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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

KELSEY O'REILLY,

Plaintiff and Respondent,

v.

GLEN NELSON, TRUSTEE OF THE JET INVESTMENT TRUST,

Defendant and Appellant;

ERIC BJORKLUND,

Intervener and Appellant.

2d Civil No. B266392
(Super. Ct. No. 1393857)
(Santa Barbara County)

Defendant Glen Nelson, Trustee of the Jet Investment Trust dated 11/1/1984 ("the Trust"),[1] and intervener

[1] Nelson's title is taken from the complaint and the judgment. In his briefs, Nelson refers to himself as the "Trustee of the Toomey Family Children's Trust - JET Investment Company."

Eric Bjorklund appeal from a judgment following a jury trial. The judgment was entered in favor of Bjorklund and respondent Kelsey O'Reilly. Nelson also appeals from the trial court's orders granting a partial new trial on punitive damages and denying his motion for judgment on the punitive damages issue notwithstanding the verdict.

Before the jury trial began, the court tried the issue of whether property owned by the Trust was subject to a road easement in favor of property owned by Bjorklund and O'Reilly. Nelson contends that the trial court erroneously found such an easement.

As to the jury trial, Nelson argues that (1) the trial court erroneously instructed the jury, (2) the evidence is insufficient to support an award of punitive damages, and (3) the amount of punitive damages is excessive. Bjorklund claims that the trial court erroneously denied his request to instruct the jury on past lost earnings. We affirm.

Facts

In 2007 O'Reilly and Bjorklund took title as joint tenants to parcel 79, which consists of approximately 100 acres. The Trust owns parcels 76, 78, and 80-83 ("the Trust property"), which consist of approximately 860 acres. It acquired the parcels from the Toomey family. Their location is shown on the map attached to this opinion as Appendix A.* The Trust property is to the north and west of O'Reilly's and Bjorklund's parcel 79. The north and west sides of parcel 79 adjoin the Trust's parcel 80.

The deed conveying parcel 79 to O'Reilly and Bjorklund grants them "[a] non-exclusive easement for ingress

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* Appendix A does not have a page number. It appears immediately after page 25.

and egress over existing road to [parcel 79]." John Hebda, O'Reilly's expert on easements and chain of title, testified that the easement road runs north of parcel 79 through the Trust property to Tepusquet Canyon Road. Appendix A shows that the road runs through Trust parcels 80, 83, 82, 78, and 76. According to Hebda, the easement was originally created by "an express grant" in a deed recorded on August 23, 1974. The 1974 deed granted "[a] non-exclusive easement for ingress and egress over existing roads to" parcels 32 and 79. Parcel 32 is to the south of parcel 79. (See Appendix A.)

Hebda testified that the Toomey family had originally acquired the Trust property by a deed recorded in September 1975. The deed states that the grant of the property is "[s]ubject to the encumbrances of record." Hebda opined that this means that the 1975 grant is subject to the 1974 deeded road easement that was "one of the encumbrances of record."

Hebda opined that, if there were no express grant of a road easement over the Trust property, an implied easement would have been created because of the need of a road to access parcel 79.[2] Olaf Lange, a previous owner of parcel 79, testified that he had always used the northern route through the Trust property. It "was the only way to get" to parcel 79.

After purchasing parcel 79 in 2007, O'Reilly and Bjorklund grew "medical marijuana" on the property. They used the easement road without any problem until August 2010, when Nelson blocked the road. The roadblock was located at the south

[2] "The test [for an implied easement] is whether the easement is reasonably necessary for the beneficial enjoyment of the property conveyed. [Citation.]" (*Larsson v. Grabach* (2004) 121 Cal.App.4th 1147, 1152.)

end of the Trust's parcel 80, to the north of parcel 79. (See Appendix A.) O'Reilly and Bjorklund were "unable to access [their] property." They were "landlocked." At the time of the roadblock, they were harvesting the medical marijuana crop.

Nelson claimed that parcel 79 did not have a road easement over the Trust property. He relied on an August 2010 report prepared by Justin Height, a licensed professional land surveyor. Height concluded "that there was no access to Parcel 79 over [the Trust] property." After receiving Height's report, Nelson spoke to his attorney. Nelson testified that his attorney had said to "[g]o ahead and block [the road] since there was no . . . deeded access, and the road was being damaged."

Nelson refused to remove the roadblock unless O'Reilly and Bjorklund paid him. Each gave Nelson a check for $600 or $700. Nelson removed the roadblock.

In early 2011 O'Reilly orally agreed to sell parcel 79 for $365,000 to Misha Ford and Edith Chin. At Nelson's request, O'Reilly, Ford, and Chin met with Nelson at a restaurant. Nelson insisted that parcel 79 did not have a road easement through the Trust property. Thus, if Ford and Chin purchased parcel 79, Nelson said they had three options: (1) they could sue to establish a road easement over the property to the south of parcel 79; (2) they could pay Nelson between $1,500 and $2,000 per month for a license to use the road through the Trust property; or (3) they could lease parcel 80 from Nelson for $30,000 per year and he would allow them to use the road. Nelson said he was suing the co-owner of parcel 79, Bjorklund,

and that when he got a judgment "he would have his attorneys figure out a way to 'claw it [parcel 79] back.'"[3]

Ford and Nelson drove to the south end of parcel 79 to inspect the southern route from the property. Ford testified: "You could not take a regular passenger vehicle on that road." Ford and Chin decided not to purchase parcel 79.

