Filed 1/24/19 Bayer v. Morse CA1/2
(unmodified opinion attached)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ALAN BAYER, et al., Plaintiffs and Appellants, v. FREDERICK MORSE, et al., Defendants and Appellants.	A147318 (San Francisco County Super. Ct. No. CGC13534482) ORDER MODIFYING OPINION AND DENYING REHEARING

BY THE COURT:

It is ordered that the opinion filed herein on December 28, 2018, be modified as follows:

In the third full paragraph on page 3, in the sixth line, the sentence beginning "Doyle remembered that" should be changed to "Doyle stated that".

The petition for rehearing is denied. This modification does not change the judgment.

Dated: _____ _____P.J.

Filed 12/28/18 Bayer v. Morse CA1/2 (unmodified opinion)

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Casa Madrona is an apartment complex in San Francisco centered around a courtyard. When the building management restricted use of the courtyard to ingress and egress to and from the apartments, three tenants (plaintiffs Alan Bayer and Heather Borlase, who are married, and plaintiff Heather Grosz, their some-time babysitter) filed suit for noneconomic damages and equitable relief, alleging causes of action based on familial and associational discrimination, retaliation and tenant harassment. The underlying theory was that the building manager had an animus against children and did not want them playing in the courtyard. The jury returned a verdict for plaintiffs, awarding noneconomic damages to each of them, and punitive damages ($10,000 each) to Bayer and Borlase. The trial court denied plaintiffs' request for an injunction that would have, among other things, restored the courtyard to its pre-lawsuit state, prohibited the property manager (a named defendant) from being physically present at the property, and barred the owner from hiring or authorizing certain other named individuals who had performed construction or maintenance-related services at Casa Madrona from entering

the property. The court later trebled Bayer's and Borlase's noneconomic damages and awarded attorneys fees and costs to plaintiffs as the prevailing parties. All parties now appeal. Defendants contend the trial court erred in denying their motion for new trial and motion for judgment notwithstanding the verdict on the grounds that the evidence is insufficient to support an award of noneconomic damages, that the trial court impermissibly trebled the damages, that plaintiffs were not the prevailing parties and should not have been awarded attorney fees and costs, and that the award of damages and attorney fees was a violation of due process in light of the "relatively minor transgressions" of defendants. Plaintiffs cross-appeal, contending that the trial court erred by not awarding injunctive relief requiring defendant, among other things, to restore the courtyard to the way it was before September 26, 2012. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the underlying evidence very briefly, since the appeal raises no issues about defendants' liability. At the time of trial, Bayer and Borlase had lived in Casa Madrona since 2002. They had two children, a daughter born in April 2010 and a son born in July 2012. The courtyard at Casa Madrona was a special feature of the complex, and Borlase testified that after she and Bayer were approved as tenants, she met with defendant Dennis Doyle, the property manager, to confirm that they could use the courtyard; the answer was yes, so long as they didn't bother the neighbors. Borlase admitted that there had been some drinking in the courtyard, but she never saw this after 2007. Bayer testified about their daughter playing in the courtyard and the community feeling among the adults in the building centered on the courtyard. The jury was shown short videos of courtyard life, including Bayer's and Borlase's daughter playing, as well as photographs of the courtyard with children. Other tenants testified that the courtyard provided a "sense of community" in a big city, and that it was like "our backyard" and a draw for choosing to live there.

The conflict over the courtyard began in July 2012, when Bayer learned second hand that Doyle intended to keep children out of the courtyard. Matters escalated on September 27, 2012, when the tenants received a letter signed by Doyle that barred use of

the courtyard except for ingress and egress. The letter included the claim that children needed to be kept away from the fountain area and "toxic plants" in the courtyard. In early October, Bayer and Borlase began writing letters in response, first to Doyle and then to building owner defendant Frederick Morse, to no avail. Morse thought Doyle's reference to toxic plants was an "exaggeration" and "hyperbole," but believed this was in Doyle's "bailiwick." Doyle sent Morse an email with inflammatory language about the tenants' claims.

Hearing nothing from Morse, plaintiffs and others petitioned the San Francisco Rent Board (Rent Board) for a rent reduction on account of losing the courtyard as an amenity.

Doyle thereafter made a plan to reconfigure the courtyard by jackhammering part of the hardscape and putting up fences, at a cost Morse estimated was $100,000. The work began in early February 2013, with jackhammering outside the Bayer/Borlase children's bedroom. Some of the tenants received notice the night before, but Doyle specifically instructed Martin Barron, the resident property manager, not to give notice to certain tenants, including plaintiffs.

The jury heard audio recordings from the Rent Board proceeding. Doyle stated that he ordered a fence to be put up in the courtyard because of the "legal barrage" defendants received a few days after Doyle's September 27 letter, including a letter from Bayer. Doyle also stated that the reconfiguration of the courtyard was a reaction against Bayer and Borlase for their roles in assisting tenants and to ensure that any challenge would be unsuccessful. Doyle remembered that "children constitute this huge morass of horrific legislation and overbearing laws where you can't say a word to anything about anything about children." Ultimately the Rent Board ordered monthly rent reductions in the amount of $250 for each petitioning tenant.

Plaintiffs eventually filed suit against property manager Doyle, the Morse Family Trust, and Frederick Morse, individually and as trustee of the Morse Family Trust.[1] The

[1] Another named defendant settled during trial.

jury heard seven days of trial testimony before returning verdicts in favor of Bayer and Borlase for discrimination in violation of the Fair Employment and Housing Act (FEHA, Gov. Code, § 12940 et seq.), retaliation in violation of FEHA, discrimination in violation of San Francisco Municipal Police Code (S.F. Mun. Code, art. 1.2, § 10), and tenant harassment in violation of the San Francisco Rent Ordinance (S.F. Admin. Code, § 37.10B). The jury found in favor of plaintiff Grosz for associational discrimination in violation of FEHA, and discrimination in violation of the Unruh Act. (Civ. Code, § 51 et seq.)

The jury awarded Bayer and Borlase $50,000 each in noneconomic damages. In the second phase of the trial, it awarded $10,000 to each in punitive damages ($5,000 from Morse and $5,000 from Doyle).

The jury awarded Grosz $25,000 in noneconomic damages, and a $25,000 penalty for discrimination in violation of the Unruh Act.[2]

The trial court later trebled Bayer's and Borlase's damages to $150,000 each under the provisions of San Francisco Administrative Code section 37.10B. It found all three plaintiffs were prevailing parties and awarded reasonable attorney fees and costs under multiple statutory theories.

