COURT OF APPEAL - 4TH DIST DIV 3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL W. FITZGIBBONS, Plaintiff and Appellant, v. INTEGRATED HEALTHCARE HOLDINGS, INC., Defendant and Respondent.	G048413 (Super. Ct. No. 30-2008-00108081) O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County, Gregory H. Lewis, Judge. Reversed.

The Mathews Law Group, Charles T. Mathews, George S. Azadian, Zack I. Domb, Jeffrey S. Nakao and Devin E. Rauchwerger for Plaintiff and Appellant.

Francisco J. Silva and Long X. Do for California Medical Association as Amicus Curiae on behalf of Plaintiff and Appellant.

Enterprise Counsel Group, David A. Robinson, James S. Azadian, Ryan S. Killian and Ted T. Davis for Defendant and Respondent.

* * *

Plaintiff and appellant Michael W. Fitzgibbons appeals a judgment entered after the trial court granted defendant and respondent Integrated Healthcare Holdings, Inc. (IHHI) judgment notwithstanding the verdict, and also appeals the trial court's order granting IHHI's alternative new trial motion. The trial court's decision overturned a jury's verdict awarding Fitzgibbons $5.7 million in compensatory and punitive damages on his intentional infliction of emotional distress claim against IHHI. The jury impliedly found IHHI's chief executive officer (CEO) carried out his threat to "humble" Fitzgibbons by having him arrested after arranging for a loaded handgun to be planted in his car. The jury also impliedly found the CEO caused Fitzgibbons's daughter to be in a serious auto accident after one of her tires was slashed. The CEO retaliated against Fitzgibbons to punish him for his outspoken opposition to IHHI's acquisition of the hospital where Fitzgibbons had just completed a term as chief of staff, and also Fitzgibbons's success in an earlier lawsuit that resulted in a $150,000 attorneys fee award against IHHI.

The trial court granted IHHI judgment notwithstanding the verdict because it found IHHI was not vicariously liable for its CEO's misconduct under the respondeat superior doctrine. According to the trial court, the CEO acted outside the scope of his employment because he held a personal grudge against Fitzgibbons and therefore his conduct was not reasonably foreseeable. We reverse and reinstate the jury's verdict because foreseeability of the conduct is not the exclusive test for determining the employer's vicarious liability for an employee's torts. An employee also acts within the scope of employment when his or her tort is engendered by or arises from a dispute that relates to the employer's business. Substantial evidence supports the jury's implied finding the CEO retaliated against Fitzgibbons based on a dispute relating to IHHI's acquisition and operation of the hospital, and the trial court's finding the CEO acted out

of a personal grudge impermissibly supplants the jury's determination on the weight and credibility of the evidence.

The trial court granted IHHI's alternative new trial motion on three grounds: (1) the jury's damage award was excessive; (2) the evidence was insufficient to support the jury's vicarious liability finding; and (3) the jury engaged in misconduct by using a quotient verdict to determine the amount of compensatory damages. We reverse the trial court's order on the first two grounds because the court failed to adequately specify its reasons for granting the new trial motion. The court's conclusory reasons and failure to identify the evidence requiring a verdict for IHHI prevents meaningful appellate review. On the third ground, the record lacks substantial evidence to support the trial court's finding the jury returned a quotient verdict. Although IHHI submitted a juror declaration claiming the jury returned a verdict based on the average of each juror's damages figure, that same juror also submitted a supplemental declaration stating he did not remember whether the jury conducted a second vote after calculating the average figure. IHHI's juror declaration therefore does not constitute substantial evidence. Moreover, the declarations of other jurors showed the jury did not impermissibly calculate the damages award.

I

FACTS AND PROCEDURAL HISTORY

Western Medical Center-Santa Ana (Western Med) is a hospital located in Santa Ana, California, that chiefly serves low-income and uninsured patients in central Orange County. Fitzgibbons, a physician and board certified infectious disease specialist, began working at Western Med in 1982, and served as its chief of staff from 2002 to 2004.

In 2004, Western Med's owner, Tenet Healthcare Corp. (Tenet), placed Western Med and three other Orange County hospitals up for sale. Bruce Mogel, Larry

Anderson, and James Ligon formed IHHI as a holding company to purchase these four hospitals. Mogel was IHHI's chief executive officer, Anderson was IHHI's president, and Ligon was IHHI's chief financial officer.

Fitzgibbons and other physicians opposed IHHI's efforts to purchase Western Med because they believed IHHI would jeopardize patient safety because it lacked the financial resources to operate the hospital properly. Fitzgibbons organized protests of IHHI's proposed purchase and also formed a competing doctor-investor group, Western Medical Center Acquisition, LLC, to purchase Western Med. Fitzgibbons's efforts ultimately proved unsuccessful and IHHI acquired Western Med and Tenet's other three hospitals in March 2005.

After the sale, Fitzgibbons continued to voice his concerns regarding IHHI's financial ability to operate Western Med. He succeeded in convincing a state senator to conduct public hearings on IHHI's acquisition and the quality of health care at Western Med. These hearings resulted in an agreement among IHHI, Fitzgibbons, and others regarding efforts to maintain the quality of health care at Western Med. Fitzgibbons and other members of Western Med's staff also agreed to publicly support IHHI's acquisition and operation of the hospital.

In May 2005, IHHI received a default notice on one of the loans it obtained to purchase Western Med. Fitzgibbons sent an e-mail to some of Western Med's officers and medical staff alerting them to the notice and noted Western Med's admissions had significantly decreased. A few weeks later, IHHI sued Fitzgibbons for defamation, breach of contract, intentional interference with contract, and other business torts. IHHI alleged Fitzgibbons's e-mail caused an insurance company to terminate its renegotiation of the rates the company used to pay Western Med for treating the company's insureds.

Fitzgibbons filed a motion to strike IHHI's complaint as a strategic lawsuit against public participation (SLAPP), but the trial court denied the motion and Fitzgibbons appealed. In mid-June 2006, this court reversed that decision (*Integrated*

Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal.App.4th 515), and IHHI was ordered to pay Fitzgibbons $150,000 to cover his attorneys fees in defending against IHHI's lawsuit.

Anderson testified he and Mogel discussed our opinion dismissing IHHI's lawsuit and how IHHI was going to pay Fitzgibbons's attorneys fees. Mogel was upset about the decision and declared he was going to "humble" Fitzgibbons. Anderson did not ask what Mogel meant, and Mogel did not offer any details. But during this same time period, Anderson testified the two men had other private conversations in which Mogel said he "could have [things] done to people he was displeased with."

For example, Mogel told Anderson he knew Mikey Delgado, an individual who lifted a lot of weights and was "a very strong, physically powerful person." Mogel explained to Anderson that "[Delgado] lives in the shadows of the law, . . . [and] has some legitimate businesses, [and] some businesses that are not so legitimate." According to Mogel, Delgado had some senior officers at the Santa Ana Police Department "'"on his payroll"'" or in his "pocket."

