IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DE ANZA SANTA CRUZ MOBILE ESTATES HOMEOWNERS ASSOCIATION,	Case No. H026153
Plaintiff and Respondent,	
v.	Santa Cruz County Superior Court No. CV 128001
DE ANZA SANTA CRUZ MOBILE ESTATES, et al., and MANUFACTURED HOME COMMUNITIES, INC., et al.,	Honorable Robert P. Yonts, Jr.
Defendants and Appellants. /	

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PRELIMINARY STATEMENT

The most recent chapter in this long running case – a $6 million punitive damages verdict – is difficult to reconcile with the origins of this dispute and the total damages claimed, $36,401.85. The dispute began in 1993 as an honest legal disagreement between the owners and tenants of a mobilehome park on the Santa Cruz seashore. The issue, briefly stated, was which of two statutes controlled the tenants' water charges under a submetering system newly authorized by the Legislature in 1990. That issue had never been resolved by published authority, and it remained unresolved as late as March 1998 when this Court's unpublished opinion addressed it in a related mandamus action involving these same parties. (Case no. H015876) At the penalty trial below, however, the tenants attacked the owners' interpretation of the disputed statutes as a "malignant scheme."

The $6 million judgment that resulted is untenable as a matter of law for three independent reasons. As a threshold matter, the superior court's jurisdiction over this dispute was preempted by action taken in December 1998 by the California Public Utilities Commission. However, that issue has already been briefed on a related appeal and the appellant park owners will not repeat their arguments here. (See *post*, pp. 19-20.)

What this brief does argue, first, is that the only penalty the tenants elected to pursue below, an award of punitive damages, was unavailable to them as a matter of law. They proceeded on only one cause of action, a statutory action pursuant to Section 798.86 of the Civil Code ("§ 798.86"), and that statute authorized only a prescribed

penalty in addition to any actual damages. Settled principles of statutory interpretation exclude punitive damages as an additional remedy. (*Post*, pp. 25-30) Nor can the tenants cry foul. They were intimately familiar with the penalty prescribed by § 798.86, having prayed for it in all five versions of their complaint and as late as their trial brief. (*Post*, pp. 7-9, 12) In the end, however, they failed to request it from the jury or trial court below and may no longer request it now.

This brief will also demonstrate that the punitive damages award must be reversed even if the tenants' preference for that remedy were legally supportable. They pursued such an award on prohibited grounds. They succeeded in penalizing the park owners for (1) taking an arguable if incorrect position on an unresolved legal issue; (2) petitioning courts and other branches of government for authorized forms of relief on that issue; and (3) defending this very lawsuit in a manner that was allegedly overzealous. Not one of those theories is a permissible basis to punish someone for failing to predict which of two disputed regulatory statutes an appellate court would ultimately deem controlling. Accordingly, the judgment below must be reversed – and likewise as a matter of law – even if punitive damages *were* available on a statutory action pursuant to § 798.86.

But the validity of the punitive damages award as such need not be reached if this Court agrees that an award of that kind is not authorized in a statutory action pursuant to § 798.86. And that issue can and should be resolved even though it is raised for the first time on

appeal. It is a pure question of statutory interpretation, no disputed facts are involved, the issue is one of first impression, and it has considerable importance to mobilehome tenants and owners throughout California. (*Post*, pp. 22-24) In addition, the peculiar course of the trial below would have subjected the owners to grave peril had they raised this issue with the trial court. (*Post*, pp. 24-25)

It is worth noting, however, that the tenants are far from remediless in this matter. In 1997, nearly two years before the penalty trial below, the related mandamus action resulted in a refund to the tenants of all the disputed water charges in this matter, totaling $36,401.85. (*Post*, p. 9) The tenants were also awarded $101,000 in attorneys' fees for prevailing in that action. (See CT 1264-1265 in related appeal no. H019402.) Although the present action might have resulted in additional remedies, the tenants have only themselves to blame for failing to pursue them.

STATEMENT OF THE CASE

Because this appeal centers on the legal validity of the punitive damages award, this Statement of the Case is focused accordingly. (*See*, Rule 13, California Rules of Court.) This appeal does not challenge the jury's resolution of any disputed factual issues, and so there is no need for a detailed review of the trial evidence. Indeed, this appeal rests largely on the tenants' own pleadings, briefs, and trial arguments.

A.

A SANTA CRUZ MOBILEHOME PARK CONVERTS ITS WATER SYSTEM TO "SUBMETERING" AS PERMITTED BY CIVIL CODE § 798.41

As this Court is already familiar, this case involves a mobilehome park on the Santa Cruz seashore, immediately adjacent to the Natural Bridges State Park. The plaintiff and respondent is De Anza Santa Cruz Mobile Estates Homeowners Association ("the tenants"). The defendants and appellants are De Anza Santa Cruz Mobile Estates, et al., and Manufactured Home Communities, Inc., et al., two successive groups of owners of the park (together, "the owners").

As explained in the 1998 opinion, the owners converted the park's water system in 1993 to take advantage of a newly enacted provision of the Mobilehome Residency Law (Civil Code sections 798 *et seq.*) ("MRL"). In 1990, the Legislature added Section 798.41 ("MRL § 798.41") to provide relief for park owners subject to local rent control and unable to cover their rising utility costs. Simply stated, the Legislature authorized owners to "submeter" and bill separately for such utilities, and thereby remove them from local rent control.

B.

FROM THE OUTSET, THE OWNERS EXPLAIN THE NEW BILLING SYSTEM AS THEIR INTERPRETATION OF CIVIL CODE § 798.41 IN CONJUNCTION WITH PUBLIC UTILITIES CODE § 2705.5

The owners notified the tenants of the new submetering system on May 24, 1993 (RT 9332-9333; Pls. Ex. 11) and the first monthly bills under it went out on June 1, 1993. (RT 9335; Pls. Ex. 9) The bills clearly itemized the two charges at issue below: a $7.80 "ready-to-serve" charge and a 7% "city tax" on the total water bill (usage plus ready-to-serve charge). (RT 9337; *see also,* 1998 opinion, pages 4-5.)

Under the leadership of a tenant named Herbert Rossman, who had taught law courses at the Drexel College of Business in Philadelphia (RT 9334), the tenants sent the owners an official Notice of Intent To File Action on September 24, 1993. (RT 9349; Pl. Ex. 14) In response, the owners' then president Barry McCabe, who was also an attorney (RT 10,002), sent Rossman a detailed and courteous letter explaining the owners' legal position. (Pl. Ex. 15) It assured Rossman that, "if we have inadvertently violated any valid and applicable provision of law, we will make the necessary corrections. However, I cannot honestly see where we are in error. (*Id.*, p. 1) McCabe concluded: "[i]f you believe we have overlooked something, resulting in unlawful or unreasonable treatment of the residents of De Anza Santa Cruz, please bring it to my attention. We have every intention of operating fairly, reasonably and within applicable law." (*Id.*, p. 2)

After Rossman replied with a renewed threat to sue on October 15, 1993 (Pl. Ex. 16), McCabe wrote to him again on November 2, 1993, further explaining the owners' position. (Pl. Ex. 19) Again, McCabe assured Rossman that, "[i]f you or a practicing California attorney can show me that we are unlawful in the manner of calculating water charges subsequent to the [sub]metering, we will correct it." (Pl. Ex. 19, p. 1) This letter concluded:

> Mr. Rossman, I am very sorry that you disapprove of the manner in which we have initiated water billing. . . . If you insist on having this matter submitted to a court, we will be prepared to deal with it accordingly. That is your right, and a right that we respect. (Pl. Ex. 19, p. 2)

Substantively, McCabe's letters set forth the same interpretation of the disputed statutes that the owners asserted throughout the ensuing litigation. McCabe had reviewed the pertinent statutes and attended seminars and committee meetings about them. (RT 10,013, 10,028, 10,037) His letters stated that it was not MRL § 798.41 that controlled utility charges under new submetering systems, but rather Section 2705.5 of the Public Utilities Code ("P.U. Code § 2705.5") As stated in McCabe's first letter, "[t]he charges now being made are based on the same rates as are applied by the local water utility and therefore, pursuant to [P.U. Code § 2705.5], the Public Utilities Commission does not have jurisdiction." (Pl. Ex. 15, p. 2; see also Pl. Ex. 19, p. 1)

In fact, it was undisputed below how the new water charges were determined. The owners went to the City of Santa Cruz and found out

exactly how local residents were billed for water supplied directly. (RT 10,036) In accordance with their interpretation of P.U. Code § 2705.5, the owners billed the tenants the same water usage rates, the same amount as the city's ready-to-serve charge, and the same amount as the city's tax. (RT 10,039-10,040) Right or wrong in their interpretation of the law, the owners did not simply "concoct" those charges as the tenants colorfully asserted below.

