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No. 02-16501

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Gary Greenberg

Plaintiff-Appellee,

v.

Paul Revere Life Ins. Co. and UNUMProvident Corp.,

Defendants-Appellants,

On Appeal From the United States District Court
for the District of Arizona, No. CV-99-00154-SRB

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INTRODUCTION

In an effort to cast Paul Revere as a nefarious wrongdoer, plaintiff presents a skewed view of the record, ignoring not only the undisputed evidence that it paid his claim for over eight years, but also the abundant (and again mostly undisputed) evidence that he was engaged in a scheme to deceive Paul Revere. For example:

- He never denies that he lied both to Paul Revere on his application for insurance and to several of his employers. *See* Appellants' Br. 5-7.
- He fails to mention the fact that Dr. Cheifetz specifically indicated in her 1994 IME report that she could not rule out the possibility that he was malingering. *See id.* at 10-11.
- He does not attempt to refute Dr. Willson's finding in 1998 that he was malingering on – that is, *intentionally attempting to manipulate* – cognitive tests she administered (*see id.* at 21), which surely could give reasonable people cause to question whether he was faking his emotional symptoms as well.
- He ignores the fact that the 1994 IMEs – which concluded that he suffered from some form of psychosis or thought disorder – were inconsistent with his treating physicians' unrelated diagnosis of dysthymia and panic disorder. *See id.* at 12-13.
- He ignores the undisputed testimony that psychiatric illnesses are rarely permanently disabling (*see* 11/27 Tr. 26 (ER594)) and offers no explanation as to why his treating physicians made no effort to cure him of his condition over the more than eight years that he was receiving disability benefits.
- While he attempts to explain away *some* of the many parallels between information in the claim file and David Goldfarb's detailed accusation of fraud (*see* Appellants' Br. 16; Appellee's Br. 6-7), plaintiff ignores completely the corroborating testimony of Michael Gold-

farb and Greg Davis (Appellants' Br. 16 n.8). Most of the distinctions he draws are, in any event, immaterial.¹

- In casting aspersions on the truthfulness of Goldfarb's allegations, he ignores the fact that Paul Revere received a similar anonymous tip several years earlier (at a time when he and Goldfarb were good friends). *See id.* at 14 n.7.

Similarly, plaintiff does not address the extensive evidence demonstrating that the investigation of his claim was handled appropriately. To begin with, though insinuating that Paul Revere was dragging out the investigation, he never once mentions that it was paying him full benefits – totaling approximately \$317,000 – throughout the course of that investigation. *See* 11/27 Tr. 96 (ER616). On the merits, he never challenges Dr. Pitt's qualifications, independence, or lack of bias, and he ignores the fact that Iannetti hired Dr. Pitt even though he knew that Dr. Pitt had found the claimant to be disabled in the only prior IME he had conducted for Paul Revere. *See* Appellants' Br. 18. Nor does plaintiff address his own expert's admission that most aspects of the investigation were "proper" (11/14 Tr. 122 (ER506)). And despite his single-minded focus on Goldfarb's allegations of fraud (*see* Appellee's Br. 5-13, 29-31), plaintiff ignores the facts that (1) Paul

¹ For example, it is irrelevant whether plaintiff refused to spell the word "WORLD" backwards or instead intentionally misspelled it (*see* Appellee's Br. 7); the critical fact is that Goldfarb knew that plaintiff had feigned inability to perform this elementary cognitive task. Similarly, the fact that during his policy's contestability period plaintiff initially filed *but then dropped* a claim for benefits (*id.* at 6) is entirely consistent with Goldfarb's claim that plaintiff chose to wait out the contestability period.

Revere had already decided to request a new IME *before* receiving Goldfarb's tip (*see* Appellants' Br. 13-14);² (2) the people involved in the handling of plaintiff's claim testified that Goldfarb's allegations were not particularly important to the eventual decision to terminate benefits (*see* page 7, *infra*); and (3) both Dr. Pitt and Dr. Willson testified that they *were* in fact aware that Goldfarb's veracity was in question (*see* page 9 & n.7, *infra*).

Even accepting that a perfect investigation would have involved, for example, meeting with plaintiff's neighbors or investigating Goldfarb's credibility more thoroughly, *perfection is not the standard*. In fact – as we demonstrate below – plaintiff points to nothing that supports his assertion that Paul Revere's handling of his claim went beyond the kind of judgment calls and/or mistakes that would ordinarily be expected with a claim of this nature and duration, let alone that the claim was handled with the sort of intentional malice necessary to meet Arizona's standard for punitive liability.

