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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

OBIE R. RAMBEAU et al.,	
Plaintiffs and Respondents,	G041879 consol. w/ G041982
v.	(Super. Ct. No. 07CC05001)
MYRON BARKER,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Corey S. Cramin, Judge. Affirmed as modified.

Gerald N. Shelley for Defendant and Appellant.

Herb Fox and Dennis G. Cosso for Plaintiffs and Respondents.

Following a bench trial, the trial court ordered Myron Barker to repay to Obie R. Rambeau and Delores A. Rambeau the $602,000 they had paid to him for construction of their house because he was at all times during construction an unlicensed contractor. (Bus. & Prof. Code, § 7031, subd. (b).)[1] The court also assessed an additional $100,000 in punitive damages for Barker's fraud in misrepresenting himself to be a licensed contractor. On appeal, Barker contends the judgment constitutes a punitive damage award and as such violates due process. He also challenges the award of attorney fees to the Rambeaus. We conclude the $100,000 punitive damage award was excessive and must be stricken. We otherwise reject Barker's arguments and affirm the judgment as modified.

FACTS AND PROCEDURE

The Rambeaus sued Barker, their former general contractor, over construction work he performed on their home. After Barker abandoned work on their house, the Rambeaus learned he was not a licensed contractor. Their complaint contained several causes of action against Barker including breach of contract, negligence, fraud, and disgorgement of fees paid to an unlicensed contractor pursuant to section 7031. They sought to recover what they paid to Barker, the amounts they paid a new contractor to fix and finish Barker's work, and punitive damages.

Following a bench trial, at which Barker represented himself in pro per, the court entered judgment for the Rambeaus. The court awarded them $602,000 on the breach of contract, negligence, fraud, and disgorgement causes of action, an amount representing the total fees they had paid Barker. It also awarded them $100,000 in punitive damages. On a post-judgment motion, the court ordered Barker to pay the Rambeaus $91,820 in attorney fees.

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[1] All further statutory references are to the Business and Professions Code, unless otherwise indicated.

Trial Evidence

In 1996, the Rambeaus purchased property on Lido Island in Newport Beach to construct their retirement "dream home." It was important to them to hire a competent licensed contractor. In 2001, the Rambeaus met Barker, who was building a house nearby, and began discussing hiring him to build their house. The Rambeaus retained an architect to draw up plans and after providing Barker with those plans, entered into a contract with him in April 2005.

Barker prepared the construction contract. Throughout the contract Barker referred to himself as "the Contractor." The contract provided Barker would "construct [an] entire new home" on the Rambeaus' property for $617,000. The house was to be completed within six months. The contract set forth a progress payment schedule that required all progress payments be paid half in cash and half by check. The contract provided all work would be performed by "individuals duly licensed," and Barker had discretion to hire subcontractors to perform work, but Barker would be fully responsible for paying those subcontractors. At Barker's suggestion, to speed up the demolition of the existing house on the property, the Rambeaus obtained their construction permits from the city as "owner/builder."

The Rambeaus entered into the construction contract with Barker believing he was a licensed contractor, and would not have contracted with him had they known he was not. Before signing the contract, they went with Barker to his other job sites where clients referred to Barker as their general contractor, and Barker did not correct them. Before construction began, a city inspector arrived at the jobsite. Obie asked Barker if he had his "contractor card" with him. Barker replied that he did and seemed to pull a card from his pocket, but upon seeing the inspector, Barker remarked he knew the inspector and he put the card away. Obie assumed the card had Barker's contractor's license number on it. At least once during construction, Barker expressly told Delores Rambeau he was a licensed

contractor. At least once during construction, Barker used an expired contractor's license number that was not in his name to obtain scaffolding for the site.

