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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

**KELLY JOSEPH,**

**Plaintiff and Respondent,**

**A128254**

**v.**

**(Alameda County  
Super. Ct. No. RG08393806)**

**STORUS CORPORATION,**

**Defendant and Appellant.**

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Plaintiff Kelly Joseph worked for Storus Corporation (Storus) for two and a half years. After Storus terminated her, she sued Storus for, among other things, wrongful termination in violation of public policy and breach of contract. Before trial, the court sanctioned Storus for failing to comply with the court’s pretrial order and with a local rule regarding pretrial filings.

A jury found in favor of plaintiff on her breach of contract claim. The jury found for Storus on plaintiff’s claim for wrongful termination in violation of public policy but concluded Storus acted with malice, oppression, or fraud. The court granted plaintiff’s motion for new trial on the wrongful termination claim and denied Storus’s posttrial motions.

On appeal, Storus contends: (1) the court erred by imposing sanctions; (2) the verdict on plaintiff’s breach of contract claim is not supported by substantial evidence;

(3) the court erred by granting plaintiff's new trial motion; and (4) the court erred by denying its posttrial motions.

We ordered the parties to submit supplemental briefing on the scope of review from an order partially granting a new trial. The parties agree Storus's claim regarding the court's imposition of sanctions is not cognizable on appeal. Storus also impliedly concedes we need not review its claims regarding the court's denial of its motions for directed verdict and new trial, and its motion to vacate the judgment.

We affirm the order granting plaintiff's new trial motion on the claim for wrongful termination in violation of public policy.

#### FACTUAL AND PROCEDURAL BACKGROUND

Scott Kaminski is the CEO of Storus, a company that develops and manufactures small consumer products such as jewelry cases and money clips. In 2005, Scott's brother, David, was the Vice President of Sales at Storus.<sup>1</sup> In July 2005, after speaking to David, plaintiff began working parttime for Storus. Although she was working parttime, she thought "this could work into a career . . . and it would be long-[term]." She was hired to answer phones, take orders, process returns, and do "any kind of thing that [David] needed help with in the office[.]" Plaintiff had no managerial responsibility and no decision-making power — she simply did what she was told and reported to David. Storus told her she would be making \$12 an hour. No one from Storus told her whether she would be working as an employee or independent contractor. When plaintiff received her first pay check after her first week of work, she was concerned because the check was "for the full amount" — no deductions had been "taken out" of the check.

Initially, plaintiff worked at Storus's main facility in San Ramon and used a time card to keep track of her hours. Plaintiff worked alongside Storus employees and at least one independent contractor. Plaintiff received positive feedback about her performance: she "was told that [she] was doing a great job, that [she] had great customer service

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<sup>1</sup> We refer to Scott and David by their first names for clarity and convenience. (*In re Marriage of Green* (1992) 6 Cal.App.4th 584, 588, fn. 1.)

skills” and that Storus was “really impressed with [her] work ethic.” Scott also praised plaintiff’s work.

As the year progressed, plaintiff began to work longer hours because she “had proven . . . [she] could do a good job” and had strong customer service skills. At some point in 2006, David offered to let plaintiff work from home to accommodate her child-care responsibilities.<sup>2</sup> David suggested Storus install a phone line in plaintiff’s house and supply her with a computer so she could work from home. David came to plaintiff’s house and set up the equipment and DSL line; Storus paid for the computer and the phone and DSL lines. David had business cards made for plaintiff; her title was sales representative, a promotion from her initial position.

From 2006 to January 2008, plaintiff worked from her home as a Storus sales representative. She was responsible for the wholesale business accounts at Storus and took orders for Storus products. Plaintiff received a commission for each sale and was paid a daily wage. In late 2007, plaintiff received additional accounts to manage; David emailed plaintiff to wish her luck on “all the new [accounts] you will get for Storus for the duration of 2007 and in 2008.” The email attached a list of the accounts assigned to plaintiff with a summary of 2007 sales and a forecast for 2008.

Scott and David complimented plaintiff’s work and assured her that she would have a job through 2008. In December 2007, however, Scott told plaintiff that Storus needed to collect the computer and telephone from her house and that it could no longer pay for the phone line because Storus’s accountant claimed it “creates a fuzzy area with you.” Scott explained that Storus’s accountant informed him that supplying plaintiff with a computer and paying her overhead for her phone and computer “creates a fuzzy area in how we’re categorizing you.” Scott also mentioned “there was some restructuring going on at the company” but assured her that her “position was safe[.]”

