

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KENDALL CLEMENT,

Plaintiff and Appellant,

v.

JOSEPH SHAMMAS,

Defendant and Appellant.

B253933

(Los Angeles County
Super. Ct. No. BC490542)

APPEALS from a judgment of the Superior Court of Los Angeles County,
Michelle R. Rosenblatt, Judge. Affirmed.

Morris Getzels Law Office and Morris S. Getzels for Plaintiff and Appellant.

Law Office of Tony Forberg and Tony Forberg for Defendant and Appellant.

Defendant Joseph Shammass (Shammass), an individual and doing business as T&J Liquor Store, appeals a judgment in favor of plaintiff Kendall Clement (Clement) following a court trial on Clement's claim that he and his service dog were wrongfully ejected from Shammass's premises.

Clement cross-appeals, contending the award of \$1,000 in general damages and \$190 in special damages was inadequate as a matter of law.

On the record presented, we perceive no error and affirm the judgment in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

On August 20, 2012, Clement filed suit against Shammass alleging civil rights violations and seeking damages and injunctive relief.

The matter came on for trial on August 19, 2013. Following a bench trial, the trial court issued a seven-page "Decision and Judgment" which included the following findings:¹

In 2010, Clement was diagnosed by Dr. Lu, a psychiatrist at the Veterans Administration, with depression not otherwise specified. Dr. Lu treated Clement with medication, and in March 2011 he determined Clement was stable enough to have his care supervised by his primary care physician.

Based upon his physician's advice, Clement began training his dog, Abigail, to be a service dog in late spring or early summer of 2011. Abigail helps him with his emotional problems, reminds him when to take his medications, calms him down, wakes him up, tells him when to go to bed, and "gets him out of a paralysis when he gets into a severe depression." Abigail was still in training for certain tasks when Clement brought her into Shammass's liquor store on August 19, 2011.

¹ There is no reporter's transcript of the trial. This summary is derived from the trial court's findings of fact and law, which were set forth in the judgment filed November 18, 2013.

Shammas monitors his store periodically by way of video through the Internet and was watching the store on August 19, 2011. Hidalgo Gonzalo was the store clerk on duty. Clement was a regular customer and came into the store with Abigail.

Abigail was on a leash but was not wearing a service dog vest and was not tagged as a service dog. Once inside the store, Abigail put her paws on the counter and drooled on the counter. Shammas, who was viewing the store via the Internet, directed Gonzalo to tell Clement to leave the store with Abigail. Shammas “knew Abigail was a service dog at the time Clement left the store.” Clement was upset and felt humiliated at being ejected from the store in front of other customers.

In January 2012, Dr. Lu saw Clement and diagnosed him as having Bipolar Disorder Type II, as of September 2011. “A traumatic event such as being thrown out of a store can trigger a manic episode in a person who is bipolar. Any stress can trigger the bipolar disorder.” Dr. Lu wrote Clement a letter indicating he favored Clement getting a service dog to help control his bipolar episodes in conjunction with the medications he prescribed for Clement. Clement did not present any expert testimony “that to a medical probability the incident of August 19, 2011 caused Clement to become bipolar. However, Dr. Lu’s testimony, along with the time within which Clement suffered symptoms of the disorder[,] provide strong evidence that the incident triggered manifestation of the bipolar symptoms the doctors observed in September and October 2011.”

In its Findings of Law, the trial court concluded: Clement was a disabled individual on the date of the incident. On August 19, 2011, Abigail was a service dog and Clement was training her. It is legitimate for an owner to train his own dog, no professional trainer is required, and Clement was knowledgeable about how to train a dog. The federal regulations do not require that a service dog wear signs or tags, but the establishment may inquire whether the animal is a service animal. The obligation of a place of public accommodation, such as T&J Liquor, to provide equal access to persons with disabilities arises once the business is aware that the dog is a service dog. Further,

Abigail was not out of control because, when she put her paws on the counter, Clement took effective action to control her.

The trial court concluded Shammas improperly excluded Abigail from the premises on August 19, 2011. It entered judgment in favor of Clement on the first cause of action for violation of the Unruh Civil Rights Act, second cause of action for violation of the California Disabled Persons Act, and the fourth cause of action for violation of the Americans with Disabilities Act. The trial court ordered Shammas to pay \$4,000 in civil penalties, \$190 in special damages and \$1,000 in general damages.

