Filed 10/19/11 Hardie v. Wizard Gaming CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GEORGE HARDIE, SR.,

Plaintiff and Respondent,

v.

WIZARD GAMING, INC., et al.,

Defendants and Appellants.

F060236

(Super. Ct. No. S1500CV266859)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Sidney P. Chapin, Judge.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller and Matthew B. Stucky for Defendants and Appellants.

William H. Slocumb; Christopher T. Reid for Plaintiff and Respondent.

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This is an appeal from a judgment entered on a jury verdict. Defendants and appellants Wizard Gaming, Inc., Emily Jean Cuicchi, and Richard Levinson contend portions of the verdict are not supported by substantial evidence and that the punitive damages award was excessive. We agree, in part. Accordingly, we will modify the judgment and affirm the judgment as modified.

FACTS AND PROCEDURAL HISTORY

Wizard Gaming, Inc. (the corporation) owns and operates Diamond Jim's Casino, a card room in Rosamond, California. Cuicchi is president of the corporation and chairs its board of directors. Levinson is one of the minority owners of the corporation and, along with Cuicchi, was active in the management of the casino property.

Respondent George Hardie, Sr., owns the 2.24-acre vacant lot immediately south of the casino property. In 2005, the corporation leased respondent's lot for employee and overflow parking. Under the lease, the corporation was required to provide improvements to the lot. It graded and fenced the lot, installed lights, and covered the lot in gravel. This case involves the actions by the appellants when they removed these improvements at the end of the lease and the inferences the jury could have drawn from those actions. Accordingly, a rather detailed description of the improvements will be helpful.

Prior to expansion of the parking facilities onto respondent's lot, the southern edge of the casino's paved parking lot was lined with concrete wheel stops. When the corporation began to use respondent's lot, some of these stops were removed to provide access to the new parking lot. A concrete drainage swale ran along the southern edge of the paved lot behind the wheel stops. After the lease began, a drainage pipe covered with concrete was installed to permit access across the swale and onto the new lot. A four-foot high fence was installed behind the remaining wheel stops, presumably to provide a visual cue for the pass-throughs. Levinson installed eight light poles on concrete bases in the new lot. A fence was installed on the east, west, and south

perimeters of the new lot, so that access was available only from the casino's paved lot to the north.

After a one-year automatic renewal of the lease, respondent notified the corporation he would not agree to a further renewal. The parties were unable to agree on terms for a new lease or for purchase of the lot by the corporation.

Pursuant to the lease terms, the corporation was required to remove its improvements from the lot. When the corporation removed its improvements from respondent's lot in 2008, six of the light posts were removed, as was the perimeter fence. The two light posts nearest the paved parking lot were left in place. A new fence was installed just south of the light poles, parallel to the southern edge of the parking lot. The concrete wheel stops were reinstalled in the paved parking lot; the area between the drainage swale and the new fence was landscaped with trees and bushes. The four-foot divider fence was removed. The new fence, the light poles and the landscaped area were south of the property line between the corporation's property and respondent's property; the fence was approximately four feet into respondent's property.

Respondent was working out of the country, developing a new casino in Belize, when he became aware of the encroachment on his property. In February 2009, he commissioned a survey of the property line and confirmed the encroachment. He did not inform the corporation about the survey or the encroachment. About a month later, the corporation obtained its own survey in conjunction with proposed modifications to its septic system. According to Cuicchi and Levinson, when this second survey revealed the encroachment, Cuicchi told Levinson to move the fence and remove the other improvements on respondent's property. He did so on April 2, 2009. (Cuicchi testified appellants were unaware of the presence of respondent's survey crew at the property.)

Also on April 2, 2009, respondent filed a complaint against appellants and others seeking injunctive relief and damages. Jury trial on the damages issues began February 1, 2010. The jury concluded appellants' conduct caused past economic loss to

respondent in the amount of $23,290 and general damages of $10,000. The jury found that each of the appellants acted maliciously toward respondent. It awarded punitive damages in the amount of $40,000 against Cuicchi, $15,000 against Levinson, and $25,000 against the corporation. Judgment was entered accordingly.

After their motion for new trial was denied, appellants filed a timely notice of appeal.

DISCUSSION

Appellants raise three issues on appeal. First, they contend there was insufficient evidence to support the award of general (noneconomic) damages. Next, they contend there was insufficient evidence of malice to support an award of punitive damages. Finally, if some punitive damages are permitted by the evidence, they contend the jury's award was excessive under applicable constitutional standards. We will address the issues in that order.

A. *General Damages*

"The detriment caused by the wrongful occupation of real property [with certain inapplicable exceptions] is deemed to include the value of the use of the property for the time of that wrongful occupation, … the reasonable cost of repair or restoration of the property to its original condition, and the costs, if any, of recovering the possession." (Civ. Code, § 3334, subd. (a).) Thus, in the normal case, an action for trespass seeks recovery for property damages, and does not generate a claim for noneconomic damages.

In some instances, however, a trespass may cause mental or emotional injury to the property owner or his or her family. In all the California cases we found, and in all those cited by the parties to this appeal, such damages have been awarded to persons *occupying* the premises. (See, e.g., *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 273; see *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 458 (*Kelly*) [collecting cases].) In such cases, the general damages awarded to the occupant

are known as "annoyance and discomfort damages." (*Kelly, supra,* 179 Cal.App.4th at p. 456.)

In the case before us, respondent was not an occupant of the property upon which appellants trespassed—the property was an unimproved lot. Appellants contend that, because respondent was not an occupant of the property, he was not entitled to general damages for emotional distress arising from their encroachment upon respondent's property. Respondent, however, points out that "annoyance and discomfort damages" are but a subset of the broader category of emotional distress damages, and he points to the following passage from *Kelly, supra,* 179 Cal.App.4th at page 456: "We do not question that a nonresident property owner may suffer mental or emotional distress from damage to his or her property. But annoyance and discomfort damages are distinct from general damages for mental and emotional distress. Annoyance and discomfort damages are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property."

It is not completely clear what the court in *Kelly, supra,* 179 Cal.App.4th at page 456, meant by the quoted passage. The opinion does not describe the evidence of emotional distress presented at trial by the plaintiff in that case, instead merely stating that the jury was instructed that it could award annoyance and discomfort damages. (*Id.* at pp. 446-447.) The appellate court held that the damage award had to be reversed because plaintiff was not an occupant of the property when the trespass occurred. (*Id.* at p. 459.) In addition, in the course of its discussion of emotional injury damages in trespass cases, the court quoted with approval language from a Colorado case, *Webster v. Boone* (Colo.Ct.App. 1999) 992 P.2d 1183, 1186, as follows: "'Our cases have permitted recovery for annoyance and discomfort damages on nuisance and trespass claims while at the same time precluding recovery for "pure" emotional distress.'" (*Kelly, supra,* 179 Cal.App.4th at pp. 456-457.)

In light of this citation of authority, it may be that the language relied upon by respondent is merely a factual statement, and not a statement of the law of damages. That is, the court may merely have been observing that the loss of property or use of property may, in fact, upset the owner of the property; the court may not have meant to imply that such mental distress is a compensable element of recovery for trespass.

In any event, we are not required to attempt to resolve the uncertainty in the dicta quoted from *Kelly, supra,* 179 Cal.App.4th at page 456, because the evidence here does not establish compensable emotional injury sufficient to support the verdict, even if there are hypothetical circumstances in which a trespass might support such an award of damages to a nonoccupant. In this case, literally the only evidence concerning respondent's mental state was that he was "upset" when he learned about the fence placement. Respondent stated that he was "confused why this would be done, but I wanted to verify it …." On cross-examination, respondent was asked whether he had asked appellants to move the fence when he discovered it encroached on his property. Respondent answered: "No, I did not. I was upset over finding out what I considered to be a deliberate, malicious act." We conclude that this reaction by respondent, while understandable, is not the type or degree of emotional distress for which a plaintiff can recover damages in a trespass case. (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1002.)

B. *Evidence of Malice*

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) "'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (*Id.* at

subd. (c)(1).) "'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." (*Id*. at subd. (c)(3).) Although a plaintiff must prove oppression, malice, or fraud in the trial court by clear and convincing evidence, on appeal, we review the verdict pursuant to the normal substantial evidence standard. (*George F. Hillenbrand, Inc. v. Insurance Co. of North America* (2002) 104 Cal.App.4th 784, 816.) That is, upon viewing the evidence in the light most favorable to the verdict, we must affirm the judgment unless we conclude "no reasonable jury could find the plaintiff has presented clear and convincing evidence on the disputed issue." (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 60.)

Appellants contend the only evidence they intentionally encroached on respondent's property is the fact that a witness testified he had given Cuicchi a magazine article—a few years earlier and in conjunction with a different property dispute—on the procedure for establishing a prescriptive easement. "It is hardly reasonable to assume that if a person knows about prescriptive easements, it follows that the person will seek to obtain a prescriptive easement over an adjoining lot," according to appellants' opening brief. They contend such a rule would permit a jury to conclude that every first-year law student had acted maliciously, regardless of the otherwise-innocent nature of a trespass.

The evidence concerning the magazine article was not, however, the only evidence that supported the verdict. When appellants first took possession of respondent's property under the lease, they installed a four-foot fence at the edge of their own paved parking lot. A witness who installed that fence (the same witness who testified he gave Cuicchi the magazine article—and who is a 14.5 percent owner of Wizard Gaming, Inc.) testified that, at the time that fence was installed, he told Cuicchi and Levinson that the fence was right on the property line between the corporation's lot

and respondent's lot.[1] At the time of the inception of the lease, Levinson was in charge of placing the new light posts on respondent's property. When the lease ended, Levinson was in charge of removing the light posts; it was he who decided to leave the two light posts closest to the paved parking lot and who decided to put the new six-foot fence behind those light posts on respondent's property. Appellants then removed the four-foot fence and caused the strip of land between the paved parking lot and the new fence to be fully landscaped so that it looked like a natural part of the existing parking area. They undertook these actions at a time when "everyone knew" that respondent was often out of the country developing a new casino in Belize. The totality of the evidence permits a clear and convincing inference that appellants acted with the intent to encroach upon respondent's adjoining lot. Intentional deprivation of respondent's right of possession is sufficient to support punitive damages, even in the absence of proof that they intended to permanently deprive respondent of property through establishment of a prescriptive easement. (See *Armitage v. Decker* (1990) 218 Cal.App.3d 887, 906-907.)

C. *Excessiveness of Punitive Damages*

Appellants contend that, under applicable standards that we will discuss below, punitive damages in this case should be reduced to a total of $23,290 from the $80,000 punitive damages awarded by the jury—that is, to a one-to-one ratio with the properly awarded compensatory damages.

"The due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 712.) "The imposition of 'grossly excessive or arbitrary' awards is constitutionally prohibited, for due process entitles a tortfeasor to '"fair notice not only of the conduct that will subject him to punishment, but also of the

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[1] As to Levinson, the witness qualified his testimony: "I can't be 100 percent sure I told him that, but I think I did."

severity of the penalty that a State may impose."'" (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1171 (*Simon*).)

Punitive damages will often be deemed constitutionally excessive if the ratio of such damages to the compensatory damages exceeds "a single-digit ratio." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425.) "In deciding whether an award of punitive damages is constitutionally excessive …, we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct." (*Simon, supra,* 35 Cal.4th at p. 1172.) Findings of historical fact "are still entitled to the ordinary measure of appellate deference." (*Ibid*.)

The United States Supreme Court has instructed that appellate courts must "determine the reprehensibility of a defendant[']s conduct] by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm Mut. Auto. Ins. Co. v. Campbell, supra,* 538 U.S. at p. 419.) Here, the harm did not involve personal injury, the conduct was an isolated event that did not endanger the health or safety of others, and respondent was not financially vulnerable. (See *Simon, supra,* 35 Cal.4th at p. 1180.) Nevertheless, appellants' conduct was intentional, and fairly can be described as involving trickery and deceit. Not only was the encroachment in the nature of a self-help remedy after appellants had failed to accomplish their goals through negotiations with respondent, the newly fenced area was landscaped in a manner to conceal the encroachment. In addition, respondent seldom visited his vacant lot and was out of the country when the encroachment occurred, facts inferably known by appellants. While appellants' conduct

was reprehensible, "[i]n the universe of cases warranting punitive damages under California law" (*id*. at p. 1181), the conduct was of lesser reprehensibility.

The relationship between the size of the punitive damages award and "harm done to the plaintiff" is the second factor to be applied by an appellate court. Harm to the plaintiff, as that phrase is used in punitive damages cases, is not strictly limited to the compensatory damages actually awarded. As relevant here, we must also consider whether appellants' conduct created a significant risk of greater "'potential harm'" that, for reasons not attributable to appellants, never became actual harm. (See *Simon, supra,* 35 Cal.4th at p. 1173.) Viewing the evidence in the light most favorable to the jury's verdict on compensatory damages, the jury reasonably could have concluded appellants intended to permanently deprive respondent of the strip of land, either because respondent simply would never notice the encroachment or through application of the doctrine of prescriptive easement. The jury reasonably could have inferred that appellants only removed the fence and corrected the encroachment because they had observed surveyors, acting on respondent's behalf, on the property. Accordingly, it is fair to conclude that the potential harm to respondent, if appellants' scheme had succeeded, was permanent loss of the land; yet the compensatory damages only compensated respondent for the temporary loss of the land. This factor supports a higher ratio of punitive damages to compensatory damages. (See *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 460.)

The third factor we are to consider is the relationship between the punitive damages award and any "civil penalties authorized for comparable conduct." (*Simon, supra,* 35 Cal.4th at p. 1172.) There is no civil penalty for ordinary trespass. This factor does not, in the present circumstances, provide any particular guidance in determining

the permissible level of punitive damages. (See *Amerigraphics, Inc. v. Mercury Casualty Co.* (2010) 182 Cal.App.4th 1538, 1566.)[2]

The punitive damages award, totaling $80,000, is slightly less than 3.5 times the compensatory damages properly awarded by the jury. In *Simon, supra*, 35 Cal.4th 1159, the defendant engaged in fraud when attempting to sell an office building to the plaintiff. (*Id*. at p. 1166.) The plaintiff suffered actual damages of $5,000. (*Id*. at p. 1170.) The jury awarded punitive damages of $1.7 million. (*Ibid*.) Applying the factors we have outlined above, the Supreme Court reduced the punitive damages award to $50,000, a ten-to-one ratio with the compensatory award. (*Id*. at pp. 1188-1189; see also *Amerigraphics, Inc. v. Mercury Casualty Co., supra,* 182 Cal.App.4th at p. 1566 [3.8-to-one ratio between punitive and compensatory damages for economic loss in denial of property insurance claim].) By contrast, in *Roby v. McKesson Corp., supra,* 47 Cal.4th at p. 719, the court limited punitive damages to a one-to-one ratio with compensatory damages. In that employment discrimination case, in contrast to property damage cases, the compensatory award was very large and included substantial noneconomic damages for emotional distress. (*Id*. at p. 699.) The absence of noneconomic damages in the present case supports a higher ratio between the punitive and compensatory damages. (See *id*. at p. 718.) We conclude, after independent consideration of the punitive damages award under the relevant factors, the award of $80,000 in the present case, about 3.5 times the modified compensatory award, is within the maximum award constitutionally permitted.

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[2] In some circumstances, the financial condition of the defendant can also play a role in limiting the amount of punitive damages. (See *Simon, supra*, 35 Cal.4th at pp. 1184-1186.) In the present case, appellants do not contend that this factor should play a role in our consideration of the constitutionality of the punitive damages award.

DISPOSITION

The judgment is modified to strike the $10,000 award for noneconomic damages. As modified, the judgment is affirmed. The parties shall bear their own costs on appeal.

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DETJEN, J.

WE CONCUR:

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GOMES, A.P.J.

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DAWSON, J.