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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LATRELL SPREWELL, Plaintiff and Respondent, v. NINA JURJEVIC et al., Defendants and Appellants.	A125569/A126272 (Alameda County Super. Ct. No. RG06258200)

Respondent Latrell Sprewell sold his residential property to Gulalai Rahimi in 1999. Rahimi later discovered flooding in the basement of the home. She successfully sued Sprewell for failure to disclose the property's preexisting water intrusion problems. Sprewell paid $539,079.66 to satisfy a judgment in Rahimi's favor.

Sprewell subsequently sought indemnity from the real estate broker and the agents who had represented him in the property sale (Defendants), asserting claims for negligence and breach of fiduciary duty, and a jury returned a verdict for Sprewell. The jury also found Sprewell to have been negligent, but further found that Sprewell's negligence was not a substantial factor in his damages. The court entered judgment for Sprewell for the full amount of the Rahimi judgment. Defendants moved for a new trial on the ground that the jury had not properly apportioned liability. The court conditionally granted the motion and ordered a new trial on all issues unless Sprewell accepted a 20 percent remittitur of damages. Sprewell accepted the remittitur and the court entered judgment accordingly. The court also granted Sprewell's motions for prejudgment interest and attorney fees.

While we find that the trial court did not abuse its discretion in ordering a new trial on comparative fault, we conclude the trial court erred in ordering the remittitur based on its own assessment of comparative fault, and by granting a new trial on all issues, rather than limiting retrial to the issue of apportionment. We therefore reverse the judgment and modify the new trial order to remove the remittitur condition and to limit the retrial to apportionment of liability.

I. BACKGROUND

Sprewell sued Nina Jurjevic, Tannis Kristjanson, and Mason-McDuffie Real Estate, Inc. (Mason-McDuffie) for equitable indemnity and declaratory relief. As amended in May 2006, the complaint alleged that Sprewell originally purchased certain residential property in Hayward (Property) in about 1995. The Property sellers were represented by Mason-McDuffie as real estate broker and Jurjevic as real estate salesperson. Although flooding and water intrusion had occurred in the Property before 1995, Jurjevic and Mason-McDuffie disclosed no such problems to Sprewell. After Sprewell moved in, he discovered wet carpeting in the basement and hired a contractor to determine the cause of the problem. He sent the contractor's bid to Jurjevic with a request to resolve the problem. Jurjevic arranged for a sump pump to be installed and Sprewell experienced no further water intrusion problems while living in the Property.

In February 1999, Sprewell hired Mason-McDuffie, Jurjevic and Kristjanson to represent him in sale of the Property. Jurjevic prepared a seller's disclosure statement for Sprewell to sign which did not disclose the history of water intrusion or the later sump pump installation. The agent's inspection disclosure section of the statement likewise omitted any disclosure. Prior to the sale, Kristjanson walked through the Property, noticed the basement had again flooded and reported the observation to Jurjevic, but neither Kristjanson nor Jurjevic amended the disclosure statements to disclose the recent flooding. Gulalai Rahimi bought the Property without knowledge of the water intrusion problems or the existence of the sump pump. In 2000, Rahimi discovered a flood in the basement. In 2002, she sued Sprewell for failing to disclose water intrusion problems. That suit was submitted to arbitration and the arbitrator ruled in Rahimi's favor, finding

that Jurjevic failed to disclose to Rahimi or her agent the 1995 or 1999 flooding incidents. The trial court entered a judgment against Sprewell on the arbitration award in the amount of $491,660.15 (the Rahimi Judgment).

In this action, Sprewell sought reimbursement of the damages he suffered as a result of the Rahimi Judgment, a judicial declaration that Defendants were responsible for reimbursing him for those damages and all other costs.[1] Kristjanson declared bankruptcy and was dismissed as a defendant in August 2008.

Sprewell's negligence and breach of fiduciary duty claims against Jurjevic and Mason-McDuffie were tried to a jury in March 2009. The jury returned special verdicts finding that Defendants were negligent in handling the sale of the Property in 1999; that their negligence was a substantial factor in causing harm to Sprewell; that Defendants breached a fiduciary duty they owed to Sprewell in connection with the transaction; that their breach of fiduciary duty was a substantial factor in causing harm to Sprewell; that Sprewell individually failed to comply with his personal disclosure obligations in selling the Property, but that Sprewell's conduct was *not* a substantial factor in causing the harm. Because of the last finding, the jury, as directed by the verdict form, did not apportion comparative fault between Defendants and Sprewell. The jury was not required to determine the amount of Sprewell's damages nor to address his equitable indemnity claim.

On April 6, 2009, the court entered a judgment in Sprewell's favor.[2] The court wrote, "Some important facts were uncontested and thus were not submitted to the jury for decision. The most important were these: [¶] 1. Claims against plaintiff LATRELL

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[1] Sprewell also asserted claims for violations of certain statutory duties, but Defendants successfully demurred to those claims. He sought punitive damages, but that claim did not go to trial.

[2] Before the April 6, 2009 judgment was filed, Defendants filed objections to the judgment raising, inter alia, the claims they later raised in their motion for new trial. The trial court issued an order stating that many of Defendants' arguments were more appropriately raised in postjudgment motions and specifically providing that Sprewell could seek prejudgment interest and fees after the judgment was filed.

SPREWELL had been made in an earlier binding arbitration proceeding brought by the buyer of the subject real estate, Gulalai Rahimi. . . . [¶] 2. The arbitrator, William Quimby, found against SPREWELL. The arbitration award came to $491,660.15, including attorney fees and costs of suit. In awarding that amount, the arbitrator did not distinguish between damages caused by SPREWELL's personal acts and omissions and those that were caused indirectly by the agent and broker . . . . [¶] 3. This award became a judgment of the court . . . . The total judgment amount excluding post-arbitration interest was the $491,660.15 awarded by the arbitrator. . . . It was later modified in an Amended Judgment that added some post arbitration attorney fees and costs.

"The court finds that SPREWELL had the right to seek indemnity in this civil action for the total amount that he actually paid to satisfy the judgment that incorporated the arbitration award. To satisfy the judgment SPREWELL paid $300,000.00 on March 28, 2006 and another $239,079.66 on May 11, 2006. (The defendants did not contest that SPREWELL paid these amounts to satisfy the judgment.) [¶] The jury in the present case used a special verdict form to decide how much of the total paid by SPREWELL was due to his own fault, and how much was due to the fault of the defendants. . . . [¶] . . . In the verdict, the jury allocated all of the fault to the defendants . . . ." The court entered judgment for Sprewell in the full amount he paid to satisfy the Rahimi Judgment—$539,079.66.

Defendants moved for a new trial. They argued that the jury was not permitted to decide the issue of comparative fault due to an error on the special verdict form. They argued that the special verdict form erroneously directed the jury to only apportion liability if it first determined that Sprewell's failure to comply with his personal disclosure obligations was "a substantial factor in causing his harm." Defendants argued that the "substantial factor" test was improper and the jury should instead have been

asked to determine whether Sprewell's fault was a *contributing factor* to his harm.[3] Sprewell opposed the motion.