Mogel also told Anderson he knew people who would kidnap the wife or daughter of another person with whom they had an ongoing business dispute. Mogel described how these same people could take the person "'"into a bathroom, strip him down, hold a knife to his penis. They won't cut it off. They won't hurt him at all, but they will make him crap his pants."'" After this comment, Anderson testified he stopped Mogel and warned him, "'"you know you can't do anything like that, you're talking ridiculous."'" Anderson testified he did not take Mogel's comments seriously because Mogel liked to make comments for their effect.

According to Anderson, after their conversations about Fitzgibbons, Mogel's "whole personality seemed to change." Mogel pulled up a Web site on his computer for a company called Form Labs, explaining, "'"this is [Delgado's] company."'" Mogel then told Anderson to prepare a $10,000 contract for Form Labs to

consult with the company IHHI already had hired to develop its Web site. Although Anderson questioned the need for additional help with the Web site, he prepared the contract because Mogel was his boss. Anderson completed the contract and forwarded it to Mogel a few weeks later when Mogel again asked for it. The contract was signed and dated July 10, 2006.

In late June 2006, several days after Mogel's foregoing conversations with Anderson, Fitzgibbons was having lunch in the Western Med cafeteria when two Santa Ana police officers approached him. They explained two anonymous 911 phone calls reported a man matching Fitzgibbons's description had just brandished a firearm at another driver in a road rage incident. The callers provided the license plate for Fitzgibbons's car and claimed they followed the car to the Western Med parking lot. The officers patted down Fitzgibbons for weapons and asked him to show them his car in the hospital parking lot.

Fitzgibbons gave the officers permission to search his car and they found a loaded, semi-automatic handgun and a pair of gloves under the driver's seat. The officers immediately handcuffed Fitzgibbons and arrested him for possessing a handgun, carrying a concealed weapon, and brandishing a firearm. As the officers continued to search Fitzgibbons's car, a crowd of his colleagues began to gather. Fitzgibbons protested that he was being framed by IHHI because he had just defeated it in court and he did not own a gun. No other illegal items were found in the car.

The police transported Fitzgibbons to the Santa Ana jail, where they shackled his legs, strip searched him, including a check between the checks of his buttocks, dressed him in a jail uniform, and placed him in a cell reeking of vomit. Fitzgibbons was released a few hours later, and he was never charged with any crime because laboratory tests showed "[i]nsufficient DNA for typing" on the handgun and "excluded [Fitzgibbons] as a [DNA] contributor" for the gloves. When Fitzgibbons

retrieved his car from the police impound, he found a plastic bag containing pills that was not in his car when he arrived at the hospital on the day of his arrest.

Mogel was out of town on vacation when Fitzgibbons was arrested. When he returned the next week, he stopped by Anderson's office. Anderson told Mogel, "'Well you picked a great time to be gone. All chaos broke loose here.'" In response, Mogel walked over to the office window, looked out over the employee parking lot where Fitzgibbons had been arrested, and said, "'people don't know how powerful I am.'" After this comment, it occurred to Anderson that Mogel may have been involved in Fitzgibbons's arrest. Anderson grew concerned for his own safety, but at the time he did not share his concerns with anyone.

In late July 2006, less than a month after Fitzgibbons's arrest, his daughter was involved in a serious car accident on the freeway when one of her tires blew out and her car flipped over. An inspection of the tire after the accident revealed a slash in the blown out tire that was more than an inch long. When Fitzgibbons wife heard about the accident, she immediately left the family home to help their daughter, but found one of her tires was flat.

In December 2007, Anderson left IHHI amid a series of lawsuits over control of IHHI and compensation owed to him. When IHHI's board asked Anderson if he wanted to disclose anything about his tenure with the company, Anderson did not mention Mogel's threat to humble Fitzgibbons or the people Mogel knew that could help with people that "displeased" Mogel. Similarly, Anderson did not mention his concerns for his own safety or his suspicions that Mogel may have been involved in Fitzgibbons's arrest. In June 2008, however, Anderson decided to disclose this information during the litigation over control of IHHI.

Anderson's disclosure prompted IHHI to hire independent counsel to investigate Mogel's actions. The investigation confirmed that IHHI had entered into a contract with Form Labs and paid the company $10,000, but could not confirm IHHI

received any services for the payment, Delgado was associated with Form Labs, or that Delgado even existed. IHHI uncovered a company called Form Labs, but the owner refused to cooperate with IHHI's investigation. Similarly, Mogel would not cooperate with the investigation after he hired an attorney. Although Mogel used IHHI's funds to pay for unidentified services, IHHI ultimately concluded Anderson's version of events lacked credibility. IHHI negotiated a severance package with Mogel to remove him as CEO, but hired him as a consultant.

Anderson's disclosure prompted Fitzgibbons to file this lawsuit against IHHI, asserting claims for malicious prosecution and intentional infliction of emotional distress.[1] Fitzgibbons alleged IHHI filed its earlier lawsuit against Fitzgibbons to retaliate for his opposition to IHHI's acquisition of Western Med and to discourage others from joining him. The complaint also alleged Mogel hired Delgado on IHHI's behalf to orchestrate Fitzgibbons's arrest, sabotage his daughter's car, which led to her accident, and slash his wife's tires, all of which were designed to intimidate Fitzgibbons and punish him for his successful opposition to IHHI's earlier lawsuit.

The trial court bifurcated the trial on Fitzgibbons's claims. In the first phase, the court conducted a bench trial on the malicious prosecution claim to determine whether IHHI had probable cause for pursuing its earlier action against Fitzgibbons. Finding IHHI had probable cause for its claims, the trial court granted IHHI judgment on Fitzgibbons's malicious prosecution claim.[2]

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[1] Fitzgibbons also alleged claims for intentional interference with prospective economic advantage and defamation. The trial court did not submit those claims to the jury and they are not at issue on this appeal.

[2] Fitzgibbons's opening brief challenges this ruling, but acknowledges we need not address the issue if we reverse the judgment notwithstanding the verdict and the new trial order. For the reasons explained below, we reverse the trial court's judgment and order, and therefore do not address Fitzgibbons's malicious prosecution claim.

In the second phase, the court conducted a jury trial on Fitzgibbons's claim IHHI was vicariously liable for Mogel's retaliatory acts that led to Fitzgibbons's severe emotional distress. During this phase, Fitzgibbons presented expert testimony by psychiatrist Michael Zona, M.D., who opined that Fitzgibbons suffered from posttraumatic stress disorder and lost his self-identity based on Mogel's and IHHI's conduct. Fitzgibbons, his family, and his friends also testified about the traumatic effect these events had on him. Not only was he initially embarrassed by his arrest, but the arrest and his daughter's accident lead to continuing distress about his well-being and the safety of his family. Fitzgibbons experienced depression, insomnia, and loss of appetite. He would wake up in the middle of the night screaming for help and crying, he experienced fainting spells and episodes of nausea and throwing up, and he felt as though he could not provide for and protect his family. IHHI did not present any expert testimony concerning Fitzgibbons's emotional distress.

