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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MICHAEL R. COULTER,

Plaintiff and Appellant,

v.

BARRY E. MENEFEE et al.,

Defendants and Respondents.

D060580

(Super. Ct. No. 37-2009-00057373
CU-BC-NC)

APPEAL from a judgment and order of the Superior Court of San Diego County,
Thomas P. Nugent, Judge. Affirmed.

Plaintiff Michael R. Coulter (Michael),¹ who appeals in propria persona, filed three separate actions against several defendants (collectively, defendants), which were consolidated (one of which was later ordered deconsolidated) alleging causes of action for making terrorist threats, conversion, slander/defamation, quiet title, injunctive relief/imposition of a constructive trust, declaratory relief, and, negligence.

¹ Because some of the family members share the same last name, in the interests of clarity we refer to some of the family members by their first names. We intend no disrespect.

On appeal, in a four-page brief that has only two citations to the record below, Michael asserts the court erred by (1) denying his motion for a continuance he made on the first day of trial, and (2) sustaining the defendants' demurrer without leave to amend as to his third action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Coulter et al. v. Menefee and [Joan]* (Super. Ct. San Diego County (2009) No. 37-2009-00057373-CU-BC-NC) (*Coulter I*)

In 2009, Michael and his son, David P. Coulter, sued Barry E. Menefee and Joan Coulter Jouan, alleging terrorist threats, conversion and slander/defamation.

David and Joan are the adult children of Michael and Ingrid A. Grottker. Ingrid was married to Menefee, and they resided on South Ditmar Street. Michael and his son David resided together. Ingrid had been diagnosed with cancer and was in the process of chemotherapy and radiation treatment.

The claims of terrorist threats and defamation arose out of alleged statements by Joan and Menefee made to Michael and David during a series of incidents and conversations in July of 2009. Michael claims that during a phone conversation with Menefee in which concern was expressed for the health and feeding of Ingrid, Menefee threatened Michael and David that if they came over to the Ditmar residence, they would be in "deep shit and that they are going to get hurt, and that what was happening there was none of their concern, and stay away from the house." Michael called the police following the conversation and met them at the Ditmar residence. Michael alleged that when Joan came out of the house, she said Michael and David were crazy and that they

needed to be committed to a mental institution. Three days later, David phoned Ingrid and asked if he could bring her some food. David and his girl friend, Teresa Spires, brought food to Ingrid. When Joan learned that David was at the house, she allegedly called Menefee, who returned home. At that point, Menefee was alleged to have made defamatory statements to David that "by innuendo was taken to mean and be understood that [David] was and is a homosexual."

With regard to the claim of conversion, Michael alleged he left various personal belongings in storage at the Ditmar residence after he and David moved out in 2002 to 2003. In June of 2009, Michael learned that "virtually all of the books, tools and other items left with [Ingrid] for storage had disappeared." Michael alleged Menefee had thrown the personal belongings out and falsely claimed they were previously delivered to Michael.

B. *Coulter v. Menefee and (Irene)* (Super Ct. San Diego County (2010) No. 37-2010-00050947-CU-BC-NC) (*Coulter II*)

In 2010, Michael filed a second lawsuit, this time against Menefee and Ingrid. He alleged causes of action for quiet title, injunctive relief/imposition of a constructive trust, and declaratory relief.

Alleging a number of the same facts, Michael claimed that Menefee's "main purpose in being with [Ingrid] is to somehow acquire title, or part title, to the [] Ditmar residence" Michael claimed that between 1980 and 1984, he provided Ingrid and her mother with more than \$60,000 to be held in trust for Joan and David "and for meeting periodic living expenses of Ingrid, Joan, Dave and to use for the purpose of

purchasing real property, upon condition that any real property purchased using such funds be held by [Ingrid] for the benefit of [Joan] and [David]." Michael further asserted Ingrid agreed that upon the purchase of any real property, she would designate Joan and David as tenants in common in any deed and by will.

