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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ADAM SWENDRAK, Plaintiff, Appellant, and Cross-Respondent, v. JOYCE URODE, et al. Defendants, Respondents, and Cross-Appellants.	B275175 Los Angeles County Super. Ct. No. SC122234

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Reversed in part and affirmed in part.

Campbell & Farahani, LLP, Frances M. Campbell and Nima Farahani, for Plaintiff, Appellant, and Cross-Respondent.

de la Peña & Holiday LLP, Gregory R. de la Peña and Malcolm E. McLorg, for Defendants, Respondents, and Cross-Appellants.

INTRODUCTION

Plaintiff Adam Swendrak sued his landlords, defendants Joyce and Kelli Urode,[1] after they posted a notice informing the tenants of the apartment complex in which he lived that the police had placed him on a psychiatric hold under Welfare and Institutions Code section 5150 (the notice). During trial, Swendrak moved to amend his pleading to add a new cause of action to conform to proof; the court denied that motion. Thereafter, a jury found defendants liable for negligence and public disclosure of private facts (invasion of privacy) for posting the notice, and awarded Swendrak $200,000 in non-economic damages and $625,000 in punitive damages. After the court entered judgment, defendants filed a motion for judgment notwithstanding the verdict (JNOV motion) and a motion for new trial. Those motions challenged the jury's finding of liability for the invasion of privacy claim and the award of punitive damages.

The court granted defendants' JNOV motion in part and denied it in part. The court granted the JNOV motion to the extent it challenged the jury's punitive damages award, finding the "weight of the evidence did not support a finding of malice by clear and convincing evidence." It denied the JNOV motion insofar as it challenged the jury's finding that defendants were liable for invasion of privacy. The court also granted defendants' motion for new trial, but its written order does not state the grounds for its decision. Further, the court never filed a separate

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[1] Because defendants share the same last name, we will refer to them individually by their first names.

Although the operative second amended complaint also named Raymond Urode as a defendant, he is not a party to this appeal.

specification of reasons explaining why it granted the motion for new trial.

We reverse the order granting in part defendants' JNOV motion and the order granting a new trial. We affirm the order denying Swendrak's motion to amend his pleading. The underlying judgment is reinstated.

FACTS AND PROCEDURAL BACKGROUND

1. Swendrak's 5150 hold and defendants' posting of the notice

In the early 1980s, Swendrak began renting from defendants a two-bedroom unit in an apartment complex located on 12th Street in Santa Monica (the complex). At the time of trial, Swendrak paid between $820 and $834 per month in rent for his unit, which is regulated by Santa Monica's rent control laws. According to defendants, if a new tenant were to lease Swendrak's unit, it would rent for approximately $2,100 per month.

During the afternoon of October 10, 2013, officers from the Santa Monica Police Department responded to Swendrak's apartment after receiving a call that Swendrak had allegedly poured gasoline down his kitchen sink's drain. The officers detained Swendrak under Welfare and Institutions Code section 5150 (section 5150), and they took him to a hospital, where Swendrak claims he was held for about two weeks.

Shortly after the police arrived at Swendrak's apartment, a HAZMAT team from the Santa Monica Fire Department conducted a search of the apartment. The HAZMAT team used an "Eagle 4-Gas Monitor" to try to detect the presence of hazardous materials in the apartment. Although the monitor did

not detect any gasoline, one of the members of the Fire Department smelled gasoline on an empty glass container located in Swendrak's kitchen. At trial, Swendrak stated that he used cooking oil, not gasoline, in his kitchen.

After responding to Swendrak's apartment, the Fire Department prepared a report stating that Swendrak "was being held on a 5150." The report also stated that "a small amount" of gasoline had been poured down the kitchen sink's drain and washed away with water.

Defendants, who were not at the complex when Swendrak was detained, learned about the incident from a person named Darvin, one of the complex's other tenants; Darvin had directed the officers to Swendrak's apartment when they first arrived. Darvin had called Kelli to report that the police had come to the complex and placed Swendrak on a "51/50 hold."[2] Although some of the other tenants were at the complex at the time officers from the police and fire departments arrived, none of them saw the police detain Swendrak.