The jury found Mogel acted within the scope of his employment when he retaliated against Fitzgibbons and awarded Fitzgibbons $5.2 million in compensatory damages and $500,000 in punitive damages. IHHI moved for judgment notwithstanding the verdict and, alternatively, a new trial. The trial court granted IHHI judgment notwithstanding the verdict, finding Mogel did not act within the course and scope of his employment because Mogel harbored a personal grudge against Fitzgibbons that had nothing to do with IHHI's business. The court also granted IHHI's alternative new trial motion, finding (1) the jury's damage award was excessive; (2) the evidence was insufficient to support the jury's finding IHHI was vicariously liable for Mogel's conduct; and (3) the jury engaged in misconduct by using a quotient verdict to decide the amount of Fitzgibbons's damages. The court entered judgment for IHHI, and this appeal followed.

II

DISCUSSION

A. *The Trial Court Erred In Granting IHHI Judgment Notwithstanding the Verdict*

1. Standard of Review for a Judgment Notwithstanding the Verdict

A motion for judgment notwithstanding the verdict acts as a demurrer to the evidence. (*Moore v. City & County of San Francisco* (1970) 5 Cal.App.3d 728, 734.) "The trial court may grant judgment notwithstanding the verdict only if the verdict is not supported by substantial evidence. The court may not weigh evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses. The court must deny the motion if there is any substantial evidence to support the verdict. [Citations.] This court therefore may uphold the order granting judgment notwithstanding the verdict, and affirm the judgment based thereon only if, reviewing all the evidence in the light most favorable to [the party who obtained the verdict], resolving all conflicts, and drawing all inferences in her favor, and deferring to the implicit credibility determinations of the trier of fact, there was no substantial evidence to support the jury's verdict in her favor. 'If the evidence is conflicting or if several reasonable inferences may be drawn,' the court erred in granting the motion and we must reverse. [Citation.]" (*Begnal v. Canfield Associates, Inc.* (2000) 78 Cal.App.4th 66, 72-73 (*Begnal*); see *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 877-878 (*Clemmer*).) "In other words, we apply the substantial evidence test to the jury verdict, ignoring the judgment." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 546, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

2. Governing Respondeat Superior Principles

Under the respondeat superior doctrine, an employer is vicariously liable for its employees' torts that are committed within the scope of the employment. (*Perry v.*

County of Fresno (2013) 215 Cal.App.4th 94, 101 (*Perry*).) "'"[T]he modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk."'" (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 94 (*Halliburton*).) "The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business. [Citations.]" (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 (*Bailey*).)

"In California, the scope of employment has been interpreted broadly under the respondeat superior doctrine." (*Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 (*Farmers*).) "An employee's willful, malicious and even criminal torts may fall within the scope of his or her employment, even though the employer did not authorize the employee to commit crimes or intentional torts." (*Perry*, *supra*, 215 Cal.App.4th at p. 101.) "[A]n employee's tortious act [also] may be within the scope of employment even if it contravenes an express company rule and confers no benefit to the employer." (*Farmers*, at p. 1004.)

An employer, however, is not strictly liable for its employees' torts. (*Farmers*, *supra*, 11 Cal.4th at pp. 1004-1005; *Perry*, *supra*, 215 Cal.App.4th at p. 101.) For respondeat superior liability to attach, a "causal nexus" must exist between the employee's tort and the employee's work. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 297 (*Lisa M.*); *Halliburton*, *supra*, 220 Cal.App.4th at p. 95; *Perry*, *supra*, 215 Cal.App.4th at p. 101; *Bailey*, *supra*, 48 Cal.App.4th at p. 1560.)

California courts have not identified a single governing standard for identifying this causal nexus, but instead use a variety of different tests to describe the necessary connection between the tort and the employee's work: (1) "the tort [must] be engendered by or arise from the work"; (2) "the incident leading to injury must be an 'outgrowth' of the employment"; (3) "the risk of tortious injury must be '"inherent in the working environment"' [citation] or '"typical of or broadly incidental to the enterprise

[the employer] has undertaken"'"; or (4) "the tort [must be], in a general way, foreseeable from the employee's duties." (*Lisa M., supra*, 12 Cal.4th at pp. 298-299; see *Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1521 (*Montague*); *Flores v. AutoZone West, Inc.* (2008) 161 Cal.App.4th 373, 380 (*Flores*).)

Some courts have distilled these various descriptions down to "a two-prong test to determine whether an employee's conduct was within the scope of his employment for purposes of respondeat superior liability, asking whether '"1) the act performed was either required or 'incident to his duties' [citation], or 2) the employee's misconduct could be reasonably foreseen by the employer in any event [citation]." [Citation.]' [Citation.]" (*Halliburton, supra*, 220 Cal.App.4th at p. 94; see *Montague, supra*, 223 Cal.App.4th at p. 1521; *Bailey, supra*, 48 Cal.App.4th at pp. 1559-1560; *Liu v. Republic of China* (9th Cir. 1989) 892 F.2d 1419, 1427 (*Liu*).) If the employee's conduct satisfies either prong, the employer is vicariously liable for the injury. (*Halliburton*, at p. 94; *Bailey*, at pp. 1559-1560.)

In applying this test, courts focus on the events and conditions that engendered or gave rise to the employee's tortious conduct, not the specific tortious act. (*Farmers, supra*, 11 Cal.4th at pp. 1005-1006.) If the tortious conduct was "engendered by events or conditions relating to the employment," the employee acted within the scope of his or her employment. (*Id*. at p. 1006.) "[W]here the misconduct does not arise from the conduct of the employer's enterprise but instead arises out of a personal dispute [citation] or is the result of a personal compulsion," the employee acts outside the scope of employment in committing the tort. (*Ibid*.; see *id*. at p. 1005 ["if the employee 'inflicts an injury out of personal malice, not engendered by the employment' [citation] or acts out of 'personal malice unconnected with the employment' [citation] or if the misconduct is not an 'outgrowth' of the employment [citation], the employee is not acting within the scope of employment"].)

"'Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when "the facts are undisputed and no conflicting inferences are possible."' [Citation.]" (*Lisa M.*, *supra*, 12 Cal.4th at p. 299; *Montague*, *supra*, 223 Cal.App.4th at p. 1521.)

3. Substantial Evidence Supported the Jury's Finding Mogel Acted Within the Scope of His Employment

Fitzgibbons contends the trial court erred in granting IHHI's motion for judgment notwithstanding the verdict because the court misapplied the governing legal standard for scope of employment and substantial evidence supports the jury's finding Mogel acted within the scope of his employment. We agree.

California courts consistently have found assaults and other intentional torts to fall within the scope of an employee's employment if they are committed in retaliation for or otherwise arise from a dispute relating to the employer's business or the employee's performance of duties for the employer. (See, e.g., *Fields v. Sanders* (1947) 29 Cal.2d 834, 835-836, 838-840 (*Fields*); *Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652, 654-657 (*Carr*); *Flores*, *supra*, 161 Cal.App.4th at pp. 380-383; *Caldwell v. Farley* (1955) 134 Cal.App.2d 84, 87-89 (*Caldwell*); *Pritchard v. Gilbert* (1951) 107 Cal.App.2d 1, 3-5 (*Pritchard*); *Stansell v. Safeway* (1941) 44 Cal.App.2d 822, 825-826 (*Stansell*); *Liu*, *supra*, 892 F.2d at pp. 1426-1428.) Accordingly, we apply well-established principles of the law on respondeat superior to the evidence in this record. These principles do not impose strict liability on employers for the acts of their employees; instead, they constitute an analytical framework to apply the law to the evidence.

