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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BETTY JO WALKER et al., Plaintiffs and Appellants, v. FARMERS INSURANCE EXCHANGE, Defendant and Appellant.	B188427 (Los Angeles County Super. Ct. No. BC 312281)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dunn, Judge. Affirmed.

The Quisenberry Law Firm, John N. Quisenberry, Heather M. McKeon; Esner, Chang & Ellis, Andrew N. Chang, Stuart B. Esner and Gregory R. Ellis for Plaintiffs and Appellants.

Horvitz & Levy, Barry R. Levy and Mitchell C. Tilner for Defendant and Appellant.

* * * * * *

Respondents Betty Jo Walker and Linda Williams brought an action against appellant Farmers Insurance Exchange (Farmers)[1] for breach of contract and bad faith. The jury returned a verdict for compensatory damages in excess of $1.5 million and awarded punitive damages in the amount of $8,338,255.73. The trial court conditionally granted Farmers motion for a new trial on the award of punitive damages, unless respondents agreed to a reduction of the punitive damage award to $1.5 million. Respondents agreed to the reduction. Farmers appeals, seeking to set aside the punitive damage award. Respondents cross-appeal, contending that the trial court erred in reducing the award of punitive damages and also erred in excluding certain evidence related to the claim for punitive damages. We affirm.

FACTS

1. The Accident

Respondents are life-long friends and share a condominium at 5434 Village Green Court in Los Angeles. Respondent Walker is 76 years old; the bulk of her income is $800 per month in Social Security payments; respondent Williams is an office worker earning about $2,000 per month. As condominium owners, respondents belonged to the Village Green Homeowners Association (HOA).

Walker owned a 1990 Honda. On the afternoon of June 1, 2001, while Williams was at work, Walker was proceeding towards her detached garage to get her car. The garages at Village Green are not owned by the individual condominium owners and are located in a common area. When Walker saw her garage door, she pressed the remote garage door opener. Another tenant, Juanita Wasson (not a party hereto), was struck by the garage door as it was opening; Wasson was thrown to the ground and suffered a broken hip.

2. The Policy

Farmers insured HOA under a "Condominium -- Premier" policy. The policy provided coverage for claims of bodily injury. The named insured was HOA. The policy

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[1] Two other insurance companies named by respondents' action were dismissed prior to the trial.

also stated that an insured was: "Each other unit-owner of the described condominium, but only with respect to that person's liability arising out of the ownership, maintenance or repair of the portion of the premises which is not owned solely by the unit-owner or out of that person's membership in the Association."

3. June 2001 -- January 2002

About two and a half months after the accident, Wasson made a claim against HOA, which reported the claim to Farmers.

Farmers assigned the claim to John Hughes, who described himself as a "General Adjustor." He started with Farmers in 1988; from 1994 to the time of trial, he handled homeowners association claims. Hughes reported to "Commercial Team Leader" Steve Hedglin, who in turn reported to "Commercial Claims Office Manager" Thomas Weindorf.

Hughes began by contacting HOA board member Edna Ridgley, who told him that Wasson had been struck by a garage door operated by remote control. On August 23, 2001, Hughes visited the scene of the accident and took Wasson's statement. In substance, Wasson stated that someone had activated a garage door by remote control, and that the opening door threw Wasson across the driveway, breaking her hip. Hughes prepared a report summarizing HOA's coverage and the basic facts of the claim. Hedglin reviewed the report on September 25, 2001, and made the following notation: "Need insured statement. Need scene pictures in file. Need liability analysis. Liability questionable."

In October 2001, at the request of Wasson's attorney, Farmers paid Wasson $5,000 under HOA's coverage for medical expenses.

The next event was a report prepared by Hughes and sent to Hedglin. The report noted that Wasson had a broken hip and had incurred approximately $75,000 in medical bills. The report also noted the possibility of contribution by the unit owner who had opened the garage door. However, the report noted that that this unit owner advised Hughes that she did not have any liability insurance to cover her for this accident.

The rest of the year was taken up with unsuccessful attempts to obtain a further statement from HOA's Ridgley. A notation by Hedglin made in November 2001 repeated that liability was unlikely.

