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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DIAMOND ONE CONSTRUCTION, INC., Plaintiff, Cross-defendant and Respondent, v. ZOOLOGICAL SOCIETY OF SAN DIEGO, Defendant, Cross-complainant and Appellant.	D069349 (Super. Ct. No. 37-2014-00003975-CU-FR-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed as modified.

Manning & Kass, Ellrod, Ramirez, Trester and Darin L. Wessel, John D. Marino for Defendant, Cross-complainant and Appellant.

Morris, Sullivan & Lemkul and Shawn D. Morris, Chase M. Stern, Matthew J. Yarling for Plaintiff, Cross-defendant and Respondent.

This case involves a payment dispute between Zoological Society of San Diego (the San Diego Zoo or the Zoo) and one of its general contractors, Diamond One Construction, Inc. (Diamond One) relating to the construction of a 4-D theater attraction on the Zoo's grounds, the Rio Rainforest Adventure (Rio). A jury awarded Diamond One approximately $223,000 and $371,000 in economic and punitive damages, respectively. The jury rejected the Zoo's defenses and cross-claims, which were premised on an assertion that Diamond One contracted to construct Rio for an amount not-to-exceed $500,000.

On appeal, the Zoo contends (1) Diamond One was not entitled to recover any compensation for its work because it did not comply with licensing regulations that require supervision and control by a responsible managing officer (Bus. & Prof. Code, §§ 7068, 7068.1); (2) the court failed to rule on the Zoo's theory of estoppel and incorrectly instructed the jury on several of Diamond One's affirmative defenses; (3) insufficient evidence supports the jury's finding of promissory fraud by the Zoo; (4) the court erred in excluding evidence of a prior felony conviction of Diamond One's chief executive officer; (5) the punitive damages award is not supported by sufficient evidence and violates due process; and (6) the court erred in granting prejudgment interest at a rate of 10 percent to Diamond One. For reasons we explain, we are not persuaded by the Zoo's arguments except we conclude the court should have used a seven percent prejudgment interest rate. We accordingly modify the judgment and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Between 2008 and 2014, Diamond One provided general contracting services to commercial entities, constructing "attractions" on the entities' properties. Diamond One was a family owned and operated business. David Lukacs was the majority owner and served as the secretary; his nephew Mark Lukacs served as the chief executive officer; Mark's father was the president; and Mark's brother Greg Lukacs served as another officer.[1] The corporation held a B-1 general contracting license based on David's qualifications. Mark typically handled client management while Greg typically handled "field operations and coordinating the work." Greg also held a C-27 landscape license. When Mark was young, his uncle David "often enlisted" him to help with residential construction projects. Right out of high school, Mark and Greg worked together in landscape construction for several years. Mark had been "in and around" construction throughout his life.

In late 2009, one of Diamond One's employees left the company to work for the Zoo. The former employee introduced Diamond One to the Zoo. Diamond One repaired some structures for a bear exhibit and eventually completed 85 projects for the Zoo ranging anywhere from $2,000 to $2,000,000 in value. Diamond One completed the two-million-dollar "Reptile Walk" project in July 2012. Between 2012 and 2013, Diamond One worked on multiple ongoing projects for the Zoo. The Zoo was Diamond One's

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1 We refer to the Lukacs family members by their first names for sake of clarity.

biggest client, they had an excellent working relationship, and there were no apparent disputes until Rio.

Construction of Ice Age

In 2011, the Zoo asked Diamond One to construct the "Ice Age" 4-D theater. In the 4-D theater, guests would experience special effects, such as sprayed water, while watching a film. The Zoo introduced Diamond One to Mark Cornell, a senior vice president of SimEx. SimEx specialized in bringing 4-D theater attractions to different venues. SimEx signed a revenue sharing agreement with the Zoo, promising to provide $300,000 in capital in exchange for use of the Zoo's property and the Zoo's payment of construction costs. The Zoo then entered in a written contract with Diamond One for construction, which was consistent with the Zoo's procurement policy for projects that required more than $50,000 of the Zoo's funds. The Zoo's architect, Steve Fobes, project-managed and oversaw the construction of Ice Age. He worked with Diamond One's in-house architect, Buck Ruskin, on design issues. Fobes found Ruskin to be a competent architect. Ice Age successfully completed and was profitable for the Zoo (and SimEx).

Design of Rio

The success of Ice Age was the impetus for Rio. In November 2012, John Dunlap, the "Director of the Zoo," approached Mark and said that the Zoo and SimEx wanted to build a second 4-D theater. Dunlap reported directly to the chief operating officer (COO) of the Zoo. Unknown to Mark, Dunlap had obtained the COO's approval to use the second theater to redevelop the children's zoo area at no "out-of-pocket" costs to the Zoo. The Zoo had "no budget" for Rio and did not intend to pay any money for its construction

because the project was a joint venture with SimEx. Conceptually, Dunlap explained to Mark that the new theater would be built in the children's zoo area by converting an existing tented facility known as a "sprung" structure. Dunlap and Mark informally discussed the issue of whether there was enough electrical power to build a theater in that area.

Diamond One attended a "kickoff" meeting to discuss the new Rio project. The attendees included Dunlap, Cornell, various other Zoo and SimEx personnel, Mark, and Ruskin. This first meeting was the only one where Mark remembered Dunlap telling the group the project had a $300,000 budget. The "300,000" number was not tied in any way to actual construction costs, but was carried over from Ice Age and based on anticipated revenue. As outlined to Diamond One at the kickoff meeting, the Rio project consisted of (1) converting the sprung structure into an enclosed assembly for the theater; (2) constructing a canopy over a queue line; and (3) building a ticket kiosk. The team assumed that specialized water filtration equipment could be housed in an existing naked mole rat exhibit. The team also discussed the possibility of moving two or three existing bird perches to an area by the queue line.