I. PAUL REVERE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PUNITIVE LIABILITY.

Like the trial court, plaintiff defends the finding of punitive liability almost entirely on the ground that the jury could have inferred that Iannetti deliberately

² Plaintiff's insinuation that Paul Revere somehow orchestrated Goldfarb's call (*see* Appellee's Br. 4) is preposterous and well illustrates his Procrustean approach to the record in this case.

attempted to bias Dr. Pitt's IME by bringing Goldfarb's allegations to Dr. Pitt's attention, while not disclosing that questions had been raised about Goldfarb's credibility. *See* Appellee's Br. 24. Whether or not that kind of inference – unsupported by any direct evidence of Iannetti's mental state and, indeed, contradicted by testimony of both Iannetti and Dr. Pitt – is sufficient to support a finding of bad faith, it is manifestly insufficient to support a finding of liability for punitive damages. Such a finding must rest on “clear and convincing” evidence that Paul Revere acted with “an evil mind.” *Linthicum*, 723 P.2d at 680-681.³

To be sure, the defendant's state of mind “may be established by either direct or circumstantial evidence (Appellee's Br. 22-23 (quoting *Gurule*, 734 P.2d at 87)), but the fallacy in plaintiff's argument is his assumption that any inference, no matter how attenuated, is sufficient. Inferences may be strong or weak, and it is only strong ones that can satisfy the “clear and convincing” standard and thereby ensure that “[i]nsurance companies are not liable for punitive damages every time they commit a tort,” which, in the view of the Arizona Supreme Court, would be

³ Plaintiff, like the trial court, mistakenly believes that the finding of punitive liability must be sustained so long as there is “substantial evidence” to support it. Appellee's Br. 31. In fact, however, this Court is required to “examine the evidence to see whether, if all permissible inferences were drawn in the plaintiff's favor and all questions of credibility were resolved in his behalf, the evidence then would demonstrate **by clear and convincing proof**” the requisite evil mind. *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777, 780 (9th Cir. 1975) (emphasis added).

“bad policy as well as bad law” (*Gurule*, 734 P.2d at 87). *See generally* 32A C.J.S. *Evidence* § 1306 (2002) (“*Suspicion and speculation do not rise to the level of clear and convincing evidence.*”) (emphasis added).

Plaintiff asserts that the conclusion that Paul Revere was engaged in a deliberate scheme to bias Dr. Pitt’s IME in order to justify denying his claim may be inferred from the following supposed facts: (i) Paul Revere did not independently verify Goldfarb’s allegations; (ii) Iannetti would not approve an investigation of possible medical bases for plaintiff’s psychological condition; (iii) Iannetti sent Dr. Pitt the phone memo summarizing Goldfarb’s allegations and the 14-page statement that Goldfarb subsequently provided; (iv) Paul Revere did not inform Dr. Pitt that Goldfarb’s credibility was subject to question; (v) Iannetti and Dr. Pitt talked several times before Dr. Pitt finalized his IME report; and (vi) Paul Revere did not inform plaintiff of Goldfarb’s allegations against him. Appellee’s Br. 29-30.⁴

⁴ Plaintiff identifies two additional grounds for the bad faith verdict: (i) that Paul Revere failed to interview his co-workers, family members, and treating physicians before terminating his benefits; and (ii) the assertion that Paul Revere relied on the portions of his IME reports that concluded that he was malingering on cognitive tests, while giving inadequate attention to evidence that supported a finding of disability. Appellee’s Br. 24-28. Notably, he does not contend that these grounds are sufficient alone or in combination with other evidence to support an inference that Paul Revere acted with an evil mind. Nor could he.

First, given that Paul Revere retained two leading independent experts to conduct a detailed psychological examination of plaintiff, no inference of malice can reasonably be drawn from the fact that it did not undertake the additional expense of interviewing co-workers, family members, and treating physicians.

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Because there is no direct evidence of a concerted plan to use the Goldfarb allegations to bias the IME, the question is whether the inference of intentionality that plaintiff seeks to draw from this evidence is sufficiently strong to be “clear and convincing.”⁵ As even a cursory review of the six bases identified by plaintiff will reflect, not only is the inference of intentionality he seeks to draw far from clear

Second, the record belies the allegation that Paul Revere ignored evidence that supported a finding of disability. For example, while the 1994 IMEs supported disability, Dr. Cheifetz *specifically* raised the possibility of malingering. *See* page 1, *supra*. And the fact that plaintiff’s treating physicians found him to be disabled does not alter Paul Revere’s right to rely on Dr. Pitt’s opinion, much less support an inference of evil intent. *Cf. Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965, 1967 (2003) (ERISA disability plans “are not obliged to accord special deference to the opinions of treating physicians”). Among other things, none of these physicians ever performed any diagnostic tests on plaintiff. *See* 11/27 Tr. 98; 11/14 Tr. 24-25 (Further Excerpts of Record 001-007). Similarly, the claim that Dr. Willson’s MMPI-II “*ruled out* any malingering of [Greenberg’s] depression or anxiety” (Appellee’s Br. 27 (emphasis added)) misstates the record. In fact, she said that his responses would “typically [indicate] a degree of overstatement or exaggeration,” and concluded only that she “d[id] not find *unequivocal evidence* of a malingering response style regarding these symptoms.” ER366-367 (emphasis added). Finally, the assertion that either Dr. Pitt or Dr. McDowell relied on only parts of Dr. Willson’s report (Appellee’s Br. 27-28) is demonstrably false; each addressed both information supporting disability and information showing malingering. *See* ER370-371, 373.