The trial court denied plaintiffs' request for injunctive relief which sought, among other things, restoration of the courtyard to its pre-September 2012 state, including the removal of wrought iron fences; a prohibition on the property manager's presence at the property; and a bar preventing the owner from hiring or authorizing certain individuals who performed construction or maintenance-related services under the property manager's supervision from entering the premises. It also denied defendants' motions for new trial and JNOV on damages, rejecting their argument that the damages were excessive and unsupported by the evidence. In its written order, the trial judge characterized the jury as "intelligent and attentive, as shown by the many written

[2] The jury had discretion to award up to three times the amount of Grosz's damages ($25,000) as an additional penalty.

questions jurors asked and the lengthy verdict form they navigated adroitly." Noting that the jury was "properly instructed that '[n]o fixed standard exists for deciding the amount of' noneconomic damages and to 'use your judgment to decide a reasonable amount based on the evidence and your common sense,' " the court concluded that plaintiffs "introduced sufficient evidence of damages and there is no indication the jury did not act as instructed."

These appeals were timely filed.[3]

DISCUSSION

Appeal by Morse, The Trust, and Doyle

1. The Court Did Not Err in Denying the Motion for New Trial.

Defendants contend that the trial court erred by denying their motion for new trial because there was insufficient evidence to support the jury's award of $50,000 in noneconomic damages to Bayer and to Borlase, and $25,000 in noneconomic damages to Grosz (plus a discretionary penalty of $25,000), and the awarded amount was "obviously punitive in nature without justification."

We review an order denying a motion for new trial for abuse of discretion. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) "An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances,

[3] Plaintiffs suggest that the notice of appeal filed by defendant Morse Family Trust is not timely. This is incorrect. Morse and Doyle timely filed their notices of appeal on December 17, 2015. Under California Rules of Court, rule 8.108(g)(1), "If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 20 days after the superior court clerk serves notification of the first appeal." The clerk served notification of the first appeal on January 8, 2016. Morse Family Trust filed its notice of appeal on January 19, 2016. This was within the permissible time frame, taking into account the date of the clerk's notification of the first appeal. As the leading treatise on appellate practice writes, "Nothing in Rule 8.108(g)(1) requires that the second party to file an appeal be adverse to the first party who appealed. *Any* party is eligible to utilize the 20-day extension after the timely filing of the first appeal. [*Termo Co. v. Luther* (2008) 169 CA4th 394, 403.]" (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 3.101.1, p. 3-48.)

the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] Accordingly, we can reverse the denial of a new trial motion based on insufficiency of the evidence or excessive damages only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.) The trial court's judgment or order is presumed correct on appeal, and we indulge all presumptions in favor of its correctness. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Unlike the trial judge, who acts as the 13th juror on a motion for new trial on the ground of excessive damages, the appellate court plays a more limited role: " 'It cannot weigh the evidence and pass on the credibility of the witnesses as a juror does. To hold an award excessive it must be so large as to indicate passion or prejudice on the part of the jurors.' " (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507.)

Defendants concede that the jury was properly instructed on the law. The jury was instructed with CACI No. 3905A that defendants were seeking damages for past and future "mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety, humiliation and emotional distress," and that "[n]o fixed standard exists" for deciding the amount of these damages. As the trial court noted in its written order, the jury was told to use its "judgment to decide a reasonable amount based on the evidence and your common sense," and that for an award of future noneconomic damages, a plaintiff must prove that he or she is "reasonably certain to suffer the harm." The verdict form did not differentiate between past and future damages.

At trial, Bayer and Borlase recounted the multi-year saga of their disputes with defendants. Bayer thought Doyle's September 27 letter was "confrontational and hostile," and it made him angry. The letter appeared directed to families and referred not only to residents and guests, but "baby-sitters," which made him feel "quea[s]y." By June 2013, with the courtyard fenced off, the "warm glow about the place wasn't quite there anymore." His younger child could no longer interact in the courtyard "with the environment, with the plants, with the water, the rocks, with the pavement, the chairs,"

and with other adults and young children at the apartment building. These were opportunities that his older child had that made a "huge difference" in her development. Bayer felt "deprived," and "lost a certain element of [those two years] that I expected to have that [the younger child] didn't get." Bayer lost the "communal aspect" with the closure of the courtyard, and the "developmental" opportunities for his younger child, which he considered invaluable. He summarized, "I have given up two and a half years of my life, time away from work, time away from my family, time of aggravation and stress for the sole goal of getting back what I think was wrongfully taken away from me." It was "immeasurable" to him to have the courtyard restored.

Borlase testified about the centrality of life in the courtyard and the fact that there were many parents and babies living at Casa Madrona. She showed photographs depicting courtyard scenes as she testified. She felt "sad" looking at a photograph of her younger child looking at the area where tenants, including her older child, had once been allowed to play and sit before the courtyard was reconfigured. The photograph of her younger child, shown to the jury, "looks like he's behind bars." She summarized, "[D]espite feeling fairly hopeless at times about getting this courtyard back, I do still feel that there is a chance and I do still feel that my kids will have the opportunity to stay and we can hold on to the—the bits of community that we have." She went on: "I'm fighting for peace of mind. I'm fighting for that community back. I'm—just everything that I stayed to set up. I wanted to have my kids there. I wanted them to have aunts and uncles all over the garden. All over the—the apartment and—and to be in a place that was beautiful and that had, you know, love." She testified affirmatively that she is "fighting for [her] children" because "they deserve that. [The older child] knows what she's lost. And [the younger child] deserves to have that beautiful experience. I mean, it's not—it's not about a garden. It's about a place where we can have experiences with people or we could come together and nobody had to host and nobody had to clean up and nobody had to, you know, serve anything. We could just be and that's—that's it. That's it right there."

Grosz was 72 years old at the time of trial and had lived at Casa Madrona since 1991. She was a semi-retired bookkeeper, and also did babysitting at Casa Madrona. During Grosz's testimony, the jury was shown photographs of the courtyard before it was reconfigured, and later when the hardscape had been jackhammered into rubble. Grosz testified that she awoke one morning to the sound of jackhammering and ran to her window. She had no notice that the courtyard would be jackhammered, and felt angry that her home was destroyed. She still babysits at Casa Madrona, but it is not the same without the outdoor courtyard; it is no longer possible to play with children in the courtyard. Grosz testified that with the fences up, "It's just not as conducive to anything. . . . There's no continuity of the paths and it's depressing. [¶] As I say, the fences have a depressing feeling about it. It's not friendly. It's not inviting. It's prohibitive. It says 'keep out.' " Looking at a photograph of Bayer's and Borlase's older child holding the bars to one of the fences in the courtyard after it was reconfigured, Grosz stated, "It shows the sadness. I mean, this is a place she used to play. I used to take them into the courtyard and here she is, you know, kind of looking through the fence at that. It's—it's sad. It's really very sad. And I can't even begin to imagine what's going on in her mind. I know how I feel by that loss."

