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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

AMIT PANDYA, Plaintiff and Respondent, v. WARD GILLETTE, Defendant and Appellant.	H036332 (Monterey County Super. Ct. No. M89952)

Appellant Ward Gillette challenges a judgment entered in favor of plaintiff Amit Pandya, in an action for fraud against Gillette, Albert Braun, and their company, Five Star Technologies, Inc. (Five Star). Gillette contends that there is insufficient evidence to support the trial court's findings that (1) plaintiff justifiably relied on the defendants' misrepresentation and (2) their misrepresentation caused the harm plaintiff suffered. Gillette further challenges the amount of compensatory and punitive damages awarded to plaintiff. We agree with his last point regarding punitive damages and will accordingly modify the judgment.

Background[1]

Plaintiff first heard about Five Star through a business contact, who told him that the company principals were "looking for somebody to help them turn the company around." Plaintiff met with Gillette in July or August of 2005 and discussed Gillette's business plan for Five Star. He learned that Five Star was built on a concept that involved mixing garbage materials together to make railroad ties. The company was looking for a president and chief executive officer (CEO), "somebody to lead the company to the next level." Plaintiff understood that the product had not yet been tested, and that the company was "dead financially" because it generated no revenue and had a "huge burn rate" of about $20,000 a month. Nevertheless, he believed that the product had "huge potential."

During a tour of the plant and subsequent meetings with Gillette and Braun, plaintiff learned that Five Star had three shareholders: Gillette, Braun, and a company called Una World. He also discovered that there were no revenue statements, contracts, lists of assets, or profit-and-loss statements. In a meeting on August 10, 2005, he sketched out a plan to attract investors. Plaintiff knew that the company could not pay him; instead, he proposed that he have "effective control to set the direction for the company" by holding a majority of the shares in the company. Plaintiff "essentially wagered" that if he had control over the direction of the company, he would be able to

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[1] Plaintiff complains that Gillette's statement of facts is deficient in that it fails to set forth both sides' evidence. His Respondent's Brief, however, is no model of accuracy. Many of the points in plaintiff's factual summary are completely unsupported by his record references, contrary to California Rules of Court, rule 8.204(a)(1)(C). He also makes factual assertions in his "Argument" section without any citation of the record whatsoever, making his points useless for purposes of this court's review. Even if the judgment did not require modification, plaintiff's failure to adhere to the rules governing appellate briefs would subject him to payment of his own costs. (Cf. *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1210 ["In view of the unhelpful nature of the respondents' brief, the parties are to bear their own costs on appeal"].)

turn it around, and his shares would then be worth money. With his confidence in the product, he was "willing to put in all [his] time, and effort, and energy to turn around for free on a bet that [the] company would work and move forward."

Gillette suggested alternatives of between 20 percent and 40 percent ownership. Plaintiff was "firm" in insisting on a majority share, but he added that his ownership would be limited to five years; after that, a public offering would reduce his share to two to four percent. At the end of that meeting, Braun shook plaintiff's hand, smiled, and said, "Welcome on board, Mr. President." He then took plaintiff to the bank to put plaintiff's name on the account. Braun told the bank officer that plaintiff was the new president. In Braun's presence, plaintiff signed forms as president and applied for a line of credit indicating that he was majority shareholder.[2] Plaintiff unequivocally understood that day that his proposal had been accepted. Braun, however, believed that the parties were still negotiating the terms of plaintiff's involvement in the company.

Over the next 15 days following the August 10, 2005 meeting, plaintiff contacted railroad companies, sought grants, and solicited testing. He also composed minutes of meetings that had taken place prior to his involvement, and he memorialized the agreement the parties had reached on August 10, with the title "Appendix A."[3] He sent a copy of these documents to Braun and Gillette on August 23, expecting a correction if they perceived any inaccuracies. Braun and Gillette did make corrections to the meeting

[2] At trial Braun testified that he was unaware of plaintiff's representation as being the 51 percent shareholder until the bank asked him for plaintiff's contact information in preparation for extending a loan to the company. Braun instructed the bank officer to remove that representation from the paperwork; he did not, however, confront plaintiff about this matter because he "knew what Amit wanted."

