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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GREG JOHNSON et al.,

Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY,

Defendant and Appellant.

F040188 & F040529

(Super. Ct. No. 647076-9)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

McCormick, Barstow, Sheppard, Wayte & Carruth, D. Greg Durbin; Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., Sonja R. West and Courtney A. Cook for Defendant and Appellant.

William M. Krieg & Associates, William M. Krieg and Kimberly L. Mayhew for Plaintiffs and Respondents.

Chavez & Gertler, Mark A. Chavez and Kathryn C. Palamountain for Consumers for Auto Reliability and Safety as Amicus Curiae on behalf of Plaintiffs and Respondents.

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This is an appeal from a portion of a judgment for plaintiffs, used car purchasers, against the car's manufacturer, based on its failure to make certain consumer-protection

disclosures. The appeal primarily challenges the award of punitive damages in the amount of $10 million. We conclude there is sufficient evidence to support the jury's conclusion that punitive damages were appropriate. After our constitutionally mandated independent review of the amount of punitive damages, we conclude the punitive damages award must be modified to $53,435, three times the compensatory damages.

STATUTORY CONTEXT

This action concerns events from 1996 through 1998. The following summary of various consumer protection laws refers to the code provisions existing at that time; many of the code sections have been amended several times since then. All section references are to the Civil Code, except as otherwise indicated.

Section 1793.2, subdivision (d)(2), required a motor vehicle manufacturer who was unable "to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts" to replace the vehicle or make restitution to the buyer, at the buyers election. We refer to this as the "reasonable attempts" requirement.

Section 1793.22, subdivision (b), provided in part: "It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within one year from delivery to the buyer or 12,000 miles on the odometer of the vehicle, whichever occurs first, either (1) the same nonconformity has been subject to repair four or more times by the manufacturer or its agent and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity or (2) the vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer." (The provision has a number of exceptions and qualifications that are not germane to the present case.) We refer to this as the "statutory presumption" that a car is a "lemon."

Section 1793.23, subdivision (c), required that "a manufacturer who reacquires or assists a dealer … to reacquire a motor vehicle" pursuant to the provisions of section 1792.2, subdivision (d) must (1) cause the vehicle to be retitled in the name of the manufacturer, (2) request the Department of Motor Vehicles to inscribe the ownership certificate with the notation "Lemon Law Buyback," and (3) affix a notification decal to the vehicle "if the manufacturer knew or should have known that the vehicle is required by law to be replaced" or accepted for restitution for failure to conform the vehicle to an express warranty. We refer to this as the "title branding requirement."

Section 1793.23, subdivision (d) stated: "Any manufacturer who reacquires or assists a dealer … to reacquire a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer of the vehicle, execute and deliver to the subsequent transferee a notice" disclosing the nature of the alleged problems with the vehicle. We refer to this as the "notification requirement."

FACTS AND PROCEDURAL HISTORY

Plaintiffs Greg and Jo Ann Johnson bought a used 1997 Ford Taurus from Decker Ford (Decker) in early 1998. Plaintiffs were told the previous owners of the car, the McGills, had traded in the car less than a year after they leased it from Decker because they wanted a pickup truck instead. Plaintiffs asked to see the repair records for the car and were told by the Decker salesperson that there was no record of significant repairs for the car.

The underlying facts were otherwise.

The McGills leased the new Taurus in December of 1996. On January 8, 1997, Luis McGill returned the car to the dealership complaining of a whistling noise in the transmission. After the car was in the shop a day or two, Decker diagnosed the problem

as a stuck valve in the transmission. Decker returned the car to the McGills and said it had to order a part. The necessary repairs were made at the end of January.

On February 6, McGill returned the car to Decker, complaining it was "shifting too hard": "When it would shift the front tires would leave like a skidmark," according to McGill. Decker apparently could not identify the cause of the problem. McGill returned on February 12 and Decker decided it needed to replace the transmission. After the transmission was replaced, McGill next returned the car to Decker with transmission complaints on May 21, 1997. At that time, he complained that the transmission "would just keep acting up." "Same problems like I did from the beginning, same thing." Over the next few months, McGill complained about the transmission when he took the car to Decker for repairs. Finally, while the family was driving to San Diego, the transmission locked in low gear near Bakersfield, and the McGills had to drive home in the emergency lane at 30 miles per hour.

As a result of this last incident, the McGills filled out Ford's "customer review request form" on July 28, 1997. In it, they requested that Ford "buy back vehicle. Not happy at all with this vehicle[.] This vehicle is a lemon!!" They complained, "Transmission problem six times have had same problem!!"

