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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LARRY WILSON, Plaintiff and Respondent, v. CAROLE AUTLER, Defendant and Appellant.	E040346 (Super.Ct.No. SCVSS125300) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

Varner & Brandt and Daniel A. Reed for Defendant and Appellant.

Skousen & Skousen, Robert James Skousen and James Allen for Plaintiff and Respondent.

It has been said that good fences make good neighbors. This case, alas, involves bad fences as well as bad neighbors.

Since 1996, Larry Wilson and his next-door neighbor, Carole Autler, have been embroiled in more or less constant litigation regarding Wilson's easement across Autler's property. In this particular case, Wilson filed a petition for a harassment injunction against Autler (Code Civ. Proc., § 527.6), alleging that her conduct of keeping a locked gate (or gates) across the easement constituted harassment. The trial court granted the petition and ordered Autler to provide the keys.

Two months later, Wilson filed an ex parte application. In it, he claimed that Autler had also allowed various other items, including trailers, trees, and a power pole, to obstruct the easement, and he requested an order that she remove such obstructions. The trial court, however, merely "confirm[ed its] previous order" that Autler provide keys. (Capitalization omitted.)

Finally, not quite five more months later, Wilson filed another ex parte application. He claimed that he needed immediate access to the easement, because he needed to repair his well, and his tenants needed to be able to receive deliveries of propane. Once again, he claimed that Autler had allowed various items to obstruct the easement, and he requested an order that she remove such obstructions. This time, the trial court ordered Autler to "remove all obstructions preventing reasonable access" to the easement.

Autler appeals. She contends that the trial court erred because it:

1. "Exceeded the subject matter [of] and the relief sought by the harassment petition." (Capitalization altered.)

2. Denied Autler's claim that Wilson's easement had been extinguished by prescription and, in particular, did so in the context of a harassment petition.

3. Enjoined conduct that served a "legitimate purpose" and that therefore did not constitute harassment.

We will conclude that Autler has failed to demonstrate any reversible error. Accordingly, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Background*.

Wilson owns a piece of property at 8187 Reche Canyon Road (sometimes also known as Lot 10). Autler owns the property immediately east of Wilson's, at 8189 Reche Canyon Road (sometimes also known as Lots 6 and 7). Wilson has an expressly granted easement, "for ingress and egress," across Autler's property. (See diagram attached as Appendix A, at p. 16.)

Around 1997, Autler put up a locked gate at the east end of the easement. At some point, according to Wilson, she also put up a locked gate at the west end of the easement.

In 1996, Autler and others had filed an action against Wilson, seeking a declaration that he was only entitled to use the easement for the purpose of maintaining a

certain well on his property. This resulted in a judgment, in February 2000, that Wilson had "a general right of ingress and egress which is not limited to a specific purpose."

Meanwhile, Autler had filed a petition for a harassment injunction against Wilson (case No. 327704). The trial court ordered Wilson not to use the easement "to commit harassing conduct against [Autler]." Wilson appealed, contending, among other things, that the trial court lacked the authority to adjudicate property rights in a harassment injunction proceeding.[1] In August 2000, we held that the trial court acted appropriately, because "the parties' property rights had already been resolved, after a full trial . . . ." We also held that there was evidence that Wilson was making unreasonable use of the easement and that this could constitute harassment.

In 2005, Autler filed another petition for a harassment injunction against Wilson (case No. SCVSS122758). On April 7, 2005, the trial court (per Judge Michael A. Smith) ruled: "[E]xisting valid judgments . . . establish (1) Wilson has an easement across [the] Autler property, [and] (2) Wilson has the right to use said easement for reasonable ingress and egress to and from his property . . . . [¶] Wilson's efforts to enforce his rights under these decisions to gain access to his easements therefore do not constitute harassment . . . ."

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[1] At Autler's request, we take judicial notice of our unpublished opinion in that appeal, *Pisarcek et al. v. Wilson* (Sept. 23, 1999, E022168).

B. *The Present Proceeding*.

1. *The Harassment Petition Results in an Order that Autler Provide Keys*.

On April 14, 2005, Wilson commenced the present proceeding by filing a petition for a harassment injunction against Autler.[2] (Code Civ. Proc., § 527.6.) The alleged harassment consisted of "lock[ing] the gate to Wilson's easement over Autler['s] property . . . ."