Barker admitted at trial he was not a licensed contractor when he entered into the contract with the Rambeaus or at any time during construction of their home. Barker testified he had worked in the construction business with a "partner" who held a contractor's license for 26 years, but by the time of this job, his relationship with that partner "was expiring." He used his former partner's expired contractor's license number with the scaffolding subcontractor to satisfy a "formality." Barker did not believe he needed a contractor's license to build the Rambeaus' house because "I didn't want to act as the contractor. I wasn't the contractor. They were owner/builder. I was the superintendent."

Between April 2005 and December 2005, the Rambeaus paid Barker about $520,000. The house was two months behind schedule and nowhere near completion. When Barker presented the Rambeaus with an invoice for an additional $53,000 in work they had not agreed to and for which there was no change order, he abandoned the job for three months and would not respond to their repeated phone calls. To get Barker to return to work, the Rambeaus paid him the additional amount, but Barker never fully completed the house and after further payments abandoned the job again.

The Rambeaus ultimately hired Richard Danet, a licensed contractor, to finish their house and fix work done by Barker. Danet testified that when he took over, the house was only two-thirds complete. He testified to the many problems he encountered on the job that were due to incomplete, improper, or shoddy work, done by unlicensed or unqualified workers who lacked proper supervision. By the time of trial, the Rambeaus had already paid Danet $152,400, and expected to owe him another $44,000.

Ruling and Judgment

Neither party requested a statement of decision, but following the bench trial, the court issued a detailed statement of findings and decision. It found the parties had entered into a construction contract and the Rambeaus had met their burden of proof that

Barker acted as a contractor on the job without the necessary license. Although Barker claimed he was merely the "job 'superintendent' . . . all the evidence demonstrates otherwise." Barker referred to himself as the contractor throughout the contract. He exercised a level of supervision consistent with a general contractor—hiring and directly paying subcontractors, controlling the schedule, and demanding the Rambeaus' compliance with a "'chain of command'" inconsistent with his being an employee of the Rambeaus. He repeatedly held himself out as the general contractor on the job. The fact the Rambeaus pulled their building permits as "owner/builder" was not determinative. The court concluded because Barker was an unlicensed contractor, he was required under section 7031 to disgorge all amounts paid to him by the Rambeaus—$602,000. The court further found by clear and convincing evidence Barker acted with malice and fraud and awarded $100,000 in punitive damages. The court declined to award the Rambeaus any of the additional $197,400 they paid (or anticipated paying) Danet to complete their house. Barker filed a motion for new trial, which the court denied. The court granted the Rambeaus' motion for attorney fees under section 7160.

DISCUSSION

Barker's opening brief contains 36 separate argument headings grouped under seven "issues." We group his arguments under four topics: (1) the $602,000 in damages awarded pursuant to section 7031 (disgorgement remedy); (2) the $100,000 in punitive damages awarded for fraud; (3) the $91,820 awarded as attorney fees under section 7160; and (4) the denial of his motion for new trial.

1. Disgorgement Remedy: Section 7031

Barker attacks the award of $602,000 to the Rambeaus under section 7031 on various grounds. He argues: the order he disgorge amounts the Rambeaus paid to him constitutes a punitive damage award and as such does not pass constitutional muster in this case; the disgorgement award is inconsistent with limitations on damages imposed by Civil Code section 3358 [damages for breach of obligation limited to what could be gained by full

performance] and Civil Code section 3359 [no more than reasonable damages can be recovered]; and he is entitled to an offset for amounts he paid for materials and services obtained for the Rambeaus' benefit.

Notably absent from Barker's analysis is any discussion of the *current* law concerning remedies against unlicensed contractors. Accordingly, that is where we begin. *Alatriste v. Cesar's Exterior Designs, Inc.* (2010) 183 Cal.App.4th 656 (*Alatriste*), and *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506 (*White*), and are instructive.

"Section 7031[, subdivision] (b) is part of the Contractors' State License Law, which 'is a comprehensive legislative scheme governing the construction business in California. [This statutory scheme] provides that contractors performing construction work must be licensed unless exempt. (§§ 7026 et seq., 7040 et seq.) "The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. [Citations.]" [Citation.] The [laws] are designed to protect the public from incompetent or dishonest providers of building and construction services. [Citation.]' [Citation.]" (*Alatriste, supra,* 183 Cal.App.4th at p. 664, citing *White, supra,* 178 Cal.App.4th 506.)