⁵ Despite plaintiff’s *constant* imputation of illicit intent (*see, e.g.*, Appellee’s Br. 1, 3, 10, 20, 24, 26, 29, 30), Dr. Pitt’s testimony that he *assumed* Iannetti to be inherently biased is the only even arguable evidence of inappropriate motive in the entire record. As we explained in our opening brief (at 31 n.20), the very fact that Paul Revere hired an IME physician who harbored a general skepticism of all employees engaged in claim handling is powerful evidence that Paul Revere was not attempting to rig the results of the IME. Tellingly, plaintiff offers no response to this argument.

and convincing, it is wholly unreasonable.

First, given the undisputed testimony of multiple witnesses that Goldfarb's allegations were of only limited importance to the investigation (11/27 Tr. 57 (ER606), 69 (SR184), 162 (SR190) 12/4 Tr. 38-39 (ER706-707); 11/30 Tr. 101-102 (SR249-250)), Paul Revere's failure to expend the resources necessary to verify every aspect of his story was not unreasonable, much less a basis for inferring evil intent. *See Aetna Cas. & Sur. Co. v. Superior Court*, 778 P.2d 1333, 1336 (Ariz. Ct. App. 1989) (an insurer needs to investigate only where that investigation could lead to "relevant facts").

Similarly, it was perfectly reasonable (and certainly not evil) for Iannetti to conclude that the additional time and expense associated with undertaking a *medical* inquiry was unnecessary, because the focus was on plaintiff's *psychological* condition – which Drs. Pitt and Willson had diagnosed. The question whether a medical condition might have been the cause of the psychological condition would not have affected the decision as to whether plaintiff was disabled.⁶

⁶ For the same reason, the note from Dr. Willson implying that she "did no real exploration" (Appellee's Br. 14; SR17) also does not support an inference that Paul Revere was engaged in a scheme to deny the claim. Dr. Willson wanted to examine some interesting "neurological[]" issues unrelated to Greenberg's allegedly disabling conditions, "*just to be quite thorough*" (11/30 Tr. 100 (SR248) (emphasis added)). Doing so would have been completely irrelevant to the investigation of plaintiff's disability claim. Also, as Dr. Willson explained at trial, she "already had to ask [Iannetti] for an extra half day of time, and when I spoke to
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Nor can an evil mind fairly be inferred from the fact that Iannetti shared Goldfarb's accusations with Dr. Pitt. Iannetti testified that the inclusion of the phone memo in the original package of materials was inadvertent and that he provided Pitt with the Goldfarb statement only after Pitt raised the possibility that plaintiff had attempted to manipulate the IME. *See* Appellants' Br. 19-20. Whether or not it is a good claims practice to warn an IME doctor that an insured has been accused of manipulating prior IMEs, doing so hardly can be characterized as "evil."

Relatedly, Iannetti testified that he chose not to provide Dr. Pitt with every document raising questions about Goldfarb's credibility because "the purpose why [he] sent the Goldfarb statement was not because of the allegations. It was because of the clinical description of what took place in conjunction with the IME solely." 11/30 Tr. 45 (SR233). In any event, Paul Revere *did* provide Dr. Pitt with adequate warning of Goldfarb's credibility problems, causing Pitt to explain in his report that he was "somewhat loathe [sic] to put the weight of [his] opinion into Mr. Goldfarb's assertions, *especially when [he] understand[s] Mr. Goldfarb and Mr. Greenberg are involved in litigation.*" *See* ER354 (emphasis added); *see also* 12/4

him, I said, 'You know, there are some things I want to pursue further if you want to give me more time.' He said, 'No, no. If Dr. Pitt wants to pursue those things, we'll let him make that decision.'" *id.* at 99 (SR247). Dr. Pitt's decision not to do so hardly constitutes evidence that Paul Revere had evil intent.

Tr. 38-39 (ER706-707).⁷

Next, merely calling Iannetti's phone conversations with Dr. Pitt "[s]moking gun" claims-handling behavior does not make it so. First, Kelley's testimony that Paul Revere behaved inappropriately by discussing the case with Dr. Pitt before receiving his IME report (11/14 Tr. 71 (SR73)) has no foundation. *See* Section IV.1, *infra*. Second, Dr. Pitt, not Paul Revere, initiated most of these telephone calls. *See, e.g.*, ER297, ER300. Third, plaintiff can point to no evidence that these calls had any effect on the IME report. Finally, the most significant of these calls was initiated by Dr. Pitt for purposes of requesting that Paul Revere send plaintiff for further psychological testing, which Paul Revere agreed to do. *See* ER300-301. Thus, even if a jury could find that the better practice would have been to maintain radio silence, the mere fact that Paul Revere took an interactive approach is no basis for inferring that it was engaged in a scheme to bias the IME.

