No. 18-16661

United States Court of Appeals
for the Ninth Circuit

BENJAMIN MCCLURE,

Plaintiff-Appellee,

v.

COUNTRY LIFE INSURANCE COMPANY, FDBA Country Companies, DBA Country Financial and CC SERVICES INC., DBA Country Financial,

Defendants-Appellants,

On Appeal from the United States District Court for the District of Arizona, Phoenix Case No. 2:15-cv-02597-DLR

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INTRODUCTION*

This is a case about an insurance company (Country Life) and its claims-handler partner (CCSI) that, without any reasonable basis to do so, intentionally terminated the disability claim of an insured they knew was suicidal. During a 10-day jury trial with a careful judge (Rayes, J.), the jury heard extensive evidence that supported its verdict. Defendants' witnesses all but confessed to breaching the covenant of good faith and fair dealing, which presumably explains why Defendants do not contest that finding on appeal.

On the issues Defendants do raise, the standards of review require the Court to view the facts and inferences in favor of upholding the verdict. Yet the Opening Brief ("OB") flouts this standard by ignoring all the evidence harmful to Defendants while construing other evidence in their favor. Defendants also effectively waived their third issue by failing to challenge the district court's alternative basis for the rulings set forth in that court's thoughtful, 21-page order. This Court should affirm.

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* Cases and statutes include hyperlinks to Westlaw. Record citations are to the ECF docket number (with hyperlinks to Pacer). "ER" refers to Appellants' Excerpts of Record. "SER" refers to the accompanying Supplemental Excerpts of Record. Transcript excerpts at ECF-359 were played at trial and are part of "the official trial transcript." *See* ECF-386.

JURISDICTION

This is a diversity action;[1] the amount in controversy exceeded $75,000.[2] The district court had jurisdiction under 28 U.S.C. § 1332(a)(1). Defendants appealed from a final order denying in part their motion for a new trial, entered August 8, 2018.[3] This Court has jurisdiction under 28 U.S.C. § 1291. Appellants timely appealed on August 31, 2018 under 28 U.S.C. § 2107(a) and FRAP 4(a)(4)(A)(v).[4] Plaintiff cross-appealed; the parties stipulated to dismiss the cross-appeal in this Court.

ISSUES

1. Whether the evidence precluded the jury's joint-venture finding.
2. Whether the district court had discretion to deny CCSI's new-trial motion on punitive damages.
3. Whether the district court had discretion to limit expert witness testimony.
4. Whether the district court had discretion to uphold the emotional-distress award.

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[1] ECF-50/2:3-22 (first amended complaint); ECF-76/1:21-2:6 (answer).

[2] ECF-374.

[3] ECF-427.

[4] ECF-429.

STATEMENT OF THE CASE

I. McClure and his injury.

By the time a debilitating injury threw his life into chaos, Jim McClure had achieved a dream life. He was happily married to Amy, with two daughters.[5] He was a fun-loving man, active in his church, and coached his daughter's soccer team.[6] His long-time physician Dr. Turner described him as a "dedicated parent, husband, a very diligent guy, very detail-oriented," with no major health problems.[7]

He had worked at Progressive Insurance for 14 years, becoming a high-level manager responsible for over 60 people.[8] His work meant a lot to him.[9]

In November 2012, McClure hit his head on a pole.[10] Unbeknownst to him, that blow caused a traumatic brain injury, and the next week he had severe headaches and "brain fog."[11] He unsuccessfully tried to work, and then saw Dr. Turner who referred him to Dr. Foltz, a neurologist.[12]

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[5] ECF-343/505:24-25.

[6] ECF-343/482:19-22, 504:25-505:5; ECF-345/597:19-23.

[7] ECF-343/450:5-24.

[8] ECF-350/887:24-888:1, 888:22-889:24; SER-V4/074.

[9] ECF-346/622:19-623:4; ECF-350/887:24-889:10.

[10] ECF-346/625:23-627:2.

[11] ECF-346/627:22-628:6.

[12] ECF-343/455:24-456:1; ECF-346/628:7-15.

II. McClure's injury prevented him from working.

A. Years earlier, McClure had insured himself with high-end disability insurance.

After the McClures married (17 years before the accident), their Country Life insurance agent urged them to purchase disability insurance, telling them that "goodness forbid something were to happen to you that you couldn't work," with disability insurance "at least you wouldn't have to worry about food, bills."[13]

Wanting the best protection possible, McClure purchased an "own-occupation" policy, which provided benefits if he became unable to perform the important duties of his *particular* occupation—"[i]t doesn't matter that [he] can do anything else."[14] This more-expensive policy contains no mental-health exclusion, no self-reporting limitation, and no objective-evidence requirement for mental disability.[15]

Around the time of McClure's accident, the McClures' Country Life agent had coincidentally arranged to meet with them and the accident came up.[16] Although McClure explained "he was trying to get better,"[17] the agent pressed him to file a

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[13] SER-V4/168; ECF-350/885:19-886:21.

[14] ECF-341/246:18-247:5; SER-V4/162.

[15] ECF-359-3/49:20-50:19; ECF-341/259:11-20; *cf.* SER-V4/163 (policy limitations).

[16] ECF-346/629:11-630:6.

[17] ECF-346/630:4-6.

claim because "[t]hat's what it's there for."[18] Both Dr. Turner and Dr. Foltz filled out disability claim forms, diagnosing McClure with postconcussive syndrome, vertigo, and depression, with "objective medical findings" of memory loss, confusion, and depression.[19]

Defendants (Country Life and CCSI, collectively "Country") opened the disability claim in January 2013.[20] Progressive's employer-provided short-term disability insurance also kicked in.[21]

B. After McClure tried to return to work, his conditions worsened.

With McClure's self-worth wrapped up in working and providing for his family, he tried to return to work for a half day in December 2012 (a month after the injury). It "did not go well," and he had to go home.[22]

McClure "very badly" wanted to get back to work,[23] which his wife, doctor, employer, and medical records confirm.[24] Dr. Turner "did not think Jim could

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[18] ECF-346/630:7-8.

[19] SER-V4/059-60.

[20] SER-V4/055.

[21] ECF-346/630:17-631:11.

[22] SER-V4/178.

[23] ECF-346/631:12-16.

[24] ECF-346/631:14-16 (Amy); ECF-343/460:1-23 (Dr. Turner); ECF-345/577:11-19 (Progressive representative); SER-V4/180-82.

work," and advised him to focus on getting better.[25] McClure kept "pushing to return to work" and scheduling return-to-work dates, but Dr. Turner overruled him because he "wasn't where he needed to be."[26] Dr. Turner said that "Jim's biggest fear started to become that he wouldn't be able to go back to work," and "he wanted nothing more than" to return.[27]

Anxious to improve, McClure constantly asked Dr. Turner, "[w]ho else can I see? Who else can help me? How do I get better?"[28] Eventually, McClure saw a slew of specialists: Dr. Foltz (neurologist), Dr. Howell (speech pathologist at Barrow Neurological Institute), Dr. Boulware (psychiatrist), Dr. Kang (psychiatrist), Dr. Sherman (psychiatrist), Dr. Borgaro (neuropsychologist), Tina Dent (social worker), Dr. Zaccari (social worker), and Apex Physical Therapies.[29]

McClure nevertheless got worse. He suffered from severe headaches, vertigo, "brain fog," and trouble "word finding" (speech difficulty).[30] His continued decline eventually led to depression.[31]

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[25] ECF-343/458:13-21.

[26] ECF-346/640:20-641:7; ECF-343/460:18-23.

[27] ECF-343/460:9-17, 467:9-12.

[28] ECF-343/460:1-8.

[29] ECF-343/456:17-21; ECF-346/635:23-636:15; ECF-349/802:19-804:17, 810:15-811:18; ECF-350/853:20-22, 861:15-19.

[30] ECF-346/627:11-628:6; ECF-350/898:11-23.

[31] ECF-346/635:14-20.

Dr. Foltz referred McClure to Dr. Borgaro, who administered a neuropsychological exam in January 2013.[32] Dr. Borgaro's report showed "significant neurocognitive impairment," "deficits in memory" "visual and verbal," and results "not atypical of a post-concussive syndrome."[33] Dr. Borgaro advised reevaluation in a year.[34]

In February 2013, Country reviewed McClure's medical records and found that his impairment "would prevent him from performing managerial function."[35] Country approved McClure's claim.[36] The insurance the McClures hoped never to use, now seemed to have been worth the 17 years of premiums.

C. McClure was repeatedly hospitalized.

In May 2013 (six months after his injury), McClure's depression overcame him. He was hospitalized for a week after he almost took "a handful of pills" to "do [him]self in."[37]

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[32] ECF-343/456:12-457:22; SER-V4/070.

[33] SER-V4/072-73 (Dr. Borgaro's report); *see also* ECF-359-1/50:21-52:7 (Nurse Newby confirming); ECF-359-3/24:10-25:12 (Spellmeyer confirming).

[34] SER-V4/073.

[35] SER-V4/074.

[36] SER-V4/075.

[37] ECF-346/636:13-637:5; SER-V4/077 (5/6/2013–5/13/2013).

Then, in December, he had a seizure and crashed his car.[38] He was hospitalized for another week after the police found him unconscious in his car.[39] His neurologist ordered an EEG, which showed left-side sharp waves "consistent with a diagnosis of partial epilepsy."[40]

D. Country orders a duplicative neuropsych exam and Progressive terminates McClure.

The week after getting out of the hospital, McClure went for Dr. Borgaro's one-year reassessment neuropsych exam.[41] That very same week, McClure, whose condition had worsened during the year, received a letter from Country saying that "the medical correspondence provided does not support disability from a physical standpoint."[42] The letter told him that if he did not undergo an independent medical examination ("IME") in the form of a neuropsych examination, Country would terminate his benefits.[43]

The McClures were blindsided and confused—McClure had *just* gotten out of the hospital after a seizure-induced car crash, had recently been hospitalized for suicidal depression, had been seeing a battery of specialists, and his doctor wouldn't

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[38] ECF-346/642:1-9.

[39] ECF-343/469:2-4; SER-V4/103 (12/10/2013–12/15/2013).

[40] SER-V5/025 (report); ECF-343/469:18-19 (Dr. Turner).

[41] SER-V4/106-08.

[42] SER-V4/100-101.

[43] *Id.*

let him return to work. How could the records "not support disability"? On top of that, McClure had *just* had a neuropsych exam *the same week*—Country's letter demanding a neuropsych exam literally was in the mail while he was undergoing the exam.[44]

Amy pleaded with Country to use Dr. Borgaro's report rather than making McClure endure another all-day examination when he was still a wreck from his latest hospitalization.[45] Even though it was objectively too soon for another exam, Country refused.[46]

Unfortunately, things got even worse. By January 2014, McClure hadn't been able to work for 14 months and Progressive released his position.[47] That was a "very big" blow to McClure because he still "wanted very badly to work."[48] He tried to get a new job, but his disability meant he couldn't even survive a job interview.[49]

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[44] *Compare* SER-V4/100 (12/17/2013 letter), *with* SER-V4/108 (12/18/2013 exam).

