Filed 9/23/11 Flowers v. Hillyer CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

SYLESTER FLOWERS et al.,

Plaintiffs, Cross-defendants and Respondents,

v.

RANNI HILLYER,

Defendant, Cross-complainant and Appellant.

A120478/A121941

(Alameda County Super. Ct. No. RG05200737)

Plaintiffs Sylester Flowers, Helen Flowers, Flowers Heritage Foundation, Alta Tierra Properties, LLC, The Apothecary Eastmont Town Center, Inc., and Ramsell Corporation (collectively, plaintiffs) sued Ranni Hillyer for, among other things, fraud and conversion.[1] Plaintiffs alleged Hillyer made 72 unauthorized transactions and embezzled millions of dollars while she was the chief financial officer (CFO) of Ramsell Corporation (Ramsell). Hillyer cross-complained for defamation, and for sexual harassment and retaliation in violation of the California Fair Employment Housing Act (FEHA) (Gov. Code, § 12900 et seq.).

[1] We refer to Sylester (Syl), Helen, and Eric Flowers by their first names for convenience and clarity. Plaintiffs also sued Hillyer's husband and her two sons, but they are not parties on appeal.

The trial court directed verdicts in plaintiffs' favor on 40 of the 72 transactions totaling $3,641,141.97. The jury returned a verdict for plaintiffs on all but three of the remaining transactions and awarded plaintiffs $5,546,625.23 in compensatory damages, $721,500 in noneconomic damages, and $4,825,143 in punitive damages. The jury also returned a defense verdict on Hillyer's sexual harassment claim. The court entered judgment for plaintiffs in the amount of $11,708,181,69 and denied Hillyer's posttrial motions. The court also awarded Syl and Ramsell $1,312,632 in attorney fees.

Hillyer appeals from the judgment (No. A120478) and from the order awarding attorney fees (No. A121941). We consolidate the appeals on our own motion. Hillyer contends: (1) the court abused its discretion by admitting evidence of her "past sexual relationships;" (2) the election of remedies doctrine bars plaintiffs' tort claims; (3) the award of $75,000 to Ramsell is erroneous; (4) the court erred by directing verdicts in plaintiffs' favor on various transactions; (5) the court "tainted" the jury with comments it made before closing arguments; (6) the award of noneconomic damages to Helen was excessive; (7) there was insufficient evidence of her financial condition to support the punitive damages award; (8) the denial of her new trial motion was erroneous; and (9) the award of attorney fees to Ramsell and Syl should be reversed.[2]

---

[2] Well after briefing was completed and shortly before oral argument, plaintiffs submitted two requests for judicial notice. We deny both requests for several reasons. First, the documents were not part of the record below and the trier of fact did not "consider them in making its factual findings or legal ruling[s]. . . ." (*Bradstreet v. Wong* (2008) 161 Cal.App.4th 1440, 1459, fn. 14, abrogated on another point as stated in *Martinez v. Combs* (2010) 49 Cal.4th 35.) "Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time judgment was entered.' [Citation.] No exceptional circumstances exist that would justify deviating from that rule. . . ." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Second, plaintiffs have not demonstrated how the proffered documents are relevant to the issues on appeal. Finally, many of the documents are not subject to judicial notice. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064, overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276 ["the existence of the newspaper article is irrelevant, and the truth of its contents is not judicially noticeable"]; *Jordan v.*

We conclude the absence of any evidence of Hillyer's financial condition at the time of trial precludes an award of punitive damages. Accordingly, we reverse the judgment insofar as it awards plaintiffs punitive damages. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We provide a brief overview of the facts here. We provide additional factual and procedural details as germane to the discussion of Hillyer's specific claims.

Hillyer's Employment at Ramsell and Her Relationship with Plaintiffs

Syl opened a pharmacy in Oakland in 1964. He opened several additional pharmacies in Oakland and one in Daly City. Some time thereafter, Syl created Ramsell, an information technology and public health administration company. Ramsell has two subsidiaries: Alta Tierra Properties, which owns a commercial office building and various other properties, and The Apothecary at Eastmont Town Center, Inc., in East Oakland, a pharmacy. The Flowers Heritage Foundation is a nonprofit organization run by the Flowers family that supports the HIV-positive community.

Syl and Helen married in 1995. In 1997, Ramsell began managing California's AIDS Drug Assistance Program (ADAP). By 2000, Ramsell was growing rapidly: the company had secured a sizeable contract to manage the ADAP program from 2000 to 2005. As Ramsell expanded, Syl was suffering from a reoccurrence of prostate cancer and was taking medication and undergoing surgeries that made him depressed and created tension in his marriage.

Syl met Hillyer in 2000. She represented herself as an experienced banker and entrepreneur who owned a company specializing in financial transactions, banking, and investments. She told Syl she had an MBA, an accounting degree, and significant experience in the financial services industry.[3] Based on this information, Syl decided in

---

Superstar Sandcars (2010) 182 Cal.App.4th 1416, 1421, fn. 2 [declining to take notice of several documents, including press releases].)

[3] Hillyer has a 10th grade education.

early 2001 to hire Hillyer as an independent contractor. At some point shortly thereafter, Syl promoted Hillyer to CFO and put her in charge of the Flowers' personal finances. He did this because of his declining health and because he trusted Hillyer's financial expertise. Hillyer convinced Syl to transfer his personal and business bank accounts to Bank of America, where Hillyer had worked, and to hire a new accountant. She also managed Syl's appointment calendar.

Almost immediately after Syl promoted Hillyer to CFO, she began transferring money from Ramsell and from plaintiffs' personal accounts without authorization. For example, in February 2001, Hillyer used $145,000 from the Flowers' retirement account to purchase property on Stanyan Street in San Francisco. In November 2003, she took $150,000 of plaintiffs' money and used it to buy a condominium at 88 King Street in San Francisco. From February 2001 to January 2005, Hillyer made 72 unauthorized transactions. She transferred plaintiffs' money to her own bank accounts and used it to: (1) redecorate and remodel her home; (2) purchase real estate; (3) make loans to friends, including Deepak Chopra; and (4) acquire businesses.

In 2002, Hillyer — who knew of Syl's health problems — frequently came into Syl's office, hugged him, and asked him how he was feeling. Syl thought Hillyer was a "friendly and sincere, passionate person. And then some of the hugs became a little longer, a little stronger, a little tighter." Syl, who was "struggling with a lot of issues during [that] time, . . . welcomed" Hillyer's affection. Hillyer knew that Syl and Helen were "struggling almost every day" with various aspects of their marriage; Hillyer suggested Helen might be having an affair, and might have been "taking money away to the Philippines," where her family lived. Hillyer told Syl she understood what he was "going through" and told him that she would "take care" of him. At the same time, Hillyer — who had formed a friendship with Helen — told Helen that Syl mismanaged the Flowers' money and advised Helen to see a divorce attorney.

In November 2002, Hillyer invited Syl to lunch at the Ritz Carlton Hotel. After lunch, they went to a room Hillyer had reserved; they partially undressed and were physically intimate. They did not have sexual intercourse. Syl and Hillyer met at hotels on several other occasions in 2002, 2003, and 2004; each time Hillyer planned the rendezvous and told Syl where to meet her. Syl believed the meetings were consensual. He "never felt that [he] had . . . harassed her, but more so that [he] had been made a fool of and seduced and manipulated."

In 2005, Ramsell's contract to administer the ADAP was to expire, and the State of California sent out a request for proposals (RFP) from companies interested in administering the program for the next five years. Syl placed his son, Eric, in charge of Ramsell's RFP. Hillyer, Eric, and various other Ramsell employees worked long hours finalizing the RFP. Unbeknownst to Eric, however, Hillyer made several changes to the RFP and directed a messenger to submit it before Eric could review it. Hillyer's version of the RFP failed to answer certain questions and did not include required information about Ramsell's finances, meaning the State likely would have rejected it. When Eric discovered what happened, he and Hillyer had a heated argument. Eric called Syl, who had the messenger return with the proposal. Eric revised the RFP and submitted it the following Monday. Ramsell secured the ADAP contract.

Shortly thereafter, Syl called Hillyer and directed her to come to his office to explain why she disobeyed his instructions regarding the RFP. She refused and Syl fired her for insubordination. When Syl fired Hillyer, he had no idea she had taken millions of dollars from plaintiffs.

The Litigation

In March 2005, plaintiffs sued Hillyer and others for fraud, conversion, breach of contract, breach of implied agreement, unjust enrichment, breach of fiduciary duty, and misappropriation of trade secrets. Plaintiffs alleged Hillyer embezzled at least $2.3 million dollars while she was employed by Ramsell. Plaintiffs obtained a $2,353,268 writ of attachment against Hillyer's assets. In June 2005, plaintiffs obtained an amended attachment order increasing the amount of the attachment to $5,276,162.