On February 28, 2011, after the meeting at the restaurant, Nelson again blocked the easement road. He "wanted more money" to remove the roadblock.

O'Reilly's father was living on parcel 79, and the roadblock "locked him in." He "was unable to go in and out of the property at all" unless he went by foot. O'Reilly was unable to show the property to potential buyers. The blockade was not removed until April 17, 2015.

Procedural History

In September 2012 O'Reilly filed a complaint against Nelson. The complaint alleged four causes of action. Bjorklund, appearing in propria persona, filed a complaint in intervention against Nelson. His complaint also alleged four causes of action.

The issue of the road easement was tried by the court before a jury was selected. The court found that "the many opinions advanced by Mr. Hebda [O'Reilly's expert] . . . are persuasive." On the other hand, it did not "find much to rely

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[3] Nelson was referring to an action he had filed in February 2010 against Bjorklund for negligence and trespass to the Trust property. That action is not before us in this appeal. It is before us in the companion appeal, *Nelson v. Bjorklund*, case no. B266500. The opinion in the companion appeal is being filed concurrently with the opinion in this appeal.

upon in the opinions of Mr. Dodd," Nelson's expert. The court concluded that the Trust property is burdened by a "deeded [road] easement" in favor of parcel 79. The jury was informed "that the court ruled that there is a deeded easement as a matter of law."

The jury trial lasted 23 days, including deliberations by the jury for six days. In special verdicts, the jury found in favor of O'Reilly on a nuisance cause of action and awarded him damages of $83,000. It also found in favor of O'Reilly on a cause of action for negligent interference with a prospective economic relationship. It awarded him lost profits of $60,000.

In separate special verdicts, the jury found in favor of Bjorklund on a nuisance cause of action and awarded him damages of $78,000. It also found in his favor on a cause of action for trespass on the easement road and awarded him damages of $10,000.

The jury found that, in blocking the road to parcel 79, Nelson had acted "with malice, oppression, or fraud." It awarded punitive damages of $48,000 to O'Reilly and $48,000 to Bjorklund.

With one exception, the trial court entered judgment incorporating the jury's awards of compensatory and punitive damages. The exception concerned the jury's $10,000 award to Bjorklund on his cause of action for trespass. The court ordered that Bjorklund "shall not recover the amount of $10,000" because "this duplicates other damages."

As to punitive damages, Nelson moved for judgment notwithstanding the verdict on the ground that the evidence is insufficient to support an award of punitive damages. He also moved for a new trial on several grounds, including that the

punitive damages are excessive. The trial court denied the motion for judgment notwithstanding the verdict. It granted a new trial solely on the issue of punitive damages unless O'Reilly and Bjorklund consent to a remittitur reducing the award to $10,000 for each. O'Reilly consented to the remittitur and judgment was rendered accordingly. Bjorklund refused to consent. As to Bjorklund, the trial court set the matter for a jury trial limited to the issue of punitive damages.

NELSON'S APPEAL

Admission of Extrinsic Evidence to Interpret Quitclaim Deed

"With deeds as any other contracts, '[t]he primary object of all interpretation is to ascertain and carry out the intention of the parties. [Citations.] . . . ' [Citations.]" (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.) Nelson contends that the trial court erroneously admitted extrinsic evidence to ascertain the intent of the parties to a quitclaim deed. "'A quitclaim deed transfers whatever present right or interest the grantor has in the property. [Citation.]' [Citations.]" (*Id*. at p. 239.)

The quitclaim deed was recorded on June 6, 1974. It states that Jess W. Rice and Margarette L. Rice quitclaim to Barbara Ann Phillips the real property described in Exhibit A, "[s]ubject to the encumbrances of record."[4] The property

[4] Although the quitclaim deed lists Jess Rice and Margarette Rice as grantors, Margarette Rice was not an owner of record. By a deed recorded in November 1971, Jess Rice acquired title to the property as "Jess W. Rice, a married man." Margarette Rice acknowledged that "the consideration paid by her husband for the land herein described is her husband's separate property." All further references to "Rice" are to Jess Rice.

conveyed by the quitclaim deed includes the Trust property as well as parcels 79 and 32. By three deeds simultaneously recorded approximately two months later on August 23, 1974, parcels 79 and 32 were granted to new owners and Rice granted the new owners a road easement over the Trust property. By a deed subsequently recorded in September 1975, Phillips granted the Trust property to the Toomey family, "subject to the encumbrances of record."

Nelson claims that, after the recording in June 1974 of Rice's quitclaim deed of the Trust property, Rice did not have the power in August 1974 to grant a road easement burdening that property. In addition, he claims that the trial court erroneously admitted extrinsic evidence to interpret the quitclaim deed.

