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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DIANNE GOBER et al.

Plaintiffs and Appellants,

v.

RALPHS GROCERY COMPANY,

Defendant and Appellant,

D040473

(Super. Ct. No. N72142)

APPEALS from orders and a judgment of the Superior Court of San Diego County, Michael M. Anello, Judge. Appeal from the judgment dismissed. Orders affirmed in part, reversed in part and matter remanded.

Law Offices of Philip E. Kay, Philip E. Kay, Lawrence A. Organ; Rosen, Bien & Asaro, Sanford Jay Rosen, Ernest J. Galvan, Sarah Olson Zimmerman, Richard Hardack; John W. Dalton; Luce, Forward, Hamilton & Scripps and Charles A. Bird for Plaintiffs and Appellants.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part IIB.

Horvitz & Levy, Daniel J. Gonzalez, Karen M. Bray, Curt C. Cutting; Ford & Harrison and Helene J. Wasserman for Defendant and Appellant.

In this case, plaintiffs Dianne Gober, Terrill L. Finton, Sarah Lang, Talma (Peggy) Noland, Suzanne Papiro and Tina Swann (collectively, the plaintiffs) sued their employer, Ralphs Grocery Company (Ralphs), for sexual harassment and at trial the jury held Ralphs liable to the plaintiffs for compensatory and punitive damages. The trial court granted a new trial on the amount of punitive damages based on jury misconduct and Ralphs appealed. We affirmed and remanded the matter for a retrial on the amount of punitive damages. (*Finton v. Ralphs Grocery Company* (May 30, 2000, D031670) [nonpub. opn.] (the prior opinion).) On retrial, the jury awarded each plaintiff \$5 million in punitive damages and the trial court ultimately granted Ralphs a new trial unless the plaintiffs accepted a remittitur that reduced their individual punitive damages awards.

On appeal, Ralphs attempts to challenge the constitutional propriety of the amount of the punitive damages awards by appealing the court's order denying its request for judgment notwithstanding the verdict (JNOV). However, we conclude that Ralphs was required to raise such a challenge by appealing the order granting the motion for new trial and that its failure to do so precludes us from reviewing the propriety of the punitive damages awards. Accordingly, we affirm the trial court's order conditionally granting a new trial on the amount of the punitive damages and Ralphs' purported appeal from the judgment vacated thereby is dismissed.

For purposes of remand, we also address the parties' arguments as to the admissibility of different evidence (i.e., evidence that was not presented or was excluded during the

liability trial) on the issue of the reprehensibility of Ralphs' conduct to determine the amount of punitive damages. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419 (*Campbell*)). On this issue, we conclude that different evidence is potentially admissible if it is relevant and survives an Evidence Code section 352 analysis.

In the unpublished portion of this opinion, part IIB, we affirm the order denying postjudgment interest as to some plaintiffs, but reverse the order as to others. This matter is remanded for a new trial on the proper amount of any punitive damages awards and with instructions on calculating the amount of postjudgment interest.

FACTUAL AND PROCEDURAL BACKGROUND

In August 1995, plaintiffs were employees at a store operated by Ralphs in Escondido when Roger Misiolek became the store director. While director of the Escondido store, Misiolek engaged in inappropriate touching, used profanity, made inappropriate comments on some of the plaintiffs' sex lives, and threw various objects at some of the plaintiffs. In April 1996, Gober's husband complained to Ralphs' management about the sexual harassment that Gober had suffered. Neither Gober nor any of the other plaintiffs had made any prior complaints to Ralphs' management about Misiolek's conduct. Ralphs moved Misiolek out of the Escondido store while it investigated the allegation and concluded that the complaints about Misiolek had merit.

In May 1996, Ralphs' management met with Misiolek and presented him with a written memorandum concerning his inappropriate physical touching and profanity toward female employees, as well as his harassment and harsh treatment of customers. Misiolek signed a statement on the memorandum indicating that his failure to improve in these areas

could subject him to further disciplinary action, including termination. Ralphs transferred Misiolek to a store in Mission Viejo, intending Misiolek's longer commute time to be a form of punishment; however, Ralphs' management did not inform the Mission Viejo operations manager about the reason for the transfer.

