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No. S264344

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SOLEDAD ALBARRACIN,
Respondent,

v.

FIDELITY NATIONAL FINANCIAL, INC.,
FIDELITY NATIONAL MANAGEMENT SERVICES, LLC,
Appellants.

California Court of Appeal, 2nd Dist., Div. 3, No. 292895
Appeal from Los Angeles Superior Court
Case No. BC642922, Hon. Samantha P. Jessner

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*), this Court's decisions "are binding upon and must be followed by all the state courts of California."

Does this *stare decisis* doctrine require the intermediate appellate courts, in unpublished decisions, to either follow or meaningfully distinguish this Court's relevant holdings?

2. This Court and the U.S. Supreme Court require reviewing courts to independently determine the constitutionality of punitive damages awards, including whether such an award bears a reasonable relationship to compensatory damages.

Does the fact that a compensatory award is moderate—that is, *neither* large enough to suggest an inherent punitive element *nor* small and purely economic—itself justify "a much higher ratio" of punitive damages (here, nearly 8-to-1)?

SUMMARY OF WHY THE COURT SHOULD GRANT REVIEW

This Court declared two generations ago: "Under the doctrine of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction"—and specifically, that this Court's decisions "are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales*, *supra*, 57 Cal.2d at p. 455.) This doctrine operates in published appellate opinions to support orderly development of the law and respect for this Court's role at the apex of our state's judicial system.

But for almost all litigants, the statutory right to appeal terminates in an unpublished appellate opinion. More than 90% of appellate opinions statewide are not certified for publication. (See Judicial Council of California, 2019 Court Statistics Report, p. 49, Fig. 28 (2019 Report); see also the prior eight years' Reports, Fig. 28.) And this Court reviews only a tiny fraction of all cases presented to it, resulting in about 90 written opinions per year, on average. (See 2019 Report at pp. 35, 30.) Finally, very few of this Court's opinions address unpublished Court of Appeal decisions. (See https://www.courts.ca.gov/13648.htm, last accessed September 18, 2020 [only six of the 41 civil cases now

pending for merits decisions arise from unpublished decisions, along with ten of the 38 criminal cases].)

So appellate justice in California depends, for virtually all litigants, on an assumption of compliance with this Court's precedents. Of course, most unpublished decisions do comply. But justice comes into serious doubt when unpublished decisions *neither* follow *nor* distinguish this Court's relevant holdings. That is what happened here, and as we will show, such superficial treatment of this Court's precedent is not rare.

The decision in this wrongful termination case, assessing the constitutionality of a punitive damages award, failed to confront outcome-determinative holdings in *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686 (*Roby*) and *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 (*Simon*) regarding reprehensibility and wealth. The decision neither distinguished these critical holdings of *Roby* and *Simon*, nor followed them. It omitted them, along with any discussion of Appellants' arguments based upon them—and cited inconsistent Court of Appeal decisions on wealth instead. If the court had confronted *Roby* and *Simon*'s holdings, it could not have affirmed the $1,950,000 punitive damages award, in a case where plaintiff recovered a moderate $250,000 in emotional distress damages. A petition for rehearing pointing out this failure brought a

summary denial. The court also denied two requests to publish the decision. (See docket in this Court.)

This Court has never addressed the systemic need for stare decisis in unpublished Court of Appeal decisions. It should do so here, where the breakdown concerned nothing less than the constitutional right to due process of law.

Equally warranting review is an independent, substantive question about the proportionality aspect of the due process analysis.

Plaintiff-Respondent received *neither* (1) a small compensatory award for purely economic damages, which can justify higher punitive damage ratios under *Simon* and U.S. Supreme Court precedent; *nor* (2) a compensatory award for emotional distress so large as to suggest it already included a punitive element—a factor that supports limiting the ratio to 1-to-1 under *Roby* and U.S. Supreme Court precedent. Instead plaintiff received a moderate compensatory award: $250,000 for past emotional distress. (Opinion, pp. 11-12; see also p. 23 [plaintiff did not claim economic harm], pp. 25-27 [conclusion that compensatory award contained no punitive element, unchallenged here].)

Yet the unpublished opinion misapplied *Simon* to affirm "a much higher ratio" of punitive damages simply because the

compensatory award was "not punitive" (i.e. "not considerably large")—that is, because it was moderate. (Opinion, pp. 25-27.)

No such rule of law exists, for good reasons. If moderate compensatory awards can support "a much higher ratio" of punitive damages (like the 8-to-1 ratio affirmed here) simply because the compensatory award is not already punitive in nature, then almost any case can qualify for the high-single-digit ratios that typically mark the due-process maximum. (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 367, 372 (*Nickerson*); *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1206 [noting high court's "presumptive preference for single-digit ratios"] (*Johnson*); *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425 ["(I)n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."] (*State Farm*). Further, the reprehensibility "guidepost" would no longer hold primary importance—as the U.S. Supreme Court and this Court have held it must. (*Roby*, *supra*, 47 Cal.4th at p. 713, and *Johnson*, *supra*, 35 Cal.4th at p. 1207, both citing *State Farm, supra*, 538 U.S. at p. 419.)

Unsupported rationales like this—which would not withstand the light of publication—take root and spread when this Court leaves them unreviewed. This unpublished opinion

and others discussed below do not actually discharge the Court of Appeal's duty to ensure that punitive damages "bear a '"reasonable relationship"' to compensatory damages or the plaintiff's actual harm." (Opinion, p. 24, quoting *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 580–581 (*Gore*); see also *Johnson*, *supra*, 35 Cal.4th at p. 1207 ["*State Farm* requires reasonable proportionality between punitive damages and actual or potential harm to the plaintiff"]; see Opinion, pp. 25-27.) Such injustice should not evade review merely because this opinion is non-precedential.

STATEMENT OF THE CASE

A. Summary Of The Evidence, Taken From the Court of Appeal's Opinion.

Appellants petitioned the Court of Appeal for rehearing, to call attention to the arguments and precedents that the court did not confront. Appellants did not, however, challenge the court's factual recitation, because the court did not materially err in summarizing the evidence in the light most favorable to the verdict. Anticipating that this Court "will accept the Court of Appeal opinion's statement of the . . . facts" (Cal. Rules of Court, rule 8.500(c)(2)), we simply quote it from pages 3-10, including the Procedural Background. For purposes of readability, we have not used quotation marks around the Court of Appeal's words,

and we have not altered the text, brackets or footnotes in any way—except, [[within double brackets]], to incorporate points from pages 22-23 of the Opinion where relevant and to supply a record clarification in footnote 3.[1]

--- Beginning of quotation —

The Incident in Colorado Springs

In November 2014, the Financial defendants hired Albarracin as a paralegal in its major claims department in Los Angeles. Wilson, an attorney in major claims, was one of Albarracin's supervisors.

In September 2015, the company organized a training retreat in Colorado Springs, Colorado for the major claims employees. Albarracin and about 25 other employees, including Wilson, attended the retreat.

On September 9, 2015, the second night of the retreat, Albarracin and Tamela Pittman, a paralegal in Financial's Dallas office, went to the hotel bar. They ran into Wilson, who bought

[1] Elsewhere the court did misstate the scope of the intentional infliction of emotional distress verdict, quoting the tort's elements from case law instead of from the actual verdict and the related instruction. (Opinion, p. 18.) As the Petition for Rehearing explained (pp. 11-12), that error led the court to consider far more evidence than the jury properly could have in its reprehensibility assessment. But that error is not directly relevant here.

them each a glass of wine. After Albarracin, Pittman, and Wilson talked for about 20 minutes, they left the bar to go back to their own hotel rooms. Pittman took the elevator to her floor, while Wilson and Albarracin took the stairs to their floor.

As Albarracin was walking up the stairs, Wilson approached her and asked, “So, your room or mine?” Albarracin replied that she was going back to her room and continued to walk up the stairs. Wilson followed her. When she reached her floor, Albarracin became nervous and accidentally walked into a dead-end. When she turned around, Wilson was standing in front of her.

Albarracin tried to walk past Wilson, but he raised his arms and said, “So?” Panicking, Albarracin tried to walk to her room. When Albarracin asked Wilson where his room was, Wilson said he was staying in the room next to hers. Wilson then leaned in and tried to kiss Albarracin on her lips. Albarracin pushed Wilson back and moved her head to the side. Wilson replied, “Oh, come on,” and tried to kiss Albarracin again. Albarracin pushed Wilson back a second time.

Albarracin then put her hands on Wilson’s shoulders and directed him to his room. When they reached Wilson’s door, Albarracin said, “this is your room, I am going to mine.” Once

inside her room, Albarracin sent text messages to her ex-boyfriend describing her encounter with Wilson.

The Investigation

On the morning of September 10, 2015, Albarracin reported her encounter with Wilson to Helen Straekle, the assistant to Joseph Tucker, the senior vice president of Financial's major claims department. Albarracin met with Tucker later that day in the hotel's restaurant and told him about the encounter. Tucker told Albarracin that he would come to the Los Angeles office sometime during the next week to further investigate her claim, and he advised Albarracin to take a day off of work.

Tucker, who testified that Financial has a "zero tolerance" policy for "discrimination or harassment of any kind," had recently received a complaint from a former employee, Linda Hudson, accusing Wilson of sexual harassment.[2] Nevertheless, Tucker did not take any notes of his conversation with Albarracin. When later asked if he believed Albarracin's allegations were serious, Tucker replied, "To [her], sure."

After speaking to Albarracin, Tucker met with Wilson. Wilson claimed Albarracin made up the allegations, and he

[2] We discuss Hudson's complaint in greater detail below.

denied ever trying to kiss her. Tucker did not take any notes of his conversation with Wilson.

Albarracin and Wilson flew back to Los Angeles on separate flights. When Albarracin returned to work on September 14, 2015, Wilson asked her, "Where were you on Friday? We missed you on the flight back." Albarracin was "horrified and freaked out, because [she] thought [Wilson] had been told not to talk to [her.]" The next day, Albarracin made an appointment with her doctor because she was "falling apart … and more tense and more tense, having to be in the same place with a man who attacked [her]."

