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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

B.C.,

Plaintiff and Appellant,

v.

LEE VINCENT COTTONE,

Defendant and Appellant.

G051967

(Super. Ct. No. 30-2010-00335370)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge. Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part, and remanded.

Law Offices of William J. Kopeny and William J. Kopeny; Law Office of William J. Genego and William J. Genego for Defendant and Appellant.

Lee Vincent Cottone, in pro. per.; Rosen Saba, James R. Rosen, Elizabeth L. Bradley and Maria L. Starn for Plaintiff and Appellant.

* * *

A jury found defendant Lee Vincent Cottone liable on several tort causes of action for sexually abusing his niece, plaintiff B.C., when she was between eight and 10 years old.[1] Cottone challenges the sufficiency of the evidence to support his ability to pay the jury's award of $300,000 in punitive damages, primarily citing a lack of evidence regarding his financial liabilities. B.C. cross-appeals from the court's award of $95,000 in attorney fees, asserting the court failed to apply the lodestar method in determining statutory attorney fees (Code Civ. Proc., § 1021.4). For the reasons expressed below, we reverse the award of punitive damages and remand for retrial on that issue, including Cottone's liabilities. We affirm the attorney fee award.

I

FACTUAL AND PROCEDURAL BACKGROUND

In December 2014, a jury returned a special verdict finding Cottone harmed B.C. by committing four criminal acts of molestation (Pen. Code, § 288, subd. (a)), and awarded her nearly $90,000 in compensatory damages, including $69,472 for past and future economic loss and $20,000 for noneconomic loss, including mental suffering. The jury also found Cottone acted with malice, oppression, or fraud.

Before trial, B.C. filed and served a "Notice in Lieu of Subpoena for [Cottone] to Appear at Trial and Produce Documents." (See Code Civ. Proc., § 1987.) The Notice alerted Cottone to appear at trial "prepared to give testimony" and to produce "[d]ocuments reflecting [his] current financial condition and net worth, including, but not limited to" documents establishing value, ownership or control of all real property, and numerous other categories of assets, either held personally or through businesses and

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[1] The parties do not include on appeal a transcript of the trial's liability phase, but prior appellate opinions set forth the abuse allegations. (*People v. Cottone* (2013) 57 Cal.4th 269; *Cottone v. Cottone* (Aug. 26, 2016, G051676) [nonpub. opn.]; *People v. Cottone* (Jan. 14, 2014, G042923) [nonpub. opn.].) The present appeal involves only the jury's punitive damage award and attorney fees.

trusts. The notice directed Cottone to lodge the exhibits with the court, "subject to impending court ruling(s) and/or appropriate jury finding."

At the punitive damages phase of trial, B.C. called Cottone as an adverse witness and examined him regarding various documents he had produced.[2] Cottone stated he was imprisoned following his criminal convictions from approximately October 2009 until October 2014. At the time of the damages phase of the trial, he was 62 years old and unemployed. He previously had worked as a construction supervisor, earning $60,000 a year before his imprisonment. He acknowledged he had worked at a general contracting company for 37 years, earning approximately $90,000 to $100,000 a year, but claimed he did not know how much his wife, a mortgage loan broker, earned.

Before going to prison, he had the means to purchase five properties. He owned a condominium on Pendleton Avenue in Irvine, which he believed was his least valuable property. He denied knowing the current value of the properties, including an Irvine property on Wheeler, one on New Dawn (apparently in Irvine), and another on Blakely in Irvine. His annual property tax bill on the New Dawn property was approximately $19,000. The assessed value for tax purposes of the Blakely property was $917,000. He testified his wife sold three of the properties "in order to pay our payments."

Cottone testified his wife managed their assets while he was in prison, and he claimed he had not done any banking for over six years. He denied signing a check dated July 17, 2014 that bore his name on the signature line, explaining his wife had authority to sign his name on some checks. He had paid his civil attorney's fees, but he did not know the amount because his wife wrote the checks. He acknowledged a title report for the New Dawn property showed a "loan amount" to his civil lawyers for

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[2] Cottone testified he brought to court financial documents evidencing his net worth, but his wife collected the documents without his help, and he never looked at the documents.

$200,000. His wife also had paid $23,000 in fees to Dr. Rappaport, presumably an expert witness at his trial.