The Mission Viejo operations manager began receiving complaints from employees about Misiolek's temper, use of profanity and habit of throwing things. There were no complaints about inappropriate touching. In December 1996, the Mission Viejo operations manager reported the complaints to the district manager and asked that Misiolek be removed from the store because he would not stop his offensive conduct. In September 1997, a customer complaint about Misiolek prompted another investigation by Ralphs. After finding problems in the store displays and produce department, Ralphs' management wrote a memo to the district manager stating that Misiolek needed to improve his performance or face removal from management; it also placed a copy of the memo in Misiolek's personnel file. In late November 1997, Ralphs' management met with Misiolek and informed him of the problems at the Mission Viejo store, including complaints from dissatisfied customers and employees. In December 1997, Ralphs' management demoted Misiolek from store director to food clerk and reassigned him to work as a merchandise receiver in the warehouse of another store. Management also cut Misiolek's pay in half and took away any opportunity for him to advance in the company.

In 1996, plaintiffs filed this action against Misiolek and Ralphs and later settled with Misiolek. The trial court bifurcated the trial against Ralphs on the punitive damages issue and, at the end of the first phase, the jury awarded the six plaintiffs compensatory damages

totaling \$550,000, based on its finding that Ralphs failed to take reasonable steps to prevent Misiolek's gender-based harassment. Specifically, the jury awarded: \$50,000 to Noland, \$62,500 to Finton, \$62,500 to Lang, \$75,000 to Papiro, \$100,000 to Swann and \$200,000 to Gober. In the first phase, the jury also determined that Misiolek was a managing agent of Ralphs and that Ralphs either ratified Misiolek's misconduct or had advance knowledge of his unfitness and employed him with a conscious disregard of the rights and safety of others. During the second phase, the jury awarded a total of about \$3.3 million in punitive damages against Ralphs. Specifically, the jury awarded: \$150,000 to Noland, \$350,000 to Finton, \$325,000 to Lang, \$500,000 to Papiro, \$700,000 to Swann and \$1,300,000 to Gober.

The trial court granted Ralphs' motion for a new trial as to the amount of punitive damages, based on jury misconduct during deliberations. Ralphs appealed arguing, among other things, that the punitive damages award was not supported by substantial evidence meeting the requirements of Civil Code section 3294, subdivision (b) and that the court improperly limited the grant of new trial to the amount of punitive damages.

In our unpublished prior opinion, we concluded that substantial evidence supported a finding of liability against Ralphs for punitive damages. We also held that the trial court did not err in limiting the new trial to the amount of punitive damages, noting that the parties would need to present evidence related to the reasons for imposing liability and on punitive damages on retrial. Although Ralphs argued that we should direct the trial court to exclude evidence of Misiolek's misconduct at stores where he worked before his transfer to the Escondido store and after his transfer to the Mission Viejo store, we declined to do so

because Ralphs did not contend that the trial court erred in admitting the testimony of any particular witness and any opinion on this evidence would be advisory.

Following retrial on remand, a second jury awarded each plaintiff \$5 million in punitive damages. After ruling on plaintiffs' motion for interest on their compensatory and punitive damages awards, the trial court entered judgment and Ralphs moved for JNOV and new trial on the ground the punitive damages awards were excessive. The trial court denied the JNOV motion, but vacated the judgments and conditionally granted a new trial except as to any plaintiff who consented to an award equal to 15 times her compensatory damages recovery. Gober and Swann accepted the remittiturs, but Finton, Lang, Noland and Papiro (collectively the Finton Plaintiffs) did not. All parties filed notices of appeal and Ralphs filed an interpleader action and paid Gober's and Swann's judgments into court.

DISCUSSION

I. Ralphs' Appeal

Ralphs contends the trial court erred by denying its JNOV motion because the punitive damages awards were unconstitutionally excessive. It argues we should reverse the order denying JNOV and direct the entry of judgment for the Finton Plaintiffs that includes punitive damages in a constitutionally permissive amount. Alternatively, it asks us to remand the matter for retrial of the punitive damages issue. We conclude that the trial court properly denied Ralphs' JNOV motion because the evidence supported a punitive damages verdict and that the proper vehicle to challenge the amount of the punitive damages awards under these circumstances was to appeal the order granting the new trial motion. Because

Ralphs did not appeal this order it cannot challenge the amount of punitive damages awarded thereby. (*DeZeraga v. Meggs* (2000) 83 Cal.App.4th 28, 43.)

