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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TAIMUR RAZA,

Plaintiff and Appellant,

v.

DANIEL D. SPAIN et al.,

Defendants and Respondents.

B278096

(Los Angeles County  
Super. Ct. No. BC502194)

APPEAL from an order of the Superior Court of  
Los Angeles County, Barbara M. Scheper, Judge. Reversed and  
remanded with directions; dismissal vacated.

Graham Law Corporation and Alice M. Graham for  
Plaintiff and Appellant.

Doherty & Catlow, James T. Catlow; Susan Rousier;  
Paul F. Sullivan & Associates and Susan Rousier for Defendants  
and Respondents.

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Plaintiff and appellant Taimur Raza (plaintiff)<sup>1</sup> appeals following his voluntary dismissal with prejudice of the instant action (*Raza I*) against his former neighbors, defendants and respondents Daniel Spain and Michael Randall (defendants).

Plaintiff alleged that defendants' backyard landscaping caused water to intrude onto plaintiff's property, damaging his garage and a boundary wall. The trial court struck plaintiff's claim for punitive damages, finding the allegations "vague and conclusory." Although plaintiff requested leave to amend, the trial court did not grant that request. Instead, the trial court stated that plaintiff could move for leave to amend "at such time as discovery discloses facts which would support a claim for punitive damages."

Approximately six months later, plaintiff moved for leave to amend his complaint, attaching a proposed amended complaint in which he alleged the water intrusion was part of a pattern of harassing and threatening conduct by defendants that included discriminatory language and insults directed at plaintiff and defendants' poisoning plaintiff's two dogs. Plaintiff added causes of action for intentional and negligent infliction of emotional distress and again asserted a claim for punitive damages.

The trial court denied leave to amend, finding that plaintiff had failed to explain why he had not asserted the new allegations in his original complaint. Plaintiff then filed a second action (*Raza v. Spain et al.*, case No. SC122344 (*Raza II*)), which largely

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<sup>1</sup> Plaintiff died while this appeal was pending. His mother, Hali Jilani, substituted in as plaintiff's successor in interest. To prevent confusion, however, we refer to Taimur Raza as the plaintiff given that he brought the claims in *Raza I* and *Raza II* and is the subject of those claims.

asserted the claims from his proposed amended complaint in *Raza I*. Plaintiff moved three times to consolidate *Raza I* and *Raza II*, but the trial court denied the motions.

After the trial court ruled on several motions in limine that, among other things, barred plaintiff from introducing in *Raza I* evidence relevant to the claims in *Raza II*, plaintiff dismissed his complaint in *Raza I* with prejudice in order to facilitate appeal. *Raza II* proceeded to trial, resulting in a judgment in favor of defendants.

We hold that the trial court abused its discretion in not granting plaintiff leave to amend his complaint to assert the new allegations and causes of action. We therefore vacate plaintiff's voluntary dismissal and direct the trial court to grant plaintiff's motion for leave to amend his complaint. Because our holding places the parties "in the same procedural posture as if the . . . [challenged] order had never been entered, and all issues involved in the case must be readjudicated anew" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 11:65, p. 11–22), we do not reach plaintiff's challenges to the trial court's rulings on the motions to consolidate and motions in limine.

In a separate opinion, we reverse the judgment in favor of defendants in *Raza II*. (See *Raza v. Spain et al.* (Sept. 27, 2019, B290679 [nonpub. opn.].)

## PROCEDURAL BACKGROUND

### A. Complaint and demurrer

On March 5, 2013, plaintiff filed the instant action against defendants, alleging causes of action for alteration of natural flow of surface water, trespass, nuisance, and negligence. Plaintiff

alleged that defendants, who owned the property adjoining his, had “landscaped, graded and irrigated their backyard so as to alter and disturb the natural flow of surface water,” resulting in water flowing onto plaintiff’s property and damaging his garage and a wall along his property line. Plaintiff alleged that he had notified defendants of the water intrusion and resulting damage, but they had refused to remedy the problem. Plaintiff sought compensation for damage to the property, diminution of value, and deprivation of use and possession of the property, as well as “mental anguish.” He also sought punitive damages, alleging that defendants had committed the alleged acts “oppressively, fraudulently and maliciously . . . for the purpose of injuring plaintiff and with willful and conscious disregard of plaintiff’s rights.”

