’s rulings on the pleadings.

1. Plaintiff sues Ms. Scott.

Ten months later, plaintiff and her family members, represented by the Avrek Firm, sued Ms. Scott for negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress (IIED). (1AA 131.)⁴ The court appointed a guardian ad litem to represent plaintiff’s interests. (*Ibid.*)

2. Ms. Scott successfully moves to strike punitive damages allegations.

The operative complaint sought “punitive and exemplary damages in an amount necessary to punish and/or set an example.” (1AA 139 ¶ 3.) She alleged that Ms. Scott’s conduct was wanton, willful, malicious, fraudulent, oppressive, despicable, intended, and in conscious disregard of plaintiff’s rights and safety. (1AA 136-139 ¶¶ 39, 43, 50, 56, see also 1AA 143-144 ¶¶ 1-4.) Plaintiff did not, however, allege any facts supporting these conclusory allegations.

Ms. Scott moved to strike the punitive damages claims. (1AA 143-151.) In response, plaintiff proffered no new facts that she could add by way of amendment. (1AA 153-163.)

⁴ Plaintiff’s family members later settled and dismissed their claims.

The court granted Ms. Scott's motion to strike these punitive damages allegations and prayer from the complaint. (1AA 202.)

3. Ms. Scott answers, denies liability, and pleads a settlement defense.

Ms. Scott answered the operative complaint, denying liability and asserting "[s]ettlement" as her first affirmative defense. (1AA 206-207.) In particular, Ms. Scott averred that "[p]rior to the filing of this action, plaintiffs' counsel made a legally binding offer to settle the claims of one of more plaintiffs and said offer was accepted on behalf of the defendant, resulting in a binding and enforceable settlement which constitutes a bar to further prosecution of the instant action." (1AA 207 ¶ 1.)

B. Summary judgment and the first appeal.

1. Ms. Scott moves for summary judgment based on the settlement.

Ms. Scott moved for summary judgment. (1RA 19-35, 56-65.) She argued that she was entitled to judgment as a matter of law because plaintiff, "through her counsel of record, entered into a valid and enforceable settlement with defendant, by which she agreed to release and compromise her claim for the policy limits of defendant's applicable insurance." (1RA 20.)

2. Plaintiff's counsel claims that the settlement demand letter was not client-authorized.

Plaintiff opposed summary judgment, asserting that there was no settlement agreement. (1RA 37-45.) In addition to characterizing Safeco's response to its settlement offer as a rejection and counteroffer rather than an acceptance (1RA 42-44), plaintiff's counsel contended that the Avrek law firm was not authorized to settle plaintiff's claim (1RA 47-48 ¶ 7).

3. This Court reverses summary judgment, finding a genuine fact dispute as to whether the settlement demand was authorized.

The trial court granted Ms. Scott's summary judgment motion. (1RA 86-89.) It concluded that plaintiff failed to create a triable issue of fact to negate Ms. Scott's evidence showing the parties had entered into a settlement agreement. (1RA 88-89.) The court sustained Ms. Scott's evidentiary objections to counsel's conclusory declaration and concluded that plaintiff was bound by the acts of her attorney within the scope of counsel's actual or ostensible authority. (1RA 87, 89.)

Plaintiff appealed and this Court reversed the summary judgment. (See *Carachure v. Scott* (June 10, 2016, E063780) 2016 WL 3353695 [nonpub. opn.] (*Carachure I*.) *Carachure I* held that although the trial court had properly disregarded plaintiff's counsel's declaration, Ms. Scott failed

to carry her summary judgment burden of affirmatively establishing client authorization of the settlement offer. (*Id.* at pp. *3-5 & fn. 2.) Even though the admissible “evidence support[ed] the inference that the law firm was acting with Carachure’s knowledge and consent,” this Court nonetheless held that Ms. Scott had failed to produce enough evidence at the summary judgment stage sufficient to establish, *as a matter of law*, that the Avrek Law Firm was authorized to make the settlement offer on her behalf. (*Id.* at p. *5.)

C. On remand, the trial court grants Ms. Scott’s unopposed motion for summary adjudication of plaintiff’s intentional infliction of emotional distress claim.

After the reversal and remand in *Carachure I*, Ms. Scott moved for summary adjudication of plaintiff’s cause of action for intentional infliction of emotional distress on the ground that, as a matter of law, the conduct alleged—driving without one’s glasses—even if true, was not outrageous nor intended to cause plaintiff emotional distress; nor was the conduct even reckless. (1RA 123-133.)

Ms. Scott’s accompanying separate statement cataloged multiple undisputed facts from the time of the accident:

- She was driving *under* the posted limit: 20-30 mph in a 45-mph zone.
- She hadn’t consumed any illicit or prescription drugs including alcohol or marijuana in the prior 24 hours.

- She was unaware of plaintiff's presence.
- Although she was not wearing corrective lenses, she did not believe her lack of corrective lenses caused the accident; rather, she believed that she failed to see plaintiff because it was quite dark and the vehicle in front of her obstructed her view.

(1RA 255-256 ¶¶ 3-6, 8.)

Plaintiff never opposed the motion or disputed any facts in Ms. Scott's separate statement. (See 1AA 45-71.)

The trial court granted Ms. Scott's motion, summarily adjudicating plaintiff's IIED claim. (1RA 342-344.) It found that there was no triable issue as to one or more elements of that claim, and that the claim had "no merit." (1RA 343.) In particular, there was no evidence of "outrageous conduct intended to cause any plaintiff emotional distress, or conduct enacted with reckless disregard of the probability that any plaintiff would suffer emotional distress, knowing that any plaintiff was present when the conduct occurred." (*Ibid.*)

D. Plaintiff repeatedly admits that the settlement demand was authorized.

- 1. Pre-trial, plaintiff's counsel and her guardian ad litem repeatedly and conclusively admit that the demand letter was authorized.**

Also following remand of *Carachure I*, Ms. Scott pursued targeted discovery regarding plaintiff's counsel's authority to

make the October 14, 2011 offer. In several sworn pre-trial responses to Ms. Scott's requests for admission (RFAs), plaintiff, her family members, and her legal representatives admitted that plaintiff had authorized the Avrek firm's October 14, 2011 settlement offer to Safeco, Ms. Scott's insurance carrier:⁵

- Request: "Admit that Maria Fuentes, aka Maria Estrada, authorized on YOUR behalf the policy limits demand issued by the Avrek Law Firm to Safeco in October 2011."
- Admission: "It is to the best of Plaintiff's knowledge that Maria Estrada-Fuentes [*sic*], plaintiff's Guardian ad litem, was the only person who made the decision to make a policy limit demand that had additional conditions."

(1RA 91, 98 [RFA No. 15].)

- Request: Admit that Maria Estrada Fuentes and Gabriel Fuentes, Sr. "acted as YOUR agent in authorizing AVREK to send its October 14, 2011 policy limit demand letter to Safeco."
- Admission: "[I]nterpreting the word 'agent' as being a person who speaks on behalf of someone, then Maria Fuentes [and Gabriel Fuentes, Sr. were] speaking and

⁵ This included Ms. Estrada-Fuentes (plaintiff's daughter-in-law and guardian ad litem), Gabriel Fuentes, Jr. (plaintiff's son), and Gabriel Fuentes, Sr. (Gabriel's father and plaintiff's husband).

acting on behalf of Maria Carachure and, in this way, were her ‘agent[s].’”

(1RA 264, 267, 313, 315 [RFA Nos. 39, 42].)

- Request: “Admit that Gabriel Fuentes, Jr. authorized AVREK to send its October 14, 2011 policy limit demand letter to Safeco.”
- Admission: “Maria Fuentes, Gabriel Fuentes, Jr., and Gabriel Fuentes, Sr., approved the making of a demand by Avrek Law Firm regarding Maria Carachure’s claims on her behalf.”

(1RA 265, 316 [RFA No. 44]; see also 1RA 270, 335 [RFA No. 91; “Gabriel Fuentes, S[r]., Maria Fuentes, and Gabriel Fuentes, Jr., together approved the making of a demand”]; 1RA 332-333 [RFA No. 78: “Maria Fuentes was a part of a family group who discussed and approved the making of a demand for the settlement of Maria Carachure’s claims before October 14, 2011, [but] she did not know the exact terms of the demand letter which was sent”].)

- Request: “Admit that Maria Estrada Fuentes has not objected to the \$15,000 policy limits demand for settlement of YOUR claims against Celia Acosta Scott made in AVREK’s October 14, 2011 letter.”
- Admission: “Maria Fuentes, Gabriel Fuentes, Jr., and Gabriel Fuentes, Sr., did not object to the October 14, 2011 policy limits demand by Avrek Law Firm regarding Maria Carachure’s claims.”

(1RA 270, 334 [RFA No. 88]; 2RA 642-643 ¶¶ 46-50.)

Plaintiff also admitted in multiple interrogatory responses that the settlement offer was “authorized.” (1RA 117-118 [Nos. 47-48], 291 [No. 55].)

