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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ORTHOPEDIC SYSTEMS, INC., Plaintiff, Cross-defendant and Respondent, v. ALLEN SCHLEIN, Defendant, Cross-complainant and Appellant.	A126374 (Alameda County Super. Ct. No. RG05210781)
ORTHOPEDIC SYSTEMS, INC., Plaintiff, Cross-defendant and Appellant, v. ALLEN SCHLEIN, Defendant, Cross-complainant and Respondent.	A126821 (Alameda County Super. Ct. No. RG05210781)

The instant appeals involve the contract and tort claims of an orthopedic surgeon who had an agreement with an orthopedic products company regarding the creation and sale of a medical device that bore the surgeon's name. After paying royalties to the surgeon for more than a decade, the company renounced its obligations to pay anything further for the medical device even though it still sold a version of the product bearing the surgeon's name.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part III.B., C.

Orthopedic Systems, Inc. (OSI) and Allen Schlein, M.D., entered into an agreement in which OSI acknowledged receipt of a medical device called the "Schlein Shoulder Positioner," and obligated itself to pay Dr. Schlein royalties on sales of the resulting product. After OSI stopped paying the royalties, Dr. Schlein threatened to sue for breach of contract, prompting OSI to file an action seeking a declaration of rights under the agreement. Dr. Schlein cross-complained for breach of contract, conversion, and commercial misappropriation of his name among other things. The jury found in favor of Dr. Schlein on his contract claim and awarded $616,043 in damages. The jury also awarded Dr. Schlein $750 in statutory damages for his misappropriation claim, and found that OSI earned $1,220,000 in profits attributable to the use of Dr. Schlein's name. The trial court, however, did not include the profits in the judgment.

Dr. Schlein appeals, challenging the exclusion of the profits from the judgment. OSI appeals the judgment, the denial of its judgment notwithstanding the verdict, and the postjudgment award of attorney fees.

We modify the judgment and otherwise affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Facts[1]

1. OSI's Product Development

OSI was formed by Robert Moore, an experienced chiropractor, and his family in 1977 to develop, manufacture and sell orthopedic devices. Prior to forming OSI, Moore had invented several products to help his patients. In early 1980, Moore hired Steven Lamb to head up the engineering department at OSI.

Moore attended orthopedic trade shows and conferences, where he encouraged physicians to bring ideas and concepts to OSI in exchange for a royalty, telling them "If you have a problem, let me know, I will then try to develop a product or [way] of solving

[1] We recite the facts taken from the reporter's transcript and joint appendix. As required by the rules of appellate procedure, we state the facts in the light most favorable to the judgment. (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.)

that [problem] to make your life easier and [to do] a better job for the patient and then we will pay you a royalty of five percent on that."

Moore worked closely with the physicians who brought their problems to OSI, discussing possible improvements and modifications. The product would then "evolve from that interface or interaction."

In lieu of legal formalities, Moore offered the physicians a "handshake agreement," whereby OSI would pay a royalty to the physician for as long as OSI sold the product. Nothing other than Moore's word was required; he said OSI "would pay and [it] did." Moreover, there was never any requirement that a physician participate in the modification of a product in order to continue to receive the royalties.

2. OSI's Initial Collaboration with Dr. Schlein

Dr. Schlein, an experienced orthopedic surgeon and inventor, met Moore in the early 1980's at a medical conference. Dr. Schlein and Moore started working together shortly thereafter on a cast padding product that Dr. Schlein was already manufacturing through subcontractors. Moore agreed to distribute the product without any formal written agreement.

In 1986 or 1987, Dr. Schlein brought OSI another product called the "Dynafix," which was a plastic external fixator for wrist fractures. Moore agreed to manufacture the product and sell it, and agreed to pay Dr. Schlein a royalty for as long as OSI continued to sell the product. There was no formal written agreement between OSI and Dr. Schlein when OSI initially agreed to sell the Dynafix.

3. Genesis of the Schlein Shoulder Positioner

In the mid-1980's, as arthroscopic surgery became a popular alternative to traditional surgery, Dr. Schlein found it difficult to perform arthroscopic shoulder surgery with a patient lying on the operating table.[2] Then, in or about 1988, Dr. Schlein attended

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[2] Arthroscopic surgery is performed through small incisions in the area surrounding a joint or organ. The surgeon inserts a scope or a camera through one incision and then inserts the instruments through the other incisions. This technique contrasts with

a meeting on arthroscopic surgery where another surgeon described performing shoulder surgery with a "beach chair" that elevated the patient into a seated position.

Dr. Schlein thought the beach chair concept was a good one, and he went home and started to think about how he could create something like it. Although Dr. Schlein thought he could make one, he was having trouble creating a locking or "gatch" mechanism to support the backrest.[3]

When Dr. Schlein told Moore about his difficulty in crafting a mechanism to lock the device, Moore sent him one of OSI's radiolucent tilt tables. Dr. Schlein took the table apart and extracted the gatch mechanism. He bought some plastic and went home to make the back piece of the positioner. Dr. Schlein enlisted the help of a plastic prototype maker, who helped make the head piece. Dr. Schlein then combined all of the parts and tested the device in surgery.

Dr. Schlein then sent the prototype of the positioner to Moore. After multiple discussions regarding the device, Dr. Schlein and Moore decided to work together on manufacturing it for sale through OSI. Dr. Schlein and Moore also discussed the development of a disposable pad set or "patient care kit" to be used with the shoulder positioner that would provide cushioning for the patients.

Starting in or about 1989, Dr. Schlein and Moore worked collaboratively on the shoulder positioner. Dr. Schlein understood that his agreement with OSI would be the same as it was with the Dynafix—OSI would manufacture and sell the positioner and Dr. Schlein would receive a royalty for as long as OSI sold the product. Moore had the same understanding about the arrangement. Indeed, in a handwritten note dated December 28, 1990, Moore noted that for the shoulder positioner "Schlein gets 5% royalty + Disp Pad Set." Dr. Schlein was not required to work on any subsequent modifications of the product in order to receive the agreed upon royalties.

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traditional open surgical methods where the surgeon essentially cuts open the area for surgery.

[3] Dr. Schlein thought about buying a hospital bed and cutting the back off it because gatch mechanisms were used to keep the manual beds in an upright position.

4. Sale of OSI

In or about March 1989, Moore and his family began to contemplate the sale of OSI. To that end, Moore engaged the services of a company that would assist in finding a purchaser for OSI. Once the prospective purchasers were found, Moore was required to document all of OSI's royalty agreements. As such, Moore drafted a form agreement to document the verbal handshake agreements he had with the physicians who sold products through OSI.

In early 1992, Dr. Schlein received a one-page agreement from Moore regarding the Schlein Shoulder Positioner (1992 Agreement), which provided as follows:

"[OSI] of Hayward, CA has received a product improvement idea from Dr. Allen Schlein. It is called the Schlein Shoulder Positioner.

"[OSI] will manufacture (or have manufactured) the device and will market the device.

"In return, [OSI] will pay a royalty of 5% of the list price less discounts to the Adam David Schlein trust fund.

"It is understood that a disposable pad set is being investigated. Should OSI determine that a disposable set is desirable and markets the pad set, a 5% royalty on the list price less discounts will apply.

"The royalties will be paid the 30th day of the month following the calendar quarter.

"Dr. Schlein, or his representatives shall have any reasonable opportunity to audit the sales of the device at his expense, should he so desire.

"The device has been assigned a product number for sales and accounting purposes. The pad set will also be assigned a product [number]."[4]

Dr. Schlein signed the agreement on January 10, 1992, and returned it to Moore.[5] Dr. Schlein had nothing to do with the drafting of the 1992 Agreement. Dr. Schlein had

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4 The device was assigned the product number of 5336.

5 Moore also sent Dr. Schlein a similar agreement for the Dynafix, which Dr. Schlein signed and returned to Moore.

no recollection of having any conversations with Moore either before or after he signed the written agreement.

In 1992, Moore and his family sold OSI to Marc Abramowitz and Allan Epstein. A portion of the sales agreement prepared by Moore and OSI expressly disclosed that as to the shoulder positioner, as well as other products, "[r]oyalties are payable for as long as OSI sells the product."

5. Subsequent Sale of OSI

In 1995, Abramowitz and Epstein sold 51 percent of OSI's stock to Mizuho Ikakogyo Co., Ltd. In the stock purchase agreement, OSI represented that "[p]ursuant to a letter agreement dated January 10, 1992, Dr. Allen Schlein licenses OSI the Schlein Shoulder Positioner."

Following subsequent litigation and Mizuho's eventual acquisition of the remaining 49 percent of OSI's stock, Abramowitz and Epstein agreed to refrain from making any competing products and from undermining the value of OSI. The Schlein Shoulder Positioner was expressly identified as one of the products in the noncompetition agreement due to its economic value to OSI.

6. OSI Modifications to the Schlein Shoulder Positioner

Until 1999, OSI marketed and sold the shoulder positioner under the name "Schlein Shoulder Positioner" or "Schlein Shoulder Positioner SSP 1000." In marketing brochures and in the instruction guide, OSI stated: "The manufacturer thanks Allen P. Schlein, M.D. for his assistance in the development of the OSI Schlein Shoulder Positioner SSP-1000."