Defendants filed a demurrer challenging the claim for punitive damages. Plaintiff opposed the demurrer and requested leave to amend in the event the trial court sustained it.

On August 27, 2013, the trial court deemed the demurrer a motion to strike and granted it so renamed, stating “[t]he allegations supporting the claim for punitive damages are vague and conclusory.” The trial court stated that its “ruling is without prejudice to plaintiff bringing a motion for leave to amend at such time as discovery discloses facts which would support a claim for punitive damages.”

That same day, following a case management conference, the court set trial for May 5, 2014.<sup>2</sup>

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<sup>2</sup> After several subsequent continuances, trial ultimately was set for September 12, 2016.

## **B. Motion for leave to file amended complaint**

On January 22, 2014, plaintiff filed a motion for leave to file a first amended complaint.<sup>3</sup> The proposed first amended complaint added allegations in support of punitive damages and two new causes of action: intentional and negligent infliction of emotional distress. It also included causes of action that were in the original complaint: alteration of natural flow of surface water, trespass, nuisance, and negligence. Like in the original complaint, plaintiff alleged that water flowing from defendants' backyard had damaged plaintiff's garage and boundary wall, but alleged that "[d]efendants' failure to address the water intrusion problem is part of a pattern of conduct towards plaintiff" that plaintiff characterized as "hostile, discriminatory and threatening."

Plaintiff alleged other acts by defendants purportedly within this "pattern of conduct," including "a. Hurling insults at plaintiff based on race, religion and national origin including but not limited to asserting plaintiff was a foreigner from 'the sandbox' and had no right to wear an American military uniform . . . ; [¶] b. Making groundless complaints to third parties about plaintiff; [¶] c. Calling plaintiff insulting and/or discriminatory names including but not limited to 'greaseball motherfucker'; [¶] d. Poisoning plaintiff's two pet dogs, one of which was a young puppy, resulting in harm to one dog and the death of the puppy; [¶] e. Taunting plaintiff the day after the

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<sup>3</sup> Earlier, on January 14, 2014, plaintiff filed an ex parte application seeking to shorten time for the trial court to hear his motion, which the trial court denied for lack of good cause.

poisoning of the dogs by stating that defendant Spain ‘hopes’ plaintiff ‘realizes who he is messing with.’ ”

Plaintiff alleged that, in addition to the damage to his property and loss of use and possession of the property, he “was driven to sell his home at a discount.” He further averred “mental anguish, humiliation, fear and anxiety.” He again asserted his claim for punitive damages, alleging that defendants had “acted oppressively, fraudulently and maliciously for the purpose of injuring plaintiff or with willful and conscious disregard of plaintiff’s rights.”

The trial court heard the motion for leave to amend on February 28, 2014, and stated that its tentative ruling was to deny the motion. The trial court noted that plaintiff had not explained “when the facts that give rise to the proposed new claims were discovered” as required by the Rules of Court, and with the exception of the allegations that defendants poisoned plaintiff’s dogs, it appeared to the trial court that plaintiff would have been aware of the new facts at the outset of the case. The trial court saw no reason plaintiff could not have asserted the new claims sooner, “and given the proximity of the trial date I do think there is a prejudice to the defendant[s].”

Plaintiff’s counsel argued that she interpreted the trial court’s order striking the punitive damages claims from the original complaint as requiring plaintiff to provide supporting evidence for those claims before seeking leave to amend. She represented it was not until December 2013 when third party witnesses had come forward with that supporting evidence.

The trial court stated it would adopt its tentative as its final ruling, again citing the requirement of the Rules of Court that a plaintiff seeking leave to amend explain when the plaintiff

discovered the facts supporting the proposed amended claims. The trial court continued: “The case that’s now before me, and that was before me when I sustained the demurrer, had nothing to do with these facts. Had any of these facts been alleged in the original complaint, I doubt I would have stricken the punitive damage claim. But the original complaint was just about this water damage and that they refused to change the landscaping to stop it, and I didn’t find that that was sufficient. [¶] Now, these facts, which may well support these claims, as far as I can tell, for the most part, were all within the plaintiff’s knowledge from the beginning. I understand that you don’t want to bring claims that you can’t prove, but it sounds like waiting for corroboration until . . . this close to trial is not a proper way to proceed.”

