D050479

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PATRICK A. MAJOR and ELSA L. MAJOR,
Plaintiffs and Respondents,

v.

WESTERN HOME INSURANCE COMPANY,
Defendant and Appellant.

APPEAL FROM SAN DIEGO COUNTY SUPERIOR COURT
RONALD L. STYN, JUDGE • CASE NO. GIC 842164

PETITION FOR REHEARING

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INTRODUCTION

This court should grant rehearing in this matter because the court's opinion fails to account for relevant legal authority (including binding Supreme Court authority), misstates or omits material facts, and fails to address arguments made by appellant Western Home Insurance Company (Western). (Cal. Rules of Court, rule 8.500(c)(2) [rehearing is appropriate where an opinion contains incorrect statements of fact, or omits material facts].)

Rehearing is also necessary for the additional reason that, with respect to the part of the opinion affirming the emotional distress award, this court rests its holding on a ratio analysis not

briefed by the parties and not supported by the record. (See Gov. Code, § 68081 [where appellate court issues a decision "based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party"]; see also *People v. Alice* (2007) 41 Cal.4th 668, 671; *California Casualty Ins. Co. v. Appellate Department* (1996) 46 Cal.App.4th 1145.)

LEGAL ARGUMENT

I. THE COURT'S FINDING THAT WESTERN OWED AND BREACHED A CONTRACTUAL OBLIGATION TO INCREASE THE MAJORS' POLICY LIMIT CONFLICTS WITH EXISTING LAW, AND IS CONTRARY TO THE PLAIN LANGUAGE OF THE MAJORS' INSURANCE POLICY AND OTHER UNDISPUTED EVIDENCE IN THE RECORD.

Western argued on appeal that it did not have any contractual duty to provide the Majors with insurance benefits beyond the limits specified in the insurance policy the Majors purchased. In addressing Western's challenge to the jury's breach of contract and bad faith findings here, this court correctly acknowledged that bad faith liability cannot be found where no contract benefits were actually withheld. (Typed opn., 11 [insured must show the insurer

has "withheld benefits due under the policy"].) This court further correctly acknowledged that the policy as issued to the Majors did *not* provide coverage for the benefits that are the focal point of the Majors' case—some $31,000 in personal property losses *beyond* the written policy limits purchased by the Majors. Indeed, this court further observed that, at least a year and a half before trial, "by April or May of 2005[,] Western had paid all policy benefits due under the policy." (Typed opn., 6.)

This court nonetheless held the Majors' policy contractually *required* Western to increase the policy limits to an amount high enough to cover the amount awarded by the jury—without any increase in premium—because an inspection performed after the policy went into effect showed the property was underinsured. (See typed opn., 4 [finding Western's post-loss offer to pay more than the stated coverage limits was "based upon Western's policy that *required* a modification of the coverage amount if the inspection number was not equal to the coverage in the policy" (emphasis added)]; typed opn., 13 [holding substantial evidence supports a finding that the extra funds offered by Western were "increased coverage limits *Western was contractually bound to pay*" because "Western required that the coverage limits for the dwelling (coverage A) be equal to the cost to replace the dwelling at the time the policy was issued" (emphasis added)]; *ibid.*[finding that under the Majors' policy, "Western *required* a physical inspection and appraisal of the house be generated" (emphasis added)].)

Based on this interpretation of the policy, the court affirmed the verdict on a theory of contract modification, holding that "*the* . . .

jury could conclude the policy had been modified by Western to comply with the original terms of the policy, and thus *no new consideration was necessary to support the modification.* In such a situation, 'there is no alteration. The modification is in accordance with the terms of the contract.' (*Busch v. Globe Industries* [(1962)] 200 Cal.App.2d [315], 320.)" (Typed opn., 14 (emphases added); see also typed opn., 16 [benefits offered to the Majors were "increases in coverage *dictated by the terms of the policy itself*"; distinguishing Western's authorities on the ground that "*the policy itself* provided for the coverage in the amount to which Western later increased it. It was part of the contractual bargain of the parties . . ." (emphases added)].)

