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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SUNKIST ENTERPRISES CORPORATION, et al., Plaintiff, Cross-defendants and Appellants, v. IRFAN MAHMOOD, et al., Defendants, Cross-complainants, and Appellants.	A123362 (Contra Costa County Super. Ct. No. C0600230)

Irfan Mahmood sought to recover damages for defamatory statements made about him by his uncle Syed Ali Husain. After a liability phase trial, the jury found that Husain had defamed Mahmood, that Husain acted with malice, oppression, or fraud when he defamed Mahmood, and that Mahmood was entitled to $60,000 in nominal damages. A second jury found that Mahmood was entitled to $1 million in punitive damages. On August 12, 2008, the trial court entered judgment on the jury's verdicts. Thereafter, the trial court denied Husain's motions to vacate the judgment and for judgment notwithstanding the verdict. Husain's motion for a new trial was denied after Mahmood consented to a remittitur in damages to $45,000 in compensatory damages and $450,000 in punitive damages. On October 20, 2008, the trial court entered an amended judgment reflecting the remitted damage awards. Husain appeals from the judgment and the denial of his post trial motions to the extent they are adverse to him and both Husain and Mahmood appeal from the amended judgment. Husain presents various arguments seeking, among other things,

reversal of the amended judgment, or alternatively, a reduction of the award of punitive damages on the ground that the remitted award is unconstitutionally excessive. Mahmood cross-appeals seeking reinstatement of the jury's award of punitive damages in the sum of $1 million.[1] We affirm.[2]

FACTUAL AND PROCEDURAL BACKGROUND[3]

Irfan Mahmood is the nephew of Syed Ali Husain (Husain). In 1992, Mahmood started to work for his uncle at a tire center, originally known as a Goodyear Tire Center and then Sunkist Tire Center, which was the sole business of the Sunkist Enterprises

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[1] Even though Mahmood consented to the remitted damage awards, Husain's appeal from the amended judgment permits Mahmood to cross-appeal and seek reinstatement of any portion of the jury's verdict. (*Miller v. National American Life Ins. Co*. (1976) 54 Cal.App.3d 331, 343-344; accord, *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 918, fn. 1.)

[2] We dismiss Husain's appeal from the August 12, 2008, judgment as that judgment was superseded by the amended judgment entered on October 20, 2008. We also dismiss Husain's appeal from the order denying his motion for a new trial as that order is not separately appealable. (Code Civ. Proc., § 904.1, subd. (a); see *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 689, fn. 1.) The issues raised on the dismissed appeals are considered on the appeal from the amended judgment. (Code Civ. Proc., § 906.) Sunkist Enterprises Corporation is listed as an appellant in Husain's notice of appeal, and Irfan Automotive, Inc., is listed as an appellant in Mahmood's notice of cross appeal. However, in their appellate briefs, neither Husain nor Mahmood presents any arguments seeking specific relief on behalf of the corporate entities. Consequently, we dismiss the appeals of Sunkist Enterprises Corporation and Irfan Automotive, Inc., as abandoned.

[3] The facts are taken from the undisputed documents in the superior court case file submitted in lieu of a clerk's transcript, and the evidence admitted at the trials. Any disputed evidence is construed in the light most favorable to the party prevailing on that issue at the trials. We also deferred until this time Mahmood's request that we take judicial notice of certain documents that appear on the Judicial Council web site: "CACI 1704 (09/2003)," "Invitation to Comment, CACI 08-01," and "CACI 1704 (12/2009)" and (b) certain facts: "[t]he value in 2010 dollars of $17,500 in 1961 dollars is approximately $109,000," and "[t]he value in 2010 dollars of $22,000 in 1967 dollars is approximately $121,000." We now grant Mahmood's request for judicial notice, which is not opposed by Husain.

Corporation (Sunkist).[4] In about 1999, Mahmood was promoted to store manager. His compensation was a yearly salary of $40,000, plus full medical benefits for his family. Additionally, starting in 2000, Mahmood began a separate used car business under the name Clayton Auto Sales, which was operated through a separate company, Irfan Automotive, Inc. (Irfan Automotive), which was incorporated by Mahmood in 1997.

In late 2005, Mahmood went on vacation to India. At that time, the store had an outstanding $7,000 or $8,000 debt for unpaid payroll taxes owed to the Internal Revenue Service (IRS). Mahmood left two blank but signed checks with an accountant to resolve the IRS debt. However, when Husain refused to authorize the accountant to speak with the IRS, the debt went unresolved and the IRS levied on one of Sunkist's bank accounts. As a consequence, there was insufficient money in the store's bank accounts to pay the store's expenses.

