

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

MANTA MANAGEMENT  
CORPORATION,

Cross-complainant and Respondent,

v.

CITY OF SAN BERNARDINO,

Cross-defendant and Appellant.

E036942

(Super.Ct.No. SCVSS18157)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez,  
Judge. Affirmed.

Arias, Lockwood & Gray, Arias Aaen, Joseph Arias, Christopher D. Lockwood  
and Laura Tall Liu, for Cross-defendant and Appellant.

Roger J. Diamond for Cross-complainant and Respondent.

**INTRODUCTION**

The City of San Bernardino (the city) appeals from a judgment in the amount of  
\$1.4 million, representing damages incurred by Manta Management Corporation (Manta)  
as a result of a preliminary injunction the city obtained to enforce a zoning ordinance

prohibiting Manta's operation of an adult cabaret. The preliminary injunction was dissolved after this court upheld the trial court's ruling which declared the zoning ordinance unconstitutional, and the California Supreme Court denied review.

The city contends that damages are available for a wrongfully issued preliminary injunction only if a bond has been posted or if the party wrongfully enjoined prevails in a separate action for malicious prosecution. Manta contends that the trial court correctly found that it is entitled to recover damages resulting from the injunction, despite the absence of an injunction bond, via its cross-complaint for violation of its civil rights pursuant to section 1983 of title 42 of the United States Code.

The city also contends that the award of damages is not supported by substantial evidence because there was no factual basis for separating legal profits from profits derived from illegal activities (i.e., prostitution), and that the trial court improperly placed the burden of identifying "each dollar derived from prostitution" on the city. Finally, it contends that because a large portion of Manta's profits are derived from activities which violated a city ordinance, the court erred in excluding any evidence concerning the ordinance.

We will affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

The following background is derived from the record in an appeal in a related action (*People v. Manta Management Corp.* (Jan. 26, 1999, E019635) [nonpub. opn.]), and from the record in the present appeal.

In November of 1993, the city issued Manta a conditional use permit for the operation of a nightclub to feature live entertainment and dancing at a location on Hospitality Lane. The nightclub site is located in a regional commercial, or “CR-3,” zone. Under the city’s zoning ordinances as codified in its “Development Code,” title 19 of its municipal code, nightclubs are permissible land uses in CR-3 zones. (San Bernardino Mun. Code (SBMC), § 19.06.010, subd. 2.K.) Manta commenced operation of its nightclub in June of 1994, featuring stand-up comedy acts. At the time, the club was called The Rocket Theater.

Among the land uses regulated by the city’s code are adult businesses. (SBMC, § 19.06.030, subd. 2.A.) One of the business activities classified as an adult business is that of an “adult cabaret.” (*Id.*, subd. 2.A.3.) An adult cabaret is defined as a nightclub which regularly features live performances in which the performers display specified anatomical areas or engage in specified sexual activities. (*Ibid.*)

Under the code, adult businesses are not allowed in CR-3 zones. (SBMC, § 19.06.030, subd. 2.A.) Nevertheless, on November 14, 1994, Manta began featuring topless female dancers in its nightclub, thereby converting it into an adult cabaret. It was renamed The Flesh Club.

The zoning provisions of the city’s code were adopted in 1991 and periodically amended thereafter. At the time Manta initiated the operation of an adult cabaret, the most recent amendment of the zoning provisions regulating adult businesses was ordinance No. MC-909, adopted in August of 1994. Section 19.06.030, subdivision 2.A., as amended by ordinance no. MC-909, is hereafter referred to as the “initial ordinance.”

The initial ordinance severely limits the locations at which adult businesses can be operated in the city. Adult businesses are allowed only in CH (commercial heavy) and IL (industrial light) zones. Moreover, adult businesses cannot be established “within 2[,]000 feet of another such business or within 1[,]000 feet of any religious institution, school or public park within the city or within 1[,]000 feet of any property designated for residential use or used for residential purposes.” Distances between adult businesses are measured on a straight line, building to building. Distances between adult businesses and the other specified uses are measured in a straight line, property line to property line. Manta’s location complied with the distance limitations, but not with the provision restricting adult cabarets to CH and IL zones.

On the same day that it started to operate the nightclub as an adult cabaret, Manta sued the city in federal court, alleging inter alia that the location limitations are unconstitutionally restrictive. The action sought both a judicial declaration that it has the right to present topless entertainment at its nightclub, and a permanent injunction preventing the city from enforcing the initial ordinance.

In January of 1995, while the federal action was pending, the city attorney brought an action in the name of the People of the State of California (Code Civ. Proc., § 731), alleging the operation of Manta’s adult cabaret constitutes a public nuisance, and seeking to abate the alleged nuisance through preliminary and permanent injunctions. Thereafter, the city convinced the district court to abstain from deciding the same issue pending in the state court by dismissing the federal action.

