Filed 6/25/12 Trexler v. Webb CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SHARLENE TREXLER, as Successor in Interest, etc., Plaintiff and Appellant, v. ROBERTA LYNN WEBB et al., Defendants and Respondents.	E051880 (Super.Ct.No. RIC497141) OPINION

APPEAL from the Superior Court of Riverside County. Kenneth G. Ziebarth, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Ritchie, Klinkert & McCallion, James E. Klinkert and Paul J. Gutierrez, for Plaintiff and Appellant.

Scott Showler for Defendants and Respondents.

I. INTRODUCTION

Plaintiff and appellant Sharlene Trexler, as successor in interest to Connie Gates, appeals from the trial court's order granting the motion of defendants and respondents Roberta Lynn Webb, Kivett Realtors, Inc. (Kivett), Garey Donald Teeters, and Peter Tripp for new trial in Trexler's action for elder financial abuse. Trexler contends the trial court abused its discretion because its statement of decision was not based on evidence at trial and was inconsistent with California law. We conclude that although the trial court erred in basing its decision as to economic damages, and in part, its decision as to punitive damages, on matters not in evidence, "'a verdict for an amount considerably less than that awarded [by the jury] would have had reasonable and substantial support in the evidence'" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 379 (*Horsford*), and we must therefore affirm the order.

II. FACTS AND PROCEDURAL BACKGROUND

A. The Parties

Kivett is a California corporation licensed as a real estate broker. Teeters is the sole shareholder and designated broker officer who qualified Kivett for its broker's license. Teeters also owned another corporation, Valley View Mortgage (Valley View), with a mortgage broker's license and acted as its designated broker officer. Kivett and Valley View were part of an "affiliated business arrangement" owned by Teeters, the existence of which was the subject of a disclosure form provided to clients.

Webb was employed as a licensed real estate salesperson by Kivett in 2006. Tripp was the manager of Kivett's Hemet office in 2006. Janet Lynn Wiley[1] was a loan agent for Valley View in 2006, and she was also a licensed real estate salesperson. Kivett and Valley View had adjacent offices in the same building, and Webb and Wiley had previously done business together.

Gates, born in 1940, was the seller of a home and the purchaser of a mobilehome in San Jacinto in 2006; both transactions were handled by defendants. Gates had a history of alcoholism, depression, bipolar syndrome, seizures, and schizophrenia, and she had had several lengthy stays in mental health facilities. She received social security disability income, for which Trexler, her daughter, had been appointed the financial manager. Trexler also had a power of attorney for Gates. Trexler formerly had a real estate license and was licensed in Oregon as a manufactured home inspector and installer.

B. The Transactions

In 2006, Gates was the owner of a home on 5th Street in San Jacinto. The property, which Gates purchased in 1973, included a 637-square-foot main house and a 400-square-foot converted garage. Gates lived in the home with a companion, David Stilwell.

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[1] Trexler named Wiley as a defendant in her complaint. Wiley entered into a settlement with Trexler, and Trexler dismissed her from the case. Wiley is not a party to this appeal.

Stilwell testified that Gates wanted to sell the 5th Street house because she was upset that Trexler had rented the house to Gates's stepdaughter while Gates was living in Oregon before 2002. Stilwell saw a "for sale" sign on a mobilehome on Marcy Way in a senior complex and told Gates about it.

In February 2006, Webb met Gates and provided her a listing packet that included information about Webb, Kivett, and the market, including four sales described as comparables. However, three of those sales had taken place 16, 17, and 19 months earlier, respectively, and one of the properties had recently resold for $105,000 more than the sales price Webb had indicated. Webb had assembled information on additional comparable sales in the vicinity of the 5th Street house, including many more recent transactions. In the promotional packet Webb gave Gates, a "suggested list price" of $148,750 was shown.

Meanwhile, in early 2006 Wiley was looking for a good real estate deal.

