Filed 3/17/15 Nefas v. DeMulle CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PHILLIP NEFAS et al., Plaintiffs and Appellants, v. DAVID DEMULLE, Defendant and Respondent.	B252977 (Los Angeles County Super. Ct. No. BC447070)

APPEAL from a judgment of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed.

Anderson, Armenta & Associates and Michael D. Anderson for Plaintiffs and Appellants.

Law Office of Chris Ford and Chris Ford for Defendant and Respondent.

Plaintiffs and appellants Phillip and Paul Nefas appeal a judgment after jury trial which awards $6,650 to Phillip, and $2,000 to Paul, payable by defendant and respondent David DeMulle. The Nefases' sole contention on appeal is that they are entitled to a new trial on the amount of punitive damages. We affirm the judgment.

FACTS

The Nefases elected to use an appellant's appendix on appeal. Their appendix shows the following, and little more. The Nefases filed a complaint against DeMulle by Phillip for assault and battery, trespass, nuisance, and intentional infliction of emotional distress. It also alleged a cause of action for libel by both Phillip and Paul. DeMulle filed an answer generally denying the allegations in the complaint. DeMulle filed a cross-complaint for battery against Phillip. The case was tried to a jury.

The Nefases have submitted no trial record on appeal. There is no reporter's transcript of the trial, except for a hearing which took place upon receipt of the verdict.[1] As a result, the facts established by the evidence presented at trial are unknown to our court. The pleadings noted above show that the lawsuit involved unpleasantries between neighbors who live next door to each other on "Tranquil Place" in Tujunga.

The jury returned a series of special verdicts with findings that DeMulle did not commit an assault or battery on Phillip, or any act that was outrageous, but did maintain a nuisance which caused Phillip to suffer $650 in damages. By another special verdict, the jury found that Phillip had "touch[ed] . . . DeMulle with the intent to harm or offend him," but that DeMulle was not actually harmed by Phillip's conduct."

As to the cause of action for libel, the jury returned a special verdict with findings that DeMulle caused certain false statements to be published to persons who reasonably understood them to be fact. Paraphrasing the special verdict, the jury essentially found that DeMulle falsely told others that the Nefases had a practice of trying to get their way in the neighborhood by misusing their positions with the Department of Water and Power. For example: "Paul's mantra is 'I'm from the City and you are wrong.'"

---

[1] The reporter's transcript is before us by way of the Nefases' motion to augment the record on appeal, which we granted on oral argument in their cases.

Also, DeMulle falsely told others that Paul had once falsely claimed to a group of people in the neighborhood that DeMulle caused a vehicle versus pedestrian incident.

The jury's special verdict on the Nefases' cause of action for libel included express findings that Phillip and Paul suffered no actual damages from DeMulle's false statements; the jury fixed Phillip's "assumed" damages at $6,000 and Paul's at $2,000. Thereafter, the trial court signed and entered a judgment on the jury's special verdicts.

The Nefases filed a timely joint notice of appeal.

DISCUSSION

I. Punitive Damages

The opening brief on appeal filed by the Nefases is so vaguely argued, and so bereft of any references to the trial evidence (which, as noted above, is not included as part of the record on appeal), that it fails to overcome the presumption of correctness. In short, the opening brief on appeal is of little use to our court in examining whether the judgment is erroneous or whether the error was prejudicial, thus justifying reversal.

It is appellant's obligation to demonstrate error. (See, e.g., *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1102; *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) Appellant can satisfy this burden only by giving us a record which contains the facts necessary for the court's examination of the issues, and an opening brief with citations to the record and a discussion of relevant court decisions and statutes. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632 [appellate review is confined to those facts which were established at trial and contained in the record].) Based on the record and briefing, we must affirm. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [judgment presumed correct unless error is affirmatively shown].)

Despite the omissions noted above, we are able to say that the Nefases' opening brief on appeal contends an error occurred with respect to their claim for punitive damages. Their argument rests on the repeatedly, asserted predicate that the jury returned

a finding that DeMulle had acted with malice when making his false statements about the Nefases. The record before us on appeal shows something quite different.

