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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JORGE ANDERSON, Plaintiff and Respondent, v. HEIU T. TRAN et al., Defendants and Appellants.	B265260 (Los Angeles County Super. Ct. No. EC061267)

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Fields Goldstein, Judge. Affirmed.

Law Office of Robert Gentino, Robert Gentino and Sherri Matta, for Defendants and Appellants.

Glenn A. Murphy, for Plaintiff and Respondent.

In this disability discrimination case, Hieu T. Tran, El Monte Superstore, Inc. (El Monte Superstore) and Westminster Superstore, LLC (Westminster Superstore) appeal from a money judgment awarding respondent Jorge Anderson over $400,000 in damages and penalties. Appellants argue the court erred in excluding evidence of other lawsuits filed by respondent, the amount of future noneconomic damages is not supported by the evidence, and the damage award is excessive because respondent's counsel improperly appealed to the jury's passions and sympathies during closing argument. On the record before us, we conclude that appellants have not shown reversible error and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Appellants El Monte Superstore and Westminster Superstore are supermarkets owned by appellant Tran. The parties stipulated that respondent is a disabled person who uses a service dog and that he was denied admission to El Monte Superstore on three separate occasions in 2013 and to Westminster Superstore on at least one occasion in 2011.[1] After a jury trial, the court directed verdict that, on those occasions, the supermarkets violated the Disabled Persons Act (DPA) (Civ. Code, § 54) and the Unruh Civil Rights Act (Unruh Act) (Civ. Code, §§ 51 & 52). The jury found Tran, as well as a security

[1] The court admonished the jury that another incident at Westminster Superstore in July 2011 was outside of the statute of limitation, and respondent should not be awarded damages with respect to it.

company, Capital City Patrol, Inc. (Capital City), which is not a party to this appeal, in violation of those statutes as well.[2]

The jury awarded a total of $131,500 in damages under the Unruh Act, consisting of $6,500 for future medical expenses, $75,000 for past pain and suffering, and $50,000 for future pain and suffering. It found each of the three appellants liable for 30 percent of those damages, with Capital City liable for the remaining 10 percent. Also under the Unruh Act, the jury awarded a $100,000 penalty against each of the three appellants, and a $50,000 penalty against Capital City. The court enjoined appellants from denying access to disabled persons with service animals and ordered them to post certain signs at the supermarkets.

Judgment was filed in April 2015. Appellants' motion for new trial was denied in June 2015. This timely appeal followed.

DISCUSSION

I

Appellants argue that respondent's attorney repeatedly made improper arguments and appealed to the jury's passion and sympathies in closing and rebuttal. According to appellants, the attorney vouched for respondent's credibility; speculated that Tran had given false testimony on the advice of defense counsel and had instructed a security guard to lie under oath; speculated that appellants had discriminated against others; referred to

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[2] The jury rejected respondent's claims against two other supermarkets, Shun Fat Supermarket, Inc. and SF Supermarket, Inc. It also rejected the claims that respondent suffered acts and threats of violence, and found no violations of the Ralph and Bane Acts. (Civ. Code, §§ 51.7, 52.1)

verdicts in unrelated discrimination cases ranging from hundreds of thousands to millions of dollars; and argued that, due to appellants' wealth, only a large award would send a message to them. Appellants acknowledge that no objection was made at trial but argue that an objection would have overemphasized the claimed improprieties and, in any event, would have been futile because the judge was distracted.

"[T]o preserve for appeal an instance of misconduct of counsel in the presence of the jury, an objection must have been lodged at trial and the party must also have moved for a mistrial or sought a curative admonition unless the misconduct was so persistent that an admonition would have been inadequate to cure the resulting prejudice. [Citation.] This is so because '[o]ne of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial.' [Citation.]" (*Garcia v. ConMed Corp.* (2012) 204 Cal.App.4th 144, 148.) Failure to object forfeits a claim of excessive damages based on the improper argument. (*Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1230.)

