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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

I. NELSON ROSE, Plaintiff and Respondent, v. WHITTIER COLLEGE, Defendant and Appellant.	B226983 (Los Angeles County Super. Ct. No. BC397005)

APPEAL from a judgment of the Superior Court of Los Angeles County. John P. Shook, Judge. Affirmed in part and reversed in part.

Bewley Lassleben & Miller and Ernie Z. Park; Musick, Peeler & Garrett and Cheryl A. Orr for Defendant and Appellant.

Serratore Law and Steven Serratore; Ronald P. Kaplan for Plaintiff and Respondent.

Defendant and appellant Whittier College (Whittier) appeals from the judgment entered in favor of plaintiff and respondent I. Nelson Rose (Rose), following a court trial on Rose's causes of action for fraud and negligent misrepresentation. We reverse the award of punitive damages and otherwise affirm the judgment.

BACKGROUND

1. Factual Background

Whittier is a private college located in Whittier, California. It offers a post-graduate program for the study of law at its Costa Mesa campus (the Law School). Rose was a tenured member of the faculty at the Law School, where he had taught for approximately 23 years until he left in June 2007.

On August 9, 2005, the American Bar Association (ABA) placed the Law School on a two-year probation because of the school's alleged failure to comply with ABA accreditation standards, as reflected in the low success rate of the Law School graduates on the bar examination. Being placed on probation threatened the Law School's ability to retain its current students and attract new ones. It also created serious financial concerns because Whittier depends almost entirely on tuition to meet its budgetary needs.

To address these concerns, Whittier hired an outside consulting firm, Huron Consulting Group (Huron). Huron prepared numerous reports advising Whittier on various issues, including budgetary issues and faculty salaries. Huron repeatedly advised Whittier that it was unrealistic to expect that salaries could be frozen, and that the Law School should consider salary increases of 2.5 percent. Huron also advised Whittier as to whether it could abrogate the contracts of tenured law professors based on financial exigency. Huron concluded the contracts could not be abrogated, and Whittier's legal counsel concurred with this conclusion. Neither the Huron reports nor the substance of Huron's advice to Whittier was disclosed to Rose and other tenured faculty members.

As a means of alleviating the financial strain caused by the ABA's action, Whittier decided to reduce the size of the Law School faculty. It offered its 20 full-time tenured law professors "a one time incentive for tenure buyout," offering to buy out a professor's tenure agreement in exchange for a lump sum payment equal to one year's salary.

Whittier's administrators believed it was crucial to the Law School's survival that a sufficient number of the tenured faculty accept the buyout offer.

Whittier's administrators imposed a deadline of November 1, 2006, for tenured professors to accept the buyout offer. The administrators told faculty members that the deadline was solely for budgetary reasons. In fact, the November 1 deadline was chosen in part so that the tenured professors' decision to accept the buyout offer would have to be made before the summer bar examination results were known. Whittier's administrators knew that if a higher percentage of the Law School's recent graduates passed the bar exam, fewer tenured professors would accept the buyout offer.

Whittier's administrators met with the Law School's tenured faculty in September and October 2006. During those meetings, the Law School dean, Neil Cogan (Cogan), and Whittier's chief financial officer, Janice Legoza (Legoza), told tenured professors that if they did not accept the buyout offer, they would face a 50 to 100 percent increase in workload, teaching five or six courses a year instead of the standard three or four. Cogan and Legoza also told faculty members that their salaries would be frozen for the indefinite future if they did not accept the buyout offer. On at least two occasions, Cogan threatened tenured professors with the possibility that tenure agreements could be abrogated based upon financial exigency.

Rose accepted the buyout offer in November 2006. A few weeks later, the California bar examination results were published. The pass rate for the Law School's graduates was 20 percentage points higher than the previous year's, and were the best results posted by the Law School in 17 years. In July 2007, one month after Rose's departure from the Law School, tenured professors who had not accepted Whittier's buyout offer and who remained at the Law School were given a three percent raise. No tenured professor who rejected the buyout offer experienced an increased course load.

