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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

PGA WEST RESIDENTIAL
ASSOCIATION, INC. et al.,

Plaintiffs and Respondents,

v.

DEMPSEY K. MORK et al.,

Defendants and Appellants.

E054276

(Super.Ct.No. INC079090)

OPINION

APPEAL from the Superior Court of Riverside County. Randall Donald White,
Judge. Affirmed in part; reversed in part with directions.

Law Offices of Martin N. Buchanan and Martin N. Buchanan for Defendants and
Appellants.

Peters and Freedman, Keenan A. Parker and Zachary R. Smith for Plaintiff and
Respondent PGA West Residential Association, Inc.

Law Offices of David C. Werner and David C. Werner for Plaintiffs and
Respondents Lewis and Gail Wyatt.

Defendants and appellants Lewis and Patricia Mork (the Morks) appeal from the judgment entered against them and in favor of plaintiffs and respondents Gail and Lewis Wyatt (the Wyatts) and PGA West Residential Association, Inc. (PGA West), following a court trial on their complaints for damages based, among other things, on the Morks' alleged breach of contract and negligence. In this appeal, the Morks contend the trial court erred by excluding relevant evidence; the liability determination is not supported by substantial evidence; the Wyatts' damage award does not include an offset for their settlement with PGA West and also improperly includes emotional distress damages; the damage award conflicts with the injunction the trial court issued; and the injunction improperly extends to successors in interest of the Morks.

We agree with the Morks' claims regarding damages and the injunction improperly extending to the successors in interest. Therefore, we will reverse the judgment with directions to the trial court to modify the judgment, accordingly. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The Morks and the Wyatts owned adjacent freestanding condominiums¹ in PGA West, a common interest development in La Quinta.² The Wyatts used their unit as a vacation home, with the goal of eventually living there in retirement. In April 2008, a

¹ The units in question are referred to in the trial court and occasionally hereafter as fairway units.

² The Wyatts' unit is referred to as 55-069 Riviera, and the Morks' unit is 55-051 Riviera.

cleaning service discovered the interior of the Wyatts' condominium had mold and moisture damage. The Wyatts investigated and concluded the water had entered through an exterior wall that served as the common boundary between their condominium and the Morks' patio area. The Wyatts sued the Morks and PGA West for, among other things, breach of contract based on the pertinent conditions, covenants, and restrictions (CC&R's). PGA West also sued the Morks for breach of the CC&R's, breach of contract,³ and negligence, alleging the Morks had altered the drainage in the common area courtyard and patio area of their condominium and, as a result, eliminated the drainage swale that allowed water to move away from the Wyatts' unit and flow to the adjacent golf course. After the two lawsuits were consolidated, PGA West settled with the Wyatts, contingent upon the trial court granting PGA West's motion for judgment on the pleadings on the Morks' cross-complaint,⁴ and also for a finding that the settlement had been made in good faith. PGA West filed a combined motion for judgment on the pleadings and for a determination that the settlement with the Wyatts was in good faith. The trial court granted both motions. As a result, the Morks' cross-complaint and the Wyatts' claims against PGA West were dismissed.

³ Before trial, PGA West dismissed its second cause of action for breach of contract based on an alleged maintenance agreement between the Morks and PGA West, and its seventh cause of action seeking express indemnity.

⁴ The Morks' cross-complaint asserted comparative fault and contribution claims against PGA West, both of which are claims that may only be asserted as affirmative defenses. (See former Civ. Code, § 1368.4, current Civ. Code, § 5985.) Therefore, PGA West moved for judgment on the pleadings on the Morks' cross-complaint.

In a court trial on the remaining consolidated lawsuits against the Morks, PGA West and the Wyatts presented evidence to support their theory that in the course of making various improvements, including constructing a swimming pool, the Morks and their predecessors in interest had altered the original grade of the patio and limited common area courtyard adjacent to their unit. PGA West and the Wyatts claimed that, as a result of the Morks' changes to the established grading, surface water drained away from the Morks' unit and collected in a two-foot-wide planter that extends the length of the common area wall, which separates the Morks' patio area from the interior of the Wyatts' condominium. The collected water entered the Wyatts' master bedroom by flowing under the bottom plate of the common area wall. In their defense, the Morks asserted they were not responsible for maintaining the area in question because that area is a designated limited common area and, therefore, is PGA West's responsibility.

The Wyatts and PGA West presented the testimony of Robert Mayer, the Wyatts' predecessor in interest, who testified that in 2003 water entered his master bedroom after a rainstorm and saturated a three- or four-foot square area of carpet located near the bed. In investigating the cause, Mr. Mayer discovered the Morks had poured a concrete slab in the patio area of their unit and that slab abutted the wall of Mayer's bedroom. Mayer contacted the Morks and PGA West about the water damage. The Morks eventually paid to replace Mayer's damaged carpet.

William Bobbitt, PGA West's landscape manager, testified in pertinent part that after the 2003 water intrusion into Mayer's master bedroom, he inspected the patio area between the Mork and Mayer condominiums. The southern boundary of the Morks'

patio area is the north wall of Mayer's condominium. In other words, there is no set back.⁵ The Morks had installed a concrete pad, the surface of which was higher than the weep screed of the common area wall. In addition, rocks and dirt in the planter area running the length of the common area wall were higher than the weep screed.⁶ Bobbitt told Dempsey Mork the best solution would be to remove the concrete pad, lower the dirt grade, and start over.

In 2007, the Morks constructed a swimming pool in their limited common area backyard, after applying to and obtaining approval from the PGA West's Architectural Review Committee. PGA West's expert witness, Thomas Newsom, testified, in pertinent part, that the original drainage plan for the Morks' patio area and common area backyard consisted of a high point, near where the Morks' pool pump currently is located. That high point effectively directed half of any surface water to drain to the street and the other half to drain back toward the golf course in an earthen swale. The Morks apparently eliminated that high point when they constructed the swimming pool in their backyard.

