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Court of Appeal, Fourth District, Division 1, California.  
Joaquin B. ROBLES, Plaintiff, Appellant and Respondent,  
v.  
AUTOZONE, INC., Defendant, Respondent and Appellant.  
No. D049259.  
(Super.Ct.No. GIS006945).  
July 22, 2008.

APPEAL from a judgment and order of the Superior Court of San Diego County, [Judith F. Hayes](#) and [William S. Cannon](#), Judges. Affirmed. [Charles Moore](#), Simpson & Moore, San Diego, CA, for Plaintiff, Appellant and Respondent.

[Gregg C. Sindici](#), Littler Mendelson, San Diego, CA, for Defendant, Respondent and Appellant.

[HUFFMAN](#), Acting P.J.

\*1 This appeal is another phase of the effort by Joaquin B. Robles, plaintiff, appellant and respondent, to obtain an award of punitive damages in this false imprisonment action against his former employer, defendant, respondent and appellant, AutoZone, Inc. (AutoZone). In the first trial in this action, Robles obtained a jury verdict in his favor for compensatory damages for false imprisonment. That jury found AutoZone's employee, Octavio Jara (Jara), acting within the course and scope of his employment, had falsely imprisoned Robles in the course of an internal company loss prevention investigation, and it awarded Robles \$73,150. However, the trial court granted a nonsuit on the request for punitive damages, and Robles appealed.

In the prior opinion issued by this court, we upheld the compensatory damage award but reversed the order granting nonsuit. (*Robles v. AutoZone* (Nov. 2, 2004, D041499) [nonpub. opn.] (our prior opinion).) We determined that sufficient evidence had been presented to go to a jury on whether, under [Civil Code section 3294](#), subdivision (b), it

would be permissible to impose punitive damages on AutoZone if it, as an employer, maintained corporate policies that were followed consistently over time in corporate operations, that effectively authorized conduct by employees, carried out in the course of their duties, that was oppressive, fraudulent or malicious. ([White v. Ultramar, Inc. \(1999\) 21 Cal.4th 563, 575-576](#) (*White*); [Cruz v. HomeBase \(2000\) 83 Cal.App.4th 160, 167-168](#) (*Cruz*); [College Hospital Inc. v. Superior Court \(1994\) 8 Cal. 4th 704, 726](#) (*College*)).<sup>FN1</sup>

**FN1.** Under [Civil Code section 3294](#), subdivision (b), an employer is not liable for punitive damages, based upon acts of its employees, unless “the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others *or authorized or ratified* the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice.” (Italics added.)

On remand, the trial court conducted a jury trial limited to the issue of punitive damages, and the jury returned a special verdict that awarded Robles \$7.5 million in punitive damages. In proceedings on AutoZone's request for judgment notwithstanding the verdict (JNOV), the trial court reduced that verdict to \$438,900, representing a six-to-one ratio of punitive damages to the compensatory damages previously awarded to Robles in the original proceedings. The court then entered judgment for that amount of punitive damages and costs and fees.

Both parties have appealed from the JNOV. Appellant AutoZone attacks the special verdict rendered by the jury as improperly formulated under Autozone's interpretation of this court's prior opinion and [Civil Code section 3294](#), subdivision (b). AutoZone further contends there is no substantial evidence supporting the judgment with regard to any corporate authorization or ratification of tortious acts by its employees. Also, AutoZone contends the order denying its motion to tax costs was erroneous, because the award of costs was not authorized by statute. ([Code Civ. Proc., §§ 998, 1033.5](#).)

Further, both AutoZone and Robles are contending in this court that the trial court erroneously changed the verdict amount, and both acknowledge that de novo review is appropriate to determine whether the original award was consistent with constitutional limits for an award of punitive damages. (See [Gober v. Ralphs Grocery Co. \(2006\) 137 Cal.App.4th 204](#) (*Gober*)). AutoZone contends the reduction was not great enough, compared to the actual damages previously awarded, and Robles contends any reduction was unauthorized on this record.

\*2 We will first outline the principles set forth in our prior opinion, for purposes of analyzing AutoZone's challenges to the judgment that argue the special verdict was defective and/or not supported by substantial evidence. We then address the arguments made by both parties about whether the amount of punitive damages set by the trial court violates due process principles. Finally, we will turn to the award of costs.

As will be explained, we conclude that the special verdict appropriately presented the necessary issues to the jury, with respect to corporate authorization of employee conduct,

and that substantial evidence supports the findings in the verdict. We next conclude that in ruling on the JNOV motion, the trial court appropriately reduced the amount of punitive damages to an amount that is consistent with constitutional principles and the facts proven. Moreover, the costs award is supported by the record and by statute. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. False Imprisonment Facts; Compensatory Damages Award

The background facts of the false imprisonment incident that was the basis of the first jury's award of \$73,150 compensatory damages to Robles were previously outlined in our prior opinion and need not be expanded here, except as necessary to deal with the substantial evidence challenge now brought by AutoZone to the punitive damages award. Initially, we will repeat those basic details as set forth in that opinion:

“On July 1, 2000, Robles arrived at work and was asked by two other managerial employees to sign for the cash in a deposit bag that they had prepared, as they were otherwise occupied. Robles did so, as the armored car driver was ready and waiting, and employees were not supposed to keep him waiting or it would cost the company more money. Robles signed for a bag of bills amounting to \$820 at the request of the armored car driver, even though he noticed that the deposit slip was in the wrong portion of the deposit bag, as it occasionally was, due to shortness of time or for the sake of convenience in making last minute changes. The armored car driver took the money bag to the bank. The \$820 was found to be missing at the bank for some period of time.

“On July 6, 2000, Robles arrived for work and was told by the store manager ... that he should go to the back room because loss prevention officer Jara and the district manager ... wanted to talk to him. Robles did so and Jara told him there was an issue they needed to talk about, i.e., that the bank had called stating that they received an empty bag with only a deposit slip, and the slip had Robles's signature on it. Jara asked Robles several times if he knew what had happened, and Robles said no. At some point, [the district manager] left the room. Jara then told him, “we know who did it,” and accused Robles of stealing the money. Robles denied this for the remaining part of the first portion of the loss prevention interview, which lasted two hours and seven minutes. Jara told Robles they would need a statement, and Robles filled out a form denying that he had taken the money.”

\*3 After a 10-minute break in the interview, the following events occurred. Jara asked Robles if he knew that Jara was a police officer (a reserve officer for the City of Chula Vista) and Jara told him that he could get any information about anybody. Jara told Robles he had had a former employee, Julio Martinez, arrested by the police for theft. According to Robles's testimony at the first trial, Jara then said, “All I have to do is give a phone call, and the police will be at the front of the store to pick you up, and they'll take

you to jail because what you've done is a felony, and you will serve time.” Jara said that if Robles left, he would be arrested. Robles was afraid to leave.

According to Robles, Jara then told him that they could keep the matter within the company if Robles confessed and agreed to pay the money back in monthly installments while keeping his job: “Robles then sat down and wrote what Jara dictated to him in the next page of the statement, confessing to taking the money and signing a promissory note to pay back the money.” The interview had lasted over three hours. “Robles was then suspended for a few days, fired, and his last paycheck withheld. He was unable to obtain unemployment insurance, due to being fired, but got a new and better job three or four weeks later. His lost wages amounted to \$2,000 or less.”

It was soon discovered that the money in the deposit bag, approximately \$800 AutoZone cash, had been found at the bank a few weeks later, without a deposit slip or account number, and the store manager and Jara were told at that time about telephone calls from the bank stating this, but no further action was taken by AutoZone about Robles with regard to this money.

In 2001, Robles filed a complaint for damages for false imprisonment and other theories against AutoZone and some of its employees. At the first jury trial, extensive evidence was presented about the incident and about AutoZone's procedures and policies for loss prevention, including training of loss prevention managers, such as Jara, in the use of the company interviewing manual, entitled “Investigative Interviewing, An Investigator's Guide To Interviewing” (the manual). The manual sets forth methods and interview techniques for loss prevention managers to use in interviewing employees accused of theft. Peter Brennan, Jara's supervisor and trainer, normally instructed his loss prevention managers to follow the manual by avoiding the use of terms like “steal,” “jail” and “police.”

At the first trial, the court allowed Robles to bring in evidence of impeachment witnesses, i.e., three other former employee witnesses who had been through loss prevention interviews with Jara, and they testified about how Jara had threatened them with arrest to keep them in the interview room.

In our prior unpublished opinion, we upheld the compensatory damages award. We further ruled that the nonsuit motion on punitive damages as to the corporate defendant was erroneously granted, based upon the standards set forth in [White, supra, 21 Cal.4th 563](#), for the actual or ad hoc formulation of corporate policy by authorized managing agent employees in the loss prevention field. (*Id.* at p. 576 (maj. opn. of Chin, J.); *id.* at pp. 580, 582 (conc. opn. of Mosk, J.)) <sup>FN2</sup>

<sup>FN2</sup>. Although the nonsuit ruling at the first trial foreclosed any proceedings against AutoZone for punitive damages, the parties had stipulated that Jara would pay \$5,000 individually as punitive damages.

## B. Current Trial and Verdict

\*4 In March 2006, a second jury was convened to conduct further proceedings limited to the punitive damages claim against AutoZone. Much of the evidence repeated the basic facts of the false imprisonment incident, and much more was added regarding the establishment of corporate policy, such as the adoption of the investigative manual.

Before summarizing the ground covered in the second trial, we first take note that although AutoZone has brought a substantial evidence challenge to the award of punitive damages, it has not extensively outlined the facts, but only sets them forth in general terms. Instead, it has chosen to focus on the evidence only with respect to two aspects of the language of the special verdict: Whether the jury should have been required to identify, by name, an individual managing agent who authorized Jara's conduct during the incident, including the false imprisonment; and the nature and scope of that corporate authorization, in the manual or otherwise.