2. During pre-trial hearings, plaintiff’s counsel admits authorization.

Ms. Scott moved to bifurcate the trial so the jury could decide her settlement defense before plaintiff’s negligence-based claims. (1AA 211.) Plaintiff’s counsel made it clear that there was no longer any fact dispute as to whether plaintiff’s representatives had authorized the Avrek firm’s offer on her behalf: “And the testimony is going to be we authorized a settlement demand, not the settlement. That’s the whole issue here. There is no dispute that we authorized Avrek to make a settlement demand.” (2RA 615.)

Then, when the trial court heard arguments on the parties’ proposed jury instructions before opening statements, plaintiff’s counsel again made it clear that there was no factual dispute on the authorization issue: “Nobody’s ever going to dispute that we authorized an offer.” (2RT 194:25-26.)

E. The trial: bifurcated phase one regarding Ms. Scott's settlement defense.

- 1. In opening statement, Ms. Scott's counsel proffers that she will show consent to, and authorization of, the settlement demand letter by multiple means, including by ratification.**

Based on the parties stipulation, the trial court ordered the trial bifurcated to decide Ms. Scott's settlement defense before plaintiff's injury claims. (1AA 211-212.)

Defense counsel's opening statement teed up the authorization evidence that he would proffer to prove Ms. Scott's settlement defense: "[Y]ou'll hear that a spouse in California has the ability on behalf of their other incapacitated spouse to make a settlement offer, to handle their affairs, without any formal court approval.... And, you'll hear that Ms. Carachure had a guardian ad litem appointed by the Court, who handled her case, this litigation. And in discovery responses, under oath, the guardian ad litem ratified that original October 2011 offer, and said, yes, it was authorized, and I'm saying that on half [*sic*; behalf of] Ms. Carachure." (3RT 349-350.)

- 2. Plaintiff's opening statement repeatedly admits that the settlement demand letter was authorized.**

In plaintiff's counsel's opening statement, he emphasized that plaintiff's legal representatives had authorized the

settlement offer: “Offer and demand, no issue that we agree to do that, that there was consent for an offer or a demand” (3RT 400; see also 3RT 401 [“no dispute” that plaintiff’s husband authorized the offer].) Then immediately upon returning from lunch break, plaintiff’s counsel reemphasized that settlement offer was undisputed: “I want to just make sure that you understood the difference here between the offer and demand versus settlement. We agree a hundred percent. My clients, we authorized a demand. We didn’t know what legal things the lawyers would put in but that’s beside the point. We authorized, whatever the lawyers put in there was fine.” (3RT 403:16-21.)

His argument to the jury was that even though the Avrek firm was legally authorized to make a settlement *offer* on plaintiff’s behalf, “[n]o one had the legal right to *settle* for her on October 24th, 2011.” (3RT 413:2-3.)

3. The trial court grants partial nonsuit on the authorization issue—to which plaintiff consents.

At the end of opening statements, Ms. Scott’s counsel moved for a partial nonsuit on the “consent to settle issue.” (3RT 413, 416.)

After inviting briefing and holding two hearings, the trial court granted partial nonsuit on the issue of whether Avrek firm had “the consent of the client to make an offer to settle.” (5RT 656-657; see also 3RT 416-417 [first hearing].) The court ruled that partial nonsuit on that issue was proper because plaintiff’s

counsel had the “authority of her client to make the settlement offer on [sic] the letter dated 10-14-11.” (1AA 246; see 5RT 657.)

The court then directed the clerk to enter a minute order memorializing its ruling. (5RT 660.) Plaintiff’s counsel stated that he stipulated to the oral ruling’s terms. (5RT 661-662.) The trial court entered a minute order restating its oral ruling verbatim. (1AA 246.)

The court then instructed the jury on the consent to authorization issue: “It is an established fact for this proceeding that plaintiff’s counsel had client authority to make the offer specified in the letter dated October 14, 2011.” (5RT 663.)

4. The jury renders a unanimous special verdict for Ms. Scott, finding that Safeco accepted the offer.

After four days of witness testimony, the jury reached a unanimous verdict in Ms. Scott’s favor. (2AA 360-362.)

In a special verdict, the jury found that Safeco, Ms. Scott’s insurance carrier, accepted the October 2011 settlement offer as to plaintiff’s claims against Ms. Scott by complying with all of its conditions, thereby rejecting plaintiff’s contrary arguments. (2AA 361-362.)

F. The trial court approves the jury-determined settlement under Code of Civil Procedure section 372.

Post-trial, plaintiff’s guardian ad litem refused to seek the court’s approval of the settlement, so Ms. Scott filed a motion to

both approve the settlement under Code of Civil Procedure section 372 and to enter final judgment. (2AA 256-266, 319-325.)

Ms. Scott argued that the court could either grant the motion, or act sua sponte under its inherent authority to approve the settlement. (2AA 257, 260-264.) Plaintiff opposed the motion but did not repudiate the settlement. (2AA 310-316; see 7RT 1115-1116.)

Under its own “inherent power” and “authority to unilaterally consider the approval of the settlement,” the trial court approved the settlement, finding that it was in plaintiff’s best interests. (2AA 328.) In particular, Ms. Scott’s insurance settlement funds were the only funds available to plaintiff, and the guardian ad litem’s refusal to seek settlement approval—“whether due to a litigation strategy or otherwise”—was contrary to plaintiff’s best interests. (2AA 328; 7RT 1117.)

G. Judgment, new trial motion, and appeal.

The trial court entered judgment reflecting the jury’s verdict and settlement confirmation. (2AA 360-363.)

Plaintiff moved for a new trial, urging the court to reverse its nonsuit ruling. (2AA 366-368; 2RA 655-664.) The court denied the motion. (2AA 371-373.) In its order, the court reiterated that there was no legal error in granting partial nonsuit as to one element of plaintiff’s claim based on her “repeated admission[s]” and concessions regarding client-authorization for the settlement demand letter. (2AA 372.)

Plaintiff timely appealed. (2AA 374.)

ARGUMENT

I. THE CONTEXT: A DEMAND AND RETRACTION TO SUPPOSEDLY “OPEN UP” THE POLICY.

To understand all of plaintiff’s counsel’s machinations, one has to understand their motivation and what they have been trying to accomplish by their retractions and doublespeak.

In personal injury cases like this one, where the plaintiff has incurred damages that her counsel believes exceed the defendant’s available insurance policy limits, a practice has developed referred to as “taking the lid off” or “opening up” the policy, which begins with a policy-limits demand to the defendant’s insurance carrier. (See, e.g., *Blue Ridge Ins. Co. v. Jacobsen* (2001) 25 Cal.4th 489, 494; Bentley, *Taking The Lid Off The Policy* (June 2012) Plaintiff Magazine (Bentley), at pp. 1-3.)⁶ Plaintiffs’ lawyers are familiar with these terms. (*Ibid.*)

Because insurance carriers generally are contractually obligated to pay damages only up to the liability limits, and because they can be on the hook for tortious bad faith *above* the policy limits including the entire amount of any judgment for unreasonably rejecting a settlement offer, a plaintiff’s settlement demand is often nothing more than an attempted setup to ultimately obtain an amount that far exceeds the policy limits.

⁶ Accessible at https://www.plaintiffmagazine.com/images/issues/2012/06-june/reprints/Bentley_Taking-the-lid-off-the-policy_Plaintiff-magazine.pdf [as of Jan 15, 2021].

(See Ins. Code, § 790.03, subd. (h)(5) [carrier duty to settle claims in good faith]; *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658-660 [carrier must consider insured's interests at least on par with carrier's interests in deciding whether to settle]; *Johansen v. California State Auto Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 14-15 [carrier duty to accept a reasonable settlement within policy limits where there is a "substantial likelihood of a recovery in excess of those limits"]; Bentley, at pp. 1-3 [instructing plaintiff's counsel how to execute a bad-faith setup].) Plaintiff's counsel's goal is to make a policy-limits settlement offer that the insurer does not accept.

There can be no bad faith if the insurance carrier *accepts* a valid settlement offer/demand. (See *Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 401 [bad faith liability arises from unreasonably *refusing to accept* a settlement offer within policy limits].) As the jury found, the insurer *did* properly accept the settlement demand.

Plaintiff's legal representatives authorized her counsel's policy-limits settlement demand, either before they made the demand or after through ratification. (See pp. 28-33, *ante*.) Because her counsel had unequivocally admitted authorization of the policy-limits offer, the trial court instructed the jury that the settlement offer was authorized: "It is an established fact for this proceeding that plaintiff's counsel had client authority to make the offer specified in the letter dated October 14, 2011." (5RT 663.)

Then the court asked the jury in a special verdict form whether Ms. Scott’s insurer had accepted plaintiff’s October 14, 2011 settlement offer on her behalf and fulfilled all of its conditions. (2AA 361.) The jury unanimously answered, “Yes.” (*Ibid.*) Thus, as a matter of established fact, Ms. Scott accepted plaintiff’s settlement offer. Plaintiff cannot avoid this express acceptance finding, which took bad faith off the table. That’s why the opening brief now claims—contrary to plaintiff’s pre-trial and opening statement concessions (see pp. 28-33, *ante*)—that plaintiff’s legal representatives never authorized the settlement offer in the first place. (AOB 15, 30-33; see also 2RA 727 [plaintiff’s counsel’s bad-faith litigation threat].)

