Case No. **S213873**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THOMAS NICKERSON,
Plaintiff and Appellant,

vs.

STONEBRIDGE LIFE INSURANCE COMPANY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, CASE NO. B234271.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California ("CJAC" or "amicus") welcomes the opportunity to address the issue this case presents:[1]

> **Is an award of attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813, properly included [in a court's due-process review of a punitive damage award] as compensatory damages where the fees are awarded by the jury, but excluded from compensatory damages when they are awarded by the trial court after the jury has rendered its verdict?**

The appellate opinion answered "Yes" to this question, stating "*Brandt* fees[2] are not properly included in determining the compensatory damage award when they are awarded by the trial court *after* the jury awards punitive damages." 161 Cal.Rptr.3d 629, 650; emphasis original. In support of this statement, the opinion cited to and quoted from *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538

[1] By application accompanying this brief, CJAC asks the Court to accept it for filing.

[2] *Brandt* holds that when an insurer wrongly withholds insurance benefits, the insured, in actions for breach of contract and breach of the covenant of good faith and fair dealing, may recover attorney fees reasonably incurred to compel payment of the policy benefits.

("*Amerigraphics*"), which held the trial court properly excluded attorney fees and costs from the compensatory damages calculation since those charges "were awarded by the court *after* the jury had already returned its verdict on the punitive damages." *Id.* at 1565; emphasis added. The appellate opinion also relied upon *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1224 ("*Major*") which, while it allowed the *Brandt* fees to be included as compensatory damages, did so because "*the jury awarded* . . . [the] fees as part of the tort damages. Thus, the trial court properly included all of the relevant damages in the denominator of its ratio." 161 Cal.Rptr.3d at 650; emphasis added.

This Court's phrasing of the issue and the appellate opinions in this case, *Amerigraphics* and *Major*, impliedly suggest that legal significance attaches to *when* during trial and *who* – judge or jury – decides the amount of the *Brandt* fees determines whether they are properly counted as "compensatory damages." Here, the *Brandt* fee of $12,500 was entered by the court pursuant to stipulation by the parties *after* the jury rendered its verdict. The jury, then, knew nothing of the *Brandt* fee when it rendered its verdicts for compensatory and punitive damages. Not surprisingly,[3] plaintiff feels these differences as to timing and the identity of the decision-maker should not matter, that whenever the court or jury awards *Brandt* fees, they should be considered by the

[3] We say "not surprisingly" when referring to plaintiff's position because the obvious result of increasing the size of the "compensatory damages" denominator when multiplied by whatever factor a reviewing court picks as the appropriate ratio under the guidelines of *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 ("*Campbell*")and its relatives will yield a correspondingly greater punitive damages amount, and plaintiffs' counsel is duty bound to get for their client (and due to the ubiquitous contingency fee, themselves) the maximum recovery possible.

trial and reviewing court in calculating whether the ratio of punitive damages to compensatory damages satisfies substantive due process.

Thus, plaintiff argues the trial court's reduction by remittitur of the jury's $19 million punitive award to $350,000 (10 times the jury's award to plaintiff for $35,000 in compensatory damages for emotional distress), which the appellate court affirmed, should be reversed and the trial court supposedly directed on remand to factor in the *Brandt* fee when applying the 10 to 1 ratio of punitive to compensatory damages so that he, and his attorneys, can obtain and divvy-up an additional $125,000.

Amici in support of defendants – the American Tort Reform Association and several insurance associations – argue instead for a consistent, uniform preclusion of *Brandt* fees from compensatory damages when calculating the constitutionality of the punitive award; and defendant takes an intermediate position – that *Brandt* fees should be placed in the "compensatory damages" denominator *only* when awarded by the *jury before or when* it awards punitive damages.

