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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RICHARD BARTON, Plaintiff and Appellant, v. ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA, Defendant and Appellant.	E030085 (Super.Ct.No. RIC282474) OPINION

APPEAL from the Superior Court of Riverside County. Robert George Spitzer, Judge. Affirmed.

Michael J. Cappelli for Plaintiff and Appellant.

Thelen Reid & Priest, James J. Moak and Kenneth R. Pedroza for Defendant and Appellant.

A jury found in favor of plaintiff Richard Barton on causes of action for fraud (false promise and intentional misrepresentation) and negligent misrepresentation. The jury awarded plaintiff Barton compensatory damages of $866,840.25.

Defendant Alexander Hamilton Life Insurance Company of America (Hamilton) filed a motion for a new trial on the issue of damages. The trial court granted the motion after finding that the damages were excessive within the meaning of Code of Civil Procedure section 657, subdivisions (5) and (6).[1]

Mr. Barton appeals. Although he does not "particularly oppose" the trial court's initial granting of a new trial on all damages issues, he does oppose a subsequent "clarification" of the trial court's order which would limit the new trial to compensatory damages only.

Hamilton filed a cross-appeal from the judgment entered against it, including an attack on various rulings of the trial court.

ALLEGATIONS OF THE COMPLAINT AND SPECIAL VERDICTS

On October 31, 1996, Mr. Barton filed a 54-page first amended complaint for damages against Hamilton, Roger McCall, and others. The complaint alleged that Mr. McCall was a licensed life insurance agent and/or broker. In various causes of action, the complaint generally alleges that Mr. McCall sold Mr. Barton a life insurance policy issued by Hamilton as the insurer. Mr. Barton alleged that a number of representations regarding the policy were untrue and fraudulent, that the administration of the policy was fraudulent, and that Mr. McCall had falsified documentation, forged Mr. Barton's signature, and taken out an unauthorized loan on the policy.

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[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

As noted above, the jury found in Mr. Barton's favor on two theories included in the fraud cause of action: false promise and intentional misrepresentation. A separate cause of action for negligent misrepresentation incorporated the above allegations and alleged that defendants, including Hamilton and McCall, owed a duty to insure that their statements to Mr. Barton were true and accurate. However, according to the complaint, defendants made the statements negligently, recklessly, and with no reasonable grounds for believing them to be true. The jury so found.

The jury also found that Mr. McCall made the intentional and negligent false representations, and the false promises, as an agent of defendant Hamilton. Further, it found that Hamilton had expressly authorized Mr. McCall to make the statements that were found to be misrepresentations or false promises.

In accordance with these liability findings, the trial proceeded to a damages phase. After hearing evidence on damages, the jury awarded Mr. Barton compensatory damages of $866,840.25. It was not allowed to consider the issue of punitive damages.

ISSUES

1. Mr. Barton's Appeal.

A. The Trial Court's Order of July 20, 2001.

On June 7, 2001, Hamilton filed its motion for a new trial on the issue of damages. Hamilton argued that the jury's damage award was excessive within the meaning of section 657, subdivision (5). On July 13, 2001, the trial court granted the motion and ordered a new trial "on the issue of damages only."

On July 18, 2001, Hamilton filed an ex parte application for "clarification" of the trial court's order. Hamilton asked the court to make it clear that the new trial was on the issue of compensatory damages only, and that the new trial order did not include a new trial on the issue of punitive damages. Mr. Barton responded by arguing that the new trial order included all damages, and that the new trial should therefore include the possibility of an award of punitive damages.

On July 20, 2001, the trial court granted the motion for clarification and reissued its new trial order to clearly state that a nonsuit had previously been granted on the issue of punitive damages, and that the new trial would be limited to the amount of compensatory damages.

Mr. Barton now contends the trial court lacked jurisdiction to withdraw its first order granting a new trial on the issue of damages and to issue a second order limiting the new trial to the issue of compensatory damages. Hamilton of course contends the trial court acted properly and did not abuse its discretion.

B. The Trial Court's Decision Granting a New Trial on the Ground that the Damages Awarded were Excessive.

Mr. Barton also contends the trial court abused its discretion in granting the motion for a new trial because substantial evidence supported the jury's award of damages. Hamilton responds by contending plaintiff applies the wrong standard of review, and that the damages awarded were excessive because there was no evidence supporting the amount of the verdict.

C. The Retrial of the Damages Issue.

Mr. Barton argues that the interests of justice require that the retrial include both compensatory and punitive damages issues.

Hamilton responds by arguing that the issues are separable, and that the trial court's order limiting the new trial to compensatory damages was proper.

D. The Granting of the Motion for Nonsuit on Punitive Damages.

Mr. Barton argues that the trial court erred in granting the motion for nonsuit on punitive damages because substantial evidence was submitted to support an award of punitive damages. He also contends that the trial court employed the wrong standard of proof on the issues of managing agency and ratification. As a subsidiary issue, he argues that the trial court erred in excluding certain evidence. In his reply brief, Mr. Barton contends the trial court erred in granting the motion for nonsuit on the issue of punitive damages because it failed to consider the evidence in the light most favorable to him.

Hamilton argues that the motion for nonsuit on punitive damages was properly granted because plaintiff failed to prove that Mr. McCall was a managing agent of Hamilton, or that Hamilton ratified his conduct. It also asserts the trial court used the proper standard of proof, and that the alleged errors in the admission of evidence were, at most, harmless errors.

2. Hamilton's Cross-appeal.

A. The Evidence to Support the Fraud Claims Against Hamilton.

Hamilton contends that there was no admissible evidence to support the fraud claims because Mr. McCall was not the agent of Hamilton for the purpose of imposing tort liability on Hamilton and that he did not have the authority to make representations concerning the insurance policy.

Mr. Barton finds substantial evidence to support the jury's agency finding.

B. Alleged Errors in the Admission of Evidence.

Hamilton contends that the trial court erred in admitting certain testimony into evidence, and the allowance of such testimony caused the jury to render a verdict based upon passion and prejudice. It argues its motion in limine to exclude evidence of Mr. McCall's representations which conflicted with the terms of its policies should have been granted, and that parol evidence was inadmissible to vary the terms of the policy.

Mr. Barton argues that the parol evidence rule is inapplicable because of Mr. McCall's fraud, and that the trial court properly admitted the challenged testimony.

C. Sufficiency of Evidence of Fraud.

Hamilton argues there was no competent evidence to support the elements of a claim for fraud and negligent representation. Mr. Barton of course finds ample evidence of intent to defraud, justifiable reliance, and damages.

D. Alleged Instructional Error.

Hamilton argues that the trial court erred in refusing its proposed instructions on fraud. Mr. Barton replies by arguing that the subject matter of the proposed instructions was covered by the instructions given.

Finding no errors, we reject the contentions of each party and affirm the judgment and orders granting a new trial on compensatory damages.

THE TRIAL COURT'S ORDER OF JULY 20, 2001

As described above, Mr. Barton contends the trial court lacked jurisdiction to issue its order of July 20, 2001, which granted Hamilton's application for clarification of the order granting the motion for new trial. As a result, Mr. Barton claims that the July 13, 2001, order, which granted the motion for new trial on the grounds of damages only, requires retrial of both punitive and compensatory damages.

Mr. Barton relies on the principle that "'[a] final order granting or denying [a motion for new trial], regularly made, exhausts the court's jurisdiction, and cannot be set aside or modified by the trial court except to correct clerical error or to give relief from inadvertence under C.C.P. 473.' [Citation.]" (*Wenzoski v. Central Banking System, Inc.* (1987) 43 Cal.3d 539, 542, italics omitted. See also cases cited at 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 136, subd. (b), p. 639.)

In *Wenzoski*, two unconsolidated motions for new trial were made and the first one was denied. Our Supreme Court held that the trial court's issuance of a minute order denying the first motion for a new trial was the exercise of the trial court's discretion, and

the trial court therefore lost jurisdiction to rule on the second motion for new trial. Since plaintiffs were required to file their notice of appeal within 30 days of the denial of the first motion for a new trial, and they failed to do so, the appeal was dismissed. (*Wenzoski v. Central Banking System, Inc., supra,* 43 Cal.3d 539, 542.)

We find *Wenzoski* inapplicable. In the present case, only one motion for a new trial was filed. The motion sought a new trial on grounds that the damages were excessive and the evidence was insufficient to justify the verdict under section 657, subdivisions 5 and 6. The only damages that had been awarded were compensatory damages, and the accompanying memorandum of points and authorities clearly states that the new trial was sought on the issue of compensatory damages.

The motion was heard on July 13, 2001. The trial court found the damages awarded by the jury were excessive and granted the motion. After the trial court ruled, Mr. Barton's counsel requested that any new trial on the issue of damages include punitive damages. The trial court responded that its ruling did not "contemplate the nature of the new trial on the issue of damages." The court therefore sought further briefing on the issue and set a status conference for August 27, 2001. On the same day, the court signed an order granting the motion for new trial on the issue of damages.

On July 18, 2001, Hamilton filed an ex parte application for determination of the issue of whether the new trial order included punitive damages. The application pointed out that the time for the trial court to rule on the motion for new trial would expire on July 23, 2001, and it requested expedited consideration of the issue. A response was filed

by Mr. Barton, the ex parte application was heard on July 18, 2001, and the trial court issued a revised order on July 20, 2001.

Only one motion for new trial was filed, and it was timely decided on July 13, 2001. The only issue is whether the trial court had the jurisdiction to clarify or modify its decision by an action taken within the jurisdictional time for acting on a motion for a new trial. We find that it did.

The trial court could issue a revised order on July 20, 2001, because it expressly left open the question of whether its decision applied to punitive damages or not. Since the July 13th ruling was not final with regard to this issue, the trial court had not issued a final decision on the motion for a new trial and it was entitled to complete its decision within the statutory time. Hamilton acted properly in attempting to obtain a final order before the time expired, and did so. As one practice guide states: "If the trial judge inadequately states a ground for granting a new trial, try to cure any deficiencies before expiration of the 60-day period within which the court must rule on the motion. If the order does not state an important ground for the decision, immediately call that omission to the court's attention and try to obtain a clarification." (3 Cal. Trial Practice: Civil Procedure During Trial (Cont. Ed. Bar 2002) § 25.66, p. 1461.) This is the procedure followed by Hamilton, and it was entirely proper.