For example, in *Caldwell*, the appellate court affirmed a judgment holding a labor union vicariously liable when one of its stewards assaulted the plaintiff over a dispute regarding the union's business. Members of the steward's union complained about the plaintiff's opposition to a contemplated labor strike. The steward confronted the plaintiff, and their disagreement over the strike escalated until the steward threatened

the plaintiff, and then hit him in the head with a piece of lumber. (*Caldwell*, *supra*, 134 Cal.App.2d at pp. 87-88.) The *Caldwell* court concluded the steward acted within the scope of employment because the assault arose out of their argument over the union's contemplated strike and the steward's responsibilities included addressing concerns about labor relations. The court explained "it is not conceivable" the steward acted in anything other than the scope of his employment because the only interaction between the two men related to the union's business. (*Id*. at pp. 88-89; see *Fields*, *supra*, 29 Cal.2d at pp. 835-836, 838-840 [truck driver acted within scope of employment when he beat another motorist with a wrench during dispute over truck driver's driving]; *Flores*, *supra*, 161 Cal.App.4th at pp. 380-383 [auto repair shop employee acted within scope of employment when he hit customer with metal pipe during dispute that arose while employee helped customer]; *Pritchard*, *supra*, 107 Cal.App.2d at pp. 3-5 [traveling salesman acted within scope of employment when he assaulted another motorist during dispute about near accident]; *Stansell*, *supra*, 44 Cal.App.2d at pp. 825-826 [market employee acted within scope of employment when he assaulted customer during dispute over customer's order].)

Similarly, in *Carr*, the Supreme Court overturned a directed verdict exonerating a general contractor from liability for injuries caused when its employee threw a hammer at a subcontractor's employee because the assault occurred during a dispute about the general contractor's business. (*Carr*, *supra*, 28 Cal.2d at pp. 653-654.) The *Carr* court concluded the general contractor's employee acted within the scope of employment because "[t]he evidence here presented indicates without conflict that the injury to plaintiff was an outgrowth of [the employee's] employment. Not only did the altercation leading to the injury arise solely over the performance of [the employee's] duties, but his entire association with plaintiff arose out of his employment on the building under construction. He had never seen plaintiff before the day preceding the

accident, and had never conversed with him before the dispute over [construction procedures]." (*Id*. at pp. 655-657.)

Finally, in *Liu*, the Ninth Circuit applied California law to conclude the Republic of China could be vicariously liable when its Director of the Defense Intelligence Bureau hired two men to kill a Chinese journalist who lived in the United States and was a vocal opponent of the Chinese government's policies and leaders, including the Director. Similar to this case, the Director told one of the men hired to perform the killing that the journalist "should be 'given a lesson.'" (*Liu*, *supra*, 892 F.2d at p. 1422.) The *Liu* court concluded the Director acted within the scope of his employment because the killing arose out of a dispute between the journalist and the Director over the Director's job performance and the Chinese government's policies. (*Id*. at pp. 1427-1428.) In reaching that conclusion the Ninth Circuit explained, "We see no principled distinction between this case, where [the Director] acted in part to prevent [the victim's] criticism of [the Director's job performance], and the employee in *Carr* who intentionally threw a hammer *after* another person criticized his work." (*Id*. at p. 1428, original italics.)

Here, Mogel acted within the scope of his employment because his decision to harm Fitzgibbons arose out of a dispute relating to IHHI's business of acquiring and operating Western Med. Much like the plaintiffs in *Caldwell* and *Liu*, Fitzgibbons spoke out against IHHI's acquisition of Western Med from Tenet. He formed a competing investment group in an unsuccessful attempt to buy Western Med, and after IHHI bought the hospital, IHHI sued Fitzgibbons for disclosing IHHI had defaulted on one of its loans and claiming the hospital's admissions were down significantly. Fitzgibbons prevailed in that litigation and IHHI was ordered to pay him $150,000 in attorneys fees. During his discussion with Anderson regarding how IHHI would pay those fees, Mogel angrily threatened to "humble" Fitzgibbons. In that same time period, Mogel told Anderson he knew people who could take care of anyone that displeased him and directed Anderson to

prepare a $10,000 contract for Delgado's company, Form Labs. Officers from the police department Mogel claimed Delgado had in his pocket arrested Fitzgibbons less than two weeks after these discussions, and Fitzgibbons's daughter was in a serious car accident approximately three weeks after the arrest.

Based on this evidence, the jury found Mogel acted "within the foreseeable course and scope" of his employment with IHHI and returned a verdict in Fitzgibbons's favor. The trial court, however, granted IHHI's motion for judgment notwithstanding the verdict, finding "Mogel's alleged effort to 'humble' [Fitzgibbons] had nothing to do with the business of IHHI. It was a personal grudge. The hiring of a thug was a 'startling and unusual . . . occurrence.' There was no relationship between the nature of Mogel's work and the tort committed. There is no relationship between his job description and the incidents involving [Fitzgibbons]. The alleged attack on Dr. Fitzgibbons was not reasonably foreseeable in light of Mogel's responsibilities."

Not only does the trial court's analysis improperly focus on the specific tortious acts Mogel committed, but the court also fails to point to any evidence supporting its conclusion Mogel's acts were not within the scope of his employment because he held a personal grudge against Fitzgibbons. IHHI similarly fails to point to any evidence to support the conclusion Mogel acted based on a personal grudge. Nonetheless, even if we assume evidence existed to support the trial court's personal grudge conclusion, the court still erred in granting the motion. As described above, substantial evidence supported the jury's finding Mogel acted within the scope of his employment by retaliating against Fitzgibbons for his opposition to IHHI's acquisition of Western Med and his success in opposing IHHI's lawsuit against him.

In granting IHHI's motion for judgment notwithstanding the verdict, the trial court either ignored this evidence or found it lacked credibility. As explained above, however, the trial court may not weigh the evidence, draw inferences contrary to the verdict, or assess the credibility of witnesses when ruling on a motion for judgment

notwithstanding the verdict; it must deny a motion if there is any substantial evidence to support the verdict. (*Begnal*, *supra*, 78 Cal.App.4th at pp. 72-73.) Because substantial evidence supports the jury's verdict, we conclude the trial court erred in granting IHHI's motion.

IHHI contends the record lacks substantial evidence to support the jury's verdict because the only witness who testified about Mogel's efforts to humble Fitzgibbons was Anderson, and on cross-examination Anderson conceded he had no proof of Mogel's alleged plot against Fitzgibbons and he did not disclose Mogel's comments while he still worked for IHHI because there was no "'substance'" or "'meat'" to Anderson's beliefs about Mogel's conduct. According to IHHI, Anderson's testimony was nothing but speculation, and therefore insufficient to support the jury's verdict. We disagree.