In February of 1995, the city amended its action by adding a claim for civil penalties for engaging in unlawful business practices. (Bus. & Prof. Code, §§ 17200 & 17206.) That same month, the trial court (Hon. Duane M. Lloyd) granted the city's motion for preliminary injunction and ordered Manta to cease performances of the type characterizing adult cabarets.

Manta appealed from the order granting the preliminary injunction. While that appeal was pending, Manta cross-complained against the city for declaratory relief and damages. The cross-complaint included several state causes of action and a cause of action alleging that the "ordinances and code provisions and actions" of the city violated its civil rights under the federal and state constitutions, and sought relief pursuant to section 1983 of title 42 of the United States Code.

Trial commenced in July of 1996 before the Hon. Carl Davis. The trial court bifurcated the issues, ruling that the issue of whether the preliminary injunction should be dissolved or made permanent would be tried before any damage issues. During the trial on the injunction issue, the city adopted an urgency ordinance, No. MC-977, which further amended the provisions of its code governing adult businesses by slightly enlarging the areas in which adult businesses could be located.

Following a lengthy nonjury trial, the trial court ruled that the initial ordinance is constitutionally invalid because it neither serves a substantial governmental interest nor allows for reasonable alternative avenues of communication. It also found that the constitutionality of the code, as amended by ordinance No. MC-977, was irrelevant

because Manta had established a prior nonconforming use before ordinance No. MC-977 was adopted. Accordingly, it dissolved the preliminary injunction.

The city appealed from the order dissolving that injunction. In response to the city's petition for writ of supersedeas, we stayed the trial court's order. On our own motion, we dismissed as moot Manta's appeal from the order granting the preliminary injunction. We concluded that the trial court correctly determined that the zoning ordinances violated Manta's First Amendment right of expression and affirmed the trial court's order dissolving the injunction. We also lifted the stay imposed by our writ of supersedeas.

Following the issuance of our opinion in *People v. Manta Management Corp.*, *supra*, E019635, the city filed a motion for judgment on the pleadings. The court denied the motion, holding that the cross-complaint was not based "solely on injunctive relief remedies," but instead on "a separate and distinct action for violation of constitutional rights . . . through the issuance of unconstitutionally vague ordinances designed to thwart those rights." The city's subsequent motion for summary adjudication of issues was granted as to all causes of action except the civil rights cause of action. The court found that it was undisputed that Manta did not claim any damages except those caused by the preliminary injunction and the writ of supersedeas.

The parties agreed to hold a two-step trial, first to determine liability and second to determine damages. Prior to the commencement of the bench trial, Manta filed an amended cross-complaint, alleging only the civil rights violation.

In the liability phase, the court (Hon. Donald R. Alvarez) found that the act of requesting and obtaining the preliminary injunction and the stay pending appeal constituted a basis for liability under section 1983 of title 42 of the United States Code (hereafter section 1983). In the subsequent trial on damages, the jury awarded Manta \$1.4 million in damages for lost profits.<sup>1</sup>

Following denial of its motions for judgment notwithstanding the verdict and for a new trial, the city filed a timely notice of appeal.

## DISCUSSION

### THE CITY'S ACT OF OBTAINING AN INJUNCTION TO ENFORCE AN UNCONSTITUTIONAL ORDINANCE IS AN ACT IN VIOLATION OF THE FIRST AMENDMENT WITHIN THE MEANING OF SECTION 1983

#### Introduction

Under most circumstances, if a preliminary injunction is dissolved as having been improperly granted, the formerly enjoined party may recover damages only by proceeding against the injunction bond or surety. If no bond was required as a condition of issuance of the preliminary injunction, or if the amount of the bond was insufficient to compensate the enjoined party, the party may recover his damages only if he can prevail in an independent action for malicious prosecution, i.e., by showing that the injunction was obtained maliciously and without probable cause. This is true both under California's statutory scheme relating to injunctions and under federal law. (*Dickey v.*

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<sup>1</sup> Facts pertaining to the damages issues will be discussed below.

*Rosso* (1972) 23 Cal.App.3d 493, 497-498; *Coyne-Delany Co., Inc. v. Capital Development Bd. of State of Ill.* (7th Cir. 1983) 717 F.2d 385, 393 (*Coyne-Delany*).

Because cities are exempt from the requirement of posting a bond as a condition of issuance of a preliminary injunction (Code Civ. Proc., § 995.220; *City of South San Francisco v. Cypress Lawn Cemetery Assn.* (1992) 11 Cal.App.4th 916, 920-922), the city did not post an injunction bond. On appeal, it argues that because there was no bond, it cannot be liable to Manta on its cross-complaint for damages from the injunction and the stay on appeal (hereafter referred to collectively as the injunction) because Manta did not include a cause of action for malicious prosecution in its cross-complaint.