Mark began gathering estimates for some components of the anticipated scope of work. The cost to bring electricity to the theater site would be $89,000, not including Diamond One's cost of trenching to contain the high voltage lines. The cost to get the sprung structure enclosed, as negotiated by Dunlap with the structural vendor, would be $65,000. The cost of Diamond One's initial design work was $30,000.

Regarding project design, the Zoo held a series of meetings where its personnel "completely [took] over." This was typical. Zoo personnel from different disciplines, including in animal care, architecture, landscaping, etc., generally provided Diamond One with a project's requirements before Diamond One could provide the estimated costs. As Diamond One gathered input, the scope of the project continuously grew. The Zoo decided the project needed to include a nighttime housing facility for birds—macaws in particular, to match the attraction's theme. Dunlap insisted on having 20 birds around the theater for photo opportunities. The birds had particular and unavoidable sanitation and health needs. For instance, Diamond One was told that the bird house must be waterproof; use certain building materials; and contain sloped floors, a trench drain, skylights, and windows. Also, Rio's design had to preserve the Zoo's specimen plants.

Furthermore, Diamond One was asked to alter an otter exhibit to accommodate disabled visitors. SimEx and the Zoo discovered that the naked mole rat exhibit could not be used to hold the water filtration equipment, and Diamond One was told it would need to construct a new building. SimEx also wanted the attraction to include a waterfall feature.

The design of the theater was complicated for other reasons. For example, the sprung structure was made of fabric and did not provide rigid support for hanging materials; certain ductwork had to be redesigned as a result. In the midst of the design phase, Dunlap pulled Diamond One to work on another "ropes course" project, causing a delay. Delays tended to increase costs. By February 2013, Mark relayed to Dunlap and Cornell his concerns that the project could not be completed for $300,000.

Costs to Build Rio

In mid-March 2013, Dunlap and Cornell wanted the project budget from Mark. Although he did not yet have all the subcontractors' bids and project requirements, Mark put together "budget projections" and e-mailed a spreadsheet to Cornell first. His e-mail noted that the "** symbols on the spreadsheet represent that no firm number has been obtained from the vendor yet (Placeholders, if you will)." The spreadsheet showed a budget of $767,700. Cornell replied with surprise. Mark responded to Cornell, "Cut the bird building[,] the otter exhibit[,] and the water feature[,] all paving associated with that side of the project[,] and you will cut over $250K in one slice." Mark kept working on the budget.

The next day, he e-mailed two spreadsheets to Dunlap, copying Cornell and others. The first spreadsheet showed a budget of $774,470 including the nighttime macaw holding structure, otter work, and water feature. The second spreadsheet showed a budget of $574,945 without those three components. Mark again indicated in his e-mail that he had used "place holders" for the costs of electricity, mechanical, plumbing, and tree removal.

Mark made certain assumptions to arrive at his budgeted costs, which for reasons outside of Diamond One's control, would prove inaccurate. For instance, Mark assumed he would have perimeter access to the work site by cutting a hole in the fence. He had gained approval from Dunlap and the Zoo's operations staff to cut the hole, but the legal department vetoed the idea. Diamond One ended up having to use a far more difficult

route to get workers and equipment to the site, limited to two hours a day. The limited access and longer route increased costs.

On the same day Mark e-mailed the budgets to Dunlap, he received an e-mail from Kevin Haupt, the Zoo's director of facilities management, asking for the budgets and drawings. Mark e-mailed the documents to Haupt. Haupt oversaw 200 people at the Zoo and reported to Bob Dillon (the director of operations), who reported to Dunlap. Haupt reviewed the budgets, met with Mark, and stated that he felt like the numbers were legitimate.

The Threat

The day after Mark e-mailed Dunlap the budgets, Dunlap and Cornell asked him to meet. The trio ended up at a brewery restaurant for dinner. Dunlap and Cornell were upset about the budgets. As they conversed, Cornell said he might be able to get an additional $200,000 contribution from SimEx to allow for a $500,000 budget. Mark queried whether the Zoo and SimEx should cancel the project for lack of sufficient funds, to which Dunlap replied that they could not go back to their bosses with a cancellation and that SimEx and the Zoo already had a contract with each other. Subsequently, with the possibility of having $500,000, the men discussed "value engineering," or ways to save money on materials and construction. However, given the wide disparity still between "500" and "774," Mark asked whether they could take the macaw building out, to which Dunlap responded, "No, it's not coming out. It has to be built, Mark."

Shortly thereafter, Cornell excused himself to use the restroom. Once he was out of eye sight, Dunlap leaned in and threatened Mark. Dunlap said, "Let's get something

perfectly clear, Mark. You're going to do this project for $500,000. And if you don't, I'll remove you as one of Zoo's preferred contractors and I will bury you." Mark was shocked. He had never had a company executive threaten him before. Dunlap warned Mark that Cornell was returning to their table. Cornell testified that when he returned from the restroom, the "tone" or "mood" had noticeably changed and become more serious. Though he had not witnessed the threat, Cornell observed: "John always had confidence that he could get Diamond One to build [Rio] for the [$]500,000."