On June 3, 2009, the court conditionally granted Defendants' motion for a new trial, providing a statement of its reasons. The court wrote, "The defendants claim that one of the jury's findings—specifically, that the fault of Mr. Sprewell in the handling of the sale of his home was not a 'substantial factor' in causing his harm—was not supported by the evidence presented at trial. [¶] . . . [¶] On the evidence presented at trial, the jury should have found that Mr. Sprewell's failure to comply with his disclosure obligations was a substantial factor in causing his harm (that is, the huge money award against him in his earlier litigation with Ms. Rahimi, the buyer of the home). [¶] I reach this conclusion because of the following: [¶] 1. In the arbitrator's award, the arbitrator found that 'SPREWELL, *both individually* and through his agent JURJEVIC[,] failed to disclose to RAHIMI . . .' (emphasis added). . . . [¶] 2. Mr. Sprewell failed to sign an accurate and completely truthful disclosure statement . . . . [¶] 3. Mr. Sprewell admitted that he did not deal with the disclosure documents carefully. . . . [¶] In my opinion, however, the defendant real estate professionals were much more at fault than Mr. Sprewell. He had the right to depend on their advice to keep him out of trouble. [¶] . . . [¶]

"The evidence was such that Mr. Sprewell must bear some of the consequences for his own conduct. The evidence at trial did not support a finding by the jury that Mr. Sprewell's personal fault (as found by the jury . . .) was not at least a partial cause of his liability as determined in the Rahimi arbitration. [¶] I conclude that Mr. Sprewell must take responsibility for at least 20% of the total. Applying that figure as a discount, if Mr. Sprewell accepts the remittitur, the principal amount of the judgment in his favor will become $431,263.72 rather than $539,079.66." The court ordered: "The judgment

[3] Defendants also argued that the verdict represented a double recovery because Sprewell had received an inflated profit from the sale of the Property due to the nondisclosure of the water intrusion problems, yet that increased profit was not deducted from the amount of damages under the Rahimi Judgment.

in favor of plaintiff Latrell Sprewell . . . is remitted to $431,263.72 in compensatory damages, provided that plaintiff accepts this remitted award by filing a written consent with the court by June 17, 2009. . . . [¶] If plaintiff Sprewell does not accept the remitted award, which would become part of an amended judgment, defendants will be entitled to a new trial on both liability and damages."

Sprewell accepted the remittitur on June 10, 2009. Sprewell had earlier moved, on May 20, 2009, for an award of attorney fees and prejudgment interest. Defendants opposed both requests on June 1. On July 16, the court granted the motions. On July 31, the court entered judgment for Sprewell in the principal amount of $431,263.72 plus $11,113.05 in costs, $132,064.00 in attorney fees, and $141,960.93 prejudgment interest. Defendants appeal from the July 16 order granting attorney fees and prejudgment interest and the July 31 judgment (Appeal No. A126272).[4]

II. DISCUSSION

A. *The Conditional New Trial Order*

Two issues arise with respect to the trial court's June 3, 2009 order conditionally granting Defendants a new trial. First, Defendants argue that the trial court lacked authority to condition the order on Sprewell's rejection of a remittitur because such a condition is permissible only if the court grants a new trial on the ground of excessive damages. Second, because we agree that it was error for the court to impose the remittitur condition, we must determine whether the new trial order may otherwise stand absent that condition.

[4] On June 5, 2009, Defendants appealed from the April 6 judgment awarding $539,079.66 to Sprewell pursuant to the jury verdict (Appeal No. A125569). In October, this court consolidated the appeals for purposes of briefing, oral argument and decision. Appeal No. 125569 is dismissed as moot because the April 6 judgment has been superseded by the July 31 judgment (see *Rutledge v. Rutledge* (1953) 119 Cal.App.2d 112, 113; Code Civ. Proc., § 662.5; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 98, p. 162).

1. *The Remittitur Condition*

The standard of review for an order on a motion for new trial depends on the procedural posture of the case on appeal. (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 158 (*Whitlock*).) When the trial court grants a motion for new trial and provides a statement of reasons for its decision, the standard of review is abuse of discretion. (*Id.* at p. 159.) However, any factual or legal determination underlying the order is generally scrutinized under the test applicable to that determination. (*Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 186, fn. 12.) Thus, where the question is whether the court has the authority to condition an order granting a new trial on the plaintiff's rejection of a remittitur, the issue on appeal is one of statutory interpretation (*Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452–453 (*Schelbauer*)) and is subject to de novo review (*People ex. rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432).[5]

Code of Civil Procedure section 662.5 provides, "In any civil action where after trial by jury an order granting a new trial limited to the issue of damages would be proper, the trial court may in its discretion: [¶] . . . [¶] . . . [i]f the ground for granting a new trial is excessive damages, make its order granting the new trial subject to the condition that the motion for a new trial is denied if the party in whose favor the verdict has been rendered consents to a reduction of so much thereof as the court in its independent judgment determines from the evidence to be fair and reasonable." (Code Civ. Proc., § 662.5, subd. (b).) In *Schelbauer*, the Supreme Court squarely addressed the question, "[M]ay a trial court utilize a remittitur to reapportion liability among the parties if it concludes that the jury's apportionment is not supported by the evidence and that the damage award is excessive only to the extent that it reflects an improper apportionment?" (*Schelbauer, supra,* 35 Cal.3d at pp. 445, 454.) The answer was "no."

[5] *Schelbauer* concluded that the trial court's use of a remittitur was "abuse of its discretion." (*Schelbauer, supra,* 35 Cal.3d at p. 454.) However, the opinion leaves no doubt that the Supreme Court independently decided the issue of a court's authority to impose a remittitur condition in order to correct apportionment of liability.

In *Schelbauer*, the jury found a manufacturer of roofing materials both strictly liable and negligent in a damage claim for injuries suffered by a roofer due to an unsafe condition of the materials. The jury found that neither the plaintiff roofer nor his employer were contributorily negligent. (*Schelbauer, supra,* 35 Cal.3d at pp. 445–448.) The manufacturer moved for a new trial inter alia on the ground that the evidence did not support the jury finding on contributory negligence. (*Id.* at p. 448.) The court granted the motion on that ground, but conditionally denied the motion if the plaintiff agreed to a 15 percent reduction of the damages awarded, reflecting the trial court's determination that the plaintiff was at least 5 percent and his employer was at least 10 percent contributorily negligent. (*Id.* at pp. 448–449 & fn. 2.) The plaintiff accepted the remittitur and the motion for new trial was denied. (*Id.* at p. 449.)

The Supreme Court held the trial court erred in conditioning its order. (*Schelbauer, supra,* 35 Cal.3d at p. 454.) "Section 662.5 specifically states that the procedural device of remittitur is to be utilized *only* when a new trial is warranted solely on the grounds of excessive damages. . . . [¶] The statutory requirement . . . is express and unequivocal." (*Id.* at pp. 452–453.) "A remittitur may not be used to condition a new trial order if a damage award is excessive only because it reflects an improper apportionment of liability." (*Id.* at p. 454; see also *Thompson v. Friendly Hills Regional Medical Center* (1999) 71 Cal.App.4th 544, 548 [following *Schelbauer* and reversing order granting new trial with remittitur condition on ground other than excessive damages].)