One insurmountable problem with this court's analysis is that, as Western pointed out in its briefing (ARB 5-10), *the Majors never presented a modification theory to the jury.* Whether or not the Majors suggested at various points in the proceedings that they might intend to advance such a theory, at the end of the day they did not propose any instruction on the elements of modification, which means the jury by definition made no finding on the issue. Accordingly, in the face of a substantial evidence challenge, the judgment cannot be upheld on a theory that the jury was never instructed on, and thus on *a finding that the jury never made*. (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1560 [Fourth Dist.] [where legal theory presented in the jury instructions was not supported by substantial evidence, verdict could not be upheld on alternate theory absent from the jury instructions: "We cannot uphold a judgment on the basis of a legal

theory which was not submitted to the jury," citing *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1146].)

This court's opinion fails to address Western's argument on this issue. (See ARB 9 ["No trier of fact has passed on the modification issue in this case, and the facts surrounding the purported modification . . . are disputed"], 12 [noting that, if the Majors wanted to assert a modification theory at trial, "then the jury should have been asked to resolve" the disputed facts and elements of such a theory], 13 ["the Majors failed to seek a jury instruction on modification because they were proceeding only on a legal theory of 'reformation'"].) Rehearing should be granted to address Western's argument.

Even if a modification theory had been presented to the jury, no substantial evidence would support a finding for the Majors on that theory because they paid no consideration for increased limits, and contrary to this court's conclusion, nothing in the policy supports the court's conclusion that no new consideration was required. In fact, the uncontroverted evidence adduced during the trial established that a premium increase would have been necessary to increase coverage. The court's opinion does not confront the undisputed trial testimony cited by Western in its briefs on this point. (See 8 RT 563-564 [Western's underwriter explained Western could not alter the policy limits on its own]; 13 RT 1148, 1152-1153 [plaintiffs' counsel conceding that that the policy premium would have gone up if the policy limits were increased] RB 17 [plaintiffs cited evidence that Western Home *usually* required a policy limit increase upon learning a home was

underinsured, but cited no evidence that the policy *required* Western Home to do this, with or without an additional premium payment].)

This court imposed on Western a duty to volunteer free policy limits increases based on one sentence in the Majors' policy that, in complete accord with the legislatively approved California Residential Property Insurance Disclosure form (Ins. Code, § 10102), informs the insured, "*you* must insure the dwelling to its full replacement cost at the time the policy is issued," and "*you must permit* inspections of the dwelling by the insurance company" to be eligible for replacement cost coverage. (2 CT 207, emphases added.) Contrary to this court's opinion, however, that standard policy language and all applicable California authority interpreting it places the burden exclusively on the *insured* to investigate and assure coverage for a dwelling's full replacement cost. It preserves for the insurer the right, *at its election,* to inspect the property's condition and, in the event of underinsurance, to either demand that the insured pay additional premiums to bring the coverage up to required levels, or to cancel the policy. (See 8 RT 549-556 [Western's practice upon identifying an underinsurance situation was usually to notify the agent who sold the policy that coverage needed to be reviewed with the insured so the insured could fix the problem, or to cancel the policy].) But nothing in the policy dictates that an insurer could or must unilaterally modify the parties' insurance contract to provide coverage that the insured never purchased.

On this central policy construction question, this court's opinion does not address a recent Fourth District decision (brought to this court's attention by Western in a letter brief dated July 1, 2008), which reaches a diametrically opposite conclusion regarding the insured's responsibility for selecting policy limits. In *Everett v. State Farm General Ins. Co.* (2008) 162 Cal.App.4th 649, the insurer provided "replacement cost coverage" and, like Western, provided the insured with the disclosure form language dictated by Insurance Code section 10102. (*Id.* at pp. 653, 657.) In response to the insured's argument that replacement cost policy language required the insurer to extend coverage beyond the stated policy limits, the Court of Appeal held the policy limits provision "clearly and unequivocally limits payment to the amount stated in the declarations page. There is no ambiguity. Express coverage limitations must be respected." (*Id.* at p. 658.) The court distinguished situations where policies may contain express "'promises of automatic protection'" beyond policy limits. (*Id.* at p. 660.) And, in language directly applicable here, the court held the *exact same statutorily approved language used by Western* requires the insured, not the insurer, to ascertain and maintain insurance policy limits equal to replacement costs:

> Insurance Code sections 10101 and 10102 do not require State Farm to set policy limits that equal the cost to replace the property. Nor is State Farm duty bound to set policy limits for insureds. *It is up to the insured to determine whether he or she has sufficient coverage for his or her needs.* In fact, the California Residential Property Insurance Disclosure statement provides that it is the insured's burden to obtain sufficient coverage: "To be eligible to recover [extended

> replacement cost coverage], you must insure the dwelling to its full replacement cost at the time the policy is issued, with possible periodic increases in the amount of coverage to adjust for inflation. . . ."