By contrast, Robles's brief on appeal exhaustively sets forth citations to the record for the evidence about the incident, the loss prevention procedures, the manual, the corporate structure of AutoZone, and other materials. However, many of its record cites are inaccurate. Our task is to cull out the evidence that is essential to resolve the issues presented by each appellant. For our purposes here, to determine if the special verdict was proper in format and if the evidence supported it, we initially set forth a general summary of the categories of evidence presented at the second trial, dealing with: (1) the extent of the corporate authorization by identifiable managing agents of the methods of loss prevention interviews and investigations, such as were conducted by Jara, and (2) whether Jara's methods exceeded any authorized conduct, with the knowledge of his superiors. We cannot, however, omit additional basic evidence about the incident itself.

The six-day trial began with Robles presenting his own testimony about the incident and its detrimental (albeit temporary) effect upon his ability to get a new job to support his family. He stated that even though he told Jara that day that he did not take the money, when Jara threatened him with arrest and encouraged him to confess, after telling him his family would suffer from financial harm otherwise, he gave in because he did not see any other alternative, and he believed, based on what Jara told him, that that would be the end of the matter right away and he could go back to work after serving a two-day suspension. Robles was surprised when he was called back five days later, given a zero check, and fired. After the incident, he was turned down at several other potential employers because he had a loss prevention issue pending with AutoZone, and he was unable to obtain unemployment benefits because AutoZone reported he had been fired. However, he obtained another job within three weeks, through a friend.

\*5 Robles called as witnesses two other former AutoZone employees who had been interviewed by Jara and later fired. Those witnesses testified that Jara had threatened them with arrest, in the course of seeking to obtain a confession as a means of internally resolving accusations of theft. One was later fired anyway and one walked out of the interview. Robles and two other former employees testified that their final paychecks

were confiscated as a means of paying off the promissory notes that they had written in connection with their confessions obtained by loss prevention managers.

Robles obtained testimony from Leilani Drew, the former store manager at the time the incident occurred (who had since left and then rejoined AutoZone). She said his job evaluations were satisfactory. At the time, she might have told Robles he might want to consult an attorney about the incident, although she did not remember for sure. It was unusual for cash that was missing from AutoZone's store to be found later, such as happened here, but nothing was done about it.

Robles brought in testimony from Willie Brown, a former AutoZone loss prevention manager in Los Angeles who had been trained in the same manner as Jara. They observed each other's work and found it competent. Brown had interviewed one of the former AutoZone employees who also testified, Jennifer Woods. During her interview by Brown, she was threatened with arrest if she did not confess to taking AutoZone property, and was told she could keep her job if she did so. She had not taken property, but eventually made a false confession and was fired, and later sued by AutoZone.

Robles called Jara as an adverse witness, and examined him about his training in and understanding about the loss prevention procedures and his interpretation of the manual. Based on the facts given to him at the time of the incident, Jara had already determined that it was an accusatory interview before he met with Robles. He had not interviewed the other management employees who had prepared the deposit bag on the day of the incident, however. He followed the procedures in the manual as he was trained to do. He did not believe that he had the authority to change or make policy.

During Robles's case, Peter Brennan, a divisional loss prevention manager, testified that he trained regional loss prevention managers, including Jara, according to the manual, which had been approved by the company's executive "CEO team." According to Brennan, AutoZone had so many different systems and procedures in place that it was always able to identify a guilty person.

Robles also presented expert testimony from a psychologist, Dr. Saul Kassin, who evaluated the AutoZone investigation manual. It was modeled upon an industry standard known as the Reid method, a benchmark of the field, but it also included additional material. In the opinion of this expert, some of the methods of investigation set forth in the manual were more likely than not to lead to false confessions and to create mischief or be misleading, and were based on false psychological assumptions. Two types of interviews were outlined in the manual, (1) investigative or (2) accusatory, in which the investigator assumes the employee is guilty. The manual also allows the investigator to combine the two types of interviews and does not clearly set forth the preferred practice of allowing a break between the investigation part and the accusatory part. The expert believed that AutoZone's methods for detecting a falsehood were defective and would not lead to a higher success rate in obtaining the truth. For example, the manual included behavior analysis interview techniques that were not foolproof but could lead the interviewer to be overconfident and too aggressive. Loss prevention managers such as

Jara were taught to establish dominance and control over employees they suspected of theft, through the use of psychological techniques in which they evaluated body language and behavior of the suspects to determine their truthfulness, and the purpose of the investigations was to obtain confessions or statements from suspected employees, but the behavioral indications of falsehood set forth in the manual were not all accurate.

\*6 According to the expert, his studies showed that the best trained interrogators had only a 65 percent success rate in obtaining truthful answers, and the norm was around 50 percent. However, Jara claimed a 98 percent success rate in his accusatory interviews, in obtaining a statement (although he did not call it a confession). Jara also conducted witness interviews, which he did not count in his success rate.

Further, the expert disagreed with the manual's statement that it was enough to avoid false imprisonment if the investigator allowed the employee a clear exit path. The expert said not only allowing physical access to an exit path was important, but an interviewer should also take into account the possibility of intimidation that would prevent an employee from leaving an interview, due to the employee's inferior status to the interviewer and the desperate mental state potentially created by isolation and confrontations with accusations.

AutoZone's defense case included testimony from Brennan, Jara, and its vice-president of operations, Richard Smith. Smith testified that the manual had been created after consultation with experts in the field. It was approved and adopted by the "CEO team" of AutoZone, which was composed of a number of individuals in leadership positions, at the vice-president level and higher. The identity of the approximately 40 CEO team members was shown by an annual report entered into evidence. The company's operations profit in 2005 was \$976 million.

Smith explained that the loss prevention department was a separate and autonomous cost center in the corporate structure of AutoZone, to which other cost centers were subject, to ensure that necessary investigations could be independently conducted. The vice-president of loss prevention reported to the general counsel's office, rather than to the vice-president of operations. When loss prevention managers arrived at stores, they were authorized to conduct their duties without checking with the store managers. Loss prevention created its own expenses in operating, rather than creating a profit. In general, the goals of the loss prevention activities concerning employees were to reduce "shrinkage," or the loss of inventory through internal theft, and this would lead to recovering assets and improving the profitability of each store, since shrinkage of inventory was deducted from store profits. In 2005 alone, the company incurred about \$92 million in losses from shrinkage.

In explaining the role of the manual in loss prevention, Smith testified that neither Jara nor Brennan would have the ability to set policy for investigations, as that was the role of the CEO team. Brennan is one of five divisional loss prevention managers and he supervises several individuals such as Jara. There are approximately 55 to 65 employees in loss prevention, and AutoZone employs approximately 54,000 people. Smith stated

that he was responsible for seeing to it that the written loss prevention policies were followed, and the company had processes to monitor loss prevention managers in the field to make sure they were following policy.

\*7 Brennan testified, among other things, about the nature and extent of the training given to loss prevention managers at AutoZone's nationwide headquarters in Memphis, and the content of the training, which is to enforce the policies set forth in the manual. The manual instructed investigators not to threaten employees with arrest or incarceration.

Jara testified about his version of the incident, and stated that he was never told he did something that was outside of AutoZone policy, but that the company was nevertheless taking responsibility for Robles's compensatory damages. AutoZone promoted Jara after the first trial, to the position of market investigator in which he trains other loss prevention managers, and at the time of trial, he remained employed by AutoZone.

In 2005, AutoZone adopted a new manual for loss prevention, which mainly followed the practices in the first manual, such as assuming guilt in accusatory interviews. However, it differed in that the investigator is required to ask the employee if he or she is recording the interview, which is not allowed, and the investigator is informed that obtaining confessions whenever possible is necessary to protect AutoZone from civil liability. According to Jara, and defense counsel in argument, loss prevention managers have discussed and learned from the compensatory damages verdict in this case, to use caution to the extreme.

At the close of testimony, the court and counsel discussed jury instructions and the format of the special verdict form. The court made various rulings on those issues, to be set out in the discussion portion of this opinion.<sup>[FN3](#)</sup> In closing argument, counsel for Robles suggested a punitive damages award of \$75 million to \$200 million would be appropriate.

[FN3](#). Although Robles attempts to argue jury instruction issues in his respondent's brief, AutoZone in its reply brief states that it is not raising instructional error as a grounds of appeal. We will limit our discussion of jury instructions accordingly.

After deliberations, the jury returned a special verdict as follows. It found that Robles had not proven that either Jara or Brennan was an officer, director, or managing agent of AutoZone, acting in a corporate capacity. However, the jury found that Robles had proven “that one or more officers, directors, or managing agents of AutoZone authorized, sanctioned, or encouraged conduct of Octavio Jara” on the day of the incident. The jury then set the amount of punitive damages to be awarded against AutoZone at \$7.5 million. Robles filed a memorandum of costs, including expert witness fees.<sup>[FN4](#)</sup>

[FN4](#). Robles made an statutory offer to allow judgment before the first trial, in the amount of \$40,000, which was never accepted. ([Code Civ. Proc., § 998.](#))

### C. Postverdict Proceedings

AutoZone filed its JNOV motion on several grounds. It first argued that the special verdict form was defective, in allowing the jury to make a finding of authorization of Jara's conduct, but without identifying the management employees who had done so. It also contended the verdict was not supported by substantial evidence, and it exceeded constitutional guidelines of due process under federal and state law.

Robles opposed the motion, contending that the special verdict had been properly prepared according to the direction provided by our prior opinion, and that any defense objections had been waived. Robles argued that sufficient evidence of corporate authorization of Jara's interrogation techniques had been presented, through the CEO team's adoption of the manual and the training provided, which Jara and other loss prevention managers followed in their duties. He contended the punitive damages award was proper.