### **C. Plaintiff files second action**

On April 3, 2014, plaintiff filed a second action against defendants (*Raza II*), alleging causes of action for nuisance, trespass, and intentional infliction of emotional distress. Plaintiff alleged defendants had “intentionally engaged in a pattern of conduct towards plaintiff that is hostile, discriminatory and threatening.” In addition to repeating the allegations against defendants from the proposed first amended complaint in *Raza I* concerning discriminatory insults, groundless complaints, and poisoning plaintiff’s dogs, the new complaint alleged as examples of defendants’ “pattern of conduct” the following: causing water to flow into plaintiff’s garage, aiming their sprinklers at his property, complaining to city departments about plaintiff, “staring at plaintiff,” and “complaining to plaintiff about trivial matters.”

Plaintiff alleged that “[a]s a proximate result of defendants’ acts and ongoing bad treatment of plaintiff, plaintiff ultimately decided to sell his home at a substantial discount and flee the neighborhood.” Plaintiff also claimed damages for deprivation of use, possession, and enjoyment of his property as well as “mental anguish and distress, humiliation, fear and anxiety.” Plaintiff included a prayer for punitive damages.<sup>4</sup>

The trial court in *Raza I*, upon learning that plaintiff had filed a second action, “set[ ] an Order to Show Cause . . . for sanctions pursuant to [Code of Civil Procedure s]ection 128.7 as to plaintiff’s filing of a new complaint solely for improper purposes.”

Plaintiff’s counsel, now herself represented by counsel, filed a brief in response to the order to show cause, explaining that plaintiff had filed the new action to preserve his rights and assert the claims he was unable to assert in *Raza I* because of the trial court’s denial of his motion for leave to amend. The trial court, having reviewed the papers, discharged the issue of sanctions “in light of the explanation provided by” plaintiff’s counsel. The trial court also ruled that *Raza I* and *Raza II* were related and assigned both to itself.

#### **D. Motions to consolidate**

On June 20, 2014, plaintiff moved to consolidate *Raza I* and *Raza II*. The trial court denied the motion, stating, “[*Raza I*],

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<sup>4</sup> Plaintiff filed a first amended complaint in *Raza II* on November 4, 2014, adding a claim for negligent infliction of emotional distress and making other minor changes. The distinctions between the original and first amended complaints in *Raza II* are not material to this appeal.



filed over a year ago, involves a discrete issue of property damage and has been fully prepared for trial. [*Raza II*] alleges wide ranging claims of bullying by defendants over a lengthy period of time and is at the initial stages of discovery. Consolidating the two cases will not promote judicial economy and would be prejudicial to defendants who oppose the motion.”

On October 21, 2014, following a continuance of the trial date in *Raza I*, plaintiff again moved to consolidate the two cases. The trial court denied the motion, repeating the reasons from its denial of plaintiff’s first motion to consolidate.

On May 24, 2016, plaintiff filed another motion to consolidate the two cases, arguing that delays in both cases due to plaintiff’s poor health justified the renewed motion. Defendants opposed the motion, citing the trial court’s previous determinations that consolidation would not promote judicial economy and would prejudice defendants, and argued that nothing had changed substantively in either case to justify reconsidering those earlier determinations. The trial court denied the motion “for the reasons stated in the opposition.”

#### **E. Motions in limine**

On September 19, 2016, the trial court ruled on a number of motions in limine filed by the parties.

The trial court granted defendants’ motion in limine no. 6 to exclude evidence of damage to plaintiff’s vehicles from defendants’ sprinklers, finding that evidence irrelevant.

The trial court granted defendants’ motion in limine no. 7 to exclude evidence that defendants “uttered profanities, engaged in name-calling or otherwise directed negative comments to or about plaintiff toward plaintiff or the parties’ neighbors,” except

insofar as such evidence related to “discussions or interactions regarding the garage.”

The trial court denied plaintiff’s motion in limine no. 3, which, based on defendants’ purported spoliation of evidence by removing their landscaping, sought an order establishing for purposes of the litigation that defendants caused the damage to plaintiff’s garage and wall by altering the grade of their backyard. The trial court found plaintiff did not timely request that defendants preserve the condition of their backyard, and expressed concern that evidence of alteration was inadmissible as subsequent repair or remediation. The trial court also granted defendants’ motion in limine no. 8 precluding evidence or argument “referring to any subsequent repairs, modifications, or changes made by [d]efendants to their property that allegedly caused water intrusion or other damage onto plaintiff’s property.”