2. Procedural History

Rose filed this action in August 2008 for fraud, negligent misrepresentation, and rescission of the buyout agreement. Following a court trial, the trial court ruled in Rose's favor on all of his causes of action. In a statement of decision issued on June 3, 2010, the trial court found that Whittier's administrators represented to Rose and other faculty members that tenured faculty who did not accept the buyout offer would face abrogation of their tenure contracts based on financial exigency, salary freezes or cuts, and increased course workloads. The trial court further found that Whittier's administrators made these representations without any reasonable basis for believing them to be true. The trial court found that a confidential relationship existed between Rose and Whittier, and that Whittier's administrators failed to disclose to Rose information material to his decision to relinquish his tenure at the Law School.

Based on these factual findings, the trial court concluded that Whittier was liable for fraud and negligent misrepresentation and that Rose was entitled to rescission of the buyout offer. The court ordered Rose reinstated and awarded him general damages in the amount of $350,000 and punitive damages in the amount of $500,000. Judgment was entered in Rose's favor on July 2, 2010.

Following an unsuccessful motion for a new trial, Whittier filed this appeal.

DISCUSSION

I. Standard of Review

"'"A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." [Citations.]' [Citations.]" (*People v. Nitschmann* (2010) 182 Cal.App.4th 705, 708-709.) "'"[W]e review the trial court's findings of fact to determine whether they are supported by substantial evidence. [Citation.] To the extent the trial court drew conclusions of law based upon its findings of fact, we review those conclusions of law de novo. [Citation.]"' (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.)" (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425–1426.)

II. Statements of Opinion or Future Events

The trial court found that Whittier's representations to Rose and other faculty members that tenured professors who did not accept the buyout offer would face increased workloads and no pay raises were material misrepresentations upon which Rose relied. Whittier does not challenge the sufficiency of the evidence to support this finding, but contends the trial court erred as a matter of law because the statements made were nonactionable expressions of opinion.

Expressions of opinion are not generally treated as representations of fact, and therefore are not usually grounds for a misrepresentation cause of action. (*Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308.) It is not always clear, however, whether a statement is an expression of opinion or fact. "The line between opinion and fact is not a distinct one; hence if the opinion is rendered under circumstances such that it may be regarded as amounting to a positive affirmation of fact, it will be treated as a representation of fact for purposes of a deceit action. [Citations.]" (*Mercer v. Elliott* (1962) 208 Cal.App.2d 275, 280.) "'[W]here there is a reasonable doubt as to whether a particular statement is an expression of opinion or the affirmation of a fact, the determination rests with the trier of the facts.' [Citation.]" (*Pacesetter Homes, Inc. v. Brodkin* (1970) 5 Cal.App.3d 206, 212 (*Pacesetter*), quoting *Wilson v. Municipal Bond Co.* (1936) 7 Cal.2d 144, 151.)

Whittier's statements to the tenured professors concerning salaries and workloads were made under circumstances indicating they were intended as expressions of fact, not opinion. Both Rose and David Treiman, another tenured professor who accepted the buyout offer, testified at the trial that Whittier's administrators said there would be no raises for the indefinite future and that workloads would increase if they remained on the Law School faculty. Rose further testified that he understood the administrators' representations to be statements of fact. The trial court's factual determination that Whittier's statements concerning workloads and salaries were actionable representations of fact is supported by substantial evidence. (*Pacesetter, supra*, 5 Cal.App.3d at p. 212.)