Hillyer cross-complained against Syl and Ramsell, alleging a defamation claim, as well as a claim for sexual harassment and retaliation in violation of FEHA. Hillyer alleged she was sexually harassed by Syl on at least 40 occasions between 2002 and 2004 and that she was fired in retaliation for "refusing to continue a sexual relationship" with Syl. Plaintiffs' operative third amended complaint alleged 12 claims for, among other things, fraud, conversion, breach of fiduciary duty, constructive fraudulent transfer, constructive trust, and elder abuse. The operative complaint identified 69 unauthorized transactions.

Before trial, Hillyer stipulated 72 transactions occurred. At trial, however, Hillyer denied making some of the transactions and claimed she did not owe plaintiffs any money. In a series of evasive and convoluted responses to straightforward questions, she contended she took money from plaintiffs and invested it with their consent and for their benefit. She admitted, however, that she did not have any documents to support these contentions.

After the close of evidence, plaintiffs dismissed their claims for breach of contract, breach of implied contract, and misappropriation of trade secrets; Hillyer dismissed her defamation cause of action. The court directed verdicts in plaintiffs' favor on 40 of the 72 transactions totaling $3,641,141.97. Hillyer did not oppose 22 of the directed verdicts.

In September 2007, the jury returned a verdict for plaintiffs on all but three of the remaining transactions and awarded them $5,546,625.23 in compensatory damages, $721,500 in noneconomic damages, and $4,825,143 in punitive damages. The jury also returned a defense verdict on Hillyer's sexual harassment claim. The court entered judgment for plaintiffs and denied Hillyer's JNOV and new trial motions. The court awarded Syl and Ramsell $1,312,632 in attorney fees.

DISCUSSION

I.
Any Error in Admitting Evidence Regarding Hillyer's Previous Extramarital Affairs Was Harmless

Plaintiffs moved in limine for an order allowing the introduction of evidence concerning Hillyer's prior extramarital affairs pursuant to Evidence Code section 783.[4]

---

[4] Unless otherwise noted, all further statutory references are to the Evidence Code. Under section 783, where a defendant seeks to introduce evidence of the plaintiff's sexual

Briefly, the evidence consisted of excerpts from the depositions of: (1) Hillyer's ex-husband, Charnjit Nagi, who testified Hillyer had numerous extramarital affairs while he was married to her, used sex to advance her career, and repeatedly manipulated men; (2) Arvind Amin, who testified he gave Hillyer hundreds of thousands of dollars in cash and gifts during their affair, and that she "manipulated and bewitched" him; and (3) Umila and Jaymini Amin, and Ashok Dhingra, who testified about Hillyer's affair with Amin and about another affair Hillyer had while she was married to Nagi. Plaintiffs also sought to introduce six photographs Amin took of Hillyer that supported Amin's claim that he had an extramarital affair with Hillyer and contradicted Hillyer's deposition testimony wherein she denied having an affair while she was married to Nagi. Finally, plaintiffs sought to introduce emails Hillyer sent Amin instructing him to lie during his deposition.

Plaintiffs argued the evidence was relevant to prove Hillyer's "modus operandi or plan," specifically that she "invoked a plan involving seduction, sex, and false promises in order to gain the trust of Mr. Flowers, Mr. Amin, and others." According to plaintiffs, the evidence established Hillyer used "the same tactic" with Amin and Syl "with similarly devastating results." Second, plaintiffs argued the evidence was admissible to refute Hillyer's claim that Syl sexually harassed her, and to impeach Hillyer's deposition testimony that she never had an extramarital affair. Finally, plaintiffs argued the evidence was not more prejudicial than probative under section 352.

In opposition, Hillyer argued the evidence was inadmissible for several reasons. First, she argued the deposition testimony did not establish a modus operandi or common design or plan because the conduct described in the depositions was not sufficiently similar to the conduct alleged in the present case. Next, Hillyer contended the evidence was inadmissible under section 1106 and was not admissible for impeachment purposes. Finally, Hillyer claimed the evidence was unduly prejudicial pursuant to section 352. In

---

conduct in a sexual harassment action, the defendant must bring a motion "stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented." (§ 783, subds. (a), (b); Simons, Cal. Evidence Manual (2011) §§ 3:53, 6:8, pp. 271, 467.)

reply, plaintiffs contended section 1106 did not preclude the admission of the evidence and that the evidence was sufficiently similar to demonstrate Hillyer's plan or modus operandi. They also argued the evidence was directly relevant to rebut Hillyer's description of her affair with Syl and her claim that she had never had an extramarital affair before working at Ramsell.

Following a hearing, the court allowed plaintiffs — over Hillyer's objection — to introduce pictures of Hillyer and handwritten notes from Hillyer to Amin into evidence. The court also allowed plaintiffs to introduce Hillyer's emails to Amin where she instructed him to lie during his deposition. Plaintiffs referred to Hillyer's previous extramarital affairs during their opening statement and closing argument.

On appeal, Hillyer contends the trial court "abused its discretion by allowing plaintiffs to introduce evidence of [her] past sexual relationships." In scattershot fashion, she complains about various instances where the court allowed plaintiffs' counsel to discuss her prior sexual history or introduce evidence of it. We have grouped the complaints into the following categories.

First, Hillyer complains generally that "[p]laintiffs devoted much of their opening statements to allegations about [her] prior affairs." The problem with this claim is Hillyer "did not object to these statements, and therefore has forfeited [this] claim[ ]." (*People v. Foster* (2010) 50 Cal.4th 1301, 1352 [by failing to object, defendant forfeited challenge to statements made during prosecutor's opening statement].) As a general rule, "a party must object and request an admonition in order to preserve a claim of error and enable the trial court to correct the asserted error." (*Id.* at p. 1353.)[5] We also reject Hillyer's claim that the admission of the evidence regarding her previous extramarital affairs violated her constitutional right to privacy and contravened Code of Civil Procedure section 2107.220, subdivision (a) because she failed to raise these claims in the trial court. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011,

[5] Although the jury instructions are not part of the record on appeal, we note that plaintiffs asked the court to deliver CACI No. 100, which instructs the jury that attorneys' statements are not evidence. (See CACI No. 106 (2011 ed.).)

1040 (*Winfred*) [declining to consider the plaintiff's claim that admitting evidence of extramarital affairs violated his right to privacy because he "did not raise this constitutional standard below . . ."].) Next, Hillyer contends the court erred by admitting emails she exchanged with Amin before his deposition where she, among other things, urged Amin to let the past "stay [b]uried" and reminded him that "NO one knows of the sex." Hillyer also claims the court erred by failing to comply with section 783. We reject these arguments because they are unsupported by any authority. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 (*Falcone*) ["absence of . . . citation to authority allows this court to treat the contentions as waived"].)

Hillyer's principal complaint is the court erred by admitting evidence of her affair with Amin, including photographs Amin took of her during their affair. Hillyer relies heavily on *Winfred*, *supra*, 165 Cal.App.4th at page 1040. In that case, the plaintiff was severely injured when the tire of a cargo van he was using to transport produce from Las Vegas to California delaminated, causing the van to rollover. (*Id.* at p. 1014.) He sued "the designer and the manufacturer of the tire, alleging defects in the right rear tire." (*Ibid.*) "At trial, over objection, the trial court permitted defendants to introduce evidence that, while plaintiff was married to his first wife, he had an affair with, and later married, his business partner's wife; he then had two wives; plaintiff falsely told his second wife, before marrying her, that he had divorced his first wife; he eventually divorced his second wife; and he thereafter had an affair with a third woman, with whom he had two children." (*Ibid.*) The trial court concluded: (1) the plaintiff's opening statement "'opened the door' to this evidence; (2) the evidence was admissible on the issue of [the plaintiff's] credibility; (3) the evidence showed that [the plaintiff's] brain injury was not as serious as he claimed; and (4) evidence that [the plaintiff] had a family in Las Vegas permitted an inference that he overloaded the van in order to make enough money to support two families." (*Id.* at p. 1027.) The jury returned a defense verdict. (*Id.* at p. 1014.)

The appellate court reversed and remanded for a new trial. (*Winfred, supra,* 165 Cal.App.4th at p. 1014.) The *Winfred* court rejected the trial court's rationale for admitting the evidence and determined the evidence was not relevant to the plaintiff's credibility, or to "contradict his deposition testimony that he could not recall" who Rosalinda, his ex-wife, and Maria, his daughter, were. "But his extramarital affairs were irrelevant to the substantive issue in the case: the cause of the accident. To the extent the evidence was relevant to [the plaintiff's] credibility, it was more prejudicial than probative" under section 352. (*Winfred,* at p. 1029.)

The *Winfred* court continued, "[b]ecause this evidence has no tendency to prove or disprove any disputed fact concerning the cause of [the plaintiff's] accident, its use is necessarily limited to impeachment. [Citation.] Just as evidence of a woman's unchaste behavior is no longer admissible on the issue of credibility unless it tends to show bias — for example, if she had an intimate relationship with a party or witness [citations] — neither is evidence of a man's sexual conduct [citations]. Further, a "'witness may have a strong reason to lie about [illicit, intimate relationships]'" [citation], such that he "'may not [be] cross-examine[d] . . . upon [that] collateral matter [ ] for the purpose of eliciting something to be contradicted.'" [Citation]. Accordingly, [the plaintiff's] denial of his extramarital affairs at his deposition may not be contradicted at trial because the denial itself is irrelevant and prejudicial and thus inadmissible." (*Winfred, supra,* 165 Cal.App.4th at p. 1034.)

