Filed 9/13/06

CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

STEVEN GRASSILLI, Plaintiff and Respondent, v. RICHARD BARR et al., Defendants and Appellants.	D044931 (Super. Ct. No. EC19095)

APPEAL from a judgment of the Superior Court of San Diego County, Lillian Y. Lim, Judge. Affirmed in part, reversed in part with directions.

Donna Bader; Garrison & McInnis, L.L.P. and Gregory M. Garrison, Michael W. Strain and Amelia A. McDermott for Plaintiff and Respondent.

Bill Lockyer, Attorney General, James Humes and James M. Schiavenza, Assistant Attorneys General, Kristin G. Hogue and David F. Taglienti, Deputy Attorneys General, for Defendants and Appellants.

---

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts III, IV, VI, VII, and VIII of the Discussion section.

Steven Grassilli brought a federal civil rights claim against several California Highway Patrol (CHP) officers, alleging these officers violated his constitutional rights by engaging in a series of actions against him because he complained about a CHP officer's improper conduct. (42 U.S.C. § 1983.)[1] The first trial ended in a defense verdict. In a prior unpublished decision, we reversed the judgment because the trial court erroneously excluded evidence relevant to Grassilli's constitutional retaliation claim. (*Grassilli v. Barr* (May 10, 2002, D037942) (*Grassilli I*).)

After a lengthy second trial, the jury found that CHP Officer Richard Barr and Sergeant Michael Toth wrongfully retaliated against Grassilli because Grassilli reported Officer Barr's improper conduct to CHP management, and that Sergeant Toth and Sergeant Stephen Neumann were also liable for retaliation based on their positions as Officer Barr's supervisory officers. The jury found the retaliation caused Grassilli to suffer $210,000 in economic damages and $290,000 in noneconomic damages. The jury awarded Grassilli $3 million in punitive damages against Officer Barr and approximately $1 million against Sergeant Toth. The court awarded Grassilli $800,000 in attorney fees. (§ 1988(b).)

On appeal, Officer Barr, Sergeant Toth, and Sergeant Neumann (defendants) challenge the liability findings, the compensatory and punitive damages awards, and the

---

1 All further statutory references are to title 42 of the United States Code, unless otherwise specified.

attorney fees amount. We reject these contentions, except those regarding the punitive damages awards.

In the published portion of the opinion, we hold that substantial evidence supported the finding that defendants were liable under section 1983. This finding was based on evidence that defendants engaged in, or authorized, a series of law enforcement actions—including traffic stops, equipment compliance citations, and a vehicle impoundment—to retaliate against Grassilli after he complained to CHP management about Officer Barr.

In upholding the jury's liability finding, we reject defendants' argument based on *Hartman v. Moore* (2006) ___ U.S. ___ [26 S.Ct. 1695], that the judgment must be reversed because Grassilli did not prove that the officers lacked probable cause when they participated in the law enforcement contacts forming the basis for the section 1983 action. We conclude *Hartman* is inapplicable to most of Grassilli's claims because these claims were not brought on a retaliatory prosecution theory and the claimed damages did not result from criminal charges pursued by a prosecuting agency. As to the remaining claims, we find defendants waived their rights to assert *Hartman* error.

We further conclude the approximate $1 million and $3 million punitive damages awards against Officer Barr and Sergeant Toth are excessive. The awards violate federal constitutional principles; the imposition of the awards would indisputably result in defendants' financial ruin, a circumstance prohibited by state and federal law; the jury was not given proper guidance regarding the relevance of the financial condition

evidence; and the awards include damages impermissibly imposed to punish the conduct of persons other than Officer Barr and Sergeant Toth.

Applying the established analysis for assessing a punitive damage award, we strike the punitive damages awards and remand to the superior court with directions to: (1) enter a punitive damages award against Officer Barr in the amount of $35,000, or at Grassilli's option to conduct a new trial on the proper amount of punitive damages; and (2) enter a punitive damages award against Sergeant Toth in the amount of $20,000, or at Grassilli's option to conduct a new trial on the proper amount of punitive damages. We also strike $25,000 from the cost award. We affirm the judgment in all other respects.

FACTS

Under well-established appellate rules, we state the facts in the light most favorable to the jury's findings.

During the 1990's, Grassilli lived in Santa Ysabel, a rural area near Ramona. Grassilli owned a small business that sold, installed, and serviced residential underground water tanks and pumps. Grassilli was a classic car enthusiast and regularly attended car shows in his older El Camino vehicle.

In March 1997, Grassilli called the local CHP office to complain that Officer Barr, a Ramona resident CHP officer,[2] was violating the law because he had removed the

---

[2] Under the CHP's resident officer program, less populated areas are served by "resident officers," who live in the area and are on-call from their homes.

catalytic converter from his private vehicle, but was citing other drivers for this same violation. Grassilli said Officer Barr had indicated he did not need a catalytic converter because he had a badge. Grassilli was initially reluctant to give his name, but finally agreed to do so. Grassilli based the complaint on information he received from his friend and from a mechanic who worked at the automobile shop where Officer Barr had performed the work to remove the catalytic converter. Grassilli also later verified that Officer Barr's truck did not have a catalytic converter when he inspected the truck when it was parked near Lake San Vicente.

When no action was taken on his complaint, Grassilli again called the local CHP office and eventually spoke with Sergeant Toth, one of Officer Barr's supervisors. Sergeant Toth immediately discussed Grassilli's complaint with another sergeant, Sergeant Mayfield, and then Sergeant Toth volunteered to go to Officer Barr's home to check Officer Barr's truck. According to Sergeant Toth, he called Officer Barr on the CHP radio and then inspected the truck before Officer Barr arrived home. Sergeant Toth claimed he saw a stock catalytic converter on Officer Barr's truck. Officer Barr gave conflicting testimony, stating Sergeant Toth met him at the Ramona sheriff's station and that he was present when Sergeant Toth inspected the vehicle.

After his inspection, Sergeant Toth advised Sergeant Mayfield that Grassilli's allegations against Officer Barr were not true. Sergeant Mayfield then notified Grassilli that Officer Barr's truck had a catalytic converter and he considered the matter closed. In response, Grassilli called the Sacramento CHP internal affairs office to report that Officer

Barr did not have a catalytic converter on his pickup truck, and he had been told Officer Barr would retaliate against him for initiating the complaint.

After Grassilli's call, the CHP internal affairs office ordered an investigation of Grassilli's complaint. In response, on April 14, 1997, Sergeant Mayfield met with Grassilli, filled out a CHP form that listed Grassilli's complaints against Officer Barr, and requested Grassilli to sign the form. Shortly thereafter, Sergeant Mayfield concluded that Grassilli's complaint was false and malicious, and forwarded a recommendation to the district attorney that Grassilli be criminally prosecuted for making a false complaint against an officer. Sergeant Toth and Officer Barr each denied any knowledge of Sergeant Mayfield's action, but inferences from the evidence indicated they supported Sergeant Mayfield's decision to pursue the criminal charges.

Thereafter, Officer Barr and Sergeant Toth took actions against Grassilli. We summarize these actions below.

April 27, 1997 El Camino Stop

Thirteen days after the Mayfield-Grassilli meeting, on April 27, 1997, Officer Barr made a traffic stop of Grassilli while Grassilli was driving his classic El Camino car. Officer Barr told Grassilli he was stopping him because his vehicle did not have the requisite smog equipment. Grassilli had driven this car in and around the Ramona area for the previous seven years and had never been stopped for any smog or equipment violations. Grassilli told Officer Barr that he was a resident of Santa Ysabel (as reflected on his driver's license), and therefore he was not required to have the smog equipment. Officer Barr nonetheless ticketed him for a smog violation and having an obstructed view

created by a raised air cleaner on the vehicle hood. (Veh. Code, §§ 27156, subd. (b), 26708, subd. (a).) Grassilli hired an attorney, and after a court trial, the court dismissed the smog violation based on its finding that Santa Ysabel residents are not required to obtain smog equipment certification until an ownership change.[3] The court found Grassilli guilty of the vision obstruction charge, and Grassilli thereafter lowered the air cleaner on his hood.

September 1997 Criminal Prosecution Dismissed

Based on Sergeant Mayfield's report, the district attorney filed a misdemeanor complaint alleging two counts against Grassilli, each of which carried a one-year maximum jail term: (1) making a false report against an officer (Pen. Code, § 148.6, subd. (a)(1)); and (2) dissuading an officer (Pen. Code, § 148.6, subd. (b)). The prosecutor dismissed the second count before trial. The trial was held in September 1997. After Officer Barr, Sergeant Toth, and Sergeant Mayfield testified in favor of the prosecution, the court dismissed the case for insufficient evidence.

October 1997 Tibbans Truck Stop

About five weeks later, in October 1997, Officer Barr stopped a commercial truck that was following Grassilli to a job site. Officer Barr knew the truck was associated with Grassilli's business before he detained it. The truck was towing a trailer carrying a water tank approximately 11 feet, 10 inches wide, and was operating under an annual

---

[3] At trial, the jury was instructed (without objection) that Santa Ysabel residents "are not required to be certified" for smog equipment.

Caltrans permit that allowed the truck to tow a load up to 12 feet wide. The truck was owned by James Tibbans, who was Grassilli's primary water tank supplier.

During the stop, the truck driver showed Officer Barr his Caltrans permit. Officer Barr told the truck driver he was violating the Vehicle Code because he needed a pilot car, mirror extensions, and red warning flags. Officer Barr refused to allow the truck to continue until each of these items was remedied. When Grassilli (who was also present at the scene) asked Officer Barr to call a sergeant for assistance, Officer Barr called Sergeant Toth. Sergeant Toth arrived 30 minutes later, and generally supported Officer Barr's actions without making any independent determination as to whether Officer Barr was correct. The stop took at least three hours and substantially interfered with Grassilli's work schedule.

Officer Barr ticketed the Tibbans truck driver. Although the driver later pled no contest to the three violations, testimony from Grassilli's expert witness and other CHP officers showed that the truck driver had not violated these code sections, and/or that the alleged violations were not a proper basis for taking the commercial vehicle out of service and requiring an immediate correction before the truck could continue.

January 1998-August 1998 Scheme to Impound Grassilli's Vehicle

Approximately three months after the Tibbans truck stop, Officer Barr told Sergeant Toth of an "anonymous tip" that Grassilli's new work truck was not properly

registered.[4] Grassilli had recently purchased the truck in another state and placed his existing personalized license plate on the new vehicle.

Shortly after he learned this information, Sergeant Toth decided he would not provide Grassilli the opportunity to correct the registration problem by giving him a "fix-it" ticket, and instead he would wait six months, which is the time period specified in the Vehicle Code for expired registrations becoming subject to impound. (See Veh. Code, § 22651, subd. (o).) Sergeant Toth specifically wanted to ensure Grassilli's violation resulted in an impound, rather than a notice to remedy. To this end, Sergeant Toth told the other Ramona CHP officers not to notify Grassilli of the registration problem or give Grassilli a citatio for the alleged violation. Sergeant Toth said that after the six-month period, he would be the one to stop Grassilli, give Grassilli a citation, and impound his vehicle. During the next several months, Sergeant Toth saw Grassilli's truck on "almost a daily basis."

The six-month period ended July 31, 1998. Early the next day, Officer Toth told his officers "today is the day we are going to take [Grassilli's] truck." Sergeant Toth then instructed one of the Ramona CHP officers, Officer Craig Thetford, to look for Grassilli's truck and then notify Sergeant Toth or Officer Barr when he found the truck. Within several hours, Officer Thetford radioed Sergeant Toth that he saw Grassilli driving his

---

4 The evidence regarding how Sergeant Toth and Officer Barr learned this information was contradictory (several CHP officers gave inconsistent versions of the events), but there was a reasonable basis to conclude that Officer Barr was a source of the "anonymous" tip.

truck. Sergeant Toth drove to that location, and pulled over Grassilli's vehicle. When Sergeant Toth told Grassilli he was going to impound the truck for a registration violation, Grassilli was surprised and upset, and had no idea there was any problem with the registration. Grassilli's wife generally handled those matters, and she testified she had been told she had done everything she was required to do to properly register the vehicle and to use the previous license plate. Two days later, after paying the requisite fees, Grassilli was able to retrieve his vehicle.

Sergeant Toth admitted it was not normally his duty to write registration tickets. In his 32-year career, he had never before allowed a known violation to mature so he could impound a vehicle.

Officer Barr's December 27, 1998 Traffic Stop of Grassilli's El Camino

Several months later, on December 27, 1998, Officer Barr again stopped Grassilli while he was driving his El Camino; Grassilli's young son was also in the car. Officer Barr cited Grassilli for several violations: (1) three separate counts pertaining to Grassilli's operating his vehicle without smog equipment after being notified of the violation; (2) one count of not having his driver's license in his possession; and (3) one count of vision obscurement through the windshield. In response to a radio call, Sergeant Neumann came to the scene, but he permitted Officer Barr to cite Grassilli for the various violations and supported Officer Barr's actions without any investigation. Although Grassilli told Officer Barr that his prior smog citation had been dismissed (and therefore there was no prior smog violation) and that he had "won the exact same ticket," Officer Barr cited him for the smog violations. Officer Barr believed that if the smog violation

had been dismissed, the court was wrong in doing so. Officer Barr also cited Grassilli for the hood equipment even though he was aware that the equipment had been lowered, and had been signed off by another officer. The smog violations were later dismissed by the court, and the other violations were signed off by law enforcement officers.

