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No. S213873

In the Supreme Court of the State of California

THOMAS NICKERSON,

Plaintiff and Appellant,

vs.

STONEBRIDGE LIFE INSURANCE COMPANY,

Defendant and Respondent.

ANSWER TO PETITION FOR REVIEW

After A Decision By The Court Of Appeal
Second Appellate District, Division Three, Case No. B234271

Appeal From A Judgment And Order Denying JNOV
Of The Los Angeles County Superior Court, Case No. BC405280
Honorable Mary Ann Murphy

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I.
INTRODUCTION

Plaintiff Thomas Nickerson seeks review of three punitive damages issues in this insurance action against defendant Stonebridge Life Insurance Company: (1) whether the punitive damages ratio denominator may include separate contract damages in the form of policy proceeds; (2) whether the punitive damages ratio denominator may include court-awarded *Brandt* fees [*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817]; and (3) whether the jury's $19 million punitive damages award may be affirmed on the basis of Stonebridge's wealth when the jury's compensatory damages award was $35,000 (a ratio of 543:1).

Plaintiff presents the denominator issues to this Court as ones on which the Court of Appeal authorities are in conflict. As we demonstrate, there are, in fact, no precedential conflicts as to these issues. Plaintiff presents the issue of a defendant's wealth as an important but unsettled legal question. To the contrary, the relevance of a defendant's wealth to the constitutional maximum has been decided both by the United States Supreme Court as well as this Court. For these reasons, there is no basis for this Court's review of the Court of Appeal opinion. Accordingly, the petition should be denied.

Case law is uniform that contract damages are not included in the punitive damages denominator. From the outset of this case, plaintiff has sought the policy benefits as damages for breach of the insurance contract. He alleged in his cause of action for breach of contract that under

the terms of the policy, he was entitled to an additional $31,500 in contract benefits that Stonebridge did not pay him. At the close of his case, he moved for directed verdict on his cause of action for breach of contract. The trial court granted the motion and awarded plaintiff $31,500 in contract damages. In contrast to the policy benefits he sought in his contract claim, plaintiff sought tort damages from the jury for breach of the implied covenant of good faith and fair dealing. The jury awarded plaintiff $35,000 in emotional distress damages for this tort cause of action. Recognizing that there is no actual conflict in the case authority, plaintiff contends, in effect, that the general rule that contract damages may not be included in the denominator should be abandoned in insurance cases. He argues that because there is "overlap" between contract and tort damages in insurance cases, the contract damages should be included in the denominator even when the contract damages are awarded by the court and separately stated. Plaintiff is wrong as a matter of law and procedure. By statute and case law, contract damages may not be included in the denominator. And the issue plaintiff posits is not even presented in this case. Here, there was no overlap between contract and tort damages, and, therefore, there is no reason to abandon the general rule.

Case law also is uniform that court-awarded, post-verdict *Brandt* fees are not included in the punitive damages denominator. Plaintiff cites not one case—not one—holding that *Brandt* fees awarded by the court after the jury verdict may be included in the denominator. In fact, the cases are to the contrary. And, there is good reason for these holdings. As a matter of constitutional law, punitive damages are to be based on the actual harm as determined by the jury. In other words, it is the actual damages as determined by the jury that should be included in the denominator. *Brandt*

fees that are awarded by the court by stipulation *after the jury has arrived at its compensatory and punitive damages verdict* cannot possibly have any role to play in reviewing the jury's punitive damages award for constitutional excessiveness.

Both the United States Supreme Court and this Court have held that the wealth of a defendant cannot justify an unconstitutional punitive damages award. Plaintiff requests that this Court jettison the United States Supreme Court's explicit outer limits on punitive damages to return to the days of constitutionally excessive punitive damages awards based not on the defendant's wrongdoing and the harm to the plaintiff, but instead on the defendant's wealth. Plaintiff's argument cannot be squared with due process or the courts' supervisory role in policing jury punitive damages awards for constitutional excessiveness. Moreover, where, as here, no physical harm to the plaintiff is involved, the jury found no oppression or malice, and the dissenting justice concluded that substantial evidence did not even support an award of punitive damages, review of the Court of Appeal's reduction of the punitive damages award to its constitutional maximum (10:1 ratio) is not warranted.

