Filed 12/22/16 Glovia International v. Actuant Corp. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GLOVIA INTERNATIONAL, INC., Plaintiff and Respondent, v. ACTUANT CORPORATION et al., Defendants and Appellants.	B267175 (Los Angeles County Super. Ct. No. BC498779)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed in part and reversed in part.

AlvaradoSmith, Theodore E. Bacon, David John Masutani, William M. Hensley, for Defendants and Appellants Actuant Corporation and Maxima Technologies & Systems, LLC.

Baker & Hostetler, Teresa C. Chow, Richard M. Knoth, and Michael J. Montgomery, for Plaintiff and Respondent.

Plaintiff and respondent Glovia International, Inc. (Glovia) brought an action against defendants and appellants Maxima Technologies & Systems, LLC (Maxima) and its parent company Actuant Corporation (Actuant) (together defendants) concerning defendants' alleged unauthorized use of Glovia's proprietary software. The jury returned a verdict in Actuant's favor on Glovia's conversion and negligent misrepresentation causes of action, finding the claims barred by the statute of limitations. The jury returned a verdict in Glovia's favor on its conversion cause of action against Maxima, awarding Glovia $1,196,000[1] in compensatory damages and $650,000 in punitive damages.[2] The trial court awarded Glovia attorney fees of $1,474,151.75 pursuant to Civil Code section 1717 (section 1717).

Maxima contends insufficient evidence supports the punitive damages award, the conversion claim was barred by the statute of limitations, and the conversion claim damages were improper. Defendants contend the attorney fees award was not within the scope of section 1717 and was not supported by an

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1 The jury mistakenly awarded Glovia $1,960,000. The trial court granted Glovia's motion to remit that award to $1,196,000.

2 In addition, Glovia asserted declaratory relief and unjust enrichment causes of action against defendants. The trial court and not the jury was to decide the declaratory relief cause of action, but there does not appear to be an express ruling on that cause of action in the record on appeal. The trial court correctly ruled that California law does not recognize an independent cause of action for unjust enrichment. (See *Melchior v. New Line Productions Inc.* (2003) 106 Cal.App.4th 779, 793.)

adequate showing.[3] We reverse the awards for punitive damages and attorney fees and affirm the conversion verdict and accompanying damages award.

BACKGROUND[4]

Glovia designed and manufactured software for the manufacturing industry. Glovia's software was its "lifeblood." Its Enterprise Resource Planning (ERP) software consisted of over 70 modules concerning aspects of business such as sales, purchase, and work orders that Glovia integrated so a customer could have an enterprise-wide view of its business.

Glovia limited the way customers could use its software through negotiated license agreements. It did not allow customers to permit other companies to use its software. The license agreements specified the number of modules and number of users which in turn determined the license price.

Glovia charged customers a one-time fee for a license to use its software. In addition to license fees, Glovia generated revenue through software maintenance and consulting services. Under certain circumstances, Glovia would permit a customer to

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[3] Actuant claims, in its reply brief, the cost award against it must be reversed because it was the prevailing party. We do not consider issues raised for the first time on appeal in a reply brief. (*SCI California Funeral Services, Inc. v. Five Bridges Foundation* (2012) 203 Cal.App.4th 549, 573, fn. 18.)

[4] Because Glovia did not appeal from the jury's verdicts in Actuant's favor, we do not present evidence in support of Glovia's claims against Actuant.

assign the customer's license to another entity. Glovia would charge a fee for the assignment.

In 1996, Glovia licensed its ERP software to Datcon Instruments Company which later became Maxima Technologies, Inc.[5] In 2003, Maxima Technologies, Inc. was "converted" into Maxima—i.e., Maxima Technologies & Systems, LLC. Maxima then began using Glovia's software. Maxima Technologies, Inc. did not inform Glovia about the 2003 "conversion" and request an assignment of its software license.