The trial court has discretion to grant a JNOV motion if there is no substantial evidence to support the verdict. (*Teitel v. First Los Angeles Bank* (1991) 231 Cal.App.3d 1593, 1603 (*Teitel*)). In its motion, Ralphs argued that the amount of punitive damages awarded was excessive as a matter of law and asked the trial court to reduce the award to a sum that did not violate its due process rights. It did not contend that the evidence was insufficient to support the verdict, nor could it make this argument as the jury was presented with the same evidence that our prior opinion concluded was sufficient to support a finding of liability against Ralphs for punitive damages. Where, as here, the trial court believes that the evidence supports a punitive damages award, but finds the award excessive, the proper procedure is for it to grant a conditional order for a new trial subject to the plaintiff's consent to a remittitur. (*Teitel, supra*, 231 Cal.App.3d at pp. 1604-1605.) The trial court properly denied Ralphs' JNOV motion and issued the conditional order for a new trial.

It is well settled that an appeal lies from an order granting a new trial (Code Civ. Proc., §§ 904.1, subd. (a)(4), 904.2, subd. (e), 657) and any party "aggrieved" by the new trial order may appeal (Code Civ. Proc., § 902). Although Ralphs was aggrieved by the new trial order because the trial court did not grant all the relief it requested (i.e., requested maximum of 3:1 rather than the awarded 15:1 ratio). (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 285; *Spencer v. Nelson* (1947) 30 Cal.2d 162, 164-165.) Ralphs did not appeal the new trial order and thus we lack jurisdiction to review it. (*DeZeraga v. Meggs, supra*, 83 Cal.App.4th at p. 43.) Because neither Ralphs nor plaintiffs challenged the substance of the

new trial order, the order granting a new trial stands and the judgment is vacated after this appeal becomes final. Thus, Ralphs' purported appeal from such vacated judgment is properly dismissed. (*Spencer v. Nelson, supra*, 30 Cal.2d at pp. 164-165.)

II. *Plaintiffs' Appeal*

A. Appeal of the Finton Plaintiffs Regarding the Admissibility of Different Evidence on Retrial of the Amount of Punitive Damages

Background

All plaintiffs alleged that Misiolek subjected them to unlawful sexual discrimination and harassment. Gender or sex harassment is a form of sex discrimination prohibited by the Fair Employment and Housing Act (Gov. Code, § 12900 subd. (j)(1)). Sexual harassment is defined as including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1146 (*Weeks*)). Courts have recognized two theories of liability for sex-based workplace harassment, quid pro quo and hostile or abusive environment. (*Ibid.*) Here, plaintiffs claimed gender harassment based on a hostile environment, "defined as conduct having the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." (*Ibid.*, fn. omitted.)

It is unlawful for an employer to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring (Gov. Code, § 12900 subd. (k)) and an employer may be liable for punitive damages based on harassment by a supervisor or other employee where the employer "had advance knowledge of the unfitness of the employee and

employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (b).) Thus, where a plaintiff seeks punitive damages from an employer, the plaintiff must show that an employee acted with oppression, fraud or malice *and* that the employer engaged in conduct defined in subdivision (b) of Civil Code section 3294. (*Weeks, supra*, 63 Cal.App.4th at p. 1154.)

During the liability phase of the trial, the first jury expressly found that Misiolek engaged in gender based harassment, that his conduct was malicious, oppressive or despicable and that Ralphs failed to take reasonable steps to stop this harassment. The jury also found by clear and convincing evidence that Ralphs "committed malice, oppression or despicable conduct" because it ratified Misiolek's conduct or its managing agent "had advance knowledge" of Misiolek's unfitness and "employed him with a conscious disregard of the rights and safety of others." We held in our prior opinion that the evidence presented during the liability phase supported the jury's finding that Ralphs was liable for punitive damages based on its advance knowledge, through one of its managing agents, of Misiolek's illegal gender based harassment and its failure to take reasonable steps to stop this harassment. Thus, Ralphs' liability for punitive damages has already been determined and the sole issue to be decided on retrial is the amount of punitive damages.

After Misiolek's demotion and transfer to the Mission Viejo store, Ralphs transferred him to a store in Irvine and suspended him in August 2000 in connection with an investigation into his conduct at that store. During his suspension, Misiolek resigned his employment with Ralphs. Before retrial, the trial court granted Ralphs' motion for a

protective order and prevented plaintiffs from engaging in discovery concerning the events that occurred at the Irvine store on the ground the discovery sought was not relevant to the issues to be determined at trial.