In 1999, OSI modified parts of the backrest and added a chin strap that had been designed and patented by Lamb. OSI also changed the name of the device to the "Schlein II Universal Shoulder Positioner" and changed the product number to 5338.

OSI also modified the text of its brochures to state "[OSI] thanks [Allen] P. Schlein, M.D., for his assistance in the development of the OSI Schlein II Universal Shoulder Positioner." OSI continued to pay Dr. Schlein for the sales of the Schlein II Universal Shoulder Positioner and the patient care kits.

In 2001, OSI changed the name of the device to the "Schlein Ultra" and changed the product number from 5338 to 5358. In the marketing brochures and user guide, OSI thanked Dr. Schlein for his "assistance in the development of the OSI Schlein Ultra™ Shoulder Positioner."

OSI did not inform Dr. Schlein that it was changing the product number. OSI continued to pay Dr. Schlein royalties for the sales of the Schlein Ultra Shoulder Positioner and the patient care kits.

7. OSI Trademarks Dr. Schlein's Name

In 2001, OSI applied to trademark the name "Schlein Ultra" to the shoulder positioner. The application was approved by Lamb, who at that time was OSI's chief operating officer. Lamb also signed a declaration attesting to OSI's alleged ownership of the name "Schlein Ultra."

Lamb filed the trademark application because competitors were using Dr. Schlein's name on competing shoulder positioners and/or patient care kits. However, prior to filing the application, neither Lamb nor anyone else at OSI asked Dr. Schlein for his authority to trademark his name to the positioner.

The trademark registration was issued to OSI on September 21, 2004.

8. OSI Stops Paying Royalties to Dr. Schlein

On January 21, 2005, Lamb sent a letter to Dr. Schlein, remitting his royalty check for the fourth quarter of 2004 and advising him as follows: "As you know, OSI has paid you [a] royalty on the shoulder positioner according to the agreement signed by Bob Moore since January 1991. In light of the fact that there is no patent protection on the product and this product is in a very competitive market, it has become economically unfeasible to continue this program. It is our standard practice to pay royalties on unpatented products at a rate of 2.5% for no more than ten years. In this case, we are nearing the end of the 14th year and we have generously paid you a 5% royalty. In light of our long relationship, I am proposing that we continue this royalty at 2.5% of [the] sales for 2 more calendar quarters (i.e., through June 30, 2005) after which the royalty will be discontinued."

Prior to sending the letter to Dr. Schlein, Lamb did not do anything to determine whether it was economically feasible to continue the royalty program. Indeed, OSI's records indicated steady sales of the positioner and pad sets from 2000 through 2005.

9. OSI Continues to Sell Shoulder Positioner Using Dr. Schlein's Name

Although OSI tendered the last royalty payment to Dr. Schlein in January 2005, at least until July 29, 2005, OSI continued to market and sell the shoulder positioner and pad sets using Dr. Schlein's name.

During the period January 1, 2005 to July 31, 2005, OSI's total revenues on sales of the shoulder positioner and pad sets were $2,033,333.[6] Dr. Schlein's economic expert opined that the profit OSI earned on the forgoing sales was $1,220,000, using a 60 percent profit margin; this amount did not include royalties that were due to Dr. Schlein for that period, which was equal to 5 percent of $2,033,333 or $101,667.

OSI eventually changed the name of the shoulder positioner to the "Ultra Shoulder [P]ositioning [D]evice." In all respects, there was no difference between the Schlein Ultra Shoulder Positioner and the Ultra Shoulder Positioning Device.

B. Pretrial Proceedings

OSI filed a complaint against Dr. Schlein in May 2005, seeking declaratory relief, reformation of contract, and unjust enrichment. OSI alleged that it had no further obligation to Dr. Schlein under the 1992 Agreement, assuming it ever had one. To the extent the agreement was ever enforceable, it was terminable at the will of either party and that OSI had "effectively terminated" the agreement. OSI also claimed the agreement was void or voidable for lack of consideration.

Dr. Schlein answered the complaint and filed a cross-complaint against OSI, seeking damages for breach of contract and conversion. Dr. Schlein also asserted a claim for declaratory relief, seeking a determination that the 1992 Agreement required OSI to continue paying royalties for the sales of the shoulder positioner and pad sets. His

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[6] From 1993 through 2007, OSI's total sales on the positioner and pad sets were $28,615,000.

amended cross-complaint alleged that OSI had violated Civil Code[7] section 3344, by using his name in conjunction with its marketing and sales of the shoulder positioner and pad set. In support of this claim, Dr. Schlein alleged that he gave OSI permission to use his name to market the Schlein Shoulder Positioner on the condition that OSI satisfied its obligations under the 1992 Agreement.

C. Trial

A jury trial commenced on March 20, 2008. Throughout the trial, evidence was presented regarding the difference between damages and profits. Also, during argument, counsel for both parties discussed the difference between an award of damages and an award of profits.

The court instructed the jury as to the differences between contract and tort damages. The court also instructed the jury with CACI No. 361, explaining that Dr. Schlein could not be awarded duplicative damages: "Dr. Schlein has made claims against [OSI] for breach of contract, conversion and misappropriation. . . . [I]f you decide, by way of example, that Dr. Schlein is entitled to recover royalties on one of his claims, he cannot recover those same royalties on another claim but may, if you so decide, recover non-royalty damages on other claims where permitted."

The jury was also instructed with CACI No. 1821 regarding damages under section 3344, and advised that the "specific items of damages" claimed by Dr. Schlein were harm to reputation and loss of standing in the community and the commercial value of his name. CACI No. 1821 further instructed the jury that: "In addition, Dr. Schlein may recover any profits that [OSI] received from the use of Dr. Schlein's name." In establishing the amount of profits, the jury was instructed to "[d]etermine the gross, or total, revenue that [OSI] received" from the use of Dr. Schlein's name; to "[d]etermine the expenses that [OSI] had in obtaining the gross revenue"; and to [d]educt [OSI's] expenses from the gross revenue." The jury was also instructed that Dr. Schlein was

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[7] All further undesignated statutory references are to the Civil Code.

required to prove the amount of gross revenue and OSI was required to prove the amount of the expenses.

D. Special Verdict and Judgment

The jury returned a special verdict finding, among other things, that:

(1) Dr. Schlein and OSI entered into a contract that required OSI to pay royalties Dr. Schlein "for the sale of any shoulder positioning device and disposable pad set";

(2) OSI failed to pay royalties to Dr. Schlein;

(3) Dr. Schlein was harmed by the failure to pay royalties;

(4) Dr. Schlein's "damages" were $616,043;

(5) OSI used Dr. Schlein's name on its merchandise or to advertise or sell its products or services during the period from January 1, 2005 to July 31, 2005;

(6) Dr. Schlein's consent to use his name was dependent on OSI's payment of royalties to Dr. Schlein;

(7) OSI's use of Dr. Schlein's name was directly connected to OSI's commercial purpose;

(8) Dr. Schlein was harmed by OSI's wrongful use of his name;

(9) OSI's conduct was a substantial factor in causing harm to Dr. Schlein;

(10) Dr. Schlein suffered in the amount of $750; and

(11) OSI earned $1,220,000 in profits that were attributable to the use of Dr. Schlein's name during the period from January 1, 2005 to July 31, 2005.

In the final section of the special verdict form entitled "**Total Amount Awarded**," the jury was asked the following question: "If you awarded damages to Dr. Schlein in any of the above claims, state the total amount of damages awarded for all causes of action." In the space provided for the total, the jury inserted the amount of $616,793.

In the second phase of the trial regarding the parties' declaratory relief claims, the court found that OSI "has a continuing duty to pay royalties for the Schlein Shoulder Positioner (and related disposal pads) for so long as OSI continue[d] to use Dr. Schlein's name and/or market a substantially similar product utilizing his contributions." In so ruling, the trial court stated that "[t]he same evidence which resulted in a jury verdict on the breach of contract claims leads to an equivalent conclusion on the declaratory relief claims."

The trial court further found that Dr. Schlein was not entitled to the $1,220,000 profit identified by the jury in the special verdict, and entered a judgment awarding Dr. Schlein $616,793.

E. Motions for Judgment Notwithstanding the Verdict

OSI moved for judgment notwithstanding the verdict on the misappropriation claim, arguing among other things that this should have never gone to the jury, as it was an improper effort to "[t]ortify" a straightforward breach of contract claim, and that the verdict was not supported by substantial evidence because there was no evidence regarding a lack of consent.

Dr. Schlein also moved for partial judgment notwithstanding the verdict solely as to the issue of the exclusion of the $1,220,000 in profits.

The trial court denied both motions.

F. Motion for Attorney Fees and Costs

The trial court awarded Dr. Schlein costs and also found him to be the prevailing party under section 3344 and awarded him $320,000 in attorney fees.

II. CONTENTIONS

Dr. Schlein contends in his appeal that the trial court erred in excluding the profits earned by OSI that the jury found were attributable to OSI's use of his name.