On January 14, 2002, Hughes spoke with Wasson's attorney who offered to settle with HOA for medical expenses of about $71,000. Hughes told the attorney that he had not yet obtained a statement from HOA and that it was unlikely that Farmers would settle for the amount demanded.

4. February 2002 -- June 2002

Wasson filed her action on February 6, 2002; the named defendants were HOA and respondents.

Hughes received the complaint on March 6, 2002. He contacted Ridgley who told him that respondents were unit owners. Hughes did not think that respondents were insured or covered by the policy.

Farmers assumed HOA's defense without reservation. The case was ultimately assigned to attorney Michael O'Connor, who filed an answer on HOA's behalf. O'Connor also filed, but did not serve, a cross-complaint against respondents. A litigation report written by O'Connor shortly thereafter estimated that an adverse verdict could be in excess of $250,000 to $350,000. O'Connor's prediction turned out to be accurate. As we relate below, the eventual jury verdict in favor of Wasson was $321,406.

Respondents were served with the complaint on March 27, 2002. Respondent Williams went to HOA's Ridgley and told her that she had reviewed the CCR's for HOA and concluded that respondents were covered for liability because the accident occurred in a common area. Williams explained that she and respondent Walker did not carry homeowner's insurance because they were careful and only invited their lifelong friends who would not sue them.

Respondents retained the firm of Halverson & Associates. Respondents charged the retainer of $4,000 on a credit card, and continued to pay their legal bills by means of the credit card. Attorney Theresa Powell was assigned to handle their case.

Powell called Hughes and O'Connor and requested, informally, that Farmers defend respondents. These requests were denied, also informally. This led to a formal request by Powell set forth in a letter dated April 18, 2002. The letter pointed out that the accident occurred on Village Green common property, in an area maintained and managed solely by

Village Green, and that homeowners had no rights with regard to the use of the garage. When Hughes received this letter, he understood that he was under an obligation to act in good faith toward respondents, which meant, among other things, that he was to take account of facts that supported respondents. Hughes, however, concluded that respondents' potential liability had nothing to do with the ownership, maintenance or repair of the premises.

Farmers concedes that what now occurred violated Farmers' own protocol that was to be followed when a request to furnish a defense was denied by Farmers. Neither Hughes, Hedglin or even Weindorf had the authority to deny an insured's request for a defense. Only Weindorf's direct supervisor, zone manager Eric Sharp, had that authority. The protocol required the following steps: (1) upon receiving Powell's request to defend respondents, Hedglin would have reviewed the file to determine whether it presented a coverage question; (2) if he thought that there was such a question, he would have directed Hughes to prepare a coverage question review; (3) if Hedglin was satisfied with this review, he would forward it to Weindorf; (4) if Weindorf agreed, he would pass the matter on to Sharp; and (5) Sharp would make the final decision.

As it turned out, the decision to deny respondents a defense was made by Hughes and Hedglin. Hughes decided that there was a potential that respondents were individually liable since HOA had nothing to do with the garage door opener that respondent Walker used to open the garage; HOA had neither owned or furnished, nor had it operated, the garage door opener. Hughes concluded that respondents were not entitled to a defense on their individual liability; they were entitled only to a defense as HOA members. There is a short paper trail of notes exchanged between Hughes and Hedglin in which the two men agreed that Hughes theory of the matter was correct, and that Powell should be so informed. On June 3, 2002, Hughes wrote Powell a letter in which he denied respondents a defense for their individual liability arising from the use of the garage door opener. The letter stated that respondents would be represented collectively as HOA members.

The initial decision made by Hughes and Hedglin to deny respondents a defense was not reviewed by either Weindorf or Sharp; it is another matter whether that decision was

effectively ratified by Farmers. As we note below, substantial evidence supports the jury's verdict that Farmers adopted or approved the decision after it was made. On June 14, 2002, in an internal memo, Hughes stated that the tender of a defense had been denied, based on respondents' individual liability. While this memo was sent to Weindorf, at trial Weindorf testified that he never saw this memo. According to Weindorf, the usual procedure was followed, which was to place the memo in the file without the memo being shown to, and having been read by, Weindorf. All the same, Weindorf acknowledged at trial that the denial of a defense was a "very very" important subject.