Decker presented the form to Ford's customer service manager for the district, Belinda Buchanan. As was her routine, Buchanan first reviewed the dealer's service file. By restrictively construing Decker's records,[1] Buchanan concluded the McGill car was not a "lemon" that Ford was required to repurchase. However, she authorized Decker to offer McGill an "owner appreciation certificate" for a credit of $1,500 on any trade-in

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[1] For example, Buchanan did not treat the February 6 visit as a "service attempt" because Decker could not locate the problem on that date, even though Decker replaced the transmission six days later as a result of McGill's renewed complaint.

transaction within the next 30 days "to facilitate concerns." Decker's service manager conveyed this offer to McGill, who accepted it and traded in the car for a new pickup truck.

Decker, having purchased the Taurus as a trade-in from the McGills, placed it for sale on its own used car lot without any further repairs.

Plaintiffs, the Johnsons, bought the Taurus, as described above. In July of 1998, Greg Johnson (Johnson) took the car to Decker, complaining that the transmission delayed in shifting and "slams into gear." Decker ordered a replacement transmission and installed it on August 11. The car appeared to operate normally until February of 1999. At that time, Johnson took the car back to Decker, complaining that it was starting to make the same noises as before. Decker could not find a problem and returned the car to Johnson. A month later, the transmission would not shift into reverse. Decker again agreed to replace the transmission. At this point, Johnson voiced concerns to Decker's service writer and was allowed to review the service file on the car. For the first time he discovered McGill's problems and he concluded the car was a lemon. Two subsequent repair attempts were unsuccessful.

By complaint filed March 2, 2000, the Johnsons sued Decker and Ford. As against Ford, the complaint alleged fraud and concealment, in addition to violations of the Song-Beverly Consumer Warranty Act (§ 1790 et seq.), the Consumers Legal Remedies Act § 1750 et seq.), and the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). Other counts alleged claims against Decker and were settled before trial.

After a trial lasting more than three weeks, the jury returned a special verdict against Ford. As relevant here, the jury found Ford, as well as Decker acting as Ford's agent, intentionally concealed or suppressed facts with intent to defraud the Johnsons. It found, in essence, that the car was a lemon and that the Johnsons were entitled to statutory notice of that fact. The jury awarded compensatory damages in the amount of

$17,811.60. The jury found by clear and convincing evidence that an officer, director or managing agent of Ford was guilty of fraud or malice in the conduct on which the liability finding was based. It awarded punitive damages in the amount of $10 million. Judgment was entered accordingly.

After Ford's motions for new trial and judgment notwithstanding the verdict were denied, Ford filed a timely notice of appeal. Subsequently, the parties stipulated to the amount of attorney fees to be awarded to plaintiffs ($379,348.00), subject to defendant's right to challenge on appeal plaintiffs' underlying right to such fees. Defendant filed a notice of appeal of the award of attorney fees. We consolidated the two appeals.

DISCUSSION

On appeal, defendant contends there is insufficient evidence to support an award of punitive damages, that the amount of such damages is constitutionally excessive, and that plaintiffs are not entitled to attorney fees.

I. *Sufficiency of the Evidence to Support Awarding Punitive Damages*

A. Standard of Review.

We review the sufficiency of the evidentiary basis for the jury's verdict pursuant to the familiar substantial evidence test. (*Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1137-1138.) Accordingly, we view the whole record in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. (*Ibid*.) We determine whether the record "discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could" make the findings in question. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In reviewing an order denying judgment notwithstanding the verdict, we apply the same test. (*Romo v. Ford Motor Co., supra*, at p. 1138.)

Our standard of review remains the same where, as here, the jury has been instructed that it must make the requisite findings using the clear and convincing evidence standard. (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 602-604.)

Where the trier of fact has concluded "that the clear and convincing standard has been met, and there is substantial evidence to support it, then we must affirm." (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 606.)

In addition, defendant seems to argue that evidence of a higher degree of fraud is required to support any punitive damages award than is required for a compensatory damages award. However, settled law establishes that intentional fraud--which the jury found in this case--is sufficient to support a punitive damages award without any further finding that the conduct was despicable. (See *Horn v. Guaranty Chevrolet Motors* (1969) 270 Cal.App.2d 477, 484.)