Since 2007, his wife had given their son money, but he did not know how much. He owned a 2003 Corvette, a 1996 Chevrolet pickup, and a 1995 or 1996 Harley Davidson motorcycle, and his wife had a 2011 or 2012 Mercedes. He owned shares in publicly traded companies, but he rebuffed inquiries here as "getting into [his] weak areas." He had a retirement plan, but he did not know its value, though he noted his wife withdrew money from it to pay their "mortgages."

Cottone claimed he had only $40 in his checking account, but acknowledged he "might" have a savings account. Plaintiff's counsel showed him a document and asked if he had $263,745 in his Wells Fargo savings account as of August 2014. He replied "Sir, I've been in prison for six years. I had no access to any of these accounts, savings accounts. I don't have the access." Counsel told him a Wells Fargo account number showed it contained $160,353 in September 2014, and October 2014 statement showed a balance of $82,195. Cottone responded, "Sir, my recollection is, I do not have – I'm not aware of the accounts or money in the accounts. I've had three and four lawyers that I had to pay during those years."

Cottone did not know if he was an owner of Cottone Properties, LLC or Cottone Management, LLC, but believed he had resigned from the former entity. Asked if he was a trustor or trustee of any trusts, he responded "I would be – these are not my expertise. Do you want to know how to build a building, a high-rise, that's my expertise. As far as this stuff goes, I don't know." He signed the back page of family trusts dated in January 2007, but he did not read the trusts before signing and did not "understand these documents." He also acknowledged signing business and land trusts and a retirement plan. When plaintiff's counsel asked Cottone to estimate the value of various land trusts he owned, Cottone responded that "[w]hen you start taking out the first and seconds . . . there isn't anything left," and stated as to one of the properties, "[w]hen you put a price

out there, as you did earlier, that we paid $535,000 for the condo that we owned, I don't know, eight years ago, and she sold it for 500-, hopefully, I don't know if – what she sold it for, but she had to pay $60,000 to a realtor to sell it. And we owed 481,000 on the property because that's what this paper says (indicating). That left me negative." Cottone did not know the value of land trusts, but claimed "the first [presumably deed of trust or mortgage] was $810,000" on the Blakely trust. Cottone claimed he and his wife rented out the homes they owned other than the one they lived in "at a loss . . . ." He did not know the amounts of rent his wife collected on their rental properties.

Plaintiff's counsel asked Cottone if his wife was the person most knowledgeable about his financial net worth. He stated "[a]t this time, I would say [my wife's] been handling it, yes." Asked what his net worth was, he acknowledged, "I probably could answer that," but he never did. He generally explained he owed more against the properties than they were worth or that it "would be a wash" if they were sold, claiming "this market . . . to be a depressed market." When asked to provide his "best estimate" of his total net worth, and he responded "I really don't know."

B.C.'s counsel attempted to call Cottone's wife, Jeanie, to testify, but the trial court sustained Cottone's objection, explaining Jeanie was no longer under subpoena because B.C.'s counsel excused her from further testimony at the liability phase. Citing assessor figures and other tax documents, B.C.'s counsel argued the combined value of Cottone's property totaled close to $3.5 million, and asked the jury for 10 percent of that figure as punitive damages.

After the parties' closing arguments, B.C.'s counsel asked the trial court to provide the jury with the tax and bank documents referenced during Cottone's testimony. The court noted counsel did not label any exhibits, and counsel did not refer to the documents as exhibits on the record during the testimony. When Cottone's counsel objected on foundational and hearsay grounds, the court declined to provide the documents to the jury. As noted, the jury awarded B.C. $300,000 in punitive damages.

II

DISCUSSION

A. *We Must Reverse and Remand for a New Trial on Punitive Damages Because the Record Fails to Show Evidence of Cottone's Liabilities*

Cottone contends the evidence failed to establish his ability to pay $300,000 in punitive damages, asserting B.C. failed to present evidence of his financial liabilities. We agree.

Punitive damages serve the public purpose of punishing wrongdoing and deterring future misconduct by the defendant and other potential wrongdoers. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (*Adams*); *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1658 (*Stevens*); see Civ. Code, § 3294, subd. (a) [punitive damages allowed "for the sake of example and by way of punishing the defendant"].) In resolving whether a punitive damage award is excessive, we must evaluate whether the amount awarded substantially serves the public's interest in punishment and deterrence. (*Adams*, at p. 110; *Stevens*, at p. 1658.)

"[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13 (*Neal*); see *Adams*, *supra*, 54 Cal.3d at p. 110.) "The purpose of punitive damages 'is not served by financially destroying a defendant. The purpose is to deter, not to destroy.'" (*County of San Bernardino v. Walsh* (2007) 158 Cal.App.4th 533, 546 (*Walsh*); see *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 192 (*Soto*) [punitive damages award is excessive if "'it destroys, annihilates, or cripples the defendant'"].)