The jury saw videos and multiple photographs and heard audio, in addition to the plaintiffs' testimony. The jury had the opportunity to observe the demeanor of each plaintiff as he or she testified, as did the trial judge. While we cannot say that there was overwhelming evidence of noneconomic damages, it appears to us sufficient, and there is nothing to suggest the jury acted impermissibly as a result of passion or prejudice.

Defendants also contend that where the jury was instructed correctly on damages and returns with a verdict "contradictory to the weight of the evidence," it must have been based on a "desire to punish" them.[4] This argument fails because defendants have

[4] Defendants cite *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 for the proposition that the "due process clause . . . prohibits states from imposing grossly excessive punishment on tort-feasors," but do not explain how that holding applies to a jury verdict on noneconomic damages.

not shown that the verdict was contrary to the weight of the evidence. The award of a relatively small amount of punitive damages to Bayer and Borlase does not suggest (as defendants assert) that the jury was acting out of passion or hatred in awarding noneconomic damages. Moreover, having found in the liability phase that Grosz did not prove by clear and convincing evidence that defendants engaged in their conduct with malice, oppression or fraud as to her, the jury did not even consider punitive damages for Grosz.

Defendants cite *Fenner v. Dependable Trucking* (9th Cir.1983) 716 F.2d 598, as "synonymous with the facts" of this case. It involved a claim for negligence arising out of an accident between two trucks. After a jury trial, the district court concluded that the jury's finding of negligence by defendant but no contributory negligence by plaintiff was against the clear weight of the evidence, but the court did not set aside the verdict as requested. The Ninth Circuit held that in such circumstances, a trial court abuses its discretion by not granting a new trial. (*Id*. at p. 602.) Similarly, the Ninth Circuit held that once the district court concluded that damages were excessive, it was error to enter the jury's original verdict; the district court should have granted the motion for a new trial or denied the motion conditioned on the plaintiff accepting a remittitur (which plaintiff did not). (*Id*. at pp. 602-603.) *Fenner* has no application here.

2. <u>The Court Did Not Err in Denying the Motion for Judgment Notwithstanding the Verdict.</u>

Defendants contend the trial court erred by denying their motion for judgment notwithstanding the verdict, which they made in the alternative to their motion for new trial. The asserted ground for error here is essentially the same as in the denial of the motion for new trial: that substantial evidence does not support the jury's award of noneconomic damages.

A motion for judgment notwithstanding the verdict may be granted if the trial judge concludes there is no substantial evidence in support of the verdict, when viewed most favorably to the party who secured the verdict. (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) We review an order denying a motion for

JNOV by the same standard as the trial court, which is whether "any substantial evidence—contradicted or uncontradicted—supports the jury's conclusion." (*Ibid.*; accord, *Licudine v. Cedars-Sinai Med. Ctr*. (2016) 3 Cal.App.5th 881, 890 [on appeal, "we ask: Does the record, viewed in the light most favorable to the jury's verdict, contain evidence that is reasonable, credible and of solid value sufficient to support the jury's verdict?"].)

Defendants argue that any "inference of inconvenience, discomfort, anxiety, or emotional distress was minimal at best," noting that plaintiffs continue to live at the apartment complex and there was no expert or other percipient testimony about plaintiffs' mental or emotional injuries. However, defendants cite no authority that expert testimony is required to award noneconomic damages in a case like this. And they cannot dispute that the testimony of a single witness—even a party—is sufficient to prove a fact. (See 3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, § 101, p. 157 ["[u]nless a statute requires additional evidence, the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact," citing Evid. Code, § 411].) For the reasons we have already stated in our discussion of the order denying defendants' motion for new trial, there was substantial evidence to support the jury's noneconomic damages award.

3. <u>The Court Did Not Err in Trebling Bayer and Borlase's Damages.</u>

San Francisco Rent Ordinance section 37.10B (Tenant Harassment) (S.F. Admin. Code, § 37.10B (§ 37.10B)), in pertinent part, prohibits a landlord or its agents or employees from, in bad faith, violating any law which prohibits discrimination based on "parenthood" or "occupancy by a minor child." (§ 37.10B(a)(9).)[5] A tenant may enforce this section by a civil action, and any person who violates or aids another person in violating section 37.10B is liable for damages of "not less than three times actual damages suffered by an aggrieved party (including damages for mental or emotional

[5] The prohibited acts under section 37.10B(a) and prohibited forms of discrimination under section 37.10B(a)(9) are more numerous and extensive, but we do not list them here.

distress), or for statutory damages in the sum of one thousand dollars, whichever is greater, and whatever other relief the court deems appropriate." (§ 37.10B(c)(5).) Notably, the statute also provides that if the damage award is for mental or emotional distress, the award shall be trebled only if "the trier of fact finds that the landlord acted in knowing violation of or in reckless disregard of" this section. (§ 37.10B(c)(5).) [6]

The jury here found specifically that defendants were liable for tenant harassment as to Bayer and Borlase, and that each defendant acted in knowing violation or in reckless disregard of the tenant harassment law. Based on the jury's special verdicts, the trial court trebled the damages awards to Bayer and Borlase and awarded each $150,000. No other claim before the jury permitted treble damages.

Defendants claim that because the trial court prepared a special verdict form that "did not separate out damages under the individual causes of action in order to properly determine which damages belonged to which causes of action," the trial court could only "speculat[e] as to what damages the jury attributed to [plaintiffs] under their four successful claims," with the result that the statutory treble damages were speculative and awarded in error. This argument has no merit.

The trial court addressed the treble damages issue in a post-trial written order that bears restating in substantial part because it addresses the very argument now made by defendants on appeal:

"The jury unanimously found (1) for Bayer and Borlase on their claims 'for Tenant Harassment in Violation of San Francisco Administrative Code section 37.10B' against each of Morse, the Morse Trust and Doyle, (2) $50,000 in damages for each of Bayer and Borlase and (3) that defendants did 'act in knowing violation or in reckless disregard of the Tenant Harassment law.' Given the dictates of San Francisco's

[6] The jury instructions explained the elements of this statutory cause of action, including a special instruction on "Tenant Harassment: Damages" that stated that if the jury found defendants had "acted in knowing violation or in reckless disregard of the Tenant Harassment law, three times the amount of actual damages will be awarded as a penalty."

ordinance and the jury's findings, the Court trebles the $50,000 in damages to $150,000 for each of Bayer and Borlase—a total of $300,000.