On September 21, 2016, the trial court granted defendants’ motion in limine no. 9 to exclude three of plaintiff’s exhibits, two of which were written estimates for repairs to plaintiff’s garage, and one of which was a structural engineer’s proposal for “[s]tructural repair design” of the garage and an accompanying report evaluating the condition of the garage and fence wall. The trial court found that plaintiff had not called appropriate witnesses to authenticate the exhibits as business records, and therefore they were inadmissible hearsay.

**F. Plaintiff dismisses *Raza I* with prejudice to facilitate appeal**

On September 21, 2016, following the trial court’s rulings on the motions in limine, plaintiff requested dismissal of the instant case with prejudice to facilitate appeal, which the trial court granted. Plaintiff timely appealed.

The parties proceeded to trial in *Raza II*, and the jury returned a verdict in favor of defendants. Plaintiff timely appealed from that judgment. (See *Raza v. Spain et al.*, *supra*, B290679.)

## DISCUSSION

### **I. Plaintiff May Appeal From His Voluntary Dismissal With Prejudice Entered After The Trial Court's Adverse Rulings**

Defendants challenge plaintiff's right to appeal following a voluntary dismissal with prejudice. "Ordinarily, a plaintiff's voluntary dismissal is deemed to be nonappealable on the theory that dismissal of the action is a ministerial action of the clerk, not a judicial act." (*Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, 1012.) "However, appellate courts treat a voluntary dismissal with prejudice as an appealable order if it was entered after an adverse ruling by the trial court in order to expedite an appeal of the ruling." (*Ibid.*; see also *Austin v. Valverde* (2012) 211 Cal.App.4th 546, 550–551 [" '[M]any courts have allowed appeals by plaintiffs who dismissed their complaints after an adverse ruling by the trial court, on the theory the dismissals were not really voluntary, but only done to expedite an appeal' "].)

Here, plaintiff dismissed his case following a long series of adverse rulings, beginning with the trial court denying leave to amend his complaint, denying his multiple requests to consolidate this case with the related action *Raza II*, and granting motions in limine barring him from raising the issues he sought to raise either by amending his complaint or consolidating the two actions, including defendants' purported continuing

course of harassing conduct towards him. Plaintiff's counsel made clear she was requesting dismissal in order to facilitate plaintiff's appellate rights. Thus, the dismissal was " 'not really voluntary' " (*Austin v. Valverde*, *supra*, 211 Cal.App.4th at p. 550), and plaintiff is entitled to appeal.

Defendants quote *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 817, for the proposition that a party may not appeal a "consent judgment" unless " 'consent was merely given to facilitate an appeal following an adverse determination of a critical issue.' " Defendants argue they did not consent to judgment of dismissal in this case, nor did any of the trial court's rulings constitute an adverse determination of a critical issue.

It is immaterial that defendants did not consent to dismissal in this case. There is no indication in *Austin* that the defendant agreed to the dismissal, nor is such a requirement stated in that opinion. (*Austin v. Valverde*, *supra*, 211 Cal.App.4th at pp. 549–550.) We observe that a litigant's right to appeal should not depend on the agreement of the opposing party.

We disagree that the trial court's rulings were not adverse determinations on critical issues. The trial court's rulings prevented plaintiff from asserting his claim for punitive damages and split his factual allegations into two cases, impeding plaintiff's ability to present the story and legal theories on which he based his causes of action, to wit, a continuing course of harassing conduct against plaintiff's personal and real property and against him personally. Plaintiff therefore was unable to seek the full relief he sought in *Raza I*. Plaintiff has the right to appeal from his voluntary dismissal with prejudice.

## **II. The Trial Court Abused Its Discretion In Not Granting Leave To Amend The Complaint**

We agree with plaintiff that the trial court abused its discretion when it denied him leave to amend his complaint. Following the sustaining of a demurrer, “[d]enial of leave to amend constitutes an abuse of discretion unless the complaint shows on its face it is incapable of amendment. [Citation.] Liberality in permitting amendment is the rule, if a fair opportunity to correct any defect has not been given.” (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227 (*Angie M.*); see *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 747 [“If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment”].) The policy of liberal amendment applies equally when a trial court grants a motion to strike. (*Price v. Dames & Moore* (2001) 92 Cal.App.4th 355, 360.)