[3] The agreement as described by plaintiff acknowledged that plaintiff would receive no salary. His compensation instead was "to be in form of shares of stock in 5 Star Technologies Inc., where Amit's shares will always be, for [the] next 5 years, the total of all outstanding and issued shares plus one percentage."

notices and minutes, but they did not reject plaintiff's representation of the terms of their agreement, and nothing in their responses indicated to plaintiff that there was any misunderstanding. On August 11, 2005, however, only a day after the meeting and trip to the bank, Braun sent e-mail to Gillette discussing other arrangements they could negotiate with plaintiff that would not involve his having a majority of the shares. Defendants corresponded with plaintiff while redacting private comments they exchanged with each other.[4]

As late as March 16, 2006, defendants still had not executed the documents that reflected plaintiff's majority share of the company. On the contrary, in an e-mail to Braun that day, Gillette expressed the conviction that "we should hold on to our original verbal [*sic*] offer to Amit where we proposed that we are ALL (the 3 of us) equal partners and abandon Amit's request to be granted one more share than the cumulative sum of all outstanding shares giving him complete control of this company." Gillette also told Braun that he was "unsure at this time as to whether or not we should draft or otherwise formalize any company documents authorizing Amit's takeover as CEO, including meeting minutes."

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[4] In response to plaintiff's proposed minutes, for example, Braun commented to Gillette, "Amit is going to want at least as much [*sic*] shares as you have. This can be given to him over a period of time based on performance. But he wants control, so we can set aside shares, blocks, that is, under his voting direction. But even than [*sic*], the board of directors, being you, him, and myself [*sic*] need to vote on the matter and majority rules. Teamwork!!!! I don't mind he [*sic*] running the company and having a free hand in deals and finances, and will back him up all the way in that areas [*sic*]." Gillette redacted the first two sentences and edited the third to read, "As Amit wants control, we can set aside shares, blocks that is, under his voting direction."

In a subsequent e-mail message, Braun told Gillette about the telephone call in which the bank officer wanted to speak with plaintiff before issuing the loan because plaintiff was the majority owner of the company. Braun cautioned that his message was "just for you and I [*sic*] to know at this time, so do not repeat this to Amit as yet."

Meanwhile, between late August of 2005 and mid-March of 2006 Braun repeatedly asked plaintiff to procure funds for the company. Altogether plaintiff contributed $44,000 to enable Five Star to pay outstanding bills. While accepting the cash infusion, defendants did not transfer the majority shares to plaintiff. They also resisted informing the company lawyer about the contract with plaintiff, because they believed that the lawyer would reject the deal and "scare Pandya off." Plaintiff continued trying to get signed minutes from defendants, but the parties could not agree on the content and related issues.

On March 20, 2006, Braun wrote to Gillette, asking whether Gillette could contribute some funds to keep the company going until the next utility bill came due. He added, "Here's hoping everything works out and Will joins us. . . ." Later that day Gillette informed plaintiff that he and Braun had located a possible investor, Will Low.

On March 29, 2006, the parties met over the issues facing the company. During the meeting, to plaintiff's expressed surprise, Gillette and Braun would not acknowledge the existence of an agreement giving him majority shares; in Gillette's view, he and plaintiff "never had an agreement . . . on anything other than my offer that it be equal." The recording of the meeting was transcribed and played for the court at trial. The transcript, which the court admitted into evidence, discloses extensive arguing, during which Gillette told plaintiff that the only arrangement defendants had ever agreed to was plaintiff's position as equal partner, each owning 16.5 million shares. If plaintiff wanted to continue his involvement in the company, he would have to accept that condition, serving as an equal partner, "at the leisure of the board." Otherwise, he would be "cut loose." At one point Gillette informed plaintiff that the assets of Five Star would be moved to a holding company owned by Braun so "they're protected. So that, that matter is done. Now. If you want to come after us and sue us, do whatever you want, but 5 Star is nothing. It's a shell company. There's no assets, there's nothing."