Newsom also testified that the current drainage consists of four drain inlets in a two-foot-wide planter that runs the length of the common area wall between the Morks' patio area and the Wyatts' unit. The Morks' flagstone patio is two and one half to three

⁵ The actual wall in question is a designated common area and will sometimes be referred to as the common area wall.

⁶ Weep screed refers to metal flashing that is installed between the stucco and building paper at the bottom of an exterior wall to provide a mechanism for water that has been absorbed through the porous stucco to flow out rather than be absorbed by the interior wall. (See <<http://www.wisegeek.com/what-is-a-weep-screed.htm>> [as of Oct. 21, 2014].)

inches above the weep screed in the common area wall and, therefore, above the surface of the floor in the Wyatts' unit. That patio, which makes up two sides of the two-foot-wide planter, slopes toward the planter and the common area wall.⁷ Soil and other organic matter in the planter are at the level of the weep screed, although the building code requires soil to be four inches below the weep screed and slope away from the structure. Newsom expressed the opinion that the planter trapped water. As the level of the trapped water rises, leaves that fall from plants in the planter float up and plug the drain inlets. The trapped water in the planter would then take the path of least resistance and flow across the bottom plate of the common area wall into the Wyatts' condominium. In Newsom's opinion, the water in the planter came from a broken irrigation line in the Morks' planter.

Eleazar Lua testified, in pertinent part, that he worked on the sprinklers in the Morks' planter in January 2008 after the Morks discovered a water leak. Lua determined the source of the leak was a pipe located next to what he described as the footing of the Wyatts' unit. The pipe's location and age made repair difficult, so Lua installed a new irrigation system in the planter, presumably after capping off the broken water line.

Joseph Johnson, a mold remediation expert, testified in pertinent part that he suspected the planter in the Morks' yard was a possible source of the water and resulting

⁷ PGA West claims photographs admitted into evidence as exhibits 1, 2, and 4 best depict the area in question. However, those exhibits are not included in the exhibits that were transmitted to this court. In the absence of the pertinent photos, we will assume the edge of the Morks' flagstone patio runs parallel to the common area wall, and the common area wall and the edge of the flagstone patio make up the two long sides of the planter. The Morks' flagstone patio also apparently encloses one short end of the planter.

mold in the Wyatts' unit. Johnson stated, "The reason we suspected [the water] was coming from that side of the wall . . . was . . . all the damage was located on that wall or near that wall at the lower end of the wall. It wasn't so much up on the higher side of the wall, but it was down near the floor. It certainly seemed to emanate from the floor and came up approximately two to three feet above the floor surface."

In their defense, the Morks argued, among other things, that PGA West's architectural review committee had approved the Morks' plans to construct the swimming pool. That approval extended to any changes in the grade or existing drainage of the area in question and thus precluded any claim against them based on those changes. They also argued that PGA West was responsible for maintaining the patio area where the planter is located.

The trial court found in favor of PGA West and the Wyatts on each of their causes of action. The trial court awarded damages to the Wyatts totaling more than \$1 million, and to PGA West totaling \$41,592.37. In addition, the trial court issued a permanent injunction against the Morks and in favor of the Wyatts and awarded both PGA West and the Wyatts their requested attorney fees. The Morks appeal from the subsequently entered judgments.

DISCUSSION

1.

SUFFICIENCY OF THE EVIDENCE

The Morks contend the evidence is insufficient to support the trial court's findings that they breached their duty under the CC&R's not to interfere with the established

drainage pattern of their lot and to maintain the grading of the side yard. We agree. However, we conclude the evidence supports a finding the Morks' planter and sprinkler system constituted a nuisance, and thus supports a finding the Morks violated the CC&R's. Consequently, we will not address the particulars of the Morks' contention.

A. Statement of Decision

Before addressing the sufficiency of the evidence, we first must say a word about the statements of decision the trial court purported to issue in this case. There is no indication in the record that any of the parties requested a statement of decision under Code of Civil Procedure section 632.⁸ Instead, at the conclusion of the presentation of evidence, in lieu of closing argument, the trial court asked the parties "to provide the court with a statement of decision based on the evidence, citations to the evidence, stating your . . . argument, no more than 10 pages." In accordance with the trial court's directive, the Morks and PGA West filed "proposed statements of decision," while the Wyatts apparently filed a "statement of decision." The Morks objected to plaintiffs' filings. Ultimately the trial court signed and filed documents entitled "statement of decision," which are in fact the respective judgments in favor of PGA West and the Wyatts.

⁸ Code of Civil Procedure section 632 states, in pertinent part, "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial."

Because the trial court did not refer to Code of Civil Procedure section 632, did not ask the parties to identify the principle controverted issues, and did not use any other terminology consistent with a statement of decision, we construe the above identified documents as written closing arguments and judgments. We treat them accordingly in this appeal.

B. Standard of Review

On appeal, we must affirm the judgment if it is supported by substantial evidence. “Substantial evidence is not any evidence—it must be reasonable in nature, credible, and of solid value.” (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51.)

C. Analysis

The primary issue at trial was who was legally responsible for maintaining the patio area between the Morks’ condominium and the common area wall. The Morks presented evidence to show the area in question is designated a limited common area. Under the terms of the CC&R’s, PGA West is responsible for maintaining limited common areas. PGA West, in turn, presented evidence to show that the Morks had altered the area in question by raising the concrete slab patio and allowing organic matter in the planter to collect and cover the weep screed. As a result, water pooled in the planter and invaded the Wyatts’ unit through the common area wall. In addition, PGA West argued that the Morks were negligent in that they failed to maintain the planter area in a way that prevented water from entering the Wyatts’ condominium.