In 2011, Glovia received a letter from Actuant Shared Services informing Glovia that the name on the invoices for Maxima should be changed. David Ginsberg, Glovia's general counsel, saw a copy of the letter and noticed that the name on the letter was different than the name on Glovia's license agreement. The letter referred to "Maxima Technologies & Systems LLC," and Glovia's agreement was with "Maxima Technologies, Inc." Over the ensuing year, Glovia attempted to determine from Maxima the relationship between Maxima Technologies, Inc. and Maxima—i.e., whether they were the same entity or different entities. In July 2012, a Maxima executive sent an email to Ginsberg stating, "I cannot find a traceable route to allay your legal entity concerns. [¶] Therefore, I would like a cost estimate from you on what it takes to get this fixed, via your internal process."

Ginsberg viewed the Maxima email as an admission that Maxima Technologies, Inc. and Maxima were not the same entity. He attempted, without success, to negotiate an

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[5] Also referred to in the record as "Maxima Technologies & Systems, Inc."

assignment with Maxima, drafting and sending to Maxima an assignment agreement that Maxima rejected.

DISCUSSION

I. Punitive Damages

Maxima contends insufficient evidence supports the $650,000 punitive damages award against it because Glovia did not present evidence of Maxima's financial condition—i.e., its ability to pay the award—and there is insufficient evidence Maxima acted with oppression, fraud, or malice. We agree Glovia failed to present sufficient evidence of Maxima's financial condition and thus reverse the punitive damages award.[6]

A. Standard of Review

We review a jury's punitive damages award for substantial evidence, viewing the record in the light most favorable to the judgment. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916 (*Kelly*).)

B. Application of Relevant Principles

"In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." (Civ. Code, § 3294, subd. (a).) "An award of

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6 Because we hold Glovia failed to present sufficient evidence of Maxima's financial condition, we do not decide whether sufficient evidence supports the jury's finding that Maxima engaged in oppressive, fraudulent, or malicious conduct.

punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 & fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980] (*Neal*); *Adams v. Murakami* (1991) 54 Cal.3d 105, 110 [284 Cal.Rptr. 318, 813 P.2d 1348] (*Adams*).)" (*Kelly, supra,* 145 Cal.App.4th at p. 914.) "The ultimately proper level of punitive damages is an amount not so low that the defendant can absorb it with little or no discomfort [citation], nor so high that it destroys, annihilates, or cripples the defendant. [Citations.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621-622.)

"Even if an award is entirely reasonable in light of the other two factors in *Neal, supra,* 21 Cal.3d 910 (nature of the misconduct and amount of compensatory damages), the award can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone.*" (*Adams, supra,* 54 Cal.3d at p. 111.) Accordingly, evidence of a defendant's financial condition is a prerequisite to an award of punitive damages, and a punitive damages award unsupported by meaningful evidence of the defendant's financial condition will not survive appellate review. (*Adams, supra,* 54 Cal.3d at pp. 109, 112.) Punitive damages are determined based on the defendant's financial condition at the time of trial. (*Kelly, supra,* 145 Cal.App.4th at p. 915.) The plaintiff has the burden of proving the defendant's financial condition. (*Adams, supra,* 54 Cal.3d at p. 119; *Kelly, supra,* 145 Cal.App.4th at p. 916.)

The California Supreme Court has not prescribed a fixed standard for determining a defendant's ability to pay a punitive damages award, but net worth is the most common measure. (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194; *Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 680 (*Baxter*).) "In most cases, evidence of earnings or profit alone are not sufficient 'without examining the liabilities side of the balance sheet.' [Citations.] 'What is required is evidence of the defendant's ability to pay the damage award.' [Citation.] Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter, supra,* 150 Cal.App.4th at p. 680.) "Without evidence of the actual total financial status of the defendants, it is impossible to say that any specific award of punitive damages is appropriate." (*Kenly v. Ukegawa* (1993) 16 Cal.App.4th 49, 58 (*Kenly*).) When a punitive damages award is reversed based on the insufficiency of the evidence, the issue of punitive damages cannot be retried. (*Baxter, supra,* 150 Cal.App.4th at p. 681.)