Testimony from a single witness may constitute substantial evidence to support a jury's verdict. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767-768.) Any internal inconsistencies or conflicts in a witness's testimony—even if he or she is the only witness on a particular point—does not render the witness's testimony insufficient because it is for the jury, not the trial court on a motion for judgment notwithstanding the verdict, to resolve the conflict and give the testimony its due weight. (*Clemmer*, *supra*, 22 Cal.3d at pp. 877-878; *Meyser v. American Bldg. Maintenance, Inc.* (1978) 85 Cal.App.3d 933, 940.) Moreover, IHHI takes the portions of Anderson's testimony on which it relies out of context. Anderson waited nearly two years to disclose Mogel's threatening comments about Fitzgibbons. This occurred after he left IHHI and was in the midst of litigation and negotiation among competing factions to gain control of IHHI. Anderson, however, never retracted or contradicted his testimony, explaining it took him some time to learn everything and put all the pieces together. Accordingly, we must defer to the jury's determination about the credibility and weight of this testimony.

IHHI also argues Mogel did not act within the scope of his employment because his embezzlement of IHHI's funds to hire a criminal to frame Fitzgibbons and injure his family was so unusual and startling that it was not foreseeable, and therefore IHHI cannot be held vicariously liable for Mogel's acts. In support, IHHI cites various cases defining foreseeability for respondeat superior liability as "'merely mean[ing] that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." (See, e.g., *Lisa M.*, *supra*, 12 Cal.4th at p. 299.)

IHHI assumes foreseeability is the exclusive standard for determining whether an employee acted within the scope of his or her employment. It is not. As explained above, California courts use a variety of tests to describe the necessary causal nexus between an employee's acts and his or her work to support respondeat superior liability. (*Lisa M.*, *supra*, 12 Cal.4th at pp. 298-299; *Montague*, *supra*, 223 Cal.App.4th at p. 1521; *Flores*, *supra*, 161 Cal.App.4th at p. 380.) Whether the employee's conduct is foreseeable is one standard, but it is not the exclusive one. Indeed, even the jury instruction that IHHI proposed and the trial court gave recognizes an employee acts within the scope of his or her employment if the employee's conduct *either* (1) is reasonably related to the kinds of tasks the employer was employed to perform *or* (2) is reasonable foreseeable in light of the employer's business or the employee's responsibilities. (See CACI No. 3720.) The employer is vicariously liable if either of these two prongs is satisfied. (*Montague*, at p. 1521; *Halliburton*, *supra*, 220 Cal.App.4th at p. 94; *Bailey*, *supra*, 48 Cal.App.4th at pp. 1559-1560; *Liu*, *supra*, 892 F.2d at p. 1427.) We conclude Mogel acted within the scope of his employment because his conduct arose from or was engendered by events and conditions that related to his employment and IHHI's business, and therefore we need not address whether his conduct also was foreseeable.

The parties also extensively brief whether IHHI ratified Mogel's conduct by negotiating a generous severance package with Mogel and allowing him to serve as a well-paid consultant. The jury, however, never reached that question because it found Mogel acted within the scope of his employment. Indeed, the verdict form instructed the jury not to reach that question it if found Mogel acted within the scope of his employment. We likewise do not reach the ratification question because we conclude substantial evidence supported the jury's finding and the trial court therefore erred in granting IHHI's motion for judgment notwithstanding the verdict. Our decision overturning the trial court ruling granting judgment notwithstanding the verdict reinstates the jury's verdict unless the trial court properly granted IHHI a new trial in the alternative. (Code Civ. Proc. § 629; *Campbell v. Cal-Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 575; *Eltolad Music, Inc. v. April Music, Inc.* (1983) 139 Cal.App.3d 697, 709.) We next consider that question.[3]

B. *The Trial Court Erred In Granting IHHI's Alternative Motion for New Trial*

1. The Trial Court Failed to Adequately Specify Its Reasons for Granting a New Trial Based on Excessive Damages and Insufficiency of the Evidence

Fitzgibbons contends we must reverse the trial court's order granting IHHI a new trial on the grounds of excessive damages and insufficiency of the evidence because the trial court's order fails to provide an adequate statement of its reasons for granting a new trial on these grounds, and thereby prevents effective appellate review. We agree.

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[3] To support its answer to the amicus brief the California Medical Association (CMA) filed, IHHI requests that we take judicial notice of an amicus brief the CMA filed in another action in 2009. IHHI contends the brief shows the CMA is taking consistent positions. We deny the request because we find the brief in the other action irrelevant. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.)

A trial court's authority to grant a new trial "is established and circumscribed by statute." (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633 (*Raiders*).) Under Code of Civil Procedure section 657 (section 657), the grounds for granting a new trial include excessive damages and "[i]nsufficiency of the evidence to justify the verdict." (§ 657, subds. (5) & (6).) A new trial may not be granted on either of these two grounds unless the trial court is convinced based on its review of the entire record that "the court or jury *clearly* should have reached a different verdict or decision." (§ 657, italics added.) "California courts have consistently required strict compliance with section 657." (*Raiders*, at p. 634.)

In granting a new trial, the court must identify each statutory ground upon which it relies and provide a written specification of the reasons for granting a new trial. (§ 657.) "[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (*Ibid*.) "[T]he appellate court cannot remand the case to permit the trial court to correct an insufficient statement of reasons." (*Raiders*, *supra*, 41 Cal.4th at p. 635.) Instead, the appellate court must reverse the trial court's order and reinstate the jury's verdict. (*Mercer v. Perez* (1968) 68 Cal.2d 104, 119-124 (*Mercer*); *Stevens v Parke, Davis & Co.* (1973) 9 Cal.3d 51, 63 (*Stevens*); *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 699 (*Miller*).)

The legislative purpose for requiring the trial court to specify its reasons for granting a new trial is twofold. The first is "to promote judicial deliberation before judicial action, and thereby 'discourage hasty or ill-considered orders for new trial.' [Citation.]" (*Mercer, supra,* 68 Cal.2d at p. 113; see *Raiders, supra,* 41 Cal.4th at p. 636.) The second is to make the right to appeal meaningful by focusing the appellant

and appellate court on the specific deficiencies the trial court identified in the evidence. (*Mercer*, at pp. 113, 115; see *Raiders*, at p. 636.)

The Supreme Court has declared that "'[n]o hard and fast rule can be laid down as to the content of such a specification [of reasons], and it will necessarily vary according to the facts and circumstances of each case.' [Citation.]" (*Stevens, supra*, 9 Cal.3d at p. 60; see *Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 363-370 (*Scala*); *Mercer, supra*, 68 Cal.2d at p. 115.) But the Supreme Court also repeatedly has emphasized that when the trial court relies on either insufficiency of the evidence or excessive damages, "the judge must briefly recite the respects in which he finds the evidence to be legally inadequate; no other construction is consonant with the conclusive presumption on appeal that the order was made 'only for the reasons specified.' Phrasing the requirement in terms of the codification of the trial judge's power in [section 657], such an order must briefly identify the portion of the record which convinces the judge 'that the court or jury clearly should have reached a different verdict or decision.'" (*Mercer*, at p. 116, fn. omitted; see *Stevens*, at p. 60; *Miller, supra*, 8 Cal.3d at pp. 696-697; *Scala*, at pp. 363-364.)[4]