Joyce claims that she learned the details of Swendrak's detention by reviewing a "HAZMAT report" prepared by the Santa Monica Fire Department. She also claims that she had obtained information about the incident from a police department's website. When asked at trial what website she visited to find the information, Joyce could not provide a clear answer. Specifically, she responded: "Police Department dot G-O-V—I am not sure." When asked if she knew whether she obtained the information from the Santa Monica Police Department's website, she responded "possibly." According to the

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[2] Darvin did not testify at trial.

trial testimony of the records administrator for the Santa Monica Police Department, that department generally does not make available on its website information about a person's involuntary detention under section 5150. The records administrator also testified that she believed such information was confidential and could not be made available to the public.[3]

Joyce contacted an attorney and the Santa Monica Rent Control Board to determine what she and Kelli could do in response to Swendrak's detention. The Rent Control Board told Joyce that she could write an "RR letter" to warn Swendrak that he could not do anything else "to disturb things" at the complex.

On October 15, 2013, defendants drafted the challenged notice, explaining to the complex's other tenants details about Swendrak's detention. The notice states in relevant part:

> Regarding the incident occurring Thursday, October 10th, involving Adam in unit 5.
>
> **HERE ARE THE FACTS THAT WE KNOW ARE TRUE:**
>
> The police were called out by the Department of Mental Health, they placed Adam on a 51/50 psychiatric hold. We do not know where he is or when he will be released or if he'll be released.

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[3] Joyce also testified that she had worked as a registered nurse for 25 years and that based on her experience in the medical profession, it was common "knowledge" and "sense" that one should not disclose medical information about another person.

> We know that he poured less than 6 ounces of gasoline down the kitchen drain which HAZMAT came and remediated.
>
> He did NOT pour gas anywhere in the apartment or attempt to light anything on fire.
>
> This building is under Rent Control which governs what we can do and how we can do it. We are in contact with our attorney and he is looking into this matter. This is a legal matter which will take time and have to go through the proper legal channels.
>
> We will keep you updated as we know how we can proceed and if we need any letters from you.
>
> We know you all are concerned as we are, rest assured we are doing everything we can.

Defendants posted copies of the notice on the front door of each of the ten apartment units in the complex, and a copy of the notice was also found posted on at least one mailbox in an apartment building adjacent to the complex.[4]

2. Swendrak sues defendants

On March 14, 2014, Swendrak filed a complaint against defendants, alleging claims for defamation and elder abuse.

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[4] In 2015, after Swendrak filed this lawsuit, defendants tried to evict him from his unit.

Swendrak's claims were based on defendants' posting of the notice (the defamation claim) and an incident during which Joyce allegedly physically assaulted Swendrak by hitting him with the front door to his apartment (the elder abuse claim).[5]

On September 2, 2014, Swendrak filed the operative second amended complaint, adding claims for violation of the Fair Employment and Housing Act (FEHA), violation of the Unruh Civil Rights Act, negligence, and invasion of privacy. The negligence claim was based on both the posting of the notice and Joyce's alleged physical assault, and the invasion of privacy claim was based on the posting of the notice only. Swendrak also amended his elder abuse claim, adding allegations based on defendants' posting of the notice. Swendrak sought compensatory damages on all of his claims, statutory damages on his claim for violation of the Unruh Civil Rights Act, and punitive damages on his claims for defamation, elder abuse, violation of FEHA, and invasion of privacy.

Defendants demurred to Swendrak's second amended complaint. In January 2015, the court sustained the demurrer without leave to amend as to Swendrak's elder abuse claim to the extent that claim was based on defendants' posting of the notice; the court overruled the demurrer as to Swendrak's remaining claims.

3. The trial and the jury's verdict

A seven-day jury trial commenced on February 22, 2016. On February 29, 2016, the last day evidence on the issue of

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[5] We do not discuss in detail Swendrak's claims based on the alleged physical altercation with Joyce because none of those claims are at issue in this appeal.

liability was presented to the jury, Swendrak moved to amend his complaint to state a claim for violation of Welfare and Institutions Code section 5330. Swendrak argued the court should allow him to amend his complaint to conform to proof at trial because a claim under that statute would be based on the same facts supporting his claims for defamation, negligence, and invasion of privacy. Swendrak did not, however, attempt to explain why he waited until trial to seek to amend his pleading. The court denied Swendrak's motion to amend.

