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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JAMES LOPEZ,

Plaintiff and Respondent,

v.

KWAN INDUSTRIES, INC.
dba GOOD LUCK BAR,

Defendant and Appellant.

B166694

(Los Angeles County
Super. Ct. No. BC252102)

APPEAL from a judgment of the Superior Court of Los Angeles County,

James R. Dunn, Judge. Affirmed.

Law Offices of Carpenter & Zuckerman, John Carpenter; Law Office of Bruce Adelstein, Bruce Adelstein for Plaintiff and Respondent.

Law Offices of Daniels, Fine, Israel & Schonbuch, Michael N. Schonbuch and Jason P. Tortorici for Defendant and Appellant.

Defendant and appellant Kwan Industries, Inc. dba Good Luck Bar (“Bar”) appeals from a judgment after jury trial in favor of plaintiff and respondent James Lopez in this battery action. Bar contends the trial court erred in denying its post-trial motions based on insufficiency of the evidence. We conclude Bar has waived this contention by failing to properly set forth the material facts on appeal. Bar also contends the trial court erred in refusing to give effect to a stipulation to reduce future noneconomic damages to present value. This contention is meritless in light of Bar’s concession, at the hearing on the post-trial motions, that no such stipulation existed. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

On the night of December 29, 2000, Lopez and some friends went to Bar. At some point around midnight, they were asked to leave. Bar employees “manhandled” Lopez in an effort to forcibly escort him from Bar. One of these employees was Gregory Metoyer, a handyman who was working as a security guard because Bar was understaffed. Metoyer had no training in security. Once outside Bar, bar employees pushed Lopez to the sidewalk, where he landed on his back. Metoyer put his foot on Lopez’s neck, holding him down. As Lopez struggled to free himself from Metoyer, Bar’s security guard, James Weiland, kicked Lopez in the face.

The blow fractured Lopez’s cheekbone. Lopez immediately began to bleed profusely and his cheek swelled up “like a softball.” When the swelling fully abated,

Lopez had a “divot” or depression in his face, which did not disappear for at least eight months. The kick also caused permanent damage to Lopez’s right facial nerve. Lopez cannot flare his nostril and has an asymmetrical smile. His lip twitches involuntarily when he blinks his right eye. Lopez can control the twitch by regular botox injections, at a cost of \$2600 per year. There is a tightness to his cheek that feels “like it’s almost dead right there.”

Immediately after the injury, Lopez stayed home for a few days. He had been romantically interested in a co-worker, but did not want her to see him looking ugly. When he ultimately went out, he tried to hide his face from the public. Lopez felt depressed and isolated for nearly eight months. Although he had improved by the time of trial, he still lacked the confidence he had prior to the battery. Lopez still does not like it when people look at his face. Before the attack, he played guitar in a band that played in local clubs. He tried returning to the band once after the attack, but did not continue.

On June 11, 2001, Lopez brought suit against Bar. Among other things, Lopez alleged a cause of action for battery. The case proceeded to jury trial. At trial, Bar disputed Lopez’s version of the events leading up to his injury. According to Bar, Lopez had initiated combat with bar employees, and was attacking Metoyer on the ground outside Bar. Metoyer was in danger from Lopez and his companions when Charles Gladney, the bartender, came to Metoyer’s rescue by putting his feet on

¹ As Bar appeals from a judgment after jury trial, the facts are stated in the light most favorable to the judgment.

Lopez's face, causing Lopez to release Metoyer. The jury rejected this version of events.

Prior to submitting the case to the jury, the parties agreed to not instruct the jury to reduce future economic damages to present value. Instead, the parties agreed to stipulate to a discount rate to be applied to any future economic damages the jury might find.²

The jury found in favor of Lopez, and awarded damages in the following amounts: \$5,630 in past economic damages; \$111,800 in future economic damages; \$208,000 in past noneconomic damages; and \$104,000 in future noneconomic damages.

Although the parties had agreed to stipulate to a discount rate, no discount rate was agreed upon. The trial court initially chose to apply a four percent rate, reduced the future economic damages accordingly, and entered judgment in favor of Lopez.

Bar filed motions to vacate and set aside the judgment, for new trial, and for judgment notwithstanding the verdict. Bar's post-trial motions argued insufficiency of the evidence and excessive damages. Additionally, Bar argued the four percent discount rate was insufficient and that the parties' stipulation to reduce future damages to present value extended to noneconomic damages. Lopez opposed the motions. After a hearing, the trial court modified the judgment to apply a five percent discount rate to

² We set forth the facts surrounding the entry into this stipulation in detail in the Discussion section of this opinion.

economic damages, and otherwise denied Bar's motions. An amended judgment was entered. Bar filed a timely notice of appeal.

