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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BARBARA TIFFANY, as Executor, etc.,

Plaintiff and Respondent,

v.

DAVID JAMES SMITH et al.,

Defendants and Appellants.

D058510

(Super. Ct. No. 37-2009-00083251-
CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Frederic L. Link, Judge. Affirmed.

Dr. David James Smith appeals from a judgment in favor of his former employee, Dr. Frank J. Tiffany, on claims of disability discrimination. On appeal, Smith contends (1) the evidence was insufficient to support the jury's verdict, (2) the trial court abused its discretion by admitting evidence regarding his lifestyle, conduct with another employee, and that he was callous and indifferent, and (3) the trial court erred by failing to issue a written statement of decision on Tiffany's unfair business practices claim under Business

and Professions Code section 17200 (section 17200). We reject Smith's arguments and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Preliminarily, we note that Smith violated a basic rule of appellate practice by reciting only the evidence favorable to him and ignoring the evidence that supports the verdict. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247; *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96.) Except when pointing out a conflict in the evidence, we recite the facts most favorable to the judgment. (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 872.)

Tiffany's Employment and Termination

In 2005, Smith hired Tiffany to work as a physician at his business, the San Diego Comprehensive Pain Management Center (SDCPMC). Tiffany had severe osteoporosis, causing his bones to be brittle and fracture easily. In 2007, Tiffany broke his right arm and took approximately one to two weeks off from work to recuperate from that injury. In February 2008, Tiffany suffered a similar injury on his other arm that required surgery.

Tiffany's wife called Paul Hamwey, SDCPMC's human resources manager, to inform him of Tiffany's injury and to request that Tiffany be able to use his sick leave or vacation leave to recover from the injury. Hamwey understood that the request was for an accommodation due to Tiffany's disability. Smith called Tiffany the day after Tiffany's surgery and asked whether Tiffany would be able to return to work that week. When Tiffany responded that he could not, Smith terminated his employment.

After Tiffany's termination, Smith considered offering Tiffany part-time employment or allowing him to fill in during Smith's absence. Although he was exploring alternatives, Smith did not rescind Tiffany's termination and instructed Hamwey to cancel Tiffany's malpractice insurance. Thereafter, Smith called Tiffany and inquired as to whether he was available to fill in for a few days while Smith was on vacation. Tiffany declined because he did not have his own malpractice insurance.

Smith's Financial Condition

At trial, Smith claimed that he fired Tiffany to save money because his medical practice was losing money. According to Smith's bookkeeper, Julia Oertle, Smith was experiencing "financial strain" and had difficulty paying his bills. In late summer or early fall of 2007, Oertle developed a spreadsheet for Smith that set forth scenarios for cutting payroll. Oertle's objective was to find a way to improve immediate cash flow and "get a handle on [Smith's] accounts payable." One of Oertle's proposals was to terminate Tiffany's employment. Oertle did not consider that Tiffany generated more revenue for the business than the cost of his employment.

Oertle testified that Smith's financial distress was largely caused by a sudden cessation in Medicare payments. However, that did not occur until the end of 2008, and Smith confirmed that the drop in Medicare payments was not a factor in Tiffany's termination.

In addition to SDCPMC, Smith had numerous other business ventures, including owning an airplane, a yacht, and multiple office buildings. Some of those ventures were not profitable and Smith had trouble refinancing them; however, according to Oertle,

SDCPMC was so profitable that its revenue could support Smith's unprofitable businesses and his "lifestyle." In fact, Smith used SDCPMC's revenue to cover his other investments and businesses.

DISCUSSION

I. *Parties to the Appeal*

Tiffany died during the pendency of this appeal. His wife requested that she, as the executor of Tiffany's estate, be substituted as the respondent in this matter. We granted that request and thus this appeal proceeds with Barbara Tiffany, executor of the estate of Frank J. Tiffany, as the respondent.

II. *Sufficiency of the Evidence*

Smith argues the trial court erred in denying his motion for a new trial based on his claim that there was insufficient evidence to support the jury's verdict on Tiffany's claims of disability discrimination and failure to accommodate. We disagree.

"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, subd. 7.) "[W]here a trial court's factual finding is challenged on the ground there is no substantial evidence to sustain it, the power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence, contradicted or uncontradicted, that will support the trial court's determination. [Citation.] ¶¶ The appellate court views the evidence in the light most favorable to the

respondent[] [citation], resolves all evidentiary conflicts in favor of the prevailing party and indulges all reasonable inferences possible to uphold the trial court's findings [citation]." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.)

