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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

VINCENT ROMANDIA,	C063858
Plaintiff and Appellant,	(Super. Ct. No. 07AS04926)
v.	
ENGINEERED POLYMER SOLUTIONS, INC. et al.,	
Defendants and Appellants.	

After his employment was terminated for what his employer asserted was "conduct unbecoming a supervisor," plaintiff Vincent Romandia (who is Mexican-American and was 47 years old at the time of trial) sued his former employer, defendant Engineered Polymer Solutions, Inc. (Valspar),¹ and his former supervisor, defendant Jeremy Pond, for discrimination and

¹ Romandia named The Valspar Corporation as his employer in his complaint. Engineered Polymer Solutions, Inc., which does business as Valspar Coatings, answered. Throughout the case, the name Valspar has been used to refer to Engineered Polymer Solutions, Inc., so we will follow that same practice.

defamation. A jury found Romandia's race was not a motivating reason for the termination, but his age was, and the jury also found that both defendants had defamed Romandia because the stated reason for his termination was false. The jury awarded Romandia over \$1 million in compensatory damages and \$1.5 million in punitive damages.

Defendants moved for judgment notwithstanding the verdict (JNOV) and a new trial, claiming insufficiency of the evidence. The trial court granted JNOV on the claim for punitive damages but denied it on the underlying claims for age discrimination and defamation. As for the new trial motion, however, the trial court granted it on both of the underlying causes of action and the claim for punitive damages, finding that Romandia's termination "was not substantially motivated by a discriminatory animus based on [his] age" and that "the stated grounds for [Romandia]'s termination were . . . true, or reasonably believed to be true."

Both Romandia and defendants have appealed. On defendants' appeal from the partial denial of their JNOV motion and Romandia's appeal from the partial granting of that motion, we conclude that defendants have shown no error in the trial court's determination that there was substantial evidence to support the jury's verdict in favor of Romandia on the age discrimination and defamation claims, but Romandia is correct that the trial court did err in granting JNOV as to the punitive damages claim. Accordingly, we will partially affirm and partially reverse the trial court's order on that motion.

On Romandia's appeal from the granting of the new trial motion, we find no error. Accordingly, we will affirm the trial court's order on that motion in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

As the trial court explained in its order on the motions for JNOV and new trial, Romandia "had been an at-will employee at Valspar for several years prior to his final year, during which he had received positive performance reviews, promotions and awards, including a prestigious award given to only a few out of the thousands of Valspar employees. During the period of [Romandia]'s advancement and success at Valspar, his primary supervisor was David Binley. Mr. Binley left the position in which he was supervising [Romandia] about a year before [Romandia]'s termination, at which time another Valspar employee named Jeremy Pond became plant manager and [Romandia]'s supervisor. Pond was approximately 35 years old during the events at issue in this case, and [Romandia] is approximately ten years older than Pond.

"In the fall of 2006, several weeks before [Romandia]'s termination, Pond conducted a periodic review of [Romandia]'s work performance, which was generally positive. [Romandia] testified at trial that Pond was using the wrong form for the review and that [Romandia] therefore interrupted the review meeting, asking that Pond conduct the review at a later date, with the correct form, and that [Romandia] have an opportunity to fill out a self-evaluation form for the review as well. The review was never resumed at a later date. [Romandia] was

terminated a few weeks later, after an incident that took place after work offsite, involving [Romandia] and several other Valspar employees. At trial, [Romandia] admitted Pond's scoring on the (incorrect) form was generally fair, though not as high as Binley had been previously scoring [Romandia], and not as high as [Romandia] would have scored himself.

"At the time of his termination, [Romandia] was level II plant supervisor in a Valspar facility in which paint is manufactured. [Romandia] desired to become a level III supervisor, but Pond turned down that request shortly before [Romandia]'s termination, saying that [Romandia] did not meet the criteria for the promotion."

At trial, Romandia testified to several incidents between him and Pond that involved Romandia's age. Romandia testified that the first incident occurred in the summer, when the temperature was 103 or 104 degrees and he was playing baseball. When he told Pond he had a double header, Pond told him he "better be careful; the heat could be bad for someone [Romandia's] age." Romandia thought Pond was joking.

Sometime thereafter, Romandia and Pond had a conversation about staying in shape. When Romandia told Pond how many "reps" he could do "on a certain weight," Pond told him he "better be careful. [He] could get hurt at [his] age lifting that much weight." This time, the comment made Romandia a little agitated.

On another occasion, the company softball team had a game against a senior team (50 to 60 years old), and Pond told Romandia he should be on that team.