Shammas filed a timely notice of appeal from the judgment. Clement filed a timely notice of cross-appeal.

CONTENTIONS

Shammas contends the trial court erred in its findings that (1) at the time of the incident, Abigail was a service dog, (2) Clement was an individual with a disability at the time of the August 19, 2011 incident, and (3) Shammas violated the Americans with Disabilities Act of 1990 and the California Disabled Persons Act.

On cross-appeal, Clement contends the award of \$1,000 in general and \$190 in special damages was inadequate as a matter of law, requiring reversal and a new trial on damages.

DISCUSSION

I. SHAMMAS'S APPEAL

Shammas does not contend the trial court's findings are not supported by substantial evidence. Rather, he argues "if the trial court had correctly applied the appropriate undisputed facts to the applicable law Abigail could not have been ruled a service dog, [Clement] could not have been ruled a 'disabled' person, and the trial court should not have ruled that [Shammas] violated" the law. Shammas emphasizes "the trial evidence is not before th[is] court; however, [his] appeal does not necessitate said evidence. [He] is not arguing the trial court's Findings of Fact and, in fact, states they are

undisputed.” Shammas’s theory on appeal is that the trial court’s findings of fact “do not substantiate, and in actuality contradict, the trial court’s judgment.”

For the reasons discussed below, we reject Shammas’s contention that the trial court’s factual findings entitled him to a favorable judgment.

1. *No merit to Shammas’s challenge to the trial court’s finding that Abigail was a service dog at the time of the incident.*

Shammas contends the trial court erred in finding Abigail was a service dog within the meaning of 28 Code of Federal Regulations section 36.104 (28 C.F.R. 36.104).²

Shammas’s argument relies on the following findings by the trial court: Clement started training Abigail to be a service dog in late spring or early summer of 2011. *In January 2012*, Dr. Lu diagnosed Clement with bipolar disorder, and Dr. Lu wrote Clement a letter indicating he favored Clement getting a service dog because of his mood disorders to help control his bipolar episodes.

Shammas reasons that because Clement was not diagnosed with bipolar disorder until January 2012, he could not have been training Abigail as a service dog to treat his bipolar disorder at the time of the August 2011 incident.

Shammas’s argument is unpersuasive because it overlooks other relevant findings by the trial court. Although Shammas purports to accept all of the trial court’s factual

² 28 C.F.R. 36.104 defines “service animal” as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual’s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.”

findings and states they are “undisputed,” in reality Shammas is disputing certain findings which the trial court made. As indicated, the trial court also found that in 2010, Dr. Lu diagnosed Clement with depression, and that “based upon his physician’s advice [Clement] started training Abigail to be a service dog in late spring or early summer of 2011.” The trial court’s findings are presumed to be correct (*Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp.* (1999) 75 Cal.App.4th 110, 118), and in the absence of an adequate record, the judgment is presumed correct (*Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1507).

Thus, *prior to the incident*, “based upon his physician’s advice [Clement] started training Abigail to be a service dog in late spring or early summer of 2011,” to help manage his depression. Therefore, the trial court’s findings do not compel the conclusion that Abigail was not a service dog at the time of the August 2011 incident.

2. *No merit to Shammas’s contention the trial court erred in ruling Clement was an individual with a disability at the time of the incident.*

Shammas contends the trial court erred in ruling Clement was a disabled individual within the meaning of Americans With Disabilities Act (ADA) (42 U.S.C. § 12102(1)) and the California Disabled Persons Act (CDPA) (Civ Code, § 54, subd. (b).)³ Shammas argues Clement was not disabled at the time of the incident

³ The ADA states in relevant part: “The term ‘disability’ means, with respect to an individual—[¶] (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; [¶] (B) a record of such an impairment; or [¶] (C) being regarded as having such an impairment (as described in paragraph (3)).” (42 U.S.C. § 12102(1).)