Sprewell attempts to distinguish *Schelbauer* by arguing the remittitur resulted from the *court's* finding of the amount of Sprewell's damages as trier of fact on Sprewell's claim for indemnity, rather than the court's rejection of the *jury's* finding on the issue of Sprewell's liability on his negligence claim. The order granting a new trial cannot reasonably be construed as a ruling on the indemnity issue. First, the trial court expressly found in the April 6, 2009 judgment that Sprewell had the right to seek indemnity for the *total* amount he paid to satisfy the Rahimi Judgment. Second, the court expressly found in the order granting a new trial that "[t]he evidence at trial *did not*

support a finding by the jury that Mr. Sprewell's personal fault . . . was not at least a partial cause of his liability." (Italics added.) The court also stated it was ruling on the Defendants' claim that there was insufficient evidence to support the *jury's* findings and that the *jury's* award of damages was excessive. Sprewell argues the court's 20 percent reduction in the judgment "should not automatically mean that the reduction was an apportionment" and that the court's order "does not state that it is an intended reapportionment." However, the court expressly ruled, "I conclude that Mr. Sprewell must take responsibility for at least 20% of the total. Applying that figure as a discount, if Mr. Sprewell accepts the remittitur, the [judgment] . . . will become $431,263.72 . . . ." This case is indistinguishable from *Schelbauer* on its material facts and *Schelbauer* is dispositive.

The trial court erred in imposing a remittitur condition designed to correct what it viewed as an improper apportionment of liability between Sprewell and Defendants. The court's order was not based on a determination of excessive damages in the sense that an award of Sprewell's total damages was unsupported by the evidence of the actual injuries Sprewell suffered. That amount was a liquidated sum defined by the prior Rahimi Judgment, and was not a matter even determined by the jury. Rather, the court here concluded that "[t]he evidence at trial did not support a finding by the jury that Mr. Sprewell's personal fault . . . was not at least a partial cause of his liability [to Rahimi]." The remittitur condition is therefore invalid. (*Schelbauer, supra,* 35 Cal.3d at p. 455.)

2. *The New Trial Order*

The parties disagree as to the effect of striking the remittitur condition. Defendants argue that, once the remittitur condition is determined to be void, the remainder of the trial court's order, granting a new trial on all issues, must be enforced. Sprewell argues that Defendants "have produced no evidence . . . that the trial court properly addressed the issue of whether Sprewell was contributorily negligent. As a result, [Defendants] cannot meet their burden of proof that substantial evidence exists to support the trial court's findings . . . . [¶] Ultimately, the trial court's issuance of the

remittitur benefitted, rather than prejudiced, [Defendants], by reducing the amounts of the judgment." Sprewell also argues that, if this court reinstates the new trial order, the order should be modified to order a new trial on apportionment of liability only, not on all issues because the court's statement of reasons demonstrates that "[t]he trial court found that the jury did not err in finding [Defendants] responsible." Defendants respond that "Sprewell has not shown, or even argued, any abuse of discretion in the grant of a new trial on all issues. Indeed, Sprewell neither challenged the new trial order in the trial court nor filed a cross-appeal." They also argue on the merits that the trial court did not abuse its discretion in ordering a new trial on all issues.

The parties therefore disagree about the very basic question of who bears the burden of defending the new trial order in this appeal and whether the balance of the new trial order is properly before us at all in the absence of a cross-appeal. Sprewell contends that the record on appeal is inadequate to permit our review of at least one issue encompassed in the new trial order: whether the jury's finding that Sprewell's personal negligence was not a substantial factor in causing his harm record lacks sufficient evidentiary support. The parties clearly disagree about who has the burden of supplying the record and who has the burden of persuasion on the issue on appeal.

As appellants, Defendants of course bear the burden of establishing that they suffered prejudice from the error they assert on appeal. (*Hoffman Street, LLC v. City of West Hollywood* (2009) 179 Cal.App.4th 754, 772.) Here, prejudice from the erroneous remittitur condition is readily apparent because Defendants were thereby denied the benefit of the trial court's order otherwise granting a new trial on all issues. Sprewell argues that Defendants also bear the burden of affirmatively demonstrating that the new trial order was otherwise proper. But Defendants do not challenge the ruling *granting* their new trial motion, nor has Sprewell appealed from it. There is no requirement that Defendants defend all trial court rulings in their favor that preceded the specific ruling challenged on appeal in order to establish their entitlement to reversal. Defendants challenge the entry of a judgment against them. By demonstrating that the new trial order

was improperly conditioned, they satisfied their burden to establish prejudicial error on appeal.

As respondent, Sprewell was of course free to argue that Defendants were not prejudiced by the remittitur because the new trial order itself was unsupported. Under Code of Civil Procedure section 906 (section 906), Sprewell did not need to file a cross-appeal to raise that argument. Section 906 provides that a respondent, without appealing from the judgment, may be heard on intermediate orders affecting the judgment, including an order on a motion for a new trial, and may be heard on the proper disposition of an appeal—i.e., whether the court should "affirm, reverse or modify any judgment or order appealed from . . . [or] direct a new trial or further proceedings to be had[]"—"*for the purpose of determining whether or not the appellant was prejudiced* by the error or errors upon which he relies . . . ."[6] (§ 906, italics added; see *Selger v. Steven Brothers, Inc.* (1990) 222 Cal.App.3d 1585, 1593–1594.)

As the party raising the challenge to the new trial order, it was Sprewell who bore the burden of providing an adequate record to permit our review of the order. (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46 ["[t]he party seeking to challenge an order on appeal has the burden to provide an adequate record to assess error"].) The appellate record does not include any of the trial evidence. It includes pleadings, a pretrial order, a listing of the trial exhibits, the special verdict form, and posttrial filings, but no reporter's transcripts or trial exhibits. As we explain below, the lack of an adequate record precludes substantive review of the trial court's finding that the jury's determination that Sprewell's personal negligence was not a substantial factor in causing his harm was not supported by the evidence. Therefore, we must affirm that

[6] Although section 906 does "not authorize the reviewing court to review any decision or order from which an appeal might have been taken" (§ 906), the order granting a new trial was not appealable as it had been superseded by the judgment. (See *Jehl v. Southern Pacific Co.* (1967) 66 Cal.2d 821, 833 [defendant challenging new trial order with remittitur condition, where remittitur is accepted, must appeal from judgment].)

part of the order. The record is adequate, however, to address Sprewell's further argument that the new trial must be limited to the issue of apportionment.

3. *Insufficient Evidence for Jury Finding of No Causal Contributory Negligence*

As noted *ante*, an order granting a new trial that is supported by a statement of reasons is reviewed for abuse of discretion. (*Whitlock, supra,* 160 Cal.App.4th at p. 159.) A trial court has great discretion in granting a new trial based on its view of the evidence. (*Schelbauer, supra,* 35 Cal.3d at p. 452.) The order may be reversed "only if there is no substantial basis in the record" for the court's stated reasons for the order. (Code Civ. Proc., § 657.) "On appeal, all presumptions are in favor of the new trial order as against the verdict and conflicts in the evidence must be resolved in favor of the order. [Citation.]" (*Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 663.)