The extrinsic evidence is the testimony of Hebda, O'Reilly's easement and chain-of-title expert. Hebda testified as follows: After the recording of the quitclaim deed on June 6, 1974, three deeds were recorded at 8:00 a.m. on August 23, 1974. In one deed Phillips granted parcels 79 and 32 to Homer and Doris Renfro. In the second deed the Renfros granted the same two parcels to three couples - Thomas and Margaret Ellis, Ronald and Elda Soderquist, and Henry and Jacqueline Taber ("the three couples") - each couple to have a one-third interest in the property. In the third deed Rice granted to the three couples "[a] non-exclusive easement for ingress and egress over existing roads." This is the road easement at issue in this appeal.

Hebda continued: The three deeds were "recorded as part of one transaction." All three have the same Safeco Title Insurance file number and were handled by the same title officer,

Steve Haro. "Mid-State Bank is the escrow holder for all three." The "grant deed of an easement from Rice to [the three couples] . . . would be considered the express grant of an easement." "[T]he reason Rice is granting the easement is these parties [Rice, Phillips, the Renfros, and the three couples] all had the understanding that Rice is the one who should be granting the easement. That's why it is structured this way."

Hebda noted that Nelson is claiming that Rice's deed of the easement to the three couples is a "wild deed." A wild deed is a deed that is not in the chain of title. James Dodd, Nelson's expert, explained, "[A]t the time of the [recording] of that deed, the grantor [Rice] had no record of interest in that land [i.e., the Trust property, which was burdened by the easement]" because of the earlier recorded quitclaim deed [of the Trust property] from Rice to Phillips.

Hebda insisted that the grant deed of the easement is not a wild deed because of a document recorded before the quitclaim deed. The document, entitled "Declaration of Easements," was recorded in Santa Barbara County in January 1972 (the 1972 Declaration). Hebda opined that in the 1972 Declaration Rice had "reserve[d] the [exclusive] right to grant easements for the benefit of the owners of the lots described in the declaration, and for the benefit of the owners of adjacent land." Rice owned all of the described lots that were located in Santa Barbara County. With the exception of parcel 80, all of the Trust property was described in the 1972 Declaration.

Parcels 79 and 32 were not described in the 1972 Declaration. In 1972 parcels 79 and 80 did not exist as separate parcels. The "two properties together [had been] described" in deeds as a single block of land: "the south-half of section 12."

Rice owned this block of land, which was "adjoining and adjacent to the land described in the [1972] Declaration."

The 1972 Declaration provides, "Grantor herein [Rice] fully reserves the right to establish and reserve 'non-public' easements . . . and to grant said easements to others, over and across any portion of the land herein described [e.g., the Trust property except for Parcel 80] for the purposes of ingress and egress for the benefit of present or future owners and lien holders of said land herein described." "The use of said easements is limited to serving the real property herein described only and no other real property shall be served hereby excepting that Grantor herein reserves the exclusive right to grant said easement to owners of adjacent lands [e.g., parcels 79 and 80] whether said owners be private or governmental."

Hebda explained that Rice's reservation of a "personal right . . . to grant easements" is called an easement in gross. An easement in gross "does not attach to property." It "attaches to the person who is the easement holder." On the other hand, an easement appurtenant "attaches to the land" and "passes with the land."[5] Hebda concluded, "The intent of the

[5] "'An easement is appurtenant when it is attached to the land of the owner of the easement, and benefits him as the owner or possessor of that land. The land to which it is attached is called the dominant tenement, and the land which bears the burden, i.e., the land of another which is used or enjoyed, is called the servient tenement. . . . An easement in gross is not attached to any particular land as dominant tenement, but belongs to a person individually.' [Citation.] [¶] Because an easement in gross is personal, it may be conveyed independent of land. [Citation.] To the contrary, an easement appurtenant cannot be transferred to a third party or severed from the land. [Citation.]" (*City of Anaheim v. Metropolitan Water Dist. of*

[1972 Declaration] was to establish of record that Rice was reserving for himself an easement in gross over those properties," i.e., the properties described in the 1972 Declaration, which included the Trust property except for parcel 80.

As to Rice's 1974 quitclaim deed of the Trust property to Phillips, Hebda opined that "all real property rights passed with the quitclaim deed." "But what wasn't transferred would be an easement in gross." "[T]he only way for [the easement holder, Rice,] to transfer that easement in gross is to expressly transfer the right. And there is no express transfer in that quit claim [*sic*] deed of that personal right." The deed states that Rice is quitclaiming the property "[s]ubject to the encumbrances of record." "[A]n example of an encumbrance of record would be the 1972 Declaration."

Nelson forfeited his claim that the trial court erroneously admitted extrinsic evidence in the form of Hebda's testimony concerning the quitclaim deed. Nelson failed to object to this testimony. "In order to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court. [Citation.]" (*In re S.C.* (2006) 138 Cal.App.4th 396, 406; see also Evid. Code, § 353, subd. (a).)