The jury reached a verdict on March 1, 2016, finding defendants liable for negligence and invasion of privacy based on their posting of the notice. The jury found in favor of defendants on Swendrak's remaining claims. The jury awarded Swendrak a total of $200,000 in non-economic damages—$100,000 as to each defendant, Joyce and Kelli.

After the jury made a finding of malice or oppression, the parties stipulated that Joyce had a net worth of $7,000,000 and Kelli had a net worth of $1,200,000. Shortly thereafter, the jury awarded Swendrak a total of $625,000 in punitive damages—$500,000 as to Joyce and $125,000 as to Kelli.

4. Defendants' post-trial motions

On March 22, 2016, the court entered a judgment in favor of Swendrak consistent with the jury's verdict and findings. Notice of entry of judgment was mailed on the same day the judgment was entered.

On April 6, 2016, defendants served and filed a "Notice of Intention to Move for JNOV" and a "Notice of Intention to Move for New Trial." On April 12, 2016, defendants served and filed their moving papers for both motions. Defendants also filed two identical declarations executed by their attorney, one in support

of each motion, with a portion of the reporter's transcript from Swendrak's counsel's closing argument attached to each declaration. In his declarations, defendants' counsel opined that the jury's findings as to the invasion of privacy claim and the punitive damages award were not supported by substantial evidence.

In their JNOV motion, defendants challenged the jury's verdict as to the invasion of privacy claim, the non-economic damages award, and the punitive damages award; they did not challenge the jury's finding that defendants were negligent in posting the notice. With respect to the invasion of privacy claim, defendants argued (1) Swendrak failed to establish that his detention under section 5150 was a "private fact"; and (2) that the court improperly shifted the burden of proof to defendants to disprove the existence of the privacy element. As for punitive damages, defendants argued insufficient evidence supported the jury's finding that they acted with malice or oppression when they posted the notice and that the amount of the award was excessive. Finally, as to the award of non-economic damages, defendants argued Swendrak failed to prove he suffered any emotional distress from the posting of the notice and the court improperly limited the scope of evidence defendants could present on the issue of damages.

Defendants raised similar arguments in their motion for new trial, challenging the jury's verdict as to the invasion of privacy claim, the non-economic damages award, and the punitive damages award. They argued insufficient evidence supported the jury's award of non-economic damages because Swendrak failed to establish he suffered emotional distress as a result of defendants' posting of the notice. Defendants also

argued the court should order a new trial on the issue of punitive damages because the amount of the award was excessive and the weight of the evidence did not support a finding that defendants acted with malice or oppression when they posted the notice. Finally, defendants argued the court should order a new trial on the invasion of privacy claim because Swendrak failed to prove that his detention under section 5150 was "private," and the court improperly shifted the burden to them.

Swendrak opposed defendants' motions. He argued the JNOV motion was untimely because defendants did not file their moving papers until April 12, 2016, more than 15 days after the court mailed notice of entry of judgment. He also objected to the two declarations submitted in support of defendants' motions. Specifically, he objected to the entire third paragraph of both declarations, in which counsel opined that the jury's findings were not supported by substantial evidence. Swendrak argued counsel's statements lacked foundation and constituted improper legal opinions.

5. The court's ruling on defendants' JNOV and new trial motions

On May 12, 2016, the court held a hearing on defendants' motions. The court heard arguments from both sides and took the matter under submission. On May 13, 2016, the court issued a two-page minute order, granting and denying in part the JNOV motion, granting the motion for new trial, and sustaining all of Swendrak's evidentiary objections to the declarations submitted by defendants' counsel.

The court found defendants timely filed their JNOV motion and granted that motion to the extent it challenged the punitive damages award, finding the award was not supported by

sufficient evidence. The court explained, "The weight of the evidence did not support a finding of malice by clear and convincing evidence. [¶] The evidence established that the posting of the notice containing the private information was done without malice and out of good faith concern over the well being of the other tenants." The court denied the motion to the extent it challenged the jury's finding of liability on the invasion of privacy claim and its award of non-economic damages.