B. Good Faith Mistake vs. Policy of Concealment.

In the present case, although there were a number of different underlying causes of action upon which the jury was instructed it could base a punitive damages award, the parties agree that the award was based upon the jury's conclusion that defendant "intentionally conceal[ed] or suppress[ed] [a] fact with the intent to defraud" plaintiffs. The jury concluded defendant fraudulently concealed from plaintiffs that the used Taurus (in the language of the special verdict) had been repurchased "following a request by Mr. McGill that the vehicle be bought back because it did not conform to express warranties" and that the car was a lemon, that is, that it "qualified for replacement or restitution during the time it was owned by Mr. McGill because Ford or Decker failed to repair a nonconformity after a reasonable number of repair attempts."

Defendant has elected not to appeal these special verdict findings that it had a statutory duty to disclose these facts to plaintiffs. However, defendant contends that the evidence of fraudulent nondisclosure does not establish the heightened level of corporate misconduct necessary for imposition of punitive damages. This argument has several facets.

First, defendant contends there is "*no evidence* that Ford ever issued an [owner appreciation certificate] to any other consumer where it should have deemed the vehicle

to be a lemon," implying that this was merely aberrant conduct by an entry-level field employee. Compelling evidence, however, supports an inference that the present transaction was typical of owner appreciation certificate transactions, which numbered over 1,000 per year, and that the use of such certificates was intended, as a matter of policy, to short-circuit lemon law claims, as we briefly explain.

As summarized above, a car can be a lemon pursuant to either the reasonable attempts provision or the more specific statutory presumption. (See §§ 1793.2, subd. (d)(2), 1793.22, subd (b).) Both defendant's lemon law manual[2] and the testimony of its chief author[3] permit an inference that defendant decided that the "reasonable attempts" provision of the law was a sufficiently vague concept that it could ignore the requirement and still not be held to account, so long as the original buyers of the defective automobiles were satisfied.[4] Substantial evidence supports the conclusion that defendant

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2 The reacquired vehicles operations manual provided that a customer service manager could not use the owner appreciation certificate if the vehicle meets "state lemon law *presumption*." However, "Where used vehicles are covered by a state's lemon law, but the vehicle does not meet lemon law *presumption*, an OAC may be used." Thus, the manager must determine "that the number of repair attempts or days out of service does not qualify the vehicle for lemon law *presumption*." In addition, "a 'nonconformity,' according to most states' lemon law, is a concern affecting the use, value or safety of the vehicle. Although 'use' and 'value' may be too subjective to determine for lemon law *presumption*, OACs must not be offered if a 'safety' defect cannot be repaired." In summary, the manual provides: "When To Offer A Certificate: … In lieu of a potential goodwill vehicle replacement or refund when the vehicle does not meet state lemon law *presumption*." (All italics added.)

3 "[W]e don't determine anything by reasonable repair attempts because we cannot define reasonable repair attempts."

4 The primary author of defendant's customer satisfaction program manual testified: "As I said before, Lemon Laws tend to be vague -- uhm -- unfortunately, and reasonable to me is not definable. … [¶] If I ever discussed reasonable [in training customer service managers] I would have explained to them that I can't define reasonable and I want you to look at the presumption of the Lemon Law as a criteria." After discussing defendant's

deemed itself free, as a matter of policy, to offer lesser remedies than repurchase or restitution in any case in which the statutory presumption was not met "straight out." And, after it did so, it never caused its dealers to disclose to subsequent owners that the vehicle had been taken in trade to satisfy a customer's lemon law complaints.

Next, defendant focuses on a claim of ambiguity in the notification requirement contained in section 1793.23, subdivision (d), to argue that it merely employed its good-faith judgment in construing the law, so its conduct could not possibly be deserving of punishment. The notification requirement compels notice to a subsequent buyer if the manufacturer has reacquired or assisted a dealer to reacquire "a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties …." (§ 1793.23, subd. (d).) Defendant contends this requirement is only applicable if the vehicle in fact fails to conform to an express warranty, instead of the seemingly plain-language requirement that the reacquisition merely occur "in response to" the customer's claim that the vehicle fails to conform to such warranty. (Defendant says the car conformed to express warranties, which only required defendant to repair the car and did not warrant that the car was defect-free.) And, it argues that, even if its interpretation of the statute is wrong, that interpretation was adopted in good faith and cannot be the basis for a punitive damages award.

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stair-step approach to offering customer adjustment programs for non-statutory-presumption vehicles, this witness concluded: "We would prefer if we can make a -- the customer satisfied with the least expensive action. That's what we would prefer to take." The customer service manager involved in the present case testified "Oh, the California Lemon Law didn't define what reasonable was, so I don't recall ever having anything in writing to tell me what reasonable was from anybody. … [¶] Well, provided I hadn't met any of the presumptions of Lemon Law, you can offer an [owner appreciation certificate]."

