NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CHARLES MARGESON,

Plaintiff and Respondent,

v.

FORD MOTOR COMPANY,

Defendant and Appellant.

B287445

(Los Angeles County
Super. Ct. No. BC549430)

APPEAL from a judgment and a post-judgment order of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed in part, reversed in part, and remanded.

Horvitz & Levy, Frederic D. Cohen, Lisa Perrochet, and Allison W. Meredith; Gordon & Rees, Kevin W. Alexander and Spencer P. Hugret, for Defendant and Appellant.

Rosner, Barry & Babbitt, Hallen D. Rosner and Arlyn L. Escalante; Knight Law Group, Steve Mikhov and Roger Kirnos, for Plaintiff and Respondent.

Plaintiff and respondent Charles Margeson (Margeson) sued defendant and appellant Ford Motor Company (Ford) for fraud and other asserted wrongdoing in connection with the purchase of a truck that later experienced repeated mechanical problems requiring repairs. After a jury trial and post-trial litigation, Margeson was awarded nearly $1 million in damages and penalties, with the lion's share of that constituting punitive damages. Ford appeals from that award, and from a subsequent attorney fees award, itself totaling nearly $1 million. We principally consider whether the trial court improperly allowed Margeson's damages expert to opine Ford committed fraud and to offer opinions on the proper calculation of a punitive damages award.

I. BACKGROUND

In July 2006, Margeson purchased a new Ford F-350 truck equipped with a 6.0-liter, 350 horsepower diesel engine. The final sales price was $58,876. Margeson bought that truck over a similar truck manufactured by Chevrolet, he said, because he relied on claims the truck's engine was powerful enough to tow a fifth-wheel trailer.

The engine in Margeson's truck was produced by a third party, Navistar, which began providing 6.0-liter engines to Ford in 2002. However, from the time of its launch in 2002, the 6.0-liter engine had high rates of repair and warranty repair costs. Between 2002 and 2007, for instance, Ford spent $479 million on warranty repairs to 6.0-liter engines and more than $82 million to repurchase vehicles that could not be brought into conformity with their warranties. During this period, although the 6.0-liter engine represented only 10 percent of Ford's total engine volume,

it accounted for 80 percent of Ford's warranty spending on engines.[1]

A month after purchasing his truck and adding aftermarket improvements, Margeson's truck began emitting black smoke and experienced a major loss in power as he was towing his fifth-wheel trailer up and over a mountain pass on his way home from a vacation. Over the course of the next six years, Margeson experienced recurring engine problems when (and only when) he towed his trailer. During this period, Ford covered all of the engine-repair costs under its warranty, notwithstanding Margeson's addition of the aftermarket equipment.

Margeson eventually sued Ford because of the recurring problems and repairs needed. In his operative first amended complaint, Margeson asserted six causes of action: (1) fraud in the inducement—intentional misrepresentation, (2) fraud in the inducement—concealment, (3) negligent misrepresentation, (4) fraud in the performance of contract—intentional misrepresentation, (5) violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), and (6) violation of the Song-Beverly Consumer Warranty Act (Song-Beverly Act) (Civ. Code, § 1790 et seq.). In addition to compensatory damages, Margeson sought punitive damages under the CLRA and the general Civil Code provision governing punitive damages.

At a jury trial on the complaint, Margeson called various Ford employees to testify and testified himself. Margeson told the jury that during his pre-purchase investigation of which truck to buy, which involved talking to salespeople, reviewing brochures, and doing online research, he did not come across any information on Ford's website indicating the 6.0-liter engine was requiring more repairs than any other engine in Ford's history. Ford's director of the company's diesel motor division testified to

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[1] In 2007, Ford sued Navistar for failing to pay its portion of the warranty spending for engine repairs.

the magnitude and the intractability of the problems plaguing the 6.0-liter engine (he had been named director of the division in 2003, three years before Margeson purchased his truck, in order to address those very problems), as well as to a lack of definitive evidence showing that the problems with the engine were caused by customer misuse. A Ford service technician testified the company never provided any guidance on how to deal with customers, like Margeson, whose 6.0-liter-equipped vehicle suffered recurring engine problems.