Romandia additionally claimed that at the periodic review in the fall of 2006, he told Pond that with his limited education, his career was "basically stalled" at Valspar, and he handed Pond a completed application for educational assistance from Valspar. Pond asked Romandia why he would want to go back to school "at [his] age." Agitated, Romandia responded, "So I could take your job." Pond chuckled. Thereafter, however, Romandia did not get any response from Pond about the application, and it was not among the documents Valspar produced in connection with the litigation.

The termination of Romandia's employment came in the wake of an incident outside of work, which the trial court described as follows:

"On December 15, 2006, in the afternoon following a work shift, not long after Pond had given [Romandia] his interrupted performance review,^[2] [Romandia] and some other Valspar employees were at a bar near work called the Depot Café. The events that transpired at the Depot Café are disputed, but it is undisputed that several Valspar employees, including [Romandia], drank some beer, and had discussions about who could best perform certain job tasks. One version of events, asserted by

² The interval appears to have been just over two months, since the performance review occurred in early October.

Defendants, is that [Romandia] became inappropriately confrontational with a fellow employee (Joseph Ramirez), suggested that they step outside, and, either on the way out the door or in the parking lot, [Romandia] took a 'swing' at Ramirez, after which fellow employees broke up the altercation, and everyone left. Another version, asserted by [Romandia] is that Ramirez was drunk, but [Romandia] was not, [Romandia] suggested that Ramirez get some fresh air, at which point they and others went outside to do so, whereupon Ramirez made an aggressive advance toward [Romandia] who merely held up his hand defensively to deflect Ramirez, after which everyone left. It is undisputed that Ramirez was intoxicated and that [Romandia] had been drinking beer, although [Romandia] testified that he was not drunk. It is also undisputed that Ramirez, back home later that evening, punched a wall and broke his hand, causing him to miss several weeks of work."

According to Romandia, on December 19 Pond asked him about the incident at the Depot Café, Romandia told him what happened, and Pond said, "Okay." Later that evening, however, Pond called Romandia at home and told him not to report to work the next day and that Pond would call him and let him know when to come to work. Based on his experience at Valspar, Romandia believed he was going to be terminated.

On December 20, Pond called Romandia and told him to come in the next day. Romandia went in the next morning and met with Pond, while Kimberly Watson, Valspar's regional human resources manager, participated by telephone. At that time, Romandia was

informed that his employment was being terminated for "conduct unbecoming a supervisor."

In October 2007, Romandia commenced this action by filing a complaint against Valspar for discrimination and defamation. He claimed Valspar had unlawfully discriminated against him by terminating his employment because of his age and his race and Valspar and Pond had defamed him by asserting that he was terminated for "conduct unbecoming a supervisor." The case was tried to a jury in August and September 2009. The jury found Romandia's race was not a motivating reason for his termination, but his age was, and also found that both defendants had defamed Romandia because the stated reason for his termination was false. The jury awarded Romandia over \$1 million in compensatory damages and \$1.5 million in punitive damages.

Defendants moved for JNOV and a new trial, with the latter motion based primarily on insufficiency of the evidence. The trial court granted the JNOV motion on the claim for punitive damages but denied it on the underlying claims for age discrimination and defamation. As for the new trial motion, however, the trial court granted it on both of the underlying causes of action and the claim for punitive damages, finding that Romandia's termination "was not substantially motivated by a discriminatory animus based on [his] age" and that "the stated grounds for [Romandia]'s termination were . . . true, or reasonably believed to be true." Both sides timely appealed.

DISCUSSION

I

The Jury's Verdict -- Race Discrimination

In his appeal, one of Romandia's arguments is that the jury's verdict against him on his race discrimination claim should be reversed because substantial evidence supported a contrary finding -- in other words, there was substantial evidence to support his claim that he was terminated based on his race.

This argument need not detain us long. "It is an elementary . . . principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) What that means here is that for Romandia to establish his claim of race discrimination as against the jury's verdict, the evidence must have been such that we "can say that there is no substantial conflict on the facts, and that from the facts reasonable men can draw but one inference, which inference points unerringly to" the conclusion that Romandia was terminated because of his race. (*Ibid.*)

Romandia points to no such evidence. By his own admission, the evidence to which he points at best "provide[s] substantial

evidence of defendants' racial animus and discrimination." But we cannot overturn the jury's verdict just because there might have been substantial evidence on which a finding contrary to the jury's verdict could have been premised. Instead, as noted, to interfere with the jury's finding against Romandia on his race discrimination claim, we would have to find that the *only* reasonable conclusion based on all the evidence was that Romandia was terminated because of his race. Not even Romandia contends this is so. Accordingly, his challenge to the jury's verdict is without merit.