Whittier next argues that its statements regarding workloads and salaries were not actionable because they were mere predictions of future events. It is true as a general rule that "an actionable misrepresentation must be made about past or existing facts [and that] statements regarding future events are merely deemed opinions. [Citation.]" (*San*

Francisco Design Center Associates v. Portman Companies (1995) 41 Cal.App.4th 29, 43-44.) There are, however, recognized exceptions to this general rule. (*Borba v. Thomas* (1977) 70 Cal.App.3d 144, 152 (*Borba*).) One such exception is when one party has special or superior knowledge such that the other may rely upon the former's opinion. (*Ibid.*) The trial court found that exception to be applicable here.[1]

The trial court found that Rose's reliance on Whittier's misrepresentations was justified because Whittier's administrators not only had information not available to a professor, but were also responsible for making decisions on the very issues at stake, including salaries and work load. That information included the opinions and conclusions of its outside consultant Huron, who "repeatedly advised [Whittier] it was unrealistic to expect that salaries could be frozen." Whittier's nondisclosure of this information precludes it from characterizing its misrepresentations as mere opinions or predictions of future events. (*Borba, supra*, 70 Cal.App.3d at p. 152.)

Whittier failed to establish any legal error in the trial court's determination that Whittier's statements concerning salaries and workloads were material misrepresentations and a valid basis for holding it liable for fraud and negligent misrepresentation.

III. Nondisclosure of Huron Reports

Whittier contends its liability for fraud and misrepresentation cannot be premised on its nondisclosure of the Huron reports because it had no duty to disclose those reports to Rose. Such a duty, Whittier argues, "only arises where there is a fiduciary or confidential relationship creating such a duty of disclosure." Whittier maintains that its relationship with Rose was that of an employer and employee, not a confidential or fiduciary relationship, and that the trial court erred as a matter of law by concluding otherwise.

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1 Because the trial court properly found the superior knowledge exception to be applicable here, we do not address the parties' arguments as to whether other exceptions may also apply.

There was no legal error. The existence of a confidential relationship is a question of fact, not law. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1161.) The "'essential elements'" of such a relationship are: "'"1) The vulnerability of one party to the other which 2) results in the empowerment of the stronger party by the weaker which 3) empowerment has been solicited or accepted by the stronger party and 4) prevents the weaker party from effectively protecting itself."' [Citations.]" (*Ibid.*)

Substantial evidence supports the trial court's finding that a confidential relationship existed between Rose and Whittier. Whittier's administrators were in control of faculty salaries, course loads, and class sizes. These were the factors affecting Rose's decision as to whether to accept the buyout offer. Whittier was thus in a superior bargaining position to faculty members such as Rose who were presented with the buyout offer. The disparity in the parties' relative bargaining positions was increased by Whittier's administrators' exclusive knowledge of the information contained in the Huron reports, which specifically addressed faculty salaries and whether Whittier could abrogate faculty tenure contracts. Although the Huron reports concluded that salary freezes were unrealistic and faculty tenure contracts could not be abrogated, Whittier's administrators nevertheless told its faculty that salaries would not be increased for the indefinite future and tenure contracts might be abrogated. The trial court did not err by concluding that Whittier's nondisclosure of the Huron reports was fraudulent.

Whittier contends the trial court's finding of negligent misrepresentation cannot properly have been based on Whittier's failure to disclose the Huron reports because the tort specifically requires a positive assertion or representation and an implied assertion or omission is insufficient to establish liability for negligent misrepresentation. This contention fails because the trial court did not base its finding of negligent misrepresentation solely on Whittier's nondisclosure of the Huron reports, but on several other factual assertions made by Whittier's administrators, who had no reasonable grounds for believing those assertions to be true.

A defendant that makes a factual assertion without reasonable grounds for believing it is true may be liable for negligent misrepresentation. (Civ. Code, § 1710;

Diediker v. Peelle Financial Corp. (1997) 60 Cal.App.4th 288, 297.) A single material misrepresentation is all that is necessary to establish the tort. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 854.) There were multiple misrepresentations in this case. The trial court found that Whittier's administrators threatened Rose and other tenured faculty members that their tenure agreements could be abrogated when the administrators knew they could not; told faculty members that those who did not accept the buyout offer would have a 50 to 100 percent increase in workload; and told the faculty that salaries and benefits would be frozen or cut at a time when Whittier's outside consultants were recommending against salary cuts and the administrators themselves were recommending salary increases to Whittier's internal budget committee.