Authorities from various jurisdictions have reached differing positions on this issue,[4] and the briefs by the parties and amici marshal those opinions supportive of their views and distinguish those (on one basis or another) that do not. Counting heads or selecting opinions supportive of one's position, however, will not suffice for future guidance to courts and counsel. Determining which opinions are better reasoned and best further the public policies and pronouncements of this Court and

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[4] See, *e.g., Willow Inn, Inc. v. Public Service Mutual Insurance Co.* (3d Cir.2005) 399 F.3d 224, 236–37; *Continental Trend Resources, Inc. v. OXY USA, Inc.* (10th Cir.1996) 101 F.3d 634, 642; *Walker v. Farmers Insurance Exchange* (2007) 153 Cal.App.4th 965, 973, n. 8; but see *Laymon v. Lobby House, Inc.* (D.Del.2009) 613 F.Supp.2d 504, 505.

the High Court on calculating the acceptable size of punitive damage awards in myriad circumstances is the more difficult but proper task to undertake. That is the approach amicus strives to achieve in this brief.

Resolution of the issue presented implicates the principal purpose of CJAC – to improve the fairness, efficiency, economy and certainty of laws that determine who gets, how much, and from whom when the wrongful actions of some are alleged to occasion harm to others. Punitive damages figure prominently in the attainment of our goal because, as courts and commentators recognize, their growth in frequency and severity has "skyrocketed" out-of-control,[5] making litigation more expensive and uncertain and, as a result, correspondingly increasing prices for goods, services and insurance.[6] Indeed, judicial concern with arbitrary and unpredictably large sized punitive awards is what led to judicial creation of the three "guideposts" for determining whether a punitive award is so excessive as to violate due process: (1) "[t]he degree of reprehensibility of the defendant's misconduct;" (2) "[t]he disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award;" and (3) "[t]he difference between the punitive damages awarded by the

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[5] See, *e.g.*, *TXO Prod. Corp. v. Alliance Res. Corp.* (1993) 509 U.S. 443, 500 (O'Connor, J., dissenting)("[T]he frequency and size of [punitive damages] awards have been skyrocketing."); Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 *WIS. L. REV.* 15, 23 (tracking the growth of punitive damages awards in the 1970s and 1980s).

[6] "While overly narrow recoveries in many states offer inefficiently weak incentives for insurance companies not to breach, the current law in California is so expansive that it may err in the opposite direction. The awarding of attorney fees, punitive damages, and damages for emotional distress may overdeter insurance companies from challenging potentially invalid claims." Linda Curtis, *Damage Measurements for Bad Faith Breach of Contract: an Economic Analysis* (1986) 39 *STAN. L. REV.* 161, 177-178; footnotes omitted.

[factfinder] and the civil penalties authorized or imposed in comparable cases." *Campbell*, *supra*, 538 U.S. at 418. Application to this case of these "guideposts" – especially the second – and the principles that underlie them informs the best resolution of the issue.

SUMMARY OF SALIENT FACTS[7]

Thomas Nickerson sued Stonebridge Life Insurance Company for its partial denial of his claim for hospitalization benefits. The trial court found that a policy provision restricting coverage was unenforceable because it was not conspicuous, plain and clear, entitling Nickerson to $31,500 in additional benefits under the policy. A jury then found that Stonebridge had breached the implied covenant of good faith and fair dealing and awarded Nickerson $35,000 in compensatory damages for emotional distress. The jury found Stonebridge acted with fraud and fixed the punitive damage award at $19 million.

The trial court conditionally granted Stonebridge's new trial motion unless Nickerson consented to a reduction of the punitive damages to $350,000. Both parties appealed over the punitive damage award, specifically whether the trial court's remittitur of that award from $19 million to $350,000 based on a ratio of punitive to compensatory damages of 10:1 comports with due process.

The appellate court held that "after weighing all of the relevant factors and circumstances pursuant" to Supreme Court and this Court's precedents, the remittitur of punitive damages was proper. Specifically, the appellate opinion found "[t]he nature

[7] These facts are condensed from the appellate opinion set forth to better inform the legal issue addressed.

and size of [plaintiff's] compensatory damage award does not justify a punitive damage award beyond the constitutional maximum. While Stonebridge's financial condition is an essential consideration to be factored into our analysis, it alone cannot justify exceeding what due process will allow. . . We conclude that 10:1 is the maximum constitutionally defensible ratio." 161 Cal.Rptr.3d at 649.