The court also granted defendants' motion for new trial. The court did not state, however, what grounds or rationale it relied on in granting the motion, and it did not state whether the motion was granted in whole or in part. Instead, the court's written ruling stated only, "The Motion for New Trial is granted." The court never prepared or filed a separate specification of reasons explaining why it granted the motion for new trial.

Swendrak filed a timely appeal from the court's order partially granting defendants' request for JNOV and granting defendants' motion for new trial. Defendants filed a timely cross-appeal from the judgment and the court's order denying in part their JNOV motion.

DISCUSSION

1. The motion for judgment notwithstanding the verdict

Swendrak contends the court's May 13, 2016 order granting defendants' JNOV motion as to the punitive damages award must be reversed because the motion was untimely. He argues defendants failed to file their moving and supporting papers

within the time periods set forth in Code of Civil Procedure[6] sections 629, 659, and 659a, and that the court therefore lacked jurisdiction to grant the motion. Swendrak also contends that, even if defendants timely filed their JNOV motion, the court erred in granting that motion as to the punitive damages award because (1) the court improperly weighed the evidence; and (2) substantial evidence supports the jury's finding that defendants acted with malice or oppression when they posted the notice.

As we explain below, we agree with Swendrak that the court improperly weighed the evidence when it granted defendants' JNOV motion. Further, because there is evidence in the record to support a finding that defendants acted with malice or oppression when they posted the notice, we reverse the court's May 13, 2016 order to the extent it grants defendants' JNOV motion on the issue of punitive damages.[7]

1.1. Appealability

We begin with the threshold issue of the appealability of the order granting, in part, defendants' JNOV motion. In his notice of appeal, Swendrak states he appeals from the "Judgment Notwithstanding the Verdict and from the Order granting New Trial dated May 13, 2016." Generally, an order granting a JNOV motion is not a "final judgment" or an otherwise appealable order. (*Jordan v. Talbot* (1961) 55 Cal.2d 597, 602.) Instead, an

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[6] Other than references to section 5150, all undesignated statutory references are to the Code of Civil Procedure.

[7] Because we reverse the court's May 13, 2016 order granting defendants' JNOV motion on the merits, we do not address the issue of whether the motion was timely filed.

appeal typically lies from the subsequent judgment entered pursuant to the court's order granting the JNOV motion. (See *ibid*.)

However, an order granting judgment notwithstanding the verdict on some but not all of the issues in the case may be appealable, depending on the nature of the order. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 330 (*Beavers*).) Where the court partially grants a JNOV motion that only changes, but otherwise upholds, the verdict, "the judgment, as modified by the partial judgment notwithstanding the verdict, is immediately appealable." (*Ibid*.)

Here, the court's May 13, 2016 order partially granting defendants' JNOV motion affects only the jury's award of punitive damages, while leaving intact the rest of the jury's verdict. Thus, Swendrak may appeal from the court's May 13, 2016 order to the extent it grants in part defendants' JNOV motion.

1.2. Standards governing a motion for judgment notwithstanding the verdict

A motion for judgment notwithstanding the verdict functions as a demurrer to the evidence. (*Moore v. City & County of San Francisco* (1970) 5 Cal.App.3d 728, 734.) That is, the motion tests the legal sufficiency of the evidence supporting the verdict. (*Beavers, supra,* 225 Cal.App.3d at p. 328, fn. 6.) For purposes of the motion, all evidence supporting the verdict is presumed true, and the trial court must determine whether that evidence establishes facts that constitute a prima facie case. (See *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750 (*Fountain Valley*).)

In ruling on a JNOV motion, the trial court may not weigh the evidence or make its own credibility determinations. (*King v. State of California* (2015) 242 Cal.App.4th 265, 287.) This means that the court must resolve all conflicting evidence against the moving party and draw every reasonable inference supported by the evidence in favor of the party who secured the verdict. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 750.) " ' "A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied." ' [Citation.]" (*King*, *supra*, 242 Cal.App.4th at p. 287, quoting *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.)