On September 15, 2015, Tucker went to Los Angeles to investigate Albarracin's claim against Wilson. Tucker interviewed Albarracin, Wilson, and four other employees who did not attend the retreat at the Los Angeles office. Tucker spoke to Albarracin and Wilson about Albarracin's allegations, and he questioned the other employees about Albarracin's and Wilson's relationship and Albarracin's work performance. Tucker issued Wilson a written "Notice of Performance Counseling" and directed Wilson to attend a sexual harassment training course.

On September 16, 2015, Tucker updated Albarracin on his investigation. He told her: " 'I have talked to people. I have talked to people in—the corporate attorneys, and to the people in H.R.

And I can't tell you what measures we have taken against Robert Wilson, but I can tell you that he—it's not going to be very easy for him here. And I'm sorry, but you are going to have to work with him.' " Albarracin responded, " 'I can't work with him. I—the last three days that I've been here has been a nightmare. I am a complete mess. I am [falling] apart. My body—every single muscle in my body is tight. … I can't work with [Wilson]. … [Y]ou can't make me work with him.' " Tucker replied that he could not "take stronger measures or … do something else" unless he had "more proof of something."

Albarracin tried to find additional evidence to corroborate her complaint against Wilson. Although the hotel in Colorado Springs did not have security footage of the encounter, Albarracin told Tucker that she could provide him the text messages she sent her ex-boyfriend immediately after the encounter. Tucker never asked to see the text messages.

Shortly after her meeting with Tucker on September 16, 2015, Albarracin left work because she "desperately needed to see a doctor." Albarracin's doctor wrote Albarracin a "Work Status Report" excusing her from work through September 18, 2015, which she sent to Tucker. On September 18, 2015, Albarracin sent Tucker a second "Work Status Report" from her doctor excusing her from work through September 25, 2015.

On September 24, 2015, Albarracin sent Tucker an email detailing her encounter with Wilson in Colorado. Albarracin asked Tucker to "reconsider moving [her] to any other department in Fidelity since apparently [Wilson] cannot be touched." Albarracin also asked Tucker to forward the email to "the person in charge of Human Resources in Major Claims." Tucker never replied to, or otherwise spoke to Albarracin about, the email. Tucker did, however, forward the email to Karen Harper, the director of Financial's human resources department. Harper later testified that, as director of human resources, she had a duty to conduct a formal review of Albarracin's complaint.

On September 28, 2015, Albarracin was examined by a psychiatrist, who placed her off work through November 22, 2015. According to the psychiatrist, Albarracin was " 'very anxious' " and " 'trembled the entire [45 to 50 minute] session.' "

Harper spoke to Albarracin over the phone on September 28, 2015. They discussed the incident in Colorado Springs as well as possible arrangements that could be made to allow Albarracin to return to work, such as moving Wilson's office or Albarracin's desk to prevent Albarracin from having to interact with Wilson. At the end of the conversation, Harper promised she would call Albarracin back after speaking to Tucker about the proposed

arrangements. Harper never spoke to Tucker about a possible accommodation, nor did she call Albarracin back.

Albarracin sent Harper a psychiatrist's note placing Albarracin off work through November 22, 2015. In response, Harper explained that Albarracin was not eligible for leave under the Family and Medical Leave Act (FMLA) and instructed Albarracin to apply for a personal leave of absence through Financial.

On September 29, 2015, Financial's leave administrator, FMLASource, contacted Albarracin. The leave administrator explained that Albarracin needed to submit medical certification by October 15, 2015 before her personal leave request could be approved.

On October 6, 2015, Harper sent the following email to an employee in Financial's human resources department: "This is the girl that claimed sexual harassment which could not be validated. She went to her doctor then stopped showing up for work. I told her to apply for the personal leave and I don't think she ever did." The employee confirmed that Albarracin had applied for leave and that the company was waiting for her to submit medical certification.

On October 13, 2015, Albarracin's psychiatrist submitted a "Medical Certification" stating that, on September 9, 2015,

Albarracin began suffering from a medical condition that precluded her from working for at least two months. Financial approved Albarracin's request for sixty days of personal leave, beginning on September 17, 2015 and expiring on November 17, 2015.

On October 30, 2015, Tucker asked Harper if he could hire a new full-time, rather than a temporary, employee to fill Albarracin's position. Harper told Tucker she would follow up on his request. In early November 2015, staff in Financial's human resources department informed Harper that Albarracin would become eligible for protected FMLA leave on November 24, 2015.

On November 2, 2015, Harper sent two emails to the leave administrator. In the first email, Harper explained that Financial should inform Albarracin that her position could not be guaranteed while she was on leave. In the second email, Harper said, "Mark your calendar because next step after [November 17, 2015] will be to tell her we can no longer hold her position open and that she will need to return to work on [November 18, 2015]."

On November 10, 2015, the leave administrator informed Albarracin that her personal leave would expire on November 17, 2015, and that she was expected back at work on November 18, 2015. Around November 11, 2015, Albarracin requested two additional months of leave, to run from November 18, 2015

through January 17, 2016. On November 12, 2015, the leave administrator sent Albarracin a letter confirming that it had received her leave extension request and instructing her to submit medical certification supporting her request by November 28, 2015.

On November 16, 2015, an employee in Financial's human resources department contacted the leave administrator to verify that Albarracin had requested a two-month extension of her leave. The administrator confirmed that it was waiting for Albarracin to submit additional medical certification to support her request.

Albarracin's employment is terminated.

On November 18, 2015, Albarracin did not return to work. Financial treated Albarracin's failure to return to work as "job abandonment" because she didn't provide the leave administrator or "the company with notification for her need to extend [her personal leave] with the appropriate certification paperwork."

On November 20, 2015, Financial terminated Albarracin's employment. That same day, Albarracin sent a "Work Status Report" from her doctor to Financial's human resources department. On November 23, 2015, Albarracin emailed an employee in human resources, explaining that she couldn't provide supporting documentation for her extension request at an

earlier time because she had scheduled nearly two months in advance her November 19, 2015 doctor's appointment. Later that same day, Financial's leave administrator informed human resources that Albarracin had provided sufficient medical certification to extend her leave of absence through November 22, 2015.

Harper never finished her investigation of Albarracin's sexual harassment complaint or wrote any formal report about the complaint or the investigation before Financial fired Albarracin. In addition to never speaking to Tucker about providing Albarracin an accommodation that would allow her to return to work, Harper never interviewed Wilson or any other Fidelity employee about Albarracin's complaint.

[[*p. 23:* Albarracin did not present any evidence that Financial engaged in similar conduct in the past or that it had an organizational policy of retaliating against employees who engaged in protected activity under FEHA.]]

Albarracin testified that she continues to experience stress and anxiety as a result of her encounter with Wilson. She often suffers panic attacks, insomnia, depression, nervousness, and feelings of worthlessness. She has difficulty trusting men, and she hasn't been in an intimate relationship since the encounter with Wilson.

Hudson's Harassment Complaint

In 2015, Linda Hudson worked as a temporary legal assistant in Financial's Los Angeles office. Hudson worked for Wilson for several months.

On August 23, 2015, Hudson filed a workplace complaint, accusing Wilson of engaging in inappropriate and harassing conduct. On one occasion, Wilson walked up behind Hudson, reached over Hudson's head, and handed a piece of paper to Albarracin. When Hudson told Wilson not to reach over her head again, he "just kind of chuckled and did not apologize." The next day, Wilson quietly approached Hudson from behind and tried to frighten her.

Wilson would sometimes refer to Hudson as "'his girl'" to other people in the office. After Hudson once brought Wilson his mail, Wilson said, " 'There she is! There's my girl, yeah, there's my girl!'" Hudson was "shocked" and "felt so horrible and degraded" by Wilson's comments that she "went to the bathroom to pray." Wilson also would harshly criticize Hudson in front of other employees when she made minor mistakes at work.

In early August 2015, Hudson asked a supervisor at Financial to move her desk so that her back would not face Wilson's office. Hudson stopped working for the company in mid-August 2015. [[*pp. 23-24:* Although Linda Hudson had

complained that Wilson harassed her shortly before she left Financial, nothing in the record shows Financial retaliated against Hudson or otherwise subjected her to any form of adverse employment action after she made the complaint.]]

PROCEDURAL BACKGROUND

According to the first amended complaint,[3] Albarracin asserted five causes of action: (1) sexual harassment and hostile work environment in violation of FEHA (§ 12940, subd. (j)); (2) failure to prevent sexual harassment in violation of FEHA (§ 12940, subd. (k)); (3) retaliation for engaging in protected activity under FEHA (§ 12940, subd. (h)); (4) wrongful termination in violation of public policy; and (5) intentional infliction of emotional distress. Albarracin sought compensatory and punitive damages against each defendant.

Albarracin's claims against the Fidelity defendants and Wilson were tried in two phases before a jury in April 2018. In

[3] Management and Wilson are named as defendants in the first amended complaint; Financial is not named as a defendant in that pleading. It appears, however, that the operative pleading is a second amended complaint, and that Financial and Management are named as defendants in that pleading. The second amended complaint is not in the record on appeal. [[The trial court granted plaintiff's in-trial, oral motion to add Financial as a defendant to the First Amended Complaint. (4RT 646.) Financial then filed an Answer to that "deemed" Second Amended Complaint. (AA 165.)]]

the first phase of trial, the jury found the Fidelity defendants liable for retaliation, wrongful termination, and intentional infliction of emotional distress. The jury also found the Fidelity defendants' agents or employees acted with malice, oppression, or fraud. The jury found in favor of the Fidelity defendants and Wilson on Albarracin's claim for sexual harassment and hostile work environment, and it found in favor of Wilson on Albarracin's claim for intentional infliction of emotional distress. The jury awarded Albarracin $250,000 in non-economic damages for past emotional distress. [[*p. 23:* Albarracin did not request any damages for economic harm caused by Financial's conduct. And, in her respondent's brief, Albarracin acknowledges she could not claim financial harm based on Financial's conduct "because she was able to obtain new employment after [Financial] terminated her."]]