Interpretation of the notification requirement subdivision is wholly beside the point in the present case: the jury expressly concluded that the car, when reacquired from the McGills, was in fact a lemon under the statutory definition, regardless of its conformity to express warranties.[5] Accordingly, the car was subject to the more rigorous title branding requirement of section 1793.23, subdivision (c), which also requires notification to subsequent purchasers such as plaintiffs. The jury also concluded defendant acted with intent to defraud plaintiffs when it failed to designate the car as a lemon and disclose that status to plaintiffs.

In any case, defendant's claim that it acted in good faith with respect to its interpretation of section 1793.23, subdivision (d), arises in a context the jury wholly rejected: defendant says it never used owner appreciation certificates to short-circuit customers' lemon law claims and never issued such certificates when the cars in question were statutory lemons. Yet the evidence clearly supports an inference that defendant's entire customer response program was structured precisely to short-circuit lemon law claims whenever defendant plausibly could. In the present case, described as typical by all relevant witnesses, defendant was able to claim it did not issue an owner appreciation certificate to facilitate the trade-in of a lemon by (1) restricting consideration to the statutory presumption for lemon status and ignoring the "reasonable attempts" standard and (2) applying the most restrictive possible interpretations of statutory terms so as to defeat the presumption. In this context, the jury clearly was entitled to reject defendant's claim that its action -- assisting Decker to place the used Taurus for sale on Decker's lot

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[5] We deny the requests of plaintiffs and amicus curiae that we take judicial notice of legislative history of legislation adopting the notice requirement of section 1723.23, subdivision (d). We have no occasion in the present case to resolve the parties' competing claims about that subdivision.

without any lemon law disclosures--was in good faith or was reflective of policies adopted in a good faith misunderstanding of the lemon law.

Finally, defendant argues there was no substantial evidence that it engaged in a scheme to defraud consumers because its own manuals and policies proclaim it was not involved in such a scheme. For example, the customer satisfaction policy manual stated: "Owner Appreciation Certificates may only be offered to owners as 'goodwill' assistance to improve customer satisfaction and loyalty. The certificates may not be used to prevent an owner's lemon law claim." As discussed above, however, this and similar disclaimers are simply untrue, as clearly established by the evidence in the present case. The only sense in which such statements were even arguably true is that such certificates were not used in cases in which the customer had an iron-clad, incontrovertible lemon law claim. The evidence clearly established defendant's employees, acting pursuant to defendant's policies, first determined, using extremely restrictive criteria, that the car in question was not a lemon, and then proceeded with attempts to settle claims through owner assistance certificates and other methods that were impermissible under the lemon law.

Substantial evidence supports the jury's express finding "by clear and convincing … evidence that an officer, director or managing agent of Defendant was guilty of fraud … in the conduct" on which the jury based its finding of liability.

II. *Excessiveness of Punitive Damages*

For reasons fully explained in our opinion in *Romo v. Ford Motor Co.* (F034241), filed this date as an opinion for publication, the punitive damages award in the present case must be reduced significantly. In the present case, as in *Romo* and in keeping with then-prevailing California law, the jury was permitted to award punitive damages to punish and deter defendant's overall course of conduct in undermining the lemon law through the use of owner appreciation certificates. In the present case, the jury was asked to cause defendant to disgorge all profit from use of owner appreciation certificates in California over a two-year period. As explained in *Romo*, the due process clause of the

Fourteenth Amendment requires that the punitive damages award punish only the conduct that injured the present plaintiffs. (See generally *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) ___ U.S. ___ [123 S.Ct. 1513] (*State Farm*).)

We are required on appeal to independently review the punitive damages award to ensure the award is not constitutionally excessive. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001 532 U.S. 424, 431-433.) In doing so, we consider the three guideposts elucidated by the Supreme Court in *State Farm*, namely, reprehensibility, relationship to compensatory damages, and relevant civil and criminal penalties. (See *State Farm, supra,* ___ U.S. at p. ___ [123 S.Ct. at p. 1521].)

A. Reprehensibility.

Initially, we reject plaintiffs' contention that the evidence shows defendant engaged in a fraudulent scheme to place dangerous cars in the stream of commerce. Indeed, even if defendant had fully complied with the lemon law, all that was required of defendant was disclosure of the nature of the dispute concerning the particular vehicles; realities of the marketplace may have forced defendant to sell the cars for less based on such disclosure, but it still could have sold the cars. We view this, therefore, as a case involving economic injury, and not physical injury or potential injury.