CONTENTIONS OF THE PARTIES

Bar contends the trial court erred in denying its post-trial motions. Specifically, it contends the evidence was insufficient to support the jury's verdict of battery, because the purportedly uncontroverted evidence establishes Gladney was acting in the defense of Metoyer and that Lopez consented to any battery by means of initiating combat. Additionally, Bar argues that the award of noneconomic damages was an excessive award of pain and suffering for an "ordinary" person such as Lopez. Lopez responds that the evidence is more than sufficient to support the jury's verdict and that, in any event, Bar has waived its contentions of insufficient evidence by its failure to set forth all material evidence in its opening brief on appeal. Finally, Bar contends the judgment for future noneconomic damages in the amount of the jury verdict is improper, as the parties had stipulated to apply a discount rate to those damages. Lopez responds that the parties' stipulation applied only to economic, not noneconomic, damages.³

³ Bar also contends the trial court erred in considering Lopez's opposition to the post-trial motions as it was untimely. Although the trial court concluded the opposition was not untimely, it further noted that it denied the post-trial motions based on its own knowledge of the record. Any error in considering the opposition papers is necessarily harmless, as the trial court's ruling did not depend on them.

DISCUSSION

1. *Standard of Review*

In reviewing a denial of a motion for judgment notwithstanding the verdict or a motion for new trial on the basis of insufficient evidence, our standard of review is the same. “[O]ur power *begins* and *ends* with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.” (*Charles D. Warner & Sons, Inc. v. Seilon, Inc.* (1974) 37 Cal.App.3d 612, 617; original italics; *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703.)

2. *Sufficiency of the Evidence of Battery*

“Where the appellant challenges the sufficiency of the evidence, the reviewing court must start with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant’s burden to demonstrate otherwise. [Citation.] The appellant’s brief must set forth all of the material evidence bearing on the issue, not merely the evidence favorable to the appellant, and it also must show how the evidence does not sustain the challenged finding. [Citations.] And the appellant must support all of its factual assertions with citations to evidence in the appellate record. [Citations.] If the appellant fails to set forth all of the material evidence, its claim of insufficiency of the evidence is waived.” (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 368.)

Bar contends the evidence is insufficient to support the jury’s battery verdict. However, Bar relies solely on the testimony of Metoyer that Gladney was defending

him by putting his feet on Lopez's cheek. At no point does Bar set forth, or even attempt to refute: (1) the testimony of Lopez that he had been thrown to the ground, held down, and kicked in the face; (2) the testimony of Lopez's friend, confirming that Weiland had kicked a helpless Lopez; (3) the undisputed medical testimony that Lopez's injuries were the result of a "very significant impact" such as a kick or a punch; (4) the undisputed expert testimony that it is never appropriate for a security guard to kick someone in the face; (5) the undisputed expert testimony that it is not appropriate to stand on someone's face; and (6) the substantial disparities in the testimony of Bar's witnesses, including Gladney's own failure to testify that he, in fact, had put his feet on Lopez's face.

"Because [Bar] has not set forth all of the material evidence bearing on the issue and has not affirmatively shown why that evidence is insufficient, [Bar] has waived its claim that the judgment is not supported by substantial evidence." (*Baxter Healthcare Corp. v. Denton, supra*, 120 Cal.App.4th at p. 370.)

3. *Sufficiency of the Evidence of Noneconomic Damages*

Bar's contention that the award of noneconomic damages is similarly unsupported is similarly waived. Bar argues the award of noneconomic damages is excessive in the absence of evidence "that established [Lopez's] facial appearance prevented him from earning a living or engaging in his chosen profession."⁴ Bar,

⁴ Bar also argues the noneconomic damages are insufficient given that Lopez is currently in a relationship with Maritzi Lucero, a woman he met "after the" battery. This factual contention is false. Lopez had been friends with Lucero from before the

however, has failed to set forth and address the evidence of: (1) Lopez's depression and isolation; (2) his reluctance to be seen in public; (3) his giving up playing with a band; (4) his low self-esteem; and (5) his permanent facial nerve damage. Given Bar's failure to set forth all material evidence on this issue, we consider the contention waived.

4. *Refusal to Reduce Future Noneconomic Damages to Present Value*

On appeal, Bar contends the parties had stipulated to reduce the entire award of future damages, including noneconomic damages, by an agreed-upon discount rate. Bar contends Lopez's counsel "refused to apply the discount to the entire award of future damages, as previously agreed."⁵ The record belies this contention.

While the law provides for juries to reduce future economic damages to present value, it does not require a similar calculation for noneconomic damages. Juries are instructed to render their awards of noneconomic damages in "current dollars," but this is envisioned more as a lump sum award than the present value of a stream of future payments. (*Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 642-643.) Indeed, juries should be instructed that it is not necessary to use the same method in calculating noneconomic damages as that used for discounting economic losses. (*Id.* at p. 647.)

battery, but was afraid to seek a more romantic relationship because he assumed she would not be interested given his "horrible" appearance. Although Lucero was sympathetic and ultimately formed a romantic relationship with Lopez, it took them nearly a year to reach that point.

⁵ Bar also states Lopez failed to meet and confer in good faith to determine the discount rate. However, Bar does not contend the five percent discount rate ultimately applied by the trial court was improper.