In its opposition to Maxima's new trial motion on punitive damages, Glovia set forth the evidence it contended it presented concerning Maxima's financial condition: "[T]he trial record contains plenty of evidence showing that Maxima . . . is a multi-million dollar company. First, Actuant's chief financial officer, Andrew Lampereur, testified that Actuant paid nearly $100 million for Maxima . . . in 2006. . . . Second, Lampereur testified that Maxima . . . is about to incur the costs associated with a new software system to replace Glovia's software. . . . Third, Maxima . . . readily admits that it had the financial wherewithal to pay more than $1 million over the course of the last several years to support its stolen software. . . . And finally, Actuant's treasurer, Terry Braatz, testified at trial concerning various financial-related items in Acuant's [*sic*] most recent 10K filing with the SEC . . . ." In denying Maxima's new trial motion, the trial court stated, "The trial included sufficient and meaningful evidence of defendant's financial condition, in support of punitive damages, given the list of financial information referenced in the oppositions."

Glovia's showing concerning Maxima's ability to pay punitive damages was deficient. The price Actuant paid for Maxima in 2006 said nothing about Maxima's assets and liabilities or its income and expenses at the time of trial in 2014. (*Baxter, supra,* 150 Cal.App.4th at p. 680; *Kelly, supra,* 145 Cal.App.4th at p. 915.) Maxima's ability to pay for a new software system or for the support of its old software system provided only a partial picture of Maxima's balance sheet. (*Baxter, supra,* 150 Cal.App.4th at p. 681.) Evidence of Actuant's financial condition as reflected in its SEC filing was irrelevant to a determination of Maxima's financial condition. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1285 [evidence of the financial condition of a parent company is not relevant to establish the financial condition of its subsidiary].) "The record is thus insufficient for a reviewing court to evaluate [Maxima's] ability to pay [$650,000] in punitive damages." (*Baxter, supra,* 150 Cal.App.4th at p. 681.)

Glovia contends the relevant inquiry is whether Maxima was able to pay the punitive damages award of $650,000 and Maxima did not claim in the trial court or on appeal that the award is "beyond its ability to pay." It was Glovia's burden to demonstrate Maxima's ability to pay the award, not Maxima's burden to prove its inability. (*Adams, supra,* 54 Cal.3d at p. 123 ["It is inherently prejudicial to require a defendant to introduce evidence of personal finances"].)

Glovia also argues Maxima could not claim its inability to pay the award because it is a "wholly-owned subsidiary of Actuant, which is a 100-year old, publicly-traded, multi-national conglomerate." That Actuant may have been able to pay the punitive damages award was not relevant to Maxima's financial condition. (*Tomaselli v. Transamerica Ins. Co., supra,* 25 Cal.App.4th at p. 1283.)

Finally, relying on *Cummings Medical Corp. v. Occupational Medical Corp.* (1992) 10 Cal.App.4th 1291 (*Cummings*), Glovia argues that Maxima's financial condition aside, the punitive damages award was appropriate because it was based on the profit Maxima realized by its conversion of Glovia's software. In *Cummings*, the court held that in the absence of evidence of a defendant's net worth, a punitive damages award can be based solely on the amount of profit the defendant realized from its fraud. (*Id.* at pp. 1300-1301.) The court explained, "In our view, it is proper and fitting to 'punish' a defendant by stripping the defendant of wealth gained through defrauding the plaintiff. A punitive damages award specifically tailored to this objective can never be "excessive." (*Id.* at p. 1300.) It further held that "punitive damages calculated on the basis of the profitability of the defendant's fraudulent conduct satisfy the requirement the trier of fact consider the financial condition of the particular defendant. (See *Neal, supra,* 21 Cal.3d at p. 928.)" (*Id.* at p. 1300, fn. 8.)