Finally, plaintiff maligns Paul Revere for not sharing information about Goldfarb's allegations with plaintiff and his doctors, but he never explains how this demonstrates an intent to bias the IME process. In any event, even plaintiff's own expert agreed that Paul Revere was under no obligation to "notify Mr. Greenberg that accusations had been made against him." *See* 11/14 Tr. 99 (ER503) ("true

⁷ Dr. Willson, too, "deliberately put sort of a box around" Goldfarb's allegations. 11/30 Tr. 101 (SR249). As she explained, her attitude was "It's like maybe; maybe not." *Id.*

within certain limitations” that “an insurance company does not have to alert a claimant to the fact that they’re subject to the claim being investigated as a suspected fraud claim”). Because Goldfarb’s allegations were not an important portion of Paul Revere’s investigation – and raised significant privacy concerns – Paul Revere reasonably concluded that they should be kept confidential. Furthermore, the record reflects that Paul Revere *did* share various information with plaintiff’s treating physicians and invited them thereafter to provide additional information relevant to plaintiff’s claim (*see* Appellants’ Br. 22). Whether or not Paul Revere can be faulted for not sharing even more information, the fact that it did share some information is utterly inconsistent with an inference of evil intent.

In sum, *even if* the isolated events on which plaintiff focuses could be deemed to constitute less-than-ideal claims handling, they do not support any inference (much less a clear and convincing one) that Paul Revere was animated by an evil mind. In every case in which a defendant has been found liable for bad faith, the jury necessarily will have found that there were flaws in the handling of the claim. If punitive liability could rest on inferences from the mere finding that the claim was not handled properly, however, Arizona’s carefully wrought distinction between bad faith and punitive liability would be eviscerated, and *Linthicum*, *Gurule*, *Filasky*, and *Lange* – in which the reviewing courts upheld the finding of bad faith but overturned the finding of punitive liability – would have to have

come out the other way. Plaintiff's effort to distinguish *Linthicum* and *Gurule* (Appellee's Br. 23-24) is therefore fruitless; given the entirely plausible explanations for every aspect of Paul Revere's handling of this claim, this Court cannot affirm the finding of punitive liability under this controlling authority.

II. THE PUNITIVE DAMAGES ARE UNCONSTITUTIONALLY EXCESSIVE.

In an extreme case of wishful thinking, plaintiff implies that the Supreme Court's recent decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), is a favorable development that supports upholding the \$2,400,000 punitive award. Appellee's Br. 31-32. Nothing could be farther from the truth.

State Farm was a third-party bad faith case that arose out of an insurer's refusal to settle claims against its policyholder within the coverage limits of the policy. After the insured suffered a verdict in excess of policy limits and State Farm refused to bond the judgment, he assigned to his adversaries a 90% interest in his potential bad faith claim against State Farm in exchange for their agreement not to execute against his assets. In the ensuing litigation, the jury found State Farm liable for bad faith, fraud, and intentional infliction of emotional distress, awarding \$2,600,000 in damages for mental anguish and \$145,000,000 in punitive damages. The trial court remitted the compensatory damages to \$1,000,000 and the punitive damages to \$25,000,000, but the Utah Supreme Court reinstated the punitive award

in full. The Supreme Court then granted certiorari.

The Court fully accepted that “State Farm’s handling of the claims against the Campbells merits no praise,” observing that the company’s employees had altered documents, disregarded “the near-certain probability that, by taking the case to trial, a judgment in excess of the policy limits would be awarded,” and falsely assured the Campbells that their assets would be safe from any verdict, only to tell them after the verdict that they would need to sell their home in order to cover the uninsured portion of the judgment. *State Farm*, 123 S. Ct. at 1521. Nevertheless, the Court concluded, “a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further.” *Id.* Applying the three factors articulated in *BMW*, the Court indicated that the conduct “likely would justify a punitive damages award at or near the amount of compensatory damages.” *Id.* at 1526.

Because no objective person could conclude that defendants’ conduct toward Greenberg even approaches the blameworthiness of the conduct in *State Farm*, it is manifest that no more than a 1:1 ratio is permissible here as well. Plaintiff’s contention that the three *BMW* guideposts, as refined in *State Farm*, support the punitive award is self-evidently strained.

1. *Reprehensibility.* In *State Farm*, the Court identified five factors that bear on the reprehensibility determination and admonished that “[t]he existence of

any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *id.* at 1516. Plaintiff’s assertions notwithstanding, at most only one of the factors is present here.

First, the harm involved here was economic, not physical, in nature. Although plaintiff asserts that defendants’ termination of his benefits harmed him emotionally (Appellee’s Br. 33), the jury awarded him no damages for emotional distress. Even if it had, the Supreme Court evidently did not have emotional distress in mind when it embraced the distinction between economic and physical harm because in *State Farm* itself the Campbells received \$1,000,000 in damages for emotional distress.

Second, plaintiff’s assertion to the contrary notwithstanding, the denial of a claim for disability benefits (unlike, for example, the refusal of a health insurer to pay for a needed medical treatment) does not equate with a reckless disregard for health or safety. If it were otherwise, this factor would be present in every insurance bad faith case because invariably the failure to pay a claim is stressful to the insured. The fact that Paul Revere was “[c]harged with the knowledge” that plaintiff was suffering from an emotional condition (*id.*) doesn’t change anything. “At the time of State Farm’s wrongful conduct, ‘Mr. Campbell had residuary effects from a stroke and Parkinson’s disease’” and “[t]he couple appeared economically

vulnerable and emotionally fragile.” *State Farm*, 123 S. Ct. at 1529 (Ginsburg, J., dissenting) (citing and quoting trial court’s findings). That did not cause the Court to treat *State Farm* as a case of reckless indifference to health.