Finally, McCabe's second letter to Rossman set forth the owners' legal rationale for invoking P.U. Code § 2705.5:

> If you are implying that the law should somehow be interpreted to assure that we are not billing any more than we are paying out for our master metered water please be aware that the law is not designed to assure such an equality of cost. Within De Anza Santa Cruz we own, maintain and operate the water system. The law is designed only to assure that we do not charge more than would be charged by the local water utility if it were providing the service directly. (Pl. Ex. 19, pp. 1-2)

C.

THE TENANTS' COMPLAINT SEEKS THE PENALTY PRESCRIBED FOR THEIR STATUTORY CAUSE OF ACTION AND PUNITIVE DAMAGES ON THEIR TORT CAUSES OF ACTION

The tenants' original complaint, filed on November 23, 1993 (CT 1), contained a single cause of action alleging that the charges under the new submetering system exceeded those permitted by MRL § 798.41. (CT 2, ¶ 6) In addition to an injunction and damages, the tenants

prayed for the penalty prescribed by MRL § 798.86 for violations of MRL § 798.41. They sought:

> An award, in the discretion of the Court, in an amount not to exceed five hundred dollars ($500) for each willful violation of the California Civil Code as provided in Section 798.86. (CT 4, ¶ 3)

MRL § 798.86 read as follows at that time:

> In the event a homeowner [*i.e.,* tenant] or former homeowner of a park is the prevailing party in a civil action against the management to enforce his or her rights under this chapter, the homeowner, in addition to damages afforded under the law, may, in the discretion of the court, be awarded an amount not to exceed five hundred dollars ($500) for each willful violation of this chapter by the management. (Stats. 1978, c. 1031, p. 3178, § 1; A.B. 591)

Although the tenants later added causes of action sounding in tort, the only penalty they ever requested on their cause of action under MRL § 798.86 was the penalty prescribed by that statute. (*See* CT 114-115 & 117 [first amended complaint], CT 123 [second amended complaint], CT 313-314 [third amended complaint], and CT 540 [fourth amended complaint].)

When the tenants first sought a punitive damages award, in their first amended complaint, it was only on their new cause of action sounding in fraud. (CT 117) And in later amendments, when the tenants replaced that single fraud cause of action with causes of action for intentional misrepresentation (CT 314, 543), negligent misrepresentation (CT 315, 544) and concealment (CT 316, 545), the prayer for punitive

damages continued to be restricted to those causes of action. (CT 319, 547-548) But the prayer for relief under MRL § 798.86 always sought the prescribed penalty exclusively. (*Ante*)

D.

AFTER AN ADVERSE RULING IN A RELATED MANDAMUS ACTION, THE OWNERS REFUND ALL DISPUTED CHARGES IN 1997 – TOTALING $36,401.85 – PENDING AN APPEAL TO THIS COURT

After a Santa Cruz hearing officer upheld the tenants' position on June 29, 1995 (CT 836), advising the owners of their right to seek judicial review (CT 839), the owners did so on September 27, 1995. On that date they filed a complaint for declaratory relief combined with a petition for a writ of mandamus. (CT 2182 *et seq*.)

Following the entry of an adverse judgment in that action on July 26, 1996 (CT 2740), the owners appealed to this Court and requested a continuation of the parties' agreed stay of the hearing officer's decision. (1998 opinion, p. 8) In March 1997, a few months after this Court terminated the stay (*ibid*.), the owners made refunds to the tenants totaling $36,401.85. (CT 2796) As reflected in the judgment below, that figure represents the entirety of the injury claimed by the tenants in this case. (CT 3458-3459)

E.

THIS COURT RESOLVES THE DISPUTED LEGAL ISSUES IN 1998, FINDING EACH SIDE CORRECT IN PART AND DECLARING NEITHER SIDE TO BE THE PREVAILING PARTY

In its March 20, 1998 opinion (CT 2632 *et seq.*), this Court agreed with the tenants that the Legislature intended MRL § 798.41 to restrict submetered water charges to the park owner's "bulk" water charges as a master-meter customer. However, the Court evidenced respect in various ways for the owners' contentions. First, regarding the applicability of P.U. Code § 2705.5, the opinion observed:

> We agree [with the owners], at least in theory, that [they are] entitled to recoup the costs of installing, maintaining and operating the water delivery system. But the Public Utilities Code does not expressly provide a means for such recoupment, as it does in the case of gas and electricity. (1998 opinion, p. 17)

Second, the Court agreed with the owners' contention that they were entitled to petition the Public Utilities Commission ("PUC") for water rates that *would* be sufficient to offset the indicated costs. This Court stated: "the ultimate question of what fees and charges may or may not be assessed by the owners for submetered water, other than or in addition to passing through its costs to the tenants, must be decided by the Public Utilities Commission." (1998 opinion, p. 2)

Third, the Court agreed with the owners that the Santa Cruz hearing officer, and the superior court affirming his decision, erred in their calculation of the refunds required by MRL § 798.41. They "failed

to take into account the fact that De Anza [the owner] was billed at a higher rate for water usage than it charged the tenants in the new separate billing." (1998 opinion, p. 12) This Court reversed the superior court's judgment with appropriate directions.

Finally, given its split decision on these novel and complex regulatory issues, this Court held that neither side was entitled to costs or could yet be declared the prevailing party for attorneys' fee purposes. Indeed, the Court twice suggested that, on remand, *neither* side might ultimately be entitled to an attorneys' fee award as a prevailing party. (1998 opinion, pp. 22 & 23) In short, even though the Court rejected the owners' argument on the interpretation of MRL § 798.41 and P.U. Code § 2705.5, the opinion evidenced considerable respect for the owners' contentions.

F.

AT THE SO-CALLED "TORT" TRIAL BELOW, THE TENANTS ABANDON ALL THEIR TORT CAUSES OF ACTION AND PROCEED SOLELY ON THEIR STATUTORY CAUSE OF ACTION

As the trial date approached, the tenants began characterizing their cause of action under MRL § 798.86 as a "tort" action. In a 1998 brief, for example, the tenants described their lawsuit as follows:

> The operative complaint in this action alleges essentially two wrongs: (1) a tort claim for violation of section 798.41 of the Civil Code . . . and (2) claims for deceit. . . . (CT 2471, emphasis added)

In 1996 briefs, however, the tenants used identical language but without the "tort" adjective linked to the statutory claim. (CT 1369, 1587)

Although the tenants continued to use "tort" rhetoric at the trial (*e.g.*, RT 8643, 8753, 8755), they abandoned all three of their tort causes of action no later than the conclusion of the trial. (*See* authority cited *post*, p. 21.) Their proposed jury instructions (CT 3100) were silent as to any tort causes of action. Nor were any tort causes of action included in their opening statement (RT 9255 *et seq.*) or the special verdict form. (CT 3327-3328)

G.