Because there are no conflicts in the case authorities and no unresolved legal issues, the Court should deny the petition.

II.

THE COURT OF APPEAL DECISION

Plaintiff sued Stonebridge, alleging that Stonebridge breached the insurance contract by failing to pay him $350 per day for all of the 109 days he was in the hospital for his broken leg and claiming a right to additional policy proceeds in the amount of $31,500. (Opn. 2, 8.) The case proceeded to jury trial. At the close of his case, plaintiff moved for directed verdict on his breach of contract cause of action. The trial court granted the motion and awarded plaintiff $31,500 in contract damages. (Opn. 8.)

Plaintiff also sued Stonebridge for breach of the implied covenant of good faith and fair dealing, alleging Stonebridge had acted unreasonably and in bad faith by denying him the full policy benefits. (Opn. 8.) The jury awarded plaintiff $35,000 in emotional distress damages for this tort cause of action. (Opn. 8-9.) In addition, the jury found that Stonebridge had not acted with malice or oppression but had engaged in the tortious conduct with fraud. Following a second phase of the jury trial, the jury awarded plaintiff $19 million in punitive damages—a stunning ratio of 543:1. (Opn. 9.) Prior to the trial, the parties stipulated that the trial court would determine the amount of *Brandt* fees. Following the jury verdict, the parties stipulated to *Brandt* fees in the amount of $12,500. (Opn. 9-10.)

The trial court granted Stonebridge a conditional new trial with a remittitur of $350,000. Plaintiff did not accept the remittitur and appealed. (Opn. 10.) Based on the facts of this case, the Court of Appeal affirmed the jury's fraud punitive damages finding but reduced the punitive damages to

their constitutional maximum of $350,000. (Opn. 29.) The dissenting justice would have concluded that there was no substantial evidence to support the jury's fraud finding and reversed the punitive damages award in its entirety. (Diss. 11-12.)

The facts upon which the Court of Appeal relied are stated in its opinion as follows. Plaintiff purchased a hospital confinement indemnity policy from Stonebridge that entitled plaintiff to $350 per day for each day of hospital confinement resulting from "necessary treatment" for a "covered injury." (Opn. 2-3.) "Although payment of claims under this policy is related to healthcare services rendered to the insured, the policy is not healthcare insurance that pays for medical expenses. The insured is free to use the funds in any manner he or she wishes. . . ." (*Ibid.*) The policy defined "hospital confinement" as "being an inpatient in a Hospital for the necessary care and treatment of an Injury." (Opn. 3.) Hospital was defined as an acute care institution. (Opn. 4.) The policy further provided that Stonebridge "'may use Peer Review Organizations or other professional medical opinions to determine if health care services are: 1) medically necessary; 2) consistent with professionally recognized standards of care with respect to quality, frequency, and duration; and 3) provided in the most economical and medically appropriate site for treatment.'" (Opn. 3.)

When plaintiff broke his leg in an accident on February 11, 2008, he was taken to a Veterans' Administration hospital, where he received medical care at no cost to him. He remained in the hospital until his discharge 109 days later on May 30, 2008. (Opn. 4-5.)

After he was discharged, plaintiff submitted a claim for policy benefits. (Opn. 5.) Stonebridge requested and received information from the hospital where plaintiff was treated and forwarded plaintiff's file to the Medical Review Institute of America to obtain answers to certain questions, specifically, "(1) 'Was the confinement medically necessary for inpatient treatment of the right tibia/fibula fracture? If so, for how many days?'" (2) "'Was treatment consistent with professionally recognized standards of care with respect to quality, frequency and duration?'" and (3) "'Was treatment provided in the most economical and medically appropriate site for treatment?'" (Opn. 6.) The Case Review Submittal Form included a box that could be checked if Stonebridge required a phone consultation between the peer reviewer and plaintiff's treating physician. Stonebridge did not check the box. (*Ibid.*)

The peer review report stated that, by February 29, 2008, plaintiff's injuries had improved sufficiently that it was reasonable to transfer plaintiff "'*to a less acute care environment such as a rehabilitation center or even back home with a care giver*'. . . ." (Opn. 6.) Based on this assessment, Stonebridge notified plaintiff in a letter dated September 10, 2008, that his hospitalization was considered "necessary treatment" only up through February 29, 2008, and he would be entitled to benefits only through that date. Stonebridge sent plaintiff a check for that period of hospital confinement. (Opn. 7.)