In the second phase of trial, the parties presented evidence that the Fidelity defendants made $662 million in after-tax profit in 2017. The jury imposed $1,950,000 in punitive damages against Financial, but it did not impose any punitive damages against Management.

On July 5, 2018, the court entered judgment for Albarracin and against the Fidelity defendants.

On July 20, 2018, the Fidelity defendants filed motions for new trial and JNOV. The Fidelity defendants challenged the judgment on two grounds: (1) the jury's finding that agents or employees of the Fidelity defendants acted with malice, oppression, or fraud is not supported by the evidence; and (2) the amount of the punitive damages award was constitutionally excessive.

On August 30, 2018, the court denied the Fidelity defendants' motions. On September 26, 2018, the Fidelity defendants appealed from the judgment and the order denying the JNOV motion.

On November 19, 2018, the court awarded Albarracin $819,355 in attorneys' fees. On January 15, 2019, the Fidelity defendants appealed from the order awarding Albarracin attorneys' fees.[4]

--- End of quotation ---

B. The Court of Appeal Affirms The Denial Of JNOV On Punitive Damages, Ignoring This Court's Relevant Holdings In *Roby* And *Simon*.

Appellants challenged only the punitive damages award on appeal, arguing: (1) the record lacked substantial evidence by

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[4] We consolidated the Fidelity defendants' appeals.

which the jury could find clear and convincing proof of malice or oppression; and (2) the amount of the punitive damages award was unconstitutionally excessive.[5]

Only the second argument is relevant here. And because the jury assigned punitive damages only to Appellant Fidelity National Financial, Inc. (Financial), it is the only petitioner in this Court.

The heart of that argument was that this case and *Roby* are so similar in terms of both the verdicts and the factual settings—with the conduct and the impact on the plaintiff far more serious in *Roby*—that the due process maximum punitive damage award here was, as in *Roby*, equal to the compensatory damages. (AOB 42-44, citing *Roby*, 47 Cal.4th at pp. 702, 713-714, 719; see also ARB 32-33.) In both cases, an experienced professional woman sued a large corporate employer, and in both cases, the claims centered on a FEHA violation and a wrongful termination in violation of public policy. (See 47 Cal.4th at p. 692 [Roby suffered harassment and discrimination, and was wrongfully discharged based on her medical condition and disability].) But in *Roby*, among other things, the plaintiff had worked for the defendant

[5] They also contended the Court of Appeal had to remand for recalculation of the attorneys' fees award if it eliminated or reduced the punitive damages award to a constitutional level. (Opinion, p. 2.)

for over two decades (versus 10 months here), and following her termination, she became suicidal and completely disabled from work, in addition to depleting her savings. (*Id*. at pp. 694-697.) She therefore received more compensatory damages than Respondent Albarracin: $1,905,000. (*Id*. at p. 718.) The punitive damages award was $15,000,000, which this Court reduced to $1,905,000. (*Id*. at p. 719.)

The Second District, Division 3 affirmed the judgment here, including a punitive award nearly 8 times larger than Albarracin's compensatory damages of $250,000. It never compared this case's facts to *Roby*'s facts to explain how that result could legitimately survive this Court's holding in *Roby*. (Opinion, pp. 19-31.)

To the contrary, the court provided only a broad-brush summary of due process principles (pp. 20-21), including the three "guideposts" established in *Gore*, *supra*, that "courts should use to determine whether a punitive damages award is excessive under the due process clause:"

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

(Opinion, p. 20, citing *Gore*, *supra*, 517 U.S. at p. 575; *State Farm*, *supra*, 538 U.S. at p. 418; and *Roby*, *supra*, 47 Cal.4th at p. 712.) After recognizing that the reprehensibility guidepost is the most important (see *id*. at p. 713), the Court of Appeal noted it "should"—actually it must (*ibid*.)—consider whether:

> "[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.' [Citation.]"

(Opinion, p. 21, quoting *Roby*, *supra*, 47 Cal.4th at p. 713.)

The court acknowledged that neither the third nor the fourth factor was present here (Opinion, p. 23); that is, this was a one-time situation involving a non-vulnerable plaintiff. Then, it held that three of the five factors "tip[ped] the scales toward Financial's conduct being more reprehensible than not." (Opinion, p. 24.) But in this process, it never addressed whether Financial's conduct was more reprehensible *than that of Roby's employer*, so as to justify exceeding the constitutional limit that this Court mandated in *Roby*. Indeed, nothing in the Opinion's discussion of the reprehensibility factors even *acknowledged* any comparison to *Roby*—much less explained how Financial's conduct could reach "the medium-high range" of reprehensibility

(Opinion, p. 24) in light of *Roby*'s determination that "McKesson's conduct was at *the low end of the range of wrongdoing* that can support an award of punitive damages." (*Roby*, 47 Cal.4th at pp. 717-718, italics added.)

Financial's briefs demonstrated that the comparable factual and legal setting of *Roby* required the comparison. (See AOB 43-44, 46-47; ARB 32-33, 36-37.) But more fundamentally, stare decisis required the comparison. (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1061-1062 ["The subtle yet elementary precept of the common law is that the law is in the holding, i.e., in the application of doctrine and precedent *on the facts of the case*," italics added].) And this omission to properly analyze the most important of the three *Gore* guideposts led to a result that violates both *Roby* and the United States Constitution.

The Opinion also omitted any reckoning with *Roby* or *Simon*'s actual holdings with respect to the role of a defendant's wealth in the due process analysis. (See Opinion, pp. 29-30.) It did mention the law that a defendant's wealth "cannot be used as an open ended basis for inflating awards." (Id., p. 29, internal quotations omitted.) But it ignored *Simon*'s further directive that even in cases of high reprehensibility, "the state may have to partly yield its goals of punishment and deterrence to the federal

requirement that an award stay within the limits of due process." (35 Cal.4th at p. 1187.) The Court of Appeal plucked deterrence language from *Simon* while ignoring its actual holding that $50,000 in punitive damages was the maximum awardable against a defendant worth $46 million. (Opinion, pp. 29-30; see 35 Cal.4th at pp. 1167, 1188-1189 ["A penalty of $50,000 . . . [is not] so minor, even accounting for San Paolo Holding's wealth, that it can be completely ignored"].)

And here again, *Roby* was invisible. The analysis and holding in that case *accounted for* the wealth of a huge corporate defendant facing an individual plaintiff in a FEHA case, and *still* imposed the 1-to-1 cap:

> In applying the federal Constitution here, we have taken McKesson's wealth into consideration, and more to the point we have taken into consideration the deterrent effect that is appropriate in light of McKesson's wrongdoing. We nevertheless conclude that punitive damages in an amount equal to compensatory damages marks the constitutional limit in this case and still provides the appropriate deterrence.

(*Roby*, *supra*, 47 Cal.4th at p. 719.)[6]

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[6] At the time of trial in *Roby* (approximately 2003), McKesson Corp. ranked 20th on the Fortune 500, while Fidelity National Financial ranked 326th. (See https://fortune.com/fortune500/2003, last accessed September 18, 2020.) At the time of trial in this case (2017), McKesson Corp.

(Footnote continued)

In lieu of heeding this Court's decisions, the Opinion rested its wealth analysis on appellate precedents pre-dating *Roby* that held, in effect, the opposite: that the state might need to exact between 3 and 10 percent of the defendant's net worth to achieve deterrence. (Opinion, p. 30, quoting *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 967 and *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1701.) Of course, "an appellate court may not properly disregard Supreme Court authority in favor of a lower court ruling that it prefers." (*Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 868.) But without review, this is a wrong without a remedy—contrary to one of the most basic principles of common law. (See Civ. Code, § 3523.)

C. Financial Seeks Rehearing On The Grounds Presented Here, Which The Court of Appeal Denies.

Financial petitioned for rehearing on August 26, 2020, setting forth the decision's failure to confront this Court's holdings in *Roby* and *Simon*, why that omission was improper, and why the judgment could not stand in light of those

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ranked 5th while Fidelity ranked 293rd. (See https://fortune.com/fortune500/2017, last accessed September 18, 2020.) In its first Form 10-K filing following the events in *Roby*, McKesson Corp. called itself "the world's largest health care service and technology company." (See https://www.sec.gov/Archives/edgar/data/927653/000095014901500834/f72121e10-k.txt, last accessed September 18, 2020.)

precedents. The petition was summarily denied on September 4, 2020.

D. Albarracin And The Consumer Attorneys of California Seek Publication Of The Opinion, Which The Court Of Appeal Denies.

Both the plaintiff and the Consumer Attorneys of California filed letters seeking publication of the Opinion. The Court of Appeal denied the requests, and transmitted them to this Court as required. (Cal. Rules of Court, rule 8.1120(b)(1).)

THIS COURT'S REVIEW IS NECESSARY TO SECURE DUE PROCESS

A. The Stare Decisis Issue.

Auto Equity Sales has been this Court's leading case on stare decisis for nearly 60 years. It stated plainly that "decisions of this court are binding upon and must be followed by all the state courts of California." (57 Cal.2d at p. 455; see also *People v. Lessie* (2010) 47 Cal.4th 1152, 1167 [appellate courts are "obliged to follow both the high court's decisions (see U.S. Const., art. VI, cl. 2 [supremacy clause]) and our own"].)

But *Auto Equity Sales* offered little explanation of the doctrine, or discussion of its particular applications. (See 57 Cal.2d at pp. 455-456 [condemning superior court appellate

division's refusal to follow a Court of Appeal opinion that it deemed wrong].) That may well be because the broad edict above was meant to have no exception and little nuance. But the fact remains that *Auto Equity Sales* did not deal expressly with unpublished appellate decisions, nor has any decision of this Court since.

The silent omissions from the unpublished decision here are more dangerous than the open defiance in *Auto Equity Sales*, both because they are harder to police and because they violated the constitutional right to due process of law. As explained in Statement section B above, the punitive award here was irreconcilable with *Roby*, upon comparing all reprehensibility factors in the two cases—and the Opinion omitted any such comparison, despite extensive briefing. Nor was it possible to adhere to *Roby* and *Simon*'s holdings with respect to the defendants' wealth (also briefed clearly) and still place serious weight on Financial's wealth to justify this award. The Opinion instead chose inconsistent appellate precedents to support that weight. This Court should grant review to clarify that stare decisis requires intermediate appellate decisions, *whether or not* certified for publication, to follow or meaningfully distinguish this Court's relevant holdings.