On May 9, 2005, after a hearing,[3] the trial court ruled "that this court has no jurisdiction to make permanent orders in this case because there have been no threats of violence or [to] personal safety." (Capitalization omitted.) Nevertheless, it continued the hearing, and it ordered the case transferred to Judge Smith, apparently because he had presided over the related case. For unknown reasons, however, the case was then transferred again to Judge Donald R. Alvarez.

On June 10, 2005, after a further hearing, the trial court ruled: " . . . I'm going to grant the petition . . . to this extent: That . . . Mrs. Autler provide Mr. Wilson forthwith with whatever keys . . . may be necessary to access the gates . . . so . . . Mr. Wilson will have immediate and reasonable access of ingress and egress . . . ." It ordered Wilson's counsel to prepare a formal written order.

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[2] At the same time, Wilson also filed a similar petition for a harassment injunction against Autler's husband. None of the proceedings in that case are before us.

[3] Autler has not provided us with a reporter's transcript of this hearing.

It indicated, however, that it was not reaching any other issues: "[I]ssues pertaining to the use of the easement or disagreements regarding . . . what should be considered reasonable or unreasonable has [*sic*], to some extent or degree, been considered by -- I don't know if it's been resolved. [S]ome discussion as to defining the rights or obligations of the parties relative to trees that are there; they can't come on with self-help and take down the trees and other things that -- so there may be some -- those types of issues may have already been litigated . . . ." It suggested that the parties try to settle any other unresolved issues, and it offered to preside over a settlement conference.

2. *Wilson's First Ex Parte Application Regarding Obstructions*.

Thereafter, Wilson's counsel prepared a proposed order, but Autler's counsel refused to approve it. Accordingly, the trial court set a hearing for August 29, 2005.

On August 10, 2005, Wilson filed an ex parte application or, alternatively, an application to shorten time on a motion, for an order requiring Autler "to clear the easement . . . of any and all obstructions . . . ." He complained that Autler had blocked the easement, or had allowed it to be blocked, by vehicles, trailers, a power pole, trees, debris, a trench, and vicious dogs. The trial court granted an order shortening time and set a hearing for August 26, 2005.

Autler filed an opposition to the application, arguing (among other things) that it "impermissibly seeks to expand the court's order beyond the pleadings."

On August 26, 2005, the trial court merely "confirm[ed its] previous order" (capitalization omitted) and ordered Autler to give Wilson the keys within 24 hours.[4]

3. *Wilson's Second Ex Parte Application Regarding Obstructions.*

On October 13, 2005, on Wilson's application, the trial court issued an order to show cause (OSC) re contempt.[5] On December 9, 2005, it held a partial hearing on the contempt OSC, then continued the contempt hearing to January 20, 2006.

On January 10, 2006, Wilson filed an ex parte application for an order that Autler "abstain from obstructing the easement . . . ." He explained that he needed immediate access to repair a well that he and his tenants used for water and to deliver propane to his tenants. Once again, he complained that Autler had blocked the easement, or had allowed it to be blocked, by vehicles, trailers, a power pole, trees, and dogs.

On January 11, 2006, the trial court held a hearing on the ex parte application. At that hearing, Autler's counsel argued (among other things) that the relief sought was "beyond the harassment petition." The trial court replied, "[W]hat's before the Court today, as I see it, . . . is . . . an ex parte application for a temporary restraining order." Autler's counsel also argued that "more than adequate time has passed for adverse possession and the time for extinguishment of the easement."

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[4] Autler has not provided us with a reporter's transcript of this hearing.

[5] Autler has not included either the application or the OSC in the appellate record. As far as we can tell from the register of actions, Autler never filed an opposition to the contempt OSC.

The trial court ruled that it was "treating this as an application shortening time for hearing on [a] motion"; it set a hearing for January 20, 2006, and it gave Autler until January 17, 2006, to file an opposition.[6]

Accordingly, on January 20, 2006, the trial court held a combined hearing on (1) Wilson's contempt OSC, and (2) Wilson's ex parte application (which the court was now deeming to be a motion for an injunction). At the end of the hearing, it took both matters under submission.

On April 6, 2006, the trial court issued a written ruling and order. With respect to the contempt OSC, it declined to find Autler in contempt; however, it ordered her to provide Wilson with keys to the gates and with access to the easement. With respect to Wilson's motion for an injunction, it once again ordered Autler to provide Wilson with access to the easement. To this end, however, it further ordered Autler to "remove all obstructions preventing reasonable access (including but not limited to chains, posts, vehicles, containers, etc.)." Autler appeals from this order.