DESPITE THE TENANTS' DECISION TO PURSUE THEIR STATUTORY CAUSE OF ACTION EXCLUSIVELY, THEY NEVER REQUEST THE PENALTY PRESCRIBED BY THE PERTINENT STATUTE

The tenants' principal trial brief, filed on January 11, 1999 (CT 3206), suggested that they would ask the jury for punitive damages and the trial court for the penalty prescribed by MRL § 798.86:

> Plaintiff submits that defendants, in repeatedly committing the violations [of MRL § 798.41], acted with fraud, malice, and oppression, justifying the imposition [by] a jury of punitive damages. In addition, section 798.86 authorizes the Court to impose a penalty of up to $500 per each willful violation of the provisions of the Mobilehome Residency Law, including section 798.41. (CT 3215; emphasis added)

Although the tenants did not specify when they would ask the trial court for the statutory penalty, the above quoted language strongly

suggested that they would do so after the jury rendered its verdict. There was certainly no indication that they were foreswearing that penalty. In the end, however, they never requested it – not during the jury trial, not after the verdict was announced, and not by any subsequent motion. It was either forgotten or intentionally abandoned, and in either case the likely explanation was euphoria over the jury's $6 million punitive damages award.

H.

THE TENANTS RELY ON THEIR THEORY THAT PUNITIVE DAMAGES WERE AUTHORIZED FOR A "STATUTORY TORT"

Prior to the trial, the tenants cited two different legal theories for a punitive damages award. First, in accordance with their consistent pleadings, they sought punitive damages as an adjunct to their intentional tort causes of action. But they also articulated a theory that punitive damages were authorized for a violation of MRL § 798.41.[1] In their trial brief, for example, the tenants reasoned that "Section 3294 of the Civil Code provides that the jury may award punitive damages in any action arising from a breach of obligation not arising from contract. . . ." (CT 3208)

---

[1] The tenants occasionally mentioned the Santa Cruz rent control ordinance in this context, but this brief need not comment further on that subject. Because the tenants did not obtain a special verdict that the ordinance was violated (see authorities cited *post*, p. 21), the tenants abandoned that theory as a possible ground for punitive damages.

When the trial commenced, however, the tenants relied solely on their "statutory tort" theory for punitive damages under Civil Code § 3294 . That was the only theory they raised with the trial court in preliminary proceedings (*e.g.,* RT 8643, 8755, 8757) and, as noted previously, they failed to include any of the three tort causes of action in their proposed jury instructions or opening statement.

I.

THE PUNITIVE DAMAGES CASE ATTACKS THE OWNERS FOR THEIR INTERPRETATION OF THE PERTINENT STATUTES AND THEIR PURSUIT OF RELIEF IN THE COURTS AND OTHER BRANCHES OF GOVERNMENT

The first three sentences of the tenants' opening statement accused the owners of at least seven different sins: "greed, "indifference," "arrogance," "revenge," "threats," "intimidation," and "untruths." (RT 9255) So went the trial.

Beneath the hail of epithets, however, the tenants' case for punitive damages rested on three main grounds as demonstrated by their opening statement and closing arguments. First, they berated the owners for their interpretation of the disputed regulatory statutes in establishing the submetering charges. The tenants characterized that conduct as a profit-gouging "scheme" that was "obviously illegal." (RT 9255) This line of attack featured criticism of the owners for failing to consult or properly interpret the legislative history of MRL § 798.41 (RT 9259) or P.U. Code § 2705.5. (RT 9268-9269) The closing argument

repeated sarcastically that "[n]obody could quite take time to go to the legislative history." (RT 10,368)

The second element of the tenants' punitive damages case was an attack on the owners for pursuing judicial review of the hearing officer's decision. According to the tenants, it was "arrogance" or "greed" for the owners to continue to advocate their interpretation of the pertinent statutes "after the hearing officer told them it was illegal" and "after a judge in Superior Court told them it was illegal." (RT 9278) If the owners had only "recanted, we wouldn't be here." (RT 10,419) Instead, the owners persisted in their evil "course of conduct" of seeking judicial review:

> And even today – I mean if you look at the course of conduct even today, with the new appeal, nothing ever gets resolved with these folks. . . .
>
> And you have to decide if this conduct is . . . the type that you are going to allow, if you are going to allow them to keep . . . go[ing] to another forum. . . ." (RT 10,377)
>
> [D]on't forget who was always appealing. They were. . . . [¶] The tenants didn't go beyond the hearing officer on the sewer issue; okay? . . . [¶] Who said appeal? Who said continue on with all this? They're doing this. (RT 10,382)

The owners were even berated for "continu[ing] to ask for a stay." (RT 10,415)

The owners were likewise attacked for seeking relief from other branches of government. Although this Court expressly upheld the

owners' right to petition the PUC for new water rates, the tenants blasted them as "greedy" for doing so:

> [A]s soon as they had to give a refund, they ran over to the PUC. . . . [¶] . . . I mean, they don't have to go to the PUC. . . . There's no reason for them to go the PUC except, let's see if we can find somebody else who will give us more. . . . It was always about greed and it still is about greed. (RT 10,383)

Similarly, the owners were attacked for sending a formal letter to the City of Santa Cruz requesting a stipulation to a stay of the hearing officer's decision, and threatening legal action if the city's failure to comply subjected the owners to damages or criminal liability. (RT 9762, 10,372; Pl. Ex. 36) And the owners were likewise attacked for lodging complaints with the California State Bar and the Santa Cruz District Attorney when Mr. Rossman, who was not a licensed attorney, attempted to represent the other tenants at a court hearing. (RT 10,373)

The third element of the tenants' case for punitive damages was an attack on the owners for allegedly overzealous or "hardball" litigation conduct. The "four demurrers," (RT 10,415), appeals, stay requests, fee motions, and other defensive actions (including an allegedly raised fist after one hearing [RT 9587]) were condemned as "the type of arrogance and the type of conduct that I hope we don't want in our community." (RT 10,385; *see also,* RT 10,368-10,371, 10,377, 10,418) In a concise summary of this theme, the tenants urged stiff punishment for the owners for "filing motions and doing appeals." (RT 10,384)

J.

THE $6 MILLION VERDICT AND $700,000 FEE AWARD

The jury was not asked to decide any liability or damages issues in this case. Instead, the court instructed that it had already "found in this case that the defendants violated Civil Code Section 798.41, the De Anza defendants have caused $11,202.50 and the MHC defendants have caused $25,199.35 in actual damages and/or injury." (RT 10,347) The amounts identified as "damages" were simply the refunds issued by the respective sets of owners nearly two years before the trial. (*Ante*, p. 9) As the judgment later recited, "[a]ctual damages have been previously paid by the defendants and the judgment is satisfied as those actual damages ONLY." (CT 3459; original emphasis)

The jury was only asked to decide whether to assess punitive damages and, if so, in what amount. (CT 3327) The jury answered those questions on January 22, 1999. (*Ibid.*) The original set of owners, "the De Anza defendants" who had paid out a total of $11,202.50 in refunds, were assessed $1.8 million in punitive damages. The new set of owners, "the MHC defendants" who had issued $25,199.35 in refunds, were assessed $4.2 million in punitive damages.

In addition, the trial court subsequently awarded the tenants interest on their refunds, costs in the amount of $19,551.52, and attorneys' fees in the amount of $700,000. (CT 4422-4423) The latter award was predicated solely on MRL § 798.85.

K.

JUDGMENT, APPEAL, AND APPELLATE JURISDICTION

Judgment was entered on the verdict on February 19, 1999. (CT 3457) Notice of its entry was served by the tenants' counsel on February 23, 1999. (CT 3463-3469) On March 9, 1999, all owners timely filed and served notices of intention to move for a new trial or judgment notwithstanding the verdict. (CT 3567-3579) Those motions were denied by an order entered on April 19, 1999 (CT 4422, amended at CT 4425), and the same orders awarded the tenants interest, costs, and attorneys' fees as noted above.

All the owners joined in notices of appeal filed and served on May 17, 1999 (CT 4435-4467), specifying the judgment and the original and amended order after judgment. The notices of appeal were timely as to the original judgment pursuant to Rule 3, California Rules of Court, and as to the post-judgment orders – whether viewed independently or as modifications of the original judgment – pursuant to Rule 2, California Rules of Court. Appellate jurisdiction also lies because the judgment and post-judgment orders finally adjudicated all pending issues.

ARGUMENT

A.