Our Supreme Court has identified three criteria to apply in evaluating whether a punitive damages award is excessive under California law: (1) "the reprehensibility of the defendant's conduct"; (2) "the reasonableness of the relationship between the award and the plaintiff's harm"; and (3) "in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct." (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679 (*Baxter*); see *Adams, supra*, 54 Cal.3d at p. 110.)

We review the trier of fact's punitive damage award under the substantial evidence standard. (*Walsh, supra*, 158 Cal.App.4th at p. 545; see *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 535.) "We are also 'guided by the "historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice . . . ." [Citation.]' [Citation.] Stated differently, '[a]n appellate court may reverse an award of punitive damages only if the award appears excessive as a matter of law or is so grossly disproportionate to the ability to pay as to raise a presumption that it was the result of passion or prejudice.'" (*Behr*, at p. 535.)

Here, Cottone does not challenge the punitive damage award based on either the reprehensibility of his conduct or the relationship between the award and the harm he inflicted on B.C. Rather, he argues the award is, or may be, excessive because it exceeds his ability to pay the award based on the evidence B.C. presented of his financial condition.

"[A]n award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition." (*Adams, supra*, 54 Cal.3d at p. 109; see *Soto, supra*, 239 Cal.App.4th at p. 192; *Walsh, supra*, 158 Cal.App.4th at p. 546 ["a defendant's ability to pay a punitive damage award must be based on meaningful and substantial evidence of his or her financial condition"].) "Without such evidence, a reviewing court can only speculate as to whether

the award is appropriate or excessive," and as with compensatory damages, a punitive damages award "must not be based on speculation." (*Adams*, at pp. 112, 114.) Under *Adams*, the plaintiff has the burden of proving the defendant's financial condition to obtain punitive damages. (*Adams*, at pp. 119-123.)

"Our Supreme Court has not prescribed a rigid standard for measuring a defendant's ability to pay. [Citations.] Accordingly, there is no one particular type of financial evidence a plaintiff must obtain or introduce to satisfy its burden of demonstrating the defendant's financial condition. Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. [Citations.] Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' [Citations.] Evidence of a defendant's income, standing alone, is not '"meaningful evidence."' [Citation.] 'Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.'" (*Soto*, *supra*, 239 Cal.App.4th at p. 194; see *Baxter*, *supra*, 150 Cal.App.4th at p. 680.)

"'"Without evidence of the actual total financial status of the defendants, it is impossible to say that any specific award of punitive damage is appropriate." [Citation.]' [Citation.] 'Thus, there should be some evidence of the defendant's actual wealth' [citation], but the precise character of that evidence may vary with the facts of each case [citations]." (*Soto*, *supra*, 239 Cal.App.4th at pp. 194-195; see *Baxter*, *supra*, 150 Cal.App.4th at p. 680.) "Whether the defendant's financial prospects are bleak or bright [also] is relevant to the ultimate issue whether the damages will ruin him or be absorbed by him." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 622.) "The evidence should reflect the named defendant's financial condition at the time of trial." (*Soto*, at p. 195.)

In this case, B.C. confronted Cottone, the only witness at the punitive damages phase, with Cottone's financial documents – displayed to the jury, but not admitted into evidence – suggesting he had substantial assets, including five pieces of Orange County real estate, a bank account recently containing a substantial balance, and other assets (stocks, retirement assets) of undefined value. As noted, Cottone generally denied knowledge of his assets, liabilities and net worth, and suggested his properties were substantially encumbered.

B.C. essentially concedes she presented no evidence of Cottone's current liabilities. (*Baxter, supra,* 150 Cal.App.4th at p. 681 [silent record with respect to liabilities is insufficient].) But she argues the combined assessed value of Cottone's properties exceeded $3.4 million and the fact that $200,000 in cash "suspiciously disappeared" from the Wells Fargo bank account not long before trial together satisfied "her burden of production concerning [Cottone's] financial condition," and therefore, "the burden shifted to [him] to produce evidence regarding its ability, or inability, to pay a punitive damages award."