The trial court did not err by finding Whittier liable for negligent misrepresentation.

IV. Representations Concerning the November 1 Deadline

Whittier contends its liability for fraud and negligent misrepresentation cannot properly have been based on the trial court's finding that Whittier made misrepresentations regarding the November 1 deadline for accepting the buyout offer. Whittier's principal argument is that the statements were not false. Whittier further argues that the representations, even if untrue, were not material and were not relied upon by Rose.

The trial court found that Whittier's administrators misrepresented to Rose and others that the only reason for the November 1, 2006 deadline was budgetary concerns. Whittier's president, Sharon Herzberger, and chief financial officer Legoza both testified at the trial that the November 1 deadline was chosen in part so that professors would have to decide whether to accept or reject the buyout offer before the summer bar examination results were known. Both Herzberger and Legoza also testified that the deadline was imposed in part because if the bar exam results were good, fewer tenured professors would accept the buyout offer. The evidence presented showed that the budget under consideration by Whittier's administrators in 2006 was not approved until after May 2007 and was amended in November 2007 -- more than a year after the November 2006 deadline allegedly imposed for budgetary reasons.

Rose testified that the summer bar examination results were an important factor affecting his decision whether to accept or reject the buyout offer because those results would have determined whether or not the ABA would continue Whittier's probationary status.

Substantial evidence supports the trial court's determination that Whittier made material representations concerning the November 1, 2006 deadline for accepting the buyout offer upon which Rose relied.

V. Financial Exigency

Whittier contends its liability for fraud and negligent misrepresentation cannot properly have been based on representations that tenured faculty contracts could be abrogated due to financial exigency. The evidence showed that Whittier's legal counsel as well as its outside consultant Huron advised Whittier's administrators that the Law School could not abrogate tenure agreements based on financial exigency. Notwithstanding this advice, Cogan threatened professors that their tenure agreements could be abrogated based on financial exigency. Substantial evidence supports the trial court's determination that Whittier's administrators fraudulently and negligently misrepresented to Rose and other faculty members that tenure contracts could be abrogated due to financial exigency.

VI. Rescission

Whittier contends Rose is not entitled to the remedy of rescission because there was no fraud or misrepresentation of a material fact. Rescission is available when a party is induced by fraud or misrepresentation to enter into a contract. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415.) As discussed, there is substantial evidence to support the trial court's determination that Whittier committed fraud and made negligent misrepresentations of material facts. Rose is therefore entitled to rescission.

VII. Damages

A. Compensatory Damages

Whittier challenges the trial court's $350,000 compensatory damages award on the grounds that emotional distress damages are not recoverable for negligent misrepresentation as a matter of law, and that the damages are excessive and unsupported by substantial evidence.

The trial court based its compensatory damages award on Rose's claims for fraud as well as negligent misrepresentation. The statement of decision states: "Based on either his claim for fraud or his claim for negligent misrepresentation, [Rose] is entitled to general damages due to the embarrassment, humiliation, mental and emotional distress and discomfort caused by [Whittier]." Emotional distress damages are recoverable in a tort action for fraud (*Branch v. Homefed Bank* (1992) 6 Cal.App.4th 793, 799), and the trial court's compensatory damages award may be affirmed on that basis. Emotional distress damages may also be recovered for negligent misrepresentation under circumstances "when the negligence arises in a situation involving breach of fiduciary or quasi-fiduciary duties." (*Id.* at p. 800.) The trial court specifically found that a confidential relationship existed between Rose and Whittier. That finding supports the award of emotional distress damages to Rose in this case. (See *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, 1369 ["Confidential and fiduciary relations are in law, synonymous and may be said to exist whenever trust and confidence is reposed by one person in another"].)