Thereafter, Officer Barr performed his own independent "research" on the smog equipment issue, and, based on this research, Officer Barr formed his own opinion that the court was twice wrong in dismissing the smog violation and concluded he would continue to ticket Grassilli for the lack of smog equipment.

Officer Barr's July 28, 1999 Stop of Tibbans Truck

Approximately seven months later, on July 28, 1999, Officer Barr stopped another Tibbans truck that was carrying a large water tank to Grassilli's jobsite. Officer Barr knew the truck driver was delivering the tank to Grassilli's worksite, and stopped the truck for failure to have extended mirrors and driving on a "brown" route without a pilot car in violation of its permit. Sergeant Toth came to the scene in response to Officer Barr's radio call. Officer Barr placed the truck out of service, and refused to allow the truck driver to continue after the citation was given. The truck was detained more than three hours. Officer Barr came back three or four times and each time found something new for the driver to do before he would release the truck.

In response to Grassilli's request, CHP Officer Michael Clauser, who was specially trained as a commercial vehicle enforcement officer, came to the scene. Officer Clauser did not believe the citations were supported. According to Officer Clauser, the truck did not need extended mirrors, extended mirrors would create safety problems, and a mirror

violation was not a proper basis for taking a vehicle out of service. Additionally, although a pilot car was required on the "brown" route where the load was initially stopped, the truck would not need a pilot car if the truck was allowed to travel an additional 200 feet to Highway 78 from the place where Officer Barr detained it. The truck driver ultimately pled guilty to the mirror violation, and the pilot car violation was dismissed. A $50 suspended fine was imposed.

After the stop, Officer Clauser and Officer Barr discussed the issue of mirror violations. Officer Clauser told Officer Barr (who was not a trained commercial vehicle enforcement officer) that he was wrong to require a truck driver with an extra-wide load permit to have extended mirrors.

Grassilli Files Civil Action Against Officer Barr and Sergeant Toth

Three months after the July 1999 stop, Grassilli filed a civil rights complaint in the superior court against Officer Barr and Sergeant Toth. Officer Barr thereafter frequently followed Grassilli around town in his patrol vehicle, acting "like he was going to . . . pull [him] over. . . ." Officer Barr would drive by and glare at Grassilli. This conduct made Grassilli feel angry and nervous.

Sergeant Toth retired in July 2000, and Sergeant Neumann became Officer Barr's direct supervisor.

October 2000 "Cigarette Incident"

In October 2000, while the first trial was pending, Grassilli stopped at a light across the street from where Sergeant Neumann and Officer Barr were issuing a ticket to another motorist. Officer Barr told Sergeant Neumann he saw Grassilli throw a cigarette

out of the window. Sergeant Neumann did not observe what happened. Although Officer Barr wanted to cite Grassilli at that moment, Sergeant Neumann told Officer Barr to remain where he was and that he could file a complaint against Grassilli with the district attorney. Officer Barr thereafter filed a complaint with the district attorney's office, alleging that Grassilli had committed three separate violations: (1) throwing a cigarette; (2) failing to proceed on a green light; and (3) impeding traffic. The court found Grassilli guilty of all three counts. At the current trial, Grassilli denied that he committed any of these offenses, although he admitted that he "flipped [Officer Barr] off."

January 2001 Tibbans Truck Stop

In January 2001, several weeks before the trial was scheduled to begin, Officer Barr stopped another Tibbans truck that was following Grassilli to a job site. Officer Barr told the driver the truck was in violation of the law because the mirrors were not extended. Officer Thetford was called to the stop to assist Officer Barr. Officer Thetford found the driver had good vision with the mirrors and could see behind the vehicle. Officer Barr gave the driver a citation for not having extended mirrors, and would not allow the truck driver to continue without extending the mirrors. A court commissioner later found the truck driver guilty of the mirror violation and placed him on a one-year probation with a suspended $50 fine.

Trial Ends in Defense Verdict and Tibbans Terminates Relationship with Grassilli

The next month, the trial on Grassilli's civil rights claims against Sergeant Toth and Officer Barr resulted in a defense verdict.

At about this same time, James Tibbans told Grassilli he did not want his trucks coming into Ramona anymore because of the additional costs resulting from the CHP stops. In addition to the three Tibbans truck stops discussed above, Officer Barr regularly detained Tibbans's trucks. On at least 10 occasions, the trucks were detained by Officer Barr, but not ticketed. When Officer Barr made these stops, he would frequently ask if the load was going to Grassilli's worksite. If the truck was not associated with Grassilli, Officer Barr would permit the truck to continue. Tibbans testified he thereafter discontinued doing business with Grassilli because he "couldn't afford to have my trucks in Ramona anymore . . . [b]ecause they were being stopped on a regular basis, and it was costing me a lot of money." Tibbans testified that his Ramona-bound trucks were not stopped for equipment violations in other parts of the state, and that he had received conflicting orders from CHP officers outside Ramona that the mirrors should *not* be extended. Because of the loss of this supplier, Grassilli ultimately stopped selling tanks and changed his business to installing and servicing water pumps, which reduced his profits and required more physical labor and time, leaving less time for his family.

May 2002 Appellate Decision

In May 2002, this court reversed the judgment in the first trial, determining the trial court prejudicially erred in refusing to permit any evidence of the stops of the Tibbans trucks. (*Grassilli I, supra,* D037942.) We held that although the evidence was not relevant to Grassilli's claims that the stops violated his Fourth or Fifth Amendment rights, the evidence was relevant to Grassilli's claims that defendants retaliated against him for exercising his right to complain about Officer Barr. We held the retrial was to be

limited to Grassilli's section 1983 retaliation and related conspiracy claims against the named defendants (Officer Barr and Sergeant Toth).

Officer Barr's August 2002 Traffic Stops of Grassilli

Three months later, Officer Barr drove past Grassilli's vehicle, and then made a U-turn and ordered Grassilli to pull over. Officer Barr told Grassilli he was stopping him for not wearing a seatbelt. He also cited Grassilli for not having a motor carrier identification number and not having a registration tab on the front license plate. The evidence showed Officer Barr was not qualified to issue tickets relating to motor carrier identification numbers because he had not received the requisite training. Grassilli pled guilty to the seat belt charge. The remainder of the citation was dismissed in connection with an unrelated case against Grassilli for having started a fire on his property to burn bulldozed materials without a permit. No fine was imposed.

One week later, Officer Barr stopped Grassilli while Grassilli was driving his El Camino vehicle home from a car show. Officer Barr gave Grassilli a citation for misdemeanor violations of failing to correct smog equipment violations and windshield obstruction violations. He issued these citations even though Officer Barr admitted he knew both prior citations had been dismissed by the court and/or signed off by an officer. A "failure to correct" citation is improper if the officer knows the underlying violations have been dismissed. On the ticket, Officer Barr wrote "Ramona" as Grassilli's address instead of Santa Ysabel, which was the basis for Grassilli's assertion that the vehicle was exempt from smog equipment regulations. The court later dismissed the citations in connection with the unrelated fire case.

January 2003 Complaint

In January 2003, while the retrial was pending on Grassilli's civil rights case against Officer Barr and Sergeant Toth, Grassilli filed a second civil rights action, naming Officer Barr and Sergeant Neumann as defendants based on the events occurring after the first trial (e.g., the additional Tibbans truck stops and Officer Barr's continued vehicle stops of Grassilli's vehicles). The complaint alleged Sergeant Neumann was liable for his own retaliatory acts and for his failure to properly supervise Officer Barr. The court thereafter consolidated Grassilli's first and second actions.

In February 2003, Officer Clauser had a meeting with his supervisor, Sergeant Mark Crofton, regarding mirror requirements on trucks carrying permitted extra-wide loads. After the meeting, Sergeant Crofton ordered Officer Barr to "cease and desist" writing mirror tickets.

April 2004 Trial

The second trial was held in April 2004. During the five-week trial, Grassilli called numerous witnesses who testified to the events set forth above. Grassilli also called two CHP officers, Officer Thetford and Officer Clauser, who provided testimony favorable to Grassilli.

Officer Thetford, another Ramona resident officer, testified about Sergeant Toth's plan to impound Grassilli's vehicle. He also said both Sergeant Toth and Sergeant Neumann told him not to associate with Grassilli because Grassilli had filed a citizen's complaint and a lawsuit, and that Officer Thetford's continued association with Grassilli would detrimentally affect his career. Officer Thetford also testified at length about the

conduct of his CHP supervisors, including Sergeant Crofton (who was the defense expert at trial), in pressuring him to change his deposition testimony in the case and retaliating against him for testifying in Grassilli's favor.

Officer Clauser, one of two CHP officers trained as commercial enforcement officers in the Ramona area, testified about his observations of the July 1999 Tibbans truck stop and his opinion the truck did not require extended mirrors, a fact he communicated to Officer Barr. Officer Clauser also testified about the meeting at which his supervisor, Sergeant Crofton, ordered Officer Barr to stop writing mirror violation tickets to Grassilli, and that Sergeant Crofton later put pressure on Officer Clauser not to provide deposition testimony favorable to Grassilli.

Additionally, Grassilli presented the testimony of two expert witnesses (Jack Smith and Ronald Sealey). Jack Smith, a former El Cajon police chief who had held various internal affairs and training positions with the Los Angeles Police Department and the San Diego County Sheriff's Department, testified that Officer Barr violated applicable rules by repeatedly writing traffic citations to Grassilli for violations that had been dismissed by the court and by treating the trucks going to Grassilli's worksite differently from other trucks. Smith also opined that Sergeant Toth's handling of Grassilli's complaint violated CHP procedures, and that Sergeant Toth's conduct in precluding his officers from notifying Grassilli of the registration violation before the impound date was "[a]bsolutely wrong" and "ridiculous" under any circumstances. Smith further testified that Sergeant Neumann "neglected" his supervisory duties with respect to Officer Barr, and Sergeant Neumann's instruction to Officer Thetford not to associate

with Grassilli was "misconduct of the most serious kind" because it "smacks of the blue veil," which is "that you don't tell the truth, that you side together."

Grassilli's other expert witness, Ronald Sealey, who worked as a San Diego County Sheriff's deputy for 18 years, opined that a timeline of the stops "indicated a pattern of selective enforcement." Sealey noted that Officer Barr was the only officer citing Grassilli and the Tibbans work trucks for equipment violations despite that numerous other officers observed these vehicles. Sealey further testified that the CHP manual requires that an officer be certified to conduct under-the-hood inspections for smog violations, and that Officer Barr improperly "stacked" tickets given to Grassilli, which means "adding violations of the same nature under different [Vehicle Code] sections." With respect to the Tibbans truck stops, Sealey opined that Officer Barr was wrong about requiring the truck mirrors to be extended beyond an extra-wide load. He explained that an extension would violate Tibbans's Caltrans permit because it would take the truck beyond the permitted 12-foot width. He further testified that the CHP has adopted Commercial Vehicle Safety Alliance (CVSA) rules, which provide that an officer may take a vehicle out of service only for certain violations, and a mirror violation is not one of these violations.

In defense, each defendant testified that the actions taken against Grassilli were motivated by proper law enforcement purposes and not for retaliation. Defendants additionally called as an expert witness Sergeant Crofton, a supervising officer of the El Cajon CHP office and a trained commercial vehicle enforcement supervisor. Sergeant Crofton opined that Officer Barr's traffic citations to Grassilli were proper, and that

Officer Barr's conduct in citing and placing the Tibbans trucks out of service for the lack of extended mirrors was consistent with the Vehicle Code.

Jury Instructions and Verdict

At the conclusion of the evidence, the court instructed the jury on Grassilli's single cause of action—a civil rights violation under section 1983. With the parties' agreement, the court instructed the jury that to recover on this claim, Grassilli must prove defendants intentionally retaliated against him for complaining about Officer Barr's illegal conduct, and that the retaliation was the "decisive factor, in the absence of which [defendants] would not have acted as [they] did." The jury was further instructed that if Grassilli proved this nexus, then Grassilli could establish his claim "even if the act, when taken for a different reason, would have been proper." This instruction was qualified by an additional instruction applicable to the two instances when a prosecutor was involved in the decision to bring charges against Grassilli (the Penal Code section 148.6 charges for making a false complaint against an officer and the October 2000 cigarette incident charges). With respect to these incidents, the court instructed the jury it was required to presume defendants' conduct did not cause any injury to Grassilli, but this presumption could be rebutted by evidence that Officer Barr knowingly gave false information to the prosecutor.

During deliberations, the jurors sent a note asking for direction because one juror was refusing to deliberate. After the court questioned the juror outside the presence of the other jurors and the juror asked to be excused, both counsel agreed that the court

should grant the juror's request. The court then placed an alternate juror on the panel and instructed the jury to begin deliberations anew.

One day later, the jury reached a verdict, finding: (1) Sergeant Toth and Officer Barr retaliated against Grassilli; (2) Sergeant Neumann did not personally retaliate against Grassilli; (3) Sergeant Toth and Sergeant Neumann were liable for the retaliation in their role as supervisory officers; and (4) Sergeant Toth and Officer Barr acted "maliciously, wantonly, or oppressively against [Grassilli]." The jury awarded Grassilli compensatory damages of $357,000 against Officer Barr; $133,000 against Sergeant Toth; and $20,000 against Sergeant Neumann.

During the punitive damage phase, Grassilli did not present any additional evidence, and each defendant presented evidence only of his financial condition. After a brief deliberations period, the jury awarded $3,000,000 against Officer Barr and awarded $1,005,522 against Sergeant Toth.