Financial is not challenging the legitimacy of California's system of unpublished and non-citable appellate decisions. Nor does it suggest that unpublished decisions *typically* receive a substandard level of effort or analysis, or that such decisions *purposely* avoid this Court's commands. But clearing those low bars should not satisfy this Court. And it is undeniable that for whatever reasons, unpublished decisions *do* often fail to confront this Court's relevant holdings, whether quoting them or not.

In the realm of punitive damages alone, a troubling number of decisions since *Simon* and *Roby* have not meaningfully examined all three of the due process guideposts. (See also *Nickerson*, *supra*, 63 Cal.4th at pp. 371-372 ["reviewing courts must consider" these guideposts in evaluating the size of punitive damages awards.]) For example:

- The first and most important guidepost went unexamined in *Astor v. Rent-A-Center, Inc.* (Cal. Ct. App., Jan. 25, 2007) 2007 WL 184741 (**Ex. A** to Motion for Judicial Notice [MJN]). Instead, disposing of an argument that defendant's degree of reprehensibility did not justify the punitive award, the decision accused the defendant of "attempting to retry the case" with minimal further comment. (*Id*. at pp. *17-18.)

- The second guidepost, proportionality, went unexamined in *Wrysinski v. Agilent Technologies, Inc*. (Cal. Ct. App., Sept. 27, 2006) 2006 WL 2742475, at pp. *25-26 (**Ex. B** to MJN). Where the jury awarded a wrongfully terminated plaintiff "economic and noneconomic damages of $963,580 and awarded punitive damages of exactly four times that amount, or $3,854,320," the court's analysis consisted only of confirming that *Simon* did not *forbid* that result. The opinion quotes and then ignores *Simon*'s holding that "'[m]ultipliers *less* than nine or 10 are not . . . presumptively *valid* under *State Farm*.'" (See **Ex. B** at pp. *25-26, italics in *Simon*.)
- The identical paragraphs from Wrysinski cropped up a few years later to serve as another district's proportionality review—substituting only the damages numbers. (See *Lopez v. Bimbo Bakeries USA, Inc*. (Cal. Ct. App., Apr. 23, 2009) 2009 WL 1090375, *16-17 (**Ex. C** to MJN) [jury awarded "economic and noneconomic damages of $340,700 and awarded punitive damages of roughly six times that amount, or $2 million"].)
- In *O'Brien v. Baca* (Cal. Ct. App., Dec. 4, 2017) 2017 WL 5988347, a wrongful termination case with a $300,000 emotional distress award and $25,000 in economic

damages (p. *4), the court rejected appellant's challenge to the 3-to-1 punitive damages ratio in a footnote, dispensing with *Roby* in two sentences (p. *7, fn. 6). (See **Ex. D** to MJN.)

The publication request filed by Consumer Attorneys of California unintentionally highlights more evidence of the problem. That letter tallies the labor-and-employment decisions since *Roby* that have assessed the constitutionality of punitive damages awards:

- It correctly notes (p. 4) that the *published* decisions all affirm or require ratios to compensatory damages of 1.5-to-1 or lower. (See *Shahinian v. Cedars-Sinai Medical Center* (2011) 194 Cal.App.4th 987, 1008; *King v. U.S. Bank N.A.* (2020) 52 Cal.App.5th 728, 781; and *Colucci v. T-Mobile USA, Inc.* (2020) 48 Cal.App.5th 442, 459 (*Colucci*).)
- The letter also correctly notes that "[c]ases that approve greater ratios (4-to-1 or greater) tend to be unpublished." (p. 4.)

It is reasonable to wonder why that pattern has developed, and a reasonable answer is that the unpublished decisions are

less readily squared with this Court's and the U.S. Supreme Court's precedents.[7]

As noted, virtually all litigants receiving such unpublished opinions have to accept them—either because they lack the wherewithal to pursue Supreme Court litigation, or because this Court denies review, or because they conclude that this Court's policy of not reviewing Court of Appeal error will make relief impossible. Accordingly, this Court's review of the stare decisis issue is necessary to secure uniformity of decision *and* to settle an important question of law: whether unpublished appellate decisions must follow or distinguish this Court's directly relevant holdings. (Cal. Rules of Court, Rule 8.500(b)(1).)

B. The Disparity Issue.

Apart from its failure to adhere to this Court's precedents that control analysis of *Gore*'s reprehensibility guidepost (set forth above), the court's evaluation of the second guidepost—proportionality of punitive damages to the compensatory award—was equally untethered. In essence, the court invented a rule

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[7] See, e.g., **Exs. E and F** to MJN: *Abarca v. Citizens of Humanity, LLC* (Cal. Ct. App., July 31, 2019), 2019 WL 3451184, at pp. *3, 7 (affirming 7.8-to-1 punitive damages ratio, based on unpersuasive distinction of *Roby* in a case with very similar torts); *Kell v. AutoZone, Inc.* (Cal. Ct. App., Feb. 10, 2014) 2014 WL 509143, at pp. *32-33, as modified (Feb. 24, 2014) (same, 5-to-1 punitive damages ratio).

that, if quietly applied across other unpublished decisions, can prop up almost *any* punitive award, so long as it stays under the double-digit-multiplier presumptive ceiling.

We first explain the true rule and why it does not apply here.

With roots in U.S. Supreme Court precedent, *Roby* explained that due process "'permits a higher ratio between punitive damages and a *small compensatory award for purely economic damages* containing no punitive element than [it does] between punitive damages and *a substantial compensatory award for emotional distress; the latter may be based in part on indignation at the defendant's act* and may be so large as to serve, itself, as a deterrent.'" (47 Cal.4th at p. 718, quoting *Simon*, *supra*, 35 Cal.4th at p. 1189, italics added.)

The Opinion here quoted and relied on this rule. But the rule was wholly irrelevant, because *neither of the circumstances it mentions exists.*

- This verdict was neither small nor "purely economic." It was moderate and purely non-economic: $250,000 for past emotional distress.

- And the Court of Appeal itself held that the emotional distress award was *neither* quasi-punitive *nor* "considerably large." (Opinion, pp. 25-26.)

The quoted rule of law is for cases like *Simon*, 35 Cal.4th at p.1189, involving a small compensatory award—$5,000 in *Simon*—"consist[ing] of economic damages only." (Opinion, p. 25, not acknowledging distinction from this case.) The rule did not authorize any "higher ratio" here.

Yet the unpublished opinion misapplied *Simon* to affirm "a much higher ratio" of punitive damages simply because the compensatory award was "not punitive" (i.e. "not considerably large")—that is, *because it was moderate*. (Opinion, pp. 25-27.) This non-law was central to the court's approval of the nearly 8-to-1 punitive damages ratio. As page 30 of the Opinion shows, the compensatory award's non-punitive nature and moderate amount formed two of the four grounds for that approval—along with the wealth and reprehensibility factors the court also mishandled (see §A, *ante*).

Nothing in this or the U.S. Supreme Court's jurisprudence authorizes a higher punitive damages ratio merely because an emotional distress award is moderate—much less, because it is smaller than awards in cases imposing low multipliers. (See Opinion, p. 30; AOB 43-44; ARB 32-33, 38 [showing that *Roby*

plaintiff's far greater emotional harm naturally drove the emotional distress award higher, apart from the punitive element the court inferred]; *Colucci*, *supra*, 48 Cal.App.5th at pp. 449-450 [past and future emotional distress damages totaled $700,000 for "the immense, ongoing toll of the termination on his mental and physical health, and his struggle to find comparable employment"].)

Rightly so. If moderate compensatory awards can support "a much higher ratio" of punitive damages (like 8-to-1) simply because they're not already large or impliedly punitive, then almost any case can qualify for the high-single-digit ratios that typically mark the due-process maximum. Further, the reprehensibility "guidepost" would no longer hold primary importance—as the U.S. Supreme Court and this Court have held it must. (*Roby*, *supra*, 47 Cal.4th at p. 713, and *Johnson*, *supra*, 35 Cal.4th at p. 1207, both citing *State Farm*, 538 U.S. at p. 419.) A high ratio of punitive damages could rest on any moderate compensatory award, no matter where on the reprehensibility spectrum the defendant's conduct lay.

Illegitimate rationales like this take root and spread when this Court leaves them unreviewed. The same division rationalized another nearly 8-to-1 punitive damages ratio in an unpublished decision last year, where plaintiff's compensatory

award for similar employment torts was a moderate $70,000, almost evenly split between lost earnings and mental suffering. (See **Ex. E** to MJN: *Abarca v. Citizens of Humanity, LLC* (Cal. Ct. App., July 31, 2019), 2019 WL 3451184, at pp. *3, 7 [also misplacing reliance on *Simon*].) This Court should grant review to halt the misuse of *Simon*—or simply the improvisation of grounds for higher multipliers—in violation of the due process clause of the U.S. Constitution.

CONCLUSION

Four times since the U.S. Supreme Court decided *Gore* in 1996, this Court has addressed issues surrounding the constitutionality of a punitive damages award: *Johnson* and *Simon* (both 2005), *Roby* in 2009, and *Nickerson* in 2016. Those should have been enough to deter the decision here, as well as other similar unpublished decisions.

But they were not. The Court should grant review to: (1) insist that unpublished decisions confront this Court's directly relevant holdings, and (2) reject the rationalization of "a much higher ratio" of punitive damages based solely on the moderate size of plaintiff's compensatory damages award.

September 22, 2020

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By /s/ Laurie J. Hepler
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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), (c)(4), I certify that this PETITION FOR REVIEW contains **7,215** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

September 22, 2020

/s/ Laurie J. Hepler
Laurie J. Hepler

ATTACHMENT:
COURT OF APPEAL OPINION

Pursuant to California Rules of Court, rule 8.504(b)(4), a copy of the Court of Appeal opinion is attached.