The court reversed the judgment and remanded for a new trial, explaining, "[h]aving reviewed the testimony of the parties' experts and the other witnesses as well as the relevant exhibits, it appears reasonably probable that were it not for the trial court's incorrect evidentiary rulings, a result more favorable to [the plaintiff] could have been obtained." (*Winfred, supra,* 165 Cal.App.4th at p. 1040.) The court noted that the "trial court's erroneous evidentiary rulings, which permitted [the defendant] to parade [the plaintiff's] illicit, intimate conduct before the jury — smearing his character and inflaming the jury — likely tainted the entire verdict." (*Ibid.*)

Winfred is distinguishable. In that case, the plaintiff pursued a products liability claim following an automobile accident. (*Winfred, supra,* 165 Cal.App.4th at p. 1014.) Here — and in stark contrast to the *Winfred* plaintiff — Hillyer sued Syl and Ramsell for sexual harassment, making her extramarital affairs relevant to her claim that Syl sexually harassed her. In *Winfred*, the defendants sought to admit evidence of the plaintiff's extramarital affairs to demonstrate he was dishonest. Here, the evidence was relevant to demonstrate Hillyer seduced Syl to gain access to, and control over, his money.

Even if we assume for the sake of argument the trial court erred by admitting the evidence concerning Hillyer's previous extramarital affairs, any error was harmless. The erroneous admission of the evidence of Hillyer's previous extramarital affairs was not prejudicial because it is not reasonably probable "that were it not for the trial court's incorrect evidentiary rulings, a result more favorable to [Hillyer] could have been obtained. [Citation]." (*Winfred, supra,* 165 Cal.App.4th at p. 1040.) Before trial, Hillyer stipulated that, on 72 occasions, she transferred money out of plaintiffs' accounts. At trial, plaintiffs methodically established each of the transactions was unauthorized, notwithstanding Hillyer's unbelievable testimony to the contrary.[6] Plaintiffs submitted extensive documentation of the unauthorized transactions, including copies of checks Hillyer wrote, wire transfer receipts, and bank statements showing withdrawals Hillyer made. Moreover, plaintiffs testified they did not authorize the transactions. The evidence plaintiffs presented was so persuasive that the court directed verdicts on 22 of

[6] At trial, Hillyer denied making some of the transfers. She also claimed she transferred the money with plaintiffs' consent. Later, she admitted transferring the money for various reasons — including to remodel her home — but claimed plaintiffs had been repaid. As the trial progressed, Hillyer eventually admitted she owed plaintiffs money for many of the transactions. In a sidebar conference, the court noted that "Hillyer has been here perjuring up-and-down and sideways and I have no reason to think she will stop. . . ." The court explained that it was "not a walking lie detector," but it had "never seen a display like this. . . ." Plaintiffs established Hillyer had lied about her education and credentials, lied in pre-trial declarations, and that she lied at her deposition about a variety of subjects, including the instances of supposed sexual harassment. At trial, Hillyer testified that an FBI agent was watching the trial and intimidating her and her family.

the transactions, and denied Hillyer's new trial motion, noting the evidence supporting plaintiffs' claims was "overwhelming" and that "[i]t is hard to imagine a stronger case of embezzlement." Given this evidence, we cannot fathom how Hillyer could have received a more favorable result had the court excluded evidence of her prior extramarital affairs.

Hillyer offers several reasons why she was prejudiced by the admission of the evidence, none of which are persuasive. First, Hillyer notes the jury deliberated for four days before reaching a verdict. The length of the jury's deliberations, however, does not indicate the case was close, nor that Hillyer would have received a more favorable result absent the court's erroneous evidentiary ruling, particularly where, as here, the case was financially complex and involved numerous parties and transactions. The special verdict form required the jury to answer over 154 questions. Nor are we persuaded by the fact that one juror asked the court whether there were "guidelines on behavior and expression of jurors," specifically, whether it was appropriate to "joke about the defendants, plaintiffs before or after votes are taken[.]" This question does not indicate the jury struggled to reach a verdict on any of plaintiffs' claims.[7]

Next, Hillyer notes that the jury found in her favor on three of the transactions and claims it is "likely that [the jury] would have ruled in [her] favor" on other transactions "had the trial focused on examining the evidence rather than slandering [her]." We disagree. The evidence of Hillyer's previous extramarital affairs was a grain of sand in the mountain of evidence supporting plaintiffs' claims. Moreover, the fact that the jury found in favor of Hillyer on certain transactions supports the conclusion she was not unduly prejudiced by the admission of the evidence. Finally, there is not, as Hillyer contends, a "substantial chance [the jury] would have accepted her sexual harassment claim had the plaintiffs not been allowed to repeatedly portray her as a grifter who had spent decades using her sexual wiles to steal from men. . . ." Hillyer cites no evidence, and no authority, to support this argument. Hillyer's testimony on the supposed instances of sexual harassment was simply not believable, particularly because Syl denied sexually

---

[7] That juror abstained from answering 5 of the 154 questions on the verdict form does not alter our conclusion.

harassing Hillyer in candid and sometimes self-deprecating testimony the jury found compelling. Additionally, plaintiffs submitted evidence establishing that Hillyer's description of the alleged sexual intercourse at Ramsell's office was improbable given the confines of the office space and Syl's physical limitations at that time.

II.
The Election of Remedies Doctrine Does Not Bar Plaintiffs' Tort Claims

Following entry of judgment, Hillyer moved for JNOV, claiming she was entitled to judgment in her favor on plaintiffs' tort claims because plaintiffs elected to pursue contract remedies when they sought and obtained a writ of attachment, a remedy available only in contract actions. In response — and relying on *Waffer Internat. Corp. v. Khorsandi* (1999) 69 Cal.App.4th 1261 (*Waffer*) — plaintiffs argued the election of remedies doctrine did not apply in the context of writs of attachment. Plaintiffs also argued the doctrine did not bar their tort claims because there was no evidence their tort and contract claims arose from the same set of facts. Following a hearing, the court denied the JNOV motion.

On appeal, Hillyer argues the court erred by denying the motion for JNOV. As she did in the court below, Hillyer contends plaintiffs waived their tort claims by obtaining a writ of attachment. She is wrong. Attachment "is a remedy by which a plaintiff with a contractual claim to money (not a claim to a specific item of property) may have various items of a defendant's property seized before judgment and held by a levying officer for execution after judgment." (*Waffer, supra,* 69 Cal.App.4th at p. 1271, italics omitted; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2010) ¶ 9:853, p. 9(II)-67.) "'Broadly speaking, election of remedies is the act of choosing between two or more concurrent but inconsistent remedies based upon the same state of facts. Ordinarily a plaintiff need not elect, and cannot be compelled to elect, between inconsistent remedies during the course of trial prior to judgment. [Citations.] However, if a plaintiff has unequivocally and knowledgeably elected to proceed on one of the remedies he is pursuing, he may be barred recourse to the other.

[Citation.]'" (*Baker v. Superior Court* (1983) 150 Cal.App.3d 140, 144 (*Baker*), quoting *Roam v. Koop* (1974) 41 Cal.App.3d 1035, 1039 (*Roam*).)[8]

"Courts and commentators have long recognized the harshness of the election of remedies doctrine and have for some time looked upon it with disfavor." (*Baker*, *supra*, 150 Cal.App.3d at p. 145.) Commentators have observed that "California decisions illustrating binding election [of remedies] are comparatively rare, ... 'At best this doctrine . . . is a harsh, and now largely obsolete rule, the scope of which should not be extended.'" (Witkin, Cal. Procedure (5th ed. 2008) Actions, § 180, p. 260, quoting *Perkins v. Benguet Consol. Mining Co.* (1942) 55 Cal.App.2d 720, 756; see also Weil & Brown, Civil Procedure Before Trial, *supra*, ¶ 9:853.1, p. 9(II)-68 [reiterating same criticism of the doctrine].) In the 1970's, the laws pertaining to attachment went through a "metamorphosis" that expanded the protections available to defendants and provided "extensive due process protections. . . ." (*Waffer*, *supra*, 69 Cal.App.4th at p. 1264.) "Even before this metamorphosis in attachment law, the more expansive applications of the election doctrine were falling into disrepute. After the metamorphosis, case law has continued the trend of narrowing the election of remedies defense in favor of deciding tort claims on their merits. The rationale for this narrowing is that the election doctrine is a form of estoppel. The purpose of an estoppel is to remedy an inequity. Since the current attachment statutes carefully protect a defendant's rights and allow attachment only upon prior court order in limited circumstances, it is doubtful that attachment today can ever be said to result in an inequity justifying an estoppel. Instead, the election doctrine now appears simply outmoded in the attachment context due to the extensive revisions in the attachment statutes." (*Id.* at pp. 1264-1265.) Accordingly, "it is doubtful that the doctrine of election of remedies has any continuing viability in the attachment