DISCUSSION

I. *Sufficiency of the Evidence*

"[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers" (*Houston v. Hill* (1987) 482 U.S. 451, 461), and retaliation for this criticism is actionable as a civil rights violation under section 1983. (*Greene v. Barber* (6th Cir. 2002) 310 F.3d 889, 895; *Smart v. Board of Trustees of University of Illinois* (7th Cir. 1994) 34 F.3d 432, 434; *Rakovich v. Wade* (7th Cir. 1988) 850 F.2d 1180, 1211; *Elbrader v. Blevins* (D. Kan. 1991) 757 F.Supp. 1174, 1183.) "Official reprisal for protected speech 'offends the Constitution [because] it threatens to

inhibit exercise of the protected right' [citation], and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . ." (*Hartman v. Moore, supra,* 126 S.Ct. at p. 1701 (*Hartman*).)

Defendants do not challenge these well-settled principles, but argue that insufficient evidence supported the jury's findings that they retaliated against Grassilli. In examining this contention, we consider the evidence in the light most favorable to the prevailing party, accept as true all the evidence and reasonable inferences tending to establish the correctness of the jury's findings, and resolve every conflict in favor of the judgment. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) "'It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.'" (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369.)

A. *Substantial Evidence Supported the Retaliation Findings*

Defendants first contend the evidence was insufficient to show Sergeant Toth and Officer Barr acted with the intent to retaliate. This contention is without merit.

As detailed above, Officer Barr stopped Grassilli for alleged equipment violations shortly after Grassilli complained about Officer Barr's unlawful conduct. He then continued to stop Grassilli for these violations despite knowing a court had dismissed the violations, and/or that Grassilli had corrected the violations. Officer Barr additionally targeted only the trucks that were delivering materials to Grassilli's worksite for alleged mirror violations. Officer Barr took the trucks out of service, delayed them for hours, and

required them to have extended mirrors, despite knowing that a more experienced colleague told him he was wrong to do so. Officer Barr stopped many other Tibbans trucks, but released each truck upon learning the driver was not headed to a Grassilli worksite. Officer Barr also initiated and then was actively involved in Sergeant Toth's plan to impound Grassilli's vehicle. Grassilli's expert witnesses criticized Officer Barr's actions as unprofessional, unwarranted, and violative of CHP policy.

For years, no CHP officer in Ramona took any action against Grassilli for the condition of his El Camino car, despite that these officers frequently observed Grassilli driving this vehicle through town. Within weeks of Grassilli's complaint, Officer Barr began to cite Grassilli, detain commercial vehicles hauling his water tanks, and then set in motion a scheme that led to the impound of Grassilli's truck. The jury found the nature and timing of these actions to be much more than a mere coincidence. There was substantial evidence for the jury to reach this conclusion. Viewing the totality of the circumstances, the evidence supports a finding that the stops were not triggered merely by Officer Barr's proper attempts to enforce the law.

Similarly, Sergeant Toth's actions in impounding Grassilli's vehicle and ordering the other officers not to provide Grassilli the opportunity to timely fix the problem supports the jury's finding that Sergeant Toth acted with a retaliatory motive. CHP policy requires officers to give a citizen a "notice to correct" if the officer is aware of a registration problem before the six-month period has expired. Sergeant Toth admitted he knew of this policy and he had never previously violated the policy, but did not offer a

reasonable explanation for why he did so with Grassilli. Grassilli's experts opined that Sergeant Toth's actions were improper, unethical, and tantamount to targeting.

In challenging the sufficiency of evidence, defendants contend the evidence showed their contacts with Grassilli were motivated solely by a desire to enforce the law. Although the jury could have accepted this argument, it did not. Moreover, in asserting this argument, defendants neglect to provide a reasoned discussion of all of the evidence, which includes Grassilli's evidence. Rather than analyzing Grassilli's evidence and demonstrating it does not prove retaliation, defendants simply cite to their own favorable testimony. On appeal, we begin with the presumption that the record contains evidence sufficient to support the judgment. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) It is the appellant's burden to demonstrate otherwise. 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. (*Ibid.*; *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1510.) Where, as here, the appellant fails to set forth all of the material evidence, a claim of insufficiency of the evidence fails.

B. *Substantial Evidence Supported the Malice Findings*

For similar reasons, we reject defendants' arguments that insufficient evidence supported the jury's finding that Sergeant Toth and Officer Barr acted "maliciously, wantonly, or oppressively" against Grassilli.

As set forth above, the evidence established that Grassilli brought a complaint through proper channels pertaining to the propriety of Officer Barr's personal conduct,

and that in retaliation for the complaint, Sergeant Toth and Officer Barr intentionally targeted Grassilli over several years and used their law enforcement authority to penalize Grassilli for his decision to make this complaint. This evidence substantially supports the jury's finding that the officers acted with the requisite malice.

In challenging the jury's malice findings, defendants deny they "harbor[ed] any intent to retaliate against respondent at any time . . . ." Defendants claim the tickets issued by Officer Barr reflect nothing more than his "unyielding effort to protect the motoring public and make the highways safe" and to "aggressively, but fairly enforce the Vehicle Code." They similarly argue that Sergeant Toth's decision to wait six months to impound Grassilli's vehicle without giving him any warning was motivated solely by Sergeant Toth's "hope" that Grassilli "would properly register the truck and pay the applicable DMV fees," and therefore "[s]uch a 'goodwill' posture and act of leniency . . . simply cannot be the factual basis for a finding of malice, oppression or fraud."

Although these contentions may be legitimate arguments to be made to a jury, they do not create a basis for overturning a jury's findings on appeal. The jury rejected defendants' view of the evidence that the officers were merely performing their obligations to enforce the Vehicle Code and thus were not acting with malicious intent, and the jury had a substantial evidentiary basis to do so.

C. *Substantial Evidence Supports Supervisory Liability*

Defendants also challenge the sufficiency of the evidence to support supervisory liability against Sergeant Toth and Sergeant Neumann. To establish supervisory liability under section 1983, Grassilli was required to prove: (1) the supervisor had actual or

constructive knowledge of Officer Barr's wrongful conduct; (2) the supervisor's response "'was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices'"'; and (3) the existence of an "'affirmative causal link'" between the supervisor's inaction and Grassilli's injuries. (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209-210, fn. 6, quoting *Shaw v. Stroud* (4th Cir. 1994) 13 F.3d 791, 799.) The jury was properly instructed on these elements, and found in Grassilli's favor on each of them.

The evidence supports these findings. By personally participating in the retaliatory activities, Sergeant Toth had actual knowledge that Officer Barr was engaged in retaliatory conduct against Grassilli. Sergeant Toth not only failed to direct Officer Barr to refrain from his activities, but he supported and encouraged them. Additionally, the evidence showed that Sergeant Toth was aware that Officer Barr continued to cite Grassilli for smog violations despite the court's dismissal of the charge, but he took no action to counsel Officer Barr or discourage this conduct.

The evidence likewise showed that Sergeant Neumann was aware of the history of conflict between Grassilli and Officer Barr, and yet continued to permit Officer Barr to issue Grassilli questionable citations. Grassilli's expert witness, Smith, a former police chief with substantial internal affairs experience, opined that Sergeant Neumann "neglected" his supervisorial duties at the December 1998 stop by permitting Officer Barr to issue a ticket that was inconsistent with CHP policy, and that he encouraged the retaliatory enforcement activities taken against Grassilli. Smith stated that Sergeant Neumann's responsibilities were to defuse the conflict between Officer Barr and Grassilli,

rather than to "exacerbate" the problem. Smith also stated that Sergeant Neumann should have made a determination whether Officer Barr's personal opinion as to the smog violations was supported by CHP policy. Smith opined that Sergeant Neumann also showed tacit support for Officer Barr's actions by improperly taking disciplinary actions against Officer Thetford for associating with Grassilli and for Officer Thetford's truthful testimony in the prior proceedings.

II. *Probable Cause Element*

In their reply brief, defendants argue for the first time that the judgment must be reversed because Grassilli did not prove a lack of probable cause for the traffic stops. They rely on a recent United States Supreme Court decision, decided after the parties filed their initial appellate briefs, which interpreted the requirements of a federal civil rights retaliatory prosecution claim against federal and state officials. (*Hartman, supra,* 126 S.Ct. 1695.)[5] For the reasons explained below, we find no reversible error.

In *Hartman*, the plaintiff brought a retaliatory prosecution claim against postal inspectors who allegedly engineered his criminal prosecution in retaliation for criticism of the postal service. (*Hartman, supra,* 126 S.Ct. at p. 1700.) The Supreme Court granted certiorari to resolve a conflict among the federal circuits as to whether "a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for

---

5 Although *Hartman* involved a *Bivens* suit against federal officials (*Bivens v. Six Unknown Fed. Narcotics Agents* (1971) 403 U.S. 388), the Supreme Court made clear its analysis and holding applied equally to a section 1983 claim against a state official or employee. A *Bivens* action is the federal analog to suits brought against state officials under section 1983. (*Hartman, supra,* 126 S.Ct. at p. 1700, fn. 2.)

pressing the underlying criminal charges." (*Id.* at pp. 1701-1702.) In considering this issue, *Hartman* first reaffirmed the general rule that a plaintiff claiming retaliation against a federal or state official must generally prove a "but-for" causal connection between the unconstitutional motive and the alleged improper action, and, if this nexus is shown, the plaintiff need not prove any additional specific evidentiary link, such as the lack of objective circumstances supporting the official's action. (*Id*. at pp. 1703-1704.) In other words, where constitutionally protected speech is a motivating factor in governmental action adverse to the plaintiff, the adverse action is actionable even if there were other objective grounds for the action, unless the same action would have been taken even in the absence of the protected conduct. (See *Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 285-287.)

After reaffirming this general rule, the *Hartman* court discussed the need for a stricter causation rule for a "retaliatory *prosecution*" claim because the claim "differ[s]" from the "standard" retaliation case in two ways. (*Hartman, supra*, 126 S.Ct. at p. 1704, italics added.) First, the court stated that the probable cause issue is typically part of a retaliatory prosecution case, and thus imposing the obligation on a plaintiff to prove its absence would not create a significant additional burden for the plaintiff. (*Ibid*.) But more important to its decision, the court identified the unique causation issues inherent in a retaliatory prosecution case and found these issues make it appropriate that a plaintiff prove a stronger nexus between the alleged retaliatory actions and the resulting harm. (*Id*. at pp. 1704-1705.) The court explained that the decision to prosecute is made by an independent prosecutor (who is entitled to absolute immunity for the decision) rather than

the person alleged to have been motivated by retaliation. (*Id.* at pp. 1704-1706.) Thus, "[t]he causal connection required . . . is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another." (*Id*. at p. 1705.) The court also emphasized the "long-standing" presumption that a prosecutor has legitimate grounds for actions taken, and therefore "judicial intrusion into executive discretion of such high order should be minimal." (*Id.* at pp. 1705-1706.) To avoid the factual and legal difficulties inherent in the complex causation analysis in a retaliatory prosecution case and to give effect to the strong judicial deference accorded to prosecutorial decisionmaking, *Hartman* thus established a bright line rule holding that a plaintiff alleging a *retaliatory prosecution* claim must prove, as an element of the case, there was no probable cause for the prosecution. (*Id*. at p. 1707.)

Hartman is inapplicable to Grassilli's claims based on the traffic stops and citations because these claims and the damages sought were not based on criminal charges brought by a third party or entity against Grassilli. The damages for these claimed retaliatory actions were incurred because of the stops themselves, not necessarily the later prosecution. Further, as acknowledged by defense counsel at trial, a traffic citation constitutes the charging document and triggers a traffic proceeding without any prosecutorial decisionmaking, and therefore there is no presumption that the prosecutor has "broken the causal chain" between the defendant's conduct and the damages. The logic of the *Hartman* decision does not apply if a plaintiff's claim is based on the

defendants' retaliatory actions without the involvement of a prosecutorial agency (or similar charging entity) and the damages incurred were independent of the prosecution.

In so concluding, we recognize that a federal district court recently held *Hartman*'s probable cause requirement applied to a retaliatory *arrest* claim—even where there were no criminal charges brought. (*Hansen v. Williamson* (E.D.Mich. 2006) ___ F.Supp.2d ___, ___ [2006 U.S. Dist. LEXIS 41461].) We find the reasoning of that decision unpersuasive. Despite its broad language, *Hartman* made clear that it was imposing the lack-of-probable-cause element with respect to retaliatory prosecution claims because of the unique causation analysis arising when the charges are brought based on the decision of a third party prosecutor (or other similar entity).[6]

Although not specifically argued by defendants, we note there were two aspects of Grassilli's case that were based on an alleged retaliatory prosecution arising from the district attorney's decision to bring the charges: (1) the Penal Code section 148.6 charges brought against Grassilli for filing a false complaint, and (2) the charge arising from the October 2000 cigarette incident. With respect to these specific incidents, the jury was instructed that once a prosecutor makes an independent decision to prosecute a crime,

---

6 *Hansen* relied on *Barnes v. Wright* (6th Cir. 2006) 449 F.3d 709, which is factually distinguishable. *Barnes* held *Hartman*'s lack-of-probable-cause requirement applied to a retaliatory prosecution case where no prosecutorial agency was involved, and instead the officers with the alleged retaliatory motives "themselves initiated the grand jury proceedings against [the plaintiff]." (*Id*. at p. 720.) We agree with the *Barnes* court's conclusion that the *Hartman* rule applied under those circumstances. Because the grand jury performed a role similar to a prosecutor (made the independent decision to issue an indictment based on its conclusion there was a sufficient basis to bring the criminal action), the case was functionally the same as a retaliatory prosecution claim.