"Defendants' . . . arguments against trebling are meritless.

"*First*, it is urged that 'plaintiffs were compensated fairly' by the jury's damage awards without trebling. . . . However, defendants do not dispute that § 37.10B requires trebling. Their argument is with § 37.10B's enactors—the City's board of supervisors.

"*Second*, defendants point out that other laws violated do not require trebling, and argue that damages must be 'apportioned' to those violations[7] . . . Not so. The harm Bayer and Borlase alleged—mental and emotional distress—was the same for each cause of action tried to the jury. To avoid duplicative awards, the verdict form thus directed the jury to state one amount of compensatory damages per plaintiff if it found liability. Defendants do not claim they objected to this common (and appropriate) practice or to the verdict form in any other way."

The trial court's logic is unassailable. As a leading trial practice treatise has noted, "The use of special verdicts is discretionary with the trial court." (Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2017) ¶ 17:14, p. 17-6.) Defendants apparently did not object to this special verdict form, and with good reason.[8] The verdict form is a model of clarity, delineating each cause of action, each plaintiff, and each defendant's potential liability. The first heading of the verdict form is "Alan Bayer's Claims." Prefaced by the phrase that the jury "find[s] as follows," there are five enumerated statements, one for each of the five causes of action.[9] Immediately under each statement are six separate lines for the jury to check, depending on whether it finds

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[7] Defendants do not make the apportionment argument on appeal.

[8] Defendants do not assign error to the special verdict form per se, no doubt aware that they likely forfeited any argument on appeal by failing to object to it at trial. (See *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530.) But it is clear that the purported deficiencies with the special verdict underpin this entire argument.

[9] For example, the first statement is "1. On Alan Bayer's claim for Discrimination in Violation of the Fair Employment and Housing Act against Fred Morse, the Morse Family Trust and Dennis Doyle, we find:"

"For Mr. Bayer" or "For" each of the three separately named defendants on this first cause of action. And so on, until question 6 which states, "If you found for Mr. Bayer on any of Questions 1, 2, 3, 4, or 5, what do you find his damages, if any, to be?" There is a space for a single damages figure. Question 9, referring back to Question 5 ("Tenant Harassment in Violation of San Francisco Administrative Code § 37.10B") asks, "If you found damages for Mr. Bayer on Question 5, did defendants act in knowing violation or in reckless disregard of the Tenant Harassment Law?" The verdict form then repeats the same format for the other two plaintiffs. The end result is a completed verdict form that made crystal clear the jury's intent. There is no basis for defendants' claims that the trial court impermissibly speculated in awarding treble damages.

4. The Court Did Not Err in Finding Bayer, Borlase and Grosz Prevailing Parties and Awarding Them Attorney Fees and Costs.

In light of the statutes under which plaintiffs sued and prevailed, there were multiple avenues for the award of attorney fees and costs: to name a few, the San Francisco Rent Ordinance. (§ 37.10B(c)(5) ["prevailing plaintiff shall be entitled to reasonable attorney's fees and costs"]; and Gov. Code, § 12965, subd. (b); see *Williams v. Chino Valley Independent Fire Dist*. (2015) 61 Cal.4th 97, 115 [prevailing party in FEHA "should ordinarily receive his or her costs and attorney fees"].)

Defendants contend the trial court should have "exercised [its] discretion and determined the result a draw, with no prevailing party as there was no clear winner." Defendants argue on appeal that plaintiffs "failed to obtain their main objective of litigation (i.e. equitable relief)," Grosz did not succeed on some of her claims, and Bayer and Borlase did not prove Unruh Act violations. They point to testimony by plaintiffs (much of it cited above) about how important the courtyard was to them as an indication that plaintiffs' main trial objective must have been equitable relief.

Once again, we quote the trial court's written order determining plaintiffs were the prevailing parties and entitled to attorney fees and costs. It is spot-on:

"Defendants argue that plaintiffs are not prevailing parties, because the litigation was 'a draw.' . . . Really? Bayer and Borlase won jury verdicts on 24 of their 30 claims

against the three defendants. They also won 12 of the 12 claims this Court adjudicated above. That is a victory on 36 of the 42 Bayer/Borlase claims. Grosz's results were more mixed, but the jury also found that all defendants acted 'in knowing violation or reckless disregard' of San Francisco's tenant harassment law, and that 'defendants engaged in their conduct with malice, oppression or fraud'—and thus awarded punitive damages.

"Defendants argue that 'plaintiffs failed to obtain the main objective of litigation (i.e. equitable relief),' by which defendants apparently mean an injunction . . . . But defendants cite nothing for their notion of a 'main objective.' Plaintiffs are the prevailing parties, and this Court exercises its discretion to award attorney's fees. . . ."

We easily conclude the trial court did not err in finding that plaintiffs were the prevailing parties. To the extent defendants' position is that the trial court failed to exercise its discretion, the succinct paragraphs from the trial court's order we quoted above belie that argument. It is apparent that the trial court considered the overall case, the jury verdicts, and the substance of the jury's findings, as well as its own rulings on matters left to it to decide. Notably, in the trial court as well as on appeal, defendants' assertion that the equitable relief was the "most important part" of plaintiffs' prayer for relief has no citation to the record.

Defendants also argue that the trial court erred by failing to consider specific language in *Hsu v. Abbara* (1995) 9 Cal.4th 863 in determining the prevailing party here. *Hsu* is beside the point. It addressed the contractual right to recover attorney fees under Civil Code section 1717, and held that when a party receives a "simple, unqualified decision" in its favor on the sole contract claim in an action, the trial court must find that party was the prevailing party; it cannot determine that there was no party prevailing on the contract under the statute. (*Id*. at pp. 865-866.)[10]

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[10] For the same reasons, defendants' reliance on *Silver Creek, LLC v. BlackRock Realty Advisors* (2009) 173 Cal.App.4th 1533, 1536, another Civil Code section 1717 case, is not persuasive. There the Court of Appeal held that, where the record in a "mixed result case" clearly established that one party obtained greater relief on the

5. The Damages Award and Attorney Fees Do Not Violate Due Process.

Defendants make a two-pronged argument in support of their constitutional claim. The first is that the treble damages provision in the Rent Control ordinance has resulted in an "excessive and unconscionable award." The second is that the award of $334,080 in attorney fees makes the final judgment "excessive and unconstitutional." Neither argument was raised in the trial court. We address each in turn.