In late January 2006, while Mahmood was still on vacation, Husain went to the tire center. Husain testified that he was "shocked" at the condition of the store, that the licenses on the wall in the name of Mahmood and Irfan Automotive were covered by Sunkist's service permit and other licenses, the lack of inventory, the existence of unpaid bills, and that the credit card machine was crediting all sales to the Irfan Auto/Sunkist bank account. Husain also claimed that he found records indicating that tire center money was being used to pay Mahmood's personal expenses. Husain claimed that he paid the past due bills and past due rent. Husain did not call Mahmood and ask him to explain what was going on in the store.

While Mahmood was on vacation, Husain began to get calls from employees of Sunkist creditors about payments for outstanding bills for merchandise supplied to the tire store. Husain responded by saying that he would not pay the bills, that Mahmood had embezzled or stolen funds from the store, had stolen "millions of dollars" from Husain, or had "hijacked" the business, and the creditors should seek payment from Mahmood. An employee of one creditor sent a demand letter, and told Husain that he would send the

[4] Husain and his brother Syed Nusrat Husain were the original shareholders of Sunkist. In 1992, Syed Nusrat Husain sold his interest in the corporation to Husain, who became Sunkist's sole shareholder.

matter to the legal department. Husain said that he was not going to pay the bill and that the employee could not fight him because he was so rich and the creditor would not win because Husain had so much money. When Husain said something to the effect that he was either "going to sue or do something bad" if the creditor tried to secure payment, the employee ended the conversation. The creditor ultimately wrote off the Sunkist debt because of Husain's threats of a lawsuit. An employee of another creditor told Husain that the company's legal department would probably take legal action, and Husain started yelling and told the employee that he would sue the employee and the company for slander. An employee of a third creditor discussed the matter with the Concord police department and ultimately retrieved some parts from the Sunkist store to resolve the outstanding debt. During Husain's discussion with one of Sunkist's employees, Husain was very upset and kept talking about how Mahmood would pay for what was happening to the business, and Husain also said that he was going to take everything that Mahmood owned. Husain told another Sunkist employee that Mahmood had embezzled money and that Husain wanted to teach his nephew a lesson, "something that his mother should have taught him."

In early February 2006, before Mahmood returned from vacation, Sunkist filed this lawsuit against Mahmood and Irfan Automotive.[5] In the amended complaint, Sunkist alleged, among other things, that beginning in or around 2001, and without its knowledge or consent, defendants had been (a) unlawfully conducting Mahmood's separate Clayton Auto Sales business using Sunkist's facility, employees and resources; (b) converting to their own use revenues generated by Sunkist, "with total embezzled funds estimated to be $2,000,000"; (c) transferring Sunkist business licenses into Mahmood's own name, thereby "effectively hijack[ing]" Sunkist's business; and (d) commingling the embezzled Sunkist moneys and Clayton Auto Sales revenues into a single bank account, and using a portion of the moneys to improve real property owned by Mahmood and his wife.

Mahmood and Irfan Automotive filed an answer and a separate cross-complaint. In the cross-complaint, as amended, Mahmood alleged, among other things, that (1) there had

[5] Although the original complaint included Husain as a named plaintiff, the operative amended complaint included only Sunkist as a named plaintiff.

been no conversion of funds because Husain had authorized or knew about the commingling activities of Sunkist tire center and Mahmood's separate business that were complained about in the amended complaint, (2) Sunkist had wrongfully terminated Mahmood's employment, and (3) that Husain had defamed Mahmood by falsely and maliciously telling some Sunkist employees that Mahmood had "embezzled millions of dollars" and "hijacked" the Sunkist tire center, and telling one Sunkist employee and several employees of Sunkist's creditors that Mahmood had "embezzled" store funds and "hijacked" the Sunkist tire center. Mahmood sought "damages according to proof;" "nominal damages;" and "punitive and exemplary damages according to proof." Husain's answer to the cross-complaint contained a general denial, and affirmative defenses alleging that his purported comments and statements were privileged, and the alleged facts were not sufficient to support a claim for punitive damages.

After a liability phase trial in July 2007, the jury found that Mahmood and Irfan Automotive had not wrongfully exercised control over Sunkist's "personal property," which resulted in the dismissal of Sunkist's entire lawsuit against Mahmood and Irfan Automotive. Additionally, although the jury found that Mahmood had been terminated from his employment with Sunkist, there was no agreement that his discharge would be for good cause only, and therefore, the jury did not award any damages for wrongful termination.[6] However, the jury found that Husain had made defamatory statements about Mahmood, and that Husain acted with malice, oppression, or fraud when he made the defamatory statements about Mahmood. The jury found that Mahmood was entitled to "nominal" damages of $60,000 for the assumed harm to his reputation, but awarded no actual damages because the jury found that Husain's statements were not a substantial factor in causing harm to Mahmood. After the conclusion of the liability phase trial, the trial court denied Husain's motion for judgment notwithstanding the verdict (JNOV), rejecting his challenges

[6] On his wrongful termination cause of action Mahmood had asked the jury to award him $60,000, representing loss wages for the period from his February 2006 termination until the trial in July 2007, and the present value of $400,000, representing future loss earnings of "a conservative estimate of ten years" ($40,000 per year) for the period he would have worked for Sunkist until he had to retire.

to the sufficiency of the evidence supporting the jury's findings that his statements were slanderous per se and that he acted with malice or oppression. Also, before the start of the punitive damage phase of the trial, Husain moved to reopen the liability phase on the ground that the jury's finding of defamation was defective because it never made a finding on the issue of privilege. Mahmood opposed the motion. The trial court denied Husain's motion, ruling that Husain had waived his right to a ruling on the issue of privilege, and that even if the issue was timely raised, Husain's statements were not privileged as a matter of law because no evidence was presented that the defamatory statements were made on privileged occasions.