"the causal chain between the defendants' alleged misconduct and the criminal prosecution is [presumed to be] broken," unless Grassilli established defendants knowingly provided the district attorney with false information.

This instruction was arguably insufficient because it did not include a specific statement that Grassilli must prove a lack of probable cause for the prosecutions. However, defendants waived the right to assert instructional error by failing to raise it in the proceedings below or in their opening appellate brief. Although *Hartman* was decided after the second trial in this case, at the time of trial there was a split in the federal circuits as to whether a plaintiff is required to show a lack of probable cause in a retaliatory prosecution suit. (Compare *Moore v. Hartman* (D.C. Cir. 2004) 388 F.3d 871, 879 [no probable cause requirement]; *Poole v. County of Otero* (10th Cir. 2001) 271 F.3d 955, 961 [no probable cause requirement]; with *Wood v. Kesler* (11th Cir. 2003) 323 F.3d 872, 883 [probable cause required]; *Keenan v. Tejeda* (5th Cir. 2002) 290 F.3d 252, 260 [probable cause required]; *Mozzochi v. Borden* (2d Cir. 1992) 959 F.2d 1174, 1179-1180 [probable cause required].) Defendants thus had full opportunity to raise the issue, relying on the authorities favoring their position. Not only did they fail to raise the issue, they agreed that the jury should be instructed that it could find in Grassilli's favor on the retaliation claim based on the false charges and cigarette incident, if Grassilli proved the officers gave false information to the prosecutor. Further, defendants have never—including in their reply brief filed after *Hartman* was decided—challenged the correctness of any of the jury instructions on the causation or other liability issues, nor did they include the jury instructions as part of the designated appellate record. Under

these circumstances, defendants waived the argument that insufficient evidence supports the judgment because Grassilli failed to prove a lack of probable cause.

Moreover, defendants have not met their burden to show reversible error. We are required to imply all necessary findings in support of the jury verdict, and there was substantial evidence from which the jury could find the prosecutor did not have probable cause to bring the Penal Code section 148.6 charge against Grassilli. The criminal charges against Grassilli were dismissed for lack of evidence, and Grassilli produced substantial evidence showing the charges were objectively baseless because the evidence showed Grassilli was truthful when he communicated his concerns about Officer Barr's vehicle.

Additionally, the central thrust of Grassilli's claims and the damages sought did not center on Grassilli's claims that he was the victim of a retaliatory *prosecution.* Instead, his claims were that as a result of his exercise of his First Amendment rights, the law enforcement officers took adverse actions against him—which included repeated traffic stops, impounding of his vehicle, and stops of his delivery trucks. It was the stops themselves, rather than a prosecution by an independent prosecutorial authority, that caused the bulk of his alleged damages. Although Grassilli did present evidence that he incurred attorney fees of $9,750 to defend against the criminal charges, it is not clear whether the jury included this amount in its economic damages finding of $210,000. On our review of the record, it is not likely the outcome would have been different if the jury had been instructed regarding the probable cause requirement with respect to the damages awarded for the two prosecutions brought by the district attorney's office.

III. Evidentiary Issues

Defendants raise several evidentiary errors arising from testimony admitted over defendants' objections. We find no abuse of discretion.

A. *Testimony of Grassilli's Expert Ronald Sealey*

Defendants contend the court erred in permitting Grassilli's expert, Ronald Sealey, to testify concerning traffic enforcement standards governing commercial vehicles because he was not qualified to offer opinions on these subjects.

1. *Background*

Before trial, defendants moved to exclude Sealey's testimony because he was not qualified to testify as an expert on traffic enforcement standards. In response, Grassilli presented facts showing Sealey worked for the San Diego County Sheriff's Department from 1963 until his medical retirement in 1981. During approximately 15 of those years, Sealey worked as a traffic enforcement officer, including training other officers in traffic enforcement. Sealey's responsibilities included writing traffic tickets for Vehicle Code violations. He wrote approximately 10,000 traffic citations in his career, and made approximately three stops per week for suspected commercial vehicle violations, including for permit violations. Sealey has testified frequently as an expert in accident reconstruction cases involving large trucks and trailers, in which he is often required to research, and opine on, whether commercial vehicles met Vehicle Code requirements, including mirror-related requirements.

Sealey received traffic enforcement training from the CHP in the mid-1960's, and on CHP commercial enforcement policies in 1973. In connection with this case, Sealey

reviewed the most recent CHP manual (issued in 1995). Sealey had previously testified as an expert in police practices and procedures.

After reviewing this information, the court found Sealey had the necessary training and experience to opine on the subject of legal requirements governing commercial vehicles. The court found defendants' objections were "directed to weight as opposed to [the] admissibility" of Sealey's expert opinions.

2. *Analysis*

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) It is for the trial court to determine, in the exercise of its sound discretion, the competency and qualification of an expert witness, and the ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown. (*People v. Chavez* (1985) 39 Cal.3d 823, 828.) "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness """*clearly lacks* qualification as an expert."""" (*People v. Farnam* (2002) 28 Cal.4th 107, 162, italics in original.) The competency of an expert "'is in every case a relative one, i.e., relative to the topic about which the person is asked to make his statement.'" (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476-477.) The fact that an expert has not testified previously on the particular subject area does not disqualify the expert from testifying on the subject.

The court did not abuse its discretion in determining Sealey was qualified to testify as an expert on code requirements governing commercial vehicles. Sealey had

substantial expertise in traffic and commercial vehicle enforcement not possessed by the layperson. The fact that Sealey's primary area of expertise was in accident reconstruction does not mean he could not also testify on Vehicle Code enforcement. Sealey explained that many of his accident reconstruction cases involved big rigs and truck trailers, and frequently his causation opinions in those cases depended on his analysis as to whether the vehicle was in compliance with commercial vehicle codes.

With respect to his opinions on CHP policies, Sealey's brief training by a CHP officer in 1973, combined with his later traffic enforcement experience, gave him sufficient expertise to offer opinions on the subject. An expert is entitled to testify about governing standards even though his or her experience concerned standards applicable at a different time. (See *Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 732, overruled on other grounds in *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 74.) Moreover, if an expert possesses experience in the general area, the lack of formal training in the specific area and/or the fact that some of the training occurred many years earlier goes to the weight of the testimony and does not necessarily preclude its admissibility. (See *Evans v. Ohanesian* (1974) 39 Cal.App.3d 121, 128-129.)

We also reject defendants' argument that the court should have excluded Sealey's testimony about the propriety of the three Tibbans truck stops because the only relevant legal issue pertaining to those stops was whether the length of the detentions was unreasonable. In support of this assertion, defendants rely on language in our prior opinion in which we noted that a factfinder could find the reason the officers detained the trucks for an extended period was the officers' desire "to punish Grassilli for his earlier

complaint . . ." and thus the issue "whether the length of the stops was reasonable . . . is a factual question for the jury to determine." (*Grassilli I, supra*, D037942.) Viewed in context, these statements were illustrative of the general principle that the Tibbans truck stops were relevant to prove the retaliation claims and did not limit the jury's consideration of this evidence to the length of the stops.

B. *Testimony of CHP Officer Michael Clauser*

Defendants contend the court erred in permitting Officer Clauser to give expert testimony because he was not designated as an expert in this case.

1. *Background*

Officer Clauser is a CHP officer trained in commercial vehicle enforcement, and was present at the July 1999 Tibbans truck stop. Before trial, defense counsel objected to Officer Clauser testifying about this traffic stop. Defense counsel stated that Officer Clauser was not designated as an expert witness and therefore should not be permitted to testify as to his opinion on whether the Tibbans truck violated the Vehicle Code. The court declined to exclude all of Officer Clauser's testimony about the July 1999 stop, reasoning that Officer Clauser was entitled to testify as a percipient witness and that his opinions were relevant to the extent they were communicated to Officer Barr or his supervisors.

At the outset of Officer Clauser's testimony, the court admonished the jury that "Officer Clauser, much like other witnesses we have had here, has not been designated as an expert witness. He's not a designated expert witness. [¶] So to the extent you hear

some of his background and opinions, those are just to give some understanding to what he did or did not do, as it relates to the specifics of this case."

Officer Clauser thereafter testified that he was asked to go to the July 1999 Tibbans truck stop to provide an opinion as to the legality of the truck load. When he arrived at the scene, Officer Clauser observed the truck and measured the load. Officer Clauser determined that the vehicle was in compliance with the Caltrans permit and did not require an extended mirror, and that requiring an extended mirror would be a safety hazard. Officer Clauser also testified that a mirror violation was not a basis for placing the truck "out of service" because this type of violation was not identified on the CVSA list.

After the stop, Officer Clauser communicated his opinions to Officer Barr. Officer Clauser testified: "I told [Officer Barr] that he was wrong, that when a vehicle is operating under a transportation permit with a load, there is no way it can possibly see around 200 feet back, and that was a bad call to write that [ticket]. [¶] He was actually causing [the truck] to be illegal. He didn't have the authority for that and that he should not write it." Officer Barr responded that he disagreed with Officer Clauser and that he was going to continue to write the tickets.

2. *Analysis*

Defendants contend the court erred in permitting Officer Clauser to testify as to his opinions about legal requirements governing mirrors on vehicles carrying extra-wide loads. Defendants maintain that only a designated expert may testify as to his or her opinions. (See *FMC Corp. v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132, 1214-

1215.) However, Officer Clauser's opinion was not offered to prove the applicable commercial requirements, but was relevant because he was a percipient witness who communicated his opinion to Officer Barr. The evidence was relevant to show that Officer Barr was aware that a CHP trained commercial enforcement officer disagreed with his stopping Caltrans-permitted trucks for mirror violations, but that Officer Barr made a decision to nonetheless continue to make these stops. The court advised the jury about the limited relevance of Officer Clausen's opinion testimony.

We recognize Officer Clauser was permitted to testify to the basis for certain opinions that may have exceeded the scope of his communications with Officer Barr, including the applicability and specific contents of the CVSA and the Vehicle Code sections applicable to mirrors. However, some of this evidence was relevant to explain the basis for his interpretations of the Vehicle Code. The fact that Officer Clauser had a reasoned basis to reach his conclusions regarding the extent of an officer's authority to stop a vehicle for mirror violations was relevant to show that Officer Barr's disregard of these opinions was pretextual. Evidence Code section 800 permits a nonexpert to offer an opinion when, as here, the opinion is rationally based on the witness's perception and helpful to "a clear understanding of his testimony."

Moreover, to the extent the court erred in admitting certain portions of Officer Clauser's testimony, the error was not prejudicial. Officer Clauser's explanation for why the Tibbans truck mirrors did not violate the Vehicle Code and/or did not constitute an out-of-service violation were fully consistent with the opinions of several other witnesses at trial, including Grassilli's designated expert (Sealey). Additionally, the issue as to

whether the Tibbans truck mirrors in fact complied with the Vehicle Code was not the crucial issue in the case. Regardless of the legality of the mirrors, the issue at trial was whether Officer Barr was using the mirrors as a pretext to commit retaliatory acts against Grassilli. On our review of the record, the fact that Officer Clauser was permitted to testify to certain opinions that were not communicated to Officer Barr did not affect the outcome of the case.

C. *Officer Thetford's Testimony*

Officer Thetford was Officer Barr's coworker in Ramona who was also supervised by Sergeants Toth and Neumann. Before trial, the court denied defendants' motion to exclude Officer Thetford's testimony pertaining to Sergeant Neumann. Defendants challenge the court's ruling on appeal. We find no abuse of discretion.

At trial, Officer Thetford's testimony about Sergeant Neumann consisted of the following: (1) Sergeant Neumann told Officer Thetford not to associate with Grassilli, and any continued association would detrimentally affect Officer Thetford's career; (2) Sergeant Neumann told Officer Thetford he should give Grassilli a ticket if Officer Thetford saw Grassilli committing a traffic violation; and (3) Sergeant Neumann put pressure on Officer Thetford to change his testimony after Officer Thetford's deposition.

Defendants contend this testimony was improperly admitted because it was not relevant to any issue in the case. We disagree. Sergeant Neumann's actions directed at Officer Thetford were strongly probative on the issue whether Sergeant Neumann failed to properly supervise Officer Barr. To prove Sergeant Neumann's supervisory liability, Grassilli was required to show that Sergeant Neumann knew about Officer Barr's

retaliatory actions, and that his "'response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices . . . ."'" (*Weaver v. State of California*, *supra*, 63 Cal.App.4th at pp. 209-210, fn. 6.) The evidence that Sergeant Neumann told Officer Thetford not to associate with Grassilli and pressured Officer Thetford about his prior deposition testimony was relevant to show this deliberate indifference and wrongful support for Officer Barr's retaliatory actions.

We additionally reject defendants' contention the court abused its discretion in refusing to exclude the evidence under Evidence Code section 352 because Sergeant Thetford's testimony about Sergeant Neumann improperly "took the jury's focus away from [Grassilli's] claim of retaliation."