\*8 After taking the matter under submission, the court issued its ruling denying the JNOV motion in part and granting it in part. The court first stated that when the evidence was correctly viewed in the light most favorable to Robles, there was substantial evidence to support the jury's finding by clear and convincing evidence that the corporate defendant had acted with fraud, malice, and oppression.

The court then denied AutoZone's request to find that the special verdict format was contrary to law, insofar as it provided “that one or more officers, directors, or managing agents of AutoZone authorized, sanctioned, or encouraged conduct of Octavio Jara” on the day of the incident. The court relied on [Civil Code section 3294](#), subdivision (b), and stated that it described a need to identify “the managing agent who authorized the conduct complained of *only in the absence of evidence of corporate ratification of such conduct.* [¶] In publishing, disseminating, and training on the AutoZone security manual, in conducting nationwide training sessions on the security manual and standardized interrogation techniques, and in encouraging agents to observe other agents' interrogations in which the techniques were employed, there was overwhelming evidence that AutoZone, on a management level, added their imprimatur to the conduct of security agents who acted in conformance with the procedures detailed in the manual and implemented and expanded upon by agents in the field. *Failure to cause the jury to identify, by name, a managing agent who authorized such conduct is not fatal to plaintiff's case.*” (Italics added.)

The court further ruled that even assuming this was instructional error of some kind, any such error was waived because AutoZone had not objected to the instruction or verdict form at the time it was offered.

Next, the court rejected AutoZone's request for JNOV with respect to its challenge to the constitutionality of the amount of the award of punitive damages. The court explained its reasoning as follows. Even though corporate fraud, malice, or oppression had been found, and AutoZone's interrogation techniques were found by the jury to be abusive, as a matter of law, there were limitations to the reprehensibility of this conduct because

“AutoZone was attempting to address a legitimate problem, that is, employee pilferage. Plaintiff’s expert opined that, while he disagreed with many of the suggestions in the Loss Prevention Manual in regard to factors to be considered in the assessment of credibility that these views, though in his opinion erroneous, were widely held among otherwise credible Loss Prevention experts.”

Therefore, the court found that since Robles had not suffered from physical harm and was able to obtain similar work shortly after being fired, this required some reduction of the amount of punitive damages from the award of \$7.5 million, which represented approximately 100 times his compensatory damages award. The court concluded, “Given the active role played by the corporation in ratifying the conduct found by the jury to have constituted fraud, malice, and oppression and the resulting harm to Plaintiff, this court finds that a multiplier of 6 times compensatory damages passes constitutional muster and provides adequate redress for Plaintiff’s injury.”

\*9 The trial court (Judge Cannon) next heard the motion to tax costs brought by AutoZone. The court ruled that the motion was untimely and that even if it were to be considered on the merits, it was without support. The court relied on the offer to allow judgment made by Robles before the first trial, under [Code of Civil Procedure section 998](#), which was never accepted. Although AutoZone argued another settlement offer had been made by Robles before the second trial, it did not document the nature of this offer or how it formally superseded the earlier offer. The motion to tax costs was denied and judgment was entered accordingly. Both parties filed notices of appeal.

## DISCUSSION

We first address the challenge by AutoZone to the validity of the language of the special verdict regarding the existence of authorization of Jara’s tortious conduct by “one or more officers, directors, or managing agents” of the company. Its arguments in this respect are closely linked to its claim of insufficient evidence to support the verdict awarding punitive damages. Both these matters require us to outline the proper scope of the direction given by the prior opinion in this case.

Following that analysis, we shall turn to both sides’ claims that the trial court did not have a lawful basis, in ruling on the JNOV motion, to adjust the amount of punitive damages awarded. We then address the costs award.

### I

#### *AUTOZONE’S APPEAL REGARDING JNOV*

##### *A. Contentions: Special Verdict Defects*

AutoZone first contends that the language concerning authorization in the special verdict is too broad and is based on a misinterpretation of our prior opinion and of [Civil Code section 3294](#), subdivision (b). According to AutoZone, the false imprisonment incident itself was never authorized by the manual, and therefore no one in the corporate structure could have authorized, sanctioned, or encouraged Jara's conduct, or if so, those individuals had to be identified by name. AutoZone seeks more specificity, relying on authority such as [Cruz, supra, 83 Cal.App.4th 160, 167](#): “Corporations are legal entities which do not have minds capable of recklessness, wickedness, or intent to injure or deceive. An award of punitive damages against a corporation therefore must rest on the malice of the corporation's employees.”

Further, AutoZone argues that the verdict form fails to include an alternative ground of liability under this statute, ratification, and no such findings may be implied into the special verdict to support any such finding of liability. ([Mendoza v. Club Car, Inc. \(2000\) 81 Cal.App.4th 287, 303](#).) It contends it pursued meaningful objections to the form of the special verdict, such that it may bring these challenges on appeal.

In response, Robles contends that AutoZone's counsel agreed to the composition of the special verdict and waived any objections. Even an error such as a defect in the verdict may be waived by failure to raise it in a timely manner, through seeking correction or clarification. ([7 Witkin, Cal. Procedure \(4th ed. 1997\) Trial, § 385, pp. 438-439](#).) Robles also argues the verdict format was justified by the evidence and by statute.

\*10 At the outset, we note that we will not find any waiver by AutoZone of its objections to the special verdict form. Although the trial court and counsel extensively discussed the format of the special verdict form, the court made rulings on its content in light of consistent arguments by AutoZone that the manual did not authorize false imprisonment, so that any corporate authorization was lacking. Although the trial court made a finding of waiver, the record as a whole supports a reading that AutoZone simply lost that battle at the time, but de novo review of the legal issues raised, including the special verdict's correctness, is nevertheless justified on appeal. ([Trujillo v. North County Transit Dist. \(1998\) 63 Cal.App.4th 280, 285](#).) We next turn to the guidance provided by the prior opinion.

### *B. Prior Opinion*

The effect of the prior opinion was to set aside the earlier nonsuit ruling regarding the punitive damages request. We could not foresee at the time what evidence would be offered upon remand, nor what disputes would develop about the special verdict formulation. However, in light of the record at that time, we were able to analyze the respective contentions of the parties on whether statutory standards governing punitive damages awards could be met here. [Civil Code section 3294](#), subdivision (b) provides that an employer shall not be liable for punitive damages, based upon acts of an employee of the employer, unless: (1) the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others (2) *or authorized or ratified* the wrongful conduct for which the damages are

awarded (3) or was personally guilty of oppression, fraud, or malice. “With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.” (*Ibid.*) We read this language (“*or authorized or ratified*”) as allowing authorization or ratification to form alternative, yet related, bases of liability, mainly with respect to the timing of the corporate activity in question. AutoZone is contending that the jury verdict and evidentiary showing are defective in two major respects: definition and proof of the “managing agent” of the corporation, and/or the definition and proof of “authorization” of the false imprisonment conduct (e.g., a lack of ratification).

On appeal, the parties debate the scope of the guidance given by the prior opinion, with respect to the issues that were faced upon remand. In particular, they dispute certain language in the concurring opinion on the “authorization” prong of [Civil Code section 3294](#), subdivision (b) (“*authorized, sanctioned, or encouraged*”). Before addressing that dispute, we first outline how it arose in the context of the prior opinion as a whole. With respect to Jara's false imprisonment conduct, we were analyzing the manual as instructing the interviewer “to establish ‘dominance,’ ‘maintain control,’ and to establish to the employee the ‘probability of the company having strong evidence of their guilt.’” Although AutoZone's manual states that the subject of an interview should not be detained, it does not require the subject to be told that he is free to leave the interview room. There was evidence that Robles was told not to leave and he believed that his employer, through Jara and the store manager on duty, had the authority to require him to stay until the interview was concluded.”

\*11 With respect to the manner of interpreting the manual, we cautioned against any “unduly selective reading of the manual.” We noted that it “actually distinguishes between accusatory and witness interviews, and acknowledges that removing a cloud of suspicion from innocent employees is an appropriate objective. However, the manual gives little guidance of how much supporting documentation is required before an interview changes from a witness interview to an accusatory interview. Even though the manual contains various guidelines and recommendations which appeared to be an effort to set a neutral corporate policy, the evidence of the actual practice in the company was that the manual was loosely used as recommendations and Jara was only minimally supervised.” We accordingly concluded in the majority opinion:

“[E]ven though the manual does not expressly direct or ratify Jara's use of threats of arrest, there is substantial evidence in the record from which the trier of fact could conclude that loss prevention was a significant aspect of the company's business and that on a day-to-day basis, Jara was allowed to create and implement the local or ‘ad hoc’ policy of how to conduct loss prevention interviews, and could exceed company standards. A reasonable jury, applying the standard of clear and convincing evidence, could have reached the conclusion that as the company policy was then being administered, loss prevention interviewers such as Jara were allowed or permitted to use threats of arrest, leading to false imprisonment, even if lip service was being paid by the

company to the manual's stated policy against such threats. It was error to grant the nonsuit on behalf of AutoZone on this ground.”

We then reached similar conclusions regarding the nature of the participation of Brennan in these events. The majority opinion was accompanied by a concurring opinion expressing the following qualifications as to Justice Haller's view of the issues regarding Jara only:

“AutoZone, not Jara, established the loss prevention policy, required that interviews take place and provided detailed recommendations outlining how these interviews should be conducted. The fact AutoZone decided that it would give wide discretion to the front line employees and that it would recommend procedure, not mandate it, does not mean that Jara was transformed into a managing agent. In short, AutoZone (acting through its officers, directors and managing agents) decided corporate policy and Jara implemented it; he did not, as *Ultramar* [ *White* ] requires, “determine corporate policy.” Accordingly, I do not believe Jara fits the definition of a managing agent as used in [Civil Code section 3294](#), subdivision (b) or as interpreted by our Supreme Court. [¶] Having reached this conclusion, I am not suggesting that AutoZone cannot be held liable for punitive damages arising from Jara's conduct. If the jury determines Brennan was a managing agent and that he knowingly authorized or ratified Jara's conduct, AutoZone is subject to punitive liability. Likewise, *if the jury finds that the corporation purposely devised a loss prevention policy that encouraged, sanctioned or authorized Jara's reprehensible conduct, it could be responsible for punitive damages.*” (Italics added.)