"This statutory scheme encourages licensure by subjecting unlicensed contractors to criminal penalties and civil remedies. [Citation.] The civil remedies 'affect the unlicensed contractor's right to receive or retain compensation for unlicensed work.' [Citation.] The hiring party is entitled to enforce these remedies through a defensive 'shield' or an affirmative 'sword.' [Citation.]" (*Alatriste, supra,* 183 Cal.App.4th at p. 664.)

The "shield" is contained in section 7031, subdivision (a).[2] It provides "a complete defense to claims for compensation made by a contractor who performed work

[2] Section 7031, subdivision (a), provides, "Except as provided in subdivision (e), no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action, or recover in law or equity in any action, in any court of

without a license, unless the contractor meets the requirements of the statutory substantial compliance doctrine. [Citation.]" (*Alatriste, supra,* 183 Cal.App.4th at pp. 664-665.)

"The California Supreme Court has long given a broad, literal interpretation to section 7031[, subdivision] (a)'s shield provision. The court has held that section 7031[, subdivision] (a) applies even when the person for whom the work was performed *knew* the contractor was unlicensed. [Citation.] Additionally, unlicensed contractors are presumed to have knowledge of the law's requirements and a contractor cannot circumvent section 7031[, subdivision] (a) by alleging the beneficiary's false promise to pay despite the contractor's lack of licensure. [Citation.]" (*Alatriste, supra,* 183 Cal.App.4th at p. 665, citing *Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 994-1002 (*Hydrotech*).)

"The high court also recently reconfirmed that 'section 7031[, subdivision] (a) bars a person from suing to recover compensation for *any* work he or she did under an agreement for services requiring a contractor's license unless proper licensure was in place *at all times* during such contractual performance.' [Citation.] The court explained that '"'[s]ection 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties,* and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .'"' [Citation.]" (*Alatriste, supra,* 183 Cal.App.4th at p. 665, citing *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 419.) "'"Because of the strength and clarity of this policy" [citation], the bar of section 7031[, subdivision] (a) applies "[r]egardless of the equities."' [Citations.]" (*Alatriste, supra,* 183 Cal.App.4th at pp. 665-666, citing *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d

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this state for the collection of compensation for the performance of any act or contract where a license is required by this chapter without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract, regardless of the merits of the cause of action brought by the person . . . ."

141, 152 . . . ["the courts may not resort to equitable considerations in defiance of section 7031"].)

Section 7031's "sword" is the result of a 2001 amendment to the statute that added subdivision (b), which provides: "Except as provided in subdivision (e), a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover *all compensation paid* to the unlicensed contractor for performance of any act or contract." (Italics added.) "By adding this remedy, the Legislature sought to further section 7031[, subdivision] (a)'s policy of deterring violations of licensing requirements by 'allow[ing] persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. [Citation.]' [Citation.] A legislative committee analysis stated the purpose of the measure was '"to address the recent case of *Cooper v. Westbrook Torrey Hills, LP* (2000) 81 Cal.App.4th 1294 . . . , in which the court, in an unpublished portion of the opinion, referred to [s]ection 7031[, subdivision] (a) prohibiting an unlicensed contractor from recovering fees, but not requiring any refund of compensation already paid to the contractor. . . . This measure is intended to clearly state that those using the services of unlicensed contractors are entitled to bring an action for recovery of compensation paid.'" [Citation.]" (*Alatriste, supra,* 183 Cal.App.4th at p. 666, citing *White, supra,* 178 Cal.App.4th at p. 519.)