We also note that the issue of punitive damages had been decided before trial, and the punitive damages issue was therefore not submitted to the jury. The new trial motion sought a new trial on the grounds of excessive compensatory damages, and the trial

court's initial comments were focused on that issue. Mr. Barton's counsel used the occasion to attempt to resurrect the punitive damages issue, and to attack the trial court's prior decision eliminating punitive damages issues from the trial. However, as discussed below, the issue of punitive damages was not so interwoven with the question of compensatory damages as to require a new trial on both issues in the interests of justice.

We therefore conclude that the trial court had the jurisdiction to enter its July 20, 2001, order limiting the new trial to compensatory damages.

THE TRIAL COURT'S DECISION GRANTING A NEW TRIAL ON THE GROUND THAT THE DAMAGES AWARDED WERE EXCESSIVE

Mr. Barton's next contention is that the trial court abused its discretion in granting the motion for a new trial on compensatory damages because substantial evidence supports the jury's award of compensatory damages.

Hamilton agrees that an abuse of discretion standard of review is appropriate, but points out that the substantial evidence standard of review is inapplicable. It relies on *Mercer v. Perez* (1968) 68 Cal.2d 104. In that case, our Supreme Court held: "[A new trial] motion is addressed to the judge's sound discretion; he is vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact; on appeal, all presumptions are in favor of the order as against the verdict, and the reviewing court will not disturb the ruling unless a manifest and unmistakable abuse of discretion is made to appear. [Citations.]" (*Id.* at pp. 112-113.)

The statute requires that "such order shall be reversed as to such ground only if there is no substantial basis in the record for any such reasons." (§ 657.) Thus, the question is not whether there was substantial evidence to support the conclusions of the jury but rather whether there is a substantial basis in the record to support the trial court's conclusion that the damages were excessive.

As our Supreme Court put it: "[A]n order granting a [motion for a new trial] 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.]" (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 409.) The court further described the standard to be used as follows: "Thus, we have held that an order granting a new trial under section 657 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.] Moreover, '[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached . . . .' [Citation.] In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.' [Citation.] [¶] The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' [Citation.] Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Lane,* at p. 412.)

Mr. Barton thus has a heavy burden to bear in attacking the trial court's decision to grant a new trial on the ground that the damages were excessive.

As required by section 657, the trial court stated its reasons for granting a new trial in its July 20, 2001, order. After noting that no issue of punitive damages was presented to the jury, and that the jury was limited to a determination of compensatory economic damages, the court cited the damages instructions given to the jury. Those instructions told the jury to award Mr. Barton benefit-of-the-bargain damages (BAJI No. 12.57), i.e., "an amount that will reasonably compensate [plaintiff] for all the loss suffered by plaintiff and caused by the fraud of defendant . . . . [¶] The amount of such award shall be the difference between the actual value of that which the plaintiff received and the value which he would have had if the fraudulent representation had been true." "'. . . The "benefit-of-the-bargain" measure . . . is concerned with satisfying the expectancy interest of the defrauded plaintiff by putting him in the position he would have enjoyed if the false representation relied upon had been true; it awards the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive.' [Citations.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240.)

The court's order then states: "Immediately after hearing these instructions, and before receiving either the written instructions or the substantial amount of documentary evidence in the deliberation room, the Court received the following question from the jurors: 'We the jury would like to know if $1.5 million is the cap.'" The trial court was

troubled by this hasty question: "1.5 million dollars was the death benefit associated with the whole life policy purchased by Plaintiff Barton. And that amount of money was also brought up and placed before the jury by plaintiff's counsel in his argument suggesting that that might be fair and just compensation. [¶] That, of course, was argument and not part of the evidence. And the question was, at least, problematic in light of the Court's instruction given immediately before the question was presented to the Court."

The court found that $1.5 million, the amount of the death benefit, was not an appropriate measure of benefit-of-the-bargain damages, particularly since Mr. Barton still owned a $1.5 million policy from Hamilton's successor in interest. Consideration of the evidence relating to the present cost of similar insurance coverage established, for the trial court, that the jury's award greatly exceeded any such cost. The court also noted that the jury had settled on a precise amount and it concluded: "No rational, non-speculative calculation of economic damages, based upon the evidence, has been presented to account for the $866,840.25 verdict, or to show that it amounts to plaintiff's 'benefit of the bargain'. . . ." The trial court therefore concluded that the precise amount "was arrived at as a result of passion, prejudice, an arbitrary chance determination, or some basis other than the evidence presented and the instructions of the law."

Mr. Barton argues that fraud damages are premised on the benefit-of-the-bargain rule, and that, based on Mr. McCall's representations as to the nature of the policy, he was entitled to receive a paid-up life insurance policy with a retirement benefit. In other words, Mr. Barton contends that the difference between what Mr. McCall promised him

and what he received has two components. First, he argues that he was entitled to a paid-up universal life policy with a $1.5 million death benefit. He cites testimony that the cost of such a policy would be $37,885 per year for the rest of his life. His expert testified that the present value of the premium payments for such a policy would be up to $613,888.

Second, he argues that Mr. McCall promised that the policy would have an investment component which would allow his funds to increase at the promised interest rate of 15 percent to 17 percent per annum and that this investment component alone is worth at least $320,000.

Mr. Barton concludes that, since the present value of the cost of future policy premiums plus the present value of the alleged investment component exceeds the jury's award, substantial evidence supports the award.

Mr. Barton also contends that the jury would have been entitled to merely award him $1.5 million, the amount of the death benefit under the policy. Since this sum exceeds the amount of the jury's award, he argues that it also constitutes substantial evidence to support the award.

On the other hand, Hamilton presented evidence that the present value of the premium necessary to fund a fully paid-up policy was $214,663 and the maximum value of the $300,000 retirement benefit was $176,229. The total, $390,892, is far below the jury's award of $866,840.25.

The trial court found that an award of the full amount of the death benefit of the policy was not a proper measure of benefit-of-the-bargain damages. Secondly, the court found that Mr. Barton was currently covered by a $1.5 million policy and the accumulated cash value of that policy was approximately $55,000. Third, the court ignored the investment component argument.

It should be apparent from the foregoing that the evidence would support a wide range of damages. There was no evident basis for the jury's precise result and the trial court was fully justified in finding that it was excessive. In the words of our Supreme Court, "[t]he record also supported the foregoing findings. We emphasize again that, so long as the outcome is uncertain at the close of trial--that is, so long as the evidence can support a verdict in favor of *either* party--a properly constructed new trial order is not subject to reversal on appeal." (*Lane v. Hughes Aircraft Co., supra*, 22 Cal.4th 405, 414.) The evidence here clearly would support a verdict for a much lower sum than that awarded by the jury.

In this posture, we cannot say the trial court abused its discretion in granting the motion for a new trial on the grounds of excessive damages and failure to follow jury instructions.

THE RETRIAL OF THE DAMAGES ISSUE

Mr. Barton contends that, if a new trial is granted on the issue of damages, he should be permitted to introduce evidence to support an award of punitive damages. He

argues that the interests of justice require that the issues of compensatory and punitive damages be tried together.

Mr. Barton relies on *Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558. In that case, an artist sued a gallery for the value of consigned paintings that were destroyed by fire. He also accused the gallery owners of converting the insurance proceeds from the paintings. (*Id.* at p. 561.) The jury awarded $42,500 damages for the alleged time and expense of pursuing the converted property. (*Ibid*.) The trial court granted a new trial motion because it found the evidence did not support the award of $42,500, and it concluded that the amount must have represented either unallowable attorney fees or punitive damages. (*Id.* at p. 563.) However, there was no basis for an award of punitive damages because the jury had found no oppression, fraud, or malice. (*Ibid*.)

The trial court declined to order a new trial on punitive damages because it thought it had no discretion to grant such a new trial because no one had requested a new trial. (*Pelletier v. Eisenberg, supra,* 177 Cal.App.3d 558, 564.) The appellate court held that the trial court had the discretion to order a new trial on both compensatory and punitive damages in the interests of justice, even though the motion for a new trial only addressed one issue. (*Id.* at p. 565.) It applied the rule that "in cases where the motion for new trial addresses all the issues, it is an abuse of discretion for the trial court to grant a limited new trial when it might be prejudicial to either party. [Citation.]" (*Id.* at p. 566.) The court relied on *Hamasaki v. Flotho* (1952) 39 Cal.2d 602. In that case, our Supreme Court held that, when the issues of liability and damages are interwoven, a

partial retrial on damages may be unfair to the other party. In such a case, the trial court may order a new trial on both issues. (*Id.* at pp. 608-609.)

The issue thus presented is whether the issues of compensatory and punitive damages were so interwoven that a grant of a retrial on compensatory damages would require a retrial on punitive damages.

We agree with Hamilton that the issues are not so interwoven as to require a retrial of both issues. The trial court expressly found: "In accord with *Stewart vs. Truck Insurance Exchange* [(1993)] 17 Cal.App.4th 468, 484-485, a limited retrial on the issue of compensatory damages would not be prejudicial or unjust to either party. The evidentiary issues associated with the claim for compensatory economic damages are not inextricably intertwined with the evidence of corporate malice associated with the claim for punitive damages. . . . [A] retrial of those [punitive damages] issues would involve a wasteful expenditure of judicial time and resources."

In *Stewart*, the trial court found that "financial injury" damages were excessive and granted a conditional new trial motion on those damages. It also, without explanation, granted Stewart's new trial motion on the issue of punitive damages. The appellate court found the trial court erred in granting the new trial motion on punitive damages because there was no substantial evidence to support a punitive damage claim, and because the trial court failed to explain its reasons for granting the motion. (*Stewart v. Truck Ins. Exchange, supra*, 17 Cal.App.4th 468, 480-481.) The result was a new trial on financial injury damages and not on punitive damages. On the issue presented here,

the appellate court said: "Moreover, this is not a case where it would be prejudicial or unjust to either party to have a limited retrial. [Citation.] We do not have before us a verdict where an award of punitive damages is so interwoven with a compensatory award as to make it unfair to have a retrial limited to the latter. [Citation.] The jury never received or considered the issue of punitive damages. Its decision as to the amount of compensatory damages was thus not affected or impacted by that issue. In addition, there is no logical connection between the presence or absence of malice and the amount of compensatory damages which Stewart is entitled to recover. There is no apparent rationale for reviving the punitive damage issue merely because there is to be a new trial as to a portion of the compensatory damages." (*Id.* at p. 485.)