Nevertheless, plaintiff was concerned because she had been using the equipment for several years and was “told [she] was doing a good job and was just given the

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<sup>2</sup> Plaintiff and David agreed plaintiff would continue to work at the main office on certain weekends and evenings.

forecasted sales a month prior for 2008.” She called David and asked him whether the removal of the computer and phone had “to do with the fact that [she] had been being paid as an independent contractor when [she] — should have been paid as an employee.” David’s response was “I am not allowed to discuss this with you.”

Plaintiff was concerned she was going to lose her job and performed some “research” because she was concerned she had been “mis[characterized] as an independent contractor.” She told Scott she relied on her income and feared she would not be able to provide for her child without a job. In early January 2008, Scott called plaintiff and informed her that “Storus . . . no longer had a position for [her]. . . .” Plaintiff was surprised she was being terminated because her sales numbers were rising and she had been praised for her performance. She never thought she would be fired because she received increasing responsibility and “was rising to the occasion every time.” She was “growing [her] accounts, and . . . doing [her] job and . . . receiving positive feedback.” In 2007, plaintiff believed “that because [her] performance was done to [Storus’s] expectations and exceeded [its] expectations on numerous occasions, that [her] employment was secure and safe there.” When plaintiff asked Scott whether her position was secure at Storus, his answer was “yes.” Before she was terminated, plaintiff asked Scott whether she was being terminated because she “had possibly been paid in a way that [she] shouldn’t have been. . . .” In response, Scott was “very evasive and apologetic[.]”

Plaintiff’s operative second amended complaint alleged claims for: (1) wrongful termination in violation of public policy; (2) breach of express contract; (3) breach of implied contract of continued employment; (4) breach of the implied covenant of good faith and fair dealing; and (5) negligent infliction of emotional distress. Plaintiff dismissed her claims for breach of the implied covenant of good faith and fair dealing and negligent infliction of emotional distress.

#### *Verdict and Posttrial Motions*

At trial, Storus admitted it entered into an express oral contract with plaintiff. It also admitted, among other things, that it issued plaintiff a 1099 form in 2005, 2006, and

2007 and that it did not pay any payroll, social security, or unemployment insurance taxes on behalf of plaintiff “during the parties’ business relationship.”

The jury found for plaintiff on her breach of contract claim. By special verdict, the jury concluded: (1) there was a contract between plaintiff and Storus; (2) the contract included a term that plaintiff would not be terminated except for good cause; (3) plaintiff performed according to the contract; and (4) Storus breached the contract and plaintiff was harmed by the breach. The jury awarded plaintiff past wages and unemployment benefits.

The jury found for Storus on plaintiff’s wrongful termination claim. The jury also determined, however, that a Storus employee “engage[d] in the conduct with malice, oppression, or fraud” and that at least one officer, director or managing agent of Storus authorized that conduct. After the court discharged the jury, plaintiff’s counsel agreed with the court’s statement that a cause of action for breach of contract could not support a claim for punitive damages. Counsel explained, however, that he wished to further research the issue further and declined to dismiss the punitive damages claim.<sup>3</sup> The court entered judgment for plaintiff on the breach of contract claim in the amount of \$21,629.34, plus interest.

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<sup>3</sup> The court’s minutes contain a notation that plaintiff withdrew her punitive damages claim after the clerk read the verdict. On appeal, Storus claims plaintiff dismissed the punitive damages claim. Plaintiff disagrees. We conclude plaintiff did not dismiss her claim for punitive damages. While counsel for plaintiff agreed a cause of action for breach of contract could not support a punitive damages award, counsel did not agree to dismiss the punitive damages claim. The portion of the court’s December 18, 2009 minute order indicating “[t]he punitive damages claim is withdrawn by the plaintiff” is therefore inaccurate. Where there is a conflict between a minute order and the reporter’s transcript, “the reporter’s transcript generally prevails as the official record of proceedings [citation]. . . .” (*Arlena M. v. Superior Court* (2004) 121 Cal.App.4th 566, 570.) In any event, Storus does not claim the court erred by granting plaintiff’s new trial motion because plaintiff withdrew her punitive damages claim after the jury verdicts were read.

