S213873

SUPREME COURT OF CALIFORNIA

THOMAS NICKERSON,

Plaintiff and Appellant,

v.

STONEBRIDGE LIFE INSURANCE COMPANY,

Defendant and Respondent.

2d Civil No. B234271

(Los Angeles County
Super. Ct. No. BC405280)

REPLY BRIEF ON THE MERITS

After a Decision by the Court of Appeal
Second Appellate District, Division Three

*William M. Shernoff #38856
Howard S. Shernoff #263556
Travis M. Corby #268633
SHERNOFF BIDART
ECHEVERRIA BENTLEY LLP
600 South Indian Hill Boulevard
Claremont, CA 91711
Telephone: (909) 621-4935
Facsimile: (909) 625-6915

*Jeffrey Isaac Ehrlich #117931
THE EHRLICH LAW FIRM
16130 Ventura Boulevard, Suite 610
Encino, CA 91436
Telephone: (818) 905-3970
Facsimile: (818) 905-3975

Attorneys for Appellant and Cross-Respondent
Thomas Nickerson

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16130 Ventura Boulevard, Suite 610
Encino, CA 91436
Telephone: (818) 905-3970
Facsimile: (818) 905-3975

Attorneys for Appellant and Cross-Respondent
Thomas Nickerson

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INTRODUCTION

Stonebridge advances two theories for why courts must ignore post-verdict *Brandt* fees when determining whether a punitive damages award is constitutionally excessive.

First, Stonebridge argues that the purpose of due-process review is to determine whether jurors were biased by passion and prejudice, so it would be illogical to consider any information that was not before the jury when it awarded punitive damages. The logic of this argument is impeccable, but its premise is fallacious. The purpose of substantive due-process review of jury awards is to prevent awards that are grossly excessive; not to scrutinize the jury's motives in making the award.

The review that Stonebridge describes was already a pillar of California law before the U.S. Supreme Court formulated substantive limits on the size of punitive-damage awards under the Fourteenth Amendment. The availability of post-verdict judicial scrutiny of the jury's motives ensures that federal standards for *procedural* due process are satisfied whenever California imposes punitive damages. But jurors' subjective motivations are irrelevant when courts evaluate the *substantive* limits that the Fourteenth Amendment places on how severely the state can punish a defendant.

The size of the maximum constitutional penalty is purely a legal issue, which is not influenced by the amount that the jury

chose to award. That is why appellate courts determine it independently — instead of under the abuse-of-discretion standard that governs state-law "passion and prejudice" review. It is also the reason that courts have the power to reduce punitive damages to the constitutional limit instead of ordering a new trial. In contrast, there is no acceptable size for awards based on improper motives — which is why courts set them aside instead of merely trimming them.

Stonebridge's second argument is that if the jury had known about the *Brandt* fees, then it might have rendered a smaller punitive-damage award. That is both doubtful and irrelevant. Stonebridge *stipulated* to litigating *Brandt* fees in front of the trial judge instead of the jury; it may not contort its election into a violation of its right to procedural due process.

If Stonebridge thought that hearing about *Brandt* fees would persuade jurors to lessen its punishment, it was free to inform them about that extra category of damages. That would have been a bizarre tactic, because *more* harm rarely results in *less* punishment. In reality, Stonebridge preferred for jurors not to hear about *Brandt* fees — just like it would prefer for this Court to ignore them.

There is no reason to heed its requests because those fees are an important component of the foreseeable harm that insurance bad faith causes. Including them in the Court's review of punitive damages is not the equivalent of ex parte fact finding because

Stonebridge had a full opportunity to contest them in the trial court using the very post-verdict procedure that this Court endorsed in *Brandt v. Superior Court* (1985) 37 Cal.3d 813.

The efficiency advantages that the Court identified in *Brandt* are even more important in today's climate of strained judicial resources. In order to continue to make those advantages available, the Court should confirm that court-awarded *Brandt* fees are to be factored into due-process review of punitive-damages awards, alongside all other harm that the policyholder suffers.

ARGUMENT

A. Considering post-verdict *Brandt* fees is logical and serves the purpose of federal-due process review

1. The purpose of *substantive* due-process review is to prevent grossly excessive awards — not to scrutinize jury's motives

According to Stonebridge, "the fundamental purpose of due process review is to ensure that punitive damages awards are the product of the jury's 'rational decisionmaking' and are not tainted by passion, partiality or prejudice." (ABOM at 1.) No so. That is the avowed purpose of post-trial review of punitive damages awards under state law. But it is only an indirect goal of federal due-process review.

The procedural component of the Due Process Clause requires states to offer defendants the opportunity for meaningful judicial scrutiny of the punitive damages by a jury. California does that by

empowering trial judges to set aside awards that they believe were the result of passion or prejudice — and by then subjecting the court's determination to appellate review under the abuse-of-discretion standard.