Glovia contends the $650,000 punitive damages award was proper under *Cummings* because Maxima's profit from its conversion of Glovia's software far exceeded the combined sum of the compensatory and punitive damages awards. In support of this proposition, Glovia relies on its damages expert's testimony that his license fee damages calculation was conservative because Glovia could have forced Maxima to remove the converted software from its system and replace the software with new software which "would have been considerably more expensive and disruptive to the organization." It further relies on Maxima's statement in closing argument to the jury that it would have been "dead" if Glovia shut down Maxima's ERP system.[7]

We disagree with *Cummings* that a punitive damages award based solely on the profit the defendant gained from its oppression, fraud, or malice, without reference to the defendant's financial condition is appropriate. Although the Supreme Court has not prescribed a fixed standard for determining a defendant's ability to pay a punitive damages award,[8] it has stated that "the

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7 Glovia also attempts to support its proposition with a statement concerning Maxima's dependence on Glovia's software in Maxima's post-trial opposition to Glovia's motion for a permanent injunction enjoining Maxima's use of Glovia's software. Because that statement was not before the jury, Glovia may not rely on it as support for the jury's punitive damages award.

8 In *Adams, supra,* 54 Cal.3d at page 116, footnote 7, the court said, "Various measures of a defendant's ability to pay a punitive damages award have been suggested. Defendant in this case contends the best measure of his ability to pay is his net worth. The Association for California Tort Reform, appearing as amicus curiae on behalf of defendant, advocates the profitability of the defendant's misconduct as the proper measure. We decline

most important question is whether the amount of the punitive damages award will have deterrent effect—without being excessive." (*Adams, supra,* 54 Cal.3d at p. 111.) In other words, "[t]he purpose [of a punitive damages award] is to deter, not to destroy." (*Ibid.*)

We agree with the view expressed in *Kenly* that an award based solely on the alleged profit gained by the defendant in the absence of evidence of net worth improperly "raises the potential of its crippling or destroying the defendant, focusing as it does solely on the assets side of the balance sheet *without examining the liabilities side of the balance sheet*. Without evidence of the entire financial picture, an award based on 'profit' could leave a defendant devoid of assets with which to pay his other liabilities. It is here that we believe the *Cummings* court strayed when it concluded that an award based on the profit reaped from the fraud is proper and can *never* be excessive." (*Kenly, supra,* 16 Cal.App.4th at p. 57.)[9] Because, as explained above, Glovia did not present evidence of Maxima's ability to pay the punitive damages award, an award based on Maxima's profit from its misconduct was inappropriate.

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at present, however, to prescribe any rigid standard for measuring a defendant's ability to pay."

9 A profit-based punitive damages award might be appropriate if a plaintiff presents evidence of the defendant's ability to pay the award. (See *id.* at p. 58.)

II. Attorney Fees

Defendants contend the trial court erred in awarding Glovia attorney fees pursuant to section 1717.[10] They further contend that Glovia failed to justify its attorney fees claim. We agree that Glovia was not entitled to its attorney fees under section 1717.[11]

A. Standard of Review

We review de novo the determination of the legal basis for an award of attorney fees. (*Pueblo Radiology Medical Group, Inc. v. Gerlach* (2008) 163 Cal.App.4th 826, 828.)

B. Application of Relevant Principles

The attorney fees provision in the license agreement between Glovia and Maxima Technologies, Inc. (Datcon Instrument Company) provided, "The non-prevailing party in any legal action or proceeding under the Agreement will, in addition to any awards accruing from such litigation, also bear all costs and expenses relating to such litigation including the reasonable

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10 Section 1717, subdivision (a) provides in relevant part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

11 Because we hold that Glovia was not entitled to its attorney fees under section 1717, we do not decide whether Glovia adequately supported its attorney fees request.

attorneys' fees, court costs and other reasonable out-of-pocket expenses of the prevailing party." The attorney fees provision in the license agreement between Glovia and Enerpac Group (Actuant) provided, "If either party to the Agreement brings any action, suit, counterclaim, appeal, arbitration, or mediation against the other party regarding the terms of this Agreement, the losing party shall pay to the prevailing party a reasonable sum for attorneys' fees and costs as determined by the Court, arbitrator, or mediator."