Both *White* and *Alatriste* concluded "the Legislature intended that courts interpret sections 7031[, subdivision] (a) and 7031[, subdivision] (b) in a consistent manner, resulting in the same remedy regardless of whether the unlicensed contractor is the plaintiff or the defendant. [Citation.] '[S]ection 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the [statutory scheme's] civil penalties by (1) requiring prepayment before undertaking the next increment

of unlicensed work or (2) retaining progress payments relating to completed phases of the construction.' [Citation.]" (*Alatriste, supra,* 183 Cal.App.4th at p. 666, citing *White, supra,* 178 Cal.App.4th at p. 520.)

It is undisputed Barker was not a licensed contractor at any time during construction of the Rambeaus' house. Similarly, there is no dispute the Rambeaus' paid Barker $602,000. That alone would seemingly end the analysis as to the propriety of the $602,000 damage award under section 7031. Nonetheless, Barker contends the disgorgement award is a de facto punitive damage award and as such cannot withstand constitutional scrutiny.

Barker relies upon *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 (*Simon*), in which our Supreme Court explained, "the due process clause of the Fourteenth Amendment to the United States Constitution places limits on state courts' awards of punitive damages, limits appellate courts are required to enforce in their review of jury awards. [Citations.] The imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited, for due process entitles a tortfeasor to '"fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."' [Citation.]" "In deciding whether an award of punitive damages is constitutionally excessive . . . [appellate courts] are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct. [Citations.]" (*Id.* at p. 1172.)

Barker argues his conduct (being an unlicensed contractor) was not reprehensible; the Rambeaus were not harmed (or only minimally harmed) because most of the money they paid to him was used by him for services and materials on their house; and compared to the civil penalty for a misrepresentation by a contractor (section 7160 authorizes a civil penalty of $500 for a fraudulent representation that induces a person to

enter into a home improvement contract), an award of $602,000 in punitive damages is out of proportion.

We must reject Barker's constitutional argument. The statutorily mandated disgorgement award does not violate Barker's due process rights. Disgorgement is "an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs." (*S.E.C. v. Huffman* (5th Cir. 1993) 996 F.2d 800, 802; see *U.S. v. Philip Morris USA* (D.C. 2004) 310 F.Supp.2d 58, 63 [disgorgement not punishment implicating Eighth Amendment Excessive Fines Clause].) In *Alatriste, supra,* 183 Cal.App.4th at page 673, the court rejected the unlicensed contractor's argument that disgorgement was "unfair and 'serves no purpose other than punishment.' As noted, the legislative committee reports show that, in enacting section 7031[, subdivision (b)], the Legislature was specifically aware that permitting reimbursement may result in harsh and unfair results to an individual contractor and could result in unjust enrichment to a homeowner, but nonetheless decided that the rule was essential to effectuate the important public policy of deterring licensing violations and ensuring that all contractors are licensed. As a judicial body, we are not permitted to second-guess these policy choices." Furthermore, even if practically viewed as a form of punishment, due process constraints are imposed on punitive damage awards to ensure a defendant is on fair notice of the conduct that might subject him to punishment, and the severity of the possible penalty that might be imposed. (*Simon, supra,* 35 Cal.4th at p. 1171.) Section 7031, subdivision (b), gives clear notice of both.

We turn next to Barker's argument an award of damages under section 7031, subdivision (b) is subject to limitations on damage award imposed by Civil Code sections 3358 and 3359. Again, he is wrong.

Civil Code section 3358 on its face is inapplicable here. It provides, "*Except as expressly provided by statute*, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both

sides." (Italics added.) Section 7031, subdivision (b) expressly sets forth the disgorgement remedy for work performed by an unlicensed contractor.

Civil Code section 3359, requires damage awards "must, in all cases, be reasonable . . . ." But section 7031, subdivision (b), represents the Legislature's policy determination that in the case of work performed by an unlicensed contractor, disgorgement of amounts paid the contractor is reasonable. We cannot "second-guess" that policy determination. (*Alatriste, supra,* 183 Cal.App.4th at p. 673.)