Appellants' reliance on *Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341, 355–356 and *Love v. Wolf* (1964) 226 Cal.App.2d 378, 392 is misplaced because the attorney misconduct in those cases continued despite repeated objections. It is in that context that the courts excused the absence of an objection to every instance of misconduct. (See *Simmons*, at p. 356, citing *Love v. Wolf*, at p. 392.) In contrast, here, it would be speculative to conclude either that respondent's counsel would have persisted in making improper arguments had a timely objection been made to any of them and a sidebar

requested, or that the court would have refused to sustain a proper objection and admonish the jury. That the judge subsequently stated she had "one ear out" during closing argument does not mean she would have been unwilling to intervene had any impropriety been brought to her attention. Absent any objection at trial, appellants may not now argue that counsel's arguments resulted in an excessive damage award.

Moreover, in order to challenge the excessiveness of a damage award on appeal, a party must have raised the issue in a motion for new trial, and we generally defer to the trial court's denial of that motion because of the trial judge's greater familiarity with the case. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 614–615.) The clerk's and reporter's transcripts do not include records of the proceedings on the motion for new trial. Based on respondent's augmentation of the record with that motion, it appears that the only argument regarding excessive damages was directed at the award of future noneconomic damages. Hence, that is the only excessive damage issue preserved for appeal. We discuss it next.

II

A disabled person using a service dog may assert a disability discrimination claim based on a denial of access to a public facility under both the DPA and the Unruh Act, but may recover damages under only one of those statutes. (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 940–944.) Under the Unruh Act, a victim of discrimination may receive "actual damages, and any amount . . . up to . . . three times the amount of actual damage," but no less than $4,000 for "each and every offense." (Civ. Code, § 52, subd. (a).) Actual damages include "special and general damages." (*Id.*, § 52, subd. (h).)

Appellants argue the award of future noneconomic damages is not supported by substantial evidence because respondent "disavowed any ongoing pain and suffering." On appeal, we presume the judgment correct and resolve ambiguities in favor of its affirmance. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266, 286.) We view the evidence in the light most favorable to, and draw all reasonable inferences in favor of, the judgment. (*Rufo v. Simpson*, *supra*, 86 Cal.App.4th at p. 614.) An appellant challenging the sufficiency of the evidence on a factual point is required to set forth all material evidence supporting the judgment; failure to do so forfeits the issue. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.)

When asked about the effect of the incidents at the supermarkets on him, respondent testified: "Some of them were very emotional, where I lost my appetite. It disrupts my sleep. Sometimes you have the memories of what goes on. It ruminates in your head, and it just disrupts everything. You know, it's not a normal day. And it has what I'd like to say an effect of diminishing return on the quality of life because you don't know whether you're going to go out and if this will happen again, and it takes time in order to build up the steam to go back again. [¶] . . . [I]t makes me shake. . . . I get into confrontations, and sometimes I start shaking, and that's not easy. . . . [¶] . . . I was shaking because I was touched, and I'd never been touched like that, not someone turning me around like I'm a child." Respondent estimated that the effect of the events at the supermarkets lasted "[a] few days." When asked about his future damages, respondent expressed only his belief that he should be

able to have access to stores and his hope that access would improve for disabled individuals.

Dr. Judy Ho, a psychologist who evaluated respondent, testified she conducted a clinical interview and standardized assessment tests to get a reliable picture of his condition. She concluded that he suffers from chronic post-traumatic stress disorder, panic disorder with agoraphobia, and depression, resulting from a significant injury he received in the 1980's. Dr. Ho explained that the service dog helped respondent redirect his thoughts outside himself and feel secure. She opined that the incidents at the supermarkets had aggravated respondent's preexisting conditions. Dr. Ho reported that respondent talked a lot about the incidents, which he perceived as traumatic because they had compromised his integrity and threatened his person. Dr. Ho concluded respondent could not get past these perceived traumas because of his poor self-esteem, tendency to "ruminate," and inability to distinguish threats to his integrity from threats to his person. Dr. Ho opined that respondent could not get better without cognitive behavioral therapy.