Plaintiff's treating physician at the hospital, Dr. Nguyen, wrote to Stonebridge explaining plaintiff's extended hospitalization was due to his pre-existing paraplegia, the treatment limitations of the Veteran

Administration health care options, and plaintiff's home conditions. (Opn. 7.) In a letter dated October 10, 2008, Stonebridge responded that it was not changing its decision because Dr. Nguyen did not indicate that hospitalization in an "'acute care setting'" was required as of March 1, 2008. (Opn. 7.) Stonebridge did not provide Dr. Nguyen's letter to the peer reviewer. (Opn. 15.)

In determining the maximum amount of punitive damages constitutionally allowable under the due process clause to be $350,000—a 10:1 ratio between the punitive damages and the $35,000 compensatory tort damages—the majority applied the three due process "guideposts" established by the United States Supreme Court to the foregoing facts: "'(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. [Citation.]'" (Opn. 13, citations omitted.)

The majority also applied the requisite reprehensibility factors to the facts of the case, namely "'whether: [(1)] the harm caused was physical as opposed to economic; [(2)] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [(3)] the target of the conduct had financial vulnerability; [(4)] the conduct involved repeated actions or was an isolated incident; and [(5)] the harm was the result of intentional malice, trickery, or deceit, or mere accident.'" (Opn. 14, citation omitted.)

With respect to the first factor, the majority concluded that plaintiff's "injuries were solely economic as they 'arose from a transaction in the economic realm, not from some physical assault or trauma' and 'there were no physical injuries.'" (Opn. 14, citation omitted.) As to the second factor, the majority held that Stonebridge recklessly disregarded plaintiff's health and safety based on evidence, *inter alia*, that Stonebridge did not provide plaintiff's doctor's letter to the peer reviewer and used the inconspicuous "necessary treatment" language to deny policyholder claims. (Opn. 15-16.) The majority also concluded that the third factor weighed in plaintiff's favor because plaintiff was financially vulnerable in that he needed the policy proceeds to replace his van. (Opn. 17.) The majority further concluded that Stonebridge's conduct involved repeated actions because Stonebridge had a business practice of using the "necessary treatment" definition to deny claims by other insureds and of not requesting that medical peer reviewers contact the treating physicians. (Opn. 17-18.)

As to the fifth factor, the majority concluded there was substantial evidence that the harm to plaintiff was "not accidental, but the result of a deceitful practice designed to deny him his policy benefits." (Opn. 20.) The majority's view that there was substantial evidence of fraud was based on two pieces of evidence. First, the majority concluded that Stonebridge had systematically tried to limit the "scope of its promise of coverage by burying it in the definition of 'Necessary Treatment'" in order to deny benefits to policy holders. According to the majority, this constituted concealment. (Opn. 21.) Second, Stonebridge did not allow the peer reviewer to speak with the treating physician by failing to check the appropriate box on the transmittal form, thus "concealing material

information from the claims' functional decision-maker so as to limit the amount Stonebridge would have to pay out on its policies." (Opn. 21.) The majority concluded that the fifth reprehensibility factor was satisfied, and that this same evidence also constituted substantial evidence to support the jury's finding of fraud as a basis for imposition of punitive damages. (Opn. 21, 22.)

In analyzing the ratio between the punitive and compensatory damages, the majority concluded that the punitive damages as remitted by the trial court comported with due process. (Opn. 25.) The majority reasoned that because plaintiff's compensatory damages were relatively low, and taking into account Stonebridge's $368 million net worth, "a significant ratio of punitive to compensatory damages comports with due process." (Opn. 26.) The Court of Appeal agreed with the trial court that a 10:1 ratio was the constitutionally maximum award under the facts of this case.