Weindorf's first and only involvement with Wasson's action was in March 2003 when he granted trial authority, which meant that he authorized that the action would be tried rather than settled.

5. Respondents Settle; Wasson's Case Goes to a Verdict

The burden of the legal fees incurred in defending Wasson's action was very onerous for respondents. By May 2003 and prior to trial, respondents could no longer manage the expense and they instructed Powell to settle, which she did for $6,500. Given their exposure, respondents were lucky to settle for this amount. The funds for the settlement came from the $4,000 retainer respondents had paid Powell's firm, and from a loan of $2,500 from a personal friend. In other words, it was all borrowed money. When they settled, respondents owed fees of over $45,000. By the time of the trial of the instant case, they still owed $25,000 on the credit card that respondents used to finance the legal fees.

Wasson's action went to a verdict of $321,406. The jury allocated 10 percent of fault to Wasson, 10 percent to respondent Walker and 80 percent to HOA.

PROCEDURAL HISTORY

Respondents filed their action against Farmers in March 2004.

Based on stipulated facts, the parties tried to the court the issue whether Farmers had a duty to defend respondents in the Wasson action. The trial court found that, while it was not unreasonable for Farmers to conclude that Wasson had been seeking damages based on respondents' independent negligent act of using the garage door opener, there was a potential that respondents would be liable on a claim arising out of the ownership,

maintenance or repair of the common area. Accordingly, the court concluded that Farmers had a duty to defend respondents in the Wasson action.

The case went to trial on the amount of damages arising from Farmers' breach of its duty to defend respondents. At the close of respondents' case, Farmers moved for a nonsuit on punitive damages on the grounds that there was no clear and convincing evidence of oppression or malice, that neither Hughes or Hedglin was a managing agent, and that there was no evidence that anyone in authority ratified the conduct of Hughes and Hedglin. The motion was denied.

The jury returned the following special verdicts:

(1) Farmers unreasonably refused to defend respondents. (2) Respondents expended $45,431.80 in defending the Wasson action, and $6,500 in settling that action. (3) Each of the two respondents was awarded $750,000 for emotional distress. (4) Farmers had engaged in conduct with oppression; the jury found that Farmers had *not* engaged in conduct that was malicious or fraudulent. (5) One or more officers, director or managing agents of Farmers knew of the conduct and adopted or approved it after it occurred. (6) The amount of $8,338,255.73 was awarded in punitive damages. The parties stipulated that the award of punitive damages is one percent of Farmers' net worth.

In posttrial proceedings, the trial court awarded respondents attorney fees of $142,778 pursuant to *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 (where insurer's tortious conduct compels insured to retain counsel to obtain benefits under policy, insurer is liable for attorney's fees). The total judgment, including attorney fees, was $10,032,965.53.

Farmers moved for a judgment notwithstanding the verdict and for a new trial on the grounds, among others, that had supported its motion for a nonsuit. The trial court denied the motion for a judgment notwithstanding the verdict and granted the motion for a new trial, unless respondents agreed to a reduction of punitive damages to $1.5 million. Respondents agreed to the reduction. As noted, both sides have appealed.

DISCUSSION

1. Substantial Evidence Supports the Award of $1.5 Million in Punitive Damages

a. The Standard of Review

Farmers contends that respondents did not prove by clear and convincing evidence that Hughes or Hedglin acted with oppression when they denied respondents' request for a defense. Specifically, Farmers contends: "This should be an easy case. No reasonable jury could have found by clear and convincing evidence[2] that Hughes or Hedglin committed despicable acts. Their decision was not vile, base, contemptible, miserable, wretched or loathsome. It was not the sort of decision that would be looked down upon or despised by ordinary decent people.[3] It did not come close to the level of outrage associated with a crime."