Third, plaintiff himself concedes that “the verdict here was based upon defendants’ handling of Greenberg’s claim alone” (Appellee’s Br. 38) and hence that the conduct was “an isolated incident” (*State Farm*, 123 S. Ct. at 1521).

Fourth, defendants’ conduct did not involve “intentional malice, trickery, or deceit.” Appellee’s Br. 34. For the contrary proposition, plaintiff relies on the trial court’s statement that the jury could have found that defendants “selectively disclosed to and withheld information from Dr. Pitt.”” *Id.* (misquoting and misciting ER734). As we pointed out in our opening brief (at 35-36) and plaintiff ignores, under *Cooper Industries* the constitutionally mandated *de novo* excessiveness review requires more than merely speculating about what the jury could have found. Instead, reviewing courts must evaluate the evidence for themselves to make an independent assessment of the degree of reprehensibility of the conduct. Here, there is no evidence that, in dealing with Dr. Pitt, defendants intended to deceive him or anyone else. To the contrary, the only evidence on the subject is that (i) the phone memo summarizing Goldfarb’s allegations was *inadvertently* included in the materials sent to Dr. Pitt; (ii) Dr. Pitt was aware that there was an interpersonal conflict between Goldberg and Greenberg that had resulted in litigation between them (*see*

page 8-9, *supra*); and (iii) Dr. Pitt reached his conclusions “[i]ndependent of Mr. Goldfarb’s report” (ER354). And even if there were a basis for concluding that the handling of the Goldfarb allegations involved “trickery,” it pales in comparison to the active alteration of documents and affirmative misstatements involved in *State Farm*. See 123 S. Ct. at 1521.

Finally, although Greenberg may have been “financially vulnerable” in the sense that any person denied disability benefits is financially vulnerable, that hardly is enough to justify a finding of high reprehensibility and thereby distinguish this case from *State Farm*. After all, State Farm *knew with certainty* that Campbell was retired and would have to sell his house in order to pay the excess verdict, yet that still was not sufficient to cause the Supreme Court to find State Farm’s conduct to be sufficiently reprehensible to justify punitive damages in excess of the Campbells’ compensatory award.

In short, defendants’ conduct here was objectively less reprehensible than the conduct in *State Farm*. Moreover, as we pointed out in our opening brief (at 36-37) and plaintiff utterly ignores, Greenberg bears much of the responsibility for his own plight, having set out on a course to deceive defendants, his treating physicians, and the IME doctors into believing him to be more psychologically troubled than he in fact was. That further mitigates the reprehensibility of defendants’ conduct and compels the conclusion that a seven-figure punitive award is grossly ex-

cessive.

2. *Ratio*. In *State Farm*, the Supreme Court held that, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 123 S. Ct. at 1524 (emphasis added). It later stated that “[a]n application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages.” *Id.* at 1526.⁸

Those statements are dispositive here. Whether the Court focuses on the \$151,552.42 in past benefits or the \$547,445.42 total damages award, the compensatory damages are quite “substantial.” Moreover, there can be no question that defendants’ conduct is far less culpable than the conduct involved in *State Farm*. Accordingly, the ratio guidepost compels the conclusion that the \$2,400,000 exaction in this case is unconstitutionally excessive.⁹

⁸ Plaintiff fastens onto the Court’s reference to the fact that emotional distress damages contain a punitive component. *See* Appellee’s Br. 37-38. He fails to recognize, however, that the very same thing can be said of an award of attorneys’ fees. *See* Appellants’ Br. 39. Because he received a very substantial fee award, *State Farm* compels the conclusion that a ratio in excess of 1:1 is excessive.

⁹ Plaintiff asserts that the ratios involved here are constitutionally permissible in light of defendants’ substantial net worth. Appellee’s Br. 35-36. The Supreme Court squarely held in *State Farm*, however, that “[t]he wealth of a defendant can-

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3. *Penalties for Comparable Misconduct.* In applying the third *BMW* guidepost in *State Farm*, the Supreme Court held that “[t]he most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a \$10,000 fine for an act of fraud.” *Id.*¹⁰ Because this case also involves an allegation of bad-faith claim handling, here too the relevant sanction is the \$5,000 fine established by the Arizona legislature for violations of its unfair claims practices act.

Echoing the trial court (*see* ER735), plaintiff urges the Court to ignore the \$5,000 fine on the ground that defendants could suffer the “suspension or revocation” of their license (Appellee’s Br. 36). But in *State Farm* the Supreme Court rejected similar “speculat[ion] about the loss of State Farm’s business license, the disgorgement of profits, and possible imprisonment.” 123 S. Ct. at 1526. Accordingly, here, as in *State Farm*, the proper focus is on the legislatively established fine for unfair claims practices. Because the punitive award is orders of magnitude greater than that fine, the third guidepost compels the conclusion that the award is unconstitutionally excessive.

not justify an otherwise unconstitutional punitive damages award.” 123 S. Ct. at 1525.