As we previously stated, Smith had a duty to "fairly summarize all of the facts in the light most favorable to the judgment." (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) "A party who challenges the sufficiency of the evidence to support a finding *must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable.*" (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218, italics added.) If the appellant does not do so, the reviewing court may deem the substantial evidence contention to have been waived. (*Ibid.*; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Smith failed to satisfy this very basic burden and thus waived his substantial evidence contention.

In any event, we conclude the jury's verdict on Tiffany's claim of disability discrimination was supported by substantial evidence. "Disparate treatment," the form of discrimination at issue here, "is *intentional* discrimination against one or more persons on prohibited grounds." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 (*Guz*)). Because direct evidence of discriminatory motive is ordinarily unavailable, California courts have adopted a "three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination . . . based on a theory of disparate treatment." (*Id.* at p. 354, citing *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.) Under the applicable test, (1) the plaintiff/employee must set forth

sufficient evidence to establish a prima facie case of discrimination, (2) the defendant/employer must then articulate a legitimate, nondiscriminatory reason for the adverse employment action, and (3) the employee then has the opportunity to show the employer's articulated reason is pretextual. (*Guz, supra*, at pp. 355–356.)

Plaintiff's prima facie burden is minimal, and the specific elements may vary depending on the particular facts. Generally, plaintiff must show "(1) he was a member of a protected class, (2) he was qualified for the position . . . sought or was performing competently in the position . . . held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Guz, supra*, 24 Cal.4th at p. 355.)

Here, Smith challenges the sufficiency of the evidence on the second and fourth factors, namely that Tiffany could perform his job and that Smith had a discriminatory motive for terminating Tiffany's employment. We conclude that there was substantial evidence to support these factors. Although the parties did not cite to specific testimony that Tiffany was able to perform his job, the jury could reasonably infer this element from the evidence. The evidence showed that Tiffany's left arm injury in 2008, which immediately preceded his termination, was a "mirror image" of the injury that he suffered in 2007 to his right arm. After his 2007 injury, Tiffany took one to two weeks off and then returned to work. Thus, Tiffany presumably could have returned to work after recuperating from nearly the same injury on his other arm. The fact that Tiffany could return to work after his injury (and termination) in 2008 was further supported by

evidence that Smith asked Tiffany to fill in while Smith was on vacation and considered offering Tiffany part-time employment.

The evidence was also sufficient to establish that Smith had a discriminatory motive. Although Smith attempts to persuade us that the evidence showed nothing more than a coincidence in the timing of Tiffany's termination and his disability, the evidence went well beyond that to establish discriminatory intent. Hamwey testified that Tiffany's employment was terminated because SDCMPC needed "to continue [to] service [its] patients with appropriate personnel" and that Smith believed Tiffany was not "appropriate personnel" due to Tiffany's health issues and disability. Further, shortly after Tiffany's injury, Smith wrote to Hamwey and stated, "The games up. Let [Tiffany] go. I cannot continue in this fashion. But first confirm we have an employment at-will contract. I hate to do this, but I need to move on." Hamwey felt that Smith was discriminating against Tiffany because of the "circumstances that [Tiffany] had with his health event."

Assuming Smith adequately rebutted the presumption of discrimination through his claim that he fired Tiffany for financial reasons, the burden shifted to Tiffany to demonstrate that Smith's purported reasons were actually a pretext for disability discrimination. (*Guz, supra*, 24 Cal.4th at pp. 355–356.) We conclude Tiffany met that burden. Tiffany demonstrated that the major factor in Smith's alleged financial distress, a drop in Medicare payments, did not occur until well after Tiffany's termination. Further, viewing the evidence in the light most favorable to the judgment, it showed that SDCPMC was thriving financially and could also support Smith's unprofitable business

ventures. Accordingly, the jury could have reasonably concluded that Smith's purported reason for firing Tiffany was merely a pretext for discrimination.

Lastly, Smith makes a vague argument regarding Tiffany's claim of disability discrimination based on a failure to accommodate. Although Smith cites to some law in this regard, he fails to apply that law to the facts or point to any way in which the evidence was insufficient to support the jury's verdict on this claim. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.) By alluding to an argument without properly developing it, Smith forfeited his contention on appeal. (See *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 165; *Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, 689.)

III. Admission of Character Evidence

Smith next argues the trial court abused its discretion when it admitted certain evidence. We disagree.

