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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CHAD A. PADILLA, JR.,

Plaintiff and Appellant,

v.

KAHUNA RESTAURANT GROUP, LLC,  
et al.,

Defendants and Respondents.

B272142

(Los Angeles County  
Super. Ct. No. SC121233)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Craig D. Karlan, Judge. Affirmed.

Chad A. Padilla, Jr., in pro. per., for Plaintiff and Appellant.

Dorenfeld Law, David K. Dorenfeld and Matthew N. Selmer  
for Defendants and Respondents.

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## **INTRODUCTION**

Chad Padilla sued Kahuna Restaurant Group and its restaurant manager, John Bakalar, for intentional infliction of emotional distress, alleging Bakalar sexually harassed and accosted Padilla at the restaurant. Kahuna and Bakalar filed a cross-complaint against Padilla for defamation, alleging Padilla posted false statements on the Internet about his alleged assault and the restaurant. Following a trial at which Padilla represented himself and there was no court reporter, the jury returned a verdict in favor of Kahuna and Bakalar on Padilla's complaint, and in favor of Kahuna and Bakalar on their cross-complaint. The jury awarded Kahuna \$200,000 and Bakalar \$300,000 in presumed damages, as well as \$50,000 each in punitive damages.

Padilla makes three arguments on appeal. First, he argues counsel for Kahuna and Bakalar violated a court order granting one of Padilla's motions in limine. Second, he contends the trial court made several erroneous rulings that deprived him of a fair trial. Third, he argues the jury's awards of presumed and punitive damages are unconstitutional and excessive.

We conclude Padilla has not met his burden of showing that the trial court committed any prejudicial error in the rulings Padilla challenges and that the damages awards are excessive. Therefore, we affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Padilla filed this action for intentional infliction of emotional distress, claiming Bakalar sexually harassed and

accosted him at a restaurant owned and operated by Kahuna and managed by Bakalar. In addition to filing this action, Padilla, using his name and several aliases, posted statements on a website that publishes crowd-sourced reviews about local businesses, accusing Bakalar, Kahuna, and its owners of misconduct. In these statements, Padilla accused Bakalar of, among other things, “mess[ing] around with the gay bartenders” at the restaurant, cheating “on his purported wife with other gay men,” taking Padilla “into the office upstairs” and trying “to have his way with” him, and employing bartenders “in exchange for sexual favors.” Padilla also wrote that the owners of the restaurant had been sued for “sexually harassing and sexually accosting” a former bartender and that Bakalar “loves to sexually harass and sexually accost young attractive gay guys.” Padilla added that he “was told [Bakalar] was straight,” but later learned “from reliable sources (an attorney) that [Bakalar] is far from straight.” Padilla warned potential customers, in all capital letters, not to come to the restaurant. Padilla also made disparaging comments about the attorneys for the restaurant, including that they “are completely unethical and will do anything to cheat their way into fooling [the judge] presiding over this case,” and that lead counsel for Kahuna and Bakalar “is nothing more than a bitter old fat man who is upset that a nonlawyer knows how to do all legal documents better than [he does].”

Counsel for the restaurant contacted Padilla and demanded he remove the statements he had posted and cease posting further defamatory comments. After Padilla refused to comply with the demands and continued to post negative reviews, Kahuna and Bakalar filed a cross-complaint for defamation.

Before trial, Padilla made a motion in limine to exclude any evidence of or reference to other lawsuits that he had filed or that involved him. The court granted the motion, but ruled that counsel for Kahuna and Bakalar could ask Padilla about any past emotional distress he had experienced, because such evidence was relevant to the issue of his damages. At trial, counsel for Kahuna and Bakalar asked Padilla about emotional distress he had previously suffered in connection with an experience Padilla had at another restaurant. Padilla objected to this question and argued it violated the court's order on his motion in limine. The court ruled the question was "a fair question."

The trial lasted four days. The court instructed the jury pursuant to CACI No. 1702, regarding speech by private figures involving a matter of public concern, that Kahuna and Bakalar had to prove by clear and convincing evidence Padilla knew the statements he posted were false or had serious doubts about the truth of the statements. The court also instructed the jury that Kahuna and Bakalar had to prove actual malice to recover punitive damages against Padilla.