On appeal, the question is not whether there is clear and convincing evidence that Hughes' and Hedglin's conduct was oppressive in the sense of Civil Code section 3294 but whether there is substantial evidence that supports the jury's verdict that there was such conduct in this case. "We review the record for substantial evidence of circumstances warranting the imposition of punitive damages. We reject appellant's argument that a more stringent standard than the normal substantial evidence rule should apply due to the 1987 amendments to Civil Code section 3294, subdivision (a) which required that the trier of fact find 'clear and convincing evidence' of malice, fraud, or oppression. [Citations.] Despite the difference in the standard for the determination of this issue by the trier of fact, it has been held that in such circumstances the substantial evidence test applied by the reviewing

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2 "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).)

3 The jury was instructed in terms CACI (Judicial Council of California, Civil Jury Instructions) No. 3945 that "oppression" is defined as despicable conduct that subjected respondents to cruel and unjust hardships, and that "despicable conduct" is conduct so vile, base or contemptible that it would be looked down upon and despised by reasonable people.

court is not altered." (*Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576.) "That standard ['clear and convincing' standard] was adopted, however, for the edification and guidance of the trial court, and was not intended as a standard for appellate review." (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.)

We conclude that there is substantial evidence that supports the jury's verdict.

b. Hughes and Hedglin's Initial Decision Was Patently Wrong

As the court in *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 892, aptly observed, "a careless disregard for the rights of its insured and an obstinate persistence in an ill-advised initial position" on the part of an insurer can amount to oppression in the sense of Civil Code section 3294.

From the outset, Hughes and then Hedglin showed scant regard for respondents' rights. For one, it appears that no one from Farmers, including Hughes, ever contacted respondents to get their version of the events, even though this was required by Farmers internal procedures. This aside, the substance of Hughes' theory was that since respondent Walker owned and used the garage door opener, *both* respondents were "independently" liable. As we explain below, Hughes' theory of "independent" liability is his alone, misleading and wrong. But accepting this theory at face value for the moment, not even this theory justifies denying coverage to Williams, who was at work when the accident happened. Williams simply had nothing to do with the use of the garage door opener, when the door hit Wasson. Apart from Williams as the co-owner of the condominium, there was not even a colorable theory under which she could be "independently" liable. Denying Williams a defense was not only an inexcusable repudiation of Farmers' obligation, it was even wrong in terms of Hughes' own theory.

Hughes' theory of "independent" liability is both misleading and unsupported by insurance law. Under the policy, the question was whether Walker's use of the remote garage door opener arose from the "ownership, maintenance or repair of the portion of the premises which is not owned solely by the unit-owner" (the quotation is from the policy), i.e., the common area of the garages. When the issue is approached in these terms, it is hard to see why use of the door opener would not arise from the ownership of the garage, in

which event the act of using the opener is covered by the policy. A consideration whether the negligent act was "independent" diverts the analysis into irrelevant considerations, such as that it was Walker and not HOA as such who decided to use the door opener. While the negligent act must be covered by the policy (14 Couch on Insurance (3d ed. 2005) § 201:17, pp. 201-40 to 201-41),[4] there is nothing in the law of insurance that distinguishes between a covered act and one that is "independent," and not covered for that reason. On the other hand, if "independent" liability means a negligent act that is not covered by the policy (see fn. 4 & accompanying text), the term adds nothing and is only confusing; it is far better to address the actual issue directly, i.e., whether the terms of the policy cover the negligent act.

The fact is that Hughes' theory of "independent" liability was hand-tailored to justify the result that he reached, which was to deny respondents a defense. Had the correct test been applied, as it was by the trial court in finding that Farmers had a duty to defend respondents, the result would have been that respondents were entitled to a defense. Thus, from the very first the decision to deny a defense was based on patently invalid grounds, i.e., respondents' alleged "independent" liability.[5]

c. Farmers Affirms and Stands by the Initial Decision

Having made a very bad start, matters only got worse. In August 2002, Hughes left for another position with Farmers; neither he nor Hedglin had anything to do with the case after that date. Before Hughes left the case, he wrote a memo in June 2002 in which he noted that the tender of a defense had been denied, based on respondents' "individual" liability. Thus, the denial of a defense and the reason for that denial became a matter of Farmers' own records. There were two factors that were known to Farmers that gave ample notice of the seriousness of that decision. First, attorney O'Connor informed Farmers that

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[4] We mean by this that liability that does not arise from the ownership, maintenance or repair of the premises is not covered by the policy.