In response to plaintiff's attempt to "alter the ratio of punitive to compensatory damages" by asserting trial court error in "failing to measure the punitive damage award against additional categories of compensatory damages, *i.e.*, uncompensated potential harm, the policy benefits, and the *Brandt* fees," the appellate majority disagreed. The opinion explained that plaintiff "was fully compensated for his emotional distress injuries," "the trial court properly declined to include the policy benefits in its ratio calculation as punitive damages are not authorized in contract actions," and *"Brandt* fees are not properly included in determining the compensatory damage award when they are awarded by the trial court *after* the jury awards punitive damages." 161 Cal.Rptr.3d at 650; emphasis original.

Plaintiff petitioned for review on numerous grounds and the court granted review on the issue presented.

SUMMARY OF ARGUMENT

Due process requires that damage awards be based on evidence presented to the jury; and that a defendant be allowed to present to the jury all available defenses on liability and damages. Thus, evidence the jury hears to determine attorney fees in insurance bad faith claims (*Brandt* fees) may be added to the compensatory damage category and considered in determining whether the size of the punitive damage award

in relation to it comports with due process proportionality. Attorney fees determined by the court post-verdict, however, should not be factored into any compensatory/punitive damage ratio as they were not evidence of damages as determined by the trier of fact.

Should the *jury* determine *Brandt* fees, that amount would properly be considered as "recoverable . . . damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action." But when, as here, the jury never hears of these fees because they are determined by the court post-verdict, it would be improper for the court to add them into either the verdict for compensatory or punitive damages in its calculation of a ratio based on evidence never heard or considered by the jury.

ARGUMENT

I. DUE PROCESS REQUIRES THAT DAMAGE AWARDS BE BASED ON EVIDENCE PRESENTED TO THE JURY AND THAT THE DEFENDANT BE PERMITTED TO PRESENT TO THE JURY ALL AVAILABLE DEFENSES ON LIABILITY AND DAMAGES.

"Due process requires that there be an opportunity to present every available defense." *American Surety Co. v. Baldwin* (1932) 287 U.S. 156, 168. See also *Nickey v. Mississippi* (1934) 292 U.S. 393, 396. This includes defenses pertaining to the propriety and size of damage awards, including punitive damages. "[A]ny procedure to determine the defendant's liability . . . must . . . permit the defendant to introduce its own evidence, both to challenge the plaintiffs' showing and to reduce overall damages." *Duran v. U.S. Bank Nat'l. Assoc.* (2014) 59 Cal.4th 1, 38.

Due process also requires that appellate review of punitive damage awards be independent (de novo). *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 436. Indeed, "[i]t is the duty and responsibility of an appellate court to intervene where the [punitive] award is so grossly disproportionate or palpably excessive as to raise a presumption that it was the product or passion and prejudice." *Dumas v. Stocker* (1989) 213 Cal.App.3d 1262, 1266. In making that determination, California law is congruent with federal requirements respecting the three due process guideposts: (1) the degree of reprehensibility of defendant's conduct; (2) the relationship between the amount of punitive damages awarded and the actual harm suffered; and (3) the relationship between the amount of punitives awarded and defendant's financial condition. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.

All three factors must be considered. "Nothing in *Neal* suggests that any of the three is dispensable." *Adams v. Murakami* (1991) 54 Cal.3d 105, 111. All three *Neal* guideposts must, as happened here, be evaluated on appeal. For example, "meaningful evidence" of defendant's financial condition is absolutely required to support a punitive damages award. Absent such evidence, the award must be reversed on appeal. *Id.* at 111-116. Defendant's wealth is not, however, a guidepost in evaluating the reasonableness of a punitive damages award under federal due process standards. In fact, the Supreme Court has held that a defendant's wealth cannot justify an otherwise unconstitutional punitive damages award (*Campbell*, *supra*, 538 U.S. at 428), though it did not completely rule out a defendant's wealth or profits in punitive damage assessments. *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185-1186.