Appellants concede that respondent's testimony supports the award of past noneconomic damages, but argue that it cannot support the award of future noneconomic damages because respondent testified he had recovered from the incidents at the supermarkets. Appellants contend that the testimony of Dr. Ho, based as it was on respondent's out-of-court statements, cannot contradict respondent's in-court testimony, but they provide no factual summary of her testimony and only an incomplete summary of respondent's testimony. Appellants' challenge to the sufficiency of the evidence may be deemed forfeited for failure to provide a complete summary of the evidence supporting the

award of noneconomic damages. (See *Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d at p. 881.)

Our review of the record indicates that, contrary to appellants' representation, there is no clear discrepancy between the testimony of Dr. Ho and that of respondent at trial. Respondent testified regarding the effects the incidents had on him mostly in the present tense; he spoke in the past tense only about his loss of appetite and shaking when touched. On appeal, he argues his testimony about his recovery was limited to getting over the physical manifestations of trauma (such as shaking and loss of sleep and appetite). Indeed, respondent was not asked specifically whether he had recovered from each of the claimed effects of the incidents at the supermarkets. His answer that their "effect" lasted "a few days" followed a series of questions about his physical reaction to being touched and turned around like "a child" during some of the confrontations. Hence, it is questionable whether respondent conceded that he had completely recovered.

Dr. Ho testified respondent had told her he had "a few days" of "being extremely sad and having a very difficult time getting past thinking about the events." But she also opined that the effects on respondent's psyche lasted past this initial acute phase. Specifically, she was concerned that respondent continued to construe the events at the supermarkets as "trauma," and she opined that he was unable to get past them completely, or place them in proper perspective, without cognitive behavioral therapy. Notably, the jury heard respondent's in-court testimony that he perceived the incidents as involving "violence." While the jury rejected the claim of violence as a separate basis for liability, it is not unreasonable to infer that the tenor of respondent's

testimony supported Dr. Ho's conclusion that he had not recovered completely.

To the extent the record on the issue of respondent's continuing emotional distress is ambiguous, we must resolve the ambiguity in favor of the judgment. (See *City of Santa Maria v. Adam*, *supra*, 211 Cal.App.4th at p. 286.)[3]

III

Appellants argue that the court's pretrial order excluding evidence of other lawsuits brought by respondent prevented them from presenting evidence that his emotional distress stemmed from other instances of discrimination and the theft of his dogs. The trial court has broad discretion in ruling on the admissibility of evidence, and its ruling will be upheld unless there is a clear showing of an abuse of discretion that prejudiced appellants—that is, a showing that the court's ruling exceeded the bounds of reason, and that it is reasonably probable a result more favorable to appellants would have been reached absent the error. (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432.)

Generally, evidence that a person is or has been involved in other lawsuits is inadmissible when its only purported relevance is to establish the person's propensity to pursue litigation. (*Lowenthal v. Mortimer* (1954) 125 Cal.App.2d 636, 640–644.) Such evidence is barred because it "involves the danger of both

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[3] Appellants' argument that Dr. Ho's testimony does not support future noneconomic damages is undercut by their failure to challenge the future economic damages awarded to cover the cognitive behavioral therapy she recommended. It begs the question why respondent would be entitled to damages for such therapy absent evidence of ongoing trauma caused by appellants.

undue prejudice and time-wasting confusion of issues. [Citations.]" (*Brown v. Affonso* (1960) 185 Cal.App.2d 235, 238.) However, evidence of prior injuries or claims of injury is relevant on the issue of damages where the plaintiff claims similar injuries in the present case. (*Id.* at pp. 238–239; *Prichard v. Veterans Cab Co.* (1965) 63 Cal.2d 727, 733–734.)

Here, respondent filed a motion in limine to exclude evidence of other lawsuits as more prejudicial than probative under Evidence Code section 352. In their opposition, appellants argued the evidence was relevant to motive. At the pretrial hearing, appellants' counsel represented that respondent was "a serial plaintiff" who "goes into various markets to be thrown out, . . . and then he claims he's been damaged for whatever reason and he suffered some emotional distress. But he makes that exact same claim in other lawsuits."[4] After the court noted that respondent's motive for going into the supermarkets was not

