

Unpublished Disposition

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United States Court of Appeals, Ninth Circuit.

Margaret KEANE, also known as Margaret Keane McGuire, Plaintiff–Appellee,

v.

Walter KEANE, Defendant–Appellant,

And

Gannett Co., Inc., d/b/a USA Today, Defendant.

No. 87–1741.

Argued and Submitted May 11, 1989.

Submission Deferred May 16, 1989.

Resubmitted May 30, 1989.

Submission Vacated June 8, 1989.

Resubmitted June 29, 1989. Decided Jan. 18, 1990.

Synopsis

D.Hawaii

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Appeal from the United States District Court for the District of Hawaii; Harold M. Fong, District Judge, Presiding.

Before WALLACE and NOONAN, Circuit Judges, and THOMAS ZILLY,* District Judge.

MEMORANDUM

1. Walter Keane (Walter) appeals from the district court's denial of his motions for a *judgment notwithstanding the verdict*, *remittitur* or new trial, and its entry of summary judgment on his counterclaim. Margaret Keane McGuire (Margaret), Walter's ex-wife, sued Walter for defamation and malicious prosecution, and sought a declaratory judgment; Walter brought a counterclaim alleging copyright infringement. Walter asks us to overturn a \$4,000,000 jury verdict because of numerous alleged district court errors, including its denial of a continuance, its restriction on cross-examination of a witness, various erroneous evidentiary rulings and jury instructions, judicial misconduct, and excessiveness of the verdict. The district court had diversity jurisdiction under 28 U.S.C. § 1332(a). We have jurisdiction over Walter's timely appeal pursuant to 28 U.S.C. § 1291. We affirm as to liability, and reverse and remand for a new trial on the question of damages.

* Honorable Thomas Zilly, United States District Judge, Western District of Washington, sitting by designation.

I

Walter challenges the district court's denial of a continuance. Walter's counsel withdrew with the permission of the court, and Walter learned this—at the latest—49 days before the scheduled trial date of May 6, 1986. The magistrate and trial judge denied Walter's request for a continuance until October 13, 1986, but the district judge did bifurcate the trial, so that the defamation claim would be tried as scheduled and Walter would have the benefit of counsel for co-defendant Gannett. The remaining claims were not decided until well after Walter's proposed October 13 trial date, so we need not consider the denial of the continuance in relation to those claims.

In civil cases, we review the denial of a continuance for abuse of discretion. *United States v. 2.61 Acres of Land, More or Less*, 791 F.2d 666, 670 (9th Cir.1985) (*2.61 Acres*). The issue on review is not whether we consider a request for a continuance reasonable, but whether the district court's refusal to grant the continuance was “so unreasonable and arbitrary as to amount to an abuse of discretion.” *Ruiz v. Hamburg–American Line*, 478 F.2d 29, 31–32 (9th Cir.1973) (*Ruiz*). Whether the court has abused its discretion depends upon the facts of each individual case. *2.61 Acres*, 791 F.2d at 670. Review should focus on “the reasons presented to the trial judge at the time the request is denied.” *Ungar v. Sarafite*, 376 U.S. 575, 589 (1984). When we do so, we find no abuse of discretion.

Although we might have found Walter's request for a continuance reasonable, we cannot say that the district court's refusal was “so unreasonable and arbitrary as to amount to an abuse of his discretion.” *Ruiz*, 478 F.2d at 31–32. A continuance may properly be denied even where the denial leaves the moving party unrepresented at trial, even where that party is a criminal defendant. *See United States v. Studley*, 783 F.2d 934, 938–39 (9th Cir.1986). Walter displayed a lack of diligence in failing to secure counsel in 49 days, and the court reasonably was skeptical whether Walter would be able to secure counsel in the near future. The court itself would have been inconvenienced by a continuance, and the plaintiff and co-defendant, as well as their witnesses, may well have been inconvenienced by rescheduling trial in Hawaii. Although Walter may well have suffered significant prejudice, this was not foreseeable at the time the continuance was denied. The court bifurcated the trial and ensured that Walter would have benefit of co-defendant's counsel. The court reasonably expected Gannett to defend on the basis of truth as well as lack of actual malice and could not have anticipated the directed verdict in Gannett's favor that left Walter alone at the defense table for the last days of trial. Nor could the court have anticipated the extreme degree of Walter's erratic, emotional, and repetitive conduct in the courtroom, which went well beyond what might ordinarily be expected of pro se parties.