[45] SER-V4/102; ECF-346/646:1-648:7, 650:8-20.

[46] ECF-341/292:20-293:12; SER-V4/102.

[47] ECF-346/642:13-643:1.

[48] ECF-346/643:2-12.

[49] ECF-346/643:13-23.

E. Country terminates benefits.

In February 2014, Dr. Strupinsky administered the neuropsych IME that Country demanded.[50] For months, the McClures repeatedly begged Country for a copy because McClure's doctors asked for it.[51] At that time, they also told Country that McClure had "blacked out while driving due to a seizure" and "was hospitalized for a week."[52]

Although the recent hospital records were enough to support McClure's claim on their own, in April 2014 Country sent the McClures another letter claiming it found no evidence of "any incapacity to perform your occupation as a Manager of Sales and Service."[53] Country had terminated McClure's disability benefits. Country also finally provided Dr. Strupinsky's report for which the McClures had been begging.[54]

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[50] SER-V4/115.

[51] SER-V4/104 (claims memo) ("his doctors really need to see a copy . . . *so they will know how to treat him in the future*" (emphasis added)); ECF-346/651:16-653:24.

[52] SER-V4/111.

[53] SER-V4/109-10.

[54] SER-V4/110.

III. Unbeknownst to McClure, Country had been improperly looking for reasons to deny his claim.

A. Country stopped requesting medical records.

As the insurer, Country knew it had an obligation to "get as many medical records as" possible.[55] Indeed, the duty of good faith obligates insurers to "get ongoing medical records,"[56] typically "at least monthly or every three months."[57] But after only six months, Country abruptly stopped requesting records—records Country knew made it "a payable claim."[58]

When Country terminated the claim in April 2014, Country had not requested records from Dr. Turner in seven months, Dr. Foltz in eight months, Dr. Howell in five months, and Dr. Boulware/Dr. Kang in eight months.[59] Country never requested *any* records from Dr. Sherman.[60] Likewise for EEG records, even though seizures "alone can be a basis for disability."[61] To top it off, Country never requested the

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[55] ECF-359-3/38:20-22.

[56] ECF-341/264:2.

[57] ECF-341/257:4-16.

[58] ECF-359-3/117:7-24.

[59] ECF-341/280:11-281:7; SER-V4/078-80, 90, 92-93; *see also* ECF-390/1172:7-23.

[60] ECF-390/1172:24-1173:13.

[61] ECF-341/312:3-22; ECF-359-1/119:13-16.

records from McClure's two most recent hospitalizations,[62] which were sufficient *on their own* to support his claim,[63] even though the McClures authorized their release.[64] Country had failed to conduct a "thorough, fair," and unbiased investigation.[65]

B. Country tied claims handlers' bonuses to financial performance.

Meanwhile, Country was struggling financially and "losing money" on disability claims.[66] To fix this, Country's corporate family began sharing financial information with claims employees and letting them know if the figures improved, employees would personally benefit.[67]

The month before terminating McClure's claim, Country changed its bonus program so employees—including disability claims handlers—would get bonuses

[62] ECF-359-3/144:9-19 ("We did not have the hospital records, no."); ECF-353/962:12-15.

[63] ECF-359-1/72:23-77:6, 77:20-79:2, 118:13-119:10, 119:13-16, 123:12-18, 124:3-10; ECF-359-3/45:1-5, 140:11-25; ECF-353/962:12-18; *see also* ECF-342/340:7-12.

[64] SER-V4/077, 103.

[65] ECF-341/263:21-22.

[66] ECF-392/1486:2-19; ECF-342/365:18-366:6.

[67] SER-V5/006-20.

based on the company's "return on revenue."[68] Country kept "them informed of whether they're going to be moving toward bonus or not."[69]

But the only way claims handlers can improve company profits is to deny or terminate claims.[70] Thus, although an insurer cannot terminate a claim based on profit considerations, and must give "equal consideration" to the insured's interests,[71] Defendants implemented policies that virtually guaranteed the claims handlers would do otherwise. Predictably, when Country's financial condition worsened, those involved with McClure's claim began looking for ways to terminate his benefits.[72]

C. To improve its bottom line, Country hunted for reasons to terminate McClure's claim.

Country never doubted McClure's doctors' qualifications or treatment choices, but nevertheless began looking for other ways to deny the claim. One claims handler in the bonus pool (Nurse Newby) tried practically everything. She categorized McClure's condition as "a mental nervous condition," thinking

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[68] SER-V5/027; ECF-392/1476:8-1477:5.

[69] ECF-342/370:4-6.

[70] ECF-342/368:20-369:12.

[71] ECF-341/262:17-263:5, 271:1-272:2; *see also* ECF-353/944:15-24.

[72] *Compare* SER-V5/006-07 *and* ECF-342/364:10-365:4 (performance in 2012, at time of McClure's accident), *with* SER-V5/008-16, *and* ECF-342/365:15-368:19 (performance in 2014, when Country hunted for reasons to terminate McClure's claim).

(incorrectly) that his policy had a two-year mental-nervous limitation.[73] She noted that some of his symptoms were "self-reported,"[74] apparently thinking (incorrectly) that his policy required more.[75] She even requested surveillance, which was rejected, presumably because Country never doubted McClure's sincerity—"we don't believe that he was fraudulent or making a fraudulent claim, no."[76]

In late 2013, Country reviewed speech therapy notes from Dr. Howell. She had seen McClure 22 times, and had documented significant functional deficits, including decreased ability to "work in a competitive environment."[77] But Newby—perhaps thinking (incorrectly) that McClure's policy required "objective evidence"—wrote that Dr. Howell's records "do not document *objective* evidence of impairment."[78] This was untrue—the records had an "[o]bjective data" category,"[79] and even Country's claim file noted that on the phone McClure "seemed very disoriented" and "was struggling stringing together a sentence without stopping

[73] ECF-359-3/50:3-19.

[74] SER-V4/091; ECF-359-3/53:7-10.

[75] ECF-341/259:17-20; *cf.* SER-V4/163 (policy limitations).

[76] ECF-353/948:9-17; *see also* ECF-359-3/53:21-54:21.

[77] SER-V4/097.

[78] SER-V4/099 (emphasis added); ECF-341/259:11-16; *cf.* SER-V4/163 (policy limitations).

[79] SER-V4/096; *see also* ECF-359-3/57:6-68:3.

or double checking his wording."[80] Also, Country's claims analyst knew Dr. Howell's records "supported [McClure's] continued disability."[81]

D. Dr. Strupinsky's IME.

Although an insurer must "have a reasonable basis" to order an IME,[82] Country used its invented critique of Dr. Howell to justify forcing McClure to endure another neuropsych exam.[83] PsyBar (which arranged the examination) warned Country that "it was too close" in time for another neuropsych exam,[84] but Country ignored that warning.

The IME also violated other industry standards. Dr. Strupinsky was required to review McClure's past medical records, but the most recent records were missing because Country never requested them.[85] Dr. Strupinsky even "ask[ed] for more records," but "[t]hey were not provided."[86]

Curiously, Country did not ask Dr. Strupinsky to analyze whether McClure could perform the key duties of his occupation, and nothing in her report indicates

[80] SER-V4/076; ECF-359-1/108:11-109:12.

[81] ECF-359-3/68:4-10.

[82] ECF-341/268:13-269:20.

[83] ECF-359-1/98:10-101:2; SER-V4/099, 102; ECF-341/281:8-17.

[84] ECF-341/292:20-293:12.

[85] ECF-392/1423:21-1425:13.

[86] ECF-392/1425:18-22.

that McClure could perform his managerial functions.[87] Indeed, Dr. Strupinsky testified that she did not intend to suggest that he could.[88] The report did, however, note that McClure continued to suffer from "Major Depressive Disorder" and "Generalized Anxiety Disorder," and recommended treatment.[89] It also identified McClure's "suicidal ideation" with several results in the "severe" range.[90] It also stated that some results were "invalid."[91]

Most importantly, though, Dr. Strupinsky's report contained an italicized warning that the report "*may be misunderstood by persons without training in neuropsychology. Please contact the author of this report or seek out the opinion of another neuropsychologist should you have questions about any aspect of these test results*."[92]

The nurse Country charged with reviewing the report told her supervisor that she didn't have *any* experience interpreting such reports—this was her first.[93] Although PsyBar specifically offered for Country to "speak with a psychologist if

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[87] ECF-392/1421:23-1423:3; ECF-342/338:16-20.

[88] ECF-342/338:16-20.

[89] SER-V4/138.

[90] SER-V4/133; *accord* ECF-392/1435:7-1436:4.

[91] SER-V4/135-40; *see also* SER-V4/108 (description of MMPI-2).

[92] SER-V4/128.

[93] ECF-341/300:18-24.

you would like to discuss this report for clarification *at no charge*,"[94] Country did not do so.[95] Country also failed to provide the report to McClure's treating physicians, even though "one of the reasons you obtain an IME" is to gain "a deeper understanding and to share that information with the treating physician[s]."[96] This, too, violated industry standards.[97]

Although the duty of good faith required Country to conduct a "thorough, fair," and unbiased investigation[98] before terminating a claim, Country did no other investigation—not even a phone call to McClure's physicians.[99] That duty also obligated Country to (1) "be objective" in evaluating the information and not "ignore information in the record that supports" the insured,[100] (2) "giv[e] significant weight to the treating physician," and (3) have "a very good reason" to disregard the "treating physician's opinions."[101] Nevertheless, Country ignored the records supporting McClure's claim and disregarded the consensus of McClure's treating

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[94] SER-V4/114 (emphasis added).

[95] ECF-341/306:15-307:13.

[96] ECF-341/309:4-7.

[97] ECF-341/307:18-22.

[98] ECF-341/263:21-22.

[99] *Compare* SER-V4/279 (claims analyst "happy" to call physicians if it is "quicker" "to help our insured"), *with* ECF-343/473:6-8 (no calls), *and* ECF-342/354:16-25 (no calls).

[100] ECF-341/265:6-15.

[101] ECF-341/268:1-8.

physicians. In the termination letter, Country then flat-out lied to McClure, telling him that "the medical information does not show physical or cognitive impairments" supporting disability.[102]

Country had thus terminated McClure's claim without any reasonable basis to do so.

E. Country ignored additional evidence of McClure's disability.

Before receiving the termination letter, Amy sent Country a letter that crossed in the mail with Country's letter. She identified (and even included some copies of) several medical records that Country did not have: an EEG "showing sharp brain waves in the left hemisphere, which shows seizure tendencies," "a VNG test . . . diagnosing of BBPV," and high ammonia levels.[103] Country ignored these records because "the determination had been made. Our practice is not to request additional information after we've already made the determination that the claim was terminated."[104]

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[102] SER-V4/109-10; ECF-341/287:23-288:22 ("an outrageous violation of . . . industry standards"; "an outright misrepresentation"; "I've never seen anything quite this outrageous, to be honest.").

[103] SER-V4/111-12.

[104] ECF-359-3/153:15-19; *see also* ECF-359-3/175:3-17.