On February 27, 2006, Webb and Kivett listed the 5th Street house for sale at a price of $185,000. Webb and Kivett did not do any advertising for the house, did not hold any open houses, and did not put the property on the multiple listing service until February 28, when it was shown as a "sold" listing. Webb did not remember if a "for sale" sign had been placed on the property. On the same day the 5th Street house was listed, Webb wrote an offer for Wiley to purchase the property for $178,000. Gates was to pay for all necessary termite repair work. Kivett represented both the buyer and the seller in the transaction.

Also on the same day, Webb wrote an offer for Gates to purchase the mobilehome on Marcy Way, also listed by Kivett. The offer for the mobilehome was for the full listed price of $120,000, all cash, and again Gates was to pay for all necessary termite repair work.

In the first week of April 2006, Trexler, who lived in Oregon, learned of the pending real estate transactions. She asked Tripp on Friday, April 7, 2006, for information about the transactions. Specifically, she wanted to know what the increase in property taxes would be for the new house. Gates was on social security disability, and she was not allowed to have over $2,000 in cash reserve. Trexler also had concerns that the new property was a 1973 manufactured home; from her experience, she knew it was difficult to obtain financing for such homes, which would limit the ability to sell such a home in the future. Tripp told Trexler he would get back to her, and after her conversation with him, she believed he would follow up with her before anything else occurred; however, she never heard back from him. On Monday, April 10, Gates told Trexler the transactions had already been recorded and closed. Trexler later learned the transactions had recorded on Wednesday, April 12.

Gates had a seizure/convulsion on April 12, 2006, the day the escrow closed, and she was hospitalized for two and a half weeks. Stilwell moved all her belongings to the Marcy Way mobilehome. Gates was in and out of the hospital several more times until she died on October 2, 2006.

Three months after purchasing the 5th Street house, Wiley resold it for $239,000. She did not place the property on the multiple listing service or list it with a realtor, but she placed a "For Sale by Owner" sign on the property and immediately received 10 to 15 inquiries from potential buyers. She obtained the purchase offer a couple of weeks after placing the sign.

At trial, Tripp testified that mobilehomes, such as Marcy Way, are difficult to finance and sell. He claimed he had discussed those facts with Gates but had provided no written disclosures.

Alan Wallace, an expert witness for Trexler, testified that real estate brokers and salespersons owe fiduciary duties to their clients, including "a duty to advise and protect the clients" and to "put the client's interest ahead of" their own. He testified that use of misleading comparable sales data to induce the listing of property below market value would be a breach of a broker's fiduciary duty, and in the case of an elderly seller, the breach would be "even more egregious." He testified the fact that the 5th Street house was listed and sold the same day to an employee of a company owned by the same designated broker, without any advertising, "for sale" sign, or exposure on a multiple listing service, indicated the transaction had not been at arm's length. In Wallace's opinion, defendants' conduct was, at minimum, "reckless" when they went ahead and closed the real estate transactions without further contact with Trexler after she raised a "red flag" about her mother's mental health. Also in his opinion, sales that had occurred 17 or 18 months before the current listing were not considered comparable. And if a

person wants to make a full price offer to purchase property, the broker has a duty to advise the person that he or she is paying more than market price. In his opinion, Wiley's subsequent resale created a reasonable inference that the 5th Street house had been listed at well below market value.

Tripp also reviewed the transaction file, and he approved of Webb's conduct in relation to the transaction. He prepared a memorandum for the transaction file after his conversation with Trexler on April 6, 2006. After that conversation, he arranged for Gates to come to his office. Gates arrived with Stilwell on Monday, April 10. They met for 30 to 45 minutes, and Gates appeared to understand the discussion. Tripp stated Gates was enthusiastic about the transaction and irritated with her daughter. He testified that Trexler never told him she had a power of attorney or an unrecorded deed to the 5th Street house. He testified that he explained to Gates the utility costs and maintenance costs would be higher for the Marcy Way mobilehome. A note in the escrow file dated April 5, 2006, and signed by Gates stated: "I'm satisfied with the arrangements that were made and I want to go forward to close escrow." Stilwell testified the note was not in Gates's handwriting, and her first name was misspelled "Constanse" in the note.