OSI contends in its appeal that: (1) the trial court erred in allowing the jury to interpret the 1992 Agreement; (2) the jury's finding that OSI breached the 1992 Agreement is inconsistent with the plain language of the contract and contrary to the extrinsic evidence establishing that OSI was required to pay royalties to Dr. Schlein only on sales of the Schlein Shoulder Positioner; (3) in the equitable phase of trial, the court erroneously declared the rights and obligations under the 1992 Agreement as requiring OSI to pay royalties on the sales of products other than the Schlein Shoulder Positioner; (4) the evidence does not support the jury's finding that OSI violated section 3344 by misappropriating Dr. Schlein's name; (5) the jury's finding that OSI both breached the 1992 Agreement and misappropriated Dr. Schlein's name is not supported by law; and (6) the trial court erred in awarding attorney fees to Dr. Schlein, and to the extent the award was proper, the amount was unreasonable.

III. DISCUSSION

A. Dr. Schlein's Appeal (No. A126374)

In his appeal, Dr. Schlein argues that the trial court erroneously interpreted the special verdict by excluding the profits that were clearly awarded by the jury. We agree.

1. Background

The jury returned a special verdict finding, among other things, in favor of Dr. Schlein on his breach of contract and misappropriation claims. The special verdict contained five sections, which posed various questions. In response to question four in section one of the special verdict, regarding Dr. Schlein's breach of contract claims, the jury found that Dr. Schlein was damaged in the amount $616,043. In section four of the special verdict, pertaining to Dr. Schlein's misappropriation claims under section 3344, the jury was asked in question six: "What, if any, actual damages did Dr. Schlein suffer as a result of the wrongful use of his name? [¶] a. Insert the greater of the actual damages suffered by Dr. Schlein or $750 . . . ." The jury inserted $750 in the space provided. Then, in question seven, the jury was asked: "What profit did OSI earn, if any, attributable to the use of Dr. Schlein's name during the period from January 1, 2005 to July 31, 2005?" In the space provided, the jury wrote $1,220,000.

The final section of the special verdict form was called "Section Five—Total Amount Awarded," and it provided as follows: "If you awarded damages to Dr. Schlein in any of the above claims, state the total amount of damages awarded for all causes action." The jury wrote "$616,793.00" in the space provided.

OSI argued that the jury's insertion of $616,793 in section five of the special verdict meant that Dr. Schlein was not entitled to the profits. According to OSI, the jury simply inserted $1,220,000 in response to question seven of section four—the section pertaining to Dr. Schlein's misappropriation claims—"because there was no instruction suggesting [that] they could skip the question." Alternately, OSI argued that the jury declined to award the profits in the "total amount" awarded because it already had taken the profits into consideration in calculating the damages.

Dr. Schlein countered that the heading of the final section of the special verdict form (total amount awarded) was " 'unfortunate,' "[8] and that the sum denoted in response should be read as referring only to the damages awarded ($616,793) and not as excluding the $1,220,000 in profits.

In finding that Dr. Schlein was not entitled to the profits identified by the jury in the special verdict, the trial court did not provide the basis for its reasoning. Rather, it merely incorporated by reference OSI's brief regarding section 3344, which the court found was more persuasive than the position advanced by Dr. Schlein.

2. The Trial Court Improperly Interpreted the Special Verdict

When no objection is made that a special verdict is ambiguous or incomplete before the jury is discharged, "it falls to 'the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.' [Citations.] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.] If the verdict is hopelessly ambiguous, a reversal is required, although retrial may be limited to the issue of damages. [Citations.]"[9] (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457.)

However, "[a] court reviewing a special verdict does not infer findings in favor of the prevailing party [citation], and there is no presumption in favor of upholding a special verdict when the inconsistency is between two questions in a special verdict." (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092; see also *City of San*

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[8] It appears that this section was added to the special verdict form at the insistence of the trial court, with the intended goal of providing a math check.

[9] Below, neither party sought clarification of the special verdict before the jury was discharged. Indeed, each side maintained that the special verdict was not ambiguous—OSI taking the position that profits were not awarded and Dr. Schlein taking the position that they were.

Diego v. D.R. Horton San Diego Holding Co., Inc. (2005) 126 Cal.App.4th 668, 678 [" 'special verdict's correctness must be analyzed as a matter of law' "].)

Taken as a whole and in light of the parties' claims, the special verdict shows the jury found that OSI breached the 1992 Agreement and misappropriated Dr. Schlein's name. Consistent with these findings, the jury found that Dr. Schlein was damaged by the breach in the amount of $616,043 and that he was harmed by the misappropriation in the amount of $750. Thus, it awarded damages to Dr. Schlein in the amount of $616,793. Regarding the amount of profits OSI earned that were attributable to the use of Dr. Schlein's name, the jury found for Dr. Schlein in the amount $1,220,000.

The record belies OSI's suggestions that the jury may have purposely failed to include the profits in the total amount awarded because it had taken the profits into consideration in calculating damages. In calculating the profit amount, Dr. Schlein's expert excluded the royalties OSI should have paid to Dr. Schlein ($122,730) under the contract for the seven-month period from January 1, 2005 to July 31, 2005, from OSI gross revenues for that period ($2,033,333) and also took into consideration a 60 percent profit margin, to arrive at a net figure of $1,220,000.

The jury awarded the exact figure calculated by Dr. Schlein's expert. Where, as here, a jury's verdict precisely matches an expert's testimony, logic and common sense tells us that the jury accepted the expert's analysis and calculations. (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 17 [jury's special verdict matched exhibit to the penny]; see also *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 748 [jury's award of precise amount stated by expert strong indication jury accepted expert's testimony on that point]; *Foss v. Anthony Industries* (1983) 139 Cal.App.3d 794, 801 [fact that jury awarded exact amount testified by expert showed jury used same underlying assumptions as expert].)

Moreover, it is clear that had it been so inclined, the jury could have omitted a profits finding from the verdict. Specifically, the jury was asked: "What profit did OSI earn, *if any*, attributable to the use of Dr. Schlein's name . . . ?" (Italics added.) The jury could have easily inserted a zero in the space provided. Likewise, the jury could have simply left it blank, which we recognize would have raised another ambiguity problem; fortunately we do not have to address that ambiguity or otherwise choose between inconsistent answers. This is not a case where the jury valued a skiploader at both $15,500 and $30,000 (see *Zagami, Inc. v. James A. Crone, Inc.*, *supra*, 160 Cal.App.4th at p. 1093), or valued land at both $445,000 and $850,000 per acre (see *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.*, *supra*, 126 Cal.App.4th at p. 683), or found a car was both negligently designed and had no design defect (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1182). Rather, the issue is whether Dr. Schlein was entitled to the $1,220,000 in profits earned by OSI's use of his name. The answer to this question requires a review of the applicable law.

California law has long recognized "the right to profit from the commercial value of one's identity as an aspect of the right of publicity." (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409; see also *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679; *Downing v. Abercrombie & Fitch* (9th Cir. 2001) 265 F.3d 994, 1001 (*Downing*).) "What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name . . . ." (*KNB Enterprises v. Matthews* (2000) 78 Cal.App.4th 362, 366.) There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. (*Downing, supra*, 265 F.3d at p. 1001.) To prove the common law cause of action, the plaintiff must establish: " '(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.' [Citation.]" (*Ibid.*) To prove the statutory remedy, a plaintiff must present evidence of "all the elements of the common law cause of action" and must also prove "a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose." (*Ibid.*)

Section 3344 governs the statutory remedy. Section 3344, subdivision (a) (section 3344(a)) provides in relevant part that "in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages."

Dr. Schlein asserts that the phrase "and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages" applies both to the minimum statutory damages of $750 or to actual damages. The interpretation of section 3344(a), and its phrase "and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages," is a legal issue subject to our de novo review. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 500.)

In arguing that Dr. Schlein was not entitled to the profits specified by the jury, OSI claimed the statute should be interpreted to exclude any award of profit where actual damages are not awarded. According to OSI, the section 3344(a) phrase "and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages" should be applied only to the phrase regarding "actual damages suffered by him or her as a result of the unauthorized use," and not to the phrase regarding the $750 award.

In construing section 3344(a), "we turn first to the language of the statute, giving the words their ordinary meaning. [Citations.] We must follow the statute's plain meaning, if such appears, unless doing so would lead to absurd results the Legislature could not have intended. [Citations.] If our examination of the statutory language leaves doubt about its meaning, we may consult other evidence of the Legislature's intent, such as the history and background of the measure. [Citations.]" (*People v. Birkett* (1999) 21 Cal.4th 226, 231-232.)

OSI's position is essentially based on the " 'last antecedent' " rule of statutory construction, which generally provides that " 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' " (*White v. County of Sacramento*

(1982) 31 Cal.3d 676, 680.) However, "[e]vidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma." (*Ibid.*) Here, the phrase referencing profits is set off by a comma, suggesting that it applies both to the minimum statutory damages and to actual damages.