Within a day of the dinner, Mark told his girlfriend, father, and brother Greg about the threat, which Greg corroborated. Weeks later, Mark also told Cornell about the threat; Cornell recalled that Mark "seemed pretty upset about it." During payment negotiations, Mark told the Zoo's general counsel, Dillon, and Haupt, that Dunlap had threatened him.

The Zoo's Promises to Diamond One

The day after the threat, Mark called Dunlap to try and back out of the Rio project and still keep intact Diamond One's relationship with the Zoo. Diamond One could not sustain a large financial loss on Rio, yet needed to keep working on other projects for the Zoo. During their phone call, Dunlap said, "There's a possibility I can get you some more money, Mark." Then, a few days later while the two were privately meeting in Dunlap's office, he told Mark, "I can find you some additional money if it's associated with animals." Dunlap said he had access to animal care funds, or possibly, department-specific funds. A similar situation had recently occurred on the Reptile Walk project. For that project, although certain work was unbudgeted, Dunlap had come up with

$100,000 in funds to pay Diamond One. With the assurance of further payment on Rio beyond $500,000, Diamond One began preparatory construction work. Diamond One did not have a set of permitted plans yet, but Dunlap insisted that work begin.

SimEx Contracts with the Zoo, Not Diamond One

Similar to Ice Age, SimEx and the Zoo had signed a revenue sharing agreement for Rio. SimEx had initially agreed to make a $300,000 capital contribution in exchange for the Zoo's provision of the site and improvements.

After the threat at the restaurant, Dunlap asked Mark to send a $500,000 budget to Cornell, so that Cornell could obtain approval for an additional $200,000 from SimEx. Dunlap was using Mark "as a tool." Accordingly, Mark prepared a revised budget of about $517,000 and sent it to Cornell, with cover e-mail language indicating that Cornell should have Dunlap pay for the "cages and bird holding" and the project would have a $500,000 budget. In reaction to Dunlap's threat, Mark essentially "chopp[ed]" money from various line items in his original budget that in no way matched economic reality. For example, instead of the previously estimated $42,000 cost for the water feature, Mark had inserted, "FREE." He also zeroed out all of Diamond One's fees and costs associated with project management, superintendents, trucks, warranty, overhead, and profit.

Cornell obtained SimEx's approval to contribute $500,000 to the project. SimEx and the Zoo executed an amendment to their revenue sharing agreement, which reflected SimEx's new capital contribution of $500,000. SimEx and the Zoo's agreement stated in part: "The Rio Rainforest Attraction Location, basic facilities, Rio Rainforest Attraction Location improvements and management and operations shall be provided by [the Zoo]

free of charge to [SimEx] except that [SimEx] shall make a capital contribution of $500,000 to [the Zoo]." In this manner, SimEx ensured that its maximum liability on Rio would be $500,000. Diamond One was never provided with a copy of the revenue sharing agreement.

Rather than follow the protocol used in Ice Age where Diamond One contracted with the Zoo, Dunlap instructed Diamond One to contract directly with SimEx. Dunlap said that the COO would take "forever" to sign a contract, and the project would get delayed. Thus, Mark prepared a draft contract between Diamond One and SimEx, and e-mailed it to Dillon, Haupt, Adam Ringler (director of performance improvement), and Cornell. Cornell received the draft contract, but ignored it because the Zoo and SimEx's revenue sharing agreement required the Zoo to construct and pay for necessary improvements. SimEx would not be contracting with Diamond One for the construction of Rio. No one from the Zoo questioned the fact that the document was unsigned.

Diamond One received progress payments by submitting its invoices to Zoo personnel, who approved the invoices for payment by SimEx. Haupt was responsible for checking that Diamond One actually completed invoiced tasks, and Ringler was responsible for making sure that payments to Diamond One stayed within $500,000, the amount of SimEx's contribution. No one at the Zoo, however, was responsible for checking to see whether construction of Rio was actually on course to be completed within $500,000. Dunlap had no construction background and did not typically oversee construction.

Rio Is Built Despite Setbacks and Delays

Between March and September 2013, construction was underway on Rio. A major unforeseen setback occurred in getting electrical power to the theater due to complications involving Balboa Park and SDG&E. Mark personally spent an extra 100 or so hours to get necessary building permits, which were finally obtained in mid-June 2013.

Also in mid-June, Dunlap left his position at the Zoo. Prior to his leaving, he assured Mark that Ringler would "take care" of paying Diamond One with animal funds as needed, yet Dunlap did not actually provide Ringler, Haupt, Dillon, or anyone else at the Zoo, with a history of the project or the promises he had made to Mark. After Dunlap's departure, no one at the Zoo fully embraced the role of project manager, and for a while, Mark was not even sure who to report to. At least once in mid-July and once in August 2013, Mark conversed with Haupt, expressing his concerns about costs rising beyond $500,000. Both times, Haupt urged Diamond One to continue working and reassured Mark that Diamond One would get paid.

In September 2013, Mark on Diamond One's behalf informed SimEx and the Zoo that Diamond One had incurred costs of approximately $680,000 and there would still be more subcontractors' invoices. The Zoo ignored the issue of costs exceeding $500,000, thinking SimEx was responsible. Apparently no one at the Zoo thought it necessary to clarify the obligations of the Zoo versus SimEx. A week later, Rio had its grand opening. By all accounts, the attraction's opening was a success, and there were no issues with

Diamond One's workmanship. Diamond One had workers at the Rio site for another month to complete tasks for the Zoo.