\*12 Concurring opinions, properly read, “constitute only the personal views of the writer.” ([People v. Superior Court \(1976\) 56 Cal.App.3d 191, 194.](#)) We now apply all these guideposts to the arguments on appeal.

### *C. Background Leading to Special Verdict Format: JNOV Denial*

Although AutoZone has not framed its arguments in terms of instructional error, it is nevertheless important to read the special verdict that is attacked here in view of the instructions given. The jury was instructed in the language of CACI No. 3945, as adapted, to provide that it had been established that Jara had falsely imprisoned Robles, causing Robles actual damages in the amount of \$73,150, and that Jara thereby engaged in fraud, malice, and oppression. The jury was then told “to determine whether the corporate defendant, AutoZone is also responsible for punitive damages in connection with the false imprisonment.” The court continued the instruction in the language of CACI No. 3945: “The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future. [¶] You may award punitive damages against AutoZone only if [Robles] proves that AutoZone engaged in that conduct with malice, fraud, or oppression. To do this, [Robles] must prove one of the following by clear and convincing evidence: [¶] 1. That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of AutoZone, who acted on behalf of AutoZone; [or][¶] 2. That the conduct constituting malice, oppression, or fraud was authorized by one or more

officers, directors, or managing agents of AutoZone; [or][¶] 3. That one or more officers, directors, or managing agents of AutoZone actually knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.”

After defining malice, oppression, despicable conduct, and fraud, the instruction continued: “An employee is a ‘managing agent’ if he exercises substantial independent authority and judgment in his corporate decision making so that his decisions ultimately determine corporate policy.” The instruction explained there is no fixed formula for determining the amount of punitive damages, and set forth the factors to be considered: reprehensibility, reasonable relationship between Robles's harm and the amount of punitive damages, and the amount necessary to punish the defendant and discourage future wrongful conduct, in view of its financial condition. (CACI No. 3945.) The court agreed to give this instruction after noting to counsel that the evidence included the company-approved loss prevention manuals that were part of corporate headquarters material used at nationwide training, and that “the jury could find that the materials within the manuals constituted fraud, malice or oppression, and I don't think you have to show who wrote the manual or who in the corporate office specifically by name approved the manual, only that it was used at the direction of the corporate officers in general, that the corporation, put this out as its manual for loss prevention.”

\*13 Next, the jury was given a special instruction about the effect of an employee's title: “The title given to an employee by a corporation is not in and of itself determinative of whether such employee is a managing agent but is merely one factor to be considered in making this determination. Corporate liability turns on the extent of discretion conferred on the employee by the corporation, not on any employee's official title.”

After the court and counsel agreed upon the instructions to be given, they turned to the language of the special verdict, which first asked whether Jara or Brennan were managing agents. Regarding the question that is now attacked on appeal, the trial court explained its view that “it can be either Jara, or Brennan, or a corporate officer, in my opinion, unnamed, responsible for the manual if the evidence is sufficient to prove that the corporate officers issued that manual in their training in Tennessee to make everybody-let's assume the books said beat people with chains. We don't have to name the person who wrote the book.”

In argument to the jury on the special verdict language, Robles's attorney focused on the evidence about whether the 40-some corporate representatives on the CEO team had reviewed the policies in the manual and thereby authorized, approved, sanctioned, or encouraged conduct such as Jara had engaged in with Robles. Plaintiff's counsel reminded the jury that the manual instructed investigators to create dominance through several techniques, and the expert witness had testified that the manual's procedures mixed up the investigative part and the accusatory part. Also, Jara had a 98 percent success rate in obtaining statements from interviewees against whom he had evidence, even though the nationwide average was about half that. <sup>FNS</sup> In response, defense counsel argued there was a leap in logic “that when the company's policy is to prohibit all of the conduct that Mr. Robles told us on the witness stand that he found offensive that day,

when the Company policy is to prohibit that, how can there be this reversal that that is now the policy of AutoZone to falsely imprison people?”

[FN5](#). The parties dispute whether Jara's 98 percent success rate referred to obtaining confessions or obtaining statements. Jara explained in his testimony that out of 200 or 300 accusatory interviews he had done, he had obtained statements from 98 percent of the persons against whom he had evidence, and the other 2 percent had walked out. He did not label these signed confessions, but statements. He also obtained statements from witnesses, which did not count in his 98 percent rate.

#### *D. Analysis on JNOV Denial: Special Verdict*

We first address AutoZone's statutory objections to the form of the verdict, that the language concerning authorization in the verdict is too broad under [Civil Code section 3294](#), subdivision (b). It claims error because the verdict did not require the jury to identify, by name, an individual managing agent who authorized Jara's conduct during the incident, including the false imprisonment. Next, it contends that since two terms used in the form, sanctioned or encouraged, do not appear in the statute, this somehow expanded the allowable scope of liability for punitive damages.

Returning to the language of [Civil Code section 3294](#), subdivision (b), as relevant here, it allows punitive damages to be imposed on an employer, based upon acts of its employee, where the employer *authorized or ratified* the wrongful conduct for which compensatory damages are awarded. This language (“*or authorized or ratified*”) must by its terms allow such authorization or ratification to form alternative bases of liability: “With respect to a corporate employer, the ... authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.” ([Civ.Code, § 3294](#), subd. (b); italics added.) In [Cruz, supra, 83 Cal.App.4th 160, 168](#), ratification is defined as the “[c]onfirmation and acceptance of a previous act.” [Citation.] A corporation cannot confirm and accept that which it does not actually know about. [Citation.]”

\*14 We first reject AutoZone's contentions that the ratification prong of this statute was never argued to the trial court, or that it had to be specifically inserted into the special verdict form. The evidence as a whole extensively dealt with the concept of corporate adoption of the manual and the extent of supervision of the front-line employees who were conducting loss prevention investigations, in terms of training and follow-up. Those issues were mainly presented in terms of asking the jury to decide whether Jara's conduct, leading to the false imprisonment incident, was authorized by corporate policy and procedure, as established by the CEO team, and as found in the manual. However, evidence was also presented on whether AutoZone had made any changes in response to the incident, and after the first trial, to change its policies or the manual, so that both the time periods before and after the incident were fully covered by the evidence.

Moreover, in ruling on the JNOV, the trial court evaluated the evidence as showing that AutoZone had played an active role “in ratifying the conduct found by the jury to have constituted fraud, malice and oppression.” The court's order interpreted the language of [Civil Code section 3294](#), subdivision (b), “*or authorized or ratified*,” as describing “the necessity of identifying the managing agent who authorized the conduct complained of only in the absence of evidence of corporate ratification of such conduct” (apparently to allow alternative bases of liability). The manner in which the evidence was developed was primarily directed toward authorization issues, but since the subject conduct of AutoZone and its representatives extended over a long period of time, both ratification and authorization concepts came into play. In any case, we are satisfied that the special verdict language may be evaluated on its face, in terms of authorization, without the need of creating any additional implied findings on ratification. (*Mendoza v. Club Car, Inc.*, [supra](#), 81 Cal.App.4th 287, 303.) No such additional findings are essential on this record.

Robles's theory of trial sought to show that responsible officers, directors, or managing agents of AutoZone had authority to set “corporate policies” that allowed or encouraged the false imprisonment incident to occur as it did. This terminology creates some difficulty. In *Cruz*, [supra](#), 83 Cal.App.4th 160, the court undertook to give meaning to the term “corporate policy” as used in *White*, [supra](#), 21 Cal.4th at page 573, by referring to dictionary definitions as follows: “ ‘Corporate policy’ is not defined by statute, nor in the case law relating to punitive damages. Dictionary definitions of ‘policy’ include the following: ‘The general principles by which a government [or other body] is guided in its management of public affairs.’ [Citation.] ‘A principle, plan or course of action as pursued by a government, organization, individual etc.’ [Citation.] The [U.S.] Supreme Court has defined ‘official policy’ ... as ‘formal rules or understandings-often but not always committed to writing-that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time.’ [Citation.]” (*Cruz*, [supra](#), at p. 167.)

\*15 In *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1207-1208 (*Johnson*), the court was analyzing the related issue of the requirements for due process review of punitive damages awards, for proportionality, and made these comments about leading federal decisions (e.g., *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 (*State Farm*)) and their views of the exercise of discretion regarding punitive damages generally: “Nothing the high court has said about due process review requires that California juries and courts ignore *evidence of corporate policies and practices* and evaluate the defendant's harm to the plaintiff in isolation. [¶] California law has long endorsed the use of punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct, and hence allowed consideration of that conduct's scale and profitability in determining the size of award that will vindicate the state's legitimate interests. We do not read the high court's decisions, which specifically acknowledge that states may use punitive damages for punishment and deterrence, as mandating the abandonment of that principle.” (*Johnson*, [supra](#), 35 Cal.4th 1191, 1207-1208, fn. omitted; italics added.)