What is perhaps the most damaging to Dr. Schlein's position is that the qualifying phrase refers to profits that are "not taken into account in computing the actual damages." (§ 3344(a).) The reference to profits in connection with the computation of actual damages lends some credence to OSI's interpretation of section 3344(a) that profits are not applicable when the minimum statutory damages are awarded. Although, grammatically speaking, such an interpretation would be plausible, we are not persuaded. " 'The rules of grammar and canons of construction are but tools, "guides to help courts determine likely legislative intent. [Citations.] And that intent is critical. Those who write statutes seek to solve human problems. Fidelity to their aims requires us to approach an interpretive problem not as if it were a purely logical game, like a Rubik's Cube, but as an effort to divine the human intent that underlies the statute." ' (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1017 . . . .)" (*Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 148, 153-154.)

The human problem to be solved by section 3344(a) is the provision of a remedy to a person whose name, among other things, is misappropriated. That statute provides for damages (statutory or actual), as well as profits. We recognize there is some ambiguity regarding whether the minimum measure of damages is $750 plus profits or just $750. Accordingly, we look to the legislative history for clarification. (*People v. Birkett, supra,* 21 Cal.4th at pp. 231-232.)

In *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988 (*Miller*), the court traced the history of section 3344 in order to determine, inter alia, what the minimum statutory damages (i.e., the $750 award) set forth in subdivision (a) were meant to remedy (*id.* at p. 1002). According to *Miller*, "[t]he statute's legislative history reveals section 3344(a) was intended to fill 'a gap which exist[ed] in the common law tort of invasion of privacy' as applied to noncelebrity plaintiffs whose names lacked 'commercial value on the open market.' [Citation.] Unlike an entertainment or sports star, noncelebrity plaintiffs often could not prove damages under the common law; therefore, section 3344(a) as originally enacted in 1971 'established a concrete remedy for the little man with a minimum . . . payment,' 'a simple, civil remedy for the injured individual.' [Citation.]" (*Miller, supra,* 159 Cal.App.4th at p. 1002, fn. omitted.) Thus, the *Miller* court confirmed that section 3344 was enacted to provide a "practical remedy for a noncelebrity plaintiff whose damages are difficult to prove . . . ." (*Miller, supra,* at p. 1002.)

We can conceive no rational basis for the Legislature to limit the $750 as an alternative to all other damages, including profits. If someone profits from the unauthorized use of another's name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages. Similar reasoning appears to be reflected in the civil jury instructions for damages under section 3344, which provides: "If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than $750, then you must award [him/her] $750. [¶] In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]'s [name . . .] [that have not already been taken into account in computing the above damages]." (CACI No. 1821, italics omitted.)

An interpretation of section 3344(a) that limits the minimum measure of damages to $750 as an alternative to all other damages, including profits, would be contrary to the spirit of the statute and the long-recognized right to control the commercial use, and thus protect the economic value of one's name. (*Gionfriddo v. Major League Baseball, supra,* 94 Cal.App.4th at p. 409; see also *Stewart v. Rolling Stone LLC, supra,* 181 Cal.App.4th at p. 679; *KNB Enterprises v. Matthews, supra,* 78 Cal.App.4th at p. 366.) Section 3344(a) was enacted to provide "a practical remedy for a noncelebrity plaintiff whose damages are difficult to prove . . . ." (*Miller, supra*, 159 Cal.App.4th at p. 1002.) The purpose of the statute is not served by preventing an injured plaintiff from recouping the profits attributable to the unauthorized use of his or her name where actual damages are not awarded.

We hold that under section 3344(a), an injured party may recover either the amount of damages specified in the statute or actual damages, whichever is greater, as well as profits from the unauthorized use.

Given the above analysis, it clearly appears that the trial court's interpretation of the special verdict is erroneous. We find no factual or legal support for excluding the $1,220,000 in profits from the jury's special verdict. "Whenever an appellate court may make a final determination of the rights of the parties from the record on appeal, it may, in order to avoid subjecting the parties to any further delay or expense, modify the judgment and affirm it, rather than remand for a new determination. [Citations.]" (*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1170; see also Code Civ. Proc., § 43.) The record is sufficiently definite in this case to do so.

Accordingly, we modify the judgment so that it accurately reflects the jury's special verdict, namely its finding that Dr. Schlein was entitled to $1,220,000 as a result of OSI's unauthorized use of his name, and affirm the judgment as so modified.

B. OSI's Cross-appeal (No. A126821)[*]

1. Contract Claims

a. The Trial Court Did Not Err in Allowing the Jury to Interpret the 1992 Agreement

The 1992 Agreement acknowledges that OSI has received a "product improvement idea" from Dr. Schlein called the "Schlein Shoulder Positioner." The 1992 Agreement states that OSI will manufacture and market the "device," and in exchange OSI will pay a 5 percent royalty to Dr. Schlein.

The 1992 Agreement does not further define the term "device" or "product improvement idea." The 1992 Agreement also does not set forth a specific duration.

[*] See footnote, *ante*, page 1.

Rather, it provides only that the "royalties will be paid the 30th day of the month following the calendar quarter."

Throughout this litigation, and its motion for directed verdict, OSI argued that the 1992 Agreement only required it to make royalty payments to Dr. Schlein for the "Schlein Shoulder Positioner," and that it was not required to pay royalties for any subsequent generations of the positioner. The trial court, over OSI's objection, submitted that issue to the jury. The jury found in Dr. Schlein's favor, concluding that the 1992 Agreement required OSI to make continued royalty payments to Dr. Schlein "for the sale of *any* shoulder positioning device and disposable pad set." (Italics added.)

OSI contends the trial court erred in submitting that question of contract interpretation to the jury because the 1992 Agreement was completely integrated, which required the court to decide the meaning of the terms as a matter of law. Dr. Schlein, on the other hand, contends the issue was properly submitted to the jury because the 1992 Agreement was not integrated as evidenced by the lack of an integration provision. Dr. Schlein further asserts that the term "product improvement idea" was ambiguous and required extrinsic evidence to interpret the meaning of this term. Dr. Schlein argues that the trial court's finding regarding the lack of integration is consistent with OSI's own pleadings, which claimed that the 1992 Agreement "is incomplete in many respects," and that the "Agreement does not discuss the impact of material modifications made to the 'Schlein Shoulder Positioner' on royalty rights . . . ."

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. [Citation.]" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*).) Nevertheless, an inflexible "rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.)

As codified, the parol evidence rule provides that the terms of a final, written agreement "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." (Code Civ. Proc., § 1856, subd. (a); see, e.g., *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co., supra,* 69 Cal.2d at p. 39; *Masterson v. Sine* (1968) 68 Cal.2d 222, 225; see generally, 2 Witkin, Cal. Evidence (4th ed. 2000) Documentary Evidence, § 59, pp. 179-180.) As the California Supreme Court explained over 40 years ago, "[w]hen the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary its terms. [Citations.]" (*Masterson v. Sine, supra,* 68 Cal.2d at p. 225.)

"The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement. The instrument itself may help to resolve that issue." (*Masterson v. Sine, supra,* 68 Cal.2d at p. 225; see also, e.g., *Founding Members, supra,* 109 Cal.App.4th at pp. 953-954.) The existence of an integration clause is indicative of that intent. (See *Founding Members, supra,* 109 Cal.App.4th at pp. 953-954 [listing several factors, including existence of integration clause and circumstances at contract formation]; *Haggard v. Kimberly Quality Care, Inc.* (1995) 39 Cal.App.4th 508, 518 [discussing contract's two integration clauses and circumstances at contract formation].) "This type of clause has been held conclusive on the issue of integration, so that parol evidence to show that the parties did not intend the writing to constitute the sole agreement will be excluded. [Citations.]" (2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 70, p. 190, italics omitted.)

But even where an integration clause manifests the parties' intent that the contract is a final and complete expression of their agreement, parol evidence nevertheless may be admissible as an aid to interpreting the contract. (*Haggard v. Kimberly Quality Care, Inc., supra,* 39 Cal.App.4th at p. 519.) Put another way, evidence offered to prove a meaning to which the contract is susceptible "does not contravene the merger clause. [Citations.]" (2 Witkin, Cal. Evidence, *supra*, Documentary Evidence, § 71, p. 190.)

In sum, parol evidence is not admissible to contradict a contract's terms, but it may be admitted to interpret those provisions in a proper case, even where the parties have included an integration clause. (*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at p. 37; *Haggard v. Kimberly Quality Care, Inc.*, *supra*, 39 Cal.App.4th at p. 519.)

Here, nothing on the face of the 1992 Agreement suggests that it is a complete (or even partial) embodiment of the expression of the parties' agreement regarding the payment of royalties. Indeed, there is no integration clause or other language manifesting the parties' intent that the 1992 Agreement is the final and complete expression of the royalty agreement. Also, given the fact that prior to his endeavors to sell OSI, Moore had run the company as a family business—with handshake agreements and little more than his word as guaranteeing royalty payments—the parties' understanding of the duration of the agreement and OSI's obligation to pay royalties thereunder might naturally have been made as a separate agreement. While Dr. Schlein testified that he did not have any conversations with Moore prior to the drafting and signing of the agreement, this does not diminish the fact that the parties might naturally have made a separate royalty agreement.