IV. In the aftermath of the termination, McClure deteriorated and Country refused to remedy its misconduct.

McClure's injury left him in a particularly vulnerable state. McClure expected his disability insurer to be there if he ever needed it—that's why he paid premiums for 17 years.[105] Aggravating or worsening his condition is the foreseeable and predictable result of abandoning him and destroying his ability to provide for his family. And that's exactly what happened.

As explained below (Argument § IV.C), being abandoned by his insurer aggravated his existing symptoms, throwing him into unprecedented rage and causing more severe depression.[106] He had increased suicidal thoughts linked directly to the termination, and was sent for "psychiatric hospitalization" within weeks of the termination.[107]

On top of that, his identity depended on providing for his family. His insurance benefits allowed his family to squeak by. After Defendants terminated his claim, he had to turn to charity just to put food on the table, his church had to pay

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[105] ECF-350/886:11-14, 905:6-17, 907:14-23, 909:16 ("I just totally feel that they didn't care for me.").

[106] ECF-350/907:24-908:6; ECF-346/660:8, 660:15-21, 662:11-17, 663:6, 664:14-21; ECF-343/472:3, 472:19-20.

[107] ECF-350/908:13-909:20 (Q. "Do you feel that the suicidal feelings that you were experiencing that led up to your admission in June had anything to do with the termination of your benefits by Country Life? / A. . . . "[Y]es, I did."); ECF-346/664:14-21.

his daughter's soccer expenses, and friends had to bring over a turkey for Thanksgiving.[108] This made him more humiliated and despondent than ever before.[109]

V. Litigation and trial.

A. McClure sued Country for its bad faith termination.

It was glaringly obvious that Country lacked any reasonable basis to terminate McClure's benefits given his extensively documented medical conditions. Accordingly, in September 2015, McClure's attorney wrote Country, asking it "to undo the wrongful denial," and provided supporting details.[110] The letter gave Country one chance to rectify its egregious misdeeds.

Country initially drafted a response saying that Country agreed that McClure had "suffered from depression and anxiety," offered to consider new evidence, and explained that "[i]f the records support the insured's claim, COUNTRY Life will pay benefits *retroactive to May, 2014*"—the termination date.[111] But Country never

[108] ECF-346/666:20-668:13; ECF-350/910:2-3; ECF-345/604:3-5.

[109] ECF-346/669:7-17; ECF-350/910:2-14; ECF-345/603:22-604:21, 605:21-606:14; ECF-343/472:8-15.

[110] SER-V4/144.

[111] SER-V5/023-24 (emphasis added); *see also* ECF-390/1152:3-10.

sent this draft.[112] Its official response deleted the offer to reconsider the previous decision with retroactive benefits, expressly refusing to "consider benefits" before October 24, 2014.[113] Conveniently, that would have meant a new claim, new waiting period, and substantially reduced benefits.[114]

B. Country's indefensible partial reinstatement of benefits during the litigation.

In December 2015, McClure sued Country Life and CCSI (Country Life's sister corporation that administered claims on Country's behalf)[115] for breach of contract and insurance bad faith.[116]

The lawsuit forced Country to review the medical records it had previously tried to ignore, and, as a result, Country knew it owed McClure benefits.[117] But Country also apparently believed it would look bad to a jury if it admitted that McClure was disabled when Country terminated his claim. Country thus chose to take the incoherent position that McClure was disabled from November 27, 2012 to

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[112] ECF-390/1152:14-18. Country changed its mind because of an unrelated and irrelevant mistake a Country agent made on a form McClure signed. McClure never saw the mistake because the agent sent McClure only the signature page. No one disputes that McClure did not intentionally do anything wrong. *See* ECF-390/1153:21-1163:20.

[113] SER-V4/147.

[114] ECF-390/1160:22-1162:11.

[115] *See* Argument § I.C.

[116] ECF-1; ECF-50.

[117] ECF-390/1145:5-20.

April 23, 2014, and again after June 16, 2014, but miraculously could perform his high-level managerial functions for seven weeks from April 23 to June 16, 2014.[118] But the medical evidence uniformly contradicted Country's revisionist history.[119]

Meanwhile, Aetna (which ran Progressive's employer-provided long-term disability) had found McClure "disabled from *any reasonable occupation*," and has continued to pay uninterrupted disability benefits.[120] In addition, he has received uninterrupted social security disability benefits (for which his insurers required him to apply).[121] Unfortunately, those benefits covered only a portion of his former salary, so McClure also needed his Country policy.[122]

C. Trial.

The case proceeded to a 10-day jury trial. Defendants agreed not to contest that "[t]he individuals who worked on the adjustment and processing of Mr. McClure's disability claim were employees of . . . CCSI."[123] The evidence showed

[118] *Cf.* ECF-340/221:19-222:12 (Country's opening statement).

[119] ECF-392/1462:7-12.

[120] SER-V4/179 (email from Aetna in Progressive's files) (emphasis added); ECF-345/593:10-595:7 (Progressive representative).

[121] ECF-349/794:25-795:7; SER-V4/160.

[122] ECF-346/665:5-24.

[123] ECF-309/3:2-4:5, ¶ K.

that although Country issued the policies, Country Life had no employees, and CCSI employees administered the claims on Country Life's behalf.[124]

Qualified[125] disability claims consultant Mary Fuller explained Country's various obligations—obligations with which Defendants' witnesses agreed.[126] Fuller testified at length how Country "violated the[] [applicable good-faith] standards throughout the claim, prior to the termination, and they violated them again after litigation and when they reinstated his benefits."[127] She explained that in its denial letter, Country made "an outright misrepresentation to the insured about the facts related to his claim,"[128] and that some of Country's misconduct was more "outrageous" than anything she had seen in her fifteen years as a disability-claims consultant.[129]

McClure, Amy, McClure's doctors, and others testified about how his injury disabled him.[130] The jury also heard Dr. Turner's devastating prognosis for

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[124] *See* Argument § I.C.

[125] ECF-341/230:19-24, 234:1-235:14, 236:16-18.

[126] *See, e.g.*, ECF-359-3/37:1-38:5 (Spellmeyer); ECF-353/943:25-944:24, 957:7-13 (Anderson).

[127] ECF-341/273:5-7.

[128] ECF-341/288:8-13.

[129] ECF-341/230:20-24, 288:14-289:8, 308:25-309:13.

[130] ECF-350/898:8-901:8 (McClure); ECF-346/635:13-638:25 (Amy); ECF-343/447:25-449:21, 450:14-18 (Dr. Turner); ECF-345/598:18-599:4 (Figg).

McClure,[131] and heard extensive evidence of the harm Defendants caused McClure.[132]

In contrast, Defendants lacked any coherent defense, and their witnesses made the jury's job easy. Country's claims analyst, for example, admitted that Country needed "evidence" that McClure could "return to his occupation" before denying the claim (which it lacked), and that Country would need "some kind of basis" to reject the "treating doctor's opinion[s]"[133] (which it also lacked). She also admitted that Country lacked "any basis for rejecting any of [McClure's] treating doctors' opinions," and that the records in Country's possession confirmed "it was a payable claim."[134] As for the missing hospital records, she testified Country did not need them because "we were already paying" the claim,[135] which made no sense when Country denied the claim.

The jury found for McClure on all claims. On the bad faith claim, the jury awarded $1,290,000 for emotional distress, $45,000 for loss of enjoyment, and $173,593.76 in future disability benefits, with $2,500,000 in punitive damages

[131] ECF-343/449:11-21.

[132] *See* notes 209-236, below.

[133] ECF-359-3/39:16-40:23.

[134] ECF-359-3/117:7-24, 134:13-15.

[135] ECF-359-3/45:13-20.

against each of Country Life and CCSI.[136] On breach of contract, it awarded $23,469.35 in unpaid policy benefits and $1,245.74 in unrefunded premium payments.[137] It also found that CCSI and Country Life were jointly liable.[138]

After the district court entered judgment, Country moved for a new trial and motion for judgment as a matter of law on joint venture.[139] In a thorough, 21-page order, the district court denied the motion (except as to an irrelevant and unappealed issue).[140] Country appealed, McClure cross-appealed, and the parties stipulated to dismiss the cross-appeal.[141]

SUMMARY OF ARGUMENT

1. Ample evidence permitted the jury to find that Country Life and CCSI had formed a joint venture. Defendants agreed not to contest that "[t]he individuals who worked on the adjustment and processing of Mr. McClure's disability claim were employees of . . . CCSI."[142] Country Life issued insurance policies and collected premiums, while CCSI administered claims on the policies. The evidence

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[136] ECF-374/4:1-5:14.

[137] ECF-374/3:1-9.

[138] ECF-374/2:1-11.

[139] ECF-397 (judgment); ECF-404 (motion); ECF-411 (response); ECF-412 (reply).

[140] ECF-427.

[141] ECF-429 (notice of appeal); ECF-436 (notice of cross-appeal).

[142] ECF-309/3:2-4:5, ¶ K.

was undisputed that Country Life has no employees, and that the companies shared a common interest in profitably administering claims on Country Life's disability policies as part of the same "Country Financial" corporate family. Because Country has no employees, the jury could also find that CCSI had at least "some voice" in administering claims on Country Life's disability policies, which is all that is required to satisfy the "equal right of control" element. Although Defendants may not like it, this case is a paradigm example of a claims-handling joint venture. (Argument §§ I.B-I.C.) Defendants' contention otherwise ignores the standard of review and improperly invites the Court to construe evidence in their favor. (Argument § I.D.)

2. Arizona law permits punitive damages against a company for the actions of its employees (under respondeat superior) and its joint venturer. (Argument § II.B.) The evidence permitted the jury to award punitive damages against CCSI on both bases. First, CCSI's employees committed the culpable claims-handling conduct, and respondeat superior makes CCSI liable for these acts. Second, Defendants were engaged in a joint venture, meaning each company is responsible for the conduct of the employees working for the CCSI-Country Life joint venture. (Argument § II.C.) Defendants' argument that the higher burden of proof for punitive damages protects CCSI from punitive liability misses the point. CCSI employees engaged in the misconduct giving rise to Country Life's punitive

liability (which Defendants do not challenge on appeal). That means that the jury could separately assess CCSI with punitive damages under either respondeat superior or joint venture. In other words, the jury could rely on the same clear and convincing evidence to separately assess both Defendants with punitive damages. (Argument § II.D.)

3. The district court limited the testimony of Defendants' expert witness on two independent grounds: (1) reliability, and (2) ultimate legal issue. Country did not appeal (and therefore waived) the second basis. (Argument §§ III.C.3-III.C.4.) Moreover, Rule 702 required the district court to serve as gatekeeper and exclude unreliable expert testimony. (Argument §§ III.C.1-III.C.2.) The expert's conception of bad faith was inconsistent with Arizona law, so the district court properly excluded it, while still allowing the expert "to give all of her relevant and otherwise admissible opinions."[143] (Argument § III.C.3.) Moreover, Defendants failed to identify any opinion that the district court actually excluded so it is impossible to say they suffered any prejudice. (Argument § III.D.)