The next day plaintiff expressed his understanding of the conclusions reached at the meeting—notably, defendants' proposal to grant equal shares to Braun, Gillette, Low, Braun's son, and plaintiff, thereby "cutting" plaintiff's majority share to 20 percent. In addition, as plaintiff related it, his personal no-interest loan would be recharacterized as a contribution toward the purchase of his shares. If he did not accept this new arrangement, he noted, he would be terminated as president and CEO and removed from the board, he would lose all his stock, and defendants would "consider" giving him a promissory note for the money he loaned the company. Finally, in the event that plaintiff sought compensation for the time and money he had put into Five Star, the assets of the company were to be placed in a holding company to keep it out of reach of the courts.

Plaintiff did not accept this "ultimatum," and he was terminated on March 30, 2006. On March 21, 2008, he filed this action against Gillette, Braun, and Five Star, asserting fraud, violation of Corporations Code section 25401, conversion, and breach of oral contract. Plaintiff requested $44,000 for "rescission and restitution of the consideration paid," along with general and punitive damages. Ward and Gillette separately answered the complaint and, together with Five Star, filed a cross-complaint against plaintiff for fraud, breach of oral contract, breach of fiduciary duty, and promise made without intention to perform. In August 2008 a default judgment was entered against Five Star, and the remaining parties (including Five Star as cross-complainant) appeared for a court trial on April 27, 2010.

At trial Gillette and Ward maintained that there was no contract between the parties, and that even if a contract existed, (a) there was no fraud and (b) they could not be personally liable for any wrongdoing. The court found, however, that the parties had reached a contract, that they had deceived plaintiff into believing his demand for majority control had been met, and that they were liable as alter-egos of Five Star. The court awarded plaintiff $94,000, consisting of reimbursement of the $44,000 loan and $50,000 for plaintiff's lost time, plus interest. The court also granted plaintiff $94,000 as punitive damages. Defendants were to take nothing on their cross-complaint. After denial of Gillette and Braun's motion for a new trial, Gillette alone brought this appeal.

Discussion

1. Appealability

Gillette first filed his notice of appeal from the August 11, 2010 judgment on November 18, 2010, just short of 30 days after the court denied the motion for a new trial. (Cal. Rules of Court, rule 8.108(b)(1)(A)). On November 22, 2010, he filed an amended notice, this time purporting to appeal from the October 20 order denying the motion. Plaintiff now urges us to dismiss the appeal, pointing out that an order denying a motion for a new trial is not an appealable order. He concedes that Gillette's opening brief "demonstrates that he intends to appeal the trial court's judgment;" but he then obliquely retracts that concession by arguing that the amended notice "indicates a conscious, specific intent *not* to appeal the underlying judgment. It would be contrary to logic and precedent for this appellate court to impute an intent inconsistent with these actions."

Plaintiff acknowledges the guidance supplied by *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20, where the Supreme Court reaffirmed the appellate practice of considering a notice of appeal from an underlying judgment when a party has appealed from *both* the judgment and the order denying that party's motion for a new trial. Here, however, plaintiff insists that we should ignore the first notice and acknowledge only the second notice, and thus refuse to consider the merits of the appeal.

Gillette responds that the "clear import of the amended notice of appeal was to inform this court that the notice of appeal was timely filed under rule 8.108(b)(1)." Although there is no clear evidentiary basis for inferring such intent, we agree with Gillette's additional point, that no conceivable prejudice can accrue to plaintiff by considering the appeal on the merits. We will therefore dismiss the appeal from the nonappealable order and proceed to review the matter as an appeal from the original judgment.