If Nelson had preserved the extrinsic evidence issue for appellate review, we would have concluded that the trial court did not abuse its discretion. (See *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 ["Trial court

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Southern Cal. (1978) 82 Cal.App.3d 763, 767-768, italics omitted.) "An easement in gross is a personal right, or a right attached to the person; it is an interest in the real property of another; but it is not personal property." (*Balestra v. Button* (1942) 54 Cal.App.2d 192, 197.)

rulings on the admissibility of evidence . . . are generally reviewed for abuse of discretion"].) The "'test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.]' [Citation.]" (*City of Manhattan Beach v. Superior Court*, *supra*, 13 Cal.4th at p. 246.) Hebda's testimony was relevant to prove a meaning to which the language of the quitclaim deed is reasonably susceptible. The deed states that Rice quitclaims the property "[s]ubject to the encumbrances of record." Hebda's testimony was admissible to show that one of these encumbrances was the recorded 1972 Declaration, which reserved an easement in gross personal to Rice.

The Trial Court Did Not Err in Conducting a Court Trial on the Existence of the Road Easement

Nelson argues: "The evidence . . . adduced during the [court trial] presented unresolved conflicts as to the intent of the parties to various deeds . . . . However[,] the trial court ruled on the issue of the existence of the deeded easement without allowing the jury to assess the . . . conflicting extrinsic evidence." Nelson claims that he "did not waive having the jury sit as the trier of fact as to any conflicting extrinsic evidence admitted by the trial court and used to interpret the Quitclaim Deed."

We disagree. Nelson asked the court to determine the issue of the existence of the road easement: "Determination of this issue *by the Court* at the commencement of trial would promote judicial economy and efficiency in that it would preclude consumption of time on interference and damages issues that are

no longer relevant if *the Court determines* that no deeded easement exists." (Italics added.)

In any event, "because [Nelson] and his counsel failed to object to proceeding with the court trial and participated in that trial through its ultimate conclusion, [Nelson] is deemed to have waived or forfeited [any] error [in not conducting a jury trial], along with his statutory right to a jury trial . . . ." (*In re Conservatorship of Joseph W.* (2011) 199 Cal.App.4th 953, 967.) "[I]t is well established that '. . . a party cannot without objection try his case before a court without a jury, lose it and then complain that it was not tried by jury. [Citation.]' . . . 'Defendants cannot play "Heads I win, Tails you lose" with the trial court.' [Citation.]" (*Taylor v. Union Pacific Railroad Corp.* (1976) 16 Cal.3d 893, 900.)

Substantial Evidence Supports the Finding that the 1972 Declaration Established an Easement in Gross

Nelson claims that substantial evidence does not support the court's finding that the 1972 Declaration "established an easement in gross in Declarant Jess Rice to grant easements over land Rice no longer owned." Whether an easement in gross has been created "is determined mainly by the nature of the right and the intention of the parties." (*Eastman v. Piper* (1924) 68 Cal.App. 554, 568.)

"'The ultimate determination is whether a *reasonable* trier of fact could have found [the existence of an easement in gross] based on the *whole* record. [Citation.]' [Citation.]" (*Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 84.) "We . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving

all conflicts in its favor . . . ." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

"[T]he testimony of a single witness, including the testimony of an expert, may be sufficient to constitute substantial evidence [citation], [but] when an expert bases his or her conclusion on factors that are 'speculative, remote or conjectural,' or on 'assumptions . . . not supported by the record,' the expert's opinion 'cannot rise to the dignity of substantial evidence' and a judgment based solely on that opinion 'must be reversed for lack of substantial evidence.' [Citations.] Similarly, '[a]n expert's opinion that assumes an incorrect legal theory cannot constitute substantial evidence.' [Citation.]" (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1191-1192.)

Hebda's expert testimony constitutes substantial evidence that the 1972 Declaration created an easement in gross personal to Rice. Hebda's opinion does not assume "an incorrect legal theory." (*Wise v. DLA Piper LLP (US)*, *supra*, 220 Cal.App.4th at p. 1192.) Nor is it "'speculative, remote or conjectural,' or [based] on 'assumptions . . . not supported by the record . . . .'" (*Id*. at pp. 1191-1192.) It is based on the 1972 Declaration, the June 1974 quitclaim deed, the August 1974 deeds, and sound logic.

The Quitclaim Deed Did Not Transfer Rice's Easement in Gross

"[A]n easement in gross is property and can be transferred." (*Collier v. Oelke* (1962) 202 Cal.App.2d 843, 847.) Nelson contends that the trial court erred in finding that the June 1974 quitclaim deed did not transfer Rice's easement in gross to Phillips.

The quitclaim deed was recorded before the recording in August 1974 of Phillips's deed of parcels 79 and 32 to the

Renfros, the Renfros' deed of the same two parcels to the three couples, and Rice's deed to the three couples of the road easement. Exercising our independent review, we conclude that the August 1974 transactions make clear that, when Rice quitclaimed the property to Phillips "[s]ubject to the encumbrances of record," the parties intended that one of the encumbrances was the 1972 Declaration creating an easement in gross personal to Rice. If the parties had intended that the quitclaim deed would transfer the easement in gross to Phillips, then Phillips, not Rice, would have transferred the easement to the three couples. We agree with the following testimony of Hebda: "[T]he reason Rice is granting the easement is these parties all had the understanding that Rice is the one who should be granting the easement. That's why it is structured this way."