(*Ibid.,* emphasis added; see also *id.* at p. 661 ["the California Residential Property Insurance Disclosure statement places the burden of determining the higher limit of liability needed on the insured"]; accord, *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1096; *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 956.)

These cases support the trial court's nonsuit ruling in favor of Western, declaring that Western was *not* responsible for the Majors' lack of adequate coverage. (See 6 CT 1254; 13 RT 1104-1105, 1153 ; see also ARB 14.) The Majors did not cross-appeal the nonsuit ruling. To hold now that Western *was* contractually obligated to modify the policy to raise the Majors' limits renders the judgment internally inconsistent—and contrary to recent Fourth District precedent.

In sum, this court's ruling creates a novel burden upon California insurers to increase insurance coverage *at no additional premium cost to the insured* whenever a policy contains a provision *allowing* the insurer to conduct routine inspections. Such a burden on insurers is unprecedented, is flatly contrary to the weight of authority and contradicts the plain language of the policy. without the erroneous premise that a legally binding modification of the Majors' coverage limits was "required" under the policy, there can be no finding of a modification without consideration (see typed opn., 14), and the jury's verdict based on a withholding of contract benefits cannot be affirmed. Rehearing should therefore be granted

to allow this court to account for the material facts, omitted from the opinion, establishing that neither the policy here, nor any applicable legal authority, required Western to upgrade the Majors' policy. Moreover, as the jury was not instructed on the modification theory, the verdict cannot in any event be affirmed on an assumption that the jury made a finding of modification.

II. THE OPINION FAILS TO ADDRESS WESTERN'S ARGUMENT WITH RESPECT TO THE CONTRACT DAMAGES, AND OMITS AND MISSTATES KEY FACTS BEARING ON THOSE DAMAGES.

Western argued that, even if there were a modification, no evidence in the record supported the jury's award of contractual damages based on nonpayment of a supplemental claim for replacement cost benefits for personal property (the only contract damages the jury awarded), because the Majors never met their burden of providing Western with the information needed to calculate the amount of any such benefits owed. (AOB 33-36; ARB 23-25 & fn. 7.) In response to that substantial evidence challenge, this court observed that the Majors submitted receipts to support their supplemental claim and that Linda Dare "requested the Majors match the receipts" to the original inventory of items upon which depreciated value had been paid. (Typed opn., 8.) It is uncontroverted that the Majors refused to comply with this request. (See AOB 17; 7 RT 347; 12 RT 935-937.)

In affirming the jury's finding that Western nonetheless owed replacement cost benefits based on the receipts, this court noted that, "with the Majors' first claim for personal property benefits, Western did not require the Majors to match receipts to their inventory," and concluded "there is no such requirement in the insurance policy." (Typed opn., 17.) Rehearing on this issue should be granted because, as we now explain, neither of these conclusions addresses Western's argument about the insureds' burden of establishing the nature and amount of their loss before any benefits become payable. (See AOB 17; ARB 23-25.)

First, it is irrelevant that Western did not require cross-referencing between receipts and the original 77-page inventory in connection with the Majors' initial claim for actual cash value because such a match-up would be impossible—*receipts at that point would not even exist,* since the property had not yet been replaced, and no claim for replacement cost value was being made. (See ARB 24-25 & fn. 7 [when the Majors claimed losses totaling $171,000 in damaged personal property, *Western paid $156,721* based on the depreciated value of the property].) The match-up that Linda Dare requested in connection with the supplemental claim was needed precisely because Dare needed to know the extent to which the new claim included items not part of the original claim, the extent to which the Majors were seeking *additional* payments on items they had already been paid for on a depreciated basis, and had since replaced, and how much those additional amounts might be. (See 2 CT 218 [policy provides: "We will pay no more than the actual cash value of the damage until actual repair or replacement

is complete"].) Only the Majors could answer those questions, and they refused to do so. Because the opinion nowhere addresses this crucial point, rehearing should be granted.