¹⁰ The \$10,000 statutory fine actually is for violation of Utah’s Unfair Claims Practices Act, but the Utah Supreme Court had referred to it as a fine for fraud, and the Supreme Court adopted the same characterization.

In sum, if a punitive award equal to the amount of compensatory damages represents the constitutional maximum in *State Farm*, it follows that no more (and probably less) than that is permissible here. The Court should reduce the punitive award accordingly.

III. THE AWARD OF FUTURE BENEFITS IS UNSUSTAINABLE.

Plaintiff asserts that the award of future benefits must stand because Paul Revere never attempted to establish that his condition might improve over time. Appellee's Br. 38. That argument misses the point, which is that Paul Revere should not have the burden of proving what may happen in the future. Instead, plaintiff retains a right to bring another lawsuit against Paul Revere in the event it refuses to pay his claim in the future. In such a suit, he would be entitled (under a breach-of-contract theory) to recover any unpaid benefits upon proving that he was totally disabled at the time the benefits were denied, and (under a bad-faith theory) could receive an award of punitive damages upon proof that the failure to pay those benefits constituted "aggravated and outrageous conduct" (*Linthicum*, 723 P.2d at 680).

Plaintiff next argues that the damages from a tort can include "future lost wages, future medical expenses, [and] future pain and suffering." Appellee's Br. 39 (quoting ER728). Again he misses our point. We recognize that tort law permits the recovery of future damages that are reasonably certain to occur and that

are proximately caused by the tort. *See* Appellants’ Br. 43. But the *hypothesized* loss of future benefits *cannot* be said to arise out of the alleged bad faith denial of benefits in the past. Instead, the failure to pay benefits in the face of a final judicial determination that the insured is disabled constitutes a new delict that can be the basis for a new award of damages. *See id.* at 44-46. For this reason, the cases (and model jury instruction) that plaintiff cites (Appellee’s Br. 42) for the proposition that Arizona law allows recovery of the full amount of damages caused by the tort do not advance the ball for him in the slightest.¹¹

Plaintiff does cite (at 39-42) a few cases from other jurisdictions, as well as a treatise written by three California plaintiffs’ lawyers,¹² that find future benefits to be awardable. These authorities commit precisely the same logical fallacy as plaintiff: it simply is not correct to assume that a denial of benefits in the past is the source of the loss of future benefits when there is an intervening judicial determi-

¹¹ The more relevant model instruction – governing the measure of damages for first-party bad faith – limits recovery to “[t]he unpaid benefits of the policy.” *See* Recommended Arizona Jury Instructions, Bad Faith 7 (First Party). The fact that “unpaid benefits” does not encompass future benefits is clear from the comment’s statement that the jury may award interest on the unpaid benefits.

¹² *See* SHERNOFF *ET AL.*, INSURANCE BAD FAITH LITIGATION xv-xvi (2003) (indicating that all three authors regularly litigate cases on behalf of insurance bad faith plaintiffs and are members of local, state, and national associations of plaintiffs’ lawyers). Another, less biased, treatise has called the rule in some states that future benefits are available “regrettable” and “[un]sound.” *See* ASHLEY, BAD FAITH ACTIONS: LIABILITY AND DAMAGES § 8:02, at 8-3 (2d ed. 1997).

nation that the insured is entitled to benefits.¹³

In fact, plaintiff's treatise undercuts his argument, as it acknowledges that awarding "a lump-sum award against the insurance company" is a "*punitive* action." INSURANCE BAD FAITH LITIGATION § 7.04[4], at 7-40 (emphasis added); *see also* 14 COUCH ON INSURANCE § 207:76 (3d ed. 2003) (calling lump-sum payment of future benefits a "penalty"). Under Arizona law, however, "[r]ecovery in a tort action is limited to those damages which are the direct and proximate consequence of the defendant's wrongful acts." *Valley Nat'l Bank*, 517 P.2d at 1260; Appellants' Br. 42. Damages that are "punitive" or a "penalty" definitionally cannot form a portion of *compensatory* damages, and therefore are not available in Arizona.

Finally, plaintiff's reliance (at 43) on federal cases involving awards of front pay backfires. For one thing, plaintiff's cases recognize that front pay is provided for by statute. *See, e.g., Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 853 n.3 (2001). No Arizona statute provides for an award of future benefits in an insurance bad faith case, and this Court therefore should be loath to recognize such

¹³ Thus, plaintiff's effort to distinguish *Doe v. Provident* (Appellee's Br. 40) is misguided. Although the plaintiff's claim in that case was brought under Pennsylvania's statutory bad-faith law, the court's rationale for *why* future benefits should not be available applies with full force to common law claims. *See* 936 F. Supp. at 308 ("allegations about the bad faith conduct of defendant * * * do not show that once a judgment has been entered against it defendant will continue to improperly deny the benefits owed to plaintiff, especially in the face of possible punitive damages").

a remedy. More importantly, plaintiff's cases specify that front pay should be awarded only "when the antagonism between employer and employee is so great that reinstatement is not appropriate" – a showing that the plaintiff has the burden of making. *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1020 (9th Cir. 2000) (internal quotation marks and citation omitted).

