Filed 5/3/18 Markowitz v. Markowitz CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SAUL MARKOWITZ as attorney in fact, etc., Plaintiff and Respondent, v. JOSEPH MARKOWITZ, Defendant and Appellant.	B278585 (Los Angeles County Super. Ct. No. BC560982)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael P. Linfield, Judge. Affirmed.

Holstrom, Block & Parke and Ronald B. Funk for Defendant and Appellant.

Marcus, Watanabe & Enowitz and Wendy Y. Wantanabe for Plaintiff and Respondent.

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On behalf of his 90-year-old mother, one brother sued another brother for financial elder abuse in pressuring her to give the latter brother money, including through harassing telephone calls. After the close of evidence, the trial court allowed the suing brother to seek damages for mental suffering, as well as for financial abuse. The court awarded $100,000 for mental suffering, but no damages for financial harm. On appeal, the losing brother argues that the court erred in allowing the suing brother to use transcripts of telephone conversations recorded in violation of Penal Code section 632 to inform the psychology expert's opinion and to impeach the losing brother's testimony. He also argues that the court erred in allowing the amendment to conform to proof. We conclude the trial court did not err, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Rose and David Markowitz have three sons: Defendant Joseph Markowitz (defendant), plaintiff Saul Markowitz (plaintiff), and Philip Markowitz (Philip).[1] None of the sons gets along. In June 1998, Rose and David established the David and Rose Markowitz 1998 Trust (trust) in which they placed various pieces of real property as well as the contents of bank accounts collectively valued at more than $10 million, and named themselves cotrustees. David died in 2006.

Between David's death and January 2014, Rose, who was then in her late 80's, modified the trust or granted durable powers of attorney to one or more of her sons. During that same time, Rose also issued millions of dollars worth of checks to

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1 We refer to the parties and nonparty family members by first names for clarity only, we mean no disrespect.

various people on defendant's behalf, including $1.8 million to a Wine Club and tens of thousands of dollars to one of defendant's ex-girlfriends for support of his young son. By 2014, plaintiff was the favored son, as Rose gave him control of her bank account and appointed him as her attorney in fact.

Defendant was not pleased. In August 2014, he began a campaign of repeatedly calling Rose on the phone, "dozens of times a day"—up to 69 times in one day. In these calls, he insisted that she "give [him his] money now" and that she go with him to the bank or, alternatively, that she appoint a third party neutral to manage her money because plaintiff and Philip could not be trusted. Interspersed with these demands, defendant called the police to Rose's house and said that "the police [were] on [his] side"; repeatedly ignored Rose's requests to "leave [her] alone"; and when Rose was so exasperated that she said she was "ready to kill [her]self," defendant replied, "You deserve it." The calls made Rose "extremely upset" and caused her to cry.

II. Procedural Background

A. *Complaint*

In October 2014, plaintiff sued defendant on Rose's behalf for (1) financial elder abuse, (2) unjust enrichment, and (3) conversion. The complaint alleged that defendant caused "over a million dollars in checks" to be issued on his behalf without Rose's knowledge, and that defendant "constantly harasses and puts pressure upon Rose by telephoning her between 50 and 100 times a day," even after Rose would "hang up" to avoid him.

B. *Trial*

The matter proceeded to a three-day bench trial.

At trial, plaintiff testified that between January and August 2014, he witnessed defendant carry out a relentless campaign to convince his mother to give him money and grant him control over the trust. Plaintiff, who lived with Rose, testified that defendant "incessantly" called her on the phone, up to 69 times in one day, begging and harassing her to give him "his money" despite Rose's repeated protests. Plaintiff also testified that defendant would arrive at their house unannounced with the police in tow, having falsely reported that Rose was being held against her will.

1. *Audiotapes and transcripts*

Because defendant's relentless harassment was causing Rose to "cry," "scream," lose sleep, and "breakdown," and because of defendant's history of violence, plaintiff on August 22, 2014, obtained a temporary restraining order (TRO) for Rose against defendant. Plaintiff also installed a recording device to record defendant's incoming calls.

During trial, plaintiff sought to introduce those tapes as well as transcriptions of the tapes. Defendant objected on the ground that the tapes violated Penal Code section 632's prohibition against recording telephone conversations without *every party's* consent. The trial court sustained the objection as to any recordings made before the TRO issued because the TRO authorized Rose to record any impermissible contacts from defendant. The court nevertheless ruled that plaintiff could testify to any calls he personally overheard.