II

The Motion For JNOV

In their appeal, defendants contend the trial court erred in denying their motion for JNOV on Romandia's claims for age discrimination and defamation. In his appeal, Romandia contends the trial court erred in granting the motion for JNOV on his claim for punitive damages. After setting forth the standard of review, we address these arguments in turn. As we will explain, we find no merit in defendants' arguments but agree with Romandia.

A

Standard Of Review

"An 'appeal from the trial court's denial of the . . . motion for judgment notwithstanding the verdict is a challenge to the sufficiency of the evidence to support the jury's verdict and the trial court's decision. The standard of review is essentially the same as when the trial court has granted the

motion.' [Citation.] In ruling on a motion for JNOV, "the trial court may not weigh the evidence or judge the credibility of the witnesses, as it may do on a motion for a new trial, but must accept the evidence tending to support the verdict as true, unless on its face it should be inherently incredible. Such order may be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is no evidence sufficiently substantial to support the verdict. [¶] On an appeal from the judgment notwithstanding the verdict, the appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict.'" (Carter v. CB Richard Ellis, Inc. (2004) 122 Cal.App.4th 1313, 1320.)

B

Age Discrimination

Defendants contend the trial court erred in denying their motion for JNOV on Romandia's age discrimination claim because (1) Romandia did not prove his age played any role in his termination; (2) Valspar terminated Romandia for legitimate, nondiscriminatory reasons; and (3) Romandia failed to present evidence that Valspar's stated reasons for terminating his employment were pretextual.

In making their arguments, however, defendants ignore one of the fundamental rules of review for sufficiency of the evidence. "Inasmuch as the 'reviewing court starts with the

presumption that the record contains evidence to sustain every finding of fact' [citation], and must accept as true all evidence tending to establish the correctness of the findings as made, taking into account, as well, all inferences which might reasonably have been thought by the [trier of fact] to lead to the same conclusion, and resolve every conflict in the testimony in favor of the findings [citations], the burden is on the appellant 'to demonstrate that there is no substantial evidence to support the challenged findings.' [Citations.] A recitation of only [the appellant's] own evidence or a general unsupported denial that any evidence sustains the findings is not the 'demonstration' contemplated under the rule. An appellant 'is required to set forth in his brief all of the material evidence on the point and not merely his own evidence. If this is not done, the error assigned is deemed [forfeited].'" (*Green v. Green* (1963) 215 Cal.App.2d 31, 35; cf. *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574 ["If the [appellant] fails to present us with all the relevant evidence, or fails to present that evidence in the light most favorable to the [respondent], then he cannot carry his burden of showing the evidence was insufficient because support for the jury's verdict may lie in the evidence he ignores"].)

Instead of setting out in their brief all of the relevant evidence on Romandia's claim for age discrimination in the light most favorable to Romandia, with all reasonable inferences drawn in favor of Romandia, and then arguing why that evidence and those inferences are nonetheless insufficient to support the

jury's verdict, defendants fail to account for all of the evidence Romandia presented, and what evidence they do discuss they present and argue in the light most favorable to them, not to Romandia. Defendants also fail to account for credibility determinations the jury could have made adversely to them and in favor of Romandia, and they fail to draw (as we must) all reasonable inferences the jury could have drawn in support of its verdict. For these reasons, they have forfeited their challenge to the sufficiency of the evidence to prove age discrimination.

To the extent defendants argue, based on the California Supreme Court's decision in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, that "[a]s a matter of law" the age-related comments Pond allegedly made to Romandia were "insufficient to give rise to an inference that Romandia was terminated because of his age," defendants are mistaken. Defendants correctly note two statements from *Reid*: first, that it is a "'common-sense proposition' that a slur, in and of itself, does not prove actionable discrimination" (*id.* at p. 541), and second, that "[a] stray remark alone may not create a triable issue of age discrimination" (*ibid.*). These statements do not mean, however, that a *number* of age-related comments by a supervisor cannot, *along with other evidence*, give rise to an inference of age-based animus on the part of the supervisor. Indeed, the Supreme Court held in *Reid* that on a summary judgment motion in a discrimination case, it is proper for the courts to "consider[] evidence of alleged discriminatory comments made by decision

makers and coworkers with all other evidence in the record.” (*Id.* at p. 545.) As the court explained, “even if age-related comments can be considered stray remarks because they were not made in the direct context of the decisional process, a court should not categorically discount the evidence if relevant; it should be left to the fact finder to assess its probative value.” (*Id.* at p. 540.)

In other words, *Reid* stands for the proposition that even stray comments made outside the decisional process can support a finding of discriminatory motive. Whether the age-related comments Pond made here were sufficient, along with all the other evidence, to give rise to a reasonable inference of age-based animus was a matter for the jury to decide.