THE JUDGMENT AND POST-JUDGMENT ORDERS SHOULD BE REVERSED BECAUSE A PUC INVESTIGATION PREEMPTED THE SUPERIOR COURT'S JURISDICTION

On December 17, 1998, three weeks before the trial commenced below, the PUC asserted jurisdiction over a central legal issue in this case: the applicability of P.U. Code § 2705.5 to the determination of submetered water charges at mobilehome parks (and apartments). The PUC issued a formal Order Instituting Investigation on that issue (CT 2912-2929) to consider the adoption of a uniform statewide regulation. Accordingly, the owners moved to dismiss this action on preemption grounds (CT 2881-2995), but the motion was denied on January 8, 1999 (CT 3034) and the penalty trial proceeded as scheduled on January 11, 1999.

Because the preemption issues stand fully briefed in this Court on appeals in the related mandamus action (case nos. H019402 & H019543), the owners adopt their previous arguments here. (*See*, Rule 13, California Rules of Court.) They add two points, however. In the mandamus action, where the PUC's action followed the entry of final judgment (CT 1246-1265 in case no. H019402), the tenants opposed preemption on "retroactivity" grounds. In this action, however, the trial had not even commenced when the PUC initiated its investigation. Moreover, the recent case of *Hartwell Corporation v. Superior Court* (1999) 74 Cal.App.4th 837, 75 Cal.App.4th 706A (*petition for review pending*) applied its preemption holding to every pending tort action within the scope of a PUC investigation.

Second, *Hartwell* strongly supports the owners' preemption argument on the merits. It held that the PUC's initiation of a similar

investigation, one involving water quality standards, barred any further proceedings on related civil actions against water providers. A contrary rule "opens the door to the imposition of varied and unpredictable water quality standards based on potentially inconsistent jury verdicts which 'second-guess' PUC regulation of the quality of water provided by public utilities." (74 Cal.App.4th at 859) So here. Once the PUC determined that submetering charges at mobilehome parks deserved a full-scale, quasi-legislative investigation, private civil actions on that issue were preempted.

B.

THE PUNITIVE DAMAGES AWARD SHOULD BE REVERSED IN ANY EVENT BECAUSE THE STATUTORY CAUSE OF ACTION ELECTED BY THE TENANTS AT TRIAL DOES NOT AUTHORIZE SUCH AN AWARD

1.

INTRODUCTION

A plaintiff who "rel[ies] solely on a statutory violation . . . [and did not] pursu[e] any common law tort cause of action" is limited to the prescribed statutory remedies. (*Turnbull & Turnbull, Inc.* v. *ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, 827 [plaintiff was limited to treble damages penalty authorized for statutory claim of unfair business practices]; *see also*, *Troensegaard* v. *Silvercrest Industries, Inc.,* (1985) 175 Cal.App.3d 218, 228 [mobilehome buyer waived punitive damages under Civil Code § 3294 by seeking only a statutory penalty and other remedies for breach of warranty].)

In this case, the tenants conclusively abandoned their punitive damages remedy when they conclusively abandoned their tort causes of action – by failing to obtain a special verdict on any of them. (*Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993)* 13 Cal.App. 4th 949, 960-961 ["without an actual verdict by the jury on a fraud (or other tort) cause of action, the instructions and evidence cannot support the punitive damage award."]; *see also*, *Trujillo v. North County Transit District* (1998) 63 Cal.App.4th 280, 285 ["The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. . . . With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict." (Cits. and internal quotation marks omitted)].) Accordingly, when the special verdict was rendered below without any tort causes of action as required for a punitive damages award, the tenants were conclusively restricted to the remedies prescribed by MRL § 798.86: an award for any damages suffered and a statutory penalty up to $500 per violation of the MRL.

Obviously, the tenants were banking on their "statutory tort" theory, that punitive damages could be awarded under Civil Code § 3294 for a violation of MRL § 798.41. But they were wrong for three reasons. First, when remedies are expressly prescribed in legislation like the MRL, those remedies are exclusive. Second, the omission of punitive damages from MRL § 798.86 makes that remedy unavailable *a fortiori,* both as a matter of statutory interpretation and to avoid constitutional problems caused by the authorization of a *second* penal remedy for the same conduct. Finally, the legislative history of MRL

§ 798.86 confirms that its authorization of a "damages" award referred to actual damages only.

At the threshold, however, this brief will demonstrate that the Court may and should decide this statutory interpretation issue because of its nature, importance, and square presentation on the record below.

2.

THIS IMPORTANT STATUTORY ISSUE, OF FIRST IMPRESSION, CAN AND SHOULD BE ADDRESSED ALTHOUGH IT IS RAISED FOR THE FIRST TIME ON APPEAL

As this Court held in *B & P Dev. Corp. v. City of Saratoga* (1986) 185 Cal.App.3d 949, 959, "a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts." (Quoting *Hale v. Morgan* (1978) 22 Cal.3d 388, 394) (*Accord*, *California Pools, Inc. v. Pazargad* (1982) 131 Cal.App.3d 601 ["it is settled that when a pure question of law is raised by undisputed facts, it may be considered for the first time on appeal."]; *see also*, 9 Witkin, *Cal. Procedure* (4th ed.1997), Appeal, § 407, p. 459 [same rule constitutes exception to "theory of trial" doctrine].) It is also axiomatic that the appellate court reviews such pure legal issues *de novo*.

The foregoing rule applies *a fortiori* where "the public interest or public policy is involved." (*Resolution Trust Corporation v. Winslow* (1992) 9 Cal.App.4th 1799, 1810) In that case, involving a full-scale

trial, this Court reversed the judgment on the basis of a federal banking law issue that was raised for the first time on appeal:

> There are many situations where appellate courts will consider [matters raised for the first time on appeal]. . . . [¶] The federal *D'Oench* doctrines implement important federal public policy and their application is of great public interest. . . . The facts relevant to the application of the D'Oench doctrines herein are not, as we have discussed, subject to dispute. The effect of applying the D'Oench doctrines is, therefore, purely a question of law. . . . . (9 Cal.App.4th at 1810-1811)

So here. First, no disputed facts are involved on the question whether punitive damages are authorized for a violation of MRL § 798.41. That is a pure question of law, fully presented by the pleadings, jury instructions, and other trial proceedings confirming that the tenants obtained punitive damages below solely on the basis of their cause of action under MRL § 798.86.

Second, the question presented is one of first impression and considerable public importance and interest in California. The Legislature has underscored the importance of the owner/tenant relationship in mobilehome parks by enacting comprehensive legislation on that subject with a detailed remedial statute, MRL § 798.86. And there are compelling reasons to decide whether the heavy club of punitive damages was intended to be included in that remedial scheme. Among other things, adding punitive damages to the mix could significantly increase the burdens on our courts by increasing

the frequency and lessening the settlement prospects of MRL litigation. On the other hand, if the Legislature did intend punitive damages to be available despite the omission of that remedy from MRL § 798.86, mobilehome park owners should be advised of that now.

Finally, litigants are not required to "preserve" an issue at a time when it would severely compromise their interests to do so. As stated in *City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 276:

> In our adversary system, defense counsel had no obligation to help try plaintiffs' case by pointing out evidence which had been omitted. Nor do we believe that defense counsel was required to advise the court of this deficiency in plaintiffs' case. In fact, defense counsel would have violated his obligation to his clients had he done so.

(*Accord*, *Warner Construction Corporation v. City of Los Angeles* (1970) 2 Cal.3d 285, 302 [defendant's tactical decision not to object to speculativeness of the damages claim did not waive that issue].)

As the trial unfolded in the present case, the owners were subject to grave peril if they reminded or educated their adversaries about which penalties were and were not available for a violation of the MRL. The tenants appeared poised to ask the trial court for at least a $1 million penalty under MRL § 798.86 (CT 547) at some undisclosed time during or after the jury trial. Accordingly, as long as the court retained jurisdiction to entertain that request, the owners had no obligation to alert their adversaries to the importance of making it in a timely fashion.

3.