The trial court found, however, that the acts of seeking and obtaining the injunction were an effort to enforce the unconstitutional zoning ordinance and thus subjected the city to liability under section 1983 as a violation of Manta's First Amendment rights. For that reason, it found that Manta's right to damages was independent of the normal remedies for wrongful issuance of an injunction. On appeal, the city contends that it is not a violation of the First Amendment to seek redress through the courts and that it cannot be liable for damages under section 1983 on that basis.

#### Standard of Review

The pertinent facts are undisputed, and we therefore independently review the issue as a question of pure law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.)



## Discussion

We address first the city's contention that it cannot be liable for damages under section 1983 based on its action of seeking to enforce its unconstitutional ordinance by means of a preliminary injunction.

As relevant to this case, section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ." Section 1983 was enacted specifically to provide compensation "to those deprived of their federal rights by state actors." (*Felder v. Casey* (1988) 487 U.S. 131, 141.) Monetary damages are available under section 1983 for "actions 'found . . . to have been violative . . . of constitutional rights and to have caused compensable injury.' [Citation.]" (*Carey v. Phipus* (1978) 435 U.S. 247, 255, italics omitted.)

Local governments, including cities, are "state actors" within the meaning of section 1983. (*Monell v. Department of Social Services of City of New York* (1977) 436 U.S. 658, 690 (*Monell*); *Felder v. Casey*, *supra*, 487 U.S. at p. 139.) Thus, a city may be sued for "monetary, declaratory or injunctive relief" under section 1983 if it "unconstitutional[ly] implements or executes a policy statement, *ordinance*, regulation, or decision officially adopted and promulgated by [the city's] officers." (*Monell*, at p. 690, italics added.)

“Implementation” of an ordinance necessarily includes official action to enforce it. Thus, a city is liable for damages which result from an arrest or criminal prosecution pursuant to an ordinance which is later determined to be unconstitutional. (*Grossman v. City of Portland* (9th Cir. 1994) 33 F.3d 1200, 1203-1210; *Murray v. City of Sioux Falls* (8th Cir. 1989) 867 F.2d 472, 474, fn. 2.) Cities are also liable for damages resulting from civil actions brought to enforce unconstitutional ordinances. In *RK Ventures, Inc. v. City of Seattle* (9th Cir. 2002) 307 F.3d 1045, the Ninth Circuit held that the plaintiff could maintain a section 1983 action for damages resulting from prosecution of a civil abatement action based on an unconstitutional ordinance. (*Id.* at pp. 1050-1063.) In *Gerritsen v. City of Los Angeles* (9th Cir. 1993) 994 F.2d 570, 575-578, 580, certiorari denied (1993) 510 U.S. 915, the same court held that a city’s enforcement of an unconstitutional ordinance restricting handbill distribution supports a section 1983 action for monetary damages. Other courts have applied section 1983 to civil enforcement of unconstitutional ordinances in a variety of contexts. (See *AAK, Inc. v. City of Woonsocket* (D.R.I. 1993) 830 F.Supp. 99, 100-101, 105 [imposition of a higher licensing fee on an adult cabaret than on other similar entertainment businesses supports claim for monetary damages]; *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.* (N.D.Ill. 1985) 622 F.Supp. 423, 433-434 [enforcement of invalid ordinance regulating use of pesticide supports claim for damages]; *Negin v. City of Mentor, Ohio* (N.D. Ohio 1985) 601 F.Supp. 1502, 1505 [city is liable for damages resulting from unconstitutional application of zoning ordinance].)

None of these cases, nor any others we have found, involves a situation similar to this case, in which the city's enforcement of its ordinance was sanctioned by a court before the ordinance was found to be unconstitutional. During oral argument, it was suggested that the city is immune from liability because it enforced the ordinance in good faith reliance on an injunction duly issued by the trial court.<sup>2</sup> We have found no cases which are directly on point.<sup>3</sup> However, we conclude that the city's good-faith reliance on the trial court's issuance of the preliminary injunction does not provide it with immunity.

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<sup>2</sup> In a similar vein, the city contends that it cannot be liable for damages resulting from the preliminary injunction in the absence of a showing that it acted maliciously. However, the cases the city relies on in support of that contention do not involve claims arising under section 1983. Malice is not an element of a section 1983 claim based on enforcement of an unconstitutional ordinance: As we discuss below, a city is liable for damages resulting from its enforcement of an unconstitutional ordinance even if it acts in good faith.