Ralphs filed numerous motions in limine seeking to limit the scope of the evidence admitted at the retrial and, as relevant to this appeal, the trial court granted its motions in limine numbers 1 and 5, which excluded all evidence of Misiolek's misconduct at the Irvine store and all percipient witnesses who did not testify during the first trial. We denied plaintiffs' petition for a writ of mandate seeking to reverse these rulings on the ground they had an adequate remedy by way of appeal. (*Finton v. Superior Court* (Dec. 6, 2001), D038949 [unpub. ord.]) After opening statements, plaintiffs moved for a mistrial contending, among other things, that the trial court abused its discretion by limiting the scope of the retrial to the evidence received during the first trial. The trial court denied the mistrial, but revised several of its rulings on Ralphs' motions in limine.

Analysis

The Finton Plaintiffs claim the trial court erred by granting Ralphs' motion for a protective order and motions in limine numbers 1 and 5, and by denying their first motion for a mistrial. As a threshold matter, we reject Ralphs' contention that the Finton Plaintiffs are improperly seeking advisory rulings on evidentiary issues that they plan to raise at the retrial. Because the parties did not challenge the substance of the new trial order, this case will again be remanded for a limited new trial on the amount of punitive damages and the parties will be returned to the same position they were in after completing the liability phase. (*Hall v. Superior Court In and For Los Angeles County* (1955) 45 Cal.2d 377, 381.) In this situation,

the propriety of the trial court's specific evidentiary rulings is no longer at issue.

Nonetheless, we address the general evidentiary issues presented for the guidance of the parties and the trial court on retrial and because this matter presents important questions regarding the admissibility of evidence during a retrial that may also arise in future cases. (Code Civ. Proc., § 43; 9 Witkin, Cal. Procedure (4th 1997) Appeal, § 337, p. 378.)

Turning to the merits, our high court has concluded that trial courts have discretion as to the scope of the evidence that may be introduced at retrial on the proper amount of punitive damages. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 781, fn. 3.) Here, the trial court categorically excluded all evidence during retrial of the punitive damages issue that was not admitted during the liability phase of the proceeding without assessing the admissibility of the evidence.

We conclude that on a retrial of the amount of punitive damages, the trial court is free to independently assess whether evidence not presented during the liability phase of the proceeding is relevant to the issues presented during the punitive damages phase and, if relevant, whether the probative value of the evidence outweighs its prejudicial effect. (Evid. Code, § 352.) If the proposed evidence is potentially relevant for different purposes, one admissible (i.e., to assist in determining the proper amount of punitive damages) and one inadmissible (i.e., addressing liability for punitive damages), upon request, the trial court may instruct the jury as to the proper use of the evidence. (Evid. Code, § 355.) Nonetheless, the trial court retains the discretion to exclude the evidence altogether where the danger of the jury's misuse of the evidence for the inadmissible purpose is acute, and its value for the

legitimate purpose is slight or other evidence can readily prove the point for which it is admissible. (Evid. Code, § 352.)

All evidence admitted during the liability phase of this proceeding is potentially admissible during the retrial of the punitive damages issue. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 887-888.) Here, the trial court's decision to have portions of the reporter's transcript of the liability phase of the proceeding read to the jury was an expeditious and cost effective way of presenting this evidence. Nevertheless, some evidence admitted during the liability phase may be objectionable if considered for a purpose other than the amount of punitive damages during the subsequent punitive damages phase of this proceeding. For example, evidence pertaining to the two plaintiffs that accepted the remittitur is not admissible in calculating the amount of punitive damages to award the remaining plaintiffs because Ralphs has already been punished and has paid for this conduct.

To guide the trial court in deciding whether evidence not admitted during the liability phase is admissible in calculating the amount of punitive damages to award the Finton Plaintiffs, we examine the two categories of evidence that the plaintiffs sought to admit during the retrial: (1) evidence excluded or not presented during the initial liability phase of the trial, and (2) evidence of events occurring after Misiolek left the Escondido store and no longer had any interaction with the plaintiffs.

In *Campbell*, the United States Supreme Court considered whether a punitive damages award was so excessive as to violate due process. (*Campbell, supra*, 538 U.S. at pp. 417-429.) In determining the constitutionality of the punitive damages award, the *Campbell* court looked to three guideposts, consisting of (1) the degree of reprehensibility of

the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (*Id.* at p. 418, citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 (*Gore*)). These guideposts can also assist a trier of fact in determining the amount of punitive damages to award in the first instance. (See BAJI No. 14.72.2.)