Before specifically addressing the validity of the special verdict on the authorization issues, which involve corporate policy, we return to the ruling of the trial court on JNOV, in which it relied on certain aspects of the evidence to assess the appropriateness and amount of punitive damages, as against the company itself. The court said that the evidence showed that after Robles's termination, "Plaintiff was faced with an uncertain future in that he learned as time went by that he had been 'blackballed' by AutoZone and that AutoZone was informing potential employers of plaintiff's status as a security risk. This occurred at a time when, in fact Plaintiff had stolen nothing from AutoZone. *By taking the position that security personnel could promise continued employment in exchange for a confession, AutoZone as a corporate employer played a direct role in causing plaintiff's damages. AutoZone knew or should have known that false promises were being made by its loss prevention managers on a statewide if not a nationwide basis. AutoZone knew or should have known that they were likely to profit from the retained wages from confessing employees.*"

The trial court's ruling also analyzed the appropriateness of punitive damages in any amount as follows: "AutoZone's conduct in coercing a confession from Plaintiff evidenced a conscious disregard for the health and wellbeing of the Plaintiff who was known to be financially vulnerable at the time of this incident-riding two or more buses a day to and from his low paying job at AutoZone. *The evidence established that the conduct complained of was not an isolated incident but was rather a course of conduct repeated in every instance in which theft by an employee was suspected. AutoZone employed a pattern or practice of isolating the suspect and then tricking the suspect into believing that the ordeal would end and they would continue their employment if only they would agree to repay the missing money. There was nothing that could be described as accidental about AutoZone's procedures. It was designed to achieve one goal at any cost to the employee-that is, recapture of AutoZone's monetary loss as AutoZone defined that loss.*"

\*16 In its order, the trial court did not address the identity of the individual or collective AutoZone decision makers in its review. When the jury was instructed, it was told no special title was required to be assigned to a corporate managing agent. Other case law has found, without comment on this issue, that punitive damages may properly be awarded against a corporation, without an identification of the individual corporate decision makers by name. In [Grimshaw v. Ford Motor Co. \(1981\) 119 Cal.App.3d 757](#), the court evaluated the evidence, including circumstantial evidence, and found the plaintiff had made a substantial showing "that Ford's management decided to proceed with the production of the Pinto with knowledge of test results revealing design defects which rendered the fuel tank extremely vulnerable on rear impact at low speeds and endangered the safety and lives of the occupants. Such conduct constitutes corporate malice." ([Id. at p. 814.](#)) Likewise, the court referred to Ford's cost-benefit decisions, "balancing human lives and limbs against corporate profits," as showing Ford's "institutional mentality" as "one of callous indifference to public safety," justifying a punitive damages award based on corporate conduct constituting "conscious disregard" of the probability of injury to members of the consuming public. ([Id. at p. 813](#); see also [Romo v. Ford Motor Company \(2003\) 113 Cal.App. 4th 738, 755.](#))

More recently, this court in [\*Buell-Wilson v. Ford Motor Co.\* \(2008\) 160 Cal.App.4th 1107, 1149](#), evaluated the evidence of the conduct of Ford management and engineers, as justifying punitive damages awards based on corporate conduct, although only a few of those officials and employees were referred to by name at trial. For example, “Ford's engineers knew that the vehicle's design was unstable and prone to rollover in emergency maneuvers due to its high center of gravity and narrow track width. Ford had known for decades the importance of vehicle stability in emergency maneuvers.” ([\*Id.\* at p. 1124.](#)) Also, “Ford's design engineers repeatedly requested Ford to widen the track width and lower the center of gravity on the Explorer to increase its stability. However, management declined to do so. As acknowledged by Robert Simpson, a program manager for the development of the Explorer, this was because of ‘the ... investment that Ford had sunk into the Explorer’ ....” ([\*Id.\* at p. 1125.](#))

Case law has not yet created any requirement under circumstances like these that an individual managing agent must be identified in order for punitive damages liability to be established against a corporation. In the usual employment case in which punitive damages are sought based on tortious conduct, the identity of the offender and the complaining party's supervisor or superior is known to the individual. For example, in [\*White, supra\*, 21 Cal.4th 563](#), the plaintiff employee was fired by a supervisor, Salla, who “exercised substantial discretionary authority over vital aspects of the [employer's] business, [such as] managing numerous stores on a daily basis and making significant decisions affecting both store and company policy.” ([\*Id.\* at p. 577.](#)) When this supervisor fired the employee for testifying at an unemployment hearing, she was exercising “substantial discretionary authority over decisions that ultimately determined corporate policy in a most crucial aspect of Ultramar's business.” (*Ibid.*) That plaintiff (White) was in a position to know what happened to him and why. Again, in [\*Cruz, supra\*, 83 Cal.App.4th 160](#), the plaintiff knew that a company's employees had arrested him and roughed him up, but he could not show any chain of command-type relationship between that conduct and the corporate leadership policies.

\*17 Next, in [\*Gelfo v. Lockheed Martin Corp.\* \(2006\) 140 Cal.App.4th 34, 63](#), the trial court granted the defendant employer's motion for directed verdict on the ground that the former employee suing the employer had failed to make a sufficient showing that it was a corporate decision maker who made the adverse job action (rescinding his job offer). Gelfo, the plaintiff, had failed to bring in any evidence that the named corporate employee, a vice-president, held such a position in the corporate hierarchy to justify a finding that he was to blame for the adverse action, through any exercise of “substantial discretionary authority over decisions that ultimately determine corporate policy,” so as to justify a punitive damages award against the employer. The court noted that under [\*White, supra\*, 21 Cal.4th at p. 567](#), the decision of whether an employee is a managing agent, for purposes of imposing punitive damages liability upon the employer, must be made on a case-by-case basis, but it only remains a factual issue if sufficient evidence has been presented to support a verdict in the favor of the party seeking to establish that fact. ([\*Gelfo, supra\*, at p. 63.](#))

The cases we have just referred to are distinguishable on their facts, because the types of decisions made by the managing agents, officers or directors were different and more readily discoverable by the complaining parties. The general principle to be enforced is that “*punitive* damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” ([College, supra, 8 Cal.4th 704, 724, fn. 11.](#)) In [Weeks v. Baker & McKenzie \(1998\) 63 Cal.App.4th 1128, 1151](#) (*Weeks*), the court interpreted the term “managing agent” as referring to a function performed by the corporate representative, and stated that this was a fact specific issue in cases that arise under the statute.

Here too, these facts presented issues about how the language of the official manual was utilized and interpreted in practice, when loss prevention investigators were carrying out their duties in the field. Robles's counsel argued to the jury that Jara's acts arose out of the policies he learned in his training. The jury heard testimony about the CEO team's adoption of the manual and its decision to give loss prevention enough autonomy so that there was very little supervision in the field of investigation practices during the events of this case. Plaintiff's attorney suggested to the jury that this did not mean that the written policies were for real, since they were not enforced. Using a case-by-case approach, the jury could reasonably have concluded from all the evidence that management employees, officers and directors, such as the CEO team, had carried out their job functions by establishing loss prevention policies that, as a whole and as administered, allowed abuses to occur, such as false imprisonment. (See [White, supra, 21 Cal.4th at p. 567.](#))

\*18 Based on the kind of showing made here about corporate policy and procedure, we now reject the argument by AutoZone that since the verdict did not require identification of corporate decision makers by name, the verdict form was incorrect in inquiring about whether any officers, directors, or managing agents in the corporate structure had “authorized, sanctioned, or encouraged” Jara's conduct. AutoZone makes too narrow a reading of both the statute and our prior opinion, in light of the scope of the topics of evidence actually presented to the jury. In broad outline, these included the following: (1) the nature and extent of the company-wide training given to loss prevention managers, and the content of the manual; (2) identity of the leadership group of AutoZone, and their creation of the loss prevention component of the company and direction of it; (3) the methods used by the interviewers, for at least four former employees who testified, including the making of false promises that in return for a confession and a promissory note, employees suspected of theft could keep their jobs; and (4) AutoZone's actions after the incident, such as finding the money but doing nothing about it, and after the verdict in the first trial, such as promoting Jara and revising the manual to a limited extent.

Each of the above topics of evidence addresses far more than the identity of Jara or Brennan as a managing agent of the corporation, and the special verdict properly extended the inquiry in that manner. This was consistent with the approach set forth in the concurring opinion in our prior decision in this case: “Likewise, if the jury finds that the corporation purposely devised a loss prevention policy that encouraged, sanctioned or authorized Jara's reprehensible conduct, it could be responsible for punitive damages.”

We are well aware that concurring opinions are not the equivalent of a majority opinion for purposes of the retrial, but the analysis set forth therein is not an incorrect reading of [Civil Code section 3294](#), subdivision (b).

Moreover, even assuming *arguendo* that the language concerning authorization in the verdict was too broad, in its use of the terms “sanctioned or encouraged,” the jury had been properly instructed under CACI No. 3945, regarding liability of the employer if its officers, directors, or managing agents actually knew of the malicious conduct and adopted or approved it after it occurred. Even if the trial court and the parties were mistaken in their interpretations of the concurring opinion and the majority in our prior opinion, we think any error was harmless, because that “sanctioned or encouraged” language generally falls within the scope of the issues covered by CACI, as it correctly interprets [Civil Code section 3294](#), subdivision (b), and the jury was not likely to be misled.

In any case, evidence was presented at this trial that the jury could reasonably have interpreted as showing the CEO team carried out its functions of corporate supervision and design of the loss prevention cost center, in such a manner that allowed the principles set forth in the manual to be loosely applied and abused by individual loss prevention managers. (See, [Weeks, supra, 63 Cal. App.4th at p. 1151](#).) There were approximately 54,000 AutoZone employees, and about 55 loss prevention employees, including clerical staff. Brennan was one of five managers who each supervised five or six regional loss prevention managers like Brown and Jara. Jara investigated about 60 stores and Brown formerly investigated about 100. Jara's understanding was that he never learned he did anything that was outside of AutoZone policy. The jury could have inferred that the kinds of practices shown to have been used on Robles and the three other former employees who testified were allowed to occur because of the latitude knowingly given to loss prevention managers to interpret the manual's guidelines and policies, and that nothing was done to restrain this, even though incidents like these were indications that the policies of the manual were being violated. It does not make any difference that the company's original motivation of recovering revenue for the stores was an appropriate one, if the loss prevention methods regularly carried this to extremes.

