

No. D051166

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

Darla Leeper-Johnson,

Plaintiff and Respondent

vs.

The Prudential Insurance Company of America,

Defendant and Appellant

Appeal from the Superior Court of San Diego County
Case No. GIE 18815
The Honorable Eddie C. Sturgeon

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INTRODUCTION

The plaintiff in this case, Darla Leeper-Johnson, was insured under a group disability policy issued by defendant The Prudential Insurance Company of America (“Prudential”). The policy expressly conditions receipt of benefits on the covered individual’s submission of objective medical evidence that she is unable to perform the duties of any occupation for which she is fitted by education, training, or experience. In other words, under this policy disability turns not on a particular diagnosis, but on ability to function in the workplace. The policy also expressly provides that a covered individual is entitled to no more than 24 months of benefits if the individual’s disability is caused at least in part by a mental condition.

Leeper-Johnson made a claim under this policy in mid-1995. Her disabling condition was attributed first to lupus, and later, after the lupus was indisputably brought under control, to fibromyalgia, a diagnosis for otherwise unexplained widespread, chronic soft-tissue pain. As Leeper-Johnson’s counsel admitted in his opening statement at trial, 95 percent of people diagnosed with fibromyalgia are able to work.

Although Leeper-Johnson never submitted objective medical evidence that her condition was disabling and although her file was replete with indications that her condition was partly caused by depression, Prudential paid her benefits for six years before finally terminating them. It did so after both a doctor it retained to perform an independent medical examination (“IME”) of Leeper-Johnson and a second doctor it retained to evaluate her medical records each concluded that she was not totally disabled as that term is defined in the policy. During the second of two internal appeals, a third doctor retained by Prudential to review Leeper-Johnson’s records reached the same conclusion.

Leeper-Johnson sued, alleging breach of contract and bad faith. At trial, Leeper-Johnson’s attending physician admitted that she had relied

entirely on Leeper-Johnson's self reports in concluding that Leeper-Johnson could not return to work. That same physician also admitted that Leeper-Johnson had altered one of her attending physician statements before submitting it to Prudential in order to make it more compelling.

Nevertheless, a split jury found for Leeper-Johnson on both of her causes of action. It awarded her \$267,082 in unpaid disability benefits and \$400,000 for the future value of her policy. In addition, the jury awarded \$315,000 for "past economic loss"—despite the absence of any evidence of such loss beyond the unpaid policy benefits—and \$500,000 for past emotional distress. The jury also found Prudential liable for punitive damages, and imposed a \$14 million punitive award, which the superior court later determined to be unconstitutionally excessive. The superior court thereafter awarded \$548,408.84 in attorneys' fees and \$93,975.00 in costs. These breathtaking awards are the result of a series of legal errors by the superior court.

To begin with, the superior court refused to instruct the jury on two critical aspects of the insurance policy: (i) the requirement that Leeper-Johnson support her disability claim with objective medical evidence; and (ii) the provision that precludes recovery of benefits for more than 24 months if the disability is caused in whole or part by a mental condition. And the court compounded its error regarding the mental-condition limitation by barring one of the doctors whom Prudential had retained to review Leeper-Johnson's file from addressing the psychological components of her condition and by expurgating psychological references from his report to Prudential merely because he is not a specialist in mental disorders.

These fundamental instructional and evidentiary errors, however, were only the tip of the iceberg. Because Leeper-Johnson never did come forward with objective medical evidence that she was disabled, this case never should

have gone to the jury. Moreover, binding California Supreme Court precedent makes clear that the superior court should have directed a verdict in favor of Prudential with respect to all benefits accruing after Leeper-Johnson refused to undergo any further IMEs during her second internal appeal. The “genuine-dispute” doctrine should have precluded Leeper-Johnson’s bad-faith claim because there were, at minimum, good-faith disputes about not only whether Leeper-Johnson’s condition was disabling but also whether the objective-evidence requirement and mental-condition limitation precluded her from recovering any further benefits. And three Court of Appeal cases, including one decided by this very Division, make clear that punitive damages are not warranted in a bad-faith case when, as here, there is no evidence that the claim denial was part of a broader pattern or scheme or that the insurer harbored actual malice toward the insured.

The damages awards also are infected with error. The \$315,000 award for past economic loss has no support in the record, and instead is the product of admitted juror misconduct. Supported only by Leeper-Johnson’s unadorned testimony that she was “shocked,” “scared,” and “devastated” by the termination of her claim, the \$500,000 emotional-distress award is far out of line with awards in prior insurance bad-faith cases involving demonstrably more severe emotional harm. And the superior court’s decision to allow Leeper-Johnson a choice between a new trial on punitive damages and accepting a reduced punitive award of \$4 million is doubly erroneous. The court should have simply reduced the award to the maximum amount permitted by the Constitution, which, assuming *arguendo* that any punitive award is permissible on this record, would be far less than \$4 million.

Finally, in awarding attorneys’ fees of \$548,408.84, the superior court deviated materially from the methodology prescribed by the California Supreme Court for setting fee awards in bad-faith cases.

STATEMENT OF THE CASE

Leeper-Johnson brought this case against Prudential, alleging breach of contract and bad faith arising out of Prudential's denial of her claim for disability benefits. After several days of deliberations, the jury found for Leeper-Johnson on both causes of action by a vote of 10-2 (*see* RT3993-98), awarding the compensatory damages identified above (*see* AA178-80¹). By a vote of 11-1, the jury declined to award Leeper-Johnson any damages for future emotional distress. And by a 10-2 vote, the jury found that Prudential had committed "malice, oppression, or fraud," the statutory requirement for the imposition of punitive damages. *See* RT4002-03. Following several more days of deliberations, the jury imposed \$14,000,000 in punitive damages (*see* AA183), by a 9-3 vote, after Leeper-Johnson's counsel insinuated that the punitive damages would go to the state (*see* RT4040-41).

The superior court denied Prudential's post-trial motions with the exception of agreeing that the punitive award was unconstitutionally excessive because Prudential's conduct was "at the low end of the scale" of reprehensibility. RT4665; AA1850. After Leeper-Johnson declined to accept a remittitur of the punitive award to \$4,000,000 (*see* AA1851-52), the superior court ordered a new trial on punitive damages (*see* AA1853). Thereafter, the trial court awarded Leeper-Johnson \$548,408.84 in attorneys' fees and \$93,975.00 in costs. *See* AA1933-34.

STATEMENT OF FACTS

1. The Policy

As an employee of the University of California, Leeper-Johnson enrolled for coverage under the University's group disability policy with Prudential. The policy specifies that, during the first year of a disability, a

¹ "AA" refers throughout to the Appellant's Appendix.

covered employee would be entitled to receive benefits if (i) “[d]ue to a medically determinable physical or mental impairment resulting from a bodily injury or disease,” she were (ii) “completely unable to perform any and every duty pertaining to [her] current occupation,” (iii) “not working at any job for wage or profit,” and (iv) “under the Direct and Continuous Care of a Doctor which began no later than 7 days following the day you were first unable to work.” AA720. The monthly benefit during the first year of a disability is 70 percent of pre-disability income. AA715-16.

The policy further specifies that, after receiving benefits for a year, the covered employee could continue to receive benefits only if the employee is “completely unable to perform the material and substantial duties of *any occupation for which [the employee is] reasonably fitted* by [his or her] education, training or experience.” AA720 (emphasis added). The monthly benefit after the first year is 50 percent of pre-disability income. AA715-16.

The policy specifies that it is the covered employee’s “responsibility to give Prudential the required *objective medical evidence* to verify [his or her] continuous total disability” and that the employee “*cannot receive benefits without providing this information.*” AA728 (emphasis added).

In general, the policy pays benefits until the age of 65. AA715. However, under the heading “BENEFIT LIMITATION,” the policy specifies that a covered employee is entitled to “a lifetime maximum limit” of 24 months of benefits if his or her total disability is “caused at least in part by a mental, psychoneurotic or personality disorder or substance abuse.” AA722.

2. Leeper-Johnson’s Disability Claim And Prudential’s Claim Handling.

In May 1995, Leeper-Johnson left her job as a construction manager at the University of California, San Francisco, due to a flare-up of lupus. *See* AA4. Prudential approved her claim for benefits in a letter dated July 12,

1995. *See* AA90. In the first months of 1996, Leeper-Johnson was nearly released to return to work several times by various physicians (*see* AA34-38, 89), but Prudential continued to pay benefits without question. The first year of her benefits ended on June 5, 1996 (*see* AA4), at which point the policy required her to be totally disabled from “any occupation for which [she was] reasonably fitted” (AA720), not just her prior job.

On December 31, 1996, Leeper-Johnson’s then-current physician, Dr. Lee, mentioned for the first time that Leeper-Johnson might be suffering from fibromyalgia. AA87-88. Fibromyalgia is a condition characterized by otherwise unexplained complaints of widespread chronic soft-tissue pain. *See* RT300-07, 3402.² At trial, this was the primary condition that Leeper-Johnson alleged to be the cause of her functional limitations. (Her lupus eventually cleared up, and it was undisputed at trial that she does not have active lupus and is not disabled by lupus. *See* RT402-03.³) In July 1997, Dr. Lee released Leeper-Johnson to return to work on August 15, 1997. AA85-86. However, on August 1, 1997, Leeper-Johnson was seen for the first time by Dr. Suzanne Rizkalla, who completed a form certifying that Leeper-Johnson was totally disabled. AA83-84. At trial, Dr. Rizkalla testified that she gave the disability certification form to Leeper-Johnson and that Leeper-Johnson made significant modifications to it without Dr. Rizkalla’s permission before sending the form to Prudential.⁴ RT854-61, 902-03. Although Dr.

² For a recent discussion of this diagnosis, see Alex Berenson, *Drug Approved: Is Disease Real?* (Jan. 14, 2008) N.Y. Times.

³ Leeper-Johnson also had been diagnosed with antiphospholipid antibody syndrome, which her doctors agree does not affect her ability to work. *See* RT400-401; 412-13.

⁴ Among the changes made by Leeper-Johnson were the following bolded phrases, added to Dr. Rizkalla’s actual responses in regular font:

(con’t)

Rizkalla remained Leeper-Johnson's primary treating physician through trial, she never tested Leeper-Johnson's functional abilities and, remarkably, never even observed Leeper-Johnson having functional difficulties of any kind. *See* RT908-14. As Dr. Rizkalla admitted at trial, she simply accepted Leeper-Johnson's description of her alleged disability, but had no independent reason to think that Leeper-Johnson was suffering from functional limitations, let alone limitations so severe as to render her completely unable to work in any occupation for which she was reasonably fitted. RT923.

In January 2000, roughly 2½ years after Dr. Rizkalla first certified that Leeper-Johnson was totally disabled, a claim representative opined that ongoing review of the claim was needed because Leeper-Johnson's reported condition is "often characterized by periods of flares and remissions," making it important to "[a]ssess current severity and treatment to determine if [there has been] any change in condition or activity level." AA49. This comment prompted Prudential to (i) ask Leeper-Johnson to complete a Comprehensive Claimant Statement describing her current medical conditions, limitations, and activities (*see* AA79-82); (ii) engage rheumatologist Dr. Gwen Brachman to review all of Leeper-Johnson's medical records (AA76-78); and (iii) arrange

-
- "Describe any significant changes in employee's life style since illness began: She became more depressed **and less mobile/activity decreased due to ↑ symptoms.**"
 - "Has employee made significant progress? If no explain: **symptoms continue to wax and wane unpredictably and pat[ient] is more susceptible to bouts of severe fatigue and depression.**" Dr. Rizkalla had simply circled "no" in the second sentence of the question.
 - "What work duties can employee perform at this time?: None. **No return to work plan is foreseeable [sic] at present time.**"

Compare AA83-84 (submitted by Leeper-Johnson) *with* AA491-92 (subpoenaed from Dr. Rizkalla's office).

for Leeper-Johnson to undergo an Independent Medical Examination (“IME”) with an occupational physician, Dr. Jonathan Greenberger (AA66-75).

After reviewing Leeper-Johnson’s medical records and Comprehensive Claimant Statement, Dr. Brachman concluded that Leeper-Johnson’s “symptoms from fibromyalgia are not of a degree of severity that would prohibit [her] from physically performing the essential functions of a sedentary job with the reasonable accommodation that she be able to change position frequently.” AA78. Dr. Brachman noted that Leeper-Johnson’s Comprehensive Claimant Statement reported that Leeper-Johnson was “able to perform light household chores, grocery shopping and even horseback riding,” which “are at a level of physical functioning above that required to perform a sedentary job.” *Id.*

After reviewing the medical records and conducting an examination of Leeper-Johnson, Dr. Greenberger concluded that “physical exam findings here are lacking, and I certainly do not see anything that would preclude the patient from returning to work as a manager.”⁵ AA74. He noted that “[t]he patient has subjective complaints but no objective findings” and concluded that “[t]he patient would be capable of returning to her work at the present time.”⁶ *Id.*

On January 25, 2001, after reviewing these results of the renewed investigation, a claim representative recommended terminating Leeper-

⁵ Leeper-Johnson has criticized Dr. Greenberger’s conclusion that she did not qualify for the diagnosis of fibromyalgia. But the question whether she had fibromyalgia—and thus Dr. Greenberger’s opinion on that question—is irrelevant under the policy, which requires that she have *functional limitations* that prevent her from working in any occupation for which she is reasonably fitted, not that she be diagnosed with a disease.