Accordingly, we conclude the 1992 Agreement was not integrated either completely or partially. Even assuming arguendo that the 1992 Agreement was a fully or partially integrated contract, parol evidence nevertheless would have been admissible as an aid in interpreting the contract. (*Haggard v. Kimberly Quality Care, Inc., supra,* 39 Cal.App.4th at p. 519.) Of course, that extrinsic evidence may be admissible to interpret an ambiguous contract provision "does not mean resolution of that ambiguity is necessarily a jury question. Absent a conflict in the evidence, the interpretation of the contract remains a matter of law. [Citations.]" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1134.)

Although OSI maintains that interpretation of the 1992 Agreement did not depend on the credibility of conflicting extrinsic evidence, the record belies this claim. Both

Moore and Dr. Schlein were of the understanding that OSI would continue to pay royalties for as long as OSI sold the product. However, Lamb was of the opinion that the 1992 Agreement was limited solely to the "Schlein Shoulder Positioner" bearing product number 5336. Despite this limited view of the 1992 Agreement, OSI continued to pay royalties to Dr. Schlein regarding the sales of subsequent generations of the device, which had different names and product numbers. Given the conflict in the evidence regarding the product covered by the 1992 Agreement, as well as the duration of the agreement, the trial court did not err in submitting these matters to jury.

b. The 1992 Agreement Required Continued Royalty Payments to Dr. Schlein

We review the jury's determination of whether a breach occurred under the deferential substantial evidence standard. (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 (*Roddenberry*).) "Under the substantial evidence standard of review, 'we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, in support of the judgment.' " (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266, italics omitted.)

For ease of reference, we again provide the terms of the 1992 Agreement, which are as follows:

"[OSI] of Hayward, CA has received a product improvement idea from Dr. Allen Schlein. It is called the Schlein Shoulder Positioner.

"[OSI] will manufacture (or have manufactured) the device and will market the device.

"In return, [OSI] will pay a royalty of 5% of the list price less discounts to the Adam David Schlein trust fund.

"It is understood that a disposable pad set is being investigated. Should OSI determine that a disposable set is desirable and markets the pad set, a 5% royalty on the list price less discounts will apply.

"The royalties will be paid the 30th day of the month following the calendar quarter.

"Dr. Schlein, or his representatives shall have any reasonable opportunity to audit the sales of the device at his expense, should he so desire.

"The device has been assigned a product number for sales and accounting purposes. The pad set will also be assigned a product [number]."

Relying on *Roddenberry, supra,* 44 Cal.App.4th 634, OSI argues the plain language of the 1992 Agreement limits its obligations to pay royalties to Dr. Schlein only for the "Schlein Shoulder Positioner." OSI's reliance is misplaced. In *Roddenberry*, the issue was whether a marital settlement agreement entitled the plaintiff to her former husband's postdivorce profits on the television series *Star Trek*. (*Id.* at p. 640.) The appellate court concluded that the trial court properly ignored or rejected the plaintiff's trial testimony regarding her interpretation of the parties' intent when they entered into the marital settlement agreement, because it was contrary to the express language of the agreement and inconsistent with other evidence. (*Id.* at pp. 643, 649.)

The *Roddenberry* court nevertheless reversed the judgment to the extent it awarded the plaintiff profits for *Star Trek* 2 and 3 because the award was not based on evidence of contractual intent, but rather on the plaintiff's theory that *Star Trek* 2 and 3 were " 'continuations' " of *Star Trek* 1. (*Roddenberry, supra,* 44 Cal.App.4th at pp. 644, 657.) In rejecting the " 'continuations' " theory, the court explained that "[w]hether or not Star Trek 2 and 3 are 'continuations' of Star Trek 1 is irrelevant. In order to be relevant, the 'continuation' question would have to be the second step of a two-step analysis. The foundational step would be proof of contractual intent that the [plaintiff] receive profits from postdivorce 'continuations' of Star Trek 1. The second step would be proof that Star Trek 2 and 3 are in fact 'continuations' of Star Trek 1." (*Id.* at pp. 657-658.) The court noted that while the record might arguably contain evidence of step 2, it did not contain evidence of step 1. (*Id.* at p. 658.) There, rather than pointing to evidence showing an agreement that the plaintiff would receive profits from postdivorce " 'continuations,' " so that the plaintiff would share in her former husband's postdivorce efforts, the plaintiff merely argued that she was entitled to these "uncontemplated profits" because the parties' agreement did not expressly exclude them. (*Id.* at p. 658, fn. 19.) The appellate court was not persuaded, explaining that "[a] failure to exclude the uncontemplated is not the equivalent of substantial evidence supporting inclusion." (*Ibid.*)

The instant case is readily distinguishable. Unlike the plaintiff in *Roddenberry*, Dr. Schlein met the foundational requirement of establishing contractual intent. Specifically, Dr. Schlein presented evidence that prior to the 1992 Agreement, he and Moore had performed under a handshake agreement that obligated OSI to pay royalties to Dr. Schlein for as long as OSI sold the product. He also presented evidence that he and Moore shared the same understanding with respect to the rights and obligations under the 1992 Agreement. Moreover, unlike in *Roddenberry*, there was evidence that product modifications were contemplated by the parties from the very beginning. However, no evidence suggested that Dr. Schlein was required to participate in all the subsequent modifications in order to receive the royalty payments. Indeed, Moore expressly stated that such participation was not required, and the only prerequisite for continued royalty payments was continued sales by OSI.

Consistent with the contractual intent of the parties, OSI continued to make royalty payments to Dr. Schlein even after subsequent product modifications, name changes and product number reassignments. Despite this continued performance under the contract, OSI insists that Dr. Schlein was not entitled to continued royalties because the 1992 Agreement pertained only to the "Schlein Shoulder Positioner," and that in any event Dr. Schlein did not participate in the subsequent product modifications. Yet, OSI continued to thank Dr. Schlein for his assistance in the development of the subsequent generations.

These anomalies cannot be reconciled on the theory that the parties agreed to limit the 1992 Agreement to the "Schlein Shoulder Positioner." There is no evidence the parties agreed or even discussed such a limited royalty agreement.

In sum, considering the relevant contract language, together with the properly admitted extrinsic evidence that helps explain it, we conclude that the 1992 Agreement was intended to cover "any shoulder positioning device and disposable pad set."[10] The jury's finding of breach was thus supported by substantial evidence.

2. Misappropriation Claims

OSI raises a three-fold argument purportedly establishing reversible error with respect to the judgment in favor Dr. Schlein on his misappropriation claims under section 3344. First, OSI asserts that the trial court erred in granting Dr. Schlein's motion to amend his amended cross-complaint. Second, OSI argues that the evidence does not support the jury's finding that it violated section 3344. And, finally, OSI claims that the jury's finding that OSI both breached the 1992 Agreement and misappropriated Dr. Schlein's name is not supported by law. We address each claim in turn.

a. No Abuse of Discretion in Granting Leave to Amend at Trial

OSI contends the trial court abused its discretion when it allowed an amendment to Dr. Schlein's amended cross-complaint to conform to proof after the close of evidence at trial. Before addressing the merits of this argument, we begin with an overview of the relevant procedural history.

(i) Background

In June 2005, Dr. Schlein filed his original cross-complaint, claiming, among other things, that OSI breached the 1992 Agreement by failing to pay him royalties on sale of the Schlein Shoulder Positioner and its successors. In or around August 2006, OSI agreed to a stipulation allowing Dr. Schlein to amend his cross-complaint to add a

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[10] By reason of this holding, we similarly conclude that the trial court did not err in declaring that the 1992 Agreement obligated OSI to pay Dr. Schlein royalties on sales of products other than the Schlein Shoulder Positioner.

common law misappropriation claim and a section 3344 claim. For reasons not disclosed in the record, the stipulation and amendment were not actually filed until March 2008.

In any event, even before the amended cross-complaint was filed, OSI moved to strike the soon to be added misappropriation claims. The motion was heard on March 5, 2008, two weeks before trial commenced. At the hearing, Dr. Schlein's counsel provided the basis for Dr. Schlein's misappropriation claims. Specifically, counsel explained that OSI was liable for misappropriation because the company unlawfully registered the "Schlein Shoulder Positioner" trademark. Counsel also explained that OSI was liable for misappropriation because it had utilized Dr. Schlein's name to sell the shoulder positioner for a period of time in 2005 without ever paying the requisite royalties. OSI's counsel understood that Dr. Schlein's misappropriation claim was based on the assertion that OSI "did not have his consent to continue to use his name after the termination of the underlying agreement."

The trial court denied OSI's motion to strike, and later that same day OSI executed the stipulation regarding the amendment, and Dr. Schlein filed his amended cross-complaint.

Once the parties had rested, counsel for Dr. Schlein moved to amend the misappropriation claims to conform to proof. Counsel argued that "given how the evidence has unfolded" it was "clear" that "OSI utilized his name knowing that they owed him a royalty." The proposed amendments had the effect of asserting that OSI was liable for common law and statutory misappropriation to the extent there was a finding that the 1992 Agreement was invalid or unenforceable *or* where OSI was utilizing Dr. Schlein's name and not paying him a royalty.