Plaintiff was hoping to prove that the carrier had refused the settlement demand (to try to create a bad-faith scenario), but once the jury found it had been accepted, she backpedaled, claiming that the original demand was “unauthorized” (presumably so that she could later claim that the subsequent settlement demand in the fall of 2012 *was* authorized).

Plaintiff cannot have it both ways.

Plaintiff’s currently-claimed retraction—after both a jury finding and court approval—should be seen for what it is: pure gamesmanship. Plaintiff and her counsel are not satisfied with Ms. Scott’s \$15,000 insurance policy limits. They are seeking much more. (See 2RA 727.) But Ms. Scott has no funds for them to access, so they can only attempt to recover more by disclaiming consent to the 2011 settlement offer and later asserting a failure to accept the 2012 settlement demand. (See AOB 15, 30-33.)

That ship has sailed, as the first offer was accepted. As we explain below, this Court should reject the opening brief's "no-authorization" gambit.

II. THE TRIAL COURT PROPERLY GRANTED PARTIAL NONSUIT ON THE AUTHORIZATION ISSUE, BECAUSE PLAINTIFF UNEQUIVOCALLY CONCEDED THAT THE SETTLEMENT OFFER WAS AUTHORIZED.

A. Nonsuit is properly granted after plaintiff's opening statement where the presentation affirmatively shows plaintiff has no case.

Nonsuit is properly granted after opening statements where the plaintiff's counsel's presentation "affirmatively shows the inadequacies of the case as a matter of law." (*Stephan v. Proctor* (1965) 235 Cal.App.2d 228, 231; see also *Paul v. Layne & Bowler Corp.* (1937) 9 Cal.2d 561, 564 [nonsuit not reversed for being granted after opening statements].)

That's precisely what occurred here.

The parties agreed to bifurcate trial so that in phase one a jury would decide Ms. Scott's affirmative settlement defense. (1AA 211.) During plaintiff's opening statement, her counsel admitted facts barring part of her claim—i.e., plaintiff's settlement-offer authorization (3RT 400-401)—so the trial court properly granted partial nonsuit (1AA 246; see 5RT 657). Plaintiff's challenges all lack merit.

B. Plaintiff's procedural quibbles are baseless.

1. Ms. Scott had standing to seek nonsuit.

As stated in the opening brief, “[o]nly a ‘defendant’ can move for nonsuit.” (AOB 19.) But even though Ms. Scott is the defendant, plaintiff asserts she necessarily lacked standing to move for nonsuit because she had the burden on her settlement defense. (AOB 19-20.) Plaintiff is wrong.

Where, as here, the plaintiff's opening statement discloses evidence or concedes facts establishing an affirmative defense, a defendant has standing to move for nonsuit as to that defense. (E.g., *Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 285 [nonsuit proper where plaintiff's pre-trial presentation establishes an affirmative defense which defeats a cause of action]; *Castaneda v. Bornstein* (1995) 36 Cal.App.4th 1818, 1824-1825 [nonsuit properly granted where plaintiff's evidence establishes affirmative defense]; *Breazeal v. Henry Mayo Newhall Memorial Hospital* (1991) 234 Cal.App.3d 1329, 1337 [nonsuit properly granted where plaintiff's evidence establishes affirmative defense of Good Samaritan immunity]; *Rokos v. Peck* (1986) 182 Cal.App.3d 604, 611 [nonsuit properly granted after opening statement as to lack of standing defense]; *Russell v. Soldinger* (1976) 59 Cal.App.3d 633, 639, 645-646 [affirming nonsuit on opening statement based on unclean hands defense]; *Sperling v. Hatch* (1970) 10 Cal.App.3d 54, 57, 61-62 [nonsuit based on assumption of risk proper as to plaintiff who established the defense by his own testimony as a matter of law].)

No authorities suggest that the defense burden of proof on affirmative defenses prevents a defendant from seeking nonsuit regarding those defenses where the facts are admitted.

For instance, in *Russell v. Soldinger*, the plaintiff sued the defendant for breach of an oral agreement to cooperate in acquiring certain real property at a probate sale. (59 Cal.App.3d at pp. 635-636, 640-641.) But during opening statement, plaintiff's counsel admitted that the oral agreement was made during the course of the probate sale itself and that plaintiff had refrained from bidding based on his claimed agreement with the defendant, an agreement that would be illegal. (*Id.* at pp. 641, 644-645.) After opening statement, the trial court granted a defense nonsuit motion based on an illegality affirmative defense. (*Id.* at p. 641.)

Russell affirmed the trial court's nonsuit. (*Id.* at p. 646.) "[T]he opening statement [had] revealed" facts as to which the "only inference to be drawn" was that the parties intended to make an advantageous purchase at the expense of the estate Such an agreement is clearly contrary to public policy and is void and unenforceable." (*Id.* at p. 641.) Thus, *Russell* squarely supports nonsuit enforcing a defendant's affirmative defense.

Rokos v. Peck is in accord. There, the plaintiff sued for breach of contract and, in her opening statement, counsel "conceded that there had been no assignment" of the claimed contractual rights. (182 Cal.App.3d at p. 611.) The defense moved for nonsuit, arguing that she had "no standing to sue for breach of contract." (*Ibid.*)

As in *Russell*, the defense nonsuit motion was expressly and necessarily based on an affirmative defense, because lack of standing *is* an affirmative defense. (See *Rokos*, at pp. 610-611; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 558 [“the way to raise lack of standing is to plead it *as an affirmative defense*,” italics added].) As in *Russell*, the trial court granted the affirmative-defense-based nonsuit motion, and on appeal, *Rokos* affirmed. (*Rokos*, at pp. 611-612, 621.) It held that plaintiff had no standing to sue, so nonsuit was proper. (*Id.* at pp. 611-616, 620-621.)

In both *Russell* and *Rokos*, it made no difference that the defendant had the burden of proof on its affirmative defenses. Nonsuit was still warranted because the plaintiff’s opening statement affirmatively conceded the critical issues establishing those defenses. The same rule applies here, and entirely defeats plaintiff’s argument. (See AOB 19-25.) The bottom line is that nonsuit on an affirmative defense on which the defendant bears the burden of proof is entirely proper.

No case supports the opening brief’s argument that “[w]hen the trial relates to an affirmative defense, the allowable moving party as to nonsuit of the affirmative defense is a plaintiff, since the defendant carries the burden of proof.” (AOB 20.) Plaintiff cites only one case that supposedly bars a defense nonsuit motion premised on an affirmative defense: *Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195. (AOB 20-21.) But nothing in *Brassinga* addresses the issue.

Brassinga concerns a trial court’s denial of a motion to bifurcate an affirmative defense based on the exclusive remedy of workers compensation, the trial court’s nonsuit of that affirmative defense, and the City’s directed verdict motion based on governmental immunity. (*Id.* at pp. 205-208.) There is no discussion in *Brassinga* of a defendant’s right to nonsuit on an affirmative defense. A case is not authority for a proposition the court did not consider or resolve. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 127; *Fairbanks v. Superior Court* (2009) 46 Cal.4th 56, 64.)

In this case, partial nonsuit was appropriate during the bifurcated trial of Ms. Scott’s affirmative settlement defense. Plaintiff’s lone authority does not suggest otherwise.

2. The trial court was empowered to grant partial nonsuit regarding any “issue” in the case, including client-authorization of the settlement demand.

a. Section 581c’s broad language and its legislative history.

Plaintiff next contends that nonsuits are limited to entire causes of action and cannot be applied to one element or issue within a cause of action. (AOB 25-29.) She claims that partial nonsuits are impermissible except in limited circumstances that she selectively posits. But the broad statutory language is explicitly contrary: “If it appears that the evidence presented, or to be presented, supports the granting of the motion as to *some*

but not all of the issues involved in the action, the court shall grant the motion *as to those issues* and the action shall proceed as to the issues remaining.” (Code Civ. Proc., § 581c, subd. (b), italics added [statute’s title permits “partial grant of motion”].)

The Legislature used the term “issues” in section 581c. It knows how to say “causes of action” or “affirmative defenses” when it wants to. (See, e.g., Code Civ. Proc., § 437c, subd. (f)(1) [summary adjudication limited to “causes of action,” “affirmative defenses,” “issues of duty,” or “claims for damages”].) But when it amended section 581c to permit partial nonsuits, it chose the word “issues.”

The pre-1980 version of section 581c only permitted a trial court to grant nonsuit “as to *all issues*.” (Concurrently filed Motion Requesting Judicial Notice of Section 581c’s Legislative History (RJN), at pp. 30, 51, italics added; see *American Broadcasting Companies, Inc. v. Walter Reade-Sterling, Inc.* (1974) 43 Cal.App.3d 401, 406, fn. 3 [pre-1980 version].) In 1977, a superior court judge recommended that section 581c should be amended to provide “specific statutory authority” to trial courts to grant *partial* nonsuit motions as to “some of plaintiff’s causes of action, *theories of relief or issues*”—motions which the judge believed courts had been granting for years without any such authority. (RJN at p. 24, italics added.)