[8] For a comprehensive view of the development and erosion of the election of remedies doctrine, see *Waffer*, *supra*, 69 Cal.App.4th at pages 1269 to 1273.

context" (*id.* at p. 1268) and cases have "steadily restricted [its] application . . . ." (*Id.* at p. 1274.)[9]

Even if we assume the election of remedies doctrine "survives in the attachment context to some degree," it does not apply here because "differing operative facts are involved in the contract and tort claims." (*Waffer, supra,* 69 Cal.App.4th at pp. 1268, 1278; *Baker, supra,* 150 Cal.App.3d at p. 146; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 137 (*Glendale*).) Here, the elements of plaintiffs' fraud, conversion, and elder abuse claims differ from the elements of a contract cause of action. (See, e.g., *Waffer, supra,* 69 Cal.App.4th at p. 1278.) On one hand, plaintiffs' breach of contract cause of action is based on allegations that Hillyer breached the employment agreement by "removing and retaining Ramsell files, records, documents, funds, and a computer and office equipment from the Ramsell office" without Ramsell's consent. Plaintiffs' breach of implied agreement cause of action is premised on allegations that Hillyer breached an implied agreement to act as a fiduciary to plaintiffs and to perform her duties as chief financial officer diligently. On the other hand, plaintiffs fraud and other tort claims arise out of Hillyer's act of repeatedly transferring, appropriating, and converting plaintiffs' money for a wrongful use and with the intent to defraud. Additionally, the facts material to plaintiffs' contract claims arose at a different time than the facts material to plaintiffs' tort claims. Hillyer does not argue otherwise.

For all of these reasons, plaintiffs' act of obtaining an attachment of Hillyer's assets did not bar them from pursuing tort claims against her. (*Waffer, supra,* 69 Cal.App.4th at p. 1268.) Accordingly, the court properly denied Hillyer's motion for JNOV.

---

[9] We are not persuaded by plaintiffs' reliance on *Roam, supra,* 41 Cal.App.3d at page 1039. *Roam* was decided before the changes in the attachment laws and, as a result, has little application here. (See, e.g., *Waffer, supra,* 69 Cal.App.4th at p. 1270.)

III.

Hillyer's Challenge Regarding the Award of Damages to Ramsell Fails

At some point during her employment at Ramsell, Hillyer took Syl to see a piece of property owned by Naz Meah. Hillyer presented the property to Syl as a potential investment. After Syl told Hillyer he was not interested in purchasing the property, she contacted Syl's son, Eric, about the property. When Syl learned that Eric intended to buy the property, he scolded Eric but loaned him $75,000 for the down payment. In 2001, Eric sued Meah after learning that title to the property was clouded. The case settled, with Meah agreeing to pay Eric $75,000 and Hillyer agreeing to pay Meah $30,000. Hillyer intercepted the $75,000 check and deposited it into her own bank account instead of into Ramsell's bank account. She then paid Meah $30,000 using some of the $75,000.

Without an objection from Hillyer, the court directed a verdict on plaintiffs' claim regarding the $30,000. By special verdict, the jury concluded Hillyer owed Ramsell $75,000 from the "Eric Flowers/Meah Settlement." The jury determined Hillyer committed fraud and conversion with respect to the transaction, and that she breached her fiduciary duty to Ramsell.

On appeal, Hillyer challenges the award of $75,000 to Ramsell. Although her argument is difficult to follow, she seems to contend the award of $75,000 was erroneous because the money belonged to Eric, who was not a party to plaintiffs' lawsuit. The "second problem" with the $75,000 award, according to Hillyer, was "that the $30,000 which the court awarded on a directed verdict was part of the same $75,000 that the jury awarded to Ramsell. The company got a double recovery for money that never belonged to it in the first place." We reject these arguments because they are unsupported by any legal authority. (*Kensington University v. Council for Private Postsecondary etc. Education* (1997) 54 Cal.App.4th 27, 42-43.) In any event, plaintiffs demonstrated the $75,000 belonged to Syl and that he loaned it to Eric. That Eric was not a party to the lawsuit does not prevent plaintiffs from recovering the $75,000 where the money belonged to Syl and Eric had an obligation to repay him. With respect to Hillyer's second argument, Ramsell did not get a "double recovery." Hillyer committed two wrongs: she misappropriated $75,000 of Ramsell's money and used $30,000 of plaintiffs' money (instead of using her own money, as she was required to do) to pay Meah. Plaintiffs were therefore able to recover damages for both wrongs.

We also reject Hillyer's claim, raised for the first time in her reply brief, that conflicting evidence with respect to plaintiffs' claim regarding the $30,000 precluded a directed verdict. "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. To withhold a point until the closing brief deprives the respondent of the opportunity to answer it or requires the effort and delay of an additional brief by permission." (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

IV.
The Court Properly Granted a Directed Verdict on Plaintiffs' Claim Regarding 950 Harrison Street

As noted above, the court directed verdicts on 40 of 72 transactions. On appeal, Hillyer claims the court erred by directing verdicts "on numerous claims that should have been decided by the jury," apparently because these unspecified claims "involved substantial conflicting evidence." We do not address this claim because Hillyer has not identified the directed verdicts about which she complains. "[I]t is counsel's duty to point out portions of the record that support the position taken on appeal." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) We will not search the record on behalf of appellant. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.)

Hillyer gives "an example" where the court should not have directed a verdict: according to Hillyer, there was conflicting testimony pertaining to the transaction involving 950 Harrison Street. The problem with this argument is Hillyer did not oppose plaintiffs' motion for a directed verdict on the 950 Harrison Street transaction. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630 ["if the party resisting a motion for directed verdict produces sufficient evidence to support a jury verdict in his or her favor, the motion must be denied"].) Even if Hillyer had preserved her challenge to the directed verdict for appellate review, we would reject it because there was no substantial evidence supporting her defense.

"'"A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party. [Citations.]" [Citations.] This court decides de novo whether sufficient evidence was presented to withstand a directed verdict. [Citations.]' [Citation.]" (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1154.) Because Hillyer appeals from a judgment based on a directed verdict in favor of plaintiffs, "we view the evidence in the light most favorable to [Hillyer]. Conflicts in the evidence are resolved, and inferences from the evidence are drawn, in [her] favor. If there is substantial evidence to support [Hillyer's defense], *and* if the state of the law also supports that [defense], we must reverse the judgment. [Citation.]" (*Margolin v. Shemeria* (2000) 85 Cal.App.4th 891, 895.)

Viewing the evidence in the light most favorable to Hillyer, we cannot conclude there was substantial evidence tending to prove plaintiffs consented to the 950 Harrison Street transaction, or that there is substantial evidence Hillyer repaid plaintiffs for the money she took to purchase the property at 950 Harrison Street. At trial, Hillyer admitted: (1) she purchased the Harrison Street property for $604,000 using money from the Flowers Heritage Foundation; (2) she did not notify Syl when she transferred the money out of the Flowers Heritage Foundation bank account; (3) she took possession of the property as her sole and separate property; and (4) the property was in her name. At trial, plaintiffs introduced testimony from Hillyer's deposition where she conceded the purchase of 950 Harrison was a personal investment and that she intended to repay plaintiffs. Hillyer, however, could not explain how she had repaid or would repay the money. At one point, Hillyer seemed to concede she owed Syl money with respect to the property.

Hillyer suggests a directed verdict was improper because she testified at trial that she did not owe plaintiffs any money from the 950 Harrison Street transaction. Hillyer also claims a directed verdict was improper because she testified the 950 Harrison Street property was an investment for Syl and that documents supporting this contention would have been in her "files." Hillyer, however, did not produce these "files," during discovery and plaintiffs were unable to locate them. We conclude Hillyer's evidence was not substantial. "'Substantial evidence' is not synonymous with 'any' evidence; rather, it means the evidence must be of ponderable legal significance, reasonable, credible, and of solid value." (*Cahill v. San Diego Gas & Electric* Co. (2011) 194 Cal.App.4th 939, 958.) Hillyer's evidence was contradictory, incredible, and of minimal value given her penchant for perjury. As a result, the trial court properly directed a verdict for plaintiffs on the 950 Harrison Street transaction.[10]

V.
The Court Did Not "Taint" the Jury with Comments It Made before Closing Arguments

Before closing arguments, the court informed the jury it had directed verdicts for plaintiffs on 40 transactions. The court explained directed verdicts: "A directed verdict is when I tell you that's how it is going to be. You may want to know how I have the authority to do that? If we have a serious factual question, the jury decides it. In some of these situations, there was not a serious factual question about whether the money was owed or not. For a case to get to the jury, there must be 'substantial evidence.' . . . Substantial evidence is reasonable if it is credible and of solid value. Obviously the word cannot be deemed synonymous with anything. It has to be evidence of some substance to

[10] We note that Hillyer has not, and cannot, demonstrate she suffered prejudice as a result of the court's order directing a verdict on the 950 Harrison Street transaction. The jury concluded Hillyer owed Flowers Heritage Foundation $604,000 and that she committed fraud, conversion and breach of fiduciary duty with respect to that transaction.

get to the jury. . . . Mrs. Hillyer pretty much conceded she owes the money. The money was transferred to her and she owes it. So, there is nothing for the jury to decide."