"[T]o comply with section 657 'the trial judge is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses,' nor need he undertake 'a discussion of the weight to be given, and the inferences to be drawn from each item of evidence supporting, or impeaching, the judgment.' [Citation.]" (*Scala, supra*, 3 Cal.3d at p. 370.) But "the trial judge [is required] to briefly identify the

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[4] Although the Supreme Court established these standards in cases addressing the ground of insufficient evidence, it has extended these standards to a finding of excessive damages. (*Stevens, supra*, 9 Cal.3d at pp. 61-62 ["In light of the parallel treatment of the two grounds in the statute, we are of the opinion that what we have said as to the required content of the specification where 'insufficiency of the evidence' is relied upon should apply where 'excessive or inadequate damages' is the designated ground"].)

deficiencies he finds in 'the evidence' or 'the record' or [citation] 'the proof'—rather than merely in 'the issues' or 'the ultimate facts.'" (*Id*. at p. 367.) Moreover, "[i]t is helpful if the court declares what witnesses it believed, what testimony was to be disregarded or the value of any impeachment.' [Citation.]" (*Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1227 (*Montoya*); see *Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 404.) Ultimately, the trial judge "must supply the reviewing court with information such as to enable it to review in a meaningful way the order granting the new trial." (*Aronowicz v. Nalley's, Inc.* (1972) 30 Cal.App.3d 27, 39; see *Scala*, *supra*, 3 Cal.3d at p. 370.)

For example, in *Scala*, the Supreme Court reversed an order granting a new trial based on insufficiency of the evidence because the trial court's specification of reasons failed to meet the foregoing standards. The trial court's specification explained, "'there is no sufficient evidence to show that the defendant was negligent and the evidence does show that the plaintiff failed to use ordinary care for his own safety and that that failure was a proximate cause of his injuries.'" (*Scala*, *supra*, 3 Cal.3d at p. 363.) The *Scala* court concluded this specification was inadequate because it provided "little if any assistance to the appellant or to the reviewing court. Negligence . . . is a complex issue requiring for its resolution the determination of the existence or nonexistence of a variety of different elements, including the standard of due care, foreseeability of risk, duty to the person injured, breach of that duty, cause in fact, and proximate cause. To state that a party 'was not negligent' does not identify which one or more of the foregoing elements the adversary failed to prove by a preponderance of the evidence; and to state that a party 'was negligent' does not identify which of his acts or omissions deviated so far from the conduct of an ordinarily prudent person as to warrant that condemnation." (*Id*. at pp. 366-367.)

In *Stevens*, the Supreme Court reversed an order granting a new trial on the ground of excessive damages. The trial court's specification of reasons explained, "'the

Court finds that the verdict is excessive, that it is not sustained by the evidence, and that it is based upon prejudice and passion on the part of the jury.'" (*Stevens, supra,* 9 Cal.3d at p. 59, fn. 9.) Applying the foregoing standards, the *Stevens* court concluded this statement was insufficient because "[i]t does not indicate the respects in which the evidence dictated a less sizable verdict, and fails even to hint at any portion of the record that would tend to support the judge's ruling." (*Id*. at p. 62.)

Similarly, in *Dizon v. Pope* (1974) 44 Cal.App.3d 146, the Court of Appeal reversed an order granting a new trial on excessive damages if the plaintiff did not accept a reduction in the judgment from $35,000 to $15,000. The trial court's specification stated, "'The motion for new trial will be granted on the grounds that the verdict is excessive. The plaintiff sustained special damages of $1536.00. The injury was to soft tissue and does not appear to be permanent.'" (*Id*. at pp. 147-148.) The appellate court concluded this statement failed to satisfy section 657 because "[t]he court in its order did not discuss the evidence[,] . . . did not set forth how it arrived at the total of special damages mentioned in the order or the significance of its statement regarding soft tissue[, and] . . . [¶] did not specify the evidence which convinced the court that appellant's 'injury . . . does not appear to be permanent.'" (*Id*. at p. 149.)

Here, the trial court specified the following reasons for granting IHHI a new trial based on excessive damages: "The jury verdict appears to be a product of passion and prejudice instead of an evaluation of the extent of [Fitzgibbons's] emotional distress. The award for only emotional distress damages is completely out of line with similar injuries in other cases. [¶] [Fitzgibbons] failed to introduce any evidence of medical expenses or loss of income. The entire amount of compensatory damages was for noneconomic damages, such as emotional distress. [Fitzgibbons] was not hospitalized or medically treated. He did not take any medication. There were no physical manifestations of injury. While [Fitzgibbons] sustained embarrassment, the emotional distress was not of a substantial quality or duration. At worst, some other

doctors poked fun at him. By giving [Fitzgibbons] the benefit of the doubt, his emotional distress barely would qualify as being 'severe.'" This specification of reasons fails to meet the foregoing standards because it offers a series of conclusions without specifying the evidence that convinced the court the jury should have reached a different verdict, or any acknowledgement of the evidence that supports the jury's award.

For example, the trial court asserted the award appears to be the product of passion and prejudice, the entire amount was for noneconomic damages, and the evidence failed to show Fitzgibbons had any medical expenses, loss of income, physical manifestations of injuries, or medical treatment. These are nothing but conclusions that fail to acknowledge the substantial and contrary evidence Fitzgibbons presented. (See *Stevens*, *supra*, 9 Cal.3d at p. 62 ["statement that the amount of the verdict was 'based upon prejudice and passion on the part of the jury' is not a 'reason' that provides an insight into the record"]; *Previte v. Lincolnwood, Inc.* (1975) 48 Cal.App.3d 976, 986 (*Previte*) ["statement is insufficient as a reason [if] it merely states conclusions and ultimate facts, and there is no reference to what portion of the record the court relied upon in reaching the conclusion"].)

Contrary to the trial court's conclusions, Fitzgibbons, his wife, and his medical expert testified Fitzgibbons has suffered and continues to suffer severe emotional distress and physical manifestations of that distress, including vomiting, fainting, panic attacks, migraines, weight loss, inability to sleep, and other symptoms. Fitzgibbons's expert psychologist testified Fitzgibbons continued to suffer posttraumatic distress disorder because of Mogel's conduct in having him arrested and causing his daughter's auto accident. Fitzgibbons testified he continues to see a psychologist for his emotional distress, he saw both a gastroenterologist and a neurologist to address some of his physical symptoms, and he resorted to antidepressants to address his conditions. He also testified he spent over $15,000 seeking medical treatment for his emotional distress and physical symptoms. This evidence supports the jury's award to Fitzgibbons, but the trial

court ignored it and provided no explanation why this evidence is not legally adequate to support the award. Moreover, the trial court's specification of reasons fails to recognize Fitzgibbons was not required to establish a physical manifestation of injury or even a monetary loss to recover for intentional infliction of emotional distress. (See *Thing v. La Chusa* (1989) 48 Cal.3d 644, 648-650; *Grimes v. Carter* (1966) 241 Cal.App.2d 694, 699 ["In California, 'One who has been wrongfully and intentionally subjected to embarrassment, humiliation, fear or other forms of mental anguish may recover compensatory damages even though [she] has suffered no physical injury,' and '. . . the right to compensation exists even though no monetary loss has been sustained'"].)