THE PRESCRIBED STATUTORY REMEDIES FOR VIOLATIONS OF THE MRL ARE EXCLUSIVE

Under settled principles of interpretation, MRL § 798.86 provides the exclusive remedies for violation of the new rights the MRL conferred upon mobilehome tenants. (*Compare* MRL § 798.88, subd. (g), expressly stating that the remedy provided by that section is "nonexclusive.") As stated in *Turnbull & Turnbull, supra,* 219 Cal.App.3d at 826-827, "when a new right, not existing at common law, is created by statute and a statutory remedy for the infringement thereof is provided, such remedy is exclusive of all others unless the statutory remedy is inadequate." (*Accord, Strauss* v. *A.L. Randall Co., Inc.* (1983) 144 Cal.App.3d 514, 518 [disapproved on other grounds in *Rojo v. Klinger* (1990) 52 Cal.3d 65, 82].) By contrast, *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211 held that punitive damages *were* permissible because a statute authorizing a civil action did not specify which judicial remedies were available.

The MRL established a new and comprehensive set of rights and remedies for mobilehome tenants. (*Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 378, 381) No such specialized rights and remedies existed at common law, and certainly none involving submetered water charges in rent-control jurisdictions. Other statutes, by comparison, have been expressly stated to be declaratory of existing common law. (*E.g.* Veh. Code, § 21101.6 and Bus. & Prof. Code § 10,474.)

The only exception to this exclusive-remedy rule is "when the statutory remedy has been found inadequate." (*Strauss, supra*, 144 Cal.App.3d at 519) But the remedies authorized by MRL § 798.86 are more than adequate within the meaning of this exception. The leading authority is *Orloff* v. *Los Angeles Turf Club* (1947) 30 Cal.2d 110, where a race track violated a civil rights statute by excluding the plaintiff from the premises without any showing of bad behavior. Although the only prescribed remedy was an award of damages, *Orloff,* applying traditional equity reasoning, upheld an award of injunctive relief on the grounds that it was extremely difficult to define and award damages for being excluded from a race track.

No such "inadequacy" problem exists here. The damages available for exceeding utility charges permitted by MRL § 798.41 are straightforward and formulaic – the amount of any excess charges. In addition, MRL § 798.86 authorizes a substantial penalty and MRL § 798.85 authorizes an attorneys' fee award for tenants held to be prevailing parties in actions under the MRL. If that collection of remedies were deemed "inadequate" under *Orloff*, the exception would completely swallow the settled rule that prescribed statutory remedies are exclusive.

4

IT IS ESPECIALLY IMPROPER TO PERMIT A PUNITIVE DAMAGES REMEDY WHEN THE LEGISLATURE OMITS IT FROM A REMEDIAL STATUTE AND PRESCRIBES A DIFFERENT PENALTY INSTEAD

To permit a punitive damages remedy is especially improper where, as here, a remedial statute authorizes a different penalty and fails to authorize punitive damages as well. Even the general doctrine of *expressio unius* forbids a punitive damages remedy in that circumstance. However, there is direct precedent that punitive damages must be authorized expressly before the courts may even consider awarding that remedy in addition to a prescribed penalty. "[H]ad the Legislature . . . permitted a double recovery of punitive and penal damages for the same . . . acts, it would in some appropriate manner have said so." (*Troensegaard* v. *Silvercrest Industries, Inc., supra*, 175 Cal.App.3d 218, 228.)

Moreover, both statutory penalties and punitive damages are penal in nature, requiring strict construction of any statute authorizing either. (*See*, *Menefee* v. *Ostawan* (1991) 228 Cal.App.3d 239, 243.) "Uniformly, we have looked with disfavor on ever-mounting penalties and have narrowly construed the statutes which either require or permit them." (*Hale* v. *Morgan, supra*, 22 Cal.3d 388, 401.) "The law traditionally disfavors forfeitures and statutes imposing them are to be strictly construed." (*Troensegaard* v. *Silvercrest Industries, supra*, 175 Cal.App.3d 218, 227 [cit. omitted]) Thus, the Legislature's express authorization of a penalty other than punitive damages must be strictly construed to mean just that.

Mindful of the foregoing principles, when the California Legislature wishes to authorize punitive damage it knows full well how

to do so expressly. The omission of a punitive damage remedy from MRL § 798.86 stands in sharp contrast to the many analogous remedial statutes in California that expressly authorize punitive damages. (*E.g.,* Fin. Code § 779(a); Civ. Code, §§ 56.35, 1786.50; H&S Code, § 1285.) Our Legislature was fully capable of including similar language had it intended to authorize punitive damages for a violation of the MRL.

Finally, it is settled that the general statute on punitive damages, Section 3294 of the Civil Code, must bow to a statute specifically addressing the penal remedies authorized for MRL violations. (*See, Schmidt v. Superior Court, supra,* 48 Cal.3d 370, 383 ["Under traditional principles of statutory interpretation, there can be no question but that the later enacted and more specific provisions of [MRL] section 798.76 relating to adults-only rules in mobilehome parks would prevail over the more general provisions of the Unruh Act."]; *accord, Miller v. Superior Court* (1999) 21 Cal.4th 883, 895 [specific statute controls even if another, "standing alone, would be broad enough to include the subject to which the more particular provision relates."].) In this case, accordingly, the statute determining penal remedies for MRL violations is MRL § 798.86, not Civil Code § 3294.

5.

ALLOWING PUNITIVE DAMAGES IN THIS CASE WOULD ALSO VIOLATE THE PARK OWNERS' DUE PROCESS RIGHTS

"[A] statute is to be construed whenever possible so as to preserve its constitutionality." (*Walnut Creek Manor* v. *Fair Employment and*

Housing Commission (1991) 54 Cal.3d 245, 271) Here, it would infringe two separate constitutional due process rights to read a punitive damages remedy into the MRL. It would violate the owners' right to fair notice of penalties for particular conduct, and also the rule prohibiting *double* penalties for that conduct. (Cal. Const., art. I, § 7; U.S. Const., 14th amendment)

To begin with, the text of MRL § 798.86 gives no notice of the availability of punitive damages for a violation of the MRL. Nor has any published appellate decision ever construed MRL § 798.86 in that manner. As the United States Supreme Court observed in *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 574: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." (*Accord, Keeler v. Superior Court* (1970) 2 Cal.3d 619, 633-634.)

Due process principles also mandate that the MRL be construed to avoid an unconstitutional double penalty. "A defendant has a due process right to be protected against unlimited multiple punishment for the same act. A defendant in a civil action has a right to be protected against double recoveries not because they violate 'double jeopardy' but simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process." (*Troensegaard* v. *Silvercrest Industries, Inc., supra*, 175

Cal.App.3d 218, 227-228, cit. omitted) Here, the Legislature expressly authorized only one penalty, not two, for violation of MRL § 798.41. To avoid compounding the constitutional infirmity already noted, this Court should strictly construe the Legislature's stated intent to authorize only one penal remedy for such a violation.

6.

THE LEGISLATIVE HISTORY OF MRL § 798.86 CONFIRMS THE LEGISLATURE'S INTENT TO AUTHORIZE ACTUAL DAMAGES ONLY

MRL § 798.86 and its predecessors (*see* accompanying legislative history ["LH"], for which judicial notice is requested separately), have always authorized the prescribed penalty "in addition to damages afforded under the law. . . ." (LH Vol. 1, Tab A, #1) While the tenants might argue that the quoted phrase could be construed to include punitive as well as actual damages, that reading would fly in the face of the common meaning of the word "damages" as well as the many interpretative and constitutional principles just reviewed in this brief. In addition, that reading is irreconcilable with the legislative history.

The original Legislative Counsel's Digest accompanying SB 701 (LH Vol. 1, Tab A, #1) described the proposed remedial statute as follows:

> This bill . . . would entitle a tenant . . . who is the prevailing party to recover, in addition to his actual damages, $250 for each violation . . . . (*Id.*, #1, Item 1a, p. 3; emphasis added)

The Legislative Counsel's Digest remained unchanged in that respect throughout the history of this statute. It continued to describe the term "damages afforded under the law" as "actual damages." (*Id.*, #1, Item b, p. 3; Item c, p. 3; Item d, p. 3; Item e, p. 3; Item f, p. 3; Item g, p. 3; Item h, p. 2) If the accuracy of that longstanding description had ever been challenged it could easily have been changed – as occurred with the Legislative Counsel's Digest in *Gregory v. City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 83 (*hearing denied*) (overruled on other grounds in *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 686, fn. 43).