The majority also held that the trial court did not err in failing to measure the punitive damages award against additional categories of compensatory damages, such as the policy benefits and *Brandt* fees. (Opn. 27.) It held that "the trial court properly declined to include the policy benefits in its ratio calculation as punitive damages are not authorized in contract actions." (*Ibid.*) And, "*Brandt* fees are not properly included in determining the compensatory damage award when they are awarded by the trial court *after* the jury awards punitive damages." (*Ibid.*)

Justice Croskey disagreed with the majority that there was substantial evidence of fraud to serve as a basis for imposition of punitive damages. (Diss. 1.) Justice Croskey concluded that the "'necessary

treatment' limitation *was* expressly stated in the policy," and, although the court found that it was not conspicuous, it nevertheless "was *not* concealed." (Diss. 9.)

Justice Croskey also rejected plaintiff's argument that Stonebridge had concealed a material fact by failing to ensure that a peer reviewer would communicate by phone with the treating physician. (Diss. 10.) "There is no indication in the record that such communication was necessary for a competent peer review, that the failure to check the box prevented the peer reviewer from communicating with the treating physician if appropriate or that Stonebridge intentionally concealed any information in this regard with the intention of denying policy benefits." (Diss. 10.) Thus, the failure to check the box "is insufficient to support a reasonable inference that it acted with the intention of concealing relevant information so as to wrongfully deprive Nickerson of policy coverage." (Diss. 10.)

Justice Croskey further rejected plaintiff's argument that Stonebridge concealed a material fact by failing to provide the peer reviewer with Dr. Nguyen's letter explaining the reasons for plaintiff's continued hospitalization. (Diss. 10.) According to Justice Croskey, "the letter contained no information about Nickerson's medical condition that was not already included in records previously provided to the peer reviewer." (Diss. 10.)

Justice Croskey therefore concluded that "the evidence, viewed in the light most favorable to the judgment, is clearly insufficient to support a finding of either an intentional concealment of a material fact or an intent to

injure based on the failure to provide Dr. Nguyen's letter to the peer reviewer." (Diss. 11.) Justice Croskey thus would have stricken the punitive damages award in its entirety.

III.

REVIEW IS NOT NECESSARY TO SECURE UNIFORMITY OR SETTLE AN IMPORTANT ISSUE

Review by this Court is warranted only to decide important legal questions or maintain uniformity of decision among the appellate courts by ensuring that the published Court of Appeal opinions of this state are not in conflict in their analysis or articulation of the law. (See, e.g., Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2006) ¶ 13.1, p. 13-1; *People v. Davis* (1905) 147 Cal. 346, 348; Cal. Rules of Court, rule 8.500(b) ["Court may order review . . . [w]hen necessary to secure uniformity of decision or to settle an important question of law . . . ."].)

Review of the Court of Appeal's decision in this case is not warranted under either of these standards.

A. Court of Appeal Decisions Uniformly Hold That Contract Damages Cannot Be Taken Into Account In Determining The Ratio Of Compensatory To Punitive Damages

Contrary to plaintiff's suggestion, the rule that policy proceeds and other types of contract damages are not to be considered in measuring the proportionality of punitive damages awards was not "created" in *Textron*

Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh (2004) 118 Cal.App.4th 1061 (*Textron*), disapproved on other grounds in *Zhang v. Superior Court* (2013) 57 Cal.4th 364. That rule is codified in statute. Civil Code section 3294, subdivision (a) allows the recovery of punitive damages "[i]n an action for the breach of an obligation not arising from contract, where it is proven . . . the defendant has been guilty of oppression, fraud, or malice . . . ." California law has long recognized that, as section 3294 mandates, "[i]n the absence of an independent tort, punitive damages may not be awarded for breach of contract 'even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious.'" (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 516 [citation omitted]; *Ericson v. Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854 [punitive damages cannot be predicated on a breach of contract cause of action].) This rule has been applied consistently across all substantive fields, including insurance coverage and bad faith actions. (*Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1205-1207 [affirming contract damages for policy proceeds but reversing damages for breach of the implied covenant of good faith and fair dealing and attendant punitive damages].)

Accordingly, far from adopting a novel new legal principle, in holding that purely contractual damages cannot serve as a basis for punitive damages, *Textron* simply applied section 3294's plain language in adherence to existing precedent. In *Textron*, the parties had held separate trials on the breach of contract claims and the tort claims, and the jury returned separate awards on each cause of action. Because the contract and tort damages were distinct, the court held that the contract damages could not be taken into

account in determining the proportionality of the punitive damages award. (*Textron, supra,* 118 Cal.App.4th at pp. 1084-1085.)