Second, this court held "there is no . . . requirement in the insurance policy" that the Majors match receipts to their inventory. (Typed opn., 17.) Rehearing should be granted because this faulty premise for the court's affirmance of the contract damages is contrary to the policy terms, which affirmatively place the burden of establishing the fact and amount of coverage on *the insureds*. Under the bold heading, "**Your Duties After Loss**," the policy requires the insured to "[k]eep an accurate record of repair expenses" and to "[p]repare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss." (2 CT 217.) The insured must "[a]ttach all bills, receipts and related documents that justify the figures in the inventory." (*Ibid.*) It is undisputed here that the Majors never undertook to attach their receipts to an inventory that would allow Western to evaluate what might already have been paid on the purchased items, and what more might be owed. Accordingly, rehearing should be granted to address the Majors' failure of proof on this point.

III. THE COURT'S AFFIRMANCE OF THE EMOTIONAL DISTRESS AWARD RESTS ON AN ISSUE NOT RAISED IN THE PARTIES' BRIEFING AND NOT SUPPORTED BY THE RECORD.

This court agreed with Western's showing that emotional distress damages in cases like this must be based on distress over an actual economic loss caused by an insurer's withholding of policy benefits. (See typed opn., 18-21; see also AOB 37-38; ARB 26-30; Western Letter Briefs dated Aug. 28, 2008 and Sept. 26, 2008.) This court nonetheless affirmed the jury's $450,000 distress awards on the ground that it could not be excessive if it was no more than two times greater than the jury's total award of some $220,000 in economic damages, *including the Brandt fees awarded as tort damages*. This court concluded it could end its inquiry into the lack of substantial evidence supporting the distress award once the court found a low ratio between the distress damages and the total economic damages. (Typed opn., 21 ["In determining whether the noneconomic damages award is excessive, we compare the amount of that award to the economic damages award, to see if there is a reasonable relationship between the two"].) There are at least two serious flaws with this analysis.

First, this court cites no authority for the proposition that a low ratio between distress damages and economic damages is sufficient *in itself* to support the distress award, and we are aware of none. On the contrary, as this court notes elsewhere in its opinion (see typed opn., 18), the California Supreme Court has held

distress damages must first be shown to be incidental to the initial breach of contract, i.e., the withholding of policy benefits (*Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 128). The foundational question, therefore, is whether substantial evidence demonstrates a *causal link* between the distress and an actual economic loss caused by the initial contractual breach. If not, the award is improper.

Only if the answer to the causation question is *yes* should a court then examine whether the award is simply too high in comparison to the economic loss allegedly giving rise to the distress. Rehearing should be granted because this court never answered the foundational causation question before comparing the distress award to the *Brandt* fee award based on the Majors' contingent fee contract with their attorney.

Second, while Western disputes the conclusion that *Brandt* fees are part of the "initial breach" sufficient to support the distress award, there is no need to answer that question in this case because *there is simply no evidence that the Majors suffered any distress over an anticipated economic loss due to their contingency fee contract.* The Majors never paid the fees that were awarded (the fee award meant the Majors could collect their entire compensatory damages without reduction), and they certainly never testified to any distress flowing from the contingent fee arrangement with their counsel. The issue of distress over contingent fees just did not come up. In fact, Elsa Major testified that the Majors owed their attorneys

nothing for recovering payments that were within the policy limits.[1] (8 RT 449-450; see AOB 31.) Thus, the evidence in the record directly contradicts the notion that the distress award could be justified based on the economic harm of incurring *Brandt* fees to recover policy benefits. (See AOB 31.) Moreover, as Western's briefing demonstrated, the Majors' distress was tied to the fire and other events and circumstances not attributable to any bad faith denial of contract benefits by Western (AOB 38-41; ARB 28-30), so there is no legal or factual basis for this enormous distress award.

IV. THE OPINION FAILS TO ACKNOWLEDGE THE SUPREME COURT'S BINDING DECISION IN *CASSIM* ON THE APPLICABLE MEASURE OF DAMAGES FOR *BRANDT* FEES IN A CONTINGENT FEE CASE, AND FAILS TO ADDRESS WESTERN'S ARGUMENT THAT THE MAJORS FAILED TO MEET THEIR BURDEN OF PRODUCING EVIDENCE FROM WHICH COMPENSABLE FEE DAMAGES COULD BE CALCULATED.