B.C. relies on *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1309-1310 (*Pfeifer*). There, after the jury returned its verdicts in the liability phase, the trial court ordered the defendant to produce evidence of its financial condition for the punitive damages phase, including a witness named Springs and two specified documents, a balance sheet and an income statement. (See *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 609 (*Mike Davidov Co.*) [Civil Code section 3295 authorizes trial court to direct a defendant to produce evidence of its financial condition after a jury has found it is subject to an award of punitive damages even when the plaintiff made no pretrial efforts to obtain the evidence].) In *Pfeifer*, defendant's financial documents described a $244 million figure as an "'asbestos litigation set aside.'" (*Pfeifer, supra,* at p. 1303.) The parties disagreed whether including this figure in the defendant's liabilities amounted to double-counting the sum as a liability when the funds already had been set

aside. In argument, plaintiff referred to the financial documents, *noting both asset and liability information*, and told the jury that although the documents showed a negative net worth, the "'set aside'" was included in the liability information, and subtracting that amount from liabilities resulted in a positive net worth. Defense counsel did not object or present additional evidence. During the plaintiff's argument, the court sustained a defense objection to a suggestion the money set aside for asbestos litigation was in a bank account.

Relevant to our purposes, *Pfeifer* rejected the defendant's argument the plaintiff was "obliged to present testimony from an accounting or financial expert to establish [] ability to pay." (*Pfeifer*, *supra*, 220 Cal.App.4th at p. 1309.) The court instead explained, "Generally, after the party with the burden of proof on an issue 'produces evidence of such weight that a determination in that party's favor would necessarily be required,' the burden of producing evidence is transferred to the other party." (*Ibid.*) The court noted the plaintiff "*identified [] total assets and total liabilities* for 2009 and 2010, characterized the funds [] set aside for asbestos litigation as a liability, and described their function. In our view, this showing was sufficient to shift the burden of producing evidence regarding [] ability to pay to [the defendant]. If [the defendant] believed that additional evidence was needed to explain the 'set aside' for asbestos litigation, it was free to call an expert. This [it] did not do. In sum, [plaintiff's] showing was sufficient to show [defendant's] financial condition." (*Id.* at pp. 1309-1310, italics added.)

Here, Cottone does not argue B.C. failed to present testimony from an accounting or financial expert to establish ability to pay. Rather, Cottone argues B.C. failed to present evidence of Cottone's liabilities, which courts have held "'should accompany evidence of assets . . . .'" (*Soto*, *supra*, 239 Cal.App.4th at p. 194; see *Baxter*, *supra*, 150 Cal.App.4th at p. 680.) Nothing in *Pfeifer* suggests a plaintiff may produce only evidence of a defendant's assets and thereby shift the burden to the

defendant to produce evidence of liabilities. The burden shifting applies where the party with the burden of proof produces persuasive evidence requiring a determination in that party's favor. A plaintiff who produces only a defendant's asset information is not entitled to a determination the defendant has the ability to pay a punitive damage award.

B.C. asserts that "assuming, *arguendo,* that the evidence was inadequate to establish [Cottone's] 'net worth,'" net worth is "not the sole means by which to establish a defendant's ability to pay an award of punitive damages . . . ." That may be true, but B.C. relied on Cottone's assets, and did not establish another basis, such as income versus expenses, or borrowing capacity, to justify the award.

B.C. also asserts "any evidentiary shortcomings are solely attributable to" Cottone. This is not accurate. B.C. did not produce other witnesses, including Cottone's wife,[3] to provide financial information about Cottone's liabilities. If the lodged documents contained liability information, counsel did not take the steps necessary to admit into evidence the financial information Cottone produced before the punitive damage phase. Consequently, these documents are not part of the appellate record. While we might agree Cottone was evasive and nonresponsive in answering questions about his financial condition, claiming "ignorance of the contents and genuineness of his own financial records," these factors support remand to establish Cottone's liabilities, but do not excuse plaintiff's failure to produce a balanced picture of Cottone's financial condition, including his liabilities.[4] For

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[3] B.C. does not assert the trial court erred in concluding she failed to subpoena Cottone's spouse for the punitive damages phase of trial.

[4] We cannot agree with our dissenting colleague a notice "to be prepared to give testimony" is enforceable. There is no basis for a party to compel an adversary to "be prepared." Code of Civil Procedure section 1987 permits service of a notice requiring an adversary to be present and to bring the documents described in the notice, but that is all. The record does not show B.C. complained that Cottone failed to produce the requested records, nor did B.C. move to introduce documentary evidence that was produced. B.C. had the burden of proof and that burden did not shift simply because Cottone's testimony was evasive.

example, we note that Cottone referenced documents containing mortgage information, but the record does not include these documents to support the judgment on appeal.