The punitive damages phase of the trial originally commenced on February 25, 2008. However, due to the serious illness of a seated juror and the previous dismissal of all alternate jurors, the trial court was forced to declare a mistrial on May 5, 2008, when Husain refused to proceed with only 11 jurors. The matter was continued for trial with a new jury. Before the second trial, the trial court denied Husain's motions for a nonsuit and to strike the first jury's findings that Mahmood was entitled to $60,000 in nominal damages and that Husain had acted with malice, oppression, or fraud.

In July 2008, the punitive damages phase was tried before a new jury. Although the trial court would not allow either party to "go into the previous part of the lawsuit in detail," it recognized that the empanelling of a new jury necessitated that "there [were] many aspects of what was presented in the last trial that would need to be represented" to the new jurors. The trial court granted Husain's request to allow him to testify as to circumstances that led him to believe Mahmood had stolen money from the tire store and why he had said Mahmood had "hijacked and stolen" funds from the store. Mahmood was similarly granted the right to present explanatory evidence in rebuttal regarding Husain's accusations against Mahmood. Pursuant to the trial court's ruling, both Husain and Mahmood testified regarding some of the circumstances giving rise to the litigation between the parties.[7] The

[7] Consequently, we see no merit to Husain's statement in the fact section of his opening brief that the "second jury heard evidence related only to Husain's wealth, alleged reprehensibility, and the amount of punitive damages to be awarded." Husain also contends he was not permitted to present all the evidence that led up to the statements he had made.

second jury returned a special verdict, finding that Mahmood was entitled to an award of $1 million in punitive damages. On August 12, 2008, the trial court filed a judgment based on the verdicts for liability and damages found by the juries.

Husain filed separate motions seeking to vacate the judgment, for JNOV, or for a new trial, which motions were opposed by Mahmood. The trial court denied the motions to vacate the judgment and for JNOV. However, the trial court found that the jury's monetary awards were excessive and directed a new trial unless Mahmood agreed to accept remitted awards of $45,000 in compensatory damages and $450,000 in punitive damages. After Mahmood accepted the remitted damages, the trial court filed an order denying the motion for a new trial and the judgment was amended accordingly. Additional facts will be discussed as necessary in addressing the parties' arguments on their timely appeals.

DISCUSSION

I. Litigation Privilege Defense to Defamation Cause of Action

In his opening brief Husain argues in effect that the trial court erred in failing to submit the issue of privilege to either the first or second jury. According to Husain, although his first trial counsel did not seek a jury instruction on the issue of privilege, his new counsel asked the court to submit the issue for consideration before the first jury was discharged. Alternatively, Husain contends that we should hold that, as a matter of law, the cause of action for defamation is barred by the litigation privilege. As we now discuss, we conclude the trial court did not err by refusing to submit the issue of privilege to either jury since Husain failed to meet his burden of producing facts sufficient to invoke the litigation privilege.

Contrary to Husain's contention, the issue on the law of privilege was well settled before the liability phase of the trial in this case. Based on the Civil Code's statutory

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However, he does not state what evidence he was precluded from presenting and how he was prejudiced by the court's refusal to allow that evidence at the second trial. Consequently, any challenge to the trial court's rulings is not properly before us and we do not further address the matter.

language describing the litigation privilege,[8] "the courts has derived this 'usual formulation': '[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]' [Citation.]" (*Edwards v. Centex Real Estate Corp*. (1997) 53 Cal.App.4th 15, 29 (*Edwards*).) "The statute includes nothing about communications made in a prelitigation context, that is, *before* suit is filed. Nevertheless, the courts have applied the judicial privilege to certain discrete categories of communications made in advance of actual litigation." (*Id.* at p. 30.) However, "the mere potential or 'bare possibility' that judicial proceedings 'might be instituted' in the future is insufficient to invoke the litigation privilege. [Citation.] In every case, the privileged communication must have some relation to an imminent lawsuit or judicial proceeding which is *actually* contemplated seriously and in good faith to resolve a dispute, *and not simply as a tactical ploy to negotiate a bargain*. [Citations.] . . . [T]he privilege attaches at that point in time that imminent access to the courts is seriously proposed by a party in good faith for the purpose of resolving a dispute, and not when a threat of litigation is made merely as a means of obtaining a settlement." (*Id*. at p. 36; second italics added; fn. omitted.) As the party seeking to invoke the absolute bar of the litigation privilege, Husain had "the burden of establishing the preliminary facts" showing that the statements were made on a privileged occasion. [Citations.]" (*Id.* at p. 37.) Specifically, he was required to produce evidence that would "establish that at the time the communications were made, litigation was not a mere possibility on the horizon, but was actually proposed, seriously and in good faith . . . ." (*Ibid.*; see *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1251.) We conclude that Husain failed to meet his burden.