[5] We note in the margin the further fact that omnibus clauses of the kind found here that, in addition to the named insured, also name additional insureds are to be liberally construed in favor of the insureds. (8 Couch on Insurance, *supra*, § 111:7, pp. 111-14 to 111-16.) Needless to say, Hughes construction of the policy was anything but liberal.

Wasson could be expected to recover a verdict between $250,000 and $350,000; thus, there was every indication that Wasson's case, and therefore respondents' exposure, was substantial. Second, Hughes learned that respondents did not have liability insurance. Taken together, these factors meant that Farmers was on notice that respondents faced a potentially ruinous adverse judgment.

The next step taken by Farmers was Weindorf's decision in March 2003 not to settle and to proceed to trial. Weindorf met with Hughes' and Hedglin's successors and he reviewed the file. According to Weindorf's own testimony at trial, this meant that he read O'Connor's pretrial report and the materials in the file that reflected the "facts of loss" such as damages and injuries sustained. Even though it is rather hard to believe, Weindorf also testified that he never saw the memorandum prepared by Hughes in June 2002 that stated that respondents' tender of the defense had been rejected. In ruling on the posttrial motions, the trial court found on this issue: "The court finds there is substantial evidence for the jury to have found that he [Weindorf] did indeed see it, at least at the time of the trial authorization, and that he either saw it at or about the time it was received, or is charged with such responsibility to see it under his managerial position. Also, it was up to the jury to judge the credibility of the testimony as to whether he had in fact seen it earlier. The court finds that there is substantial evidence from which the jury could have reached this conclusion."

While we subscribe to the trial court's careful analysis of Weindorf's role, the fact that speaks most eloquently is that Weindorf rejected a settlement of the case and chose to go to trial. At this point, respondents were still in the case; they settled in May 2003, three months after Weindorf authorized the trial. We think that it is inconceivable that Weindorf made this decision without knowing that respondents were separately represented. This would lead him to ask why that was so; the answer was the Hughes/Hedglin decision to refuse the tender of the defense.

As the trial court noted, respondents' expert Petersen opined that Farmers conduct was unreasonable for three reasons. First, there was a failure to conduct an adequate investigation. Second, Farmers failed to communicate with respondents. Third, there was a

failure to appropriately evaluate coverage; coverage counsel was not consulted and there was no legal analysis of the question. Given that respondents faced financial ruin, we think that the third reason given by Petersen suffices. Exposing respondents to a substantial adverse judgment on the basis of a coverage decision that was never submitted by Farmers for review by a qualified person is not reasonable conduct on the part of the insurer. While this is not the only reason for the award of punitive damages, this failure on Farmers' part supports the jury's verdict.

d. Farmers' Contentions Are Without Merit

Relying on deposition testimony by *respondents*' expert, Farmers contends that the coverage question in this case was intricate and complicated and that, for this reason, Hughes and Hedglin cannot be faulted, especially to the point of awarding punitive damages. This misses the mark. The critical decision, of course, was denying respondents a defense. The basis of that decision was not an analysis of the "intricate" coverage question, but a theory made of whole cloth for the occasion, Hughes' theory of "independent" liability. Indeed, if the coverage question was intricate, and we do not think that this is necessarily so, Farmers should have referred the matter to coverage counsel. This it failed to do.

Farmers contends that Hughes' "misunderstanding" of the policy cannot support punitive damages. It is true that Hughes "misunderstood" the policy. But there was far more in this case than Hughes' misunderstanding. There were the facts that respondents were particularly vulnerable and known to be such by Farmers, that Farmers did nothing to correct, or even question, Hughes "misunderstanding," that Farmers internal procedures, which might well have averted the catastrophe respondents faced, were not followed, and that the coverage decision was patently wrong, to give only an incomplete list.

Farmers contends that there is no evidence that shows that Hughes or Hedglin acted in conscious disregard of respondents' right to a defense. The possibility that Hughes and Hedglin might have believed in good faith in the "independent" liability theory does not mean that Farmers, a very substantial insurance company, can adopt and act upon a patently wrong-headed theory that has no support in insurance law *to the substantial detriment of*

Farmers' insureds. In any event, the lack of any evidence that Hughes had at least *some* basis for his "independent" liability theory makes his good faith very questionable, especially when, based upon such a theory, he took it upon himself, in derogation of Farmers' own policy, to make a decision he had no right to make. This smacks more of arrogance than of good faith.