The Court of Appeal reached the same conclusion in *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1207 (*Major*), where the jury also rendered separate damages awards on the breach of contract and tort causes of action. The court explained that "where both contract and tort damages are awarded in insurance bad faith cases, only the *tort* damages are considered in measuring the proportionality of a punitive damages award." (*Id.* at p. 1224.)

Contrary to Plaintiff's characterization, *Amerigraphics, Inc. v. Mercury Cas. Co.* (2010) 182 Cal.App.4th 1538 (*Amerigraphics*) does not conflict with either of these authorities. In that case, the jury did *not* render separate awards for the breach of contract and bad faith causes of action. Rather, it awarded a unitary sum for both the breach of contract and bad faith claim. Both the plaintiff and the defendant agreed that the bad faith damages were "the same as those caused by the breach of contract." (*Id.* at p. 1558.) The Court of Appeal did not take issue with the basic proposition that only damages attributable to tortious conduct can support an award of punitive damages. It held, however, that because the damages in that case were indisputably attributable to such conduct, the punitive damages award was not without basis as the defendant contended. (*Id.* at pp. 1557-1558.)

The rationale and holding of *Amerigraphics* do not apply in this case. Here, the contractual and tort damages plaintiff was awarded were entirely separate and clearly delineated. The contract damages were awarded

by the trial court pursuant to a directed verdict motion seeking judgment on the breach of contract cause of action at the close of plaintiff's case. These damages represented the policy proceeds to which the court found plaintiff was entitled as a matter of contract, irrespective of whether Stonebridge engaged in tortious conduct resulting in tort damages. The compensatory damages the jury awarded, on the other hand, were for emotional distress, and they were awarded pursuant to the bad faith cause of action.

Because the policy proceeds represent purely contractual damages, section 3294 does not permit them to serve as a predicate for punitive damages. *Textron*, *Major* and *Amerigraphics* all recognize this principle and are consistent with each other. In *Textron* and *Major*, this principle applied because, as in this case, the contract and tort damages were clearly delineated. In *Amerigraphics*, the principle did not apply because, unlike in *Textron*, *Major* and this case, all of the compensatory damages were attributable to the tortious conduct. There is, therefore, no conflict in the Court of Appeal authorities on this point. As such, in excluding plaintiff's contract damages from the punitive damages ratio, the Court of Appeal did no more than apply settled legal principles to the facts before it.

According to plaintiff, the policy proceeds rule is not mandated by federal due process. Plaintiff argues that because due process is meant to give the defendant notice of the conduct that may subject it to punitive damages, and the deprivation of policy proceeds is harm that can be caused by that conduct, including policy proceeds in the punitive damages calculus does not offend due process. Due process, however, comes into play only when the amount of punitive damages is at issue. It is irrelevant to the

question of what types of injuries or claims can give rise to a punitive damages award. That is a question of state law. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 117; *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568 (*BMW of North America*) ["States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."]; *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 957 ["The substantive and procedural rules for determining the measure of a punitive damage award is a question of state law . . . ."].)

This point is made most compellingly in plaintiff's petition, which provides examples of other states that permit punitive damages for breaches of contract. (Petn. 20.) These examples underscore that the *availability* of punitive damages (as opposed to the amount) is purely a matter of state law. Like other states, California is free to allow punitive damages for breaches of contract. However, the California Legislature has elected to limit punitive damages to tort claims accompanied by malice, oppression or fraud. The fact that federal due process may not mandate such substantive constraints on punitive damages does not diminish the force and effect of those constraints as a matter of California law.