Thus, in 1980, the Legislature amended section 581c to “provide that if the evidence supported granting the [nonsuit] motion as to *some* but not all the *issues*, the court would grant the motion as to those *issues*. The action would then proceed as to

the remaining *issues*.” (RJN at p. 19, italics added; see Code Civ. Proc., § 581c, subd. (b) [court can grant “motion as to some but not all of the issues”].) Since the 1980 amendment, section 581c has expressly “permit[ed] courts to grant partial nonsuits.” (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 325 [discussing the 1980 amendment].) Section 581c is one of many “procedural devices to enable partial resolution of *issues* when appropriate,” and whenever the *issues* may be narrowed, “the burden on the parties and the courts is reduced” and “judicial economy” is promoted. (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1480, italics added.)

By its broad terms, section 581c supports the partial nonsuit in this case as to one affirmative-defense issue.

b. Case law.

Numerous authorities confirm that courts may grant partial nonsuits regarding factual “issues”—including issues that comprise less than an entire cause of action. (See *Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 60 & fn. 36 [unjust enrichment remedy in trade secrets misappropriation action]; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 58 [punitive damages]; *Bromme v. Pavitt* (1992) 5 Cal.App.4th 1487, 1506-1507 [supposed medical negligence after date on which plaintiff had less than 50% chance of surviving]; *Wright v. City of Los Angeles* (1990) 219 Cal.App.3d 318, 350-353 [several causes of action as to several parties]; *Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238, 266 [court’s rationale for denying nonsuit only as to damages after a certain time

“was clearly erroneous, as a nonsuit motion may be made as to ‘some ... of the issues involved in the action’”].)

The parties briefed the “partial nonsuit” issue twice at trial—first when the trial court considered Ms. Scott’s motion, then when plaintiff moved for a new trial to challenge the court’s partial nonsuit ruling. (1AA 237-243; 2RA 660-661, 714-716.)⁷ In denying a new trial and affirming its partial nonsuit ruling on the settlement-offer-authorization issue, the trial court correctly relied on *Bromme v. Pavitt* for the proposition that nonsuit is properly granted “if the evidence is insufficient to establish *an element* of a cause of action.” (2AA 373, citing *Bromme, supra*, 5 Cal.App.4th at p. 1508, italics added.)

Bromme rejected the same argument that plaintiff here made at trial and parrots on appeal—namely, that the trial court’s order was erroneous because it was directed not to an entire element of his cause of action but only to a *portion* of one element. (5 Cal.App.4th at p. 1507; see also 2RA 660-661; AOB 28-29.) The plaintiff in *Bromme*, like plaintiff here, cited

⁷ The opening brief states that initially the court was “concerned upon Ms. Scott’s making of the motion for partial nonsuit on one element of a cause of action.” (AOB 25.) But the court simply stated it had no prior experience with partial nonsuits; it didn’t say it was “concerned.” (3RT 419.) That’s why it invited briefing from both sides and held a hearing: To make sure the ruling was legally supportable. In short, the court did its job. In any event, the court’s initial tentative statements are irrelevant. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105 [a court has inherent power to “reconsider its prior interim rulings”].)

“no authority for his novel contention, and we are not aware of any.” (*Bromme*, at p. 1507.)

In *Bromme*, a decedent had a less-than-50-percent chance of survival at a critical point in time—i.e., it was more probable than not that she would have died from cancer regardless of any negligence. (*Id.* at pp. 1495-1496.) Because the plaintiff-husband had no cause of action for negligent treatment after that critical time, the trial court ordered partial nonsuit “not to an entire element of his cause of action but only to a portion of the element of causation.” (*Id.* at pp. 1499, 1507.) Based on this ruling, the negligence claim could go to the jury only as to conduct before, but not after, the critical point in time. (*Id.* at p. 1492.)

The discrete nature of the issue *Bromme* excised—“a portion of the element of causation”—was not even an entire element of a cause of action. It was one element—causation—and only for part of the time at issue. Thus, *Bromme* is instructive because it confirms that nonsuit can properly be granted on a specific issue that is neither an entire cause of action nor even an entire element of that cause of action. (*Id.* at p. 1507.) As such, it plainly stands for the principle that a partial nonsuit on a single, discrete issue, even if not a legal cause of action or an entire “element” of a party’s claim, can be granted. Simply because a nonsuit is partial does not support reversal.

The opening brief attempts to dodge *Bromme*’s import, as plaintiff’s trial court briefs did, by semantically characterizing the court’s action in that case as “split[ting] the cause of action into two parts.” (AOB 29.) But *Bromme* confirms otherwise,

affirming a partial nonsuit as to causation as to some, but not all of the claim. (5 Cal.App.4th at p. 1507.) If partial nonsuit was proper on a sub-issue by sub-issue basis to weed out particular negligent acts in a single cause of action as it was in *Bromme*, then it was also proper here to address a single element of an affirmative defense.

Hoch, supra, 24 Cal.App.4th 48 (see AOB 29), also supports affirmance. There, the trial court's partial nonsuit eliminated not an entire cause of action, but a discrete issue of claimed relief: punitive damages. *Hoch* rejected the plaintiff's argument that "nonsuit may not be granted on punitive damages, because a claim for punitive damages is not a complete cause of action." (*Hoch*, at p. 58; see also *Ajaxo, supra*, 135 Cal.App.4th at p. 60 & fn. 36 [unjust enrichment remedy in trade secrets misappropriation action subject to nonsuit].)

"Issues" are "issues"—not causes of action or defenses. (See Black's Law Dict. (9th ed. 2009) p. 907, col. 2 ["issue" defined as "[a] point in dispute between two or more parties.... In an appeal, an issue may take the form of a separate and discrete question of law or fact, or a combination of both"].) The opening brief cites no authority holding that one issue within an affirmative settlement-defense—such as consent to an offer—is not subject to nonsuit where plaintiff has, by her own admissions, removed the issue from the jury. No authority ever cited by plaintiff so constrains the court's partial nonsuit power. The absence of such authority is predictable given the contrary authority cited above.

Instead, plaintiff relies on a passage from the Rutter Guide. (AOB 26-27.) She claims the trial court *necessarily* erred in granting Ms. Scott’s nonsuit motion because the Rutter Guide’s list of partial nonsuit examples does not include “nonsuit as to one element of an affirmative defense.” (AOB 26.) First, the Rutter Guide’s list of examples is non-exhaustive—it simply lists situations where a partial nonsuit *may* be granted. (Wegner, et al., Cal. Practice Guide: Civil Trials & Evidence (The Rutter Group 2020) ¶¶ 12:207 to 12:213.) In any event, the absence of a specific, on-point example in the Rutter Guide is not legal authority for the proposition that nonsuits as to an issue within an affirmative defense are improper.

Ultimately, the opening brief improperly places form over substance by arguing the trial court erred in nonsuiting the consent to settle issue. (See Civ. Code, § 3528 [“The law respects form less than substance”].) Plaintiff admits that the settlement demand was “authorized” (see pp. 28-33, *ante*), but apparently hoped to make a false, misleading, and legally unsupported argument to the jury that she still somehow retained the right to withdraw her authorization once the offer was accepted. There was no reason to give the jury a material issue that plaintiff rendered moot by her own admissions.

Whether the settlement demand in the letter was client-authorized was unquestionably one of the “issues involved in the action.” The issue was thus properly nonsuited.

c. No miscarriage of justice.

Even assuming an identifiable partial-nonsuit procedural misstep (there was none), that would be no basis for reversal. The California Constitution is clear: “No judgment shall be set aside ... for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13.) Plaintiff repeatedly, unequivocally, and conclusively admitted that her counsel’s settlement offer was client-authorized. There is no “miscarriage of justice” in the trial court simply deeming as proven what plaintiff, through her counsel and legal representatives, repeatedly admitted.

C. Partial nonsuit was proper as plaintiff repeatedly and unequivocally admitted authorization.

1. Plaintiff *agreed with the trial court’s ruling; she cannot backtrack now.*

The trial court stated its partial nonsuit ruling in one succinct sentence: “So that it’s clear for your minute order, Madam Clerk. The Court has granted defendant’s motion for partial nonsuit establishing that plaintiff’s counsel had authorization of her client to make the settlement offer set forth in the letter of October 14th, 2011.” (5RT 660; see 1AA 246 [minute order].) Plaintiff’s counsel responded: “Your Honor,

I stipulate, if you say it exactly the way you said it in the minute order, we can even stipulate to that. I don't mind." (5RT 661.)