We agree with the trial court that *Stewart* is persuasive. As in *Stewart*, the jury here never considered an award of punitive damages. In fact, it was specifically instructed not to do so. Secondly, the issues are different. The question of compensatory damages only required the jury to determine the amount that would compensate Mr. Barton for the loss he sustained as a result of the fraud. The measure of damages is the benefit of the bargain. At most, this determination would depend upon the jury's evaluation of the present value of premium payments for the allegedly paid-up policy and the present value of the alleged retirement benefit. On the other hand, a reversal of the nonsuit on punitive damages would require that the jury first determine liability for such damages and then the amount of such damages. Liability issues would include agency, ratification and malice issues. In other words, we agree with Hamilton that "a new trial

on the issue of punitive damages would cover Alexander Hamilton's entire course of conduct, [and] would involve a determination of whether it acted with malice and whether it ratified McCall's conduct. The proof related to compensatory and punitive damages involves unrelated factual proof and legal issues." The factual proof would presumably include evidence of Hamilton's treatment of other policyholders who were also victims of McCall's fraud.

Since it is apparent that the compensatory and punitive damages issues are separate, and not interwoven, neither *Pelletier* nor the interests of justice require retrial of both compensatory and punitive damages issues.

THE GRANTING OF THE MOTION FOR NONSUIT ON PUNITIVE DAMAGES

Mr. Barton also argues the trial court erred in granting Hamilton's nonsuit motion on the issue of punitive damages. He cites *Stewart*: "In reviewing the trial court's order granting Stewart a new trial on the punitive damage claim, we necessarily review the correctness of the court's original order granting Truck a nonsuit on that issue. If the trial court correctly granted the nonsuit motion, then there was no error of law on which to base the grant of a new trial." (*Stewart v. Truck Ins. Exchange, supra*, 17 Cal.App.4th 468, 481.) Assuming that the same principle would apply when a new trial on the punitive damages claim is denied, Mr. Barton proceeds to argue the merits of the nonsuit motion. We will therefore consider the merits of the nonsuit motion.

1. <u>The Standard Used in Deciding the Nonsuit Motion.</u>

Mr. Barton argues that the preponderance of the evidence standard applies to the determinations, under Civil Code section 3294, subdivision (b), of whether he submitted sufficient evidence that Mr. McCall was a managing agent of Hamilton and whether Hamilton ratified Mr. McCall's fraud.

Mr. Barton cites the statute: "(a) 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. [¶] (b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (Civ. Code, § 3294, italics added.)

Mr. Barton argues that the clear and convincing evidence required by subdivision (a) of the statute does not apply to subdivision (b), and that the proper standard of proof

for the determination of managing agent status or conduct alleged to be ratification is the preponderance of the evidence standard.

Mr. Barton cites the Use Note to BAJI No. 14.73 (9th ed. 2002), which states: "The committee believes that there is a substantial issue as to whether the requirement of clear and convincing evidence applies to the findings required by [Civil Code section 3294] subdivision (b). Therefore, the trial judge will have to make that choice pending legislative or appellate court clarification." He also cites the leading cases of *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, *Agarwal v. Johnson* (1979) 25 Cal.3d 932 (disapproved by *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4), and *White v. Ultramar, Inc., supra,* 21 Cal.4th 563, but these cases do not discuss the burden of proof to be applied in deciding a motion for nonsuit.

Hamilton argues that the trial court properly applied a clear and convincing evidence standard. It also cites a passage from *Stewart*: "Since January 1, 1988, a claim for punitive damages has required evidence which establishes by '*clear and convincing evidence*' that the defendant has been 'guilty of oppression, fraud, or malice.' If a plaintiff is to recover on such a claim, it will be necessary that the evidence presented meet this higher evidentiary standard. . . . [¶] We see no reason why this standard should not apply here. If Stewart was ever going to prevail on his punitive damage claim he could only do so by the presentation of clear and convincing evidence that Truck had by its conduct[ ] demonstrated malice." (*Stewart v. Truck Ins. Exchange, supra*, 17 Cal.App.4th 468, 481-482, fn. omitted.)

We agree with Hamilton. "In our view, this issue is substantially identical to the problem raised by a defendant's motion for summary judgment in a case where the plaintiff's ultimate burden of proof will be by 'clear and convincing' evidence. In such a case, the evidence and all inferences which can reasonably be drawn therefrom must meet that higher standard. [Citations.]" (*Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 539; *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1121.) Accordingly, evidence of ratification of Mr. McCall's actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence. The trial court did not err in applying this burden of proof to its decision on Hamilton's nonsuit motion.

In addition, Hamilton points out that any error in this regard was invited by Mr. Barton's application of the clear and convincing standard in his opposition to the motion and in his presentation at the hearing. We agree with Hamilton and find that the trial court did not err when it required Mr. Barton to prove his punitive damages case by clear and convincing evidence. We also agree with Hamilton's fall-back position that any issue which was created by application of the wrong standard of proof was nonprejudicial because, as discussed below, the trial court found a lack of *any* evidence that Mr. McCall was a managing agent of Hamilton or that Hamilton ratified his conduct.

2. <u>The Contention that Substantial Evidence Supported the Claim for Punitive Damages.</u>

Mr. Barton next argues the merits of his contention that the trial court erred in granting the nonsuit motion on punitive damages by citing evidence which he claims shows that Mr. McCall was a managing agent of Hamilton, and that Hamilton ratified his actions. Mr. Barton argues the facts were sufficient to allow a jury to conclude that Mr. McCall was a regional director and officer of Hamilton.

In view of this argument, we will review the basic facts Mr. Barton relies on in support of his contention. First, he contends that Mr. McCall was specifically identified by Hamilton as a regional director and officer of Hamilton. He cites exhibits 3 and 1166. Exhibit 3 is the application Mr. McCall submitted to become a personal producing general agent for Hamilton. Mr. Bickers, the regional director, signed the application with a recommendation to contract with Mr. McCall as a life insurance agent. Nothing in the application suggests that Mr. McCall was to become a company employee or officer. It was merely part of the process of recruiting Mr. McCall to sell Hamilton's life insurance products. Exhibit 1166 is a computer printout that appears to be Hamilton's record of Mr. McCall's basic personal data. Under his name is a line which states: "Type-Full Time Regional Director." However, Mr. McCall's name is crossed out and the name of Mr. Bickers, the regional director, is written above it. Mr. Barton testified that the document was produced in discovery and that Mr. McCall's name was highlighted rather than being crossed out. In fact, Mr. Barton explicitly testified that Mr.

McCall told him that he (Mr. McCall) was a full-time regional manager for Hamilton. But even if Mr. McCall misrepresented his position, this evidence does not establish that he was a managing agent under the criteria discussed below.

The only other documentation of Mr. McCall's status was his contract with Hamilton. That contract gave Mr. McCall the authority to solicit applications for life insurance with Hamilton in accordance with its usual practices, to appoint subagents subject to Hamilton's approval, and to collect the initial policy premiums. The contract contained a number of limitations and regulations, some of which Mr. McCall routinely breached. It also provided: "The General Agent at all times shall be deemed an independent contractor and nothing contained herein shall be construed to create the relationship of employer and employee between the Company and the General Agent. The General Agent shall be free to exercise independent judgment as to the persons from whom applications for policies and annuity contracts will be solicited and the time and place of solicitation. The General Agent shall abide by the rules and regulations of the Company enumerated herein, but such rules and regulations shall not be construed so as to interfere with the freedom of action of the General Agent." It is therefore clear that Mr. McCall was not an employee of Hamilton but, as noted above, the jury found that he was acting as Hamilton's agent when he made the false representations.

Mr. Barton points out that the contract allowed Mr. McCall to appoint subagents. He further relies on the fact that Mr. McCall was a member of the President's Council, an incentive organization for top producing agents. As a member of the council, Mr.

McCall would be in a better position to talk to top management. As an illustration, Mr. Barton cites testimony that Mr. McCall called him from a convention, put a person identified as the company president on the telephone, and that person gave him reassurances about the performance of his policy. In our view, these facts are not supportive of plaintiff's position that Mr. McCall was a managing agent of Hamilton.

Mr. Barton cites testimony of Hamilton's in-house counsel that Mr. McCall and Mr. Bickers explained a policy illustration problem to Hamilton, and Hamilton corrected the problem. The problem arose when another customer of Mr. McCall, William Friis, put $80,000 into a policy but still received premium notices. Mr. Friis testified that he believed he had a single premium paid-up policy. After discussion with Hamilton, Hamilton's representataives acknowledged that no further premiums were due. This testimony does not support the conclusion that Mr. McCall was able to set policy for Hamilton. At most, it shows that he knew who to contact to deal with a problem.

The parties agree that Mr. McCall obtained policy loans by forging policyholder's signatures to the applications, made other withdrawals without the policyholder's consent, misappropriated premium money, and generally betrayed his position of trust. The losses amounted to roughly $1,200,000, and Hamilton reimbursed policyholders in roughly that amount.[2] Mr. McCall subsequently served a jail term for his crimes.

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[2] Hamilton's deputy general counsel testified the company spent $1.7 million to reimburse policyholders on their claims.

Although Mr. Barton cites a number of these defalcations in his reply brief, there is no evidence that Hamilton was aware of these breaches before Mr. Barton's complaint. He concludes this discussion by arguing Mr. McCall had an "unlimited grant of authority" because he was authorized to "solicit applications, meet with customers, evaluate the customer's needs for insurance, recommend an appropriate life insurance product, assist in the completion of the application, inform the prospective customers as to the merits of the policies, insure that the policies satisfied the needs of the customer and do whatever else 'appropriate' to make the customer satisfied." In our view, these actions would be taken by any life insurance salesman, and the fact that Mr. McCall was authorized to take these actions does not mean he was a managing agent of Hamilton.

Civil Code section 3294 requires the acts which support a punitive damages award against a corporation be done by, or ratified by, a managing agent of the corporation. Normally, a managing agent is an employee of the corporation who exercises substantial discretionary authority over significant portions of the corporation's business. Such an employee may be an officer of the corporation, or person in a lesser position. Although it is possible that a nonemployee, such as a director, could be found to be a managing agent, we have been cited only one case that supports the proposition that a lower level nonemployee could have such an influence over the business so as to be a managing agent. In *Liberty Transport, Inc. v. Harry W. Gorst Co.* (1991) 229 Cal.App.3d 417 (disapproved on other grounds in *Adams v. Murakami* (1991) 54 Cal.3d 105, 116) the actions of a broker who represented London-based insurance companies were held to

justify an award of punitive damages against the insurance companies, based on the broker's status as a managing general agent and the insurance companies' ratification of the broker's actions. (*Id.* at pp. 439-440.)