OSI objected to the proposed amendment based on prejudice, claiming that the additional language "improperly converted" what was essentially a contract case into a tort case. For this reason, OSI argued that had this language been in the complaint from the beginning the misappropriation claims would have been subject to a demurrer. OSI's counsel further argued that "the prejudice is essentially another level of potential jury confusion with respect to the fact that tort claims and contract claims are and should be different and accomplish different results."

The trial court permitted the amendment, finding it was "appropriate" based on the proof and that it was ultimately up to the jury to determine whether Dr. Schlein prevailed on his misappropriation claims.

(ii) Analysis

We begin with the proposition that "leave to amend a complaint is entrusted to the sound discretion of the trial court, and ' " '[t]he exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse.' " ' (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 242 . . . .)" (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909.) The amendment of pleadings to conform to proof at trial is specifically governed by Code of Civil Procedure section 469, which provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the Court may order the pleading to be amended upon such terms as may be just."

In the instant case, OSI does not specifically claim to have been *misled*. A central issue at trial was that OSI sold various versions of the shoulder positioner device bearing Dr. Schlein's name without paying the requisite royalties. Moreover, at the hearing on OSI's motion to strike Dr. Schlein's misappropriation claims, counsel for Dr. Schlein explained that OSI was liable for misappropriation because it had utilized Dr. Schlein's name to sell the shoulder positioner for a period of time in 2005 without ever paying the requisite royalties. OSI's counsel also acknowledged an express understanding that the misappropriation claim was based on the assertion that OSI "did not have his consent to continue to use his name after the termination of the underlying agreement." Thus, the subsequent amendment was not exactly a surprise. Under these circumstances, the court might reasonably have concluded that the variation between the allegations of the cross-complaint, and the evidence that OSI sold the device using Dr. Schlein's name without paying him royalties, was not a "material" variance.

Even if the court did view the evidence as representing a material variance from the allegations of the complaint, it still retained the discretion to "order the pleading to be amended upon such terms that may be just." (Code Civ. Proc., § 469.) OSI fails to explain how the decision to allow the amendment was unjust.

To be sure, OSI does claim the decision to allow the amendment was prejudicial, but it merely asserts that the amendment allowed Dr. Schlein to "tortif[y]" his contract claim. According to OSI, this amendment was without legal support and the case might have settled early on. Beyond this conclusory allegation, OSI does not suggest how it might have prepared for trial differently if Dr. Schlein had formally amended his cross-complaint earlier in the litigation. We cannot presume it is prejudicial to a defendant—and thus, unjust—every time a trial court allows an unpleaded factual allegation to be added into a plaintiff's case at trial. The determination of prejudice must be based on the specific circumstances of the case. The cases cited by OSI in support of its position are distinguishable.

For example, unlike OSI's generic claim of prejudice in this case, the defendants in *Garcia v. Roberts, supra,* 173 Cal.App.4th at page 913, detailed exactly how the plaintiff's altered claim had interfered with their ability to defend the case: "As defendants point out, a number of significant factual issues that specifically related to the lease-option agreement were not pursued in plaintiff's deposition or in other discovery, since it became unnecessary to do so in light of what plaintiff asserted under oath at his deposition. . . . Indeed, since plaintiff denied knowledge of the lease-option agreement, the pursuit of discovery from plaintiff on that subject could reasonably go no further."

Similarly, the other cases cited by OSI are inapposite. In *Emerald Bay Community Assn. v. Golden Eagle Ins. Corp.* (2005) 130 Cal.App.4th 1078, following the end of trial, the plaintiff waited until three months after the court had issued its intended decision before seeking to amend the complaint. Under these circumstances, there was no abuse of discretion in denying the posttrial motion to amend the complaint. (Compare *id*. at p. 1097 with *Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285-287, overruled on another point in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [trial court erred in allowing amendment of cross-complaint after announcement of intended decision and filing of proposed findings of fact; amendment also alleged facts entirely outside cause of action alleged in cross-complaint].)

Likewise, in *Rainer v. Community Memorial Hosp.* (1971) 18 Cal.App.3d 240, the plaintiff sought to amend a personal injury complaint at the outset of trial, attempting to add a theory of independent negligence in addition to the theory of respondeat superior. (*Id.* at pp. 257-259.) In affirming the trial court's denial of the request, the appellate court explained that had the motion been timely made it "could have been allowed almost as a matter of course even if it 'added a significant new dimension to the lawsuit.' [Citation.]" (*Id.* at p. 258.) However, given the timing of the request, prejudice was shown as "[the] new issue would further complicate an already potentially complicated trial before a jury, [and] no discovery and preparation on the trial of these issues had been made by [the defendants] . . . ." (*Ibid.*) Here, as previously noted, OSI had ample notice both before and during trial of Dr. Schlein's claim that his name was used without his consent.

By reason of the foregoing, we conclude there is no basis for OSI's claim of prejudice.

b. Sufficiency of the Evidence

OSI also claims the evidence was insufficient to demonstrate either a lack of prior consent, or that Dr. Schlein suffered any injury to the commercial value of his name. These assertions are unpersuasive as well.

(i) Consent

"California has provided a statutory remedy for commercial misappropriation under . . . section 3344, which provides, in relevant part, '[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising . . . without such person's prior consent . . . shall be liable for any damages sustained by the person . . . .' 'Under section 3344, a plaintiff must prove all the elements of the common law cause of action. In addition, the plaintiff must allege a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' [Citation]." (*Stewart v. Rolling Stone LLC, supra,* 181 Cal.App.4th at p. 680, fn. omitted.)

OSI argues that properly interpreted section 3344 requires only a lack of prior consent, not merely a lack of *continuing* consent. OSI purports to engage in statutory interpretation, but its analysis is perfunctory and conclusory: i.e., OSI simply claims that based on the plain language of that statute and the legislative history, this court should not read section 3344 as requiring a lack of continuing consent. OSI does not make a real effort at construing the challenged statutory language, but simply states that section 3344 "could hardly be plainer, referring as it does to lack of 'prior' consent, *not* lack of 'continuing' consent." Additionally, OSI does not actually cite to or discuss the legislative history, but abstractly states "[n]either the legislative history of section 3344 nor any other extrinsic aid supports rejection of the 'lack of *prior* consent' interpretation," in favor of the "lack of *continuing* consent' interpretation."

In any case, even overlooking these obvious shortcomings, OSI's reasoning is clearly flawed, as it fails to consider the nature and scope of the consent given. In essence, OSI's argument "amounts to the assertion that, by consenting to eat apples with dinner, one has also consented to eat oranges. [However,] [t]he fact that both are fruit does not make them indistinguishable." (*Ainsworth v. Century Supply Co.* (Ill.Ct.App. 1998) 693 N.E.2d 510, 514.) In other words, OSI's defense must amount to more than showing that Dr. Schlein had previously consented to the use of his name. That is not in dispute. Whether Dr. Schlein's consent remained in effect after the nonpayment of royalties is.

Although there is scant California authority on this issue, there is ample authority from other jurisdictions standing for the proposition that use beyond the scope of the consent granted constitutes tortious conduct. (See *Leavy v. Cooney* (1963) 214 Cal.App.2d 496, 501 [use outside consent agreement constitutes tortious invasion of privacy]; see also *Facenda v. N.F.L. Films, Inc.* (3d Cir. 2008) 542 F.3d 1007, 1031 [use of plaintiff's voice for advertising purposes where consent limited to documentary films constitutes infringement]; *Zim v. Western Pub. Co.* (5th Cir. 1978) 573 F.2d 1318, 1327 [use of author’s name outside use permitted in publishing contract is tortious, interpreting Florida law]; *John Daly Enterprises, LLC v. Hippo Golf Co., Inc.* (S.D.Fla. 2009) 646 F.Supp.2d 1347, 1351 [use of professional golfer’s name and picture on Web page after endorsement agreement ended is infringement]; *Ryan v. Volpone Stamp Co., Inc.* (S.D.N.Y. 2000) 107 F.Supp.2d 369, 392 [plaintiff able to assert infringement claim against former licensee whose license plaintiff terminated for nonpayment of royalties]; *Whisper Wear, Inc. v. Morgan* (Ga.Ct.App. 2006) 627 S.E.2d 178, 180 [model had valid misappropriation claim against manufacturer of breast pumps that used photographs of model in manner not authorized under voucher between model and photographer]; *Shields v. Gross* (N.Y. 1983) 448 N.E.2d 108, 112 [defense to invasion of privacy no broader than consent granted]; *Welch v. Mr. Christmas Inc.* (N.Y. 1982) 440 N.E.2d 1317, 1320 [use after expiration of effective period of consent “no less an invasion of privacy than is use without consent”].)

Here, the fact that Dr. Schlein consented to the use of his name in selling the device in exchange for a royalty did not constitute consent to the gratuitous use of his name in connection with future sales. Thus, OSI’s defense to liability under section 3344 can be no broader than the consent granted by Dr. Schlein (see, e.g., *Shields v. Gross, supra,* 448 N.E.2d at p. 112), which the evidence established was implicitly tethered to the royalty payments. Specifically, Dr. Schlein testified that the consent to use his name was based on the payment of royalties. Moore testified that he did not think that OSI had the right to use Dr. Schlein’s name without his permission. Also, Mark Lane, vice-president of sales and marketing at OSI, confirmed that he was told to remove Dr. Schlein’s name from the product and all advertising because OSI had stopped paying royalties to Dr. Schlein. Later, Lane sent an e-mail to his staff and OSI’s outside marketing firm directing them to remove Dr. Schlein’s name from all products.