The degree of reprehensibility of the defendant's conduct is the most important indicium of the reasonableness of a punitive damages award. (*Campbell, supra*, 538 U.S. at p. 419.) To determine the reprehensibility of a defendant's conduct, courts are instructed to consider whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. (*Ibid.*) These questions may also be presented to the trier of fact to aid in evaluating the reprehensibility of a defendant's conduct, and thus, in determining the amount of punitive damages to award. (See BAJI No. 14.71.2.)

Although not done here, requiring the jury to make specific findings regarding whether the defendant acted with malice or oppression or fraud (Civ. Code, § 3294, subd. (c)) would be helpful. Such findings may assist a trial court called upon to assess the propriety of a punitive damages award and, where a retrial on the amount of punitive damages is presented to a different jury, these findings will assist the trial court in evaluating

whether evidence not presented during the liability phase is admissible for the jury's determination of the appropriate amount of punitive damages to award.

The Finton Plaintiffs contend that certain evidence of Misiolek's misconduct *prior* to his transfer to the Escondido store, and Ralphs' reaction thereto, that was not presented or was excluded by the trial court during the liability phase, was admissible to show advance notice and recidivism. Evidence regarding Ralphs' advance notice or knowledge is no longer relevant to establish liability for punitive damages based on the conclusion in our prior opinion that the evidence presented during the liability phase of the proceeding supported the jury's finding that Ralphs was liable for punitive damages because one of its managing agents ratified Misiolek's misconduct or knew that Misiolek had acted inappropriately prior to his becoming director of the Escondido store and failed to take reasonable steps to prevent the misconduct. Nevertheless, evidence of other incidents of *prior* misconduct *by Ralphs* that is factually and legally *similar* to the Finton Plaintiffs' claims is relevant to Ralphs' reprehensibility because conduct that is recidivistic can be punished more harshly than an isolated incident. (*Campbell, supra*, 538 U.S. at p. 423.) Such evidence is admissible if its probative value outweighs its prejudicial effect. (Evid. Code, § 352.) In evaluating such evidence the trial court must determine whether the prior transgressions are similar to the conduct in question. (*Campbell, supra*, 538 U.S. at p. 423, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 462, fn. 28 (*TXO*).) Any such evidence must show that Misiolek engaged in *similar* gender based harassment *prior* to his transfer to the Escondido store and that Ralphs' management ratified the conduct or knew of this specific harassment and continued to employ Misiolek without taking reasonable steps to prevent his

abusive conduct. (See Civ. Code, § 3294, subd. (b).) This evidence has a legal and factual nexus to plaintiffs because Ralphs' intervention at an earlier date could have prevented or reduced Misiolek's harassment of these plaintiffs.

The Finton Plaintiffs also contend that evidence of Ralphs' *subsequent* misconduct is relevant to the reprehensibility analysis because it shows a continued reckless disregard for the safety of other female employees, pointing out that the *Campbell* decision allows courts to consider whether the defendant's "tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others" as part of the reprehensibility analysis. (*Campbell, supra*, 538 U.S. at p. 419.) In discussing the reprehensibility factor, however, the *Campbell* court cautioned that a defendant "should be punished for the conduct that harmed the plaintiff" and that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis" (*Id.* at p. 423.) Moreover, when the United States Supreme Court introduced the concept of evaluating "recidivism" in connection with a punitive damages award, it permitted consideration of the existence and frequency of similar *past* conduct as a factor in determining the reprehensibility of the defendant's conduct. (*Gore, supra*, 517 U.S. at pp. 574, fn. 21, 576-577.) Thus, the concept of recidivism addressed in *Campbell* refers to similar events occurring *before* the acts complained of by the plaintiffs. (*Campbell, supra*, 538 U.S. at p. 423.)

Introducing evidence of Ralphs' *subsequent* misconduct toward nonparties that was not presented during the liability phase of the trial increases the chance that the new jury will punish Ralphs for conduct directed toward these nonparties, leading to the possibility of

multiple punitive damages awards for the same conduct because nonparties are usually not bound by judgments obtained by other plaintiffs. (*Campbell, supra*, 538 U.S. at p. 423.) To the extent Ralphs may have repeated its unlawful conduct and other individuals sue Ralphs for its misconduct, evidence pertaining to the instant plaintiffs may be admissible to show recidivism.