The same understanding of the term "damages afforded under the law" was reiterated in the Enrolled Bill Memorandum to Governor, dated September 24, 1975 (LH Vol. 1, Tab A, #13), which stated as follows:

> The bill also provides that the prevailing party . . . may recover . . . in [the] court's discretion in addition to his actual damages, $250 for each willful violation . . . . (*Id.*, pages 1-2; emphasis added)

And that same understanding has persisted to the present time. When AB 591 was introduced on February 25, 1997, to increase the statutory penalty for MHL violations (LH Vol. 2, #1), no change was proposed in the term "damages afforded under the law." (*Id.*, Item 1a) Moreover, the same understanding was reiterated in at least five significant documents: the bill report prepared for the Assembly Committee on

Judiciary, (*id.*, Item 3, p. 2);[2] the bill report prepared for the Senate Judiciary Committee (*id.*, Item 6);[3] the bill report for the Senate Rules Committee (*id.*, item 8, p. 1);[4] and a special memorandum dated June 16, 1997 from the Legislative Counsel to the bill's author (*id.*, Item 12, p. 1).[5]

C.

INDEPENDENTLY, THE PUNITIVE DAMAGES AWARD SHOULD BE REVERSED BECAUSE IT RESTS ON PROHIBITED GROUNDS

Even if punitive damages *were* authorized for a violation of MRL § 798.41, the award rendered below is still untenable as a matter of law. It was predicated on three prohibited grounds: (1) taking an arguable position on an unresolved legal issue; (2) petitioning courts and other branches of government for authorized forms of redress on that issue; and (3) defending this very lawsuit in an allegedly overzealous manner.

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[2] "Nevertheless, a penalty cap of $5000 [per violation] may be felt excessive in light of the availability of recovery of actual damages and the jurisdictional limit of small claims courts."

[3] Existing law allows successful plaintiff/mobilehome owners in suits against management to be awarded up to $500 for willful violations of the Mobilehome Residency Law, in addition to their actual damages. [¶] This bill would raise the limit of these discretionary penalties to $2,000. (*Id.*, Item 6, p. 2)

[4] "This bill would raise the existing discretionary penalty. . . . This penalty is in addition to the award of plaintiff's actual damages."

[5] "A homeowner . . . who is the prevailing party . . . in small claims court . . . would be limited to a total award of $5,000, which award include his or her actual damages plus any additional amount awarded in the discretion of the court for willful violation. . . ."

We address those grounds in the indicated order, and they likewise present pure questions of law subject to *de novo* review. The owners are not challenging the sufficiency of the evidence to support the tenants' factual contentions, but rather the legal viability of those contentions as support for a punitive damages award.

1.

THE AWARD IMPERMISSIBLY PENALIZED AN ARGUABLE POSITION ON A NOVEL AND COMPLEX LEGAL ISSUE

It is one thing to hold a defendant accountable in damages for the consequences of a legal position ultimately rejected by the courts. It is quite another thing to impose punitive damages for that legal position when the pertinent statutes were complex, one was newly enacted, no appellate court had resolved the issue in dispute, and the defendant's position reflected at least an arguable interpretation of the statutes. Punitive damages are prohibited in that circumstance by federal and California due process guarantees and this state's case law on the punitive damages remedy itself.

BMW of North America, Inc. v. Gore, supra, 517 U.S. 559, held that it is unconstitutional to base punitive damages on a defendant's reliance on an arguable interpretation of a state statute. The Court explained that "no state court had explicitly addressed" the statutory issue involved, and that the Court's own "review of the text of the statutes . . . persuades us that in the absence of a state-court determination to the contrary, a corporate executive could reasonably

interpret the disclosure requirements" in the manner that BMW had. (*Id.* at 577-578) It mattered not that "[p]erhaps the statutes may also be interpreted in another way." (*Id.* at 578) Due process did not permit a "reprehensibility" finding on that ground for punitive damages purposes.

The California courts have likewise prohibited punitive damages – or *any* tort remedy – based on a defendant's arguable if incorrect position on unresolved issues of statutory interpretation or common law. For example, even though insurance companies are deemed fiduciaries for certain purposes, they are not subject to "bad faith" tort or punitive damages liability if a court merely holds that they misconstrued the benefits due to a policyholder. *Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, *Dalrymple v. United Services Auto. Assoc.* (1995) 40 Cal.App.4th 497 and like cases hold that tort remedies are prohibited if the denial of benefits rested on an arguably correct position – and especially if the dispute involved unresolved questions of statutory interpretation or case law.

Opsal reversed a punitive damages award, as a matter of law, even though the court rejected the insurer's coverage position on the merits. In rejecting punitive damages, *Opsal* held as follows concerning the policyholder's attack on the insurer's interpretation of a statute:

> [W]e cannot say that USAA's invocation of the one-year period, even if erroneous, was unreasonable. USAA took the position that the Soldiers' and Sailors' Civil Relief Act did not apply to contractual periods of limitation. Opsal has cited a single out-of-state case . . . for the proposition that

> the Soldiers' and Sailors' Civil Relief Act applies to contractual time limitations. While we express no opinion on the . . . ultimate resolution of the issue, such authority does not, in our view, automatically eliminate the "genuine issue . . . under California law" which exists as to the act's application to contractual periods of limitation. (1206-1207)

Opsal also rejected any punitive damages based on the insurer's position on a point of case law. The opinion explained that the point had not yet been resolved by the California Supreme Court:

> Here, USAA denied coverage based on reasoning which presaged the Supreme Court's dicta in footnote 7 of Garvey. (*Garvey v. State Farm Fire & Casualty Co., supra*, 48 Cal.3d at pp. 408-409, fn. 7.) . . . . Clearly there exists "a genuine issue . . . under California law" until the meaning of Garvey's footnote 7 is resolved. (2 Cal.App.4th at 1205)

(Accord, *Dalrymple, supra*, 40 Cal.App.4th 497, 519-520 [tort liability was prohibited because "uncertainties in controlling case law" contributed to "a genuine issue as to the insurer's liability under the policy under California law. . . ."])

BMW, supra, and the equivalent California cases are directly in point here. Punitive damages may not be predicated on the owners' interpretation of MRL § 798.41 and P.U. Code § 2705.5 because it was at least an arguable one. In *Opsal*'s terms, there was at least a "genuine issue" about which statute controlled the new submetering system authorized by the Legislature. Moreover, legally trained officers of each set of owners (RT 10,002 [McCabe], 10,252-10,253 [Ellen Kelleher])

reviewed the relevant statutes and consulted other sources as well, though not the legislative histories. (RT 10,013, 10,028, 10,030, 10,034 [McCabe]; 10,272-10,285 [Kelleher]) While this Court disagreed in 1998 with the owners' interpretation, it recognized that the lack of controlling precedent[6] required a searching and *de novo* appraisal of the parties' competing arguments based on the histories and underlying purposes of the pertinent statutes. And the Public Utilities Commission likewise found it necessary to conduct its own searching analysis of the legal issues underlying this dispute. (CT 2912-2929)

The leading case of *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 provides apt guidance for the resolution of this issue. Despite this Court's agreement with the tenants in 1998 on the main statutory interpretation issues, the Court found the owners' contentions sufficiently meritorious to deny the tenants' motions to dismiss the appeal, deny them any appellate costs, and deny them prevailing party status for attorneys' fee purposes. It seems inconceivable, therefore, that this Court would have granted a motion for sanctions against the owners on the basis that their contentions were frivolous. But nonfrivolous contentions are precisely what due process and California case law immunize from punitive damages liability. Thus, *Marriage of Flaherty*'s

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[6] The decision cited most often, *Greening v. Johnson* (1997) 53 Cal.App.4th 1223, had little direct relevance to this case. It involved cable television charges that were held improper only because the tenants did not request that amenity.

concluding language, finding that the appellate contentions there were not frivolous, is equally applicable to the owners' contentions here:

> On the merits, the appeal raised substantial questions . . . . Although this court has affirmed the trial court, it was not unreasonable for James' counsel to think the issues were arguable. There are at least two sides to every legal dispute, and reasonable attorneys will often disagree about the merits of a particular case. Here, it cannot be said that "any reasonable person would agree that [James' argument] is totally and completely devoid of merit . . . ." (Cit. omitted) This appeal was not frivolous. (*Id*. at 651)

It only remains to point out that the asserted frivolousness of the owners' legal position presents a legal issue for courts alone to determine, not juries. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863 [trial court must resolve objective "probable cause" issue in malicious prosecution actions]; *Coleman v. Gulf Ins. Group* (1986) 41 Cal.3d 782) [only the appellate court, not a subsequent jury, may resolve claims that an appeal was frivolous]; *see also*, *BMW*, *supra; Opsal*, *supra*; *Dalrymple, supra*.) In the present case, accordingly, this Court may and should decide this issue on a *de novo* basis. Even if the owners' subjective motives were as "malignant" as the tenants say they were, this Court should now hold that the owners' legal position was objectively arguable and therefore not subject to punitive damages.