B.C. also argues "the evidence supports a finding that [Cottone] concealed and manipulated his assets. In particular, [he] was unable to explain how more than $200,000 disappeared from his bank account in the three months leading up to trial." The record contains no definitive explanation for the disappearance of the money, although there was a suggestion Cottone made a "loan" or agreed to a lien on his attorneys' behalf in the amount of $200,000.[5] While B.C. obtained Cottone's bank statement, her lawyer made no effort to trace the funds by presenting cancelled checks or other information about withdrawn funds, and did not call witnesses other than Cottone to explain Cottone's declining balance or establish Cottone hid the money. B.C. did not request a special verdict or other finding Cottone "concealed and manipulated" any asset. (Cf. *Walsh*, *supra*, 158 Cal.App.4th at pp. 546-547 [trial court found defendants systematically and deceitfully manipulated and concealed their ill-gotten gains and net worth, and provided knowingly false testimony at trial concerning the extent of the wealth they obtained from the bribery scheme].) It is mere speculation to conclude Cottone's failure to account for the money established he had the financial ability to pay the punitive damages award absent any evidence concerning his liabilities.

Relying on *Mike Davidov Co.*, *supra*, 78 Cal.App.4th 597, B.C. argues Cottone "effectively waived any right to appeal the punitive damages award based on the absence of substantial evidence." In *Mike Davidov Co.*, the plaintiff sued the defendant for fraud after the defendant failed to return a diamond. Following a bench trial, the court awarded the plaintiff $20,301 in compensatory damages, and $96,000 in punitive damages. The appellate court affirmed the punitive damage award even though the

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[5] In B.C.'s motion for attorney fees, her counsel asserted Cottone's wife testified at trial the $200,000 reduction in funds was due to payment of attorney fees in defense of the action.

plaintiff did not produce evidence of defendant's financial condition. The court explained the defendant disobeyed a court order requiring him to produce his financial records, and therefore could not object to the absence of this evidence.

Here, Cottone responded to B.C.'s request to produce documents of his current financial condition. B.C. did not object in the trial court the documents did not contain the requested information, and the court did not make a finding Cottone disobeyed a court order requiring him to produce his financial records. *Mike Davidov Co.* does not provide a basis for B.C. to rely on the estoppel doctrine.

Returning to her arguments that Cottone "should not be allowed to obstruct evidence of his financial condition and then complain that [B.C.] failed to meet her burden of proof on the issue," B.C. cites *Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441 (*Green*). There, in response to a court order to submit financial statements, the company produced a 24-page document described as a balance sheet and profit and loss statement. Finding the document incomprehensible, plaintiff called the company's CEO to testify about the company's financial condition. The CEO failed to respond to direct questions, gave evasive answers, and claimed ignorance of basic financial questions about the company, including knowledge of the company's "net assets" or liabilities. But the CEO acknowledged the company was profitable, "in the black," a "good investment," and that the company's net income or profit for the prior year was $677,343. (*Id.* at pp. 450-452.) The jury awarded punitive damages of approximately $1.2 million, the same amount it awarded in compensatory damages. The appellate court affirmed, noting the evidence of profit was sufficient to support the award, and the "testimony that defendant was 'in the black' (and . . . a 'good investment') [told] the jury that defendant's assets were greater than its liabilities, so the specter that defendant may have been 'saddled with large debts' does not appear to be a reasonable inference to draw." (*Id.* at p. 453.)

Green is distinguishable. The record does not show Cottone, an individual rather than a company, had profits or was "in the black." Even if Cottone "stonewalled"

during his testimony concerning his financial affairs – he had been in prison for several years until a few months before trial – nothing suggests the documents he provided were incomprehensible on the issue of his assets and liabilities. Unlike the plaintiff's counsel in *Green*, B.C.'s counsel did not ask Cottone about liabilities, and instead focused only on the assessed value of his properties and a bank account. B.C. fails to explain why, thwarted by Cottone's apparent obtuseness, she did not take other steps to present a complete picture of Cottone's financial condition.

Because the record contains insufficient evidence of Cottone's liabilities, we may not make a reasonably informed decision whether a $300,000 award is excessively disproportionate to Cottone's ability to pay. The award must be reversed.

Citing *Kelly v. Haag* (2006) 145 Cal.App.4th 910 (*Kelly*), Cottone asserts we should modify the judgment by striking the punitive damages award. In *Kelly*, the plaintiff "submitted *no evidence* of [the defendant's] net worth and relied exclusively on admissions [he had] made long before trial regarding his real properties." (*Id.* at p. 914, italics added.) The court reversed the award of punitive damages and declined to remand for retrial. *Kelly* explained that where a plaintiff has had a full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to "support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence." (*Id.* at p. 919.)