Without a record of the jury trial, we cannot determine if there was a "substantial basis in the record" for the court's determination that the evidence did not support the jury's finding that Sprewell's personal negligence was not a substantial factor in causing his damages. By way of comparison, the *Schelbauer* Court reviewed a similar new trial ruling. (*Schelbauer, supra,* 35 Cal.3d at pp. 448, 456.) The Court reviewed the trial evidence and, citing specific evidence in support of the trial court's order, concluded "[t]here was . . . sufficient evidence to support the trial court's determination that both [plaintiff] and [his employer] were also negligent." (*Id.* at pp. 456–457.) We cannot conduct a similar review of the trial court's ruling here because the trial evidence is not before us. Because Sprewell is responsible for producing an adequate record, his challenge to the ruling necessarily fails. The court's order granting a new trial on the stated ground must therefore be affirmed.

a. *Scope of New Trial Order*

The trial court also ordered that, if Sprewell did not accept the remitted award, "a new trial on both liability and damages" would be required. Sprewell argues any retrial should have been limited to the issue of apportionment of liability. A similar issue arose in *Schelbauer*: the trial court granted a new trial on all issues even though it had found

error in only one aspect of the jury verdict, and the plaintiff urged the Supreme Court to limit the new trial to the sole contested issue, apportionment of liability. (*Schelbauer, supra,* 35 Cal.3d at pp. 455–456.)

"A reviewing court should not modify an order granting a new trial on all issues to one granting a limited new trial 'unless such an order should have been made as a matter of law.' [Citation.]" (*Schelbauer, supra,* 35 Cal.3d at p. 456.) In *Schelbauer*, the court noted that the new trial order "clearly indicates that the trial court (1) concurred with the jury's special verdicts that [the manufacturer] was liable to some extent and that the total damages sustained by [the plaintiff] were $865,000, and (2) disagreed only with the jury's apportionment of liability." (*Id.* at p. 456.) The court then reviewed the trial evidence and concluded sufficient evidence existed to support the liability findings. (*Id.* at pp. 456–457.) The court concluded retrial on those issues was unnecessary: "There is no reason to subject the parties and the courts to the expense and delay of retrial of those issues on which the jury and the trial court agreed and which are supported by the evidence. . . . Accordingly, the new trial order is modified to limit the new trial to the issue of apportionment of liability." (*Id.* at p. 457.)

Here, the trial court's order clearly indicates that the court agreed with the jury's finding that Defendants were liable for Sprewell's damages. In fact, the court observed that Defendants were "much more at fault than Mr. Sprewell." Although we lack the ability to review the trial record to determine whether such findings are supported by the trial evidence, we conclude that, in the circumstances of this case, such a review is unnecessary. Defendants made no challenge to the jury's finding that they were liable to Sprewell in their motion for a new trial, and they make no suggestion in this appeal that the finding was unsupported by the evidence. Defendants have essentially conceded that the finding of their liability had ample support in the evidence.

The new trial order also clearly indicates that the court agreed with the jury's finding that Sprewell was personally negligent. Indeed, the court ruled that the jury *under*estimated the degree of Sprewell's contributory negligence. Although we likewise lack a record to determine whether these findings are supported by the evidence, we

again conclude such a review is unnecessary. Sprewell has not contested the finding, and Defendants would have no reason to contest it. We conclude both parties concede that the finding of Sprewell's negligence had adequate support in the evidence.

The gross amount of the damages is also not an issue for any retrial. This is not an issue that was submitted to the jury in the first instance. The April 6, 2009 judgment recited that the amount of the arbitration award against Sprewell was not contested, and thus was not submitted to the jury for decision. The trial court also stated in that judgment that the amounts Sprewell paid to satisfy the Rahimi Judgment ($539,079.66) were uncontested by Defendants. In their motion for a new trial, Defendants challenged the amount of damages on a single ground: that Sprewell obtained a double recovery because the increased profit he realized from the Property sale due to the nondisclosure of the water intrusion problems was not subtracted from the damages he incurred in the Rahimi lawsuit. They argued the judgment should be reduced by $80,000, an amount the arbitrator found was the increased cost of the Property due to the nondisclosure.[7] The trial court implicitly rejected this argument when it based its 20 percent remittitur on the amount of Sprewell's total damages ($539,079.66).

Defendants do not renew the double recovery argument on appeal in challenging the July 31, 2009 judgment. That issue is therefore forfeited.

Defendants nevertheless now argue on appeal that they are entitled to a jury determination of damages on retrial. They argue an order limiting the retrial to the issue of apportionment of liability "would have denied appellants any trial whatsoever on their argument that damages were improper." They contend "neither the jury nor the trial court ever addressed the factual issues pertaining to the proper amount of Sprewell's

[7] Defendants also argued in their motion for a new trial that the trial court could order a new trial on the issue of damages as a remedy for the double recovery error. However, they did not argue that they had been denied the right to a jury trial on this issue. Similarly, in their objections to the judgment (which was denied by the trial court with the understanding that the issue could be raised after entry of the April 6, 2009 judgment), Defendants argued "the verdict should be pro tanto reduced by the court" on the double recovery theory. They did not argue a right to a jury trial on the issue.

damages." However, Defendants make no showing that they were precluded from challenging the amount of damages at trial, and provide no record to show that they sought to do so. They made no such argument in their objections to the judgment or in their motion for a new trial. On the contrary, they implicitly acknowledge that the parties were given the opportunity to raise damages issues before the jury. In their objections to the judgment, they argued that Sprewell had forfeited any claim for recovery of the fees he incurred in the Rahimi Judgment and any claim for prejudgment interest because he had failed to raise those damages issues before the jury. Similarly, Sprewell argued in opposition to Defendants' motion for a new trial that Defendants had forfeited their double recovery argument because they did not raise it before or during trial. Insofar as the record discloses, Defendants never disputed Sprewell's forfeiture argument. In short, Defendants have made no showing that they were denied the right to raise damages issues at the original trial, and they have not explained why they are entitled to a second bite at the apple.[8]

In sum, the record before us establishes that the jury and trial court agreed that both Defendants and Sprewell were negligent and that the total amount of Sprewell's damages was $539,079.66. Defendants have essentially conceded that these findings were supported by sufficient evidence at trial and present nothing here to show otherwise. Therefore, the only remaining contested issue is apportionment of liability. The new trial order should be limited to apportionment because "[t]here is no reason to subject the parties and the courts to the expense and delay of retrial of those issues on which the jury and the trial court agreed and which are supported by the evidence." (*Schelbauer, supra,* 35 Cal.3d at p. 457.)

[8] Defendants also argue they were denied their right to a trial on Sprewell's equitable indemnity claim. Again, Defendants make no showing that they were denied the right to present this issue to the jury at the trial. In their objections to the judgment and motion for a new trial, they made no such argument. They also did not raise the argument in their opening brief. We deem the issue forfeited.