Michael alleged that in January of 2010 he learned that title to the Ditmar residence was not vested in Ingrid, Joan and David as tenants in common. He discovered that the property was originally vested solely in Ingrid's name as an unmarried woman in breach of his alleged agreement with Ingrid. He also alleged that he discovered that Menefee tortiously interfered with the agreement by causing Ingrid to quit claim the property to Menefee and Ingrid as joint tenants in August of 2009. Michael sought to quiet title in the Ditmar residence by a judgment declaring the August 2009 quit claim deed null and void and that Ingrid, Joan and David were tenants in common, each having a one-third interest in the property. Michael also sought a constructive trust and declaratory relief to preclude Menefee from selling or otherwise encumbering the Ditmar residence.

C. Coulter v. Ingrid, Menefee, [Joan and Paul Jouan] (Super. Ct. San Diego County, 2010, No. 37-2010-00055491-CU-PO-NC) (*Coulter III*)

Michael thereafter brought a third lawsuit suit after allegedly suffering a heart attack, an "enlargement of [an] abdominal aortic aneurysm," and suffering a head injury five months later when he dropped a dumbbell on his forehead. That complaint contained a single cause of action for negligence against Ingrid, Menefee, Joan and her husband, Paul Jouan. Michael alleged Ingrid owed a duty of care to leave a note at her

house or to otherwise call and let Menefee know that she left the house with son David and would be at David and Michael's house.

Michael and David resided on Barnard Drive in Oceanside. According to the complaint, David, having received no phone call from Ingrid and "because of great concern for his mother's health and welfare" went to Ingrid's house on September 2, 2009. After noticing Menefee's car was not present, David knocked on the door and was invited in by his mother. When Ingrid's nurse advised she "could get out of the house and walk around," David suggested Ingrid accompany him back to his house to see a new kitten and visit with Michael. Ingrid agreed and they drove to David and Michael's house.

"After being there a short while," Joan telephoned, spoke with David over the speaker phone with Michael listening, and demanded to know if Ingrid was there. David confirmed Ingrid was visiting, doing fine, and that he was going to be bringing her back. At that point, Joan informed David that she had just spoken with Menefee, that together they had called the Oceanside Police Department and "reported that [David] and [Michael] had kidnapped and abducted [Ingrid], and that the police were on their way." David and Michael then heard Paul in the background saying, "[Y]es, and tell them that we told the police that [David] and [Michael] had kidnapped and abducted [Ingrid] . . . had her prisoner and barricaded inside their house, and that they were going to shoot it out with the police."

After the phone call from Joan, David left with Ingrid to take her back to her house. David and Ingrid "were shocked to see four (4) police cars, and numerous police

officers" upon exiting the driveway from David and Michael's residence. Then, when David and Ingrid "arrived back at [Ingrid's] residence, numerous police cars and many police officers were there, and [Menefee] was running around yelling that David" had kidnapped Ingrid. Ingrid "told them no, that she simply went over to see the new kitten and visit with [Michael]." The police informed David and Ingrid of the police reports made by Joan and Menefee and "that the swat [*sic*] team would have been on its way within five (5) minutes if they hadn't seen [David] and [Ingrid] leave [Michael's] residence."

Michael alleged that "[u]pon learning of what had happened, later that day from [David], the fright and fear (which had been building up since the telephone call from [Joan]) of possibly seeing [David], [Ingrid], and possibly himself, being shot by the police, caused [Michael] to have a heart attack (and his abdominal aortic aneurysm to become greatly enlarged)" Michael alleged that five months later, he was doing presses above his head with a dumbbell when he "heard what sounded like gun shots and police sirens, which startled him (he is constantly in a nervous condition worrying about the police storming his residence because of what [Joan], [Paul] and [Menefee] previously [said and did], to such an extent he immediately dropped the dumbbell down from above his head" Michael alleged he suffered an eye injury from this incident. The alleged source of this fright and resulting personal injuries was the knowledge that Menefee and Joan reported to the police that Ingrid had been kidnapped by David and/or Michael, and Michael's alleged fear the police might storm his house.