<sup>3</sup> In *Dennis v. Sparks* (1980) 449 U.S. 24 (*Dennis*), the United States Supreme Court accepted, without discussion, that if a state actor is involved in the procurement of an injunction which violates the constitutional rights of the party enjoined, section 1983 may be invoked in an action for damages resulting from the injunction. However, *Dennis* is factually distinct from this case. In *Dennis*, the plaintiffs brought an action for damages under section 1983 against a state court judge and other individuals who allegedly conspired to bribe the judge to issue an injunction prohibiting the plaintiffs from producing minerals from certain oil leases, thus depriving the plaintiffs of property without due process of law. The defendants moved for dismissal, arguing that the judge was immune from damages for his official, albeit corrupt, acts, and that his dismissal from the action compelled the conclusion that the remaining defendants did not act under color of law. (*Dennis*, at pp. 25-26.) The Supreme Court held that although the judge was immune from damages because he acted within his official capacity, his intentional involvement in a conspiracy to obtain an injunction by corrupt means constituted state action, and the private parties who conspired with him acted "under color of law" within the meaning of section 1983. (*Dennis*, at pp. 27-30.) In this case, there is no issue of bad faith on the part of the city, and certainly no suggestion of corruption on the part of the court which issued the injunction. Moreover, because it does not explicitly address the question of whether the procurement of an injunction which in itself violates the enjoined

[footnote continued on next page]

In *Owen v. City of Independence, Mo.* (1980) 445 U.S. 622 (*Owen*), the United States Supreme Court addressed the question whether section 1983 affords qualified immunity to a municipality if the city official or employee responsible for the unconstitutional action would be entitled to such immunity, i.e. if the official or employee was acting in good faith, based on an objectively reasonable belief that his or her conduct was lawful. (See *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818, 819.) After reviewing the language of section 1983 and its legislative history, the Supreme Court held that even if employees or officials may be entitled to qualified immunity, municipalities themselves have *no* immunity from damages liability “flowing from their constitutional violations.” (*Owen*, at p. 657.)

The court explained that section 1983 “creates a species of tort liability that on its face admits of no immunities. [Citation.] Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted.” (*Owen, supra*, 445 U.S. at p. 635.) Despite the expansive language of section 1983 and the absence of any express incorporation of any common-law immunities, the court noted that it had on several occasions “found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’ [Citation.]”

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*[footnote continued from previous page]*

party’s constitutional rights is actionable under section 1983, *Dennis* is not citable as authority on the issue. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 88 [case is not authority for points not decided].)

(*Owen*, at p. 637.) Thus, the court has interpreted section 1983 to encompass certain immunities that were well established at common law and which were compatible with the purposes of section 1983. However, there is no tradition of immunity for municipalities. (*Owen*, at pp. 638-650.) Congress enacted section 1983 to provide a broad remedy of compensation for violation of federally protected civil rights and intended it to be broadly and liberally construed in favor of providing redress (*Owen*, at p. 650, citing *Monell*, *supra*, 436 U.S. at p. 685), and the court found no reason “to suppose that injuries occasioned by a municipality’s unconstitutional conduct were not also meant to be fully redressable through [section 1983’s] sweep.” (*Owen*, at p. 650.)

Moreover, to afford such an immunity even for good-faith constitutional violations would be contrary to the purposes of section 1983. Section 1983 was intended not only to provide compensation to the victims of past abuses, “but to serve as a deterrent against future constitutional deprivations, as well.” (*Owen*, *supra*, 445 U.S. at p. 651.) The court held that the knowledge that a city will be liable “for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights.” (*Id.* at pp. 651-652.)

In summary, the court held, “municipalities have no immunity from damages liability flowing from their constitutional violations.” (*Owen*, *supra*, 445 U.S. at p. 657.) With respect to governmental responsibility, “No longer is individual ‘blameworthiness’ the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct. . . . [I]n the scenario of the

[section] 1983 cause of action . . . [t]he innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public [as represented by the municipal entity] will be forced to bear only the costs of injury inflicted by the ‘execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.’ [Citation].” (*Id.* at pp. 657-658.)

*Owen, supra*, 445 U.S. 622 makes it abundantly clear that a city has no immunity for constitutional violations, and that it is no defense to a section 1983 action that the city acted based on a good-faith belief that its actions were lawful. Reliance on existing law does not confer immunity. Rather, a city is liable for violations of constitutional rights “even if those rights had not been clearly established when the violation occurred. Such a determination merely makes municipalities, like private individuals, responsible for anticipating developments in the law. We noted that such liability would motivate each of the city’s elected officials to ‘consider whether his decision comports with constitutional mandates and . . . weigh the risk that a violation might result in an award of damages from the public treasury.’ [Citation.]” (*American Trucking Associations, Inc. v. Smith* (1990) 496 U.S. 167, 185.) It is only where changes in the law are not reasonably foreseeable that a city may avoid liability if its conduct comported with the law as it existed at the time of the conduct in question. (*Ibid.*) Similarly, good-faith reliance on a

preliminary injunction or other order of a trial court does not confer such a defense. Rather, a city must anticipate that a trial court ruling may be overturned on appeal and must weigh the risk that proceeding in reliance on the trial court order may result in an award of damages.