Furthermore, although the quitclaim deed was recorded more than two months before the recording of Rice's deed of the easement to the three couples, Rice signed the easement deed before signing the quitclaim deed. The easement deed was signed on May 21, 1974. The quitclaim deed was signed on May 30, 1974. Nothing in the record suggests that, when Rice signed the quitclaim deed, he intended to nullify the easement deed that he had signed only nine days earlier.[6]

Finally, the quitclaim deed does not mention Rice's easement in gross. Such an easement does "not pass to another

[6] Rice's signing of the easement deed on May 21, 1974, does not mean that the deed became effective on that date. "A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor." (Civ. Code, § 1054.) The recording of a deed is prima facie evidence of delivery. (Evid. Code, § 1600.) We assume that the easement deed did not become effective until it was recorded on August 23, 1974.

save by specific assignment." (*St. Louis v. DeBon* (1962) 204 Cal.App.2d 464, 466.) An easement appurtenant, in contrast, "pass[es] with the land without specific mention." (*Ibid.*; see also 6 Miller & Starr, Cal. Real Estate (4th ed., 2016) § 15:7, p. 15-32 ["An owner of an easement in gross intending to transfer the easement must do so intentionally and expressly"].)

Jury Instruction on Negligent Interference with Prospective Economic Relations or Advantage

Nelson argues that the trial court erred in giving a modified version of CACI No. 2204 on negligent interference with prospective economic relations or advantage. He asserts: The instruction "permitted the jury to find against . . . Nelson without having to determine that [he] engaged in conduct that was wrongful independent of the interference itself. . . . The . . . instruction effectively allowed the jury to find that merely claiming to prospective buyers of [parcel] 79 that there was no easement across [the Trust] property . . . was sufficient independent wrongful conduct."

The modified instruction given to the jury provided: "Kelsey O' Reilly claims that Glen Nelson negligently interfered with a relationship between him [and] Misha Ford and that probably would have resulted in an economic benefit to Kelsey O'Reilly. To establish this claim, Kelsey O'Reilly must prove all of the following: [¶] 1. That Kelsey O'Reilly, Misha Ford and Edith Chin were in an economic relationship that probably would have resulted in a future economic benefit to Kelsey O'Reilly; [¶] 2. That Glen Nelson knew or should have known of this relationship; [¶] 3. That Glen Nelson knew or should have known that this relationship would be disrupted if he failed to act with reasonable care; [¶] 4. That Glen Nelson failed to act with

reasonable care; [¶] 5. *That Glen Nelson engaged in wrongful conduct by claiming that Parcel 79 had no easement rights providing access (ingress and egress) over the main road through the [Trust] property*; [¶] 6. That the relationship was disrupted; [¶] 7. That Kelsey O'Reilly was harmed; and [¶] 8. That Glen Nelson's wrongful conduct was a substantial factor in causing Kelsey O'Reilly's harm." (Italics added.)

As to the fifth italicized part of the modified instruction, Nelson argues, "If the trial court intended that the requisite independent misconduct . . . was making a negligent misrepresentation, the jury should have been instructed as to all of the elements of that tort."

"To establish a claim for interference with prospective economic advantage, . . . a plaintiff must plead that the defendant engaged in an independently wrongful act. [Citation.] . . . [A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard. [Citations.]" (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1158-1159, fn. omitted.) The requirement of an independently wrongful act applies to claims for negligent as well as intentional interference with prospective economic relations or advantage. (*National Medical Transp. Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440.)

The modified instruction given here provides no guidance whether the allegedly wrongful act - Nelson's claim that parcel 79 does not have a road easement through Trust property - was proscribed by a "constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Korea Supply Co. v. Lockheed Martin Corp.*, *supra*, 29 Cal.4th at p.

1159.) The basis for the wrongful act was a tort - Nelson's negligent misrepresentation. The use notes to CACI No. 2204 warn, "If the conduct is tortious, [the] judge should instruct on the elements of the tort." The elements of the tort of negligent misrepresentation are: "(1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. [Citations.]" (*Ragland v. U.S. Bank Nat. Assn.* (2012) 209 Cal.App.4th 182, 196.)

The trial court should have instructed the jury on the elements of the wrongful act of negligent misrepresentation, i.e., the first three elements of the tort. If Nelson's conduct had satisfied these elements, it would have been wrongful "by some legal measure other than the fact of interference itself." (*Della Penna*, *supra*, 11 Cal.4th at p. 393.)

That the modified instruction was erroneous does not end the matter. Nelson must show that he was prejudiced by the error, i.e., that "'it is reasonably probable that a result more favorable to [him] would have been reached in the absence of the error.' [Citations.]" (*Sabato v. Brooks* (2015) 242 Cal.App.4th 715, 724-725.)