Both Rose and his psychiatric expert witness testified concerning the emotional distress Rose suffered as a result of Whittier's conduct. Substantial evidence supports the compensatory damages award.

Whittier contends the emotional distress damages were excessive. The rules governing appellate review of a claim of damages are well established. The amount of damages is a fact question, committed to the discretion of the trier of fact. "An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption . . . .” (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-507.) Such is not the case here. In light of the evidence, the $350,000 compensatory damages award was not excessive.

B. Punitive Damages

Whittier maintains the evidence is insufficient to support the trial court’s award of $500,000 in punitive damages because no evidence of Whittier’s financial condition or ability to pay such damages was presented at the trial, as required by *Adams v. Murakami* (1991) 54 Cal.3d 105. In that case, the California Supreme Court held that a punitive damages award must be supported by evidence of a defendant’s financial condition. (*Id.* at pp. 109-116.) The court specifically left open, however, the question of what kind of evidence must be presented: “We decline at present, however, to prescribe any rigid standard for measuring a defendant’s ability to pay. . . . We cannot conclude on the record before us that any particular measure of ability to pay is superior to all others or that a single standard is appropriate in all cases.” (*Id.* at p. 116, fn. 7.)

Rose contends there was evidence that Whittier profited from its fraudulent conduct and that such evidence is sufficient to support the punitive damages award. There was evidence that as a result of seven tenured professors’ acceptance of the buyout offer, Whittier reduced its budget deficit by $900,000 to $1 million a year.

There is a conflict in authority as to whether a punitive damages award may be based solely on the amount of profit the defendant derived from its fraudulent conduct, as was the case here. In *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291 (*Cummings*), Division Seven of this district found the evidence sufficient to support an award of $598,300 in punitive damages despite the absence of any evidence of the defendant’s net worth because the plaintiff had established that the defendant’s tortious conduct earned the defendant a profit in excess of $1 million. (*Id.* at p. 1298.) The ill-gotten profit, the court reasoned, is “objectively based and uniquely appropriate as the basis for punitive damages. . . . Removing the gain in such a case, in addition to requiring the [the defendant] to compensate the plaintiff for its actual losses, makes it less likely the defendant will repeat the conduct. A gain-based measure of this sort sends a clear signal to defendants that such misconduct does not pay and, thus, serves the deterrent function of punitive damages." (*Id.* at pp. 1299-1300.) The court in *Cummings* went on to state that "even if taking away the defendant's ill-gotten gains may sometimes not be enough to deter similar conduct, it is never too much." (*Id.* at p. 1300.)

In *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49 (*Kenly*), another case involving punitive damages for fraud, the Fourth Appellate District disagreed with *Cummings.* The court in *Kenly* held that a punitive damages award based solely on profits is improper because it does not account for the defendant's ability to pay such an award. (*Kenly, supra,* at p. 57.) The court reasoned that "[a]n award based solely on the alleged 'profit' gained by the defendant, in the absence of evidence of net worth, raises the potential of its crippling or destroying the defendant, focusing as it does solely on the assets side of the balance sheet *without examining the liabilities side of the balance sheet.* Without evidence of the entire financial picture, an award based on 'profit' could leave a defendant devoid of assets with which to pay his other liabilities." (*Ibid.*)

We find the standard set forth in *Kenly* to be the better reasoned one and apply that standard here. The California Supreme Court has made clear that a fully informed determination concerning punitive damages requires evidence of the defendant's overall financial condition. (*Adams v. Murakami, supra,* 54 Cal.3d 105.) Such evidence is lacking here. We therefore reverse the punitive damages award.

VIII. Motions for Sanctions on Appeal

Rose filed a motion seeking sanctions against Whittier for pursuing a frivolous appeal. That motion is denied.

DISPOSITION

The punitive damages award is reversed. In all other respects, the judgment is affirmed. The parties will bear their respective costs on appeal.

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______________________________, J.
CHAVEZ

We concur:

______________________________, P. J.
BOREN

______________________________, J.
DOI TODD