As a matter of law, plaintiff's counsel's on-the-record stipulation binds plaintiff to the precise language the court stated in its minute order. (Code Civ. Proc., § 283, subd. (1); *Hehr v. Swendseid* (1966) 243 Cal.App.2d 142, 149.) "Such a stipulation made in open court constitutes "not only an agreement between the parties but also between them and the court, which the latter is bound to enforce, not only for the benefit of those interested, but for the protection of its own honor and dignity." (Cathcart v. Gregory (1941) 45 Cal.App.2d 179, 187, quoting *Webster v. Webster* (1932) 216 Cal. 485, 489.)

Plaintiff cannot permissibly withdraw her counsel's on-the-record stipulation, which binds her to the settlement offer. (See *People v. Crimm* (1942) 19 Cal.2d 314, 317; *Palmer v. City of Oakland* (1978) 86 Cal.App.3d 39, 44 [a stipulation is conclusive upon the parties; a party is estopped from taking a contrary position in the same litigation].)

The opening brief doesn't mention this stipulation. But, it has the same effect as the opening statement: It definitively establishes that plaintiff's legal representatives authorized the October 2011 settlement offer, thereby making the trial court's partial nonsuit on the authorization issue legally supported.

At a minimum, it means that any claimed procedural misstep was invited error on plaintiff's part. (*In re Marriage of*

Maxfield (1983) 142 Cal.App.3d 755, 759 [invited error bars attack on order entered pursuant to a stipulation].)

2. The trial court reasonably construed counsel’s concession in plaintiff’s opening statement as a binding judicial admission; there was no other way to read it.

In plaintiff’s counsel’s opening statement, he repeatedly admitted that plaintiff’s legal representatives had authorized the October 2011 settlement offer to Ms. Scott’s insurer: “Offer and demand, no issue that we agree[d] to do that, that there was consent for an offer or a demand” (3RT 400; see also *ibid.* “[t]here’s no dispute about it. Of course we did. So that [*sic*] that’s not the issue”]; 3RT 401 [“no dispute” that the offer was authorized].) Then immediately upon returning from lunch break, he reemphasized that there is no dispute that plaintiff’s legal representatives authorized the settlement offer: “I want to just make sure that you understood the difference here between the offer and demand versus settlement. We agree a hundred percent. *My clients, we authorized a demand.* We didn’t know what legal things the lawyers would put in but that’s beside the point. We authorized, whatever the lawyers put in there was fine.” (3RT 403:16-21, italics added.)

An oral statement at trial by counsel “is a binding judicial admission if the statement was an unambiguous concession of a matter then at issue and was not made improvidently or unguardedly.” (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) The

trial court “may rely on concessions made by plaintiff’s counsel during oral argument to show there was no basis for a cause of action.” (*Physicians Committee for Responsible Medicine v. KFC Corp.* (2014) 224 Cal.App.4th 166, 180.) This was not some offhand comment. The concession here was considered and then repeated.

Where an attorney’s statement can be the “reasonably construed” as conceding a fact issue, that statement is binding on the client. (*Zelayeta v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 734; see *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 561 [plaintiffs’ counsel’s admissions to court had immediate effect of eliminating certain allegations from complaint].)

The opening brief acknowledges that plaintiff’s opening statement “included *discussion* that Ms. Carachure’s family approved of the demand (‘My clients, we authorized a demand.’ 3 RT 403:18).” (AOB 30-31, italics added.) But it asserts “trial counsel’s statement of the ‘six words’ was not intended to be an *admission* that *legal authority to settle* existed.” (AOB 32, italics added.) It argues that the court’s partial nonsuit was improper because the “six words” were ambiguous—first, because the words “[m]y clients” could have referred *only* to plaintiff but *not* to her family members, and second, because counsel didn’t specifically say that someone was acting with plaintiff’s “*legal authority as her agent.*” (AOB 30-33, italics added.) Neither reading holds water.

First, there is no reasonable interpretation of the plural phrase “[m]y clients” that would refer only to one plaintiff. When a word ends in the letter “s” that generally means more than one. Such a reading is compelled when read in context with the plural word “we” that follows. “My clients” included plaintiff’s husband and her guardian ad litem. *They* were the people who had legal authority to authorize the settlement offer.

Second, the word “authorize” means “[t]o give *legal* authority.” (Black’s Law Dict. (9th ed. 2009) p. 153, col. 2, italics added; Merriam-Webster Dict. <<https://www.merriam-webster.com/dictionary/authorize>> [authorize: “to invest especially with legal authority”].) Merriam-Webster’s dictionary’s on-point example leaves no doubt that counsel’s use of “authorized” in this case meant “legally authorized”: “She is *authorized* to act for her husband.” (Merriam-Webster Dict., original italics.)

There’s no other way to read plaintiff’s unequivocal concession: She and her family—i.e., “[m]y clients”—“authorized” the October 2011 settlement demand. The six unambiguous words spoken by counsel, by themselves, eliminated that fact issue from the case.

Third, when the trial court stated unequivocally that it understood counsel’s statement, counsel did not suggest that he had been misunderstood. (5RT 660.) To the contrary, counsel *stipulated* that the concession was “that plaintiff’s counsel [i.e., the Avrek firm] had authorization of her client to make the

settlement offer set forth in the letter of October 14th, 2011.”
(5RT 660-661.)

3. Plaintiff’s discovery responses, including formal admissions and other pre-trial statements, confirm plaintiff’s unequivocal client-authorization concession.

The opening brief’s assertion that plaintiff never conceded the settlement-offer-authorization issue ignores that counsel’s opening statement was just the culmination of repeated, binding concessions and admissions made by plaintiff and her counsel.

In multiple sworn discovery responses—to both interrogatories *and* requests for admission—plaintiff, through her guardian ad litem Maria Fuentes, admitted that the October 2011 settlement was authorized. For example, she admitted:

- “Maria Fuentes, Gabriel Fuentes, Jr., and Gabriel Fuentes, Sr., approved the making of a demand by Avrek Law Firm regarding Maria Carachure’s claims on her behalf.” (1RA 265, 316 [RFA No. 44]; 1RA 270, 335 [RFA No. 91; admitting they “approved” the offer]; see 1RA 91, 98 [RFA No. 15; plaintiff’s guardian ad litem “made the decision to make a policy limit demand ...”].)⁸

⁸ Maria Fuentes is plaintiff’s guardian ad litem, Gabriel Fuentes, Sr. is her husband, and Gabriel Fuentes, Jr. is her son.

- “Maria Fuentes was a part of a family group who discussed and approved the making of a demand for the settlement of Maria Carachure’s claims before October 14, 2011, [but] she did not know the exact terms of the demand letter which was sent.” (1RA 332-333 [RFA No. 78].)

Request for admission (RFA) responses are conclusive; they “eliminate the need for proof.” (*Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 864; *Jahn v. Brickey* (1985) 168 Cal.App.3d 399, 404 [RFAs “serve a function similar to the pleadings in a lawsuit in that they are ‘aimed primarily at setting at rest a triable issue so it will not have to be tried’”].) “Matters that are admitted or deemed admitted through [RFA] discovery devices are conclusively established in the litigation and are not subject to being contested through contradictory evidence.” (*Stover v. Bruntz* (2017) 12 Cal.App.5th 19, 30; see *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979 [matters admitted constitute binding judicial admissions]; Code Civ. Proc., § 2033.410.)

“While the discovery statutes do include a mechanism for withdrawing a deemed admission, a party may withdraw such an admission *only* on leave of court granted after notice to all parties. (Code Civ. Proc., § 2033.300, subds. (a) & (b).) The court may permit withdrawal of an admission *only* if the admission was the result of mistake, inadvertence, or excusable neglect and the opposing party will not be substantially prejudiced.” (*Stover*, at p. 30, italics added.) Here, plaintiff made no effort to withdraw her admissions, so her responses to Ms. Scott’s RFAs

established, as a matter of law, the facts stated therein. (See *Joyce v. Ford Motor Co.* (2011) 198 Cal.App.4th 1478, 1489 [party’s failure to withdraw or amend RFA response prior to nonsuit establishes fact].) These admissions act as a waiver to assert otherwise. (See, e.g., *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271 [a judicial admission “is a *waiver of proof* of a fact by conceding its truth, and it has the effect of removing the matter from the issues,” original italics].)

And these weren’t plaintiff’s only pre-trial admissions that the settlement offer was legally authorized. During two pre-trial hearings, plaintiff’s counsel himself also unequivocally admitted that the settlement offer was authorized:

- “And the testimony is going to be we authorized a settlement demand, not the settlement. That’s the whole issue here. *There is no dispute that we authorized Avrek to make a settlement demand.*” (2RA 615, italics added.)
- “Nobody’s *ever* going to dispute that we authorized an offer.” (2RT 194:25-26, italics added.)

Again, counsel unequivocally and deliberately conceded that client authorization was undisputed. Just as he said during opening statements, plaintiff’s counsel used the word “we” to indicate the offer was authorized by *all* plaintiff-clients. As plaintiff repeatedly admitted the offer was authorized both in discovery responses and in open court, there was no reason to

have a trial on that issue.⁹ Accordingly, when trial counsel made the same admission during opening statement, partial nonsuit on that issue was warranted. The ruling must be affirmed.