\*19 Even though there were policies governing the types of investigations that could be conducted, the corporate enforcement of them were shown to be sporadic, at least as the four former employees who testified were concerned. From this evidence, the jury could have concluded that the corporate leadership team decisions had effectively authorized the type of conduct that occurred here. (See [Cruz, supra, 83 Cal.App.4th 160, 167](#) [“But the law does not impute every employee's malice to the corporation. Instead, the punitive damage statute requires proof of malice among corporate leaders: the ‘officer[s], director[s], or managing agent[s].’ ([Civ.Code, § 3294](#), subd. (b).) This is the group whose intentions guide corporate conduct.”])

The existence of corporate authorization of Jara's conduct is a matter of inferences to be drawn from the evidence about the corporate structure, the training of the loss prevention managers, the methods they used, and the ultimate results of the investigation

of Robles. Circumstantial evidence is not an improper means of showing authorization. ([Grimshaw, supra, 119 Cal.App.3d 757 at p. 813.](#)) Under the circumstances shown here, neither [Civil Code section 3294](#), subdivision (b) nor the cases interpreting it expressly require an identification by name to be made of the particular corporate officer, director, agent, group, or team who created corporate policy and implemented it, in order for a punitive damages award to be made against an employer. Nor is it dispositive under these circumstances that the acts of false imprisonment were not expressly authorized by the manual, as we next address. The special verdict format used here was not defective on its face.

#### *E. Contentions and Analysis on JNOV Denial: Sufficiency of the Evidence*

This portion of AutoZone's appeal presents a substantial evidence challenge to the denial of the JNOV motion, and therefore also to the jury verdict in favor of Robles. To evaluate whether the record supports the verdict, we apply standard rules of review:

“An ‘appeal from the trial court's denial of the ... motion for judgment notwithstanding the verdict is a challenge to the sufficiency of the evidence to support the jury's verdict and the trial court's decision. The standard of review is essentially the same as when the trial court has granted the motion.’ [Citation.] In ruling on a motion for JNOV, “ ‘the trial court may not weigh the evidence or judge the credibility of the witnesses.... Such order may be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is no evidence sufficiently substantial to support the verdict.’ “ “ “ ([Carter v. CB Richard Ellis, Inc. \(2004\) 122 Cal.App.4th 1313, 1320.](#))

Disputed factual issues resolved by the finder of fact are reviewed under this test: Substantial evidence is “evidence of ‘ponderable legal significance, ... reasonable in nature, credible, and of solid value.’ [Citations.]” ([Bowers v. Bernards \(1984\) 150 Cal.App.3d 870, 873.](#)) In determining its existence, we look at the entire record on appeal rather than simply considering the evidence cited by a party. (*Ibid.*) “The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record. [Citation.] While substantial evidence may consist of inferences, such inferences must be ‘a product of logic and reason’ and ‘must rest on the evidence’ [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].” ([Kuhn v. Department of General Services \(1994\) 22 Cal.App.4th 1627, 1633.](#))

\*20 As we have already noted, AutoZone's briefs provide few citations to any page and line references in the record, but instead present this claim as the other side of the coin of its legal arguments. That is, it again argues that the verdict is fatally unsupported in the evidence because (1) it does not identify a managing agent individually, and (2) it does not acknowledge that the manual itself does not contain authorization for the false imprisonment that occurred here.

AutoZone particularly relies on the principles set forth in [\*Kolstad v. American Dental Assn.\* \(1999\) 527 U.S. 526](#), a case discussed in [\*White, supra\*, 21 Cal.4th 563, 568](#), as support for a side issue that was not before the California Supreme Court in *White* (i.e., the effect in a future case of a showing that a managing agent acted in violation of an employer's specific written policy forbidding adverse employment actions against employees under certain circumstances). In *White*, the holding in *Kolstad* was summarized as follows: the existence of a “written policy forbidding discrimination under title VII of the Civil Rights Act of 1964 [citation] may operate as a bar to punitive damage liability [of an employer].” (*White, supra*, at p. 568, fn. 2.) The California Supreme Court, in *White*, thus commented, in reference to *Kolstad*: “Although the issue is not presented here, and we do not address it or offer our view on its merits, in future cases, if a company has a written policy that specifically forbids retaliation against employees who testify at unemployment hearings, it may operate to limit corporate liability for punitive damages, as long as the employer implements the written policy in good faith.” (*White, supra*, at p. 568, fn. 2.) AutoZone argues this authority supports a finding that since false imprisonment was not allowed by the manual, no corporate authorization of Jara's conduct could have been implied or found, in the face of the manual's provisions requiring the investigator to leave a clear exit path for the employee. (See also [\*State Department of Health Services v. Superior Court\* \(2003\) 31 Cal.4th 1026, 1044](#) [if an employer has taken good faith steps to prevent tortious conduct in the workplace, such as establishing specific written policies against it, the policy may prevent a finding of the employer's liability for punitive damages].)

A major problem with AutoZone's reliance on its written policy, that its investigator must leave the employee being interviewed a clear exit path, is that the expert psychologist evaluated the interview techniques set forth in the manual as creating not only physical but also mental barriers to leaving such an accusatory interview, based upon the powerful position of the company investigator over the employee, and the presumption of guilt, combined with false promises of leniency. In closing argument, counsel for AutoZone referred to this expert as “neutral,” because he had studied the manual in light of other standard types of approaches to loss prevention. The jury could have listened to the expert and drawn inferences from the manner of adoption of the manual and the interview techniques contained within it, together with the structure and level of supervision of the loss prevention department, to determine that the necessary good faith element of implementation of an adequate written policy had not been proven here, with respect to the employer's policies and practices. Instead, these policies effectively fostered bad behavior or abuse of power by loss prevention managers, rather than correcting or avoiding such problems.

\*21 The trial court ruled on JNOV that a sufficient showing of fault by the employer itself had been made. The evidence in the record substantially supports the conclusions on corporate authorization, as outlined above, and we do not need to repeat it. Moreover, AutoZone reads the record too narrowly to attempt to focus only on false imprisonment as banned by the manual. More than that occurred in connection with the false imprisonment incident, and the compensatory damages award included lost wages and emotional distress. The punitive damages award had support in the evidence in the topics

outlined above, including the training given to loss prevention managers and the overall content of the manual; the jury could properly infer that since Jara and Brown used similar tactics in interviews, they were doing what they had been trained to do and were acting within the spirit and guidance of the policy. Jara testified he was acting within the policies as he had been taught them, and was not told by the employer that he had done anything wrong. This apparently included the making of false promises of leniency in return for a confession and a promissory note, which effectively canceled out the employee's final paycheck (which was not in all cases warranted and in some cases contrary to Labor Code provisions).

The evidence suggested, and the jury believed, that the CEO team had sanctioned and endorsed this type of conduct over time due to the results it obtained, such as increased recovery of assets. This was a result of the leadership group of AutoZone creating and operating the loss prevention component of the company in a manner that did not create enough safeguards that would have prevented the kind of abuses that were shown here. In this particular case, no theft had ever occurred, as was discovered soon after the incident.

This record supports a conclusion that the finding of corporate authorization of Jara's tortious conduct (established in the first trial to be malicious and oppressive) is supported by sufficient evidence of company loss prevention policies and principles that were designed and administered in such a way as to support a jury finding that they enabled, justified, and encouraged the abuses that occurred here. (See [Cruz, supra, 83 Cal.App.4th at pp. 167-168.](#)) Nevertheless, the original amount of the punitive damages award, \$7.5 million, and the reduction of it by the court in the JNOV motion, are next subject to review on constitutional grounds, as requested by both sides.

## II

### *SEPARATE APPEALS REGARDING THE JNOV: AMOUNT OF PUNITIVES*

Each party argues the trial court erred in altering the original amount of the punitive damages award, \$7.5 million, when it ruled on the JNOV motion. We first set forth the guideposts established by federal law for de novo review on constitutional grounds of the proper limitations on punitive damages awards, then apply those rules to each set of contentions on this record.

#### *A. Constitutional Maximum of Punitive Damages Awards: Review*

\*22 As explained by this court in [Gober, supra, 137 Cal.App.4th 204, 212](#), both state and federal appellate courts will conduct de novo review of punitive damages awards that have been challenged for being constitutionally excessive. ([State Farm, supra, 538 U.S. 408, 418](#); [Cooper Industries, Inc. v. Leatherman Tool Group, Inc. \(2001\) 532 U.S. 424, 433-434](#) (*Cooper Industries*)). The rationale for this type of de novo review is that “ “[u]nlike the measure of actual damages suffered, which presents a question of historical

or predictive fact, ... the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury.” ‘ [Citations.]’ ( *Gober, supra*, at p. 212.)

In making such determinations, an appellate court will enforce the policy that since punitive damages are different from compensatory damages, “they must bear a reasonable relationship, and be proportionate, to compensatory damages. [Citations.]” ( *Gober, supra*, [137 Cal.App.4th at pp. 212-213](#).) These principles have been developed such that there is no bright line rule that sets the proper ratio of compensatory to punitive damages, but this ratio “should generally be no higher than 4 to 1 and almost never more than 9 to 1.” ( *Gober, supra*, at p. 213, citing *State Farm, supra*, [538 U.S. at p. 425](#).)

The California Supreme Court agrees that “the constitutional excessiveness of a punitive damages award presents a legal issue that appellate courts could determine independently.” ( *Gober, supra*, [137 Cal.App.4th at p. 213](#), citing *Simon v. Paolo U.S. Holding Co, Inc.* (2005) [35 Cal.4th 1159, 1187](#) ( *Simon* ).) When deciding a constitutional maximum for such an award, “a court does not decide whether the verdict is unreasonable based on the facts; rather, it examines the punitive damages award to determine whether it is constitutionally excessive and, if so, may adjust it to the maximum amount permitted by the Constitution.” ( *Gober, supra*, at p. 214, citing *Simon, supra*, at p. 1188.)