Diamond One Seeks Payment

Mark attempted to collect additional payments for Diamond One's work from SimEx and/or the Zoo. SimEx informed the Zoo it had no contract with Diamond One for the construction of Rio since that was the Zoo's responsibility under their revenue sharing agreement—a proposition the Zoo did not refute. Mark met with the Zoo's general counsel, Dillon, and Haupt. The Zoo agreed to pay Diamond One's outstanding subcontractors' claims, but would not agree to pay Diamond One's general conditions, profit, or overhead, of about $200,000.

Superior Court Proceedings

In February 2014, Diamond One filed its complaint against the Zoo, seeking to recover the reasonable value of its services in constructing Rio. The Zoo filed a cross-complaint, alleging, inter alia, breach of contract and/or breach of third party beneficiary contract. The Zoo pleaded as follows: "Diamond One, by and through its officers, directors and/or project managers, inclusive of Mark Lukacs, entered into a contract with Zoo and/or [SimEx] for the express benefit of Zoo to construct the Rio Rainforest for [$500,000]. The terms of the contract between the parties was oral and written and specifically memorialized in a document . . . ."

At trial, Diamond One presented detailed evidence of its costs on Rio, such as employees' time sheets. Diamond One's expert witness, who had reviewed billing records and inspected the construction, testified that Diamond One had been paid several

hundred thousand dollars less than the reasonable value of the project's construction costs, which, in the expert's opinion, was about $1.37 million.

The jury found that Diamond One did not enter a contract with SimEx and awarded Diamond One $222,741 in economic damages based on its claims of quantum meruit and fraud. Although the jury found that Diamond One had misrepresented the existence of a contract between it and SimEx, the jury found the Zoo was not reasonable in relying on the misrepresentation and the Zoo could have discovered the lack of a signed contract. In a second phase of trial, the jury assessed $371,250 in punitive damages against the Zoo. Following the denial of several posttrial motions, the Zoo filed a timely notice of appeal.

DISCUSSION

I. COMPLIANCE WITH CONTRACTOR'S STATE LICENSE LAW

A. *Additional Background*

On various occasions in proceedings below, the Zoo contended that Diamond One was not properly licensed as a general contractor and thus unable to maintain its lawsuit.[2] During trial, the Zoo filed a motion for nonsuit, asserting in part that Diamond One should be deemed unlicensed because it had not complied with responsible managing officer (RMO) requirements. The court considered the parties' briefs; oral argument;

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2 Section 7031 of the Business and Professions Code provides that a party may not sue in a California court to recover compensation for any act or contract that requires a California contractor's license, unless it establishes it was duly licensed at all times during its performance. (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 991-992 (*Hydrotech*).) Further statutory references are to the Business and Professions Code unless otherwise stated.

testimony of David Lukacs, Diamond One's RMO; and other undisputed evidence presented during Diamond One's case-in-chief. In denying the Zoo's motion, the court stated that it had reviewed pertinent case law, was "very familiar with RMOs," and "Diamond One was in compliance with the RMO regulations."

We provide a summary of additional undisputed evidence. David had been the majority owner (51 percent) and RMO of Diamond One since its formation in 2008. As we have indicated, David is Mark and Greg's uncle. David obtained his B-1 general contractor license in 1978 and transferred it to Diamond One in 2008. He maintained the license in good standing at all times. The sufficiency of David's knowledge, experience, and qualifications to be licensed as a general contractor, are undisputed.

In the 2013 to 2014 timeframe, David worked in Diamond One's office for about 32 to 38 hours a week. Although principally performing office management and administration duties, he made himself available to any employee "out in the field" to resolve issues, including health and safety issues. David reviewed his employees' time sheets, supervised payroll, took various steps to ensure his company was properly insured, prepared reports relating to Diamond One's workers, managed the new hire process, prepared the employee handbook, managed the company's health and safety program, documented employee injuries, and managed the company's accounting. He performed all of these functions in furtherance of Diamond One's construction operations.

David was aware that Diamond One had been engaged in multiple construction projects at the Zoo, including the construction of the Rio 4D theater. He was involved in

these construction projects to the extent described above, by managing office activities. For example, David reviewed timesheets, supervised payroll, and implemented safety procedures, for Diamond One's employees who performed construction on Rio. He was not involved in field work at the construction site nor did he decide how the construction was to be completed; he relied on Mark and Greg to handle daily field operations. Mark took him to the zoo once for a "tour" of various Diamond One projects, during which time they walked around the whole zoo.

B. *Law and Analysis*

The Zoo does not contest Diamond One's holding of a facially valid license, but contends the license was a sham due to lack of supervision and/or control by David.

"The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. [Citation.] The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech*, *supra*, 52 Cal.3d at p. 995.) To enforce the licensing requirements, violators may not sue to recover compensation for their work. (*Ibid.*)

"[A] corporation qualifies for a contractor's license 'by the appearance of a responsible managing officer or responsible managing employee who is qualified for the same license classification as the classification being applied for.' (§ 7068, subd. (b)(3); see § 7065, subd. (c)(3) [corporation qualifies for contractor's license 'upon the appearance of a qualifying individual appearing either as a responsible managing officer

or a responsible managing employee on behalf of the corporation'].) The qualifying individual must be 'a bona fide officer or employee of the corporation and must be actively engaged in the work covered by the license. [Citation.] The qualifier must exercise direct supervision over the work for which the license is issued to the extent necessary to secure full compliance with the provisions of the law.' " (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518-519.)