Mr. Barton cites the leading case on this subject. In *White v. Ultramar, Inc., supra*, 21 Cal.4th 563, our Supreme Court interpreted the statutory term "managing agent" to mean "those employees who exercise substantial discretion in their decisionmaking so that their decisions ultimately determine corporate policy. [Citation.]" (*Id.* at p. 566.) The court found that the mere ability to hire and fire employees does not make a supervisory employee a managing agent: "Instead, we conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy." (*Id.* at pp. 566-567.)

The court approved *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal.App.4th 397, in which the court held that "supervisory employees are not managing agents under section 3294, subdivision (b), unless they in fact exercise substantial discretion in their decision making capability. [Citation.]" (*White v. Ultramar, Inc., supra*, 21 Cal.4th 563, 573.) The court noted that, in *Kelly-Zurian*, the supervisor was an administrator who had direct authority over plaintiff's employment responsibilities, but plaintiff failed to show that the supervisor was engaged in policymaking for the corporation. (*White v. Ultramar, Inc., supra*, 21 Cal.4th 563, 573-574.)

The trial court found *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, persuasive. Mr. Cruz, a HomeBase customer, was falsely accused of shoplifting by its security personnel. An altercation ensued, and Mr. Cruz sued HomeBase for battery, false imprisonment, and malicious prosecution. He sought punitive damages on grounds that the corporation had ratified the behavior of its security personnel by not disciplining or firing them. (*Id.* at pp. 163-164.) Citing *White*, the court held that a managing agent is an employee who exercises substantial discretion over decisions that ultimately determine corporate policy. (*Id.* at p. 167.) It further defined "corporate policy" to mean "the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations." (*Ibid*.) The security personnel in *Cruz* were not managing agents. The senior security officer "supervised only a few employees, and had authority over only one narrow area of the single stores multifaceted operations: security. There was not a hint of evidence that he exercised authority over corporate principles or rules of general application in the corporation." (*Id.* at p. 168.)

The trial court also considered *Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal.App.4th 1608. In that case, Mr. Herrick, a security guard, was terminated. The supervisor who terminated him threatened Mr. Herrick with a gun and Mr. Herrick suffered severe emotional distress as a result of the incident. (*Id.* at pp. 1613-1615.) The jury found that the hotel manager was a managerial employee who ratified the supervisor's actions and it awarded punitive damages. The appellate court upheld the award of punitive damages.

Here, the trial court concluded: "There is no evidence that Mr. McCall had substantial discretion or authority over decisions that ultimately determined corporate policy. He set no policy. Rather, he ignored the policies of the corporate defendant in this case."

We agree. Mr. McCall was an independent insurance broker, not a corporate employee. Although he was Hamilton's agent for the sale of life insurance policies, there is no evidence that he was in the managerial group that set corporate policy for Hamilton. Accordingly, the trial court properly found that Mr. McCall was not a managing agent of Hamilton.

Alternatively, Mr. Barton argues that Hamilton ratified the fraudulent conduct of McCall. But the evidence does not support this claim. The evidence does not show that Hamilton was aware of any fraudulent conduct by Mr. McCall until Mr. Barton complained to Hamilton about an unauthorized loan that Mr. McCall had taken against Mr. Barton's policy. The situation with Mr. Friis, discussed above, does not show that Mr. McCall was stealing money or misrepresenting the terms of the Hamilton policies with Hamilton's consent. Instead, the evidence supports the conclusion that Mr. McCall was an independent insurance broker who was cheating both his clients and the insurance company he represented. Obviously, a corporation cannot ratify conduct it is unaware of, and it did not ratify Mr. McCall's fraud. (*Cruz v. HomeBase, supra*, 83 Cal.App.4th 160, 168.)

As our Supreme Court has held: "[R]atification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties. [¶] The issue commonly arises where the employer or its managing agent is charged with failing to intercede in a known pattern of workplace abuse, or failing to investigate or discipline the errant employee once such misconduct became known. [Citations.] Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 726.)

As soon as Hamilton became aware of Mr. Barton's complaint, it terminated Mr. McCall's agent agreement and initiated an investigation. It hired an attorney in California to interview Mr. McCall and it reported Mr. McCall's conduct to the Department of Insurance and the Riverside Police Department. It contacted policyholders in the Riverside area, and it reimbursed them for their losses in the total sum of approximately $1.2 million. Instead of ratifying or approving of Mr. McCall's conduct, it tried to solve the problem by restoring the stolen funds. Hamilton also offered Mr. Barton the opportunity to rescind the policy and it offered to reimburse him for any money that he was out of pocket as a result of Mr. McCall's acts. Such conduct cannot be considered ratification of Mr. McCall's conduct. Instead, it falls within the established principle that, when the agent exceeds his authority, there is no ratification when the principal repudiates the agent's actions as soon as the principal learns of them. (*Hale v.*

Farmers Ins. Exch. (1974) 42 Cal.App.3d 681, 691-692, overruled on other grounds in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 822.) Despite Mr. Barton's contrary argument, we do not view Hamilton's conduct as an improper attempt to ratify part of Mr. McCall's conduct while disavowing the remainder. (Civ. Code, § 2311; *Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1656.)

Mr. Barton alleges that Mr. McCall was misrepresenting the terms of the policies, and that he is entitled to benefit-of-the-bargain damages calculated as if the misrepresentations had been true, i.e., the representation that he had a paid-up policy and the representation that the policy had a significant investment component at 15 percent interest. The jury agreed with him and awarded damages for his alleged loss. But the misrepresentations were not authorized or approved by Hamilton, and they do not provide a basis for an award of punitive damages. We therefore agree with the trial court: "There's been no evidence--certainly no clear and convincing evidence that at that time they took actions to ratify that conduct. The conduct again is for the jury to look at, and Roger McCall had done a number of things which are not alleged to be the fraud in this case--or not understood to be fraud in this case, including the taking out of unauthorized loans on insureds' policies, the retention of the premiums on insureds' policies, the application for insurance without an authorization from the insureds, and there's no indication that any of those activities were adopted by the corporation [*sic*]." The nonsuit motion on punitive damages was properly granted on its merits.

3. The Alleged Errors in the Exclusion of Evidence.

Finally, Mr. Barton seeks to invoke the rule that a nonsuit may be reversed when the trial court erroneously excluded evidence that would have supported his position on appeal. (*Lawless v. Calaway* (1944) 24 Cal.2d 81, 89.) He divides the excluded evidence into four categories: evidence of Mr. McCall's out-of-court statements, evidence of a suit by Hamilton against Union Bank for accepting checks with signatures forged by Mr. McCall, other evidence which would allegedly show knowledge and ratification, and evidence of Hamilton's ethical compliance program.

The trial court excluded Mr. McCall's testimony as a discovery sanction. It granted a motion in limine to exclude Mr. McCall's testimony from trial. The statements were primarily a tape recorded conversation with Hamilton's investigator in which he admitted unauthorized policy loans. Mr. Barton contends the tape recorded statement included substantial discussions about his claim that the policy was a paid-up policy, and this testimony would impeach the testimony of the investigator that he was unaware of such a claim. However, none of the statements cited by Mr. Barton had anything to do with the issue of whether Mr. McCall was a managing agent of Hamilton, or whether it ratified his actions. We therefore agree with Hamilton that any error in refusing to admit the statements was harmless.

Second, Mr. Barton argues the trial court erred in granting a motion in limine that prevented him from introducing evidence of Hamilton's lawsuit against Union Bank to recover damages for the bank's acceptance of checks forged and endorsed by Mr.

McCall. Mr. Barton argues that this litigation conflicts with Hamilton's assertions that it had no legal obligation to repay policyholders their losses. Even if this were true, it has nothing to do with the issues presented in the nonsuit motion on punitive damages. The evidence was not probative on the issues of whether Mr. McCall was a managerial agent of Hamilton or whether it ratified his fraud. Accordingly, the trial court did not abuse its discretion in excluding the evidence.

Third, Mr. Barton argues that the trial court improperly limited the number of other policyholders which he could present. He proposed to present testimony of 12 other policyholders to show that Mr. McCall made similar misrepresentations about the paid-up nature of the policies to them. He was allowed to present four of the policyholders as witnesses. Mr. Barton now argues that the testimony of the excluded witnesses would contradict Hamilton's position that it had no knowledge that policyholders were claiming that their policies were paid-up policies. In essence, the contention is that Hamilton's investigation of Mr. McCall's fraud was not in good faith because, although Hamilton restored the stolen money, it did not focus on claims that the policies were paid-up policies. Mr. Barton characterizes this conduct as a cover-up and argues that the evidence goes to the crucial questions of what Hamilton knew and when it knew it.

While we agree that the evidence might have had some relevancy on the knowledge and ratification issues, Mr. Barton was allowed to present his four best

witnesses. It appears that none of the excluded witnesses would present any additional testimony on the issues of whether Mr. McCall was a managerial agent of the company.

Fourth, Mr. Barton sought to present evidence of Hamilton's ethical compliance program. The trial court granted a motion in limine to exclude such evidence. Mr. Barton argues that the program shows that the company was aware that industry standards required it to guard against rogue agents and their propensity to misrepresent universal life policies as paid-up policies. According to Mr. Barton, evidence of such a program also shows that there was a general industry concern about misrepresentations by sales agents, that Hamilton was aware of the possibility of agent fraud and misrepresentation, and that the adoption of an agents' code of conduct "further dictated the manner and procedures under which it was to investigate claims of misrepresentations to protect policyholders from such fraud."

The trial court, finding the compliance program was contemporaneous with the fraud, excluded the evidence under Evidence Code section 1151. That section makes inadmissible evidence of subsequent remedial conduct. Mr. Barton does not attack this finding. In any event, we agree with Hamilton that the proposed evidence concerning the compliance program does not tend to prove either actual knowledge or ratification of Mr. McCall's fraudulent conduct.

We therefore conclude that the excluded evidence would not have helped Mr. Barton's position on the nonsuit motion. Consideration of that evidence does not show

that the trial court abused its discretion either in excluding the evidence or in granting the motion for nonsuit on punitive damages.