#### *B. Guideposts for Determining Permissive Punitive Damages Awards*

Again as laid out in *Gober*, in conducting this type of de novo review, we follow well-established “guideposts” as set forth in United States Supreme Court case law: “(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.” ( *Gober, supra*, [137 Cal.App.4th at pp. 215-216](#), citing *State Farm, supra*, [538 U.S. at p. 418](#); *BMW of North America, Inc. v. Gore* (1996) [517 U.S. 559, 575](#).) In this process, findings of historical fact must be accepted as true, if supported by substantial evidence. ( *Simon, supra*, [35 Cal.4th at p. 1172](#).)

In assessing the reasonableness of an award under the relevant three guideposts in a given case, the first (the misconduct's degree of reprehensibility) is the most important, and includes a number of subfactors to be considered. “To assess this factor, courts must consider whether: ‘the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.’ [Citation.]” ( *Gober, supra*, [137 Cal.App.4th at p. 219](#).)

\*23 In awarding or reviewing punitive damages, a court may consider whether “the defendant's illegal or wrongful conduct toward others ... was similar to the tortious conduct that injured the plaintiff or plaintiffs.” ([Johnson, supra, 35 Cal.4th 1191, 1204.](#))

The second such guidepost, the ratio of punitive damages to the actual or potential harm established as to the claimant, is also subject to constitutional limitations that have some limited flexibility. As this court set forth in *Gober*, quoting from [State Farm, supra, 538 U.S. at page 425](#), “ ‘few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process’ ” and a four-to-one to 1 ratio “might be close to the line of constitutional impropriety.” ([Gober, supra, 137 Cal.App.4th 204 at p. 222.](#)) Only where there are “extraordinary factors, such as extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages,” would punitive damages be justifiable in excess of a single-digit ratio. (*Ibid.*, citing to [State Farm, supra, 538 U.S. at p. 425](#); [Simon, supra, 35 Cal.4th at p. 1182.](#))

Regarding the third guidepost, comparable civil penalties, there is no close analogy to an award of compensatory damages for false imprisonment. Robles suggests using federal antitrust law, the Sherman Act, but has not persuasively argued why that body of law or this guidepost may bear any weight here at all. ([15 U.S.C. § 1](#); [State Farm, supra, 538 U.S. at p. 428.](#)) The trial court did not utilize this factor and there was good reason for that.

We accordingly seek to measure, against the relevant guideposts, the trial court's ruling on JNOV, which reduced the jury's \$7.5 million punitive damages award to an amount that reflected a six-to-one ratio of punitive damages to compensatory damages (i.e., \$438,900), as opposed to the original 100-to-one ratio.

### *C. Facts; Ruling*

In rendering its ruling, the trial court summarized certain key aspects of the evidence presented to the jury, with reference to the guideposts set forth by applicable case law. The court explained its conclusion and reasoning as follows: “In reducing the award to six times compensatory damages (\$438,900) this Court takes into consideration the nature and extent of Plaintiff's damages, as well as the deterrent function of punitive damages which ‘will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.’ [Citation.]”

Regarding the guidepost of reprehensibility, the trial court expressly noted that although the false imprisonment incident did not inflict any physical harm on Robles, there were nevertheless components of both economic and noneconomic compensatory damages awarded. Because of Jara's acts, Robles suffered from increased financial vulnerability, and he “was faced with an uncertain future in that he learned as time went by that he had been ‘blackballed’ by AutoZone and that AutoZone was informing potential employers of plaintiff's status as a security risk. This occurred at a time when, in fact, Plaintiff had stolen nothing from AutoZone. By taking the position that security

personnel could promise continued employment in exchange for a confession, AutoZone as a corporate employer played a direct role in causing plaintiff's damages.... AutoZone knew or should have known that they were likely to profit from the retained wages from confessing employees.”

\*24 Next, also regarding the guidepost of reprehensible conduct, the trial court evaluated AutoZone's conduct in coercing a confession from Robles as showing “a conscious disregard for the health and well being of the Plaintiff who was known to be financially vulnerable at the time of this incident.... The evidence established that the conduct complained of was not an isolated incident but was rather a course of conduct repeated in every instance in which theft by an employee was suspected. AutoZone employed a pattern or practice of isolating the suspect and then tricking the suspect into believing that the ordeal would end and they would continue their employment if only they would agree to repay the missing money. There was nothing that could be described as accidental about AutoZone's procedures. It was designed to achieve one goal at any cost to the employee-that is, recapture of AutoZone's monetary loss as AutoZone defined that loss.”

An additional factor considered by the trial court, regarding reprehensibility, was that the goal of loss prevention is a legitimate goal, because companies must be allowed to address employee pilferage. The court noted that plaintiff's expert had acknowledged that the manual contained some suggestions and factors that were widely accepted among other credible loss prevention experts. Accordingly, the court found that some degree of punitive damages was appropriate, but the award of 100 times the compensatory damages was not supported by substantial evidence and was therefore excessive as a matter of law.

The trial court further addressed this issue of proportionality as follows: “Thus the reprehensibility of the conduct complained of in this case is relatively high but must be balanced against the rather short duration of Plaintiff's damages as a result of the AutoZone acts.” Robles had found a new job at a similar rate of pay within about three weeks, so that his damages could not be considered to be catastrophic, permanent, or ongoing.

The trial court's ruling concluded that the corporation had played an active role in ratifying the conduct found by the jury to have constituted fraud, malice and oppression, that it was established that Robles had suffered from some degree of harm, and therefore the court made a finding that “a multiplier of 6 times compensatory damages passes constitutional muster and provides adequate redress for Plaintiff's injury.”

#### *D. AutoZone's Objections; Analysis*

AutoZone mainly attacks the trial court's evaluation that its conduct was reprehensible, and raises several theories why this was erroneous. As a backup position, it also contends that at most, this case does not represent any of the factors justifying more than a three-to-one ratio between punitive and compensatory damages.

First, AutoZone emphasizes that the trial court acknowledged that there is good reason for a company to have a loss prevention program, and many of the principles in the manual are accepted by other professionals in the field. AutoZone claims that the only evidence was that the loss prevention department does not create a profit, but only creates costs for the company. However, that argument does not account for the evidence that the only reason for the loss prevention program is to recover assets and thereby increase the profitability of the retail stores. In this instance, no actual theft had occurred, and the investigation was inadequate from the outset.

\*25 AutoZone also attacked the credibility of three other employee-witnesses who were subjected to stressful interviews by Jara or by Brown, and who were detained similarly to Robles, and it therefore suggested they were not objective or believable witnesses, so that there was no recidivism proven about this false imprisonment conduct. Further, AutoZone points to the relatively moderate compensatory damages awarded, particularly since Robles was able to obtain other employment soon after the incident, to suggest that he has already been adequately compensated. Also, AutoZone continues to dispute that it authorized the type of conduct that occurred here, or ratified it.

The trial court acknowledged many of these arguments in its reasoning process. As set forth previously in our discussion of the other issues raised by AutoZone, we have found no reversible error in any of the questions of law or substantial evidence challenges raised to the validity of the punitive damages finding. We think that the trial court acted in accordance with the applicable case law in undertaking to evaluate, on an objective basis, the showing at trial of AutoZone's representative's tortious conduct, together with its corporate policies about the manual, as amounting to a showing there was an indifference to or a reckless disregard of the well-being of its employees such as Robles, who had some degree of financial vulnerability, as did the fellow employee-witnesses who testified. The necessary intentional trickery or deceit had been proven. ([Gober, supra, 137 Cal.App.4th at p. 219.](#))

Moreover, with respect to the ratio selected by the court, we find no fault with the six-to-one ratio represented by the ruling. This is not a case in which certain “extraordinary factors, such as extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages,” have been demonstrated, so as to justify a particularly large punitive damages award (i.e., over a single-digit ratio). ([Gober, supra, 137 Cal.App.4th at p. 222](#), citing to [State Farm, supra, 538 U.S. at p. 425](#); [Simon, supra, 35 Cal.4th at p. 1182](#).) The compensatory damages previously awarded were in a meaningful range, and the \$2,000-some economic damages and \$71,000-some noneconomic damages awarded do not fall into the category of the cases in which “a substantial compensatory award for emotional distress ... may be based in part on indignation at the defendant's act and may be so large as to serve, itself, as a deterrent.” ([Simon, supra, 35 Cal.4th 1159, 1189](#); [State Farm, supra, 538 U.S. at pp. 425-426](#).) It was appropriate for Robles to go forward and make out a case for punitives, to fully redress his injury. Also, even a six-to-one ratio of punitive damages represents a blot on a corporation's reputation and has a punitive effect. The level of punitive damages imposed is not required to be so large as to impede the activities of the corporation. On the whole, the trial court was justified in

choosing a multiplier that was within the single-digit range, that was not unduly large, and that was consistent with recent caselaw, such as *Gober*.

#### *E. Robles's Objections; Analysis*

\*26 Robles first argues that the trial court's JNOV ruling impermissibly took over the function of the jury, by balancing the harm and making new findings to replace the jury verdict dollar amount. We disagree that this type of factfinding took place, in light of the trial court's ruling that closely tracks the reprehensibility and ratio factors of case law, in order to adjust the punitive damages award to a constitutional maximum. The trial court properly and objectively considered such factors as a profit motive, the emotional suffering that Robles had shown, the showing that recurring incidents like this had taken place, and the lack of any accident in the corporate policies effectively allowing such detentions with false promises of leniency in return for a promissory note.

We also disagree with Robles that the trial court erroneously failed to take into account certain other reprehensibility factors, such as potential harm to Robles that never occurred (prosecution, jail time, wrongful imprisonment tort damages for a year, etc.). Instead, Robles has not shown that the relevant guideposts were misapplied in those respects.