In addition to these fact witnesses, Margeson presented testimony from two expert witnesses: an automotive expert and a damages expert, Barbara Luna (Luna). (We discuss Luna's testimony, central to the issues raised in this appeal, in greater detail *post*.) In its defense case, Ford called a single witness, one of its vehicle engineers, to testify as an automotive expert.[2]

In June 2017, after deliberating for the better part of three days, the jury found for Margeson on all of his claims and awarded him $72,564.04 in compensatory damages (an amount stipulated to by the parties), $141,973.30 in civil penalties (the maximum under the Song-Beverly Act), and a punitive damages award 20 times his compensatory damages: $1,451,973.30. The special verdict form the jury completed indicated it was unanimous on many issues, including whether Ford intentionally failed to disclose facts that Margeson did not know and could not have reasonably discovered (yes), whether Ford intended to deceive Margeson by concealing facts (yes), and whether Ford's

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[2] The parties' automotive experts disagreed sharply on the cause of the problems with the engine in Margeson's truck. Ford's expert opined that the problems "had a lot to do with the aftermarket components that were installed on his vehicle." Margeson's expert maintained some of the trucks sold by Ford with a 6.0-liter engine, including Margeson's truck, suffered from "defects in material and workmanship" and that the engine's injectors were the root cause of the problems.

concealment of facts was a substantial factor in causing harm to him (yes again). On other issues, however, there were a couple dissenting jurors. The jury was split ten to two on the issue of whether Ford advertised the truck with the "intent not to sell it as advertised" and on the appropriate amount of a punitive damages award for one of the fraud claims.

Ford moved for a new trial and judgment notwithstanding the verdict, arguing, among other things, that the punitive damages award was excessive and that the trial court erroneously permitted Luna (Margeson's damages expert) to testify about "indicia of fraud" that she observed in Ford internal documents admitted as exhibits at trial. In the main, the trial court denied Ford's new trial motion, finding the jury "could not have reached a different verdict except for the amount of punitive damages." As to that punitive damages award, however, the court concluded it was excessive and conditionally granted a new trial unless Margeson agreed to an amount limited to 10 times his compensatory damages. Margeson did agree, and the punitive damages award was accordingly reduced to $725,640.40.

Margeson brought a motion for a statutory award of attorney fees under the CLRA and the Song-Beverly Act, which the trial court granted without any reduction to the number of hours billed by Margeson's attorneys. The ultimate amount of fees awarded by the trial court—including a 1.8 multiplier the trial court chose to apply to the lodestar amount—was $953,793.90.

II. DISCUSSION

Ford contends the trial court incorrectly allowed Luna to opine Ford committed fraud and to "discuss the law governing punitive damages awards and to opine on the appropriate amount of the punitive damages award." We hold the trial court was within its discretion to permit Luna to identify herself as a fraud examiner, to highlight internal Ford documents that in her

experience raised red flags, and to state Ford did not disclose (and should have disclosed) problems with the 6.0-liter engine in the documents she reviewed. The same cannot be said, however, for the trial court's decision to give Luna carte blanche to opine on the calculation of punitive damages—including an inaccurate description of a "triangulation" process that should be used when deciding whether to award punitive damages and an incorrect recitation of reference points the jury should use to arrive at her recommended punitive damages award. A new trial on punitive damages is required because it is reasonably probable the jury's punitive damages decision would have been more favorable to Ford had the trial court excluded the improper testimony.

Our reversal of the punitive damages award makes it unnecessary to address Ford's remaining arguments on appeal, save two. Ford contends there was insufficient evidence to justify the jury's fraud finding but we believe the evidence was adequate under the substantial evidence standard that applies. Ford also asserts two of the trial court's jury instructions were erroneous (one on the Song-Beverly Act and the other on vicarious liability) but neither instruction prejudiced Ford's defense.

A. The Trial Court Was within Its Discretion to Allow Luna's Testimony Except as to Calculation of Punitive Damages, Which Was Prejudicial Error in That Respect

Margeson designated Luna, a Certified Fraud Examiner with more than 30 years' experience as a forensic accountant, as his damages expert. On the eve of trial, Ford objected to expected testimony from Luna on fraud and punitive damages on the grounds that the testimony would be beyond her area of expertise and invade the province of the jury. Margeson maintained Luna was well-qualified and her proposed testimony about various "indicia of fraud" was permissible because "[d]eciphering Ford's intent is a critical element not just in establishing the underlying

elements of Plaintiff's fraud causes of action, which the jury will determine, but also to show Ford should be subject to an award of punitive damages." The trial court, without expressly overruling Ford's objection, permitted Luna to offer opinions on Ford's failure to disclose certain information to Margeson and on how punitive damages should be calculated. The latter was error.

1. Additional background: Luna's testimony and closing argument

Luna, who earned a master's degree and a doctorate in applied mathematics from Harvard University, testified she had worked at a variety of accounting firms for 39 years. She told the jury she is a certified public accountant and a "certified fraud examiner."

