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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CRYSTAL COVE COMMUNITY
ASSOCIATION,

Plaintiff, Cross-defendant and
Respondent,

v.

MARIE T. BARTLING et al.,

Defendants, Cross-complainants and
Appellants.

G045742

(Super. Ct. No. 07CC08937)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Motion to strike portions of respondent's brief. Judgment affirmed; motion denied.

Bremer, Whyte, Brown & O'Meara, Kere K. Tickner, Devin R. Lucas; and Everett L. Skillman for Defendants, Cross-complainants and Appellants.

Neuland & Whitney and Frederick T. Whitney for Plaintiff, Cross-defendant and Respondent.

Defendants and cross-complainants Marie T. Bartling and Gary B. Bartling appeal from a money judgment in favor of plaintiff and cross-defendant Crystal Cove Community Association, arguing there was judicial and jury misconduct. The former is based on four statements the court made during trial and the latter results from a claim the jury used an average to award damages. Finding no error we affirm.

Defendants made a motion to strike three statements in the statement of facts in the respondent's brief as unsupported by a record reference. Since factual issues are irrelevant and not the subject of the appeal, we deny the motion. We note, however, that plaintiff's brief contains few record references in violation of the Rules of Court. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Our denial of the motion should not be construed as approval of the deficiency. Further, we consider only what is in the record.

FACTS AND PROCEDURAL HISTORY

Because the facts are not at issue only a brief summary is necessary. Defendants owned a residence in a development governed by plaintiff pursuant to Covenants, Conditions and Restrictions, and Reservation of Easements (CC&R's). After defendants began constructing their landscaping the parties got into a dispute about whether defendants were following the plans they had submitted and had approved by plaintiff. Plaintiff's lawyer sent a letter to defendants demanding they stop any further work that plaintiff had not approved, and specifically noted two violations, removal of pilasters and a gate from a common area wall and modification of a "mow strip." Defendants decided to continue building. Plaintiff then levied \$1,000 per month fines for each of the two violations, which ultimately totaled \$63,500.

Plaintiff filed an action against defendants for breach of the CC&R's, nuisance and declaratory relief. The breach cause of action was the only one that

ultimately went to the jury. Defendants cross-complained for, among other things, breach of fiduciary duty, seeking emotional distress damages. The jury returned a verdict in the sum of \$31,750 in favor of plaintiff on the complaint and nothing to defendants on their cross-complaint. The court denied defendants' motion for new trial and awarded almost \$650,000 in attorney fees to plaintiff.

DISCUSSION

1. Judicial Misconduct

Defendants assert the court denied them a fair trial by making four prejudicial statements and giving their lawyer less time than plaintiff's in closing argument.

a. Court's Statements

The first two statements occurred with respect to one answer by defendant Marie Bartling to a question by the lawyer representing defendants on their cross-complaint. Marie, who had been a director of the homeowner's association, was asked about her duties. She answered that the board heard requests from members who "wanted a grant deed to community property . . . and/or limited maintenance easements over community property, and we granted those grant deeds." The court sustained plaintiff's hearsay objection, and then stated: "The jury is instructed to disregard the self-serving testimony of this witness The question was what were part of the functions of the witness as a member of the board. And so she has gone way beyond. We're going to instruct counsel and witness to rein it in." Later in the day defendants' lawyer explained to the court he believed the "self-serving" label given to the testimony would improperly influence the jury. The court, noting it regretted it had used such strong

language, nevertheless stated it did not “think it inappropriate in light of the fact that the response to the question posed was so far off base as to be gratuitous and absolutely improper and simply trying to create a foundation to go forward and in an area that at that point could not be dealt with.” The court agreed, however, to instruct the jury the next day “to disregard my comment in that area.”

Defendants claim the court’s characterization of the testimony as “self-serving” discounted Marie’s credibility and communicated to the jury it did not believe her. But “[t]he court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.” (Cal. Const., Art. 6, § 10; see *Lewis v. Bill Robertson & Sons, Inc.* (1984) 162 Cal.App.3d 650, 654 [“trial judge [may] use his experience and training in evaluating the evidence, so as to aid the jury in reaching a just verdict” and “may analyze all or part of the testimony and express his views with respect to its credibility”].)

We are not persuaded by the cases on which defendants rely, *Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal.App.4th 994 and *Davis v. Pezel* (1933) 131 Cal.App. 46. In both of them the court made multiple improper statements that infected the entire action, not the case here. (*Haluck v. Ricoh Electronics, Inc.*, *supra*, 151 Cal.App.4th at p. 1008; *Davis v Pezel*, *supra*, 131 Cal.App. at p. 54.)