6. The Award of Treble Damages Is Not Unconstitutional Here.

Defendants argue for the first time on appeal that the statutory trebling of emotional distress damages here is a violation of their substantive due process rights in view "of the relatively minor transgressions" of defendants, and because it results in a "windfall" that is "far in excess of that needed to provide an incentive to bring the action."

The underpinning of their argument is *Balmoral Hotel Tenants Assn. v. Lee* (1990) 226 Cal.App.3d 686 (*Balmoral*). In *Balmoral*, a jury returned a general verdict in favor of tenants on their complaints for interruption of utility service in violation of Civil Code section 789.3, breach of the covenant of quiet enjoyment, breach of the implied warranty of habitability, intentional infliction of emotional distress, negligent infliction of severe emotional distress, and unlawful eviction under an earlier version of San Francisco Administrative Code section 37.9, subdivision (f) (section 37.9(f)). This latter section allowed a tenant to recover "actual damages" from a landlord for eviction or attempted eviction in violation of the statute. The tenants recovered damages for mental anguish on the tort theory and on the violation of the rent control ordinance. The issue in *Balmoral* was whether "actual damages" in the statute at issue included damages for

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contract, the trial court abused its discretion in deciding there was no prevailing party on a contract for purposes of attorney fees. In that case, the Court of Appeal concluded that the property owner who successfully obtained declaratory relief terminating the purchase agreements was the prevailing party under the contract, despite the fact that the putative purchaser succeeded on its claim to get its monetary deposits back. We are not persuaded by defendants' argument that the facts and holding of this case are "glaringly synonymous" with this case.

mental suffering. Although the court recognized that "actual damages" is "ordinarily synonymous with compensatory damages which may include damages for mental suffering" (*id.* at p. 689), it concluded that the phrase in section 37.9(f) was ambiguous. Interpreting it as "referring narrowly to out-of-pocket expenses" would be more in keeping with the legislative purpose of treble damages, which the *Balmoral* court believed was to " 'provide sufficient financial incentive to justify' " bringing wrongful eviction suits where a small amounts of money were at stake. (*Id*. at pp. 690-691, quoting *Kelly v. Yee* (1989) 213 Cal.App.3d 336, 341).)

The rent ordinance at issue in this case, section 37.10B(c)(5) is different in three key respects. It addresses tenant harassment, not unlawful eviction. It expressly states that actual damages included mental suffering. And it also requires a finding that where the damage award is for mental or emotional distress, the "trier of fact" must find that the landlord acted in "knowing violation or in reckless disregard" of this section.

Defendants nonetheless rely on *Balmoral* because much of the opinion is devoted to considering the possibility that "the mandatory trebling of damages for mental suffering may under unusual circumstances . . . 'produce constitutionally excessive penalties.' " (*Balmoral*, *supra*, 226 Cal.App.3d at p. 696.) The *Balmoral* court concluded that if it had construed the trebling statute at issue there to apply to damages for mental suffering, the trebling of damages would have been unconstitutionally excessive in that particular case: the general verdict awarded damages to 23 plaintiffs in the total sum of $1,481,690 (which was then trebled), plus court ordered attorney fees of $261,000. The financial impact on the appellant of a $4.8 million judgment was "catastrophic," since the judgment would exceed 50 percent of his net worth; and "confiscatory in relation to the value of the hotel," which was appraised at $2.1 million. (*Id*. at p. 696.) But because the *Balmoral* court construed the statute as not including noneconomic damages, the potential unconstitutional consequences were avoided.

Balmoral relied on the reasoning of *Hale v. Morgan* (1978) 22 Cal.3d 388, 405 (*Hale*), which held that, as applied to the defendant there, the $100 per day statutory penalty imposed by Civil Code section 798.3 for willfully turning off the utilities of a

tenant with intent to evict the tenant was unconstitutional because it brought about a "confiscatory result." The facts in *Hale* were remarkable. Plaintiff moved his mobile home into defendant landlord's mobile home park without defendant's knowledge or consent. They eventually agreed on $65 per month rent, which included water and garbage but not electricity. Plaintiff then failed to pay rent for the next three months, and defendant disconnected the water and electrical lines. Much litigation ensued, although the Supreme Court notes the record is not entirely clear. Among other things, defendant recovered judgment against plaintiff in small claims court for delinquent rent. Plaintiff later sued defendant for damages and statutory penalties under Civil Code section 789.3 for shutting off the utilities, and eventually obtained a judgment of penalties under the statute that amounted to $17,300 (173 days). (*Id*. at p. 393.) The Supreme Court held that penalties in this amount were unconstitutionally excessive. It turned out that defendant was a cable television installer who lived in Daly City and personally managed this small mobile home park in South Lake Tahoe that he had only recently purchased before the events transpired in this case. There were only a handful of mobile homes on defendant's premises and he had no employees; the court characterized it as a "modest operation by a relatively unsophisticated landlord." (*Id*. at p. 405.) Plaintiff's yearly rental (had he paid it) would have been $780, but the accumulation of a year's worth of statutory penalties against defendant would have been $36,500. Although the record did not disclose the price defendant paid to purchase the mobile home park, the court concluded "it is not inconceivable that although plaintiff's initial entry may have constituted a trespass, and though it was subsequently determined judicially that he breached his rental contract, he may well end up owning the park or a substantial equity therein as a consequence of the application of section 789.3 to defendant's conduct. Such a confiscatory result is wholly disproportionate to any discernable and legitimate legislative goal, and is so clearly unfair that it cannot be sustained." (*Ibid*.)

Faced with these facts, the Supreme Court in *Hale* concluded, "In summary, operation of the penalty provided by [Civil Code] section 789.3 is mandatory, mechanical, potentially limitless in its effect regardless of circumstance, and capable of

serious abuse. Its severity appears to exceed that of sanctions imposed for other more serious civil violations in California and for similar prohibited acts in other jurisdictions. For all of the foregoing reasons in combination, we hold that section 789.3 may, under circumstances such as those herein presented, produce unconstitutionally excessive penalties." (*Hale, supra*, 22 Cal.3d at p. 404.) The court cautioned that "[w]here, as here, a penal statute may be subject to both constitutional and unconstitutional applications, courts evaluate the propriety of the sanction on a case-by-case basis." A statute is "presumed to be constitutional" unless its "unconstitutionality 'clearly, positively and unmistakably appears.' " (*Ibid*.)