The court granted plaintiff's new trial motion. The court denied Storus's motions for directed verdict and new trial. The court also denied Storus's motion for judgment notwithstanding the verdict (JNOV) motion and its motion to vacate the judgment.

#### DISCUSSION

Storus has appealed from the judgment and the order granting plaintiff's new trial motion. When the trial court grants motion for new trial, however, "the judgment is vacated. Since there is no longer a judgment, any appeal must be from the order granting a new trial. [Citation.]" (*Marshall v. Brown* (1983) 141 Cal.App.3d 408, 414 (*Marshall*)). The same rule applies when the court orders a partial new trial. "[W]here a partial new trial is granted, the undisturbed issues remain as the subject of the judgment entered by the clerk and hence are subject to immediate appeal. However, in these circumstances the rule is settled that the portions of the judgment which are not subject to the new trial order are nevertheless not appealable. [C]ourts have reasoned that the new trial order has the effect of vacating the entire judgment and holding in abeyance the portions which are not subject to a new trial until one final judgment can be entered." (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 329 (*Beavers*)).

*Marshall* is instructive. There, the lower court granted the plaintiff a new trial on damages and the defendants appealed. (*Marshall, supra*, 141 Cal.App.3d at p. 413.) The defendants' notice of appeal also sought "review of the new trial order of November 10, 1980, 'insofar as and to the extent that said order is limited to the ground of inadequate and excessive damages.' Defendants further appeal[ed] from the denial of their motion for a new trial, and from the denial of their motion for judgment notwithstanding the verdict. Finally, defendants appeal[ed] from the judgment in the within action, 'if any.'" (*Id.* at p. 414.)

The appellate court affirmed the partial grant of a new trial but declined to address the defendants' appeal from the denial of their JNOV motion. The *Marshall* court explained, "[w]e recognize that '[t]he purpose of limited retrials is to expedite the administration of justice by avoiding costly repetition.' [Citation.] With a view toward economy of appellate review, we do not address other issues raised by defendants and not

likely to be renewed in a new trial limited to damages. We therefore defer any consideration of the admissibility of the testimony of Jill Boxley, neither do we review the assignments of misconduct by counsel urged on this appeal. Any consideration of these issues will have to await entry of a judgment, from which defendants will then have a right of appeal. [Citation.] For the guidance of the trial court we turn now to several questions raised by the parties which are certain to recur in a new trial on the issue of damages.” (*Marshall, supra*, 141 Cal.App.3d at pp. 415-416; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 2:141.1, pp. 2-72.5-2-72.6.)

Here, the order granting a new trial on plaintiff’s claim for wrongful termination in violation of public policy provides, “[c]onsistent with the record in this action, plaintiff’s allegation of ‘violation of public policy’ is and shall be limited to proof of a contention by [plaintiff] that she was terminated by Storus . . . because she questioned Storus . . . regarding her classification as an independent contractor. Such new trial will include trial of [plaintiff’s] assertion that she is entitled to an award of exemplary damages pursuant to Civil Code section 3294.” Under *Marshall* and *Beavers*, “portions of the judgment which are not subject to the new trial order are . . . not appealable.” (*Beavers, supra*, 225 Cal.App.3d at p. 329; *Marshall, supra*, 141 Cal.App.3d at pp. 415-416.)

We can and will, however, discuss the parties’ contentions to “the extent necessary to guide the trial court upon retrial. [Citations.]” (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 286 (*Liodas*)). For this reason, we discuss Storus’s claim that substantial evidence does not support the verdict on plaintiff’s claim for breach of implied contract of continued employment.<sup>4</sup>

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<sup>4</sup> Relying on *Beavers, supra*, 225 Cal.App.3d at page 330, Storus contends “the breach of contract claim . . . is also subject to review on appeal.” We disagree. In *Beavers*, the “trial court granted partial judgment notwithstanding the verdict and granted a new trial as an alternative to the partial judgment notwithstanding the verdict and as to all other issues.” (*Ibid.*) The *Beavers* court explained that “[s]ince plaintiffs have properly appealed from the new trial order, the judgment, including the portion affected by the judgment notwithstanding the verdict, is subject to review in this appeal.” (*Ibid.*)

*Substantial Evidence Supports the Verdict on Plaintiff's Claim for Breach of Implied Contract of Continued Employment*

As stated above, the jury found for plaintiff on her claim for breach of implied contract of continued employment. By special verdict, the jury concluded the contract between plaintiff and Storus provided plaintiff would not be terminated except for good cause and that Storus breached the contract, harming plaintiff. The jury awarded plaintiff past wages and unemployment benefits.