Here, plaintiff requested leave to amend in his opposition to defendants’ demurrer. The trial court, construing the demurrer as a motion to strike, struck the allegations and claims for punitive damages as “vague and conclusory.” Instead of immediately granting plaintiff an opportunity to address this defect by amending his complaint to provide more specific allegations, the trial court stated that its “ruling is without prejudice to plaintiff bringing a motion for leave to amend at such time as discovery discloses facts which would support a claim for punitive damages.”

The trial court abused its discretion by not granting immediate leave to amend. Nothing about the complaint

indicated it was “incapable of amendment.” (*Angie M.*, *supra*, 37 Cal.App.4th at p. 1227.) Indeed, the trial court observed when it denied plaintiff’s later request for leave to amend, “Had any of these facts [in the proposed first amended complaint] been alleged in the original complaint, I doubt I would have stricken the punitive damage claim.” The trial court further erred by stating that it would allow amendment only if plaintiff provided supporting facts obtained through discovery. (See *Sanai v. Saltz* (2009) 170 Cal.App.4th 746, 770 [error for trial court to “demand, as the condition for leave to amend, that a party present admissible evidence sufficient to withstand summary judgment”].)

Having stated its ruling was without prejudice to plaintiff bringing a later motion to amend, the trial court compounded its errors by ruling against plaintiff when he brought that later motion. The trial court found that plaintiff was aware of most of the new allegations at the time he filed his original complaint and questioned why plaintiff had not asserted them sooner. The trial court had denied plaintiff that opportunity, however, by not allowing immediate amendment of the complaint following the grant of the motion to strike, and stating that it would only permit amendment based on facts obtained through discovery. It was an abuse of discretion to deny leave to amend based on delay caused by the trial court’s own orders. We reject defendants’ contention that plaintiff did not adequately explain why he did not assert the new allegations and claims sooner.

The trial court’s errors prejudiced plaintiff, who, at minimum, was prevented from asserting a claim for punitive damages, despite raising that claim in his complaint and twice requesting leave to amend to provide supporting allegations, first

in opposition to defendants' demurrer, then in a separate motion seeking leave to amend.

We reject defendants' claim that they would have been prejudiced had the trial court permitted plaintiff to amend his complaint. Defendants argue that providing them time to challenge the amended pleading would have required continuing the trial date, prejudicing defendants "by fading memories and the potential loss of evidence." Defendants would also have to expend further time and resources for additional discovery.

Assuming *arguendo* those purported consequences constitute prejudice sufficient to deny leave to amend, those consequences could have been avoided had the trial court granted leave to amend at the time it granted the motion to strike. Thus, any prejudice was due to the trial court's erroneous orders, not to delay by plaintiff.

Because the trial court erred in not granting leave to amend, we vacate plaintiff's dismissal with prejudice, reverse the trial court's order denying plaintiff's motion for leave to amend, and direct the trial court to enter a new order granting that motion. We express no opinion as to the effect of any subsequent events, including plaintiff's death, on the allegations or causes of action in plaintiff's proposed first amended complaint, which the trial court and the parties may address on remand as necessary.

### **III. We Do Not Reach Plaintiff's Other Claims Of Error**

In addition to challenging the trial court's denial of leave to amend, plaintiff challenges the trial court's denial of his consolidation motions and the rulings on the motions in limine described above.

In light of our reversal of the trial court's denial of leave to amend, we need not reach these challenges. "As a general rule,

an unqualified reversal *vacates* the appealed judgment or order. As a result, the case is placed in the same procedural posture as if the judgment or order had never been entered, and all issues involved in the case must be readjudicated anew.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 11:65, p. 11–22.) This principle is particularly apt here, where many of the trial court’s challenged rulings arose only because of the trial court’s earlier order denying leave to amend. Because on remand the trial court can take a fresh look at a motion to consolidate *Raza I* and *Raza II*, if any, and the motions in limine, if the parties file them, we decline to address whether those rulings were correct.

### **DISPOSITION**

The dismissal with prejudice is vacated. The order denying plaintiff’s motion for leave to amend the complaint is reversed, and the trial court is directed to enter a new order granting that motion. The matter is remanded for further proceedings not inconsistent with this opinion. Plaintiff is awarded his costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.