A ruling on a JNOV motion is "reviewed for the existence of substantial evidence." (*OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.) We review the entire record in the light most favorable to the verdict, drawing all reasonable inferences and resolving all evidentiary conflicts in support of the judgment. (*Brennan v. Townsend & O'Leary Enterprises, Inc.* (2011) 199 Cal.App.4th 1336, 1340.)

1.3. The court erred in granting judgment notwithstanding the verdict as to the punitive damages award.

The trial court granted defendants' JNOV motion on the grounds that insufficient evidence supported the jury's punitive damages award. In explaining its reasoning, the court acknowledged that it weighed the evidence in making its ruling. Specifically, the court stated, "The weight of the evidence did not

support a finding of malice by clear and convincing evidence." This was error. The court could not reweigh the evidence when ruling on defendants' JNOV motion. (*Tun v. Wells Fargo Dealer Services, Inc.* (2016) 5 Cal.App.5th 309, 333 (*Tun*).) Instead, the court was required to resolve all factual conflicts and draw all reasonable inferences from the evidence in Swendrak's favor. (*Ibid.*)

Substantial evidence also supports the jury's finding that defendants acted with malice or oppression when they posted the notice. For example, there is evidence that would support an inference that defendants used the notice to manufacture a purported concern for other tenants when they really just wanted to force Swendrak out of the complex so they could obtain higher rent for his unit. At the time of trial, Swendrak paid about $830 per month for his two-bedroom apartment that he has rented since the early 1980s. Defendants testified that Swendrak's lease was protected by Santa Monica's rent control laws, and that they would be able to obtain higher rent if Swendrak's lease were terminated and they found a new tenant to rent his unit. Kelli believed that she and her mother could obtain around $2,100 per month if they leased Swendrak's unit to a new tenant, more than two-and-half times the amount of rent Swendrak was paying. Indeed, Kelli testified that she and her mother tried to evict Swendrak from his unit in 2015, after they posted the notice. Although defendants presented evidence that they posted the notice for the purpose of alleviating their other tenants' safety concerns, that evidence simply raised a factual conflict, one that the trial court was required to resolve in Swendrak's favor when ruling on the JNOV motion. (See *Tun*, *supra*, 5 Cal.App.5th at p. 333.) Because there is evidence in the

record to support a finding that defendants acted with malice or oppression when they posted the notice, the court should have denied the JNOV motion to the extent it challenged the jury's verdict on punitive damages.

1.4. The court properly denied defendants' motion for judgment notwithstanding the verdict to the extent it challenged the jury's finding of liability on Swendrak's invasion of privacy claim.

In their cross-appeal, defendants contend the court erred in denying their JNOV motion to the extent it challenged the jury's finding of liability for invasion of privacy. They argue there is no substantial evidence to support the jury's finding because Swendrak failed to establish how his being involuntarily detained by the police on a "psychiatric hold" constituted private or privileged information. Defendants contend that, as a matter of law, such information cannot constitute a "private fact" that would support a claim for invasion of privacy. As we explain below, the court properly denied defendants' JNOV motion to the extent it challenged the jury's finding of liability on Swendrak's invasion of privacy claim.

To establish a claim for invasion of privacy, a plaintiff must prove the following elements: " '(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern.' " (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214.) Because defendants limit their discussion of the invasion of privacy claim in their opening brief to the "private fact" element, we limit our analysis of the court's ruling to that element.

The right to privacy has been defined as " 'the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short it is the right to be left alone.' [Citation.]" (*Gill v. Curtis Pub. Co.* (1952) 38 Cal.2d 273, 276.) To support a claim for invasion of privacy, an expectation of privacy in the fact at issue need not be absolute. (*Sanders v. American Broadcasting Companies* (1999) 20 Cal.4th 907, 915–916.) It is also not necessary that the fact at issue be secret. (*M.G. v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 632.) Therefore, a fact or information does not lose its "private" nature simply because the fact or information is known by someone other than the plaintiff. "[T]he claim of a right of privacy is not ' "so much one of total secrecy as it is of the right to *define* one's circle of intimacy. . . . " ' Information disclosed to a few people may remain private." (*Ibid.*, fns. omitted.)