For the foregoing reasons, we conclude defendants have failed to show any error in the trial court’s denial of their motion for JNOV on Romandia’s age discrimination claim.

C

Defamation

Defendants contend the trial court erred in denying their motion for JNOV on Romandia’s defamation claim because the allegedly defamatory statement was: (1) opinion, not fact; (2) substantially true; and (3) privileged under subdivision (c) of Civil Code section 47. We are not persuaded.

1. *Opinion Versus Fact*

Defendants contend that because the word “unbecoming” “is by nature a subjective characterization,” the statement that Romandia was terminated for “conduct unbecoming a supervisor”

was not actionable as a matter of law because it was a statement of opinion rather than fact. In granting defendants' motion for a new trial, the trial court determined that the phrase "conduct unbecoming a supervisor" could be actionable because it "implies underlying facts known by the publisher of the statement, that [Romandia] committed concrete, identifiable acts that were inappropriate for a supervisor to engage in."

"It is an essential element of defamation that the publication be of a false statement of fact rather than opinion. [Citations.] Nevertheless, a statement of opinion may be actionable ". . . if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.'" [Citation.] Thus, there is no wholesale defamation exemption for anything that might be labeled an opinion. If a statement of opinion implies a knowledge of *facts* which may lead to a defamatory conclusion, the implied facts must themselves be true. Even if the publisher of the opinion states the facts upon which he or she bases this opinion, if those facts are either incorrect or incomplete, or if the person's assessment of them is erroneous, the statement of opinion may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications, and such statements may be actionable. In such a case, the dispositive question is whether a reasonable factfinder could conclude the published statements *imply* an assertion of defamatory *fact*. If so, the defendant must prove the fact is true." (*Ringler Associates Inc. v. Maryland Casualty Co.* (2000) 80 Cal.App.4th 1165, 1181.)

Here, as the trial court recognized, the statement that Romandia was terminated for "conduct unbecoming a supervisor" implied an assertion of undisclosed fact, specifically, that Romandia engaged in certain conduct that was inappropriate (i.e., "unbecoming") for a supervisor. Whether Romandia actually engaged in such conduct was a factual matter that could be proven or disproven. Accordingly, defendants have failed to show that the allegedly defamatory statement here was, as a matter of law, not actionable because it was not a statement of fact or a statement of opinion that implied an assertion of fact.

2. *Truth*

Defendants contend the trial court erred in denying their motion for JNOV because they "established by a preponderance of the evidence the substantial truth of the statement that Romandia engaged in 'conduct unbecoming a supervisor.'" Defendants' argument ignores the standard of review, and when the argument is viewed in light of that standard we are not persuaded.

Given the jury's finding that the statement was *not* substantially true, on appeal from the trial court's denial of their motion for JNOV, defendants can prevail only if they show there was *no* substantial evidence to support *that* finding. It is not enough for them to argue that there was substantial evidence to support the finding they advocated, i.e., that the statement was substantially true. Instead, they must persuade us that there was no substantial evidence from which the jury

could have found that the statement was *not* substantially true. Stated another way, they must persuade us that, even viewing all of the evidence in Romandia's favor, the statement was substantially true as a matter of law.

Defendants argue that "[e]ven considering only Romandia's testimony regarding [the incident at] the Depot Cafe, he engaged in actions that evening which are accurately characterized as 'conduct unbecoming a supervisor.'" In their view, Romandia's testimony about the incident established that he "engag[ed] subordinates in a work-related debate outside normal working hours in a bar," which they contend was necessarily "unbecoming a supervisor."

Viewing all the evidence in the light most favorable to the jury's verdict, however, the jury could have found that the statement regarding the reason for Romandia's termination implied that he was fired for "taking a swing" at Ramirez, which is what Watson testified she was convinced had happened. If, as we must presume, the jury found that Romandia did *not* take a swing at Ramirez, then on that basis the jury could have found that the undisclosed facts implied by the statement were false. It necessarily follows that when the evidence is viewed in the light most favorable to Romandia, the statement was not substantially true as a matter of law.

3. *Privilege*

Defendants contend the trial court erred in denying their motion for JNOV because the allegedly defamatory statement was privileged. Again, we disagree.

Subdivision (c) of Civil Code section 47 establishes a conditional or qualified privilege defense to a defamation claim for a statement made “[i]n a communication, without malice, to a person interested therein, (1) by one who is also interested, . . . or (3) who is requested by the person interested to give the information.” (See *Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [“The existence of privilege is a defense to an action for defamation”].) As applicable to the facts of this case, “Subdivision (c) makes conditionally privileged a communication concerning job performance made without malice.” (*Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 368.)