Defendants argue on appeal that "the same analysis" applies here. They contend the "treble damage portion of the award, $200,000, is 'substantial' by any measure" especially when compared to statutory damages if defendants had shut off plaintiffs' utilities or physically removed them from the premises; it is impossible to know what aspect of the award the jury meant for the San Francisco Rent Ordinance cause of action; and the "relatively low" award of $20,000 in punitive damages indicates the jury felt a "minimal award" was sufficient for punishment. Further, they argue, the rationale for treble damages is to serve as an incentive to the filing of lawsuits, not to deter conduct.[11] Thus where trebling leads to an additional $200,000 in damages, and there is "no economic loss, tenant displacement or significant emotional injury," and tenants in only two units filed the lawsuit, "incentive gives way to windfall and become confiscatory."

Plaintiffs make three responses in opposition to defendants attack on the treble damages award. First, the statute at issue specifically defines damages for mental or

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[11] *Balmoral*, *supra*, 226 Cal.App.3d at page 695, drew a distinction between "two categories" of treble damage statutes. "The trebling of damages often serves to deter antisocial conduct; in other cases, involving claims that are ordinarily small in amount, the trebling is intended simply to provide sufficient economic incentive for aggrieved persons to bring suit." (*Ibid*.) *Balmoral* noted that "violations of the rent control ordinance do not always involve reprehensible conduct," and might be technical or committed in good faith on mistaken legal advice. Further, because section 37.9 "does not condition the trebling of damages on the presence of a malicious or willful intent, it cannot rationally be intended to deter wrongful conduct." (*Id.*at p. 695, fn. 4.)

emotional distress as within the term "actual damages," and subject to mandatory trebling where the landlord acts in knowing violation or in reckless disregard of the statute. *Balmoral* only considered the constitutional implications because the statute in that case, as then written, was ambiguous as to what "actual damages" meant.

Second, *Balmoral* acknowledges that trebling mental suffering/anguish awards is not per se impermissible. Moreover the constitutional analysis in *Balmoral* centers on excessive damage awards where the conduct was *not* inherently "antisocial." (*Balmoral, supra*, 226 Cal.App.3d at pp. 695-696.) By comparison, defendants here were found in violation of an ordinance prohibiting "tenant harassment," and the underlying conduct was defendants' violation of FEHA and the San Francisco Police Code, article 1.2 prohibiting housing discrimination. (§ 37.10B(a)(9).) In addition, the jury found that defendants acting in knowing violation or in reckless disregard of the tenant harassment law.

Third, even if the total amount awarded by trebling ($200,000, twice the base damages of $100,000) is analyzed from the perspective of punitive damages ratios, it amounts to a 2-1 ratio, which is within the permissible range. (See *Bankhead v. ArvinMeritor, Inc*. (2012) 205 Cal.App.4th 68, 88-89 [discussing punitive/compensatory damage ratios that are constitutionally acceptable].) Plaintiffs point out that defendant Doyle cites no law supporting the position that the total award is excessive as to him. As to Morse and the Morse Family Trust, even if they were liable as principals for the entire amount of the $370,000 damages judgment, their net worth is approximately $80 million, and they collected rents in 2014 of $2.7 million.

Tellingly, in their reply brief, defendants make no response to any of plaintiffs' arguments on the constitutionality of the treble damage award, instead restating practically verbatim the same argument as in their opening brief.

We agree with plaintiffs. Treble damages were called for by the statute, and there was no constitutional infirmity in awarding them here. The treble damages do not amount to constitutionally excessive penalties. They were awarded by a jury after a finding that defendants acted in "knowing violation or in reckless disregard of the

Tenant Harassment law." Unlike the circumstance posited by *Balmoral*, this was not a technical violation or one committed in good faith on mistaken legal advice. (*Balmoral*, *supra*, 226 Cal.App.3d at p. 695, fn. 4.) There is no basis to overturn the treble damage award.

7. The Attorney Fees Award is Not Unconstitutional.

The trial court awarded attorney fees in the amount of $334,080 (786 hours with a lodestar of $278,400, with a 1.2 multiplier). Defendants contend this amounts to a "windfall" to plaintiffs, and violates defendants' substantive due process rights. This argument is without merit.

First, the burden is on defendants as appellants to affirmatively demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We "are not required to examine undeveloped claims or to supply arguments for the litigants." (*Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52.) When attorney fees awards are at issue, the appellant has the burden to show, with specificity, why the award is improper. (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) And as has been repeatedly stated, the experienced trial judge is in the best position to judge the value of the legal services, and our review is highly deferential. (*Calvo Fisher & Jacob LLP v. Lujan* (2015) 234 Cal.App.4th 608, 620 (*Calvo*).)

Here defendants simply make the ipse dixit that "[t]he trial court failed to have [plaintiffs] account for how it took [786] hours to 'reasonably' prosecute this rather simple matter and then improperly added a 1.2 multiplier to the $278,400 lodestar for the $334,080 award without any justification for doing so." They then cite, without more, the trial court's six-page order awarding attorney's fees. This is no substitute for argument or analysis, and we will not comb the record to find the argument. In any event, the trial court's order makes clear that defendants' contentions are demonstrably not the case: the trial court *did* award attorney fees by reasoned analysis, noting that defendants did not challenge plaintiff's attorney's hourly rate ($400) or any of the

attorney's specific time entries.[12] Moreover, a point that goes unmentioned by defendants is that the trial court applied a 1.2 multiplier, rather than the 1.5 multiplier requested by plaintiffs, and explained his reasoning for doing so in detail. We consider this aspect of the argument no further.

Second, the "substantive due process" claim, raised for the first time on appeal, does not fare better, because its underpinnings are the trial court's asserted failures described above and are largely derivative of defendants' unpersuasive arguments that plaintiffs were not even the prevailing parties and should not have been awarded fees at all. Conceding as it must that the amount of fees awarded by the trial court is subject to a "very deferential standard of review," defendants argue that because the award of attorney fees bring the total judgment to $700,000, it "shocks the conscience given the facts of the case," and should be reversed on that basis. Defendants cite *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 for unassailable propositions that attorney fees awards in FEHA make it easier for plaintiffs of limited means to pursue meritorious claims in the public interest, and that the goal of the lodestar method is to calculate " ' "reasonable" attorney fee[s], and not to encourage unnecessary litigation of claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak.' " (*Id*. at p. 985.) Defendants then assert (without citation) that plaintiffs "are not of 'limited means' and need incentive to bring suit," and that the attorney fees award "in a straightforward case like this is unconscionable."