The court's attorney fee analysis (typed opn., 25) fails to address the defect Western pointed out in its briefing with regard to plaintiffs' failure to introduce competent evidence supporting their burden of proof on the amount of fees spent to recover contract

[1] It was uncontroverted that the $6,070 the Majors actually paid their attorneys prior to trial was for the attorneys' work pursuing tort claims "over and beyond" the policy limits. (8 RT 446-447.)

benefits. (See AOB 49-51; ARB 35-40.) In approving the fee award, this court makes no mention of the Supreme Court's decision in *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 812 (*Cassim*), or of the fact that the Majors never introduced evidence that would satisfy the Supreme Court's test for awarding *Brandt* fees to a plaintiff who entered into a contingency fee contract. Instead, this court refers to "detailed testimony" from plaintiffs' counsel, who spent some time one Saturday coming up with a post-hoc estimation regarding the hours he had spent on various aspects of the case, and then calculated the reasonable value of his services based on a hypothetical hourly rate. (See ARB 38.)

The type of testimony offered by the Majors' counsel here is not competent to support the *Brandt* fee award as a matter of law under binding Supreme Court precedent. Instead, the Majors were required to introduce evidence of their contingency fee agreement, and to multiply the contingency percentage by the compensatory damages on which the fees were to be calculated to arrive at the *ceiling* on any award. (*Cassim, supra,* 33 Cal.4th at p. 812.) That figure is then to be multiplied by the percentage of total hours spent exclusively on contract recovery issues plus a *portion* of the amount of time spent on issues jointly implicating contract and tort recoveries. (*Ibid.*)

Here, because Elsa Major testified that fees were owed only on amounts "over and beyond" policy limits (8 RT 446; see also 8 RT 447), the maximum fees the Majors could possibly owe for *all* work to obtain *any* compensatory damages (i.e., the *Cassim* ceiling on the award of fees as damages) would be the contingency

percentage of 40% (8 RT 447; 11 RT 886; see also 11 RT 875) multiplied by the distress award of $450,000, which totals $180,000. The jury awarded $189,000. (16 RT 1287.) In other words, the jury awarded more than 100 percent of the ceiling figure!

Under *Brandt* and *Cassim*, for the award to be supported by substantial evidence, it would have to be a significantly smaller percentage of $180,000, limited to the proportion of the Majors' counsel's time spent on efforts attributable to collecting the contract damages of $31,000. But, as Western pointed out (e.g., ARB 40-41), much of counsel's work involved other issues, including litigation against a different party (Countrywide), pursuing a claim resolved in Western's favor upon nonsuit (reformation based on being underinsured), and pursuing claims for emotional distress and punitive damages for which *Brandt* fees cannot be awarded. The Majors' counsel himself estimated that no more than 60 percent of his time litigating against Western was spent on contract issues or on issues "jointly related" to contract and tort matters. (See ARB 39-40 [even the 60 percent figure is improperly inflated because "jointly related" work must be further broken down to account for what subset of that work is fairly attributable to obtaining contract benefits].) It is simply impossible to arrive at the jury's fee award based on the evidence that the Majors provided.

Because this court's opinion does not address the evidence under the correct legal standard applicable to an award of fees as damages (which requires a far more rigorous showing than that recounted in this court's opinion), rehearing should be granted.

V. IN FINDING WESTERN COULD BE VICARIOUSLY LIABLE FOR ACTS OF OPPRESSION BY LINDA DARE AS WESTERN'S MANAGING AGENT, THIS COURT FAILED TO ACCOUNT FOR THE UNDISPUTED EVIDENCE THAT, FAR FROM SETTING COMPANY POLICY, DARE ADMITTED SHE ACTED *CONTRARY* TO COMPANY POLICY.

In identifying Linda Dare as the "managing agent" whose bad acts support a punitive award against Western (typed opn., 29-30), the opinion ignores the critical fact that Dare was acting contrary to Western's claims handling guidelines. (AOB 54; ARB 45.) The court's failure even to mention that fact, much less give any significance to it, effectively creates strict liability for punitive damages for anything an insurer's agent does in the course and scope of adjusting claims—even when it is against company policy.

This court relied on the California Supreme Court's decision in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, which predated the 1981 statutory amendment adding a "managing agent" requirement for vicarious liability for punitive damages. (Typed opn. 26-27.) But even *Egan* and cases following it prohibit vicarious liability based solely on the agent's authority to make decisions—even decisions that are important in one particular circumstance—where those decisions do not carry over to other company operations

so as to become company policy.[2] The Supreme Court stated in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563 (*White*), that "supervisors who have no discretionary authority over decisions *that ultimately determine corporate policy* would not be considered managing agents . . . ." (*Id.* at p. 577; see also *ibid.* [finding an employee "zone manager" qualified as a managing agent only because he had substantial discretionary authority in his zone such that he was "making significant decisions affecting both store *and company policy*" (emphasis added)].) This court departed from *White* by applying an overly inclusive definition of "corporate policy" as including the ability to make claims adjusting decisions on a case-by-case basis. In fact, "'corporate policy' is the *general principles* which guide a corporation, or rules *intended to be*