“[T]he malice necessary to defeat a qualified privilege is ‘actual malice.’ Such malice is established by a showing that the publication was motivated by hatred or ill will toward the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights.

[Citation.] However, the lack of reasonable grounds requires more than mere negligence. Malice is shown only when the negligence amounts to a reckless or wanton disregard for the truth, so as to imply a willful disregard for, or avoidance of, accuracy.” (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 740.)

Application of the privilege requires a two-step analysis: defendant bears “the initial burden of demonstrating that the allegedly defamatory communication was made upon a privileged occasion, and the plaintiff then [bears] the burden of proving

that defendant . . . made the statement with malice.”

(*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1208.)

Here, defendants contend there was no substantial evidence to support a finding that the statement that Romandia was terminated for “conduct unbecoming a supervisor” was made with malice. In making this argument, however, defendants again fail to set forth or consider all of the evidence in the light most favorable to the jury’s verdict, including all inferences the jury could have reasonably drawn and all credibility determinations the jury could have made. For example, as we have noted, Watson claimed she was convinced Romandia took a swing at Ramirez. Ultimately, however, she had to admit that the only basis for her conclusion was a statement by another employee, Richard Griffin (who died before trial), who allegedly told her he saw Romandia swing at Ramirez. If the jury decided that Griffin did not actually tell Watson that, then the jury could have found that Valspar had no reasonable basis for believing that Romandia took a swing at Ramirez but that Valspar nonetheless purported to terminate Romandia’s employment on the basis that he *had* taken a swing at Ramirez (and in doing so had engaged in “conduct unbecoming a supervisor”). Alternatively, if the jury decided that Griffin did tell Watson he saw a swing, but Watson did not genuinely believe that was what occurred, and Valspar nevertheless terminated Romandia for “conduct unbecoming a supervisor,” again the jury could have found that the false statement of the reason for Romandia’s termination was made with

reckless disregard for the truth, if not outright knowledge of its falsity, either of which constitutes malice.

For the foregoing reasons, we conclude defendants have shown no error in the denial of their motion for JNOV on Romandia's defamation claim.

D

Punitive Damages

For his part, Romandia contends the trial court erred in granting defendants' motion for JNOV on his claim for punitive damages because there was substantial evidence to support the jury's verdict. According to Romandia, "malice may be inferred from an act of discrimination" and "from a defamatory publication of a pretextual reason for firing an employee, especially when the defendant employer should have known that termination for a false reason of 'conduct unbecoming a supervisor' would injure the employee in his opportunities for future employment."

Having concluded there was "sufficient, though minimal, substance to support the verdict of age discrimination" and of defamation, the trial court decided the evidence was "not sufficient to constitute 'clear and convincing' evidence of the foundation of malice, oppression or fraud that must support a punitive damage award." In reaching this conclusion, however, and in undertaking the analysis of the evidence that led to this conclusion, the court made a fundamental error: the court took into account the "clear and convincing" burden of proof Romandia had to meet to prove his entitlement to punitive damages. For

example, the court stated that it was "not persuaded that any post-termination conduct by Valspar rises to the level of clear and convincing evidence of malice, oppression or fraud."

Similarly, the court stated that, "[o]n balance, the very weak evidence of a plot to fire [Romandia] because of his age and then engage in a cover-up is so insubstantial that it cannot support the requirement of 'clear and convincing' evidence of intentional fraud, oppression or malice."

The trial court's description of the evidence as "very weak," and its conclusion that the evidence "cannot support the requirement of 'clear and convincing' evidence," shows that the trial court misapplied the substantial evidence standard of review that it was supposed to apply in considering the motion for JNOV. As we will explain, while relevant to the jury's determination of the case, the "clear and convincing" burden of proof did not govern the trial court's review, on defendants' motion for JNOV, of the sufficiency of the evidence to support the jury's determination. By bringing the burden of proof into its analysis, the trial court engaged in a *weighing* of the evidence that is antithetical to the substantial evidence standard of review. When that standard of review is properly applied, Romandia is correct that there was substantial evidence to support the jury's determination on the issue of punitive damages.

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression,

fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) For purposes of this statute, "'[m]alice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (*Id.*, subd. (c)(1).)

Punitive damages can be recovered in an action for employment discrimination (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 215), as well as in an action for defamation (*Shumate v. Johnson Publishing Co.* (1956) 139 Cal.App.2d 121, 135). Thus, having prevailed on his claims, Romandia could recover punitive damages as long as he proved oppression, fraud, or malice by clear and convincing evidence. The requirement that Romandia meet that higher burden of proof, however, was relevant only to the jury's determination of the case. Once the jury decided that Romandia had proven by clear and convincing evidence that Valspar acted with oppression, fraud, or malice, that higher burden of proof "disappear[ed]" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371, p. 428) and had no bearing on the trial court's review of the jury's decision on a motion for JNOV.