Plaintiff called a geriatric psychologist as an expert witness. The expert testified about Rose's susceptibility to the

undue influence of others, that defendant's conduct constituted elder abuse, and that defendant's campaign of calls inflicted "mental suffering" on Rose. When the expert indicated that his opinion relied in part upon the recorded telephone calls, defendant objected. The trial court overruled the objection, noting that "[a]n expert is allowed to rely on nonadmissible evidence" in offering an opinion. The expert went on to relay some of the content of the calls, but defendant did not object.

Defendant testified. During cross-examination, defendant denied telling Rose she had to go with him to the bank; denied demanding any money from her; denied saying that a third party neutral would give him money; denied saying he was her only trustworthy son; denied saying that Philip was a "liar"; denied telling Rose, "You deserve it" in response to her statement, "I'm ready to kill myself"; denied saying, "I've got the police on my side"; denied that his intent was to ask for money; indicated Rose only "may have" told him to "leave [her] alone"; denied that Rose ever hung up on him more than "once or twice"; denied that Rose told him she was not going to give him control of her money; and denied that Rose said she did not want a third party in charge of her money. Plaintiff sought to impeach this specific testimony with defendant's and Rose's contrary statements on the taped calls. The trial court ruled that it would allow such impeachment, and plaintiff proceeded to introduce excerpts from the taped calls that directly contradicted the portions of defendant's trial testimony set forth above.

2. *Amendment to conform to proof*

After the parties rested their cases, plaintiff "move[d] to amend according to proof to make it clear that the [first] cause of action [in the complaint for elder abuse] covers not just financial

elder abuse but elder abuse causing mental distress or physical injury." Defendant objected, but the trial court granted the motion. In so ruling, the court explained that "it [was] clear to both parties that the main issue here was going to be [the] repeated phone calls by [defendant] to his mother for the purpose . . . of getting the mother to take him to the bank or . . . getting money or changing terms in the trust documents."

3. *Ruling*

The trial court issued its ruling orally.[2]

With respect to plaintiff's elder abuse claim, the court found that defendant's calls amounted to "unrelenting pressure" and "badgering" of Rose; and that this badgering constituted elder abuse and, more specifically, "clear emotional abuse." However, that abuse did not constitute *financial* elder abuse because the calls had not caused Rose to transfer any money or property to defendant (and because Rose's earlier transfers for defendant's benefit were never shown to be the product of any coercion). For the same reasons, and because the evidence indicated that Rose wanted each of her sons to have one "third of her assets," the court rejected plaintiff's claims for unjust enrichment and conversion.

Nevertheless, the court found that defendant's conduct caused Rose mental suffering and awarded $100,000 in damages for her pain and suffering.

C. *Appeal*

After the court entered judgment, defendant filed a timely notice of appeal.

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2 The transcript of the trial court's ruling was omitted from the record. We take judicial notice of it at this time. (Evid. Code, §§ 452, subd. (c) & 459.)

DISCUSSION

Defendant raises two clusters of issues on appeal—namely, that the trial court erred (1) in allowing plaintiff's expert to rely on the taped telephone calls and in allowing plaintiff to impeach defendant with those calls, and (2) in allowing plaintiff to amend his complaint to add allegations regarding mental suffering as part of his elder abuse claim. We review both questions for an abuse of discretion. (*McIntyre v. The Colonies-Pacific, LLC* (2014) 228 Cal.App.4th 664, 670 [evidentiary rulings]; *Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31 (*Trafton*) [amendment to conform to proof].)

I. Use of Recorded Telephone Calls

A. *Penal Code section 632*

Penal Code section 632 declares any "electronic . . . recording" of a "confidential communication" "not admissible in any judicial . . . proceeding" unless "all parties" to that communication had consented to the recording. (Pen. Code, § 632, subds. (a) & (d).) By its plain language, it bars the introduction of such taped telephone conversations into evidence. (E.g., *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1487-1488 (*Frio*).) The trial court barred plaintiff from admitting the tapes from any call recorded before the TRO issued (that is, before August 22, 2014), but (1) allowed plaintiff's expert to rely on the tapes' content in forming his opinions, and (2) allowed plaintiff to impeach defendant's testimony with the tapes. Defendant attacks these two uses of the tapes.

1. *Expert's use of tapes*

An expert witness may base his opinion on "matter . . . made known to him at or before the hearing, *whether or not admissible*, that is of a type that reasonably may be relied upon

by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subd. (b), italics added; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 133 [so noting].) Because experts opining on a person's mental state often rely on prior statements of that person and the conduct to which they have been subjected, the content of the recorded calls are of a type that "reasonably may be relied upon" by plaintiff's expert. Consequently, the expert could rely on the tapes' content "whether or not admissible."