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[4] The record does not show that, at the pre-trial stage, appellants provided any details about the lawsuits they intended to rely on. In relation to the motion for new trial, appellants mentioned three specific discrimination lawsuits filed by respondent (against the State of New Jersey, Seafood City, and 7-Eleven), and a fourth one regarding dog theft. We note that, in *Anderson v. Seafood City* (Dec. 13, 2016, No. B263925 [nonpub. opn.]), Division One of this district affirmed terminating sanctions against respondent in a discrimination case against a supermarket, from which he allegedly was turned away because he used a service dog. Unlike appellants here, the defendant in that case did not stipulate to liability and in discovery actively challenged respondent's claims and Dr. Ho's conclusions. The terminating sanctions were due to respondent's failure to comply with the court's discovery orders.

relevant to whether his statutory rights were violated, appellants' counsel clarified that the other lawsuits were relevant to respondent's damages. The court agreed to allow appellants to attack the damages by other means, "but not by [the] fact that he has a lot of lawsuits." The court granted the motion in limine, prohibiting references to other lawsuits by respondent, as "highly prejudicial with little or no relevancy to this case."

At trial, appellants' attorney asked respondent whether he had gone to other supermarkets between 2011 and 2013, and respondent admitted he had. Respondent's attorney objected to a subsequent question about his client's visit to a market in Cerritos, citing the motion in limine. The court noted it was "not certain of that" and held a sidebar, the reporting of which was waived by both attorneys. After the sidebar, the court overruled the objection "as to just those questions," but appellants' attorney chose not to pursue the pending question, or any follow-up questions that may have been discussed at sidebar.

Later on during trial, Capital City's separate counsel asked Dr. Ho whether other traumatic events had occurred in respondent's life since 2011 for which she would recommend cognitive behavioral therapy. Respondent's counsel objected, again citing the motion in limine. Another unreported sidebar discussion followed, after which Dr. Ho was allowed to answer the question. She testified respondent had told her about similar incidents that had occurred at other supermarkets in 2012. Capital City's attorney initially signaled that he had no further questions, then requested permission to ask whether Dr. Ho would recommend behavioral cognitive therapy for those incidents as well. The court interjected: "I think she's answered that. A condition of your question was for which you'd

recommend cognitive therapy." Capital City's attorney replied: "Then we're done here. Sorry."

Respondent argues that the motion in limine did not preclude evidence that other incidents could have caused respondent emotional distress, as evidenced by Dr. Ho's testimony, and that appellants' counsel had an opportunity to ask questions about the effect of those incidents on respondent's claim for emotional distress in this case, but chose not to. Appellants argue that such questions would have risked running afoul of the ruling on the motion in limine since Dr. Ho was retained as an expert in the other lawsuits as well.

On this record, appellants have failed to show that the ruling on the motion in limine was a prejudicial abuse of discretion. We cannot speculate about the content of unreported sidebar discussions during trial.[5] However, the court's overruling of objections to questions about respondent's visits to other supermarkets and Dr. Ho's testimony about her recommendation for cognitive behavioral therapy with regard to other discriminatory incidents indicates that the ruling on the motion in limine did not preclude all references to such incidents. Appellants do not explain why it would have been necessary to reference other lawsuits in order to elicit Dr. Ho's opinion about the effect of the other incidents on respondent's mental state.

The record indicates that appellants' counsel chose not to pursue a line of questions to which the court had overruled objection, and that Capital City's attorney ended his questioning

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[5] Since appellants have not provided a complete record of the proceedings on their motion for new trial, it is impossible to tell whether a record of the court's rulings at sidebar was developed during those proceedings.

of Dr. Ho prematurely because he admittedly "forgot" to ask a further question; when allowed to reopen questioning, the attorney restated his earlier question, which the court considered asked and answered. Nothing in this record suggests counsel for the defense refrained from asking additional questions for fear of violating the ruling on the motion in limine.

A judgment is presumed correct, and it is appellants' burden to affirmatively demonstrate error on appeal. (*Ruelas v. Superior Court* (2015) 235 Cal.App.4th 374, 383.) Appellants have not carried their burden to show error on the record before us.

DISPOSITION

The judgment is affirmed. Respondent is entitled to his costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.