Defendants cite a line of cases holding that "[t]he decision on limiting the new trial appropriately rests in the discretion of the trial judge," and "any doubts should be resolved in favor of granting a complete new trial." (*Leipert v. Honold* (1952) 39 Cal.2d 462, 467 (*Leipert*); see also *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 285 (*Liodas*); *Baxter v. Phillips* (1970) 4 Cal.App.3d 610, 616–617 (*Baxter*).) Each of these cases is distinguishable. In *Leipert*, the Supreme Court's concern was that the inadequate damages award may have been the result of jury compromise or bias and that the liability finding was not a reliable one. (*Leipert*, at pp. 467–470; see also *Rose v. Melody Lane* (1952) 39 Cal.2d 481, 488 [companion case] (*Rose*); *Cary v. Wentzel* (1952) 39 Cal.2d 491, 492–493 [same] (*Cary*).) The Supreme Court noted that the damages awarded to the plaintiff were clearly inadequate, the issue of liability was very close, and the jury had great difficulty reaching a verdict. (*Leipert*, at pp. 467–470.) The court concluded, "the record in this case so strongly indicates that the inadequate verdict for [the plaintiff] was the result of a compromise that it would be unjust to defendants to have a new trial limited to the issue of damages." (*Id.* at p. 470; see also *Rose*, at pp. 488–490; *Cary*, at pp. 493–495.) The court held that an abuse of discretion is shown when "circumstances indicate that the verdict was probably the result of prejudice, sympathy, or compromise or that for some other reason the liability issue has not actually been determined." (*Leipert*, at p. 467.) No such issues arise in this case. For the reasons already stated, the issues of each party's liability and the total amount of damages are essentially undisputed.

In *Liodas*, also cited by Defendants, the Supreme Court concluded that a limited retrial order was an abuse of discretion because the second jury would not be able redetermine damages without also determining exactly which acts by the defendants gave rise to liability. "As [these facts] must be redetermined prefatory to any damages verdict, the matter of liability is substantially inseparable from that of damages in the present posture of the case. A partial new trial would be prejudicial to respondent. A new trial on all issues is thus required." (*Liodas, supra,* 19 Cal.3d at p. 286.) Here, in contrast, a second jury will be able to determine the parties' relative liability without revisiting the

questions whether they were each negligent or what Sprewell's total damages were. Although much of the same evidence might be presented at the retrial, Defendants cite no authority that this fact alone supports an order for a new trial on all issues. On the contrary, *Schelbauer* instructs that a reviewing court must, as a matter of law, limit a new trial order to prevent retrial of facts found by the jury that are supported by substantial evidence and that the trial court found were supported by substantial evidence.[9]

Finally, in *Baxter*, the court rejected an argument that an order granting a new trial on all issues should be limited to the issue of liability only. (*Baxter*, *supra*, 4 Cal.App.3d at pp. 613, 617.) The court explained, "[I]t cannot be said that the evidence is clear with respect to the amount to be assessed as damages . . . ." (*Id.* at p. 617.) Here, however, the issues of damages and each party's negligence are undisputed.

We conclude as a matter of law that the trial court should have limited its new trial order to the issue of apportionment of liability.

B. *Prejudgment Interest*

"[I]f a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. . . ." (Code Civ. Proc., § 43.) Accordingly, even though we reverse the judgment, including the court's awards of interest and fees, we address the parties' legal arguments on these issues which are likely to arise on remand.

1. *Factual and Procedural Background*

Sprewell requested an award of prejudgment interest under Civil Code section 3287, subdivision (a) (section 3287(a)) on the ground that "not only are damages readily ascertainable, they are undisputed." He argued that he properly presented his request in a posttrial motion to the court, and he requested an award of 10 percent interest. Defendants opposed the request, arguing that prejudgment interest can be awarded in noncontract actions only in the discretion of the jury and that Sprewell

[9] Defendants appeared to concede at oral argument that this court has the power to limit the scope of any retrial on remand.

forfeited his claim for interest by not asking for an award prejudgment interest as an element of his damages.

The trial court did not specify the statutory basis for its award of prejudgment interest. The court reiterated that the dates and amount of Sprewell's payments to satisfy the Rahimi Judgment were undisputed. The court then wrote, "If prejudgment interest is allowed, it can easily be calculated by using the dates when Mr. Sprewell made his two payments to satisfy the arbitration award (which became a judgment), less 20% of each payment to account for the reduction ordered in the remittitur." On the procedural issues, the court wrote, "The defendants claim that prejudgment interest may not be included in the judgment because the jury never ordered it. . . . Neither side asked that the issue of prejudgment interest be submitted to the jury. I believe that all parties assumed that prejudgment interest was an issue for the judge to decide after the jury rendered its verdict. [¶] An indemnity claim—such as the one litigated here—is in the nature of a contract claim. . . . [¶] The request for prejudgment interest was timely. We do not have a final judgment as yet." The court granted prejudgment interest to Sprewell by calculating 10 percent interest on each payment from the date of the payment and reducing the resulting figure by 20 percent.

On appeal, Defendants argue that Sprewell was not entitled to an award of interest under section 3287(a) because his damages were not liquidated, and that he was not entitled to an award of interest under Civil Code Section 3287, subdivision (b) (section 3287(b)) because his action was not based on contract. They also argue that the trial court used an incorrect interest rate in calculating the prejudgment interest.[10]

[10] The parties also dispute whether Sprewell's motion for fees under Civil Code section 3287 was timely under the rule of *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824. Because this issue is fact specific to the timing of the motion with respect to a now vacated judgment, the issues are not likely to arise on remand and we need not address them here.

2. *Analysis*

Three statutory provisions govern awards of prejudgment interest. Section 3287(a) applies whenever damages are liquidated. Section 3287(b) applies when damages are unliquidated and are "based upon a cause of action in contract." Civil Code section 3288 (section 3288) applies "[i]n an action for the breach of an obligation not arising from contract" even when the damages are unliquidated. We first consider Sprewell's entitlement to prejudgment interest under section 3287(a) on the ground that his damages were liquidated. We then consider whether Sprewell may be entitled to prejudgment interest if the court determines his damages are unliquidated. Finally, we address the interest rate issue.

a. *Section 3287(a) and Liquidated Damages*

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day . . . ." (§ 3287(a).) "Damages are deemed certain when, though the parties dispute liability, they essentially do not dispute the computation of damages, if any. [Citation.] 'The statute does not authorize prejudgment interest where the amount of damage, as opposed to the determination of liability, "depends upon a judicial determination based upon conflicting evidence and is not ascertainable from truthful data supplied by the claimant to his debtor." [Citations.]' [Citation.]" (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 354–355 (*Employers Mutual*).) "If the requirements of [section 3287(a)] are met, an award of prejudgment interest is mandatory. [Citation.] The denial of prejudgment interest under [section 3287(a)] presents a question of law we must review on an independent basis. [Citations.]" (*Employers Mutual*, at p. 347.)

We first note that an award of prejudgment interest is authorized—indeed, mandated upon request—whenever damages are liquidated, regardless of whether the damages are for claims based on contract. (§ 3287(a); *Levy-Zentner Co. v. Southern Pac. Transportation Co.* (1977) 74 Cal.App.3d 762, 794–798; Wegner et al., Cal. Practice

Guide: Civil Trials and Evidence (The Rutter Group 2010) ¶ 17:179, p. 17-141 (Rev. #1 2009).)

The critical issue on a section 3287(a) award is whether damages were liquidated. Here, the amounts and dates of Sprewell's payments to satisfy the Rahimi Judgment were undisputed. As noted *ante*, the record indicates that Defendants did not contest the gross damage amount at trial by seeking an offset for Sprewell's alleged double recovery or otherwise. Therefore, it clearly appears, as the trial court recited, that the amount of Sprewell's damages was undisputed and the only contested issues at trial focused on liability, including Sprewell's comparative liability for the damages.