4. Arizona law permits recovery for humiliation and other emotional harms, and the eggshell-plaintiff doctrine makes a tortfeasor responsible for aggravation of preexisting conditions. (Argument § IV.B.) The district court had

[143] ECF-427/4:13-5:1.

discretion to deny a new trial because the evidence permitted the jury to find that Country's bad-faith termination caused new and aggravated humiliation, depression, and anxiety beyond what McClure's underlying injury caused (e.g., from financially wrecking the family and causing him to become hospitalized from increased suicidal thoughts directly linked to the bad-faith termination). (Argument § IV.C.) Country's arguments to the contrary ignore the standard of review, ignore abundant evidence supporting the verdict, and construe isolated snippets of evidence in their favor. (Argument § IV.D.) Defendants also ignore the great deference given to the jury and district court on these issues. (Argument § IV.E.)

The Court should affirm.

ARGUMENT

I. The jury could find Defendants were joint venturers.

A. Standard of Review.

Whether a joint venture exists is normally "a question of fact to the jury." *Mercer v. Vinson*, 336 P.2d 854, 858 (Ariz. 1959). To reverse the district court's Rule 50(b) ruling, the Court must conclude that "the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion," which "is contrary to that of the jury." *Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794, 797 (9th Cir. 2017) (citation omitted).

B. Arizona law on joint venture.

Under Arizona law, a third-party claims administrator may be held "jointly and severally liable with the [insurer] for a bad faith refusal to pay" if the parties are engaged in a joint venture. *Farr v. Transamerica Occidental Life Ins. Co. of Cal.*, 699 P.2d 376, 386 (Ariz. App. 1984); *see also Sparks v. Republic Nat'l Life Ins. Co.*, 647 P.2d 1127, 1138 (Ariz. 1982) (jury could decide whether insurer and claims administrator were in joint venture). "A joint venture requires an agreement, a common purpose, a community of interest, and an equal right of control." *Sparks*, 647 P.2d at 1138.

C. Evidence supports the jury's joint venture finding.

The district court correctly found the evidence permitted the jury to find the requisite four elements.

First, a joint venture agreement "may be expressed or implied" and "is founded upon a mutual understanding between the parties that they will associate themselves in a particular venture, and their intent to do so may be inferred from their conduct." *Ellingson v. Sloan*, 527 P.2d 1100, 1104 (Ariz. App. 1974). Here, Country Life issued the disability policies[144] and accepted the insureds' premiums,[145]

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[144] SER-V4/154-75 (Country Life policy); ECF-390/1168:10-12 (Country's claims attorney confirming "Country Life is the entity that sells the disability policies").

[145] SER-V4/113 (Country Life letter requesting payment).

while CCSI managed the claims on Country Life's behalf.[146] In fact, Country Life had no employees; all claim management responsibilities fell to CCSI, which provided the employees to administer Country Life's claims.[147] Where, as here, the "facts indicate that the entities were not separate and independent corporations, but intimately intertwined companies that worked closely together" for a common purpose, there is enough evidence for a jury "to infer an agreement to engage in a joint venture." *Bobrowski v. Red Door Grp.*, 2011 WL 3555712, at *7 (D. Ariz. Aug. 11, 2011).

Second, the jury could find that Defendants shared a common purpose in administering claims. Both Defendants are within the "Country Financial" corporate family.[148] As discussed above, CCSI administered claims on Country Life's policies because Country Life has no employees. Tellingly, in the final pretrial order, Defendants *agreed not to contest* the fact that "[t]he individuals who worked on the

[146] ECF-309/3:2-4:5, ¶ K.

[147] ECF-359-5/7:2-7; ECF-392/1467:9-10, 1473:19-1474:14 (Carpenter testifying that although he "work[s] for Country Life," "[e]verybody in the organization" is employed by CCSI).

[148] ECF-359-5/10:12-11:4 ("Country Financial" is "a global term for all the companies"); SER-V5/021 (Country Life's "organizational chart"); ECF-390/1168:13-17 ("Country Financial" is "a trade name that's used by several entities").

adjustment and processing of Mr. McClure's disability claim were employees of . . . CCSI."[149]

Third, the jury could find that Defendants shared a community of interest in profitably administering claims on Country Life's disability policies. Again, Defendants belong to "Country Financial's" corporate family, which encourages "a high performance culture" by "[c]reating goal clarity and alignment" and promoting "stronger links between performance and pay."[150] Thus, all Country Financial employees—from "managers, CEO, down to mailroom people"—are eligible to participate in a common bonus program.[151] The bonus pool is "based on the operating results from all the [Country Life] companies."[152] The claims paid by Country Life on its disability policies impacts the company's income.[153] Country Financial regularly updates managers about financial results that impact bonuses.[154] This shared financial interest permitted the jury to find a shared community of interest. *See Bobrowski*, 2011 WL 3555712, at *7 ("All the entities shared a

[149] ECF-309/3:2-4:5, ¶ K.

[150] SER-V4/284-85; *see also* SER-V4/282 ("Employees are encouraged to find ways to work more efficiently and help continue to make a positive impact on our Return on Revenue (ROR).").

[151] ECF-392/1476:16-18.

[152] ECF-392/1476:19-21.

[153] ECF-359-5/115:1-4.

[154] SER-V5/006-20 (Country Life Vice President reporting financial results to CCSI employees, including disability claims manager Carpenter).

community of interest in selling units."); *see also Ceimo v. Gen. Am. Life Ins. Co.*, 2003 WL 25481095, at *1 (D. Ariz. Sept. 17, 2003) (finding community of interest where, as here, defendants "not only retained the same lawyers, but were, for the most part, treated as a single unit throughout the trial"), *aff'd*, 137 F. App'x 968 (9th Cir. 2005).

Finally, the jury could find that Defendants had an equal right to control the claims on Country Life's disability policies. As the district court instructed the jury,[155] a party to a joint venture need not have "an equivalent amount of control over the venture's operation"; instead, "it is sufficient that a venturer has some voice or right to be heard in the control and management of the venture." *Estate of Hernandez v. Flavio*, 930 P.2d 1309, 1313 (Ariz. 1997). Given that Country Life has no employees,[156] the jury could find that CCSI had at least "some voice" in administering claims on Country Life's disability policies. *Id.*

[155] ECF-384/18:11-14 ("For Country Life and [CCSI] to have a joint right to control over the venture it is not necessary for control over the venture to be shared equally. To be joint venturers, each venturer need only have a voice or right to be heard in the venture.").

[156] ECF-359-5/7:2-7; ECF-392/1467:9-10, 1473:19-1474:14 ("Everybody in the organization" is employed by CCSI); *see also* ECF-390/1167:7-20 (disability claims attorney testifying that he didn't know whether he worked for Country Life or CCSI).

Thus, the evidence (and Defendants' agreement not to contest that CCSI employees processed the claim)[157] permitted the jury to find that Country Life and CCSI were engaged in a joint venture to administer the claims on Country Life's disability policies.

D. Defendants' arguments lack merit.

The above shows that Defendants' claim (at 16-17) that "McClure and the District Court substitute evidence that the entities are part of one corporate family" for evidence of a "joint venture" rests on flouting the standard of review. Indeed, Defendants (at 17-18) blatantly construe isolated snippets of evidence in their favor, while ignoring the abundant evidence supporting the verdict. Defendants cannot show that the evidence, construed in McClure's favor, "permits only one reasonable conclusion" in their favor. *Dunlap*, 878 F.3d at 797.

Defendants' contention (at 18-19) that "McClure offered no evidence of an *actual* agreement" for CCSI "to handle the claims," ignores that a joint venture does not require an express agreement. *See Ellingson*, 527 P.2d at 1104. Defendants necessarily had some agreement, whether "express or implied" by conduct, *id.*, because one entity does not administer another entity's claims without one. Moreover, their claim (at 19) that *Sparks* and *Farr* dealt with "true third-party

[157] ECF-309/3:2-4:5, ¶ K.

arrangements" misses the point. The entity handling claims (whoever it is) may be held liable, and here, CCSI handled the claims.

Finally, Defendants cite (at 16 & n.3) *Landers-Scelfo v. Corp. Office Sys., Inc.*, 827 N.E.2d 1051 (Ill. App. Ct. 2005), for the proposition that "[a] joint venture does not arise simply because two entities have an ongoing relationship, or because one entity provides some service to the other." In *Landers-Scelfo*, "[t]he *only* sign of cooperation" between the entities was payroll and human resources services. *Id.* at 1058 (emphasis added). Here, CCSI provided Country Life with literally all its employees, including everyone who administered claims on Country Life's disability policies. (*See* Argument § I.C.) Country Life could not administer the claims on its disability policies without CCSI.

II. The district court had discretion to deny a new trial on punitive damages and Defendants have waived any challenge to the district court's alternative basis.

A. Standard of review.

Defendants did not file a Rule 50(b) motion on punitive damages, so they are limited to requesting a new trial on the issue. *See, e.g., Desrosiers v. Flight Int'l of Fla, Inc.*, 156 F.3d 952, 957 (9th Cir. 1998) (absent a proper Rule 50(b) motion, an "appellate court [is] without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.") (citation omitted). When, as here, the district court denied the motion because the verdict was not against the weight of

evidence, the ruling is "virtually unassailable." *Lam v. City of San Jose*, 869 F.3d 1077, 1084 (9th Cir. 2017) (citation omitted). This Court reviews the denial for "abuse of discretion," and may reverse "only when there is an *absolute absence of evidence* to support the jury's verdict." *Id.* (citation omitted).

B. A corporation can be liable for punitive damages for its agents' or joint venturer's acts.

"An employer is vicariously liable for the negligent or tortious acts of its employee acting within the scope and course of employment." *Higginbotham v. AN Motors of Scottsdale*, 269 P.3d 726, 728, ¶ 5 (Ariz. Ct. App. 2012) (citation omitted). Basic agency principals also teach that "a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority," and the jury was so instructed.[158] Moreover, "[t]wo employers can be vicariously liable for an employee's actions." *Ruelas v. Staff Builders Pers. Servs., Inc.*, 18 P.3d 138, 142, ¶ 13 (Ariz. Ct. App. 2001); *see also Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934, 939 (9th Cir. 2002) (an agent can have more than one principal). Lastly, in a joint venture, each party is both the agent and principal of the other "so that the act of one is the act of all." *West v. Soto*, 336 P.2d 153, 157 (Ariz. 1959).

[158] ECF-384/17:1-7.

Arizona also "allows punitive liability against a principal for the conduct of its agent without any showing of the principal's evil mind." *Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn*, 907 P.2d 506, 516 (Ariz. Ct. App. 1995). Accordingly, "punitive damages may be assessed against an employee and his employer, and even though the employer is liable only in respondeat superior, the employer will be liable for the separate assessment against it." *Id.* at 526.