"A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to

support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied." (*Brandenburg v. Pac. Gas & Elec. Co.* (1946) 28 Cal.2d 282, 284.)

Where the substantial evidence standard of review is applied to a factual determination that was made by the trier of fact subject to the clear and convincing evidence burden of proof, the burden of proof "does not affect the nature of [the] review." (*In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 601.) "[T]he principle of law that the power of a reviewing court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings of the [trier of fact] . . . is as applicable in a case to which the rule of clear and convincing proof applies as it is in other cases. The statement found in many cases that to establish a particular fact the evidence must be clear and convincing is a rule of evidence directed to the [trier of fact]. [Citations.] Whether the evidence is clear and convincing must be determined by the [trier of fact] and [the reviewing] court must accept that determination as conclusive if there is substantial evidence to support it." (*Baines v. Zuieback* (1948) 84 Cal.App.2d 483, 488.)

Thus, the question before the trial court on the motion for JNOV -- and before us on review of the trial court's ruling on that motion -- is whether there was substantial evidence that Valspar acted with oppression, fraud, or malice. Viewing the

evidence in the light most favorable to Romandia (and the jury's verdict), we conclude there was (and that the trial court erred in concluding otherwise). By crediting Romandia's evidence, discrediting defendants' evidence, and drawing all reasonable inferences in favor of Romandia, the jury could have determined that Pond harbored age-based animus against Romandia and that, because of that animus, he participated in the decision to terminate Romandia's employment, which Valspar tried to justify as being based on Romandia "taking a swing" at Ramirez, when Valspar knew that did not happen. On this view of the evidence, the jury could have concluded not only (as we have determined already) that Valspar acted with malice in making a false statement about why Romandia was terminated for purposes of the tort of defamation, but also that Valspar's conduct evidenced malice for purposes of imposing punitive damages -- that is, conduct intended to cause injury to Romandia. Accordingly, the trial court erred in granting defendants' motion for JNOV on the issue of punitive damages.

III

The New Trial Motion

We now turn to Romandia's appeal from the trial court's new trial order. As we will explain, Romandia has failed to persuade us of any error by the trial court in granting a new

trial on his claims for age discrimination and defamation and for punitive damages.³

A

Standard Of Review

Romandia contends the trial court's decision to grant a new trial on his claims for age discrimination and defamation is "governed by the 'abuse of discretion' standard of review." While that assertion is technically correct, the determination of whether a trial court abused its discretion in granting a new trial based on insufficiency of the evidence is governed by some very specific rules that are far from self-evident from the general term "abuse of discretion."

The trial court may grant "a new or further trial . . . on all or part of the issues" based on the "[i]nsufficiency of the evidence to justify the verdict." (Code Civ. Proc., § 657.) When granting a new trial, the court must "specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated." (*Ibid.*) "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict . . . unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different

³ If a trial court orders JNOV and also orders a new trial, the new trial order is effective if the order granting JNOV is reversed on appeal and the new trial order is affirmed. (Code Civ. Proc., § 629.)

verdict or decision." (*Ibid.*) "[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict . . . , it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and *such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.*" (*Ibid.*, italics added.)

Applying this standard, the California Supreme Court has held that "an order granting a new trial under section 657 [for insufficiency of the evidence] 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.] Moreover, '[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached' [Citation.] In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.' [Citation.] [¶] The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' [Citation.] Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.)

In this case, in arguing that the trial court abused its discretion in granting a new trial on his claims for age discrimination and defamation and for punitive damages, Romandia does not apply (or even acknowledge) the foregoing rules. Instead, with respect to his claims for age discrimination and defamation, he argues that the trial court abused its discretion because, in his view, the court's grant of a new trial was "based upon an erroneous concept of legal principles applicable to the case," i.e., on an error of law. He contends that when a new trial order is based on such an error, it must be reversed. As we will explain, however, Romandia has failed to show that the trial court's new trial order was based on an erroneous understanding of the legal principles applicable here.

As for the punitive damages claim, Romandia argues only that the trial court abused its discretion in ordering a new trial because there was substantial evidence to support the jury's decision, but that argument turns the standard of review on its head. As we have explained, we must treat the new trial order as presumptively correct, and Romandia can overcome that presumption only if he shows there was no reasonable basis for the trial court's decision. He has not done so.