While BAJI No. 14.70, governing economic losses, clearly defines “present cash value” and requires the jury to calculate the present cash value of an award,⁶ BAJI No. 14.13, governing noneconomic damages, is phrased in more general terms of “current dollars” and specifically provides the jury need not use the same method used in calculating economic damages.⁷ As such, since a properly-instructed jury renders an award of noneconomic damages in current dollars, it would be anomalous to then reduce the award to present value.

In this case, the parties stipulated to reduce the jury’s award of economic damages only. The issue of a stipulation first arose during the discussion on jury instructions, where the discussion was clearly limited to future economic damages. Lopez’s counsel initially submitted BAJI No. 14.70 on present cash value. Lopez’s counsel argued, “There was testimony today about his future medical treatment. The injection to his face for the rest of his life, we’ll be seeking, as far as future special damages to be calculated as present value.” Bar’s counsel argued that it would be

⁶ The instruction states, in pertinent part, “Any [award for] [finding of] future economic loss must be only for its present cash value. [¶] Present cash value is the present sum of money which, together with the investment return thereon when invested so as to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts, and for the period that you find future benefits would have been received.” (BAJI No. 14.70.)

⁷ In pertinent part, BAJI No. 14.13 provides, “If you conclude that the plaintiff is entitled to recover compensation for future non-economic damages, you should determine that amount in current dollars, that is, the amount paid at the time of judgment that will compensate a plaintiff for future pain and suffering. [¶] The method you use in determining future economic losses need not be followed by you in your determination of non-economic damages.”

improper to give the jury that instruction in the absence of any expert testimony on an appropriate discount rate. The trial court asked the parties if the court would have the power to reduce an undiscounted award for the value of the injections based on evidence introduced post-trial. At this point, Bar's counsel stated that he had previously tried cases where the parties stipulated to a discount rate. In those cases, the jury was not instructed on present value, and the court simply reduced the "award for the future stuff" based on the stipulation. The parties agreed they would attempt to craft such a stipulation.

Bar's counsel then noted that, "under that scenario," they would need to alter the verdict form. When the trial court asked Bar's counsel how this was handled in the past, Bar's counsel stated, "We had a separate line. We had past economic damages, future economic damages. And then we stipulated the court would reduce future economics based upon our agreed upon [rate]." The trial court told the parties it would not give BAJI No. 14.70 on present value if the parties reached a stipulation. The trial court confirmed, "[I]f you can agree, then we'll have, under the economic damages portion, two subparts. Then I'll find a number for them. And we'll discount the one piece, if it's necessary to do that."

In the event, no stipulation was ever placed on the record or entered into in writing. However, it is clear that a stipulation was reached with respect to future *economic* damages, given that the parties submitted an agreed-upon set of jury instruction which did not include BAJI No. 14.70. As to noneconomic damages,

pursuant to the parties' jointly-submitted instructions,⁸ the trial court instructed the jury in the language of BAJI No. 14.13, to award noneconomic damages in "current dollars."

In its post-trial motions, Bar took the position Lopez had agreed to discount future noneconomic damages as well as future economic damages. Yet, at the hearing on the post-trial motions, Bar backed down from this position, conceding that there had been no meeting of the minds on this point. Bar's counsel was adamant that Bar was not claiming an intentional breach of the stipulation, and repeatedly stated there simply was no meeting of the minds.

The trial court declined to discount the noneconomic damages. The jury had been properly instructed to award noneconomic damages in "current dollars," California law does not mandate discounting noneconomic damages (*Salgado v. County of Los Angeles, supra*, 19 Cal.4th at pp. 642-643), and Bar failed to prove a stipulation to the contrary.

⁸ In its opening brief on appeal, Bar states that neither party requested BAJI No. 14.13 be read to the jury. This is not true, although the record is not as clear as it could be. The parties submitted a stack of agreed-upon instructions to the trial court. BAJI No. 14.13 was apparently included in this stack, as the trial court read it when it read the other instructions. However, as the trial court began reading BAJI No. 14.13, which begins with a definition of non-economic damages, the court realized this portion of the instruction was duplicative of another instruction it had just read. The parties agreed the trial court need not read the duplicative part, and the trial court then skipped to the key paragraph about "current dollars." The court later explained that it skipped the early paragraphs because they were duplicative. For reasons not entirely clear from the record, it does not appear that either instruction defining noneconomic damages was included in the clerk's transcript. However, it is certain that BAJI No. 14.13 had been requested by the parties, and that the paragraph on "current dollars" was read to the jury with both parties' consent.

In its brief on appeal, Bar contends the parties had stipulated to reduce future noneconomic damages, Lopez breached its agreement, and the trial court erred by relying on the “technicality” that the stipulation had not been placed on the record. This is a misstatement of the record. At the hearing, Bar repeatedly conceded there was no meeting of the minds on a stipulation. Bar cannot now contend the trial court erred in not enforcing a stipulation that Bar admitted did not exist. To the extent Bar argues the jury’s verdict was improper in that it lacked economic evidence on which to make a present value award of noneconomic damages, the law simply does not require such a precise calculation.

DISPOSITION

The judgment is affirmed. Lopez shall recover his costs on appeal.

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CROSKEY, Acting P.J.

We Concur:

KITCHING, J.

ALDRICH, J.