Resolution of the parties’ contentions depends first on the terms of the CC&R’s. Conditions, covenants, and restrictions included in the declaration creating a common

interest development are enforceable equitable servitudes that inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both. (Former Civ. Code, § 1354, subd. (a).)⁹ California courts have not decided whether CC&R's form the basis for a breach of contract action. (See *Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1377, fn. 7.)

We need not resolve the issue of whether the CC&R's create a contractual duty between the association and property owners, or between individual property owners. Therefore, we need not determine whether the Morks were responsible for maintaining the side yard or interfered with the existing drainage pattern. As we shall explain, the CC&R's prohibited the Morks from maintaining a nuisance. The evidence is undisputed that in January 2008, the Morks discovered a leaking pipe in their patio area planter. The Morks had that leak repaired and at the same time had a new irrigation system installed in the planter. The Morks, even if not obligated to do so under the CC&R's, assumed the responsibility for repairing the leak, and of installing the irrigation system. Consequently, they also assumed the duty to maintain that system in a way that did not create a nuisance.

“The same rules that apply to interpretation of contracts apply to the interpretation of CC&R's. “[W]e must independently interpret the provisions of the document. . . . It

⁹ The Civil Code provisions pertaining to common interest developments were repealed in 2012, and new provisions, set out in Civil Code section 4000 et seq. became effective January 1, 2014. (See Stats. 2012, ch. 180, § 1.) In this opinion, all references are to the former Civil Code provisions in effect at the time pertinent to this action.

is a general rule that restrictive covenants are construed strictly against the person seeking to enforce them, and any doubt will be resolved in favor of the free use of land. But it is also true that the ““intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation.”” [Citation.]” (*Chee v. Amanda Goldt Property Management, supra*, 143 Cal.App.4th at p. 1377.) In other words, we are not bound by the trial court’s interpretation of the CC&R’s.

According to the condominium plan and the CC&R’s, the area next to the Morks’ unit in which the planter is located is designated a “patio,” and is included in the definition of a limited common area. More particularly, under section 1, article IX of the CC&R’s, which were introduced into evidence at trial, the association is “exclusively responsible for all maintenance, repair, upkeep and replacement of the Common Area, Association Property, and the Limited Common Area unless maintained by the Owner as set forth in Article IV, Section 5, and any facilities, landscaping, and structures located within such areas.” Article IV, section 5 is entitled “Rights in Limited Common Area of the Condominium Project,” and states in pertinent part, “The space comprising the Limited Common Area adjacent to a Unit is approximately depicted on the recorded Condominium Plan for each Unit. The actual space of the Limited Common Area shall include the space from the exterior walls of the building containing such Unit, to the as-built wall, fence, gate or other structures separating such area from other portions of the Condominium Project, or the area immediately adjacent to such Unit consisting of *patios*, courtyards, landscaping and walkways continuing to either the adjacent Lot Line or enclosed by a wall, fence, gate, or other structure separating such area from other

portions of the Common Area, including that portion of such wall, fence, gate, or other structure facing the Unit.” (Italics added.) Under section 5, the association will continue to maintain the limited common area if “(i) the Owner provides the Association with access by the Master Key held by the Association,” and “(ii) Such Owner does not alter existing landscaping or otherwise construct improvements in the Limited Common Area so as to increase the Association’s cost of maintenance.”

The evidence is undisputed in this case that the planter in which the irrigation system is located is in an area designated “P” on the recorded condominium development plan. The pertinent recorded plan states, “Each of those areas shown on this plan bearing the letter designation ‘P’ is an element of a unit consisting of a patio area. The lateral and vertical boundaries of each such element are the exterior surfaces of the perimeter walls, windows and doors of the adjacent building structure, where such surfaces adjoin such element and the interior surfaces of the perimeter wall, floors, and ceilings of each such element, where such surfaces exist. Otherwise, the lateral and vertical boundaries of each such element are the horizontal and vertical planes at the dimensions and elevations shown hereon for each such element. Each such element includes only the airspace encompassed by said boundaries.”

At trial, PGA West took the position that the unit owners were responsible for maintaining the patio area because it was part of the unit. For example, Kelly McGalliard, PGA West’s operations manager, testified that the patio area, which is unique to the fairway units, is a “private area that is considered to be part of the unit,” and is not maintained by PGA West. That testimony is not supported by the CC&R’s.

Although the area in question is designated “P” for purposes of use, i.e., it is an element of the unit over which the unit owner has the exclusive right of use, the CC&R’s, as quoted above, include “patio” in the definition of limited common area for which PGA West is responsible for maintenance.

The trial court found that section 5 of article IV applied and, as a result, PGA West was no longer responsible for maintaining the patio area in question. We must affirm that finding if it is supported by substantial evidence.

The evidence, recounted above, includes evidence the Morks constructed an improvement¹⁰ in the patio area in question, specifically they added flagstone to the surface of a concrete slab the previous owner apparently had installed. The Morks also installed an irrigation system in the planter area. Under the CC&R’s, those improvements would terminate PGA West’s obligation to maintain the limited common area in question if they “increase the Association’s cost of maintenance.” No direct evidence was presented at trial on the issue of whether PGA West’s maintenance costs increased as a result of the Morks installing a new irrigation system in the planter, but a reasonable inference may be drawn from the record (supported by common sense) that maintaining the irrigation system and repairing any additional leakage would increase

¹⁰ The CC&R’s define an “Improvement” as including, “without limitation, the construction, installation, alteration, addition, or remodeling of any buildings, wall, deck, fence, swimming pool, spa, landscaping, patio, patio cover, skylights, solar heating equipment, antenna/satellite dish, or any other structure, addition, alteration or modification to a Lot or exterior of a Unit.”