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[12] In fact, the trial court found that plaintiffs' trial attorney Kraus presented "detailed time records" and an "extensive declaration," and that Kraus "performed well in hard-fought litigation against exceptionally able opposing counsel. In particular, Kraus recognized the advantage afforded by California housing discrimination law—that he need only show discrimination was one motivating factor for defendants' decisions, even when other factors existed. See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 217. Kraus stressed this point repeatedly to the jury, and rightly so." And as to the number of hours involved, the court wrote that "*Defendants* benefitted from the fact that Bayer and Borlase are able lawyers who worked extensively on the case, but seek no hourly compensation. This case could not have been fully worked up and taken through trial in just the 786 hours Kraus toiled on it."

As a panel of this division noted in *Calvo*, our colleagues in Division Four "have observed that the 'only proper basis of reversal of an amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination.' (*Akins v. Enterprise Rent-A-Car Co*. (2000) 79 Cal.App.4th 1127, 1134.)" (*Calvo, supra*, 234 Cal.App.4th at p. 620.) Defendants do not appeal the jury's findings by clear and convincing evidence that they violated the San Francisco Rent Ordinance, FEHA, the Unruh Act and the San Francisco Police Code. They do not appeal the jury's verdict awarding Bayer and Borlase punitive damages. Given the trial court's thorough explication of its reasons, we are not persuaded there is any basis to overturn the attorney fees award.

Plaintiffs' Cross-Appeal: The Court Did Not Err in Denying the Injunction

We set out in substantial part the trial court's comprehensive statement of decision regarding plaintiffs' request for permanent injunction, omitting citations to the parties' trial briefing:

". . . The suit's basic notion was that Doyle harbored animus toward children, who played in the courtyard.

"In a housing claim under California's Fair Employment and Housing Act, plaintiffs need only show that discrimination was one motivating factor for defendants' decisions. As recognized by the California Supreme Court, this is the lowest bar in the state's discrimination law—plaintiffs need not show that 'discrimination was a but for cause' of, or even a 'substantial factor' in the decision. See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 217. Plaintiffs thus successfully argued to our jury that, while Doyle may have had several motivations for his decisions, defendants violated the law if but one motivation was familial discrimination.

"Plaintiffs prevailed on most claims at trial. After post-trial trebling and attorney fees, they may well be awarded in excess of $500,000.[13] The jury also awarded punitive

[13] This order was entered before the award of attorney fees and costs.

damages, though in relatively minimal amounts—$10,000 against each of Doyle and Morse.

"This statement of decision addresses an equitable issue left for the Court to decide: plaintiffs' request for a permanent injunction. [Fn. omitted.]

"PERMANENT INJUNCTION

"Plaintiffs request a permanent injunction

"(1) 'requiring Defendants to restore the garden to its pre-September 26, 2012 condition, including the removal of the wrought iron fencing, returning of the seating area including benches and table, return of the circulating water in the central water [fountain] of the courtyard, and removal of the prohibition against the use of the garden by tenants'; [fn. omitted.]

"(2) 'prohibiting Defendants [sic] Dennis Doyle from being physically present at the property' and 'barring Morse' from 'hiring or authorizing Dennis Doyle, Arthur Mills, Shawn Ganapoler, or anyone else who has performed construction or maintenance-related services at Casa Madrona under the supervision of Mills or Doyle from entering the premises';

"(3) requiring removal of 'surveillance cameras that face into any tenant's unit'; and

"(4) that 'all Defendants, their employees, agents, representatives, successors, assigns, and all persons who act in concert with them be permanently enjoined from committing any acts herein.

"Plaintiffs fail to establish the conventional grounds for an injunction. Most importantly, they do not show that monetary compensation cannot afford them adequate relief. See Civ. Code § 3422. The Rent Board ascertained monthly rent reductions for plaintiffs' diminished use of the courtyard, and they stand to recover an additional $500,000+ post trial.

"Plaintiffs point to Government Code § 12989.2, which allows a court to grant injunctive relief 'as it deems appropriate' in a housing discrimination case. However,

this Court does not deem the requested injunction to be appropriate, for it would be unprecedented in reach and intrusiveness.

"Plaintiffs cite no case in which a court has ever subjected a property manager to a lifetime ban from a property he manages, or dictated to a landlord whom he may or may not hire to work on his property. Likewise, plaintiffs cite no case in which a court has ever frozen in time a feature like a courtyard in the configuration it once existed. [Fn. omitted.]

"The 'unlawful practices' in this case were neither flagrant nor egregious. See Gov't Code § 12989.2. Truth told, familial issues played merely a supporting role in the ongoing drama between Casa Madrona's management and tenants. Adults drinking alcohol in the courtyard, adults congregating to disturb other residents and adult tenants' 'guerilla gardening' were at least as salient. Moreover, as addressed above, plaintiffs prevailed by relying on the lowest standard of discrimination in California law—familial discrimination was a motivating factor among several for the landlord's decisions, rather than a 'substantial factor' or a 'but for' cause. See *Harris*, 56 Cal.4th at 217.

"Nor were defendants' practices inherently discriminatory, like refusing to rent based on a prospective tenant's race, religion or familial status. No one disputes that a landlord generally has the right to configure property such as a courtyard as he wishes. In San Francisco, if this is viewed as withdrawal of a housing service, the Rent Board can grant recompense as it did here.

"Further, the permanent injunction plaintiffs request would demand too much intervention from the courts. Conditions change at an apartment complex, and a court cannot reasonably supervise its ongoing operation. Indeed, plaintiffs now recognize the folly of demanding 'return of the circulating water in the central water fountain,' suggesting that 'when the drought abates' they return to court for an order 'to activate the foun[tain].' Likewise, the 'benches and table' in 'the seating area.' When they wear out,

the Court apparently would need another hearing to supervise purchase of new patio furniture, to keep the courtyard in its 'pre-September 26, 2012' state.[14]

"Plaintiffs' demand for removal of 'surveillance cameras that face into any tenant's unit' is to similar effect. A court is not equipped to supervise ongoing disputes about angles at which cameras are positioned or their width or depth of field. In any event, the Court notes the trial evidence that windows are blacked out in the camera shots, so they cannot observe inside apartments.

"Finally, plaintiffs' demand that defendants be 'permanently enjoined from committing any acts herein' is simply too overbroad and unfocused.

"For the reasons stated above, plaintiffs' request for injunctive relief is DENIED."