2. Sufficiency of the Evidence: Justifiable Reliance and Causation

In his complaint plaintiff alleged several false statements of fact and a promise that if plaintiff accepted the position of president and CEO of Five Star, he would have control of the company and be given 51 percent of the outstanding shares. The trial court determined that defendants had engaged in fraud by deceiving plaintiff, within the meaning of Civil Code sections 1709 and 1710.[5] Defendants gave plaintiff the impression that they had accepted his proposal to "work for free for five years" on condition that he have majority control of the company. Yet, the court found, defendants "did not intend to fulfill the agreement. On August 11, 2005, one day after the agreement to hire Pandya, the Defendants plotted how to maintain their majority control of the corporation. . . . They hid their ideas from Pandya, sending him sanitized versions of their emails and delaying the execution of necessary documents including minutes."

On appeal, Gillette does not dispute these facts; thus, he implicitly concedes that misrepresentation occurred. Instead, Gillette contends only that plaintiff did not *justifiably* rely on defendants' misrepresentations and that the misrepresentations did not cause the harm he suffered.

Section 1709 provides a remedy in damages for one who is deceived by another "with intent to induce him to alter his position to his injury or risk." Section 1710 more specifically defines "deceit" as "1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; [¶] 2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; [¶] 3. The suppression of a fact, by one who is bound to disclose it, or who gives information of

[5] All further statutory references are to the Civil Code.

other facts which are likely to mislead for want of communication of that fact; or, [¶] 4. A promise, made without any intention of performing it."

Our Supreme Court has refined this definition by adopting pertinent sections of the Second Restatement of Torts—namely, sections 525, 531, and 551. "Section 525 of the Restatement Second of Torts states: 'One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act *or to refrain from action* in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.' . . . Section 531 states the 'general rule' that '[o]ne who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act *or to refrain from action* in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced'. . . And section 551, subdivision (1) states: 'One who fails to disclose to another a fact that he knows may justifiably induce the other to act *or refrain from acting* in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose . . . .' " (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 174.)[6]

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[6] Also of some relevance in this case is subdivision (2) of the Restatement Second of Torts section 551: "(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, [¶] (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and [¶] (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and [¶] (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and [¶] (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and [¶] (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other,

In order to establish tort liability for deceit, a plaintiff must show "(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1108; *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." (*Lazar*, *supra*, 12 Cal.4th at p. 638.) "Thus, in a promissory fraud action, to sufficiently allege [that] defendant made a misrepresentation, the complaint must allege (1) the defendant made a representation of intent to perform some future action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent at the time that the promise was made, i.e., the promise was false." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1060.)

In addressing the first element at issue, justifiable reliance, Gillette asserts that significant facts known to plaintiff made his reliance unreasonable. Specifically, Gillette argues, plaintiff knew (1) that the company was in financial trouble, which would prevent him from getting paid; (2) that the product was untested; (3) that the company had no profit and loss statement, list of assets and their values, or formal minutes of past meetings; and (4) that the assets of Una World had been purchased in return for 7 million shares, but that defendants were not going to issue those shares to Una World because they did not like its president.[7] Gillette also notes the "further warning of the company's

because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts."

[7] Gillette also cites plaintiff's knowledge that two others, an investor and the lawyer who had helped incorporate Five Star, were also due shares; but the record indicates that

financial troubles" when, immediately after agreeing to work for Five Star, plaintiff was told that the company was running out of cash. Finally, Gillette points out that there was no formal written agreement between the parties; plaintiff had prepared a document memorializing the terms, "but neither Gillette nor Braun ever signed it." In short, Gillette argues, "[n]o reasonable person would have given so much time and money to Five Star under these circumstances."

"Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. . . . 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239; cf. *Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1300 [reliance on statement of intent not justified if plaintiff knows promisor will be unable to carry out his intention], quoting Rest.2d Contracts, § 171, com. a, p. 466.)

Gillette acknowledges the burden he faces on appeal. " 'Defendant correctly states that fraud must be proved by clear and convincing evidence. [Citations.] But it is the function of the trial court, not the reviewing court, to determine whether that standard has been met, and the trial court's determination of the issue is conclusive where, as here, it is supported by substantial evidence. . . . [I]t was the exclusive province of the trial court to determine which of two or more reasonable inferences should be drawn; and its findings, based on the inferences drawn, cannot be disturbed on appeal. . . .' " (*Edmunds v. Valley*

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plaintiff did not learn about these shareholders until more than two weeks after reaching agreement with defendants.