On appeal, Hillyer contends the court "tainted the jury by stating, just before closing arguments, that much of [her] testimony was not credible." We disagree with Hillyer's characterization. The court did not tell the jury that Hillyer was "not credible." The court simply explained that it had directed verdicts in plaintiffs' favor on 40 transactions because Hillyer admitted she owed the money at issue to plaintiffs. Hillyer's complaints about the court's comments fail for the additional reasons that she: (1) consented to many of the directed verdicts; (2) failed to object to the court's comments; and (3) has not established the court's remarks caused a miscarriage of justice requiring reversal, particularly where the court instructed the jury, "[i]n reaching your verdict, do not guess what I think your verdict should be from something I may have said or done." (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 620; *Ward v. De Martini* (1930) 108 Cal.App. 745, 751.)

VI.
We Decline to Address Hillyer's Claim Regarding the Noneconomic Damages Awarded to Helen

The jury awarded Syl $240,500 in noneconomic damages and awarded $481,000 to Helen. Hillyer urges this court to reduce Helen's damages by $240,500, or the amount by which they exceeded Syl's noneconomic damages. Hillyer seems to contend the noneconomic damages awarded to Helen were excessive because there "was no substantial evidence she had suffered any injuries which were not also suffered at least equally by Syl."

We decline to address this claim for two reasons. First, it is unsupported by any authority. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]' [Citations.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 793; see also *Falcone, supra,* 164 Cal.App.4th at p. 830.)

We decline to address this claim for the additional reason that Hillyer may not challenge the excessiveness of the noneconomic damages award to Helen for the first time on appeal. Hillyer's new trial motion did not challenge the award of noneconomic damages to Helen. "A failure to timely move for a new trial ordinarily precludes a party from complaining on appeal that the damages awarded were either excessive or inadequate, whether the case was tried by a jury or by the court. [Citation.] The power to weigh the evidence and resolve issues of credibility is vested in the trial court, not the reviewing court. [Citation.] Thus, a party who first challenges the damage award on appeal, without a motion for a new trial, unnecessarily burdens the appellate court with issues that can and should be resolved at the trial level. [Citation.] Consequently, if ascertainment of the amount of damages turns on the credibility of witnesses, conflicting evidence, or other factual questions, the award may not be challenged for inadequacy or excessiveness for the first time on appeal. [Citation.]" (*Jamison v. Jamison* (2008) 164 Cal.App.4th 714, 719-720.) Here, the amount of noneconomic damages awarded to Helen turns on various factual questions. As a result, Hillyer's failure to raise this issue in her new trial motion precludes her from doing so on appeal.

VII.
The Punitive Damages Award Must be Reversed Because There is Insufficient Evidence of Hillyer's Financial Condition at the Time of Trial

In May and June 2005, plaintiffs propounded document requests demanding Hillyer produce, among other things, documents related to: (1) real and personal property she owned; (2) bank accounts, financial accounts, certificates of deposit, and safe deposit boxes owned or held in her name; and (3) financial statements that she provided to anyone within the last five years. Hillyer did not respond to the document requests, nor did she produce any documents. Plaintiffs moved to compel, and the court ordered her to respond by September 2005. The court advised Hillyer that her failure to comply with the court order "and/or further discovery misuse may result in the imposition of future sanctions, including monetary, evidence, issue or terminating sanctions." Hillyer served responses to the document requests but did not produce any documents.

Plaintiffs then filed a second motion to compel production of documents and sought monetary, issue, evidentiary, and terminating sanctions. The court granted the motion in part, ordering Hillyer to provide further responses, but denying plaintiffs' requests for sanctions. It is not clear whether Hillyer complied with the court's order. At trial, plaintiffs did not introduce evidence of Hillyer's financial condition or net worth. The jury awarded plaintiffs $4,825,143 in punitive damages.

On appeal, Hillyer contends there was insufficient evidence of her financial condition to support the punitive damages award. A plaintiff may recover punitive damages "for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) "An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct." (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 914 (*Kelly*).) A plaintiff seeking punitive damages must introduce meaningful evidence of the defendant's financial condition. The rationale for this rule is the punitive damages award should be sufficient to deter future misconduct without being so disproportionate to the defendant's ability to pay that it is excessive. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110-112 (*Adams*); *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185.) A plaintiff typically proves ability to pay with evidence of a defendant's net worth; "evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680 (*Baxter*).)

Plaintiffs contend Hillyer is barred from raising the issue of the propriety of awarding punitive damages because she failed to raise it in her motion for new trial. Generally, an appellant may not claim on appeal that punitive damages are excessive if he or she failed to raise the issue in the court below by motion for new trial. *(Schroeder v. Auto Driveway Co.* (1974) 11 Cal.3d 908, 918-919.) But "[t]he failure to move for a new trial, however, does not preclude a party from urging legal errors in the trial of the damage issue such as erroneous rulings on admissibility of evidence, errors in jury instructions, or failure to apply the proper legal measure of damages. [Citations.]" (*Glendale, supra,* 66 Cal.App.3d at p. 122; *Adams, supra,* 54 Cal.3d at p. 115.)

Adams is instructive. In that case, the California Supreme Court held that the presentation of evidence of a defendant's financial condition was a prerequisite to an award of punitive damages and that the burden was on the plaintiff to introduce evidence of the defendant's financial condition. (*Adams, supra,* 54 Cal.3d at p. 109.) In reaching this conclusion, our high court rejected the plaintiff's assertion that the defendant had not preserved his argument on this point, explaining that "a reviewing court has discretion to decide such an issue if it presents a pure question of law arising on undisputed facts, particularly when the issue is a matter of important public policy. [Citation.] Most important . . . the primary interest that must be protected is the public interest in punitive damage awards in appropriate amounts. We cannot allow the *public* interest to be thwarted by a defendant's oversight or trial tactics." (*Id.* at p. 115, fn. 5.)

We are not persuaded by plaintiffs' reliance on *Campbell v. McClure* (1986) 182 Cal.App.3d 806, 807-808 (*Campbell*). In *Campbell*, the trial court awarded the plaintiffs nearly $100,000 in punitive damages and the defendant appealed, contending the punitive damages were "excessive and . . . improperly calculated." (*Id.* at p. 808.) The appellate court noted that the record did not contain any evidence of the defendant's wealth, "an important consideration in determining the amount of punitive damages" but concluded the defendant's failure to challenge the amount of the punitive damages award in the trial court precluded appellate "consideration of the issue." The *Campbell* court observed that the amount of a punitive damages award "must be first challenged in the trial court where it is most appropriately resolved." (*Id.* at p. 808 & fn. 1.) The court held that the defendant's "failure . . . to move for new trial precludes our review of the amount of the award, a question depending upon resolution of conflicting factual evidence best resolved by the trier of fact. [Citation.]" (*Id.* at pp. 811-812.)

Campbell stands for the proposition that a defendant who has not sought a new trial cannot argue the excessiveness of punitive damages on appeal if the challenge concerns conflicting evidence or other factual questions.[11] In *Campbell*, the amount of the damage award was at issue. (*Campbell, supra*, 182 Cal.App.3d at p. 808, fn. 1.) Here and in contrast to *Campbell*, the issue is not the amount of the punitive damages award but rather the legality of the award itself. Because the lack of evidence of Hillyer's financial condition presents a legal issue based on undisputed facts — and not a factual question — we consider the propriety of the punitive damages award notwithstanding Hillyer's failure to raise the issue in her new trial motion. *Campbell* does not compel a different conclusion.

Plaintiffs urge us to uphold the award of punitive damages because Hillyer refused to comply with her obligation to produce documents related to her financial condition. They rely on *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 603-604 (*Davidov*), where the appellate court held that a defendant who fails to comply with a trial court order to produce records of his or her financial condition may be estopped from challenging that award on grounds of absence of evidence of financial condition.[12] In *Davidov*, the jury rendered a verdict for plaintiff on his fraud claim. The trial court granted the plaintiff's request to conduct discovery on the defendant's financial condition and ordered him to produce "all records regarding his net worth" by the following day. (*Id.* at p. 603.) The defendant failed to comply and the court awarded $96,000 in punitive damages. (*Id.* at p. 604.)

The defendant appealed, contending the plaintiff had failed to produce sufficient evidence of his financial condition. (*Davidov, supra*, 78 Cal.App.4th at p. 605.) The Second District Court of Appeal rejected this argument and held the defendant waived his right to complain about the lack of evidence by disobeying the trial court's order to produce records reflecting his financial condition. (*Id.* at pp. 608-609.) As the *Davidov*

---

[11] Notably, *Campbell* predates *Adams*, which requires the plaintiff seeking punitive damages to present evidence of the defendant's financial condition.