Defendants also conclude that the court’s statement to their lawyer and Marie to “rein it in” implied they were violating court rules. We disagree. In the 12 pages of questions preceding this one, the court had sustained over 20 objections. The court had every right to admonish counsel to frame permissible questions and Marie to limit her answers to them. (Code Civ. Proc., § 128, subd. (a)(3) [judge has authority to “provide for the orderly conduct of proceedings before it”]; Evid. Code, §§ 765, subd. (a) [court controls examination of witnesses]; 766 [“witness must give responsive answers”].)

In addition, the morning following this exchange and before testimony resumed the court instructed the jury: “Incidentally, folks, yesterday afternoon in striking some testimony, I made some comments that may be misperceived by you. There will be a jury instruction in the trial that says . . . that anything that I have said and done may not be taken by you as how I think you should rule in this case. I ask you to keep that instruction in mind at this point, similarly with respect to my rulings on objections and my rulings or orders to strike. Again, that’s not to be taken as indicative of how I think you should rule one way or another.”

The record is silent as to whether the formal instruction on this topic was given. But the court’s instruction during trial sufficed to tell the jury that when making its decision it should disregard any comments by the judge. We reject defendants’ argument this instruction was “simply too cryptic and confusing to have any curative effect whatsoever.”

Defendants next argue the court “belittled” Marie’s claim for emotional distress damages based on the following colloquy. Her counsel asked, “When you received [the letter ordering defendants to cease construction] how did that affect you?” She answered: “It affected me in every way[,] . . . mentally, emotionally, physically, and financially.” When plaintiff objected on a relevance ground the court sustained it, stating, “I have no emotional distress claim in this case that I’m aware of.” When counsel disagreed and the court said, “Show me,” he explained there was a breach of fiduciary duty cause of action. The court then stated, “All right. Overruled.” Defendants claim that, even though the court changed its ruling to allow the testimony, it “communicated to the jury” the “claim was frivolous,” characterizing the comment overruling the objection as “[]grudging.”

This argument has no merit. The judge asked counsel to remind him of the emotional distress claim and then allowed the testimony. There is nothing in the record

to show that he “begrudging[ly]” overruled the objection. In light of that, defendants’ assertion the jury would assume that if the judge did not remember the claim it must not exist does not hold up.

The next day the court, speaking to the jury referred to the two occasions Marie testified about her stress caused by the lawsuit and that it had stricken those statements. The court pointed out that although lawsuits generally cause stress, Marie was not entitled to any damages for it. Shortly thereafter the jury was dismissed and defendants’ lawyer referred to that comment, claiming the jury would understand it to mean the court had stricken all of her testimony relating to her stress. The judge responded that had not been his intent and had been trying to differentiate between noncompensable litigation stress and stress for which damages may be awarded. However he gave counsel the opportunity to prepare a statement to be read to the jury. The statement prepared and read to the jury was as follows: “By my statement to you this Thursday that you are to disregard Marie Bartling’s damages related to emotional stress caused [by] this trial, this litigation[,] I did not mean to imply you are to disregard any evidence of any other factor causing emotional distress to [her].” The court went on to add, “Just so you know. The trial may not be considered a factor. This litigation, even the ramp up to this litigation [may] not be considered a factor[;] however any other component of emotional stress attributable to the disputes between the parties may be.”

We concur with the trial court that its initial statement was plainly directed to the stress of litigation and did not state or even imply that Marie could not recover for other stress. And, if the jury had been confused, counsel’s prepared statement explained it. We do not agree that the judge’s additional comment “affirmatively frustrated the attempts [by defendants’ lawyer] to mitigate the harm caused by his misconduct” in making the comment in the first place. It merely distinguished between stress for which

Marie could recover damages and that for which she could not. There was no misconduct.

Finally, defendants direct us to a statement the court made in the morning right before closing arguments were to start. “First of all, last night of course we learned for the first time that Osama Bin Laden is deceased, apparently well buried at sea. I am reminded of a comment from, quote, . . . Thomas Jefferson, the price of freedom is eternal vigilance. Only took us nine years to bring this man to bay. Yet, I happened to have watched all the celebrations around the White House, Time[s] Square, people thrilled of course that he’s killed. [¶] But I cannot help but think about Lincoln, Gettysburg Address where he talked about the people that sacrificed so much at that particular juncture in the Civil War. That . . . address obviously 147 years ago, yet, it seems timely even today. You know, lest we forget all those people who sacrificed their lives for us. I get emotional, sorry. [¶] On the frivolous note, of course, yesterday’s event completely eclipsed the wedding on Friday. I know you all stayed home so you could watch the wedding, right? I cannot help but comment I got home Friday afternoon about five o’clock, and, of course, the wedding was all over. You saw . . . all the replays and replays and replays. [¶] My wife, I should tell you, was the Queen of the Los Angeles County Fair many years ago. I shouldn’t say that, a couple years ago. So I walked to the door to find my wife wearing her tiara while watching the wedding. Royalty, it is something, isn’t it. [¶] I have a feeling, however, that the wedding is completely eclipsed and out of everybody’s minds after yesterday’s events. Let’s hear it for the combined Special Forces in – particularly for the Navy SEALs for doing a good job. And while I probably shouldn’t say this coming from a judicial standpoint but saving us a trial.”