II

2. Walter contends that he was denied a fair trial because the district court improperly limited his cross-examination of witness Plumer, his former girlfriend. Plumer testified as a rebuttal witness for Margaret, after Gannett's directed verdict motion had been granted, and Walter had rested his defense. Walter was then representing himself. His cross-examination elicited a vitriolic response from Plumer. The district judge declared a recess, and ordered Walter and Margaret's lawyer into his chambers for a conference. The conference was not recorded because the proceedings were being taped without a court reporter, and while the courtroom had taping equipment, the judge's chambers did not. At this conference, the district judge asked Walter for an offer of proof as to what questions he intended to ask and what testimony he planned to elicit on cross-examination. Because this conference was not recorded, the record does not tell us what if any offer of proof Walter made. We withdrew this case from submission pursuant to Fed.R.App.P. 10(c) or (e) in order that the record might be reconstructed. This effort failed.

Walter apparently made an offer of proof, but did so only in the unrecorded meeting in the judge's chambers. Walter failed to make an offer of proof on the record, nor does the record otherwise show what his line of questioning would have been.

It was Walter's responsibility, either during or immediately after the in-chambers conference, to preserve a proper record for appeal, and the consequences of any insufficiency properly fall on him. *See United States v. Mills*, 597 F.2d 693, 698 (9th Cir.1979) (*Mills*); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1414 (9th Cir.1986).

Although invited to do so by this court, Walter has not followed the procedures prescribed by Rule 10(c). Nor has the district court established a record pursuant to Fed.R.App.P. 10(e). “Since no record is provided upon which [Walter's] claim can be evaluated, it must be denied.” *Mills*, 597 F.2d at 698.

Not only was there no preservation of the issue on appeal, but any abuse of discretion would not have resulted in reversal. Without downplaying the importance of cross-examination, we conclude that there was no harmful error. Plumer's direct testimony was cumulative in many respects, and her bias and partiality were obvious to the jury. In light of the other overwhelming evidence against Walter, we cannot conclude that the cross-examination, whatever it would have been, would have changed the outcome of the case.

III

Walter identifies five specific items of inadmissible evidence introduced by Margaret: (1) the testimony of Margaret's daughter, Jane Ulbrich, that Walter had threatened her and struck her when she was a child during Walter and Margaret's marriage; (2) Margaret's testimony about Walter's threatening and abusive behavior during their marriage; (3) the reading of deposition testimony from the Keanes' former secretary regarding domestic discord and threats by Walter against Margaret; (4) the *Life* magazine article in which Margaret claimed credit for painting the big-eyed children, and which recounted Margaret's challenging Walter to a "paint out" in San Francisco; and (5) a 1970 letter from Margaret to John May, Walter's friend and witness, in which Margaret recounted threats by Walter and claimed that their marriage was "a long lie."

3. Where Walter failed to object to evidence, any objection is waived absent a showing of plain error affecting his substantial rights. *United States v. Rogers*, 769 F.2d 1418, 1425 (9th Cir.1985). Otherwise, we review evidentiary decisions for abuse of discretion. *Kisor v. Johns-Mansville Corp.*, 783 F.2d 1337, 1340 (9th Cir.1986) (*Kisor*). We will not reverse unless, more probably than not, the error tainted the verdict. *Id.*

Walter did not object to the testimony from Margaret, her daughter, and her former secretary regarding Walter's violent propensities during their marriage and Margaret's fear of him. Though prejudicial, this evidence was relevant to show why Margaret was afraid to say that the paintings were hers. We cannot say this rises to the level of plain error affecting substantial rights.

Walter points out correctly that during closing argument Margaret's counsel read to the jury a portion of Margaret's former secretary's deposition that had not earlier been read into evidence. No timely objection was made. The effect of this testimony was largely cumulative. In this excerpt, Margaret allegedly told the secretary about threats Walter had made to burn the house down and kill her if she tried to leave him; that day the police eventually came to take him away. At the end of this episode, Margaret allegedly stated that she, not Walter, had done the paintings.

There was already testimony from the secretary before the jury that Margaret had told her Walter could not paint. There was also testimony from her that Margaret claimed Walter threatened her. The secretary also described Walter's bullying personality and his treatment of Margaret. We cannot say that an unobjected to reference to this part of the deposition during closing argument was plain error.