When a defendant receives this opportunity for post-trial review of punitive damages, then procedural due process has been served — regardless of the outcome. Defendants do *not* have a substantive due process right to a correct judicial assessment of the jury's rationality. (*TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 458 fn. 24 ["we do not suggest that a defendant has a substantive due process right to a correct determination of the 'reasonableness' of a punitive damages award"].)

Stonebridge has labored to obscure this distinction, because it wants the Court to believe that the purpose of due-process review is preventing jurors from making irrational decisions. It advances that narrative by filling its brief with snippets from Supreme Court decisions that mention the importance of preventing juries from imposing penalties based on passion or prejudice. In each instance, the Supreme Court was actually explaining the purpose of the *procedural* protections that due process requires states to afford defendants.

This case involves the *substantive* limits that due process places on the amount of punitive damages — which is a fundamentally different inquiry. (See *Pacific Mut. Life Ins. Co. v.*

Haslip (1991) 499 U.S. 1, 55-56 (O'Connor, J., dissenting.) ["whether the award is grossly excessive . . . is an important substantive due process concern, but our focus here is on the requirements of procedural due process"].) The purpose of substantive due-process review is to prevent awards from being grossly excessive, not to scrutinize the jury's thinking. (*Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 214 ["in deciding the constitutional maximum, a court does not decide whether the verdict is unreasonable based on the facts; rather, it examines the punitive damages award to determine whether it is constitutionally excessive."].)

If this form of review were intended to evaluate the jury's decision making, then courts would need to apply the same standards as the jury. They do not. Jurors are never instructed about the third *Gore* guidepost — the availability of comparable civil or criminal penalties. Even Stonebridge admits that "guidepost was not intended to be a factor for the jury's consideration." (ABOM at 43, quoting *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 959.)

This falsifies Stonebridge's theory that the purpose of federal due-process review is to evaluate the rationality of the jury's decision making. The jury is not informed about the civil and criminal penalties, so their size is "completely unhelpful in the evaluation of the rationality of the jury's decisionmaking." (ABOM at 33.) Yet courts evaluate them anyway — just as they should evaluate post-verdict *Brandt* fees.

Stonebridge's theory also fails to explain the difference in the applicable standards of review. The trial court has "discretion in determining that the amount of punitive damages awarded by the jury was not the result of passion or prejudice." (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 83.) Yet appellate courts do not defer to trial judges when applying the *Gore* factors, because a jury's motivations have no relevance to the amount of the maximum constitutional penalty.

Stonebridge is simply wrong when it asserts that the purpose of federal due-process review "is to determine whether such awards are tainted by juries' irrationality, arbitrariness, bias, or other improper motives." (ABOM at 10-11.) An award that is "tainted" by improper motives cannot be rehabilitated. Courts have the power to reduce punitive damages to the maximum amount allowed by the constitution precisely because the *Gore* factors have nothing to do with the jury's motivations.

Stonebridge has lost "sight of the fact that a jury determined the amount of punitive damages to be awarded and the only question here is whether those awards were constitutionally excessive." (*Gober*, 137 Cal.App.4th at p. 213.) In making that determination, there is no need for the Court to restrict itself to the information that jurors considered.

2. *Brandt* fees are part of the actual harm caused by the defendant, regardless of which fact finder awards them

Insurance companies can only be effectively deterred from engaging in institutional bad faith if they are held accountable for *all* of the harm their wrongdoing produces — including the fees that policyholders incur merely to obtain the proceeds of the contract. (See *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1225.) The purpose of punitive damages would be subverted if that harm were arbitrarily ignored, merely because the compensation for that harm was awarded by the trial judge instead of the jury.

Stonebridge tries to make it look like the *Gore* ratio only includes "actual harm as determined by the jury." (ABOM at 2, quoting *BMW of North America v. Gore* (1996) 517 U.S. 559, 582.) But the phrase that Stonebridge plucks from *Gore* was not prescribing any sort of rule. Instead, the Court was just making an observation about the relative size of the punitive-damage and compensatory-damage awards.

That becomes obvious when the sentence is quoted in full: "The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his actual harm as determined by the jury." (*Id.*) There is simply no directive in this sentence that says that damages awarded by the trial court after the verdict must be excluded from any due-process consideration of a punitive-damage award.

Elsewhere in its brief, Stonebridge abandons this untenable position and admits that the Court may consider harm that is *not* included in the jury's verdict. It acknowledges that this Court has considered evidence of potential uncompensated harm. (See ABOM at 29-30 citing *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1174.) And it argues that court-awarded *Brandt* fees may also be considered, so long as the jury knows about them. (ABOM at 46-47.)

