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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JAMES MURPHY,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO et al.,

Defendants and Respondents.

D057343

(Super. Ct. No. 37-2008-00098182-
CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

James Murphy — a former lifeguard for the City of San Diego (the City) — appeals the trial court's ruling denying his motion for a new trial or in the alternative for a judgment notwithstanding the verdict (JNOV) in his lawsuit against the City and Sergeant Edward Harris of the City's lifeguard service. Appearing in pro propria persona, Murphy contends that the trial court erred in denying his posttrial motions with respect to his defamation cause of action against Sergeant Harris because the evidence established that

Sergeant Harris maliciously lied about Murphy having "missed rescues" as a lifeguard. We conclude that Murphy's contention is without merit, and accordingly we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

After serving as a seasonal lifeguard for the City for several years and then attending an advanced lifeguard academy, Murphy was hired by the City to be a permanent year-round lifeguard, beginning with a one-year probationary period. For his first assignment as a probationary permanent lifeguard, Murphy was stationed in a rocky area that encompasses La Jolla Cove and adjoining areas starting in January 2008. Sergeant Harris was Murphy's initial supervisor.

In his written performance review of Murphy's job performance through March 9, 2008, Sergeant Harris described two incidents that occurred on the last day of the review period.

The first incident involved the rescue of two scuba divers in a rip current at Shell Beach, near La Jolla Cove, by another lifeguard. Murphy was away from the lifeguard station during the rescue emergency because he was working out, as lifeguards are permitted to do if they are available to respond in an emergency. Murphy did not respond to the emergency, as he did not notice that a flag had been lowered at the lifeguard station signaling an emergency, was not available by radio, and did not hear the sirens from responding vehicles.

The second incident involved a kayaker who had impermissibly entered La Jolla Cove and was stuck on a sharp and potentially dangerous reef called Razor Reef for a short time while Murphy was watching from the lifeguard station. When Sergeant Harris arrived at the scene, the kayaker was approaching Razor Reef, and Sergeant Harris believed that Murphy should have already been preparing to run into the water to assist the kayaker. Sergeant Harris told Murphy something such as, "You should already be gone on that." According to Sergeant Harris, Murphy indicated his unawareness of the situation by asking, "On what?" Another lifeguard on the beach began to respond on a paddleboard after Sergeant Harris yelled, and the kayaker ended up clearing himself from the area without incident.

Based on these incidents and two incidents that occurred in January 2008 when Murphy was not available by radio, the performance review stated that Sergeant Harris's "greatest concern going forward is that [Murphy] has performed at a below standard level when it comes to situational awareness."

On May 22, 2008, an internal memorandum from "Sergeant James Gartland, SDFR/Lifeguards" recommended to Lieutenant John Greenhalgh that Murphy's employment be terminated for failure of probation. Sergeant Gartland had become Murphy's supervisor in early April 2008. He testified that the memorandum was a collective effort by several people, including himself and Sergeant Harris. The May 22, 2008 memorandum described the incidents set forth in the earlier performance review drafted by Sergeant Harris as well as several other more recent problems with Murphy's performance. These more recent problems included Murphy's difficulties with radio

communication, several instances in which Murphy's supervisors believed he was being untruthful and Murphy's missing of a planned meeting with his superiors.

The May 22, 2008 memorandum also described two additional incidents indicating Murphy's lack of situational awareness when watching the water.

First, on March 24, 2008, Sergeant Gartland observed a situation with a snorkeler in La Jolla Cove who was being struck by waves close to Razor Reef. Although the snorkeler was able to avoid injury, Sergeant Gartland's assessment of the situation was that Murphy should have responded to assist the person but did not do so. Murphy later told Sergeant Gartland that he did not respond because the snorkeler had informed him of his plan to swim close to the reef. Sergeant Gartland believed that Murphy should have been more proactive in preventing snorkelers from being washed onto Razor Reef.

Second, on May 16, 2008, Murphy was watching the water from above Shell Beach while two other lifeguards were rescuing beachgoers who had been swept out into the ocean. Sergeant Gartland arrived during the rescue and observed two snorkelers in an adjacent area who were in distress and in need of assistance. Murphy had not noticed the problem with the snorkelers. Sergeant Gartland yelled for assistance, and one of the lifeguards who had just returned from the first rescue quickly responded by swimming out to rescue the two snorkelers. Based on this incident, the May 22, 2008 memorandum states, "On May 16th, 2008 . . . Murphy misses two rescues at Shell Beach."