In this case, there is evidence to support the jury's finding that defendants disclosed private information about Swendrak that would support a claim for invasion of privacy. Specifically, the administrator of records for the Santa Monica Police Department testified that the department does not publicize records of a person's detention under section 5150 because that information is private and cannot be disclosed, unless the person who has been detained consents to the information's release.

Defendants contend the fact that Swendrak had been detained and placed on a psychiatric hold under section 5150 was public information at the time they posted the notice because they had learned of that fact by reviewing a "HAZMAT report" and a police department's website. The jury, however, may have disbelieved Joyce's testimony about how she received the information about Swendrak's detention. Indeed, as noted above,

Joyce could not recall at trial what website she viewed to obtain the information. In any event, to the extent defendants testified that they retrieved the information of Swendrak's detention from public sources, such as a fire department's HAZMAT report or a police department's website, that testimony simply establishes a conflict in the evidence as to whether the information of Swendrak's detention was publicly available, a conflict that the trial court properly resolved in Swendrak's favor on liability when it ruled on defendants' JNOV motion. (See *Tun*, *supra*, 5 Cal.App.5th at p. 333.)

2. The motion for a new trial

Swendrak contends we must reverse the court's May 13, 2016 order granting defendants' motion for new trial because the court failed to state what grounds or rationale it relied on in granting the motion. Defendants, on the other hand, argue it is clear from the record that the court granted the motion for new trial on the same grounds it granted their JNOV motion—i.e., insufficiency of the evidence to support the punitive damages award. Defendants do not, however, advance any substantive arguments addressing why the court properly granted their new trial motion. As we explain below, this approach is fatal to defendants' attempt to defend the court's order on appeal.

2.1. Standards governing a motion for a new trial

A party may move for a new trial by filing a "notice of intention to move for new trial" after a jury renders its verdict but before judgment is entered, or within 15 days of the date notice of entry of judgment is mailed or, if notice is not mailed, within 180 days of the date judgment is entered. (§ 659, subd. (a).) Within 10 days of filing its notice of intent, the moving

party must file its moving papers and any supporting affidavits or declarations. (§ 659a.)

If a court grants a new trial, it must issue a ruling setting forth the grounds upon which the new trial is granted and the reasons for granting the new trial upon each of the stated grounds. (§ 657.) The ruling must be in writing and signed by the court and, if not set forth in the order granting the new trial, it must be issued within 10 days of the date the order is entered. (§ 657; *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 634 (*Oakland Raiders*).) "[A]n oral recital, no matter how thoroughly it may have been prepared, cannot amount to compliance in any degree, 'substantial' or otherwise," with the requirement that the ruling be in writing and signed by the court. (*La Manna v. Stewart* (1975) 13 Cal.3d 413, 420 (*La Manna*).) The requirements that the ruling be signed, in writing, and filed within 10 days of the date the court grants the new trial are mandatory and jurisdictional, and an appellate court "cannot remand the case to permit the trial court to correct an insufficient statement of reasons." (*Oakland Raiders, supra*, 41 Cal.4th at p. 635.)

The failure to specify any grounds for granting a new trial renders the order defective, but not void. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 900 (*Sanchez-Corea*).) When the court does not state the grounds and rationale it relied on in granting a new trial, the party in whose favor the new trial was granted carries the burden on appeal " 'to advance any grounds upon which the order should be affirmed, and a record and argument to support it.' [Citation.]" (*Ibid.*) However, an order granting a new trial that fails to specify any grounds or reasons cannot be affirmed on appeal on the grounds of insufficient

evidence to support the verdict or excessive damages. (§ 657; *Oakland Raiders*, *supra*, 41 Cal.4th at p. 634.)

