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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ESSEX INSURANCE COMPANY, Plaintiff, Cross-defendant and Respondent, v. PROFESSIONAL BUILDING CONTRACTORS, INC., Defendant, Cross-complainant and Appellant.	B221970 (Los Angeles County Super. Ct. No. BC353152)

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge, Luis A. Lavin, Judge. Reversed and remanded with directions.

Stanzler Law Group, Jordan S. Stanzler and Jeffrey M. Curtiss for Defendant, Cross-complainant and Appellant.

LeClairRyan, Peter M. Hart and Matthew R. Halloran for Plaintiff, Cross-defendant and Respondent.

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This is the third appeal that has arisen from a jury verdict in favor of defendant, cross-complainant and appellant Professional Building Contractors, Inc. (PBC) on its cross-complaint for bad faith against plaintiff, cross-defendant and respondent Essex Insurance Company (Essex). Previously, we affirmed an order conditionally granting Essex's motion for new trial on the issue of punitive damages, in which the trial court ruled it would deny the motion if PBC consented to a remittitur of punitive damages in an amount equal to the compensatory damages award. Thereafter, we affirmed in part and reversed in part the trial court's rulings on several posttrial motions brought by PBC. This time, PBC appeals from the punitive damages judgment ultimately entered by the trial court on the ground that the court miscalculated the amount of punitive damages by awarding a figure equal to the compensatory damages amount as reduced to account for a third-party settlement.

We reverse. The one-to-one ratio between punitive and compensatory damages should have been calculated using the jury's compensatory damages award. The amount of the jury's compensatory damages award was not altered by a setoff for a third-party settlement.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2007, a jury awarded PBC $687,264.22 in compensatory damages and $2.5 million in punitive damages on its cross-complaint against Essex.[1] In January 2008, the trial court conditionally granted Essex's motion for a new trial, ruling that "[t]he motion will be denied if PBC consents to a remittitur of punitive damages to the equivalent of whatever the final number is for compensatory damages and Brandt fees." In making this ruling, the trial court observed: "PBC's punitive damage award is

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[1] Additional facts relating to the dispute between PBC and Essex are set forth in our unpublished opinions in prior appeals, *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B206879, filed on July 21, 2009 and *Essex Insurance Company v. Professional Building Contractors, Inc.*, case No. B215005, filed on April 6, 2010.

approximately 3.66 times its compensatory damages. This number is lower if Brandt fees are considered, which they should be because they are damages. Jet Source Charter teaches that even this ratio is too high, and must be no greater than a 1:1 ratio."[2]

In an unpublished decision we affirmed, finding that "[t]he trial court properly exercised its discretion to reduce the punitive damages award to a one-to-one ratio on the basis of the evidence concerning Essex's reprehensibility and the amount of compensatory damages awarded." The opinion did not consider ongoing trial court proceedings, including the trial court's January 2008 grant of a motion for setoff pursuant to Code of Civil Procedure section 877 that concerned a $375,000 settlement payment by Municipality Insurance Services.

In March 2009, while the appeal was pending, the trial court (via a different judge than the trial judge) entered a judgment in the amount of $307,264.22, calculated by subtracting the $375,000 settlement payment from the $682,264.22 compensatory damages award.[3] In June 2009, the trial court corrected the judgment by adding $23,837.55 in costs.

Following the issuance of the remittitur in the first appeal, PBC proposed a judgment on punitive damages in the amount of $682,264.22, plus interest. On the other hand, Essex proposed a judgment on punitive damages in the amount of $331,101.77, calculated by adding the compensatory damages award of $307,264.22 as offset by the $375,000 settlement, plus $23,837.55 in costs. The parties each filed objections to the other's proposed judgment. In December 2009, the trial court entered judgment as proposed by Essex.

PBC appealed.

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[2] The trial court was referring to *Brandt v. Superior Court* (1985) 37 Cal.3d 813 and *Jet Source Charter v. Doherty* (2007) 148 Cal.App.4th 1.

[3] In the second appeal, we reversed the trial court's denial of prejudgment interest and affirmed the denial of PBC's other posttrial motions.

DISCUSSION

The appeal presents a single issue: Whether the one-to-one ratio between compensatory damages and punitive damages ordered by the trial court and affirmed by this Court must be measured by the jury's award of compensatory damages or by an amount that takes account of a setoff for a third-party settlement. "It is settled that the same rules of interpretation apply in ascertaining the meaning of a judgment as in ascertaining the meaning of any other writing. [Citation.]" (*Lesh v. Lesh* (1970) 8 Cal.App.3d 883, 890.) Where, as here, there is no conflicting extrinsic evidence introduced as to the judgment's meaning, construction of the judgment is a question of law that we review independently. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.) "The entire order made by the court must be considered as a whole, and not merely one phrase therein, in order to determine its meaning and effect." (*People v. Priegel* (1954) 126 Cal.App.2d 587, 589.)