In reality, the United States Supreme Court has gone even further than that. It has relied on potential harm to validate a punitive-damage award, even when the jury was only instructed to consider actual harm. (See *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 486, 113 S.Ct. 2711, 2735, 125 L.Ed.2d 366 (O'Connor, J., dissenting); accord *Pulla v. Amoco Oil Co.* (8th Cir. 1995) 72 F.3d 648, 660, fn. 18.)

Clearly, courts are permitted to consider harm that was not included in the jury's decision making. There is therefore no logical reason for them to ignore *Brandt* fees, merely because jurors were ignorant of that harm when they awarded punitive damages.

B. Stonebridge's right to procedural due process will not be impaired by considering the post-verdict *Brandt* fees

1. Stonebridge had the opportunity to present every available defense against punitive damages

Stonebridge has only itself to blame for any adverse impact on the punitive damages award caused by the jury not determining the

Brandt fees. It had a constitutional right to have the jury hear the evidence and determine the *Brandt* fees, which it waived by stipulating that the jury *would not* determine the *Brandt* fees. (*Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 510-511.)

Had Stonebridge truly believed that its obligation to pay *Brandt* fees represented a potential defense against punitive damages, it was free to insist on having those fees awarded by the jury. Even after it stipulated that the amount of the fees would be determined by the trial judge, Stonebridge was not obligated to keep the existence of *Brandt* fees a secret. It simply chose not to discuss them during the punitive-damages phase of the trial.

If Stonebridge's ability to put on its defense was at all impaired by the format of the trial, then it had an obligation to protect its interests by bringing that problem to the court's attention. (*See, e.g., People v. Peevy* (1998) 17 Cal.4th 1184, 1205; *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92 fn. 2.) By remaining silent, Stonebridge forfeited the ability to complain on appeal that the jury did not consider the *Brandt* fees. (*Id.*) Indeed, because Stonebridge affirmatively stipulated that the jury should not hear this evidence, any error was invited error. (*Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23, 32; *see also* 9 Bernard E. Witkin, California Procedure: Appeal (4th ed. 1997), § 383, at 434-35.)

2. This case does not involve evidence outside of the record because the *Brandt* fees were litigated below

Stonebridge repeatedly implies that it would be unfair to review punitive-damages awards based on evidence it never had an opportunity to address. That might be a valid argument if the evidence at issue came from outside the record. But the *Brandt* fees at issue here were litigated in the trial court: Stonebridge stipulated that they were $12,500. (Typed opn. at 9.) Its only complaint is that the jury did not hear about this stipulation.

Stonebridge's argument must fail because neither it nor any other civil litigant in a California court can claim a federal due-process right to have any issue determined by a jury, as opposed to a judge. Only criminal defendants enjoy a federally mandated right to a jury in state courts, via the Sixth Amendment, which has been applied against the States via its incorporation into the Due Process Clause of the Fourteenth Amendment. (See *Duncan v. Louisiana* (1968) 391 U.S. 145, 147-158.) By contrast, the Seventh Amendment has never been incorporated into the Due Process Clause. (*Curtis v. Loether* (1974) 415 U.S. 189, 192 fn. 6 ["The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment."]; *Mountain Timber Co. v. Washington* (1917) 243 U.S. 219, 235 [Seventh Amendment "has no reference to proceedings in the state courts"].)

"[T]he procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure." (*Hardware Dealers' Mutual Fire Ins. Co. of Wisconsin v. Glidden Co.* (1931) 284 U.S. 151, 158.) Due process is satisfied so long as the state's chosen procedure is not "unreasonable or arbitrary" and it provides defendants with reasonable notice and an opportunity to be heard. (*Id.*) The procedure in this case objectively satisfied those standards.

3. Omitting *Brandt* fees from the punitive-damages phase of the trial cannot have prejudiced Stonebridge

To establish a violation of due process based on its inability to present certain evidence, a defendant must establish that the evidence was both "favorable" and "material."(*In re Sassounian* (1995) 9 Cal.4th 535, 543-545.) Stonebridge cannot satisfy either requirement.

The evidence of *Brandt* fees was unfavorable to Stonebridge because it would have increased the amount of compensatory damages. Jurors are instructed to award an amount of punitive damages that is proportionate to the harm caused by the defendant's wrongdoing, so an increase in compensatory damages tends to produce a corollary increase in punitive damages.

That tendency is the reason that Stonebridge wants this Court to ignore the *Brandt* fees when reviewing the punitive damages. So it remains unclear how Stonebridge can contend that it was prejudiced by the jury not hearing the same evidence when awarding punitive damages. If the *Brandt* fees demonstrate the need to limit punitive damages, then Stonebridge should be thrilled about this Court taking them into account.