The jury returned a verdict in favor of Kahuna and Bakalar on both the complaint and the cross-complaint. The jury awarded Kahuna \$200,000 and Bakalar \$300,000 in damages, and \$50,000 each in punitive damages. Padilla filed a motion for a new trial, which the trial court denied. Padilla appealed.

## DISCUSSION

A. *Padilla Has Not Shown Counsel for Kahuna and Bakalar Violated the Trial Court's Order on Padilla's Motion in Limine*

Padilla argues counsel for Kahuna and Bakalar violated the trial court's order granting his motion in limine to exclude evidence of his prior lawsuits by allowing counsel to question him about an incident in 2007 where Padilla claimed he suffered emotional distress. Although the limited record does not include the actual ruling on Padilla's motion in limine, the record suggests the court granted the motion, at least in part, pursuant to a stipulation by the parties. The court's posttrial order denying Padilla's motion for a new trial refers to "the stipulat[ed] Court order excluding any reference, mention[,] or evidence of any other lawsuits filed by or involving [Padilla]" and concludes counsel for Kahuna and Bakalar did not violate that order. In denying Padilla's motion for a new trial, the court stated Kahuna and Bakalar "were not precluded from questioning [Padilla] regarding his past emotional distress, as his past suffering was directly relevant to the damages in this action for his emotional distress claim." Padilla does not challenge this ruling.

Padilla has not met his burden of showing the trial court abused its discretion in overruling Padilla's objection to the question that he contends violated the court's pretrial order. Although there is no reporter's transcript of the hearing on the motion in limine or the trial, the available record indicates the inquiry by counsel for Bakalar and Kahuna into Padilla's previous emotional distress did not violate the order. Padilla points (by citing to an excerpt of the trial transcript attached to

his motion for a new trial) to an instance where counsel for Bakalar and Kahuna used the word “lawsuits.” This record shows, however, that counsel used the term “lawsuits” to clarify for the court, in response to Padilla’s objection, that he was *not* asking about lawsuits but about prior emotional distress. Although stating in front of the jury that counsel was not asking about lawsuits may not have been the best way to comply with the court order not to mention lawsuits, the court was well within its discretion in finding counsel had not violated a court order.

Padilla also argues the use by counsel for Bakalar and Kahuna of the words “claim” and “deposition,” when counsel inquired about Padilla’s previous emotional distress, was a clear reference to prior litigation, about which the court had ordered counsel for Bakalar and Kahuna not to inquire. Padilla, however, does not provide any information or citation to the record indicating the court had precluded counsel for Bakalar and Kahuna from using these words. Counsel asked Padilla whether he had “an emotional distress claim arising out of” an incident at another restaurant. Counsel’s use of the word “claim” did not necessarily refer to a lawsuit; in context it referred to an incident where Padilla claimed he suffered emotional distress. The trial court did not abuse its discretion in ruling counsel did not violate the court’s order by using the word “claim.”

As for the use of the word “deposition,” the excerpt of the trial transcript Padilla attached to his motion for a new trial reflects that counsel for Bakalar and Kahuna did not actually say the word, or at least not all of it. In trying to remember the name of the restaurant where Padilla claimed he had previously suffered emotional distress, counsel could not recall the name of

the restaurant, started to say “depo,” but appeared to interrupt himself before completing the thought:

“Q: Going back to 2007 regarding an incident with an outfit named—it’s not Kahuna, it’s Kalani, you had an emotional distress, correct?

“A: Kalani.

“Q: Kaluna, I forget the name of the depo—hang on one second. The name of the facility is—I’ll get—let me get back to that—Kahala restaurant. Did you have an emotional distress claim arising out of Kahala Restaurant Group?”

“[¶¶]

“A: Okay. Okay. Yes.”

Again, the court did not abuse its discretion in ruling that counsel’s utterance of the first half of the word “deposition,” which occurred as part of a natural human inability to remember the name of a similar sounding restaurant, was a violation of a court order. And, as the trial court found, the conduct by counsel for Kahuna and Bakalar “did not prevent [Padilla] from obtaining a fair trial.”