Nelson was not prejudiced. In the earlier court trial, the court determined that the Trust property is subject to a road easement in favor of parcel 79. Thus, Nelson's statement to Chin and Ford that it is not subject to a road easement was a misrepresentation of an existing fact. The fact was material. Without the easement, parcel 79 was landlocked. The jury impliedly found that Nelson had made the misrepresentation

"without reasonable ground for believing it to be true." (*Ragland v. U.S. Bank Nat. Assn.*, supra, 209 Cal.App.4th at p. 196.) The fourth part of the modified instruction requires a finding that "Nelson failed to act with reasonable care." In its special verdict, the jury found that he had not acted with reasonable care. Finally, Nelson intended to induce Ford and Chin to rely on his statement that there is no road easement. He wanted them to purchase a license to use the road through the Trust property. Accordingly, it is not reasonably probable that a result more favorable to Nelson would have occurred had the jury been instructed on the first three elements of negligent misrepresentation.

Substantial Evidence Supports an Award of Punitive Damages

Nelson contends that the evidence is insufficient to support an award of punitive damages. "Under Civil Code section 3294, punitive damages may be recovered 'where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice . . . .' (§ 3294, subd. (a).) Malice is defined as either 'conduct which is intended by the defendant to cause injury to the plaintiff,' or 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' (§ 3294, subd. (c)(1).) Oppression is 'despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.' (§ 3294, subd. (c)(2).)" (*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton* (2002) 96 Cal.App.4th 1017, 1048.) "'"The mere carelessness or ignorance of the defendant does not justify the imposition of punitive damages. . . . Punitive damages are proper only when the tortious conduct rises to levels of extreme indifference to the plaintiff's rights, a level

which decent citizens should not have to tolerate.'" [Citation.]" (*Id*. at p. 1051.)

"[T]he jury award of punitive damages must be upheld if it is supported by substantial evidence. [Citations.] . . . [W]e are bound to 'consider the evidence in the light *most favorable to the prevailing party,* giving him the benefit of *every reasonable inference,* and *resolving conflicts* in support of the judgment.' [Citation.] But since the jury's findings were subject to a heightened burden of proof [i.e., clear and convincing evidence], we must review the record in support of these findings in light of that burden. In other words, we must inquire whether the record contains 'substantial evidence to support a determination by clear and convincing evidence . . . .' [Citation.]" (*Shade Foods*, *Inc. v. Innovative Product Sales & Marketing*, *Inc.* (2000) 78 Cal.App.4th 847, 891.)

In its special verdict the jury found that, "[i]n blockading the road to Parcel 79, . . . Nelson act[ed] with malice, oppression, or fraud." Substantial evidence supports a determination by clear and convincing evidence that Nelson acted with malice or oppression. Nelson relied on the opinion of a land surveyor, Justin Height, that there was no road easement. But Height testified that he was not qualified or authorized to give legal opinions on property rights. In January 2012 Gary Grubacich, O'Reilly's counsel, wrote a detailed letter to Nelson's counsel, Christopher Clark, refuting Height's opinion that there was no road easement. Grubacich enclosed the 1972 Declaration and explained why it created "personal and not appurtenant easements." He enclosed and discussed the June 1974 quitclaim deed and the three deeds simultaneously recorded in August 1974. Based on these documents, Grubacich claimed that parcel

79 has an "'expressly granted easement.'" (Bold omitted.) He also claimed that, if there were no expressly granted easement, parcel 79 would have an easement by necessity or an easement by prescription. The latter easement arose because, during the 30-year prior ownership of parcel 79 by Ralph and Irma Ulmer, they had "consistently traveled and used" the road through the Trust property.[7] In 1976 the Ulmers purchased parcel 79 from the three couples. Grubacich continued: "[T]he policy of this State supports the free access[i]bility and transfer of real property. Thus, no court is going to land-lock the O'Reilly parcel."

Nelson asked Height to review Grubacich's letter. In a March 2012 letter to Nelson, Height said that he had not been aware of Rice's August 1974 express grant of a road easement to the three couples. He noted, "[Grubacich] seems to be asserting that Rice held a 'personal easement' interest (also known as an easement in gross), which he granted to [the three couples]." Height opined that Grubacich was wrong. He did not mention Grubacich's claim that, in the absence of an expressly granted

[7] "The elements necessary to establish an easement by prescription are open and notorious use of another's land, which use is continuous and uninterrupted for five years and adverse to the land's owner. [Citation.]" (*Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1308.) In his letter Grubacich stated: "[D]uring the Ulmers' 30 year ownership of [parcel 79], they consistently traveled and used, for more than the required 5 years, the existing roads across your clients' and others' properties to the North to access theirs, thereby creating an 'easement by prescription.'" (Bold omitted.)

easement, parcel 79 had a road easement either by necessity or by prescription.