PGA West's normal costs of maintenance.¹¹ Consequently, under article IV, section 5, quoted above, the Morks are responsible, at the very least, for maintaining the planter area irrigation system, which the undisputed evidence shows they installed at their own expense.

Moreover, this same evidence supports an implied finding the Morks understood they were responsible for maintaining the planter area. Otherwise, they would not have paid Mr. Mayer in 2003 for the water damage to his carpet, and they would have called PGA West when they discovered the leaking pipe in January 2008. Instead, the Morks repaired the problem themselves, as evidenced by the testimony of Eleazer Lua and Dempsey Mork.

In short, the evidence is sufficient to support a finding that under the pertinent CC&R's, the Morks are responsible for maintaining the irrigation system, if not also the planter, located in the patio area of their condominium unit. The evidence further supports a finding that the Morks' failure to properly maintain the irrigation system caused damage to the common area wall, which PGA West is charged with maintaining under the CC&R's, and also caused damage to the interior of the Wyatts' condominium.

The evidence also supports a finding that the Morks' use of the planter constituted a nuisance in violation of article VII, section 12, of the CC&R's which states, "No noxious, illegal, or offensive activities shall be carried out or conducted upon any part of

¹¹ At trial, the parties focused on the increased cost of maintenance associated with the pool to support their claim the Morks were responsible for maintaining the patio area. The pool is located in an area identified as courtyard that is separate from the patio and, therefore, is not relevant to the maintenance issue presented in this case.

the Property nor shall anything be done that unreasonably interferes with any other resident's right to quiet enjoyment of his or her property, or which endangers the health or annoys or disturbs, or is offensive to such residents.”

The evidence supports a finding that the Morks' use of the irrigation system installed by Eleazer Lua unreasonably interfered with the Wyatts' quiet enjoyment of their property, and also annoyed and disturbed the Wyatts as residents. There was evidence presented at trial that, when inspected after the Wyatts discovered the moisture and mold in their unit, the planter was full of water and the most likely source of that water was a leak in the Morks' irrigation system. It is also possible that the standing water might have been the result of too much watering, i.e., the Morks leaving the irrigation system on too long. In any event, both PGA West and the Wyatts are authorized under the terms of the CC&R's, quoted above, to initiate an action to enforce article VII, section 12 and abate the nuisance.

In summary, the evidence is sufficient to support a finding the Morks breached the CC&R's by failing to maintain the planter and irrigation system in the patio area adjacent to their condominium, and this oversight created a nuisance. Accordingly, we must conclude there is sufficient evidence to support the trial court's liability determination.

2.

EXCLUSION OF EVIDENCE

A. Kurt Grosz Deposition Testimony

The Morks contend the trial court committed reversible error by excluding the deposition testimony of Kurt Grosz, an expert witness retained by the Wyatts, who in

deposition testimony opined that the water intrusion into the Wyatts' condominium was caused by PGA West's failure to waterproof the foundation. The Morks intended to show they had used reasonable diligence to subpoena Grosz to appear and testify at trial, but had been unable to secure his attendance. To that end, they sought to have the process server, Joshua Robbins, testify about his efforts to serve Grosz with a subpoena. The trial court, at the urging of the Wyatts' attorney, ultimately precluded the process server from testifying because the Morks had not included him in their list of potential trial witnesses. Because the trial court would not permit the process server to testify, the Morks were unable to establish reasonable diligence and, therefore, were ultimately precluded from presenting Grosz's deposition testimony at trial.

We agree with the Morks that the trial court erred when it precluded them from attempting to make the foundational showing necessary to use Grosz's deposition testimony at trial. We will not address that issue however, because reversal of the judgment is required only if the Morks show the error was prejudicial. "The burden is on the appellant in every case to show that the claimed error is prejudicial; i.e., that it has resulted in a miscarriage of justice." (*Cucinella v. Weston Biscuit Co.* (1954) 42 Cal.2d 71, 82; see also Cal. Const., art. VI, § 13; Evid. Code, § 354.)

As previously noted, the Morks intended to present the process server's testimony to establish the showing required under Code of Civil Procedure section 2025.620, subdivision (c)(2)(E), which permits a party to use a deposition in place of a person's testimony at trial, "if the court finds . . . [t]he deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in

open court, is . . . [a]bsent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.”

In order to demonstrate prejudice, the Morks must show the trial court would have granted their motion to use Grosz's deposition testimony at trial. Therefore, the Morks first had to show that if the trial court had allowed the process server to testify, they would have established they had exercised reasonable diligence to procure Grosz's attendance at trial. We know what the process server would have said if he had testified because the Morks submitted his declarations as part of their filings in support of their new trial motion.

In those declarations, Joshua Robbins stated in pertinent part, he “was hired (1/31/11) to serve Civil Subpoena (Duces Tecum) on Kurt Grosz.” Robbins attempted to serve the subpoena on Grosz at his place of business at 3:36 p.m. on January 31, 2011, but Grosz was not “present in his office and no other information regarding where he may be found was given, except [Robbins] was informed by an individual (female) with in [*sic*] that office to catch him early morning.” Robbins tried again to serve Grosz at his office on February 1, 2011, between 7:40 a.m. and 8:30 a.m., but no one was in the office. On February 2, 2011, Robbins tried a third time to serve Grosz at 2:33 p.m., but was told by the “same individual (female)” that Grosz was gone for the rest of the day. Robbins made a fourth attempt on February 3, 2011, at 12:19 p.m., to serve Grosz at his office, and “this time the same individual (female)” told him Grosz was in Las Vegas and would not be in the office for the rest of the week.