On appeal, Storus contends the jury erred by finding Storus breached a contract with plaintiff “that included a term that [plaintiff] could only be terminated for good cause.” “When a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review. [Citations.] “[T]he power of [the] appellate court *begins and ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the [verdict].” [Citations.]’ [Citation.] We must ‘view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . .’ [Citation.]” (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.)

The presumption in California is employment is at will, absent an “express oral or written agreement specifying the length of employment or the grounds for termination.” (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677 (*Foley*); Lab. Code, § 2922.) “This presumption of at-will employment may be rebutted only by evidence of an express or implied agreement between the parties that the employment would be terminated only for cause. The existence of an implied promise to discharge an employee only for good

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Here and in contrast to *Beavers*, the court did not grant a partial JNOV and, in the alternative, a new trial. We nevertheless review Storus’s contention regarding the alleged absence of evidence to support the verdict on plaintiff’s breach of implied contract claim to guide the court on retrial. (*Liodas, supra*, 19 Cal.3d at p. 286.) There is a significant overlap between the factual elements of a breach of implied contract of continued employment claim and a claim for wrongful termination in violation of public policy.

cause is generally, but not always, a question of fact for the jury.” (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1386.)

“Evidence which may be considered in determining the existence of an implied in fact contract to terminate only for good cause includes: “[T]he personnel policies or practices of the employer, the employee’s longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.” [Citations.] [Citation.]” (*Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1488, quoting *Foley, supra*, 47 Cal.3d at p. 680.) “Where there is no express agreement, the issue is whether other evidence of the parties’ conduct has a ‘tendency in reason’ [citation] to demonstrate the existence of an actual mutual understanding on *particular* terms and conditions of employment.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 337.) The court must examine the totality of the circumstances “to determine whether the parties’ conduct, considered in the context of surrounding circumstances, gave rise to an implied-in-fact contract limiting the employer’s termination rights.” (*Ibid.*)

Here, plaintiff testified she believed her parttime work at Storus would be long-term; she also testified she received positive feedback about her work from both Scott and David and that she took on additional responsibility while she worked at Storus. Plaintiff further testified that in 2006, Storus provided her with equipment to enable her to work at home; the following year, she received additional accounts to manage and a forecast for her sales in 2008. According to plaintiff, Scott assured her that her position at Storus was “safe” shortly before she was terminated. Finally, plaintiff testified she did not think she would be fired because she had been praised for her performance, was doing her job well, and had been assured her job was “secure and safe.”

Viewing — as we must — the evidence in the light most favorable to plaintiff, we conclude substantial evidence supports the jury’s determination that Storus breached an implied contract to terminate only for good cause. Taken together, this evidence has a “‘tendency in reason’ . . . to demonstrate the existence of an actual mutual

understanding” that plaintiff would not be terminated except for good cause. (*Guz, supra*, 24 Cal.4th at p. 337.)<sup>5</sup>

In its opening brief, Storus contends the court erred by denying its motion for JNOV because plaintiff “did not provide substantial evidence to support the verdict that a breach of contract occurred.” We reject this argument for two reasons. First, Storus’s motion for JNOV is not part of the appellate record. It is well-settled Storus “must affirmatively show error by an adequate record.” It has not done so. (9 Witkin, *Cal Procedure* (5th ed. 2008) Appeal, § 628, p. 704; *Wilcox, supra*, 124 Cal.App.4th at pp. 498-499.) Second — and as we have already discussed — there was substantial evidence supporting the jury’s determination that Storus breached an implied contract not to terminate plaintiff except for good cause. (See *Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1603.)

*Appellant Has Not Established the Court Abused Its Discretion by Granting Plaintiff’s New Trial Motion*

As noted above, the jury found for plaintiff on the breach of contract claim but for Storus on the claim for wrongful termination in violation of public policy. The jury also concluded Storus acted with malice, oppression, or fraud.