Margaret contends that the contents of the *Life* magazine article from 1970 qualified as prior inconsistent statements by Walter and as prior consistent statements by Margaret under Fed.R.Evid. 801(d)(1). Initially, as Walter points out, the court sustained Gannett's objection to admitting the *Life* article, principally on relevancy grounds because it was rebutting statements not yet in evidence. Later, the relevant testimony was given by Margaret and Walter, and admission of the article over Walter's objection was no abuse of discretion. *See Kisor*, 783 F.2d at 1340.

The court admitted into evidence, over Walter's objection, a letter written by Margaret to John May in November 1970. Walter contends now that this letter is highly prejudicial prior consistent hearsay because it asserts Margaret's claim that she did the paintings and includes highly disparaging descriptions of Walter and threats he had made. This evidence was offered in rebuttal to a 1976 letter May wrote the Keanes' accountant attributing two now-disputed paintings to Walter. This evidence thus demonstrated that at the time of May's letter, he was aware that Margaret contested the paintings' authorship. This evidence was also a prior consistent statement confirming that Margaret notified others in 1970 that she had painted the Keane paintings. Otherwise, this letter contained largely cumulative evidence. Even if this was an error, we cannot say that more probably than not it tainted the verdict. *See id.* Much evidence similar to the contents of the letter was already before the jury.

IV

4. Failure to make contemporaneous objection to a proposed jury instruction precludes appellate review even in cases of plain error. *Herrington v. County of Sonoma*, 834 F.2d 1488, 1500 n. 12 (9th Cir.1987) (*Herrington*). On appeal, Walter argues that the trial court erred by twice including the phrase “Thinking he was dead” in the jury instructions in light of the court's earlier ruling that this phrase was only a statement of motive and not actionable per se. Walter's failure to object to the instructions precludes our review. *See id.*

V

Walter contends that he was denied a fair trial because of judicial misconduct. He asserts that the district judge lost patience with him and made numerous prejudicial statements.

“Very few cases outside of the criminal law area support an appellate finding of general judicial misconduct during trial. The standard of reversal is whether the trial was unfair.” *Handgards, Inc. v. Ethican, Inc.*, 743 F.2d 1282, 1289 (9th Cir.1984) (citations omitted), *cert. denied*, 469 U.S. 1190 (1985). “District courts have broad discretion in controlling the conduct of a trial ... [and the] presentation of evidence and interrogation of witnesses.” *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 465–66 (9th Cir.), *cert. denied*, 108 S.Ct. 158 (1987). A clear and precise showing of prejudice must be made to secure a reversal, particularly in noncriminal trials. *Hansen v. Commissioner*, 820 F.2d 1464, 1467 (9th Cir.1987).

We conclude that Walter was not denied a fair trial. While on occasion the judge may have lost patience with Walter's courtroom antics and failure to follow instructions, we see nothing so extraordinary as to indicate the judge was biased. *See In re Yagman*, 796 F.2d 1165, 1178–80 & n. 16 (9th Cir.), *amended*, 803 F.2d 1085 (9th Cir. 1986), *mandamus granted*, 815 F.2d 575 (9th Cir.), *cert. denied*, 108 S.Ct. 450 (1987). The record does not reflect advocacy or partiality on the merits. *See Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 530–31 (9th Cir.1986). “[A]t worst, the [court] expressed impatience and exasperation with [Walter] and his handling of the case, but there is no indication that meaningful evidence was improperly excluded or that [he was] treated unfairly.” *Smith v. Commissioner*, 800 F.2d 930, 935–36 (9th Cir.1986).

The district court's occasional derogatory comments concerning Walter's handling of the case would not have unduly biased the jury on the merits. The only judicial comment of serious concern occurred when Walter testified on redirect that Damon had been his wife's lover in Honolulu. The court then commented, “I guess if you haven't got any money you can libel anyone you want to and get away with it.” Waltersuggests that the jury might have formed the impression that since the judge thought Walter would libel Damon, he would also make defamatory statements about his ex-wife. Although we do not condone the judge's comment, we do not believe that, in the context of the whole proceedings, it rendered this trial unfair. This comment does not rise to the level of an opinion on an ultimate issue of fact or advocacy for the opposing part. *See Maheu v. Hughes Tool Co.*, 569 F.2d 459, 471–72 (9th Cir.1977).