[12] The only other case upon which plaintiffs rely, *Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1503, footnote 1, has no application here. That case does not concern an award of punitive damages or a party's purported failure to produce court-ordered documents.

court explained, "defendant's records were the only source of information regarding his financial condition available to plaintiff. By his disobedience of a proper court order, defendant improperly deprived plaintiff of the opportunity to meet his burden of proof on the issue. Defendant may not now be heard to complain about the absence of such evidence. As defendant has not called our attention to anything in the record which otherwise reflects that the punitive damage award is excessive, we will affirm the award." (*Id.* at p. 609.) Relying on *Davidov*, other courts have reached similar results. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 41["trial court's order directing [the defendant] to produce a current financial statement precludes [him] from claiming on appeal that the record contains insufficient evidence of his financial condition"]; see also *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 243-244.)

Davidov is distinguishable. Here and in contrast to *Davidov*, the trial court did not order Hillyer to produce evidence of her financial condition for the purpose of determining the amount of a punitive damages award. There is no indication that plaintiffs sought — or that the trial court ordered — pretrial discovery of Hillyer's financial condition pursuant to Civil Code section 3295, subdivision (c).[13] Nor is there any indication that Hillyer disobeyed such an order. Additionally, there is no indication

---

[13] Civil Code section 3295 provides: "[n]o pretrial discovery by the plaintiff shall be permitted" regarding "[t]he profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence" and a defendant's financial condition "unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial." (Civ. Code, § 3295, subd. (a)(1), (c).)

plaintiffs sought the production at trial of evidence of Hillyer's net worth or other pertinent information concerning her financial condition. Plaintiffs did not serve Hillyer (or anyone else) with a notice to appear and produce documents relating to Hillyer's financial condition pursuant to Code of Civil Procedure section 1987, subdivision (b), which is the equivalent of a court order.[14] (Code Civ. Proc., § 1985, subd. (a); see also *Kelly, supra,* 145 Cal.App.4th at p. 919.) Nor did plaintiffs move to bifurcate the trial and seek a court order permitting discovery of Hillyer's financial condition after the jury determined liability. In connection with plaintiffs' motion for attorney fees, the court noted it did not allocate any of plaintiffs' attorney fees toward their punitive damages claim "because they were not based on any evidence beyond what had already [been] presented on such claims as the elder abuse claims. Any additional attorney time was *de minimus*."

Plaintiffs do not direct us to any evidence in the record of Hillyer's financial condition or her ability to pay the punitive damages award. We note that although the jury had before it evidence of Hillyer's salary before she was fired from Ramsell and evidence that she purchased a home in 2000, it had no evidence of Hillyer's liabilities. There was no indication of Hillyer's income at the time of trial, the critical point in time, and there was nothing to show whether Hillyer possessed any other assets, had liabilities, or whether she owned or owed money on a house, car or any personal property at the time of trial. The absence of such evidence precludes an award of punitive damages because we have no idea of the impact of the punitive damage award on her financial viability. Without this information, we can "'only speculate as to whether the award is appropriate or excessive.'" (*Baxter, supra,* 150 Cal.App.4th at p. 680, quoting *Adams, supra,* 54 Cal.3d at p. 112.) "[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows [her] to absorb the award with little or no

[14] Plaintiffs used the subpoena procedure described in Code of Civil Procedure section 1987 to subpoena a notebook Hillyer referred to while she was testifying. Plaintiffs, however, did not subpoena Hillyer to produce documents regarding her financial condition.

discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth . . . exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 & fn. 13.)

Lara v. Cadag (1993) 13 Cal.App.4th 1061, 1063 (*Cadag*), and *Kelly, supra,* 145 Cal.App.4th page 917, support our conclusion. In *Cadag*, the trial court awarded punitive damages of $70,000. The appellate court reversed, concluding the evidence was insufficient to support the award. The court explained, "[n]o evidence of [the defendant's] net worth was presented. The evidence of his financial condition . . . came in by way of his answers to questions on cross-examination — that he owns and operates a family medical clinic with a monthly net profit of $3,000 and that he works part-time at another clinic where he earns an additional $5,000 to $6,000 each month. That is all there is. We do not have a clue about his assets or liabilities and we have no idea if he owns or owes money on a house or a yacht or a racehorse. Anything beyond the pure arithmetic necessary to figure out that his annual income is somewhere between $96,000 and $108,000 would be pure speculation." (*Cadag, supra,* 13 Cal.App.4th at p. 1063, fn. omitted.)

The Fourth District reached a similar result in *Kelly*. There, the court concluded the plaintiff failed to satisfy his burden to present meaningful evidence of the defendant's financial condition or ability to pay. (*Kelly, supra,* 145 Cal.App.4th at p. 917.) The *Kelly* court was not persuaded by evidence that the defendant owned property because "there was no evidence of any encumbrances on the properties at the time of trial, or of other liabilities [the defendant] may have had. . . . Obviously, without any evidence [the defendant] still held the assets, or of the amounts of his liabilities, the $75,000 award is unsupported by substantial evidence and excessive." (*Ibid.;* see also *Baxter, supra,* 150 Cal.App.4th at p. 681 [reversing award of punitive damages where record showed the defendant owned "substantial assets" but where record was "silent with respect to her liabilities"].)

At oral argument, counsel for plaintiffs claimed that any attempt to obtain financial records from Hillyer would have been futile because she refused to produce documents during discovery and lied about the whereabouts of those documents at trial. Counsel's belief regarding the futility of obtaining evidence regarding Hillyer's financial condition should not have precluded him from obtaining a court order directing Hillyer to produce evidence of her financial condition for the purpose of determining the amount of a punitive damages award.

We reverse the judgment insofar as it awards plaintiffs punitive damages. Plaintiffs do not request — and are not entitled to — a retrial because they had a full opportunity to present evidence of financial condition but failed to do so. (*Kelly, supra,* 145 Cal.App.4th at pp. 919-920; *Baxter*, *supra*, 150 Cal.App.4th at p. 681.)

VIII.
The Court Did Not Err by Denying Hillyer's New Trial Motion

During discovery, plaintiffs obtained a copy of a June 2005 email exchange between Hillyer and her former attorney, Peter Lamberto. In the email, Lamberto opined that "no reasonable person is likely to believe that you did not misappropriate the money to purchase the [Infield] business" and that "moving very large sums of Flowers' money around in [a] convoluted way, in the way that someone might try if they were being deceptive . . . on many, many occasions without any documentation of your intent or plan, is not something you were shy about." Lamberto asked Hillyer, "Do we want to go in there again and get killed because we can never present a reasonable explanation that does not fly in the face of accepted and proper banking, investing, or accounting practices? [¶] What we should be focusing on is how much money of Flowers was used that he is certainly owed. The present complaint says that number is $5.2 million. Unless you are going to claim that someone forged your name on the dozens of checks taking money out of the Flowers' accounts, you owe him the money. . . . When we have the right number, [$]5.2 million or whatever, we can try to settle this case. . . ." Finally, Lamberto told Hillyer that the value of the sexual harassment claim alleged in her cross-complaint "has a value of less than the change in my pocket."

Plaintiffs marked the Lamberto email as exhibit 916 and included it in their list of proposed trial exhibits. The court, however, did not rule on the admissibility of the exhibit. During trial, plaintiffs filed a brief to "support the admissibility of . . . Exhibit 916. . . ." Plaintiffs explained that the court had previously ordered the production of the Lamberto email; that it was admissible under the crime-fraud exception to the attorney-client privilege; and that Hillyer waived any protections afforded by the attorney-client privilege by testifying at trial about the email. At a hearing, the court noted its reluctance "to allow into the evidence a former attorney's view of the case. . . ." The court, however, did not rule on the email's admissibility.

After the jury reached its verdict, counsel for plaintiffs informed the court that the Lamberto email "(which has remained under submission and has not been admitted into evidence)" was inadvertently included in some of the binders provided to the jurors, the Court and opposing counsel during the trial. This document was also apparently included in the evidence binders that went into the jury room." Plaintiffs' counsel explained that "[p]laintiffs and their counsel were not aware of this development prior to the verdicts" and noted, "[w]hile we do not believe that this exhibit influenced the verdicts or the outcome of this case, we wanted to bring this matter to the Court's attention."

A few days after receiving the letter from plaintiffs' counsel, the court entered judgment for plaintiffs. Hillyer then moved for a new trial on the grounds that plaintiffs "submitted to the jury a prejudicial email" from Lamberto, "despite the Court's prior order that the document could not be used as evidence."[15] Hillyer's theory was the jurors "looked at the Lamberto email both before and during deliberations, and discussed it in the jury room;" she argued the jury's review of the email constituted "inadvertent[ ]" juror misconduct. According to Hillyer, the email from Lamberto was "damning because

15 As Hillyer correctly notes in her opening brief on appeal, the court did not rule on the admissibility of the Lamberto email.

it is a snapshot in time, reflecting counsel's doubts and misgivings about the evidence" without giving her an opportunity to offer an explanation.