In *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948 (*Wisper*), the court addressed the issue of whether comparative liability rendered an otherwise-liquidated damages claim too uncertain to support an award of prejudgment interest under section 3287(a). In *Wisper*, a corporation owning real estate, retained a property manager who hired a convicted embezzler (Benitez) to collect and deposit checks for the company. Benitez managed to open a new account in the company's name at a bank that did business with some of the company's shareholders. He deposited company checks totaling more than $1 million in that account and later withdrew the money and used it for his personal benefit. Although Wisper received financial statements and bank records that would have disclosed the diversion of funds, the company never noticed the diversion. Wisper sued the bank for negligence and mistake. The jury found Wisper 75 percent responsible and the bank 25 percent responsible. The trial court denied Wisper's request for prejudgment interest under Civil Code section 3287. (*Id.* at pp. 952–955.)

In affirming the trial court, the Court of Appeal relied on three principles underlying awards of prejudgment interest. First, " '[t]he policy underlying authorization of an award of prejudgment interest is to compensate the injured party—to make that party whole for the accrual of wealth which could have been produced during the period of loss. [Citations.]' [Citation.] [¶] . . . 'The test for recovery of prejudgment interest under [section 3287(a)] is whether *defendant* actually know[s] the amount owed or from

reasonably available information could the defendant have computed that amount. [Citation.]' [Citations.]." (*Wisper, supra,* 49 Cal.App.4th at p. 960.) Second, " 'The fact it is possible to determine with some certainty one figure which is but a single *element* in the mathematical calculations involved in deriving a claim does not necessarily render the claim itself either certain or calculable.' " (*Id.* at pp. 960–961.) Third, " 'where there is a large discrepancy between the amount of damages demanded in the complaint and the size of the eventual award, that fact militates against a finding of the certainty mandated by [Civil Code section 3287].' " (*Id.* at p. 961.)

The court concluded: "Applying these principles to the facts before us, it is clear the amount of damages owed by [the bank] to Wisper was not subject to calculation until after the completion of a trial. Although the universe of Wisper's damage was calculable—that is, the number of checks totaling in excess of $1.4 million—the question of whether and to what extent [the bank] had any liability for Wisper's loss was hotly disputed. At the end of the battle, Wisper emerged with a mere 25 percent of its claimed damages. Thus, there is a significant disparity between that which was sought and that which was ultimately found appropriate. Only one element of the claim was certain until the jury made its findings. [Citation.]" (*Wisper, supra,* 49 Cal.App.4th at p. 961.)

The *Wisper* court did not adopt a blanket rule that damages are definitionally unliquidated in all cases involving comparative liability. (*Wisper, supra,* 49 Cal.App.4th at p. 962.) "[T]here may be cases in which a plaintiff who recovers virtually all of the claimed damages, except for a minor percentage based on his or her comparative fault, would still be entitled to an award of prejudgment interest." (*Ibid.*) The dispositive factor in *Wisper* was "the vast disparity between the claimed damage and that which was awarded." (*Ibid.*)

In other words, whether Sprewell is ultimately entitled to recover prejudgment interest under section 3287(a) will depend upon whether there is a "large disparity" between the amount claimed and the amount recovered.

b. *Sections 3287(b), 3288 and Unliquidated Damages*

Section 3287(b) or section 3288 governs a request for prejudgment interest on unliquidated damages. As noted *ante*, section 3287(b) governs an award of prejudgment interest where unliquidated damages are "based upon a cause of action in contract." Under this statute, the trial court determines in its discretion whether to award prejudgment interest. (*Ibid.*) Section 3288 governs an award of prejudgment interest where unliquidated damages are recovered "[i]n an action for the breach of an obligation not arising from contract."[11] Under section 3288, the trier of fact has the discretion to award prejudgment interest. Although section 3288 specifies that interest may be awarded under its provisions "in the discretion of the *jury*" (italics added), case law establishes that where a covered cause of action is tried to a court (i.e., the court is the trier of fact), the court has the discretion to award interest under the statute. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1586–1587.)

Sprewell does not dispute that his claims for negligence and breach of fiduciary duty are noncontract claims governed by section 3288. (See, e.g., *Michelson v. Hamada, supra,* 29 Cal.App.4th at p. 1586 [§ 3288 applies to claims for fraud and breach of fiduciary duty].) However, as we discuss *post*, he also claims the court properly awarded him interest under section 3287(b) on his indemnity claim. That is, he implicitly argues that his indemnity claim is "based upon a cause of action in contract." (§ 3287(b).) The trial court ruled that Sprewell's equitable indemnity claim was based on the theory of implied contractual indemnity and thus was "in the nature of a contract claim."

We conclude Sprewell's equitable indemnity claim is properly characterized as a noncontract cause of action that is governed by section 3288. As the Supreme Court has explained: "Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and

[11] Section 3288 states that "[i]n an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury."

(3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity). [Citations.] [¶] Although the foregoing categories of indemnity were once regarded as distinct, we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. [Citation.] Though not extinguished, implied contractual indemnity is now viewed simply as 'a form of equitable indemnity.' [Citations.]" (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1157, fn. omitted (*Prince*).) The Supreme Court had previously held that comparative liability principles should apply to a claim of implied contractual indemnity as well as a claim of traditional equitable indemnity because both claims found their source in equitable considerations rather than in the private agreements of contracting parties. (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1029 & fn. 10 (*Bay Development*).) In *Prince*, the court held that joint liability is a prerequisite for both forms of equitable indemnity, again emphasizing their shared equitable foundations. (*Prince*, at pp. 1164–1166.)

Both decisions criticized a Court of Appeal decision that emphasizes the *difference* between traditional equitable indemnity and implied contractual indemnity and the *similarity* between a claim for implied contractual indemnity and a contract action. (See *Bear Creek Planning Com. v. Title Ins. & Trust Co.* (1985) 164 Cal.App.3d 1227, 1236–1243 (*Bear Creek*).) As *Prince* explained, "while *Bear Creek* correctly observed that the implied contractual indemnity doctrine is grounded upon the indemnitor's failure to properly perform contractual duties owed to the indemnitee, the decision was flawed to the extent it viewed the doctrine as akin or analogous to express contractual indemnity. . . . [¶] More importantly, *Bear Creek* failed to appreciate that implied contractual indemnity is and always has been restitutionary in nature, meaning it is intended to address the situation where ' "one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." ' [Citation.]" (*Prince*, at p. 1166.) The Supreme Court explained that treating a claim for implied contractual indemnity claim as a contract claim would lead to anomalous results because of the absence of restrictive contract principles, thus allowing the

"transform[ation of] a breach of contract claim into a vehicle for the recovery of tort damages." (*Id.* at p. 1166, fn. 10.)

While the specific holdings of *Prince* and *Bay Development* are not at issue here, we conclude that the Supreme Court's emphatic pronouncements in these cases that the essential character of an implied contractual indemnity claim is equitable rather than contractual should govern the question of whether section 3287(b) or section 3288 applies to such a claim. Notably, the *Bear Creek* case disapproved in the high court's decisions holds that a claim for implied contractual indemnity is "a cause of action in contract within the meaning of [section 3287(b)]. [Citation.]" (*Bear Creek, supra,* 164 Cal.App.3d at p. 1247.) While the Supreme Court did not have occasion to review that holding in *Prince* or *Bay Development*, we think the continuing vitality of *Bear Creek* is at best questionable.