We are somewhat astounded by Farmers' argument that there is no evidence that respondents experienced cruel and unjust hardship. Farmers claims it is not "responsible" for respondents' decision to defend and settle Wasson's case. The substance of this argument is that respondents, not Farmers, made their own decisions to retain counsel, to defend the action, and to settle the case. But respondents never wished to make these decisions, which were thrust upon them by Farmers. The point, of course, is that respondents would not have had to retain counsel, defend the action and then settle the case with borrowed money if Farmers had complied with its duty and defended respondents. Given that respondents were elderly women of very limited means, we emphatically reject Farmers' contention that the prospect of financial devastation that respondents faced was not a cruel and unjust hardship. It is hard to imagine persons such as respondents who are more vulnerable and less able to fend for themselves, and therefore more dependent on their insurer. No one, perhaps least of all respondents, could contemplate with anything other than dread an expected verdict in excess of $250,000 for which there was no coverage. This is cruel and unjust hardship by any measure.

In sum, this is a case when the insurer's initial decision was patently wrong, when that decision exposed respondents, who were particularly vulnerable, to a calamitous outcome, when the insurer persisted on the course it had chosen without regard for the consequences, and without the slightest effort to review the correctness of the initial decision. We conclude that the verdict awarding punitive damages is supported by substantial evidence.

2. There Is Substantial Evidence That Farmers Ratified Hughes' and Hedglin's Decision

Farmers contends that respondents failed to prove by clear and convincing evidence that an officer, director or managing agent of Farmers committed, authorized or ratified any oppressive act.

The jury returned a special verdict that found that one or more officers, directors or managing agents of Farmers knew of the conduct and adopted or approved it. The question is whether there is substantial evidence to support this verdict; we find there is such evidence.

In ruling on the posttrial motions, the trial court found that Weindorf had midlevel management responsibility for approximately two-thirds of the claims in California and that this showed that he was a managing agent for purposes of punitive damage analysis. Farmers states that it is "debatable" whether Weindorf was a managing agent,[6] but that Weindorf could not have ratified the decision because there is no evidence that Weindorf actually knew that Hughes had denied the request for a defense or that he had done so "with oppression." Farmers states that the only contact Weindorf had with the file was in March 2003, when he authorized the trial.

We have already cited the trial court's findings concerning the credibility of Weindorf's denial that he ever saw in the file Hughes' June 2002 memo that stated the tender of the defense had been refused. Whether Weindorf was credible or not, the fact is that, when he authorized the trial, Weindorf must have known that respondents were separately represented. This means that Weindorf must have asked himself why that was so, and this of course led him to Hughes and Hedglin's decision to deny the defense. In sum, we find it wholly incredible that Weindorf made the decision to go to trial without also knowing that respondents were separately represented because their tender of a defense had been denied.

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6 Farmers does not really challenge the trial court's finding that Weindorf was a managing agent.

Respondents' dire situation would have been at once resolved if Weindorf in March 2003 had overruled the Hughes/Hedglin decision re the tender of respondents' defense, which Weindorf very clearly had the power to do. Weindorf, however, did nothing of the sort. Instead, Weindorf's decision to authorize to take Wasson's case to trial put respondents in the worst possible position. Weindorf's decision in March 2003 had two components to it: (1) Weindorf's confirmation of the decision Hughes and Hedglin had made to deny respondents a defense; and (2) to go to trial. The combination of these two components meant not only that respondents had been denied their right to a defense, they were being forced to go to trial. Given these circumstances, respondents were lucky to settle with borrowed money.[7]

There are two answers to Farmers' contention that there is nothing to show that Weindorf knew that the tender of a defense had been denied with oppression. First, Weindorf's own actions were, for the reasons stated immediately above, oppressive. Weindorf was well aware of the fact that respondents were in a very difficult position, as a result Weindorf's decision to go to trial and the decision to deny them a defense. Second, what was true about respondents' situation in March 2002, when the matter came to Weindorf's attention, was also true in June 2001, when the tender of the defense was denied. That is, Weindorf acted on the basis of the same set of facts on which Hughes and Hedglin acted. Those facts show that Farmers' conduct vis-à-vis respondents was oppressive.