In sum, substantial evidence supported the jury’s finding that Dr. Schlein’s consent to the use of his name was dependent on OSI’s payment of royalties to Dr. Schlein.

(ii) Injury

OSI also claims that Dr. Schlein presented no evidence of any injury to the commercial value of his name. Citing to various cases, OSI insists that the evidence regarding the amount of royalties it failed to pay Dr. Schlein was irrelevant to whether he suffered an injury to the commercial value of his name. (See *KNB Enterprises v. Matthews, supra,* 78 Cal.App.4th at p. 366 [noting that § 3344 "has become a tool to control the commercial use and, thus, protect the economic value of one's name"]; *Miller, supra,* 159 Cal.App.4th at pp. 1005-1006 [discussing injury to commercial value of celebrity names]; *Solano v. Playgirl, Inc.* (9th Cir. 2002) 292 F.3d 1078, 1090 [measure of damages for misappropriation included economic value of use of name]; *Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416 [celebrity "injured economically" if automobile advertisement using his former name would make it difficult to endorse other automobiles].)

OSI argues that it is "hard to conceive" how the nonpayment of royalties could have caused a loss to the economic value of Dr. Schlein's name. OSI asserts that although its nonpayment of royalties would have decreased Dr. Schlein's revenue, it would not have decreased his name's market value.

In its myopic view of the injury redressed by section 3344(a), OSI overlooks the crucial fact that Dr. Schlein was *not a celebrity*. It bears repeating that section 3344(a) was enacted to "fill 'a gap which existed[ed] in the common law tort of invasion of privacy' as applied to noncelebrity plaintiffs whose names lacked 'commercial value on the open market.' [Citation.]" (*Miller, supra,* 159 Cal.App.4th at p. 1002.) Implicit in this reasoning is a recognition that a plaintiff is entitled to minimal damages even if actual damages are not proven.

Returning to the instant case, the jury found that Dr. Schlein was harmed by the unauthorized use of his name, and that he was entitled to recover the statutory minimum of $750, which it necessarily deemed was greater than the amount of actual damages suffered by Dr. Schlein. This finding is supported by substantial evidence.

Accordingly, we conclude the injury element was satisfied.

c. Contract and Tort Claims

OSI argues that the law did not support the section 3344 misappropriation verdict because it did not violate any duty that was *independent* of its obligations under the 1992 Agreement. OSI acknowledges that the duty not to use another's name without prior consent arises independently under tort law, but insists that any purported unauthorized use did not arise separately from the 1992 Agreement. OSI reasons that "[w]ithout the [1992] Agreement, OSI would not have begun to use Dr. Schlein's name in the first place." As we shall explain, this assertion rests on faulty logic.

Relying on a series of inapposite cases, OSI claims that Dr. Schlein was not entitled to recover for both breach of contract and misappropriation. In each of these cases, the alleged tort violation was based on the nonperformance under the contract. (See *Aas v. Superior Court* (2000) 24 Cal.4th 627, 635-636 [homeowners could not pursue negligence claims for alleged construction defects causing no separate damages]; *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28, 58-59 [no tortious breach of construction contract based on nonperformance under contract]; *Erlich v. Menezes* (1999) 21 Cal.4th 543, 550-552 [no emotional distress resulting from negligent breach of construction contract]; *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 87-88, 90-103 [no bad faith denial of employment contract where tort based on failure to perform under contract]; *Applied Equipment Corp. v. Litton Saudi Arabia, Ltd.* (1994) 7 Cal.4th 503, 514-518 [manufacturer not liable for conspiring to breach own contract]; *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1180-1186 [fraudulent misrepresentations designed to induce employee to resign not separately actionable]; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 682-683, 693 [no tortious invasion of employment contract based on employer breach of implied covenant of good faith and fair dealing].)

Here, the fatal flaw in OSI's reasoning is that it overlooks the fact that although the 1992 Agreement initially provided OSI the right to use Dr. Schlein's name, that consent was implicitly revoked when OSI repudiated the agreement in January 2005 by failing to pay the requisite royalties. We would be in a different situation had OSI removed Dr. Schlein's name from the product in January 2005 and simply sold it under another name. In that case, Dr. Schlein would still be entitled to pursue his nonpayment of royalties claim, but there would be no basis for his misappropriation claim. In other words, it is the *continued use* of Dr. Schlein's name *after OSI stopped paying the agreed upon royalties* (i.e. the revocation of consent) that constituted a violation of an independent legal duty.

Although not cited by either party, we find *Leavy v. Cooney, supra*, 214 Cal.App.2d 496 to be particularly instructive. There, the plaintiff, a public prosecutor, agreed with a film producer to be photographed and to act as a narrator without compensation in a film depicting a famous trial, provided that the film be shown only on television and not in theaters. (*Id.* at pp. 498-499.) The producer breached the agreement by contracting with a distributor for theatrical exhibition of the film. (*Id.* at p. 499.) The jury awarded compensatory damages to the plaintiff based on his testimony that he suffered humiliation and embarrassment stemming from his fear that if the film would be shown in theaters, the public would think he was being compensated for his participation in the project, which would subject him to severe criticism. (*Ibid.*) The defendants argued that they were not liable for such damages because any possible injury to the plaintiff's feelings from the unauthorized use of the film was not in the minds of the plaintiff and the producer at the time they signed the agreement, and that no injury was shown as a proximate result of the breach of that agreement by the producer. (*Id.* at p. 500.)

In affirming judgment in favor of the plaintiff, the *Leavy* court rejected the notion that the wrongful actions of the defendants consisted only of the plaintiff's rights under the contract. (*Leavy v. Cooney, supra,* 214 Cal.App.2d at pp. 500-501.) The court explained: "[The distributor] had no contract with [the prosecutor], and its conduct was clearly tortious. The contract between [the prosecutor] and [the producer] related only to exhibition on television, and the wrong of defendants consists not only in the breach of an agreement not to exhibit the film in theaters, but also in the fact that it could not, under any circumstances, be so exhibited without the consent of [the prosecutor], which he had not given. Defendants had no more right to show the pictures in theaters than they would have had if [the prosecutor] had refused to permit it to be shown publicly at all." (*Id.* at p. 501.) The court concluded that "[a]s to [the producer] the wrong consisted of breach of contract and also of a tortious invasion of [the prosecutor's] right of privacy; as to [the distributor] the wrong was the breach of an obligation not arising out of contract." (*Ibid.*)

So too here, OSI's wrong consisted of breach of contract by failing to pay Dr. Schlein the agreed upon royalties and also the tortious invasion of his right to control the use of his name. *Leavy v. Cooney, supra,* 214 Cal.App.2d 496 appears to be the only California case acknowledging that use outside the scope of the consent granted in a contract not only constitutes a breach of contract, but also gives rise to a tort action for invasion of privacy or infringement of the right of publicity. The courts of New York, Georgia, Florida, Massachusetts, Connecticut, Ohio, and Illinois have all recognized this concept. (See 2 McCarthy, The Rights of Publicity and Privacy (2d ed. 2011) Assignments & Licenses, § 10:36, p. 556; *Dzurenko v. Jordache, Inc.,* (N.Y. 1983) 451 N.E.2d 477, 478 ["for use beyond the granted consent, [plaintiff] had action under [New York privacy and publicity] statute and was not limited to action sounding in contract"]; *Rivell v. Private Health Care Systems, Inc.* (11th Cir. 2008) 520 F.3d 1308, 1310-1311 [physicians' tort claim of appropriation of their names against preferred provider organizations (PPO's) not preempted by contract with PPO manager; contracts were merely some evidence of consent or lack thereof, which was affirmative defense to appropriation claim]; *Donoghue v. IBC USA (Publications), Inc.* (1st Cir.1995) 70 F.3d 206, 217-218 [use in advertising that is not authorized by license between parties constitutes violation of Massachusetts' privacy/publicity statute]; *Zim v. Western Pub. Co., supra*, 573 F.2d at p. 1327; *Seifer v. PHE, Inc.* (S.D. Ohio 2002) 196 F.Supp.2d 622, 631 [grant of sublicense was not authorized by license and triggered claim for infringement]; see also Rest.3d, Unfair Competition, § 46, com. f ("[t]he defense of consent extends only to conduct that is within the scope of the consent. . . . If the use is outside the scope of consent, the defendant is subject to liability for any harm resulting from conduct that exceeds the consent"].)

In sum, we conclude that there is a legal basis for the jury's verdict in favor Dr. Schlein on his misappropriation claims and that this verdict was supported by substantial evidence. Accordingly, the trial court properly denied OSI's motion for judgment notwithstanding the verdict as to Dr. Schlein's misappropriation claims.