As against Ingrid, Michael alleged that "[Ingrid] negligently and carelessly failed to telephone [Menefee] or leave a note (taped to the front door of her residence and/or placed in another conspicuous place within or outside the residence) advising [Menefee] that she was going with [David] over to his residence on Barnard Dr. to see his new kitten and visit a short while with [Michael]. She likewise negligently failed to telephone [Joan] to tell her, or leave a message, that she was going with [David] to see his new kitten and to visit with [Michael] at their residence, and that she would be returning home shortly, or within a reasonable time; and that if either [Menefee] or [Joan] had any questions, they could call her on her cell phone or Michael and [David's] home phone, or [David's] cell phone."

D. Consolidation of Coulter I, Coulter II and Coulter III

On October 4, 2010, *Coulter I*, *Coulter II* and *Coulter III* were ordered consolidated. Around that same time, demurrers were filed challenging the complaints in *Coulter II* and *Coulter III*.

In his combined opposition to the demurrers, Michael alleged that Ingrid and Menefee owed Michael a duty of care to warn each other of Ingrid's voluntarily going to Michael's residence. He asserted they "both realized and knew that [Menefee] would negligently believe that [Ingrid] had been taken to [Michael's] residence against her will, and that it was reasonably foreseeable that [Michael would] sustain injury from [Menefee] calling the police regarding kidnapping, among other things." Michael further argued that his overhearing the telephone conversation between Joan, Menefee and David

"regarding the prospective false police report" was "sufficient to bring him within *Thing v. La Chusa* (1989) 48 Cal.3d 644 [*Thing*]."

E. Dismissal and Deconsolidation of Coulter III

On December 10, 2010, the court heard the demurrers and took them under submission. Michael did not designate the court's final ruling as part of the record on appeal.

On or about December 14, 2010, the court issued its decision on the demurrers. The demurrer by Ingrid to the complaint in *Coulter III* was sustained without leave to amend and the complaint in *Coulter III* was dismissed. The basis for the court's ruling cannot be determined because Michael has not included the court's order as part of the record on appeal.

Thereafter, on December 15, 2010, the court ordered *Coulter III* deconsolidated.

F. Bench Trial in Coulter I and Coulter II

Coulter I and *Coulter II* were originally scheduled for trial on April 8, 2011. The parties stipulated and agreed that a 45-day continuance of the trial to July 15, 2011, was necessary in light of remaining discovery and the recent substitution of counsel for Menefee. The court continued the trial date to July 15, 2011.

On Friday, July 15, 2011, the parties appeared for trial call, announced they were ready to proceed and waived jury. On Monday, July 18, 2011, the bench trial commenced. Michael moved to continue the trial again, and the court denied Michael's motion. The specific basis for the motion cannot be ascertained from the clerk's transcript because no written moving papers were filed with the court.

The bench trial lasted less than one day. Defendants' motion for nonsuit was taken under submission. The court also took the case under submission.

On July 22, 2011, the court issued its written decision. In its decision, it was noted that through various pretrial motions, Michael's remaining claims were limited to quiet title, defamation and conversion. The trial court found Michael failed to meet his burden of proving his remaining claims by a preponderance of the evidence and that the defamation claim was barred.

On August 8, 2011, the court entered judgment against Michael.

G. Michael's Appeal

Michael's notice of appeal was filed on September 6, 2011. The notice of appeal specified that Michael was appealing from the judgment in favor of Menefee and Ingrid entered on August 8, 2011, in *Coulter I and Coulter II*. It further stated: "This Appeal is based upon errors of law in evidentiary rulings during the trial, and upon errors of law and Erroneous Findings of fact and law in the judgment rendered. [¶] Plaintiff [Michael] further appeals from the Court's denial of Plaintiff's motion for continuance of trial made on July 18, 2011 on the grounds that the Court committed reversible error and abuse of discretion in refusing to continue the trial-plaintiff's file and other evidentiary materials had been lost shortly before the time of the motion for continuance."

Michael only designated a clerk's transcript with portions of the pleadings on file with the court. He did not designate the reporter's transcript of the bench trial.²

I. STANDARD OF REVIEW

We review de novo the courts order sustaining the defendants' demurrer. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) In doing so we review the facts alleged in the complaint to determine whether the complaint states a cause of action on any available theory. (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.)