Murphy was taken off water observation after the May 16, 2008 incident. On May 29, 2008, Murphy was notified that his probation was being terminated. After affording Murphy a hearing, the City terminated his employment in June 2008.

Murphy filed a lawsuit against the City and Sergeant Harris. The lawsuit proceeded to trial on causes of actions alleging discrimination and harassment based on a perceived physical disability (Gov. Code, § 12940, subds. (a), (j)), unlawful retaliation (*id.*, § 12940, subd. (h)), and defamation. The jury completed special verdict forms, resulting in findings against Murphy on each cause of action.

Murphy filed a motion for a new trial or in the alternative for JNOV on the defamation cause of action against Sergeant Harris. The trial court denied the motion. Judgment was entered against Murphy.

II

DISCUSSION

Murphy's sole contention on appeal is that the trial court erred in denying his motion for a new trial or in the alternative for JNOV on the defamation cause of action against Sergeant Harris because the jury's special verdict on that cause of action was inconsistent with the evidence.

A. *Applicable Legal Standards*

The new trial motion was premised on Code of Civil Procedure section 657, subdivision (6), which provides that the trial court may grant a new trial based on "[i]nsufficiency of the evidence to justify the verdict or other decision" A new trial "shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision . . . , unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.)

We apply an abuse of discretion standard when reviewing the trial court's decision to deny a motion for a new trial on the ground of insufficient evidence. (*Windeler v. Scheers Jewelers* (1970) 8 Cal.App.3d 844, 852.)

With respect to the motion for JNOV under Code of Civil Procedure section 629, Murphy was required to show that, viewing the evidence in the light most favorable to the verdict, there was no substantial evidence to support the jury's special verdict. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68; Code Civ. Proc., § 629.) We apply the same standard on appeal, "to make an independent determination whether there is any substantial evidence to support the jury's findings." (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1284.)

B. *The Relevant Evidence*

The defamation cause of action against Sergeant Harris was based on the theory that Sergeant Harris had untruthfully stated that Murphy was a liar or that Murphy had missed one or more rescues. In the special verdict form, the jury responded affirmatively to the following two questions:

- "26. Did Sgt. Edward Harris make the following statement to persons other than Mr. Murphy:
 - "a. That James Murphy missed one or more crucial rescues.
 - "b. That James Murphy was a liar."
- "27. Did the people to whom the statements were made reasonably understand that the statements were about Mr. Murphy?"

The next question asked,

"28. Did Sgt. Edward Harris fail to use reasonable care to determine the truth or falsity of the statement?"

The jury answered question No. 28 negatively. That answer resulted in a verdict against Murphy on the defamation cause of action.

Murphy contends that the evidence at trial conclusively established that Sergeant Harris lied about Murphy having missed one or more rescues. He contends that because of that purportedly conclusive evidence, the jury should have answered question No. 28 on the special verdict form by indicating Sergeant Harris *did not* use reasonable care to determine the truth or falsity of his statements about Murphy's missed rescues.

To support his argument, Murphy focuses on Sergeant Harris's testimony during questioning by Murphy's attorney at trial. Murphy's attorney first asked Sergeant Harris to define the term "rescue." Sergeant Harris stated, "Water rescue is when we swim out to someone who's panicked or someone's stuck, someone's tired, somebody who's in need of medical aid, there's a wide range of why we would go out to help somebody, but when someone needs our assistance to ensure that they're not going to die or be seriously injured." Murphy's attorney followed up, "And you bring them into safety?" Sergeant Harris answered, "Yes."

Later, Murphy's attorney asked Sergeant Harris whether, using his definition of rescue, Murphy missed a rescue on March 9, 2008, during the incident involving the kayaker at Razor Reef, in that "the kayaker that was on Razor Reef was able to get off Razor Reef by himself and paddle away." After pointing out that Murphy "did not act

appropriately" and "did not see that rescue," Sergeant Harris conceded that Murphy "did not miss a rescue" as he had defined that term.

Murphy's attorney also asked Sergeant Harris to apply his definition of rescue to the incident that Sergeant Garland witnessed involving the snorkeler at Razor Reef on March 24, 2008, in light of the fact that "on that date no one was rescued, were they?" After pointing out that he was not present at the March 24, 2008 incident, Sergeant Harris agreed that if the incident occurred as Sergeant Gartland described it, any accusation that Murphy "missed a rescue" during that incident would have been false based on his definition of rescue.¹

Murphy contends that this testimony establishes that Sergeant Harris "knew that he was not telling the truth about what happened." According to Murphy, during his testimony Sergeant Harris "admitted that his statements against Mr. Murphy about missed rescues were false." Murphy argues that Sergeant Harris "publish[ed] these lies in Mr. Murphy's performance evaluation [and] termination memo."