Circle Estates, supra, 16 Cal.App.4th at p. 1297.)[8] The reviewing court does not *ignore* the losing party's evidence, as plaintiff suggests; instead, " 'all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity[ ] to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.' " (*OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 866 (*OCM*), quoting *Estate of Teel* (1944) 25 Cal.2d 520, 527.) We cannot, of course, reverse a judgment for insufficient evidence merely because the witnesses offered conflicting testimony, " ' "for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." ' [Citations.]" (*OCM, supra*, 157 Cal.App.4th at p. 867.)

We agree with Gillette that plaintiff was " 'aware of the risks' of investing his time and money into Five Star, a struggling company that had yet to produce a product." But that fact does not relate to the gravamen of plaintiff's fraud claim. Plaintiff's awareness of the company's shaky financial condition, and, arguably, of its inadequate record-keeping, would be relevant if, for example, he had alleged misrepresentation of the current or expected profitability of the product. (See, e.g., *Atari Corp. v. Ernst & Whinney* (9th Cir. 1992) 981 F.2d 1025, 1029 [reliance unjustified where plaintiff purchased company despite belief that company's assets were overvalued].) But that is not the essence of defendants' tortious conduct. Defendants led plaintiff to believe that they had accepted his express, "firm" condition of joining the company as president and

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[8] We do not accept the statement in *Edmunds*, *supra*, that fraud must be proved by clear and convincing evidence. (See *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 292-293; *Grubb Co., Inc. v. Department of Real Estate* (2011) 194 Cal.App.4th 1494, 1503.) This disagreement, however, is tangential and does not affect the substance or ultimate merit of the parties' positions.

CEO with no salary: that he have functional control of the company and 51 percent of the outstanding shares.

The only fact Gillette cites that even remotely bears upon defendants' false promise is plaintiff's awareness that Five Star had not issued the shares to which Una World was entitled. That fact was plainly insufficient to convince the trial court that plaintiff's reliance on defendants' misrepresentations was unreasonable. It was for the trial court, as finder of fact, to determine the significance of defendants' refusal to issue one company its shares. The court could have found that plaintiff reasonably believed defendants when they told him that the reason they were not giving Una World those shares was that its president was "a really, really bad guy." We will not second-guess the lower court in making this factual determination. Without evidence that plaintiff should have known that defendants would not keep their promise to make him majority shareholder, the court properly determined that plaintiff's reliance on the misrepresentation was justified.

A similar conclusion must attend Gillette's contention that there was insufficient evidence of causation. He is correct that even where reliance has occurred, "no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes." (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 60; see also *OCM, supra*, 157 Cal.App.4th at p. 872 [proximate causation shown between misrepresented financial condition of company and damages to purchasers of notes], citing Rest.2d Torts § 548A, com. b, p. 107) [entitlement to damages requires causal link between losses and facts misrepresented].) "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his damage." (*Beckwith v. Dahl, supra*, 205 Cal.App.4th at p. 1062.)

Plaintiff's challenge is again predicated on the assumption that plaintiff claims a lost investment: "Pandya gave the $44,000 and his time to Five Star because he expected a profitable return on those investment[s] *when and if* the product became successful. Nothing in the record indicates that Pandya would not have gotten his $44,000 back, with a profit, if the product had been successful enough to produce profits for the company. However, since Five Star was never able to produce a successful product, <u>all</u> investments—by the defendants as well as by Pandya—were lost." This is not the factual basis of defendants' liability. Although plaintiff did allege a misrepresentation of the company's value in his complaint, the allegation the court found meritorious was that plaintiff was assured that he would be given 51 percent of the shares and functional control of the company in exchange for his service as president and CEO. Thus, this case does not resemble those in which a plaintiff invested in a product or security by relying on a false assurance of its worth. (See, e.g., *Kruse v. Bank of America*, *supra*, 202 Cal.App.3d at p. 63 [loss following stock transfer caused not by asserted misrepresentations by bank, but by bank's refusal to extend long-term loan to business]; *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 990 [lost commissions speculative to the extent based on assumed growth of account]; compare *OCM*, *supra*, 157 Cal.App.4th at pp. 873-875 [causal link shown between misrepresentation and loss of investment]; cf. *Service by Medallion v. Clorox* Co. (1996) 44 Cal.App.4th 1807, [no cause of action for deceit where expenses incurred in entering and performing contract caused by defendant's nonperformance and termination of contract, not its alleged fraudulent promise to ensure continued performance of plaintiff's nonunion personnel.)