As to the denial of Michael's request for a continuance, the "decision to grant or deny a continuance is committed to the sound discretion of the trial court." (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984; and see Cal. Rules of Ct., rule 3.1332(d).) In making such a decision, the court may be called upon to make a factual determination as to whether to believe and/or give credence to the reasons for the requested continuance. With regard to this factual determination, "the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) ""We have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the

² Michael belatedly attempted to augment the record to include the reporter's transcript of the trial, which we denied as it was filed after the defendants filed their respondents' brief, giving them no opportunity to respond to any arguments related to matters appearing in the reporter's transcript.

reasonable inferences that may be drawn therefrom." (Johnson v. Pratt & Whitney Canada, Inc. (1994) 28 Cal.App.4th 613, 622-623.)

II. ANALYSIS

A. Waiver

As we have noted, *ante*, *Coulter III* was deconsolidated in December of 2010 when the trial court issued its ruling on the demurrers and dismissed that action. Michael's notice of appeal was not made from the judgment in that action, but only from the consolidated cases of *Coulter I* and *Coulter II*. Thus, Michael has waived the right to challenge the ruling sustaining respondents' demurrer to the complaint in *Coulter III*.

Similarly, by only designating the clerk's transcript on this appeal, we cannot review the merits of his request for a continuance as the reason for the request, and the court's findings in denying a continuance, appear only in the reporter's transcript. His assertion in his opening brief that good cause existed for a continuance because "[p]laintiff's complete file disappeared shortly before trial" is made without citation to the record on appeal, and thus may not be reviewed on appeal. "It is the duty of a party to support the arguments in its briefs by appropriate reference to the record" (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856; see also *Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) If no citation is furnished, we may treat the point as waived. (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

Moreover, as we shall explain, *post*, even if we were to consider Michael's claims on the merits, they are unavailing.

B. *The Demurrer in Coulter III Was Properly Sustained*

"[T]he law requires more than a mere failure to exercise care and a resulting injury. There must be a legal duty to exercise care under the circumstances, owed to the person injured, and a breach of that duty must be the proximate cause of the resulting injury. [Citations.] Thus, the determination that a duty of care exists is an essential precondition to liability founded on negligence." (*Hooks v. Southern Cal. Permanente Medical Group* (1980) 107 Cal.App.3d 435, 443.) "The threshold determination that a duty is owed [to] the plaintiff is a question of law within the exclusive province of the court." (*Ibid.*)

Michael's sole basis for his assertion that Ingrid owed a duty of care to him are the holdings in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 (*Tarasoff*) and *Thing, supra*, 48 Cal.3d 644. However, *Tarasoff* and *Thing* do not support the imposition of a duty of care on the part of Ingrid as to Michael.

As to *Thing, supra*, 48 Cal.3d 644, Michael's citation to that case is not helpful as that case only held that a family member could not recover for negligent infliction of emotional distress when that family member did not witness the victim being injured. (*Id.* at p. 669.)

In Michael's opening brief he asserts that Ingrid had a duty to warn Menefee that she had gone voluntarily to his house because she knew he would call the police when he discovered she was not at her residence. However, no such duty to warn exists in the absence of a "special relationship" between the parties that does not exist in this case.

Tarasoff and subsequent cases note that "as a general matter, there is no duty to act to protect others from the conduct of third parties. [Citations] But . . . , courts have recognized exceptions to the general no-duty-to-protect rule, one of which [is] the 'special relationship' doctrine" (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 235, fns. omitted, citing in part to *Tarasoff, supra*, 17 Cal.3d at p. 435.) The circumstances leading courts to find the existence of a special relationship, and in turn a duty of care to warn of the actions of a third party, are not present in this case. Rather, the relationships alleged in *Coulter III* are governed by the holding in *Hansra v. Superior Court* (1992) 7 Cal.App.4th 630, 645 (*Hansra*), in which the Court of Appeal found no duty of care existed.