Thus, even if future benefits *are* authorized, the finder of fact "should carefully examine the relationship between the insured and the insurer to gauge whether the insured should have to deal with the insurer in the future." 14 COUCH ON INSURANCE § 207:76. Here, plaintiff was allowed to recover future benefits without having to establish that his relationship with Paul Revere has become so antagonistic that Paul Revere cannot be trusted to handle his claim fairly in the future; that plaintiff now argues that it has in fact deteriorated to that extent (Appellee's Br. 44) is irrelevant, as neither the district court nor the jury made such a determination. At minimum, therefore, Paul Revere should receive a new trial in which the jury is charged with resolving this factual question.

IV. THE DISTRICT COURT'S ERRONEOUS EVIDENTIARY RULINGS NECESSITATE A NEW TRIAL.

1. The District Court committed reversible error in allowing Kelley to testify. Citing no source material whatsoever on the subject of insurance practices, Kelley opined that numerous aspects of Paul Revere's handling of plaintiff's claim violated industry standards. For example, Kelley claimed that:

- in the overall “administration of this claim,” Paul Revere did not live up to industry standards (11/14 Tr. 63 (ER468));
- “it was improper to provide Dr. Pitt with [Goldfarb’s] statement,” and “doubly improper” to do so “after the examination had occurred but before the report was written” (*id.* at 68 (ER473));
- it was improper for Iannetti to discuss the case with Dr. Pitt before Pitt finalized his IME report (*id.* at 71, 87 (ER476, 491));
- it was “improper” for Paul Revere “to have focused just on Dr. Pitt’s reports” instead of on the views of Greenberg’s treating physicians (*id.* at 77 (ER481); *but see Nord, supra*);
- it was “[a]bsolutely * * * improper” not to “inform Mr. Greenberg that Mr. Goldfarb had made accusations against him” (11/14 Tr. at 79 (ER483)); and
- it was improper not to give the videotape of Dr. Pitt’s IME interview to Dr. Moyal (*id.* at 84 (ER488)).

These assertions were plainly prejudicial to Paul Revere.¹⁴ Plaintiff focuses on Kelley’s qualification as an expert (Appellee’s Br. 46) and on the admissibility of expert testimony *generally* (*id.* at 46, 52-53), but the critical question is whether Kelley’s *specific* testimony was *reliable* – something plaintiff has failed entirely to

¹⁴ Plaintiff misses the point in asserting (Appellee’s Br. 46, 53-54) that Kelley’s testimony was not the *only* support for the jury’s finding of bad faith. We have not asserted that the error in admitting Kelley’s testimony necessitates entry of judgment as a matter of law, but simply that its prejudicial impact necessitates a new trial.

Because the district court ruled *in limine* that Kelley’s testimony would be admissible, plaintiff also errs in asserting (*id.* at 49, 53) that Paul Revere waived its objection to that testimony. *See* Appellants’ Br. 48 n.25; FED. R. EVID. 103(a).

demonstrate.¹⁵ Although the test of admissibility is “flexible” (Appellee’s Br. 50) and “the *Daubert* factors may not always apply” (*id.*), it remains the case that reliability must be established.

Kraeger v. Nationwide Mutual Insurance Co., 1997 WL 109582 (E.D. Pa. Mar. 7, 1997), on which plaintiff relies (Appellee’s Br. 51), in fact demonstrates the problem with Kelley’s testimony. In *Kraeger*, the court applied “the rationale behind *Daubert*” (1997 WL 109582, at *1) in allowing the testimony of an expert who “base[d] his opinions and testimony on * * * statutes” (*id.* at *2). As the court explained, “[i]t would be reasonable for experts in bad faith insurance practices *to look to the relevant statutory and regulatory requirements in examining the reasonableness of an insurer’s actions.*” *Id.* (emphasis added). Here, by contrast, Kelley cited to nothing – neither statute nor regulation nor treatise nor claim manual – to justify his criticisms of Paul Revere.

For this reason, plaintiff is mistaken in suggesting (Appellee’s Br. 50-51) that *United States v. Hankey*, 203 F.3d 1160 (9th Cir. 2000), supports the admis-

¹⁵ The distinction between the qualification of a witness as an expert and the admissibility of specific testimony by that witness is manifest in the text of Rule 702, and even in plaintiff’s *own* quotation from *Couch on Insurance* (see Appellee’s Br. 52). Thus, this Court recently clarified that, because “the opinion of a purported ‘expert’ * * * [is] likely to carry special weight with the jury,” “care must be taken to assure that a proffered witness truly qualifies as an expert, *and* that such testimony meets the requirements of Rule 702.” *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004 (9th Cir. 2001) (emphasis added).