For the foregoing reasons, we conclude that a city is liable for damages under section 1983 if it chooses to enforce an unconstitutional ordinance by means of a preliminary injunction. It is no defense that the injunction was sought in good faith, nor does the city's reliance on a preliminary injunction duly issued by a trial court insulate it from liability.

We next address the city's contention that Manta has no remedy for the improperly issued injunction because it failed to obtain an injunction bond.

The city is correct that under both California and federal law, a party which is subjected to an improper preliminary injunction may, as a general rule, recover its damages only by an action to recover on an injunction bond. (*Dickey v. Rosso, supra*, 23 Cal.App.3d at p. 497; *Coyne-Delany, supra*, 717 F.2d at p. 393.) An exception to that rule lies, however, if the party which obtained the injunction did so maliciously and without probable cause. (*Robinson v. Kellum* (1856) 6 Cal. 399, 399-400; *Dickey v. Rosso, supra*, 23 Cal.App.3d at p. 497; *Meyers v. Block* (1887) 120 U.S 206, 211-212; *Buddy Systems, Inc. v. Exer-Genie, Inc.* (1976) 545 F.2d 1164, 1168.) Under those circumstances, the wrongfully enjoined party can sue for malicious prosecution and can recover damages even if there was no injunction bond. (*Buddy Systems, Inc. v. Exer-Genie, Inc., supra*, 545 F.2d at p. 1168.) Because the act of seeking the injunction

maliciously and without probable cause is itself a tort, the action is not subject to the statutory rules which limit recovery of damages for the mere erroneous issuance of a preliminary injunction. (See *Kellum v. Robinson*, *supra*, 6 Cal. at p. 400.)

Similarly, a section 1983 claim is a “species of tort.” (*Owen*, *supra*, 445 U.S. at p. 635.) Thus, just as the act of seeking an injunction maliciously and without probable cause is a tort, so too is the act of seeking and obtaining an injunction to enforce an unconstitutional ordinance. The trial court recognized this, holding that the injunction was the vehicle by which the city sought to enforce an unconstitutional ordinance, and that Manta’s cross-complaint was thus based not on the mere wrongful issuance of an injunction but on “a separate and distinct action for violation of [Manta’s] constitutional rights” by means of the injunction. By analogy to the rule that damages for a maliciously obtained injunction are available regardless of the existence of an injunction bond, a section 1983 action based on a city’s act of obtaining an injunction to enforce an unconstitutional ordinance is also not subject to the rule that damages may be recovered only in an action on a bond.

The city cites *Coyne-Delany*, *supra*, 717 F.2d 385 as authority that the rule that damages for an improperly obtained injunction are available only if an injunction bond has been obtained applies in section 1983 litigation. However, *Coyne-Delany* does not state such a rule. Moreover, its facts are the converse of the facts in this case. In that case, a manufacturer sued a public entity for alleged deprivation of a constitutionally protected property right in connection with a state contract to replace plumbing fixtures in an Illinois state prison. The manufacturer obtained a temporary restraining order to



prevent the threatened deprivation of its rights. When the subsequent preliminary injunction was dissolved, the court held that the defendant -- the public entity -- could obtain damages only up to the amount of the injunction bond. (*Id.* at pp. 388-390, 393-394.) Thus, in that case, the party which alleged a deprivation of its civil rights was also the party which sought and obtained the preliminary injunction. In this case, the injunction was not issued to enjoin an alleged violation of Manta's civil rights but rather was the *means* of depriving Manta of its civil rights. *Coyne-Delany* is thus inapposite.

In summary, we conclude that the section 1983 action is a tort action independent of the statutory remedies for improperly issued preliminary injunctions, and that the absence of a bond is irrelevant to Manta's claim for damages.<sup>4</sup>

The city next contends that Manta waived its right to damages because it failed to "invoke the federal supremacy clause" and demand an injunction bond under rule 65 of the Federal Rules of Civil Procedure.

Rule 65 provides in pertinent part that "no preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems

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<sup>4</sup> There is an independent reason that section 995.220 of the Code of Civil Procedure cannot be applied to defeat Manta's claim. Section 995.220 was enacted to provide municipalities with immunity from damages resulting from improperly issued injunctions. (*City of South San Francisco v. Cypress Lawn Cemetery Assn.*, *supra*, 11 Cal.App.4th at p. 922.) However, the United States Supreme Court has held that conduct which is wrongful under section 1983 cannot be immunized by state law. (*Martinez v. State of California* (1980) 444 U.S. 277, 284, fn. 8.) "'A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. [Citation.] The immunity claim raises a question of federal law.' [Citation.]" (*Ibid.*)

proper, for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.” (Fed. Rules Civ.Proc., rule 65(c), 28 U.S.C.) A state public entity, such as a city, is apparently not exempt from this requirement. However, federal procedural rules are generally not applicable in state court proceedings (*Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.* (D.C. Cir. 1971) 442 F.2d 1234, 1239; *Rader v. Baltimore & O. R. Co.* (7th Cir. 1940) 108 F.2d 980, 986), and the city provides no authority or argument which supports its claim that Manta could have invoked rule 65 of the Federal Rules of Civil Procedure to require the city to post a bond. Moreover, because we have determined that Manta’s section 1983 claim is not subject to the rules concerning damages resulting from an erroneously issued preliminary injunction, the availability of a bond is irrelevant, and we need not resolve this issue.