The omission of the *Brandt* fees cannot have been "material" because it is not reasonably probable that it affected the outcome. (*In re Sassounian*, 9 Cal.4th at pp. 543-545.) Stonebridge suggests that jurors might have felt that the increased compensatory damages were enough to deter Stonebridge, obviating the need for punitive damages. (ABOM at 39-40.) This is not a serious argument. It is inconceivable that the jurors who awarded $19 million in punitive damages would have been placated by knowing that Stonebridge had to pay an additional $12,500 in attorney's fees.

C. Forcing *Brandt* fees to be litigated pre-verdict would needlessly waste limited judicial resources

This Court has already held that, as a matter of judicial economy, it is preferable for *Brandt* fees to be awarded by the trial judge instead of the jury. (*Brandt v. Superior Court*, 37 Cal.3d at pp. 819-820.) "When a case is tried, neither party knows whether he will prevail until the trial is concluded, so both parties must present evidence of attorneys' fees and estimates must be made on work yet

to be performed. It saves time and is more efficient if the prevailing party obtains fees after the judgment when all the facts are known by seeking them as costs." (*Beneficial Standard Properties, Inc. v. Scharps* (1977) 67 Cal.App.3d 227, 232 fn. 3.) Unfortunately, if court-awarded *Brandt* fees cannot be relied on to support punitive damages, then plaintiffs will no longer stipulate to this procedure.

Stonebridge counters that *Brandt* fees may be litigated before the trial judge after the jury returns a verdict on bad faith but before the punitive-damages phase of the trial begins. (ABOM at 46-47.) That might have been possible in this case, in which the fees were stipulated. But in many lawsuits, the amount of *Brandt* fees is a major factual dispute that requires significant time and effort to resolve. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 814 (Baxter, J., concurring and dissenting.)

It is unrealistic to believe that courts would be able to expeditiously resolve those disputes. The more probable outcome is that, after returning a verdict in the first phase of a trial, jurors would be forced to wait a substantial amount of time before the punitive-damages phase even begins. Stonebridge's approach would therefore lengthen trials, making it harder to find jurors able to serve and reducing the number of trials that the courts can provide.

CONCLUSION

Brandt fees represent an important part of the harm caused by Stonebridge's wrongdoing. Stonebridge has no due-process right for

them to be ignored. When Courts determine the maximum constitutional penalty, they must take account of *all* the harm an insurer has inflicted on the insured who prevails on a bad-faith claim. Nothing less will deter institutional bad faith.

Dated: June 3, 2014.

Respectfully submitted,
SHERNOFF BIDART
ECHEVERRIA BENTLEY LLP
THE EHRLICH LAW FIRM

By: _____
Jeffrey Isaac Ehrlich
Attorneys for Appellant

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Dated: June 3, 2014.

Jeffrey Isaac Ehrlich

Nickerson v. Stonebridge Life Insurance Company
Supreme Court No. S213873
Court of Appeal No. B234271

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: 600 South Indian Hill Boulevard, Claremont, California 91711.

On **June 3, 2014,** I served the foregoing documents described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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[XX] BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Claremont, California, in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

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[XX] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **June 3, 2014,** at Claremont, California.

Susan Lacey

Nickerson v. Stonebridge Life Insurance Company
Supreme Court No. S213873
Court of Appeal No. B234271
Superior Court Case No. BC405280

SERVICE LIST

Margaret M. Grignon, Esq. Raymond Yoon Kim, Esq. REED SMITH LLP 355 South Grand Avenue, Suite 2900 Los Angeles, CA 90071 Telephone: (213) 457-8000	Attorneys for Stonebridge Life Insurance Company
Mark Baute, Esq. Henry Chi-Jen Wang, Esq. BAUTE CROCHETIERE & WANG LLP 777 South Figueroa Street, Suite 4900 Los Angeles, CA 90017 Telephone: (213) 630-5000	Attorneys for Stonebridge Life Insurance Company
David Lawrence Abney, Esq. KNAPP & ROBERTS, P.C. Suite 181 8777 North Gainey Center Drive Phoenix, AZ 85258	Counsel for Amicus Curiae United Policyholders
Amy Bach, Esq. United Policyholders 381 Bush Street, 8th Floor San Francisco, CA 94104	Amicus Curiae
Clerk of the Superior Court Los Angeles Superior Court Hon. Mary Ann Murphy 111 North Hill Street Los Angeles, CA 90012	

Clerk, Court of Appeal
Second Appellate District, Div. 3
North Tower, Floor 2
300 South Spring Street
Los Angeles, CA 90013-1213

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Clerk of the Court
350 McAllister Street
San Francisco, CA 94102

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