HAMILTON'S CROSS-APPEAL

THE EVIDENCE TO SUPPORT THE FRAUD CLAIMS AGAINST HAMILTON

Hamilton strikes first at the basic liability finding of the jury. It contends that there was no admissible evidence to support the fraud claims because Mr. McCall was not the agent of Hamilton for the purpose of imposing tort liability on Hamilton and that he did not have the authority to make representations concerning the insurance policy.[3]

Hamilton brought a summary judgment motion on grounds that McCall was not its agent, but was instead an insurance broker acting for Mr. Barton and other policyholders. It also argued that Mr. McCall did not have actual or ostensible authority to bind Hamilton.

The trial court (Judge Cunnison) denied the motion. Citing Insurance Code section 1731[4] and *Loehr v. Great Republic Ins. Co.* (1990) 226 Cal.App.3d 727, the court

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[3] By order filed October 23, 2002, we reserved decision on Mr. Barton's request that we take judicial notice of the records in a North Carolina action. The request states that Hamilton sued its bonding company to recover sums paid to policyholders defrauded by Mr. McCall. As part of that action, Hamilton representatives testified that Mr. McCall was an authorized agent of Hamilton at the time he made the fraudulent representations. Since, as discussed below, we agree that Mr. McCall was an authorized agent of Hamilton, the record of the North Carolina action, which was not before the trial court, is not necessary to our decision. Accordingly, the request for judicial notice is denied.

[4] Insurance Code section 1731 states: "A person licensed as a broker-agent shall be deemed to be acting as an insurance agent in the transaction of insurance placed with

held that Mr. McCall was the agent of Hamilton as a matter of law. In *Loehr*, the court held that the insurance agent was the agent of the insurance company and "[a]s such, his acts and omissions as agent were binding on respondent. [Citation.] Of course, [the agent] may perform acts outside his agency or in excess of his authority for which [the insurance company] would have no responsibility or liability, and there may be factual questions as to representations he made to the insured." (*Id.* at p. 734.)

There were such factual questions here, and the agency issue was submitted to the jury. The jury found that Mr. McCall was the agent of Hamilton at the time the false promises and intentional and negligent misrepresentations were made.

In view of the jury's findings, we do not need to consider the correctness of the ruling denying Hamilton's summary judgment motion. Even if the ruling was incorrect, the agency issue was subsequently submitted to the jury under instructions which defined principles of agency law, as discussed below. Suffice it to say, there was ample evidence to support the trial court's denial of the motion and the subsequent jury verdict.

There was also a substantial issue as to whether Mr. McCall was acting in excess of his authority in misrepresenting Hamilton's life insurance products. This issue was also submitted to the jury, and it found that Hamilton expressly authorized Mr. McCall to make the representations to Mr. Barton.

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those insurers for whom a notice of appointment has been filed with the Insurance Commissioner in accordance with Section 1704 and is then in force."

Hamilton now contends that Mr. McCall was not its agent but rather was Mr. Barton's agent. It argues that tort liability must be determined by common law principal/agent relationships, rather than statutory provisions. It cites a number of cases to support its contention, including *Goldstone v. Columbia Life etc. Co.* (1917) 33 Cal.App. 119, and *Frasch v. London & Lancashire F. Ins. Co.* (1931) 213 Cal. 219.

From this foundation, Hamilton argues that Mr. McCall was Mr. Barton's agent to obtain life insurance for Mr. Barton. It relies on *Shapiro v. Equitable Life Assur. Soc.* (1946) 76 Cal.App.2d 75. In that case, the insured, plaintiff Shapiro, sought to charge the insurance company with the responsibility for the forgery of a man named Frankel. The appellate court held that Mr. Shapiro had the burden "to prove the existence of such agency and that Frankel was authorized by [the insurance company] to do on its behalf the acts of which [Mr. Shapiro] complains. [Citations.] [Mr. Shapiro] failed to prove any of the allegations in the complaint necessary to bind [the insurance company] for Frankel's acts. The uncontradicted evidence is to the contrary." (*Id.* at p. 83.) The court went on to describe the limiting provisions of the contract between the insurance company and Mr. Frankel, and held that Mr. Frankel was the agent of Mr. Shapiro when Mr. Frankel held the insurance policies for Mr. Shapiro. (*Id.* at pp. 83-84.)

Hamilton argues that the same limiting provisions are found in the contract between Hamilton and Mr. McCall, and that Mr. McCall also held Mr. Barton's insurance policy in his office. Mr. McCall also diverted premium notices, annual

statements and other communications from Hamilton by listing his office as Mr. Barton's mailing address.

Although the jury could have found Mr. McCall was Mr. Barton's agent, it did not do so. Instead, it was instructed on the general principles of agency and was told to decide whether Mr. McCall was acting as the agent of Hamilton or not. It was further instructed that plaintiff had the burden of proving the authority of Mr. McCall to act for Hamilton. The jury made its decision, and substantial evidence supports it. For example, the contract between Hamilton and Mr. McCall clearly and obviously supports the jury's conclusion that Mr. McCall was an agent of Hamilton. The jury could disregard the limitations on Mr. McCall's actual authority, as stated in the contract, and decide that he had ostensible authority to make representations about the policy to Mr. Barton.

Although Hamilton would prefer that we not consider the statutory provisions, those provisions also support the conclusion that Mr. McCall was an agent of Hamilton. (Ins. Code, §§ 31, 32, 1622, 1626, 1731; see also *Loehr v. Great Republic Ins. Co., supra*, 226 Cal.App.3d 727.) For example, Insurance Code section 32 defines "life agent" as "an insurance agent authorized, by and on behalf of a life, disability or life and disability insurer, to transact life, disability or life and disability insurance." Insurance Code section 1626 provides: "A life licensee is a person authorized by and on behalf of a life, disability, or life and disability insurer to transact life, disability, or life and disability insurance, and a life agent license is a license so to act." Insurance Code section 1731 provides: "A person licensed as a broker-agent shall be deemed to be acting as an

insurance agent in the transaction of insurance placed with those insurers for whom a notice of appointment has been filed with the Insurance Commissioner in accordance with Section 1704 and is then in force."[5] The statutes thus fully support the contention that Mr. McCall was Hamilton's agent.

As Mr. Barton points out, agency is a factual issue for the jury, and the jury's determination must be upheld when it is based on substantial evidence, including evidence of ostensible authority. (*Gulf Ins. Co. v. TIG Ins. Co.* (2001) 86 Cal.App.4th 422, 439.) There was such evidence here, and we agree with Mr. Barton that Hamilton is merely attempting to relitigate factual issues that the jury decided adversely to it.

Hamilton contends that, if it is found that Mr. McCall was an agent of Hamilton, he was simultaneously the agent of Mr. Barton. Under this heading, Hamilton argues that, assuming dual agency, the trial court erred in finding that Mr. McCall was Hamilton's agent as a matter of law. But, again, the decision denying the summary judgment motion is not the relevant issue. Following denial of the summary judgment motion, the question was presented to the jury and it found that Mr. McCall was the agent of Hamilton. The jury's decision was supported by substantial evidence.

Hamilton also contends that Mr. McCall had neither actual nor ostensible authority to misrepresent its products. While we agree that he did not have actual authority under the terms of the agent agreement, he did have the actual authority stated

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[5] Mr. McCall was so designated by Hamilton.

in Civil Code section 2319.[6] But even if Mr. McCall had no actual authority, the fact remains that the jury could have based its decision on his ostensible authority.

"An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." (Civ. Code, § 2300.) "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) "A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." (Civ. Code, § 2334.)

As we stated in the recent case of *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448: "Nominally, these statutes require proof of three elements: '"[First] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person in relying

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[6] Civil Code section 2319 states: "An agent has authority: [¶] 1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency; and, [¶] 2. To make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made."

Hamilton responds by citing Civil Code section 2316: "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess."

on the agent's apparent authority must not be guilty of negligence."' [Citation.]" (*Id.* at pp. 1456-1457.) "'The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence. [Citation.]' [Citation.]" (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1576; *Stanhope v. L. A. Coll. of Chiropractic* (1942) 54 Cal.App.2d 141, 146.)

The jury's attention was directed to these issues, and, as noted above, its determination is supported by substantial evidence. The jury could reasonably infer that Mr. McCall had the authority to describe the products being sold by Hamilton. The misrepresentations by Mr. McCall were misrepresentations about how the policy would perform, not the words of the policy themselves. A universal life policy is a complex product, and it is normally sold with a policy illustration. According to Mr. Barton, Mr. McCall showed him an illustration and then took it back. It was not submitted at trial but the jury was entitled to accept Mr. Barton's understanding of the manner in which the policy would perform in finding liability and awarding benefit-of-the-bargain damages. "Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions." (*Clement v. Smith* (1993) 16 Cal.App.4th 39, 45.)

Hamilton argues, however, that Hamilton did not make any representations to Mr. Barton, and Mr. Barton was on notice as to Mr. McCall's authority by statements in the

application for insurance. It also argues that Mr. McCall was only a soliciting agent, and that he had no authority to bind Hamilton at all. (*Toth v. Metropolitan Life Ins. Co.* (1932) 123 Cal.App. 185, 192; *Porter v. General Acc. etc. Assur. Corp.* (1916) 30 Cal.App. 198, 203; *Browne v. Commercial Union Assur. Co.* (1916) 30 Cal.App. 547, 554. See generally 3 Couch on Insurance 3d (1995) § 45:21, pp. 45:32-45:34.)

The jury could have found that Hamilton, acting through Mr. McCall, did make the representations: "The rule is that '""whatever is said by an agent, either in the making of a contract for his principal, or at the time, and accompanying *the performance of any act, within the scope of his authority*, . . . of the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal, and admissible as evidence . . . . But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of his principal, . . . are not binding upon his principal . . . and are not admissible . . . ."' [Citation.]' [Citation.]" (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1077.) "A 'failure to deliver the agreed-upon coverage' case is actionable . . . . A broker's failure to obtain the type of insurance requested by an insured may constitute actionable negligence and the proximate cause of injury. [Citation.] Moreover, if the agent fails to exercise reasonable care in procuring the type of insurance that the insured demanded and bargained for, the cases hold that the insurer may be liable under theories of ratification and ostensible authority." (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1119-1120.)