These concepts apply with full force to insurers. Indeed, the law imposes on insurers "the duty of good faith," which "governs the insurer in discharging its contractual duties." *Walter v. Simmons*, 818 P.2d 214, 223 (Ariz. Ct. App. 1991). That duty is non-delegable—an insurer "cannot escape liability for a breach of that duty by delegating it to another, regardless of how the relationship of that third party is characterized." *Id.* Consequently, when an insurer utilizes another party for its claims handling, it remains liable for punitive damages should the other entity's employees engage in misconduct. *See, e.g.*, *Mendoza v. McDonald's Corp.*, 213 P.3d 288, 305, ¶ 56 (Ariz. Ct. App. 2009) (insurer's "liability for punitive damages extend[ed] to the actions of its [outside counsel] as well as the actions of its own employees and the [third-party claim administrator's] employees who worked on [the insured's] claim").

Similarly, a third-party claims administrator may be liable for punitive damages if a joint venture exists. *Farr*, 699 P.2d at 385-86 (jury separately assessed

punitive damages against third-party claims administrator in joint venture with insurer). Moreover, because any employer may be liable for punitive damages via respondeat superior, it follows that a third-party claims administrator whose employees engage in claims handling may be liable for punitive damages due to its employees' misconduct. *Cf. Arellano v. Primerica Life Ins. Co.*, 332 P.3d 597, 605, ¶ 37 (Ariz. Ct. App. 2014) ("An award of punitive damages . . . serves to encourage an employer to exercise control over its employees and agents.").

If the rule were otherwise, an insurance company could avoid punitive liability by hiring others to perform its claim handling, or, alternatively, the third party could avoid punitive liability notwithstanding the misconduct of its agents and employees. By both making the insurer's duty of good faith non-delegable and by holding the company whose agents perform the claims handling potentially liable for punitive damages, both the insurance company and its claims adjuster have a strong incentive to act in good faith. At bottom, nothing precludes two corporate entities from having punitive damages *separately* assessed against them based on the same agents' misconduct.

The fact that a jury must separately assess each defendant's punitive damages (if warranted) does not contradict these principles—it promotes them. Separate assessment allows the jury to determine a punishment that fits the offense, and determine whether the "reprehensibility" of their conduct "differ[s]." *Planned*

Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists, 422 F.3d 949, 960 (9th Cir. 2005). But when, as here, two defendants jointly engage in the wrongful acts and share equal culpability, a jury may award the same amount against each defendant.

C. The district court correctly rejected CCSI's request for a new trial given CCSI's respondeat superior and joint venture liability.

The district court denied a new trial on two independent bases: (1) respondent superior, and (2) joint venture.[159] This Court may affirm on either basis.

As a threshold matter, Defendants, for good reason, do not appeal the $2.5 million punitive-damages award against Country Life. Under Arizona law, "willful and knowing failure to process or pay a claim known to be valid" suffices for punitive damages in the insurance bad faith context. *Farr*, 699 P.2d at 383; *see also Rawlings v. Apodaca*, 726 P.2d 565, 579 (Ariz. 1986) (citing *Farr* with approval). The jury may also award punitive damages for (1) fraud in connection with denying the claim, (2) "[d]eliberate, overt and dishonest dealings," *Farr*, 699 P.2d at 383, and (3) other "sufficiently 'oppressive, outrageous or intolerable'" conduct, *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073, 1080 (Ariz. 1987) (citation omitted). Because Country Life didn't appeal the punitive-damages award, Defendants implicitly concede that the evidence permitted the jury to make these findings as to Country

[159] ECF-427/14:27-17:9.

Life. Consequently, the Court may assume that Country Life's agents (i.e., CCSI's employees) engaged in conduct warranting punitive damages.

1. Respondeat superior. As detailed in Argument § I.C, the evidence here established that Country Life issued the policies while CCSI—through its employees—administered the claims. Without objection, the district court instructed the jury that Country Life "cannot escape liability for failure to perform that duty by delegating its responsibility to somebody else,"[160] and that a corporation "is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority."[161] The jury, therefore, could easily find that CCSI's employees' culpable claims-handling conduct that gave rise to Country Life's liability (due to its non-delegable duty of good faith) also warranted punitive damages against CCSI (under respondeat superior). Indeed, as the district court observed, "[t]here was no dispute during trial about respondeat superior liability."[162]

2. Joint venture. As discussed in Argument § I.C, the evidence and instructions also permitted the jury to find a joint venture between Country Life and CCSI, meaning "the act of one is the act of all."[163] Thus, as the district court

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[160] ECF-384/26:1-5.

[161] ECF-384/17:1-7.

[162] ECF-427/16:2-3.

[163] ECF-427/16:20-22 (quoting *West*, 336 P.2d at 157); *see also* ECF-384/18:16-17 (jury instructions) ("[Y]ou must find each defendant responsible for the acts of the other.").

explained, "an award of punitive damages against each as a result of the actions of the employees working for the joint enterprise is allowed."[164] Indeed, because Defendants implicitly concede that their agents' misconduct was sufficiently reprehensible to support the $2.5M award against Country Life, it likewise supports the award against CCSI. The district court did not abuse its discretion by denying CCSI's request for a new trial on punitive liability.

D. CCSI's arguments ignore the record below.

In the face of this evidence, Defendants ask the Court to construe the evidence in their favor: "McClure proved—at most—that CCSI, as a staffing/HR entity, issued the paychecks for the people who handled his claim on behalf of Country Life." (OB23.) But the evidence, construed in McClure's favor, shows that CCSI not only employed the claims personnel, but also defined, influenced, and incentivized the claims-handling conduct CCSI sought from its employees. (*See* Argument § I.C.)

Tellingly, Defendants recognize that CCSI could be held liable under a respondeat superior theory, and therefore claim (at 23) that "McClure did not plead or prove any vicarious liability theory (including principal-agent or respondeat superior). . . ." But when they tried to convince the district court of this nonsense,

[164] ECF-427/16:5-7.

that court emphasized that "[t]he entire case . . . was premised on respondeat superior liability."[165]

Perhaps recognizing that the jury instructions undermine their fantastical claim that "McClure did not request a jury instruction that would allow a punitive damage award against CCSI based on Country Life's conduct," Defendants invent an alleged admission: McClure's "counsel flatly admitted to this failure [concerning the instructions] at the hearing on CCSI's post-trial motion challenging the punitive damage award." (OB23-24.) But nothing uttered post-trial could alter the instructions actually given, which *required* the jury to "find each defendant responsible for the acts of the other" in a joint venture (and also for CCSI's own employees' misconduct).[166]

Moreover, Defendants mischaracterize the supposed admission, which concerned irrelevant "joint and several liability."[167] The cited page also shows that although McClure's counsel agreed that there "has to be a specific finding as to each defendant that they acted with an evil mind,"[168] he explained that "much of the

[165] ECF-427/15:16-17.

[166] ECF-384/17:1-18:17.

[167] ER251 (ECF-425/4:8-9).

[168] *Id.* (ECF-425/4:5-7).

conduct is overlapping," such that "both [companies] are responsible" for the same individuals' misconduct (as explained above).[169]

Defendants also argue (at 22) that because the burden of proof is higher for punitive damages than joint venture, "[e]ven if" a joint venture exists, "there still can be no punitive damages award against CCSI on the record here." Not so. *CCSI's employees* engaged in the misconduct giving rise to Country Life's punitive liability by, for example, failing to "pay a claim known to be valid." *Farr*, 699 P.2d at 383. Because Defendants were in a joint venture, the very same clear and convincing evidence of *CCSI's employees'* misconduct—evidence Defendants implicitly concede permitted the jury to assess punitive damages against Country Life—permitted the jury to assess punitive damages against CCSI.

For this and other reasons, Defendants cannot find solace in *In re First Allied Mortg. Co.*, 471 F.3d 977 (9th Cir. 2006). That was "the rare case in which it is sufficiently certain that the jury award was not based on proper consideration of the evidence." *Id*. at 1001. Here, substantial evidence—not "blurred-lines argument" (OB25)—supports the punitive damages award, and Defendants all but concede the point. For these reasons, and contrary to Defendants' contention, either respondeat

[169] *Id.* (ECF-425/4:3-23).

superior or joint venture permitted the jury to award punitive damages against both CCSI and Country Life "in their individual capacities." (OB22.)

Given the actual record along with Defendants' implicit concession that respondeat superior suffices for liability, the Court should affirm the district court's ruling on punitive damage liability.

III. The district court had the discretion to limit Roberts's testimony; Defendants have waived any challenge to the district court's findings on this issue.

Defendants have waived this issue because they failed to appeal the trial court's alternative basis for its ruling. *See infra* Argument §§ III.C.3-III.C.4.

A. Standard of Review.

This Court reviews a "district court's evidentiary rulings," including its decisions to "exclude expert testimony . . . for an abuse of discretion." *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 859 (9th Cir. 2014). To reverse, the appellant must make "a showing of prejudice," *id.*, i.e., that, "more probably than not, the lower court's error tainted the verdict." *McEuin v. Crown Equip. Corp.*, 328 F.3d 1028, 1032 (9th Cir. 2003).

B. Additional procedural background.

After Defendants called Roberts to testify, McClure's counsel asked to voir dire Roberts.[170] Defendants did not ask for the jury to leave. Ultimately, the voir dire "revealed that Ms. Roberts' definition of insurance bad faith was not consistent with the definition utilized by Arizona courts."[171]

In particular, Roberts thought that "bad faith" in Arizona "is the unreasonable denial of a claim by a company with intent to injure the claimant."[172] But under Arizona law, the required "intent need not be an intent to injure, harm or oppress," rather than mistake or oversight. *Rawlings*, 726 P.2d at 577. Rather, "[i]t is sufficient to establish the tort of bad faith that the defendant has acted intentionally." *Id.* Consequently, the "jury need not even be instructed on intent." *Id.* Here, the instruction explained that "McClure must prove that Country Life intended its conduct," but "does not need to prove that Country Life intended to cause injury."[173]

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[170] ECF-391/1278:5-6, 1291:7-12. "Voir dire" means "[a] preliminary examination to test the competence of a witness or evidence." *Voir Dire*, Black's Law Dictionary (11th ed. 2019).

[171] ECF-427/3:22-23.

[172] SER-V5/052:23-24 ("[I]f you intend to wrongfully deny a claim, I think implicit in that is intent to harm.").

[173] ECF-384/24:1-6. The district court also instructed the jury that "Country Life's conduct is not intentional if it is inadvertent or due to a good faith mistake." *Id.*

In addition to revealing that Roberts "seem[ed] confused" because she was adding "an element that's not in the definition of" bad faith,[174] the voir dire also revealed that Roberts's qualifications were, at best, sketchy. Among other glaring problems, Roberts had "no experience handling disability claims,"[175] and hadn't read many key depositions.[176]

Outside the jury's presence,[177] the district court reviewed Roberts's deposition, which confirmed Roberts misunderstood Arizona bad-faith law.[178] The district court gave Defendants an opportunity to find "where she explains that she understands the standard of care,"[179] but what they pointed to—her reports—only confirmed Roberts's confusion.[180]

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[174] ECF-391/1308:15-18.

[175] ECF-391/1291:18-1292:9.

[176] ECF-391/1295:2-1296:10.

[177] ECF-391/1296:17-1320:8.

[178] ECF-391/1308:5-23.

[179] ECF-391/1312:13-14.