The second federal due process guidepost for determining whether the size of the punitive damage award passes constitutional muster – *i.e.*, "[t]he disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award" – echoes the second *Neal* guidepost for determining whether a punitive damage award is "excessive" – *i.e.*, "the relationship between the amount of punitive damages awarded and the actual harm suffered." This "relationship" or "disparity" is measured as an arithmetic ratio, with the amount of the punitive damages award serving as the numerator and the "actual or potential" harm, the compensatory damage award, the denominator. The ratio between punitive and compensatory damages is a "central feature in [the] due process analysis." *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 507.

Courts must ensure as a matter of substantive due process that the measure of punishment is both "reasonable and *proportionate* to the amount of harm to the plaintiff and to the general damages recovered." *Campbell, supra*, 538 U.S. at 426; emphasis added. This factor – the ratio between compensatory and punitive damages – is the "most commonly cited indicum of an unreasonable or excessive punitive damages award." *BMW of North America. Inc. v. Gore* (1999) 517 U.S. 559, 580 ("*Gore*"). A bright-line test is inappropriate (*see id.* at 582-583) as "it is difficult or impossible to make useful generalizations" (*Payne v. Jones* (2d Cir. 2012) 696 F.3d 189, 201); but, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process." *Campbell, supra*, 538 U.S. at 425.

The Supreme Court has found that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional

impropriety." *Pac. Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 22–23 ("*Haslip*"). More than a decade later, the Court affirmed the continued validity of this sentiment, but also noted that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell,* 538 U.S. at 425. Heeding guidance from cases like *Haslip, Gore,* and *Campbell,* courts throughout the country have recognized the overarching principle that a single-digit ratio is "more likely to comport with due process" than a double-digit one. *Id.*

A. Compensatory Damages Decided by the Jury is the Proper Measure of "Actual or Potential Harm" for Determining whether the Punitive Damage Ratio Comports with Due Process.

Key to proportionality review is that the damages comprising the numerator and denominator be determined *by the jury* and not the court unless the court is sitting as the trier-of-fact. The fundamental question before the appellate court, then, is whether the judgment is supported by the evidence presented *to the jury* (*Fortman v. Hemco, Inc.* (1989) 211 Cal.App.3d 241, 261), in other words, whether the evidence is sufficient to support the compensatory and punitive damage verdicts and whether the ratio of each to the other jibes with no more than the constitutional maximum. Obviously, evidence not presented to the jury, such as the stipulation in this case as to the amount of *Brandt* fees, cannot be properly added to the denominator or numerator[8] by the trial or

[8] Some courts view attorney fee awards as "punitive" in nature rather than "compensatory," which would make such an award an increase to the numerator in the due process ratio calculation and decrease the amount of punitive damages recoverable. Fees awarded under the bad faith exception to the American rule have been classified as punitive by the U.S. Supreme Court. *Hall v. Cole* (1973) 412 U.S. 1, 5 ("a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, (continued...)

appellate court, as it would result in proportionality review based on evidence never heard or considered by the jury.

Bardis v. Oates (2004) 119 Cal.App.4th 1 (*Bardis*) is instructive on this point, as it teaches that an insurer's underpayment of actual cash value to the insured as found *by the jury* must be considered when determining the ratio between punitive damages and compensatory damages. *Bardis* explains:

> Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. . . . The idea behind looking at ratios is that '[p]unitive damages must bear a reasonable relationship and be proportionate to the actual harm suffered by the plaintiff (*i.e.*, compensatory damages). [Citations.] Logic and common sense tell us that the amount *the jury found* to be the '*total amount of damages suffered by plaintiffs'* . . . most closely reflects the United States Supreme Court's formulation of the 'actual harm *as determined by the jury*' [citation; emphasis added], and should be used as the base figure in calculating the ratio for punitive damages.

Id. at 17-18; emphasis added; see also *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39

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[8](...continued)
wantonly, or for oppressive reasons.' . . . [T]he underlying rationale of 'fee shifting' is, of course, punitive" (citations omitted; quoting 6 James Wm. Moore, *MOORE'S FEDERAL PRACTICE* 54.77[2], at 1709 (2d ed. 1972))); *see also Shimman v. Int'l Union of Operating Eng'rs* (6th Cir.1984) 744 F.2d 1226, 1232 n. 9 ("Fees awarded under the bad faith exception [to the American rule] are punitive in nature."). Where an award of attorney fees "includes a certain punitive element," the fee award supports a lower punitive to compensatory ratio as punishment has already been partially imposed in the form of attorney fees. *Parrish v. Sollecito* (S.D.N.Y.2003) 280 F.Supp.2d 145, 164. In such cases, attorney fees are not considered part of the compensatory award. *Laymon v. Lobby House, Inc., supra*, 613 F.Supp.2d 504.

Cal.4th 133, 147 ["The substance of a bad faith action in these first party matters is the insurer's unreasonable refusal to pay benefits under the policy."].

Amerigraphics, Inc. v. Mercury Casualty Co., *supra*, 182 Cal.App.4th 1538 underscores the importance of a *jury determination* of the actual harm suffered by plaintiff to be redressed by compensatory damages and the amount it finds appropriate for punitive damages before the trial and appellate court apply the proportionality criterion. After the printing and graphics company Amerigraphics lost its printer, scanner, and other property in a flood, the company's insurer delayed paying the claim, effectively putting the plaintiff company out of business. The jury awarded the plaintiff $130,000 in damages for breach of contract and bad faith, $40,000 in prejudgment interest, and $3 million in punitive damages. The trial court awarded the plaintiff $346,541.25 in attorney fees plus costs of $31,490.97. Plaintiff then accepted a remittitur of the punitive damages award to $1.7 million.

When the defendant insurer challenged the punitive damage award as excessive, the plaintiff claimed the ratio of punitive to compensatory damages was just 3.2:1 by including the court-awarded attorney fees and prejudgment interest in the "total compensatory damages" category. The appellate court, however, found that the trial court properly excluded the attorney fees and costs from the compensatory damages calculation since those charges "were awarded by the court *after* the jury had already returned its verdict on the punitive damages." *Id.* at 1565; emphasis added. The court added that it was "aware of no authority" supporting plaintiff's claims that prejudgment interest should be included in the ratio calculation. *Id.* Applying a rationale similar to *Gore's* "*actual damage as determined by the jury*" standard, the appellate

court determined that $500,000, not $1.7 million, was "the maximum amount of punitive damages consistent with due process in this case . . . an award based on a 3.8-to-1 ratio of compensatory damages." *Id.* at 1566.

To be sure, attorney fees and prejudgment interest are not ordinarily issues of "actual harm as *determined by the jury*." *Gore*, 517 U.S. at 582; emphasis added. The availability of recovery of attorney fees to a prevailing party, and determination of a reasonable fee, are normally legal issues for the court, not questions of fact for the jury. See Adam Babich, *The Wages of Sin: The Violator-Pays Rule for Environmental Citizen Suits* (2003) 10 *WIDENER L. REV.* 219, 262-63 ("Appellate courts 'review de novo the standards and procedures applied . . . in determining attorneys' fees, as it is a purely legal question,' but 'the reasonableness of an award of attorneys' fees is reviewed for abuse of discretion.'" (alteration in original; citation omitted)). Likewise, the availability of prejudgment interest and its calculation is determined by the court post-trial based on state statutes and case law. These awards are typically made by the court post-verdict, meaning the amount of "actual harm" and the size of the punitive award has already been decided and the jury's role is over.

B. It is Fair and Sensible to Allow the Parties to Stipulate to a Post-Verdict Determination of *Brandt* Fees that are not Added to Compensatory Damages, or Present Evidence of Same to the Jury for its Determination that will then Result in the Fees being Added to Compensatory Damages.

Now *Brandt* makes clear that the "preferred" method for determining a successful plainitff's attorney fee in an insurance bad faith action like this case is the way it was done here: by a "stipulation for a post-judgment allocation and award by the trial court . . . since that determination would be made after completion of the legal

services . . . and proof . . . could be simplified because of the court's expertise in evaluating legal services." *Brandt*, *supra*, 37 Cal.3d at 819-820. If the parties are unwilling to stipulate or allow the court to award the attorney fees, *Brandt* explains the alternative:

> If, however, the matter is to be presented to the jury, the court should instruct along the following lines: "If you find (1) that the plaintiff is entitled to recover on his cause of action for breach of the implied covenant of good faith and fair dealing, and (2) that because of such breach it was reasonably necessary for the plaintiff to employ the services of an attorney to collect the benefits due under the policy, then and only then is the plaintiff entitled to an award for attorney's fees incurred to obtain the policy benefits, which award must not include attorney's fees incurred to recover any other portion of the verdict.