Finally, the city argues that under federal law, there is good cause for denying damages based on Manta’s failure to oppose the injunction on the grounds on which it ultimately prevailed at trial. An appellate court will ordinarily not decide any issue not adjudicated in the trial court. (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486.) The city does not provide any citation to the record to demonstrate that the issue was adjudicated below, and we therefore decline to address it. (Calif. Rules of Court, rule 14(a)(1)(C); *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

ISSUES PERTAINING TO BURDEN OF PROOF AND SUFFICIENCY OF THE  
EVIDENCE

Introduction

The city makes three arguments which are related: that Manta was not entitled to recover any damages based on profits it would have made from illegal activities; that the court incorrectly allocated to it the burden of proving how much of Manta's profits were derived from illegal activities; and that the evidence was insufficient to allow the jury to determine the amount of profit from legal activities Manta lost. The following background pertains to those issues.

Approximately 53 months elapsed between the time Manta was forced by the preliminary injunction to cease operating as an adult cabaret and the commencement of the trial on damages. By the time the damages trial commenced, Manta had been back in operation as an adult cabaret for approximately the same length of time. For this reason, the trial court decided that the profit Manta had made since reopening was the most appropriate basis for determining the profit Manta would have made during the period the club was not operating. Accordingly, Manta's case in chief consisted of evidence of the expenses it incurred in maintaining its premises while it was unable to operate as an adult cabaret and the profit it had earned since it reopened. Its expenses during the shutdown, for items such as rent, maintenance of the building and landscape maintenance, totaled \$943,208. Its net profits after reopening totaled \$1,669,064. Manta thus requested damages in the amount of \$2,612,272.

The city challenged the accounting basis for Manta's claimed damages<sup>5</sup>, and also presented evidence that a number of the dancers at the club engaged in prostitution, with the knowledge and encouragement of Manta's owner, Waldon Randall Welty, and the club's management. Manta rebutted the city's evidence concerning prostitution by testimony from several dancers that while some of the women engaged in prostitution, the majority of them engaged only in legal lap dances, and that Manta's management did not countenance prostitution. Manta's evidence included testimony from one of its managers that she reprimanded, suspended and occasionally terminated dancers who went beyond the bounds of legality.

A special verdict required the jury to answer four questions pertaining to damages. The jury answered "yes" to the question, "Do you find that any net profits earned between July 9, 1999 and March 31, 2004 were earned from illegal activities?" and the question, "Are you able to reasonably allocate Manta Management, Inc.'s net profit as between lawfully earned net profit and unlawfully earned net profit?" The jury awarded Manta \$1.4 million in damages, but was not required to specify how it arrived at that figure.

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<sup>5</sup> Although the city challenged Manta's expert as to the propriety of adding Manta's out of pocket expenses during the shutdown to the profits it earned during the period after it reopened to determine its total damages, the city's accounting expert agreed that this was appropriate.

## Discussion

### 1. Manta Was Entitled to Recover Profits It Would Have Earned from Its Legal Activities

The city contends that because some of Manta's income was earned from prostitution, it should be barred from recovering any of its lost profits. The city relies on cases which illustrate the principle that no person or entity is entitled to sue to recover damages incurred in connection with illegal activity. (See, e.g., *Homami v. Iranzadi* (1989) 211 Cal.App.3d 1104, 1109-1113 and cases discussed therein.) It also relies by analogy on cases which hold that illegal contracts cannot be enforced.

We agree that Manta is not entitled to recover any portion of its profits that were generated by illegal activity. However, just as contracts which have both legal and illegal objectives may be enforced if the illegal objectives can be severed from those which are legal (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 122-123), a business which engages in some illegal conduct should be allowed to recover its legally-earned profits.

With respect to contracts that are partially illegal in their terms or objectives, the California Supreme Court has held that “. . . [w]hether a contract is entire or separable depends upon its language and subject matter . . . . If the contract is divisible, the first part may stand, although the latter is illegal. [Citation.]’ [Citations.] . . . Thus, the rule relating to severability of partially illegal contracts is that a contract is severable if the court can, consistent with the intent of the parties, reasonably relate the illegal consideration on one side to some specified or determinable portion of the consideration

on the other side.” (*Keene v. Harling* (1964) 61 Cal.2d 318, 320-321; see *Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at p. 122.)