We find that there is substantial evidence that Farmers, through Weindorf, ratified Hughes' and Hedglin's initial decision to deny respondents a defense.

3. The Trial Court's Order That Reduced Punitive Damages to $1.5 Million Is Affirmed

"In a series of decisions culminating in *State Farm* [*Mut. Automobile Ins. Co. v. Campbell* (2003)] 538 U.S. 408 [(*State Farm*)], the United States Supreme Court has determined that the due process clause of the Fourteenth Amendment to the United States Constitution places limits on state courts' awards of punitive damages, limits appellate

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[7] As it was, the settlement was quite generous on Wasson's part. Under the eventual judgment, respondent Walker would have owed in excess of $31,000.

courts are required to enforce in their review of jury awards." (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 (*Simon*).) "Eschewing both rigid numerical limits and a subjective inquiry into the jury's motives, the high court eventually expounded in *BMW* [*of North America, Inc. v. Gore* (1996) 517 U.S. 559] and *State Farm* a three-factor weighing analysis looking to the nature and effects of the defendant's tortious conduct and the state's treatment of comparable conduct in other contexts. As articulated in *State Farm*, the constitutional 'guideposts' for reviewing courts are: '(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.' " (*Id.* at pp. 1171-1172.)

In finding that punitive damages in this case should be $1.5 million and not the over $8.3 million awarded by the jury, the trial court first addressed the matter of the ratio between the compensatory and punitive awards. The trial court noted the observation of the court in *Simon* that, while a ratio of 3 or 4 to 1 is a guideline norm, where the compensatory damages are substantial, then a lesser ratio, one that is perhaps only equal to compensatory damages, is the outermost limit of the due process guarantee. (*Simon*, *supra*, 35 Cal.4th at p. 1182.) The trial court found that the 5.5 to 1 ratio[8] in this case was excessive, especially in light of the much lesser degree of reprehensibility than found in *Campbell v. State Farm Mut. Auto. Ins. Co.* (Utah 2004) 98 P.3d 409, 418, where the Utah Supreme Court, on remand from *State Farm*, *supra*, 538 U.S. 408, approved a 9 to 1 ratio.

As far as the reprehensibility of Farmers' conduct was concerned, the trial court referred to the following facts that indicated a relatively low level of reprehensibility: Farmers' decision caused economic harm and emotional distress, and not physical harm; Farmers' conduct did not evince an indifference or reckless disregard for the health and safety of others; Farmers' conduct toward respondents was an isolated incident; and the harm to plaintiffs was the result of oversight and a mistake. This analysis complies with the

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[8] If the attorney fees awarded are added to the verdict, the ratio is 4.92 to 1.

listing of factors indicating reprehensibility in the United States Supreme Court's *State Farm* decision.[9]

The trial court found in its minute order: "Given the very substantial compensatory damages, which in the court's view contain a punitive element, the relative lack of reprehensibility and consideration of the other factors in the cases, the court finds that an award of $1,500,000 is appropriate in this case."

We agree with the trial court that the compensatory damages in this case are substantial. Respondents recovered all of their economic damages, as well as attorney fees generated by their case against Farmers. In addition, respondents each received $750,000 for emotional distress. Since respondents did not have to pay attorney fees, this is quite a handsome recovery. Indeed, we agree with the trial court that there is a punitive element to respondents' recovery of compensatory damages. Thus, this case appears to come within the description of a case by the *Simon* decision where the compensatory damages are so substantial as to support only a 1 to 1 ratio.

The same result obtains if the case is approached from the perspective of the reprehensibility of Farmers' conduct. The only reprehensibility factor (see fn. 9) that is unquestionably present here is that respondents were financially vulnerable. As far as the trial court's findings on the balance of the reprehensibility factors are concerned, "findings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference." (*Simon*, *supra*, 35 Cal.4th at p. 1172.) We return to these findings in discussing respondents' contentions in the text immediately following.