2.

THE AWARD IMPERMISSIBLY PENALIZED THE ACT OF PETITIONING COURTS AND OTHER BRANCHES OF GOVERNMENT FOR REDRESS

The California Supreme Court has repeatedly barred any tort remedies – with the sole exception of a malicious prosecution action – predicated on the act of petitioning a court or other governmental body for redress. *(E.g., Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118; *California Teachers Assoc. v. State of California* (1999) 20 Cal.4th 327.) Moreover, *Coleman v. Gulf Ins. Group, supra*, 41 Cal.3d 782, expressly prohibited attempts to impose tort liability for the act of prosecuting an allegedly frivolous appeal.

This fundamental rule has both constitutional and statutory underpinnings. As explained in *Pacific Gas & Electric, supra*, 50 Cal.3d 1118, n. 15 at 1133, "[t]he right to petition for redress of grievances is a basic right guaranteed by the state and federal Constitutions (U.S. Const., 1st Amend.; Cal Const., art. I, § 3)." And to punish an exercise of that right is also a due process violation. (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363) As recently explained in *California Teachers Assoc., supra,* 20 Cal.4th at 356:

> The availability of and access to judicial and quasi-judicial bodies to decide controversies and to safeguard constitutionally protected interests against arbitrary or erroneous deprivations by the state are fundamental components of our society.

Those principles are also embodied in California's absolute "litigation privilege" established by Section 47 of the California Civil Code.

Nor is tort immunity in this area confined to petitioning the courts. Both *Pacific Gas & Electric* and *California Teachers* confirm that

"[t]his right of access extends to the constitutional right to petition administrative tribunals." (*California Teachers*, 20 Cal.4th at 335, quoting *Pacific Gas & Electric*, 50 Cal.3d at 1135) And the same right extends to petitioning a public utilities commission, a city, a professional regulatory body, and a district attorney. The California Legislature has itself endorsed that broad construction of the federal and state constitutional petition rights.[7] (*See also, Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993) 508 U.S. 49 and *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board* (1983) 461 U.S. 731 (1983), construing the First Amendment petition right as a broad limitation on antitrust claims based on petitioning *any* governmental entity.)

As documented in this brief, a major element of the tenants' case for punitive damages was an attack on the owners for pursuing authorized forms of relief in the Santa Cruz County Superior Court; lawful appeals and stay motions in this Court; authorized forms of relief in the PUC;[8] and less formal but no less authorized forms of relief from

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[7] Code Civ. Proc. § 425.16, subd. (e), provides that, "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law . . . ."

[8] *Pacific Gas & Electric* precludes any argument that the owners remained subject to tort remedies for the PUC petition because it was

(continued...)

the California State Bar, the City of Santa Cruz, and the Santa Cruz District Attorney. Conduct of that kind is a prohibited ground for punitive damages except in a malicious prosecution action. What *California Teachers* said about the right of access to courts applies with equal force to the right of access to any other branch of government:

> An individual's constitutional right of access to the courts cannot be impaired, either directly . . . or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits. . . . [S]tate officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. (20 Cal.4th at 339; cits. and internal quotation marks omitted)

No more need be said on this issue, except that it presents another pure question of law requiring no consideration of disputed factual matters. Thus, the standard of review is again *de novo*. This Court may and should hold that this second element of the tenants' case for punitive damages was likewise invalid as a matter of law.

3.

THE AWARD IMPERMISSIBLY PENALIZED THE OWNERS FOR ALLEGEDLY OVERZEALOUS LITIGATION TACTICS

The third substantive element of the tenants' case for punitive damages is irreconcilable with this Court's holding in *Palmer v. Ted*

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[8](...continued)
advanced by an affiliated company, not them. *Pacific Gas & Electric* conferred constitutional immunity on a defendant for encouraging and supporting a third party to exercise its right of access to the courts.

Stevens Honda, Inc. (1987) 193 Cal.App.3d 530 – a holding that is directly controlling on its facts and binding as *stare decisis.*

In *Palmer*, as here, "[t]he trial court allowed plaintiff to introduce evidence of defendant's litigation tactics . . . to prove bad faith, lack of probable cause, malice, or oppression." (*Id.* at 533) In a close analogy to the present case, "[p]laintiff was permitted to testify, over objection, that in two and one-half years of litigation preceding the trial in July 1985, he had fought sixteen law and motion matters, tying one and winning the other fifteen, three with sanctions, at a cost of some $56,000 in attorney fees. In his opinion, defendant was 'stone-walling' him." (*Id.* at 535) Even the plaintiff's rationale in *Palmer* was similar to the tenants' rationale below (although the owners' oft-criticized demurrers were successful). The plaintiff argued that litigation misconduct was probative of the defendant's evil state of mind in the underlying tort, bad-faith denial of a contract.

This Court emphatically rejected such a ground for punitive damages. "[O]nce litigation has commenced, the actions taken in its defense are not, in our view, probative of whether defendant in bad faith denied the contractual obligation prior to the lawsuit." (*Id.* at 539) "While the essence of this tort is a defendant's 'stone-wall' denial of the existence of a contract, neither *Seaman's* nor its progeny suggest that the very manner in which a defendant conducts its defense in the litigation can be further evidence of bad faith." (*Id.* at 537) "It is for the law-and-motion judge and not the jury to assess whether a party should be

penalized for bad faith discovery positions." (*Id.* at 540) The reasoning in *Palmer* applies directly and forcefully here, where the case for punitive damages likewise treated litigation conduct as proof of an evil state of mind on the underlying issues.

Palmer also controls this appeal in another way. It persuasively distinguished the very cases that the tenants cited on this issue – *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870 and *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157. *Palmer* held that *White* is limited to ongoing insurance coverage disputes, and *Oren* is limited to abuse of process lawsuits. Because the present case fits neither description, and *Palmer* is binding precedent, the owners see no point in attempting to improve on *Palmer*'s analysis showing that *White* and *Oren* are inapposite.

Moreover, *Palmer* finds strong support in a long line of California Supreme Court cases holding that the only permissible remedies for litigation misconduct are motions for sanctions and, in appropriate cases, separate actions for abuse of process or malicious prosecution. (*E.g.*, *Silberg v. Anderson* (1990) 50 Cal.3d 205; *Rubin v. Green* (1993) 4 Cal.4th 1187) Most recently, the Supreme Court explained this rule as follows in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1 in rejecting any tort remedy for "first party" spoliation of evidence:

> [U]sing tort law to correct misconduct arising during litigation raises policy considerations not present in

> deciding whether to create tort remedies for harms arising in other contexts. In the past, we have favored remedying litigation-related misconduct by sanctions imposed within the underlying lawsuit rather than by creating new derivative torts. . . . (*Id.* at 8; cits. and internal quotation marks omitted)

In sum, the tenants' inflammatory complaints about "litigation-related misconduct" (*Cedars-Sinai, supra*) had no business in a trial about submetered water charges at a mobilehome park. This was yet another prohibited ground for a punitive damages award.

D.