⁶ Dr. Greenberger’s opinion is thus consistent with Dr. Rizkalla’s testimony that there was no evidence of disability other than Leeper-Johnson’s self-report. *See* RT912, 923.

Johnson's claim. AA16. But the claim representative also recommended extending benefits to Leeper-Johnson through May 2001 and offering job placement services "as a measure of assistance" "as [Leeper-Johnson] has been OOW [off of work] for >5 years." *Id.* Prudential sent a letter to that effect the following day. AA3-6.

A year and a half passed. Then, on July 18, 2002, Leeper-Johnson filed an internal appeal of Prudential's decision. AA140-74. In support of her appeal, Leeper-Johnson submitted a declaration (AA155-62) and letters from her treating physicians, Drs. Keith Colburn (AA140-46) and Suzanne Rizkalla (AA147). Dr. Colburn's letter did not offer any additional medical evidence. Instead, it criticized the reports submitted by Drs. Brachman and Greenberger, but with a focus on whether Leeper-Johnson qualified for certain diagnoses, not whether she suffered from functional limitations so severe that she could not perform any occupation for which she is reasonably fitted. Dr. Rizkalla's half-page letter simply reiterated her opinion that Leeper-Johnson is disabled by "depression and chronic fatigue." AA147. After reviewing the new materials submitted by Leeper-Johnson, Drs. Brachman and Greenberger each prepared a supplemental report and each concluded that there still was no evidence that Leeper-Johnson was disabled. AA51-55, 56-63. Accordingly, Prudential denied the appeal on October 30, 2002. AA7-10.

Leeper-Johnson filed a second internal appeal on April 14, 2003. AA122-24. She did not submit any additional medical evidence to support her claim, but simply continued her criticism of the reports submitted by Drs. Brachman and Greenberger. *Id.* She particularly complained that Dr. Greenberger was unqualified to evaluate her alleged disability because he is an occupational physician, not a rheumatologist, which is the specialty that includes fibromyalgia. *Id.* In response to this complaint, Prudential scheduled an IME with a rheumatologist, Dr. Jeff Sarkozi. AA11-12. Leeper-Johnson

refused to attend that or any other IME until Prudential reinstated her claim and paid both her back benefits and the attorneys' fees she incurred in seeking to have her claim reinstated. AA120-21; *see also* AA33. Because Leeper-Johnson refused to attend the IME, Prudential asked Dr. Sarkozi to review her medical records. He did so and, like Drs. Greenberger and Brachman, found that there was no objective medical evidence in the file indicating that Leeper-Johnson was totally disabled. *See* AA92-118. Prudential subsequently denied the second appeal. *See* AA13-15.

ARGUMENT

I. The Superior Court Erroneously Wrote The Objective-Medical-Evidence Requirement Out Of The Insurance Policy.

The group policy under which Leeper-Johnson was covered specifies that it is the covered employee's "responsibility to give Prudential the required *objective medical evidence* to verify [her] continuous total disability" and that the employee "*cannot receive benefits without providing this information.*" AA728 (emphasis added).⁷ The policy's requirement of "objective medical evidence" was of central importance to this case because the only *medical* evidence Leeper-Johnson produced was the disability certifications of her doctors, neither of whom could identify any *objective* evidence that Leeper-Johnson was unable to work.

⁷ As Prudential's Vice President, John Barilla, succinctly explained, the commonsense notion of objective evidence means evidence that is "measurable, quantifiable, or observable." AA1554. Merriam-Webster defines "objective" as "relating to, or being an object, phenomenon, or condition in the realm of sensible experience independent of individual thought and perceptible by all observers" and specifies that when used to describe "a symptom of disease" the term means "perceptible to persons other than the affected individual." Merriam-Webster Online Dictionary (2008) www.merriam-webster.com/dictionary/objective.

Despite the obvious relevance of the policy’s objective-medical-evidence requirement, the superior court refused to instruct the jury on it. At the very least, that error requires a new trial. Because Leeper-Johnson failed to produce objective medical evidence of her alleged functional limitations, however, this Court can and should go further and render judgment for Prudential.

A. The superior court erred in refusing to instruct the jury that Leeper-Johnson was required to provide objective medical evidence of her disability as a condition of obtaining benefits.

After showing at trial that Leeper-Johnson had failed to produce objective medical evidence of her alleged functional limitations (*see* pages 13-16, *infra*), Prudential asked the superior court both to instruct the jury on the policy’s objective-medical-evidence requirement (AA783) and to include a question on the verdict sheet asking the jury to determine whether Leeper-Johnson “provide[d] Prudential with objective medical evidence to verify her continued ‘total disability’” (*see* AA779-80). The superior court appeared to agree that the policy required objective medical evidence (*see* RT3581) but nevertheless refused to either instruct the jury or include a verdict-sheet question on this provision, instead telling counsel to argue the requirement to the jury (RT3579-80, 3601-02). Even after Prudential’s counsel pointed out that it is the court’s obligation to instruct on the law (RT3581), the superior court still refused, stating that “if you want to argue the objective [evidence requirement] counsel, you are going to be able to argue that,” but “in my thought process ... if we start going that far down the line, I’d be real concerned the jurors are just going to go, ‘judge, what are you’—the big issue—‘was she or was she not disabled?’ and you can argue what you want” (RT3582-83). That refusal to instruct on an undisputed policy provision was reversible error.

“[T]rial courts have an obligation to instruct juries on the controlling legal principles in a case” (*Buell-Wilson v. Ford Motor Co.* (2008) 160 Cal.App.4th 1107, 73 Cal.Rptr.3d 277, 328 (internal quotation marks omitted)), and there can be no doubt that “[t]he interpretation and application of the terms of an insurance policy” constitute just such controlling legal principles (*Gin v. Pennsylvania Life Ins. Co.* (2005) 134 Cal.App.4th 939, 943. *See generally* *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238 (it is “solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence”) (quoting *Parsons v. Bristol Dev. Co.* (1965) 62 Cal.2d 861, 865-66)).⁸ Therefore, once “the terms of the contract[] [have been] ascertained, the court should ... construe[] the same and instruct[] the jury as to the meaning and effect thereof.” *Carolina Well Drilling Co. v. California Midway Oil Co.* (1918) 178 Cal. 337, 341; *see also* *Clark v. Leshner* (1956) 46 Cal.2d 874, 883 (“the construction of the writing was the responsibility of the trial court and not the function of the jury” and “[t]he instructions of the court ... erroneously left to the jury the legal question of the interpretation of the assignment”).

Furthermore, “a counsel’s closing statements do *not* replace the need for the court to properly instruct the jury.” *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1460 (emphasis added). As the Arizona Supreme Court has explained, “[i]nstructions have a different effect upon the jury than closing arguments. ... Having just been warned that they need not accept the parties’ closing arguments as fact, the members of the jury would not be likely to embrace and apply [the party’s] argument as fully as if it had come from ‘on high.’” *DeMontiney v. Desert Manor Convalescent Ctr., Inc.*

⁸ Leeper-Johnson did not present any such extrinsic evidence here.

(Ariz. 1985) 695 P.2d 255, 260 (internal quotation marks and citation omitted). Indeed, this jury clearly understood the difference between a party's argument and an instruction from the court. During the second phase of trial, the jurors asked the court about an argument made by Leeper-Johnson's counsel, correctly noting that "[t]he law we are to use comes from the Judge and non[e] of this was mentioned by him." AA181. That comment perfectly highlights the reason that courts are bound to instruct the jury on contract provisions rather than simply telling the parties to argue the terms of the contract to the jury.

In sum, there is no justification for the superior court's refusal to instruct the jury on this undisputed and highly relevant policy provision. Accordingly, at minimum, a new trial is required.

B. Prudential is entitled to judgment because Leeper-Johnson did not produce objective medical evidence that she was completely unable to perform the material duties of any occupation for which she is reasonably fitted.

The expense and inconvenience of a new trial can be avoided, however, because no properly instructed jury could find that Leeper-Johnson provided objective medical evidence that she was "completely unable to perform the material and substantial duties of any occupation for which [she is] reasonably fitted by [her] education, training or experience" (AA720).

The only medical evidence that Leeper-Johnson submitted to Prudential or offered at trial was the opinions of her treating physicians. But both of them had simply accepted Leeper-Johnson's claim that she was disabled, and neither could identify any objective evidence confirming that claim.

Leeper-Johnson's primary physician, Dr. Rizkalla, admitted that the only reason she had to think that Leeper-Johnson was disabled was "[Leeper-Johnson's] self-report ... only her self-reports." RT923. Indeed, when Dr. Rizkalla was asked whether there was "[s]omething you have observed, you

would have noted, you would have tested for[,] [a]nything at all—was there anything that would have supported Ms. Johnson’s reports to you that her activities were limited,” she honestly answered “No.” RT912.⁹

Moreover, far from showing that Leeper-Johnson could not perform any occupation for which she is reasonably suited, the objective observations and measurements that Dr. Rizkalla did report indicated that Leeper-Johnson was functioning normally. Dr. Rizkalla testified that Leeper-Johnson did not have the muscle atrophy that might be expected in someone with chronically reduced physical capabilities. RT908-10. She also noted that Leeper-Johnson had normal range of motion in her limbs and neck (RT913-14) and had never displayed difficulty walking, sitting, standing, using her arms and fingers, or functioning normally in any way (RT910-11).¹⁰

Although Leeper-Johnson’s second treating physician, Dr. Colburn, was not as straightforward as Dr. Rizkalla, he also could not identify any objective medical evidence confirming Leeper-Johnson’s self-reported functional limitations. Dr. Colburn, like Dr. Rizkalla, had done no functional testing and made no independent observations that confirmed Leeper-Johnson’s self reports. *See, e.g.*, RT260-66, 388-90, 415-23. He talked about the trigger point test for fibromyalgia and the laboratory test for lupus, but both of those are purely diagnostic tests (*i.e.*, they may qualify Leeper-Johnson for a diagnosis but they say nothing at all about her ability to work).

⁹ Dr. Rizkalla also admitted that she had no way to assess whether Leeper-Johnson was correctly describing her actual condition or even telling the truth when she claimed to be totally disabled. RT927.

¹⁰ Leeper-Johnson apparently recognized that Dr. Rizkalla’s certifications might not meet the proof requirements under her policy because, as Dr. Rizkalla testified at trial, Leeper-Johnson secretly altered Dr. Rizkalla’s attending physician statement by adding substantial new “findings” before sending the form to Prudential. *See* page 6 & note 4, *supra*.

Indeed, it was undisputed that Leeper-Johnson's lupus was inactive and did not limit her functioning (*see, e.g.*, RT277), and even Leeper-Johnson's counsel admitted that 95 percent of people diagnosed with fibromyalgia can work with appropriate accommodations and thus are not totally disabled from any occupation for which they are fitted (*see* RT96-97).

In an effort to manufacture some semblance of objective medical evidence, Leeper-Johnson's counsel tried to get Dr. Colburn to testify that his "Haq" questionnaire was objective. But Dr. Colburn wouldn't bite, instead admitting that the questionnaire "obviously has some subjectivity written into it" and "[t]here's no way to say it's totally objective." RT352-53. In fact, the "Haq" questionnaire is completely subjective; it is simply a scale to rate the patient's subjective complaints. As Dr. Colburn conceded, "[i]t's patient generated"; "[t]hey give us what they are feeling at the time." RT351-53; *see also id.* ("[t]his is a patient generated questionnaire. ... The patient is supposed to fill this out and tell me [whether they are] able to do these [different] activities"); RT3406-07 (Dr. Sarkozi's testimony that "whatever is there [in the Haq questionnaire] tells you what the patient reported as a subjective report, but there's no objectivity to it insofar as telling you [whether] what the patient is telling you is actually valid or real"). In sum, just as with Dr. Rizkalla, Dr. Colburn's opinion was based on nothing more than Leeper-Johnson's own subjective belief that she was disabled and thus does not constitute objective medical evidence that Leeper-Johnson suffered from severe functional limitations.

All of this was confirmed by each of the three physicians retained by Prudential to review Leeper-Johnson's claim. Dr. Brachman observed that "there is no evidence of any impairment that would prohibit [Leeper-Johnson] from performing the essential functions of a sedentary job" with reasonable accommodations. AA78. Dr. Greenberger noted that "physical exam findings

here are lacking” and recognized that, although “[t]he patient has subjective complaints,” there are “no objective findings.” AA74. And Dr. Sarkozi concluded that Leeper-Johnson could return to work with appropriate accommodations in part because he found “no objective evidence of a primary physical disability.” AA118.