[180] ECF-391/1316:5-9 (Court noting that Roberts starts with the correct standard, but she then twice "talks about the knowingly set out to harm Mr. McClure."); *see also* SER-V5/223 (Roberts's final reports) ("My review found no indication of any intent to harm the policyholder.").

The district court then made a "narrow"[181] ruling: Defendants "can't ask the ultimate opinion about bad faith."[182] Over McClure's protestations,[183] the district court further ruled that Roberts could talk about Defendants' "process" for claims handling and whether Defendants' decisions had "a reasonable basis."[184]

This qualification gutted the limiting ruling because "[w]hether the action amounts to bad faith depends upon whether the insurer failed to honor a claim without a reasonable basis for doing so." *Sparks*, 647 P.2d at 1136. Unsurprisingly, Roberts then proceeded to testify at length, and ultimately gave "all of her relevant and otherwise admissible opinions."[185]

C. The district court properly limited Roberts' testimony because it was unreliable and went to an ultimate legal issue.

1. District courts must exclude unreliable expert testimony.

Federal Rule of Evidence 702 "assigns to the district court the role of gatekeeper and charges the court with assuring that expert testimony 'rests on a

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[181] ECF-427/5:25-26 ("The Court's ruling was narrow, however, and based on the witness's misunderstanding of the applicable definition of bad faith.").

[182] ECF-391/1319:25-1320:1.

[183] ECF-391/1315:17-19 ("You know, you can't just say they had a reasonable basis when she considers a reasonable basis as being that basis which is where they don't intend to harm the insured.").

[184] ECF-391/1319:7-15, 1320:3-6.

[185] *See* ECF-427/3:20-5:23 (noting the lack of limitation and summarizing Roberts's testimony); *see also* ECF-392/1365:18-19 (noting that Defendants "got in most of the opinions anyway").

reliable foundation and is relevant to the task at hand.'" *United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)). "The gatekeeper role entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* (citation omitted). This gatekeeping role is mandatory. *United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1191 (9th Cir. 2019) ("The district court abused its discretion in admitting [expert's] testimony without first finding it relevant and reliable under *Daubert* and Rule 702.").

Although obligatory, the trial judge has "considerable leeway" in "how to go about determining whether particular expert testimony is reliable."[186] This "broad discretion" includes not compelling trial courts "to conduct pretrial hearings in order to discharge the gatekeeping function." *United States v. Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000) (affirming district court's decision to not conduct a separate *Daubert* hearing and instead permit counsel to "conduct voir dire of the proffered expert at trial, in the presence of the jury" with further questioning outside of the jury's presence if the expert's testimony raised concerns).

[186] ECF-427/4:6-13 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)).

Moreover, the trial judge must "at the outset, pursuant to Rule 104(a)," conduct a preliminary assessment of the admissibility of the expert testimony. *Daubert*, 509 U.S. at 594-95. Subject to some exceptions not relevant here, Rule 104 gives trial judges wide latitude over whether to conduct the examination in front of the jury. *See* Fed. R. Evid. 104 advisory committee's note to subdivision (c) in 1972 proposed rule ("Not infrequently . . . time is saved by taking foundation proof in the presence of the jury").

Thus, Rule 104 gives district courts "discretion to allow opposing counsel to challenge the competency of an expert or other person by voir dire of the witness." Voir Dire of Witness (As to Admissibility of Testimony or Demonstrative Evidence), Federal Trial Objections § V20 (6th ed.) (copy at SER-V5/229-30). "This [voir dire] is done by interrupting direct examination and allowing opposing counsel to examine the witness by leading questions for the purpose of establishing grounds for an objection." *Id*.

2. Courts may exclude testimony that encroaches the district court's role of instructing the jury on applicable law.

Moreover, although testimony may not be objectionable merely "because it embraces an ultimate issue to be decided by the trier of fact," Fed. R. Evid. 704(a), "an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law," *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (citation omitted) (expert excluded for making

"erroneous statements of law"). "[I]nstructing the jury as to the applicable law is the distinct and exclusive province of the court." *Id.* at 1059 (affirming order precluding witness "from directly applying the UCC and other law to the facts of this case.").

3. Roberts' unreliable testimony went to an ultimate legal issue.

The district court provided two independent bases for why Roberts "could not opine that Defendants' conduct amounted to good faith or bad faith."[187] This Court may affirm on either basis.

1. Roberts's definition of "bad faith," which included "intent to injure the claimant,"[188] properly caused the district court concern. Moreover, Roberts never corrected her deposition,[189] and her confusion permeated her reports.[190] Roberts's blatant misunderstanding of Arizona law gave the district court ample basis to preclude Roberts from "giving opinions about standard of care when she's expressly

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[187] ECF-427/3:27-28.

[188] SER-V5/052:10-12.

[189] ECF-391/1301:11-13 ("COURT: Was there a correction made to the deposition or anything else? / MR. BURKE: No.").

[190] *See, e.g.*, SER-V5/223 ("My review found no indication of any intent to harm the policyholder."); *see also* ECF-391/1317:6-11 ("THE COURT: So I'm concerned about her giving opinions about what is bad faith because she defines it wrong. And she does it not only in the deposition but twice in the report, she talks about the intent to harm. She gives the right definition, but then she talks later in there about intent to harm being somehow an issue.").

stated the standard of care incorrectly."[191] *See, e.g.*, *Ruvalcaba-Garcia*, 923 F.3d at 1188 ("district court *must* perform a 'gatekeeping role'" (emphasis added; citation omitted)). Tellingly, Defendants do not dispute that bad faith in Arizona does not require any intent to harm the insured.

2. The district court found that "Roberts' opinions on whether Defendants acted in bad faith also were inadmissible because they were opinions on an ultimate issue of law."[192] As the district court explained, "instructing the jury on the applicable law 'is the distinct and exclusive province' of the court."[193] *Cf. Woods v. Lecureux*, 110 F.3d 1215, 1221 (6th Cir. 1997) (district court did not abuse its discretion in excluding expert witness testimony on whether a defendant was "deliberately indifferent" because it turns on the defendant's "mental state" and encompasses "the ultimate issue" for "the trier of fact").

4. Defendants' contention that the district court lacked the discretion to limit Roberts's testimony ignores one of the bases for the court's ruling and otherwise lacks merit.

On appeal, Defendants do not challenge the district court's second basis for its ruling (ultimate issue). Defendants have therefore waived any challenge to this basis, on which this Court may affirm. *Hillis v. Heineman*, 626 F.3d 1014, 1019 n.1

[191] ECF-391/1312:6-7.

[192] ECF-427/4:18-19.

[193] ECF-427/4:25-27 (citation omitted).

(9th Cir. 2010) ("Because [appellants] do not challenge the alternative ground on appeal, they have waived it, and we affirm the dismissal of the claims against [appellee] on that basis." (citation omitted)); *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief.").

Moreover, Defendants' critique of the first basis lacks merit. They contend (at 27) that the district court "erred by allowing McClure to make an untimely *Daubert* challenge," and "improperly excluding relevant testimony from Defendants' expert witness." But as previously explained, the district court had the duty to evaluate the reliability of Defendants' expert, and had wide latitude over how to do so. This Court has held, for example, that a district court may permit "voir dire of the proffered expert at trial, in the presence of the jury" with further questioning outside of the jury's presence to resolve admissibility issues. *Alatorre*, 222 F.3d at 1099. Nothing required the district court to conduct a pre-trial *Daubert* hearing. *See id*. Moreover, it would run contrary to foundational notions of justice and fairness to require a district court to admit blatantly inadmissible expert testimony that is likely to confuse the jury merely because the district court learned about the expert's unreliability during trial.

If the district court had not made a preventive ruling outside the presence of the jury, it unquestionably could have repeatedly sustained objections

contemporaneously (in front of the jury) each time Defendants' counsel asked a question that would have elicited inadmissible testimony. That alternative would have achieved the same result as the preventive ruling, but with *more* disruption. It cannot be an abuse of discretion to achieve the same result with less disruption via a preventive ruling.

The record also undermines Defendants' contention that Roberts correctly understood the relevant bad-faith standard. To defend her testimony, Defendants cite (at 28-29) a *causation* instruction. But Roberts testified about "*the definition* of bad faith in Arizona." When asked how *she* would "define 'bad faith' in Arizona," she gave an answer contrary to Arizona law.[194]

Defendants also emphasize (at 29-30) the district court's criticism of how the dispute unfolded, but the court's commentary merely confirms that the district court took the issue seriously. Ultimately, the record confirms that the district court did exactly what a careful trial judge should do in these circumstances.

D. Defendants suffered no prejudice and waived their challenge to the district court's findings.

Below, Defendants identified Roberts's "four opinions" they claim the district court precluded.[195] But as the district court explained, its narrow ruling "precluded

[194] ER780 (SER-V5/052).

[195] ECF-404/4:19-5:6.

none" of them.[196] The district court further found that had Defendants offered those four opinions, "they would have been inadmissible for reasons other than Rule 702(c)," and explained in detail the basis for this finding.[197] Defendants thus suffered no prejudice. *Cf. United States v. Laurienti*, 611 F.3d 530, 548 (9th Cir. 2010) (finding no prejudicial error and explaining that "[u]nlike in many cases, where the district court prohibits all testimony by a proffered expert, the district court here permitted testimony by Meyer on a wide range of topics and sustained objections only to a limited set of questions.").

Defendants' prejudice argument (at 32-34) suffers from several fatal flaws. First, as explained above, the district court found that (1) its narrow ruling did not have the preclusive effect claimed by Defendants, and (2) Defendants identified nothing that would have been otherwise admissible. On appeal, Defendants do not and cannot identify new opinions that the district court allegedly improperly excluded. Nor do they challenge the district court's findings on this issue (or say anything about them on appeal), although they could have done so. Having elected to not challenge these findings in their Opening Brief, Defendants may not do so in

[196] *See* ECF-427/4:28-5:1 (Roberts was free "to give all of her relevant and otherwise admissible opinions").

[197] *See* ECF-427/5:27-7:2.

reply, and this Court may affirm based on these unchallenged findings. *See, e.g.*, *Indep. Towers*, 350 F.3d at 929.

Second, Defendants' prejudice arguments rest on mischaracterizing the district court's actual ruling. Under Arizona law, "bad faith depends upon whether the insurer failed to honor a claim without a reasonable basis for doing so." *Sparks*, 647 P.2d at 1136. The district court permitted Roberts to "give her opinions on whether Country Life acted reasonably in adjusting the claim,"[198] thereby gutting its initial limitation on Roberts. The district court's narrow ruling thus could not have prejudiced defendants. *Cf. Laurienti*, 611 F.3d at 548 (any error harmless where district court permitted expert to testify "on a wide range of topics and sustained objections only to a limited set of questions").

Third, on appeal Defendants argue (at 32) that "Roberts should have been allowed to testify about Country Life's and CCSI's intent because it is directly relevant to McClure's request for punitive damages against them." But Defendants have waived this argument because they failed to make it below.[199] *See Slaven v. Am. Trading Transp. Co.*, 146 F.3d 1066, 1069 (9th Cir. 1998) ("[A]ppellate court will not consider issues that were not properly raised before the district court."). Roberts's report also says nothing about punitive damages, and she admitted that she

[198] ECF-427/4:2-4.