Defendant argues that *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) dictates a different result. It does not. *Sanchez* clarified the hearsay rules governing experts—in civil as well as criminal cases—by prohibiting experts from "relat[ing] as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id.* at p. 686; *People v. Bona* (2017) 15 Cal.App.5th 511, 520 ["Although *Sanchez* is a criminal case, it also applies to civil cases"].) But *Sanchez* reaffirmed the long-standing rule that an "expert may still *rely* on hearsay in forming an opinion, and may tell the [trier of fact] *in general terms* that he did so." (*Sanchez*, at p. 685.) Thus, *Sanchez* does not invalidate the trial court's ruling that plaintiff's expert could rely on the tapes' content notwithstanding their inadmissibility.

To be sure, and as the trial court noted, the expert on a few occasions transgressed the line re-established in *Sanchez* when he relayed some of the tapes' content. But, also as the trial court noted, defendant never contemporaneously objected to these transgressions and his failure to do so—when *Sanchez* had been on the books for nearly a month by the time of trial—forfeits his right to complain about it on appeal. (*People v. Clark* (2016)

63 Cal.4th 522, 603 [objection on specific evidentiary ground required to preserve issue on appeal]; Evid. Code, § 353.) And even if defendant had objected, the transgressions were harmless because, as discussed below, all of the statements the expert relayed were elsewhere properly admissible as substantive evidence.

2. *Use of tapes to impeach defendant*

Penal Code section 632's bar on the use of non-consensually recorded conversations does not prohibit their use to impeach a witness making statements inconsistent with those conversations. (*Frio*, *supra*, 203 Cal.App.3d at pp. 1496-1497; *People v. Crow* (1994) 28 Cal.App.4th 440, 452 ["Evidence of confidential conversations obtained by . . . recording in violation of section 632 . . . can be used to impeach inconsistent testimony by those seeking to exclude the evidence"].) The reason for this exception is simple: Section 632 does not "confer upon a testifying witness the right to commit perjury." (*Frio*, at p. 1497.) In this case, each excerpt of the recorded calls admitted to impeach defendant directly contradicted defendant's testimony, and was accordingly admissible to impeach him.

Defendant raises two arguments in response. First, he asserts that *Frio* deals solely with how recordings that violate Penal Code section 632 may be used to refresh a witness's recollection and how they affect the impeached witness's in-court testimony. Defendant is wrong. Although *Frio* dealt with these topics (*Frio*, *supra*, 203 Cal.App.3d at pp. 1491-1492, 1497-1498), it also expressly held that such recordings could be used for impeachment (*id.* at p. 1497). Second, defendant contends that the calls were used to impeach him on a "collateral matter" and inadmissible on that basis. Again, defendant is wrong. Although

courts generally do not permit a party to cross-examine a witness on a matter collateral to the issues in dispute at trial and then introduce extrinsic evidence to impeach him on that collateral matter (e.g., *People v. Moses* (1972) 24 Cal.App.3d 384, 398-399; *Marocco v. Ford Motor Co.* (1970) 7 Cal.App.3d 84, 93-94), what defendant said to Rose, how he said it, and how Rose reacted were not collateral matters. To the contrary, they went to the very heart of whether defendant subjected Rose to elder abuse.

B. *Hearsay*

Defendant also seems to raise an independent hearsay objection to the admission of the tapes. To the extent he does, the objection is not properly before us because he did not raise a hearsay objection during trial. (Evid. Code, § 353.) Any such objection lacks merit in any event because the excerpts of the tapes used to impeach defendant were admissible as substantive evidence. Defendant's statements on the tapes were admissible notwithstanding the hearsay rule because (1) they were not hearsay, as they were the legally operative facts that constituted the elder abuse itself (and were thus not admitted for their truth (Evid. Code, § 1200, subd. (a) [hearsay defined as statements "offered to prove the truth of the matter stated"])), and (2) they constituted defendant's prior inconsistent statements (Evid. Code, § 1235; *People v. Chism* (2014) 58 Cal.4th 1266, 1294). Rose's statements on the tapes were admissible notwithstanding the hearsay rule because they were admitted to prove how defendant paid no heed to her statements that she did not want assistance managing her money, ignored her pleas to leave her alone and taunted her about killing herself; they were not admitted to prove that Rose actually wanted him to leave her and her finances alone or to prove she actually wanted to kill herself.

(Evid. Code, § 1200, subd. (a).)