C. OSI's Appeal (Fees)*

Section 3344(a) clearly states that "[t]he prevailing party in any action under this section shall . . . be entitled to attorney's fees and costs." Under this provision, Dr. Schlein sought and was awarded attorney fees in the amount $320,000.

On appeal, OSI argues that the trial court erred reversibly in awarding such fees to Dr. Schlein because: (1) given the minimal amount of damages awarded by the jury ($750), OSI was actually the prevailing party; and (2) the amount awarded was unreasonable. Neither contention has any merit.

1. Prevailing Party Status

Despite OSI's argument to the contrary, Dr. Schlein was the prevailing party entitled to attorney fees under section 3344. Dr. Schlein prevailed on the merits of his section 3344 claim given the verdict in his favor on this claim. That he was awarded statutory damages in the amount of $750 is of no moment. As discussed, the jury also awarded $1,220,000 in profits due to OSI's unauthorized use of Dr. Schlein's name. This clearly entitled Dr. Schlein to prevailing status.

The authorities cited by OSI do not compel a contrary conclusion. In each of these cases, the litigation terminated without a determination of the merits. In *Gilbert v. National Enquirer, Inc.* (1997) 55 Cal.App.4th 1273, 1275 and *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 Cal.App.4th 1568, 1570-1571, the actions were dismissed without prejudice prior to trial. Under these circumstances, it could not be said that the party requesting fees had prevailed on a "practical level." (*Gilbert, supra*, at pp. 1277-1278; *Heather Farms, supra*, at p. 1574.) Likewise, in *Moran v. Endres* (2006) 135 Cal.App.4th 952, a defendant was not entitled to fees under Code of Civil

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* See footnote, *ante*, page 1.

Procedure section 425.16, subdivision (c)(1) where the defendant had moved to strike all 11 causes of action in a complaint, but prevailed only as to one purported cause of action for "conspiracy." (*Id.* at pp. 954-956.) In upholding the denial of attorney fees, the court explained that this was an "illusory victory" (*id.* at p. 954) at best, which did not entitle the defendant to fees because the ruling "in every practical sense meant nothing" (*id.* at p. 956).

Here, in contrast, Dr. Schlein's claim proceeded to a jury trial, resulting in a special verdict in his favor on his causes of action, awarding $616,793 in damages and $1,220,000 in profits. Clearly, this was not a trivial victory.

However, even disregarding the $1,220,000 in profits, we would still conclude that Dr. Schlein was the prevailing party entitled to attorney fees. The mandatory fee provision of section 3344(a) does not require that the prevailing party be awarded actual as opposed to statutory damages. Rather, it provides that that the prevailing party "shall" be entitled to attorney fees. (§ 3344(a).) We conceive no rational purpose for making the availability of attorney fees contingent upon the amount of damages awarded to the injured party. Our reasoning finds support in the legislative history of the statute, which reveals that it was intended to provide for a minimum measure of damages and for "recovery of attorney fees," which were "to be measured by the amount of time expended and not by the amount of recovery." (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 826 (1971 Reg. Sess.) as amended May 3, 1971, p. 1.)

In any case, we conclude that Dr. Schlein was unquestionably the prevailing party.

2. Reasonableness of Award

"In determining the amount of reasonable attorney fees to be awarded under a statutory attorney fees provision, the trial court begins by calculating the " 'lodestar' " amount. [Citations.] The 'lodestar' is 'the number of hours reasonably expended multiplied by the reasonable hourly rate.' [Citation.] To determine the reasonable hourly rate, the court looks to the 'hourly rate . . . prevailing in the community for similar work.' [Citation.] Using the lodestar as the basis for the attorney fees award 'anchors the trial court's analysis to an objective determination of the value of an attorney's services, ensuring that the amount awarded is not arbitrary. [Citation.]' [Citation.]" (*Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1393-1394.)

" 'California courts have long held that trial courts have broad discretion in determining the amount of a reasonable attorney's fee award. This determination is necessarily ad hoc and must be resolved on the particular circumstances of each case.' [Citation.] In exercising its discretion, the trial court may accordingly 'consider all of the facts and the entire procedural history of the case in setting the amount of a reasonable attorney's fee award.' [Citation.] An attorney fees award ' "will not be overturned in the absence of a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence. [Citations.]" [Citation.]' [Citation.]" (*Bernardi v. County of Monterey, supra,* 167 Cal.App.4th at p. 1394.)

" 'When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. . . .' [Citation.]" (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686-687 (*Bell*).) However, "[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed." (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130; see also *Akins v. Enterprise Rent–A–Car Co.* (2000) 79 Cal.App.4th 1127, 1132-1133.) Apportionment of fees and costs similarly rests within the sound discretion of the trial court. (See *San Dieguito Partnership v. San Dieguito River Valley Regional etc. Authority* (1998) 61 Cal.App.4th 910, 920, disapproved on other grounds in *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1097, fn. 5.)

Here, while OSI does not challenge the hourly rates that the trial court deemed were reasonable, OSI contends that the lodestar amount should be reduced to reflect Dr. Schlein's minimal success on his misappropriation claim. OSI also claims that award is improperly inflated as it includes fees beyond those allowed under section 3344.

a. The Lodestar Amount

OSI's challenge to the lodestar amount is based on its contention that an award of $320,000 in attorney fees is grossly disproportionate in this case as Dr. Schlein was only awarded $750, which represented only a fraction of the damages he sought. This position, like OSI's challenge to Dr. Schlein's prevailing party status, is without merit. First, as discussed, Dr. Schlein's recovery on his misappropriation claims included the $750 minimum measure of damages, as well as OSI's profits from the unauthorized use of his name. Second, even if Dr. Schlein had not been entitled to the $1,220,000 in profits, nothing in the plain language or legislative intent of section 3344 indicates that the attorney fees must bear a percentage to the ultimate recovery of damages. Indeed, the proportionality requirement advocated by OSI would be contrary to the legislative intent of section 3344(a), as it would hinder injured parties with small potential damages from seeking redress—the very issue that the statute was enacted to address.

On this record, we find no abuse of direction in the lodestar amount awarded.

b. Apportionment

Similarly, our independent review of the record establishes that the lower court did not abuse its discretion in finding that both the factual and legal issues related to Dr. Schlein's breach of contract claim and his misappropriation claim could not be disentangled, making apportionment inappropriate. Dr. Schlein's breach of contract claim and his misappropriation claim regarding the OSI's sale of the shoulder positioner without payment of the agreed upon royalties and its unauthorized use of Dr. Schlein's name in connection with such sales presented " ' "related legal theories" ' " and involved " ' "a common core of facts." ' " (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417.)

OSI cites *Bell, supra,* 82 Cal.App.4th 672 to support its argument that the court should have apportioned the fees, but reliance on this case is inappropriate. *Bell* concerned a football coach's lawsuit against the school district that alleged four violations of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.; the Brown Act) and 11 other tort causes of action. (*Bell*, *supra*, 82 Cal.App.4th at pp. 678–680.) The trial court awarded attorney fees and costs on all causes of action based on the attorney fees provision of the Brown Act. (*Bell, supra,* at p. 686.) In reversing the fee award, the appellate court concluded that the lower court abused its discretion, and explained: "Although the Brown Act violation may have procedurally facilitated the wrongful termination or retaliatory firing, it did not substantively beget it. Simply stated, they constitute two separate and distinct claims, one entitled to statutory fees and the other not." (*Id.* at p. 688.) The court also noted that the plaintiff's counsel made candid admissions that suggested the fees could be apportioned between the Brown Act violations and the tort actions. (*Bell, supra,* at p. 689.)

The *Bell* court affirmed the rule that apportionment of attorney fees "rests within the sound discretion of the trial court." (*Bell, supra,* 82 Cal.App.4th at p. 687.) It pointed out that attorney fees "need not be apportioned when incurred for representation on an issue common to both causes of action in which fees are proper and those in which they are not. [Citation.] Apportionment is not required when the claims for relief are so intertwined that it would be impracticable, if not impossible, to separate the attorney's time into compensable and noncompensable units. [Citations.]" (*Ibid.*)

In *Bell,* a clear line of demarcation existed between the compensable and noncompensable causes of action. The attorney fees associated with bringing the tort causes of action in *Bell* existed independently of the Brown Act causes of action. In contrast, here the breach of contract claim and the misappropriation claim involved the same issues and evidence necessary to establish Dr. Schlein's cross-claims. The trial court correctly determined that the two claims were "inextricably interrelated," and that with the exception of "exclusion by [Dr.] Schlein of a request for fees before the [section] 3344 claim was added," the attorney fees "cannot be segregated among the contract and statutory claims."

Accordingly, the trial court did not abuse its discretion in determining Dr. Schlein's request for attorney fees was reasonable in the amount.

IV. DISPOSITION

The judgment is modified to conform with the jury's special verdict, namely its finding that Dr. Schlein was entitled to $1,220,000, representing OSI's profits from the unauthorized use of Dr. Schlein's name. As so modified, the judgment is affirmed. Dr. Schlein is entitled to his costs on appeal.

Reardon, J.

We concur:

Ruvolo, P.J.

Sepulveda, J.

Trial Court:	Alameda County Superior Court
Trial Judge:	Hon. Robert B. Freedman
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