The court's statement about "similar injuries in other cases" also does not provide an adequate statement of reasons because it is improper to consider awards in other cases when evaluating a jury's damages award: "'The vast variety of and disparity between awards in other cases demonstrate that injuries can seldom be measured on the same scale. . . . For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of fact finding.' [Citation.]" (*Bigboy, supra*, 154 Cal.App.3d at p. 406.) Indeed, "'"[t]here is no fixed or absolute standard by which to compute the monetary value of emotional distress."' [Citation.] '[T]he jury is entrusted with vast discretion in determining the amount of damages to be awarded. . . .' [Citation.]" (*Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 595.) "'"'. . . An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' . . .'" [Citation.]" (*Ibid*.) The trial court made no such findings.

The court's final three sentences concluding Fitzgibbons suffered only embarrassment and, at worst, other doctors poked fun at him, fail to identify the evidence that lead the trial court to this conclusion and flatly ignores the foregoing evidence to the

contrary. (See *Miller*, *supra*, 8 Cal.3d at pp. 698-699 [trial court's specification of reasons granting new trial based on insufficiency of the evidence was insufficient because court's statement defendant properly discharged its duty "fail[ed] to identify which aspects of the evidence convince the trial judge [defendant properly discharged its duty]"]; *Previte, supra,* 48 Cal.App.3d at p. 986.) Based on these deficiencies, the trial court's specification of reasons fails to provide the information necessary to enable us to review its decision in a meaningful way. We are left to speculate why the court ignored the evidence showing Fitzgibbons suffered emotional distress far beyond mere embarrassment and physical manifestations of that distress.

For example, did the trial court not believe the testimony of Fitzgibbons, his wife, and his expert regarding the severe emotional distress he suffered and the physical manifestations of that distress? Did the trial court agree with IHHI's contention the distress was caused by the earlier litigation IHHI filed against Fitzgibbons, rather than Mogel's efforts to humble Fitzgibbons, and therefore was not recoverable based on IHHI's victory on the malicious prosecution claim? Did the court find Fitzgibbons did not suffer any emotional distress based on his daughter's auto accident or did the court find IHHI was not responsible for the accident?

The "fundamental purpose[]" behind section 657's requirement that the trial court provide a specification of reasons is "to put an end to this kind of speculation." (*Mercer*, *supra*, 68 Cal.2d at p. 117; *Raiders*, 41 Cal.4th at p. 638 [legislative intent behind requiring specification of reasons is "'to preclude just this type of guesswork'"]; *Miller*, *supra*, 8 Cal.3d at p. 698, fn. 8 [same].) Indeed, "'we are not permitted to infer the trial court's reasons where we have not been told what they are,'" and therefore we must reverse the trial court's order granting a new trial based on excessive damages. (*Scala*, *supra*, 3 Cal.3d at p. 365.)

Similarly, we conclude the trial court's specification of reasons for granting a new trial based on insufficient evidence is inadequate because it fails to identify any

aspect of the evidence to support that ruling. The trial court order's simply states, "[Fitzgibbons] failed to prove vicarious liability." That is a bare conclusion that does not meet the foregoing standards. The court's order granting judgment notwithstanding the verdict concluded IHHI was not vicariously liable for Mogel's acts because his conduct was not foreseeable given the nature of IHHI's business and that Mogel held a personal grudge against Fitzgibbons. As explained above, foreseeability is not the exclusive standard for determining vicarious liability and the trial court failed to address evidence showing the events and conditions that motivated Mogel's conduct were related to IHHI's business. Although the trial court concluded Mogel acted out of a personal grudge, the trial court did not refer to any evidence supporting that conclusion and did not address the evidence showing Mogel's conduct arose out of a dispute relating to IHHI's acquisition and operation of Western Med. Accordingly, the trial court's statements in its order granting judgment notwithstanding the verdict also fail to satisfy section 657's requirement to specify reasons for granting a new trial.

IHHI contends the trial court adequately specified its reasons because the court adequately explained why it granted the motion and had no obligation to cite or discuss specific testimony or evidence to support its decision; instead, a brief descriptive statement is all that was required. To support this contention, IHHI cites four cases where the appellate court upheld a new trial order based on a specification of reasons that did not cite specific evidence to support the trial court's decision. (See *Montoya, supra*, 220 Cal.App.4th 1215; *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121 (*Mokler*); *Romero v. Riggs* (1994) 24 Cal.App.4th 117 (*Romero*); *Thompson v. John Strona & Sons* (1970) 5 Cal.App.3d 705 (*Thompson*).) Although we agree the trial court was not required to cite specific evidence by page and line number, these four cases do not support IHHI's position because the cases either did not analyze whether the trial court's specification of reasons met the foregoing legal standards or adequately identified the evidence that lead the trial court to grant a new trial.

In *Mokler*, we affirmed the trial court's decision granting a new trial based on excessive damages because the court's specification of reasons pointed to six categories of damages the plaintiff sought but for which the trial court found no evidentiary support. The appellant did not challenge the trial court's specification of reasons, but rather challenged only the sufficiency of the evidence to support the trial court's decision, and therefore we did not decide whether the trial court adequately specified its reasons. (*Mokler*, *supra*, 157 Cal.App.4th at pp. 146-147.) "'"An opinion is not authority for propositions not considered." [Citation.]' [Citations.]" (*People v. McGraw-Hill Companies, Inc.* (2014) 228 Cal.App.4th 1382, 1390 (*McGraw-Hill*).)

IHHI's reliance on *Thompson* is similarly misplaced because the appellate court considered only whether substantial evidence supported the trial court's decision to grant a new trial based on excessive damages. (*Thompson*, *supra*, 5 Cal.App.3d at pp. 710-712.) The Court of Appeal did not address the adequacy of the trial court's specification of reasons, and therefore the opinion does not aid IHHI. (*McGraw-Hill*, *supra*, 228 Cal.App.4th at p. 1390.)

Montoya and *Romero* both involved medical malpractice claims where a health care provider failed to timely diagnose the plaintiff's medical condition, but the defendant nonetheless prevailed because the jury found the defendant's negligence did not cause the plaintiff's injuries. (*Montoya*, *supra*, 220 Cal.App.4th at pp. 1217-1219, 1224-1225; *Romero*, *supra*, 24 Cal.App.4th at pp. 119-120.) Both trial courts granted the plaintiffs' new trial motions, finding the evidence insufficient to support the jury's verdict on causation. (*Montoya*, at p. 1226; *Romero*, at p. 121.) In *Montoya*, the trial court's specification of reasons acknowledged the experts' testimony differed on whether the defendant caused the decedent's death, but the court concluded the overwhelming weight of the evidence required the jury to find in the plaintiffs' favor. (*Montoya*, at p. 1226.) In *Romero*, the trial court's specification of reasons explained the expert medical evidence "overwhelming[ly]" established the defendant's negligence caused the

plaintiff's injuries. (*Romero*, at p. 121.) The *Montoya* court found the court's specification of reasons sufficient because it "isolated the precise issue upon which it based its rationale" and pointed to the conflicting expert testimony that lead it to conclude causation existed. (*Montoya*, at p. 1229.) The *Romero* court found the trial court's specification of reasons sufficient because the evidence the trial court referred to in its order—the "overwhelming" medical evidence on causation— adequately guided the appellate court to the evidence and issue to consider on appeal and provided a sufficient basis for the trial court's decision. (*Romero*, at pp. 123-124.)