[199] *See* ECF-391/1296:19-1319:17.

had not researched Arizona's punitive damages standard because "that's a legal question for the Court."[200] Moreover, although the district court did not exclude her testimony concerning "punitive damages," as Defendants claim (at 32-33), that testimony was inadmissible for other reasons.[201]

Lastly, Defendants' argument highlights another reason the district court ruled correctly. As McClure's counsel explained during trial, Roberts—by focusing on intent to harm—injected "the elevated standard for punitive damages" into her bad-faith opinions.[202] Intent to harm is not required for punitive damages, but the excluded testimony suggested otherwise. *See Rawlings*, 726 P.2d at 578 (explaining that the requisite "evil mind" necessary for punitive damages may be shown with either (1) intent to injure, or (2) "*although not intending to cause injury*, defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others" (emphasis added)).

Defendants' remaining prejudice arguments likewise fail.

1. Defendants complain (at 33) that McClure's expert was "not so limited." But in the pages Defendants cite (ER542, 544-45, 535-38), they objected to only one question, and that objection was different from the one McClure made

[200] ECF-391/1292:24-1293:3.

[201] *See* ECF-427/5:24-6:14; *see also* ECF-391/1292:24-1293:3.

[202] ECF-391/1304:4-8.

about Roberts's opinions.[203] Moreover, unlike Roberts, McClure's expert did not rely on demonstrably incorrect standards.

2. Defendants' contention (at 31) that McClure's counsel "took full advantage" of the limiting ruling rests on a sleight of hand. Counsel quoted the settled bad-faith jury instruction and argued, "Well, you heard the intentional part of this is no one has to break a sweat over, because this is just they intend to do it, and they did."[204] This is consistent with the weak concept of intent in Arizona law.[205] And abundant evidence justified the other closing argument about which Defendants complain (at 33-34) (concerning intent to harm McClure by financially benefitting themselves at McClure's expense). The argument did not become more compelling due to any excluded testimony. Moreover, Roberts could not have properly given any opinions that would have influenced that argument or given the Defendants any more basis to rebut it than they otherwise could in argument.

3. Defendants' complaint about the instruction (at 31-32, 34) ignores that the "[t]he instruction the Court gave was proposed by Defendants and agreed to as modified."[206]

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[203] ECF-341/287:16-17.

[204] ECF-394/1663:4-6.

[205] *See* ECF-384/24:1-6 (jury instructions) ("McClure does not need to prove that Country Life intended to cause injury.").

[206] ECF-427/6:25-26 (citing ECF-393/1567:4-10).

4. Defendants' "conflicting evidence" cases (at 34) ignore that Roberts used an incorrect legal standard. No evidence, conflicting or otherwise, would have required the district court to ignore that. *Cf. Daubert*, 509 U.S. at 595 (The "focus, of course, must be solely on principles and methodology, not on the conclusions they generate.").

Accordingly, the Court should affirm the district court's narrow ruling concerning Roberts.

IV. The district court had discretion to uphold the jury's emotional-distress award.

A. Standard of review.

See Argument § II.A.

B. An insurance-bad-faith plaintiff may recover emotional distress damages.

Under Arizona law, a bad-faith plaintiff "may recover all the losses caused by defendant's conduct, including damages for pain, humiliation and inconvenience, as well as for pecuniary losses." *Rawlings*, 726 P.2d at 577. Under the eggshell-plaintiff rule, "[a]ggravation of an existing disease may be allowed for in the damages awarded." *Tucson Rapid Transit Co. v. Rubiaz*, 187 P. 568, 571 (Ariz. 1920) (citation omitted). The district court thus properly instructed the jury that it could award damages for a "preexisting physical *or emotional* condition that was

aggravated or made worse,"[207] including "humiliation" and "anxiety."[208] Defendants assert no error in the instructions.

C. The evidence allowed the district court to deny Defendants' motion.

The jury could easily find that Country's termination aggravated McClure's preexisting emotional condition.

1. Country knew that terminating disability benefits "can be devastating to an insured"—especially a suicidal person suffering from depression, anxiety, and problems with cognitive functioning.[209] Despite knowing about McClure's fragile state,[210] Country consciously disregarded the risks of significant harm to McClure by not taking any precautions when it terminated his claim using its fabricated basis.[211]

2. When Amy first learned of Country's termination, she "debated" whether to even tell McClure because she "thought it would send him into further depression."[212] In other words, because of the very injury that caused McClure's

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[207] ECF-384/34:4-8 (emphases added).

[208] ECF-384/35:10-11.

[209] ECF-359-3/38:23-39:5, 39:7-13, 39:15, 126:7-127:24 (Spellmeyer); *see also* ECF-343/466:10-14.

[210] E.g., from Dr. Strupinsky's report. *See* SER-V4/133.

[211] ECF-390/1171:22-1174:2; *see* Statement of Case § III.D (summary of duties).

[212] ECF-346/659:22-23.

disability in the first place, aggravating or worsening his condition is the foreseeable and predictable result of abandoning him and destroying his ability to provide for his family. And that's exactly what happened.

When Amy told McClure about the termination, he reacted just as she feared. McClure said the termination letter made him "really angry" because when he first purchased the disability policy in 1995, his Country agent explained that "if it's ever needed, it will be there for you, and that's one less thing you have to worry about."[213] That's why McClure had paid premiums for 17 years. He "could not fathom that all these years that [they]'ve been paying for this and they just take it away, and they take it away for something false like this. It really hurt."[214] As McClure explained, "I really had a hard time processing, so I couldn't really get emotions out."[215]

In fact, the termination caused an unprecedented "rage fit" in McClure: "I had never had that type" of anger before; "I didn't even realize how angry I can get. . . . I was doing things in front of my kids that I wasn't even aware of. And it was just—I cannot even tell you the—inside how much it was."[216]

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[213] ECF-350/905:6-17.

[214] ECF-350/907:14-23.

[215] *Id.*

[216] ECF-350/907:23-908:6.

3. According to Amy, McClure "isolated himself"—his telltale sign of heightened depression.[217] "[H]e would go to bed for days at a time. . . . He would have nothing to do with me, nothing to do with the kids. He was very despondent."[218] Amy worried that "he may be slipping into suicidal thoughts."[219]

Sure enough, Amy saw McClure "spiraling down."[220] When they went to church one Sunday, the congregants were asked to share a Bible verse. McClure spontaneously recited a bone-chilling scripture passage common at funerals: "Although I walk through the valley [of] the shadow of death, I will fear no evil. . . ."[221] This "[r]eally scared" Amy; she started to "[r]eally lose [her] mind."[222]

4. Apart from all of that, McClure became humiliated and despondent over losing his ability to provide for his family. He purchased disability insurance specifically to get peace of mind that he could provide for his family if he ever became disabled.[223] While Country paid benefits, the McClures could still pay their bills. But after Country terminated the claim, they had to turn to charity to put food

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[217] ECF-346/660:8; *see also* ECF-346/687:17-18 ("[W]hen Jim gets depressed, he isolates himself.").

[218] ECF-346/660:15-18.

[219] ECF-346/660:19-21.

[220] ECF-346/663:6.

[221] ECF-346/662:11-14 (quoting Psalm 23:4).

[222] ECF-346/662:16-17.

[223] ECF-350/886:11-14.

on the table: "We had to ask our church for help. We had to ask St. Vincent de Paul[224] for help" for food and groceries.[225] Their church paid their daughter's soccer expenses, and they had a Thanksgiving dinner because a friend brought over a turkey and fixings.[226]

Before his disability, McClure had a very successful career, loved working, and took pride in providing for his family. That meant that relying on others was "[v]ery emasculating, very insulting, very hurtful."[227] McClure explained, "I have never done anything [like ask a charity for food], nor did I want to do that. But I had to make sure my kids had food. . . . I've always worked so hard to care and provide, and I can't even put food on the table now. And that I have to ask people, yes, that was the hardest thing I had to do."[228] According to McClure's friend, it was "[d]efinitely" a "humbling experience" for McClure to rely on "people bring[ing] food and getting charity from the church."[229] When talking about his post-termination finances, McClure got "very emotional about it" because "he wasn't able

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[224] Essentially a food bank charity.

[225] ECF-346/666:20-667:12 (Amy); *see also* ECF-350/910:2-3; ECF-345/604:3-5.

[226] ECF-346/667:13-668:13.

[227] ECF-346/669:11-14.

[228] ECF-350/910:2-14.

[229] ECF-345/606:25-607:3.

to provide for his family."[230] When talking about Country's termination, McClure would "get frazzled or need to sit down. He'd get kind of light-headed" and would come to "tears."[231] Dr. Turner explained that the termination made McClure "very distressed."[232]

5. Within two months of the termination, McClure was hospitalized. When he told a hospital social worker that he "wanted to take his own life," he was quickly transported by ambulance to another hospital for "psychiatric hospitalization."[233]

When asked whether his "suicidal feelings . . . had anything to do with" Country's termination, he answered, "yes, I did."[234] He "fe[lt] like [Country] didn't care for me."[235] Dr. Turner confirmed that the termination aggravated McClure's emotional condition.[236] In other words, by "tak[ing] advantage of the unequal positions," Country became "a second source of injury to the insured." *Rawlings*, 726 P.2d at 573.

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[230] ECF-345/605:21-606:3.

[231] ECF-345/603:22-604:21, 606:4-14.

[232] ECF-343/472:3.

[233] ECF-346/664:14-21; *see also* ECF-343/472:19-20 (McClure "was hospitalized again for depression and suicidal ideation.").

[234] ECF-350/909:8-20.

[235] *Id.*

[236] ECF-343/472:8-15.

This evidence thus permitted the jury to find that Country's bad faith caused "[e]motional distress, humiliation, inconvenience, and anxiety," and "aggravated [and] made worse" his "preexisting . . . emotional condition."[237] Moreover, given the district court's careful analysis of this issue after seeing the witnesses first-hand,[238] its ruling is "virtually unassailable." *Lam*, 869 F.3d at 1084. This is particularly so given Arizona's low bar for causation, which allows liability if Defendants' conduct contributes "only a little" to Plaintiff's damages. *Ontiveros v. Borak*, 667 P.2d 200, 205 (Ariz. 1983).

D. Defendants' contention that the district court abused its discretion lacks merit.

1. Country ignores the record.

Country contends (at 37-39) that McClure "failed to prove that his emotional distress would not have occurred without the termination of benefits" and (at 42-44) that he "did not establish an actual aggravation of his condition." These arguments ignore the standard of review, improperly ignore the evidence the district court identified, and improperly invite the Court to construe the evidence in Country's favor.

To support its case, Country essentially addresses three sets of evidence. The first set (at 38) concerns symptoms present before the termination, but the jury was

[237] ECF-384/34:1-35:15 (jury instructions); *accord* ECF-374/4:1-15 (verdict).