A variety of activities can constitute direct supervision and control, including " 'any one or any combination of the following activities: supervising construction, managing construction activities by making technical and administrative decisions, checking jobs for proper workmanship, or direct supervision on construction job sites.' " (*Acosta v. Glenfed Development Corp.* (2005) 128 Cal.App.4th 1278, 1299, citing Cal. Code Regs., tit. 16, § 823, subd. (b).) Personal presence at a construction site is not required. (*G.E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance Co*. (1992) 11 Cal.App.4th 318, 329; but see *Acosta,* at pp. 1299-1300 [if subcontractors engaged in willful misconduct in home construction, then it would be reasonable to impute knowledge to general contractor based on direct supervision requirement].)

Applying the foregoing principles to the facts, we are satisfied that David Lukacs exercised sufficient supervision and control of Diamond One's construction operations to secure full compliance with relevant rules and regulations. (§ 7068.1, subd. (a); compare *Fechi v. Trojan Construction Co.* (1960) 185 Cal.App.2d 121, 123-124 ["had any problems arisen in connection with the job, respondent or his foreman would have consulted" the responsible managing employee] with *Buzgheia v. Leasco Sierra Grove*

(1997) 60 Cal.App.4th 374, 382 [evidence presented that license holder was not a bona fide employee].) The record shows that David was the majority owner of Diamond One since its inception. He was physically present and working in Diamond One's Poway office on a daily basis. He hired, and had direct interactions with, employees who worked on construction sites. He made management and administrative decisions in furtherance of the company's construction operations. He profited or lost money based on Diamond One's construction activities. He knew that his company had successfully completed numerous projects for the Zoo, and he had a longstanding basis to understand the competency of his nephews, Mark and Greg. David monitored, at least on a high level, the kinds of projects that Diamond One was constructing at the Zoo, and it could be inferred that he expected Mark to consult with him on any issues if needed. There is no claim, and no indication at all in the record, that Diamond One's construction of Rio was defective in any regard.

The Zoo's cited authorities are readily distinguishable, such as where RMOs were completely absent (and living in a foreign country) during the relevant construction activities, e.g., *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 511-512, or retired from the corporation, e.g., *Famous Builders Inc. v. Bolin* (1968) 264 Cal.App.2d 37, 40-41, or "at no time performed any function whatsoever in the management or operation of the business," e.g., *Rushing v. Powell* (1976) 61 Cal.App.3d 597, 602. Under the circumstances, Diamond One established its valid licensure during the construction of Rio, and it could properly maintain an action against the Zoo.

II. ESTOPPEL, DURESS, AND UNDUE INFLUENCE

A. *Estoppel*

The Zoo contends the trial court failed to make a legal determination whether Diamond One was barred from recovery based on principles of estoppel. In its motion for nonsuit, the Zoo argued that Diamond One was estopped from denying it had a contract with SimEx based on "its performance of work and submission of pay requests consistent with the written memorialization." The Zoo's argument was based on principles of equitable estoppel, as codified in Evidence Code section 623, which states: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in its favor. (Code Civ. Proc., § 581c, subd. (a); *Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 117.) A trial court's ruling on a motion for nonsuit is reviewed under the substantial evidence test. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.) " 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor . . . ." ' " (*Carson v. Facilities*

Development Co. (1984) 36 Cal.3d 830, 838-839; *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)

We note at the outset that the trial court did not fail to rule on the issue of estoppel. The court denied the Zoo's motion for nonsuit, thereby rejecting the Zoo's argument.[3] The Zoo did not request a more detailed statement or explanation from the court regarding its rationale for denying the motion for nonsuit or postjudgment motions as pertained to estoppel. We have no basis to infer the court "refused to consider the estoppel issues." (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61.)

Moreover, the court did not err in rejecting the Zoo's estoppel argument. " 'To constitute [an equitable] estoppel, the party claiming the benefit of it must be destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge.' " (*Murphy v. Clayton* (1896) 113 Cal.153, 160.) Based on our review of the record, there is substantial evidence the Zoo either knew or should have known that Diamond One and SimEx did not enter a contract. Both Diamond One and SimEx disclaimed ever entering into a contract with each other, and Mark testified that he only prepared a draft contract with SimEx due to Dunlap's threat and directions. The supposed contract was never signed. There was undisputed evidence that SimEx told the Zoo that SimEx had no contract with Diamond One. Indeed, the jury found that the Zoo could have discovered

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3 Likewise, the court denied the Zoo's postjudgment motions, which proffered estoppel as a ground to vacate and enter a new judgment and/or for a new trial.

the lack of a signed contract. The court correctly declined to enter judgment as a matter of law for the Zoo, both prior to and after the jury returned its verdict.

B. *Economic Duress*

The Zoo next contends the court erred in instructing the jury on economic duress. The Zoo's theory of liability on its cross-complaint was that Diamond One contracted with SimEx to construct Rio for an amount not-to-exceed $500,000 and therefore had no right to demand payment beyond that amount from the Zoo. Diamond One denied the formation of any such contract, and further claimed as one of its affirmative defenses that it only ever consented out of duress.

"The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644.) Whether a reasonably prudent person has a reasonable alternative is a factual determination generally not susceptible to determination as a matter of law. (*Ibid.*)

Here, Diamond One's claim of duress was based on the threat by Dunlap that Diamond One must agree to complete the Rio project for $500,000 or else lose its status as a "preferred contractor" and suffer other negative consequences, i.e., get "bur[ied]." The record shows that Dunlap, as the Zoo director, was in a position to influence the Zoo on its selection of contractors as well as the opinions of other Zoo personnel; the Zoo's personnel were well connected in San Diego where Diamond One operated; Diamond One's biggest client was the Zoo; Diamond One constructed theme park attractions and

its business as a whole would suffer without Zoo projects; the Zoo was otherwise quite pleased with Diamond One's construction services; and Diamond One was a family business of limited means. There is substantial evidence that Diamond One complied with Dunlap's demands because it had no reasonable alternative, i.e., the Lukacs family's livelihood depended on continuing business from the Zoo. The court did not err in instructing the jury on economic duress.