B. *The Trial Court’s Discretionary Rulings Did Not Deprive Padilla of a Fair Trial*

Padilla contends he did not receive a fair trial because the trial court, over his objections, allowed Bakalar and Kahuna to change the contentions and defenses they intended on asserting at trial. Specifically, Padilla argues he was prejudiced because the trial court allowed Bakalar and Kahuna to (1) drop their defense that Bakalar was heterosexual, (2) withdraw their assertion that Padilla defamed them by making statements online that Kahuna’s owners stole from the restaurant’s

employees, and (3) withdraw and then reassert their allegation that Padilla defamed them by making statements Kahuna hired employees in exchange for sexual favors.

Padilla, however, does not provide any record of these allegedly unfair rulings. He does not identify any order that prevented him from introducing evidence or that allowed Bakalar and Kahuna to assert, withdraw, or reassert any arguments or defenses. There is no record that Bakalar and Kahuna changed their arguments or theories, let alone that in doing so they prejudiced Padilla. In the absence of such a record, Padilla cannot show the trial court's rulings were an abuse of discretion or deprived him of a fair trial. (See *Rhue v. Superior Court* (2017) 17 Cal.App.5th 892, 897-898 ["[f]ailure to provide an adequate record on an issue requires that the issue be resolved against appellant," and "[w]ithout a record, either by transcript or settled statement, a reviewing court must make all presumptions in favor of the validity of the judgment"]; *Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 ["[i]t is [the appellant's] obligation . . . to present a complete record for appellate review, and in the absence of a required reporter's transcript and other documents, we presume the judgment is correct"]; *Biscaro v. Stern* (2010) 181 Cal.App.4th 702, 708 ["[t]he general rule is that on a silent record the 'trial court is presumed to have been aware of and followed the applicable law' when exercising its discretion"]; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 448 ["[t]he absence of a record concerning what actually occurred at the trial precludes a determination that the trial court abused its discretion"].)



C. *The Jury's Awards of Presumed Damages Did Not Violate Padilla's Constitutional Rights*

Citing *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 (*Gertz*), Padilla argues the jury's awards of presumed damages violated his constitutional rights because the trial court allowed the jury to award presumed damages based on "mere negligence" rather than actual malice. The trial court, however, properly instructed the jurors that, in order to award presumed damages, they had to find actual malice.

Although a private figure plaintiff need not prove actual malice to recover damages for defamation (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 398; see *Khawar v. Globe Intern., Inc.* (1998) 19 Cal.4th 254, 264 (*Khawar*) [there is no "actual malice requirement on the recovery of damages for actual injury caused to a private figure by the publication of a defamatory falsehood"]), to recover presumed or punitive damages "a private figure plaintiff must prove actual malice if the defamatory statement involves matters of public concern." (*Khawar*, at p. 274.) "[I]f a plaintiff in a defamation case involving a matter of public concern seeks presumed damages, because the statements are libelous per se [citation], it must prove actual malice, i.e., that defendant knew the complained-of speech was false or acted with reckless disregard of whether it was false." (*ZL Technologies, Inc. v. Does 1-7* (2017) 13 Cal.App.5th 603, 631.)

The trial court gave the correct instructions on presumed and punitive damages. The jury instructions, to the extent the trial court read them correctly,<sup>1</sup> told the jurors that, to award presumed or punitive damages, they had to find by clear and convincing evidence that Padilla knew the statements he wrote were false or that he had serious doubts about whether the statements he wrote were true. (See *Khawar, supra*, 19 Cal.4th at p. 275 “[t]o prove actual malice . . . a plaintiff must ‘demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement’”].) Padilla does not challenge the finding of actual malice, nor does he argue the evidence was insufficient to support the jury’s finding of actual malice. Thus, the jury’s finding that Bakalar and Kahuna were entitled to presumed damages did not violate Padilla’s constitutional rights. (See *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1015 (*Weller*) [“the only limitation [*Gertz*] placed on recovery of presumed damages was that the plaintiff must prove that the defamatory statements were published with ‘knowledge of falsity or reckless disregard for the truth,’” and the “jury specifically found that [the plaintiff] met that burden”].)

D. *The Awards of Presumed and Punitive  
Damages Were Not Excessive*

The trial court instructed the jury: “If Kahuna and/or Bakalar has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings but proves by

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<sup>1</sup> The printed jury instructions are in the clerk’s transcript. As noted, there is no reporter’s transcript.

clear and convincing evidence that Padilla knew the statement(s) were false or that he had serious doubts about the truth of the statement(s), then the law assumes that Kahuna and/or Bakalar's reputation has been harmed and that he/it has suffered shame, mortification, or hurt feelings. Without presenting evidence of damage, Kahuna and/or Bakalar is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar." This instruction, which Padilla does not challenge, accurately stated the law of presumed damages. (See *Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1473 [approving similar language in a BAJI instruction].)