In a second declaration, Robbins stated he was hired again on February 22, 2011, to serve Grosz with a subpoena to appear at trial. Because his previous attempts had been unsuccessful, he hired a private investigator to do a “skip trace” report to locate other addresses for Grosz. Robbins stated that on February 22, 2011, at 7:46 p.m., a previous address for Grosz in Laguna Beach was discovered, and at 8:23 p.m. an attempt to serve Grosz at that location was made. “No individual by the name of Kurt Grosz was a tenant of that address.” Robbins then apparently watched Grosz’s office from 7:16 a.m. to 11:00 a.m. on February 23, 2011, but Grosz did not show up. Robbins learned from people in Grosz’s office that Grosz was in Arizona on business. That afternoon, Robbins discovered what appeared to be a current residence address for Grosz. Robbins arrived at the address at 4:16 p.m. and waited until 6:27 p.m. but Grosz did not show up. A neighbor told Robbins that Grosz’s vehicle had not been parked in its assigned space for about three days.

“The term ‘[r]easonable diligence, often called “due diligence” in case law, “connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.’” [Citation.] Considerations relevant to the due diligence inquiry ‘include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness’s possible location were competently explored.’” (*People v. Herrera* (2010) 49 Cal.4th 613, 622.)

The Morks' process server made seven attempts to serve Grosz with a subpoena,¹² which we will presume required his attendance at trial, even though the process server in his first declaration identified the document simply as a subpoena duces tecum.¹³ Despite the number of attempts to serve Grosz, there is no evidence that anyone directly contacted Grosz to ask him if he would testify at trial and, if so, whether he would accept service of process. In other words, there was no evidence to indicate Grosz was evading service of process. Therefore, the process server's random attempts to serve Grosz do not constitute reasonable diligence. To be reasonable, the effort must at the very least be designed to actually accomplish the objective. The most reasonable method to serve the subpoena on Grosz would have been to call him, or someone at his office, and ask when he would be there or if he would authorize someone else to accept service of process.

Moreover, the effort to catch Grosz at his office was not sustained and, therefore, was not diligent. The process server did not stake out Grosz's office and wait for him to appear. At most, he waited for less than an hour in the morning on February 1, 2011, and then left before anyone appeared at the office to start work. He made three other random stops at Grosz's office, two of which were in mid-afternoon, even though he had been told the best time to catch Grosz was early in the morning, and one just after noon during what traditionally is considered the lunch hour. On his last stop, just after noon on

¹² In a so-called pocket brief addressing the admissibility of Grosz's deposition testimony, the Morks stated they had subpoenaed Grosz to appear at trial, and made 10 "renewed attempts" to serve Grosz. Both statements are incorrect.

¹³ A subpoena duces tecum is one that compels the production of evidence, such as books or documents. (See Code Civ. Proc, § 1985.)

February 3, 2011, the process server learned Grosz was in Las Vegas and would not be in the office “for the rest of the week.” We take judicial notice pursuant to Evidence Code sections 459 and 452 that February 3, 2011, was a Thursday. Therefore, the phrase “rest of the week,” which we assume means work week, consisted of one day, Friday.

Between February 3 and February 22, the Morks did not make any effort to locate and serve Grosz, even though trial had started. On February 22, Robbins went to what turned out to be an old address for Grosz in Laguna Beach. On February 23, Robbins waited at Grosz’s office from 7:16 a.m. to 11 a.m., but Grosz did not appear and Robbins learned he was in Arizona on business. Five hours later, at 4:16 p.m., Robbins went to what appeared to be Grosz’s current residence address and learned Grosz had not been there for three days. Robbins did not explain in his declaration why he believed Grosz would be at his residence address in Laguna Beach when only five hours earlier Robbins had been told Grosz was in Arizona.

The above noted showing does not demonstrate reasonable diligence in attempting to locate and serve Grosz. Therefore, the Morks have not shown the trial court’s error was prejudicial. Even if the trial court had allowed the process server to testify and had considered the Morks’ motion under Code of Civil Procedure section 2025.620, subdivision (c)(2)(E), the trial court could still have denied the Morks’ motion to use Grosz’s deposition in lieu of testimony at trial.

B. PGA West Letter to Morks' Predecessor in Interest

The Morks also contend the trial court committed prejudicial error when it excluded on the basis of hearsay and lack of foundation a letter dated April 8, 1991, from PGA West to Mr. and Mrs. Lawrence Kitchen, the then owners of the Morks' condominium, i.e., their predecessors in interest. The letter advised the Kitchens as follows: "The apparent grade of your side yard was not reduced to accommodate the cement pad you installed, as water runs off toward your next door neighbor's side wall. There was so much standing water in the planted bed that water seeped into your neighbor's master bedroom, soaking their carpet." The letter goes on to suggest installation of a French drain as a solution to the problem. The letter is signed, "Carol Whitlock for PGA West Residential Association."

During cross-examination, the Morks attempted to question Lewis Wyatt about the letter, and presumably introduce it into evidence at trial. However, the trial court sustained hearsay and lack of foundation objections interposed by both opposing counsel. Later, William Bobbitt, PGA West's landscape manager, testified he recognized the letter and that it had been found after this litigation started when "we were looking through the files." Bobbitt confirmed the letter had been in a file PGA West maintained on the Morks' condominium. The files were maintained by address of the unit.

We begin our discussion with the principle that a written document, such as the letter here in question, must be shown to be authentic before it is admissible in evidence. (Evid. Code, § 1401.) A document is authenticated when sufficient evidence has been produced to sustain a finding that the document is what it purports to be. (Evid. Code,

§ 1400; *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321.) The author’s testimony is not required to authenticate a document (Evid. Code, § 1411); instead, its authenticity may be established by the content of the writing (Evid. Code, § 1421) or by other means (Evid. Code, § 1410 [no restriction on “the means by which a writing may be authenticated”]).