In his effort to add contract damages into the punitive damages mix, plaintiff also tries to blur the distinction between contract and tort damages in insurance cases. Plaintiff argues that because, in insurance cases, policy proceeds can be sought under a contract theory, a tort theory, or both, it does not matter under which cause of action those damages are awarded. (Petn. 22.) This is incorrect. To begin, plaintiff's argument is premised on

an improper conflation of the two causes of action at issue. A cause of action against an insurer for breach of contract is distinct from a cause of action for breach of the implied covenant of good faith and fair dealing, and liability for breach of contract does not establish liability for bad faith. (See generally *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1292 [just because an insurer may be liable for breach of contract does not mean it is liable in bad faith]; *Chateau Chamberay Homeowners Ass'n. v. Associated Intern. Ins. Co.* (2001) 90 Cal.App.4th 335, 347 ["an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute . . . is not liable in bad faith even though it might be liable for breach of contract"].) Moreover, because of section 3294, when it comes to California punitive damages law, whether policy proceeds are recovered under a breach of contract cause of action or a tort cause of action is crucial and indeed dispositive. Just because a plaintiff prevails on both a contract claim and a tort claim does not mean that the damages that were specifically awarded under the contract claim *are attributable to the tortious conduct*. When policy proceeds are recovered *as* contract damages, they do not constitute an injury caused by the kind of conduct the Legislature has determined can subject a defendant to punitive damages.

In sum, in light of the facts of this case, Civil Code section 3294 and the uniform case law holding that only tort claims can support punitive damages, there is no basis to grant review of this issue.

B. Court of Appeal Decisions Uniformly Hold That Court-Awarded *Brandt* Fees Cannot Be Taken Into Account In Determining The Ratio Of Compensatory To Punitive Damages

Plaintiff's asserted conflict in the appellate decisions regarding the *Brandt* fee issue is equally phantasmal. There is no split of authority.

Under *Brandt*, a plaintiff may recover attorney fees in an insurance action only to the extent incurred to recover contract damages. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 812.) Although the amount of fees to be awarded is a jury question, the parties may agree to have the court try the claim. (*Brandt, supra,* 37 Cal.3d at p. 819.) Only two cases—*Amerigraphics* and the Court of Appeal in this case—have addressed the question whether *court-awarded Brandt* fees may be considered in deciding the appropriate ratio of punitive damages to compensatory damages. And both courts have answered the question in the negative.[1] Plaintiff tries to manufacture the appearance of a split of authority by citing *Major*, *supra*, 169 Cal.App.4th at p. 1224, but there the court held only, and without discussion, that *Brandt* fees awarded by a jury could be considered in assessing the proportionality of that jury's award of punitive damages—an entirely different question.

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[1] Contrary to plaintiff's contention, *Textron* did not involve a challenge to the punitive damages award based on the manner in which *Brandt* fees were awarded. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57 [cases are not authority for propositions not considered].)

The holdings in *Amerigraphics* and this case echo the United States Supreme Court's formulation that punitive damages should be based on "the actual harm *as determined by the jury*." (*BMW of North America*, *supra*, 517 U.S. at p. 582, italics added.) This means that "the actual damages as determined by the jury should be used as the base figure for calculating the punitive damages ratio." (*Amerigraphics*, *supra*, 182 Cal.App.4th at p. 1565; *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 17-18 (*Bardis*) ["Logic and common sense tell us that the amount the jury found to be" the total damages "most closely reflects the United States Supreme Court's formulation of the 'actual harm as determined by the jury.'"] [citing *BMW of North America*, *supra*, 517 U.S. at p. 582].)

California appellate courts have consistently followed this approach when deciding what types of damages go into the punitive damages calculation. For this reason, prejudgment interest, *Brandt* fees, and other items of damage, *when awarded by a court*, are not included in the denominator for determining the proportionality of punitive damages. (*Amerigraphics*, *supra*, 182 Cal.App.4th at p. 1566; accord *Bardis*, *supra*, 119 Cal.App.4th at pp. 17-18 [prejudgment interest awarded by jury could be included in punitive damages ratio; attorney fees and costs not awarded by the jury could not].)

The CACI jury instruction regarding the amount of punitive damages reflects this approach. That instruction asks the jury to consider whether there is a "reasonable relationship between the amount of punitive damages and [plaintiff's] harm . . . that [defendant] knew was likely to occur because of [his/her/its] conduct]." (CACI 3942.) The language of the

instruction suggests that the harm relevant to determining the appropriate amount of punitive damages is tied to the compensatory damages *the jury* awards in the particular case. Moreover, "'[c]ompensatory damages "are intended to redress the *concrete loss* that the plaintiff has suffered by reason of the defendant's wrongful conduct."'" (*Bardis*, *supra*, 119 Cal.App.4th at p. 17, quoting *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1059 [italics added].) Items of claimed compensatory damages that are not submitted to the jury and that a court determines later, however, are not concrete losses at the time of the jury's punitive damages award. They are inherently uncertain, both as to the plaintiff's entitlement to them and their amount. For example, as in this case, the amount of allowable fees may be severely constrained by the language of the attorney retention agreement. As such, to allow such contingent post-verdict damages to impact the amount of punitive damages comports neither with California law nor the CACI instruction on punitive damages.