Plaintiff's argument at trial was that Ms. Scott and her carrier had not adequately accepted the authorized offer made on her behalf. The jury unanimously rejected that theory, a rejection plaintiff does not challenge on appeal. Her other theory, not explained, appears to have been that a party who makes an offer gets to back out of that offer (or at least needs to reconfirm it) once it is accepted. But no law supports such a proposition. To the contrary, a final, binding contract is formed once an offer is accepted. (See *J.B.B. Investment Partners Ltd. v. Fair* (2019) 37 Cal.App.5th 1, 11.) Only a counteroffer could have vested a choice with the plaintiff as to whether she wanted to "accept" that counteroffer. But the jury rejected any notion that Ms. Scott's carrier made a counteroffer in response to the demand (2AA 361), and the opening brief does not challenge that finding.

The bottom line: There was a client-authorized offer which the jury unanimously found was properly accepted. That created a binding settlement contract.

⁹ Plaintiff also admitted settlement authorization in multiple interrogatory responses. (See p. 31, *ante*.) While not "judicial admissions" per se, they confirm that the trial court's properly construed counsel's concession that led to the partial nonsuit.

III. THE TRIAL COURT WAS MORE THAN JUSTIFIED IN APPROVING THE SETTLEMENT FOUND BY THE JURY.

The opening brief next claims the trial court lacked power to approve the settlement agreement that the jury found existed. (AOB 36-38.) Not so.

A. Authorization of a guardian’s settlement is a discretionary, not jurisdictional, issue.

It is undisputed that the trial court properly appointed a guardian ad litem to represent plaintiff’s interests. (1AA 131; Code Civ. Proc., § 372, subd. (a)(1).) As a matter of law, many guardian ad litem acts on behalf of an incapacitated party require court approval. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 644.) Court approval is required where, as here, the guardian ad litem has agreed “to compromise” or settle the incapacitated party’s claims. (§ 372, subd. (a)(1); *Dacanay v. Mendoza* (9th Cir. 1978) 573 F.2d 1075, 1078-1079.) Court approval ensures that the interests of the incapacitated party “have been fully and fairly considered.” (*County of Shasta v. Caruthers* (1995) 31 Cal.App.4th 1838, 1847, citing § 372.)

The opening brief vaguely claims, citing out-of-context language from a case not involving settlement approval, that a guardian’s request for a settlement approval is a jurisdictional prerequisite to a court’s approval. (AOB 34-36.) Wrong. No authority holds that a court’s approval of a guardian’s settlement on behalf of an incapacitated party—upon a finding that it would

be in the plaintiff's best interests—is a jurisdictional question. Indeed, the authorities are contrary. “Should a guardian ad litem take an action inimical to the legitimate interests of the [incompetent person], the court retains the supervisory authority to rescind or modify the action taken.” (*Golin, supra*, 190 Cal.App.4th at p. 644, brackets added by court; see also *Pearson v. Superior Court* (2012) 202 Cal.App.4th 1333, 1339 [section 372's purpose is “to protect the [incapacitated party] involved in litigation by adding an extra layer of scrutiny to the settlement of the [party's] claims”].)

As we discuss below, that's precisely what occurred here. The trial court's decision—squarely within its supervisory authority to ensure that plaintiff's representatives were making decisions in the plaintiff's best interests—was not jurisdictionally barred. Rather, in light of her guardian's and counsel's gamesmanship, the court had inherent authority and discretion to approve the settlement.

B. The trial court's duty to protect plaintiff's rights gave it ample inherent authority to approve the settlement in its discretion over the guardian's objections.

In the guardian ad litem context, courts have “inherent power summarily to enforce a settlement agreement with respect to an action pending before it.” (*Dacanay, supra*, 573 F.2d at p. 1078.) Under Code of Civil Procedure section 372, a trial court can decide whether to approve a compromise even *without any*

formal motion—including sua sponte, “ex parte, in chambers.”
(*Pearson, supra*, 202 Cal.App.4th at p. 1337, fn. 2.)

As applied here, that means the trial court had ample discretionary power to decide—even sua sponte—that approving and enforcing the settlement was in plaintiff’s best interests, and that not doing so would be contrary to plaintiff’s interests. (2AA 328; *Scruton v. Korean Air Lines Co.* (1995) 39 Cal.App.4th 1596, 1607-1608 [court determines whether guardian’s settlement would be in the plaintiff’s best interests]; see also *Estate of Escobedo v. City of Redwood City* (N.D.Cal. Mar. 2, 2006, No. C03-03204 MJJ) 2006 WL 571354, at pp. *4, *12 [magistrate judge correctly applied *Scruton* standard in finding that repudiation was inimical, contrary or adverse to minor’s best interests based on all of the evidence before him].)¹⁰

As we show below, substantial evidence supports the court’s findings made within its proper exercise of these inherent powers.

¹⁰ Unpublished district court cases are persuasive authority where they involve similar facts. (See *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1432, fn. 6 [“[a]lthough not binding precedent on our court, we may consider relevant, unpublished federal district court opinions as persuasive”].)

C. Substantial evidence supports the trial court’s discretionary finding that the settlement, which the jury unanimously found existed, was in plaintiff’s best interests.

In deciding whether to approve a guardian ad litem’s settlement made on behalf of an incapacitated party, the court has a *duty* to ensure that the incapacitated person’s “rights are protected.” (*Scruton, supra*, 39 Cal.App.4th at p. 1605.) A guardian ad litem cannot override the trial court’s duty to the incapacitated party by unjustifiably repudiating a settlement. *Scruton* and *Dacanay*, cited in the opening brief (AOB 37), hold that, where a guardian ad litem settles a ward’s claims, the trial court must approve it, absent a *justified* repudiation of the settlement by the guardian (*Dacanay, supra*, 573 F.2d at p. 1080; *Scruton, supra*, 39 Cal.App.4th at pp. 1605-1606). A guardian ad litem cannot stand in the way of a settlement in the plaintiff’s best interests: “[A]n obdurate guardian ad litem cannot with impunity foreclose the court from directing a proposed settlement.” (*Dacanay*, at p. 1080.)

Dacanay and *Scruton* involved minor wards whose guardians, upon learning new information, repudiated the agreements. (*Dacanay*, at pp. 1076-1078; *Scruton*, at pp. 1601-1602.) Both courts allowed the guardians to do so because they had good cause to repudiate the agreements at issue. (*Scruton*, at pp. 1604-1608; *Dacanay*, at pp. 1077-1079.) Both recognized, however, that the ultimate power to determine the plaintiff’s best interests lies with the court.

Here, in contrast, plaintiff's guardian did not repudiate the settlement, and even made it clear at trial that she would *never* repudiate it. (See 2AA 265-266, 278, 304 ["You can write down in your notes, Your Honor, 'Plaintiff is not repudiating [the] demand.'... We are not repudiating [*sic*] any demand at all Never has [that happened] and never will."].) But, even had plaintiff's guardian sought to repudiate the settlement, substantial evidence supports the court's proper exercise of its inherent power to approve the settlement over the guardian's purported objection.

In approving the agreement that the jury unanimously found to exist, the trial court made three express findings:

- **No settlement repudiation.** "Plaintiff does not specifically repudiate the settlement, nor does she provide and [*sic*; any] substantive opposition to the settlement."
- **Guardian ad litem not acting in plaintiff's best interests.** Plaintiff's failure to move the court to approve the settlement agreement—"whether due to a litigation strategy or otherwise"—was "adverse to the best interests of Maria Carachure."
- **Settlement in plaintiff's best interests.** "[A]fter consideration of the evidence, the settlement is in the best interests of Maria Carachure[;] the insurance funds which will be paid in settlement are the only funds available to her."

(2AA 328.)

Substantial evidence supports these findings. (See *Guardianship of Brown* (1976) 16 Cal.3d 326, 337-338 [court's findings as to whether guardian ad litem was acting in plaintiff's best interests are reviewed for substantial evidence].)

The circumstances of this case uniquely required the trial court to satisfy its legal duty to the incapacitated plaintiff, as her legal representatives did not repudiate the demand that the jury had found created a binding settlement agreement. (2AA 265-266, 278, 304, 328.) But they also refused to petition the court to approve it. (7RT 1116-1117.) In other words, they sought to leave plaintiff in a legal limbo.

The trial court, thus, properly lived up to its duty to protect plaintiff's rights by exercising its "inherent power" and "authority to unilaterally consider the approval of the settlement," because it found the settlement to be in plaintiff's "best interests." (2AA 328.)