Robles next contends that the six-to-one ratio, such as was established in [Gober, supra, 137 Cal.App.4th 204](#), is not appropriate in this case, because the compensatory damages he received do not contain any statutory entitlement to attorney fees, such as the plaintiffs in *Gober* had a right to under FEHA. ([Gov.Code, § 12900 et seq.](#)) He also contends *Gober* is distinguishable because the culpable corporate conduct in that case was mainly a failure to take corrective action against a rogue employee, whereas here, the corporate conduct amounted to the setting of policy at the highest levels of the company.

It is true that each case involves different facts and circumstances that must be evaluated by an appellate court when reviewing a record to establish a constitutional maximum for a punitive damages award. However, attorney fee awards per se are not a valid consideration in setting damages. In [Gober, supra, 137 Cal.App.4th 204](#), we explained that the six-to-one ratio was not the amount we believed the jury should have awarded, what this court would have awarded if we were triers of fact, or what ratio will always be appropriate under similar facts. Instead, we said that on that record, “this ratio is the absolute constitutional maximum that could possibly be awarded under these particular facts. [Citation.]” ([Id. at p. 223.](#))

Here too, we have conducted a de novo review of the record and have concluded, based on our evaluation of the guideposts provided by case law, that a six-to-one ratio of punitive to compensatory damages is sufficient to punish AutoZone and deter it and others from similar conduct in the future. This ratio is reasonable and proportionate to the amount of harm suffered and to the compensatory damages that Robles has already recovered, even if its emotional distress component already represents a punitive element. ([State Farm, supra, 538 U.S. at p. 426](#) [compensatory damages for emotional distress

already contain a punitive element].) The JNOV ruling withstands the challenges brought by each side.

### III

#### *COSTS: STATUTORY BASIS FOR EXPERT FEES AWARD*

##### *A. Background*

\*27 Following service of the notice of entry of judgment, Robles filed and served his memorandum of costs on June 19, 2006, seeking \$34,700.70. On July 31, 2006, AutoZone brought a motion to tax costs, complaining that the expert witness fees by the psychologist who testified, Dr. Kassin (\$16,617.75), and an economist, Brodshatzer, whose testimony was excluded (\$2,543.50), were not justified by statute. AutoZone relied on [Code of Civil Procedure section 1033.5](#), subdivision (b)(1), providing that expert fees are not ordinary costs unless the expert was court-appointed.

Robles objected that the motion was untimely, because it was filed more than 15 days (plus five for mailing) after the service of the cost memorandum. ([Cal. Rules of Court, rule 3.1700\(b\)\(1\)](#), formerly rule 870(b)(1).) He argued the motion should have been filed by July 10, so that any objections to the cost memo had been waived. He contended that the costs could then be entered by the clerk on a ministerial basis. ([Code Civ. Proc., § 1032](#); [Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co. \(1990\) 223 Cal.App.3d 924, 928.](#))

Also, even assuming that statutorily disallowed costs could be stricken by the court, Robles argued his costs properly included expert witness fees, because his [Code of Civil Procedure section 998](#) offer to allow judgment for \$40,000, made in 2002 before the first trial, was never accepted, and his judgment was greater than that.

In reply, AutoZone argued another settlement offer had been made by Robles three weeks before the second trial began in March of 2006, for \$731,500, and it claimed that no one thought the original offer still remained in force.

The court denied the motion as untimely, and ruled that even if it were to be considered on the merits, it was without support. The court relied on the original offer to allow judgment, made by Robles, as supporting an award of expert fees as costs. The motion to tax costs was denied and judgment was entered allowing the requested costs of \$34,700.70.

AutoZone challenges this award on several bases. First, it contends the motion should be considered timely, even though late filed, because the trial court always retains the power to strike costs forbidden by statute, such as expert fees not ordered by the court. ([Hansen v. Farmers Automobile Interinsurance Exch. \(1936\) 12 Cal.App.2d 493, 494.](#))

Second, it argues there is no support for an award of expert witness fees under [Code of Civil Procedure section 998](#), because that offer did not remain in effect during the second trial, and these trial preparation fees were not justifiably incurred, since they were related only to the second trial. ([Code Civ. Proc., § 1033.5](#), subd. (c).)

### *B. Applicable Standards*

This ground of appeal presents de novo statutory interpretation questions on undisputed facts. (*Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal.App.4th 382, 389-390 (*Wilson* ).) [Code of Civil Procedure, section 1033.5](#), subdivision (b) provides that the following items are not allowable as costs, except when expressly authorized by law: “(1) Fees of experts not ordered by the court.” [Code of Civil Procedure, section 1033.5](#), subdivision (c) requires that any award of costs is subject to the following rules: “(1) Costs are allowable if incurred, whether or not paid. [¶] (2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation. [¶] (3) Allowable costs shall be reasonable in amount. [¶] (4) Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion.”

\*28 Under [Code of Civil Procedure section 998](#), subdivision (a), “The costs allowed under [Sections 1031](#) and [1032](#) shall be withheld or augmented as provided in this section.” Under [Code of Civil Procedure section 998](#), subdivision (b), a statutory offer must be in writing, to allow judgment to be taken in accordance with the terms and conditions stated at that time, and shall include “a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed....”

Under [Code of Civil Procedure section 998](#), subdivision (b)(3): “For purposes of this subdivision, a trial or arbitration shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence.”

Under [Code of Civil Procedure, section 998](#), subdivision (d): “If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award ..., the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs.”

“In reviewing an award of costs and fees under [Code of Civil Procedure section 998](#), the appellate court will examine the circumstances of the case to determine if the trial court abused its discretion in evaluating the reasonableness of the offer or its refusal.

[Citations.] The purpose of [Code of Civil Procedure section 998](#) is to encourage the settlement of litigation without trial. [Citation.] ... To implement these principles, the following rule has been developed: ‘Where, as here, the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in [section 998](#). The burden is therefore properly on [defendant], as offeree, to prove otherwise.’ [Citation.]” ([Carver v. Chevron U.S.A., Inc. \(2002\) 97 Cal.App.4th 132, 152.](#))

### C. Analysis

As a threshold matter, we accept the argument by AutoZone that a trial court always retains the power to reduce a request for costs by any amounts that are expressly forbidden by statute. ([Hanson, supra, 12 Cal.App.2d 493, 494.](#)) However, that is not the issue presented here, due to the presence in the record of an earlier offer to allow judgment under [Code of Civil Procedure section 998](#).

\*29 AutoZone relies on several cases for the proposition that a first offer to allow judgment should not be considered to remain effective before a second trial, and may have been superseded. In [Distefano v. Hall \(1968\) 263 Cal.App.2d 380, 384-385](#), the court analyzed a predecessor statute to [Code of Civil Procedure section 998](#), on contractual principles, and held that a new statutory offer to allow judgment, communicated prior to a valid acceptance of a previous offer, served to extinguish and replace a previous one. The court said, “But we cannot attribute to the Legislature an intention to give less than full effect to the parties’ reappraisals of the merits of their respective positions where a case has been tried, appealed and reversed for retrial. Under such circumstances, an offer of compromise made before the second trial pursuant to section [997/998] should clearly supersede that made before the first trial. To deny the parties this flexibility would actually discourage settlements and defeat the very purpose of the act.” (*Ibid.*)

Likewise, in [Wilson, supra, 72 Cal.App.4th 382, 389-390](#), the court addressed the question of whether a subsequent statutory offer extinguishes a prior offer, under contract principles. The court approved the view that “there is an evolutionary aspect to lawsuits and the law, in fairness, must allow the parties the opportunity to review their respective positions as the lawsuit matures. The litigants should be given a chance to learn the facts that underlie the dispute and consider how the law applies before they are asked to make a decision that, if made incorrectly, could add significantly to their costs of trial.” However, the court also noted that the legislative purpose of [Code of Civil Procedure section 998](#) “is generally better served by a bright line rule in which the parties know that any judgment will be measured against a single valid statutory offer-i.e., the statutory offer most recently rejected-regardless of offers made earlier in the litigation. [Citation.]” (*Wilson, supra*, at p. 391.) There, the facts were that the plaintiff’s second statutory offer extinguished the first, such that the second offer had to be used to evaluate whether a more favorable judgment had been obtained at trial by the defendant. ([Code Civ. Proc., § 998](#), subd. (d).)

AutoZone further interprets [Code of Civil Procedure section 998](#), subdivision (b)(3) under these facts as limiting any expert witness fees that are allowable as costs to those incurred in the first trial.

None of these arguments is supported by the record. Although AutoZone referred in its reply points and authorities before the trial court to a second settlement offer by Robles shortly before the second trial, for over \$700,000, it has not provided any actual documentation of it in the record in the form of a declaration or a copy of a statutory offer to allow judgment that satisfies the standards of [Code of Civil Procedure section 998](#). The burden was on AutoZone to show that the memorandum of costs contained items that were not allowable. Under [Code of Civil Procedure section 1033.5](#), subdivision (c)(4), the trial court retains some discretion to allow cost items that were not mentioned in this section, upon application. Here, AutoZone failed to demonstrate that the original offer to allow judgment was no longer effective. As such, Robles could legitimately seek costs under [Code of Civil Procedure section 998](#), which would include expert witness fees, since this second trial was essentially a continuance and a completion of the first.

\*30 Finally, it is not dispositive that some of the expert work was not utilized at trial, since it is not always possible to anticipate which issues will be reached at trial. ([Code of Civ. Proc., § 1033.5](#), subd. (c).) The trial court acted within its discretion to determine that the cost memorandum was proper on its face and AutoZone had failed to show the expert witness fees were unauthorized by statute or otherwise improper. We have been given no basis in the record to reverse the JNOV or the order awarding costs.

#### DISPOSITION

The JNOV and the order awarding costs are affirmed. Costs on appeal are awarded to Robles.

WE CONCUR: [HALLER](#) and [McDONALD](#), JJ.

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