Numerous courts have held that an insurer is entitled to judgment if an insured fails to adduce objective medical evidence of her functional limitations, even when the policy at issue—unlike the policy covering Leeper-Johnson—does not explicitly require such proof. For example, in a case much like this one, the U.S. Court of Appeals for the First Circuit upheld Prudential’s decision that an insured was not disabled due to fibromyalgia and chronic fatigue because the insured had failed to identify “any limitations or restrictions, based on objective findings.” *Boardman v. Prudential Ins. Co. of Am.* (1st Cir. 2003) 337 F.3d 9, 16-17. The court observed that, although “the *diagnoses* of chronic fatigue syndrome and fibromyalgia may not lend themselves to objective clinical findings, the *physical limitations* imposed by the symptoms of such illnesses do lend themselves to objective analysis.”¹¹ *Id.* at 17 n.5 (emphasis added). Accordingly, because the plaintiff had not presented such objective clinical findings of her alleged physical limitations, and instead, like Leeper-Johnson, had submitted only her self-reports and the opinions of her treating physicians based on those self-reports, she could not receive benefits. *Id.* at 17.

¹¹ As noted above (*see* pages 4-5, 8 note 5, *supra*), the definition of total disability in the policy relates to the covered employee’s functional limitations, not her diagnosis. Thus, the relevant question is whether she has produced objective medical evidence of sufficiently severe functional limitations. The question whether she produced (or could produce) objective medical evidence of her diagnosis is irrelevant.

In another case involving a diagnosis of fibromyalgia, the United States Court of Appeals for the Eighth Circuit concluded that it was reasonable to deny a claim for lack of “clinical and objective” evidence because the “potential for varying impact of [fibromyalgia] among different patients” justified “requesting objective information to verify that *this* claimant ... was disabled to the point that she could not perform even sedentary or light-duty work.” *Pralutsky v. Metro. Life Ins. Co.* (8th Cir. 2006) 435 F.3d 833, 839-40 (emphasis added). Importantly, the court noted that statements from the plaintiff’s treating physicians “largely repeating [the plaintiff’s] subjective complaints” do not satisfy the objective-evidence requirement. *Id.* at 841.

Similarly, the United States District Court for the Central District of California recently held that it was reasonable for an insurer to insist on objective medical proof of the insured’s functional limitations, even though there was no requirement for objective proof in the policy, because “a finding of disability based on mere subjective complaints would open the [insurer] up to malingering and would greatly hamper [the insurer] from exercising its fiduciary role of scrutinizing requests for benefits.” *Bratton v. Metro. Life Ins. Co.* (C.D. Cal. 2006) 439 F.Supp.2d 1039, 1052. The court also noted that, because the certifications of the insured’s treating physicians were not based on objective medical evidence, they were inadequate to establish the insured’s disability under the policy. *Id.* at 1053-54.

Finally, another federal district court recently held that “[t]he requirement that a plaintiff submit objective evidence of the impact of a diagnosed disease, illness or other condition is logical and necessary, especially in the case of diagnoses such as [chronic fatigue syndrome].” *Brucks v. The Coca-Cola Co.* (N.D. Ga. 2005) 391 F.Supp.2d 1193, 1205. The court explained that “[t]he objective-evidence requirement promotes integrity in the application of the law” because “it requires claimants to

establish that the diagnosed disease, illness or condition results in an actual disability, not just a perceived one,” which ensures that “there is corroboration for a claimant’s subjective complaints, thus deterring embellished allegations of the effect of the diagnosed malady as well as deterring fraud in the claims process.” *Id.*¹²

As in *Boardman*, *Pralutsky*, *Bratton*, and *Brucks*, no reasonable jury could find that Leeper-Johnson provided Prudential with “objective medical evidence” that she suffered from functional limitations so severe as to render her totally unable to perform any job for which she is suited. At most, she provided certifications from doctors who simply repeated her own description of her alleged limitations. As the cases just discussed (and common sense) indicate, that does not qualify as objective medical evidence. Accordingly, the Court should enter judgment for Prudential on the contract claim.

II. The Superior Court Erroneously Wrote The Mental-Condition Limitation Out Of The Insurance Policy.

Although the insurance policy in this case pays benefits until the age of 65 for disabilities caused by many conditions, it provides that covered employees may not receive more than 24 months of benefits for disabilities

¹² See also *Rose v. Hartford Fin. Svcs. Group, Inc.* (6th Cir. Mar. 11, 2008) 2008 WL 648965, at *6, *9 (observing that “it is entirely reasonable for an insurer to request objective evidence of a claimant’s functional capacity” and holding that insurer governed by ERISA acted reasonably in denying fibromyalgia-disability claim of insured whose only evidence was physician reports that simply accepted her self reports and letters from friends and neighbors that expressed their non-medical opinions regarding disability); *Jordan v. Northrop Grumman Corp.* (9th Cir. 2004) 370 F.3d 869, 878 (holding in ERISA case that “[w]ith a condition such as fibromyalgia, where the applicant’s physicians depend entirely on the patient’s pain reports for their diagnoses, their *ipse dixit* cannot be unchallengeable That the administrator ultimately rejects the applicant’s physicians’ views does not establish that it ‘ignored’ them.”).

that are “caused at least in part by a mental, psychoneurotic or personality disorder.” AA722. Just as with the objective-medical-evidence requirement, there can be no dispute that this is a valid and enforceable part of the contract between Prudential and Leeper-Johnson. Nevertheless, just as with the objective-medical-evidence requirement, the superior court effectively eliminated the mental-condition limitation from the policy by (a) refusing to instruct the jury or include a verdict-sheet question on this explicit policy provision, and (b) excluding competent evidence on the mental aspects of Leeper-Johnson’s medical conditions.

A. The superior court erred in refusing to instruct the jury about the mental-condition limitation and to include a question about that limitation on the verdict form.

When Leeper-Johnson completed a Comprehensive Claimant Statement for Prudential during its reassessment of her claim in June 2000, she listed “[d]epression” among her “current injur[ies] or illness[es].” AA79. When asked “[w]hat specific symptoms [she was] experiencing,” she listed “fatigue, memory loss,” and “inability to concentrate/focus.” *Id.* That was consistent with one of her very first claimant statements, in which she included “depression, memory loss, loss of concentration” among her illnesses and “loss of memory and concentration, depression” as the first of the symptoms that allegedly interfered with her ability to work. AA135. It also was consistent with one of the earliest treatment notes sent to Prudential, which indicated that Leeper-Johnson’s “Depression/Anxiety” was “quite severe.” AA119.

Dr. Colburn agreed that Leeper-Johnson had depression. RT265. And Dr. Rizkalla confirmed that she was actively treating Leeper-Johnson for depression in 2001 and that Leeper-Johnson was “suffering from depression and chronic fatigue, which are limiting her activities, making her unable to work.” AA134; *see also* AA138, 139; RT917.

Moreover, in secretly embellishing Dr. Rizkalla's Attending Physician Statement, Leeper-Johnson herself added the words "pat[ient] is more susceptible to bouts of severe fatigue and *depression*." Compare AA83-84 (emphasis added) with AA491-92.

In her first medical review, Dr. Brachman noted that Leeper-Johnson was being "treated for depression/anxiety" and that "her psychological status has been classified as dysthymia [a form of depression]." AA78. After being provided more medical records during Leeper-Johnson's first appeal, Dr. Brachman's second report observed that Leeper-Johnson "has been diagnosed with and treated for depression for several years" and that "[i]mpaired memory, concentration difficulties and fatigue are well known symptoms of depression." AA131.

Similarly, Dr. Sarkozi remarked that "[t]he record clearly clinically supports a diagnosis of depression with features including anhedonia, fatigue, psychomotor retardation, subjective cognitive impairment, changes in weight, anxiety, reported altered sleep pattern with insomnia ... and clinically significant distress and impairment in social, occupational and personal areas of function[ing]." AA111; *see generally* AA111-13 (Dr. Sarkozi's discussion of the medical records relating to depression). Dr. Sarkozi also suggested that Leeper-Johnson's "depression, anxiety, stress and psychological conditions and psychosocial disruption with neurovegetative and somatic features" might be causing a "functional impairment and specifically work related impairment." AA115.¹³

After receiving Leeper-Johnson's Comprehensive Claimant Statement, all of her medical records, Dr. Brachman's review, and Dr. Greenberger's

¹³ As we discuss below (*see* Part II.B), the superior court erroneously redacted this discussion from Dr. Sarkozi's report.

IME report, Prudential concluded that the evidence did not support a finding that Leeper-Johnson was completely unable to work in “any occupation for which [she is] reasonably fitted” (AA720). Indeed, Dr. Greenberger advised Prudential that, in his opinion, Leeper-Johnson could return to her old job (not just any job for which she is reasonably fitted), and Dr. Brachman agreed that Leeper-Johnson could return to work with reasonable accommodations. Accordingly, Prudential denied the claim based on the conclusion that Leeper-Johnson was not suffering from functional impairments sufficient to render her totally disabled under the policy. AA3-6. However, the denial letter reminded Leeper-Johnson that, even if she was experiencing some functional limitations, the policy “contains a Benefit Limitation provision” that would limit her to 24 months of benefits for a disability that was “caused at least in part by a mental, psychoneurotic or personality disorder.” AA4. The letter that Prudential sent following Leeper-Johnson’s first appeal reminded her that “she had exhausted her benefits under the benefit limitation for mental, psychoneurotic, or personality disorders” and that she therefore “was no longer eligible for benefits due to depression.” AA8. And the letter to Leeper-Johnson’s counsel following the second appeal and Dr. Sarkozi’s review stated that, “although Dr. Sarkozi indicates that [Leeper-Johnson’s] psychological conditions may impact her functioning, she is no longer eligible for benefits for these conditions” because “she has exhausted her benefits” under the 24-month mental-condition limitation. AA14.

Under the undisputed terms of the insurance policy, even if the jury found that she was suffering functional limitations so severe that she could not work in any occupation for which she is reasonably fitted, she still could not recover benefits if the jury—weighing the evidence discussed above—determined that those limitations were caused, even just “in part,” by a mental condition such as depression. Accordingly, Prudential asked the superior

court to instruct the jury that the insurance policy “provides that benefits shall only be paid for 24 months for a Total Disability that was caused at least in part by a mental, psychoneurotic or personality disorder.” AA748. Prudential also asked the court to include a verdict-sheet question asking the jury to specify whether, if Leeper-Johnson had functional limitations, they were “due, in part, to a mental, psychoneurotic or personality disorder or substance abuse.” AA779. But as with the objective-medical-evidence requirement, the court refused to instruct the jury or to include a verdict-sheet question, instead directing counsel, once again, to argue the meaning of the contract to the jury (RT3583-84, 3601-02).

For the very same reasons that it was error to refuse to instruct the jury on the policy’s objective-medical-evidence requirement (*see* pages 11-13, *supra*), so too was it error to refuse to instruct the jury about the mental-condition limitation. In requesting this instruction, Prudential sought nothing more than the enforcement of the terms of its policy. *See, e.g., Calmbacher v. Prudential Ins. Co. of Am.* (M.D. Fla. 2005) 392 F.Supp.2d 1364, 1369 (recognizing that, when a disability policy includes a 24-month limitation for mental conditions, one of the issues at trial is whether the plaintiff was totally disabled “for reasons other than those that qualify as a mental illness”). By failing to instruct the jury on a critical limitation on Leeper-Johnson’s right to benefits, the superior court effectively wrote that important limitation out of the policy.

The impact of the court’s instructional error was compounded by its refusal to include a question about the mental-condition limitation on the verdict sheet. Prudential requested that the verdict sheet ask the jurors: “Was [Leeper-Johnson’s] ‘total disability’ due, in part, to a mental, psychoneurotic, or personality disorder or substance abuse?” AA779. And because it was undisputed that Leeper-Johnson already had received 24 months of benefits,

the proposed verdict sheet would have told the jury that if it answered “yes” it was to “stop here, answer no further questions, and have the presiding juror sign and date this form.” *Id.* The proposed question was a clear, accurate, and non-argumentative method of presenting this explicit and unambiguous limitation to the jury. The refusal of the superior court to instruct the jury on “the controlling legal principles” and to embody them in the verdict sheet thus necessitates a new trial.

B. The superior court erred in excluding competent evidence that any functional limitations that Leeper-Johnson may have been experiencing were caused, at least in part, by a mental or psychoneurotic condition.

Not only did the superior court refuse to instruct on the mental-condition limitation, it also prevented Prudential from offering expert testimony on the functional effects of Leeper-Johnson’s depression. Prudential’s expert, Dr. Sarkozi, is an experienced physician with a specialty in pain and fatigue syndromes who also treats his patients for associated psychiatric issues, including depression. *See, e.g.,* RT3371-72. He intended to testify, consistent with his report, that if Leeper-Johnson was experiencing functional limitations, they were caused at least in part by a mental or psychoneurotic condition.

Dr. Sarkozi is not a psychiatrist, but California courts long have recognized that even a general practitioner can have sufficient experience and expertise to opine on psychiatric matters. *See, e.g., In re Dolbeer’s Estate* (1906) 149 Cal. 227, 248 (“A general practitioner who has had experience in the various kinds of mental afflictions is as competent to testify to the sanity or insanity of a person as the skilled expert who devotes his entire time to the study of such diseases.”); *Evans v. Ohanesian* (1974) 39 Cal.App.3d 121, 128 (“Nor is it critical whether a medical expert is a general practitioner or a specialist so long as he exhibits knowledge of the subject.”). Indeed, neither

of Leeper-Johnson's treating physicians is a psychiatrist, and yet they have treated her depression for years, prescribing many types of depression medication. *See, e.g.*, AA134, 138, 139.