In opposition to the new trial motion, plaintiffs argued there was no jury misconduct and, alternatively, that Hillyer could not demonstrate a reasonable probability of a more favorable result absent the misconduct. In support of their opposition, plaintiffs submitted the declarations of two jurors averring they did not recall seeing the Lamberto email or hearing it discussed during trial or jury deliberations. Plaintiffs also submitted declarations from three of their attorneys testifying they were unaware before or during trial that any exhibit or juror binders.

Following a hearing, the court denied the new trial motion. It determined the inclusion of the Lamberto email in the juror and exhibit binders was inadvertent. Although the court concluded the "events here did constitute jury misconduct" within the meaning of Code of Civil Procedure section 657, it determined the "overwhelming evidence presented by the plaintiffs" at trial overcome "any presumption of prejudice. [¶] It is hard to imagine a stronger case of embezzlement. 'You had to be there.' . . . Ms. Hillyer admitted in almost every instance that she had taken the money. She never raised a true defense to any transaction . . . the nearest that she ever got to a defense was to say that Sylester Flowers knew what she was doing. But she never presented any documentary evidence that this was the case." The court further explained that "[t]he case against her was stronger because there were so many transactions for the jury to consider" and because Hillyer "obviously perjured herself" at trial and during her deposition. The court concluded, "[i]n a different case, where only a single claim of embezzlement was made, the jury's unauthorized review of something like Exhibit 916 would easily justify a new trial. [¶] Not in this case. The evidence was just too overwhelming on every cause of action. [¶] . . . [to] overcome the presumption that . . . Hillyer was prejudiced by what happened here."

On appeal, Hillyer contends the court erred by denying her new trial motion. As she did in the court below, Hillyer claims the court was required to grant her motion because "plaintiffs gave the jury a prejudicial and inflammatory document which had not been allowed into evidence." The parties agree that a juror's "inadvertent receipt of information outside the court proceedings is considered 'misconduct' and creates a presumption of prejudice which, if not rebutted, requires a new trial. [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 994, superseded by statute on another issue.) "Juror misconduct raises a rebuttable presumption that the misconduct was prejudicial. [Citation.] Misconduct was prejudicial if there is a substantial likelihood that the juror was biased and that the misconduct affected the verdict. [Citations.] A presumption of prejudice is rebutted if the entire record, including the nature of the misconduct and the surrounding circumstances, indicates that there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the party moving for a new trial. [Citations.]" (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 58 (*Ovando*).) Courts have upheld a trial court's denial of a new trial motion where the party opposing the motion demonstrates there was "'no substantial likelihood that the incident prejudiced'" the party moving for a new trial. (*Zapien, supra,* 4 Cal.4th at p. 994, quoting *People v. Mincey* (1992) 2 Cal.4th 408, 467.)

As noted above, the court determined the "overwhelming" evidence at trial overcame any presumption of prejudice. Hillyer has not established the court abused its discretion by denying her new trial motion or by concluding plaintiffs successfully rebutted the presumption of prejudice. (*Ovando, supra,* 150 Cal.App.4th at p. 59.) The evidence against Hillyer was — as the trial court correctly described — overwhelming. She admitted in almost every instance to taking the money, and if she did not admit to taking the money, she failed to raise a plausible defense to doing so. She also perjured herself numerous times during trial. Moreover, and in opposition to the new trial motion, two jurors averred they did not recall seeing the email or hearing it discussed during trial or jury deliberations. Given this evidence, the trial court properly concluded there was no substantial likelihood the presence of the email in certain juror and exhibit binders prejudiced Hillyer.

IX.

The Award of Attorney Fees to Syl and Ramsell Was Not an Abuse of Discretion

After the court entered judgment for plaintiffs, Syl and Ramsell sought recovery of $2,850,340.19 in attorney fees. Syl sought attorney fees pursuant to Welfare and Institutions Code section 15657.5 for successfully prosecuting his elder abuse claims; Syl and Ramsell sought attorney fees pursuant to Government Code section 12965 for successfully defending Hillyer's FEHA sexual harassment claim.

Hillyer opposed the motion on various grounds. Among other things, Hillyer argued: (1) plaintiffs failed to apportion their fees between recoverable and nonrecoverable aspects of the case; (2) counsel for plaintiffs "rampant redactions and use of 'block billing'" made it impossible to assess the reasonableness of their request for fees; (3) plaintiffs' fee request was "unreasonably high" because they "over-litigated" the case; and (4) plaintiffs were not entitled to fees in connection with her cross-complaint for sexual harassment.

Following a hearing, the court awarded Syl $770,576 in attorney fees on his elder abuse claims. It awarded Syl and Ramsell $542,056 in attorney fees for their successful defense of Hillyer's sexual harassment claim. The court issued a lengthy written order describing its rationale for awarding fees and explaining how it calculated the amount of fees awarded.

A. *Awarding Syl $770,576 in Attorney Fees Pursuant to Welfare and Institutions Code section 15657.5 Was Not an Abuse of Discretion.*

The jury concluded Hillyer committed two instances of financial elder abuse. As relevant here, two law firms represented plaintiffs: Collette Erickson Farmer & O'Neill LLP (Collette) and Burkhalter, Kessler, Goodman & George LLP (Burkhalter). Collette represented plaintiffs from the filing of the complaint until some time before trial and sought $1,983,721 in fees. Burkhalter, Kessler, Goodman & George LLP (Burkhalter) represented Ramsell on Hillyer's sexual harassment claim and sought $886,619.19 in fees. Because Burkhalter did not represent Syl until after trial, the court denied plaintiffs' request for fees generated by Burkhalter on Syl's elder abuse claims.

The court determined 45.7 percent of Collette's fees were attributable to Syl's elder abuse claims and allocated $906,560 in fees to those claims. The court reduced this amount by 15 percent (rather than 20 percent Hillyer requested) because Collette's billing statements amounted to "'block billing'" and because many of the billing entries were redacted, "making them less than adequate to determine whether the work was all necessary." The court awarded Syl $770,576 in fees.

On appeal, Hillyer claims the court "improperly awarded elder-abuse fees for work performed on behalf of clients other than Syl." This argument has no merit. The court awarded attorney fees to Syl pursuant to Welfare and Institutions Code section 15657.5 for the successful prosecution of his elder abuse claims. In awarding these fees, the court determined the amount of time Collette spent on these elder abuse claims and apportioned the fee request accordingly. We fail to see how the court, as Hillyer contends, "improperly credited all of the plaintiffs when only Syl was eligible for elder abuse damages."

Next, Hillyer contends the court should have reduced Collette's fees by "20% or more" given the redactions and "'block billing'" entries on the attorney invoices. We agree with Hillyer that block billing makes it impossible to separate out time between claims and difficult to determine whether the time spent on a particular task was reasonable. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 689.) When presented with block billing in a fee request, "the trial court should exercise its discretion in assigning a reasonable percentage to the entries or simply cast them aside." (*Id.* at p. 689.) Here, the court reduced the amount plaintiffs sought by 15 percent — more than $130,000 — based on the redactions and block billing entries. Given the court's familiarity with the case, and having observed the efforts of the attorneys, the court's assessment of the time Collette reasonably spent on Syl's elder abuse claims was not an abuse of discretion. (*Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 103 [affirming award of attorney fees; trial court was in a position to determine that tasks described in billing statements challenged as "block billings" required total amount of time billed]; *Welch v. Metropolitan Life Ins. Co.* (9th Cir. 2007) 480 F.3d 942, 948 [court adopted 20 percent fee reduction for block billing; noting that State Bar of California Committee on Mandatory Fee Arbitration concluded that block billing "may increase time by 10% to 30%"].) The cases upon which Hillyer relies do not support her contention that the court abused its discretion by failing to further reduce the fee award.

Finally, Hillyer argues Syl was awarded attorney fees on the elder abuse claims twice for the same work. Hillyer seems to claim the court's denial of plaintiffs' request for monetary sanctions associated with their motions to compel precluded them from recovering attorney fees after trial. Without citing any authority, Hillyer claims, "where plaintiffs had previously been denied sanctions or attorney fees, those denials are res judicata and barred any further claim for the attorney time at issue." We disagree. """Res judicata" describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.'" [Citation.]" (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 683.) Hillyer has not demonstrated the various orders in which the court declined to award plaintiffs monetary sanctions or attorney fees during the discovery process constituted a "final judgment on the merits." (*Id.* at p. 683.)