[238] ECF-427/7:3-9:3 (new-trial ruling).

instructed that it could not award damages "for any physical or emotional condition that pre-existed the fault of Country."[239] "The law presumes that jurors carefully follow the instructions given to them and there is nothing to suggest that they failed to do so here." *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1023 (9th Cir. 2000) (citation omitted; alterations incorporated). Moreover, the jury heard extensive evidence (summarized above) that permitted it to find that Country caused McClure additional harm.

Country's second set of evidence (at 38) links some symptoms to McClure's head injury. Although the jury heard evidence that McClure's head injury caused many symptoms, it also heard evidence that permitted it to find that the *termination* caused new and additional harm. For example, the termination of benefits, not just his head injury, caused him to have to turn to food banks and charity to feed his family.

Country's third set of evidence (at 42-43) supposedly addresses symptoms aggravated by the termination. Although some symptoms (e.g., seizures) did not worsen post-termination, Defendants ignore the evidence that permitted the jury to find that the termination "aggravated" and "worse[ned]" his symptoms [240] He was

[239] ECF-384/34:4-5.

[240] ECF-384/34:5-8 (jury instruction).

more humiliated than ever before,[241] experienced rage of a type he "had never had" before termination,[242] and was in "bed for days at a time" (more depressed than ever before).[243]

Dr. Turner also testified about how the termination made everything worse when he was "already so down and distraught."[244] And McClure specifically linked his suicidal thoughts to the termination:

> [Q.] Do you feel that the suicidal feelings that you were experiencing that led up to your admission in June had anything to do with the termination of your benefits by Country Life?
>
> A. The thing before all this happened was that I didn't even have these worries because I had those other things that I was working on. And then that stuff, when given that letter, and still can never understand how they could have felt that way. I just totally feel that they didn't care for me, and it didn't matter and I'm—on top of everything that was going on, I just like—this is—I can't do nothing right. And I—the easy way for me is I don't want to be a burden to my family more, and, *yes, I did*.[245]

Country tries to inject ambiguity into his answer by questioning (at 43) what "all this" referred to. But viewed in McClure's favor, the jury could understand "all this" to refer to the aftermath of Country's termination. *See DSPT Int'l, Inc. v.*

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[241] ECF-350/910:2-14.

[242] ECF-350/907:24-908:6.

[243] ECF-346/660:15-18.

[244] ECF-343/472:8-15.

[245] ECF-350/909:8-20 (emphasis added).

Nahum, 624 F.3d 1213, 1218 (9th Cir. 2010) (Court must "draw all reasonable inferences in [McClure]'s favor."). And, as discussed above, there was abundant additional evidence that supported the jury's verdict on this issue, and the district court carefully considered that evidence in its 21-page order.[246] (*See* Statement of the Case § IV; Argument § IV.C.) Country (at 42) also plucks one phrase from Dr. Turner's notes, where he notes that "not much has really changed." (Quoting ER711 (alteration omitted).) But Dr. Turner wrote that note eight months after Country's termination made things worse. Because McClure had already seen Dr. Turner at least eight times since the termination, the jury could infer that Dr. Turner's note meant that nothing had changed *from the previous visit*, not that nothing had changed since the termination.[247] Meanwhile, Dr. Turner testified that the termination made McClure "very distressed."[248]

At bottom, the aggravated symptoms were the foreseeable and predictable result of terminating someone who was already in a fragile state.[249]

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[246] ECF-427/7:3-9:3.

[247] SER-V4/183-276.

[248] ECF-343/472:3-15.

[249] ECF-343/466:11-14; ECF-346/659:22-23.

2. Damages for exacerbating psychological injury to an emotionally vulnerable plaintiff is neither novel nor requires any heightened proof.

The evidence convincingly showed that Defendants caused McClure to suffer significant "[e]motional distress, humiliation, inconvenience, and anxiety," and that he suffered more such harm from Defendants' bad faith "than a normally healthy person would have"[250] precisely because he was in a particularly vulnerable state when Defendants terminated his claim. Perhaps recognizing the facts hurt them, Defendants now claim (at 42) that McClure's theory of aggravation "lacks solid legal ground," and that he faced a "complex causation paradigm" that he failed to meet. This argument suffers numerous problems.

First, McClure's emotional distress damages are not "divorced from any physical injury," as Country contends (at 40). McClure's head injury caused his mental illness and related conditions, which Country then aggravated by terminating McClure's coverage in bad faith.

Second, this is another improper new argument "never argued before the district court." *Hillis*, 626 F.3d at 1019.

Third, McClure's damages theory comes from settled Arizona law (eggshell plaintiff), which the district court set forth in the unchallenged instructions.[251]

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[250] ECF-384/34:1-35:15 (jury instructions).

[251] ECF-384/34:1-13.

Notably, the only prerequisite for recovering emotional-distress damages in Arizona is "that the insurer's bad faith resulted in an invasion of property rights. Damages for pain, humiliation, or inconvenience, as well as pecuniary losses for expenses such as attorney's fees, trigger an invasion of protected property rights" and thus entitle the plaintiff to damages. *Filasky v. Preferred Risk Mut. Ins. Co.*, 734 P.2d 76, 82 (Ariz. 1987) (citation omitted); *accord Farr*, 699 P.2d at 382. Thus, contrary to Country's suggestion (at 39-40), Arizona law does not require a "physical injury" for emotional-distress damages.

Fourth, Defendants' suggestion that McClure failed to prove any aggravation again simply ignores the evidence, misconstrues the evidence in their favor, and improperly attempts to impose an improper burden of proof.

Fifth, favoring the insurer in psychological disability cases, as Defendants request, would create a dangerous precedent. If anything, those suffering from psychological disabilities are likely to suffer more emotional distress and anxiety from a bad-faith termination than others because they are more likely to be vulnerable. The law should not incentivize insurers to treat claimants with psychological disabilities worse than those with physical disabilities.

Lastly, Defendants fail to cite any case showing that McClure's theory of aggravation lacks "solid legal ground." (OB42.) *Lewy v. S. Pac. Transp. Co.*, 799 F.2d 1281 (9th Cir. 1986) held only that *any* "discharge-related claims are not

cognizable under the [Federal Employers' Liability Act]"—whether emotional or otherwise. *Id.* at 1297. Although Defendants say (at 41) that "this Court agreed with the trial judge" about "metaphysical proximate-cause analysis," this Court affirmed on an alternate basis (expressly citing the maxim for affirming "on any ground supported by the record"), *id.* at 1286, and expressly did "not review the trial judge's ruling" that Defendants quote, *id.* at 1285 n.1.

E. The district court was not obligated to reduce the verdict.

Defendants' suggestion that this Court should use the cold transcript to second-guess the jury's and district court's damages determination likewise ignores the evidence and standard of review. This Court gives "'great deference' to a jury's award of damages." *Williams v. Gaye*, 895 F.3d 1106, 1128 (9th Cir. 2018) (citations omitted). The Court is constitutionally limited to reviewing "for 'abuse of discretion.'" *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 419 (1996). State law governs the "substantive" standard for evaluating damages claims. *Id.* at 426-30. Arizona courts "will not disturb a jury's damage award unless it is 'so unreasonable and outrageous as to *shock the conscience* of this court.'" *Acuna v. Kroack*, 128 P.3d 221, 231, ¶ 36 (Ariz. Ct. App. 2006) (emphasis added). *Cf. Harper v. City of Los Angeles*, 533 F.3d 1010, 1028 (9th Cir. 2008) (under federal law, the Court must uphold the verdict "[u]nless the amount is grossly excessive or

monstrous, clearly not supported by the evidence, or based only on speculation or guesswork").

For emotional-distress damages, "this court does not require that damage awards must be supported by 'objective' evidence." *Harper*, 533 F.3d at 1030 (quoting *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1040 (9th Cir. 2003)). The Court will uphold damages "based on testimony alone or appropriate inference from circumstances." *Id.* The jury's role in damages "is of 'particular importance where the jury must determine appropriate damages for emotional loss.'" *Kerege v. Viscount Hotel Grp., LLC*, 2011 WL 4379343, at *6 (Ariz. Ct. App. Sept. 16, 2011) (citation omitted).

In addition, "security from financial loss is a primary goal motivating the purchase of insurance." *Deese v. State Farm Mut. Auto. Ins. Co.*, 838 P.2d 1265, 1269 (Ariz. 1992). The jury could reasonably assess the value of the lost peace of mind, lost security, and the severe effect on McClure's emotional well-being.

Here—for all the reasons discussed above—the district court correctly held that "there was ample evidence supporting the jury's verdict for emotional distress."[252] *See also Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1003 (9th Cir. 2004) ($2.7 million compensatory damages for bad-faith termination

[252] ECF-427/8:15-16 (new-trial ruling).

of disability policy); *Ceimo*, 137 F. App'x at 970 ($5 million "not so unreasonable that it shocks the conscience of this court"); *Leavey v. Unum Provident Corp.*, 295 F. App'x 255, 259 (9th Cir. 2008) ($1.2 million emotional-distress award for bad-faith termination of disability policy); *Lumbermens Mut. Cas. Co. v. Combs*, 873 N.E.2d 692, 721 (Ind. Ct. App. 2007) ($1.5 million emotional-distress award for bad-faith termination of disability benefits).

Tellingly, the two Circuit decisions Country cites (at 44) *affirmed* the damages awards. *See Zhang*, 339 F.3d at 1040-41; *Brady v. Gebbie*, 859 F.2d 1543, 1558 (9th Cir. 1988). The only remaining case (at 44) remanded for reconsideration under a new statutory standard. *Gasperini*, 518 U.S. at 438. Moreover, although Country asserts (at 44) that under *Gasperini* a verdict may be reversed for being merely "too far out of line," the case did not so hold. That's also not the standard used by Arizona or federal courts.

Country's assertion (at 44-45) that damages must stop as soon as it reinstated benefits contradicts the jury instruction that McClure may recover "[e]motional distress, humiliation, inconvenience, and anxiety experienced, and *reasonably probable to be experienced in the future*."[253] As the district court recognized, the harm "caused by Defendants' bad-faith conduct did not turn on and off like a water

[253] ECF-384/35:10-11 (emphasis added).

hose."[254] *Cf. Leavey*, 295 F. App'x at 257 (upholding $1 million emotional-distress damages award in insurance-bad-faith case even though insured "was informed that his benefits would be continued" and insurer never stopped paying).

Third, Country points to the time that passed before McClure contacted the insurer. But Country offers no explanation for why this means the verdict "'shock[s] the conscience.'" *Acuna*, 128 P.3d at 231, ¶ 36.

The Court should affirm on this issue. But if the Court alters the judgment on compensatory damages, it should remand (without reversing or vacating) on punitive damages for the district court to consider in the first instance whether any additional alterations are necessary. (*Cf.* OB35.)

CONCLUSION

The Court should affirm.

RESPECTFULLY SUBMITTED this 30th day of August, 2019.

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[254] ECF-427/8:27-28 (new-trial ruling).

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STATEMENT OF RELATED CASES

McClure knows of no related cases.

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number 18-16661

I am the attorney or self-represented party.

This brief contains 13,929 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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s/ Eric M. Fraser
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