As noted, the jury awarded Kahuna \$200,000 in presumed damages, Bakalar \$300,000 in presumed damages, and each of them \$50,000 in punitive damages. Padilla contends these awards are excessive. These awards are indeed large, but Padilla has not shown they are excessive. (See *Behrendt v. Times-Mirror Co.* (1938) 30 Cal.App.2d 77, 90 ["[i]n actions for libel or slander the amount of damages recoverable is peculiarly within the discretion of the jury, for there can be no fixed or mathematical rule on the subject"], disapproved on another ground in *Fuentes v. Tucker* (1947) 31 Cal.2d 1, 7; 2 Smolla, *Law of Defamation* (2d ed. 2017 update) § 9:17, at p. 9-15 ["[p]resumed damages are by no means merely nominal" and "may at times be quite substantial"].)

"It is well settled that damages are excessive only where the recovery is so grossly disproportionate to the injury that the award may be presumed to have been the result of passion or prejudice." (*Sommer v. Gabor*, *supra*, 40 Cal.App.4th at pp. 1470-1471; see *Mendoza v. City of West Covina* (2012) 206

Cal.App.4th 702, 721 [reviewing court “will interfere only when the award is so disproportionate to the injuries suffered that it shocks the conscience and virtually compels the conclusion the award was based on passion or prejudice”]; *Weller, supra*, 232 Cal.App.3d at pp. 1013-1014 [the correct standard of review of a damages award in a defamation case is “the ‘historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as a result of passion and prejudice on the part of the jurors’”].) Failure to prove actual damages, although a factor in determining whether damages for injury to reputation are excessive, does not necessarily mean a damage award was excessive. (*Weller*, at p. 1014.)

Padilla does not cite to any evidence in the record suggesting that the damages awards are grossly disproportionate to the reputational injuries of Bakalar and Kahuna or that the verdicts were the result of passion or prejudice. There is no record of the testimony by Bakalar and Kahuna regarding their injuries, nor is there any indication the jurors decided the case based on passion or prejudice rather than the evidence. Padilla argued in his motion for a new trial that Bakalar and the owners of Kahuna “never gave any testimony as to any loss of damages and submitted no evidence to show how they suffered any damages and what damages they actually sustained . . . .” But Kahuna and Bakalar argued in opposition to Padilla’s motion for a new trial that Bakalar “testified outrage and damage to his reputation[,] which a juror could see and hear during Bakalar’s emotional testimony,” and that the restaurant owners “expressed outrage over accusations, expressed as true, that not only did they have a business practice of hiring and promotions in

exchange for sex, but that they themselves engaged in such activities.” Without a reporter’s transcript, we cannot evaluate the parties’ different versions of the testimony at trial or whether the presumed damages award was grossly disproportional.

All we have on this issue is the trial court’s ruling that the damages awards were not excessive. In denying Padilla’s motion for a new trial, the trial court stated, “[T]he Court cannot conclude based upon the evidence and entire record that the jury should have reached a different verdict. In light of the allegations levied by [Bakalar and Kahuna] in their cross-complaint against [Padilla,] coupled with [the] evidence at trial, the amount of damages awarded by the jury is not excessive.” We are in no position, on this record, to say otherwise. (See *J.P. v. Carlsbad Unified School District* (2014) 232 Cal.App.4th 323, 342 [“[w]here, as here, the trial court has denied a motion for new trial based on excessive damages, the trial court’s decision should “be accorded great weight because having been present at the trial the trial judge was necessarily more familiar with the evidence””]; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614 [“the appellate court ordinarily defers to the trial court’s denial of a motion for new trial based on excessive damages, because of the trial judge’s greater familiarity with the case”]; *Sommer v. Gabor*, *supra*, 40 Cal.App.4th at p. 1471 [“the trial court’s determination of whether damages were excessive “is entitled to great weight” because it is bound by the “more demanding test of weighing conflicting evidence than our standard of review under the substantial evidence rule””].)

## **DISPOSITION**

The judgment is affirmed. Kahuna and Bakalar are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J. \*

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\*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.