In *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds*), "our Supreme Court addressed whether nonsignatories to a contract can share the benefits and burdens of a prevailing party attorney fees clause. The plaintiff (a supplier) sued the defendants (shareholders and directors of a bankrupt corporation supplied by the plaintiff) on an alter ego theory. (*Id.* at p. 127.) The trial court rejected the alter ego theory and awarded attorney fees to the shareholder defendants, based on a contract signed by the bankrupt corporation. (*Ibid.*) Highlighting the policy of reciprocity established in Civil Code section 1717 [footnote omitted], the *Reynolds* court affirmed the award. (*Reynolds*, at pp. 128-129.) 'Its purposes require section 1717 be interpreted to further provide a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant.' (*Id.* at p. 128.) *Reynolds* concluded that the shareholder defendants must be entitled to recover attorney fees because if they had lost, they clearly would have been held liable for the supplier's attorney fees as the alter egos of the bankrupt corporation. (*Id.* at p. 129; see *Pueblo Radiology Medical Group,* *Inc. v. Gerlach*[*, supra,*] 163 Cal.App.4th [at pp.] 828-829 [77 Cal.Rptr.3d 880] [applying *Reynolds*].)" (*CB Richard Ellis, Inc. v. Terra Nostra Consultants* (2014) 230 Cal.App.4th 405, 416-417.)

As relevant here, Glovia's action against Actuant and Maxima asserted causes of action for conversion and declaratory relief. On the conversion cause of action, Actuant prevailed against Glovia and Glovia prevailed against Maxima. Although the record on appeal does not contain an express ruling on Glovia's declaratory relief cause of action, we infer from the trial court's minute order granting Glovia injunctive relief that the trial court ruled in Glovia's favor on that cause of action.[12] The central issue in both causes of action was Glovia's claim that neither Actuant nor Maxima had a license to use Glovia's software. By prevailing on those causes of action, Glovia established that Actuant and Maxima were not parties to the license agreements.

Relying on *Santisas v. Goodin* (1998) 17 Cal.4th 599, 610-611 (*Santisas*), Glovia argues, "[W]here a dispute involves a contract that contains an attorney fee provision, § 1717 authorizes fees where a party prevails by proving the contract is invalid or unenforceable." Glovia's reliance on *Santisas* is misplaced. The *Santisas* court held that when a plaintiff brings an action on a contract that contains a provision awarding attorney fees to the prevailing party, and the defendant successfully defends the action by arguing that the contract was inapplicable, invalid, unenforceable, or nonexistent, then the

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12 "The Complaint sufficiently alleges multiple causes of action in support of proved claims related to requested injunctive relief (e.g., Complaint, ¶¶31, 39 and prayer 1.)" Paragraph 39 is the first paragraph of Glovia's declaratory relief cause of action.

reciprocal provisions of section 1717 apply. (*Id.* at p. 611 ["To ensure mutuality of remedy *in this situation*, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. [Citations.]" (Italics added.)].)

Here, Glovia did not bring an action on a contract—i.e., to enforce the contract's terms. (*MBNA America Bank, N.A. v. Gorman* (2006) 147 Cal.App.4th Supp. 1, 7 ["An action is 'on the contract' when it is brought to enforce the provisions of the contract"].) Instead, it brought an action claiming Actuant and Maxima were not valid holders of a license, a claim upon which it prevailed. Thus, as Glovia succeeded in proving it was not a party to a contract (i.e., license agreement) with Actuant or Maxima that contained an attorney fees clause, it was not entitled to its attorney fees.