sion of Kelley’s testimony. Critically, in *Hankey* this Court reiterated that testimony must be “relevant and reliable” to be admissible. *Id.* at 1168. It found testimony of an undercover police officer about the “code of silence” that prevents gang members from testifying against each other to be sufficiently reliable because, among other things, the officer had first-hand experience with the gang at issue and had communicated and worked undercover with “thousands” of gang members in the Compton neighborhood of Los Angeles. *Id.* at 1168-1169. In other words, there was a tight link between the officer’s experience and knowledge and the opinion he offered, which was quasi-factual in nature. Here, by contrast, Kelley had no direct knowledge of Paul Revere. Instead, he merely served as a mouth-piece for the theories of plaintiff’s counsel, placing a sinister interpretation on events as to which he had no direct information. This kind of result-oriented speculation is the essence of unreliability.¹⁶

In any event, as we explained in our opening brief (at 51-52), a new trial is required because the district court never made the necessary finding of reliability. *See Mukhtar*, 299 F.3d at 1065. Plaintiff’s response that this case is different (Appellee’s Br. 47-48) – because here the trial court “circumscribed Kelley’s expert

¹⁶ Plaintiff’s final bad-faith case (Appellee’s Br. 51) – *United States Fidelity & Guaranty Co. v. Sulco, Inc.*, 171 F.R.D. 305, 308 (D. Kan. 1997) – held that a party cannot raise a *Daubert*-type challenge to the admissibility of non-scientific evidence, and hence is no longer good law after *Kumho*.

testimony” – misses the point. Although the court precluded Kelley from testifying about the legal conclusion of bad faith (*see* 10/29 Tr. 32 (ER448)), nothing in the court’s ruling even touched on the critical question of *reliability*.

2. Plaintiff’s defense of the district court’s ruling precluding Dr. Pitt from testifying about plaintiff’s psychological condition during Pitt’s deposition misses the point.¹⁷ We do not deny that the excluded testimony would have been expert testimony under Rule 702, rather than lay testimony under Rule 701. *See* Appellee’s Br. 56. But Paul Revere did not attempt to call Pitt as a layperson, and it fully complied with the applicable requirements in FRCP 26 *by disclosing that Pitt would testify*. Nothing in Rule 701 purports to alter the longstanding distinction in FRCP 26 between specially-retained expert witnesses and other expert witnesses. *That* is the distinction that matters here, not the difference between expert and lay testimony.

Similarly, plaintiff’s discussion (Appellee’s Br. 56-57) of what testimony *by treating physicians* is admissible without disclosure is simply irrelevant. Treating physicians are exempted from Rule 26(a)(2)(B) disclosure not because of anything unique to their status as treating physicians, but because they are not “retained or specially employed to provide expert testimony in the case.” Dr. Pitt also was not

¹⁷ Because the district court’s ruling excluding this evidence was definitive, plaintiff is wrong to suggest (at 54) that Paul Revere was obligated to make an offer of proof of this testimony. *See Mukhtar*, 299 F.3d at 1062-1063.

hired to provide expert testimony; rather, years before this litigation commenced he was asked to analyze plaintiff's asserted disability. Because his initial contact with plaintiff was independent from this eventual litigation, he is, for these purposes, equivalent to a treating physician.

Finally, plaintiff provides no support for his assertion (Appellee's Br. 55) that Dr. Pitt had magically acquired the status of an expert retained to provide expert testimony by the time of his deposition. As one of the IME doctors involved in the review of plaintiff's condition, Pitt's personal knowledge of that review process was critical to the litigation; he therefore was deposed by plaintiff in the normal course of fact discovery.¹⁸

3. Plaintiff's Yahoo® postings dramatically illustrate that he so hated Paul Revere that he was willing to fabricate ornate lies to injure its reputation. Needless to say, his credibility was a central issue in the case, and he does not contend otherwise. Instead, his main response to our argument is that the trial court only "tentatively" excluded these materials. Appellee's Br. 59. But the trial court's order was, in relevant part, final; it refused to allow Paul Revere to use these postings to undermine plaintiff's credibility. *See* 11/7 Tr. 13 (ER453). The court's allowance that the evidence somehow might later "become relevant" for

¹⁸ We do not dispute that a *Daubert* analysis would apply to this testimony (*see* Appellee's Br. 58), but plaintiff has never asserted any reason why the testimony would not satisfy such inquiry.

other purposes (*id.*) does not alter the finality of *this* erroneous – and substantially prejudicial – ruling. Plaintiff also halfheartedly argues (Appellee’s Br. 60) that the postings were excludable under FED. R. EVID. 403, but wishing does not make it so. In a case like this, Paul Revere had every right to demonstrate to the jury that plaintiff is untrustworthy.

Respectfully submitted.

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June 23, 2003

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(B)

I hereby certify that – according to the word-count facility in Microsoft Word – this brief, excluding those portions omitted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), consists of 6,985 words and thus complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

David M. Gossett

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2003, I served two copies of the foregoing Reply Brief for the Appellants, as well as one copy of the Further Excerpts of Record, by overnight delivery on Appellees herein, at the following address:

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