Grubacich's letter put Nelson on notice that there was a reasonable legal basis for the existence of a road easement through the Trust property. Nevertheless, Nelson blockaded the road for three more years until April 17, 2015. The jury could have reasonably concluded that, in disregarding Grubacich's letter and continuing the blockade based on Height's opinion, Nelson had acted recklessly and in conscious disregard of O'Reilly's and Bjorklund's right of access to parcel 79. In a January 2011 email, Height warned Nelson that he was neither authorized nor qualified to give legal opinions: "[I]t occurred to me that I'm reviewing statutes and case law in an attempt to form an opinion and advise a client on how to proceed with what is probably a legal matter. This sounds a lot like practicing law, which I am not qualified or authorized to do."

In view of Nelson's continuation of the blockade for three years after the receipt of Grubacich's letter, as well as the hardship and economic injury that he knew would be caused by the blockade, the jury could have reasonably found by clear and convincing evidence that Nelson's conduct was despicable in that it rose to the ""level[] of extreme indifference to [O'Reilly's and Bjorklund's] rights, a level which decent citizens should not have to tolerate."" (*American Airlines*, *Inc. v. Sheppard*, *Mullin*, *Richter & Hampton*, *supra*, 96 Cal.App.4th at p. 1051.)

The Amount of Punitive Damages Is Not Excessive

Nelson argues that "[t]he $96,000 punitive damage award was manifestly excessive." But the question is not whether $96,000 is excessive, but whether $10,000 is excessive. Nelson ignores the court's reduction of O'Reilly's punitive

damages from $48,000 to $10,000 and the granting of a new trial as to Bjorklund's punitive damages. Nelson fails to meet his burden of showing that the only punitive damages award subject to appellate review - $10,000 to O'Reilly - is excessive. "The burden is on the appellant in every case affirmatively to show error . . . ." (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601.)

BJORKLUND'S APPEAL

Alleged Denial of Request to Give CACI No. 3903C

Bjorklund claims that the trial court erroneously denied his request to give CACI No. 3903C on past lost earnings. The instruction provides, "To recover damages for past lost earnings, [*name of plaintiff*] must prove the amount of [*insert one or more of the following:* income/earnings/salary/wages] that [he/she] has lost to date." Bjorklund asserts, "[T]he withholding of the jury instruction 3903C deprived [him of] any remuneration for the loss of his ability to produce [medical marijuana] revenue during the grow seasons of 2011; 2012; 2013; and 2014 . . . during the term that the blockade was in place on the Northern Easement." Bjorkland maintains that his loss was $684,000.

A party "may not complain of the failure to instruct on a particular issue where he has not requested a specific, proper instruction. [Citations.]" (*Alvarez v. Felker Mfg. Co.* (1964) 230 Cal.App.2d 987, 1001.) Bjorklund does not cite any portion of the record showing that he requested CACI No. 3903C. In his reply brief Bjorklund alleges, "Jury Instruction 3903C was not given - despite the adamant request. (RT, v. VIII, p. 2141, [lines] 11-14.)" But the record citation does not support the allegation. The cited lines of the reporter's transcript read as follows: "Mr. Bjorklund: Well, that's what I'm doing for a living.

I'm back there full-time. That is my job. He knows that's what I'm doing. That's what I do with my life."

In his opening brief Bjorklund cites page 2146, lines 9-11 of the reporter's transcript. The cited lines show that Bjorklund stated to the court: "I think I should be just allowed the jury instruction that says I'm able to make a salary growing marijuana, and my earned income was my salary." This did not constitute a specific request for CACI No. 3903C.

Bjorklund notes: "[T]he specific discussion regarding Jury Instruction 3903C was made off the record. However, the email (~~attached~~) [*sic*] communications between Mr. Bjorklund and Mr. Ogden (Glen Nelson's attorney) confirm that the request for Jury Instruction 3903(C) was a topic of discussion as '*tomorrow* [*sic*].'" Bjorklund does not indicate where in the record the email can be found.

"Because [Bjorklund] provides no record citations to support [his] claim [that the trial court denied his request to give CACI No. 3903C], it is forfeited. [Citation.]" (*In re Estates of Collins* (2012) 205 Cal.App.4th 1238, 1251, fn. 11; see also *Lonely Maiden Productions*, *LLC v. GoldenTree Asset Management*, *LP* (2011) 201 Cal.App.4th 368, 384 ["'If no [record] citation "is furnished on a particular point, the court may treat it as waived"'"].)

Even if Bjorklund had provided record citations showing that the trial court denied his request to give CACI No. 3903C, he would not have carried his burden of showing error. "A party is entitled upon request to correct . . . instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) Bjorklund's claimed loss of $684,000 for 2011-

2014 is based on his 2009 federal income tax return (Form 1040, line 43), which shows a total taxable income from all sources of approximately $171,000. He assumes that, without the blockade of the easement road, his "earnings" from parcel 79 would have been $171,000 for each of the four years from 2011 through 2014 ($171,000 x 4 = $684,000). But he cites no evidence, let alone substantial evidence, supporting this assumption. "Absent such evidence . . . , this jury would have been put to sheer speculation in determining" Bjorklund's past lost earnings. (*Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 614.) In October 2010 the Sheriff "raided" parcel 79 and destroyed all of the marijuana plants. This did not bode well for future marijuana harvests on parcel 79.[8]

Disposition

The judgment, order denying Nelson's motion for judgment on the punitive damages issue notwithstanding the verdict, and order granting a partial new trial on punitive damages are affirmed. O'Reilly shall recover from Nelson his costs on appeal. Bjorklund and Nelson shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J. TANGEMAN, J.