C. Evidence of Economic Damages

Trexler, who was qualified as a real estate valuation expert, testified that the 5th Street house was worth between $230,000 and $250,000 in February 2006. She based her estimate on her personal knowledge of the attributes of the house as well as on her investigation and analysis of comparable sales data from Webb's transaction file.

Defendants' appraiser testified the value was $190,000. As noted, Wiley resold the house for $239,000 within about three months, without conducting any formal marketing.

In September 2006, Trexler began looking into the suitability of the Marcy Way mobilehome for Gates. She learned that Gates's utility bills were much higher than they had been at the 5th Street house. Moreover, the mobilehome had two wood stoves, and Gates had emphysema and chronic obstructive pulmonary disease. When Trexler first saw the Marcy Way mobilehome in September 2006, she saw stains that indicated long-standing water intrusion. A certified mold inspector testified he had inspected the Marcy Way mobilehome in February 2007. His inspection revealed extensive water damage and "mold-like substance" in many areas of the property. Air samples revealed mold spores in several rooms. A manager and estimator for a company certified and licensed in removal of hazardous materials testified that he had prepared an estimate in August 2007 for removal and disposition of mold-contaminated materials at the Marcy Way mobilehome. His estimate for the work was $24,700, and he testified the cost may have increased 10 or 15 percent since then.

Gates paid $7,120 in commissions to defendants, $3,320 for termite damage repairs, $1,404 closing costs for the sale of the 5th Street house, and $709 in closing costs for the purchase of the Marcy Way mobilehome.

D. Evidence of Mental Suffering

Stilwell testified that around the time of the transactions, Gates was not "able to get out of bed and act normally during the day." She had "panic attacks [and] similar

outbursts" and had to be tied down "during all of the transactions that [were] going on." Stilwell continued: "She was even in the hospital at that time. I called 911, she just—total collapse." Gates told him "that she shouldn't—she really got in over her head, and she didn't understand it all. It was confusing and too fast and she wanted [it] to stop." When asked why she felt she could not stop the transactions, Stilwell testified: "She was confused. She didn't know how to stop it. She didn't want to go forward. That's part of her disease that was going on at the time. And there . . . wasn't anything you could say or do. Once something like that got ahead of her, and I can't stop her from doing anything that she—that was—she was in that state of mind. I just couldn't do it." Gates had stated she was afraid of being sued if she halted the transactions. When asked about Gates's mental state after the purchase of the Marcy Way mobilehome, Stilwell testified she "was getting worse. She had been in the hospital so many times during that time. Hemet Valley. And as a matter of fact in April, she was in the hospital, I picked her up from the hospital, brought her to [the] Marcy property, back she went, brought her back, back she went, brought her back. Last time she didn't make it." Stilwell had told Webb that Gates was not capable of making decisions. The trial court sustained a relevance objection to a question about whether Gates ever expressed remorse about getting involved in the real estate transactions.

Trexler testified that Gates "was scared that she could not stop what had been happening. And felt remorse for what she had done without telling me soon enough. But

felt pressured that she was going to be sued if she didn't follow through. And I think was more embarrassed about even having to admit what she did."

Webb testified that she talked to Gates about 25 times during the transactions, and Gates was excited about the transactions. The escrow officer also testified that Gates seemed "enthusiastic" and "[v]ery excited about getting a new home." Also, as recounted above, Tripp testified that on April 10, 2006, Gates was enthusiastic about the transactions and irritated with Trexler.

E. Motion for Directed Verdict and Jury Verdict, and Motion for New Trial

Following trial, defendants moved for a directed verdict on all claims. The trial court denied the motion, explaining: "And in considering each of these arguments, this court believes that there is some evidence with reference to each of these items and it's a matter of argument to the jury. And the jury is going to have to make the determination, so the motion is denied."

The jury entered a special verdict finding that all four defendants had taken or assisted in taking Gates's property "for a wrongful use or with the intent to defraud or by undue influences." The jury awarded Trexler $112,825 in economic damages and $200,000 in noneconomic damages.