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[6] The record regarding Autler's opposition is very confusing. Autler has included it in the appellate record. The register of actions, however, does not reflect that it was ever filed. There is some indication that Autler's counsel had trouble filing it because, instead of being captioned as an opposition, it was captioned as a "Motion to Dismiss . . . or, in the Alternative, Motion for Change of Venue" (capitalization altered) and purportedly set for hearing in just three days. The trial court even stated: "There is . . . no opposition to Wilson's ex parte application . . . ." Elsewhere, however, the trial court referred to the existence and the contents of the opposition in such a way as to demonstrate that it did read and consider it.

II

EXCEEDING THE SCOPE OF THE HARASSMENT PETITION

Autler contends that the trial court "erred by issuing a permanent injunction which exceeded the subject matter and the relief sought by the harassment petition." (Capitalization altered.) Her argument under this heading is narrow and specific. We deem her to have waived any other arguments.

First, she argues that the relief sought in Wilson's original harassment petition was limited to unlocking one particular gate and did not include the removal of any obstacles within the easement. We do not agree, however, that this prevented the trial court from issuing a broader order.

"Upon notice and motion, the court may modify . . . a final injunction upon a showing that there has been a material change in the facts upon which the injunction was granted, that the law upon which the injunction was granted has changed, or that the ends of justice would be served by the modification or dissolution of the injunction." (Civ. Code, § 3424, subd. (a); accord, Code Civ. Proc., § 533.) "This statute codifies a long-settled judicial recognition of the inherent power of the court to amend an injunction in the interest of justice when ' . . . there has been a change in the controlling facts upon which the injunction rested, or the law has been changed, modified or extended, or where the ends of justice would be served by modification.' [Citations.]" (*Swan Magnetics, Inc. v. Superior Court* (1997) 56 Cal.App.4th 1504, 1509, quoting *Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal.2d 92, 95.)

Here, the trial court had already granted the petition, on June 10, 2005, when it ordered Autler to provide keys. Its minute order even stated, "Case dispositioned by judgment." (Capitalization altered.) By April 6, 2006, however, it had become apparent that merely obtaining the keys to the gates would be a hollow victory; Wilson remained unable to use and enjoy the easement unless and until Autler removed the obstacles from it. The trial court therefore issued a modified injunction on notice and motion (albeit on shortened time). At that point, it was not constrained by the allegations of the original pleadings.

Second, Autler also argues that the trial court had already refused to order her to remove any obstacles. She asserts that "she had a right to rely upon the trial court's consistent prior rulings . . . ." First, she relies on its order on June 10, 2005, that she provide Wilson with keys. At that time, however, Wilson was only requesting keys; he had not yet requested the removal of obstacles.[7] She also cites the hearing on December 9, 2005, but at that time, the only issue before the court was whether to hold Autler in contempt; there was no issue as to the removal of obstacles. Moreover, at that hearing, the trial court did not make any order; it merely continued the hearing.

Admittedly, in Wilson's August, 10, 2005, ex parte application, he did ask the trial court to order Autler to remove obstacles. Moreover, on August 26, 2005, the trial court denied this request (at least implicitly) by ordering Autler to provide keys, but not

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[7] Autler's brief cites Wilson's August 10 request, then states that the trial court denied it on June 10. This is not only untrue but, absent a time machine, impossible.

ordering her to remove obstacles. However, because Autler has not given us a reporter's transcript of this hearing, we cannot tell whether this was in any way inconsistent with its later order. The trial court may have simply wanted to begin by ordering Autler to turn over the keys and to wait and see whether it even really needed to address the issue of obstacles. In any event, even assuming the trial court did actually make a considered decision to deny the request, it had the inherent authority to change its mind. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1096.)

We therefore conclude that the trial court was not barred from issuing an injunction requiring the removal of obstacles.[8]

III

EXTINCTION BY PRESCRIPTION

Autler contends that the easement had been extinguished by prescription. However, she also contends that the trial court could not determine the validity of her prescription claim in the context of a harassment petition. Apparently her position is that the trial court should have declined to issue an injunction unless and until Wilson prevailed on the prescription issue in a separate civil action.

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[8] Autler does not contend that the injunction was erroneous because it was not explicitly limited to a duration of not more than three years. (See Code Civ. Proc., § 527.6, subd. (d).) We therefore do not consider any such contention.