Similarly, Civil Code section 54, at subdivision (b)(1), defines disability as “any mental or physical disability as defined in Section 12926 of the Government Code.” Government Code section 12926, in turn, at subdivision (j)(1), defines mental disability as including, but not limited to, “[h]aving any mental or psychological disorder or condition, such as intellectual disability, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.”

because the trial court found the August 2011 incident was the triggering event for Clement's bipolar disorder.

Here again, Shammas overlooks other relevant findings by the trial court. As indicated, the trial court found that Dr. Lu diagnosed Clement with depression in 2010, and that Clement was in treatment for that condition at the time of the incident. Thus, the trial court's findings do not compel the conclusion that Clement was not disabled prior to the August 2011 incident.

3. *No merit to Shammas's remaining contention that he did not violate the ADA or the CDPA.*

Shammas contends that he could not have violated the ADA or the CDPA because Abigail was not a service dog on the date in question, and because the incident "was the trigger to [Clement's] bipolar symptoms, which then led his doctor" to advise him to get a service dog. Therefore, Clement was not disabled at the time of the incident. This contention, which is predicated on Shammas's earlier arguments, similarly fails.

As already discussed, the trial court's findings also included the following: Clement was diagnosed with depression in 2010, and based upon his physician's advice, Clement began training Abigail to be a service dog in late spring or early summer of 2011.

Thus, contrary to Shammas's arguments, the trial court's findings do not compel the conclusion that Abigail was not a service dog at the relevant time, or that Clement was not disabled at the relevant time.

II. CLEMENT'S CROSS-APPEAL

1. *Clement's failure to move for new trial below on the ground of inadequate damages precludes him from raising the issue on appeal.*

On cross-appeal, Clement contends the award of \$1,000 in general and \$190 in special damages was inadequate as a matter of law, requiring the matter to be reversed and remanded for a new trial on those damages.

It is settled that “a plaintiff who has not sought a new trial cannot argue inadequacy of damages on appeal. (*Jenkins v. Dahnert* (1962) 202 Cal.App.2d 567, 568; *Warner v. Urbach* (1955) 131 Cal.App.2d 5, 6; *Alexander v. McDonald* (1948) 86 Cal.App.2d 670, 671.)” (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918, fn. 6; accord, *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759 [failure to move for new trial ordinarily precludes party from complaining on appeal that damages awarded were either excessive or inadequate, *whether the case was tried by a jury or by the court*].) Because Clement did not bring a motion for a new trial in the court below, he “did not comply with the foregoing rule and ha[s] waived the right to have the question of the inadequacy of the damages considered by this court.” (*Alexander v. McDonald, supra*, 86 Cal.App.2d at p. 671.)

Clement acknowledges he did not seek a new trial below, but argues his contention regarding inadequate damages is properly before this court because he “is not arguing that the judgment is unsupported by the evidence. See, *McAllister v. George* (1977) 73 Cal.App.3d 258, 262 [*McAllister*].)” Clement’s reliance on *McAllister* is misplaced. *McAllister* held the requirement of filing a motion for new trial was “inapplicable . . . because the gist of plaintiff’s contention [was] not that the jury award [was] unsupported by the evidence, but rather that the trial court erred in excluding relevant evidence of damages.” (*Id.* at p. 261, fn. 1.)

Here, the gist of Clement’s cross-appeal is not evidentiary error. Rather, Clement’s entire contention on cross-appeal is that the damage award was inadequate. Therefore, the Supreme Court’s pronouncement in *Schroeder* is controlling. Having failed to raise inadequacy of damages by way of a motion for new trial, Clement “cannot argue inadequacy of damages on appeal.” (*Schroeder, supra*, 11 Cal.3d at p. 918, fn. 6.)

Finally, even assuming the issue of inadequate damages is properly before this court, the contention would fail. It is a basic principle of appellate procedure that “appellants, including cross-appellants, bear the burden of affirmatively showing error by an adequate record” (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794),

and “[w]hen a record is silent on a point urged as error, we indulge all presumptions in favor of the judgment.” (*Ibid.*) Clement has not presented this court with a reporter’s transcript of the trial. Therefore, it is impossible for this court to determine whether, in light of the evidence that he presented below, the damage award was inadequate as a matter of law. We can only presume the \$1,190 awarded in general and special damages is supported by substantial evidence adduced at trial.

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

ALDRICH, J.

EGERTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.