Upon receipt of the special verdict forms, the court polled the jurors, asking that they raise their hand to indicate their vote on each answer the judge recited from the completed form. When it came to question No. 7 on the libel special verdict form, which asked whether DeMulle had acted with malice, the court read aloud the jury's answer, which ostensibly was "Yes." The court asked the jurors to raise their hand if that was their vote. The court then stated: "I don't see ---- I don't see enough for a verdict." The court asked the foreman to explain. He said, "I think I didn't put my response on here. What is the question?" The court said, "The instruction was, if you found actual damages in answering question No. 6, then answer question No. 7." The foreman indicated that the jury did not answer question 7 because they did not find actual damages, only assumed damages. The court then asked the jury foreman, "Why did you put 'yes' in No. 7 then?" The jury foreman answered, "I didn't." At that point, the court indicated it would take up the matter later with the lawyers. During some follow-up questions, the court ascertained from the jury foreman that the jury did not answer question No. 7. The court asked, "If you wrote 'yes," that was an error?" At that point, another juror spoke out, "I believe it was an error." The clerk then continued reading the other special verdicts. A short time later, at the conclusion of the polling, the trial court asked the jurors to wait in the jury room, and then addressed the issue of question No. 7 with the lawyers. The following exchange then transpired:

"THE COURT: The only issue we seem to have at this point is whether the finding on libel was --- was that the libel?

"[THE NEFASES' COUNSEL]: The libel question.

"THE COURT: Do you find that David DeMulle acted with malice, oppression, or fraud in publishing the statement. [¶] Their answer was yes, but that's incorrect because it does not follow the instruction. They found no actual damages. Can we get punitive damages for assumed harm?

"[DEMULLE'S COUNSEL]: I believe the jurors indicated that was not their verdict. That was written by mistake.

"THE COURT: Right. Right. It is written there. So my question is, is anybody insisting on going on with it?

"[THE NEFASES' COUNSEL]: No.

"THE COURT: So we won't. We'll thank and excuse the jurors."

The trial court's judgment includes an express provision stating that the court had determined, after polling and questioning the jurors that any finding of malice indicated on the jury's special verdict on the Nefases' libel claim was a scrivener's error by the jury. In short, based on the record before us on appeal, the Nefases are wrong in telling our court that there was a malice finding in this case. Thus, the Nefases are wrong that there is some error in connection with the failure to award punitive damages. Without a finding of malice, no punitive damages could be awarded.

The Nefases argue there was error in the special verdict form on their cause of action for libel which contributed to jury's failure to award punitive damages. We are not persuaded.

First, to the extent the Nefases's opening brief asserts that the trial court "modified the special verdict form" which had been approved by the parties, no record reference is offered to support this assertion. Second, to the extent the Nefases argue that it was error for the (allegedly modified) special verdict form not to have included a "space for the jury to state an amount of punitive damages" to be awarded, we repeat -- the jury did not find malice. This means that any asserted problem with the failure to include a question on the jury form as to the *amount* of punitive damages is misplaced at best.

Lastly, the Nefases argue that the special verdict form erroneously told the jurors to consider the issue of malice as posed in question No. 7 only if they had awarded "actual damages" to the Nefases. As noted above, the jury found that the Nefases did not suffer any "actual damages" from DeMulle's libelous statements, but did award them a combined $8,000 in "assumed damages." Here, we find any claim of error to have been

forfeited. First, the Nefases' accusation that the trial court modified an approved special verdict form is not supported by any record reference. Having agreed to the special verdict form submitted to the jury, the Nefases may not complain on appeal. Further, the Nefases' trial counsel expressly stated to the trial court, before the jury was released, that they did not desire to go on with the issue of the malice in their case. As a result, the Nefases may not complain on appeal as to any error with respect to their claim for punitive damages. In summary, the jury made no finding of malice against DeMulle, and the Nefases agreed that they did not desire to pursue the issue further, and agreed the jury could be dismissed. This ended their case.

II. Sanctions on Appeal

At oral argument, our court addressed the issue of sanctions on appeal with the lawyers. Although we find — based on the nature of the record and the briefs submitted on appeal — that this is close case for sanctions, we find that the better course is to end any further court involvement with the parties.

DISPOSITION

The judgment is affirmed. Respondent is awarded costs on appeal.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.