C. *Authentication*

Defendant also asserts, without more, that the tapes lacked a proper evidentiary foundation. This argument was forfeited for lack of objection (Evid. Code, § 353), and is without merit in light of plaintiff's testimony regarding how he recorded the tapes and of the expert's testimony that he recognized both voices on the calls. This suffices. (Evid. Code, § 1400; *People v. Williams* (1997) 16 Cal.4th 635, 662 [foundation for tape recording laid when witness "testified that the tape was a record of his conversation"].)[3]

II. Amendment to Conform to Proof

A court has the discretion to allow a party to amend its pleading to conform to the proof at trial, even after the trial itself is over. (Code Civ. Proc., §§ 469 [allowing amendment of any pleading to conform to proof at trial so long as the variance has not "actually misled the adverse party to his prejudice in maintaining his . . . defense upon the merits"], 473 [court may allow a party to amend any pleading "in furtherance of justice"], 576 [allowing amendment of any pleading "at any time before or after commencement of trial"]; *Glougie v. Glougie* (1916) 174 Cal. 126, 132.) As a general matter, such amendments are favored. (*Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400; *Trafton*, *supra*, 69 Cal.2d at p. 31 ["[s]uch amendments have been allowed with great liberality"].)

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3 In light of our conclusions, we need not reach plaintiff's alternative arguments that the recordings were admissible under Penal Code section 633.5 or under the hearsay exception for state of mind.

More specifically, a court deciding whether to allow such an amendment is to consider "'(1) whether facts or legal theories are being changed and (2) whether the opposing party will be prejudiced by the proposed amendment.'" (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 910; *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1378.) These two factors "'represent[] a different side of the same coin.'" (*Garcia*, at p. 910.) Where the movant "attempts to set forth an entirely different set of facts by way of amendment," the amendment is more likely to be prejudicial. (*Simone v. McKee* (1956) 142 Cal.App.2d 307, 314.) But "'[i]f the same set of facts supports merely a different theory[,] . . . no prejudice can result,'" and the amendment may be appropriate. (*Garcia*, at p. 910.) An amendment that changes the legal theory is prejudicial (and hence should be denied) if it is """a wholly different cause of action"""—that is, if it adds a legal theory based on "a wholly distinct and different legal obligation against the defendant." (*Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 20, quoting *Frost v. Witter* (1901) 132 Cal. 421, 424; *Unruh v. Smith* (1954) 123 Cal.App.2d 431, 438 [amendment must not "substantially chang[e] the cause of action"]; *Hathaway v. Siskiyou Union High School Dist.* (1944) 66 Cal.App.2d 103, 110 ["a plaintiff may not sue upon one theory and recover upon proof of another"].)

The trial court did not abuse its discretion in allowing plaintiff to amend his complaint to allow him to pursue mental suffering damages under his previously alleged claim for elder abuse. Although plaintiff's complaint alleged, and was captioned as, a claim for *financial* elder abuse, the mechanism of that abuse—namely, defendant's campaign of harassing calls—was alleged in the complaint and was proven at trial. The complaint

also broadly sought "compensatory," "consequential," and "incidental" damages." The caption is not controlling. (Civ. Code, § 3528; *Brown v. Wells Fargo Bank, NA* (2012) 204 Cal.App.4th 1353, 1356.) More to the point, the amendment also did not allege "'a wholly different cause of action.'" Although the current statutory definition of "[a]buse of an elder" lists three types of abuse and lists "treatment with resulting . . . mental suffering" separately from "[f]inancial abuse" (Welf. & Inst. Code, § 15610.07, subd. (a)), the statutory definition in effect at the time of the 2014 calls listed only two types of abuse and listed "mental suffering" and "financial abuse" together (Former Welf. & Inst. Code, § 15610.07, as amended by Stats. 1998, ch. 946, § 2 and repealed by Stats. 2015, ch. 285, §1). Critically, *both* financial abuse and mental abuse are simply different forms of elder abuse. (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1346-1347 [so noting].) And both forms of elder abuse protect the same primary right—that is, the elder's right "not to be abused or defrauded." (*Estate of Dito* (2011) 198 Cal.App.4th 791, 802.) Given this overlap, we cannot conclude that the trial court abused its discretion in allowing the amendment.

Defendant makes three arguments in response. First, he asserts that the trial court would not have abused its discretion had it denied the amendment. This assertion is irrelevant because the question before us is whether the court abused its discretion by *allowing* it; as explained above, the court did not. Second, defendant argues that he would have asked different questions at Rose's deposition had he known she might seek mental suffering damages resulting from his harassing phone calls. We disagree because defendant had ample notice of the

factual basis for the elder abuse (namely, the phone calls) and ample notice that plaintiff was broadly seeking damages. Lastly, defendant contends that the trial court erred in not requiring plaintiff to file a new complaint with language incorporating the approved amendment. He is wrong. Where, as here, "the proof was made, the fact that no formal amendment was filed is immaterial." (*Donovan v. Wechsler* (1970) 11 Cal.App.3d 210, 213.)

DISPOSITION

The judgment is affirmed. Plaintiff is entitled to his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST