CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Vanderpol v Starr (4/15/11)

Special Verdict; Spite Fence Statute; Nuisance

Plaintiffs' property adjoins that of defendants. Situated on a hillside, plaintiffs' land is above defendants' property, and both have views of the Pacific Ocean. When Plaintiffs purchased the property in 1999, a line of eucalyptus trees ran along the defendants' side of a fence separating the two parcels. The trees did not block plaintiffs' view. The prior owner stated there was an arrangement with the property owner below to keep the trees trimmed to heights that would not disrupt the view. The trees were about 9 to 12 feet tall and had been recently trimmed.

In 2001, Mr. Vanderpol approached his downhill neighbors and they agreed the trees could be trimmed by plaintiffs' licensed and bonded arborist. The trees were trimmed to a uniform height of 14 feet while Mrs. Starr watched. A year later, plaintiff again approached his neighbors and they again consented to the trimming under the same terms as previously. Again, defendant said she wanted to be home during the operation. As before, she provided direction and the trimming was accomplished.

In July, 2004, plaintiff again spoke to defendants by phone and a date was selected for trimming the trees. This time, defendant met plaintiff in her back yard and stated that she would only allow a few trees in the corner of her lot to be trimmed two or three feet off the top. Plaintiff responded that was not what he and defendant had agreed on, that the crew had his deposit and was ready to begin, and that she was going back on her word. The conversation intensified and defendant called plaintiff a "bully" and said she knew how to "deal" with bullies. She demanded plaintiff leave her property and threatened to call the police. Instead, plaintiff called the police when defendant threatened his pets. (Interestingly, defendant's two children were home at the time and both testified that plaintiff was the aggressor.)

About a month later, defendants began planting new trees along the common border, including up to 20 pine trees and 65 Italian cypresses. Defendant testified the new trees were to provide a visual screen between her property and that of plaintiff. In 2007, plaintiffs' counsel notified defendants their trees were obstructing his clients' view and were annoying, and advised them to trim their trees. Plaintiff estimated the trees were then four to five times higher than when he and his wife moved to the residence in 2000. Defendants did not trim their trees.

Plaintiffs sued defendants in 2009, alleging a cause of action for private nuisance based on California's "spite fence" statute, Civil Code section 841.14. At trial, plaintiffs' expert testified the "value loss" from the obstruction caused by the trees was $57,000. This estimate did not include the value of the loss of enjoyment of the view. Plaintiffs also pursued a nuisance claim based on ordinary negligence principles, sections 3479 and 3481, for leaves and debris defendants allegedly deposited in their yard, staining the concrete and clogging the pool filter.

In the first question on the special verdict form, the jury found defendants maliciously maintained trees that unnecessarily exceed 10 feet for the dominant purpose of annoying the plaintiffs. The jury then answered special verdict question number two and found this conduct was a substantial factor in causing harm to plaintiffs. In the third question of the special verdict, the jury found that the defendants did **not** "create a condition that was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Counsel had earlier stipulated the question only applied to leaves and debris, not the view.

The jury found damages for past economic damages in the amount of $57,000. The trial court, sitting in equity, then issued an order to enjoin the defendants from maintaining their trees at a height in excess of 15 feet nine inches. Based on the injunction, the plaintiffs did not received monetary damages because the trimming required by the injunction would result in no change in market value to the plaintiffs' property. Both sides appealed the judgment.

Defendants claimed error in entering a permanent injunction because plaintiffs failed to prove they sustained an injury under the statutes in special verdict question three. Plaintiffs claim that in prevailing on the first two special verdict questions they established nuisance per se and were thus entitled to

damages and injunctive relief. On appeal defendants also questioned whether a row of trees even qualified as a fence under the statute.

The Fourth District Court of Appeal reviewed section 841.4 which provides that any fence or other structure in the nature of a fence unnecessarily exceeding 10 feet in height maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property is a private nuisance. An owner injured in comfort or enjoyment may enforce the remedies provided. In 2002, the Third DCA issued its opinion in _Wilson v Handley_ (2002) 97 Cal.App.4th 1301, concluding a "row of trees planted on or near the boundary line between adjoining parcels of land can be a fence or other structure in the nature of a fence." The opinion explained that spite fence statutes developed in the late 1800's and were enacted to prevent unnecessary interference with a neighbor's light and air. The Court adopted a commonsense meaning for the term "structure" in section 841.4, broadly defining the word as "something arranged in a definite pattern of organization." (See _Wilson_, at p, 1306) Thus a row of trees could constitute a "structure" under the statute.