But even if Mr. McCall's statements were not attributable to Hamilton, the jury could find that Mr. McCall had ostensible authority because of Hamilton's failure to supervise its agents. In other words, it was not necessary for Hamilton itself to make any representations to Mr. Barton. As noted above, its neglect in supervising Mr. McCall to guard against misrepresentation of its products could be a basis for liability under an ostensible authority theory. The burden of supervising the activities of the agents of the insurance company is on the insurance company, and if it neglects to ensure that its agents are properly describing its products and providing correct policy illustrations using, for example, realistic interest rate projections, the jury may find that its neglect led to a reasonable belief by the insured that the policy being sold was the policy described by the agent. (Cf. *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 962 [class action alleging misrepresentations as part of a scheme by insurance company and its agents to induce existing policyholders to purchase universal life policies].)

The jury could properly find that the statements in the application did not put Mr. Barton on notice because there was no evidence that Mr. Barton was aware of the statements limiting the agent's authority when he signed an application in blank. The jury also had to decide the nature of Mr. McCall's agency in order to determine the extent of his authority. The evidence on this subject varied widely, from Mr. Barton's contention that Mr. McCall was a regional director of Hamilton to Hamilton's contention that Mr. McCall was merely a broker employed by Mr. Barton to find suitable life insurance for Mr. Barton.

We therefore find no basis for concluding, as a matter of law, that Mr. McCall did not have ostensible authority. The issue was a factual one and substantial evidence supports the jury's decision. (*Gulf Ins. Co. v. TIG Ins. Co., supra,* 86 Cal.App.4th 422, 439.)

ALLEGED ERRORS IN THE ADMISSION OF EVIDENCE

Hamilton contends that the trial court erred in denying four motions in limine and consequently admitting certain testimony into evidence. It argues that the allowance of such testimony caused the jury to render a verdict based upon passion and prejudice.

The first motion in limine was to preclude the introduction of any evidence of representations by Mr. McCall which conflicted with the written terms of the insurance policy. Both the policy and the insurance code provide that the policy is an integrated agreement. (Ins. Code, § 10113.) Under the parol evidence rule, terms of an integrated agreement may not be contradicted by contemporaneous oral agreements. (§ 1856.) Hamilton therefore argues that parol evidence of the representations made by Mr. McCall was inadmissible to vary the terms of the policy. Hamilton acknowledges, however, that Code of Civil Procedure section 1856, subdivision (g), provides an exception to the parol evidence rule when fraud is in issue but it claims the exception has limited applicability.

Hamilton cites *Bank of America etc. v. Pendergrass* (1935) 4 Cal.2d 258: "Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence

concerning its use, and not a promise directly at variance with the promise of the writing." (*Id.* at p. 263.)

Hamilton also relies on *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412: "'Promissory fraud' is a promise made without any intention of performing it. [Citations.] The fraud exception to the parol evidence rule does not apply to such promissory fraud if the evidence in question is offered to show a promise which contradicts an integrated written agreement. Unless the false promise is either independent of or consistent with the written instrument, evidence thereof is inadmissible. [Citations.]" (*Id.* at p. 1436.)

Neither the integration clause nor the parol evidence rule prevents Mr. Barton from asserting a cause of action for fraud in the inducement. "[A] contract provision stating that all representations are contained therein does not bar an action for fraud. [Citations.]" (*Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Development Corp.* (1995) 32 Cal.App.4th 985, 992; see generally 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 410, pp. 368-369.)

The parol evidence rule prevents extrinsic evidence to contradict the terms of a written agreement. Even if it was applicable to the representations made by Mr. McCall, we would agree with Mr. Barton that there was evidence here from which the jury could reasonably conclude that the fraud of Mr. McCall was in his description of how the policy worked. By using generous interest rate assumptions and failing to explain limitations on the amount of the buildup of cash surrender values, Mr. McCall

represented that the policy was paid-up, i.e., the interest would be sufficient to pay premiums, and that the policy had an investment component that would generate high interest returns. In other words, the evidence of fraud by false promise did not necessarily contradict the terms of the policy but rather tended to be a false explanation of how the policy would actually work. As noted above, universal life insurance policies are complex insurance and investment vehicles, and companies generally require illustrations to accompany the policies to explain them. The illustration for Mr. Barton's policy was missing, and the court and jury therefore relied on Mr. Barton's testimony regarding it. As discussed below, oral testimony may be used to establish the terms of a missing policy and we find that this principle allowed oral testimony regarding the contents of the lost policy illustration. (*Dart Industries, Inc. v. Commercial Union Ins. Co., supra*, 28 Cal.4th 1059.) Thus, the parol evidence did not necessarily contradict the terms of the policy, but rather could be interpreted to be consistent with the written agreement.[7]

Mr. Barton relies on *Clement v. Smith, supra*, 16 Cal.App.4th 39. In that case, the court held that substantial evidence supported the trial court's determination that the agent misrepresented the extent of coverage purchased by plaintiff Clement. The court then found that the jury could find that Mr. Clement's reliance on the agent's statements

[7] As part of his scheme, Mr. McCall arranged to keep the policy itself and Mr. Barton did not even see it for several years after it was issued. Mr. McCall also had Mr. Barton's annual statements mailed to Mr. McCall's address.

was reasonable, and that, in some situations, the insured could reasonably rely on the agent's misrepresentations: "When dealing with a contract as adhesive as the typical insurance policy, we are unwilling to impose on the insured so onerous a burden as would automatically defeat any agent's liability for misrepresentation. Certainly, an insured cannot remain intentionally ignorant of the terms of his or her policy. . . . Absent some notice or warning, an insured should be able to rely on an agent's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions. This is particularly true in view of the understandable reluctance of an insured to commence a study of the policy terms where even the courts have recognized that few if any terms of an insurance policy can be clearly and completely understood by persons untrained in insurance law. [Citations.]" (*Id.* at p. 45.)

Mr. Barton's contention that Mr. McCall's representations did not necessarily conflict with the provisions of the policy is bolstered by the testimony of Mr. Stange, a senior vice-president and general counsel of Jefferson Pilot, the holding company that owns Hamilton. Mr. Stange testified that a policy illustration could show assumptions regarding policy performance that would support a conclusion that the policy was paid-up because the investment performance was sufficient to pay the premiums. He acknowledged that the policy would only show the premiums being paid until the maturity date. It would not show that no premiums needed to be paid because of the investment performance shown in the illustration. In other words, the illustration would

misrepresent the source of the premium payments, and the cost of the policy to the insured, by showing that unrealistically high assumed investment performance would pay the premiums required by the policy.

"Parole [*sic*] evidence is always admissible to prove fraud, including circumstances where a purportedly fraudulently induced contract contains relevant exculpatory language, or integration clauses, as here. The parole [*sic*] evidence rule is not intended to be a shield for fraud [citations]." (*Hartman v. Shell Oil Co.* (1977) 68 Cal.App.3d 240, 251.)

We agree that an insured may reasonably rely on the insurance agent's representations concerning the contents of the policy and the way in which the financial terms would operate. We therefore find no merit in the contention that the trial court erred in failing to exclude such testimony under the parol evidence rule.

The second motion in limine was to exclude testimony concerning the policy illustration because the illustration could not be located. Hamilton contended that such evidence would violate the secondary evidence rule. (Evid. Code, § 1521.[8]) After discussion, the trial court denied the motion.

Hamilton now argues that Mr. Barton's testimony regarding the contents of the policy illustration was unfair to it as the illustration itself was never produced and its contents are in dispute.

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[8] Effective January 1, 1999, the best evidence rule (Evid. Code, § 1500 et seq.) was repealed and replaced by the secondary evidence rule (Evid. Code, § 1521 et seq.).

The secondary evidence rule provides: "(a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following: [¶] (1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion; [¶] (2) Admission of the secondary evidence would be unfair." (Evid. Code, § 1521.)

Evidence Code section 1523, subdivision (a) provides: "Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing." Mr. Barton relies on Evidence Code section 1523, subdivision (b): "Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence."

Evidence Code section 1523, subdivision (b) continues prior law that allowed oral testimony to describe the contents of a document that had been lost or destroyed without fraudulent intent by the proponent of the evidence, that was unavailable, or that was under the control of the opponent. (Former Evid. Code, §§ 1501-1503; Best Evidence Rule (Nov. 1996) 26 Cal. Law Revision Com. Rep. (1996) 369, 395.). The trial court could allow the evidence under Evidence Code section 1523, subdivision (b).

Our Supreme Court has recently addressed the relationship of these sections: "These statutes are codifications of the venerable common law rule that lost documents may be proved by secondary evidence. In *Folsom's Executors v. Scott* (1856) 6 Cal. 460,

461, the court stated: 'The rule . . . for the admission of secondary evidence of a lost paper, requires "that a *bona fide* and diligent search has been unsuccessfully made for it in the place where it was most likely to be found;" and further, "the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.["]'" (*Dart Industries, Inc. v. Commercial Union Ins. Co., supra*, 28 Cal.4th 1059, 1068.) Oral testimony was admissible to prove the terms of the missing instrument (*id.* at p. 1070) and the court held that "the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. . . . In turn, the insurer has the burden of proving the substance of any policy provision 'essential to the . . . defense' [citation], i.e., any provision that functions to defeat the insured's claim. [Citations.]" (*Id.* at pp. 1071-1072, fns. omitted.)

Notwithstanding the admissibility of oral testimony to prove the contents of the lost policy, Hamilton rests on the trial court's ability to exercise its discretion to exclude the evidence under Evidence Code section 1521, subdivision (a). As noted above, such evidence must be excluded if the trial court makes either a finding that a genuine dispute exists and justice requires exclusion, or that admission of the oral testimony would be unfair.

Despite Hamilton's request in the in limine motion, the trial court did not specifically make either of these discretionary findings. Instead, it heard argument and merely denied the motion.

We cannot say the trial court abused its discretion in failing to decide that the interests of justice require the exclusion of the testimony, or that admission of the secondary evidence would be unfair. Hamilton cites our prior discussion of the applicable standard: "The trial court is 'vested with broad discretion in ruling on the admissibility of evidence.' [Citation.] '[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' [Citation.] '"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]' [Citation.]" (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431.) The trial court did not abuse its discretion in granting the second motion in limine.