Asked to explain what a certified fraud examiner does, Luna testified she was trained and experienced in identifying "indicia of fraud." In practical terms, she testified "[t]he kinds of things that I get involved in as a certified fraud examiner is tracing the money, finding the money. . . . I also look at publications and different communications as well to find things that really aren't true or that are different than what was stated." Asked to define "indicia of fraud," Luna explained it is a "term of art from certified fraud examiners and CPAs" that was "not a legal conclusion" but was "beyond the scope of what the general public gets to know." She elaborated: "So you're looking at the underlying documents to see if there's a trend, a pattern, that you see. If you see enough of them, it smells like, tastes like, that's what we're looking for. If there's a concurrence of the same type of—I don't want to use the word 'evidence' because I don't want to use a legal term. The same kind of information that is presenting itself over and again." Reiterating, she told the jury "it gets to the preponderance of these observations. I see a lot of the same observations over and again over time. And they seem to all be indicating certain, I guess, events."

As to Margeson's case specifically, Luna testified she had an "opportunity to make those observations of patterns or trends" she saw in past cases where she had been retained as an expert. She explained her observations were drawn from documents provided to her, including internal Ford communications (e.g., emails, presentations, codes of conduct), documents prepared by Ford or its agents for public consumption (e.g., annual and quarterly filings with the U.S. Securities and Exchange Commission (SEC)), and complaints and declarations filed by Ford in other litigation. Luna cautioned, however, that she formed her opinions assuming that the documents provided to her—including the allegations in Margeson's complaint (as a "starting point" or "background")—were true.

Luna testified the documents she reviewed and considered were "about 11 inches or so . . ., plus more."[3] She highlighted several during her testimony, including internal Ford documents frankly acknowledging problems with the 6.0-liter diesel engine. She noted, for instance, an internal email dated February 5, 2006, (five months before Margeson purchased his automobile) from the former director of Ford's North American diesel division who observed with dismay that warranty repairs on the 6.0-liter engine were "running about $36 million a year but . . . have been as high $5 million a month" and Ford nevertheless was unwilling to pay for an engine upgrade.[4] Luna also referred during her

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[3] While testifying, Luna referred to a demonstrative exhibit, prepared under her supervision, that placed along a timeline stretching from 2002 to 2012 summaries of and excerpts from various Ford internal communications and memoranda, as well as sworn testimony by Ford employees in its lawsuit against Navistar.

[4] In a follow-up communication sent two hours after this email, the director of Ford's diesel division warned the recipients not to forward or reference his original email.

testimony to a chain of internal emails (among the notations on her timeline) that were written in June 2006, one month before Margeson purchased his truck. The author of one email in the chain, Mike Frommann, a Ford warranty program manager, disputed a claim by another Ford employee that problems with the 6.0-liter engine could be blamed on aftermarket equipment installed by purchasers. Frommann argued that the presence of aftermarket equipment was irrelevant because the 6.0-liter engine exceeded Ford's own cylinder pressure specifications. Frommann wrote in his email: "We don't want to have our cylinder pressure specs published or documented by having them subpoenaed or we might face a class action. When we have a defect, we have to honor our warranty. . . . I recommend we all delete these emails."

Much of Luna's testimony, however, was focused not on the Ford documents themselves but on the disclosure obligations of publicly traded companies (and their executives) and the absence of any disclosure to Margeson or the general public regarding problems with the 6.0-liter engine referenced in internal Ford documents she reviewed. Luna testified that in Ford's SEC filings and the many other documents she reviewed, she saw no specific disclosure of the problems with that engine—which she believed Ford had an obligation disclose.

In addition to discussing Ford's failure to disclose to consumers the problems with the 6.0-liter engine (at least in the materials she reviewed), Luna also offered an opinion on, as Margeson puts it in his respondent's brief, "what would be a reasonable punitive damages award against Ford in this case." Luna asserted determining punitive damages involved a process she called "a triangulation."[5] She agreed she was "not a lawyer,"

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[5] Luna explained: "It's usually a multiple of the underlying damages, considering the amount of punitive damages, how bad the acts were, extended period of time these acts may have been

but she nevertheless testified she had "vast experience" and had reviewed two "legal opinions" (i.e., published cases) discussing punitive damages. She ultimately opined, relying on a demonstrative exhibit that she said represented her "opinions" and "calculations," that Margeson's compensatory damages should be increased by "a multiplier of nine" to calculate punitive damages.[6] But she also told the jury that the upper limit of a punitive damages award, in her experience, could be astronomically higher than that: "[U]sually it goes . . . you're not going to be more than 10 percent of the net worth of the company or 10 percent of the income of the company, a net income of the company."[7] And she added, by way of illustration, that a punitive damages award nine times the amount of Margeson's compensatory damages would, for Ford, be the equivalent of one dollar to a person with a net worth of $50,000.