The Justices in the earlier opinion then addressed whether a row of trees could be a structure "in the nature of a fence." Because spite fence statutes were enacted to prevent unnecessarily high barriers between properties, the 3rd DCA determined that a row of trees planted or maintained at or near the boundary line between adjoining parcels can be a "structure in the nature of a fence" for purposes of section 841.4. The Fourth DCA then adopted the findings in Wilson to conclude a row of trees serving as a barrier between parcels can satisfy the statutory language of a "structure in the nature of a fence."

The Justices then turned to the injury requirement of the statute. The jury did make findings regarding defendants' maintenance of the trees to annoy plaintiffs, but was never asked to determine whether the plaintiffs sustained injury in their comfort and enjoyment of their estate by such nuisance as required by the statute. Plaintiffs claim the jury found injury by virtue of its answer to question number two. The appellate court then pointed out, to the contrary, that the second question addressed causation, not injury. Plaintiffs also argued that the first special verdict question established liability for purposes of section 841.4, by establishing liability. Again the Court disagreed, noting that damages and injunctive relief could not be available to an owner or occupant of adjoining property without a finding of injury in their comfort or enjoyment of the estate by such nuisance.

Here, the plaintiffs special verdict neglected to ask the jury to determine whether the plaintiffs were injured "by such nuisance" in the "comfort" or "enjoyment" of their property. Counsel stipulated that question number three was specifically limited to whether defendants created a condition that was an obstruction to the free use of such property to interfere with comfortable enjoyment, as the result of leaves and debris *and not view.* As such, the 4th DCA determined plaintiffs must still prove injury to recover under the statute. Unlike a general verdict (which merely implies findings on all issues in favor of the plaintiff or defendant), a special verdict presents the jury each ultimate fact in the case. The jury must resolve all of the ultimate facts presented to it in the special verdict, so that "nothing shall remain to the court but to draw from them conclusions of law." (CCP section 624)

The requirement that the jury must resolve every controverted issue is one of the recognized **pitfalls of special verdicts**. "The possibility of a defective or incomplete special verdict, or possibly no verdict at all is much greater than with a general verdict that is tested by special findings." (*Myers Building Industries, Ltd. v Interface Technology, Inc.* (1993) 13 Cal.App.4th 949) Unlike a general verdict or a general verdict with special findings, with a special verdict a reviewing court will not infer findings to support the verdict. (*Zagami, Inc. v James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083)

In the trial court, the jury was not asked in the special verdict whether the plaintiffs were injured in their comfort or enjoyment by the nuisance/trees. The special verdict is therefore defective on its face. (see *City of San Diego v D. R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668) Even so, the jury awarded damages of $57,000 to plaintiffs for past economic loss based on the lost value of property. Thus the jury did not award plaintiffs any damages for injury to their comfort or enjoyment of their property, and found no damage for non-economic loss. The expert's appraisal of a $57,000 damage figure did not include a valuation of loss of enjoyment of the view. Thus, the Justices concluded the jury did not make a determination that the trees injured the plaintiffs in their comfort and enjoyment of their property as required by Civil Code section 841.4.

In addition, the record shows that with the trial court sitting in equity to hear the injunction request, the plaintiffs did not ask the court to make its own independent findings, including a finding that the plaintiffs sustained injury in the comfort and enjoyment of their property from the defendants' trees. Finally,

the Court concluded the plaintiffs were not entitled to any relief under the general nuisance statutes because that claim was limited to leaves and debris.

Accordingly, although the jury found the defendants maliciously maintained their trees in excess of ten feet for the dominant purpose of annoying plaintiffs, the jury did not find, nor was it asked to find, that the plaintiffs were injured in either their comfort or enjoyment of their property as required by section 841.4. The judgment is reversed as is the permanent injunction, and the case is remanded for a new trial consistent with the Justices' opinion. Each party is to bear their own costs on appeal.

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