Id. at 820.

Should a plaintiff in an insurance bad faith action elect to introduce evidence before the jury as to his *Brandt* fees, the defendant would be entitled to present his evidence as to the proper amount of those fees. If punitive damages are then sought by plaintiff after the jury renders its verdict on compensatory damages, including the *Brandt* fees, the defendant would be permitted to argue that these damages should not be large, as plaintiff was made whole through a combination of compensatory damages that included, as here for instance, insurance benefits, emotional distress and attorney fees and costs. In fact, a defendant could request a jury instruction per *Campbell* and argue in accordance with it that where, as here,

> compensatory damages include an amount for emotional distress

> . . . aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both.

Campbell, *supra*, 538 U.S. at 426 (quoting *RESTATEMENT (SECOND) OF TORTS* § 908, cmt. c (1977)).[9] These defenses and arguments would not, however, barring an unlikely stipulation by the parties, be allowed when *Brandt* fees are determined by the court post-verdict as they would have no logical connection to the evidence heard by the jury.

Should the *jury* determine *Brandt* fees, that amount would properly be considered as "recoverable . . . damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action." *Brandt*, *supra*, 37 Cal.3d at 817. But when, as here, the jury never hears of these fees because they are determined by the court post-verdict, it would be improper for the court to add them into either the verdict for compensatory or punitive damages in its calculation of a ratio based on evidence never heard or considered by the jury.

Other sound reasons support judicial refusal to factor in *Brandt* fees not determined by the jury but by the court post-verdict when measuring the reasonableness of a punitive damage award. As the Utah Supreme Court explained

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[9] Punitive damages were developed to compensate plaintiffs for injuries that were otherwise not compensable. Previously, intangible harms such as emotional distress and pain and suffering were not compensable. Punitive damages addressed this perceived gap. But, when courts began to recognize intangible harm as compensable, the justification for punitive damages shifted to punishment and deterrence. Jane Mallor & Berry Roberts, *Punitive Damages: Toward a Principled Approach* (1999) 50 *HASTINGS L.J.* 969, 970 (discussing the historical development of punitive damages).

when reconsidering *Campbell* on remand from the High Court:

> The incorporation of attorney fees and expenses into the compensatory damages award would substantially alter the manner in which trials are conducted in this state. Under our general practice, the issues of whether attorney fees are available to a party and the reasonableness of the requested fees are reserved for determination by the judge after the conclusion of the trial or other proceedings. [Citation] We have little doubt that the interests of justice would be subverted by sidetracking the focus of a trial away from the central claims of the parties and onto issues relating to attorney fees and expenses.

Campbell v. State Farm Mut. Auto. Ins. Co. (Utah 2004) 98 P.3d 409, 420.

Despite this perceived difficulty, it remains fair to permit the plaintiff to elect whether to submit his *Brandt* fees to the jury for its determination as to the "actual harm" plaintiff suffered or allow the court to determine *Brandt* fees post-verdict where they cannot be factored into the punitive/compensatory damage ratio. Plaintiffs should not be permitted to "have their cake and eat it too," stipulate to attorney fees out of the presence of the jury and then have those amounts added into the denominator of compensatory damages in order to boost the amount of punitive damages they would be entitled to based on a ratio that comports with due process.

CONCLUSION

For all the reasons aforementioned, the Court should affirm the decision of the Court of Appeal.

Dated: July 7, 2014

Respectfully submitted,

/s/

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Counsel for *Amicus Curiae*

CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 5,000 words.

Date: July 7, 2014

/s/
Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On July 7, 2014, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in Support of Defendant/Respondent in *Thomas Nickerson v. Stonebridge Life Insurance Company*, S213873 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 7th day of July 2014 at Sacramento, California.

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