Moreover, because we are resolving Autler's narrow contention on concomitantly narrow grounds, we need not consider whether the issues could have been expanded beyond those normally presented by a petition for a harassment injunction. (See, e.g., Code Civ. Proc., § 469 [variance between pleading and proof].)

Wilson responds (among other things) that Autler waived this contention by failing to raise it below. We agree.

Admittedly, Wilson filed his ex parte application on January 10, and on January 11, at a hearing on the ex parte application, Autler's counsel argued that "more than adequate time has passed for prescription and the time for extinguishment of the easement." The trial court, however, refused to grant the application on an ex parte basis; instead, it set it for hearing on shortened time, and it allowed Autler to file an opposition. Autler's opposition, once filed, did not mention prescription. Moreover, at the subsequent hearing, on January 20, Autler's counsel *still* did not mention prescription. The trial court could hardly be expected to remember a passing remark from an ex parte hearing earlier that month; even if it did, however, it was entitled to conclude that Autler had abandoned this line of attack.

Autler notes that one of the exhibits attached to her opposition was a copy of a complaint she had filed against Wilson, in which she alleged that the easement had been extinguished by prescription. She never argued, however, that that complaint was relevant for this purpose, nor did she call the trial court's attention to any evidence supporting the allegations of the complaint. The trial court was not required to come up with arguments for her.

As Autler also notes, at the hearing on January 20, counsel for *Wilson* read part of this complaint aloud to the court. The only point Wilson's counsel was making, however, was that in that complaint, Autler had admitted, under oath, that a west gate

existed -- something she had denied in the contempt proceeding. Once again, counsel for *Autler* did not argue that the complaint was *also* relevant to the issue of prescription; he did not raise prescription at all. Also, once again, he did not call the trial court's attention to any *evidence* supporting the allegations of that other complaint.

We therefore conclude that Autler waived any issue as to extinction by prescription.

IV

"NO LEGITIMATE PURPOSE"

Autler contends that the trial court erred by requiring her to remove obstacles from the easement, because her conduct in this respect did not constitute harassment. Under Code of Civil Procedure section 527.6, subdivision (b), a course of conduct cannot constitute harassment unless it "serves no legitimate purpose." Autler therefore argues that keeping the alleged obstacles on her own property "cannot be argued to serve 'no legitimate purpose' . . . ." Once again, we consider only the narrow and specific contention presented.

"In assessing whether substantial evidence supports the requisite elements of willful harassment, as defined in Code of Civil Procedure section 527.6, we review the evidence before the trial court in accordance with the customary rules of appellate review. We resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable,

credible and of solid value. [Citations.]" (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.)

It does not appear that Autler ever raised this particular contention below. Nevertheless, this does not constitute a waiver, because it goes to whether there was sufficient evidence to support the trial court's order. (See *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.)

Autler, however, *has* waived this contention by failing to set forth or cite (Cal. Rules of Court, rule 8.204(a)(1)(C)) all of the relevant evidence. "When appellants challenge the sufficiency of the evidence, all material evidence on the point must be set forth and not merely their own evidence. [Citation.] Failure to do so amounts to waiver of the alleged error and we may presume that the record contains evidence to sustain every finding of fact. [Citation.]" (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1255; accord, *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881-882.)

Even aside from waiver, the point lacks merit. The extreme degree of animus between the parties provides strong support for an inference that Autler maintained obstacles in the easement purely out of spite. She had admitted that she intended to prevent Wilson from having any use of the easement whatsoever. She had also admitted that it was only after the easement was in existence, and with knowledge of the easement, that she began parking trailers there. Moreover, there was evidence that she began parking a vehicle inside the east gate, so that it could not be opened, sometime after

August 26, 2005, when the trial court ordered her to provide keys to the gates. From a map of her property, it appeared that she had ample room in which to keep trailers, vehicles, and other movable property without encroaching on the easement. Admittedly, the obstacles also included some less readily movable property, such as trees and a power pole. Still, a person not motivated by spite, who was willing, in good faith, to provide access to the easement, would not necessarily mind removing (or moving) these objects. Thus, from the evidence that Autler had no legitimate reason for keeping readily movable property in the easement, the trial court could reasonably conclude that she also had no legitimate reason for keeping less movable property in the easement.

V

DISPOSITION

The order appealed from is affirmed. Wilson is awarded costs on appeal against Autler.