Although the evidence of Sergeant Neumann's retaliatory conduct against Officer Thetford had the potential to confuse the jurors with respect to the central issue of whether defendants retaliated *against Grassilli*, the court did not abuse its discretion in concluding the jury could separate these issues. Defendants had the opportunity to request the court to issue a limiting instruction on the evidence, and we presume defendants made the limited relevance of the evidence clear to the jury during their closing arguments.[7] Having presided over the lengthy trial and viewed the witnesses and jury, the court had a reasonable basis to conclude the jury was not likely to misinterpret

---

[7] With the parties' agreement, closing arguments in the liability phase of the trial were not reported.

the evidence of Sergeant Neumann's actions against Officer Thetford as evidence of his direct retaliation against Grassilli.

The jury verdict in fact supports that the evidence about Sergeant Neumann's actions against Officer Thetford did not improperly taint the remainder of the trial. The jury found Grassilli did not prove his retaliation claims against Sergeant Neumann and, although it found Sergeant Neumann liable for supervisory liability, it apportioned only a small percentage of fault for this conduct. This finding reflects the jury understood that the evidence about Sergeant Neumann's actions against Officer Thetford was not relevant to show Sergeant Neumann's retaliation against Grassilli.

In addition to challenging Officer Thetford's testimony concerning Sergeant Neumann, defendants also argue the court erred in permitting Officer Thetford to testify about the internal criminal investigation initiated against him. After Officer Thetford was deposed in the case, several CHP supervising officers (who did not include Sergeant Toth or Sergeant Neumann) began an internal criminal investigation against him, accused Officer Thetford of committing perjury, and pressured him to change his testimony. Officer Thetford testified at trial about the investigation, and voluntarily brought the transcript of an internal administrative hearing to trial.

This evidence was probative for several reasons. First, the evidence was relevant to explain Officer Thetford's demeanor and state of mind in providing favorable testimony to Grassilli. The jury was entitled to know that Officer Thetford was testifying truthfully despite substantial potential risk to his career. Additionally, the testimony was relevant because Sergeant Crofton, who was defendants' expert witness, actively

participated in the investigation and made numerous statements that brought his credibility into question. For example, Officer Thetford testified that during the investigation, Sergeant Crofton urged Officer Thetford to change his prior testimony. At the investigative hearing, Sergeant Crofton told Officer Thetford that it was "important for you not to say anything that would embarrass the Department," and that Officer Thetford's deposition testimony "was extremely damaging to the Highway Patrol [and] that there would be a great monetary loss to the Highway Patrol should [Officer Thetford's] testimony come up in court . . . ." Sergeant Crofton told Officer Thetford that "we [the CHP] go out of our way never to be construed in any way other than the way we want to be construed." Because these statements were highly probative to challenge Sergeant Crofton's credibility, Grassilli was entitled to elicit the information.

Contrary to defendants' additional assertions, Officer Thetford's reference to the administrative hearing transcript at trial did not reflect prejudicial error. While answering a question during his direct examination, Officer Thetford made an unsolicited comment that he had brought to trial the transcripts from an internal investigation hearing. Outside the presence of the jurors, Grassilli's counsel asked for an opportunity to review the transcript. Officer Thetford said he had no objection to providing the attorneys with copies of the transcript. Defense counsel, however, objected to the disclosure of the transcript based on the CHP's right to assert a statutory privilege for personnel records. Although the court questioned whether the CHP could assert a privilege if the employee waived that privilege, the court ultimately decided that the transcript would not be disclosed to the jury, but that each counsel would be provided with a copy.

Thereafter, Officer Thetford responded to Grassilli's counsel's questions about the investigation primarily from his memory, rather than from the transcript. However, during defense counsel's cross-examination, counsel questioned Officer Thetford directly about the transcript, including whether he had identified any particular sections of the transcript that he thought were important. At one point, when Officer Thetford asked to refer to the transcript, defense counsel responded, "You can refer to anything you want, sir." Officer Thetford then read without objection from the transcript.

On this record, there was no error pertaining to the administrative transcript. It is undisputed that Officer Thetford brought the transcript to court voluntarily without being asked to do so by either counsel. Moreover, the transcript was not admitted as an exhibit, and Officer Thetford relied on the contents only after defense counsel specifically invited him to do so.

IV. *Compensatory Damages*

The jury awarded Grassilli $210,000 in economic damages and $290,000 in noneconomic damages.[8] Defendants challenge the sufficiency of the evidence to support these amounts.

---

8 The jury apportioned the economic damages as follows: $147,000 against Officer Barr; $58,000 against Sergeant Toth; and $5,000 against Sergeant Neumann. The jury apportioned the noneconomic damages as follows: $210,000 against Officer Barr; $58,000 against Sergeant Toth; and $15,000 against Sergeant Neumann.

A. *Generally Applicable Law*

When a section 1983 plaintiff "seek[s] damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." (*Memphis Community School Dist. v. Stachura* (1986) 477 U.S. 299, 306.) "[D]amages in tort cases are designed to provide '*compensation* for the injury caused to plaintiff by defendant's breach of duty.' [Citations.]" (*Ibid*.) The jury has wide latitude in the amount of damages to be awarded. The jury's finding will be upheld if it does not exceed some """rational appraisal or estimate of the damages that could be based upon the evidence . . . ."""" (*Baron v. Suffolk County Sheriff's Dept.* (1st Cir. 2005) 402 F.3d 225, 245.)

B. *Economic Damages*

On his economic damages claim, Grassilli presented evidence that defendants' retaliatory actions caused him to (1) suffer $228,011 in lost profits and loss of business value because of Tibbans's decision not to continue to sell water tanks to Grassilli; and (2) incur attorney fees of $9,750 to defend Grassilli in the various infractions and criminal actions. The jury found Grassilli proved he suffered $210,000 in economic damages. On appeal, defendants contend the jury's factual determination as to lost profits and loss of business value is unsupported by the evidence.

Grassilli's theory of lost business damages was based on evidence showing (1) Grassilli owned an established profitable business (Ramona Pump & Supply); (2) Grassilli had a valuable business relationship with Tibbans, whereby he purchased the water tanks at below-market prices in exchange for an exclusive buy-sell agreement; (3)

Tibbans decided to stop selling and delivering water tanks to Grassilli because of Officer Barr's repeated actions in delaying and citing the Tibbans trucks carrying water tanks to Grassilli's jobsites; (4) Grassilli thereafter changed his business model and stopped selling water tanks because he no longer had access to a low-priced supplier; (5) the Ramona Pump & Supply profits and sales decreased after the termination of the Tibbans-Grassilli relationship; and (6) the decline in profits could not be explained by other relevant economic factors.

To show the amount of the loss, Grassilli presented the testimony of an expert economist, Michael Willoughby, who opined that Grassilli's business suffered lost profits because of the loss of its primary supplier. Willoughby found that Ramona Pump & Supply was an established business, and thus its business history provided a basis for calculating any business loss. Willoughby examined the financial records for the year 1999 to determine a baseline for the business profits. He then used expected population growth figures and other estimates to make assumptions as to the growth in sales and expenses. Based on that analysis, Willoughby compared what Grassilli should have earned with what he did actually earn. This comparison established that the lost profits for year 2000 were $15,348; lost profits for year 2001 were $23,324; and lost profits for year 2002 were $33,811. The total of these lost profits was $72,483.

With respect to the loss of business value, Willoughby said this loss reflected an evaluation of how much the business was worth in 2002 relative to what it might have been worth without the termination of the Tibbans-Grassilli relationship. To calculate this figure, Willoughby looked at the sales of businesses similar to Grassilli's business.

He then identified an appropriate ratio by using a data service and applied a multiplier of 4.6 for earnings from four transactions of pump services businesses, averaging the sales, and concluded buyers were paying $4.60 for every dollar of earnings. Based on this analysis, Willoughby estimated a loss of business value of $155,528.

Willoughby's expert opinions provided a reasonable basis for the jury to conclude that Grassilli's business suffered a loss of approximately $228,000 caused by defendants' conduct. When a defendant's tortious conduct impacts an established business, lost profits "are generally recoverable if the amount 'may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. [Citations.]'" (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883.) "Uncertainty as to the *amount* of profits is not fatal to such a claim. [Citations.] '. . . It is enough to demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. [Citations.]'" (*Id.* at pp. 883-884.)

In asserting the economic damages award was unsupported, defendants argue that Willoughby's opinions were based on an improper assumption, i.e., that the most significant interference by defendants came in 2000. Defendants maintain that this assumption was improper because the jury verdict reflects that the jury "was most offended by the interference between 1997 and 1999." However, the issue as to which acts the jury found most offensive is not necessarily determinative of the damages amount. The bulk of the claimed *economic* damages were caused by the impact on Grassilli's business resulting from Tibbans's decision to terminate the relationship. The evidence was undisputed that the final decision to terminate came in early 2001, and

there was some evidence supporting that the relationship began deteriorating in prior years based on Officer Barr's conduct targeting the Tibbans trucks. Based on this evidence, the jury could find Willoughby's assumption that defendants' conduct caused a loss of profits beginning in 2000 to be reasonable, even if the claimed wrongful conduct began much earlier.

Defendants alternatively challenge the economic damages award by complaining that Grassilli did not "identify one job, by name or otherwise, lost because of appellants' retaliatory conduct." The absence of this evidence does not preclude a finding that he lost profits. The essence of Grassilli's lost profits claim was that Tibbans's refusal to continue to sell him tanks made it difficult for him to continue the water tank portion of his business and he thus lost profits he would have earned. The evidence was undisputed that Grassilli had a decrease in sales of water tanks from 1999 to 2002. Although the jury was entitled to consider the fact that Grassilli did not produce specific evidence of a particular job lost because of defendants' conduct, the fact does not preclude the jury's lost profits finding.

Defendants additionally argue that Grassilli did not have any documentation supporting that he lost 100 days of work. However, it is not clear that the jury awarded Grassilli any damages for this claimed lost work. Likewise, Grassilli's testimony that he did not "know" if defendants' conduct diminished his business profits is not fatal to his damages claim. Grassilli made clear at trial he did not keep the books for his business and was not familiar with the company finances, and that his wife was responsible for this aspect of the business. Grassilli's expert, Willoughby, testified that he spoke with

Mrs. Grassilli, rather than Mr. Grassilli, about the business finances because of her greater familiarity with the financial aspects of the business.

We additionally reject defendants' emphasis on the fact that Grassilli's expert did not specifically opine as to whether the lost profits were proximately caused by defendants' actions. It was undisputed that Grassilli's sales went down after the termination of the Tibbans relationship, and Willoughby was unable to identify any other likely basis for this decline. It is reasonable to conclude the loss of a primary supplier who had sold its products to Grassilli at below-market prices would result in an economic loss to Grassilli. Although the defense expert opined that drought conditions and/or the lack of a contractor's license could have been a cause of the loss of profits, the jury was entitled to reject these opinions.

Substantial evidence supported the economic damages award.

C. *Noneconomic Damages*

The jury awarded Grassilli $300,000 in noneconomic damages against the three defendants. Of this amount, the jury found Officer Barr responsible for $210,000, Sergeant Toth responsible for $75,000, and Sergeant Neumann responsible for $15,000. On appeal, defendants claim these damages were excessive as a matter of law.

Under section 1983, a plaintiff is entitled to emotional distress damages caused by the defendant's violation of the plaintiff's constitutional rights. (*Memphis Community School Dist. v. Stachura*, *supra*, 477 U.S. at p. 307; *Carey v. Piphus* (1978) 435 U.S. 247, 264; see *Mathie v. Fries* (2d Cir. 1997) 121 F.3d 808, 813-815.) The plaintiff has the burden to show the extent and magnitude of the emotional injuries, and it is within the

jury's province to determine the appropriate amount of damages. If the defendant claims the amount awarded was excessive, a trial court has broad discretion in determining the validity of this claim. (*Sheets v. Salt Lake County* (10th Cir. 1995) 45 F.3d 1383, 1390.) A trial court's rejection of an excessive damages argument is "entitled to considerable deference on appeal." (*Ibid*.) A reviewing court "will only find an abuse of discretion if the jury award is '"so excessive . . . as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or another improper cause invaded the trial . . . ."' [Citation.]" (*Ibid*., accord *Mathie, supra*, 121 F.3d at p. 813.)

In this case, the jury and the trial judge, who heard Grassilli testify and observed his demeanor, could reasonably reach the conclusion that he had suffered substantial emotional distress. Both Grassilli and his wife testified that the retaliation caused Grassilli to become upset, angry, nervous, and short-tempered. This evidence showed Grassilli's relationship with his wife and children was substantially affected. Grassilli became quiet and would not interact with his family. Grassilli began avoiding going into town or out to dinner and no longer felt comfortable taking his sons to car shows because of his concern he would be stopped by Officer Barr while driving his El Camino. Although defendants attempt to trivialize the fact that Grassilli no longer felt comfortable going to car shows with his sons, this circumstance must be viewed in the context of the importance that these shows had in Grassilli's personal and social life. Moreover, the retaliatory activities caused Grassilli to change his business (because of the termination of his relationship with Tibbans), so that he was required to spend more time performing labor-intensive activities and less time with his family.

In asserting there was insufficient evidence to support the jury's finding, defendants focus on evidence showing that on several occasions Grassilli communicated his displeasure with the officers' continued harassment by verbalizing profanities to Officer Barr and engaging in other similar conduct. Defendants argue this conduct shows there was an absence of any "'real' emotional trauma suffered by" Grassilli. The jury, however, had a substantial basis to find that Grassilli did not engage in some of these alleged activities. Additionally, to the extent that Grassilli did communicate his displeasure to the officers, the jury had an ample basis to find the communications did not reflect the absence of emotional distress, and instead were the manifestations of a person who was deeply frustrated, angry and upset by the law enforcement officers' continuing retaliatory activities.