AT A MINIMUM, THE PUNITIVE DAMAGES AWARD SHOULD BE REVERSED FOR A NEW TRIAL OR REDUCED BY THIS COURT

If for any reason this Court concludes that the punitive damages award below should not be reversed outright as a matter of law, the award should still be reversed and remanded for a new trial or, alternatively, reduced by this Court in an exercise of its remittitur power. (*See, e.g., Notrica v. State Compensation Ins. Fund* (1999) 70 Cal.App.4th 911.) That disposition is required, at a minimum, because of the prejudicial effect of each of the three grounds for punitive damages below and the excessiveness of the resulting award.

1.

EACH OF THE THREE PROHIBITED GROUNDS FOR PUNITIVE DAMAGES BELOW WAS SUFFICIENTLY PREJUDICIAL TO REQUIRE A NEW TRIAL

In the unlikely event this Court decides that one or even two of the three grounds advanced for punitive damages below were permissible, the prejudicial impact of the remaining ground(s) would still require a reversal of the judgment and a remand for a new trial. Showing the way again is *Palmer v. Ted Stevens Honda, Inc., supra,* 193 Cal.App.3d 530. There, this Court remanded the punitive damages issue for a retrial because the prohibited ground of litigation conduct, though not the exclusive basis for the award, played a sufficiently prejudicial role to require a reversal of the judgment:

> Not only was admission of this evidence of defendant's litigation conduct . . . error, we conclude it undermines the integrity of the punitive damage award. The jury was instructed to consider in arriving at a punitive damage award "[t]he reprehensibility of the conduct of the defendant." Plaintiff's closing argument relied heavily on this improper evidence in requesting punitive damages. The jury awarded punitive damages five times greater than compensatory damages. This ratio is some indication the award resulted from passion and prejudice. (193 Cal.App. 3d at 540)

The same is true here, and *a fortiori* given the much larger and more disproportionate punitive damages award. The three grounds outlined in this brief played an equally prominent and inflammatory role in the tenants' case for punitive damages. Accordingly, if this Court agrees that even one of those grounds was prohibited, its influence was sufficiently strong at the trial below to require a reversal of the judgment for reasons similar to those stated in *Palmer*.

2.

THE PUNITIVE DAMAGES AWARD WAS UNCONSTITUTIONALLY EXCESSIVE

The $6 million award below was unconstitutionally excessive for three main reasons. First, it was strikingly disproportionate to the $36,401.85 total injury *claimed* by the tenants, and their actual injury was substantially smaller. It was only the *loss of use* of the "excess" charges from the time they were paid, on a month to month basis, until the time they were all refunded in full, nearly two years before the trial commenced. Accordingly, the interest awarded on those refunds, roughly $5,000,[9] is a much more accurate reflection of the total injury in this case. But even using a "damages" figure of $36,401.85, the punitive damages award was still 165 times greater, clearly violating current constitutional standards.

In *Pacific Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, the high court held that a 4-to-1 ratio of punitive to actual damages was "close to the line . . . of constitutional impropriety." (*Id.* at 23-24) In *Palmer, supra*, this Court held a punitive damages award excessive that was "five times greater than compensatory damages." (193 Cal.App.3d at 540) Not surprisingly, therefore, *Notrica, supra*, 70 Cal.App.4th 911, held that a punitive damages award 20 times greater than actual damages was

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[9] The tenants requested a total of $7,124.28 in interest covering a 40-month period. (CT 3335) However, the trial court rejected any interest for the 14-month period in which the tenants had agreed to a stay of the owners' duty to make refunds and reduce future charges. (CT 4423)

"excessive as a matter of law." (*Id.* at 952). Nor did the high court hesitate in *BMW of North America, Inc. v. Gore, supra*, 517 U.S. 559, to reverse a punitive award that was 500 times greater than actual injury. (*Id.* at 582)

Second, the punitive damages award below was excessive given the conduct complained of in this case. Even if this Court finds there was *some* conduct a jury could reasonably consider in assessing punitive damages, major elements of the conduct deemed punishable below were not. Because the size of the award reflected such impermissible elements, it should be reversed and remanded for that reason as well. (*See, Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal. 4th 965, 1004 [punitive damages award reversed because trial court "might not have made the award or might have awarded a lesser sum" but for its reliance on a prohibited tort theory]; *Fidler v. Hollywood Park Operating Company* (1990) 223 Cal.App.3d 483, 488-489 [award of contract damages reversed because jury also "heard and considered" an unauthorized emotional distress/punitive damages claim that was "particularly of the sort likely to inflame the jury and evoke passion."].)

Finally, the punitive damages award was excessive because, just as in *BMW*, the jury was permitted to increase the owners' punishment to prevent their so-called "greed" in California from being repeated in other jurisdictions. The tenants presented inflammatory testimony and argument that the current owners – a large national corporation and its affiliates based in Chicago – would reap $30 million in unlawful

"advantage" (RT 10,361) if they overcharged their 25,000 mobilehome tenants throughout the United States. (RT 9871) This violated a direct holding in *BMW*:

> [O]ne State's power to impose burdens on the interstate market for automobiles is not only subordinate to the federal power over interstate commerce . . . but is also constrained by the need to respect the interests of other States. . . . [¶] . . . [T]the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. (517 U.S. 559 at 571-572)

The quoted reasoning in *BMW* applies just as forcefully to a nationwide mobilehome business.

E.

THE $700,000 ATTORNEYS' FEE AWARD SHOULD BE REVERSED NO MATTER HOW THIS COURT DECIDES THE PUNITIVE DAMAGES ISSUES

Under settled law, if this Court reverses the principal judgment below the associated attorneys' fee award must likewise be reversed. (*California Grocers Assoc., Inc. v. Bank of America, NTSA* (1994) 22 Cal.App.4th 205, 220) For similar reasons, even a reduction of the judgment would require at least a reconsideration of the associated fee award, whether by this Court or on a remand by the trial court.

However, the attorneys' fee award must be reversed even if this Court affirms the punitive damages award in full. The only legal basis for the fee award was MRL § 798.85, and that statute authorizes a fee award only if the tenant prevails "[i]n any action arising out of the provisions of this chapter [the MRL] . . . ." Here, however, the only MRL-authorized relief ever obtained by the tenants was in the related mandamus action. The refunds were compelled by that action, not this. The judgment in this action merely recited that the refunds had already been paid.

The tenants' only substantive relief in this action was a punitive damages award on their "statutory tort" theory – a theory predicated on Civil Code § 3294, not MRL § 798.86. (*Ante*, pp. 13-14) The former statute, however, does not authorize attorneys' fee awards for success in obtaining punitive damages awards. Accordingly, even if this Court were to affirm the punitive damages award below in its entirety, the tenants would still not be prevailing parties on an MRL action as required for a fee award under MRL § 798.85.

CONCLUSION

As stated at the outset, this litigation has strayed far from its origins and appropriate remedies. The related mandamus action provided the tenants with a favorable ruling on the disputed regulatory issues, a full refund of the $36,401.85 in disputed water charges, and a $101,000 attorneys' fee award for securing those refunds. True, the tenants had every right to continue the present litigation by seeking punitive

damages on their tort causes of action or a statutory penalty under Section 798.86 of the Mobilehome Residency Law (Civil Code § 798 *et seq.*). However, an overly ambitious trial strategy led them to abandon both of those remedies, and it is now time to bring this long running case to a close.

For the reasons stated in this brief, both the punitive damages and fee awards below should be reversed as a matter of law and without a remand. Neither remedy was authorized by the relevant provision of the Mobilehome Residency Law, and the punitive damages award, even if authorized in principle, rested on prohibited grounds.

DATED: December 8 , 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served --

APPELLANTS' OPENING BRIEF

by enclosing true copies of said document in envelopes with proper postage prepaid and addressed to --

Mark B. Fredkin, Esq. — Attorneys for Respondents
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Clerk, California Supreme Court (5 copies)
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701 Ocean Street, Room 110
Santa Cruz, CA 95060

and placing same for delivery by the United States Postal Service in my usual manner on the date stated below.

The foregoing is true and correct. Executed under penalty of perjury at Novato, California.

DATED: December 8, 1999

____

ELLIOT L. BIEN