The third motion in limine was to preclude evidence of claims made by other persons who were insured by Hamilton through Mr. McCall. First, Hamilton contends that such evidence was irrelevant to any issues in the action. (Evid. Code, § 210.) Second, Hamilton contends that such evidence of Mr. McCall's prior conduct was inadmissible as character evidence under Evidence Code section 1101. It argues that the evidence of prior conduct cannot be used to corroborate or bolster the credibility of a witness, citing *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396-1397.

As Mr. Barton notes, character evidence is admissible to prove a common plan or scheme under Evidence Code section 1101, subdivision (b). In this case, the testimony of the four other persons who purchased a Hamilton policy through Mr. McCall tended to establish that Mr. McCall was making the same false promises to each of his customers. An illustration which accompanied the Friis policy was available and was used by Mr. Barton to support his claim that he was promised a paid-up policy. Such testimony was also relevant to prove the contents of the missing illustration. For example, in *Dart Industries, Inc. v. Commercial Union Ins. Co., supra*, 28 Cal.4th 1059, the trial court allowed evidence that other product liability claims during the relevant period were paid by the insurance company to show the existence of a policy. The Supreme Court agreed: "On this record, the trial court's conclusion that it was probable that Commercial Union paid the Hinkle and Boone claims to comply with its contractual obligation is a reasonable inference, and as such it must be upheld on appeal." (*Id.* at p. 1076.)

We therefore conclude that the trial court did not err in refusing to exclude the testimony of all of the other insureds regarding the representations Mr. McCall made to them.[9]

The fourth motion in limine was to preclude admission of Mr. Barton's testimony regarding an alleged telephone conversation between Mr. Barton and Hamilton's

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[9] As noted above, the court treated the issue as an Evidence Code section 352 issue and limited Mr. Barton to four witnesses. In response to Mr. Barton's appeal, we have found that it did not err in doing so.

president. The basis for exclusion was that the evidence was inherently unreliable and inadmissible under Evidence Code section 403, subdivision (a)(4).

Evidence Code section 403 states "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] . . . [¶] (4) The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself."

According to the motion, Mr. Barton would testify that the president and/or treasurer of Hamilton affirmed the promises made by Mr. McCall with regard to the policy: In 1990, "[Mr.] Barton received a call directly from McCall who told Barton he was then present with the president and treasurer of Hamilton. Barton had been trying to get in touch with McCall to make inquiries regarding his coverage and why he was not receiving written documentation regarding his coverage and the status of his account. The gentlemen [*sic*] purporting to be the president and treasurer of Hamilton vouched for McCall and that he, McCall, was one of Hamilton's top producers."

The trial court denied the motion, commenting that "Mr. Barton may testify concerning what he believes he heard from these unidentified parties, and the trier of fact will determine what weight to give that testimony." Mr. Barton then testified to the substance of the telephone call. He stated that he was told "Roger was doing a great job for the company, and my policy was performing as Mr. McCall represented."

Hamilton now argues that the trial court should have granted the motion because the identity of the person Mr. Barton talked to could not be confirmed. It cites *People v. Collins* (1975) 44 Cal.App.3d 617, 628 (superseded by statute on another ground as stated in *People v. Cole* (1982) 31 Cal.3d 568, 577-578), and *People v. Witt* (1975) 53 Cal.App.3d 154, 174. In those criminal cases, the court held that the evidence should be excluded because the identity of the caller could not be authenticated, thus rendering the testimony objectionable on grounds of insufficient foundation. "The authentication, however, was extremely thin. The identity of McClain's caller was a preliminary fact which defendant had the burden of establishing. [Citation.] If the evidence was sufficient to sustain a finding either way, the question was for the jury; the judge, however, had the sole function of deciding whether there was sufficient evidence of the caller's identity to submit the question to the jury. [Citations.] There was no error in excluding the proffered impeachment." (*People v. Collins, supra*, 44 Cal.App.3d 617, 628 (superseded by statute on another ground as stated in *People v. Cole, supra,* 31 Cal.3d 568, 577-578).)

Mr. Barton relies on *McAllister v. George* (1977) 73 Cal.App.3d 258. The issue in that case was the authenticity of a dental bill. Plaintiff testified concerning it but the trial court refused to admit it into evidence. The appellate court stated: "This testimony was sufficient evidence of the circumstances surrounding the document to sustain a finding that it was what its contents purported to be, a bill for dental services rendered. The sending of an invoice is a circumstance which normally flows from the performance of

professional services. The bill, by referring to the same matters testified to by plaintiff, matters as to which only plaintiff and the party who performed the dental services would likely have knowledge, was authenticated by its contents in light of the circumstances. [Citations.] The contrary inferences flowing from the facts that the bill was handwritten, not on official stationery, and signed by a student were issues going to the weight of the evidence to be resolved by the jury. [Citation.]" (*Id.* at p. 263.)

We agree with Mr. Barton that the trial court did not err in denying the in limine motion because there was enough evidence to allow it to find that the authenticating evidence was sufficient to allow the testimony to be presented to the jury. Mr. Barton cites *People v. Cudjo* (1993) 6 Cal.4th 585. Speaking in a hearsay context, our Supreme Court said: "Except in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution; such doubts do not afford a ground for refusing to admit evidence under the hearsay exception for statements against penal interest. [Citations.]" (*Id.* at p. 609.)

In addition to Mr. Barton's testimony regarding Mr. McCall's identification of the speaker, Mr. Barton testified that he asked the president to send him an annual report, and he subsequently received an annual report from Hamilton's treasurer. In addition, Rick McCarter, a vice-president of Hamilton, testified that he was not aware of any instance where Hamilton's president would call individual policyholders about their policies. He was then asked: "So if I were to say that Roger McCall prevailed on the president . . . of the company to call Mr. Barton about his policy once when Mr. Barton had a policy

question, would that strike you as usual or unusual or at all?" Mr. McCarter answered "usual" because "The president of our company at that time was very producer-oriented and would . . . try to help the producer, if he could." The credibility of Mr. Barton and Mr. McCarter was a jury issue.

We agree with the trial court that this testimony was barely sufficient evidence of authentication to allow the jury to hear the testimony and to determine the weight to be given to it. Accordingly, the trial court did not abuse its discretion in denying Hamilton's motion in limine on grounds that the authentication of the conversation was sufficient to create a jury issue.

SUFFICIENCY OF EVIDENCE OF FRAUD

Hamilton argues there was no competent evidence to support the elements of a claim for fraud and negligent representation. Under this heading, it argues that Mr. Barton failed to establish that (1) Mr. McCall made the alleged misrepresentations with actual knowledge of their falsity and with the specific intent to defraud Mr. Barton; (2) Mr. Barton justifiably relied on the alleged misrepresentations; or (3) Mr. Barton sustained any losses by reason of the misrepresentations.

Under the first heading, Hamilton argues that any policy illustrations that Mr. McCall gave to Mr. Barton must have contained a guaranteed interest rate because such a rate was programmed into the software used for such illustrations. "At best, McCall may have failed to fully explain all of the factors going into the policy." Hamilton also argues that the statements about the future cash value of the policy, i.e., the alleged investment

component, were merely nonactionable opinions as to future events. Such predictions are not actionable fraud. (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158.)

In our view, the element of knowledge of falsity or intent to defraud is supported by Mr. Barton's testimony that he was promised a paid-up policy with a substantial investment component. While the jury could have found otherwise, it did not and there was ample evidence to support a fraud verdict. The record is full of testimony regarding Mr. McCall's behavior, ranging from outright theft of funds to forgery of policy loan applications and policy statements, and false statements as to the alleged interest rates applicable to the alleged investment component of the policy. Since Mr. McCall did not testify, and the critical policy illustration was not produced, Mr. Barton provided the primary testimony as to the representations made at the time of sale, including the statements made by use of the illustration. For example, Mr. Barton testified that he was promised a paid-up policy. Although it was certainly possible for an insured, such as Mr. Friis, to deposit sufficient funds to prepay premiums indefinitely, the jury could find that the relatively small premium paid by Mr. Barton would be insufficient, that Mr. McCall, as an experienced life insurance agent would know that it was insufficient, and that he lied about the policy in order to sell the insurance.

Civil Code section 1572 defines fraud to include several species of misrepresentations that constitute fraud, including "The suggestion, as a fact, of that which is not true, by one who does not believe it to be true" and "The suppression of that

which is true, by one having knowledge or belief of the fact." Based on Mr. Barton's testimony, and the jury's evaluation of his credibility, the jury could find that Mr. McCall told Mr. Barton that the policy being sold was a paid-up policy when Mr. McCall either knew that it was not or intentionally suppressed the fact that it was not. (Evid. Code, § 411; Civ. Code, § 1572.)

Even if, as Hamilton claims, the evidence did not support a claim of intentional misrepresentation, it certainly supports a finding of negligent misrepresentation. (Civ. Code, § 2338.) Since the jury also found in Mr. Barton's favor on this ground, the verdict is supportable on this ground alone.

There may be some merit to Hamilton's contention that the statements regarding the future performance of the alleged investment component policy were not actionable, and could not provide a basis for compensatory damages. As discussed above, the trial court ignored this alleged damages component in its new trial order. However, since there will be a new trial on the damages issues, we do not need to discuss the contention further.

Hamilton also argues that the element of justifiable reliance is lacking because Mr. Barton signed a policy application which contemplated annual premiums and he actually or constructively accepted the policy, which refers to annual premium payments. It cites cases in which the insured is held to knowledge of the application and the policy terms. (*Pacific Ins. Co. v. Kent* (C.D. Cal. 2000) 120 F.Supp.2d 1205, 1210-1211; *Lunardi v.*

Great-West Life Assurance Co. (1995) 37 Cal.App.4th 807, 820; *Taff v. Atlas Assur. Co.* (1943) 58 Cal.App.2d 696, 702-703.)

Our Supreme Court has described the reliance element of fraud: "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. [Citations.]" (*Alliance Mortgage Co. v. Rothwell, supra*, 10 Cal.4th 1226, 1239.) The court went on to emphasize that the question of whether a plaintiff's reliance was reasonable is a factual question. (*Ibid.*)

Hamilton relies on *Hackethal v. National Casualty Co.* (1987) 189 Cal.App.3d 1102 and *Hadland v. NN Investors Life Ins. Co.* (1994) 24 Cal.App.4th 1578. In *Hackethal*, the court held that the statements of an insurance agent at the time the policy was sold could not have induced reliance when the agent also gave the insured a brochure which expressly stated the limitations of the policy. If the insured did rely on any such statements, his reliance was unjustifiable as a matter of law. (*Hackethal v. National Casualty Co., supra*, 189 Cal.App.3d 1102, 1111.) *Hadland* followed *Hackethal* and held that the case was the exceptional one in which justifiable reliance could be determined to be lacking as a matter of law. (*Hadland,* at p. 1586.) The court held that the Hadlands were bound by the express terms of the insurance policy, even if they never read it: "The Hadlands, having failed to read the policy and having accepted it without objection, cannot be heard to complain it was not what they expected. Their reliance on

representations about what they were getting for their money was unjustified as a matter of law." (*Hadland,* at p. 1589, fn. omitted.)