F. Punitive Damages

Evidence showed that Kivett's net worth was $1.7 million, Teeters's was $5 million, Tripp's was $200,000, and Webb's was zero.

The jury found that Trexler proved by clear and convincing evidence that Teeters or an officer, director, or managing agent had authorized the conduct of Webb and/or Tripp, knew of the wrongful conduct of Webb and/or Tripp, and adopted and approved of their conduct after it occurred. The jury found that defendants acted with recklessness, malice, oppression, or fraud and awarded a total of $515,000 in punitive damages ($2,500 against Webb, $12,500 against Tripp, $400,000 against Teeters, and $100,000 against Kivett). Judgment was entered on the verdict.

G. Motion for New Trial

Defendants moved for a new trial on the ground of excessive damages. The parties provided further briefing and the trial court held a hearing, following which it entered a statement of decision.

1. Economic Damages

In its statement of decision, the trial court summarized the evidence regarding the fair market value of the 5th Street house: Trexler had testified as to her opinion that the value of the property was $230,000 to $250,000; "a Mr. Peatross of Coldwell Banker had independently appraised the subject property to have a fair market value of between $180,000.00 and $200,000.00"; and a defense expert had testified the fair market value was $190,000. Although Wiley had sold the house for $239,000 three months after purchasing it, the trial court discounted that figure because "evidence was . . . presented

which indicated that she had spent some money to improve the property[2] before she was able to sale [*sic*] it for the higher price. . . . [and] that sale took place at a time when there was a rising market." The trial court noted Trexler had submitted into evidence a schedule of comparable sales that included 15 comparable sales that Webb had compiled. The trial court then conducted its own analysis of those comparable sales and determined that the average sales price was $190,500 and the average per square foot price was $271. Applying that multiplier to the square footage of the 5th Street main house, and excluding the square footage of the converted garage, the court calculated the value of the property at $172,627. The trial court then concluded that Gates did not lose any money when she sold the 5th Street house for $178,000.

The trial court also summarized the evidence regarding the fair market value of the Marcy Way mobilehome: five comparable sales were between $115,000 and $45,000 with an average of $88,409 and an average square foot price of $64.20. Applying that multiplier to the square footage of the Marcy Way mobilehome, the trial court calculated the value of the property at $92,448. The trial court therefore determined Gates had "lost $27,552.00, when she paid $120,000.00 for a mobile home that had an apparent fair market value of only $92,448.00, based on the comparable sales."

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[2] In fact, in our review of the record, we located no such evidence, although defendants' attorney made certain representations in his opening statement. And at trial, Trexler's counsel pointed out in his argument to the jury that no such evidence had ever been presented.

2. Noneconomic Damages

In its statement of decision, the trial court addressed noneconomic damages as follows: "[T]he only evidence on the issue of non-economic damages was the testimony of David Stillwell [*sic*] that having agreed to sell her 5th [S]treet residence and then purchase the Marcy Way mobile home that Ms. Gates was afraid that she would be sued if she tried to back out of both transactions. That fear was caused more by the actions of the plaintiff, than by any actions on the part of any of the defendants. Also, that fear could only have had a very short duration of the period from February 27, 2006, until the date escrow closed on April 12, 2006. . . . During most of that period, the evidence indicates that Ms. Gates was hospitalized because of health problems. If she was entitled to any damages, certainly the amount of $200,000.00 awarded by the jury was excessive."

3. Punitive Damages

Finally, the trial court addressed the punitive damages award. The trial court stated the listing price of $185,000 for the 5th Street house that Webb suggested to Gates was not unreasonable "for the reasons discussed above," and although Webb and Tripp may have been negligent in failing to attempt to negotiate down the price of the Marcy Way mobilehome, there was no evidence of recklessness, malice, oppression, or fraud toward Gates. The trial court therefore held that punitive damages were unjustified.

4. Ruling

The trial court granted the motion for new trial, subject to denial if Trexler consented to a judgment for economic damages only in the amount of $27,552.