After considering the evidence, observing Grassilli and his wife testify, and evaluating defendants' attitude towards Grassilli, the jury placed a $300,000 monetary value on Grassilli's emotional distress. The trial judge, who presided over the trial and had the opportunity to view the evidence first-hand, exercised independent judgment in deciding that the $300,000 was not excessive.

On the record before us, we cannot conclude this amount reflects passion or prejudice, or shocks the judicial conscience. Although Grassilli was not overly verbal or detailed about his emotional suffering, the jury was aware that he was not someone who could easily articulate or explain his feelings. It was not unreasonable for a jury to conclude that someone in Grassilli's position, who was harassed by law enforcement officers over a five-year period, would suffer substantial emotional trauma, frustration

and humiliation. Grassilli's testimony showed that the officers' conduct did in fact take an emotional toll on his personal and professional life. "It is within the jury's province to evaluate the credibility of witnesses who testify to emotional distress, and we shall not disturb those credibility determinations on appeal." (*Bruso v. United Airlines, Inc.* (7th Cir. 2001) 239 F.3d 848, 857.)

V. *Punitive Damages*

A. *Relevant Factual and Procedural Background*

Before the punitive damages phase, defendants notified the court they intended to produce evidence of their financial conditions, and proposed a jury instruction stating the jury "may" consider this evidence in determining the appropriate punitive damages award. Grassilli's counsel agreed the defendants had the right to present financial condition evidence, but objected to the proposed instruction because federal, not state, law applied. Grassilli's counsel requested that the court use Instruction No. 7.5 of the Ninth Circuit's manual on model jury instructions which does not mention financial condition evidence. (9th Cir. Civ. Jury Instr. 7.5 (2001).)[9] Grassilli's counsel also asserted that if defendants submitted their financial evidence, he should be permitted to

---

9 The model instruction states in relevant part: "The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future. [¶] . . . [¶] If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff." (9th Cir. Civ. Jury Instr. 7.5, *supra*.)

ask defendants whether they were entitled to be indemnified by the state for a punitive damages award under Government Code section 825.[10]

After considering these arguments, the court ruled: (1) it would permit defendants to produce evidence of their financial conditions; (2) it would give Grassilli's proposed federal model punitive damage instruction that did not specifically refer to the financial condition evidence; and (3) it would not permit Grassilli to introduce evidence pertaining to Government Code section 825 relating to the possibility of indemnification.

The only evidence presented during the ensuing punitive damages phase was the testimony of Officer Barr and Sergeant Toth concerning their financial resources. Neither officer was cross-examined. Officer Barr testified that his gross salary as a CHP officer is approximately $5,000 per month, and his wife earns a gross monthly salary of

---

10 Government Code section 825, subdivision (b), provides that a public entity may pay for a compensatory damages award against an employee acting within the scope of his or her employment, but a public entity is *not* authorized to pay a punitive damages award *unless* "*the governing body of [the] public entity . . . finds all of the following:* [¶] (1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity. [¶] (2) *At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity*. [¶] (3) Payment of the claim or judgment would be in the best interests of the public entity. [¶] As used in this subdivision with respect to an entity of state government, 'a decision of the governing body' means the approval of the Legislature for payment of that part of a judgment that is for punitive damages or exemplary damages, upon recommendation of the appointing power of the employee or former employee, based upon the finding by the Legislature and the appointing authority of the existence of the three conditions for payment of a punitive or exemplary damages claim." (Italics added.) Section 825, subdivision (b) further states that "[t]he possibility that a public entity may pay that part of a judgment that is for punitive damages shall not be disclosed in any trial in which it is alleged that a public employee is liable for punitive or exemplary damages, and that disclosure shall be grounds for a mistrial."

about $4,000. Their total monthly expenses are $6,700. The couple has three children under the age of 13, and they own their home with a fair market value of about $410,000, encumbered by a first and second mortgage totaling $370,000. Officer Barr has approximately $8,000 in bank accounts, a retirement account of $6,500, and three vehicles, two on which he is making payments. Officer Barr has no other investments or income sources.

Sergeant Toth testified that he has been retired since July 2000, and he receives approximately $60,000 in annual retirement income. He has retirement accounts of approximately $55,000, and a checking/savings account of about $10,000. Sergeant Toth estimated his monthly expenses to be approximately $3,300. Sergeant Toth owns a home with a fair market value of approximately $400,000, and owes $135,000 on the mortgage, and owns rental property with a value of approximately $200,000 and a loan balance of $72,000. He earns approximately $30 per month from the rental property.

During his closing argument, Grassilli's counsel urged the jury to "send a message" and to award an amount sufficient to insure defendants would be held accountable for their breach of trust. He reminded the jury of CHP management's complicity in promoting an environment that obfuscates the truth and called upon the jury to act as the conscience of the community and to "reform the process." Although deferring to the jury, counsel maintained that nothing less than a "small fortune" would deter future conduct and suggested such figures as $7 million or a 10 to 1 ratio.

In response, defense counsel argued that punitive damages were not warranted as Grassilli had been handsomely rewarded and had been "made whole" by the

compensatory damages award. He stressed that "these two individuals are not responsible for reforming the California Highway Patrol" and rejected the view that the jury should "hold these two individuals out to cause a reform." In further support of his argument, defense counsel stated that "these individuals are going to feel the pain with any award" and, in an obvious reference to compensatory damages, stated they "are going to be punished handsomely with having to write a check." Grassilli's counsel objected on the basis of "[m]isstatement of the law." The court sustained the objection.

In his rebuttal, Grassilli's counsel focused on defendants' testimony regarding their limited financial resources and suggested a defendant's financial condition was of no relevance in setting punitive damages:

> "[s]trap out [defense counsel's] argument, I have no money, therefore, don't hold me accountable. I have no money, therefore, don't punish me. The law doesn't say that. [¶] Here is the law: punitive damages doesn't talk about 'I have no money, so don't punish me.' But that's what they're saying. [¶] And what kind of message would that say to other officers? [¶] Let's just embrace his argument. They have no money, so give them $50,000 or less. If I'm a law enforcement [officer] and I want to get by with this, I bankrupt myself and put it all in my wife's name. 'I have no money. You can't touch me. I have no money.' [¶] Folks, that's just not right. This is a case that they never said they're sorry, once. They . . . fail[ed] to accept responsibility in this here. [¶] What have we heard? [¶] Nothing, 'Don't hurt me. I have no money.' [¶] The flip side is, I have no money. You can't hurt me."

After a brief deliberations period, the jury awarded approximately $4 million in punitive damages: $3,000,000 against Officer Barr and $1,005,522 against Sergeant Toth.

B. *Analysis*

Defendants contend the punitive damages award is excessive and violates their due process rights. They also contend the court erred in failing to instruct the jury that their financial condition was relevant in determining the appropriate amount of punitive damages to be awarded. They claim this failure was particularly prejudicial because of defense counsel's argument suggesting the jury should not consider defendants' financial condition in determining the appropriate amount of punitive damages. For the reasons explained below, we conclude that the amount of the award is excessive on constitutional and nonconstitutional grounds.

1. *Constitutional Limits*

Punitive damages advance important state interests of deterrence and retribution. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 (*State Farm*).) The due process clause, however, "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. . . . '[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.'" (*Id*. at pp. 416-417.) Thus, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." (*Id*. at p. 417.)

To determine the constitutional limits of a punitive damages award in any given case, a court examines three "guideposts" articulated by the United States Supreme Court: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity

between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra,* 538 U.S. at p. 418, citing *BMW of North American, Inc. v. Gore* (1996) 517 U.S. 559, 575; *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th 204, 215 (*Gober*).)

We apply a de novo review and independently assess these factors. (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 436; *Simon v. San Paulo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1172 (*Simon*).) Although a jury's underlying findings and determinations as to the extent and cause of the plaintiff's injury are factual determinations, "a punitive damages award is not a finding of fact, but rather an expression of moral condemnation." (*Gober, supra,* 137 Cal.App.4th at p. 212.)

Under these principles, we conclude the $3 million and approximately $1 million punitive damages awards exceed constitutional limits.

Reprehensibility

Abuse of authority by a law enforcement officer is reprehensible and punitive damages awards "serve a critical role in deterring such misconduct." (*DiSorbo v. Hoy* (2nd Cir. 2003) 343 F.3d 172, 188.) To protect society, we give law enforcement officers great power, but do so with the expectation that they will use this authority properly. Any breach of that trust is a serious matter deserving of a substantial monetary sanction that will meaningfully punish the defendant and serve to assure that the officer (as well as other law enforcement officers) will never again engage in similar conduct.

However, it is the degree of the reprehensibility, not its existence in an absolute sense, that is the critical factor in evaluating whether a damages award withstands constitutional scrutiny. (*State Farm, supra,* 538 U.S. at p. 419.) The United States Supreme Court has cautioned that the totality of the circumstances must be considered in determining the level of reprehensibility and has observed that a defendant's conduct—even where repetitive acts are involved—may be less culpable for purposes of punitive damages if the conduct caused no physical harm and did not otherwise detrimentally affect the plaintiff's health or safety. (*Ibid.*) That is the case here.

The jury found Officer Barr and Sergeant T oth repeatedly abused their law enforcement authority and used the power of the state for the purpose of retaliating against Grassilli for exercising his constitutional rights. This conduct was wrong and inexcusable. However, Grassilli was never physically assaulted, imprisoned or otherwise physically mistreated or abused, or threatened with such mistreatment. The harm Grassilli suffered was far less serious than suffering caused by the defendants' conduct in other civil rights cases in which the courts have found lesser awards to be constitutionally excessive. (See, e.g., *DiSorbo v. Hoy, supra*, 343 F.3d 172 [police officer used excessive force on woman at police station, including slamming her against the wall, choking her, and striking her repeatedly as she lay face down; court reduced $1.275 million punitive damage award to $75,000]; *Mathie v. Fries, supra,* 121 F.3d at pp. 810, 817 [prisoner subject to "horrific" rape and repeated sexual advances by corrections officer who engaged in "'an outrageous abuse of power and authority'"; court found $500,000 punitive

damages award constitutionally excessive, reduced award to $200,000].) Moreover, the improper conduct occurred sporadically, rather than on a weekly or even a monthly basis.

Additionally, the reprehensibility factor focuses on the conduct of the defendant, and not on the activities of other individuals or entities who may share the blame. On our review of the record, the amount of the award likely includes the jury's adoption of Grassilli's counsel's argument that the CHP management should be punished for its conduct in encouraging other officers to be less than honest about defendants' wrongful conduct. At oral argument, Grassilli's counsel expressly agreed with this assessment. However, the punitive damages award cannot be constitutionally upheld to the extent it includes an amount to punish the CHP management. In setting the level of punitive damages, a jury may consider the amount necessary to deter the conduct of the defendant and others, but it may not punish a defendant for the wrongful conduct of another person or entity.

Ratio of Punitive Damages to Actual or Potential Harm

The second relevant constitutional factor in evaluating whether a punitive award exceeds constitutional limits is the ratio between the compensatory and punitive damages. (*State Farm, supra,* 538 U.S. at p. 425.) "Although this ratio is not 'marked by a simple mathematical formula' (*State Farm, supra,* 538 U.S. at p. 424, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 458), the United States Supreme Court has decreed that 'few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process' and has cautioned that a 4 to 1 ratio 'might be close to the line of constitutional impropriety.'

(*State Farm, supra,* 538 U.S. at p. 425.)" (*Gober, supra,* 137 Cal.App.4th at p. 222.) "Nonetheless, extraordinary factors, such as extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages, may justify punitive damages in excess of a single-digit ratio." (*Ibid.*, citing *State Farm, supra,* 538 U.S. at p. 425; *Simon, supra*, 35 Cal.4th at p. 1182.) On the other hand, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm*, *supra*, 538 U.S. at p. 425.)

The award against Sergeant Toth reflected an 8 to 1 ratio, and the award against Officer Barr an 8.5 to 1 ratio. These ratios are close to the upper constitutional limits, and the case does not include the extraordinary factors identified by the Supreme Court as justifying a larger ratio. Defendants did not cause physical harm, and the compensatory damages were not unusually small, hard to detect, or difficult to measure. Grassilli was fully compensated for his economic damages and received a substantial recovery for his claimed emotional injuries. The high court has recognized that when the compensatory damages award includes a substantial amount of emotional distress damages, there is a danger that this compensation will be duplicated in a punitive damages award, thus calling for a smaller ratio. (*State Farm, supra,* 538 U.S. at p. 426; see Rest.2d Torts § 908, com. c, p. 466 ["In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and

compensation and a verdict for a specified amount frequently includes elements of both"].)

Comparison to Civil Remedies

The final Supreme Court guidepost requires a comparison between the punitive damages award and other civil penalties authorized or imposed in comparable cases. (*State Farm, supra,* 538 U.S. at p. 428.) "The rationale for this consideration is that, if the penalties for comparable misconduct are much less than a punitive damages award, the tortfeasor lacked fair notice that the wrongful conduct could entail a sizable punitive damages award." (*DiSorbo v. Hoy*, *supra,* 343 F.3d at p. 187.)