Although the policy in this case may have been relatively clear, the dispute of the parties was more over how the complex financial provisions of the policy would act in practice. Rather than contradicting the policy, Mr. McCall's representations tended to explain it in a misleading manner. For example, the policy called for regular premium payments but it was obvious that, if sufficient money was on deposit, the interest would be sufficient to pay premiums directly. When Mr. McCall represented that the policy was a paid-up policy, he may have been referring to this possibility, even though he knew, or should have known, that the money to be paid by Mr. Barton would be insufficient to pay up the policy under reasonably foreseeable interest rates. In other words, by overstating the interest rates, Mr. McCall could give Mr. Barton the false assurance that no further premiums would ever be due. Mr. McCall made similar representations to Mr. Friis. Since the policy illustration is missing, we do not know the extent to which Mr. McCall's statements misrepresented the terms of the policy. But the possibility that the representations did not obviously contradict the policy is sufficient to throw the case into the usual category of cases in which the jury must determine whether Mr. Barton's reliance was justifiable.

An earlier Supreme Court case, *Seeger v. Odell* (1941) 18 Cal.2d 409, 414, provided the basis for the standard instruction on the subject: "To establish fraud by a false [representation] [or] [promise], plaintiff must not only act in reliance on it, but must

be justified in that reliance, that is, it was reasonable in the light of the circumstances and plaintiff's intelligence, experience and knowledge, to accept the [representation] [or] [promise] without making an independent inquiry or investigation." (BAJI No. 12.52 (9th ed. 2002) & Use Note.) Accordingly, the issue was a jury issue, the jury expressly found justifiable reliance, and there was substantial evidence to support the jury's finding.

Finally, Hamilton argues that Mr. Barton did not establish that he sustained any losses by reason of the misrepresentations. It argues that Mr. Barton is still covered by a life insurance policy with a face value of $1.5 million, the fact that the policy is not a paid-up policy is due to Mr. Barton's failure to put sufficient funds on deposit to make it so, and the evidence as to the current cash value of the alleged retirement benefit was insufficient. Hamilton also points out that it offered rescission at the time that Mr. McCall's fraud was discovered, but that Mr. Barton declined to rescind the policy, and it is still in effect.

Both the claims of Mr. Barton and the jury's award obviously present significant damages issues. Accordingly, the trial court exercised its discretion and granted the new trial motion, and we have upheld that decision. Since a new trial will be held on compensatory damages, we do not need to consider further the damages issues now raised by Hamilton.

THE ALLEGED INSTRUCTIONAL ERROR

Hamilton argues the trial court erred in refusing its proposed fraud instructions. The proposed instructions would have told the jury that (1) "Fraud cannot be predicated on statements made by one who believes in, and has no reason to doubt, their truth"; (2) "A prediction of a future event is nothing more than an opinion and does not amount to actionable fraud"; and (3) "A person is not entitled to rely upon speculative statements about possible profits and performance."

The first proposed instruction was directed to the question of whether Mr. Barton had met his burden of showing that Mr. McCall's statements were knowingly false. It was based on *Meeker v. Cross* (1922) 59 Cal.App. 512. The second and third are based on the principle that the actionable misrepresentation must be the misrepresentation of a past or existing material fact. They were based on *Tarmann v. State Farm Mut. Auto. Ins. Co., supra,* 2 Cal.App.4th 153, 158 and *Pacesetter Homes, Inc. v. Brodkin* (1970) 5 Cal.App.3d 206, 211. Hamilton argues that, without these instructions "the jury was left to speculate as to this element of the fraud claim" and was specifically not told that opinions could not be the basis of recovery.

The trial court excluded the first on grounds that it was duplicative of BAJI No. 12.31. The basis for excluding the second proposed special instruction is unclear, but the trial court noted that "under some circumstances a person may be entitled to rely upon opinions expressed about future returns." The instruction was thus incomplete because it failed to describe the circumstances in which a promise of future conduct is actionable.

Those circumstances are described in the *Tarmann* and *Pacetter Homes* cases cited above, and in BAJI No. 12.32. The third proposed special instruction was excluded on grounds that it was argumentative and incomplete.

As Mr. Barton points out, the jury was fully instructed on fraud by the giving of BAJI Nos. 12.31, 12.32, 12.40, 12.41, 12.45, 12.51 and 12.52. The requirement that the plaintiff must prove that the statements were knowingly false is included within BAJI No. 12.31 (9th ed. 2002).[10] Despite Hamilton's claim that "the jury was left uninstructed on how to treat opinions in relation to a claim of fraud," BAJI No. 12.32 informed the jury that opinions are not ordinarily the basis for actionable fraud.[11] Although the

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[10] BAJI No. 12.31 (9th ed. 2002), as given, states: "The essential elements of a claim of fraud by an intentional misrepresentation are: [¶] 1. The defendant must have made a representation as to a past or existing material fact; [¶] 2. The representation must have been false; [¶] 3. The defendant must have known that the representation was false when made; [¶] 4. The defendant must have made the representation with an intent to defraud the plaintiff, that is, he must have made the representation for the purpose of inducing the plaintiff to rely upon it and to act or to refrain from acting in reliance thereon; [¶] 5. The plaintiff must have been unaware of the falsity of the representation; must have acted in reliance upon the truth of the recommendation and must have been justified in relying upon the representation; [¶] 6. And, finally, as a result of the reliance upon the truth of the representation, the plaintiff must have sustained damage."

[11] The instruction states: "Ordinarily, expressions of opinion are not treated as representations of fact upon which to base actionable fraud. However, when one party possesses or holds himself out as possessing superior knowledge or special information regarding the subject of a representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or holding himself out as possessing such knowledge or information will be treated as a representation of fact although if made by any other person it might be regarded as an expression of opinion. When a party states

limitations concerning opinions of future events were not expressly stated, the general subject matter of when opinions are actionable was adequately covered by the giving of BAJI No. 12.32.

We therefore find that the trial court did not err in denying the requested special instructions at the liability phase of the trial.

DISPOSITION

The judgment entered on May 23, 2001, in favor of plaintiff Barton is affirmed as to liability. The trial court's orders of July 13, 2001, and July 20, 2001, which granted Hamilton's motion for new trial on the issue of compensatory damages, are affirmed. Each party is to bear its own costs on appeal.

HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

KING

J.

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an opinion as a fact, in such a manner that it is reasonable to rely and act upon it as a fact, it may be treated as a representation of fact."

Filed 8/6/03

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RICHARD BARTON, Plaintiff and Appellant, v. ALEXANDER HAMILTON LIFE INSURANCE COMPANY OF AMERICA, Defendant and Appellant.	E030085 (Super.Ct.No. RIC282474) ORDER DENYING PETITION FOR REHEARING, CERTIFYING OPINION FOR PARTIAL PUBLICATION, NO CHANGE IN JUDGMENT

THE COURT:

The court has received and reviewed Mr. Barton's petition for rehearing filed on July 22, 2003, and Alexander Hamilton's request for publication of the opinion filed on July 28, 2003.

The petition for rehearing states that our opinion states that the "trial court requested further briefing and scheduled a further hearing on the issue of the continued viability of punitive damages in a subsequent trial. This is an incorrect factual supposition unsupported by the record on appeal." (Pet. for reh. p. 2)

In response to this argument, we note that the minute order of July 13, 2001, states, in part, "Motion for New Trial Granted . . . . [¶] Counsel are ordered to properly brief the issues of damages. [¶] Hearing re Issue of Damages set 8/27/01 at 8:30 dept. 08." (CT 2831-2832) After granting the motion for new trial at the July 13th hearing, the court said: "The Court's ruling does not contemplate the nature of the new trial on the issue of damages. I think I would want both sides to brief the issue as to the evidence and whether or not it should include punitive damages. So I'm not prepared to answer that question at this point in time." (RT 2793) Briefing was to be submitted by early August. (RT 2801-2802) Because of the subsequent ex parte application and the July 20th order, the August 27th hearing was subsequently vacated. (CT 3079)

The petition for rehearing also argues that we erred in assuming that the issue of punitive damages had been decided before trial. (Pet. for reh. pp. 5-6, citing opinion, pp. 9-10) The punitive damages issue was raised in a request for summary judgment or summary adjudication filed by Alexander Hamilton on April 16, 1999, and supplemented on June 10, 1999. (CT 471, 940) Summary adjudication was granted as to punitive damages. (CT 1094) Alexander Hamilton also filed an in limine motion for an order striking plaintiffs' claim to punitive damages on May 18, 1999 (CT 929) but the trial court declined to rule on it. (RT 103-104) At trial, a motion for nonsuit on punitive damages was granted. (RT 2691)

We did not give these rulings res judicata or issue preclusion effect but merely pointed out that the new trial motion sought a new trial on the grounds of excessive

compensatory damages. The trial court focused on that issue, presumably because punitive damages were no longer an issue in the case.

The petition for rehearing is DENIED. There is no change in the judgment.

Since it appears that a portion of the opinion meets the criteria for publication as set forth in California Rules of Court, rule 976, Alexander Hamilton's request for partial publication is GRANTED.

IT IS ORDERED that the opinion is certified for partial publication. The portion to be published is from the beginning through the end of the section entitled "ALLEGATIONS OF THE COMPLAINT AND SPECIAL VERDICTS" (Slip opn. pp. 2-3), the beginning of the section entitled "THE GRANTING OF THE MOTION FOR NONSUIT ON PUNITIVE DAMAGES" through the end of the subsection, "1. The Standard Used in Deciding the Nonsuit Motion." (Slip opn. pp. 19-22), and the section entitled "DISPOSITION" (Slip opn. p. 64).

HOLLENHORST
Acting P.J.

We concur:

RICHLI
J.

KING
J.