Barker also attacks on the award of damages under section 7031, subdivision (b), by asserting he is entitled to an offset for amounts he paid out for materials and services performed by licensed subcontractors for the Rambeaus' benefit. Both *White, supra,* 178 Cal.App.4th 506, and *Alatriste, supra,* 183 Cal.App.4th 656, addressed and rejected the same contention.

White concluded section 7031, subdivision (b)'s "authorization of recovery of *'all* compensation paid to the unlicensed contractor for performance of any act or contract' [citation] means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White, supra,* 178 Cal.App.4th at pp. 520-521.) The *White* court reasoned this "interpretation . . . is consistent with the usual meaning of the word 'all,' which signifies the whole number and does not admit of an exception or exclusion not specified. [Citation.] In short, 'all compensation paid' does not mean all compensation less reductions for offsets. [¶] Our use of the plain and usual meaning of the word 'all' is consistent with the reference to offsets in the legislative [history] as well as the statement [in the Assembly Judiciary Committee Analysis] that 'deterrence can best be realized by compelling violators to return all compensation received from providing their unlicensed services.' [Citation.] If reductions for offset were allowed, deterrence of unlicensed work would be diminished." (*Id.* at p. 521; see also *Alatriste, supra,* 183 Cal.App.4th at p. 672.) We agree with the analyses of *White* and *Alatrise*. Barker's reliance on *S & Q Construction Company v. Palma CEIA*

Development Organization (1960) 179 Cal.App.2d 364, is misplaced as it predates the enactment of section 7031, subdivision (b). Barker is not entitled to claim offsets for amounts he expended on materials, supplies, and services he obtained for the Rambeaus.[3]

2. The $100,000 Punitive Damage Award

Barker challenges the award of $100,000 in punitive damages on the fraud cause of action as excessive. In briefing, Barker's argument is part and parcel of his due process challenge to the disgorgement award under section 7031, subdivision (b). As already noted, the disgorgement award is not properly analyzed as a punitive damage award. Accordingly, we apply Barker's punitive damage arguments only to the actual punitive damage award. We agree with Barker the $100,000 punitive damage award must be stricken.

"'The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.' [Citation.] The function of punitive damages is not served if the defendant is wealthy enough to pay the award without feeling economic pain. [Citation.] Nevertheless, the award must not be so great that it exceeds the level necessary to punish and deter. [Citation.]" (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 581 (*Zaxis*).)

The highest courts of both the United States and California have established guideposts to assist a reviewing court in determining whether a punitive damage award is excessive. The United States Supreme Court prescribes consideration of the following in determining whether an award violates the due process clause of the United States

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[3] Barker also attacks the $602,000 award to the extent it is based on breach of contract, negligence, and fraud. He argues the court applied the wrong measure for compensatory damages for breach of contract, negligence, and fraud. A trial court judgment will be affirmed if it is correct on any theory, even though the plaintiff sought recovery on several bases. (*Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1046, disapproved on another ground in *Simon, supra*, 35 Cal.App.4th at pp. 1182-1183.) Because we affirm the damage award under section 7301, subdivision (b), we need not address these contentions.

Constitution: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. [Citation.]" (*State Farm Mut. Auto. Ins. v. Campbell* (2003) 538 U.S. 408, 418.) In considering a federal due process challenge, the reviewing court conducts a de novo review. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 440.)

Separate from Fourteenth Amendment considerations, the California Supreme Court has established three benchmarks for determining whether a punitive damage claim is excessive: "(1) the reprehensibility of the defendant's conduct; (2) the actual harm suffered; and (3) the wealth of the defendant. [Citation.]" (*Zaxis, supra,* 89 Cal.App.4th at pp. 581-582; citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 (*Neal*).) Under the California standard, "An award that is reasonable in light of the first two factors may nevertheless be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone." (*Id.* at p. 582.)