Here, the trial court concluded that the one-to-one ratio specified in the order conditionally granting a new trial could be construed to refer to the compensatory damages award as reduced by the third-party settlement. The "ratio" calculus prescribed in United States Supreme Court decisions concerns "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award." (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418.) While neither we nor the parties have located any California authority on point, we are persuaded by the reasoning of out-of-state authority holding that the ratio calculus may not be altered by consideration of a third-party settlement. For example, in *Hayes Sight & Sound, Inc. v. ONEOK, Inc.* (Kan. 2006) 281 Kan. 1287 [136 P.3d 428], the punitive damages award was $5.25 million and the compensatory damages award was approximately $1.7 million, or a three-to-one ratio. The defendant argued, however, that "'net' compensatory damages of $130,596.99 ought to be used in calculating the ratio"—the "net" figure calculated by applying both setoff amounts for insurance payments and percentage of fault. (*Id.* at p. 1316.) In answering the question whether there was any rational or legal

basis for reducing the amount of the compensatory damages award for the purpose of calculating the punitive damages ratio, the court stated: "For reducing damages by setoff, [the defendant] cites no legal authority. The extent to which [the defendant's] *conduct* contributed to plaintiffs' losses is not altered by insurance coverage. There is no sound reason for subtracting setoff before calculating the ratio of punitive to compensatory damages." (*Ibid*.)

Other cases are in accord. (See *Kelley v. Michaels* (10th Cir. 1995) 59 F.3d 1050, 1055 [rejecting argument that punitive damages were excessive as a matter of law by declining to use $2,750 as the amount of compensatory damages; the actual damages awarded were $292,750 and the plaintiff received a setoff of $290,000 for a third-party settlement]; *Allsup's Convenience Stores, Inc. v. North River Ins. Co.* (N.M. 1999) 127 N.M. 1, 19 [976 P.2d 1] [declining to measure punitive damages award against the net figure paid for compensatory damages, explaining that "[t]he fact that damages may be offset does not mean that they were not caused or that they never existed sufficiently to support a punitive damages award"]; *Exxon Corp. v. Yarema* (Md. App. 1986) 69 Md. App. 124, 138–139 [516 A.2d 990] [rejecting argument that punitive damages should not have been awarded on the basis there was no actual loss because compensatory damages were reduced to zero in light of previous settlements; the reduction of compensatory damages to zero was not a determination that no damage had been suffered, but only that damages were not collectible because of third-party payments].)

The premise behind these cases is that the amount of damages suffered by a plaintiff and awarded by a jury does not change by reason of a setoff for a third-party settlement. Because the amount of compensatory damages remains unchanged, the amount of punitive damages specified to be awarded in an amount equivalent to the compensatory damages award, likewise, should not change. In asserting that the amount of compensatory damages was not fixed, Essex focuses on language in the new trial order that the motion would be denied if "PBC consents to a remittitur of punitive damages to the equivalent of whatever the *final* number is for compensatory damages and Brandt

fees." (Italics added.) We are not persuaded that the trial court's reference to a "final" number was intended to encompass a settlement offset. Rather, a more reasonable interpretation is that the court was considering the yet undetermined amounts for additional attorney fees pursuant to *Brandt v. Superior Court, supra,* 37 Cal.3d 813, interest and/or costs. Indeed, the record indicates that the final compensatory damages figure was actually increased by the addition of a $23,837.55 cost award.

Accordingly, we conclude that the one-to-one ratio between punitive and compensatory damages refers to the compensatory damages awarded by the jury. Thus, the judgment should have provided for an award of punitive damages in the amount of $706,101.77, a figure equivalent to the $682,264.22 in compensatory damages plus $23,837.55 in costs.[4] Contrary to PBC's position on appeal, the judgment correctly omitted any provision for an award of prejudgment interest, as PBC had no right to recover punitive damages within the meaning of Civil Code section 3287, subdivision (a), once the trial court conditionally granted Essex's motion for new trial on punitive damages.

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[4] Both because it proposed the judgment entered and has not appealed from the judgment, Essex is precluded from challenging the propriety of including costs as part of compensatory damages for purposes of the ratio calculus. (See, e.g., *County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118 [invited error]; *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439 [nonappealing respondent may not urge error on appeal].)

DISPOSITION

The judgment is reversed and the trial court is directed to enter a new judgment awarding PBC punitive damages in the amount of $706,101.77, with no provision for an award of prejudgment interest. Moreover, this amount is to remain unchanged regardless of any prejudgment interest modification to the compensatory damages award. The trial court ruled that punitive damages should be "equivalent"—not equal—to the compensatory damages award. The trial court is further directed to include an award of postjudgment interest at the legal rate running from December 29, 2009, the date of the original judgment on punitive damages. (See *Snapp v. State Farm Fire & Cas. Co.* (1964) 60 Cal.2d 816, 820–822; *General Ins. Co. v. Mammoth Vista Owners' Assn.* (1985) 174 Cal.App.3d 810, 829.) PBC is entitled to its costs on appeal.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