The plaintiff in *Kelly* failed to request a pretrial discovery order for the defendant's financial condition, and failed to subpoena documents or witnesses to establish the defendant's financial condition. The plaintiff also declined the trial court's offer to continue the proceedings to obtain the defendant's testimony after the court expressed concern about the lack of evidence of net worth. Here, in contrast, B.C. requested Cottone's financial information and confronted him at trial with the documents. Cottone does not dispute he owned five properties with a combined assessed value of over $3.4 million dollars. He also had a bank account containing over a quarter of a million dollars a few

months before trial, as well as other assets. Thus, the record reflects a likelihood Cottone had the financial ability to pay a punitive damages award.

While the information included in the record on appeal does not disclose Cottone's liabilities, Cottone bears some responsibility for the evidentiary shortcomings, as noted. Plaintiff's pretrial notice directed him to submit his financial documentation and to come prepared to testify on those topics at trial, but he made no effort to educate himself about his financial condition, and instead evaded B.C.'s questions with nonresponsive answers. The documents shown to the jury revealed Cottone possessed substantial assets, and resulted in the jury awarding substantial punitive damages. Given the reprehensibility of Cottone's conduct – sexually abusing a child age eight to 10 years old – remand to allow a retrial on the punitive damages issue is appropriate. (See *Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 56 [punitive damages award reversed for insufficient proof of financial condition and remanded for retrial on punitive damages]; *Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1065 [punitive damages award based solely on proof of the defendant's annual income reversed and matter remanded for a new trial on punitive damages].)

B. *The Trial Court Did Not Abuse Its Discretion in Awarding Attorney Fees*

B.C. in her cross-appeal argues the court abused its discretion in awarding only $95,000 in prevailing party attorney fees. Before trial, B.C.'s counsel moved for attorney fees under Code of Civil Procedure section 1021.4 and, following the jury's verdict, sought $1.3 million in fees. Counsel based the figure on "the lodestar value . . . (attorneys' reasonable hourly rates times hours worked), times a requested multiplier of 1.75 to compensate" for the risk of nonpayment, the inevitable delay in receiving payment, counsel's skill and advancement of litigation costs, and to encourage counsel to undertake similarly important public interest litigation in the future. Counsel explained the firm undertook the case on a contingent basis, and B.C. was obligated to pay

45 percent of all amounts recovered, including court-awarded attorney fees. In a supporting declaration, trial counsel stated the firm's lawyers and staff expended 1550.3 hours on the case at various hourly rates ranging from $600 to $150 an hour. Counsel observed the case had been pending for four years and required 13 witnesses to testify over 14 days of trial. Counsel provided a general description of the legal work performed, and further asserted that "[defense] counsel received at least $400,000 in compensation in the two months preceding trial . . . ."

Cottone opposed the fee request, noting an award was discretionary under Code of Civil Procedure section 1021.4. Cottone asserted that while B.C. devoted "most of [her] litigation efforts" to claims Cottone molested her hundreds of times, the jury's special verdict form reflected liability only for the four instances reflected in Cottone's criminal conviction. Noting also that B.C. requested the jury to award $12 million in damages, but obtained approximately $90,000, a small fraction of the amount sought, Cottone argued the relative lack of success required the court to award no more than $10,000 in fees.

At the hearing on the motion for fees, the trial court accepted at face value B.C.'s counsel's declaration of hours and hourly rate, but questioned whether awarding fees was a "mechanical decision" calculated by multiplying the firm's hours by the hourly rates, "even though the results would suggest that that would not support that amount of work . . . ." Noting "there was really no risk in the case" due to "stipulated liability" involving the four criminal convictions, the court found that "considering what [B.C.] asked for . . . and what the case involved, the plaintiff's success was very modest, certainly on the liability and regular damages . . . ." Given the "admitted liability for . . . heinous conduct" the court disagreed with the argument the case was unique, difficult or high risk. The court concluded, "Everything I saw about the trial . . . what the expectations of the parties were when the trial began, taking all of these things into account, I don't think that it was anywhere near the attorney's fees that the plaintiff has

requested. I think it would simply just be completely in error." In awarding B.C. $95,000 in attorney fees, the court explained it took into account the contingent fee agreement.