Under California law, a person who violates another person's constitutional rights may be liable for a maximum of three times the amount of the actual damage suffered. (Civ. Code, §§ 52, subd. (a), 52.1, subds. (a), (b); see *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, 752-753.) The 8 to 1 and 8.5 to 1 ratios are substantially higher than this amount. Further, although law enforcement officers are presumed to understand the serious consequences that can occur if the officer misuses his or her law enforcement authority, it is doubtful defendants would have been prepared for a punitive damages award amounting to Officer Barr's entire annual income for 50 years, or Sergeant Toth's entire retirement income for 16 years. (See *Lee v. Edwards* (2nd Cir. 1996) 101 F.3d 805, 811.)

Conclusion on Constitutional Guideposts

After considering the relevant constitutional factors outlined by our high court, we conclude the $3 million award against Officer Barr and the $1 million award against

Sergeant Toth exceed constitutional limits. Clearly, defendants' conduct was highly reprehensible. However, it was not sufficiently blameworthy to warrant such high awards. Additionally, the ratio of punitive to compensatory damages raises the potential of duplicative damages and the awards far exceed the treble damages authorized as statutory penalties for civil rights violations.

2. *Punitive Damage Award Excessive with Respect to Each Defendant's Ability to Pay*

In addition to reviewing the constitutionality of a punitive damages award, an appellate court is obligated to review the award for reasonableness, including whether the award is within the defendant's ability to pay. (*Patterson v. Balsamico* (2d Cir. 2006) 440 F.3d 104, 121-122 (*Patterson*); *Vasbinder v. Scott* (2d Cir. 1992) 976 F.2d 118, 121 (*Vasbinder*); *DiSorbo v. Hoy, supra,* 343 F.3d at p. 189, fn. 9; see also *Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 269-270.) Because the punitive damages award was based solely on a federal civil rights claim, we review the excessiveness claim under federal law applicable to punitive damages awards. (*Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1413-1416.)

Under federal law, a punitive damages award is not dependent on proof of a defendant's ability to pay (*Kemezy v. Peters* (7th Cir. 1996) 79 F.3d 33, 33-34; *Woods-Drake v. Lundy* (5th Cir. 1982) 667 F.2d 1198, 1203, fn. 9; *Chavez v. Keat, supra,* 34 Cal.App.4th at pp. 1410-1411), but if evidence is submitted, it is an important consideration as to the reasonableness of the award. (*Patterson, supra,* 440 F.3d at p. 122; *Fall v. Indiana Univ. Bd. of Trustees* (N.D. Ind. 1998) 33 F.Supp.2d 729, 747.) A punitive damages "award should not be so high as to result in the financial ruin of the

defendant. [Citation.] Nor should it constitute a disproportionately large percentage of a defendant's net worth." (*Vasbinder*, *supra*, 976 F.2d at p. 121; see *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1596 [Under California law, punitive damages generally should not exceed 10 percent of the defendant's net worth].) """[E]ven outrageous conduct will not support an oppressive or patently excessive award of damages."""" (*Patterson*, *supra*, 440 F.3d at p. 122.)

Utilizing these principles, "'[o]ur task is to make certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.'" (*Patterson*, *supra*, 440 F.3d at pp. 121-122.) This evaluation requires a delicate balance between the amount necessary to deter and punish unacceptable conduct and an amount that will not result in financial devastation. This balance is particularly important when punitive damages are awarded against an individual with limited means, rather than against a financially successful business.

Based on the unchallenged evidence, Officer Barr's net worth was in the range of $50,000 to $55,000 and his annual salary was $60,000, but the punitive award was $3 million. Sergeant Toth faces a $1 million punitive judgment compared to a net worth of approximately $415,000 and a retirement income of approximately $60,000 per year. These punitive damages awards constitute a disproportionately large percentage of each defendant's wealth and would result in defendants' financial ruin. The award was approximately 60 times Officer Barr's net worth and 50 times his annual pay. The award was approximately 2½ times Sergeant Toth's net worth, and 16 times his annual retirement pay. An award is supposed to "sting" (*Bains LLC v. Arco Products Co.* (9th

Cir. 2005) 405 F.3d 764, 777), but not impoverish a defendant. (*Vasbinder, supra,* 976 F.2d at p. 121.) The purpose of punitive damages is not served by financially destroying a defendant. (*Ibid.*)

In apparent recognition of these defendants' limited resources, Grassilli does not suggest that either defendant has the financial ability to pay the punitive damages award. Rather, he argues their financial conditions should not be a factor in our consideration because the trial court erroneously refused to allow Grassilli to introduce evidence showing the state, not the defendants, would pay for the punitive damages award. However, in support of his argument below, Grassilli relied only on Government Code section 825, which authorizes the state to indemnify a public employee for a punitive damages award only under very limited circumstances. (See fn. 10, *ante.*) Under this code section, a public entity may not pay a punitive damages award unless *the Legislature* makes a specific finding that "[a]t the time of the act giving rise to the liability, the employee . . . acted . . . in good faith, without actual malice and in the apparent best interests of the public entity." (Gov. Code, § 825, subd. (b)(2).) Because the jury's findings reflect that Sergeant Toth and Officer Barr did not act in good faith, it is unlikely the Legislature could properly authorize a reimbursement for the punitive damages. Moreover, at a posttrial motion concerning defendants' obligation to post bond, Grassilli's counsel took a contrary position to that asserted on appeal and argued Government Code section 825 would not apply.

This case differs materially from *Lawson v. Trowbridge* (7th Cir. 1998) 153 F.3d 368, relied upon by Grassilli. *Lawson* holds that indemnification evidence may be

admitted on cross-examination to impeach a defendant who suggests to the jury he will be financially ruined by a large punitive damages award. (*Id.* at 379.) In *Lawson*, the evidence showed that under the applicable state law (Wisconsin), the public employee defendants would be fully indemnified for punitive damages. (*Ibid.*) In this case, Grassilli did not identify any evidence to show that defendants would be indemnified by the state. The fact there is a statutory mechanism for a public employee to be indemnified does not make this process relevant, unless there is some reasonable possibility the defendant will be indemnified under that statute.[11]

Our determination that the jury's punitive damages awards are excessive is not intended as a criticism of the jurors' reasoning processes. Justifiably, the jurors wanted to punish and deter the officers' unacceptable conduct, but were given no guidance as to their role in evaluating an appropriate award vis-à-vis each defendant's financial condition. Although the court properly permitted each defendant to submit evidence of his financial condition, it refused to instruct the jury as to the relevance of this evidence. This was error, as a party is entitled to have a jury instructed consistent with his or her theory of the case, and the lack of an instruction created ambiguity and improperly invited extreme results. (See *Pacific Mutual Life Insurance Co. v. Haslip* (1990) 499 U.S. 1, 18 [emphasizing importance of jury instructions to provide adequate guidance to

---

11 Based on our conclusion that Government Code section 825 is inapplicable here, we need not reach the issue whether the statutory prohibition on admitting evidence of the potential for statutory indemnification applies in a punitive damages claim based solely on a federal cause of action.

jury in assessing proper amount of punitive damages]; *Atencio v. City of Albuquerque* (D.N.M. 1996) 911 F.Supp. 1433, 1445-1448.) Without a statement from the court that the evidence was proper for the jury to consider, the jury could have easily misunderstood the relevance and importance of this evidence. And Grassilli's counsel exacerbated the problem when, in rebuttal argument, he wrongly implied that the jury was not entitled to take this evidence into consideration in awarding the punitive damages.[12]

Grassilli's reliance on the Ninth Circuit's model punitive damages instruction is misplaced. (9th Cir. Civ. Jury Instr. 7.5, *supra*.) This standard instruction (given by the trial court here) does not mention the defendant's financial condition because a plaintiff seeking punitive damages on a federal claim does not have the burden of producing evidence of a defendant's financial condition. Thus, in many cases there will be no financial evidence presented at trial. However, federal law permits a defendant to produce evidence of his or her financial condition to support an argument that the defendant will be financially ruined by a large award. Recognizing this, a comment to the model instruction states that the court should consider giving an instruction pertaining to the relevance of financial condition evidence *if* this evidence is offered at trial. (9th Cir. Civ. Jury Instr. 7.5 com., *supra*.) In this case, the court erred in refusing defendants' request that it instruct on the relevance of the evidence.

---

12 This comment appears to have been precipitated by defense counsel's improper claim the officers had already been punished enough because they were personally responsible for paying the compensatory damages.

We also note that the jury appears to have embraced Grassilli's plea that the award be used as a platform not only to punish these individual officers, but also to punish the CHP management for encouraging its officers to be less than honest about the wrongful conduct and attempting to cover up the conduct. We would agree that the evidence in this case supported strong condemnation of this behavior. However, this evidence was not relevant to deciding the appropriate punitive damages award as against these *individual* officers.

3. *Conclusions Regarding Punitive Damage Amount*

After carefully considering the relevant factors, including the evidence at trial, the purposes of punitive damages, the constitutional guideposts, defendants' ability to satisfy a judgment, and the jury's plain intentions that a large damage amount is necessary to deter and punish the conduct, we conclude awards of no more than $35,000 as to Officer Barr, and $20,000 as to Sergeant Toth will satisfy the proper purposes of punitive damages. Considering defendants' financial conditions, these are substantial sums of money that will punish, but not financially devastate, the defendants and will also comport with the jury's obvious intentions that these and other officers understand that abuses of authority will not be tolerated.

Our substantial reduction of the award should not be misinterpreted as condoning or trivializing defendants' conduct. Although defendants continue to argue they were doing "nothing more" than enforcing the Vehicle Code, the jury reached a very different conclusion. The jury's liability and damages award reflect its findings that Officer Barr and Sergeant Toth intentionally sought to penalize Grassilli for exercising his

constitutional right to complain about Officer Barr's conduct and that this campaign to harass Grassilli and intentionally injure his business constituted an extreme and outrageous abuse of law enforcement authority. These findings were fully supported on the record before us.

Unless a court is reducing an award to the constitutional maximum, a court generally will not reduce an award without offering the plaintiff the option of a new trial on the issue. (See *Simon, supra,* 35 Cal.4th at pp. 1187-1188; *Gober, supra,* 137 Cal.App.4th at pp. 213-214; see also *Vasbinder, supra,* 976 F.2d at p. 122.) Accordingly, we remand the case to permit Grassilli to accept these punitive award amounts or to retry the punitive damages phase.

VI. *Jury Misconduct*

Defendants contend the court erred in denying their new trial motion on grounds of jury misconduct. The contention is without merit.

A. *Background*

After one and one-half days of deliberations, the court received a jury note stating: "Juror # 2 has withdrawn and refuses to deliberate [¶] Even with this we have the numbers except for damages [¶] Can we proceed as is." (Underscoring omitted.) With counsels' agreement, the court instructed the jury on its obligation to deliberate "as a whole," and to be tolerant and patient of different viewpoints. The court then asked whether there was any juror "who feels that they can no longer deliberate in this case . . . ." When Juror No. 2 raised his hand, the court and counsel questioned this juror outside the presence of the other jurors.

During the questioning, Juror No. 2 said he disagreed with the other jurors' opinions on fundamental issues, and was "having a problem listening" and had to "plug" his ears because his views were "so far outside everyone else's thinking." He said it was "[p]ainful" to listen to the other jurors and he had "gut-wrenching pain" and could not sleep. After this juror made clear he was seeking to be excused, the court asked counsel whether there was "any opposition to me excusing this juror and seating the alternate?" Grassilli's counsel answered "[n]o, your honor." Defense counsel responded "[n]one." The court then granted Juror No. 2's request to be excused.

The court then brought in the remaining jurors and told the jurors it had replaced Juror No. 2 with an alternate juror. The court admonished the jurors that it must begin deliberations anew and "disregard all past deliberations." In response to a juror's request, the court gave the jury a new verdict form.

After the jury rendered its verdict in favor of Grassilli, defendants moved for a new trial, asserting a jury misconduct claim. In support, defendants submitted the following declaration from Juror No. 2:

> "3. At one of our morning breaks during trial, juror [Mr. O.], . . . who eventually was elected jury foreperson, approached me and two other jurors . . . in the courtyard of the courthouse and said 'I'm getting messages from places. My tea bag this morning had a message attached to it.' [The juror] then read aloud the message on the tab which, as I recall, read 'justice will not be done until those not injured by crime feel as indignant as those who are.' I also overheard [Juror O] [tell two or three other jurors] that he was getting messages and had a message to read to them. I then observed him begin to read from the [tea bag] tab.

> "4. During another break about three weeks into trial, juror [Mr. E.] approached me and asked 'How far out do they expect you to have to put the mirrors.'
>
> "5. Almost immediately after entering the deliberation room, juror Ms. S.] threw her pocket book on the jurors' table and exclaimed 'I'm absolutely sure Barr did not have a catalytic converter. They are guilty and are going to pay. [Sergeant] Mayfield should be up there with them.'
>
> "6. During deliberations in the first phase of trial, juror [Mr. O.] remarked 'I'm going to write a note to the judge and ask who is responsible to pay the monetary damages?' At that point, other jurors commented that the employer would have to pay the damages.
>
> "7. At another point in the deliberations, after I had expressed my views regarding liability to the other jurors, [Mr. O.] became very angry with me, pointed his arm at me with index finger extended and yelled loudly 'You don't talk like that' and 'You don't call him [plaintiff] lawless.'
>
> "8. A number of jurors commented during our deliberations that there should be more CHP officers and supervisors on trial, specifically mentioning John Mayfield."

