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 Select for FOCUS<sup>™</sup> or Delivery*2007 Cal. App. Unpub. LEXIS 7421, \**LANCE PAULSON et al., Plaintiffs and Respondents, v. **FIRE PREVENTION SERVICES, INC.**, Defendant and Appellant.

D048991

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

2007 Cal. App. Unpub. LEXIS 7421

September 13, 2007, Filed

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**PRIOR HISTORY: [\*1]**

APPEAL from a judgment of the Superior Court of San Diego County, No. GIC827699. Lillian Y. Lim, Judge.

**DISPOSITION:** Affirmed.

**CORE TERMS:** new trial, judgment notwithstanding, forfeited, nonsuit, abatement, statement of facts, jury's verdict, opening brief, appealable, jury trial, legal authority, reporter's transcript, postjudgment, correctness, completion, waived, conclusions of law, negligence claim, notice of appeal, conducting, retired, handled

**JUDGES:** AARON, J.; HALLER, Acting P.J., O'ROURKE, J. concurred.**OPINION BY:** AARON**OPINION**

I.

## INTRODUCTION

The trial court entered a judgment against appellant **Fire Prevention Services, Inc.** (FPSI) in the amount of \$124,419.60. We conclude that FPSI has forfeited all of its claims on appeal by filing a wholly inadequate brief and record. Accordingly, we affirm the judgment.

II.

## FACTUAL AND PROCEDURAL BACKGROUND

Respondent Lance Paulson and his wife, respondent Suzanne Lentchner, owned property in El Centro. FPSI

entered into an agreement with the City of El Centro (City) to enforce the City's nuisance abatement program. Pursuant to this agreement, FPSI entered respondents' property on two separate occasions for the purpose of conducting forced abatements. FPSI sent respondents bills that totaled approximately \$102,000 for the work it performed on the property.

Respondents filed an action against FPSI. Although the complaint is not contained in the record, we are able to determine that respondents brought a negligence claim against FPSI, among other causes of action. After a jury trial, the jury rendered a verdict [\*2] in favor of respondents on their negligence claim. The jury determined that FPSI had caused respondents to suffer \$124,419.60 in damages, including \$94,419.60 in economic damages and \$30,000 in noneconomic damages. The trial court entered a judgment in favor of respondents and against FPSI in the amount of \$124,419.60. The trial court subsequently denied FPSI's motion for judgment notwithstanding the verdict and its motion for new trial.

In its brief, FPSI purports to appeal from the trial court's denial of its motions for nonsuit, the jury's findings of fact and conclusions of law, the judgment, and the trial court's denial of its motions for new trial and judgment notwithstanding the verdict.<sup>1</sup> We are compelled to conclude that FPSI has forfeited all of its claims. We reach this conclusion reluctantly, in view of the substantial judgment rendered against FPSI. However, the numerous material deficiencies in FPSI's brief prevent us from conducting a meaningful review of the issues alluded to therein.

## FOOTNOTES

<sup>1</sup> FPSI states in its brief that it appeals from: "1. The jury's Findings of Facts and Conclusions of Law [citation]; 2. The defendant's Motion for Non-Suit [citation]; 3. Motion for Judgment [\*3] at the Completion of Trial [citation]; 4. Motion for New Trial; and 5. Motion [for Judgment] Notwithstanding the Verdict [citation]; 6. Motion for New Trial[;] 7. As an absentee owner, where previous abatement had occurred, Plaintiffs knew the procedure and what to expect from previous experience." We interpret this statement as indicated in the text.

III.

## DISCUSSION

*A. This court may not review the trial court's denial of FPSI's motion for new trial and motion for judgment notwithstanding the verdict*

### *1. Factual and procedural background*

On May 1, 2006, FPSI filed a motion for new trial and a motion for judgment notwithstanding the verdict. On May 11, the trial court entered a judgment in favor of respondents. On May 26, the trial court entered an order denying FPSI's motion for new trial and its motion for judgment notwithstanding the verdict. On July 6, FPSI filed a notice of appeal. FPSI's notice of appeal refers only to the trial court's May 11 judgment, and makes no reference to the trial court's May 26 postjudgment order.

### *2. Appealability of the denials of the motion for judgment notwithstanding the verdict and motion for a new trial*

An order denying a motion for judgment notwithstanding [\*4] the verdict is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(4).) However, appellate courts lack jurisdiction to review an appealable postjudgment order from which a party has not filed an appeal. (See Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal.App.3d 35, 46.)

"[A]n order denying a motion for a new trial is not independently appealable and may be reviewed only on appeal from the underlying judgment." (Walker v. Los Angeles County Metropolitan Transp. Authority (2005) 35 Cal.4th 15, 19 (Walker).)

FPSI did not file an appeal from the trial court's May 26, 2006 order denying its motion for judgment notwithstanding the verdict. Accordingly, we lack appellate jurisdiction to consider whether the court erred

in denying FPSI's motion for judgment notwithstanding the verdict. (See *Norman I. Krug Real Estate Investments, Inc. v. Praszker, supra*, 220 Cal.App.3d at p. 46; *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 240.)