2.2. The order granting defendants' motion for a new trial must be reversed.

In its May 13, 2016 written ruling, the court did not set forth any specific grounds or rationale explaining why it granted defendants' motion for a new trial. To be sure, the court explained that it granted defendants' JNOV motion as to the punitive damages award because insufficient evidence supported the jury's finding that defendants engaged in malice or oppression when they posted the notice. However, with respect to the portion of the ruling addressing defendants' motion for new trial, which appears in a new paragraph in the order, the court simply stated, "The Motion for New Trial is granted." Since the court's May 13, 2016 ruling does not set forth any grounds or rationale explaining why the court granted a new trial, defendants bear the burden on appeal of demonstrating why the order should be affirmed. (*Sanchez-Corea*, *supra*, 38 Cal.3d at p. 900.)

On appeal, defendants argue the court properly granted their motion for new trial for insufficient evidence to support the punitive damages award. They do not attempt to argue, however, that the court granted a new trial on any of the other grounds stated in their motion. Defendants' concession is fatal. As noted, a new trial order that does not set forth any grounds or reasoning for why the new trial was granted cannot be affirmed on appeal for insufficient evidence or excessive damages. (See *Oakland Raiders*, *supra*, 41 Cal.4th at p. 634.) Therefore, on its face, the court's order cannot be affirmed on those grounds.

In addition, we reject defendants' contention that when the court's May 13, 2016 written order is read as a whole and in conjunction with the court's oral statements at the May 12, 2016 hearing, it is clear that the court granted a new trial for the same reasons it granted defendant's JNOV motion. It is well-established that a court's oral recital of the reasons for granting a new trial, no matter how thorough the recital is, cannot function as a substitute for the writing requirement of section 657. (*La Manna*, *supra*, 13 Cal.3d at p. 420.) Thus, defendants cannot rely on the court's oral statements at the May 12, 2016 hearing as a substitute for the requirement that the court explain in writing the grounds and rationale for granting a new trial.

We also reject defendants' contention that we should rely on the portion of the court's written ruling explaining why it granted defendants' JNOV motion to ascertain why the court granted a new trial. Certainly in granting a new trial, a court may adopt the same grounds and rationale relied upon to grant a JNOV motion. However, the court must make clear that it is adopting those reasons, or at least relying on the same reasons, in granting a new trial so that a reviewing court is able to determine why the court granted a new trial. (See *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 413.) Here, the portion of the court's written ruling granting a new trial makes no reference to the court's statement of reasons for granting defendants' JNOV motion, nor does it include even a summary of reasons that tracks those the court relied on in granting the JNOV motion. We therefore cannot determine whether the court relied on the same grounds to grant a new trial as it did to grant defendants' JNOV motion.

Finally, we note that even if we could rely on the court's statements explaining why the court granted defendants' JNOV motion to determine why it also granted a new trial, those statements would be insufficient to satisfy the standards of section 657. A court's ruling granting a new trial must identify what aspects of the record support the trial court's ruling. (See *Mercer v. Perez* (1968) 68 Cal.2d 104, 116 [an order granting a new trial "must briefly identify the portion of the record which convinces the judge 'that the court or jury clearly should have reached a different verdict or decision' "].) While the court is not required to identify the record by page number, it must identify **some** evidence, arguments, or instructions, that support the court's finding that the jury's verdict cannot be sustained. (See *Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1227.) Here, the court's ruling on the JNOV motion states only that the weight of the evidence does not support a finding of malice and that the evidence established that defendants posted the notice out of good faith concern for their other tenants' safety. The court does not, however, identify what testimony or other evidence it relied on to reach this conclusion.

For these reasons, we reverse the court's May 13, 2016 order granting a new trial. Because we have also reversed the court's order granting defendants' JNOV motion, the original judgment, including the jury's verdict on the issue of punitive damages, is reinstated. (See *La Manna*, *supra*, 13 Cal.3d at p. 425.)

3. The motion to amend Swendrak's complaint

Swendrak contends the court abused its discretion when it denied his motion to amend his operative second amended complaint during trial to state a claim for violation of Welfare

and Institutions Code section 5330.[8] He argues the court should have allowed him to amend his pleading because a claim under that statute would have been based on the same facts supporting his claims for defamation, negligence, and invasion of privacy, and defendants therefore would not have been prejudiced by the amendment. He also argues the court's ruling was prejudicial because it deprived him of the opportunity to obtain treble damages under Welfare and Institutions Code section 5330. We find no error.