On appeal, plaintiffs now challenge only two parts of the order denying injunctive relief: as they put it, not "rescinding the September 27 policy barring social use of the courtyard and reconfiguring the courtyard to its pre-retaliatory state."

Plaintiffs acknowledge that even "under FEHA, et al., injunctive relief is not per se, *invariably*, mandatory." Although plaintiffs concede that the trial court retained the discretion to issue an injunction or not, they contend the trial court abused its discretion in denying the injunction, arguing that the court's discretion was limited because relief was sought under FEHA, the Unruh Act, and the San Francisco Rent Ordinance—not simply Code of Civil Procedure section 526 with its familiar enumerated criteria.[15]

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[14] "At oral argument, plaintiffs pointed to a clause in their proposed injunction that they say is less intrusive: 'removal of the prohibition against the use of the garden by the tenants.' However, the 'use' plaintiffs envision would effectively require all of the changes they demand—removal of the wrought iron fencing, return of the benches and table, etc."

[15] In fact, the trial judge did not refer to Code of Civil Procedure section 526. Instead, as noted he referred to Civil Code section 3422, which states in pertinent part that a "final injunction may be granted to prevent the breach of an obligation existing in favor of applicant: [¶] 1. Where pecuniary compensation would not afford adequate relief; [¶] 2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; [or] [¶] 3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings . . . ."

Otherwise, they say, defendants are being permitted to "buy the right to discriminate, retaliate and deprive."

Plaintiffs claim that without an injunction, defendants are maintaining "on-going familial discrimination," something that defendants have no more right to do than, if they owned a restaurant, mandate that "any protected group eat in a separate room, segregated from other diners, but at some discount (i.e., the restaurant paying for the privilege to discriminate)." Yet they concede that "[t]he law does not require defendants to make rental properties child-friendly." Still, they argue that the trial court erred by "refusing to require Defendants to return to the status quo ante before trying to find some lawful way to bar the children at Casa Madrona from using the courtyard to grow into mature and well-adjusted adults, as society expects and depends on. Therefore, the trial court abused its discretion. This does not mean that landlords have an affirmative duty to do anything other than keep premises safe and habitable, and not issue discriminatory rules, but it does mean that they may not engage in/allow conduct which discriminates against children and their families without proper justification under the law."

Plaintiffs assert that all of the court's reasons for denying the injunction are in error, even under the "general statute" for awarding injunctive relief. In their view, they have suffered an ongoing and irreparable harm: "[t]he irreparable injury is the effect this 'landscaping' has on both the physical ability of families to use the courtyard as they had before as well as the psychological nature of the reconfigured area." Bayer's and Borlase's children "cannot play . . . in the safe confines of the courtyard. The[] children have lost the ability to learn to interact with adults more readily. Grosz has lost the ability to babysit in an idyllic setting perfect for young children. All three Plaintiffs, and the growing children of Bayer and Borlase, have lost their ability to readily interact with their neighbors in a personable, direct way. Moreover, Plaintiffs will have to file

repeated lawsuits every few years to seek additional, but insufficient, money damages so long as the discriminatory, et al., conduct remains."[16]

As to their substantial compensatory damage award, plaintiffs contend it only "ameliorated" their mental suffering, but did not "fix the problem." It was still important for their older child to use the courtyard and they "wish[] that their [younger child] could have had—and have going forward—similar opportunities to enjoy the advantages of the courtyard." Plaintiffs further contend the trial court's determination that they had been sufficiently compensated was arbitrary and an "unworkable standard" because it meant that bad actors could "buy their way out of a mandatory injunction," and it would put "victims' attorneys in a bind—prove too much and lose injunctive relief." And plaintiffs argue that the Rent Board reduction in rent did not compensate them for the "discrimination, retaliation, harassment, and deprivation they suffered."

Defendants contend the trial court did not abuse its discretion. Considering the factors of Civil Code section 3422, plaintiffs were fully compensated by an ongoing $250 per month rent reduction for loss of a housing service (use of the courtyard), as well as by the substantial monetary judgment in this case. Plaintiffs represent the only two units that are seeking to restore the courtyard to its pre-2012 state; already 15 of the leases have a "no use" provision regarding the courtyard. Defendants assert there are no cases where courts have provided the equitable relief plaintiffs are seeking here, particularly in light of the monetary compensation, punitive damages, and rent reduction. Plaintiffs have not cited any case authority that compels a contrary result.[17]

Government Code section 12989.2 states in part that "if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award

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[16] This last point about repeated litigation is puzzling, since the jury was instructed that plaintiffs sought—and they could award—"damages for past and future" noneconomic damages, as described above.

[17] Yet Plaintiffs have cited close to 100 cases in their cross-appellants' brief on this issue alone. We need not discuss all of them, distinguish them factually, or point out where the citations are not on point.

the plaintiff actual and punitive damages and may grant other relief, including the issuance of a . . . permanent injunction . . . as it deems appropriate to prevent any defendant from engaging in or continuing to engage in an unlawful practice." There is no doubt that it is discretionary with the trial court. As our Supreme Court has stated, "upon a finding of unlawful discrimination, a court may grant injunctive relief where appropriate to stop discriminatory practices." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 234.)

The trial court recognized that for the jury to find in plaintiffs' favor under FEHA and the Unruh Act, it had to find only that Bayer's and Borlase's "familial status [was] a motivating factor" for defendants' actions, "even though other factors may have also motivated the practice." The trial court heard all of the evidence in this hard-fought litigation, and specifically identified other factors that led to the decision to reconfigure the courtyard that the trial judge described as "at least as salient," such as "[a]dults drinking alcohol in the courtyard, adults congregating to disturb other residents and adult tenants' 'guerilla gardening.' " The trial court did not find defendants' actions "flagrant or egregious" or sufficient to warrant a mandatory injunction to reconfigure the courtyard again and restore it to its pre-2012 state, which would have required the expenditure of funds and ongoing supervision by the court. Indeed, on appeal plaintiffs do not assert that the trial court abused its discretion in denying large portions of its request for injunctive relief. The trial court recognized that plaintiffs received a substantial award of noneconomic damages, punitive damages, and attorney fees, as well as ongoing monthly rent reductions for the plaintiffs.[18] On this record, we cannot say that the trial court abused its discretion.

DISPOSITION

The judgment is affirmed. Each side shall bear its own costs on appeal.

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[18] Defendants assert that as of the time of their reply brief on appeal, the amount of rent reductions were in excess of $14,000 per unit.

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Miller, J.

We concur:

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Kline, P.J.

_____
Stewart, J.

A147318, *Alan Bayer, et al.. v. Frederick Morse, et al.*