In this case, the letter in question was written on PGA West letterhead, addressed to the owner of a condominium unit located in the PGA West development, concerned events that occurred on property located within the PGA West development, and was signed by a person purporting to act on behalf of PGA West. That was sufficient evidence to establish the authenticity of the letter. The previously recounted testimony of William Bobbitt, in which he stated the letter had been found in a file maintained by PGA West and located in its office, was sufficient to dispel any remaining question regarding the provenance of the letter. Consequently, we conclude the trial court abused its discretion by sustaining the lack of foundation objections to the letter in question.

The remaining issue is whether the trial court abused its discretion by sustaining hearsay objections to the letter. “[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question. [Citations].” (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) That analysis requires us to examine “the underlying determination whether the evidence was indeed hearsay. [Citation.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 203.) Hearsay evidence is “evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to

prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) With certain exceptions, hearsay evidence is inadmissible. (Evid. Code, § 1200, subd. (b).)

The PGA West letter is hearsay if offered to prove the truth of the matter asserted, i.e., that the previous owner had not reduced the grade of the side yard before installing a cement pad as evidenced by the fact that “water runs off toward your next door neighbor’s side wall. There was so much standing water in the planted bed that water seeped into your neighbor’s master bedroom, soaking their carpet.” The Morks’ proposed use of the letter was not to prove the truth of the matter asserted, i.e., the cause of the water leaking into the master bedroom of the Wyatts’ property. Instead, the Morks intended to use the letter as evidence that water leaked into the master bedroom of the Wyatts’ property long before the Morks had purchased the adjacent condominium. To prove the fact of that event, the letter is not hearsay.

Moreover, even if the Morks offered the letter for its hearsay purpose, it is admissible under the hearsay exception for party admissions set out in Evidence Code section 1222, which states, “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and [¶] (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.”

The letter, as previously noted, is on PGA West letterhead, and is signed by Carol Whitlock, “for PGA West Residential Association.” The quoted language constitutes

evidence of authority to speak on behalf of PGA West. In addition, Kelly McGalliard, the operations manager at PGA West at the times pertinent to this lawsuit, testified Carol Whitlock was a manager at PGA West. The April 8, 1991 letter, if offered for its hearsay purpose, is admissible under the party admission exception to the hearsay rule.

Because the letter was authenticated and was either not hearsay or was within an exception the hearsay rule, we conclude the trial court abused its discretion by excluding the letter from evidence at trial. The remaining issue we must resolve is whether the error was prejudicial, i.e., that it resulted in a miscarriage of justice. (Evid. Code, § 354.) In this context, a miscarriage of justice occurs when this court is able to say, if the evidence had been admitted, it is reasonably probable the trier of fact would have reached a result more favorable to the complaining party. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Morks contend the letter is evidence that the problem with water leaking into the Wyatts' unit preceded the Morks' ownership of the adjacent unit and, therefore, they could not have caused the problem. We disagree for two reasons. First, the letter is consistent with the theory put forth by PGA West and the Wyatts that the side yard grade was too high after the then owners installed their patio and, as a result, water ran off the patio toward the Wyatts' unit. Second, despite the parties focus at trial, the Morks' liability was not predicated on who changed the grade but rather on who was responsible for maintaining the patio area planter. On this issue, which is dispositive in our view, the letter is silent and, therefore, irrelevant. Accordingly, we conclude the error was harmless.

3.

DAMAGE AWARD AND ATTORNEY FEES

The trial court awarded the Wyatts damages as follows:

\$154,272.65 for out-of-pocket losses;

\$270,000 for loss of use, based on the reasonable rental value of their condominium, as a result of the Morks maintaining a nuisance on their property;

\$89,100 in prejudgment interest; and

\$600,000 for emotional distress damages (\$300,000 to each of the Wyatts).

The Morks challenge the award of emotional distress damages, and also contend the trial court erred by refusing to offset the settlement PGA West paid to the Wyatts. We agree. Moreover, because we will reduce the damage award, and that award affects the trial court's calculation of attorney fees the Morks are obligated to pay the Wyatts, we will reduce the attorney fee award, accordingly.

A. Emotional Distress Damages

The trial court purported to award emotional distress damages to the Wyatts on the theories of breach of contract, negligence, trespass, and nuisance, i.e., the first, second, sixth, and seventh causes of action of the Wyatts' complaint.¹⁴ The emotional distress damages claimed in connection with the breach of contract cause of action apparently are based on the theory the Morks breached the CC&R's by maintaining a nuisance, and,

¹⁴ The Wyatts contend the Morks did not raise this issue in the trial court and, therefore, may not raise it for the first time on appeal. The Wyatts are incorrect. The Morks challenged the amount of the award in their new trial motion.

because emotional distress damages purportedly are recoverable as an element of nuisance damages, they should also be recoverable when the nuisance claim is the basis for the breach of contract.

Assuming without actually deciding that the Wyatts have a valid claim for breach of contract against the Morks, emotional distress damages are not a recoverable element of damage. (See *Erlich v. Menezes* (1999) 21 Cal.4th 543, 558-559.) The Wyatts effectively concede the issue. They argue the trial court did not award emotional distress damages. Instead, they claim a “careful reading” of the statement of decision reveals the court awarded damages for discomfort and annoyance under the authority of *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266 (*Smith*).

Smith states, ““It is settled that, regardless of whether the occupant of land has sustained physical injury, he may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his family when such discomfort or suffering has been proximately caused by a trespass or a nuisance. [Citations.]’ [Citations.] ‘Damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance, inconvenience, and discomfort [citation]’ [Citations.] ‘[M]ental distress caused by the nuisance created and maintained by the defendant is an element of loss of enjoyment. [Citations.]’” (*Smith, supra*, 214 Cal.App.3d at pp. 287-288.)