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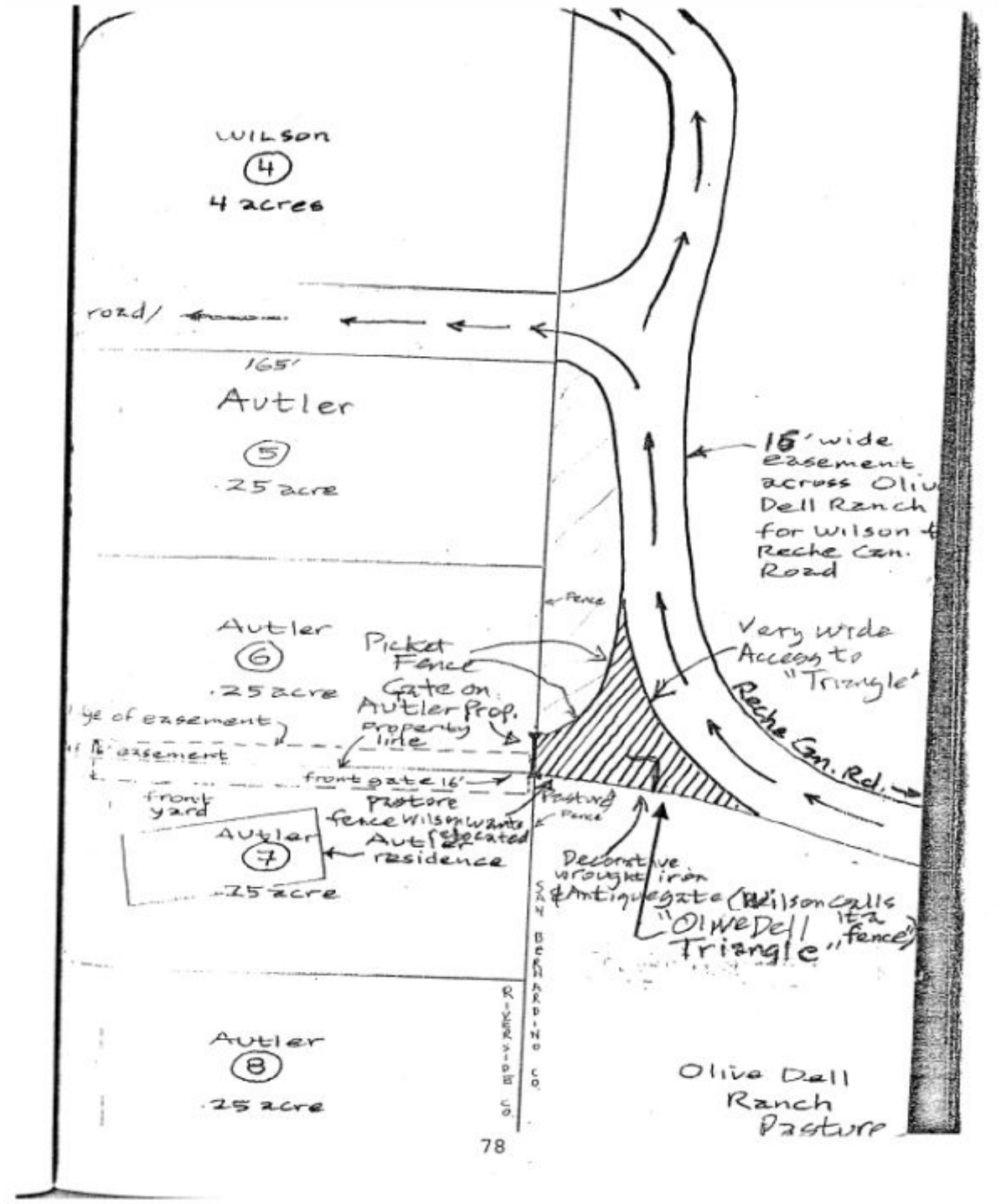
RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.


Wilson
4
4 acres
road/
165'
Autler
5
.25 acre
16' wide easement across Olive Dell Ranch for Wilson + Reche Can. Road
Fence
Autler
6
.25 acre
Picket Fence
Gate on Autler Prop.
Very wide Access to "Triangle"
Reche Can. Rd.
Property line
front gate 16'
Pasture Fence
front yard
Autler
7
.25 acre
Decorative wrought iron & Antique gate (Wilson calls it a fence)
"Olive Dell Triangle"
SAN BERNARDINO CO.
RIVERSIDE CO.
Autler
8
.25 acre
Olive Dell Ranch Pasture
78

APPENDIX A