In the argument section of his briefs, Husain contends, in a conclusory fashion,[9] that at the time he made the statements in question, he was "discuss[ing] matters which were to

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[8] Civil Code section 47 reads, in pertinent part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . judicial proceeding . . . ."

[9] The argument section of Husain's briefs does not include appropriate record citations as required by our court rule. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [each brief must

shortly be made the subject of a lawsuit that he intended to file against Mahmood, based upon alleged fraud as to the corporation," and "creditors of the tire store were seeking to collect monies from Husain" and "contemplating litigation." Husain further contends that he "honestly believed that his business had been hijacked because monies were directly going into an account controlled by Mahmood, and all licenses had been placed under Mahmood's corporate number, and his statements regarding Mahmood's embezzlement and hijacking the store "were intended to convey that the debt was not that of Sunkist or Husain, the owner of Sunkist, but rather of Mahmood." We conclude that Husain's arguments are unavailing.

During the liability phase of the trial, no evidence was submitted from which a jury could reasonably find that Husain's statements were made in contemplation of litigation against his nephew. In his conversations with Sunkist's employees and creditors, Husain made no reference to any legal action he intended to take against his nephew. Nor was there any evidence from which a jury could reasonably find that at the time Husain made his statements, Sunkist's employees and creditors had an interest in Husain's dispute with Mahmood, "as either potential witnesses or unwitting participants in Mahmood's alleged misconduct." (Cf. *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1267-1268 [attorney's letter discussing potential litigation between client and employee sent to current or former customers was covered by litigation privilege].) Indeed, each of the employees of the creditors expressed surprise or bewilderment at Husain's accusations against Mahmood, and each Sunkist employee attempted to distance himself from the dispute between Husain and Mahmood. "[T]he mere potential or 'bare possibility' that judicial proceedings 'might be instituted' in the future," by Husain was not sufficient to demonstrate as a matter of fact or law that Husain was entitled to invoke the litigation privilege. (*Edwards, supra,* 53

"[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"].) The record citations in the Statement of Facts section of Husain's briefs do not cure the error of failing to include appropriate record citations in the argument section of the briefs. The purpose of the citation rule is "to enable appellate justices and staff attorneys to locate relevant portions of the record expeditiously without thumbing through and rereading earlier portions of a brief." (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16.)

Cal.App.4th at p. 36, citing Rest.2d Torts, §§ 586-588, com. e, pp. 247-251.) We also see no merit to Husain's argument that he was privileged in making defamatory statements about Mahmood because Sunkist's creditors were contemplating litigation regarding their outstanding invoices. Husain "cannot obtain the benefits of the privilege to protect [his] own communications merely by establishing that [he] anticipated a potential for litigation . . . arising out of some claim or dispute. . . . [T]he privilege only arises at the point in time when litigation is no longer a mere possibility, but has instead ripened into a *proposed proceeding* that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute." (*Edwards, supra*, 53 Cal.App.4th at p. 39; see *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1381.) The cases cited by Husain are factually distinguishable and do not require a different result.

II. The Remitted Award of $45,000 in Compensatory Damages Is Sustainable[10]

We initially find no merit to Husain's argument that the remitted award of $45,000 in compensatory damages was excessive because the trial court should have reduced the jury's award of "nominal damages" of $60,000 to $1. According to Husain, "[i]t is well established that a judgment for nominal damages *must involve a trivial sum*; such damages are damages in name only and not in fact, and are the same as no damages at all [citation]." (Italics added.) However, it is equally well settled that the rule as stated by Husain does not apply to defamation actions based on language that is slanderous per se.[11] (*Lick v. Owen*

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[10] We do not separately address Husain's arguments that the jury's "award of $60,000 is not supported by the evidence," and "was intended to constitute 'punitive damages,' rather than 'nominal damages.' " On Husain's appeal we review the trial court's remitted award of $45,000 in compensatory damages "as if it had been returned in the first instance by the jury in the reduced amount." (*Hughes v. Hearst Publications, Inc*. (1947) 79 Cal.App.2d 703, 705 (*Hughes*).) On Mahmood's cross-appeal, he asserts that the jury properly exercised its discretion in awarding $60,000, and he asks us to "order reinstatement of the original judgment." However, he does not specifically contend that the trial court abused its discretion in reducing the jury's verdict or that the remitted award of $45,000 is inadequate as a matter of law. Consequently, we limit our discussion to whether the remitted award of $45,000 in compensatory damages is sustainable.