Nevertheless, on the morning that Dr. Sarkozi was scheduled to testify, the trial court limited his testimony, ruling that he could opine that Leeper-Johnson *had* depression but could not "go much further than that." RT3381. Specifically, the court directed that Dr. Sarkozi could *not* opine either that "depression is causing [Leeper-Johnson] to have restrictions or limitations" (RT3384) or that "depression accounts for [her] symptoms" (RT3385-86). The court also ordered that the report that Dr. Sarkozi had prepared during Leeper-Johnson's second appeal be redacted to remove his discussion of the functional effects of Leeper-Johnson's depression. RT3383-84. Of course, the question whether Leeper-Johnson's depression was causing her symptoms and functional limitations was the very question that determines whether the policy's mental-condition limitation applies.

Because Dr. Sarkozki had the necessary expertise to opine on these clearly relevant topics, the court erred in prohibiting him from doing so. And by preventing Prudential from establishing that any functional limitations Leeper-Johnson may be experiencing were caused by her depression or other associated mental conditions, the superior court deprived Prudential of the ability to show that Leeper-Johnson had failed to prove her entitlement to benefits under the contract.¹⁴

¹⁴ In opposition to Prudential's post-trial motions, Leeper-Johnson did not argue that Dr. Sarkozi lacked expertise to opine on these issues, but instead contended that his testimony was appropriately excluded because it was, in Leeper-Johnson's opinion, outweighed by the opinions of *her* experts that her depression did not cause her alleged functional limitations. *See* AA1513-14. Of course, the existence of a contrary opinion is no basis at all for silencing an (con't)

Moreover, by excluding Dr. Sarkozi's opinion the superior court gave the jury a misimpression of Prudential's handling of Leeper-Johnson's second appeal. The letter denying that appeal, which was before the jury, stated that, "although Dr. Sarkozi indicates that [Leeper-Johnson's] psychological conditions may impact her functioning, she is no longer eligible for benefits for these conditions" because "she has exhausted her benefits" under the 24-month mental-condition limitation. AA14. When the superior court silenced Dr. Sarkozi on this issue (and required heavy redaction of his report), it created the inaccurate appearance that Prudential had misled Leeper-Johnson and misrepresented Dr. Sarkozi's opinion in its denial letter. Hence, even apart from the superior court's refusal to enforce the mental-condition limitation, the shackling of Dr. Sarkozi necessitates a new trial.

III. Prudential Is Entitled To Judgment With Respect To Benefits That Accrued After Leeper-Johnson Refused To Attend Further IMEs.

It has long been the law in California that, when an insured refuses to attend an IME that has been requested "in accordance with the provisions of the policy," she is "not entitled to judgment in [an] action for disability benefits subsequent to [the date of her refusal]." *Erreca v. Western States Life Ins. Co.* (1942) 19 Cal.2d 388, 404. That rule is applicable here because Leeper-Johnson categorically refused to attend any further IMEs on June 16, 2003, unless and until Prudential paid her all accrued benefits, plus her attorneys' fees. Under *Erreca*, Prudential is entitled to judgment with respect to all benefits that were awarded for periods subsequent to that date.

The insurance policy specifies that Prudential has the right to have claimants examined "when and *as often as is reasonable* while the claim is

expert and, as shown above (*see* pages 19-21, *supra*), there was ample evidence in the record to support Dr. Sarkozi's proffered testimony.

pending.” AA728 (emphasis added). That “is a reasonable [requirement] and the right periodically to examine [an insured] for proof of continued disability is a condition to the future liability of the insurer.” *Erreca*, 19 Cal.2d at 401.

In her second appeal letter, Leeper-Johnson complained that Dr. Greenberger, the physician who had conducted the initial IME, was not qualified to assess her claim because he was an occupational physician, not a rheumatologist (the specialty that includes expertise in fibromyalgia). *See* AA122-24.¹⁵ In response, and as part of its continuing investigation of Leeper-Johnson’s claim in connection with her second appeal, Prudential scheduled an IME with a rheumatologist. AA11-12.

On June 16, 2003, Leeper-Johnson, through her counsel, sent Prudential a letter stating that she “will not be attending the scheduled [IME]” because “there is no claim pending and Prudential does not have the right to demand another IME.” AA120. The letter argued that Prudential’s right to investigate ended with the initial denial of her claim and stated that Leeper-Johnson would not attend any further IMEs until “Prudential reinstates her claim” and “pays all back benefits and attorneys fees.” AA121

The very same day, Prudential called Leeper-Johnson’s counsel to explain that it is “not unusual to arrange for IME’s in this situation” and that

¹⁵ This criticism is baseless. The question whether Leeper-Johnson has fibromyalgia is *irrelevant* under the policy. *See* page 4-5, 8 note 5, *supra*. The relevant question is whether Leeper-Johnson has functional limitations that prevent her from working—an assessment that Dr. Greenberger, an occupational physician, was perfectly well suited to make. Indeed, Dr. Colburn admitted that, as a rheumatologist, he is not qualified to determine whether Leeper-Johnson is functionally disabled, but would rely on “somebody who determines disability because I don’t do that.” RT277-78. In any event, Dr. Greenberger did have experience with fibromyalgia and was qualified to diagnose that condition. *See* RT1220-24.

the “[b]asis for the IME was [Leeper-Johnson’s] objections to Dr. Greenberger’s report.” AA33. Leeper-Johnson’s counsel “raised his voice and indicated that [Prudential] should just pay the claim [and that] Ms. Johnson would not be attending the IME.”¹⁶ *Id.*

Leeper-Johnson’s position that Prudential had no right to request an IME after the initial denial finds no support in the policy and is directly contrary to *Erreca*, which held that “the right of the insurer [to request an IME] survives its denial of liability regardless of the basis thereof.” 19 Cal.2d at 401.

Because Leeper-Johnson refused to attend any future IMEs on June 16, 2003, *Erreca* establishes that she cannot receive judgment for those benefits that would have accrued after that date. Her economist testified that this would reduce the award of past contract benefits (line 3 on the verdict form) to \$112,156. RT1281-82. It also would require that the \$400,000 award for future benefits (line 6(b) on the verdict form) be excised.¹⁷ Accordingly, if the Court does not enter judgment for Prudential or remand for a new trial on the contract claim (*see* Sections I and II, *supra*) it should enter judgment for

¹⁶ In her letter, Leeper-Johnson also complained that the specific IME that Prudential had scheduled was too far away from her home and would take too long. AA121. Those complaints are beside the point, however, as Leeper-Johnson’s position—confirmed in the follow-up phone call—was that she would not attend *any* IME until Prudential paid both her back benefits and her attorneys’ fees.

¹⁷ Leeper-Johnson has argued that *Erreca* does not prevent her from obtaining future benefits because those are awarded on a tort theory of recovery. *See* AA1429. Her position has no support in the case law and is at odds with the policy behind *Erreca*, which is to prevent an insured from running to court to obtain benefits (undoubtedly with the hope of a large extra-contractual windfall) after denying the insurer its contractual right to investigate the claim.

Prudential with respect to those benefits accruing after June 16, 2003, reduce the award for past contract benefits to \$112,156, and excise the award of future benefits. *See, e.g., Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1605 n.6 (“A judgment notwithstanding the verdict for an amount less than the jury verdict would seem appropriate where there can be no dispute as to the amount.”). If the Court does remand for a new trial on the contract claim, it still should enter judgment for Prudential on benefits accruing after June 16, 2003, making clear that she cannot receive a judgment for such benefits at the new trial.

IV. Prudential Is Entitled To Judgment On The Bad-Faith Claim.

Because Prudential is entitled to judgment on the contract claim (*see* Part I, *supra*), and there can be no bad faith in the absence of a breach of contract (*see, e.g., Benavides v. State Farm Gen. Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 (citing *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 35-36)), Prudential is entitled to judgment on the bad-faith claim as well. In any event, the bad-faith finding is unsustainable in its own right because, at the very least, there was a reasonable dispute about Leeper-Johnson’s entitlement to benefits under this policy, which precludes a bad-faith claim as a matter of law.

The law implies in every insurance contract a covenant of good faith and fair dealing that “requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement.” *Egan v. Mut. of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 818. A mere breach of contract is not enough to establish bad faith because bad faith involves “unfair dealing rather than mistaken judgment.” *Congleton v. Nat’l Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59 (internal quotation marks omitted). To establish an insurer’s bad faith, an insured must show that the insurer “fail[ed] or refus[ed] to discharge contractual responsibilities,

prompted not by an honest mistake, bad judgment or negligence but rather by *a conscious and deliberate act.*” *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 (emphasis added). In other words, there is room in the law for an insurer to be wrong about coverage and to make mistakes in handling a claim without breaching its duty of good faith. And the very most that the record here shows is an error in coverage and mistakes in handling Leeper-Johnson’s claim. Accordingly, even if the Court sustains the contract judgment (or, alternatively, orders a new trial on the contract claim), it should enter judgment for Prudential on the bad-faith claim.

A. The genuine-dispute doctrine precludes a finding of bad faith.

The law requires an insurer to balance its own interests—which include the interests of shareholders and other policyholders—with the interests of the insured. *See Chateau Chamberay Homeowners Ass’n v. Associated Int’l Ins. Co.* (2001) 90 Cal.App.4th 335, 347. An insurer must treat an insured’s interest as *equal* to its own; but it is perfectly appropriate for an insurer to resolve genuine disputes about coverage against an insured. *See Blake v. Aetna Life Ins. Co.* (1979) 99 Cal.App.3d 901, 924. Accordingly, if a genuine dispute regarding coverage exists, the insurer’s denial of the claim cannot give rise to liability for bad faith, even if a jury later decides that the insurer’s decision was wrong. *See Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 723; *see also Chateau Chamberay*, 90 Cal.App.4th at 347.

This “genuine-dispute” doctrine precludes a finding of bad faith here. Even accepting *arguendo* that Leeper-Johnson satisfied the policy’s requirements for receiving disability benefits, Prudential’s contrary conclusion was not “inherently unreasonable,” which is the standard that must be met to support a finding of bad faith. *Congleton*, 189 Cal.App.3d at 59.

In order to qualify for benefits, Leeper-Johnson had to be suffering such severe functional limitations that she was completely unable to perform any occupation for which she is reasonably fitted. AA720. Under the explicit provisions of the contract, she was required to prove those functional limitations with objective medical evidence (AA728) and, because she had already been paid for more than 24 months, could not recover benefits for limitations caused, even in part, by a mental or psychoneurotic condition (AA722).

To support her disability claim, Leeper-Johnson submitted the opinions of her treating physicians. But those physicians did not rely on testing or even independent observations indicating that Leeper-Johnson suffered from severe functional limitations. Instead, they simply accepted Leeper-Johnson's description of her limitations without question. Indeed, far from revealing that Leeper-Johnson was so functionally limited as to be incapable of performing any occupation for which she was qualified, the observations that her physicians did make and the testing that they did perform all showed her to be functioning normally. *See* pages 13-15, *supra*. And the three physicians that Prudential hired to review Leeper-Johnson's claim each separately concluded that, based on the evidence available, Leeper-Johnson could return to work with appropriate restrictions.

At trial, both parties attempted to identify weaknesses in the opinions of the physicians who supported the other side. As discussed in more detail below, Leeper-Johnson contended through her "bad-faith expert" that Drs. Greenberger and Brachman did not have complete information and ignored certain aspects of her claim.¹⁸ Prudential showed that Drs. Greenberger and

¹⁸ Although it does not matter for purposes of the present argument, both of those allegations are false. *See generally* Part IV.B, *infra*.

Brachman were correct to conclude that Leeper-Johnson’s treating physicians had uncritically accepted Leeper-Johnson’s description of her functional abilities—a fact that Dr. Rizkalla admitted at trial (RT912, 923). Regardless of the ultimate merits of these competing expert opinions or the parties’ criticisms of them, however, they at least create a genuine dispute about whether Leeper-Johnson was entitled to benefits under the policy.

Chateau Chamberay held that the genuine-dispute doctrine may be invoked “where an insurer ... is relying on the advice and opinions of independent experts.” 90 Cal.App.4th at 348. Indeed, “under existing law, a single, thorough report by an independent expert is sufficient, all other things being equal, to support application of the ‘genuine dispute’ doctrine.” *Adams v. Allstate Ins. Co.* (C.D. Cal. 2002) 187 F.Supp.2d 1219, 1227. Here, Prudential relied on three separate reports by experts, each of whom concluded that Leeper-Johnson was capable of returning to work.¹⁹

¹⁹ Although Leeper-Johnson took issue with Dr. Greenberger’s IME, her criticisms do not implicate any of the exceptions to the genuine dispute doctrine recognized in *Chateau Chamberay* (see 90 Cal.App.4th at 348-49) for the simple reason that Prudential relied on the opinions of *three* experts, not just Dr. Greenberger—and would have had access to a second IME but for Leeper-Johnson’s refusal to submit to any further examinations. But even if Prudential had relied solely on Dr. Greenberger, Leeper-Johnson’s attacks on his IME are baseless.