The trial court has broad discretion in ruling on the admissibility of evidence, and its ruling will be upheld on appeal unless there is a clear showing of an abuse of discretion that prejudiced the appellant—i.e., a showing the court's ruling exceeded the bounds of reason and it is reasonably probable a result more favorable to the appellant would have been reached absent the error. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432.)

Smith specifically argues the trial court erred in admitting the following evidence: (1) he made sexual advances on an employee at a party; (2) he lived in the affluent

community of Rancho Santa Fe; (3) he owed his prior lawyers \$200,000 for their work on this case; (4) he owned a boat and a plane and took lavish vacations; and (5) he was callous and indifferent. We address each of these items in turn.

First, in regard to evidence that Smith made sexual advances on an employee at a party, we conclude the trial court did not abuse its discretion in admitting such evidence and, even if it did, the error was harmless. At trial, in the context of discussing the alleged downturn in Smith's finances, Smith's counsel asked Tiffany's wife whether employees received Christmas bonuses in 2007 and whether there was a Christmas party that year. Thereafter, Tiffany's counsel asked the witness whether she knew why Smith stopped having office parties. Tiffany's wife explained that there was an incident at a party that involved Smith pulling a female employee onto his lap. This evidence was relevant to rebut Smith's contention that he fired Tiffany due to his financial condition. Specifically, it suggests that Smith stopped having office parties for a reason other than his alleged financial distress. Even if admitting the evidence was error, however, we find it was not prejudicial because it is not reasonably probable that Smith would have obtained a more favorable result absent the error.

Second, Smith's argument that the trial court erred in admitting evidence that he lived in Rancho Santa Fe also has no merit. Smith points to a portion of the record wherein Tiffany's counsel asked Oertle about a document concerning the refinancing of Smith's home. Oertle testified that there was a note on the document that stated, "refinanced loan docs for Wells Fargo on . . . Smith Rancho estate." When Tiffany's counsel attempted to delve into information concerning Smith's assets on that document,

the trial court *excluded* the evidence. We find no error in the trial court's ruling and thus no abuse of discretion.

Third, Smith's argument that the trial court erred in admitting evidence that he owed his prior lawyers \$200,000 for their work on this case is flawed. Based on our review of the record, the trial court excluded that evidence. Accordingly, there was no abuse of discretion.

In regard to Smith's remaining contentions that the trial court erred in admitting evidence that he owned a boat and a plane, took lavish vacations, and was callous and indifferent, he failed to cite to the specific testimony or other evidence that is the subject of his argument. This court is not required to make an independent search of the record for facts to support Smith's position. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) Thus, Smith forfeited the contentions on appeal.

Lastly, Smith makes a vague argument regarding statements made by Tiffany's counsel during closing argument that the jury should dislike Smith and "send a message" through its verdict. The record before us does not include counsel's closing arguments. "Where the party fails to furnish an adequate record of the challenged proceedings, his claim on appeal must be resolved against him. [Citations.]" (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46.)

IV. *Statement of Decision*

Tiffany sought recovery under section 17200 based on his contention that Smith's actions constituted unfair business practices. After the jury returned its verdicts, the trial court held a hearing on the section 17200 claim. At the conclusion of that hearing, the

court found in favor of Smith, but denied his request for a statement of decision because "the matter was heard in less than 20 minutes and [was] on the record." Relying on Code of Civil Procedure section 632 (section 632), Smith argues the trial court erred by failing to issue a written statement of decision.

As an initial matter, we note that, in his brief, Smith selectively omitted a portion of section 632, which provides that "when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties." Based on the trial court's reasoning for denying Smith's request for a statement of decision, he should have cited this portion of the statute. Smith had a duty to accurately and fairly summarize the applicable law, which he did not do. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) ¶ 9:27, p. 9-8.)

Regardless, the issue must be resolved against Smith. "[I]t is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) "'A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.'" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

The record before us shows that the trial court held a hearing on Tiffany's section 17200 claim, but Smith failed to provide a reporter's transcript of the hearing. This deficiency prevents us from adequately evaluating his claim on appeal because we are unable to determine whether the alleged error resulted in prejudice. Thus, Smith's claim on appeal must be resolved against him. (*Rancho Santa Fe Assn. v. Dolan-King, supra*, 115 Cal.App.4th at p. 46.)

DISPOSITION

The judgment is affirmed. Tiffany is entitled to recover costs and reasonable attorney fees on appeal, to be determined by the trial court. (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448.)

MCINTYRE, J.

WE CONCUR:

McDONALD, Acting P. J.

O'ROURKE, J.