The Zoo further contends that the court's actual instruction, which was given without objection as to its form, contained a misstatement of law. The court instructed the jury using a modified version of CACI No. 333, as follows in pertinent part:

> "[Diamond One] claims that there was no contract because its consent was given under duress. [Diamond One] must prove all of the following:
>
> 1. That [the Zoo] used a wrongful act or wrongful threat to pressure [Diamond One] into consenting to the contract;
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> 2. That a reasonable person in [Diamond One]'s position would have believed that it no reasonable alternative except to consent to the contract; and
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> 3. That [Diamond One] would not have consented to the contract without the wrongful act or wrongful threat.
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> An act or a threat is wrongful if the resulting exchange is not on fair terms *or* what is threatened is otherwise a use of power for illegitimate ends."

(Italic emphasis added.)

The Zoo asserts the jury instruction was incorrect because an act or a threat is wrongful if the resulting exchange is not on fair terms "*and*" what is threatened is a use of power for illegitimate ends—not "*or*." (Rest.2d Contracts, § 176, subd. (2).)

We conclude there is no reasonable probability the Zoo would have obtained a more favorable result with a correct instruction. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 ["Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' "].) Ample evidence supports that a contract was not formed between Diamond One and SimEx; both parties to the supposed contract unequivocally denied entering a contract. The jury likely concluded as much based on the instructions for contract formation, which would have obviated any need to rely on the duress instruction.

In any event, Dunlap's threat undoubtedly (1) yielded an unfair exchange *and* (2) constituted a use of power for illegitimate ends. "The proper limits of bargaining are difficult to define with precision. Hard bargaining between experienced adversaries of relatively equal power ought not to be discouraged. . . . Where, however, a party has been induced to make a contract by some power exercised by the other for illegitimate ends, the transaction is suspect." (Rest.2d Contracts § 176, Comment.) The jury necessarily believed Mark's testimony regarding Dunlap's threat to deprive Diamond One of work at the Zoo—work which otherwise had no reason to cease. The threat explained Mark's subsequent conduct and supported the fact that he did not actually consent to accept $500,000 for Diamond One's construction of Rio. The jury found that Dunlap's conduct, on behalf of the Zoo, was sufficiently malevolent to warrant punitive damages. The erroneous instruction was clearly harmless.

C. *Undue Influence*

The Zoo also challenges the court's instructing the jury on undue influence, another of Diamond One's affirmative defenses to the formation of a contract with SimEx similar to the defense of duress. The court instructed the jury based on CACI No. 334, as follows in pertinent part:

> "[Diamond One] claims that there was no contract because it was unfairly pressured by [the Zoo] into consenting into the contract. To succeed, [Diamond One] must prove both of the following:
>
> 1. That [the Zoo] used a relationship of trust and confidence to induce or pressure [Diamond One] into consenting to the contract; and
>
> 2. That [Diamond One] would not otherwise have consented to the contract."

The Zoo argues there is insufficient evidence of a relationship of trust and confidence to support the court's instruction. A confidential relationship "*may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another*." (*O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153.) "[T]he existence of a confidential relationship presents a question of fact which, of necessity, may be determined only on a case by case basis." (*Ibid.*) "Undue influence consists . . . [i]n the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him[.]" (Civ. Code, § 1575.)

Mark, Dunlap, and even Cornell, testified to the confidential and trust-based relationship Dunlap maintained with Mark. Cornell observed Dunlap and Mark had a

"deep[] relationship," which would allow the "two guys [to] sort out anything." Mark testified to multiple instances where the Zoo paid Diamond One for work despite a lack of advance documentation and one recent instance when Dunlap found funds to pay Diamond One despite there being no obviously available funds for the work. There is substantial evidence that Dunlap had gained Mark's trust and confidence to such a degree that he could exert undue pressure on Mark to consent to a $500,000 contract. Mark explained that the only reason he might have appeared to consent to a $500,000 contract was because of the threat and pressure from Dunlap. The court did not err in instructing the jury on undue influence.

III. SUFFICENCY OF EVIDENCE TO SUPPORT PROMISSORY FRAUD

The Zoo contends Diamond One presented insufficient evidence to support its claim of promissory fraud. Diamond One's claim was principally based on Dunlap's representation to Mark that the Zoo would find a way to pay Diamond One for its work on Rio. The Zoo's contention lacks merit.

" 'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) " 'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." (*Ibid.*; see Civ. Code, § 1710, subd. (4).) In a promissory fraud cause

of action, "the required intent is an intent to induce action." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062.)