B. *Awarding Syl and Ramsell Attorney Fees as Prevailing Parties Pursuant to Government Code section 12965 Was Not an Abuse of Discretion.*

As stated above, the court awarded Syl and Ramsell $542,056 for their successful defense of Hillyer's sexual harassment claim. In a written ruling, the court noted Government Code section 12965[16] gives the court discretion to award fees to a "successful defendant in a FEHA case." Additionally, the court explained that awarding fees was proper because Hillyer's claims "were totally false, supported by nothing more

[16] Government Code section 12965, subdivision (b) states in pertinent part: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees, except where the action is filed by a public agency or a public official, acting in an official capacity."

than Ranni Hillyer's perjured testimony. . . . [t]here were a half-dozen or so liaisons between Ranni Hillyer and Sylester Flowers, but the jury understood what had happened. Ranni Hillyer was not a victim at all. She was the seductress, Sylester Flowers the victim. She spun her web and dragged him in. [¶] Her reason for preying on Sylester Flowers was a set-up. She was looking for a claim to set off against his claim for the millions that she had stolen from him and his companies. By the time of these liaisons, she had already embezzled millions of dollars."

The court determined 20 percent — or $396,744 — of Collette's fees and 30 percent — or $240,969 — of Burkhalter's fees should be allocated to the defense of the sexual harassment claim, for a total of $637,713. The court reduced this amount by 15 percent because the billing statements were redacted and contained "'block billing'" entries. The court awarded Syl and Ramsell $542,056 as prevailing parties on Hillyer's claim for sexual harassment in violation of FEHA.

On appeal, Hillyer claims the court erred by awarding attorney fees in connection with her sexual harassment claim for three reasons: (1) the defense verdict on her claim "was secured with improper evidence of [her] sexual history;" (2) her claim was not frivolous; and (3) there was no evidence, and no court determination, of her ability to pay the fees.

First, we reject Hillyer's claim that the trial court's award of attorney fees was improperly "shaped" by the erroneous admission of evidence of her previous extramarital affairs. At trial, plaintiffs established Hillyer had lied in various declarations and at her deposition about all of the incidents giving rise to her sexual harassment claim. And at trial, Syl denied sexually harassing Hillyer and offered credible testimony that Hillyer's version of the events was highly unlikely.

Next, we address Hillyer's claims regarding the award of attorney fees to plaintiffs as prevailing defendants in her FEHA sexual harassment case. To place the issue in context, we briefly "review the principles governing attorney fee awards in FEHA actions. . . ." (*Young v. Exxon Mobile Corp.* (2008) 168 Cal.App.4th 1467, 1474 (*Young*).) In FEHA actions, the court has discretion to award reasonable attorney fees to the prevailing party. (Gov. Code, § 12965, subd. (b).) "California courts have followed federal law, and hold that, in exercising its discretion, a trial court should ordinarily award attorney fees to a prevailing plaintiff, unless special circumstances would render an award of fees unjust. A prevailing defendant, however, should be awarded fees under the FEHA only 'in the rare case in which the plaintiff's action was frivolous, unreasonable, or without foundation.'" (*Young, supra,* 168 Cal.App.4th at p. 1474, quoting *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 864 (*Rosenman*); *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1390 (*Cummings*).) We review the award of attorney fees pursuant to Government Code section 12965 for abuse of discretion. (*Cummings,* at pp. 1386-1387.) Here, the court did not abuse its discretion by determining Hillyer's sexual harassment claim was frivolous. For the reasons discussed above, this is one of those "rare" cases where Hillyer's sexual harassment claim "'was frivolous, unreasonable, or without foundation.' [Citation.]" (*Young, supra,* 168 Cal.App.4th at p. 1474.)

Hillyer's final argument is the award of attorney fees pursuant to Government Code section 12965 must be reversed because the trial court failed to make a *written* finding regarding Hillyer's ability to pay before awarding attorney fees to plaintiffs pursuant to Government Code section 12965. Hillyer has forfeited this argument. "'[T]o preserve an issue for appeal, a party ordinarily must raise the objection in the trial court.'" (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 948, quoting *In re S.C.* (2006) 138 Cal.App.4th 396, 406; *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264.) Hillyer did not raise the issue of her inability to pay in the trial court. She did not oppose plaintiffs' request for Government Code section 12965 attorney fees on the ground that she could not afford to pay them; at hearing on plaintiffs' motion for attorney fees, Hillyer did not contend she was unable to pay the attorney fees, nor did she offer any evidence demonstrating her inability to pay. (Compare *Patton v. County of Kings* (9th Cir. 1988) 857 F.2d 1379, 1382.)

Hillyer concedes she did not raise the issue of her inability to pay attorney fees in the trial court, and that such a failure would "ordinarily" result in waiver. She argues, however, that the court had a "nonwaivable" obligation to make a written finding on her ability to pay before awarding attorney fees. Hillyer is incorrect. To be sure, the court must make findings when it awards attorney fees to a prevailing defendant in a FEHA case. (*Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1202-1203 (*Villanueva*).) These "necessary" and "nonwaivable" findings "concern[ ] the merits of the [FEHA] claim." (*Rosenman, supra,* 91 Cal.App.4th at p. 866, fn. omitted; *Cummings, supra,* 11 Cal.App.4th at p. 1388; Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) § 8:318.5, pp. 8-194.3-8.194-4.) There is no requirement that one of the findings concern the plaintiff's ability to pay. What the court must do is *consider* the plaintiff's financial resources before awarding attorney fees in favor of the prevailing defendant. (*Villanueva, supra*, 160 Cal.App.4th at p. 1202.)

Rosenman and *Villanueva* guide our analysis. In *Rosenman*, the appellate court reversed an award of attorney fees to the prevailing defendant in a FEHA case because the trial court failed to make any findings regarding whether the plaintiff's claim was not frivolous, unreasonable, or groundless and because the record revealed "no substantial evidence" to support an inferred finding. (*Rosenman, supra*, 91 Cal.App.4th at p. 869.) The *Rosenman* court imposed "a nonwaivable requirement that trial courts make written findings reflecting the *Christiansburg/Cummings* standard in every case where they award attorney fees in favor of defendants in FEHA actions."[17] In a footnote, the *Rosenman* court instructed that trial courts "should also make findings as to the plaintiff's

---

[17] In *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421 (*Christiansburg*), the United States Supreme Court concluded "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." In *Cummings*, the Second District Court of Appeal and cautioned "'such awards should be permitted not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.'" (*Cummings, supra*, 11 Cal.App.4th at p. 1387, quoting *Christiansburg, supra*, 434 U.S. at p. 421.)

ability to pay attorney fees, and how large the award should be in light of the plaintiff's financial situation." (*Rosenman, supra,* 91 Cal.App.4th at p. 868, fn. 42.) Under *Rosenman*, the trial court should — but is not required — to make express findings regarding the plaintiff's ability to pay the attorney fee award. (*Villanueva, supra,* 160 Cal.App.4th at pp. 1203-1204; *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 831, fn. 4 [noting that *Rosenman* "held that the trial court should make explicit findings on the plaintiff's ability to pay the attorney fees"].)

Villanueva is also instructive. There, the trial court awarded nearly $40,000 in attorney fees to the City of Colton pursuant to Government Code section 12965 after the City prevailed in a frivolous employment discrimination action. (*Villanueva, supra,* 160 Cal.App.4th at pp. 1191, 1200.) On appeal, the plaintiff claimed the court "failed to take into account his inability to pay such a sizable sum." (*Id.* at p. 1191.) The appellate court rejected this argument. It explained the plaintiff "offered no evidence of any kind which might have warranted a reduced fee award. Indeed, in responding to the City's request, he easily could have offered a declaration setting forth his gross income, his net income, his monthly expenses, his assets, or any other information which he thought would lend support to his position. He failed to do so. Thus, while we are confident that a trial court has an obligation to consider a losing party's financial status before assessing attorney fees under the FEHA, on the record before us we are unable to say that the court's fee award was an abuse of discretion." (*Id.* at p. 1204.) The *Villanueva* court also explained there was evidence supporting the plaintiff's ability to pay, specifically personnel records showing the plaintiff earned $25 per hour, which was considerably more than the average American. (*Id.* at p. 1203.)

The same is true here. Hillyer, like the plaintiff in *Villanueva*, could have offered a declaration setting forth her income, monthly expenses, assets, or any other information she thought would demonstrate her inability to pay the attorney fee award. Alternatively, she could have explained, at the hearing on the attorney fees motion, why she was unable to pay an attorney fee award. She did not. And as in *Villanueva*, there was some evidence (though limited) of Hillyer's ability to pay, specifically that Hillyer made between $150,000 and $200,000 from 2003 to 2005 and that she owed her own home. As a result — and like the *Villanueva* court — "we are unable to say that the court's fee award was an abuse of discretion." (*Villanueva, supra,* 160 Cal.App.4th at p. 1204.) We note that the better course of practice would have been for the trial court to make an explicit written finding on Hillyer's ability to pay. But here, we cannot find an abuse of discretion in the court's failure to do so, given Hillyer's failure to raise the issue in the trial court and offer any evidentiary support of her contention.

DISPOSITION

The judgment is reversed insofar as it awards plaintiffs punitive damages. The matter is remanded to the trial court with directions to strike that portion of the judgment. In all other respects, the judgment is affirmed. Each party to bear its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

____

Jones, P.J.

We concur:

____

Needham, J.

____

Bruiniers, J.