Although it is true that punitive damages are also aimed at "deterrence and retribution" (*Campbell, supra*, 538 U.S. at p. 416), we believe these damages should be measured at the time these plaintiffs demonstrated that Ralphs, through its managing agent, became aware of the acts committed against them. While we are not prepared to set forth a general rule that evidence of Ralphs subsequent misconduct toward other employees is never admissible, we believe such evidence is generally inadmissible. Nevertheless, should Ralphs argue during retrial that it "cleaned up" its act when it first learned of Misiolek's misconduct, this could open the door to the admission of evidence of its subsequent misconduct for impeachment.

B. Appeal By All Plaintiffs Regarding the Calculation of Interest

The trial court concluded that the compensatory damages awards were certain as of the date of the initial compensatory damages verdict and awarded plaintiffs prejudgment interest on these damages from the date of that verdict to the date of the judgment on retrial (Civ. Code, § 3287, subd. (a)), a ruling the parties have not challenged. But, the trial court denied their request for postjudgment interest on the compensatory damage awards from the first trial (Code Civ. Proc., § 685.010), reasoning that its order granting a partial new trial of

punitive damages vacated the underlying judgment. The trial court also denied plaintiffs' request for postjudgment interest on the punitive damages awards.

The Finton Plaintiffs contend they are entitled to postjudgment interest on their compensatory damages awards starting on the date the trial court entered judgment after the first trial. Alternatively, they seek interest from the date the jury rendered its verdict on retrial of the punitive damages issue. We disagree.

Interest commences to accrue on a money judgment on the date of entry of the judgment. (Code Civ. Proc., § 685.020, subd. (a).) The Finton Plaintiffs are not entitled to postjudgment interest because the trial court vacated the judgment after issuing its conditional order granting a new trial. (*Jones v. World Life Research Institute* (1976) 60 Cal.App.3d 836, 848 ["There can be no interest on a judgment prior to its rendition and entry"].) Although the Finton Plaintiffs argue that postjudgment interest accrues from the date of the initial judgment, not the date that the judgment is affirmed or modified on appeal (*Ehret v. Congoleum Corp.* (2001) 87 Cal.App.4th 202, 209), the granting of a partial new trial vacates the judgment previously entered. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 329.) Stated differently, the Finton Plaintiffs' successful new trial motion vacated the judgment and there was no judgment that Ralphs could pay in order to avoid liability for postjudgment interest. The Finton Plaintiffs also seek postjudgment interest on their punitive damages awards as of the date these awards are quantified, but their request is inappropriate because there is no judgment or even an award of punitive damages on which such interest can accrue.

Gober and Swann correctly assert they are entitled to postjudgment interest on their compensatory and punitive damages awards (Code Civ. Proc., § 685.020, subd. (a)), but we reject their argument that interest commenced the date the trial court entered judgment after the first trial or the date the second jury rendered its verdict on retrial. Until these plaintiffs accepted the remitted judgment, there was no judgment in their favor for postjudgment interest to accrue. These plaintiffs argue that the original punitive damages awards were never reversed, but only modified to a sum yet to be decided. This argument is erroneous because the initial jury finding that Ralphs acted with "malice, oppression or despicable conduct" merely established Ralphs' *liability* for a punitive damages award, making such an award permissible. (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801; *Pelletier v. Eisenberg* (1986) 177 Cal.App.3d 558, 564-565.) Even after a finding of liability for punitive damages, a jury retains the discretion "to say whether or not punitive damages shall be awarded." (*Brewer, supra*, 32 Cal.2d at p. 801; see CACI Nos. 3942, 3949.) Thus, we conclude that Gober and Swann are entitled to postjudgment interest on their compensatory and punitive damages awards commencing the date they accepted the remitted judgment, until the date the judgment was paid or deposited into the court, a time period that does not overlap their prejudgment interest award. (Code Civ. Proc., §§ 685.020, subd. (a), 685.030, subd. (c), (d)(2).)

DISPOSITION

The order granting new trial is affirmed and the appeal from the judgment vacated thereby is dismissed. This case is remanded for a new trial on the proper amount of any punitive damages awards to the Finton Plaintiffs. The order denying the award of

postjudgment interest is affirmed as to the Finton Plaintiffs and reversed as to Gober and Swann. The trial court is directed, upon proper motion, to award Gober and Swann postjudgment interest on their compensatory and punitive damages awards. All plaintiffs are entitled to costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

McINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.