Filed 8/13/20

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL – SECOND DIST.
FILED
Aug 13, 2020
DANIEL P. POTTER, Clerk
ZClayton Deputy Clerk

SOLEDAD ALBARRACIN, Plaintiff and Respondent, v. FIDELITY NATIONAL FINANCIAL, INC., et al., Defendants and Appellants.	B292895 Los Angeles County Super. Ct. No. BC642922

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Samantha P. Jessner, Judge. Affirmed.

Jackson Lewis, Henry L. Sanchez, Negin Iraninejadian; Greines, Martin, Stein & Richland, Robin Meadow and Laurie J. Hepler for Defendants and Appellants.

Arias Sanguinetti Wang & Torrijos, Mike M. Arias, Katherine E. Harvey-Lee; Rodriguez & Tran, Griselda Rodriguez, Derek T. Tran; The Ehrlich Law Firm and Jeffrey I. Ehrlich for Plaintiff and Respondent.

INTRODUCTION

Soledad Albarracin sued Fidelity National Financial, Inc. (Financial), Fidelity National Management Services, LLC (Management),[1] and her former supervisor, Robert Wilson, for intentional infliction of emotional distress and several employment-related claims arising out of the termination of her employment after she complained that Wilson had sexually harassed her during a work retreat. A jury found the Fidelity defendants liable for intentional infliction of emotional distress, retaliation for engaging in protected activity under the Fair Employment and Housing Act (FEHA) (Gov. Code,[2] § 12900 et seq.), and wrongful termination. The jury awarded Albarracin $250,000 for past emotional distress caused by the Fidelity defendants and imposed $1,950,000 in punitive damages against Financial. After the trial court denied the Fidelity defendants' motions for new trial and judgment notwithstanding the verdict (JNOV), it awarded Albarracin nearly $820,000 in attorneys' fees.

On appeal, the Fidelity defendants challenge the punitive damages award, arguing: (1) insufficient evidence supports the jury's finding that they engaged in oppressive or malicious conduct; and (2) the amount of the punitive damages award is unconstitutionally excessive. The Fidelity defendants also contend we must remand the matter for recalculation of Albarracin's attorneys' fees award if we reverse or reduce the punitive damages award. We conclude substantial evidence

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[1] We refer to Financial and Management collectively as the Fidelity defendants or the company.

[2] All undesignated statutory references are to the Government Code.

supports the jury's finding of oppressive or malicious conduct and the amount of the award does not exceed constitutional limits. We therefore affirm the judgment and orders.

FACTUAL BACKGROUND

1. The Incident in Colorado Springs

In November 2014, the Financial defendants hired Albarracin as a paralegal in its major claims department in Los Angeles. Wilson, an attorney in major claims, was one of Albarracin's supervisors.

In September 2015, the company organized a training retreat in Colorado Springs, Colorado for the major claims employees. Albarracin and about 25 other employees, including Wilson, attended the retreat.

On September 9, 2015, the second night of the retreat, Albarracin and Tamela Pittman, a paralegal in Financial's Dallas office, went to the hotel bar. They ran into Wilson, who bought them each a glass of wine. After Albarracin, Pittman, and Wilson talked for about 20 minutes, they left the bar to go back to their own hotel rooms. Pittman took the elevator to her floor, while Wilson and Albarracin took the stairs to their floor.

As Albarracin was walking up the stairs, Wilson approached her and asked, "So, your room or mine?" Albarracin replied that she was going back to her room and continued to walk up the stairs. Wilson followed her. When she reached her floor, Albarracin became nervous and accidentally walked into a dead-end. When she turned around, Wilson was standing in front of her.

Albarracin tried to walk past Wilson, but he raised his arms and said, "So?" Panicking, Albarracin tried to walk to her

room. When Albarracin asked Wilson where his room was, Wilson said he was staying in the room next to hers. Wilson then leaned in and tried to kiss Albarracin on her lips. Albarracin pushed Wilson back and moved her head to the side. Wilson replied, "Oh, come on," and tried to kiss Albarracin again. Albarracin pushed Wilson back a second time.

Albarracin then put her hands on Wilson's shoulders and directed him to his room. When they reached Wilson's door, Albarracin said, "this is your room, I am going to mine." Once inside her room, Albarracin sent text messages to her ex-boyfriend describing her encounter with Wilson.

2. The Investigation

On the morning of September 10, 2015, Albarracin reported her encounter with Wilson to Helen Straekle, the assistant to Joseph Tucker, the senior vice president of Financial's major claims department. Albarracin met with Tucker later that day in the hotel's restaurant and told him about the encounter. Tucker told Albarracin that he would come to the Los Angeles office sometime during the next week to further investigate her claim, and he advised Albarracin to take a day off of work.

Tucker, who testified that Financial has a "zero tolerance" policy for "discrimination or harassment of any kind," had recently received a complaint from a former employee, Linda Hudson, accusing Wilson of sexual harassment.[3] Nevertheless, Tucker did not take any notes of his conversation with Albarracin. When later asked if he believed Albarracin's allegations were serious, Tucker replied, "To [her], sure."

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[3] We discuss Hudson's complaint in greater detail below.

After speaking to Albarracin, Tucker met with Wilson. Wilson claimed Albarracin made up the allegations, and he denied ever trying to kiss her. Tucker did not take any notes of his conversation with Wilson.

Albarracin and Wilson flew back to Los Angeles on separate flights. When Albarracin returned to work on September 14, 2015, Wilson asked her, "Where were you on Friday? We missed you on the flight back." Albarracin was "horrified and freaked out, because [she] thought [Wilson] had been told not to talk to [her.]" The next day, Albarracin made an appointment with her doctor because she was "falling apart … and more tense and more tense, having to be in the same place with a man who attacked [her]."

On September 15, 2015, Tucker went to Los Angeles to investigate Albarracin's claim against Wilson. Tucker interviewed Albarracin, Wilson, and four other employees who did not attend the retreat at the Los Angeles office. Tucker spoke to Albarracin and Wilson about Albarracin's allegations, and he questioned the other employees about Albarracin's and Wilson's relationship and Albarracin's work performance. Tucker issued Wilson a written "Notice of Performance Counseling" and directed Wilson to attend a sexual harassment training course.

On September 16, 2015, Tucker updated Albarracin on his investigation. He told her: " 'I have talked to people. I have talked to people in—the corporate attorneys, and to the people in H.R. And I can't tell you what measures we have taken against Robert Wilson, but I can tell you that he—it's not going to be very easy for him here. And I'm sorry, but you are going to have to work with him.' " Albarracin responded, " 'I can't work with him. I—the last three days that I've been here has been a nightmare. I am a

complete mess. I am [falling] apart. My body—every single muscle in my body is tight. … I can't work with [Wilson]. … [Y]ou can't make me work with him.' " Tucker replied that he could not "take stronger measures or … do something else" unless he had "more proof of something."

Albarracin tried to find additional evidence to corroborate her complaint against Wilson. Although the hotel in Colorado Springs did not have security footage of the encounter, Albarracin told Tucker that she could provide him the text messages she sent her ex-boyfriend immediately after the encounter. Tucker never asked to see the text messages.

Shortly after her meeting with Tucker on September 16, 2015, Albarracin left work because she "desperately needed to see a doctor." Albarracin's doctor wrote Albarracin a "Work Status Report" excusing her from work through September 18, 2015, which she sent to Tucker. On September 18, 2015, Albarracin sent Tucker a second "Work Status Report" from her doctor excusing her from work through September 25, 2015.

On September 24, 2015, Albarracin sent Tucker an email detailing her encounter with Wilson in Colorado. Albarracin asked Tucker to "reconsider moving [her] to any other department in Fidelity since apparently [Wilson] cannot be touched." Albarracin also asked Tucker to forward the email to "the person in charge of Human Resources in Major Claims." Tucker never replied to, or otherwise spoke to Albarracin about, the email. Tucker did, however, forward the email to Karen Harper, the director of Financial's human resources department. Harper later testified that, as director of human resources, she had a duty to conduct a formal review of Albarracin's complaint.

On September 28, 2015, Albarracin was examined by a psychiatrist, who placed her off work through November 22, 2015. According to the psychiatrist, Albarracin was " 'very anxious' " and " 'trembled the entire [45 to 50 minute] session.' "

Harper spoke to Albarracin over the phone on September 28, 2015. They discussed the incident in Colorado Springs as well as possible arrangements that could be made to allow Albarracin to return to work, such as moving Wilson's office or Albarracin's desk to prevent Albarracin from having to interact with Wilson. At the end of the conversation, Harper promised she would call Albarracin back after speaking to Tucker about the proposed arrangements. Harper never spoke to Tucker about a possible accommodation, nor did she call Albarracin back.

Albarracin sent Harper a psychiatrist's note placing Albarracin off work through November 22, 2015. In response, Harper explained that Albarracin was not eligible for leave under the Family and Medical Leave Act (FMLA) and instructed Albarracin to apply for a personal leave of absence through Financial.

On September 29, 2015, Financial's leave administrator, FMLASource, contacted Albarracin. The leave administrator explained that Albarracin needed to submit medical certification by October 15, 2015 before her personal leave request could be approved.

On October 6, 2015, Harper sent the following email to an employee in Financial's human resources department: "This is the girl that claimed sexual harassment which could not be validated. She went to her doctor then stopped showing up for work. I told her to apply for the personal leave and I don't think she ever did." The employee confirmed that Albarracin had

applied for leave and that the company was waiting for her to submit medical certification.

On October 13, 2015, Albarracin's psychiatrist submitted a "Medical Certification" stating that, on September 9, 2015, Albarracin began suffering from a medical condition that precluded her from working for at least two months. Financial approved Albarracin's request for sixty days of personal leave, beginning on September 17, 2015 and expiring on November 17, 2015.

On October 30, 2015, Tucker asked Harper if he could hire a new full-time, rather than a temporary, employee to fill Albarracin's position. Harper told Tucker she would follow up on his request. In early November 2015, staff in Financial's human resources department informed Harper that Albarracin would become eligible for protected FMLA leave on November 24, 2015.