Montoya and *Romero* are inapposite because the specification of reasons in those cases pointed to the evidence that lead the trial court to grant the new trial motion. Consistent with the foregoing standards, the specifications of reasons in *Montoya* and *Romero* did not cite to specific testimony and evidence by page and line number, but nonetheless identified the evidence that lead the trial courts to rule as they did and thereby provided an adequate basis for appellate review. In *Montoya*, the trial court pointed to the conflicting expert testimony on causation and explained how it resolved that conflict. In *Romero*, the trial court pointed to the overwhelming expert testimony on causation. As explained above, the trial court's specification of reasons in this case does not identify any evidence for us to review regarding its ruling on either excessive damages or insufficiency of the evidence. The trial court faulted Fitzgibbons for failing to present evidence on certain issues without acknowledging he did present evidence on those issues, and without explaining why that evidence did not support the jury's verdict.

2. Substantial Evidence Does Not Support Trial Court's Decision to Grant a New Trial Based on Juror Misconduct

Fitzgibbons contends the trial court erred in granting IHHI a new trial based on juror misconduct because no substantial evidence supported the trial court's finding the jury returned an improper quotient verdict. We agree.

Section 657 authorizes a trial court to grant a new trial based on jury misconduct, and further provides, "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors." (§ 657.)

"Verdicts reached by tossing a coin, drawing lots, or any other form of gambling are examples of improper chance verdicts. [Citation.] 'The more sophisticated device of the quotient verdict is equally improper: The jurors agree to be bound by an average of their views; each writes the amount he favors on a slip of paper; the sums are added and divided by 12, and the resulting "quotient" pursuant to the prior agreement, is accepted as the verdict without further deliberation or consideration of its fairness.' [Citation.]" (*Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064, italics omitted (*Chronakis*).)

"'[T]here is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict.' [Citation.] [¶] Thus, evidence an average figure was later rounded either up or down has been held definitive proof the jurors were not bound by their agreement to adopt the average figure as their final verdict. Consequently, such verdicts are not considered improper because they indicate further consideration and deliberation by the jurors in agreeing on the rounded-off figure. (See, e.g., *Will v. Southern Pacific Co.* (1941) 18 Cal.2d 468, 477 [not improper quotient verdict because counteraffidavits proved jurors later voted on rounded off average figure]; *Monroe v. Lashus* (1959) 170 Cal.App.2d 1, 6 [not improper quotient verdict because counteraffidavits asserted jurors did not agree to be bound by average figure and evidence of rounding off appeared on all affidavits]; *Glass v. Gulf Oil*

Corp. (1970) 12 Cal.App.3d 412, 435 [evidence averaged figure rounded off before jurors arrived at final figure appeared on face of affidavits].)" (*Chronakis*, *supra*, 14 Cal.App.4th at p. 1066; see *Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462-463.)

"The trial court is vested with broad discretion to act upon a motion for new trial. [Citation.] When the motion is based upon juror misconduct, the reviewing court should accept the trial court's factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial. [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) "'When an issue is tried on affidavits . . . and where there is a *substantial* conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.' [Citations.]" (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 108, italics added (*Weathers*); see *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1647 (*Fredrics*).)

Here, the trial court found the jury reached an improper quotient verdict in deciding upon the amount of compensatory damages to award. The trial court acknowledged receiving six juror declarations on the quotient verdict issue—two from IHHI to support the motion and four from Fitzgibbons in opposition. The declarations IHHI submitted from Juror Nos. 9 and 10 state the jury arrived at it damage award by each juror writing a figure down on a piece of paper, throwing out the highest and lowest figures, and then adopting the average of the remaining 10 figures as the verdict. Only Juror No. 10 stated the jury adopted the average without further deliberation.

The jury foreperson and three other jurors submitted declarations denying the jury adopted the average of the figures as its verdict without further deliberation. The declarations explained after deliberation there was a wide discrepancy on how much to award. The jury decided to determine the average of the jurors' views to further its deliberations. Initially, the jury discussed throwing out the high and low figures as Juror Nos. 9 and 10 claimed, but the jurors decided they did not want to exclude any juror's

evaluation. The jurors therefore agreed to take the average of all 12 figures, but that no one could submit a figure higher than $10 million to prevent a single juror from unduly skewing the average with a high number. The jurors each submitted their individual assessment of damages and the foreperson wrote each figure on a dry erase board. The average of all 12 figures was approximately $5.167 million. At that point, the jury collectively decided to round the figure up to $5.2 million, instead of down. The jury then took a vote to decide whether at least nine jurors agreed to award Fitzgibbons $5.2 million, and when at least nine jurors agreed, the jury returned that figure as its verdict.

After reviewing the declarations, the trial court acknowledged a dispute among the jurors, but granted the motion because it found "it is more probable than not that the jury agreed in advance to abide by the quotient verdict." In reaching this conclusion, the trial court failed to acknowledge Juror No. 10's supplemental declaration that acknowledges the other jurors' testimony that they held further deliberations after determining the average of each juror's figure, and admitted, "I have no memory of such a second or follow-up vote." In the face of the specific testimony regarding how the jury arrived at its verdict, Juror No. 10 did not deny that further deliberations occurred after the average was determined, and he did not address the jury's decision to round the average figure up. Accordingly, unrebutted evidence showed the jury conducted further deliberations after calculating the average by agreeing to round the average up and then agreeing to accept that rounded figure as the verdict.

As explained above, evidence an average figure was later rounded off is definitive proof the jurors were not bound by a prior agreement to accept the average figure as their verdict without further discussion. (*Chronakis*, *supra*, 14 Cal.App.4th at p. 1066; *Glass v. Gulf Oil Corp.*, *supra*, 12 Cal.App.3d at p. 436 ["Since the sum agreed upon was not the average, it may be inferred there was in fact an agreement after the averaging, and that therefore the verdict—in this case, the answer to the special interrogatory—cannot be impeached"].)

IHHI contends we must defer to the trial court's resolution of the conflict in the juror declarations and may not substitute our determination regarding the declarations' weight and credibility for that of the trial court. The trial court, however, did not acknowledge Juror No. 10's supplemental declaration, and we must defer to the trial court's factual determinations only when there is a "'substantial conflict'" in the evidence. (*Weathers*, *supra*, 5 Cal.3d at p. 108; *Fredrics*, *supra*, 29 Cal.App.4th at p. 1647.) There is no substantial conflict here because Juror No. 10's statement he does not remember a second vote is not sufficient to establish a second vote did not occur in the face of multiple declarations saying it did. Moreover, Juror No. 10 does not contest the other juror's declarations that the jury rounded off the average figure before agreeing to accept it as the verdict. Accordingly, the record lacks substantial evidence to support the trial court's conclusion the jury returned an improper quotient verdict.

III

DISPOSITION

The judgment notwithstanding the verdict and the order granting a new trial are reversed, and the jury's verdict is reinstated. Fitzgibbons shall recover his costs on appeal.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.