3.1. Standards governing motions to amend a pleading during trial

The trial court may allow a party to amend its pleading at any stage of the proceedings. (§§ 469 & 473, subd. (a)(1).) We review the court's ruling on a motion to amend a pleading to conform to proof at trial for abuse of discretion. (*Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377 (*Duchrow*).)

Generally, " '[c]ourts must apply a policy of liberality in permitting amendments at any stage of the proceeding, including during trial, when no prejudice to the opposing party is shown. . . . ' " (*Duchrow*, *supra*, 215 Cal.App.4th at p. 1377.) However, " '[t]he law is well settled that a long deferred

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[8] Welfare and Institutions Code section 5330, subdivision (a), provides in relevant part: "Any person may bring an action against an individual who has willfully and knowingly released confidential information or records concerning him or her in violation of this chapter, or of Chapter 1 (commencing with Section 11860) of Part 3 of Division 10.5 of the Health and Safety Code, for the greater of the following amounts: [¶] (1) Ten thousand dollars ($10,000). [¶] (2) Three times the amount of actual damages, if any, sustained by the plaintiff."

presentation of the proposed amendment without a showing of excuse for the delay is itself a significant factor to uphold the trial court's denial of the amendment. [Citation.]' [Citation.] 'The law is also clear that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may—of itself—be a valid reason for denial.' [Citation.]" (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 613 (*Leader*).) " 'Thus, [if the trial court denies a motion to amend during trial,] appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is " 'offered after long unexplained delay . . . or where there is a lack of diligence . . . .' " ' [Citation.]" (*Duchrow*, *supra*, 215 Cal.App.4th at p. 1377, insertion in original.) In addition, " 'amendments of pleadings to conform to the proofs should not be allowed when they *raise new issues not included in the original pleadings* and upon which the adverse party had *no opportunity to defend* . . . .' " ' " (*Id.* at p. 1378, italics in original.)

Thus, in determining whether to grant a motion to amend a pleading during trial, courts should take the following factors into account: (1) whether there is a reasonable excuse for the delay; (2) whether the amendment relates to the facts or only to legal theories; and (3) whether the opposing party will be prejudiced by the amendment. (*Duchrow*, *supra*, 215 Cal.App.4th at pp. 1378–1379.)

3.2. The court properly denied Swendrak's motion to amend his complaint.

The court did not abuse its discretion when it denied Swendrak's motion to amend his pleading to state a claim for violation of Welfare and Institutions Code section 5330. First, Swendrak failed to demonstrate good cause for seeking to amend

his complaint on the last day evidence was presented to the jury. As Swendrak acknowledged in his motion, the same facts that gave rise to his defamation, negligence, and invasion of privacy claims would have supported his claim for violation of Welfare and Institutions Code section 5330. Thus, Swendrak should have been aware of the facts giving rise to that claim at the time he filed his original complaint in March 2014. Swendrak did not explain below, nor does he explain on appeal, why it took him nearly two years to assert that claim. Based on Swendrak's failure to explain the delay, the court did not err in denying the motion. (See *Leader*, *supra*, 89 Cal.App.4th at p. 613.)

Second, an amendment at this late stage would have prejudiced defendants. As noted, section 5330 allows a plaintiff to recover three times the amount of actual damages the plaintiff has suffered. (Welf. & Inst. Code, § 5330, subd. (a)(1).) Had defendants been aware that Swendrak was seeking to triple the amount of damages he could have recovered for his claims of negligence and invasion of privacy, they may have engaged in different pre-trial preparation, changed their strategy at trial, or sought a settlement of the case before it went to trial. (See *Duchrow*, *supra*, 215 Cal.App.4th at pp. 1381-1383.)

DISPOSITION

The court's May 13, 2016 order is reversed insofar as it grants defendants' motion for judgment notwithstanding the verdict, and grants defendants' motion for new trial. The court's February 29, 2016 order denying Swendrak's motion to amend is affirmed. The judgment entered on March 22, 2016 is reinstated in its entirety and, as reinstated, is affirmed. (See *La Manna*, *supra*, 13 Cal.3d at p. 425.) Swendrak shall recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.