Mark testified regarding Dunlap's false and/or misleading statements, including Dunlap's promise to pay Diamond One using funds reserved for animals. Based on all the circumstances, the jury could infer that Dunlap knew the Zoo did not intend to perform, and he made the statements to induce Diamond One to begin construction. Dunlap had assured his superiors there would be no out-of-pocket costs to the Zoo for Rio, and the Zoo maintained "no budget" for the project. At the same time, Mark was indicating that Diamond One would need to withdraw from the project, and Dunlap wanted the project completed. Mark believed Dunlap's statement based on his understanding that Dunlap had access to other unallocated Zoo funds and the Zoo had paid Diamond One for work on Reptile Walk in such a fashion. Thus, the jury could find reasonable reliance on Dunlap's statements. There is substantial evidence of promissory fraud.[4]

IV. EXCLUSION OF PRIOR FELONY CONVICTION EVIDENCE

The Zoo contends the trial court erred in excluding evidence of Mark's prior felony conviction. In 2007, Mark was convicted of aiding and abetting the transportation

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[4] The Zoo alternatively claims, without any legal citation, that it was deprived of an opportunity to present "critical" evidence to the jury on the element of justifiable reliance because its expert witness was not permitted to testify regarding the standard of care for RMOs to memorialize agreements in writing. The claim is forfeited. The Zoo did not previously seek to introduce expert testimony to the jury on the issue of justifiable reliance.

of an illegal alien (8 U.S.C. § 1324, subd. (a)(1)(A)). Mark admitted driving his boss's truck across the border from Rosarito, Mexico, to California, at his boss's request. The truck contained an undocumented person secretly stowed in a floorboard compartment. Mark pleaded guilty to the offense and was placed on probation for five years. In 2011, the court terminated his probation early based on good behavior.

The circumstances of the offense and Mark's release from probation were presented to the trial court during Diamond One's motions in limine. Diamond One argued the conviction was irrelevant, remote, and unduly prejudicial. In response, the Zoo argued the conviction was relevant to Mark's credibility and honesty. The trial court considered the parties' papers and arguments, noting for the record it had looked at "the length of time when the felony conviction was, . . . whether the defendant was successful on probation or not, . . . [and] the crime itself," and had done its "[Evidence Code section]352 analysis." The court found the prior felony conviction was a "crime of moral turpitude," but would be unduly prejudicial based on the state of the evidence and case history. The court explicitly stated it had "weighed in its mind" the probative value of the evidence versus the prejudicial effect and decided to exclude the evidence.

Under Evidence Code section 788, prior felony convictions may be used for the purpose of attacking the credibility of a witness. "Upon proper objection to the admission of a prior felony conviction for purposes of impeachment in a civil case, a trial court is bound to perform the weighing function prescribed by [Evidence Code] section 352." (*Robbins v. Wong* (1994) 27 Cal.App.4th 261, 274 [providing historical review of admissibility of prior conviction evidence].) Under Evidence Code section 352, the

"court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

In *People v. Beagle* (1972) 6 Cal.3d 441, 453, the Court identified four factors that should be considered in deciding whether to admit or exclude a prior conviction under Evidence Code section 352. These factors are: (1) whether the prior conviction "rest[s] on dishonest conduct"; (2) the "nearness or remoteness of the prior conviction," including whether the crime had been followed by a "legally blameless life"; (3) whether "the prior conviction is for the same or substantially similar conduct for which the accused is on trial"; and (4) "what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions." (*Beagle*, at p. 453.) We review the court's ruling to exclude a witness's prior conviction for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 259.)

We cannot say the court abused its discretion here. The prior conviction involved entirely dissimilar, albeit dishonest, conduct from that of the instant matter. Mark became a productive, law abiding citizen after his conviction, and the Zoo had not accused him of dishonesty prior to this case. There is also a good deal of evidence supporting that Mark was telling the truth, e.g., witnesses recounted his prior consistent statements, Cornell independently observed a noticeable shift in the mood after the threat, and it did not make financial sense for Diamond One to willingly take an enormous loss on the Rio project. Conversely, there was a significant risk of undue prejudice given

Mark's transportation of an illegal alien under potentially dangerous circumstances. (Cf. *Velasquez v. Centrome, Inc.* (2015) 233 Cal.App.4th 1191, 1213 [discussing "strong danger of prejudice" attendant with disclosing "undocumented immigrant" status].) The court did not abuse its discretion in excluding the prior felony conviction.

V. PREJUDICIAL ERROR

The Zoo claims the court's errors were either individually or cumulatively prejudicial. There were no errors to cumulate, and as we have noted, the instructional error on duress was harmless. Accordingly, we reject the Zoo's claim.

VI. PUNITIVE DAMAGES

The Zoo challenges the jury's award of punitive damages. After the first phase of trial where the jury found by clear and convincing evidence the Zoo's conduct to be malicious, oppressive, or fraudulent, the jury was presented with evidence of the Zoo's financial condition to determine the amount of punitive damages, if any. For the year ending 2014, the Zoo's cash and cash equivalents totaled over $95,000,000 and its unrestricted net assets totaled over $202,000,000. The jury found that punitive damages should be assessed against the Zoo in the amount of $371,250.

A. *Whether the Zoo could be held accountable for Dunlap's conduct*

The Zoo argues the jury's punitive damages award was based on Dunlap's conduct and there is insufficient evidence he was an officer, director, or managing agent as required to hold the Zoo accountable for his conduct. (See Civ. Code, § 3294, subd. (b) ["act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation"]; CACI No. 3944.) The Zoo's argument is meritless.

Dunlap testified he was the one and only "Director of the San Diego Zoo." He described how he had been responsible for the "day-to-day operations of the zoological park." Departments that reported to him included admissions, security, buildings and grounds, animal care, education, construction and maintenance, and food and beverage. The architecture and planning department served him. He reported immediately to the COO, who told architect Fobes that Rio was "John's project." Other "directors" of operations, performance improvement, facilities management, etc., all answered to Dunlap. The inferior directors, who managed numerous employees themselves, looked to him for leadership and guidance. Dunlap originated the idea of Rio and made a number of discretionary decisions that influenced the scope and tenor of the project. There can be no serious dispute he "exercise[d] substantial discretionary authority over decisions that ultimately determine[d] corporate policy." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 577 [discussing the meaning of "managing agent"].) The jury could assess punitive damages against the Zoo based on Dunlap's conduct.