Leeper-Johnson asserts, for example, that the third-party scheduling service employed by Prudential “misrepresent[ed] the nature of the investigatory proceedings” (*Chateau Chamberay*, 90 Cal.App.4th at 348) by concealing the fact that the IME was intended to evaluate her continuing eligibility for benefits. But the IME obviously was part of Prudential’s continued investigation of Leeper-Johnson’s claim, and the scheduling service’s alleged description of the IME’s purpose (see RT1582) did not say otherwise.

Leeper-Johnson also contends that Dr. Greenberger was “unreasonable” (*Chateau Chamberay*, 90 Cal.App.4th at 348) because he (con’t)

In addition to these genuine disputes about Leeper-Johnson's functional capacity, there also were genuine disputes over whether she met the policy's objective-medical-evidence requirement and whether any functional limitations she may have been experiencing were caused by her depression. Even if the superior court had not committed reversible error by eliminating those issues from the trial, the undisputed language in the policy at least creates a genuine dispute sufficient to prevent a finding of bad faith. Indeed, just with respect to the objective-evidence requirement, the fact that cases with similar fact patterns have resulted in judgments for the insurer (*see* pages 16-18, *supra*) proves that Prudential's decision on this claim, even if wrong, cannot be so unreasonable as to amount to bad faith.

B. Prudential's investigation was reasonable.

The case law suggests that there might still be bad-faith liability notwithstanding the existence of a genuine dispute, if the insurer consciously and deliberately handled the claim in an unreasonable fashion. *Chateau Chamberay*, 90 Cal.App.4th at 348-49; *Wilson*, 42 Cal.4th at 723. Accordingly, Leeper-Johnson's bad-faith expert, David Peterson, purported to identify multiple ways in which the handling of Leeper-Johnson's claim was unreasonable. Virtually every allegation he leveled against Prudential, however, is plainly contradicted by the documentary record (with the one or two remaining allegations being foreclosed by California law). For example:

reported that he had conducted a tender-point examination that she did not think he had performed. *See* AA1434-35. Even accepting her lay opinion on this matter, however, the tender-point examination is simply a diagnostic tool for fibromyalgia and cannot prove or disprove functional limitations. It was Dr. Greenberger's conclusion that Leeper-Johnson was functionally able to work, not his rejection of the fibromyalgia diagnosis, that mattered for purposes of Prudential's claim decision.

- He asserted that a form in the claim file memorializing an internal discussion about Leeper-Johnson’s claim was evidence of bad faith because it should have had a place “at the bottom” for identifying what needs to be done on the claim (RT733) and then, without batting an eye, proceeded to describe the notations on the right margin of the form (AA91) where the people handling plaintiff’s claim “identify[] what they need to do on this file” (RT734).
- He asserted that “the insurance company was focusing on only objective evidence” and was “ignoring the long history of pain and suffering and the mental aspect of the depression, the inability to concentrate, etc.” (RT740), even though the very claim-handling note that he was discussing (RT739) acknowledged that Leeper-Johnson’s claim is based in part on memory problems, fatigue, and difficulty concentrating (AA50).
- He asserted that it is “unclear from Dr. Greenberger’s [IME] report exactly what was sent to him” and opined that Prudential was guilty of bad faith because Dr. Greenberger did not list the records that he reviewed (RT744-45), even though Dr. Greenberger *did* list the records, describing his review of “[d]isability slips” and records from “Dr. Brachman,” “Loma Linda Faculty Medical Offices,” “Dr. Rizkala,” “Dr. Finley,” and “Kaiser” (AA72-73).
- He asserted that Dr. Brachman “was not sent a list of the duties that the insured performed at her prior job,” did not know how many hours Leeper-Johnson worked at her prior job, and did not analyze the duties that Leeper-Johnson “performed at her prior job” (RT744), even though the definition of total disability that applied during the relevant period did not require Leeper-Johnson to be able to perform her prior job, but simply any job for which she is fitted (AA720).
- He asserted that the referral letter to Dr. Brachman was “very slanted” because it (truthfully) said that Leeper-Johnson “indicates current activities including horseback riding” but, allegedly, did not “attach a copy of the claimant’s statement” describing those activities (RT751-52), even though the letter *did* attach a copy of the Comprehensive Claimant Statement (*see* AA2).
- He accused Dr. Brachman of applying a “strict medical interpretation” of disability because “there is no consideration given to the depression, the lack of memory, the inability to concentrate ... so she’s kind of pushing that mental part aside” (RT753-54),

even though Dr. Brachman specifically noted that plaintiff “was/is treated for depression/anxiety” and considered the medical records related to those conditions (AA78).

- He asserted that Prudential acted in bad faith because it “should have ... sen[t] Brachman’s report to Dr. Greenberger but ... the file didn’t reflect that” (RT755-56), even though the file explicitly *did* reflect that Prudential sent Dr. Brachman’s report to Dr. Greenberger (*see* AA72).

Indeed, Peterson was so consistently and plainly wrong about the record as to cast serious doubt on whether he actually reviewed the documents or simply recited a series of criticisms given to him by Leeper-Johnson’s counsel.

There are a few instances in which Peterson was not wrong about the facts of Prudential’s investigation. Specifically, he accurately observed that Prudential did not initiate contact with Leeper-Johnson’s horse trainer, husband, or “other witnesses” (RT743-44), and he correctly observed that Prudential did not conduct surveillance of Leeper-Johnson (RT766-67). But his assertion that Prudential acted in bad faith by not pursuing these potential sources of information is contrary to the law. An insurer is not required to chase down every possible lead before acting on a claim, and bad faith cannot be proved simply by identifying other types of investigation that could have led to evidence relevant to the insured’s claim. *See, e.g., Cardiner v. Provident Life & Accident Ins. Co.* (C.D. Cal. 2001) 158 F.Supp.2d 1088, 1105 (“[A] mere recitation of actions that an insurer should have taken is not dispositive. Indeed, if this were the case, then most insureds could easily claim bad faith.”); *accord Phelps v. Provident Life & Accident Ins. Co.* (C.D. Cal. 1999) 60 F.Supp.2d 1014, 1023; *Nakauchi v. Allstate Ins. Co.* (C.D. Cal. Mar. 19, 2003) 2003 WL 1733543, at *4.

Moreover, Peterson’s opinion is directly contrary to the language of the policy, which explicitly states that it is Leeper-Johnson’s “responsibility to give Prudential the required objective medical evidence to verify [her]

continuous total disability” and that she “cannot receive benefits without providing this information.” AA728. Prudential initially denied Leeper-Johnson’s claim based on a compilation of materials that included extensive medical records from her treating physicians, statements submitted by Leeper-Johnson, and the opinions of two physicians whom Prudential retained to assist in evaluating the claim. After the initial denial, Prudential twice gave Leeper-Johnson a wide-open opportunity to submit any evidence that she thought could “verify [her] continuous total disability.” Even though Leeper-Johnson was represented by counsel during these appeals, she did not submit statements from her horse trainer or husband or “other witnesses.” Given that Leeper-Johnson and her counsel did not think that this kind of evidence was relevant and helpful to meet her burden under the policy or to respond to Prudential’s initial denial of her claim, Prudential cannot be deemed to have consciously and deliberately acted in an unreasonable fashion by not seeking out such information on its own.

V. The Award For “Past Economic Loss” Should Be Excised.

The only economic loss that Leeper-Johnson claimed at trial was the non-payment of benefits. Her economist testified that the total amount of unpaid benefits under the policy was approximately \$665,500 (\$254,562 for past unpaid benefits and \$410,902 for the present value of future benefits). RT1277-79. Prudential did not challenge that calculation. Essentially embracing these figures, the jury awarded \$267,082 on line 3 of the verdict form for past unpaid benefits (under the contract claim) and \$400,000 on line 6b for future benefits (under the tort claim)—a total of \$667,082. AA179.

Line 6a of the verdict form (under the tort claim) was labeled “past economic loss.” *Id.* Understandably confused because there was no evidence of a “past economic loss” other than the contract benefits, the jury asked the superior court “what is meant by ‘Past Economic Loss’ in question 6A?”

AA175. With Leeper-Johnson’s consent, the court instructed the jury that “[p]ast economic loss under Question 6a of the Special Verdict form *is the same as* the covered loss through today, if any, under Question 3” and cautioned the jurors not to award duplicative damages. AA176 (emphasis added). Nevertheless, the jury awarded Leeper-Johnson \$315,000 on line 6(a) for “past economic loss.” AA179. That award clearly violated the trial court’s instruction and should be excised because there is no evidence of any past economic harm other than the past unpaid benefits that the jury awarded on line 3 of the verdict form.

Moreover, a declaration from the jury foreman, David Franklin, reveals that the jury explicitly agreed to “bypass the Court’s warning against duplication of damages under questions 6a and question 3.” AA804 at ¶ 13. Indeed, Franklin declared that the jurors verbally agreed to use a formula he proposed—arbitrarily awarding Leeper-Johnson 70 percent of her pre-disability income for six years (*id.*)—even though there was no evidence of such harm. Declarations of three other jurors corroborate that this award is the result of juror misconduct. AA819-20 at ¶¶ 7-9, AA815 at ¶ 10, and AA809-10 at ¶ 10.

In opposition to Prudential’s post-trial motions, Leeper-Johnson argued that Prudential’s counsel had somehow invited this error by informing the jury that the policy paid benefits equal to 70 percent of her pre-disability income during the first year of a disability and 50 percent of her pre-disability income thereafter (*see* AA1438-39; 715-16). But counsel’s accurate statement of the benefits due under the policy during the first year cannot salvage this duplicative award because Leeper-Johnson did not even allege, must less prove, underpayment of benefits during the first year of her claim. She obviously cannot receive compensation for a harm that never occurred. *Cf. McLaughlin*, 23 Cal.App.4th at 1162 (it is “impermissible” to award damages

without evidence of “actual damage”). In any event, even *if* Leeper-Johnson had proved underpayment of benefits during the first year, that would have supported an award of only 20 percent of her income for one year, not 70 percent of her income for six years.

Because there is no evidence that Leeper-Johnson suffered a \$315,000 economic loss over and above the past benefits that she was awarded, and because this part of the verdict is the result of explicit juror misconduct, the award for “past economic loss” should be reversed.

VI. The Non-Economic Damages Are Excessive.

Under California law, there is no presumption of compensable emotional distress or other non-economic damage from an insurance company’s denial of a claim—even a bad-faith denial. *See McLaughlin v. Nat’l Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1162. Rather, it is the plaintiff’s burden to prove that she suffered emotional distress or pain, not caused by her underlying medical condition, but “resulting from the insurer’s bad faith breach of contract.” *Jordan v. Allstate Ins. Co* (2007) 148 Cal.App.4th 1062, 1079; *see also Blake v. Aetna Life Ins. Co.* (1979) 99 Ca.3d 901, 925 (compensable emotional distress must be “traceable directly to nonpayment of the claim”). Although a bad-faith plaintiff need not prove “severe” emotional distress (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Ca.3d 566, 580), “the law does not compensate [] emotional injuries which are trivial or transitory, as contrasted to substantial or enduring” (*Tan Jay Int’l, Ltd. v. Canadian Indem. Co.* (1988) 198 Cal.App.3d 695, 708).

An appellate court will reverse or reduce an award of non-economic damages if the size of the award “shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.” *Buell-Wilson*, 73 Cal.Rptr.3d at 302. “[T]he appellate court must determine every conflict in the evidence in respondent’s favor, and must give [her] the benefit of every inference

reasonably to be drawn from the record.” *Id.* at 303. “[T]he appellate court should consider the amounts awarded in prior cases for similar injuries,” but “each case must be decided on its own facts and circumstances.” *Id.*

The emotional distress allegedly caused by Prudential’s conduct here is woefully inadequate to support a half-million-dollar award. At the prompting of her counsel, Leeper-Johnson testified that she was “shocked,” “scared,” “stressed,” and “devastated” when she received Prudential’s denial letter and that she felt “vulnerable,” “frustrated,” and saddened” during her appeal of that decision. RT1608-12. These temporary effects, while unfortunate, do not justify an award of \$500,000—the equivalent of approximately seven years’ salary for Leeper-Johnson.