On November 2, 2015, Harper sent two emails to the leave administrator. In the first email, Harper explained that Financial should inform Albarracin that her position could not be guaranteed while she was on leave. In the second email, Harper said, "Mark your calendar because next step after [November 17, 2015] will be to tell her we can no longer hold her position open and that she will need to return to work on [November 18, 2015]."

On November 10, 2015, the leave administrator informed Albarracin that her personal leave would expire on November 17, 2015, and that she was expected back at work on November 18, 2015. Around November 11, 2015, Albarracin requested two additional months of leave, to run from November 18, 2015 through January 17, 2016. On November 12, 2015, the leave administrator sent Albarracin a letter confirming that it had received her leave extension request and instructing her to

submit medical certification supporting her request by November 28, 2015.

On November 16, 2015, an employee in Financial's human resources department contacted the leave administrator to verify that Albarracin had requested a two-month extension of her leave. The administrator confirmed that it was waiting for Albarracin to submit additional medical certification to support her request.

3. Albarracin's employment is terminated.

On November 18, 2015, Albarracin did not return to work. Financial treated Albarracin's failure to return to work as "job abandonment" because she didn't provide the leave administrator or "the company with notification for her need to extend [her personal leave] with the appropriate certification paperwork."

On November 20, 2015, Financial terminated Albarracin's employment. That same day, Albarracin sent a "Work Status Report" from her doctor to Financial's human resources department. On November 23, 2015, Albarracin emailed an employee in human resources, explaining that she couldn't provide supporting documentation for her extension request at an earlier time because she had scheduled nearly two months in advance her November 19, 2015 doctor's appointment. Later that same day, Financial's leave administrator informed human resources that Albarracin had provided sufficient medical certification to extend her leave of absence through November 22, 2015.

Harper never finished her investigation of Albarracin's sexual harassment complaint or wrote any formal report about the complaint or the investigation before Financial fired Albarracin. In addition to never speaking to Tucker about

providing Albarracin an accommodation that would allow her to return to work, Harper never interviewed Wilson or any other Fidelity employee about Albarracin's complaint.

Albarracin testified that she continues to experience stress and anxiety as a result of her encounter with Wilson. She often suffers panic attacks, insomnia, depression, nervousness, and feelings of worthlessness. She has difficulty trusting men, and she hasn't been in an intimate relationship since the encounter with Wilson.

4. Hudson's Harassment Complaint

In 2015, Linda Hudson worked as a temporary legal assistant in Financial's Los Angeles office. Hudson worked for Wilson for several months.

On August 23, 2015, Hudson filed a workplace complaint, accusing Wilson of engaging in inappropriate and harassing conduct. On one occasion, Wilson walked up behind Hudson, reached over Hudson's head, and handed a piece of paper to Albarracin. When Hudson told Wilson not to reach over her head again, he "just kind of chuckled and did not apologize." The next day, Wilson quietly approached Hudson from behind and tried to frighten her.

Wilson would sometimes refer to Hudson as " 'his girl' " to other people in the office. After Hudson once brought Wilson his mail, Wilson said, " 'There she is! There's my girl, yeah, there's my girl!' " Hudson was "shocked" and "felt so horrible and degraded" by Wilson's comments that she "went to the bathroom to pray." Wilson also would harshly criticize Hudson in front of other employees when she made minor mistakes at work.

In early August 2015, Hudson asked a supervisor at Financial to move her desk so that her back would not face

Wilson's office. Hudson stopped working for the company in mid-August 2015.

PROCEDURAL BACKGROUND

According to the first amended complaint,[4] Albarracin asserted five causes of action: (1) sexual harassment and hostile work environment in violation of FEHA (§ 12940, subd. (j)); (2) failure to prevent sexual harassment in violation of FEHA (§ 12940, subd. (k)); (3) retaliation for engaging in protected activity under FEHA (§ 12940, subd. (h)); (4) wrongful termination in violation of public policy; and (5) intentional infliction of emotional distress. Albarracin sought compensatory and punitive damages against each defendant.

Albarracin's claims against the Fidelity defendants and Wilson were tried in two phases before a jury in April 2018. In the first phase of trial, the jury found the Fidelity defendants liable for retaliation, wrongful termination, and intentional infliction of emotional distress. The jury also found the Fidelity defendants' agents or employees acted with malice, oppression, or fraud. The jury found in favor of the Fidelity defendants and Wilson on Albarracin's claim for sexual harassment and hostile work environment, and it found in favor of Wilson on Albarracin's claim for intentional infliction of emotional distress. The jury

[4] Management and Wilson are named as defendants in the first amended complaint; Financial is not named as a defendant in that pleading. It appears, however, that the operative pleading is a second amended complaint, and that Financial and Management are named as defendants in that pleading. The second amended complaint is not in the record on appeal.

awarded Albarracin $250,000 in non-economic damages for past emotional distress.

In the second phase of trial, the parties presented evidence that the Fidelity defendants made $662 million in after-tax profit in 2017. The jury imposed $1,950,000 in punitive damages against Financial, but it did not impose any punitive damages against Management.

On July 5, 2018, the court entered judgment for Albarracin and against the Fidelity defendants.

On July 20, 2018, the Fidelity defendants filed motions for new trial and JNOV. The Fidelity defendants challenged the judgment on two grounds: (1) the jury's finding that agents or employees of the Fidelity defendants acted with malice, oppression, or fraud is not supported by the evidence; and (2) the amount of the punitive damages award was constitutionally excessive.

On August 30, 2018, the court denied the Fidelity defendants' motions. On September 26, 2018, the Fidelity defendants appealed from the judgment and the order denying the JNOV motion.

On November 19, 2018, the court awarded Albarracin $819,355 in attorneys' fees. On January 15, 2019, the Fidelity defendants appealed from the order awarding Albarracin attorneys' fees.[5]

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[5] We consolidated the Fidelity defendants' appeals.

DISCUSSION

1. The Jury's Finding of Malice or Oppression

The Fidelity defendants contend the court erred in denying their JNOV motion because insufficient evidence supports the jury's finding that they acted with malice or oppression when investigating Albarracin's sexual harassment complaint and terminating her employment. The Fidelity defendants do not challenge any of the underlying findings of liability for retaliation under FEHA, wrongful termination, or intentional infliction of emotional distress. And because they do not differentiate Financial's acts or omissions from Management's acts or omissions, we treat these defendants interchangeably in determining whether substantial evidence supports the jury's finding of malice or oppression.

1.1. Applicable Law and Standard of Review

To support a punitive damages award, the plaintiff must prove by clear and convincing evidence that the "defendant has been guilty of oppression, fraud, or malice."[6] (Civ. Code, § 3294, subd. (a).) Malice is defined as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (*Id.*, subd. (c)(1).) " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (*Id.*, subd. (c)(2).)

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[6] The parties do not dispute that the jury's punitive damages award was based on a finding of malice or oppression, and not fraud.

“ ‘Despicable conduct’ is conduct that is ‘ “so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by most ordinary decent people.” ’ [Citation.]” (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1159.) Typically, such conduct has “the character of outrage associated with crime.” (*Ibid.*) Defendants act with “ ‘conscious disregard’ ” when they are aware of the probable dangerous consequences of their conduct and willfully and “ ‘ “deliberately failed to avoid those consequences.” ’ [Citation.]” (*Ibid.*) Thus, defendants must have actual knowledge of the risk of harm created by their conduct and, despite that knowledge, fail to take steps they know “ ‘will reduce or eliminate the risk of harm.’ [Citation.]” (*Ibid.*)

Generally, something more than the mere commission of a tort is required to support an award of punitive damages. (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894.) Thus, “wrongful termination, without more, will not sustain a finding of malice or oppression.” (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 717.) But evidence that the employer acted with callousness or spite, a discriminatory intent, or offered a pretextual explanation to justify its wrongful termination may support a finding of malice or oppression. (See *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 428 [employer’s “callous and retaliatory” conduct toward employee supported punitive damages award]; *Cloud v. Casey* (1999) 76 Cal.App.4th 895, 912 (*Cloud*) [employer’s use of a false explanation to hide gender-based termination supported punitive damages award]; *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394, 1403 [employer’s fabricated criticism to justify wrongful termination supported

punitive damages award], disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.)

Malice and oppression may be proven through direct evidence or inferred from the circumstances surrounding the defendant's conduct. (*Monge v. Superior Court* (1986) 176 Cal.App.3d 503, 511.) Because malice, oppression, or fraud must be proven by clear and convincing evidence, we review the jury's finding to determine "whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true." (*Conservatorship of O.B.* (July 27, 2020, S254938) __ Cal.5th __ [p. 12] [courts must apply a heightened standard of review on appeal to account for the clear and convincing standard of proof].) We view "the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence." (*Ibid.*)

1.2. Substantial evidence supports the jury's finding.

As discussed below, substantial evidence supports the jury's finding that the company acted with malice or oppression.

We begin by addressing the way the Fidelity defendants handled Albarracin's sexual harassment complaint. Shortly after she complained that Wilson had sexually harassed her, Albarracin told Tucker that she was suffering severe anxiety and stress because of that encounter, and she provided supporting medical documentation. Harper became aware of that information in late-September 2015. Albarracin also explained to Harper and Tucker that she could not return to work if she would be required to interact with Wilson, and she proposed

accommodations that could resolve that issue, such as moving her workspace away from Wilson's office or transferring her to a different department.

Tucker never responded to Albarracin's request for an accommodation. And, although Harper promised Albarracin she would discuss potential accommodations with Tucker, Harper never did. Nor did Harper otherwise make any effort to find Albarracin an accommodation that would enable her to return to work. Moreover, Harper never interviewed any employees, including Wilson, about Albarracin's sexual harassment complaint, even though she admitted it was her duty to investigate such complaints filed by Financial employees. Instead, Harper focused her efforts on determining when Albarracin would become eligible for protected FMLA leave and when Financial could terminate her employment. Based on this evidence, the jury could infer that the company's handling of Albarracin's sexual harassment complaint was malicious or oppressive because Tucker and Harper acted with conscious disregard of Albarracin's emotional distress and her right to complain about workplace harassment.[7] (See *Butte Fire Cases*, *supra*, 24 Cal.App.5th at p. 1159.)