During closing argument, Margeson's attorney repeatedly reminded the jury of Luna's qualifications and her testimony on punitive damages. He recalled for the jury that Luna "has a Ph.D. in applied math from some out-of-the-way university called

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over. And then it also considers the net worth and the net income, primarily the net worth of the company."

[6] Luna conceded, in response to a question on cross-examination, that whether punitive damages must be awarded was "up to the jury to decide," but she also described in detail the process by which she chose the nine-fold multiplier. She told the jury she "looked at the repeated times that the customer had to bring in their car, or truck, that it wasn't told to them originally, where it was stated in marketing materials if anything was disclosed. And I looked at the repeated observations of the e-mails that I saw that the same problems were happening. And there was a lot of correspondence or e-mails between internal people at Ford, but nothing that I knew of, to the customer."

[7] Luna testified Ford's net worth was $30.6 billion in 2017 and its net income was about $3.7 billion per year.

Harvard" and described her as "not the gold standard, but the platinum standard on fraud damages." Margeson's attorney also told the jury that Luna's punitive damages calculation was only a "baseline," "conservative[ ]" estimate of what would be an effective punitive damages award. Relying on Luna's testimony equating a punitive damages award of nine times the compensatory damages to one dollar for a person making $50,000 per year, counsel suggested the jury should go beyond a nine-fold multiplier in determining a punitive damages award: "Will they change their policy and forego these profits, . . . if they know that they have to pay the equivalent of a buck? [¶] . . . [¶] $10, $100? What will work to get [Ford] to actually do something?"

2. Law regarding the admission of expert testimony

"California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness . . . and to give testimony in the form of an opinion." (*People v. Vang* (2011) 52 Cal.4th 1038, 1044.) "'Generally, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." [Citations.] Also, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." [Citation.] However, '"'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.'"'" [Citations.]" (*Burton v. Sanner* (2012) 207 Cal.App.4th 12, 19 (*Burton*).)

Expert testimony should accordingly be excluded "'"when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men [and women] of ordinary education

could reach a conclusion as intelligently as the witness'" [citation].' [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 60.) "[W]hen an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not aid the jurors, it supplants them." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183 (*Summers*).)

We review a "ruling excluding or admitting expert testimony for abuse of discretion." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) In undertaking that review, we may look to federal case law for guidance. (See, e.g., *id.* at 769 & fn. 5 & 771-772; *Summers*, *supra*, 69 Cal.App.4th at 1181-1182.)

3. The trial court did not abuse its discretion by allowing Luna to make reference to indicia of fraud or her status as a certified fraud examiner

Luna's testimony about Ford's internal documents and the company's failure to disclose problems with the 6.0-liter engine, peppered at times with remarks concerning "indicia of fraud" or her status as a "certified fraud examiner," came close to the line that divides permissible expert opinion from impermissible advocacy that usurps the role of the jury. We do not believe, however, that the trial court abused its discretion in allowing the testimony—indeed, the abuse of discretion standard counsels deference in such close-to-the-line scenarios.

Luna did not say Ford or its employees were guilty of fraud or liable for any violation of California common or statutory law. To the contrary, she testified she formed her opinions on damages merely by assuming the documents she reviewed were true. She highlighted certain Ford internal emails that she found of interest to her "pattern" and "trend" observations, given her experience in prior cases, but again, she did not testify these documents were evidence of fraud (indeed, she avoided even

using the word "evidence," which she believed to be a legal term, during her testimony. Luna did at one point testify (over objection) that "Ford obviously knew where problems were," but even that was not, as Ford argues, an impermissible opinion about a party's motives or intent. Rather, Luna was answering a specific question about a Ford database system and her statement about Ford's knowledge came only in the context of her review of database records on repairs and warranties. So while it is certainly true that Luna uttered the word fraud during her testimony—mainly in describing her background and duties as a certified fraud examiner—she was careful not to connect that testimony to specific exhibits in evidence so as to opine the documents were proof of fraud.[8]

This case is therefore unlike authority Ford cites where appellate courts reversed because an expert opined there was evidence a party had a particular motive or expressed a view on how an issue like the reasonableness of a party's conduct should be decided. (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 290-291 (*Kotla*) [in an employment

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[8] Ford argues Luna did make such a connection, generically, at one point in her testimony. Ford argues: "Luna specifically testified that Ford acted fraudulently. She explained that the term 'indicia of fraud' referred to 'indications of fraud.' 'So you're looking at the underlying documents to see if there's a trend, a pattern, that you see." [Citation.]' When asked if she saw these indicia of fraud in the emails she described, *she said she did*." (Emphasis in original.) Ford's argument, however, improperly truncates Luna's answer. Here is what she said (with the omitted portion italicized): "So you're looking at the underlying documents to see if there's a trend, a pattern, that you see. *If you see enough of them, it smells like, tastes like, that's what we're looking for*." Although Luna did testify she observed patterns or trends in the documents she reviewed for Margeson's case, she did not testify there were "enough of them" such that the jury should accept "that's what we're looking for."

discrimination case, expert testified there was evidence the employer had a retaliatory motive]; *Burton*, *supra*, 207 Cal.App.4th at 19-20 [retired police officer expert who opined on whether a party's acts in self-defense were reasonable usurped the role of the jury].) Unlike those cases, Luna's testimony concerning Ford documents and the absence of disclosures was more akin to summary witness testimony, aggregating and highlighting exhibits in evidence that the jury might find relevant to its determination of what Ford knew and summarizing her review of fairly voluminous documents to establish Ford did not disclose problems with the 6.0-liter engine. The trial court could reasonably determine she had the requisite background to do that and did not go beyond the permissible bounds of expert testimony.

4. Luna's opinions on how the jury should calculate punitive damages were inadmissible

Luna's testimony about the calculation of punitive damages, however, is another matter entirely. On that subject, her testimony usurped the jury's role and offered legal conclusions that were beyond her expertise.

In California, "[d]eterminations related to assessment of punitive damages have traditionally been left to the discretion of the jury." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 821 (*Egan*).) "'While punitive damages must bear a reasonable relation to actual damages, no fixed ratio exists to determine the proper proportion. [Citation.] Rather, calculating punitive damages involves a fluid process of adding or subtracting depending on the circumstances. [Citation.] [¶] Within this framework, [the trier of fact has] wide discretion to determine what punitive damage award is proper. [Citation.] There is no simple formula for calculating punitive damages in that there is no particular sum that represents the only correct amount for such damages in any given case. Instead, there is a

wide range of reasonableness for punitive damages reflective of the fact finder's human response to the evidence presented. [Citation.]'" (*Morgan v. Davidson* (2018) 29 Cal.App.5th 540, 552.) Federal decisions are in accord. (*Atlas Food Sys. and Servs., Inc. v. Crane Nat'l Vendors, Inc.* (4th Cir. 1996) 99 F.3d 587, 594; see also *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 24-25 (Scalia, J., concurring) ["it has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury . . ."].)

Luna's testimony that the punitive damages award should be nine times the amount of compensatory damages—and her description of legal principles governing punitive damages awards, which was a poor substitute for a proper jury instruction—should not have been admitted. Luna not only usurped the role of the jury in determining the amount of a punitive damages award, she also usurped the role of the trial court to instruct the jury on punitive damage awards. (See, e.g., *L.A. Teachers Union v. L.A. City Bd. of Ed.* (1969) 71 Cal.2d 551, 556 [the question of how the law should be applied to particular facts "is one of law and not of fact, and not the subject of . . . 'expert' testimony"]; *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841, [expert is not authorized to testify to "legal conclusions in the guise of expert opinion"]; *Voilas v. General Motors Corp.* (D.N.J. 1999) 73 F.Supp.2d 452, 463-465 [expert testimony outlining three methods of calculating punitive damages and a range of punitive damage awards "carries the risk of swaying and misleading the jury into the erroneous belief that it is limited to one of the three methods and ranges of damages outlined"]; *Baldonado v. Weyth* (N.D. Ill. April 30, 2012, No. 04 C 4312) 2012 WL 1520331 at *3 ["it is not proper for Dr. Maloney to give an expert opinion on the amount of punitive damages the jury should award. The amount, if any, is for the jury to decide based on the facts of this case and the applicable punitive damages law.

Such expert testimony would [in]vade the province of the jury"].) To be sure, Luna had the requisite expertise to appropriately testify as to Ford's financial condition (a factor the jury must consider when making its own determination of punitive damages (*Soto v. BorgWarnerMorse* (2015) 239 Cal.App.4th 165, 197-198)), but her testimony on that topic consumed only a single page of the trial transcript. The bulk of her punitive damages testimony was an effort to tell the jury how to do its job—a job it could perform without her assistance.

5. Admission of Luna's improper punitive damages opinions was prejudicial

Reviewing courts will not set aside a verdict or reverse a judgment because of the erroneous admission or exclusion of evidence unless the error "resulted in a miscarriage of justice." (Evid. Code, § 354; *Cassim v. Allstate Ins. Co*. (2004) 33 Cal.4th 780, 801-802.) "A miscarriage of justice occurs only when the reviewing court is convinced it is reasonably probable a result more favorable to the appellant would have been reached absent the error." (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 24; accord, *Pannu v. Land Rover North America, Inc*. (2011) 191 Cal.App.4th 1298, 1317 ["'trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a "miscarriage of justice"—that is, that a different result would have been probable if the error had not occurred'"].) Our Supreme Court has "'made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*.' [Citation.]" (*Cassim v. Allstate Ins. Co*., *supra*, at 800.)

In assessing whether the admission of improperly admitted expert testimony was prejudicial, California courts look at several factors, including: whether the testimony by respondent's expert was challenged by a countervailing expert for the

appellant (*Burton*, *supra*, 207 Cal.App.4th at 22) and whether respondent's argument to the jury may have contributed to the misleading effect of the improperly admitted evidence (*Kotla*, *supra*, 115 Cal.App.4th 283, 295, 296; *Burton*, *supra*, 207 Cal.App.4th at 22). Both of these factors reveal Luna's testimony prejudiced the jury's award of punitive damages.

There was no material dispute over Margeson's compensatory damages (which were ultimately the subject of a stipulation) and Ford did not designate a damages expert to testify at trial. After deposing Luna, however, Ford moved to exclude her expected testimony on punitive damages as rendering improper opinions, which, as we have held, the testimony did. Because Luna's opinions went beyond the bounds of proper expert testimony, it is no answer to the question of prejudice—as Margeson urges in his respondent's brief—that Ford "*did not bother presenting an alternative view[point] with its own expert*" (emphasis in original). That would have simply compounded the inadmissible testimony. Rather, as precedent in similar circumstances holds, the presentation of the unrebutted improper testimony counsels in favor of reversal. (*Burton*, *supra*, 207 Cal.App.4th at 22 [explaining, in reversing jury verdict, that the defendant was "greatly disadvantaged because—presumably realizing expert testimony [on the reasonableness of defendant's self-defense] was inadmissible—he designated no expert to refute [plaintiff's expert's] opinions"].)

As for closing argument at trial, that only exacerbated the impact of Luna's improper testimony. Margeson's attorney repeatedly emphasized Luna's credentials ("not the gold standard, but the platinum standard on fraud damages") and her testimony on the appropriate size of a punitive damages award. Not only that, Margeson's attorney used Luna's $1/$50,000 illustration to argue the jury could and should go beyond the nine-fold multiplier applied by Luna—which counsel was able to argue because Luna told the jury the only limit on punitive

damages was "usually" ten percent of a company's net worth or annual income, i.e., $370 million to $3.7 billion for Ford. That the jury awarded a punitive damages in an amount 20 times Margeson's compensatory damages strongly suggests the jury was influenced by counsel's efforts to capitalize on Luna's improper testimony. (See *Kotla*, *supra*, 115 Cal.App.4th at 294-295 [reversing jury verdict and stating "[plaintiff's] counsel took the jury point by point through all of the facts that [plaintiff's expert] deemed to be indicative of retaliation . . . . Counsel called the testimony 'very powerful' and emphasized that it was the uncontradicted testimony of an expert in the field"].)

We are therefore convinced on these facts that there is a reasonable chance the jury would have reached a verdict more favorable to Ford on the issue of punitive damages had the trial court acted as a gatekeeper and enforced proper limits on Luna's testimony. We shall accordingly reverse the punitive damages aspect of the judgment. (See, e.g., *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 780-781.)

B. There Was Sufficient Evidence of Fraud to Support an Award of Punitive Damages

Ford argues there was insufficient evidence to support a punitive damages finding under Civil Code section 3294, subdivision (a), which authorizes such damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." Because the argument raises the question of whether a retrial on punitive damages is permitted on remand, we address it notwithstanding our reversal of the punitive damages award.

The substantial evidence standard applies to our consideration of the sufficiency of the evidence. (*Egan, supra,* 24 Cal.3d at 821.) Perhaps unsurprisingly, given the recounting we have already done of the testimony and exhibits presented at

trial, we hold there was enough evidence of fraud under that standard.

The magnitude of Ford's problem with its 6.0-liter engine was conveyed to the jury through testimony (videotaped deposition testimony and written affidavits) by various Ford managers. For example, John Koszewnik (Koszewnik), the director of Ford's North American diesel division from 2003 to 2006, testified about the magnitude and intractability of the problems plaguing the 6.0-liter engine. Koszewnik had been named director in 2003 in order to identify the problem with the engine and correct it. After three years on the job, Koszewnik sent an email to colleagues in February 2006 (five months before Margeson purchased his truck) observing with dismay that warranty repairs on the 6.0-liter engine were "running about $36 million a year but . . . have been as high $5 million a month!"

From affidavits submitted by Ford employees in the Navistar lawsuit, the jury learned that by February 2007, warranty repair costs on the 6.0-liter engine exceeded $400 million (more than $227 million in repair costs for the engine's fuel injectors and more than $182 million on repairs to the engine's turbochargers), which was the largest repair rate ever experienced by any Ford engine. There was also evidence that the engine represented only 10 percent of Ford's total engine volume but accounted for 80 percent of Ford's warranty spending on engines, which in turn represented 25 percent of Ford's overall warranty spending.

There was also adequate evidence of intentional concealment of these problems by Ford to the detriment of consumers. Margeson testified that during his pre-purchase investigation, which involved talking to salespeople, reviewing brochures, and doing online research, no one disclosed and he did not see any information indicating that the 6.0-liter engine was suffering more repairs than any other engine in Ford's history. This testimony, of course, was bolstered by internal Ford

communications presenting a solid circumstantial case for intentional concealment.

To take one example, two hours after Koszewnik sent his February 2006 email dismaying the rising warranty costs associated with the 6.0-liter engine, he sent a follow-up email to the recipients directing them not to forward or reference his email. To take another, in warranty manager Frommann's June 2006 email sent a month before Margeson purchased his truck, he warned his colleagues that Ford might face a class action lawsuit over the problems with the 6.0-liter engine and urged his colleagues to delete emails discussing the problems with the 6.0-liter engine. To take a third, Scott Eeley (Eeley), a Ford employee responsible for customer service relations from 2003 to 2006, also testified that in October 2005, more than eight months before Margeson purchased his vehicle, he sent an email to Koszewnik advising that Ford should repurchase four trucks with the 6.0-liter engine because multiple problems with the engines were not likely to be solved and the problems had rendered the vehicles "unreliable." Eeley went on to state that he was being pressured by the director of Ford's customer services division to admit that the 6.0-liter engine was "crap" and its problems could not be fixed, but Eeley advised that, notwithstanding his recommendation to repurchase the four trucks, he would continue to adhere to Koszewnik's position that all problems with the engine could be fixed. Also, as already discussed, Luna testified about the absence of specific disclosures about any of this in the large number of documents she reviewed.

Ford also complains there was insufficient evidence that any fraud was committed or ratified by an officer, director, or managing agent of the company. (See generally *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1436 ["[P]unitive damages cannot be awarded against a corporation for conduct of an employee unless a corporate officer, director, or managing agent had knowledge of the employee's unfitness and

disregarded the rights of others (or authorized/ratified the conduct or committed the act of oppression)"]; *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 573 [corporate punitive damage liability limited to "those employees who exercise substantial independent authority and judgment over decisions that ultimately determine corporate policy"].) Under the substantial evidence standard that applies, that is wrong. Koszewnik, for instance, was director of Ford's North American diesel division, and even Frommann was a warranty program manager who exercised substantial independent authority over Ford's policy on what repairs would be covered under warranty. The jury could properly infer from the testimony at trial, the professional titles of the Ford employees themselves, and the hundreds of millions of dollars in monetary costs associated with problems with the 6.0-liter engine (circumstantial evidence that managing agents of the company must have been involved with a problem of that scale) that fraud supporting punitive damages was attributable to Ford as a corporate entity.

C. The Asserted Instructional Errors Were Not Prejudicial

"A judgment may not be reversed on appeal, even for error involving 'misdirection of the jury,' unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) When the error is one of state law only, it generally does not warrant reversal unless there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached. [Citation.]" (*Soule v. General Motors Corp*. (1994) 8 Cal.4th 548, 574 (*Soule*).)

While there is no precise formula for measuring the effect of an erroneous instruction, several factors are considered in measuring prejudice, including the degree of conflict in the evidence, counsel's arguments, the effect of other instructions,

the closeness of the jury's verdict, and any indication by the jury itself that it was confused by the instruction, including a request for clarification. (*Soule*, *supra*, 8 Cal.4th at 574, 581 & fn. 11; *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876; accord, *Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 479.)

"'[O]ur standard of review in this regard is the opposite of the traditional substantial evidence test. '"'[I]n assessing an instruction's prejudicial impact, we cannot use the view of the evidence and inferences most favorable to [Margeson]. [Citations.] Instead, we must assume the jury might have believed [Ford's] evidence and, if properly instructed, might have decided in [its] favor. [Citations.]" [Citation.]'"' (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 304.)

1. The introductory instruction on the Song-Beverly Act was not prejudicial

With regard to his Song-Beverly Act cause of action, Margeson proposed the following special jury instruction: "The [Song-Beverly Act] is a remedial measure, intended for the protection of the consumer; it should be construed in a manner calculated to bring its benefits into action. Any interpretation that would significantly vitiate a manufacturer's incentive to comply should be avoided." Margeson styled the instruction as an "introduction" to the Song-Beverly Act. The proposed instruction was based, in part, on *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal.App.4th 174, which described the Song-Beverly Act as follows: "the Act is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction to bring its benefits into action." (*Id.* at 184.)