B

Age Discrimination

With respect to his claim for age discrimination, Romandia contends the trial court erred "as a matter of law" by characterizing the age-related comments Pond made to Romandia as "'stray remarks'" that were "not entitled to any probative

value." According to Romandia, the court's rejection of this evidence relied "on an identified principle of law" -- the "stray remarks" doctrine -- that our Supreme Court repudiated in *Reid v. Google, Inc.*, *supra*, 50 Cal.4th at page 512, which the court decided after the trial in this case.

To explain why we are not persuaded by this argument, we begin with the trial court's decision. In reaching its determination that the evidence, taken as a whole, did not "reasonably support[] a conclusion that [Romandia]'s termination . . . was motivated in substantial part by a discriminatory animus based on [Romandia]'s age," the trial court set forth at length the evidence on which Romandia relied to show age discrimination. The first evidence the court mentioned were the three age-related comments Pond allegedly made to Romandia "regarding sports and exercise activities." In rejecting these comments as evidence of discriminatory animus, the trial court explained as follows:

"The evidence of Pond's comments regarding sports and exercise activities . . . , assuming they occurred, fall into the category of 'stray remarks' that do not in the Court's view rise to the level o[f] displaying a sufficient age-based animus to support a finding of discriminatory motive. These are comments that are unrelated to work performance, and were made in a context of co-workers bantering or kidding about recreational activities. One reasonable interpretation of some of the comments is that Pond was genuinely (and appropriately) concerned with [Romandia]'s welfare -- given [Romandia]'s own

descriptions of his strenuous physical activity[.] In the Court's view, reference to a person's age does not automatically indicate a discriminatory attitude, particularly when relevant to [the] content of the statement, such as concern about risks to another person's wellbeing. In this case, Pond displayed no age-based discriminatory animus in his periodic review of [Romandia], made after these sports/exercise comments, when he scored [Romandia]'s work performance in a manner that [Romandia] agreed was fair[.] In addition, Pond stated in the evaluation that 'overall, [Romandia] is an excellent performer and an asset to Valspar.'

With this aspect of the court's decision in mind, we turn to *Reid*, the case on which Romandia's argument relies. In *Reid*, which was also an age discrimination case, our Supreme Court confronted the question of whether California courts should "follow the federal courts in adopting the 'stray remarks doctrine' in employment discrimination cases." (*Reid v. Google, Inc.*, *supra*, 50 Cal.4th at p. 516.) As the court explained, "Under this doctrine, statements that nondecision makers make or that decision makers make outside of the decisional process are deemed 'stray,' and they are irrelevant and insufficient to avoid summary judgment." (*Ibid.*) The Supreme Court ultimately decided that the Court of Appeal correctly rejected the categorical exclusion of evidence by operation of the stray remarks doctrine. (*Id.* at p. 538.)

Romandia's contention here is that the trial court's decision to order a new trial on his age discrimination claim

must be reversed because in rejecting as evidence of discriminatory animus the three comments Pond allegedly made to Romandia relating to sports and exercise activities, the trial court relied on the stray remarks doctrine, which was error in light of the Supreme Court's subsequent repudiation of that doctrine. We reject this contention because, as we read the trial court's decision, that court did not rely on the later-repudiated stray remarks doctrine in rejecting the three comments by Pond as evidence of age-based discriminatory animus. In other words, the trial court did not reject the comments by Pond as relevant evidence of age-based animus because it felt compelled to do so *as a matter of law* under the stray remarks doctrine. Instead, what the trial court did was decide, in its role as an independent trier of fact, that *as a matter of fact* Pond's comments did not constitute evidence of age-based animus, because (1) the comments were "unrelated to work performance, and were made in a context of co-workers bantering or kidding about recreational activities"; (2) Pond may have been "genuinely (and appropriately) concerned with [Romandia]'s welfare -- given [Romandia]'s own descriptions of his strenuous physical activity"; and (3) "Pond displayed no age-based discriminatory animus in his periodic review of [Romandia], made after these sports/exercise comments, when he scored [Romandia]'s work performance in a manner that [Romandia] agreed was fair" and in which he stated "that 'overall, [Romandia] is an excellent performer and an asset to Valspar.'"

Under the rules previously set forth, we must defer to any factual determination made by the trial court in granting a new trial based on insufficiency of the evidence as long as there is a substantial basis in the record for that determination. Here, there was certainly no evidence that *compelled* the trial court to find that Pond's alleged comments to Romandia were based on an animus against Romandia because of Romandia's age. Under these circumstances, we cannot substitute our judgment for that of the trial court. Accordingly, Romandia has failed to show any legal error or abuse of discretion in the trial court's grant of a new trial on his claim for age discrimination.

