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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ROBERT CAREY CONTRACTOR, Plaintiff, Cross-defendant and Respondent, v. MARY CASAMENTO et al., Defendants, Cross-complainants and Appellants, OXNARD PLUMBING CO., INC. et al., Cross-defendants and Respondents.	2d Civil No. B279701 (Super. Ct. No. 56-2014-00457572-CU-OR-VTA) (Ventura County)

Mary Casamento and Ian Campbell appeal from judgments entered against them after a jury trial. They claim that the trial court abused its discretion in denying their motion for a new trial. The motion was based on opposing counsel's misconduct in displaying to the jury evidence that the court had previously excluded. Because there is neither a reporter's transcript nor an agreed or settled statement setting forth the relevant trial court proceedings, appellants cannot carry their

burden of affirmatively showing error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We affirm.

Procedural History

In September 2014 Robert Carey Contractor (Contractor), a partnership and licensed contractor, filed against appellants a complaint consisting of five causes of action. Contractor sought to recover money owed for work and material that he had furnished to appellants pursuant to a written contract.

Appellants filed a cross-complaint against Contractor; Robert Carey personally; Oxnard Plumbing Co., Inc. (Oxnard); and Frank Flores Pedroza, Jr. (Pedroza), Oxnard's controlling shareholder. The cross-complaint consisted of six causes of action. The first cause of action alleged that Oxnard and Pedroza had failed to perform their obligations under a contract "for the remodeling of [appellants' home] to make it more wheelchair accessible."

The jury returned a special verdict that is not included in the record on appeal. The record includes a document entitled "Judgment After Jury Trial." As to Contractor's complaint, judgment in the amount of $68,069.78 was entered in favor of Contractor and against appellants. As to appellants' cross-complaint, judgment was entered in favor of the cross-defendants.

Before the jury trial began, appellants made a motion in limine to exclude "[a]ny mention of a party having insurance." The record does not include the trial court's ruling on the motion. There is no reporter's transcript of the pretrial or trial proceedings.

After the entry of judgment, appellants filed a motion for a new trial. They argued that counsel for Oxnard and Pedroza had displayed to the jury "on an overhead projector" a document showing that an insurance company had paid Casamento "$235,518.72 on her property damage claim." This was in violation of the court's order granting appellants' "motion in limine prohibiting the disclosure to the jury of the amount of money paid to Mary Casamento under her homeowners insurance claim for loss of property." Appellants alleged that they had timely "objected to showing the jury the 'non-exhibit' as prejudicial and in violation of the ruling on the motion in limine." They maintained that the display of the insurance payment "was extremely prejudicial" because "[t]he jury could easily conclude that [Casamento] had already been fully compensated for her construction claim since the amount paid by insurance was approximately three (3) times the amount she was claiming [in her cross-complaint] against Oxnard/Pedroza for defective workmanship."

In his written opposition to the motion for a new trial, counsel for Oxnard and Pedroza said that the court had "ordered that the insurance evidence was admissible, but the total dollar figure of the insurance amount paid was not admissible." Counsel continued: "During the cross-examination of Mary Casamento, [counsel] accidentally, and briefly, depicted the summary amount paid for one category of Mary Casamento's insurance claim . . . . [¶] Casamento objected [but] . . . did not ask the court to admonish the jury to disregard the evidence, a fatal flaw." (Some capitalization omitted.)

The record includes a reporter's transcript of the hearing on the motion for a new trial. (This is the only reporter's

transcript in the record.) Counsel for Oxnard and Pedroza made clear that he disagreed with appellants' version of the display to the jury of the insurance payment: "[Appellants' counsel's] recitation of how these things occurred is inaccurate. . . . There's no record. . . . [S]ince there is a reporter now, I want to make sure that we have a record that that's not how it actually happened." Counsel for Oxnard and Pedroza stressed that "there was no request for any admonition." Furthermore, "there's no evidence at all . . . to even infer that this had anything to do with the jury's verdict and that it had anything to do with the deprivation of Mary Casamento getting a fair trial."

Without discussing the matter or making any findings, the trial court took the matter under submission. In a subsequent minute order, the court denied without comment the motion for a new trial.[1]

Discussion

Appellants argue that the trial court abused its discretion in denying their motion for a new trial. They claim that, in displaying the insurance payment to the jury, counsel for Oxnard and Pedroza engaged in deliberate and "egregious misconduct" that "clearly influenced the jury, and created a situation where the cross-complainants were seriously prejudiced and received an adverse verdict as a result."

"[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal. [Citations.]" (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) "Attorney

[1] The minute order states, "Matter is taken under submission. After further consideration of the submitted matter, the court rules as follows: The motion for new trial is denied."

misconduct is an irregularity in the proceedings and a ground for a new trial. [Citation.] . . . However, to preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition . . . . [¶] But it is not enough for a party to show attorney misconduct. In order to justify a new trial, the party must demonstrate that the misconduct was prejudicial. [Citation.]" (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148-149.)

"In our review of [an] order *denying* a new trial, . . . we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the [misconduct] was prejudicial. [Citations.]" (*City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 872.) Prejudicial misconduct has occurred if it is "reasonably probable that the jury would have arrived at a different verdict in the absence of the [misconduct]." (*Ibid.*)

Appellants' argument contains a fatal flaw: the record is inadequate to review their claim of error. With the exception of the reporter's transcript of the hearing on the motion for a new trial, there is no reporter's transcript or agreed or settled statement in lieu of a reporter's transcript. (See Cal. Rules of Court, rules 8.130(h), 8.134, 8.137.) Appellants have "a duty to provide an adequate record on appeal to support [their] claim of error. [Citation.] In the absence of an adequate record, the judgment is presumed correct. [Citation.] 'All intendments and presumptions are made to support the judgment on matters as to which the record is silent.' [Citation.] Error must be affirmatively shown. [Citation.]" (*Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1507.)

Even if counsel for Oxnard and Pedroza had committed misconduct, the record is silent as to whether appellants requested a curative admonition. Oxnard and Pedroza have insisted that no such request was made. Because of the silent record, we must presume that appellants did not request an admonition. "Where the record is silent we must presume the court correctly ruled based on what occurred in the unreported proceedings. [Citation.]" (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 429.)

"Attorney misconduct is incurable only in extreme cases. [Citations.]" (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1412.) "The failure to timely object and request an admonition waives a claim of error unless the misconduct was so prejudicial that it could not be cured by an admonition [citations], an objection or request for admonition would have been futile [citation] or the court promptly overruled an objection and the objecting party had no opportunity to request an admonition [citation]." (*Ibid*.) Appellants have not shown that they fall within any of the exceptions to this waiver rule. Accordingly, their "failure to timely object and request an admonition to the jury precludes our consideration of the point on appeal." (*Ibid*.)

In any event, without a reporter's transcript or agreed or settled statement setting forth the relevant evidence presented at the trial, appellants cannot show that they were prejudiced by the alleged misconduct. We are unable to "fulfill our obligation of reviewing the entire record, *including the evidence*, so as to make an independent determination as to whether the [misconduct] was prejudicial. [Citations.]" (*City of Los Angeles v. Decker*, *supra*, 18 Cal.3d at p. 872, italics added.) "'Failure to provide an adequate record on an issue requires that

the issue be resolved against [appellant].' [Citation.]" (*Foust v. San Jose Construction Co.* (2011) 198 Cal.App.4th 181, 187.)

Disposition

The judgments are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Kevin G. DeNoce, Judge

Superior Court County of Ventura

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