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[7] Under Civil Code section 3294, subdivision (b), an employer may not be liable for punitive damages based on the actions of its employees unless: (1) 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"; (2) the employer "authorized or ratified the wrongful conduct for which the damages are awarded"; or (3) the employer is "personally guilty of oppression, fraud, or malice." The Fidelity defendants do not contend that they could not be held liable for punitive damages based on any of the grounds outlined in Civil Code section 3294, subdivision (b).

The jury also could find that the company provided a false explanation for its retaliatory firing of Albarracin. When Albarracin didn't return to work on November 18, 2015, the day after her personal leave expired, Financial treated her absence as "job abandonment." Financial claimed Albarracin didn't notify the company or its leave administrator that she wanted to extend her leave or provide appropriate certification to justify a leave extension. But there was evidence that, less than a week before Albarracin's leave was set to expire, Albarracin submitted a leave extension request. And, on November 12, 2015, Financial's leave administrator told Albarracin that she had until November 28, 2015 to submit certification supporting that request. Based on this evidence, the jury could find that the company's stated reason for firing Albarracin was false and designed to hide its retaliatory intent in firing her—i.e., because she complained that Wilson had sexually harassed her. (See *Cloud*, *supra*, 76 Cal.App.4th at p. 912 [providing a false explanation for a retaliatory or discriminatory termination supports a finding of malice or oppression]; *Colucci v. T-Mobile USA, Inc.* (2020) 48 Cal.App.5th 442, 456 (*Colucci*) [employer's use of a false explanation to justify wrongful termination supports finding that employer's "conduct was malicious or oppressive"].)

The Fidelity defendants contend insufficient evidence supports the jury's finding because the company's conduct in investigating Albarracin's sexual harassment complaint and terminating her employment was, at worst, "negligent," "shoddy," "inept," "overzealous," "callous," or "legally erroneous." According to the Fidelity defendants, such conduct does not support a finding of "malice" or "oppression" necessary to justify a punitive

damages award. This argument is misguided for a couple of reasons.

First, the Fidelity defendants ignore that the jury found them liable for intentional infliction of emotional distress, a finding the Fidelity defendants do not challenge on appeal. That means the jury found the company's conduct in investigating Albarracin's sexual harassment complaint and terminating her employment was "outrageous," or so " ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' [Citation.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051.) The jury also found that the company "intend[ed] to cause [Albarracin] emotional distress" or acted "with reckless disregard of the probability that [Albarracin] would suffer emotional distress." (See *id.* at p. 1051 [intentional infliction of emotional distress requires the jury to find the defendant intended to injure the plaintiff or that the defendant engaged in the challenged conduct with the realization that injury will result].) The jury, therefore, rejected the Fidelity defendants' position that their conduct was merely negligent, shoddy, inept, callous, or overzealous. Because they do not challenge the jury's finding of liability, the Fidelity defendants cannot recharacterize their conduct as falling below the threshold for intentional infliction of emotional distress. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894–895, fn. 10 [an appellant waives any argument that could have been, but was not, raised in its opening brief].)

Second, the Fidelity defendants' reliance on decisions reversing punitive damages awards against insurance companies is misplaced. (See *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566; *Tomaselli v. Transamerica Ins. Co.* (1994) 25

Cal.App.4th 1269.) In *Patrick* and *Tomaselli*, the insurance companies denied their policyholders' claims in bad faith. (*Patrick*, at p. 1570; *Tomaselli*, at p. 1279.) Each company's conduct in denying its policyholders' claims was found to be negligent, unreasonable, inept, callous, or overzealous. (*Patrick,* at p. 1576; *Tomaselli*, at p. 1288.) Importantly, and unlike in this case, the juries in *Patrick* and *Tomaselli* never made any findings that the companies intended to harm, or acted with reckless disregard of the probability that their conduct would harm, the policyholders. (*Patrick*, at pp. 1575–1576; *Tomaselli*, at pp. 1286–1288.) Nor was there substantial evidence in *Patrick* or *Tomaselli* to support a finding that the insurance company acted with malice or oppression when it denied the policyholders' claims in bad faith. (*Patrick*, at pp. 1575–1576; *Tomaselli*, at pp. 1286–1288.) *Patrick* and *Tomaselli*, therefore, do not support the Fidelity defendants' argument that Financial's conduct in investigating Albarracin's sexual harassment complaint and terminating her employment fell below the standards for malice or oppression.

In sum, the record contains substantial evidence from which the jury could have found it highly probable that the Fidelity defendants acted with malice or oppression in how they handled Albarracin's sexual harassment complaint and terminated her employment.

2. Constitutionality of the Punitive Damages Award

The Fidelity defendants next contend that, even if the jury properly awarded Albarracin punitive damages, the amount of that award is unconstitutionally excessive because it is nearly eight times the amount of the compensatory damages award. The Fidelity defendants ask us to reduce the punitive damages award

from $1,950,000 to $250,000, the same amount as the compensatory damages award. We conclude the punitive damages award passes constitutional muster.

2.1. Applicable Law and Standard of Review

Courts may impose punitive damages to further a state's interest in punishing and deterring unlawful conduct. (*State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 (*State Farm*).) But the Fourteenth Amendment's due process clause places limitations on the amount of punitive damages awards, prohibiting the imposition of grossly excessive or arbitrary punishments on tortfeasors. (*Ibid.*; see also *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712 (*Roby*) [the due process clause restricts the amount of punitive damages courts may award].) " '[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.' " (*State Farm,* at pp. 416–417.)

In *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 (*Gore*), the United States Supreme Court outlined three "guideposts" that courts should use to determine whether a punitive damages award is excessive under the due process clause: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (*Id.* at p. 575; see also *State Farm*, *supra*, 538 U.S. at p. 418; *Roby*, *supra*, 47 Cal.4th at p. 712.)

We review the constitutionality of a punitive damages award de novo. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*).) Nevertheless, we review "findings of historical fact" for substantial evidence. (*Ibid*.)

2.2. Reprehensibility

The most important of the three *Gore* guideposts "is the degree of reprehensibility of the defendant's conduct." (*Roby*, *supra*, 47 Cal.4th at p. 713.) When evaluating this factor, courts should "consider whether '[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.' [Citation.]" (*Ibid*.)

As a preliminary matter, the Fidelity defendants contend Albarracin waived application of the first two reprehensibility factors because, during closing argument, Albarracin's counsel told the jury that he didn't "necessarily believe [those factors] appl[y] to" this case, and ultimately discussed only the third, fourth, and fifth factors. This argument lacks merit.

As the California Supreme Court explained in *Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, "[t]he *Gore* guideposts are framed neither as rules of trial procedure nor as model jury instructions. Rather, recognizing that postverdict judicial review is an essential step in a state's ultimate determination of the amount of a punitive damages award [citation], *Gore* prescribes a set of rules for *reviewing courts* to apply in order to ensure that the state ultimately does not impose an award whose size exceeds constitutional limits [citation]." (*Id.*

at p. 375, italics added.) When evaluating the constitutionality of a punitive damages award, the reviewing court's job is to identify the constitutional ceiling for such damages, not to determine whether the amount of the damages is the most reasonable under the facts of the case. (*Simon*, *supra*, 35 Cal.4th at p. 1188.) In other words, the *Gore* guideposts do not "regulat[e] the jury's decisionmaking process." (*Nickerson*, at p. 375.) Indeed, a reviewing court's application of the *Gore* factors in determining whether a punitive damages award is constitutional may sometimes be based on evidence or arguments not before the jury. (*Ibid*.) We therefore decline to find Albarracin waived application of any of the *Gore* guideposts, including the reprehensibility factors, to our analysis of the constitutionality of the punitive damages award.

Looking to the first reprehensibility factor, the injury caused by Financial's conduct was not purely economic. Albarracin suffered emotional harm as a result of Financial's failure to investigate her sexual harassment complaint and its termination of her employment. Albarracin described experiencing severe stress and anxiety immediately after her encounter with Wilson and throughout the period Financial was supposed to be investigating her sexual harassment complaint. Albarracin also provided medical documentation showing she was treated by a psychiatrist for those symptoms. As the *Roby* court explained, emotional harm constitutes "physical harm" insofar as it "affected [the plaintiff's] emotional and mental health, rather than being a purely economic harm." (*Roby*, *supra*, 47 Cal.4th at p. 713; see also *State Farm*, *supra*, 538 U.S. at p. 419.) This factor increases the reprehensibility of Financial's conduct.

With respect to the second factor, Financial demonstrated an indifference to, or reckless disregard for, Albarracin's health and safety. Albarracin repeatedly made it clear to Tucker and Harper that the prospect of continuing to work near Wilson caused her severe emotional distress, and she supported those claims with documents from her psychiatrist. The company refused to conduct a legitimate investigation of Albarracin's complaint, it ignored Albarracin's requests for an accommodation that would allow her to return to work, and it waited until it had an excuse to terminate her employment—i.e., her failure to return to work the day after her personal leave expired. This factor also increases the reprehensibility of Financial's conduct.

The third factor—financial vulnerability—is not present in this case. Albarracin did not request any damages for economic harm caused by Financial's conduct. And, in her respondent's brief, Albarracin acknowledges she could not claim financial harm based on Financial's conduct "because she was able to obtain new employment after [Financial] terminated her." Because Albarracin did not present evidence of financial vulnerability, this factor does not increase the reprehensibility of Financial's conduct. (See *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 987, fn. 11 [the third reprehensibility factor typically is not relevant where the plaintiff did not suffer any economic harm].)

As for the fourth factor, Albarracin did not present any evidence that Financial engaged in similar conduct in the past or that it had an organizational policy of retaliating against employees who engaged in protected activity under FEHA. Although Linda Hudson had complained that Wilson harassed her shortly before she left Financial, nothing in the record shows

Financial retaliated against Hudson or otherwise subjected her to any form of adverse employment action after she made the complaint.

There is evidence, however, of the fifth factor—that Albarracin's harm was the result of intentional trickery, malice or deceit. As we discussed above, Financial's tortious conduct leading up to, and including, its termination of Albarracin's employment was not accidental. Financial obviously intended to fire Albarracin. And despite assuring Albarracin that her complaint against Wilson would be taken seriously, Tucker and Harper refused to conduct a good-faith investigation of Albarracin's complaint or to provide her a workplace accommodation that would allow her to return to work.

In sum, three of the five reprehensibility factors are present in this case. Those factors—physical harm; indifference or reckless disregard; and intentional malice, trickery, or deceit—tip the scales toward Financial's conduct being more reprehensible than not since they reflect an intent to cause, or at least a reckless disregard that its conduct would cause, physical harm to Albarracin. Accordingly, we conclude the reprehensibility of Financial's conduct falls within the medium-high range.

2.3. Disparity Between Compensatory and Punitive Damages

Punitive damages must bear a " 'reasonable relationship' " to compensatory damages or the plaintiff's actual harm. (*Gore*, *supra*, 517 U.S. at pp. 580–581.) "Generally, California courts 'have adopted a broad range of permissible ratios—from as low as one to one to as high as 16 to 1—depending on the specific facts of each case.' [Citation.]" (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1313 (*Pfeifer*).) But there is no "bright-line

ratio which a punitive damages award cannot exceed." (*State Farm*, *supra*, 538 U.S. at p. 425.)

" '[D]ue process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element than [it does] between punitive damages and a substantial compensatory award for emotional distress; the latter may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent.' " (*Roby*, *supra*, 47 Cal.4th at p. 718.) Thus, in evaluating whether a punitive damages award falls within constitutional limits, reviewing courts should look to whether the compensatory damages award is punitive in nature, such as a substantial award for emotional suffering cause only by economic harm. (*Pfeifer*, *supra*, 220 Cal.App.4th at p. 1313.)

The Fidelity defendants contend that because the jury awarded Albarracin compensatory damages for emotional distress only, the compensatory damages reflect its intent to punish Financial and, as a result, the punitive damages must be set at the same value. While a one-to-one ratio may be appropriate where there is "relatively low reprehensibility and a substantial award of noneconomic damages" (*Roby*, *supra*, 47 Cal.4th at p. 718), a much higher ratio may be appropriate where the compensatory damages award is not punitive or the amount of the award is not substantial (see *Simon*, *supra*, 35 Cal.4th at p. 1181–1183). For example, in *Simon*, the court concluded a 10-to-1 ratio between punitive and compensatory damages was the constitutional limit where the compensatory award was "quite small"—i.e., $5,000—and consisted of economic damages only, while the reprehensibility of the defendant's conduct was low—

i.e., only one of the five reprehensibility factors was present. (*Simon*, at p. 1189.)

Here, the circumstances supporting the award of emotional distress damages do not reflect the jury's intent to punish Financial. Emotional distress damages are often found to serve as punishment in cases where the plaintiff's emotional harm stemmed from a purely economic injury. (See *State Farm*, *supra*, 538 U.S. at p. 426 [compensatory damages for emotional distress caused by purely economic injury reflected jury's intent to punish the defendant]; see also *Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 566–567 [noting that awards of emotional distress damages arising out of purely economic harm with no physical injuries tend to include a punitive element].) In this case, however, Albarracin presented evidence that she suffered serious emotional and psychological harm because of her encounter with, and Financial's failure to conduct a legitimate investigation of her sexual harassment complaint against, Wilson. Accordingly, the award of emotional distress damages reflects the jury's intent to compensate Albarracin for her suffering, not to punish Financial for its conduct. (See *Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 23 (*Nickerson II*) [emotional distress damages were not punitive because they were awarded to compensate the plaintiff for his emotional suffering].)

Further, the amount of emotional distress damages the jury awarded Albarracin was not considerably large. Contrast this case with *Roby*, where the jury awarded the plaintiff $1.3 million in emotional distress damages stemming from her workplace harassment and discrimination and wrongful termination. The Supreme Court concluded the jury intended to

punish the defendants based on the “substantial award” of damages for emotional distress and the relatively low reprehensibility of the defendants’ conduct. (See *Roby*, *supra*, 47 Cal.4th at pp. 718–719; see also *Colucci*, *supra*, 48 Cal.App.5th at p. 459 [$1,020,042 compensatory damages award, which included $700,000 for “noneconomic harm and/or emotional distress,” was “substantial” such that it reflected the jury’s intent to punish the defendant].) The amount of emotional distress damages the jury awarded Albarracin, however, is less than one-fifth the amount awarded to the plaintiff in *Roby*.

Moreover, the jury didn’t award Albarracin the full amount of emotional distress damages that she requested. During closing argument of the first phase of trial, Albarracin’s counsel asked the jury to award Albarracin “a couple million dollars” in compensatory damages for the emotional distress she suffered as a result of her encounter with Wilson and Financial’s failure to investigate her sexual harassment complaint. But the jury awarded Albarracin a much smaller amount—$250,000. Had the jury intended to punish Financial for its conduct, it could have awarded Albarracin a substantially larger amount of emotional distress damages.

2.4. Comparable Civil Penalties

The final *Gore* guidepost requires us to “consider ‘the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases[.]’ ” (*Roby*, *supra*, 47 Cal.4th at p. 718.) “ ‘The rationale for this consideration is that, if the penalties for comparable misconduct are much less than a punitive damages award, the tortfeasor lacked fair notice that the wrongful conduct could entail a sizable punitive damages award.’ [Citation.]” (*Grassilli v.*

Barr (2006) 142 Cal.App.4th 1260, 1290.) This guidepost has minimal utility, however, in cases where no comparable civil penalties exist. (See *Simon*, *supra*, 35 Cal.4th at pp. 1183–1184.)

At the time *Roby* was decided, section 12970 authorized the California Fair Employment and Housing Commission to assess a fine of up to $150,000 against an employer found to violate FEHA if the plaintiff pursued her claims administratively before the commission. (*Roby*, *supra*, 47 Cal.4th at pp. 718–719.) In 2013, before Albarracin's FEHA claims arose, the California Legislature eliminated the Fair Employment and Housing Commission, repealed section 12970, and did not replace the civil penalty authorized by section 12970 with a comparable one. (See Sen. Bill No. 1038 (2011-2012 Reg. Sess.) §§ 28, 35–54.) The Fidelity defendants point to the $25,000 civil penalty that may be assessed against a defendant in a case brought by the Department of Fair Housing and Employment, where the defendant is found to have denied the victim a right provided for by Civil Code section 51.7, otherwise known as the Ralph Civil Rights Act of 1976. (See § 12965, subd. (c).) None of the circumstances warranting imposition of a civil penalty under section 12965 exist in this case, however. (See § 12965; Civ. Code, § 51.7.)

Because the parties have not identified any civil penalty that could be imposed in a comparable case, the third *Gore* guidepost is not relevant in determining whether the punitive damages award in this case exceeds the constitutional limit. (See *Nickerson II*, *supra*, 5 Cal.App.5th at p. 23 [the third *Gore* guidepost is not relevant where there are no comparable civil penalties].)

2.5. Financial's Wealth

The Fidelity defendants argue the court erred in relying on Financial's wealth to uphold the punitive damages award in this case. Specifically, the Fidelity defendants contend that Financial's wealth, by itself, cannot justify an otherwise excessive award. While we agree that wealth alone cannot be used to determine the constitutionality of a punitive damages award, the court properly relied on Financial's wealth in evaluating whether the punitive damages award passed constitutional muster.

A defendant's wealth cannot be used "as ' "an open ended basis for inflating awards" ' " or to "replace reprehensibility as a constraining principle." (*Simon*, *supra*, 35 Cal.4th at p. 1186.) Nevertheless, the defendant's wealth "is an essential factor in fixing an amount that is sufficient to serve [the] goals [of deterring wrongful behavior] without exceeding the necessary level of punishment." (*Id*. at p. 1185.) " '[O]bviously, the function of deterrence ... will not be served if the wealth of the defendant allows [it] to absorb the award with little or no discomfort.' [Citation.]" (*Ibid*.) "Because a court reviewing the jury's award for due process compliance may consider what level of punishment is necessary to vindicate the state's legitimate interests in deterring conduct harmful to state residents, the defendant's financial condition remains a legitimate consideration in setting punitive damages." (*Ibid*.)

Here, the parties presented evidence that the Fidelity defendants made $662 million in after-tax profit in 2017. The Fidelity defendants do not dispute that this figure represents the company's financial condition for purposes of setting an appropriate punitive damages award. The ratio between Albarracin's punitive damages award and Financial's wealth is,

therefore, miniscule. Specifically, the $1,950,000 award is less one-third of one percent of Financial's after-tax profit in 2017. This factor clearly does not weigh in favor of finding the punitive damages award in this case is unconstitutionally excessive. (See *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 967 [a punitive damages award less than 3.2 percent of the defendant's nearly $60 million net worth "would not amount to much more than a slap on the wrist"]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1701 ["A multiplier of 5 to 10 percent of net worth may be necessary to deter a very wealthy wrongdoer."].)

2.6. Conclusion

Based on our analysis of the *Gore* guideposts, we conclude the $1,950,000 punitive damages award in this case passes constitutional muster. Specifically, the nearly eight-to-one ratio between punitive and compensatory damages is justified by the following factors: (1) the medium-high level of reprehensibility of Financial's conduct; (2) the non-punitive nature of the compensatory damages award; (3) the compensatory damages award is several times smaller than such awards in cases limiting the ratio between punitive and compensatory damages to the low single digits (see *Roby*, *supra*, 47 Cal.4th at pp. 718–719; *Colucci*, *supra*, 48 Cal.App.5th at p. 459); and (4) the miniscule ratio between the amount of the punitive damages award and the company's wealth.[8]

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[8] Because we affirm the punitive damages award without any reduction, we need not address the Fidelity defendants' argument that the case should be remanded for recalculation of Albarracin's attorneys' fees.

DISPOSITION

The judgment and challenged orders are affirmed. Albarracin shall recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On September 22, 2020, I served the foregoing document described as: **PETITION FOR REVIEW** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Mail: By placing a true copy thereof enclosed in sealed envelopes addressed as indicated below and delivering such envelopes by mail. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on September 22, 2020, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Leslie Barela
Leslie Barela

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