Nevertheless, it is reprehensible for a regulated manufacturer to implement a scheme that intentionally undermines the protections granted consumers by state law. If the manufacturer believes the law is too vague to implement or requires of it inconsistent actions, the courts are available to the manufacturer to challenge the law. If it simply does not like the law or thinks it practically unworkable, the manufacturer has the right to petition the Legislature. It should go without saying, however, that the manufacturer does not have the right simply to ignore the parts of the law it finds objectionable.

Yet that is exactly what the evidence shows defendant did in the present case. Defendant declared the "reasonable attempts" standard of the lemon law "not definable" and ignored it. It implemented through formal policies a practice of resolving all

"reasonable attempts" claims through a "stair-step" series of inducements that permitted defendant to avoid reacquiring vehicles and notifying subsequent buyers of the claims concerning such vehicles. While this program provided some relief to defendant's new-car buyers, it entirely frustrated the additional goal of the lemon law to protect subsequent purchasers of such vehicles. Such intentional conduct is highly reprehensible.

B. Relationship to Compensatory Damages.

The compensatory damages awarded in this action were strictly economic. There was no component of the damages that addressed the "personal outrage" to the present victims of defendant's fraudulent scheme. Accordingly, a higher ratio of punitive damages to compensatory damages is permitted by the Constitution.

C. Other Civil and Criminal Penalties.

As defendant suggests, where a defendant has "willfully" violated the Song-Beverly Consumer Warranty Act, the Legislature has determined that the punitive interests of the state are satisfied by a civil penalty equal to twice the damages award. (§ 1794, subd. (c).) In the present case, the punitive damages award arises from a fraud cause of action which, although based on the failure to make Song-Beverly disclosures, goes beyond Song-Beverly's requirements of a "willful" violation. In the present case, the jury found defendant *intentionally* concealed the information with the *intent* to defraud plaintiffs. Accordingly, while the double damages penalty of section 1794, subdivision (c) is significant, it does not establish a legislative intent to limit punishment of the present, intentional misconduct.

D. Conclusion.

Applying the three guideposts in the present case, we determine that punitive damages in the amount of $53,435, three times the compensatory damages, is not constitutionally excessive and satisfies the state's legitimate interest in punishing the conduct that harmed the plaintiffs, thereby deterring similar conduct by defendant or others in the future. (See *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109

Cal.App.4th 1020, 1056-1057.) Unlike the circumstances in *Romo*, where significant factual issues were available for jury determinations on a retrial, in the present case the facts are clear. On such facts, we determine the modified award is the maximum award consistent with due process, and we modify the judgment accordingly.

III. ***Attorney fees***

Defendant contends plaintiffs were awarded attorney fees pursuant to the Consumers Legal Remedies Act, section 1750 et seq. Because an adequate tender of restitution in some circumstances can bar a damages claim under that act, because Decker tendered restitution, and because the jury found Decker was defendant's agent, defendant contends it had a defense to the Consumers Legal Remedies Act count. Because the Consumers Legal Remedies Act provides for attorney fees to a prevailing plaintiff, and because plaintiffs could not have prevailed on this count as a matter of law, defendant contends the award of attorney fees must fail. We need not determine whether this is correct.

Independently of the Consumers Legal Remedies Act, the Song-Beverly Consumer Warranty Act provides for attorney fees "[i]f the buyer prevails in an action under this section." (§ 1794, subd. (d).) While an appropriate tender of restitution relieves a manufacturer of the civil penalty otherwise imposed by the act (§ 1794, subd. (e)), it does not alter the manufacturer's liability for attorney fees to a prevailing plaintiff. Plaintiffs prevailed on the Song-Beverly cause of action and are entitled to attorney fees under that act, regardless of any defense that may or may not have been established under the Consumers Legal Remedies Act. Further, by electing to receive punitive damages for fraud instead of the Song-Beverly Act's civil penalty, plaintiffs did not waive their right to attorney fees: The penalty and attorney fee provisions are independent, as evidenced by the applicability of the tender-of-restitution defense to the civil penalty only. The statute clearly contemplates an award of attorney fees to a prevailing plaintiff even when no civil penalty is awarded.

DISPOSITION

The judgment is modified to award punitive damages in the total sum of $53,435. As modified, the judgment is affirmed. The parties shall bear their own costs on appeal.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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BUCKLEY, J.

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CORNELL, J.