These principles apply to contracts which involve subject matter which is subject to criminal prosecution. Thus, in *Keene v. Harling*, *supra*, the court held that a contract for the sale of coin-operated machines was severable and thus partially enforceable, even though some of the machines were illegal gambling machines. Because the contract specified the consideration to be paid for each machine, the legal portion of the contract could be severed from the illegal portion, and the seller was entitled to the agreed-upon consideration for the legal machines. (*Keene v. Harling*, *supra*, 61 Cal.2d at pp. 319-321.) It is only where the agreement is “permeated by an unlawful purpose” to the extent that the illegality cannot be purged from the contract without reforming it that it must be declared void. (*Armendariz v. Foundation Health Psychcare Services, Inc.*, *supra*, 24 Cal.4th at pp. 124-125.)

Although the analogy between illegal contracts and the situation before us is not exact, the underlying principle applies to both situations. If a business earns profits from some activities which are legal and some which are illegal, it should be entitled to recover legal profits it would have made but for the wrongful conduct of another, unless the legal profits cannot be separated from the illegal profits or the illegality so permeates the business that a trier of fact could conclude that it is essentially a criminal enterprise.

Here, the jury found that it was possible to separate Manta’s legal revenue from the revenue it derived from illegal activities. We address the sufficiency of the evidence supporting that determination below.

## 2. The Instructions on Burden of Proof

The city complains that the jury instructions erroneously placed on it the burden to prove the portion of Manta's lost profits which resulted from illegal activity. It contends that once it proved that some of Manta's profits resulted from prostitution, the burden should have shifted to Manta to prove what portion of its profits resulted from legal activities. Instead, it complains, the instructions told the jury that "it was the City's burden to prove each dollar of income which came from prostitution, and told the jury that Manta was entitled to every dollar the City could not expressly prove came from prostitution."

This is patently untrue. Not only do the instructions not place the burden on the city to prove that "every dollar that came from prostitution," the instructions implicitly, if not explicitly, placed the burden of proof on Manta.

After explaining that lost profits can be recovered only when the evidence shows with reasonable certainty both that profits would have been earned and the amount of those profits, the court instructed that the party which seeks damages based on lost profits "has the burden of presenting the best evidence available under the circumstances to attempt to establish a claim for lost profits." It went on to instruct that if the jury found that the profits Manta contended it would have earned during the shutdown "were generated in whole or in part from illegal activities, you may consider that fact in evaluating what percentage, if any, of such profits should be excluded from [Manta's] lost-profits-damages claim." Finally, it reiterated that a party "cannot recover damages

. . . if the profits would have been earned from illegal activities.” Nowhere in the instructions did the court state that the city had any burden whatsoever. We conclude that the jury would have understood the instructions quoted above to require Manta to prove, with reasonable certainty, the amount of *legal* profits it lost as a result of the injunction. Thus, assuming that the burden of proof should have been on Manta, as the city contends, the instructions correctly allocated the burden.

We do agree with the city that the court erred in instructing the jury that if it found that any of Manta’s profits resulted from illegal activities, it “may” consider that fact in evaluating the percentage of profits which should be excluded from the damage award. Because Manta was not entitled to recover any lost profits which were derived from illegal activities (*Homami v. Iranzadi, supra*, 211 Cal.App.3d at pp. 1109-1113), the language should have been mandatory rather than permissive. However, in light of the fact that the jury awarded Manta \$1.4 million rather than the \$2.6 million Manta sought, it is obvious that the jury did factor in the percentage of profits it determined to have been derived from prostitution. Thus, there is no reasonable probability that the city would have fared better if the jury had been instructed that it was required to deduct illegal profits from any award of damages, and the error was not prejudicial. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [failure to give burden-shifting instruction not prejudicial pursuant to Cal. Const., art. VI, § 13].)



3. Substantial Evidence Supports the Award of Damages

The city contends that if Manta was entitled to damages based on income it derived from legal activities, the evidence was insufficient to permit the jury to determine what portion of Manta's income was derived from legal activities.

On a claim of insufficient evidence, we review the entire record to determine whether there was substantial evidence in support of the judgment. We review the evidence in the light most favorable to the respondent and resolve all evidentiary conflicts and indulge all reasonable inferences in support of the judgment. If there is substantial evidence, contradicted or uncontradicted, which will support the judgment, we must uphold it. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

We do not know, of course, how the jury arrived at the amount it awarded. However, there were two components to Manta's damages: the expenses it incurred during the shutdown and the profits it would have made during that period. The city does not dispute that there was substantial evidence as to the expenses, nor does it claim that the expenses were tainted by illegality. An award of the full amount of the expenses would therefore be supported by substantial evidence. Assuming that the jury did award Manta the full amount of its expenses, the balance of the damages it awarded based on lost profits is \$456,792 (\$1,400,000 - \$943,208). This is slightly more than 25 percent of the amount of Manta's claim for lost profits. If there is substantial evidence which supports the conclusion that approximately 25 percent of Manta's income was derived from legal activities, we must affirm the judgment.