Causation was adequately proved here. Plaintiff testified that in reliance on defendants' acceptance of his condition, he took the job, extended a loan to the company, and worked without compensation for close to eight months. He thus proved not only that he relied on defendants' misrepresentation, but that that reliance caused the detriment of lost time and money. The court did not err in finding this element to have been proved by clear and convincing evidence.

3. Damages

Gillette next contests the award of compensatory and punitive damages. He contends that $50,000 should be struck from the judgment because plaintiff failed to prove the value of his lost time. He further contends that punitive damages should not have been awarded because there was no "meaningful evidence" of his financial condition.[9]

Gillette acknowledges that a plaintiff is entitled to recover compensation for "time and effort expended in reliance on a defendant's misrepresentation." (*Block v. Tobin* (1975) 45 Cal.App.3d 214, 220; Civ. Code, §§ 1709, 3333.) In this case, however, Gillette insists that "the record does *not* support the trial court's determination that Pandya's time and effort should be valued at $50,000 for seven and one-half months' worth of work." Gillette's argument sidesteps the standard of review. It is not our role to determine whether plaintiff should have recovered less than $50,000; our only task is to ascertain whether substantial evidence supports the trial court's finding. We conclude that it does. Plaintiff, who had previously identified himself as a "business turnaround specialist," was the founder and president of a business entity that specialized in selling businesses and helping others "get right management direction, appropriate profitability." He had bought and sold multiple businesses, had "fixed" and advised others, and was involved in the Monterey County business community. Defendants brought out plaintiff's admission that he did not have a college degree and that some of his business experience was in owning gas stations and managing Togo's restaurants and three sporting goods stores. The court heard all of this testimony and weighed it in

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[9] Gillette does not take issue with plaintiff's recovery of $44,000, the amount of his loan to the company.

determining an appropriate compensation for his time and effort. Plaintiff testified that $75,000 was a fair salary for his seven and one-half months of work; the trial court gave him significantly less than that, $50,000. Whether we would have awarded less than that amount is irrelevant; the trial court was the finder of fact, and it properly exercised its discretion in determining that $50,000 was fair. Because its findings are supported by substantial evidence, Gillette's request that we strike $50,000 from the damages award must be rejected.

The punitive damages award requires a different focus. "In the narrow context of this case, where neither the reprehensibility of the defendant's conduct nor the magnitude of harm to the plaintiff is at issue, the question is whether the amount of damages exceeds the defendant's ability to pay." (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 582.) The requirement that there be "meaningful evidence" of a defendant's financial condition in order to impose punitive damages is "ancient" and well understood. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 109, 113.) The burden of producing such evidence is, of course, on the plaintiff. (*Id.* at pp. 120-123; cf. *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1283 [annual report of parent corporation insufficient evidence of defendant company's financial condition].) "We review the trial court's award of punitive damages for substantial evidence." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679.)

Standing alone, neither net worth, nor assets, nor income is sufficient to support punitive damages. (See *Zaxis Wireless Communications, Inc. v. Motor Sound Corp., supra,* 89 Cal.App.4th at p. 582 [net worth too easily manipulated to be the sole standard for ability to pay]; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1065 [evidence of earnings is not by itself sufficient]; *Baxter v. Peterson supra,* 150 Cal.App.4th at p. 681 ["evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income"].)