Plaintiff insists that because review of punitive damages awards is de novo, whether or not the jury or the court awards *Brandt* fees is irrelevant to determining the appropriate constitutional ratio between punitive and compensatory damages. A correct understanding of the standard of review, however, reveals the flaw in plaintiff's argument. De novo review of punitive damages awards does not take place in a vacuum, divorced from the evidence the jury considered. Rather, it takes into account the evidence the jury considered in evaluating *all three* guideposts applicable to punitive damages—reprehensibility, relationship of harm to punitive damages, and the defendant's wealth. A reviewing court conducts "de novo review of a trial court's application" of the guideposts "*to the jury's award.*" (*State Farm*

Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 418 (*State Farm*) [italics added]; see also *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*) [explaining that the reviewing court conducts a de novo review of the three guideposts, including "the relationship between the award and the harm done to the plaintiff"].) As such, "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.) As this Court has explained, "[w]hile we . . . [citation] assess independently the wrongfulness of a defendant's conduct, our determination of a maximum award should allow some leeway for the possibility of reasonable differences in the weighing of culpability. In enforcing federal due process limits, an appellate court does not sit as a replacement for the jury but only as a check on arbitrary awards." (*Id.* at p. 1188.) The reviewing court, therefore, determines only the constitutional maximum in light of the evidence presented to the jury.

For this reason, evidence the jury did not consider in evaluating the three guideposts and determining the amount of punitive damages is not relevant to the reviewing court's analysis of the proportionality of the amount of punitive damages, irrespective of the standard of review. Just as it would be impermissible to defend an unconstitutionally high punitive damages award on the basis of *post-verdict* "evidence" of reprehensibility or wealth, it would

be equally impermissible to defend such an award on the basis of post-verdict "evidence" of harm the jury did not consider.[2]

For all of these reasons, the Court of Appeal was correct in following every other California appellate court in rejecting plaintiff's request to include post-verdict, court-awarded *Brandt* fees in the punitive damages ratio.

IV.

A DEFENDANT'S WEALTH CANNOT JUSTIFY A PUNITIVE DAMAGES AWARD THAT EXCEEDS THE CONSTITUTIONALLY PERMISSIBLE RATIO

Plaintiff's last ground for review seeks to do away with well-settled due process limitations on punitive damages awards. Plaintiff argues that Stonebridge's wealth justifies a punitive damages award that is more than 10 times the compensatory damages.

As this Court recognized in *Simon*, under *State Farm* "few awards" significantly exceeding a single-digit ratio will satisfy due process. (*Simon*, *supra*, 35 Cal.4th at p. 1182.) Punitive damages based on higher

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[2] Plaintiff argues that court-awarded *Brandt* fees are akin to "potential harm" and thus may properly be considered when evaluating the amount of punitive damages. (Petn. 24.) Potential harm is relevant to the punitive damages analysis, however, only when the jury hears evidence of such harm. (*Simon, supra,* 35 Cal.4th at pp. 1175-1176 [reviewing court considers potential harm on the basis of evidence presented at trial].)

ratios "are suspect" and "absent special justification . . . cannot survive appellate scrutiny under the due process clause." (*Ibid.*) Absent such special justification or extraordinary reprehensibility, a punitive damages award cannot be justified based on the defendant's wealth. All defendants are equally entitled to due process, and "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm*, *supra*, 538 U.S. at p. 427.) The United States Supreme Court thus disapproved using wealth as "'an open-ended basis for inflating awards'" and warned that wealth cannot replace reprehensibility as a constraining principle. (*Id.* at pp. 427-428; accord *BMW of North America*, *supra*, 517 U.S. at p. 585 [excessive punitive damages award cannot be upheld based on the argument it was a small percentage of defendant's net worth]; *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 719 [punitive damages award "must not punish the defendant simply for being wealthy"].)