B. *Whether the award violates due process*

The Zoo also argues the jury's punitive damages award violates due process by pointing to the fact that $371,250 in punitive damages exceeds the economic damages award of $222,741. Aside from highlighting the ratio between the two amounts, the Zoo provides little analysis regarding why the punitive damages award allegedly violates due process.

The purpose of punitive damages is not to compensate the plaintiff, but rather to punish the defendant and deter the defendant and others from committing similar acts. (Civ. Code, § 3294, subd. (a); *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046.) Punitive damages "are aimed at deterrence and retribution." (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 416 (*State Farm*).) Accordingly, the essential question in every case is "whether the amount of [punitive] damages awarded substantially serves the societal interest." (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (*Adams*).)

"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*).) An award of grossly excessive or arbitrary punitive damages is constitutionally prohibited because due process entitles a defendant to fair notice of both the conduct that will subject it to punishment and the severity of the penalty that may be imposed for the conduct. (*State Farm, supra*, 538 U.S. at pp. 416-417; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171.) "Eschewing both rigid numerical limits and a subjective inquiry into the jury's

motives," the Supreme Court set forth "a three-factor weighing analysis looking to the nature and effects of the defendant's tortious conduct and the state's treatment of comparable conduct in other contexts." (*Simon*, at pp. 1171-1172.)

In determining whether the amount of a punitive damages award is grossly excessive and violates the Fourteenth Amendment's due process clause, a court must "consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm*, *supra*, 538 U.S. at p. 418.) Regarding the second guidepost, the Supreme Court has "been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff [i.e., compensatory damages] and the punitive damages award." (*Id.* at p. 424.) Nevertheless, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*Id.* at p. 425.)

Finally, "[i]t is certainly relevant for a reviewing court to consider the wealth of a defendant when applying federal constitutional limits to an award of punitive damages, thereby ensuring that the award has the appropriate deterrent effect[.]" (*Roby, supra,* 47 Cal.4th at p. 719.) "A reviewing court cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." (*Adams, supra*, 54 Cal.3d at p.110.)

We conclude the punitive damages award is within constitutional limits. Unlike the Zoo's cited cases, this case does not involve substantial compensatory damages or unforeseeably large dollar amounts. (Cf. *State Farm, supra*, 538 U.S. at p. 425 [in light of the $1 million compensatory damages awarded, $145 million in punitive damages was excessive].) Nor does the ratio of economic to punitive damages—1:1.667—exceed, much less "significantly" exceed, a single-digit ratio. (*State Farm, supra*, 538 U.S. at p. 425.) Given the Zoo's vast cash reserves, the amount of punitive damages ensured an "appropriate deterrent effect[.]" (*Roby, supra*, 47 Cal.4th at p. 719.)

On this record, the jury's award of punitive damages is commensurate with the reprehensibility of the Zoo's conduct. The Zoo intentionally caused economic harm to a financially vulnerable target in a malicious manner, by threats and pressure. Most of the fault lay with Dunlap, but other Zoo personnel ignored the problem or allowed it to proceed, uncorrected. The Zoo deals with contractors on a daily basis, and deterring a similar situation from occurring would serve the public interest. The Zoo does not assert the punitive damages award exceeded comparable civil penalties, if any. The punitive damages award was not grossly excessive, and we find no basis for its reversal.

VII. PREJUDGMENT INTEREST

The Zoo contends the court erred in awarding Diamond One prejudgment interest from the filing of the complaint, under Civil Code section 3287, subdivision (a). Diamond One responds that, based on its claims of quasi-contract/quantum meruit, the court appropriately awarded prejudgment interest under Civil Code section 3287, subdivision (b).

Civil Code section 3287, subdivision (b) provides: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." An action in quantum meruit is an action in contract within the meaning of that statute. (*George v. Double–D Foods, Inc.* (1984) 155 Cal.App.3d 36, 46-47.) "The policy underlying authorization of an award of prejudgment interest is to compensate the injured party—to make that party whole for the accrual of wealth which could have been produced during the period of loss." (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1790.)

The Zoo provides no argument the court abused its discretion in awarding prejudgment interest under subdivision (b) of Civil Code section 3287, and we conclude the court did not err. By the time the action was filed, Diamond One had completed its construction of Rio, its costs were known, and its billing records were available. The court reasonably found that Diamond One should be compensated for the loss of its use of money to the extent permitted by statute.

The Zoo further argues the court erred in using a 10 percent contractual interest rate because Diamond One's case "was based on the absence of a contract." We agree on this point. The California Constitution provides for prejudgment interest at seven percent per annum. (Cal. Const., art. XV, § 1; *Palomar Grading & Paving, Inc. v. Wells Fargo Bank, N.A.* (2014) 230 Cal.App.4th 686, 689.) Although Civil Code section 3289, subdivision (b) provides for a 10 percent legal rate of interest chargeable after a breach of

contract when a rate is not stipulated, Diamond One disclaimed entering into a contract and the jury found that there was no contract. Under the circumstances, we are not persuaded that Civil Code section 3289 applies. (See *Pro Value Properties, Inc. v. Quality Loan Serv. Corp.* (2009) 170 Cal.App.4th 579, 583.)

DISPOSITION

The judgment shall be modified to reflect a new amount of prejudgment interest based on the rate of seven percent per annum. As modified, the judgment is affirmed. Costs on appeal are awarded to Diamond One.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.