To ensure a punitive damages award has a "'deterrent effect—without being excessive,'" a plaintiff has the burden to establish the defendant's financial condition. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 915 (*Kelly*).) "[A]ctual *evidence* of the defendant's financial condition is essential." (*Ibid.*) On appeal, a punitive damages award "cannot be sustained . . . unless the trial record contains meaningful evidence of the defendant's financial condition." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109 (*Adams*).) Furthermore, the punitive damages award must be "based on the defendant's financial condition *at the time of trial.*" (*Kelly, supra,* 145 Cal.App.4th at p. 915, italics added.)

Here, the only evidence the Rambeaus introduced regarding Barker's financial condition *at the time of trial* was his testimony under examination by the Rambeaus' attorney. Barker testified to his ownership of eight pieces of residential real estate. Barker bought his personal residence in Irvine for $127,000, took all the equity out in various

refinancing transactions to pay bills on other properties, and at the time of trial was "upside down," and owed $768,000 on the house. There was no evidence of the current fair market value of the house. Barker owned a rental property in Irvine that he bought for $325,000, but testified he took equity out over the years to pay bills, currently owed $500,000 on that property, and although the property was rented, he had monthly negative cash flow of $2,152 on that property. There was no evidence of its current fair market value. A residential property in Murietta was sold in a short sale in January 2008, and Barker lost $381,000 in the sale. Barker owned a residential property in Dove Canyon with partners that was "way upside down." They owed $644,000 on the property, Barker had put $100,000 cash into renovations, and testified the house was currently worth $610,000. Although the property was rented, it had a monthly negative cash flow of $1,253. Barker owned another property in Irvine. It was not "upside down"—Barker owed $364,000 on it and thought it was worth about $429,000. The house was rented out, but had a monthly negative cash flow of $25. Barker and a partner owned a house in Fountain Valley with no recorded liens; he thought the house was worth about $300,000. Barker owned a residential property in Brea that was also "upside down"—it had $544,000 in liens on it, was worth $400,000, and had a negative monthly cash flow of $800. A property Barker owned in Costa Mesa had $537,000 in liens, was worth $399,000, had a negative cash flow of $1,893 per month, and Barker owed $46,000 in back taxes on it. The final piece of real estate, a condominium in Irvine was worth $510,000, Barker owed $539,000 on it, and it was not rented.

As for other assets, Barker testified he currently worked for about $65 an hour. Although Barker testified he recently had worked as much as 40 hours a week, there was no evidence of his annual income. Barker had no accounts receivable. His construction tools were worth between $1,000 and $10,000. Barker owned several vehicles. He paid $35,000 for a 2004 Chevrolet truck, and still owed $10,000 on it—there was no evidence as to its current value. He owned a 2003 Cadillac on which he still owed $10,000, and again

there was no evidence of its current value. Barker owned a 2002 Corvette worth $18,000, on which he owed $10,000, and a 1979 Corvette worth about $5,000. Barker owned a 1975 Cadillac with salvaged title and which had no value. He owned a 2003 Chevrolet van worth about $10,000, a 1941 Cadillac worth about $4,000, and two trailers worth $1,000 each. He sold his 28-foot boat about one-and one half years before trial for $25,000 and used the proceeds to pay off the loan—just breaking even.

Barker had one savings account with a balance of $1,500. He had two checking accounts, into which he deposited the rents from his various properties. He typically deposited about $20,000 a month into each account—but from that he then paid all the expenses associated with the properties. Barker testified the balances in both accounts fluctuated monthly between $0 to $20,000. He had no retirement accounts, stocks, or other assets.

In defending the $100,000 punitive damage award, the Rambeaus describe Barker as a man with the financial wherewithal to own seven investment properties and a personal residence, who has $40,000 a month cash flow, owns seven vehicles and recently sold a boat. But their description is unduly optimistic. Indeed, the gist of Barker's testimony described a tenuous financial house of cards he had built upon residential real property investments in which he leveraged each property to its maximum to purchase or maintain other properties, only to have that house of cards come crumbling down. As Barker explained, of the eight residential properties houses he owns, six are "upside down," and he incurs further losses every month trying to maintain the debt on the properties and stave off foreclosure. Barker is doing little more with the equity in his investments than "robbing Peter to pay Paul" to handle his debt. Barker has almost $4 million in mortgage debt and at best about $215,000 in equity in the two properties which were not "upside down." His equity in the various vehicles, construction tools, and savings totals about $40,500. In short, at the time of trial Barker had only about $255,000 available in equity in

his real properties and assets, and had an overall negative net worth in view of his significant debt.