[11] Husain argues that his purportedly slanderous statements—that Mahmood stole or embezzled funds, stole "millions of dollars," and "hijacked" the store—were nothing more

(1874) 47 Cal. 252, 258.) In actions based on language that is slanderous per se, "damage to [the defamed] plaintiff's reputation is conclusively presumed and he need not introduce any evidence of actual damages in order to obtain or sustain an award of damages." (*Contento v. Mitchell* (1972) 28 Cal.App.3d 356, 358; see *Douglas, supra,* 43 Cal.App.3d at p. 940 [" '[t]his being a case of slander which is libelous [p]er se (charging the crime of theft), general damages are presumed as a matter of law' [citation]"].) The trial court properly instructed the jury that if Mahmood proved all the elements of defamation, "the law assumes that his reputation has been harmed. Without further evidence of damage[s], Mr. Mahmood is entitled to a nominal sum such as one dollar or *such greater sum as you believe is proper for the assumed harm to his reputation* under the circumstances of this case." (Italics added.)[12] The use of the term "nominal damages" in the special verdict form, agreed to by

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than "colorful language" he used in explaining to creditors why Sunkist was not responsible for debts incurred while Mahmood was managing the store. However, the jury apparently viewed the evidence differently, and found that "[t]he words spoken were understood by the hearer in a slanderous sense . . . ." (*Douglas v. Janis* (1974) 43 Cal.App.3d 931, 939 (*Douglas*).) A slanderous statement that imputes the crime of theft or tends to injure a person with respect to his profession, trade, or business is slanderous per se. (Civ. Code, § 46, subds. (1), (3); see *Douglas, supra,* 43 Cal.App.3d at p. 939, fn. 8; *Hanley v. Lund* (1963) 218 Cal.App.2d 633, 644 (*Hanley*), disapproved on another ground in *Adams v. Murakami* (1991) 54 Cal.3d 105, 115-116; *Moranville v. Aletto* (1957) 153 Cal.App.2d 667, 672.) Despite the jury's finding that Husain's statements did not cause substantial harm to Mahmood that would permit an award of actual damages, the jury could properly find that Mahmood was entitled to both compensatory damages for the presumed harm to his reputation (*Hanley, supra,* 218 Cal.App.2d at pp. 644-645), and punitive damages to punish Husain for his "tortious acts whose repetition or imitation the law seeks to deter" (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1187, fn. 10 (*Simon*)). In the absence of any substantive argument by Husain challenging the sufficiency of the evidence, we accept the jury's findings as to the nature of Husain's statements and Mahmood's entitlement to damages for the assumed harm to his reputation and punitive damages, and all the reasonable inferences to be drawn therefrom.

[12] Since the trial in this case, CACI No. 1704 has been modified to read, in pertinent part: "Even if [*name of plaintiff*] has not proved any actual damages for harm to reputation or shame, mortification or hurt feelings, the law assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [*name of plaintiff*] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar." (CACI No. 1704 (2011 ed.) at pp. 988-989.)

the parties and concurred in by the trial court, was merely a short-hand reference to the court's instructions regarding the jury's consideration of an award of damages for any assumed harm to Mahmood's reputation.

By reducing the verdict to $45,000 in "compensatory damages," the trial court correctly found that the jury's award of $60,000 in nominal damages was "*a form of compensatory damages*," which was "imposed for the purpose of compensating [Mahmood] for the harm which the defamatory publication . . . is assumed to have caused to his reputation." (Rest., Torts, § 621, com. a, p. 314, italics added; see, Rest.2d, Torts, § 621, com. a, p. 319.) The rationale for permitting a defamed person to recover for the assumed harm to his reputation, without a showing of "any specific harm to his reputation or any other loss caused thereby," is that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed. . . . If . . .the defamatory publication is of such kind and was published under circumstances as to justify the inference of some general impairment of his reputation or, through loss of reputation, to his other interests, he is entitled to recover general damages therefor." (*Ibid.*; see *Weller v. American Broadcasting Companies, Inc*. (1991) 232 Cal.App.3d 991, 1014 (*Weller*); *Di Giorgio Fruit Corp. v. AFL-CIO* (1963) 215 Cal.App.2d 560, 577 (*Di Giorgio Fruit Corp.*).)

As to Husain's argument that the remitted award of $45,000 in compensatory damages is excessive, we analyze that issue "under the settled rule that 'a verdict will not be disturbed by an appellate court unless it is so grossly disproportionate to any reasonable limit of compensation as shown by the evidence that it shocks one's sense of justice and raises a presumption that it is based on passion and prejudice rather than sober judgment.' [Citation.]" (*Hughes, supra,* 79 Cal.App.2d at p. 705, quoting *Roedder v. Rowley* (1946) 28 Cal.2d 820, 823.) As we now discuss, we conclude that Husain's arguments challenging the excessiveness of the remitted award of $45,000 in compensatory damages are unavailing.