In *Hansra*, a husband shot and killed his wife, then killed himself. (*Hansra, supra*, 7 Cal.App.4th at p. 633.) Daughters of wife and wife's estate sued husband's mother and brother, alleging they knew of the husband's dangerous propensities, failed to control husband, failed to warn wife, and, alternatively, incited husband to violence. (*Id.* at pp. 633-636.) The Court of Appeal in *Hansra* found under the facts of that case there was no duty of care to control or warn. (*Id.* at pp. 634, 647-648.)

The *Hansra* court went on to discuss what types of special relationships warranted the imposition of a duty of care. (*Hansra, supra*, 7 Cal.App.4th at pp. 639-645.) "The first category, special relationships between the defendant and person whose conduct needs to be controlled, includes the relationships between parent and child [citation], master and servant [citation], the possessor of land or chattels (who has a duty to control the conduct of a licensee) [citation], and "one who takes charge of a third person whom

he knows or should know to be likely to cause bodily harm to others if not controlled. . . ." [Citation.] In all of the above relationships, the ability to control the third party is essential. "The absence of such an ability is fatal to a claim of legal responsibility' Where, as in the instant case, the natural relationship between the parties . . . creates no inference of an ability to control, the actual custodial ability must affirmatively appear.'" (*Hansra, supra*, 7 Cal.App.4th at p. 645.)

The Court of Appeal in *Hansra* then rejected plaintiffs' assertion that a blood relationship with the aggressor, and the mother-in-law and brother-in-law relationship with the victim, created a special relationship sufficient to impose a duty of care to control or to warn. (*Hansra, supra*, 7 Cal.App.4th at pp. 645-646; see also *Wise v. Superior Court* (1990) 222 Cal.App.3d 1008, 1014 [wife of sniper did not owe duty of care to control husband's actions].)

Likewise, in this case no special relationship existed between Ingrid and Menefee that would give rise to a duty of care, and Ingrid was not in a position to control the alleged actions of Menefee. Thus, the demurrer in *Coulter III* was properly sustained without leave to amend.

C. The Court Did Not Abuse Its Discretion in Denying the Request To Continue the Trial Date

We review a court's decision to deny a request for a continuance under the abuse of discretion standard. (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170-171.)

Michael cannot establish he made a proper continuance request, let alone that he made a sufficient showing of good cause without the reporter's transcript showing the basis for his request and, in the absence of a written affidavit filed with the court in support of the request. In the absence of the reporter's transcript showing the basis for a trial continuance and the trial court's reasons for denying the request, all presumptions and inferences must be drawn in support of the trial court's decision. (*Mears v. Mears* (1962) 201 Cal.App.2d 408, 413.) "All intendment and presumptions are made to support the judgment on matters as to which the record is silent" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956), and there can be "no abuse of discretion requiring reversal if there exists a reasonable or fairly debatable justification under the law for the trial court's decision or, alternatively stated, if that decision falls within the permissible range of options set by the applicable legal criteria." (*Id.* at p. 957.)

The available record (the clerk's transcript) shows the court did not abuse its discretion in denying the request for a continuance. The parties appeared for trial call on Friday, July 15, 2011. According to the minutes, Michael did not request a continuance of the trial at that time and, instead, waived jury, indicating he was ready to proceed. At the commencement of the trial on Monday, July 18, 2011, Michael made his oral continuance request. Based upon the fact that Michael was ready to proceed to trial on Friday and did not indicate a need for a trial continuance at that time, the court was entitled to reject Michael's reasons for requesting a continuance.

Even if we were to consider Michael's reason for his continuance request set forth in his opening brief that "[p]laintiff's complete trial file had mysteriously vanished following a visit to the law library shortly before trial," he cannot establish error. Code of Civil Procedure section 595.4 requires that a "motion to postpone a trial on the ground of the absence of evidence can only be made on affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." The record on appeal shows no such affidavit was filed by Michael.

DISPOSITION

The judgment in *Coulter III* and the order denying Michael's request for a continuance in *Coulter I* and *II* are affirmed. Respondents shall recover their costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.