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[9] " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' [Citation.] We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm*, *supra*, 583 U.S. at p. 419.)

We do not agree with respondents' arguments that the trial court erred in reducing the punitive damages to $1.5 million.

First, contrary to respondents' contention, if the 1 to 1 ratio is upheld, the deterrent role of punitive damages would not be "eliminated." Paying $1.5 million over and above the nearly $1.7 million in compensatory damages and attorney fees cannot, as respondent contends, be put down "simply [as] just another cost of doing business." Even in this day and age, $1.5 million is a substantial sum.

Second, we do not agree that under the guidelines provided by the United States Supreme Court's *State Farm* decision[10] "reprehensibility factors are present here." Contrary to respondents' claim, there is nothing in the record to show that they "did in fact suffer physical . . . harm." Other than making this conclusory claim, respondents do not state what physical harm they suffered. Nor is there anything to show that Farmers evinced an indifference to respondents' health. The only evidence of this, according to respondents, is that Farmers denied them a defense. This is too thin a reed to lean on; it does not follow that, in denying a defense, an insurer is also necessarily indifferent to the insured's health. Nor is it sufficient for respondents to claim, again in a conclusory fashion, that Farmers' "persistent denial of a defense" satisfies the "repeated actions" prong. There was one denial of the tender of a defense; "persistent" is not the same as a repetition of the decision in other instances. For all that the record shows, Farmers' denial of respondents' tender of a defense was an isolated incident.

Third, we do not agree that the decision of the Utah Supreme Court in *Campbell v. State Farm Mut. Auto Ins. Co.*, *supra*, 98 P.2d 409 stands for the proposition that when $1 million is awarded for emotional distress, a 9 to 1 ratio is appropriate. For one, the reprehensibility factors in the Utah court's *Campbell* decision differ from those in the case before us. In fact, the Utah court found that *every one of the factors* was present in that case. (*Id.* at pp. 416-418.) That is not true of the case before us. While we agree that, given the reprehensibility of the insurer's conduct in *Campbell*, a 9 to 1 ratio is not unreasonable,

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10 See footnote 9.

Campbell does not announce a rule that a 9 to 1 ratio is to be followed every time a jury awards $1 million in emotional distress damages. In any event, even if the Utah court's *Campbell* decision announces such a rule, we would decline to adopt it; there is nothing in either federal or California law that supports such an unsound approach.

Finally, respondents cite a host of cases where ratios well in excess of a 1 to 1 ratio were approved. The answer to this is that we are deciding this case, and not the cases cited by respondents; the reprehensibility factors set forth in the United States Supreme Court's *State Farm* decision simply do not support the punitive damage award returned by the jury in respondents' case.

In light of the foregoing, we affirm the trial court's rulings that reduced the award of punitive damages to $1.5 million.

4. The Exclusion of Certain Evidence Did Not Prejudice Respondents and Was in Any Event Not Error

Respondents contend that the trial court erred in excluding two items of evidence. First is a report generated by Farmers on November 27, 2002, which stated in part that respondents were uninsured and, unless they had liquid assets, a verdict might require them to sell their condominium. The second item is that HOA had opposed respondents' motion to approve their settlement with Wasson.

Both rulings were made during pretrial, in limine motions. As Farmers points out, the rulings were tentative and therefore not properly the subject of appellate review. Be that as it may, we do not think that these rulings were erroneous or that, even if erroneous, they were prejudicial. There was evidence other than the November 2002 report that showed that respondents did not have liability insurance and were of very limited means. As far as HOA's opposition to respondents' settlement with Wasson is concerned, this is irrelevant on the issue of Farmers' conduct vis-à-vis respondents.

In any event, the exclusion of this evidence could not have harmed respondents, as the jury returned a punitive damage award of $8.3 million, which respondents believe was an appropriate verdict. The excluded evidence obviously played no role in the trial court's order reducing the punitive damage award.

DISPOSITION

The judgment, as modified by respondents' acceptance of the remitted judgment, is affirmed. Respondents Walker and Williams are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

FLIER, J.

We concur:

COOPER, P. J.

RUBIN, J.