The award is significantly larger than other “substantial” awards upheld on appeal against excessiveness challenges in insurance bad-faith litigation. *See generally* H. Walter Croskey, J., et al. 13-B CAL. PRACTICE GUIDE: INSURANCE LITIGATION (The Rutter Group 2007), ¶ 13:112-116 (describing awards of \$172,325 in *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451; \$75,000 in *Silberg v. Anderson* (1990) 50 Cal.3d 205; and \$27,350 in *Pistorius v. Prudential Ins. Co. of Am.* (1981) 123 Cal.App.3d 541).²⁰

²⁰ In opposition to Prudential’s post-trial motions, Leeper-Johnson asserted that “non-economic damages of \$1,000,000 were upheld” in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408. *See* AA1442. But that case involved separate awards of \$600,000 and \$400,000 for two plaintiffs; it did not involve California law; and, in any event, the propriety of the non-economic damages was not before the U.S. Supreme Court, which referenced it only in passing (*see id.* at 423). In California, it appears that the largest emotional-distress award mentioned in a published insurance bad-faith case is \$400,000. *See Clayton v. United Servs. Auto. Ass’n.* (1997) 54 Cal.App.4th 1158. That case involved an insurer’s “attempt[] to settle for a fraction of the policy limits the insured’s ... claim for (con’t)

Six-figure awards for emotional distress historically have been reserved for cases in which there is a severe physical manifestation of the emotional distress: a nervous breakdown, the need for psychiatric treatment, or attempts at suicide. Significantly, the \$500,000 award here is twice the \$250,000 award *overturned* in *Merlo v. Standard Life & Accident Insurance Co.* (1976) 59 Cal.App.3d 5. In that case, the defendant’s conduct caused the plaintiff to lose his family home, leaving him “sobbing, miserable and depressed,” and forcing him to “divide the children among the relatives.” *Id.* at 11. The court agreed that this evidence was “sufficient, of course, to support a sizable award,” but not “in an amount *anything like* \$250,000.” *Id.* at 16-17 (emphasis added).

Indeed, the size of the non-economic award in this case is sufficient to “raise a presumption that it is the result of passion or prejudice,” requiring a new trial. *Merlo*, 59 Cal.App.3d at 17. In deciding whether the jury was swayed by such improper considerations, appellate courts have looked to whether there is “anything specific in the record calculated to raise passion and prejudice.” *Pistorius*, 123 Cal.App.3d at 552. Here, there was substantial evidence throughout the trial that Leeper-Johnson’s underlying medical condition had emotional and psychological dimensions. *See* pages 19-21, *supra*. The jury would thus have found it difficult to distinguish between the detrimental emotional and psychological symptoms that Leeper-Johnson suffered as part of her medical condition—for which Prudential cannot be liable (*see Jordan*, 148 Cal.App.4th at 1079; *Blake*, 99 Ca.App.3d at 925)—and the alleged effects of the denial of her claim.

the death of his 15-year-old only child” (*id.* at 1160)—facts far removed from those in this case.

VII. Prudential Is Entitled To Judgment On Punitive Damages.

Whatever this Court may conclude about the sustainability of the breach-of-contract and bad-faith verdicts, the jury's finding of punitive liability must be reversed. Although Leeper-Johnson was afforded broad discovery, including depositions of high-level Prudential disability-insurance executives, she adduced no evidence that the denial of her claim was part of a broader pattern of bad-faith claim handling; no smoking-gun documents indicating that Prudential had embarked upon a scheme to cheat its insureds; no whistleblower testimony that claim handlers had been pressured to deny claims or given monetary incentives to do so; and no evidence even that Prudential employed claim-payment metrics to monitor the performance of its claims department. In the absence of such evidence, there is no basis under California law to impose punitive damages on top of all of the forms of extra-contractual damages permitted upon a finding of bad faith. To the contrary, upholding the award of punitive damages in this case would require renunciation of three published decisions of the Court of Appeal, including one by this very Court.

The type of conduct required to justify the imposition of punitive damages is “of a different dimension” than the conduct required for a finding of bad faith. *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg. Inc.* (2000) 78 Cal.App.4th 847, 890 (quoting *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1286). “Even if an insurer has acted unreasonably, it need not follow that it also acted with malice.” *Patrick v. Maryland Cas. Co.* (1990) 217 Cal.App.3d 1566, 1575. To the contrary, in bad-faith cases, as in other contexts, “the evidence in support of the award of punitive damages must satisfy a distinct and far more stringent standard.” *Shade Foods*, 78 Cal.App.4th at 890. Specifically, to recover punitive damages, the plaintiff must prove “by clear and convincing evidence” that “the defendant has been

guilty of oppression, fraud, or malice” (Cal. Civ. Code § 3294(a) (emphasis added))—in other words, that the defendant “engaged in despicable conduct with a conscious disregard of the rights or safety of others” (*Kransco v. Am. Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 410). Conduct does not qualify as “despicable” unless it is “so **vile, base, contemptible, miserable, wretched, or loathsome** that it would be looked down upon and despised by ordinary decent people.” *Tomaselli*, 25 Cal.App.4th at 1287 (emphasis added).

The requirement that a plaintiff prove the defendant’s liability for punitive damages by clear and convincing evidence means that “the evidence [must] be so clear as to leave no substantial doubt; sufficiently strong to command the **unhesitating assent of every reasonable mind.**” *In re Angelia P.* (1981) 28 Cal.3d 908, 919 (emphasis added; citation and internal quotation marks omitted).

Because “the jury’s findings were subject to a heightened burden of proof,” an appellate court “must inquire whether the record contains substantial evidence to support a determination by clear and convincing evidence.” *Shade Foods*, 78 Cal.App.4th at 891 (internal quotation marks and citation omitted). Although the court is “bound to consider the evidence in the light most favorable to the prevailing party,” it “must view the evidence presented through the prism of the substantive [clear and convincing] evidentiary burden.” *Id.* at 891-92 (internal quotation marks and citation omitted; alteration in original).

Applying this standard of review, California courts—including this one—have not hesitated to grant the relief that Prudential seeks and, indeed, have overturned punitive awards in insurance bad-faith cases that involve materially more extreme facts than those involved here. In *Tomaselli*, for example, this Court “identified facts sufficient to support a judgment for bad

faith” but concluded that “nothing was revealed” that “adds up to malice, oppression or despicable conduct.” 25 Cal.App.4th at 1288. The court held that “the retention of outside legal counsel to investigate a questionable case cannot be deemed malicious—even admitting that the counsel so retained had a reputation for digging up reasons to deny coverage.” *Id.* It also observed that allegations amounting to “overzealousness,” “negligence,” or “slipshod investigation” are not sufficient to support the imposition of punitive damages. *Id.* In sum, the court held that “the actions of [the insurer] may be found to be negligent (failing to follow up information provided by the insured), overzealous ..., legally erroneous ..., and callous (failing to communicate),” but could not be “described as evil, criminal, recklessly indifferent to the rights of the insured, or [done] with a vexatious intention to injure.” *Id.*

Similarly, in *Shade Foods* the defendant-insurer “unreasonably failed to assess [one of the plaintiffs’ claims],” “never took any meaningful action to reassess its ill-advised denial,” and delayed payment of benefits that were undeniably owed to the insured, all of which demonstrated “a careless disregard for the rights of its insured and an obstinate persistence in an ill-advised initial position.” 78 Cal.App.4th at 892. Nevertheless, taking into account “the extreme complexity of the coverage issues and the purely economic character of the losses,” the Court of Appeal concluded that “the record f[ell] well short of establishing by clear and convincing evidence the sort of contemptible conduct that could be described by the term ‘despicable.’” *Id.* Accordingly, the court overturned the jury’s punitive verdict because “[u]nreasonable and negligent as it may have been, [the defendant’s] conduct falls within the common experience of human affairs.” *Id.*

With respect to another of the plaintiffs in *Shade Foods*, the court observed that the defendant’s conduct “may have been unreasonable to the

point of constituting a form of unfair dealing, but we do not think the jury could reasonably find that it constituted clear and convincing evidence” of conduct that warrants punitive damages. 78 Cal.App.4th at 893. Thus, the court concluded that it was “unwilling to take the further step [beyond bad faith] of upholding the jury’s finding” of punitive liability. *Id.*

Finally, in *Patrick* the Court of Appeal found that “[t]here was substantial evidence ... that [the insurer’s] claims handling practices were shoddy, and that its handling of the claim ... was at times witless and infected with symptoms of bureaucratic inertia and inefficiency.” 217 Cal.App.3d at 1576. Nevertheless, the court concluded that there was “no substantial evidence that [its] actions were malicious, fraudulent, or oppressive.” *Id.* The court noted that “a consistent and unremedied pattern of egregious insurer practices might rise to the level of a malicious disregard of the insured’s rights,” but held that “inept and negligent handling of a claim” is not enough to warrant punitive damages. *Id.* Accordingly, the court vacated the punitive award.

Here, Prudential paid Leeper-Johnson benefits for approximately six years, repeatedly extending benefits past the return-to-work dates projected by her physicians. When Prudential reviewed Leeper-Johnson’s claim, two physicians retained by Prudential to assist in evaluating the claim (one of whom examined Leeper-Johnson) concluded that Leeper-Johnson was able to work with appropriate restrictions. Those medical opinions led to the denial of Leeper-Johnson’s claim. And even though Prudential believed that Leeper-Johnson no longer was totally disabled under the policy, it nevertheless extended her an additional four months of benefits and job placement assistance to help with her return to work. Without any contractual or statutory obligation to do so, Prudential twice considered Leeper-Johnson’s appeals. During these appeals, it evaluated all evidence that Leeper-Johnson

chose to submit. It also attempted to schedule a second IME with a rheumatologist in an effort to address Leeper-Johnson's complaint about the first IME. When Leeper-Johnson refused to attend that IME or any other one unless Prudential first paid both her unpaid benefits and her attorneys' fees, Prudential did not simply deny her appeal, but instead asked the physician it had retained to perform the IME to review her medical records. He did so and agreed with the first two doctors that Leeper-Johnson was not totally disabled.

Regardless of whether Prudential made the wrong decision in denying benefits under the contract or even could be said to have handled the claim in bad faith, it would be impossible to uphold the divided jury's award of punitive damages here without repudiating *Tomaselli*, *Shade Foods*, and *Patrick*. Punitive damages cannot be awarded for "overzealousness," "negligence," "callousness," or "slipshod investigation," and here there was not even that. To put it differently, the evidence in this case cannot possibly "command the unhesitating assent of every reasonable mind" (*In re Angelia P.*, 28 Cal.3d at 919) that Prudential acted *despicably*.

Of particular note, despite years of extensive discovery including depositions of high-level executives, Leeper-Johnson produced *no* evidence that the denial of her claim was part of a broader pattern of denying claims unjustifiably, that Prudential's management had given claim handlers incentives to deny claims, that management had instituted procedures intended to increase the number of denied claims, or even that management tracked claim-denial statistics. *See, e.g., Tomaselli*, 25 Cal.App.4th at 1287 ("punitive damages have been assessed against insurance companies most commonly where a showing has been made of a continuous policy of nonpayment of claims"); *Patrick*, 217 Cal.App.3d at 1576 ("a consistent and unremedied pattern of egregious insurer practices might rise to the level of a malicious disregard of the insured's rights"). Because there is no evidence that

Prudential's handling of Leeper-Johnson's claim—even if it were bad faith—is anything other than an isolated incident involving a complex claim, the punitive verdict simply cannot be squared with California's high standard for imposing punitive damages and the existing precedent from this and other California courts.

VIII. At The Very Least, The Punitive Award Should Be Reduced Outright To No More Than The Amount Of The Economic Damages, Obviating The Need For A New Trial On Punitive Damages.

On post-trial motions, the superior court correctly determined that the jury's punitive award was unconstitutionally excessive. *See* RT4664-68. Instead of reducing the award outright, however, the superior court gave Leeper-Johnson the choice of a new trial on punitive damages or a remittitur of the punitive award to \$4,000,000. *Id*; AA1850. Leeper-Johnson refused the remittitur (*see* AA1851-52), and a new trial has been ordered (*see* AA1853). But a new trial on punitive damages would serve no purpose here because Leeper-Johnson cannot obtain at that new trial more than the Constitution allows. *See Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 214 (“[o]nce a maximum constitutional award has been determined ... a new trial on punitive damages would be futile”) (quoting *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1188); *see also Buell-Wilson*, 73 Cal.Rptr.3d at 318 (reducing punitive award to maximum constitutionally permissible amount). Accordingly, this Court should simply reduce the punitive award to the largest amount permitted by the Constitution—which, as we explain below, is no more than the amount of economic damages left standing after appeal.

The Supreme Court has made clear that punitive damages may not exceed the amount that is reasonably necessary to accomplish California's interests in retribution and deterrence. *BMW of N. Am. Inc. v. Gore* (1986)

517 U.S. at 568, 584; *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 22. In determining that amount, courts look to “three ‘guideposts’ articulated by the United States Supreme Court: (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.” *Gober*, 137 Cal.App.4th at 215 (internal quotation marks and citation omitted). Proper application of these guideposts establishes that the \$4 million figure selected by the superior court far exceeds the amount necessary to punish and deter and therefore remains unconstitutionally excessive.

A. The reprehensibility of Prudential’s conduct is “at the low end of the scale.”

The superior court expressly concluded that Prudential’s conduct sits “at the low end of the scale” of reprehensibility. RT4665. That assessment is clearly right. To begin with, none of the reprehensibility factors identified by the Supreme Court (*see State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419) are present here. Specifically, (i) Prudential’s tort did not cause Leeper-Johnson physical harm; (ii) the tort did not involve reckless disregard for health or safety; (iii) there is no evidence that Prudential knew that Leeper-Johnson was financially vulnerable, much less terminated her claim for that reason; (iv) the tort in this case was an “isolated incident”; and (v) the tort was not the product of “intentional malice.” To the contrary, there was substantial evidence that Prudential acted in good faith toward Leeper-Johnson despite its underlying disagreement with her (*see* page 43-44, *supra*).