Absent the trial court's approval, the settlement would have remained in permanent limbo, with the guardian ad litem apparently being able to *forever* claim that she was empowered to repudiate it without ever actually doing so. Had the court permitted the guardian to endlessly reserve the right to repudiate the settlement, it would have prevented the settlement funds from *ever* being paid to plaintiff. Substantial evidence showed that the guardian's stance on repudiation was disingenuous and adopted for perceived strategic gain in the

litigation—not to promote plaintiff’s best interests. The guardian ad litem’s settlement-related conduct was arbitrary and capricious in the sense that her conduct was “inimical to the best interests of the court’s ward.” (*Dacanay, supra*, 573 F.2d at p. 1080; accord, *Scruton, supra*, 39 Cal.App.4th at pp. 1607-1608 [same].) Accordingly, the trial court acted within its discretion and power to unilaterally approve the settlement. The guardian’s steadfast refusal to seek court approval of the settlement contradicted plaintiff’s best interests.

In contrast, substantial evidence supports the court’s finding that the settlement *was* in plaintiff’s best interests and should be enforced. As the insurer fully accepted a policy-limits offer, there is no prospect of an insurance bad-faith claim for excess of policy limits. Therefore, the settlement will provide plaintiff with a *guaranteed*—indeed, her *only*—monetary recovery. And, it will do so now—sooner rather than later.

It is undisputed that Ms. Scott had no substantial assets at the time of the accident. (2AA 265 ¶ 2, 270.) And the settlement offer that Ms. Scott accepted was for the full limits of her insurance policy. (2RA 727, 733.) The policy-limits settlement, therefore, was the *only* source of recovery available to plaintiff, and any judgment against Ms. Scott could be readily discharged in bankruptcy.

There is simply no other money plaintiff can recover from the impecunious Ms. Scott. As such, the guardian’s refusal to file a petition to seek approval of the settlement agreement—which the jury found was validly formed—was necessarily “arbitrary

and capricious” because, unlike in *Scruton* and *Dacanay*, where the guardians learned new information that justified their pre-approval settlement repudiation, there was no factual reason here to repudiate the settlement agreement.

The trial court acted well within its power in approving the settlement in plaintiff’s best interests.

IV. PUNITIVE DAMAGES ARE PROPERLY OUT OF THIS CASE.

Finally, the opening brief claims it was error for the trial court to strike plaintiff’s allegations and the prayer supporting punitive damages, including conclusory allegations that Ms. Scott’s conduct was fraudulent, oppressive, or malicious. (AOB 38-50; 1AA 202.) The settlement agreement moots the issue. But even if not, the opening brief shows no basis to reinstate a punitive-damages claim.

A. The settlement moots any punitive damages issue.

The bifurcated trial’s entire purpose was to determine whether a valid settlement agreement existed. (See 2AA 360-362.) The jury, by special verdict, found that the carrier validly accepted the settlement offer creating a binding agreement. (*Ibid.*)

That binding settlement agreement operates as a complete bar of her claims: “[T]he merits of the original controversy are no longer in issue where a compromise agreement is made in good faith and without fraud, duress or undue influence.”

(*Argonaut Ins. Exchange v. Industrial Acc. Commission* (1958) 49 Cal.2d 706, 711.) No fraud, duress, or undue influence is claimed. “Ordinarily, such a compromise agreement is binding upon the parties and becomes the measure of their rights.” (*Ibid.*; accord, *A.L.L. Roofing & Bldg. Materials Corp. v. Community Bank* (1986) 182 Cal.App.3d 356, 359 [pre-judgment settlements are decisive of parties’ rights and bar reopening the issues settled].)

By settling the dispute, any punitive damages claim “has been rendered moot” and has been “superseded by the settlement agreement.” (*Ebensteiner Co., Inc. v. Chadmar Group* (2006) 143 Cal.App.4th 1174, 1180-1181.) Thus, the court’s order striking punitive damages allegations from the operative complaint is irrelevant.

In any event, the court properly struck plaintiff’s conclusory, unsupported allegations.

B. The conduct—unintentionally failing to wear glasses while driving—is not “malice.”

1. Standard of review.

The trial court’s order striking plaintiff’s punitive damages allegations is reviewed de novo by looking to the complaint’s allegations and assuming their truth. (*Turman v. Turning Point of Central California, Inc.* (2010) 191 Cal.App.4th 53, 63.) To state a prima facie claim for punitive damages, plaintiff had to “set forth the elements as stated in the general punitive damage statute, Civil Code section 3294.” (*Ibid.*) “These statutory

elements include allegations that the defendant has been guilty of oppression, fraud or malice.” (*Ibid.*, citing Civ. Code, § 3294, subd. (a).)

The statute requires the alleged conduct to have been “despicable.” (Civ. Code, § 3294, subds. (a), (c)(1)-(2) [requiring “despicable” conduct as an element of implied malice or oppression]; *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 331 [“despicable” is a material element of punitive damages claim].) “Despicable conduct” means conduct that is “so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.” (*Mock*, at p. 331.) “Such conduct has been described as having the character of outrage frequently associated with crime.” (*Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 333 (*Johnson & Johnson*).)

Nothing here rises anywhere close to that level.

2. Plaintiff does not assert intentional conduct.

Punitive damages are generally reserved for intentional torts. (*Lackner v. North* (2006) 135 Cal.App.4th 1188, 1212.) Here, the only remaining claims in plaintiff’s operative first amended complaint are negligence-based claims. The complaint alleged intentional infliction of emotional distress (IIED) (1AA 138-139), but the court summarily adjudicated that claim after plaintiff filed no opposition (1RA 342-344). Plaintiff doesn’t challenge, and thereby waives any challenge to, that ruling.

As stated in the opening brief, the gravamen of plaintiff's complaint is that Ms. Scott was obligated to wear corrective lenses to drive, but she chose not to wear lenses on the day in question, and then told the investigating officer that she was wearing lenses. (AOB 39; 1AA 133-135.)

Nowhere in the complaint does plaintiff allege intentional conduct. (1AA 133-139; compare AOB 48-50 [asserting despicable conduct in conscious disregard of plaintiff's safety and rights].) Her decision not to oppose Ms. Scott's successful motion for summary adjudication of her IIED claim further confirmed that reality: There is *no* intentional conduct alleged that could support punitive damages.

**3. As a matter of law, Ms. Scott's
unintentional neglect in wearing
corrective lenses was not despicable.**

**a. Punitive damages require
despicable conduct where, as here,
no intentional conduct is at issue.**

“When there is no evidence the defendant intended to harm the plaintiff, there must be evidence of conduct that is both willful *and* despicable.” (*Johnson & Johnson, supra*, 37 Cal.App.5th at p. 332, original italics; see also *Pacific Gas and Electric Company v. Superior Court* (2018) 24 Cal.App.5th 1150, 1160-1161 (*PG&E*) [“despicable” and “willful” added to statute in 1987].)

When the Legislature amended the punitive damages statute to require “despicable conduct,” it represented “a new substantive limitation on punitive damage awards.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) “As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests.” (*Ibid.*)

The Legislature obviously believed that the limitations on punitive damages were inadequate, so it chose a word to further limit such awards to circumstances where the defendant’s conduct was truly heinous and reprehensible. It chose the word “despicable” (Civ. Code, § 3294, subd. (c)(1)-(2))—a word that courts had previously reserved to describe aggravated conduct such as forcible sexual assault, racially motivated shootings, and child stabbings. (See, e.g., *People v. McElrath* (1985) 175 Cal.App.3d 178; *People v. Adams* (1982) 137 Cal.App.3d 346; *People v. Carter* (1983) 144 Cal.App.3d 534.)

Mere negligence—even gross negligence or recklessness—has never been sufficient to justify punitive damages. (*Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894; see *Lackner, supra*, 135 Cal.App.4th at p. 1213 [reckless conduct insufficient to support punitive damages as a matter of law]; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287 [carelessness and ignorance do not justify punitive damages]; *Aquino v. Superior Court* (1993) 21 Cal.App.4th 847, 856 [negligent infliction of emotional distress]; *Flyer’s Body Shop Profit Sharing Plan v.*

Ticor Title Ins. Co. (1986) 185 Cal.App.3d 1149, 1155 [reckless conduct is insufficient to justify punitive damages]; *Woolstrum v. Mailloux* (1983) 141 Cal.App.3d Supp. 1, 10 “[c]onduct which may be characterized as unreasonable, negligent, grossly negligent or reckless does not satisfy the highly culpable state of mind warranting punitive damages”].)

There was nothing “despicable” about Ms. Scott’s alleged conduct. She negligently failed to wear corrective lenses while driving. There’s no allegation that she could not see at all without her lenses. Her vision may have been less than it could have been, but that is not despicable.

Because plaintiff failed to allege that Ms. Scott conducted herself in a way that would support malice allegations, her claim for punitive damages were properly stricken.

b. *Lackner* prohibits punitive damages awards where, as here, the plaintiff was injured in an unintentional collision with the defendant.

Lackner v. North, supra, 135 Cal.App.4th 1188, compels affirming the court’s order striking punitive damages.

There, an advanced snowboarder raced against his friends down a particularly steep slope at Mammoth Mountain, directly into a “rest area” where several skiers were standing. (135 Cal.App.4th at pp. 1194-1195, 1201.) Despite that skiers were obviously in the rest area directly in his path, he made no attempt to brake until moments before he collided with the

plaintiff, throwing her 50 feet into the air, and causing her to suffer multiple severe injuries. (*Id.* at p. 1195.)