It appears that we do have jurisdiction on FPSI's appeal from the May 11 judgment to review the trial court's May 26 denial of FPSI's motion for a new trial. (See *Walker, supra*, 35 Cal.4th at p. 19.)<sup>2</sup> However, FPSI [\*5] has forfeited any claim pertaining to the trial court's May 26 order by failing to present any argument in its brief as to how the trial court erred in denying its motion for new trial.<sup>3</sup> In *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*), the court outlined the burden on an appellant to support its claims with reasoned argument:

"It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and 'all intendments and presumptions are indulged in favor of its correctness.' [Citation.] [Citation.] An appellant must provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]"

## FOOTNOTES

<sup>2</sup> We note the procedural [\*6] oddity of concluding that a party's appeal from a judgment is deemed to encompass a nonappealable order that is entered *after* the judgment has been entered. However, *Walker* states broadly that a trial court's denial of a motion for new trial is reviewable on an appeal from the judgment. (*Walker, supra*, 35 Cal.4th at p. 19.) Further, the trial court in *Walker* entered its order denying appellant's motion for new trial *after* entry of the judgment. (*Ibid.*)

<sup>3</sup> FPSI also failed to present any argument as to how the court erred in denying its motion for judgment notwithstanding the verdict. Therefore, assuming we had jurisdiction to consider this claim, we would conclude that FPSI has forfeited it as well.

Accordingly, we conclude that we may not review the trial court's denial of FPSI's motion for new trial or its denial of FPSI's motion for judgment notwithstanding the verdict.

*B. FPSI has forfeited review of its claims that the trial court erred in denying its motions for nonsuit*

During the trial, after respondents presented their evidence, FPSI made an oral motion for nonsuit. The trial court denied the motion. After FPSI had presented its evidence, FPSI made a second motion for nonsuit.<sup>4</sup> [\*7] The trial court denied this motion as well.

## FOOTNOTES

<sup>4</sup> In the trial court, both the court and FPSI referred to this motion as a "motion for nonsuit." However, in its appellate brief, FPSI refers to the motion as a "motion for judgment at the completion of trial." We refer to the motion as a motion for nonsuit; a motion for judgment is made in a *court*, rather than *jury*, trial. (See Code Civ. Proc. § 631.8.)

On appeal, FPSI does not cite to any of its arguments in favor of the motions for nonsuit or to respondents' arguments in opposition thereto. FPSI also fails to discuss the trial court's order denying its motions. Further, FPSI fails to provide any argument as to how the court erred in denying its motions. FPSI has thus forfeited any claim that the trial court erred in denying its motions for nonsuit. (See, e.g., *Benach, supra*, 149 Cal.App.4th at p. 852.)

C. *FPSI has forfeited any claim based on the jury's verdict or the trial court's judgment*

Although the grounds on which FPSI claims the jury's verdict and the court's judgment must be reversed are not entirely clear from FPSI's brief, we distill three possible arguments. First, FPSI states that it owed no duty to respondents, "other than to [\*8] not do them intentional harm." Second, FPSI contends that it was not liable to the respondents because it was a "contract employee" of the City. However, FPSI offers no legal authority or reasoned argument for either of these propositions. Accordingly, we deem both arguments forfeited. (See *Benach, supra*, 149 Cal.App.4th at p. 852.)

FPSI also contends that there was "no negligence on the part of FPSI, even though[] the jury found the same." We construe this contention as an argument that there is no substantial evidence to support the jury's verdict.

It is well established that where an appellant raises such a claim, the appellant must set forth in its brief *all* of the material evidence relevant to the question, including that which supports the judgment. If the appellant fails to do so, its claim is forfeited. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [substantial evidence review is forfeited if appellant fails to cite evidence favorable to the judgment].) Further, an appellant must "[p]rovide a summary of the significant facts limited to matters in the record." (Cal. Rules of Court, rule 8.204(2)(C).) Similarly, all parties must file briefs in which they "[s]upport [\*9] any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(1)(C).)

In its opening brief, FPSI fails to refer to significant evidence in the record that supports the judgment. For example, respondents presented evidence tending to show that FPSI was negligent in the manner in which it abated their property. There was extensive expert testimony by retired North County Fire Protection Fire Marshal Michael Bush,<sup>5</sup> who described the circumstances of FPSI's abatements on the property and concluded that FPSI had been "overzealous" in its second abatement of the property, and that FPSI could have employed "alternative" methods that did not require an "excessive amount of hauling." Rather than providing a fair summary of Mr. Bush's testimony with appropriate citations to the record, FPSI includes in its statement of facts only the following with regard to this critical testimony: "First witness was retired Fire Marshal Bush (Plaintiff's expert witness). He basically stated that he would not have handled the abatement in the manner that it was handled, but that the Fire Marshal had the authority [\*10] to do what he did, to do a single notice and cause the abatement. As a contract employee of the City, FPSI had a duty to follow the orders of [the] Fire Marshal . . . ."

#### FOOTNOTES

<sup>5</sup> Mr. Bush's testimony on initial direct examination alone comprised approximately 100 pages of the reporter's transcript.

In addition to FPSI's failure to cite all of the evidence that supported the judgment, FPSI's statement of facts in its opening brief is not in summary form, nor is it, in many instances, supported by citations to the record. Further, FPSI makes no attempt in its opening brief to connect the facts contained in the statement of facts to the legal argument presented. FPSI's reply brief contains a nine-page statement of facts that includes not a *single* reference to the reporter's transcript, in blatant disregard of California Rules of Court, rule 8.204(1)(C).

Given the extreme deficiencies in FPSI's briefing in this court, we conclude that FPSI has forfeited its claim that it committed "no negligence." (See *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881; *Benach, supra*, 149 Cal.App.4th at p. 852.)

IV.

#### DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P.J.

O'ROURKE, J.

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