Moreover, Leeper-Johnson’s own “unclean hands”—in particular, her surreptitious alteration of Dr. Rizkalla’s attending physician statement (*see* page 6 & note 4, *supra*) and her refusal to attend further IMEs—mitigate the

reprehensibility of Prudential's conduct. *See, e.g., White v. Ford Motor Co.* (9th Cir. 2007) 500 F.3d 963 (reprehensibility should be assessed in relation to the conduct and actions of others, not merely by looking at defendant's conduct in the abstract); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.* (3d Cir. 1999) 181 F.3d 446, 467 (suggesting that the plaintiff's own tortious activities weighed against a high punitive award); *Hoxsey v. Beaird* (W.D. Okla. 1968) 287 F. Supp. 416, 419-20 (declining to award punitive damages to plaintiffs because of their unclean hands); *Ezzone v. Riccardi* (Iowa 1994) 525 N.W.2d 388, 399 (concluding that defendants' conduct was the result of provocation by plaintiffs, including affirmative misrepresentations, and reducing punitive award by over 90 percent); *Day v. Hill* (Ohio Ct. App. 1993) 1993 WL 186646 (trial court properly rejected plaintiff's claim for punitive damages because of, inter alia, the plaintiff's unclean hands).

B. The maximum permissible ratio is one times the economic damages left standing after appeal.

In *State Farm*, the Supreme Court “addressed [the ratio] guidepost with markedly greater emphasis and more constraining language” than it had in previous cases, “tighten[ing] the noose” that it previously had thrown around the problem of excessive punitive awards. *Simon*, 35 Cal.4th at 1181 (citing *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408). Specifically, the Court reiterated its prior statement that a punitive award of four times compensatory damages is usually “close to the line of constitutional impropriety” and indicated that the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is “instructive,” even if “not binding.” 538 U.S. at 425. More important for present purposes, however, *State Farm* “emphasizes and supplements” *BMW* “by holding 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.” *Bains LLC v. ARCO Prods. Co.* (9th Cir. 2005) 405 F.3d 764, 776 (quoting *State Farm*, 538 U.S. at 425).

To be sure, these principles do not establish a rigid mathematical formula for calculating punitive damages, but instead create a framework under which the maximum permissible ratio depends principally on two variables: the degree of reprehensibility of the conduct and the amount of the compensatory damages. The lower on the reprehensibility spectrum the conduct falls, the lower the constitutionally permissible ratio. And as the size of the compensatory damages increases, the constitutionally permissible ratio decreases.

California courts, including this Court, have routinely applied this sliding-scale approach. For example, in one recent case, the defendants—two aircraft brokerages and two individuals who worked for the brokerages—defrauded the plaintiff by misrepresenting the negotiated prices of aircraft acquired for the plaintiff and pocketing the difference. *Jet Source Charter, Inc. v. Doherty* (2007) 148 Cal.App.4th 1, 4-7. The jury awarded the plaintiff approximately \$6.5 million in compensatory damages plus pre-judgment interest and a total of \$26.6 million in punitive damages. *Id.* at 11.

This Court observed that “the defendants’ fraudulent scheme, repeated over a number of transactions, ‘merits no praise.’” *Id.* at 11. It also noted that the compensatory damages were “substantial” but, “unlike the emotional distress damages awarded in *Campbell*, it is difficult to ascribe to this compensatory award a very large punitive element” because the compensatory damages were entirely “restitution to Jet Source for funds which had been improperly taken from it.” *Id.* Nevertheless, the Court held that a punitive award of “four times the compensatory damages, is excessive viewed in light of the principles set forth in *Campbell*” and remanded with instructions to reduce the total punitive award to no more than a 1:1 ratio. *Id.*

The Second District recently embraced the same outcome. *See Walker v. Farmers Ins. Exch.* (2007) 153 Cal.App.4th 965. In *Walker*, the trial court ordered a remittitur of the punitive award against an insurer from \$8.3 million to \$1.5 million, reflecting a 1:1 ratio to the compensatory damages. *Id.* at 973. The Court of Appeal affirmed. It agreed that “the compensatory damages in this case are substantial,” emphasizing that the plaintiffs had “recovered all of their economic damages, as well as attorney fees generated by their case” and “\$750,000 for emotional distress,” which amounted to “quite a handsome recovery.” *Id.* at 974. It also accepted the trial court’s assessment that the defendant’s conduct fell on the low end of the reprehensibility spectrum and, accordingly, that the punitive award could not constitutionally exceed the amount of the compensatory damages. *Id.* at 974-75.

The U.S. Court of Appeals for the Eighth Circuit also found a 1:1 ratio to be the constitutional maximum in a case in which the plaintiff, a victim of the defendant’s racial harassment, was awarded \$600,000 in compensatory damages and over \$6,000,000 in punitive damages. *Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790. The defendants’ conduct in *Williams* was despicable: The plaintiff’s supervisor “regularly swore at him and berated him in front of other employees” and “treated [the plaintiff] and other black employees with special scorn”; the supervisor and other employees “regularly used racially demeaning language around [the plaintiff]”; “there was a pervasive practice of using a double standard for evaluating and disciplining white and black employees”; “white managers were extended privileges, like travel at company expense, unavailable to black employees”; and “black employees were given shorter breaks than white employees.” *Id.* at 795, 798. Nevertheless, the Eighth Circuit held that a 1:1 ratio was the most that was permitted under *State Farm*, explaining:

[The plaintiff's] large compensatory award ... militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated 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." [The plaintiff] received \$600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on [his] harassment claim be remitted to \$600,000.

Id. at 799 (citation omitted).

The Eighth Circuit again drew the line at 1:1 in *Boerner v. Brown & Williamson Tobacco Co.* (8th Cir. 2005) 394 F.3d 594, even while concluding that the defendant's conduct "was highly reprehensible":

[T]he sale of this defective product occurred repeatedly over the course of many years despite [the defendant's] knowledge that the product was dangerous to the user's health; and [the defendant] actively misled consumers about the health risks associated with smoking. Moreover, the reprehensible conduct was shown to relate directly to the harm suffered by [the plaintiff]: a most painful, lingering death following extensive surgery.

Id. at 602-03. Despite that severe assessment of the defendant's conduct, the court held that "a ratio of approximately 1:1 would comport with the requirements of due process" because of the substantial compensatory award and because "[f]actors that justify a higher ratio, such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages,' are absent here." *Id.* at 603 (quoting *BMW*, 517 U.S. at 582) (second alteration in original).

Other cases drawing the line at 1:1 or lower include *Bach v. First Union Nat'l Bank* (6th Cir. 2007) 486 F.3d 150 (reducing 5.6:1 ratio to 1:1 where compensatory damages were \$400,000 and the defendant's actions were "blameworthy" but not so egregious as to warrant a departure from *State*

Farm's rule); *Zakre v. Norddeutsche Landesbank Girozentrale* (S.D.N.Y. Feb. 8, 2008) 2008 WL 351662, at *9 (reducing punitive award from \$2.5 million to \$600,000 where compensatory damages were “roughly \$1.5 million”); *Thomas v. iStar Fin., Inc.* (S.D.N.Y. 2007) 508 F.Supp.2d 252, 263 (reducing \$1.6 million punitive award to \$190,000, because the plaintiff “was awarded a very substantial amount in compensatory damages, making a punitive award equal to the compensatory damage award more appropriate”); *Casumpang v. Int’l Longshore & Warehouse Union* (D. Haw. 2005) 411 F.Supp.2d 1201, 1219-21 (reducing ratio from 4.2:1 to 1:1 where compensatory damages were \$240,000 and conduct entailed “a moderate degree of reprehensibility”); *Watson v. E.S. Sutton, Inc.* (S.D.N.Y. Sept. 6, 2005) 2005 WL 2170659, at *19 (suggesting that 1:1 was the constitutional maximum in employment discrimination case where compensatory damages were \$1,554,000, but ordering a remittitur to less than half of the compensatory damages under Fed. R. Civ. P. 59); *Maskantz v. Hayes* (Apr. 3, 2007) 2007 N.Y. App. Div. LEXIS 4136 (reducing \$100,000 punitive award to \$10,000, a 1:1 ratio); and *Roth v. Farner-Bocken Co.* (S.D. 2003) 667 N.W.2d 651, 671 (deeming punitive award that was 20 times the compensatory damages to be excessive and explaining that “where there was a substantial compensatory damage award [of \$25,000] containing a punitive element [in the form of emotional distress damages] which fully compensated [plaintiff] for the harm caused, we find ‘a punitive damages award at or near the amount of compensatory damages’ is justified”) (quoting *State Farm*, 538 U.S. at 429).

These cases are compelling here. Even if this Court reduces Leeper-Johnson’s compensatory award, that award will continue to be “substantial” and “complete compensation” for Leeper-Johnson’s alleged injuries. And, as the superior court found, Prudential’s disagreement with Leeper-Johnson over

her entitlement to benefits under the policy falls at the low end of the reprehensibility spectrum; it is not in the same league as racially harassing a subordinate, fraudulently concealing the health risks of a potentially deadly product, or intentionally and repeatedly deceiving and stealing from someone to whom the defendant owes a fiduciary duty. Accordingly, if 1:1 was the highest constitutionally permissible ratio for the conduct in *Williams*, *Boerner*, *Jet Source*, and *Walker*, then 1:1 *exceeds* the highest constitutionally permissible ratio here.

That is all the more so because Leeper-Johnson's compensatory award contains a significant amount for emotional distress. In *State Farm*, the Supreme Court recognized that compensatory damages have a deterrent effect in their own right, admonishing that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419; *see also Memphis Cmty. Sch. Dist. v. Stachura* (1986) 477 U.S. 299, 307 ("[d]eterrence ... operates through the mechanism of damages that are *compensatory*") (emphasis in original). And when those compensatory damages include a large amount for non-economic harms, "there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both." *Id.* at 426 (quoting Restatement (Second) of Torts § 908, cmt. c (1977)); *see also Simon*, 35 Cal.4th at 1182 ("when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.'"); *Walker*, 153 Cal.App.4th at 974 (compensatory award that included \$750,000 for emotional distress had a punitive element). Here, Leeper-Johnson has been awarded an enormous amount—\$500,000—for non-

economic harms. Even if that award is appropriately reduced, there can be no question that her compensatory award contains a significant punitive element.

Furthermore, assuming that Leeper-Johnson ultimately receives some amount of attorneys' fees (*but see* Part IX, *infra*), that is another reason to conclude that even a 1:1 ratio would exceed the constitutional maximum. Because attorneys' fees "include[] a certain punitive element" (*Parrish v. Sollecito* (S.D.N.Y. 2003) 280 F.Supp.2d 145, 164), a plaintiff who receives a substantial award of attorneys' fees should receive "a lesser rather than greater award of punitive damages" (*Daka, Inc. v. McCrae* (D.C. 2003) 839 A.2d 682, 701 n.24). *See also Pichler v. UNITE* (E.D. Pa. 2006) 457 F.Supp.2d 524, 532 (denying request for punitive damages because defendant "will be amply punished" by large compensatory award and attorneys' fees).

For all of these reasons, the second guidepost compels the conclusion that Leeper-Johnson's punitive award—if it is allowed to stand at all—should be reduced to no more than the amount of economic damages left standing after appeal.

C. The punitive award endorsed by the superior court is far out of line with legislatively established fines.

The third guidepost requires a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *BMW*, 517 U.S. at 583. In this case, the California legislature has fixed the maximum civil penalty for a *willful* violation of the Insurance Code (which Prudential's conduct surely is not) at \$10,000. *See* Cal. Ins. Code § 790.035(a). Accordingly, this factor also militates in favor of a punitive award no larger than the amount of economic damages, which, even if reduced pursuant to the arguments presented above, will exceed that legislatively established fine by orders of magnitude.

IX. The Award Of Attorneys' Fees Is Unsustainable.

Over Prudential's objection, the superior court awarded Leeper-Johnson \$548,408.84 in attorneys' fees. AA1933-34. Of course, if this Court orders either entry of judgment for Prudential or a new trial on the bad-faith claim, the award of attorneys' fees would have to be vacated. But even if the bad-faith judgment were affirmed, the award of attorneys' fees suffers from multiple flaws necessitating its reversal.

A. Any fee award must be limited to fees incurred to secure the policy benefits.

Although "California adheres to the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees," it has recognized "a limited exception to that rule" for insurance bad-faith cases. *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 811. Specifically, an insured who has proved bad faith may recover damages for "*the insured's cost* to hire an attorney to vindicate the insured's legal rights under the insurance policy." *Id.* at 806. "The attorney's fees are an economic loss—damages—proximately caused by the tort" and "must be distinguished from recovery of attorney's fees *qua* attorney's fees." *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817 (emphasis added). Accordingly, just as with any other type of tort damages, "the plaintiff bears the burden of proving by a preponderance of the evidence *both the existence and the amount* of damages proximately caused by the defendant's tortious actions or omissions." *Cassim*, 33 Cal.4th at 813 (emphasis added).