Accordingly, if the court determines following retrial that any damages awarded Sprewell are unliquidated, it must apply section 3288 rather than section 3287(b) to any request for prejudgment interest.

c. *Interest Rate*

Sprewell concedes that the trial court erred by awarding 10 percent interest and that 7 percent is the correct interest rate. The 10 percent rate applies only in contract actions where the contract itself does not supply an interest rate. (Civ. Code, § 3289; *Children's Hospital & Medical Center v. Bonta´* (2002) 97 Cal.App.4th 740, 774–775 (*Children's Hospital*).) In other cases, "the rate of prejudgment interest should be fixed by article XV, section 1 of the California Constitution; namely, 7 percent per annum." (*Id.* at p. 775.) Since we find that Sprewell's claims are noncontract claims, if the court awards prejudgment interest on remand it must calculate the award using the 7 percent interest rate.

C. *Attorney Fees*

In the trial court, Sprewell sought an award of fees he incurred in defending the Rahimi litigation and also an award of fees he incurred in prosecuting this indemnity action. The court did not award Sprewell the fees he incurred in the Rahimi litigation and

Sprewell has not appealed that ruling. The issue is therefore forfeited. As to fees Sprewell incurred in prosecuting this indemnity action, we conclude Sprewell is not entitled to such fees.

1. *Factual and Procedural Background*

In February 1999, Sprewell (Seller) and Jurjevic (Broker) signed a contract related to the sale of the Property entitled, "Exclusive Authorization and Right to Sell" (Agreement). Paragraph 6 of the Agreement included an indemnity provision. Paragraph 13 was an attorney fee provision.

Sprewell moved for an award of attorney fees on the basis of Paragraph 6. He argued, "While the contract provides for full indemnification (including the payment of attorney's fees) by the Seller . . . to the Broker . . . , courts have held that contracts providing for attorney fees to prevailing parties must provide for mutuality of remedy." (Citing *Smith v. Krueger* (1983) 150 Cal.App.3d 752, 756 (*Smith*).) In the alternative, he argued he was entitled to attorney fees under the doctrine of the "tort of another," citing *Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620–621 (*Prentice*). As noted, Sprewell sought an award of the fees he incurred both in defending against the action brought by Rahimi and in prosecuting the indemnity action against Defendants. In opposition, Defendants argued Sprewell had not established any entitlement to fees. Paragraph 6 only authorized an award of attorney fees to *Defendants* in the event of a breach by Sprewell, and that Sprewell was not entitled to attorney fees under the "tort of another" doctrine because he was not without fault.

The trial court agreed that Sprewell could not benefit from the "tort of another" doctrine because he had not shown that he was without fault. The court also stated that Sprewell could not recover fees under Paragraph 13 because it applied only to " 'the obligation to pay compensation under this Agreement.' " Finally, the court addressed Paragraph 6 and ruled it was an indemnity provision that must be reciprocally applied. The court denied the fees Sprewell incurred in defending the Rahimi litigation. The court ruled that Sprewell was entitled to recover the attorney fees he incurred in this action under Paragraph 6.

On appeal, Sprewell argues that fees can be awarded on a claim for implied contractual indemnity.

2. *Analysis*

In the trial court and on appeal, Sprewell has directly or indirectly raised four theories in support of the court's award of attorney fees: the tort of another doctrine; Code of Civil Procedure section 1021.6 (section 1021.6); Paragraph 13 of the Agreement, the express attorney fees provision; and Paragraph 6 of the Agreement, the indemnity provision. We address each of these arguments and conclude Sprewell has not established an entitlement to attorney fees under any of these theories.

a. *Tort of Another Doctrine*

Sprewell argued in the trial court that he was entitled to fees under the doctrine of the tort of another. "A person who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary . . . attorney fees[] . . . thereby suffered or incurred." (*Prentice, supra,* 59 Cal.2d at p. 620; *David v. Hermann* (2005) 129 Cal.App.4th 672, 688.) The doctrine does not apply when the plaintiff is also at fault in bringing about the third-party lawsuit. (*UMET Trust v. Santa Monica Medical Investment Co.* (1983) 140 Cal.App.3d 864, 872.) Here, the jury and the trial court (and the arbitrator) found Sprewell was at fault in the underlying dispute with Rahimi. Therefore, the trial court correctly denied a fee award under this doctrine. Furthermore, the "tort of another" doctrine only allows the recovery of fees that were incurred in the underlying action (here, the action by Rahimi), not fees that are incurred in a subsequent or parallel indemnity action. (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817–819.) As noted, Sprewell has forfeited any claim to such fees by not appealing from the denial of his request for such fees.

b. *Section 1021.6*

On appeal, Sprewell argues that attorney fees "are permissible when the claim for indemnity arises out of an implied contractual indemnity theory." He cites *John Hancock Mutual Life Ins. Co. v. Setser* (1996) 42 Cal.App.4th 1524, 1533–1534 (*John Hancock*),

which in turn cites section 1021.6. Section 1021.6 provides: "Upon motion, a court after reviewing the evidence in the principal case may award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds (a) that the indemnitee through the tort of the indemnitor has been required to act in the protection of the indemnitee's interest by bringing an action against or defending an action by a third person and (b) if that indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so, and (c) that the trier of fact determined that the indemnitee was without fault in the principal case which is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict." As *John Hancock* explains, section 1021.6 is closely related to the "tort of another" doctrine. (*John Hancock, supra,* 42 Cal.App.4th at pp. 1532–1533.)

As is clear from the plain statutory language, section 1021.6 requires that "the trier of fact determine[] that the indemnitee [(here, Sprewell)] was without fault in the principal case[.]" Sprewell again cannot establish that he was without fault for purposes of applying section 1021.6. Moreover, section 1021.6, like the "tort of another doctrine," only provides for the recovery of fees incurred in the underlying action, not fees incurred in the indemnity action itself. (*Bear Creek, supra,* 164 Cal.App.3d at pp. 1245–1246, disapproved on other grounds by *Bay Development, supra,* 50 Cal.3d at pp. 1031–1032 & fn. 12.) Sprewell has forfeited his claim for such fees.

c. *Paragraph 13: Attorney Fee Provision*

Paragraph 13 of the contract provides: "ATTORNEY'S FEES: In any action, proceeding, or arbitration between Seller and Broker regarding the obligation to pay compensation under this Agreement, the prevailing Seller or Broker shall be entitled to reasonable attorney's fees and costs, except as provided in paragraph 11A [which requires mediation before the parties resort to arbitration or court action.]" Although Sprewell did not rely on this provision in the trial court and does not expressly rely on it on appeal, his appellate brief relies heavily on case law applicable to express attorney fees provisions. (See *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338

(*Xuereb*); *Lerner v. Ward* (1993) 13 Cal.App.4th 155 (*Lerner*).) Therefore, we address the applicability of the express attorney fee provision in the Agreement.

The trial court correctly concluded that Paragraph 13 did not support an award of fees in this action. The provision authorizes fees in actions between the Seller (Sprewell) and Broker (Defendants) "regarding the obligation to pay compensation under this Agreement." This action involves Defendants' obligation to indemnify Sprewell for damages he had to pay to a third party, not Sprewell's obligation to pay Defendants a commission on the sale of the Property. Sprewell does not contend otherwise on appeal.