Here, plaintiff seeks to do exactly what the United States Supreme Court has forbidden—substitute wealth in the place of reprehensibility as the constraining principle for punitive damages awards. Whether or not this exercise might be appropriate in some hypothetical extraordinary case, it is not appropriate in this case. Clearly, Stonebridge's level of reprehensibility does not come close to meeting the standard necessary to justify a departure from the constitutionally maximum 10:1 ratio. The jury expressly found Stonebridge did not act with malice or oppression. In addition, as the majority noted, the harm was purely economic as opposed to physical. And although Stonebridge withheld some amounts under the policy, even prior to the lawsuit it timely paid plaintiff the portion of his claim it determined was covered. Finally, although the Court of Appeal

majority concluded that a 10:1 ratio was permissible under the facts of this case, Justice Croskey in his dissent saw no basis at all for imposition of punitive damages, concluding that the record did not contain substantial evidence of fraud.

These circumstances refute plaintiff's assertion that Stonebridge's conduct was so extreme or extraordinary that it can justify a ratio of greater than 10:1. This was an insurance dispute where reasonable minds can differ (and have differed) as to whether punitive damages are justifiable at all. There is, therefore, no "special justification" that can support a departure from the constitutionally maximum 10:1 ratio. In the absence of such justification, the United States Supreme Court's constitutional guidelines as to the appropriate ratio cannot be jettisoned based merely on Stonebridge's wealth. This case simply is not an appropriate vehicle for this Court to revisit its punitive damages jurisprudence, much less redefine and expand the constitutional contours of such liability. Nor is there any need to do so. The jurisprudence is in place, it is clear and it is uniform.

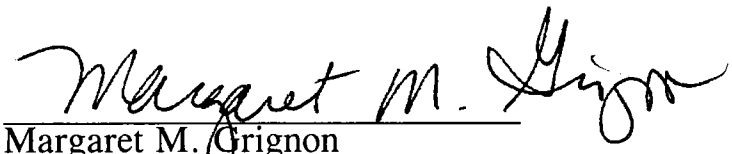
V.
CONCLUSION

The prohibitions on using contractual damages and court-awarded *Brandt* fees to determine the proportionality of punitive damages awards are not issues on which the appellate authorities are in conflict. These proscriptions are firmly rooted in statute and longstanding case law. Similarly, the constitutional constraints on the permissible ratio of punitive to compensatory damages are based on the precedents of the United States

Supreme Court as well as this Court. Plaintiff's petition thus is not so much a plea for this Court to ensure uniformity or settle an important question as it is an invitation to rewrite section 3294 and do away with longstanding principles of California law, appellate review, and federal due process. The petition should be denied.

DATED: October 29, 2013.

REED SMITH LLP

By 
Margaret M. Grignon
Attorneys for Defendant and Respondent
Stonebridge Life Insurance Company

CERTIFICATION OF COMPLIANCE

WITH CAL. R. CT. 14(C)(1)

Pursuant to California Rule of Court 14(c)(1), the foregoing Answer to Petition for Review is double-spaced and was printed in proportionately spaced 14-point Times New roman typeface. It is 24 pages long (inclusive of footnotes, but exclusive of tables and this Certificate) and contains 6,098 words. In preparing this certificate, I relied on the word count generated by MS Word 2010.

Executed on October 29, 2013, at Los Angeles, California.

Margaret M. Grignon

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On October 29, 2013, I served the following document(s) by the method indicated below:

ANSWER TO PETITION FOR REVIEW

☐	by transmitting via facsimile on this date from fax number (213) 457 8080 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 PM and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).
☒	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
☐	by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below.
☐	by personally delivering the document(s) listed above to the person(s) listed below in Dept. 25.

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Hon. Mary Ann Murphy Los Angeles Superior Court 111 North Hill Street, Dept. 25 Los Angeles, CA 90012-3014	Case No. BC405280
Court of Appeal Second Appellate District, Division Three 300 South Spring Street Second Floor, North Tower Los Angeles, CA 90013-1213	Case No. B234271

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 29, 2013, at Los Angeles, California.

Rebecca R. Rich

Rebecca R. Rich