As noted, in a case involving slander per se, "there is no specific requirement that any special damages be awarded before general damages may be awarded" for assumed damages for injury to the defamed person's reputation. (*Westphal v. Wal-Mart Stores, Inc*.

(1998) 68 Cal.App.4th 1071, 1078.) "Although failure to prove special damages may be a factor in concluding that damages for injury to reputation are excessive [citation], the failure of such proof certainly does not compel the conclusion, especially where, as here, [Mahmood] did not claim any special damages . . . ." (*Weller, supra*, 232 Cal.App.3d at p. 1014.) Consequently, we reject Husain's argument that the remitted compensatory damages are excessive because the jury found Mahmood was not entitled to actual damages because Husain's statements were not a substantial factor in causing harm to Mahmood.[13]

In considering the appropriate award of damages, the trial court " 'was bound to consider the notoriety given to the defamatory charge, the nature of the statements made and the character, condition, and influence of the parties. The damages are general in character, and specific instances of loss are not dependable standards of measurement. The general nature and extent of the business of [Mahmood] and [his] prospective damages, likely to result from the act[s] of [Husain], were material circumstances. In short, the amount of damages lay within the sound discretion of the [trial court], considering all of the circumstances of the case.['] " (*Di Giorgio Fruit Corp., supra*, 215 Cal.App.2d at p. 579.)

We find relevant to our analysis the decisions in *Hanley, supra*, 218 Cal.App.2d 633; *Stoneking v. Briggs* (1967) 254 Cal.App.2d 563 (*Stoneking*); *Russell v. Geis* (1967) 251 Cal.App.2d 560 (*Russell*) and *Douglas, supra*, 43 Cal.App.3d 931. In *Hanley*, the plaintiff doctor sought to recover monetary damages for slanderous statements made by the defendant about the death of a patient treated by the doctor, and the republication of the slanderous statements in a newspaper article. (218 Cal.App.2d at pp. 637-638.) In upholding the jury's award of $15,000 in general damages, the *Hanley* court explained: "Where, as here, slanderous statements injure one with respect to his office, profession, trade or business [citation] they are deemed slander per se. [Citation.] Therefore, there

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[13] Husain's reliance on *Regalia v. The Nethercutt Collection* (2009) 172 Cal.App.4th 361, which is cited in both his opening and reply briefs, is misplaced because that case concerns an action for slander per quod. We also decline Husain's request that we consider an unpublished decision by Division Three of the Court of Appeal, Fourth Appellate District (*Kunysz v. Sandler* (Jan. 15, 2010, G041745) [nonpub. opn.]). Husain cites no exception to our court rule that an unpublished opinion "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a), (b).)

need not have been any evidence of actual damages to support an award of compensatory damages. [Citation.] [¶] However, we believe that the evidence showed that plaintiff suffered actual damages. At least one patient stopped going to plaintiff because of the newspaper article, and some of his colleagues questioned him on the child's death. This evidence supports a finding that serious doubt was cast on plaintiff's professional ability and reputation. In light of this evidence we do not believe that the award of general damages was excessive." (*Id.* at pp. 644-645.) In *Stoneking*, a slander action, the appellate court upheld an award of $22,000 in compensatory or general damages for slander where the evidence included plaintiff's testimony that "after the alleged slander he lost a month's work and could no longer obtain carpenter-foreman employment," and even though there was no showing as to the specific dollar-value for such damages. (254 Cal.App.2d at pp. 566, 579, & fn. 8.) In *Russell*, a defamation case, the appellate court upheld the jury's awards of $55,000 in general damages to one plaintiff and $45,000 in general damages to another plaintiff. (251 Cal.App.2d at pp. 571-572.) In so ruling, the *Russell* court stated: "Here, each plaintiff introduced substantial evidence of damage to her reputation, of humiliation, and of mental suffering, as well as the inability to obtain employment. Under the principles enunciated in the numerous cases discussing the subject of damages, we cannot say that either judgment is so excessive that it must be set aside." (*Id*. at pp. 572-573.) In *Douglas*, a slander per se action, the appellate court upheld an award of general damages of $50,000 to the plaintiff for " 'damages for injury to his feelings, including mental worry, distress, grief, and mortification,' " caused by the defendant falsely stating that the plaintiff had taken funds from him or stolen funds from one of the defendant's corporations. (43 Cal.App.3d at pp. 939, 940.)