C

Defamation

With respect to his defamation claim, Romandia contends the trial court's order of a new trial was based on an error of law because the trial court's decision relied on an element of the tort of defamation not applicable to the facts of this case. We disagree.

Again, we begin with the trial court's decision. Having concluded, as a matter of fact, that Romandia's termination "was not substantially motivated by a discriminatory animus based on [his] age," the court turned its attention to Romandia's defamation claim, which "was based on the theory that Valspar and Pond falsely stated to [Romandia] that he was being terminated for 'conduct unbecoming a supervisor,' which they knew or reasonably should have known [Romandia] would be forced to republish in seeking further employment, and which in fact

hindered him in obtaining a new job." The court determined that the phrase "conduct unbecoming a supervisor" was "sufficiently factual" to provide the basis for a defamation claim, then addressed whether the statement of the reason for Romandia's termination was false. On that point, the court concluded that there appeared "to be sufficient evidence to support a reasonable belief by Defendants that something inappropriate happened at the Depot Café, which they did not want a Valspar supervisor to engage in, and that the stated grounds for [Romandia]'s termination were therefore true, or reasonably believed to be true, for defamation purposes. Further, the Court finds that there is insufficient evidence to support a finding that the statement that [Romandia] was terminated for 'conduct unbecoming a supervisor' was made with reckless disregard for the truth by either of the Defendants."

Focusing on the very last phrase above -- about whether the allegedly defamatory statement was made with reckless disregard for the truth -- Romandia contends that element does not have to "be proven when it comes to a private person seeking to recover for defamation; it only applies to a plaintiff who is a 'public figure.'" Thus, he contends, the trial court's new trial order as to the defamation claim was based on legal error, requiring reversal.

Romandia is correct that "reckless disregard [for] the truth" is an aspect of defamation when the plaintiff qualifies as a public figure. "When the plaintiff is a public figure, he or she may not recover defamation damages merely by showing the

defamatory statement was false. Instead, the plaintiff must also show the speaker made the objectionable statement with malice in its constitutional sense 'that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" (*McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 114.)

As we have seen already, however, there was a valid reason for the trial court to discuss "reckless disregard [for] the truth" in this case that had nothing to do with Romandia being a public figure. Because this case involved a statement made by Romandia's employer about the reason Romandia's employment was terminated, for Romandia to prevail on his defamation claim the trier of fact had to conclude that the statement was made with actual malice to overcome the qualified privilege in subdivision (c) of Civil Code section 47. We have explained already that the malice required to defeat that privilege can be shown if the allegedly defamatory statement was made with a reckless disregard for the truth. (*Hailstone v. Martinez, supra*, 169 Cal.App.4th at p. 740.) Thus, in determining there was "insufficient evidence to support a finding that the statement that [Romandia] was terminated for 'conduct unbecoming a supervisor' was made with reckless disregard for the truth by either of the Defendants," the trial court can be understood as concluding that defendants did not make the statement with actual malice and therefore, even if the statement had been false, the qualified privilege provided by subdivision (c) of Civil Code section 47 applied.

For the foregoing reasons, we conclude that Romandia has failed to show any error of law or abuse of discretion in the trial court's grant of a new trial on his defamation claim.⁴

D

Punitive Damages

Romandia contends the trial court abused its discretion in ordering a new trial on punitive damages because there was substantial evidence in the record to justify the jury's award. This argument is without merit for two reasons. First, the argument turns the standard of review on its head. On review of an order granting a new trial based on insufficiency of the evidence, we must presume *the trial court* was correct, and it is not enough to overcome that presumption for Romandia simply to show that there was substantial evidence to support the jury's verdict. Second, and in any event, in light of our conclusion that the trial court did not abuse its discretion in granting a new trial on Romandia's claims for age discrimination and defamation, it necessarily follows that the trial court properly granted a new trial on his claim for punitive damages because there is no way in law or logic that the award of punitive damages could stand when the jury's verdict on the underlying causes of action has been set aside.

⁴ Romandia argues for the first time in his reply brief that the reasons the trial court gave for granting a new trial on his defamation claim were "inadequate." We decline to address this argument. (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 595 [contentions raised for the first time in a reply brief are deemed forfeited].)

DISPOSITION

The jury's verdict on Romandia's claim for race discrimination is affirmed.

The order denying defendants' motion for JNOV on Romandia's claims for age discrimination and defamation is affirmed, but the order granting the motion for JNOV on Romandia's claim for punitive damages is reversed, and the trial court is directed to enter a new order denying defendants' motion for JNOV on Romandia's claim for punitive damages.

The order granting defendants' new trial motion is affirmed in its entirety.

The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

ROBIE, Acting P. J.

We concur:

MAURO, J.

MURRAY, J.