III. DISCUSSION

A. Standard of Review

"The normal standard of review of an order granting a new trial motion is both well established and highly deferential. A new trial motion 'is addressed to the judge's sound discretion; [the judge] is vested with the authority, for example, to disbelieve witnesses, reweigh the evidence, and draw reasonable inferences therefrom contrary to those of the trier of fact; on appeal, all presumptions are in favor of the order as against the verdict, and the reviewing court will not disturb the ruling unless a manifest and unmistakable abuse of discretion is made to appear.' [Citation.] . . . While the reviewing court must consider only those reasons for granting the motion stated by the trial court in its order, within those confines the question on appeal from an order conditionally granting a new trial on the basis of excessiveness of damages is simply 'whether a verdict for an amount considerably less than that awarded [by the jury] would have had reasonable and substantial support in the evidence.' [Citation.]" (*Horsford*, *supra*, 132 Cal.App.4th at p. 379.)

B. Analysis

1. Standards for Granting Motion for New Trial on Ground of Excessive Damages

Under Code of Civil Procedure section 657, subdivision 5, a new trial may be granted on the basis that the jury awarded excessive damages. "When a new trial is granted . . . the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated. [¶] A new trial shall not be granted . . . upon the ground of excessive or inadequate damages, 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.) In addition, "(a) [an] order [granting a motion for new trial] shall not be affirmed upon the ground . . . of excessive or inadequate damages, *unless such ground is stated in the order granting the motion* and (b) on appeal from an order granting a new trial . . . upon the ground of excessive or inadequate damages, *it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons*, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons." (*Ibid.*, italics added; see also *Mercer v. Perez* (1968) 68 Cal.2d 104, 119.)

"[T]he appeal from an order granting a new trial depends upon the sufficiency of the reasons specified by the trial court. Whether these reasons are sufficient depends in

turn upon whether there is a substantial basis in the record for the trial judge's decision." (*Bigboy v. County of San Diego* (1984) 154 Cal.App.3d 397, 405-406.) "[G]iven the latitude afforded a judge in new trial motions, orders granting new trials are 'infrequently reversed.'" (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 751.)

A judge ruling on a motion for new trial is bound to consider the entire record: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "'This [constitutional] provision is a limitation on the power of the trial court, but when that court has acted and granted a new trial, we must *presume* that the trial court did consider the whole record and decided that it had committed prejudicial error, and unless an inspection of the record convinces us that it is otherwise, we will not disturb the order.' [Citations.]" (*Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1324.) "On appeal all presumptions are in favor of the order and against the verdict." (*Norden v. Hartman* (1952) 111 Cal.App.2d 751, 759.)

C. Trial Court's Damages Findings

1. Analysis

In our review, we may consider only those reasons the trial court stated for granting a new trial. (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 547.) The trial court's first stated reason was that economic damages were excessive because the trial court's own analysis of comparable sales led the court to determine that the listing price for the 5th Street house had been fair, and the price Gates paid for the Marcy Way mobilehome exceeded its fair market value by only $27,552.

Evidence Code section 813, subdivision (a) requires that the value of property be shown by the opinions of qualified persons identified in the statute, including "(1) Witnesses qualified to express such opinions. [¶] (2) The owner or the spouse of the owner of the property or property interest being valued. [¶] (3) An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest."

Evidence Code section 813 thus precludes the trier of fact from regarding proof of other sales as substantive evidence; rather, "'[t]he value of property may be shown only by the opinions' of qualified persons [citation]." (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 101, p. 649.) "The reason for this unequivocal position is thus stated: [¶] 'The value of property has long been regarded as a matter to be established in judicial proceedings by expert opinion. If this rule were changed to permit the court or

jury to make a determination of value upon the basis of comparable sales or other basic valuation data . . . the court or jury would be permitted to make a determination of value without the assistance of experts qualified to analyze and interpret the facts established by the testimony and to make an award far above or far below what any expert who testified considers the property is worth—even though the court or jury may know little or nothing of property values and may never have seen the property . . . or the comparable property mentioned in the testimony . . . the long established rule that value is a matter to be established by opinion evidence should be reaffirmed or codified.' [Citation.]" (*Id.* at pp. 649-650.)