In this case, Mahmood presented substantial evidence from which the trial court could reasonably find that harm to Mahmood's reputation had been caused by Husain's accusations of embezzlement and theft of store funds. Because of Husain's defamatory statements, Mahmood had to continually respond to Sunkist's creditors that he was not responsible for Sunkist's debts. Additionally, an employee of one creditor called the police after speaking with Husain. Another creditor obtained a judgment against Mahmood and

placed a lien on his home and Mahmood had to go to Los Angeles to obtain court relief. We are not persuaded by Husain's arguments that "the evidence at trial indicates that nobody to whom Husain made the alleged defamatory statements believed them or took them seriously," and that an employee of one of Sunkist creditors who heard the defamation had been doing business with Mahmood's separate business Clayton Auto Sales for about a year at the time of the liability phase of the trial in July 2007. "If the communication is obviously defamatory in the eyes of the community generally, the fact that the particular recipient does not regard it as discreditable is not controlling." (Rest.2d Torts, § 559, com. e, p. 158.) Code of Civil Procedure section 461 allows a defendant in a defamation action to give evidence of "mitigating circumstances, to reduce the amount of damages." However, "[t]he fact that the person to whom the slander may have been uttered was not influenced thereby or had subsequently regained his confidence in the [defamed] plaintiff, would not be such a 'mitigating circumstance.' " (*Clay v. Lagiss* (1956) 143 Cal.App.2d 441, 448.)

"[I]n the absence of any proof of special damages, . . . the principal damage that could reasonably accrue to [Mahmood] from the [defamatory statements] would be damage to [his] reputation as an [employee] which would make it more difficult [for him] to secure" future employment. (*Di Giorgio Fruit Corp., supra,* 215 Cal.App.2d at pp. 578-579.) Mahmood testified that since he was effectively terminated from his Sunkist position in February 2006 until the time of the liability phase of the trial in July 2007, he had been unable to secure employment because he could not give a reference for his fifteen year employment at Sunkist. (Cf. *Triton Insurance Underwriters v. National Chiropractic Insurance Co.* (1965) 232 Cal.App.2d 829, 833, 835-838 [appellate court upheld trial court's refusal to award general damages where defendant's actionable libel did not prevent the plaintiff from qualifying to engage in insurance business as attorney in fact].) We see no reason to set aside the award of $45,000 in compensatory damages merely because that sum also approximates Mahmood's yearly salary at Sunkist. Instead, we conclude that in this case the trial court could reasonably find that Husain's defamatory statements had adversely impacted Mahmood's reputation and his ability to secure employment, thereby entitling Mahmood to recover the remitted award of $45,000 in compensatory damages.

III. The Remitted Award of $450,000 in Punitive Damages Is Not Unconstitutionally Excessive

Husain argues that the trial court's remitted award of $450,000 in punitive damage (10 times the remitted compensatory damages) is an unconstitutionally excessive amount. He asks us to reduce the amount of punitive damages to no more than $45,000 (equal to the remitted compensatory damages). Mahmood argues that the remitted award of $450,000 is not unconstitutionally excessive, and that we should reinstate the jury's award of $1 million. We conclude that in this case the jury's award of $1 million was constitutionally excessive, and the maximum constitutional limit for punitive damages is the trial court's remitted award of $450,000, or 10 times the remitted compensatory damages of $45,000. (*Simon, supra,* 35 Cal.4th at pp. 1188-1189 [an appellate court's "constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the 'right' level in the court's own view"].)

"The due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712 (*Roby*), citing to *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418 (*State Farm*) and *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568 (*BMW*).) "In deciding whether an award of punitive damages is constitutionally excessive," "we are to review the award de novo,[14] making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct.[15] [Citations.]" (*Simon, supra,* 35 Cal.4th at p. 1172; see *State Farm, supra,* 538 U.S. at p. 418, citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc*. (2001) 532 U.S. 424 and *BMW, supra,* 517 U.S. at p. 575.) "This '[e]xacting appellate review' is intended to ensure

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[14] Consequently, we do not separately address Mahmood's argument that the trial court failed to consider the "extraordinary reprehensibility" of Husain's conduct and Husain's extraordinary wealth.

[15] The third factor, the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases, is not relevant to our determination in this case.

punitive damages are the product of the ' " 'application of law, rather than a decisionmaker's caprice.' " ' (*State Farm, supra,* at p. 418.)" (*Simon, supra*, 35 Cal.4th at p. 1172.) "[F]indings of historical fact made in the trial court are still entitled to the ordinary measure of appellate deference. [Citations.]" (*Ibid.*) For the reasons we now state, we reject Husain's contentions that the reprehensibility of his conduct was low, and that a one-to-one ratio of punitive damages to compensatory damages should be the constitutional maximum in this case.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." (*BMW, supra*, 517 U.S. at p. 575.) In evaluating reprehensibility, we look at whether "the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident." (*State Farm, supra*, 538 U.S. at p. 419, citing *BMW, supra*, 517 U.S. at pp. 576-577.)

Husain argues that the degree of reprehensibility in this case is low because his statements about Mahmood did not cause Mahmood either physical or economic harm, and the tortious conduct did not evince an indifference to or a reckless disregard of the health or safety of others. Husain argues, in a conclusory fashion,[16] that he "was hurt and upset when he realized that his nephew, in whom he had placed great trust and confidence, had used his money to build up his own business and transferred all business licenses into [his] own name; failed to pay creditors and employees; left the premises in a horrible condition; was siphoning all credit card payments to his own account. He informed creditors and an employee that any obligation was that of Mahmood or his entities rather than that of Husain and Sunkist."