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[2] This court also cited the post-1981 decision in *Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061. There, the defendant insurer entered a contract with an independent company, TRM, giving it "broad discretion over defendant's bus insurance program[,]" including authority to "'solicit, bind, write and administer insurance' policies, and 'exercise [its] independent judgment as to the time, place and manner of soliciting insurance and servicing policyholders.'" (*Id.* at p. 1080.) TRM's president was in contact with "the senior management of the division handling defendant's bus program when plaintiff's claim was being considered," and participated with the insurer's senior management in the ultimate decision to deny it. (*Ibid.*) The court found this evidence, which extended far beyond evidence of mere claims handling authority, supported the jury's conclusion that TRM was defendant's managing agent. (*Id.* at pp. 1080-1081.) There is no comparable evidence here. In fact, unlike the agent in *Textron*, Linda Dare and the other employees of Cambridge Integrated Services were supposed to follow a set of "best practices" promulgated by Western, rather than devise their own independent practices contrary to those guidelines. (7 RT 280-281, 336, 343.)

followed consistently over time in corporate operations." (*Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 167, emphases added.)

This court identifies *no* evidence Linda Dare could dictate that sort of corporate policy for Western. Instead, she had broad authority to adjust individual claims *within the guidelines laid down by Western,* which she admits that *she failed to follow*. (See AOB 54; ARB 45; 7 RT 276-278 [Western promulgated a set of "best practices" guidelines that Cambridge was supposed to follow]; see also 7 RT 336, 343-344 [Dare admitted the claims handling here breached the rules Western set for Cambridge]; 11 RT 912 [Western fired Cambridge after its performance on the Majors' claim].)

This court may believe Western should have supervised Dare better (see typed opn., 28), but a lack of supervision does not transform Dare into a managing agent who could or did dictate oppressive corporate policy. As the Supreme Court said in *White*, the "drafters' goals [in amending Civil Code section 3294] were to avoid imposing punitive damages on employers who were merely negligent or reckless and to distinguish ordinary respondeat superior liability from corporate liability for punitive damages." (*White, supra*, 21 Cal.4th at p. 572.) This court should grant rehearing to consider fully the distinction expressed in *White* and to account for the omitted facts regarding Dare's unauthorized departure from expressed corporate policy.

VI. ADDITIONAL ERRORS AND OMISSIONS REQUIRE MODIFICATION OF THE OPINION

In its published opinion, this court sets forth a partially erroneous chronology of the claim handling events. For example, the court recounts that Western did not pay the Majors anything until February 2004 (typed opn., 4), when in fact the Majors received their first payment within days of the Cedars fire in October 2003 (see AOB 8-9 [citing appellate record]), and Western paid the Majors' living expenses in November 2003 and January 2004 (AOB 9-10). The opinion should therefore be modified by deleting the erroneous sentence referenced above.

In addition, the opinion's discussion of delayed mortgage payments (typed opn., 4, 5) fails to account for the uncontroverted evidence that Western had no contractual obligation to pay these benefits (independent of the modification analysis above) since those payments were due only if construction commenced within 90 days of the fire, which did not, in fact occur (AOB 13). Again, the references to withheld mortgage payments should therefore be deleted.

Finally, this court indicates that punitive damages against Western could be based on Linda Dare's "decision to refuse to pay the benefits ultimately awarded by the jury on the basis, later proven untrue, that the receipts were illegible because they were faxed." (Typed opn., 29.) But it is undisputed that Linda Dare's decision was also based on the fact (shown at trial to be true) that the Majors never met their contractual burden of providing a proper

proof-of-loss from which replacement cost payments supported by those receipts could be calculated. Moreover, there is no evidence of any corporate policy to make false assertions as to insureds' claims submissions, and no evidence Western authorized or ratified Dare's conduct in this regard. None of the law cited in this court's opinion supports a finding of punitive damages against Western based on the "illegible fax" issue, so the sentence discussing that issue (beginning with "In fact" at the bottom of page 28 and continuing onto page 29) should be stricken.

CONCLUSION

For the foregoing reasons, rehearing should be granted.

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 5,098 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: January 21, 2009

_____
Lisa Perrochet