Citing *Mountain Air Enterprises, LLC v. Sundowner Tower, LLC* (2014) 231 Cal.App.4th 805 (*Mountain Air Enterprises*)[13] and *Windsor Pacific LLC v. Samwood Co., Inc.* (2013) 213 Cal.App.4th 263 (*Windsor Pacific*), Glovia also argues that a defendant who successfully invokes a contract as an affirmative

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13 The California Supreme Court granted review in *Mountain Air Enterprises, supra,* 231 Cal.App.4th 805 (S223536). Its summary of cases accepted identifies the following issues in that case: "(1) Does the assertion of an agreement as an affirmative defense implicate the attorney fee provision in that agreement? (2) Does the term 'action' or 'proceeding' in Civil Code section 1717 and in attorney fee provisions encompass the assertion of an affirmative defense?"

defense is entitled to recover attorney fees under that contract's attorney fees provision. Glovia does not identify an affirmative defense in either Actuant's or Maxima's amended answer that raises the relevant license agreement as an affirmative defense. Glovia apparently contends that even though its action sought to establish that defendants were not parties to the license agreements, it is entitled to attorney fees under *Mountain Air Enterprises* and *Windsor Pacific* pursuant to the reciprocal provisions in section 1717 because defendants requested attorney fees in their respective answers. Because Glovia does not identify the affirmative defenses through which it claims defendants asserted the license agreements, we do not decide whether such an assertion would implicate section 1717's provisions. (See *Gil v. Mansano* (2013) 121 Cal.App.4th 739, 745 [the assertion of an affirmative defense is not an "action" for section 1717 purposes]; *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 712 & fn. 15 [raising a defense under a contract provision may have the effect of enforcing the terms of the contract, but does not constitute bringing an "action"].)

III. Conversion

Maxima contends Glovia's conversion claim was barred by the statute of limitations and Glovia failed to make a proper showing of damages on its conversion claim. Glovia timely brought its conversion claim and substantial evidence supports the jury's conversion damages award.

A. *Standards of Review*

1. Statute of Limitations

"Generally, appellate courts independently review questions of law and apply the substantial evidence standard to a superior court's findings of fact." (*SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461-462.) Resolution of a statute of limitations issue normally is a question of fact. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.) When the facts relevant to the application of a statute of limitations are not in dispute, however, the application of the statute of limitations may be decided as a question of law. (*International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611-612.)

Under the substantial evidence standard of review "'"the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' [Citation.]" (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053 superseded by statute on other grounds as stated in *Eller Media Co. v. City of Los Angeles* (2001) 87 Cal.App.4th 1217, 1219-1220.) "We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. [Citation.] The burden is on the party or parties challenging the findings and orders of the trial court to show there is no evidence of a substantial nature to support the finding or order." (*In re H.G.* (2006) 146 Cal.App.4th 1, 13.)

2. Damages

"We must uphold an award of damages whenever possible [citation] and 'can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury.' [Citations.]" (*Westphal v. Wal-Mart Stores, Inc.* (1998) 68 Cal.App.4th 1071, 1078.) "The amount of damages . . . is a fact question . . . [and] an award of damages will not be disturbed if it is supported by substantial evidence.' [Citation.]" (*Rony v. Costa* (2012) 210 Cal.App.4th 746, 753; *Westphal v. Wal-Mart Stores, Inc., supra,* 68 Cal.App.4th at p. 1078 ["The amount of damages is a fact question, committed first to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. [Citations.]"].) "'The evidence is insufficient to support a damage award only when no reasonable interpretation of the record supports the figure.' [Citation.]" (*Rony v. Costa, supra,* 210 Cal.App.4th at p. 754.)

B. Application of Relevant Principles

1. Statute of Limitations

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at 1110.) That is, the limitations period begins to run when the plaintiff "has notice or information of circumstances to put a reasonable person on inquiry." (*Id.* at pp. 1110-1111 (internal quotation marks and citations omitted).)

The statute of limitations for conversion is three years. (Code Civ. Proc., § 338, subd. (c)(1).) In 2003, Maxima was formed and began using the software Glovia licensed to Maxima Technologies, Inc. Glovia filed this action on January 8, 2013. Accordingly, Glovia's action was time-barred by the three-year statute of limitations unless accrual of the action was delayed under the discovery rule.