[8] At oral argument, Bjorklund said that he took a "calculated risk" to grow what he claims was "medical marijuana."

EXHIBIT D

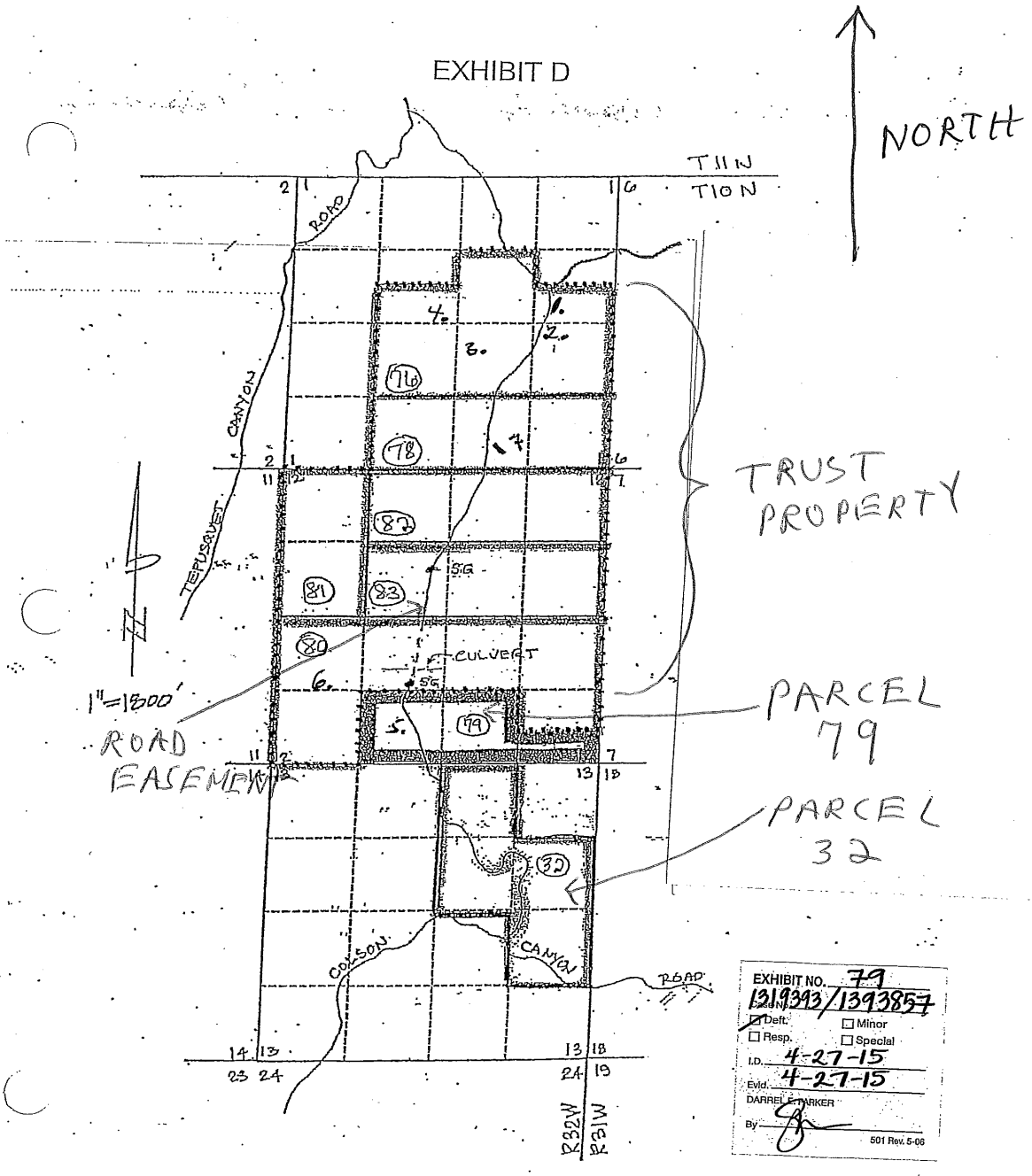

EXHIBIT NO. 79
1319393/1393857
Deft. Minor
Resp. Special
I.D. 4-27-15
Evid. 4-27-15
DARREL PARKER
By
501 Rev. 5-08

1398

APPENDIX A

Jed Beebe, Judge

Superior Court County of Santa Barbara

Ogden & Fricks, Roy E. Ogden and Sue N. Carrasco for Defendant and Appellant, Glen Nelson, Trustee of the Jet Investment Trust.

Eric Bjorklund in propria persona, Intervener and Appellant.

McCarthy & Kroes, Patrick McCarthy and Briana McCarthy, for Plaintiff and Respondent.