The plaintiff sought punitive damage for what she alleged to be reckless conduct. (*Ibid.*) The trial court summarily adjudicated plaintiff's punitive damages claim in defendant's favor. On appeal, *Lackner* affirmed. (*Id.* at p. 1214.) It held that defendant's behavior was not despicable, so plaintiff's "claim for punitive damages fail[ed] as a matter of law." (*Id.* at p. 1209.) *Lackner* reaffirmed our Supreme Court's statement in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, that the demand for evil motive is *central* to the statute's spirit; the punitive damage statute is ""violated by an award founded upon recklessness alone."" (*Lackner*, at p. 1211, quoting *Taylor*, at p. 895.)

Taylor allowed punitive damages in personal injury cases against intoxicated drivers. (24 Cal.3d at pp. 899-900.) But, as *Lackner* emphasized, *Taylor* was decided before the Legislature's amendment of the statute to require "despicable" conduct. (*Lackner*, at p. 1211.) *Lackner* also insinuated that driving while under the influence—which is more blameworthy than recklessly snowboarding into a rest area—would now be insufficient to satisfy the "despicable" conduct requirement. (*Id.* at pp. 1211-1212 & fn. 14.)

Here, the alleged conduct is far less blameworthy than either of those circumstances. It is true that Ms. Scott was required to wear corrective lenses when driving and failed to do so. (1AA 133-137; see AOB 39, 49.) But she did not intend to injure anyone. Even if Ms. Scott knew that she needed her

glasses to see more clearly, and even if she chose to drive anyway, such conduct would not be comparable to the extremely reckless behavior in *Lackner*, which was found not “despicable.” (135 Cal.App.4th at p. 1209.) Nor would it rise anywhere near the level of drunk-driving misconduct alleged in *Taylor*, which may not even qualify for punitive damages after the despicability requirement was added to the statute.

The opening brief cites *no* case in which an unintentional collision resulted in punitive damages. (See AOB 40-50.) It cites *no* case where simply failing to take an additional safety measure justified punitive damages. *Lackner*, decided in 2006, acknowledges that no prior cases held that a defendant’s conduct was despicable where it involved an unintentional collision. (135 Cal.App.4th at p. 1212.) And we have uncovered no post-*Lackner* decision awarding and upholding punitive damages following an unintentional collision. (Cf. *PG&E*, *supra*, 24 Cal.App.5th at p. 1161 [“punitive damage awards have been reversed where the defendant’s conduct was merely in bad faith and overzealous ..., or the defendant took action to protect or minimize the injury to the plaintiff,” quoting *Lackner*, at p. 1212].)

Lackner and the despicability requirement foreclose the possibility of punitive damages where, as here, plaintiff alleged conduct resulting in an unintended collision.

c. The opening brief's authorities are inapposite.

Most of the car-accident authorities cited in the opening brief predate the addition of “despicable” to Civil Code section 3294, and thus, do not address that additional, *substantive* requirement. (See AOB 40-43.) Courts must carefully distinguish cases decided prior to the amendments adding the “despicable conduct” requirement to Civil Code section 3294. (See *College Hospital, supra*, 8 Cal.4th at p. 725.)

Plaintiff's remaining authorities (AOB 43-50) all involve courses of serious misconduct that are oceans away from the facts alleged here:

- *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250. *Romo* is a products liability case in which a car manufacturer's design and production of a particular vehicle model was found to be “malicious or despicable.” (*Id.* at p. 1141.) It does not stand for the proposition claimed in the opening brief: that alleging conscious disregard of the rights or safety of the plaintiff coupled with the creation of consciously disregarded increased risks “which ‘could kill people’” is enough for punitive damages in all cases. (AOB 43-44.) It simply holds that where a car manufacturer puts into the stream of commerce a vehicle which it *knows* has a propensity to roll over and without adequate crush protection, entitlement to punitive damages is a jury question. (*Romo*, at p. 1141.) There is no allegation here

that Ms. Scott *knew* that by not wearing corrective lenses she was endangering others.

- *Buell-Wilson v. Ford Motor Co.* (2006) 141

Cal.App.4th 525, disapproved on another ground in *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21. Like *Romo*, *Buell-Wilson* is a product's liability/vehicle rollover case. (*Id.* at pp. 531, 559.)

The manufacturer's conduct in that case was despicable: It *knew* that it had designed a defective vehicle, but it released the knowingly dangerous vehicle into the stream of commerce exposing consumers to a risk of serious injury. *Buell-Wilson* held that substantial evidence supported the jury's punitive damages award in *that* context. (*Id.* at pp. 559-561.)

- *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928.

The defendant knew he would be driving under the influence after ingesting methamphetamines and packing up his car with a suitcase full of illegal drugs for a vacation. (*Id.* at p. 936.) As he approached an intersection, driving over the speed limit, he could see a red traffic light within plenty of time and distance to stop but he never even attempted to brake; he just assumed the light would turn green in time. (*Id.* at p. 931.) The jury found this extremely reckless conduct was not malicious. (*Id.* at p. 932.)

The extreme conduct in *Sumpter*, which was not malicious, does not support plaintiff's argument that the trial court erred in striking punitive damages on the grounds of insufficient allegations supporting willful, wanton, malicious, oppressive, despicable, or outrageous conduct in conscious disregard of

plaintiff's rights. (1AA 143-144, 202.) Ms. Scott's unintentional conduct did not rise to a level that could support such allegations.

None of plaintiff's cases support reversal.

4. Regardless, an unintentional tort cannot be transformed into "malicious" conduct via conclusory allegations or extrinsic evidence.

As a matter of law, "accidentally harmful conduct" does not warrant punitive damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1181.) Where, as here, a complaint only claims accidental conduct and fails to state *facts* showing that the defendant acted with malice, oppression, or fraud (see 1AA 132-140), the trial court properly strikes the conclusory statements alleging such conduct (*Turman, supra*, 191 Cal.App.4th at pp. 63-64; *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1036, 1042 [absent supportive fact assertions, conclusory punitive damages allegations properly stricken]).

Plaintiff's complaint here is devoid of any factual assertions supporting a conclusion that Ms. Scott acted with oppression, fraud, or malice. To suffice, a conclusory "oppression, fraud, and malice" allegation must be supported by other *factual* allegations. (See *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6-7.)

The opening brief drastically overstates the complaint's allegations, relying on a hearsay police report not alleged in, or attached to, the complaint. It claims Ms. Scott "deliberately and consciously decided to incapacitate herself," drove "at excessive

speed,” was “zigzagging around a stream of traffic in an area that had many pedestrians and bicyclists,” and “moved her car to the extreme right side of the roadway into the bicycle lane.” (AOB 43, 49.) Nowhere in the complaint does plaintiff allege any of these facts. At no time did she suggest to the trial court that she could make additional factual allegations. And nowhere does the opening brief provide authority that it can rely on extrinsic evidence not attached to the complaint to challenge the trial court’s ruling on the pleading. (Cf. AOB 38 [allegations must be read as a whole, all parts in their context, and assume their truth].)¹¹

Assuming the truth of plaintiff’s *actual* allegations, many words can be used to describe Ms. Scott’s behavior in neglecting to wear her corrective lenses on the day of the accident: “unwise,” “negligent” or even “grossly negligent.” But “despicable” is not one of them. Plaintiff’s counsel’s addition of “willful” and “malicious” to the complaint “adds nothing to the pleadings except to convey a sense of outrage on the part of the appellant.” (*Marin v. Jacuzzi* (1964) 224 Cal.App.2d 549, 552.) Outrage provides no basis for reversal. The Court should affirm.

CONCLUSION

An accident that causes an injury is always a bad result. But, where the client authorizes an offer to accept insurance

¹¹ Plaintiff did not oppose, and thus conceded, the undisputed fact Ms. Scott later proffered that she was driving under the speed limit. (1RA 255 ¶ 4 [unopposed separate statement].)

policy limits to settle the claim (as plaintiff *repeatedly and unequivocally* admitted), the carrier properly accepts that offer (as the jury unanimously found), and the court approves the settlement, the contract is binding. The trial court properly enforced that agreement here and properly acted to ensure plaintiff would receive the full policy limits she was due, despite her guardian ad litem's obstructionism. It is not clear what plaintiff's object is here. The carrier accepted her authorized offer for full policy limits. It did so in *2011*. It is time for plaintiff's counsel's games to end.

The settlement moots any punitive damage claim. But even if not, no conduct alleged rose to the contemptible level necessary to warrant punitive damages.

This Court must affirm the judgment.

Date: January 22, 2021

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENT'S BRIEF** contains **13,929** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: January 22, 2021

/s/ Gary J. Wax

Gary J. Wax

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On January 22, 2021, I served the foregoing document described as: **RESPONDENT'S BRIEF** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

By Mail: by placing a true copy thereof enclosed in sealed envelopes addressed as below and delivering such envelope by mail. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on January 22, 2021, at Los Angeles, California.

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

/s/ Leslie Y. Barela

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