However, Husain's argument ignores the evidence submitted by Mahmood demonstrating that Husain's defamatory statements did cause Husain more than purely "economic harm," that Husain acted with "intentional malice" towards Mahmood, and that Mahmood "had financial vulnerability." (*Roby, supra*, 47 Cal.4th at p. 713.) Because of

[16] See fn. 9, *ante*.

Husain's defamatory statements, Mahmood had to repeatedly respond to Sunkist's creditors that he was not responsible for Sunkist's debts. As to the factor of intentional malice, the trial court aptly explained on the record, "[t]he witnesses' testimony made it very clear to me that Mr. Husain did embark upon a campaign [to] ruin Mr. Mahmood. The jury understood that, and the jury used that as a basis for the determination of both the compensatory damages and the punitive damages. And I accepted their evaluation of the credibility and the intent that was in mind, and I'm satisfied that they were right. [¶] Mr. Husain did display the arrogance and attitude of someone who intended to ruin Mr. Mahmood. The jury caught that quite well." As to Mahmood's financial vulnerability, he testified that since his termination and at the time of the punitive damages trial in July 2008, he had been unable to secure employment because he lacked a reference for his work at the tire center for 15 years. Mahmood also testified that as a consequence of the defamatory statements and loss of employment at the tire center, he had to borrow more than $500,000, secured by a mortgage on his home, to defend his uncle's lawsuit to prove he was not an embezzler and "to clean his reputation." It was "a headache" and the case was "still hounding" him. He was not making any money from his separate used car business. Thus, he was "sitting in a financial hole, unable to make payments on the moneys that [he] borrowed on [his] house . . . . All [his] retirement [was] gone. [He had] borrowed up to [his] head on [his] credit cards. [He did not] know what to do. [He was] just barely making [his] payments . . . [¶] . . . [¶] because [he] got sued . . . [and] had to prove that [he] was not an embezzler, not a thief, was not a crook, [he] just got [t]his rap on [him] because [he] did not agree[ ] with [Husain.] That's why [he was] suffering and making payments or trying to struggle and survive today at 52 years of age."

We also reject Husain's argument that the constitutional maximum of punitive damages versus compensatory damages should be a ratio of one-to-one in this case. As explained by our Supreme Court in *Simon, supra,* 35 Cal.4th at p. 1182: "We understand the court's statement in *State Farm* that 'few awards' significantly exceeding a single-digit ratio will satisfy due process to establish a type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly

greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause. [Fn. omitted.] As stated in *Williams v. ConAgra Poultry Company* (8th Cir. 2004) 378 F.3d 790, 799, a ratio significantly greater than single digits 'alerts the court[] to the need for special justification.' [Citations.] [¶] Multipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm*. Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.' (*State Farm, supra,* 538 U.S. at p. 425.) But we do not agree . . ., that 'in the usual case' the high court's decisions establish an 'outer constitutional limit' of approximately *four* times the compensatory damages. Reviewing the history of double, triple and quadruple damages, the court in *State Farm* warned that 'these ratios are *not binding*,' but only 'instructive.' (*State Farm, supra*, at p. 425, italics added.) Moreover, their instruction, what '[t]hey demonstrate,' is simply that '*[s]ingle digit* multipliers are more likely to comport with due process' than ratios of 500 to 1, as in *BMW*, or 145 to 1, as in *State Farm*. (*Ibid*., italics added.)."

Given the nature and circumstances of Husain's conduct, we conclude that the jury's punitive damage award of $1 million exceeded constitutional limits and that the nature and size of the remitted award of $45,000 in compensatory damages militates for a maximum punitive damage award slightly beyond the single-digit range and that $450,000 is "in absolute size not extraordinary." (*Simon, supra,* 35 Cal.4th at p. 1189.) In reaching our determination we have considered that the remitted award of punitive damages represents only 1.5% of Husain's net worth of about $30 million, as testified to by Mahmood's expert witness. Nevertheless, we conclude that an award of $450,000 in punitive damages, is not "so minor, even accounting for [Husain's] wealth, that it can be completely ignored, especially when imposed for conduct that led to no profit" for Husain. (*Ibid*.; see *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1255 [$2 million in punitive damages "sends a forceful message" to defendants worth nearly half a billion dollars].)

DISPOSITION

The appeals by Sunkist Enterprises Corporation and Irfan Automotive, Inc., are dismissed. The appeals from the judgment filed August 12, 2008, and the order denying the motion for a new trial are dismissed. The orders denying the motions to vacate the judgment and for judgment notwithstanding the verdict are affirmed. The amended judgment filed on October 20, 2008, is affirmed. Irfan Mahmood is awarded his costs on appeal.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.