In both *Xuereb* and *Lerner*, the courts held that broadly-worded attorney fee provisions—applicable to actions between the parties that *arise* from the contract—encompass tort actions and are not limited to actions in contract. (*Xuereb, supra,* 3 Cal.App.4th at pp. 1340–1343; *Lerner, supra,* 13 Cal.App.4th at p. 160.) *Xuereb* and *Lerner* both involved real estate transactions. (*Xuereb*, at p. 1341; *Lerner*, at p. 157.) In *Xuereb*, the property buyers sued a real estate broker and agent for delivering the property in defective condition. (*Xuereb*, at p. 1341.) In *Lerner*, the purchasers sued the sellers. (*Lerner*, at p. 157.) Each case was tried to a jury only on tort theories and in each case the defendants prevailed. (*Xuereb*, at p. 1341; *Lerner*, at p. 157.) In each case, the defendants unsuccessfully moved for fees under the attorney fees provisions in their purchase agreements. (*Xuereb*, at pp. 1340–1341; *Lerner*, at pp. 158–160.) In *Xuereb*, the court of appeal held that "[t]he critical question, *under the language of the parties' attorney fees agreement*, is whether respondents' lawsuit *arose from* the Purchase Agreement." (*Id.* at p. 1343, first italics added.) The court concluded the action did arise from the agreement and reversed the order denying fees to the defendants. (*Id.* at pp. 1343–1345.) *Lerner* followed *Xuereb* in reversing a denial of fees. (*Lerner*, at p. 160; see also *Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1548–1549 [following *Xuereb* and *Lerner* where attorney fee provision applied to actions "arising out of this agreement"].)

Here, the parties' attorney fee provision only authorizes an award of fees in an action "regarding the obligation to pay compensation under this Agreement." It does not

cover any and all actions arising from the parties' contract. Because this action does not fall within the limited scope of the contractual language, Sprewell is not entitled to a fee award under this provision, regardless of whether his claims sounded in tort or contract.

Sprewell inaccurately reads *Xuereb* and *Lerner* to hold, "Code of Civil Procedure section 1021 is broader than Civil Code section 1717 and permits a trial court to award attorney's fees in actions for torts claimed to arise out of the breach of contract." Code of Civil Procedure section 1021 provides, "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is *left to the agreement, express or implied, of the parties* . . . ." (Italics added.) The statute does not "permit[] a trial court to award attorney's fees for torts claimed to arise out of the breach of contract" unless such fees are otherwise authorized by statute or a contract between the parties. In *Xuereb* and *Lerner*, the attorney fees provision in the parties' contract authorized an award of fees in any action arising from the contract. (*Xuereb, supra*, 3 Cal.App.4th at pp. 1340–1343; *Lerner, supra*, 13 Cal.App.4th at p. 160.) Here, Paragraph 13 of the Agreement does not.

d. *Paragraph 6: the Indemnity Provision*

Finally, Sprewell argues that a specific reference to attorney fees in the Paragraph 6 indemnity provision constitutes an attorney fees provision in Defendants' favor that must be reciprocally applied pursuant to Civil Code section 1717 (section 1717). The trial court agreed. The trial court erred.

Sprewell relies on the following language from Paragraph 6: "Seller . . . agrees, regardless of responsibility, to indemnify, defend and hold Broker harmless from all claims, disputes, litigation, judgments and attorney's fees arising from any incorrect information supplied by Seller, whether contained in any document, omitted therefrom, or otherwise, or from any material facts which Seller knows but fails to disclose." Although this indemnity provision only gives *Defendants* a right to indemnification against Sprewell for damages caused by a nondisclosure by Sprewell, Sprewell argued below, and the trial court agreed, that the provision must be applied reciprocally pursuant to section 1717, which requires unilateral contractual attorney fee provisions to be

applied reciprocally. (§ 1717.) The trial court thus interpreted the provision to "entitle[] Mr. Sprewell to an award of attorney fees from the 'Broker' (the defendants here) in a situation where they supplied incorrect information to the buyer of the property (which is also our case here)."

In the trial court, Sprewell relied on *Smith, supra,* 150 Cal.App.3d 752. That case is a straightforward application of section 1717. (*Id.* at pp. 756–758.) No indemnity provision was involved. On appeal, Sprewell relies on *Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 Cal.App.2d 666. In that case, the indemnity provision authorized the *plaintiffs* to recover their costs and expenses and it was the *plaintiffs* who were awarded attorney fees under the provision. (*Id.* at pp. 675, 683.) There was no need to determine whether section 1717 required the court to apply the provision reciprocally.

More to the point is *Carr Business Enterprises, Inc. v. City of Chowchilla* (2008) 166 Cal.App.4th 14 (*Carr*), and the cases discussed therein. "Generally, the inclusion of attorney fees as an item of loss in a third party claim-indemnity provision does not constitute a provision for the award of attorney fees in an action on the contract which is required to trigger section 1717. [Citations.]" (*Id.* at p. 20.) An exception arises when the indemnity provision expressly provides for fees in an action to enforce the indemnity provision, as was the case in *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 Cal.App.4th 1339, 1344 and *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500, 508–509. (*Carr*, at pp. 22–23.) The authorization of fees in an action to enforce the indemnity provision is an agreement to pay fees in an action on the contract and thus is subject to section 1717's reciprocity requirement. (*Ibid.*) In contrast, where "there is no express language authorizing recovery of fees in an action to enforce the contract[] [and] [i]nstead, the language authorizes fees as an expense of litigation . . . in any action brought by another person arising out of the performance of the contract," section 1717 does not apply. (*Carr*, at p. 23.) In this standard indemnity clause context, "[t]he intent was to ensure that [the indemnitee] did not suffer any damages if, as a result of [the indemnitor's] negligence or willful misconduct, it became embroiled in litigation with a third party. . . . [B]ecause 'an

indemnity agreement is intended by the parties to unilaterally benefit the indemnitee, holding it harmless against liabilities and expenses incurred in defending against third party tort claims [citation], application of reciprocity principles would defeat the very purpose of the agreement.' [Citations.]" (*Ibid.*)

Here, as in *Carr*, the indemnity provision does not expressly authorize an award of fees in an action to enforce the indemnity provision. Although at first glance the "arising from" language might seem to support a broad interpretation of the provision to authorize such fees (cf. *Xuereb, supra,* 3 Cal.App.4th at p. 1343), the case law does not support such a result. In two cases cited in and followed by *Carr*, the indemnity provisions similarly included "arising from" language, but the courts held the provisions were not provisions for an award of attorney fees in an action to enforce the contract governed by section 1717. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 963–964, 973; *Meininger v. Larwin-Northern California, Inc.* (1976) 63 Cal.App.3d 82, 84–85; *Carr, supra,* 166 Cal.App.4th at p. 20.)

In sum, Sprewell has not established his entitlement to recover the attorney fees he incurred in the Rahimi litigation under either the tort of another doctrine or section 1021.6, and he has not established his entitlement to recover the attorney fees he incurred in the indemnity action under the terms of his contract with Defendants.

III. DISPOSITION

The July 31, 2009 judgment is set aside. The order granting a new trial is modified to remove the remittitur condition and to limit the retrial to the issue of apportionment of liability. The court shall conduct further proceedings consistent with the views expressed in this opinion. Each side shall bear its own costs on appeal.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.