¹ Although it is not necessary to our resolution of this appeal, for the sake of correctly describing the content of Sergeant Harris's testimony, we note that later in his testimony Sergeant Harris clarified that Murphy missed "phases" of a rescue with respect to the kayaker on Razor Reef on March 9, 2008; that lifeguards "go [on] a lot of rescues where the person self-clears or the person self-rescues"; and that if the kayaker had not been able to self-clear, he would have been dragged across the reef and "would be cut from head to toe."

C. *The Trial Court Properly Denied the Motion for a New Trial or in the Alternative for a JNOV*

The fundamental problem with Murphy's argument is that there was no evidence that Sergeant Harris ever reported that Murphy "missed rescues" during the March 9, 2008 incident with the kayaker on Razor Reef or during the March 24, 2008 incident with the snorkeler at Razor Reef.² The March 9, 2008 performance review that Sergeant Harris prepared sets forth the details of the incident with the kayaker at Razor Reef, but it does not characterize that incident as a "missed rescue." On the contrary, it accurately states that Murphy had been verbally counseled "for failing to spot the kayak." The May 22, 2008 memorandum recommending the termination of Murphy's probation, which Sergeant Harris had some part in authoring, did not describe the March 9, 2008 incident with the kayaker or the March 24, 2008 incident with the snorkeler at Razor Reef

² Although the jury answered "yes" to question No. 26 in the special verdict form as to whether Sergeant Harris stated that Murphy "missed one or more crucial rescues," that does not mean that the jury found that Sergeant Harris stated that Murphy missed rescues during the March 9, 2008 incident with the kayaker on Razor Reef or during the March 24, 2008 incident with the snorkeler at Razor Reef. In finding that Sergeant Harris stated that Murphy missed one or more crucial rescues, the jury could have been referring to Sergeant Harris's performance review of Murphy, in which he described the incident concerning the scuba divers at Shell Beach on March 9, 2008, as Murphy "missing the rescue." The jury also could have been referring to the statement in the May 22, 2008 memorandum which stated that "Murphy misses two rescues" during the incident with the snorkelers at Shell Beach on May 16, 2008. Murphy does not rely on either of these statements as the basis for his contention that Sergeant Harris lied about him having missed rescues, as there was ample evidence for both those incidents that swimmers were brought into shore by a lifeguard, satisfying any definition of the term "rescue."

as missed rescues. That document simply sets forth the facts of what happened during those two incidents. Further, no one testified to hearing Sergeant Harris say that Murphy missed a rescue during the incident with the kayaker at Razor Reef on March 9, 2008 or the incident with the snorkeler at Razor Reef on March 24, 2008.

In his appellate brief, Murphy refers several times to a declaration that Sergeant Harris purportedly submitted in connection with a motion for summary judgment in this action. That declaration was not an exhibit received or discussed at trial, and also is not part of the clerk's transcript in this appeal. However, we infer from Murphy's discussion that the declaration included a heading referring to the March 9, 2008 incident involving the kayaker at Razor Reef as "Murphy misses a rescue (Kayaker)." Because it was not part of the evidence at trial, the statement in the declaration does not support Murphy's motion for a JNOV or a new trial based on insufficiency of the evidence. Nor could that statement have supported a defamation claim had it been introduced at trial, as it is subject to the litigation privilege. (Civ. Code, § 47, subd. (b); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058.)

We therefore reject Murphy's contention that, contrary to the jury's finding, Sergeant Harris's trial testimony establishes that he knowingly lied about Murphy missing rescues. There is no evidence that Sergeant Harris told anyone that Murphy missed the rescue of a kayaker on Razor Reef on March 9, 2008 or missed the rescue of a snorkeler on Razor Reef on March 24, 2008. The trial court did not err in denying Murphy's

motion for a new trial or in the alternative for a JNOV on the defamation cause of action against Sergeant Harris.³

DISPOSITION

The judgment is affirmed. Costs are awarded to Respondents.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.

³ Because we reject Murphy's contention that the evidence required a different answer to question No. 28 on the special verdict form, we need not, and do not, reach Murphy's argument that the evidence supported a finding in his favor on the remaining questions on the special verdict form.