There was substantial evidence that some of Manta's income was derived from legal activities. In addition to fees charged for lap dances, the club also obtained income from admission fees and sales of soft drinks at greatly inflated prices. Lap dancing which did not involve any acts amounting to prostitution was legal during the period that Manta was shut down. (See discussion in next section.) The club also had a stage show, which was legal. Although there is evidence that a great deal of sexual activity took place under the guise of lap dances, the evidence also showed that some customers did not purchase lap dances, but merely watched the stage show. Others who paid for lap dances did not actually have the dancer perform, but merely engaged in conversation with the dancer. Furthermore, not all of the lap dancers engaged in prostitution. The evidence concerning the extent to which prostitution occurred during lap dances was conflicting. Some of the dancers or former dancers who testified said it was rampant and blatant while others said they saw sexual activity or evidence of sexual activity, such as empty condom wrappers on the floor, only occasionally.

We agree that the evidence does not permit a precise apportionment between the legal and illegal sources of Manta's income. However, such precision is not necessary: A business is not required to prove lost profits with precision, but only with "reasonable certainty." (*S.C. Anderson, Inc. v. Bank of America* (1994) 24 Cal.App.4th 529, 537-538.) Resolution of conflicts in the evidence and determinations as to the credibility of witnesses are the exclusive province of the jury. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) The evidence permitted a range of inferences as to the extent of the prostitution which took place at The Flesh Club. It certainly supports the inference

that Manta derived about 75 percent of its profits from illegal activities and about 25 percent from legal activities.

THE TRIAL COURT PROPERLY EXCLUDED REFERENCE TO SAN  
BERNARDINO MUNICIPAL CODE SECTION 5.14

The city contends that the court erred by refusing to admit evidence and to instruct the jury that Manta violated San Bernardino Municipal Code section 5.14, which prohibits lap dancers from touching customers. It contends that because the evidence showed that many, perhaps most, of the dancers did touch their customers while performing lap dances, the majority of Manta's income was illegal.

The city does not make clear the legal basis for its argument that the trial court erred, nor does it state the applicable standard of review. However, since -- as we discuss below -- the trial court determined that the evidence pertaining to section 5.14 was not relevant, we review the court's ruling for abuse of discretion. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 8.)

The city argued below that it should be allowed to adduce evidence that San Bernardino Municipal Code section 5.14 prohibits lap dancers from touching customers. The trial court ruled that the ordinance or any violation of its provisions was irrelevant because, as the city conceded, the ordinance was enacted only after Manta resumed operations in July 1999. Thus, any lap dances which involved touching the customers, but falling short of prostitution, would have been legal during the period Manta was shut down. Even if Manta's post-July 1999 earnings for such dances were illegal, this did not preclude Manta from using its post-July 1999 earnings and expenses as the basis for

establishing the profit it would have made during the shutdown because Manta was not seeking to recover profits based on activities which were illegal when they were performed. Rather, it was merely using its post-July 1999 activities as a model to establish as nearly as possible the profits it would have earned for the same activities during the earlier period, when they undisputedly were legal. The court also declined the city's request to instruct on the ordinance.

Evidence Code section 350 precludes the admission of any evidence except relevant evidence. Relevant evidence is that which has a tendency in reason to prove a disputed fact which is of consequence to the determination of the action. (Evid. Code, § 210.) The trial court has broad discretion to determine what evidence is relevant. (*People v. Cash* (2002) 28 Cal.4th 703, 726.) Here, there was no abuse of discretion.

The city cites no authority which establishes the relevance of evidence that Manta's post-July 1999 activities violated the ordinance. It relies by analogy on cases which hold that a person may not seek to recover damages for breach of contract where the contract itself was illegal, or where actions performed pursuant to the contract were illegal. It also argues that the fact that the sale of opium and cocaine was legal at one time would not permit a seller of those drugs to bring an action for breach of contract for goods sold after they became illegal.

These analogies are inapt, primarily because Manta is not seeking compensation for acts which were illegal when they were performed. Rather, it is seeking damages for profits it would have earned from activities it would have engaged in at a time when those activities were legal, had the city not prevented it from doing so.

We find no abuse of discretion in the trial court's decision to allow Manta to use its post-July 1999 income and expenses as the basis for proving the profit it would have earned if it had been allowed to operate during the 53-month shutdown, nor any abuse of discretion in determining that it was not relevant that some of activities it engaged in post-July 1999 were illegal solely by virtue of an ordinance which was enacted in July 1999. Those activities were legal prior to July 1999, and any profits Manta might have earned based on those activities would also have been legal.

DISPOSITION

The judgment is affirmed. Manta is to recover its costs on appeal.

**CERTIFIED FOR PUBLICATION**

/s/ McKinster  
Acting P.J.

We concur:

/s/ Richli  
J.

/s/ King  
J.