Code of Civil Procedure section 1021.4 provides: "In an action for damages against a defendant based upon that defendant's commission of a felony offense for which that defendant has been convicted, the court may, upon motion, award reasonable attorney's fees to a prevailing plaintiff against the defendant who has been convicted of the felony." The moving party bears the burden of establishing it is entitled to a statutory award of fees and documenting the appropriate hours expended and hourly rates. (See *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320.) The plaintiff's degree of success in obtaining litigation objectives is a factor the trial court may consider in determining an award of reasonable attorney fees. (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1398.)

We review a trial court's award of attorney fees under Code of Civil Procedure section 1021.4 for abuse of discretion. (*Sommers v. Erb* (1992) 2 Cal.App.4th 1644, 1651-1652 [experienced trial judge best able to assess the value of professional services rendered in his or her court].) "[A]n abuse of discretion transpires if '"the trial court exceeded the bounds of reason"' in making its award of attorney fees." (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 557; *Olson v. Cohen* (2003) 106 Cal.App.4th 1209, 1217 [court will reverse an award of attorney fees only if the amount awarded is so large or small that it is convinced it is clearly wrong].)

"'It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court. . . . [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. [Citations.] . . . The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount

involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' [Citation.] Although the terms of the [contingency fee] contract may be considered, they 'do not compel any particular award.' [Citations.]" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.)

Attorney fees are recoverable on a cause of action if authorized by statute, but the court may not award attorney fees on other joined causes of action if they lack a statutory basis for recovery. (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1134 (*Akins*); see Wegner, et al, Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2017) ¶ 17:153, p. 17-128 (Wegner, Civil Trials).) This generally requires the trial court to apportion fees because the losing party is only required to pay fees incurred in defending the statutory action. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686.)

B.C. argues the trial court abused its discretion in failing to apply the lodestar method in determining the attorney fee award. But the record does not reflect the court failed to employ the lodestar method. Rather, it found B.C.'s counsel did not reasonably spend 1550 hours working on causes of action where statutory attorney fees were authorized. (See *Serrano v. Unruh* (1982) 32 Cal.3d 621, 639 [successful plaintiff is ordinarily entitled to "compensation for all hours *reasonably* spent," italics added].) Code of Civil Procedure section 1021.4 authorizes fees only for an action seeking damages based on the defendant's commission of a felony offense for which that defendant has been convicted. (*Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1339.) As the trial court noted, the jury was told it must accept Cottone's liability and malice for the four criminally-adjudicated acts of sexual abuse. According to the limited record of proceedings presented here, plaintiff spent much of the case litigating claims for sexual abuse other than those criminally adjudicated, including claims against Cottone's wife that were resolved by summary judgment. The fees motion and counsel's declaration did not attempt to apportion fees. Nothing suggests apportionment was

impossible or impractical. The record does not demonstrate the court's award was unreasonable.

B.C. faults the trial court for citing *Wood v. McGovern* (1985) 167 Cal.App.3d 772 (*Wood*). *Wood* held Code of Civil Procedure section 1021.4 authorized attorney fees in cases arising before its effective date, and remanded to the trial court with directions to exercise its discretion under the section. *Wood* stated, "On remand, we assume the court will consider those issues [the defendant's maliciousness and plaintiff's comparative fault], the 40 percent contingency fee arrangement between [the plaintiffs] and their counsel and the usual factors employed in the fixing of fees." (*Id.* at p. 779.) The court noted a contingency fee contract may preclude a statutory fee award, but it is only "a factor to consider in the award." (*Id.* at pp. 779-780.)

Citing *Ketchum v. Moses* (2011) 24 Cal.4th 1122, B.C. argues "the existence of a contingency fee agreement is a factor for the court to consider in *enhancing* the lodestar" and "considered when determining whether to utilize a multiplier." The trial court may consider a contingency fee agreement in determining what is reasonable, but it is not bound by the terms of the agreement. (*Hayward v. Ventura Volvo* (2003) 108 Cal.App.4th 509, 513.) Nothing in the record suggests the trial court used B.C.'s contingent fee agreement improperly or concluded the agreement compelled a particular award in this case. The court did not abuse its discretion if it considered the fact under the fee agreement, and given the verdict, attorney fees would be substantially less than the $1.3 million sought by B.C.'s counsel under the lodestar method. (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 426 [trial court may reduce attorney fees award based on the results obtained].)

Nor did the trial court abuse its discretion in determining B.C. did not sustain her burden in proving a basis for an upward adjustment in fees based on novelty, difficulty, the contingent nature of the fee award, and success achieved. (See Wegner, Civil Trials, *supra*, ¶ 17:153.15, p. 17-138.) The trial court did not find this was a novel

case "of significant societal importance" or a "difficult public interest case." Finally, a trial court does not abuse its discretion by failing to state the hourly amount it found reasonable or engage in any explicit analysis on the record. (*Save Our Uniquely Rural Community Environment v. County of San Bernardino* (2015) 235 Cal.App.4th 1179, 1189-1190.)

III

DISPOSITION

The damage award is reversed to allow retrial solely on the issue of the proper amount of punitive damages in light of the views expressed in this opinion. The parties shall bear their own costs on appeal.

ARONSON, J.

I CONCUR:

IKOLA, J.

Moore, J., Dissenting.

I respectfully dissent to the majority's reversal and order of remand regarding the jury's award of punitive damages. I would affirm the trial court's judgment in its entirety.

Defendant Lee Vincent Cottone was served with a notice to bring financial documents to trial and "be prepared to give testimony" concerning his finances and net worth. Yet, at trial, he testified he did not work with his wife in accumulating the documents brought to court and had no idea what was produced. Although he was released from prison in October 2014 and he gave his testimony on December 11, 2014, he explained his lack of preparedness and lack of compliance with the Code of Civil Procedure section 1987 notice: "I haven't had a chance to get into any of the financials. Since I've been out of prison . . . ."

When questioned at trial, Cottone played dumb throughout his testimony. He did not know whether he ever signed checks while he was in prison. He did not know the value of his retirement fund, either at the time of trial or when he left his employment prior to going to prison. He said he did not know how much his wife earned. As to his real properties, he did not know whether he signed any loan documents or any deeds, with such qualifications as, "Um, I could have . . . ." When shown checks bearing his name on the signature line, he denied signing them. When asked whether he owned either Cottone Properties, LLC or his own management company, he responded, "I don't know . . . ." When shown documents relating to a family trust he created and signed, he said he did not understand them. When asked his net worth, he did not answer the question. He refused to even give an estimate. He did not even want to admit that his wife is a mortgage loan broker.

A plaintiff seeking punitive damages bears the burden of establishing a defendant's financial condition. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 122-123.)

Meeting this burden is no easy task for a plaintiff, since the law protects defendants from premature disclosure of financial records. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1306; Civ. Code, § 3295.)

"On at least two occasions, the Court of Appeal has upheld awards of punitive damages where the dearth of evidence of the defendant's financial condition is attributable to the defendant's failure to comply with discovery obligations or orders. (*Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 453-454; *Mike Davidov Co. v. Issod* [(2000)] 78 Cal.App.4th [597,] 609-610.)" (*Soto v. BorgWarner Morse TEC, Inc.* (2015) 239 Cal.App.4th 165, 194.)

In *Mike Davidov Co. v. Issod, supra,* 78 Cal.App.4th at page 609, the defendant violated a proper court order, and "improperly deprived plaintiff of the opportunity to meet his burden of proof." The Court of Appeal concluded an award of punitive damages could be affirmed because there was a valid basis upon which the award could be based. (*Id.* at p. 610.) A situation similar to the current one occurred in *Green v. Laibco, LLC, supra,* 192 Cal.App.4th 441. The defendant's CEO did not know very much and could not provide estimates. His answers, much like Cottone here, were "I don't know" and "I don't think I can give an answer." (*Id.* at p. 450.) He finally conceded the company was "in the black." (*Ibid.*) The appellate court concluded "the evidence presented was sufficient for an assessment of defendant's financial condition." (*Id.* at p. 453.)

Fortunately for plaintiff here, the County's official assessment values of Cottone's five properties were produced, so there was enough evidence of his finances to provide the jury with a valid basis upon which a punitive damages award could be based. The jury awarded less than 10 percent of the combined official property values as punitive damages.

The blame for the scarcity of evidence of Cottone's financial condition rests squarely on Cottone. Cottone's actions and conduct frustrated the second phase of the trial. His refusal to respond in good faith to questions and to the notice to produce "brings disrepute to the entire legal profession and amounts to toying with the courts." (*Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200.)

In this case, plaintiff was the victim of child molestation, subjected to extreme cruelty and degradation when she was as young as eight years old. Cottone's conduct during trial was not only toying with the courts, it was a continuation of his disregard of the rights of others. There was enough evidence here to support the award of punitive damages.

MOORE, ACTING P. J.