VI

5. Walter contends that the \$4,000,000 jury damage award was “grossly excessive” for the mental anguish Margaret allegedly suffered as a result of his allegedly defamatory statement. He contends that there was no competent evidence of damages to support the award.

We “will affirm an award of damages unless it is clearly unsupported by the evidence or grossly excessive, monstrous, or shocking to the conscience.” *In re Computer Communications, Inc.*, 824 F.2d 725, 731 (9th Cir.1987). In assessing the excessiveness of damages, we consider the evidence in the light most favorable to the verdict. *Siebrand v. Gosnell*, 234 F.2d 81, 84 (9th Cir.1956).

Evidence was presented of the anguish and humiliation Margaret suffered as a result of the statements in the “USA Today” article. However, Margaret offered only speculative evidence of lost profits and injury to reputation. While “USA Today” has an extensive circulation, it would appear that the majority of readers were unfamiliar with the personalities involved, and thus were unaffected by the article. Although Walter did not object to the damages, we

conclude that the \$4,000,000 award is “so grossly excessive that it shocks the conscience.” *Herrington*, 834 F.2d at 1503. We therefore vacate the damages award and remand the damages issue for a new trial. *See id.*

VII

We turn now to the district court's entry of summary judgment in favor of Margaret on Walter's copyright infringement claim.

We review the entry of summary judgment independently. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540 (9th Cir.1989) (en banc) (*Steelworkers*). We apply the same standard used by the district court under Fed.R.Civ.P. 56(c), which provides that summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Id.*

To establish copyright infringement, the plaintiff must show (1) that he owns a valid copyright and (2) that the defendant copied the plaintiff's work. *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 206 (9th Cir.1988) (*Data East*); *Sid & Marty Krofft TV Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir.1977) (*Krofft*). To establish copying under the second prong of this test, the plaintiff must show (1) that the defendant had access to the plaintiff's work and (2) substantial similarity between plaintiff's and defendant's work. *Id.* To prevail, the plaintiff must show that the defendant copied the plaintiff's work. *See Topolos v. Caldeway*, 698 F.2d 991, 994–95 (9th Cir.1983). It is permissible, though not common, to grant summary judgment on the “substantial similarity” prong of the copying test. *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

The district court granted Margaret's motion for summary judgment because it found that Walter had failed adequately to allege copying in his pleadings. In addition, while there was evidence that Margaret had access to Walter's copyrighted work, Walter failed to present evidence of substantial similarity. He never presented copies of the works which he alleged were infringed. Walter never actually alleged that Margaret had in fact copied his work. Margaret stated without rebuttal that she only sold prints which she herself lawfully owned; Margaret denied ever copying the copyrighted art. Thus, the materials before the court present no genuine issue as to the very material fact of whether Margaret herself infringed upon some copyrighted work by Walter to which Margaret's work is substantially similar. *See Steelworkers*, 865 F.2d at 1170; *Data East*, 862 F.2d at 206; *Krofft*, 562 F.2d at 1162.

On appeal, Walter does not challenge the district court's entry of summary judgment in favor of Margaret on his unfair competition claim.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 36–3.

WALLACE, Circuit Judge, concurring and dissenting:

I concur in all but part VI and would affirm. As pointed out by the majority, there was evidence of damage to Margaret as a result of the “USA Today” article. In addition to her anguish and humiliation, there was testimony that the defamatory statements could harm her reputation as a painter. Most importantly, there was evidence of “USA Today's” readership of five million. The court instructed the jury that it could award “compensatory damages” absent any evidence of actual injury because the law presumes that defamatory statements injure reputation. The jury was told that compensatory damages are a means by which a plaintiff “can demonstrate to others the falsity of statements made by a defendant.”

I cannot say that the damages awarded here, while high, were “clearly unsupported by the evidence or grossly excessive, monstrous, or shocking to the conscience.” *In re Computer Communications, Inc.*, 824 F.2d 725, 731 (9th Cir.1987). “Although [I] might well have concluded, had [I] been [a trier] of fact, that a lesser award would have been more appropriate under the circumstances, [I am] unable to supply those extreme characterizations here.” *Fountila v. Carter*, 571 F.2d 487, 492 (9th Cir.1978). Walter concedes that he offered no evidence rebutting Margaret's damages

claim. The jury could consider testimony concerning Margaret's personal anguish, the injury to her reputation, and "USA Today's" circulation of five million people. I cannot say that this large verdict was "monstrous" or "grossly excessive."