As *Smith* suggests, damages for annoyance and discomfort resulting from trespass to property are intended to compensate the person occupying the property for interference

with use and enjoyment. (See *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 456-459 (*Kelly*)). In *Kelly*, a fire damaged or destroyed several structures on plaintiff's real property. Mudslides later destroyed another structure and caused extensive damage to the land itself. Although the plaintiff owned the real property, he was not living there at the time of the fire and mudslides. Moreover, the plaintiff had rented the property and structures to other people and they actually occupied the property at the time the fire and mudslides occurred. The *Kelly* court held that damages for annoyance and discomfort can only be awarded if the plaintiff actually occupied the property, i.e., was physically living on the property at the time trespass and resulting injury occurred. (*Ibid.*)

This view is consistent, as the *Kelly* court observed, with *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, in which the Supreme Court "recognized that "an occupant of land" may recover damages for annoyance and discomfort that would naturally ensue' from a trespass on the plaintiff's land." (*Kelly, supra*, 179 Cal.App.4th at p. 456.) "In *Kornoff*, for example, the California Supreme Court relied on the Restatement Second of Torts, section 929. [Citation.] That section provides, in relevant part, '(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for [¶] . . . [¶] (c) discomfort and annoyance to him as an occupant.' [Citation.] The Restatement commentary explains: 'Discomfort and annoyance to an occupant of the land and to the members of the household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to

his proprietary interests. . . . The *owner of land who is not an occupant is not entitled to recover for these harms* except as they may have affected the rental value of his land.’

[Citation.] The references to the ‘occupant’ and to the ‘members of the household’ suggest residency, as does the express exclusion of nonresident owners from the class of persons entitled to recover for annoyance and discomfort.” (*Kelly, supra*, 179 Cal.App.4th at p. 457.) In short “the drafters of the Restatement considered the ‘occupant’ to be a person who is [in] immediate personal possession of the property.” (*Id.* at pp. 458-459.)

In this case, the evidence is undisputed that the Wyatts used their condominium as a vacation home, although they intended eventually to live there in retirement. It is also undisputed the Wyatts did not personally discover the water invasion or the damage caused to their condominium by the trespass and nuisance.¹⁵ Moreover, there is no evidence the Wyatts were physically present when water from the Morks’ planter entered the Wyatts’ condominium, or that if they were present they experienced any annoyance or discomfort. Under these circumstances, we must conclude the Wyatts did not actually occupy the condominium at the times pertinent to the trespass and nuisance claims. Therefore, they are not legally entitled to recover damages for annoyance and discomfort caused by the trespass and nuisance.

Although we conclude the Wyatts are not entitled to recover damages for annoyance and discomfort, they are entitled to compensation for interference with their

¹⁵ A cleaning and maintenance company the Wyatts employed discovered the wet carpet in the master bedroom and the mold.

ability to use and enjoy the condominium as a result of the trespass and nuisance. The Wyatts received that compensation in the form of the fair market rental value of the property from April 2008 until the Morks had eliminated the cause of the water damage, an event that had not occurred at the time of trial,¹⁶ a sum of \$270,000, plus \$89,000 in prejudgment interest.

In summary, the Wyatts effectively concede they were not entitled to emotional distress damages and that the damages denominated as such were, in fact, for annoyance and discomfort suffered in connection with the trespass and nuisance claims. We conclude such damages are not recoverable in this action. The Wyatts assert no other legal theory on which the trial court could properly have awarded each of them \$300,000. Therefore, we will reduce the damage award by \$600,000.

B. Credit for PGA West's Settlement with the Wyatts

The trial court, as set out above, awarded the Wyatts damages totaling \$1,024,272.65. The proposed judgment was in that amount, and the Morks objected to the proposed judgment because it did not include a deduction, or offset, for the \$375,000 settlement the Wyatts had received from PGA West. The trial court did not include that deduction, or offset, in the final judgment. The Morks raised the objection again in their new trial motion. The trial court summarily denied that motion.

¹⁶ The Morks apparently refused to remove or properly repair the offending planter unless PGA West would acknowledge liability for maintenance of the area. The Wyatts argued, and the trial court apparently agreed, that until the Morks repaired the cause of the water damage, they could not repair their condominium because they had no assurance against future water damage.

The Morks contend in this appeal, as they did in the trial court, that the judgment is incorrect because it does not include an offset for the \$375,000 settlement the Wyatts had received from PGA West. PGA West does not address this issue, and the Wyatts only claim that the Morks did not raise it in the trial court and, therefore, have not preserved it for review on appeal. The Wyatts are incorrect, and we construe PGA West's silence as an implied concession.

Two statutes are pertinent to this issue—Code of Civil Procedure sections 877 and 877.6. The former addresses the effect of a settlement on joint tortfeasors and the latter concerns the effect on joint tortfeasors of a judicial determination that settlement by one of them was made in good faith. In *Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, “the Supreme Court outlined the two competing policies established by [Code of Civil Procedure] sections 877 and 877.6: (1) The equitable sharing of costs among the parties at fault and (2) the encouragement of settlements. [Citation.] It stated that section 877 makes it clear that these two goals are ‘inextricably linked. Section 877 establishes that a good faith settlement bars other defendants from seeking contribution from the settling defendant [citation], but at the same time provides that the plaintiff’s claims against the other defendants are to be reduced by “the amount of consideration paid for” the settlement (§ 877, subd. (a)). Thus, while a good faith settlement cuts off the right of other defendants to seek contribution or comparative indemnity from the settling defendant, the nonsettling defendants obtain in return a reduction in their ultimate liability to the plaintiff.’ [Citation.]” (*Erreca’s v. Superior Court* (1993) 19 Cal.App.4th 1475, 1487-1488, quoting *Abbott Ford, Inc. v. Superior Court*, at pp. 872-873.)