In *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332, property owners appealed the trial court's conditional grant of a new trial in a condemnation case unless the property owners accepted a remittitur. The property owners contended the trial court had "erred by either considering impermissible facts or facts having no support in the record or by ignoring uncontradicted evidence." (*Id.* at p. 345.) The trial court had taken the price the owners paid for the property in 1968, added the costs of grading and filling, and then increased the sum by 20 percent, which the trial court concluded was the value of the property in early 1969. The trial court then compared that figure with the jury's determination of value in July 1972. (*Id.* at p. 346.) The appellate court held that the trial court had abused its discretion by attempting to arrive at a value for the property at a time other than the established value date. Moreover, "[s]ince the opinions of valuation witnesses are the only permitted

evidence of the value of property (Evid. Code, § 813, subd. (a)), there appears to have been no basis for the court's determination of the 1969 value of the subject property. And without a valid basis for establishing the subject property's improved value in early 1969, the trial court lacked the ability to make any comparison between that value and the jury's verdict." (*Id.* at p. 348, fn. omitted.) The court therefore concluded that the new trial order could not be sustained on the ground of excessive damages. (*Id*. at p. 349.)

Here, similarly, the trial court erred in making its own determination of the value of the 5th Street house and the Marcy Way mobilehome based on the trial court's analysis of comparable sales. Hence, the trial court's conclusions regarding economic damages do not support its decision to grant a new trial. Moreover, the trial court based its conclusions on punitive damages in part on the same error: the trial court stated that the listing price for the 5th Street house was not unreasonable "for the reasons discussed above," which included the trial court's erroneous calculations.

However, the trial court also determined that the jury's award of noneconomic damages exceeded that which was fair and reasonable in light of the scant evidence that was introduced on the issue. The trial court stated that the only evidence as to noneconomic damages was Stilwell's testimony that Gates feared being sued if she cancelled the transactions and that any emotional harm to Gates had been caused by Trexler rather than by defendants. In ruling on the motion for new trial, the trial court was entitled to disbelieve witnesses and reweigh the evidence. (*Klinger v. Henderson* (1969) 276 Cal.App.2d 774, 777.)

Trexler argues the trial court's statement that the *only* evidence on the issue was Stilwell's limited testimony shows that the trial court did not consider all the evidence in the record as it was required to do. We disagree. In our view, the trial court's statement indicates not that it failed to consider all the evidence in the record, but rather that it believed the only evidence showing causation of emotional distress was Gates's fear of being sued, which the trial court attributed to Trexler, not defendants. We must presume in support of the trial court's order all reasonable inferences from the record. We therefore conclude that substantial evidence in the record supports the trial court's findings, even if the jury had reached different conclusions on the same evidence. We find no abuse of discretion in the trial court granting a new trial on the ground that the jury's award of noneconomic damages was excessive.

Trexler argues, however, that the evidence supporting the jury's award of noneconomic damages was undisputed, and the trial court therefore erred in substituting its own judgment for that of the jury. The evidence was not undisputed—in contrast to Stilwell's testimony about Gates's distress, other witnesses testified she was enthusiastic about the transactions and irritated with Trexler. Trexler's argument therefore fails on the merits.

Trexler also argues that defendants speculate that the trial court rejected much of the evidence supporting the jury's award of noneconomic damages because of insufficient proof of a causal connection between that evidence and Gates's distress, but the trial court failed to state that basis for its decision in its statement of reasons.

However, the trial court did address causation: the trial court concluded that Gates's distress was caused more by Trexler's conduct than by defendants' conduct.

Under the stringent standards that govern our review of the trial court's order, we conclude "'a verdict for an amount considerably less than that awarded [by the jury] would have had reasonable and substantial support in the evidence'" (*Horsford*, *supra*, 132 Cal.App.4th at p. 379), and we must therefore affirm the order.

IV. DISPOSITION

The order granting a new trial is affirmed. The parties are to bear their own costs.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.