The purpose of punitive damages "is to deter, not to destroy." (*Adams, supra*, 54 Cal.3d at p. 112.) Accordingly, when a defendant's financial ability to pay is measured in terms of net worth, punitive damage awards in excess of 10 percent of a defendant's net worth are generally considered excessive. (*Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515; see also *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1596 [28 percent of net worth held excessive]; *Burnett v. National Enquirer, Inc.* (1983) 144 Cal.App.3d 991, 994 [35 percent of net worth held excessive]; *Little v. Stuyvesant Life Ins. Co.* (1977) 67 Cal.App.3d 451, 469-470 [15 percent of net worth held excessive]; *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, 18 [30 percent of net worth held "so greatly disproportionate . . . that [award was] presumptively based upon passion or prejudice"].) The $100,000 punitive damage award imposed here represents almost 40 percent of Barker's available equity and assets ($255,000) at the time of trial. This is clearly excessive. Accordingly, we conclude the punitive damage award must be stricken from the judgment.

3. Attorney Fees

Barker challenges the court's award of $91,820 in attorney fees to the Rambeaus. The attorney fees were authorized by section 7160, which permits the court to award a $500 penalty and attorney fees to "[a]ny person who is induced to contract for a work of improvement, including but not limited to a home improvement, in reliance on false or fraudulent representations or false statements knowingly made . . . by the contractor or solicitor."

Barker does not dispute the Rambeaus' entitlement to fees, but complains that the court failed to apportion the fees between the cause of action to which section 7160 applied and those to which it did not. We note the cause of action to which section 7160 applied was the fraud cause of action, but Barker seems to argue the fees were only

allowable for the section 7031 disgorgement claim, and "making [that] claim cannot take more than a few hours."

Preliminarily, we may treat Barker's argument as waived. An appealed judgment or challenged ruling is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) An appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Barker's argument is devoid of any legal analysis or discussion of legal authority.

Furthermore, while section 7160 allows a consumer to recover the $500 penalty and attorney fees attributable to the false or fraudulent representations on which he or she relied, the provision does not limit a plaintiff's recovery to those fees incurred in pursuing specifically a fraud cause of action. Apportionment is required only to the extent that issues pertaining to different claims are segregable. Fees related to a common core of facts or interrelated issues are recoverable. (*Del Cerro Mobile Estates v. Proffer* (2001) 87 Cal.App.4th 943, 951; *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 687 (*Bell*).) The proper allocation of fees was a matter committed to the sound discretion of the trial court (*Bell, supra,* 82 Cal.App.4th at p. 687), and Barker has not shown the court's determination of the appropriate fees constituted an abuse of discretion.

4. Denial of New Trial Motion

Barker also contends the trial court erred by denying his new trial motion. His argument is comprised of a terse summary of two of his substantive attacks on the judgment that we have already rejected above, namely that he was entitled to offsets for amounts he paid for the Rambeaus' benefit and the disgorgement damages under section 7031 are limited by Civil Code sections 3358 and 3359. His argument is devoid of any legal analysis of the grounds for new trial (Code Civ. Proc., § 656, 657), or legal analysis of how the trial court abused its discretion (*Horsford v. Board Of Trustees Of California State University*

(2005) 132 Cal.App.4th 359, 379). Accordingly, we decline to consider the argument further.

DISPOSITION

The judgment is modified by striking the $100,000 punitive damage award. In all other respects, the judgment is affirmed. The parties shall bear their own attorney fees and costs on appeal.

O'LEARY, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.