Defendants claim this statement “trivialized the entire litigation.” They explain it “intimated that [the judge] felt that trials are a mere formality” and that their

“claim was a waste of everyone’s time.” Defendants have not shown it had any impact on the jury, but even if it did, presumably it would have been more prejudicial to plaintiff, who brought the suit, not defendants. Likewise, it is not reasonable to interpret the references to historical figures and events as making the case at hand “petty [or] unimportant.” The court was describing a historical event completely distinct from the trial.

Having said that, it might have been wiser for the court to wait to make these statements until after the jury had rendered a verdict. These comments and others like them can tend to change the emotional climate of a trial. Nevertheless, we do not believe they were reversible error.

b. Time Limits

Defendants also claim the court committed misconduct by allowing plaintiff’s counsel more time for closing argument on the complaint than it gave to their lawyer on the cross-complaint. They also maintain the court “humiliated” their lawyer when, right before he was to argue the emotional distress claim, it told him he had one minute to complete the argument because he had exceeded his time. Again, on rebuttal, the court gave counsel a minute for the same reason.

We can quickly dispose of the humiliation claim. Reminding a lawyer of his time limit is a common function of the trial court within its power to manage the trial. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 289-290; see *Bates v. Newman* (1953) 121 Cal.App.2d 800, 812 [time allowed for argument within court’s discretion and decision will not be disturbed absent abuse of discretion].) We see no evidence the court was abusive or sought to embarrass defendants’ lawyer.

Nor are we persuaded by the argument there was an improper difference in time allocation. It is true the court originally gave plaintiff 40 minutes total to argue on

the complaint while giving defendants 25. But defendants made no objection to the time allotted. Further, the actual time of argument was virtually identical, with plaintiff taking 30 minutes on the complaint and defendants using 28 on the cross-complaint.

Moreover, defendants have not shown how they were prejudiced. They claim the jury “perceived” the court’s reminder to counsel he had only one minute remaining as the “court’s negative evaluation of the merits” of their case. But the court had already explained how an argument would work, with the plaintiff and cross-complaints each bearing the burden of proof on their actions and thus having two opportunities to argue. Further, the court had informed the jury it had “imposed time limits” on the time for argument. There is no reasonable basis to believe the jury understood the court’s time warning as anything other than enforcement of those limits. In addition, defendants do not suggest what other argument could have been made on their behalf in an additional two minutes.

Finally, we disagree with the argument there was no rational basis for the limitation. At trial defendants acknowledged the issues in the complaint and cross-complaint overlapped. Thus it is natural that some of the same material covered in defendants’ response to plaintiff’s argument on the complaint applied to their argument on the cross-complaint as well. And, as defendants concede, time limits are necessary for the orderly administration of justice.

Nothing in the record persuades us defendants received anything but a fair trial.

2. *Quotient Verdict*

Plaintiff sought to recover \$63,500 in fines. The jury awarded plaintiff \$31,750 or half that amount. Defendants claim the amount of damages awarded by the

jury was improper because it was the result of a quotient verdict where the jury simply split the amount plaintiff demanded. This argument has no merit.

“A ‘quotient verdict’ is a form of chance verdict where the jurors agree *in advance* to be bound by the ‘average’” (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2011) ¶ 15:245, p. 15-53; see *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064 [quotient verdict is where “‘jurors agree to be bound by an *average* of their views’ . . . and the resulting “quotient” pursuant to the prior agreement, is accepted as the verdict without further deliberation”].)

Defendants filed four declarations in support of their motion for new trial, two by their lawyers, one by a paralegal, and one by Marie. All essentially said the same thing. They each spoke to two jurors. Both stated a third juror, who was an attorney herself, “instructed” the jury during deliberations. Before she did so, the jury was deadlocked six to six. Thereafter, the jurors split the amount sought on a nine-to-three vote.

Without deciding whether it was proper to consider these declarations, even on the merits they are insufficient to show there was an improper quotient verdict. There is no evidence the jurors agreed beforehand to this method and then failed to deliberate. In fact, the opposite is true. They deliberated and then, when purportedly deadlocked, finally awarded half the amount sought.

3. Attorney Fees

Defendants challenge the attorney fees award based solely on their ground that if the judgment is reversed plaintiff would not be the prevailing party. Since we affirm the judgment this claim fails.

DISPOSITION

The judgment is affirmed. The motion to strike is denied. Respondent is entitled to costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.