The Supreme Court has made clear that "[f]ees attributable to obtaining any portion of the plaintiff's award which exceeds the amount due under the policy are not recoverable." *Brandt*, 37 Cal.3d at 819. In other words, fees incurred proving a bad-faith claim and pursuing emotional-distress damages,

future benefits, and punitive damages are not compensable. *Cassim*, 33 Cal.4th at 811-12.

In a mixed contract/tort case, the trier of fact must “determine the percentage of the legal fees paid to the attorney that reflects the work attributable to obtaining the contract recovery.” *Id.* at 812. “[I]n most cases the amount [of such fees] will be far less” than “the legal fees for the combined tort and contract recovery.” *Id.* (emphasis added).

To ascertain the appropriate *Brandt* fee,

the trial court should determine the total number of hours an attorney spent on the case and then determine how many hours were spent working exclusively on the contract recovery. Hours spent working on issues jointly related to both the tort and contract should be apportioned, with some hours assigned to the contract and some to the tort. This latter figure, added to the hours spent on the contract alone, when divided by the total number of hours worked, should provide the appropriate percentage.

Id. When, as here, the attorneys have worked on a contingency-fee basis, the plaintiff is entitled to recover this “appropriate percentage” of the contingent fee applicable to the entire compensatory award (*i.e.*, the product of the “appropriate percentage,” the compensatory damages, and the contingent-fee percentage). *Id.*

B. Leeper-Johnson failed to carry her burden of proof.

In order to apply the *Cassim* formula, a plaintiff must first prove “the existence and the amount of damages proximately caused by the defendant’s acts or omissions”—in other words, how much she has paid (or is committed to paying) her attorneys. *Cassim*, 33 Cal.4th at 813. Here, Leeper-Johnson failed to prove either the existence or the amount of her attorneys’ fees because she refused to disclose her fee arrangements.

When Leeper-Johnson submitted a motion for *Brandt* fees without any mention—let alone proof—of the amount of fees she actually had paid (or

would pay) her attorneys, Prudential asked her counsel to produce Leeper-Johnson’s fee arrangement. AA1884, 1888. Counsel instead submitted a declaration asserting that Leeper-Johnson “signed two attorney retainer agreements with [his] law firm.” AA1871 at ¶ 4. The first—which covered Prudential’s internal appeal process—“was on an hourly fee basis at [the] firm’s customary attorney fee rates.” *Id.* The second, signed in August 2003 in anticipation of litigation, was “pertaining to the bad faith claims” and “on a contingent fee basis.” *Id.* at ¶ 5. But counsel did not attach either fee agreement and did not even disclose the contingent-fee percentage or the hourly fees actually paid by Leeper-Johnson pursuant to the first agreement. In other words, he did not produce any evidence of the actual fees that Leeper-Johnson had paid or was obligated to pay.

Prudential argued both in its briefs and at the hearing that it would be impossible to determine the *Brandt* fee without knowing the details of the fee agreements (AA1314-18, 1879-82; RT4795-96), but Leeper-Johnson still failed to produce them (RT4797-98). Nevertheless, the superior court awarded Leeper-Johnson a *Brandt* fee of \$548,408.84. AA1933-34. It derived that figure from “Billing Statements” submitted by Leeper-Johnson’s attorneys, which represented their personal valuation of the time they spent on the case. *See, e.g.*, AA1865-69. But that valuation has nothing to do with the amount of fees that Leeper-Johnson actually has paid or is obligated to pay her attorneys.²¹

²¹ The superior court’s award almost certainly violates *Cassim*’s rule that “*Brandt* fees can never exceed the legal fees for the combined tort and contract recovery.” 33 Cal.4th at 812. If Leeper-Johnson agreed to pay her attorneys a 33 1/3 percent contingent fee on her entire contract and tort recovery, then her actual attorneys’ fees for the contract and tort claim will be \$489,087 (((\$267,082 + \$315,000 + \$400,000 + \$500,000) * 0.33)—assuming (con’t)

Because she refused to disclose her fee arrangements, Leeper-Johnson failed to offer any evidence of her “cost to hire an attorney to vindicate [her] legal rights under the insurance policy” (*Cassim*, 33 Cal.4th at 806). Having twice failed to carry her burden of proving the amount of harm she suffered (or will suffer) in the form of attorneys’ fees, she is not entitled to a third bite at the apple; judgment should be entered for Prudential on this issue.

C. The superior court disregarded the applicable law.

Reversal of the attorneys’ fee award is required for the independent reason that the superior court deviated from the Supreme Court’s prescribed methodology in two critical respects. The significance of these deviations is clear from the result. In awarding Leeper-Johnson well over half of the attorneys’ fees reflected on her counsel’s Billing Statements, the superior court disregarded the Supreme Court’s categorical admonition that “[p]ermitting plaintiffs ..., in a mixed contract/tort case, to recover the majority of their attorney fees attributable to the entire compensatory damages award ... is inconsistent with the premise of our decision in *Brandt*.” *Cassim*, 33 Cal.4th at 811 (citation omitted). That is reason enough to reverse the fee award.

1 The superior court improperly allowed Leeper-Johnson to conceal her contingent-fee agreement.

It was clear error under *Cassim* for the superior court to calculate the *Brandt* fee without considering Leeper-Johnson’s contingent-fee arrangement. After explaining “the proper method of calculating [a *Brandt* award] *in a contingent fee context*” (33 Cal.4th at 811 (emphasis added)), the *Cassim*

that her entire compensatory award is affirmed. Accordingly, her *Brandt* fee could “never exceed” that amount, even if every single hour of her attorneys’ work were attributable only to her contract claim. *See Cassim*, 33 Cal.4th at 812.

Court set forth the following numerical example, which makes the contingent-fee percentage a central element in the equation:

Suppose the compensatory damages are \$3,594,000. *Suppose further that the attorney and the client have a 40 percent contingent fee agreement.* The total legal fee for the compensatory award is thus 40 percent of \$3,594,000, or \$1,437,600. Now suppose counsel spent 1,500 hours on the case, and can prove this breakdown: 200 hours on issues related solely to the contract, 500 hours on issues relevant to both the contract and the tort, and 800 hours on issues related solely to the tort. The trial court could reasonably conclude that half the hours spent on the joint contract/tort issues are fairly attributable to the contract (i.e., half of 500 hours, or 250 hours), and thus 30 percent of the hours worked (200 hours plus 250 hours, divided by 1,500 total hours) is attributable to the contract recovery. Thirty percent of the total fee (30 percent times \$1,437,600) is \$431,280. *This is the amount a trial court should award as Brandt fees in this hypothetical situation.*

Id. (emphasis added).

In short, the superior court clearly erred in allowing Leeper-Johnson to keep her contingent-fee agreement secret. At minimum, the court's error necessitates a new fee proceeding.

2 The superior court uncritically accepted (to the minute) Leeper-Johnson's allocation of her attorneys' time.

In support of her motion for attorneys' fees, Leeper-Johnson submitted "Billing Statements" that purported to identify all time devoted to the case with the exception of time devoted solely to pursuing punitive damages. *See* AA1295, 1306-07. Originally, she argued that every minute on the statements should be compensable. *See* AA1295. She accordingly sought \$783,138 in fees. *Id.* When the superior court pointed out that such a request was irreconcilable with *Brandt* and gave Leeper-Johnson a second chance to apportion fees between the contract and bad-faith claims (RT4665-68), she responded by contending that only \$19,531 of the time was solely attributable

to the bad-faith claims and that 52 percent of the time was jointly attributable to both claims. AA1860.

In response to both the original submission and the supposed apportionment, Prudential introduced detailed evidence showing that Leeper-Johnson had grossly overstated the time attributable to the contract claim and grossly understated the time that was not fairly attributable to that claim. Yet in calculating the fee award, the superior court accepted Leeper-Johnson's characterization of literally hundreds of time entries *without reapportioning even one*. Compare AA1860 with AA1930-31. In so completely abdicating its role as factfinder, the superior court committed reversible error. To take just a few examples:

Leeper-Johnson included in the time attributable to her contract claim hundreds of hours incurred in litigating a fraud claim against a completely independent defendant, Dr. Greenberger. See AA1886 at ¶ 8(f); AA1919-32 at ¶¶ 3, n.1, 19-27, 29, 31, 34, 36, 39, 40. Indeed, Leeper-Johnson admitted that she was including time spent pursuing her failed claim against Dr. Greenberger on the theory that Dr. Greenberger had raised some of the same defenses as Prudential. RT4804. That is beside the point, however, as counsel's effort to pursue *tort* damages against Dr. Greenberger as an individual cannot be "attributable to [Leeper-Johnson's] efforts to obtain the rejected payment due on the insurance contract" (*Cassim*, 33 Cal.4th. at 813).

Leeper-Johnson allocated to her breach-of-contract claim (or to both claims combined) dozens of hours incurred in working with her bad-faith expert. See AA1886 at ¶ 8(e); AA1919-32 at ¶¶ 3 n.1, 43, 47, 48. Again, Leeper-Johnson admitted this, but defended her categorization on the ground that one of the points made by her expert was relevant to rebut one of Prudential's alleged positions on the contract. RT4803. Setting aside the fact that Prudential did not actually contend that "the only proof of disability

allowed is Prudential's own in-house experts" (*id.*), the position that the bad-faith expert supposedly was needed to rebut, this rationale would justify, at most, allocating only a very small portion of her attorneys' time working with the bad-faith expert to the joint tort/contract category.

The same is true of Leeper-Johnson's allocation of the time spent deposing Prudential's top executives. The purpose of these depositions was to try—unsuccessfully—to develop some evidence of a scheme of corporate wrongdoing. These high-level executives knew nothing about the handling of Leeper-Johnson's claim and hence were not relevant to the breach-of-contract claim. Yet here again, the superior court accepted Leeper-Johnson's allocation to the minute. That failure to look behind Leeper-Johnson's allocation is particularly inexplicable given the Supreme Court's statement in *Cassim* that time spent pursuing "the reason" why claim personnel acted in the way they did is "relevant only to the bad faith cause of action." 33 Cal.4th at 811.

These are but the most obvious examples of time that the superior court should have excluded from the hours attributable to the contract claim. In uncritically accepting Leeper-Johnson's allocation, while ignoring entirely Prudential's well-supported showing of flaws in that allocation, the superior court committed reversible error.

CONCLUSION

The Court should enter judgment for Prudential on all issues. Alternatively, the Court should order a new trial on all issues and direct the superior court to enforce the agreement between the parties, including restrictions and limitations on Leeper-Johnson's coverage. In any event, the Court should enter judgment for Prudential with respect to benefits that accrued after Leeper-Johnson refused to attend future IMEs.

If the Court does not enter judgment for Prudential on all issues, it should enter judgment on the bad-faith claim (whether or not it remands for a new trial on the contract claim). Failing that, if the Court does not remand for a new trial, it should excise the unsupported \$315,000 award for “past economic loss” and substantially reduce the non-economic damages.

Regardless of the result with respect to the other claims, judgment should be entered for Prudential on the punitive verdict. At the very least, the Court should reduce the punitive award to no more than the amount of economic damages left standing after appeal.

Finally, the Court should reverse the award of attorneys’ fees or remand with instructions to calculate an award that complies with binding precedent.

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c), I certify that this Appellant's Brief is proportionally spaced, had a typeface of 13 points, and contains 18,279 words as calculated by the word processing software used to prepare it, exclusive of the materials excluded under Rule 8.204(c)(3). This is within the limit of 18,605 words granted by this Court's Order filed on April 11, 2008.

Dated: April 16, 2008

By: _____

Evan M. Tager

PROOF OF SERVICE

I, Michael S. Passaportis, declare that: I am employed in Washington DC. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1909 K Street, NW, Washington DC 20006-1101. On April 8, 2008, I served a copy of the within document(s):

APPELLANT’S BRIEF

by placing the documents listed above in a sealed overnight delivery box, affixing a pre-paid air bill, and causing the box to be delivered to a overnight delivery agent for delivery to the attorneys for respondent at these addresses:

John M. Morris
Higgs Fletcher & Mack
401 West A Street, Suite 2600
San Diego, CA 92101

Sean Simpson & Charles Moore
Simpson & Moore, LLP
550 West C St., Suite 1400
San Diego, CA 92010

In addition, four copies of Appellant’s Brief were placed in a sealed overnight delivery box, affixing a pre-paid air bill, and delivered to an overnight delivery agent for delivery to the California Supreme Court, and one copy for delivery to the Superior Court in this matter by the same means, as required by California Rule of Court 8.212(c), at the addresses set forth below:

Hon. Eddie C. Sturgeon
Superior Court for the State of California
County of San Diego
250 East Main St., Department 14
El Cajon, CA 92020

Office of the Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

I am readily familiar with the firm’s practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the overnight delivery agent on that same day with postage thereon fully prepaid in the ordinary course of business. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on April 16, 2008 at Washington DC, by _____
Michael S. Passaportis