The foregoing authority establishes the Morks are entitled to an offset against the damages awarded to the Wyatts. We will direct the trial court on remand to determine the correct amount of an offset and to modify the judgment accordingly.

C. Attorney Fee Adjustment

In their attorney fee motion, the Wyatts asked the trial court to award fees based on their 40 percent contingency fee agreement with their attorney. The trial court granted that request and awarded fees of \$445,349.06. Because we are reducing the judgment by \$600,000, the amount of the erroneously awarded emotional distress damages, and directing the trial court to offset the judgment in light of PGA West's good faith settlement, on remand the trial court must also recalculate the PGA attorney fee award accordingly.

4.

INJUNCTIVE RELIEF

The Morks contend the trial court granted injunctive relief to the Wyatts that duplicates the damages awarded to PGA West, and that also impermissibly purports to bind the Morks' successors in interest. We agree injunctive relief was improperly granted in this action. However, the Morks did not raise their initial claim regarding the conflict with the damage award in the trial court. Therefore, they may not raise it for the first time on appeal. That conclusion, however, does not mean they are without a remedy. Should they be called on to repair the drainage problem, as they are directed to

do in the injunction, and also to pay damages to PGA West for the cost of that same repair, the Morks may object in the trial court.¹⁷

The Morks did contend in their new trial motion that the injunctive relief the trial court issued in favor of the Wyatts improperly extended to the Morks' successors in interest. Contrary to the Wyatts' repeated claim, the Morks raised this issue in the trial court.

The trial court issued a permanent injunction directing the Morks, "any subsequent purchasers, successors, heirs, owners, assigns and agents," as well as "any and all different owners and ownership interests involved at 55-051 Riviera, La Quinta, CA," to do various specified things, including remove the planter, compact the soil at a level four inches below the Wyatts' weep screed, install new drains, and restore the original grading. After completing those repairs and modifications, the Morks, "any subsequent purchasers, successors, heirs, owners, assigns and agents," as well as "any and all different owners and ownership interests involved at 55-051 Riviera, La Quinta, CA," are enjoined from changing or altering the previously specified repairs and modifications. The injunction includes four more directives, for a total of six orders, commanding or prohibiting action by the Morks, "any subsequent purchasers, successors, heirs, owners, assigns and agents," as well as "any and all different owners and ownership interests involved at 55-051 Riviera, La Quinta, CA."

¹⁷ PGA West apparently has corrected the problem that caused the Wyatts' damage, in accordance with the repairs recommended by their expert engineer, Mr. Newsom. Therefore, the Morks' claim they might be required to pay PGA West and then also be required to repair the problem themselves arguably is moot.

By making the injunction applicable to more than the Morks, the trial court effectively and impermissibly made the injunction “run with the land, [and] treat[ed] the injunction as though it were an in rem remedy. This is contrary to law. An in rem action or proceeding is one which seeks to affect the interests of all persons (‘all the world’) in a particular property or thing. (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 234, p. 794.) However, an injunction—a writ or order requiring a person to refrain from a particular act or to do a particular act (Code Civ. Proc., § 525)—is an in personam remedy. [Citation.] ““An injunction is obviously a personal decree. It operates on the person of the defendant by commanding him to do or desist from certain action.”” [Citation.]” (*People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 765.) “It is well established that injunctions are not effective against the world at large. [Citations.]” (*Ibid.*)

The trial court’s injunction in this case violates the above noted legal principle. The Wyatts do not claim otherwise. Instead, they pose a series of rhetorical questions in which they ponder the Morks’ standing to assert this issue and whether the Morks have shown prejudice.¹⁸ The Wyatts’ musings are not legal authority for any proposition

¹⁸ As in other sections of their brief, the Wyatts do not address the issue but instead ask, for example, “[W]here is there a showing of miscarriage of justice or injury to the Morks? They do not object to the injunction applying to them. They’re objecting to some unidentified individual in the future (potentially a subsequent purchaser). They are complaining on behalf of that subsequent purchaser that this injunction is too broad. How do they have standing to assert the rights of a ‘subsequent purchaser?’ How are they damaged by the wording of the injunction?”

posed. In short, they have not demonstrated that the Morks lack standing to raise the claim or that a showing of prejudice is required.

The trial court lacked authority to issue an injunction directed at anyone other than defendants, Dempsey and Patricia Mork. Therefore, we will direct the trial court to amend the injunction, and any writ or order issued thereon, by deleting the following quoted phrases: “any subsequent purchasers, successors, heirs, owners, assigns and agents,” and “any and all different owners and ownership interests involved at 55-051 Riviera, La Quinta, CA.”

DISPOSITION

The judgment is reversed, and the cause is remanded with the following directions to the trial court:

- (1) Strike the emotional distress damage award of \$600,000;
 - (2) Conduct further proceedings to determine a correct offset to the Morks’ damage award for PGA West’s good faith settlement with the Wyatts. The trial court may, in its discretion, direct the parties to submit additional briefs addressing relevant issues, e.g., the propriety of an offset for economic versus noneconomic damages, cash versus noncash elements of the settlement, etc.;
 - (3) Recalculate the attorney fee award based on the modified total damage award;
- and
- (4) Modify the injunction issued in this action by deleting the phrases “any subsequent purchasers, successors, heirs, owners, assigns and agents,” “any and all

different owners and ownership interests involved at 55-051 Riviera, La Quinta, CA,”
and any other reference to any person or entity other than Dempsey and/or Patricia Mork.

The judgment is affirmed in all other respects.

All parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.