In response, Grassilli submitted declarations from several other jurors, denying many of Juror No. 2's assertions. In his declaration, the foreperson (Juror O) acknowledged that he brought his morning tea bag to court one day, but stated the "proverb" on the tab was "completely unrelated to the Grassilli case and did not influence my decision in the case in any fashion." (Italics omitted.) Juror L stated he remembered the foreperson reading a "generic proverb . . . which had something to do with justice," but did not think the statement indicated a preference for the plaintiff or defendant. Additionally, all of the jurors stated that Juror No. 2 would not deliberate and engaged in disruptive conduct, and that after Juror No. 2 was replaced, the jury began the

deliberations "all over again in a round table fashion sharing ideas and discussing issues until we came to a verdict." With respect to whether the defendants would be responsible for personally paying the damages, each juror stated that although at one point the jurors discussed who would pay any damages awarded, they all later agreed the issue of who would pay the judgment was irrelevant to their decisions.

After considering the declarations and argument, the court denied defendants' new trial motion.

B. *Analysis*

In reviewing a trial court's denial of a new trial motion alleging juror misconduct, we accept the court's factual findings if supported by substantial evidence, but independently determine whether any misconduct caused prejudice. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) The verdict will be set aside only on a substantial likelihood of juror bias showing the party was denied a fair trial. (*Id.* at p. 578.) Juror affidavits may be used to impeach a verdict only if they refer to objectively ascertainable statements, conduct, conditions or events. (Evid. Code, § 1150; *Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 910.) Evidence reflecting a juror's subjective reasoning process is inadmissible. (*Ibid.*)

Defendants first contend the foreperson (Juror O) committed prejudicial misconduct by bringing in his tea bag and reading the tab to one or two other jurors. We disagree. The tea bag contained a generally applicable principle about justice, and did not reasonably reflect a prejudgment of this particular case. Moreover, even if we were to agree with defendants that the reading of the tea bag tab was improper because it

conveyed "information from sources outside the evidence presented in court" (*Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 682), there is no substantial likelihood that it could have biased the jury. After a five-week trial, a reasonable juror would not be persuaded to decide in a particular manner about a case merely because a Good Earth tea bag contained a philosophical statement about justice.

We also reject defendants' arguments that other jurors prejudged the case. To support this argument defendants rely on Juror No. 2's statement that Juror S stated at the outset of deliberations that she believed defendants were "guilty" and that Officer Barr did not have a catalytic converter on his case. Juror S's statement was not misconduct because her statement was an appropriate part of the deliberative process. Although courts recommend that jurors not state their opinions "too strongly at the beginning of" deliberations, a juror does not commit misconduct by asserting his or her view of the evidence at any time during the deliberations. We likewise reject defendants' reliance on Juror No. 2's assertion that another juror made a statement about the case before deliberations began. This juror denied making this statement, and we presume from the court's denial of the motion that the court found the juror's denial to be credible. We are bound by the court's factual findings. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 582.)

Defendants alternatively attempt to establish jury misconduct by asserting that Juror No. 2 was not given the opportunity to participate fully in the deliberations. To show he was denied this right, defendants direct us to Juror No. 2's declaration that the foreperson yelled at him and pointed his finger at him. However, the other jurors denied that this incident occurred. Moreover, Juror No. 2 did not mention this alleged incident

to the court when he asked to be excused. Further, after Juror No. 2 admitted that he could no longer deliberate because the process was making him "sick," both plaintiff's and defendants' counsel expressly agreed that the court should excuse him from the jury. On this record, the court had sufficient factual basis to find that Juror No. 2 was not improperly denied the opportunity to participate in the deliberations.

Finally, we reject defendants' argument that the jurors committed misconduct by improperly speculating that defendants' employer would pay the damages award. Defendants rely on Juror No. 2's declaration. However, because Juror No. 2 had been dismissed and was not present during the deliberations leading to the verdict, he has no firsthand knowledge of any statements made during the relevant time. Additionally, even assuming the statements were admissible and relevant, the court had substantial basis to credit the declarations of the numerous other jurors who stated the jurors "agreed" that the "issue of who would pay any judgment" was "irrelevant."

The court properly denied defendants' new trial motion based on the alleged misconduct of the jurors.

VII. *Attorney Fees*

Defendants contend the court erred in awarding Grassilli $800,000 for attorney fees as the prevailing party.

A. *Background*

After trial, Grassilli moved for attorney fees of $1,069,008, under section 1988(b) which provides a prevailing party on a federal civil rights claim is presumptively entitled to reasonable attorney fees. (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 433-434.)

In support Grassilli submitted a 296-page document describing his attorneys' services performed during a five-year period, from the inception of the litigation (March 29, 1999) through the filing of the attorney fee motion (June 1, 2004). The document identified the nature of each task performed, the time spent for the task, who performed the work, and the exact amount of the time billed for the work. The attorney hours and fees totaled: 836 hours for work on the first trial and appeal ($234,727); and 3,000 hours for tasks performed after the appeal ($834,281). The monetary amounts were calculated based on attorney hourly rates of $350 for partners; $250 for associates; and $125 for paralegals. The total attorney fees documented was equivalent to the amount claimed ($1,069,008).

Grassilli also produced his attorneys' declarations to establish the work performed on the case was reasonable and necessary, and the hourly rate was equivalent to the prevailing community rate for similar services. According to these declarations, three attorneys performed most of the work on the case: (1) Gregory Garrison, a partner in his firm who had 11 years of experience including complex criminal and civil matters; (2) Garrison's associate, Amelia McDermott, who was responsible for motions, discovery and trial preparation work; and (3) Michael Strain, an attorney with substantial civil rights experience, who worked primarily on the second trial. Both Garrison and Strain stated that the prevailing hourly wage for attorneys who work on a matter of the complexity of this case is $350 for partners, and Garrison and another partner in his firm said the prevailing hourly wage for associates is $250.

Grassilli also submitted the declaration of Michael Marrinan, an experienced San Diego civil rights attorney, who stated he attended portions of the trial and Grassilli's attorneys performed "exemplary work" on the case. Marrinan stated that "[g]iven [the attorneys'] experience and skill, as well as the result they achieved, it is my opinion that they are at the highest level of trial lawyers in civil rights cases. It is my belief that the usual and customary hourly rate for attorneys in San Diego county who are experienced enough to successfully try a case of the complexity of the Grassilli matter is at least $350.00 per hour." (Italics omitted.)

In opposing the motion, defendants did not dispute Grassilli was entitled to recover reasonable attorney fees, but argued the amount claimed was unreasonable for various reasons, including: (1) the documentation was unsatisfactory; (2) it was unnecessary for both Garrison and Strain to attend the entire second trial; (3) the fact the second trial was so much longer than the first trial demonstrates that it was unreasonably lengthy; (4) the issues were not novel or difficult and instead the matter was merely a "glorified traffic citation" case; and (5) the claimed attorney fee rates were higher than the prevailing rate in the community. In support, they produced only the declaration of their counsel, David Taglienti, a deputy attorney general, who stated: (1) he spent approximately 2,000 hours defending the case; (2) his "hourly fee" ranged from $110 to $140; (3) Garrison "essentially tried the [first] case alone"; (4) discovery was not time consuming or difficult; and (5) the issue at the second trial was a "single claim of retaliation."

After a hearing, the court awarded Grassilli $800,000, which is about 80 percent of his claimed attorney fees. The court explained its ruling as follows: "The Court finds the requested hourly rate of $350.00 for partners and $250.00 for associates involved in this case is comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. The Court also observes plaintiff's written law and motion work that was part of this case was, in many instances, stellar in its presentation, depth of research and intellectual honesty. [¶] The Court reduces the fees requested by a percentage in this voluminous fee motion for the following reasons: 1. Plaintiff bills $125/hour for paralegal work. That per hour rate is not substantiated nor is it clear how much of that work is more in the nature of clerical or secretarial work; 2. Although, the plaintiff's case reasonably and appropriately benefited from the trial being conducted by two trial attorneys sharing the workload, the presence of both attorneys during the trial at all times and for every witness was not necessary; and 3. Hours spent on some tasks appear excessive."

Defendants challenge the court's determination on appeal.

B. *Legal Principles*

Reasonable attorney fees under section 1988 are generally determined by the "lodestar" approach: "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." (*Hensley v. Eckerhart*, *supra*, 461 U.S. at pp. 433.) A court may then adjust this figure upward or downward based on numerous relevant factors. (See *Forbush v. J.C. Penney Co.* (5th Cir. 1996) 98 F.3d 817, 821.) A trial court has broad discretion in determining the appropriate amount of fees based on

the court's "'superior understanding of the litigation.'" (*Fenster v. Tepfer & Spitz, Ltd.* (7th Cir. 2002) 301 F.3d 851, 860; see *Hensley, supra,* 461 U.S. at p. 437.) "'[W]e are not entitled to disturb a [trial] court's exercise of discretion even though we might have exercised that discretion quite differently.'" (*Trimper v. City of Norfolk, Va.* (4th Cir. 1995) 58 F.3d 68, 74.)

In determining if the hours claimed are reasonable, the trial court should consider: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the limitations imposed by the client or the case; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases. (*Trimper v. City of Norfolk, Va., supra,* 58 F.3d at p. 73; *Kerr v. Screen Extras Guild, Inc.* (9th Cir. 1975) 526 F.2d 67, 69-70.)

The appropriate hourly rate is determined according to the prevailing market rates in the community. (*Blum v. Stenson* (1984) 465 U.S. 886, 896-897.) The party seeking attorney fees bears the burden of proving the reasonableness of his requested fee award. "'The fee applicant has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services . . . .'" (*Intel Corp. v. Terabyte International, Inc.* (9th

Cir. 1993) 6 F.3d 614, 622, quoting *Jordan v. Multnomah County* (9th Cir. 1987) 815 F.2d 1258, 1263.)

C. *Analysis*

We conclude the court acted within its discretion in awarding Grassilli 80 percent of his claimed fees.

The 296-page billing record lodged by Grassilli substantiates the reasonableness of the requested attorney fees award. Although defendants are critical of Grassilli for producing such a detailed record, Grassilli should be commended for doing so. In determining the reasonableness of the hours requested, the court had the benefit of reviewing the detailed breakdown to test Grassilli's claims that the amount of hours and the nature of the tasks were necessary and reasonable. The report provided the court with a meaningful basis to derive an accurate sense for the type of work the attorneys claimed to have performed and the necessity for that work. The court presided over the five-week trial, and thus had a substantial basis to evaluate the necessity and reasonableness for these fees.

Defendants argue the amount of time spent was excessive and duplicative. The court agreed that some of the fees incurred for both Garrison and Strain to be present at the second trial were unnecessary, and the court reduced the claimed amount accordingly. Defendants do not refer to any other instances where unnecessary duplication occurred. Defendants instead argue the amount was unreasonable because the case was "simple" and "straightforward." However, the trial court had a reasonable basis to reject this argument. At trial, Grassilli was required to produce evidence of numerous encounters

between himself and the defendant law enforcement officers over a five-year period, and prove the officers' subjective motivations. Additionally, Grassilli had the burden to show a substantial link between the officers' conduct and his claimed emotional distress and economic losses to his business. In addition to these difficult proof burdens, the court found defendants' counsel added to the complexity of the lawsuit by acting in an "obstructionist" manner.

Additionally, although the second trial took longer than the first, this difference does not necessarily establish the second trial was unreasonably lengthy. Two of the defendants engaged in additional conduct against Grassilli after the first trial. Moreover, several CHP witnesses came forward after the first trial to provide favorable testimony to Grassilli. Further, the primary difference—the admission of the evidence of the Tibbans truck stops in the second trial—required substantial additional percipient and expert testimony on both liability and damage issues.

We also reject defendants' argument that the trial court erred in finding the attorney hourly rates were reasonable. Grassilli produced sworn declarations, including from an experienced attorney whose practice is devoted primarily to plaintiffs' civil rights litigation, that an ordinary and customary hourly fee charged by private practitioners with similar skill and expertise is $350 for partners and $250 for associates. Defendants did not produce any *evidence* to oppose these assertions, other than their counsel's declaration that his billing rate is at most $140, which is not necessarily comparable to that of an attorney in private practice. The court had an ample evidentiary basis to credit Grassilli's evidence that the rates charged reflected the prevailing rate in the community for similar

work. The court's careful review of the record as to the fees charged is reflected in its reduction of the award for paralegal services because Grassilli did not produce any evidence showing the $125 hourly fee was reasonable.

On our review of the entire record, we are confident the trial court considered all the relevant factors, and its determination that Grassilli was entitled to 80 percent of his claimed fees was a proper exercise of discretion.

VIII. *Expert Witness Fees*

Defendants contend the court erred in awarding expert witness fees of $25,000 based on defendants' rejection of a $1,000,000 settlement offer (exclusive of fees and costs) under Code of Civil Procedure section 998. Because our reversal of the punitive damage judgment means that Grassilli no longer obtained a judgment in excess of $1,000,000 (exclusive of fees and costs), we reverse the expert witness fee cost award.

DISPOSITION

We affirm the judgment with respect to liability, compensatory damages, and attorney fees. The judgment is reversed on the punitive damages award, with the direction that the superior court is to: (1) enter judgment against Officer Barr in the amount of $35,000, or at Grassilli's option conduct a new trial on the proper amount of punitive damages against Officer Barr; and (2) enter judgment against Sergeant Toth in the amount of $20,000, or at Grassilli's option conduct a new trial on the proper amount of punitive damages against Sergeant Toth. The court is further ordered to strike $25,000

in costs to Grassilli reflecting expert witness fees. Defendants to pay Grassilli's costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

HALLER, Acting P. J.

WE CONCUR:

MCDONALD, J.

MCINTYRE, J.