Plaintiff moved for a new trial on the claim for wrongful termination in violation of public policy pursuant to Code of Civil Procedure section 657. She claimed the verdict on her wrongful termination claim was ““against law”” because it “was contrary to correctly given instructions” and because there was “an irreconcilable conflict” between the jury finding on the breach of contract claim and the claim for wrongful termination in violation of public policy. Specifically, plaintiff argued the jury “necessarily had to decide that the evidence presented to it proved that [she] was an

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<sup>5</sup> In its supplemental brief, Storus relies on several cases not cited in its opening brief, including *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313 and *Hillsman v. Sutter Community Hospitals* (1984) 153 Cal.App.3d 743. We decline to address these cases because they were not cited in Storus’s opening brief and because they are outside the scope of our order requesting supplemental briefing. (See *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1289 (*Halvorsen*).)

employee of Storus. However, Storus claimed at trial that [she] was an independent contractor and never its employee. [She] presented testimony and documents that she had questioned Storus as to her status and, as a result, was terminated . . . in violation of public policy.”

The court granted the motion, concluding “two of the verdicts returned by the jury are against the law, namely, VF-5001 (Wrongful Termination in Violation of Public Policy) and VF-3904 (Exemplary Damages). C.C.P. section 657.6. [¶] The reasons specified are that such verdicts are fatally inconsistent, and fail to comply with and are contrary to various instructions properly provided to the jury by the court. . . .” The court continued, “[c]onsistent with the record in this action, plaintiff’s allegation of ‘violation of public policy’ is and shall be limited to proof of a contention by [plaintiff] that she was terminated by Storus . . . because she questioned Storus . . . regarding her classification as an independent contractor. Such new trial will include trial of [plaintiff’s] assertion that she is entitled to an award of exemplary damages pursuant to Civil Code section 3294.” The court denied Storus’s motion for new trial.

In its opening brief, Storus contends the verdicts are irreconcilable but claims the court erred by granting a partial new trial because plaintiff “has already proffered the evidence on this cause of action, which the jury rejected.” We decline to address this argument because it is unsupported by authority. “[A]n issue merely raised by a party without any argument or authority is deemed to be without foundation and requires no discussion.” [Citation.]” (*Roe v. McDonald’s Corp.* (2005) 129 Cal.App.4th 1107, 1114, quoting *Golden Day Schools, Inc. v. Department of Education* (1999) 69 Cal.App.4th 681, 695, fn. 9.)

In its supplemental brief, Storus contends — for the first time — that there was no basis for the order granting a partial new trial because the verdicts *were not* inconsistent. We reject this argument for two reasons. First, Storus’s supplemental brief addresses issues outside the scope of our order. Our order directed the parties to identify the issues cognizable on appeal. The order did not invite the parties to rehash the merits of those issues. Second, Storus’s position in its supplemental brief directly contradicts the

position in its opening brief. We need not address new points not raised in the course of regular briefing. (See *Halvorsen, supra*, 65 Cal.App.4th at p. 1389; *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

In any event, the court did not abuse its discretion by granting a partial new trial on plaintiff's claim for wrongful termination in violation of public policy. "The normal standard of review of an order granting a new trial motion is both well established and highly deferential. A new trial motion 'is addressed to the judge's sound discretion; [the judge] is vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact; on appeal, all presumptions are in favor of the order as against the verdict, and the reviewing court will not disturb the ruling unless a manifest and unmistakable abuse of discretion is made to appear.'" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 379.)

"Inconsistent verdicts are "against the law," and the proper remedy is a new trial." (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344 (*Shaw*), quoting *Morris v. McCauley's Quality Transmission Service* (1976) 60 Cal.App.3d 964, 970.) Here, the court concluded "two of the verdicts returned by the jury [were] against the law, namely, VF-5001 (Wrongful Termination in Violation of Public Policy) and VF-3904 (Exemplary Damages)" because they were "fatally inconsistent," and failed to comply with "various instructions properly provided to the jury by the court. . . ." We find no abuse of discretion. The jury's finding that Storus acted with malice, oppression, or fraud is irreconcilable with its finding that Storus did not terminate plaintiff in violation of public policy, particularly where it determined Storus breached an implied contract not to terminate plaintiff except for good cause. (See, e.g., *Shaw*, at pp. 1344-1345 [new trial required where verdict was irreconcilable].) As a result, the court properly determined plaintiff's claim for wrongful termination in violation of public policy should be retried.

DISPOSITION

The order granting plaintiff's new trial motion on her claim for wrongful termination in violation of public policy is affirmed. Plaintiff is entitled to costs on appeal.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.