As in much of his respondent's brief, plaintiff fails to direct us to the evidence supporting the trial judge's award. Only in his statement of facts are there two references to relevant facts with record citations: "Gillette has lived in Carmel for the last 25 years"; and "Gillette owns a home in Shaver Lake." While arguing that substantial evidence supports the award, he offers nothing in the record to support such a conclusion beyond a superficial assertion that such evidence "was acknowledged at trial." Even viewing the record in the light most favorable to the judgment (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916), we can find no such evidence. Gillette himself testified that he owned a home at Shaver Lake, but there was no further evidence on that point, nothing to give the trial court some idea of the value of the home or any indebtedness attached to it. The bare fact that Gillette had lived in Carmel for 25 years was even weaker. (Cf. *Kelly v. Haag, supra*, 145 Cal.App.4th at p. 917 [*even if* defendant currently owned properties, absence of evidence of encumbrances or other liabilities on them defeats punitive damages award].) Nor was there any indication of Gillette's income or other assets and liabilities for which he was responsible.

In an apparent effort to divert the analysis from his failure to prove Gillette's financial circumstances, plaintiff argues that the award may nonetheless be upheld because Five Star's financial condition filled the gap in evidence. Assuming, without deciding, that Five Star's financial condition may be imputed to Gillette as its alter-ego, we are directed to no meaningful evidence demonstrating Five Star's ability to pay the award either. Plaintiff suggests (again without citation to the record) that the company's value was "more than $1 million," measured by what he assumes was the cost to develop the technology. He also invokes the salvage value of the equipment, which he represents to be $100,000. He then admits that "Five Star had certain recurring liabilities and expenses, for which Pandya loaned the corporation money. . . . Gillette transferred the technology out of Five Star, leaving it 'judgment proof' to avoid debts owed to Pandya."

Plaintiff claims that this nonspecific "information" allowed the trial judge to "gauge the approximate financial condition of the corporation." He does not even suggest an amount representing this "approximate financial condition" or identify the evidence from which that condition might be inferred. At best we have plaintiff's statement of facts, which inaccurately refers to the testimony of Braun regarding his contributions to the company.[10] In addition, Braun was cross-examined about an August 2005 e-mail to Gillette, the content of which he did not recall; in that message he had speculated about the amount they could obtain from selling parts for "scrap value," which could be "upwards of [$]100,000." None of this purported evidence of net worth, notably devoid of liability and expense figures, approaches anything resembling "meaningful evidence" of Five Star's financial condition at the time of trial.

We must conclude, therefore, that plaintiff failed to establish a factual basis for imposing punitive damages on Gillette. The absence of meaningful evidence precludes a punitive damages award because it is impossible to assess its impact on Gillette's financial resources; consequently, we "can only speculate as to whether the award is appropriate or excessive." (*Adams v. Murakami, supra*, 54 Cal.3d at p. 112; see also *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 516 ["There is no basis for meaningful appellate review of a punitive damage award without evidence of the defendant's financial condition"].) The purpose of punitive damages is "to deter, not to destroy." (*Adams v. Murakami, supra*, 54 Cal.3d at p. 112.) "[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the

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[10] At trial Braun recounted his and Gillette's contributions between 1992 and 2010. Braun testified that during this period he used $700,000 of his own funds to "keep the company moving forward" in its development. Gillette, he believed, contributed $228,000. No witness testified that the company had a current value of "more than $1 million."

function of punitive damages is not served by an award which, in light of the defendant's wealth . . . exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13; see also *Kelly v. Haag, supra*, 145 Cal.App.4th at p. 915.)

Here, as in *Baxter v. Peterson supra*, 150 Cal.App.4th at page 681, plaintiff had " 'a full and fair opportunity to present his case for punitive damages, and he does not contend otherwise.' (*Kelly v. Haag, supra*, 145 Cal.App.4th at p. 919.) When a punitive damage award is reversed based on the insufficiency of the evidence, no retrial of the issue is required." We will follow *Baxter* and remove the punitive damages from the judgment without ordering retrial.

Disposition

The judgment against Gillette is modified to strike the award of punitive damages. As so modified, the judgment is affirmed. The parties shall bear their own costs on appeal.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.