Ford objected to the proposed instruction because the jury would be responsible for applying the Song-Beverly Act, not construing it, and because the instruction was not needed in light

of the many other instructions the court was planning to give on the Song-Beverly Act. The trial court overruled Ford's objection, finding the instruction's wording was supported by case law. The court later gave the instruction as proposed by Margeson, including the description of it as an introduction to the Song-Beverly Act. The introductory instruction was immediately followed by several other more specific instructions on how to apply the Song-Beverly Act.

Assuming the trial court should have avoided giving a jury instruction phrased in terms of how a statute should be construed (see, e.g., *Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 876, fn. 5), the instruction still was not prejudicial. The instruction served only as an introduction to the Song-Beverly Act and it was accompanied by several other detailed instructions on how the jury should apply the law. (Compare *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 92, 130-131 [an instruction that was "virtually a quotation of a holding" by the California Supreme Court was prejudicial because it was unaccompanied by any other clarifying instructions].) In closing argument, Margeson made only a fleeting reference to the instruction. At most, the instruction would have affected only the Song-Beverly Act determinations by the jury, and we are confident in light of the evidence at trial that it had no bearing on even that.

2. The erroneous instruction on vicarious liability was not prejudicial

Margeson proposed the following as an instruction on the issue of vicarious liability: "In this case, John Koszewnik, Mina Shams, Steven Henderson, Mike Frommann, Robert Fascetti, Scott Eeley, Scott McDonough, Lia Kern, Frank Ligon, Mike Berardi, Steve Johnston, Barb Samarzdich, Eric Gilanders, Mark Freeland and Scott Clark were the employees of Ford Motor Company. [¶] If you find that each of the named employees were acting within the scope of their employment when the incidents

occurred, then Ford Motor Company is responsible for any harm caused by the employees' action." The proposed instruction was a modified version of CACI 3703.[9]

Ford objected to the proposed instruction because it omitted any tort theory for the employees and instead referred only to their "action." The trial court overruled the objection and gave the instruction as proposed. In addition, the court gave instructions on, among other things, elements of a CLRA claim based on misrepresentation, intentional misrepresentation, concealment, existence of a duty to disclose, and false promise.

Margeson does not dispute the challenged instruction on vicarious liability was erroneous; instead, he contends only that the record does not show Ford was prejudiced by the instruction. We agree there was no prejudice.

Margeson's tort theory of the case was not something the jury had to guess at. Fully half of Margeson's causes of action explicitly involved fraud and, as his attorney explained to the jury in his opening statement, the core legal claim at issue was whether Ford committed fraud. During closing argument, Margeson's attorney continued focusing on fraud and did not devote substantial attention to the vicarious liability instruction. In addition, the jury received a number of instructions on or related to the issue of fraud and the jury did not ask the trial court to clarify principles of vicarious liability. On this record, we hold the erroneous vicarious liability instruction was not prejudicial.

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[9] CACI 3703, Legal Relationship Not Disputed, provides: "In this case [name of agent] was the [employee/agent/[insert other relationship, e.g., 'partner']] of [name of defendant]. [¶] If you find that [name of agent] was acting within the scope of [his/her] [employment/agency/[insert other relationship]] when the incident occurred, then [name of defendant] is responsible for any harm caused by [name of agent]'s [insert applicable tort theory, e.g., 'negligence']."

D. Ford's Remaining Arguments on Appeal

Our reversal of the punitive damages award makes it unnecessary to consider whether the damages awarded were constitutionally excessive. We also need not address Ford's challenge to the trial court's attorney fees order because our partial reversal of the judgment compels reversal of that order as well—since resolution of the question of punitive damages may figure in the determination of attorney fees. (See *California Grocers Assn., Inc. v. Bank of America* (1994) 22 Cal.App.4th 205, 220 [order awarding "successful party" attorneys' fees "'falls with a reversal of the judgment on which it is based"']); *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 922.) Margeson, of course, may renew his motion for attorney fees following the punitive damages retrial we shall order.

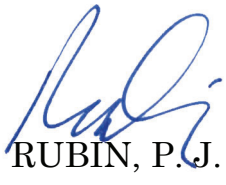
DISPOSITION

The judgment is reversed as to the punitive damages award and affirmed in all other respects, with directions to the superior court to conduct a new trial limited to determining the amount of punitive damages, if any, in a manner consistent with the views expressed in this opinion. The post-judgment attorney fees order is reversed in its entirety without prejudice to renewal of a motion for attorney fees after entry of a new judgment. The parties are to bear their own costs on appeal.

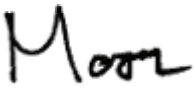
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:



RUBIN, P. J.



MOOR, J.