Ginsberg testified that Maxima Technologies, Inc. did not inform Glovia that it was "converting" into Maxima. Thus, necessarily, Glovia did not know that Maxima was thereafter using Glovia's software. Ginsberg testified he became suspicious that Maxima was not Maxima Technologies, Inc. in 2011 based on correspondence from Actuant Shared Services and began a year-long investigation of the relationship between Maxima Technologies, Inc. and Maxima. Ginsberg concluded that Maxima and Maxima Technologies, Inc. were not the same entity when he received an email in July 2012 from a Maxima executive stating, "I cannot find a traceable route to allay your legal entity concerns." Ginsberg's testimony is substantial evidence that Glovia did not suspect, and a reasonable person would not have suspected until 2011, that Maxima had converted Glovia's software. Accordingly, under the discovery rule, Glovia's conversion cause of action accrued in 2011 and the three-year statute of limitations had not run when Glovia filed its action in 2013.

Maxima suggests that Ginsberg's 2011 and 2012 correspondence with Maxima employees concerning Maxima's entity status was orchestrated to avoid the bar of the statute of limitations and should be disregarded. Instead, Maxima argues, the focus should be on testimony from Glovia Customer

Relationship Manager Linda Care whose testimony, it claims, showed she learned in 2003 that Maxima had been formed and learned in 2007 of Actuant's acquisition of Maxima, each event providing Glovia notice that Maxima was using Glovia's software.

a. 2003 Notice

In August 2003, Care took notes of a conversation with Susan Navaro, her main contact in "I.T." at Maxima. Care wrote, "Company sold to Financial July 10th. President and V.P. are invested. They want Susan to move back to Lancaster. Don't have parent company any more (High Voltage) 90 days to present financial statement. Barcelona has to do physical inventory." Care testified that it was standard practice for a customer relationship manager "when they find out there's been a sale, to ask questions of the customer to find out the needed information."

Notwithstanding Care's testimony about the standard practices of customer relationship managers, there is nothing in the notes that established that Care suspected or should have suspected that Maxima Technologies, Inc. no longer existed, Maxima had been formed, or Maxima was using software Glovia licensed to Maxima Technologies, Inc. (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at pp. 1110-1111.) At most, the conversation put Care on notice that Maxima Technologies, Inc. had been sold. However, ownership of a license "survive[s] without interruption notwithstanding repeated and even drastic changes in [a corporate licensee's] ownership." (*Institut Pasteur v. Cambridge Biotech Corp.* (1st Cir. 1997) 104 F.3d 489, 494.) Thus, the apparent change in Maxima's ownership was insufficient to trigger the statute of limitations under the discovery rule.

b. 2007 Notice

Glovia concedes that it learned in or around 2007 that Actuant had purchased Maxima. It argues, however, that a change in a licensee's ownership does not impact the licensee's right to use the licensor's software. (*Institut Pasteur v. Cambridge Biotech Corp., supra,* 104 F.3d at p. 494.) It further argues the evidence shows it did not know until 2011 that Maxima—as opposed to Maxima Technology, Inc.—existed. Thus, it had no reason to believe a software conversion had taken place in connection with the Actuant purchase. We agree the evidence fails to show that Glovia suspected or should have suspected from the 2007 Actuant purchase that Maxima was using software Glovia licensed to Maxima Technologies, Inc. (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at pp. 1110-1111.)

2. Damages

Vincent Thomas testified as Glovia's expert on damages. Thomas told the jury that Glovia's damages were the license fee that Maxima would have been required to pay to use Glovia's software at the time Maxima began using the software without permission—i.e., in 2003. He then explained that he calculated damages by determining the modules Maxima was using in 2003 and the price of those modules. He determined the license fee would have been $650,000, the interest on that sum as of the date of trial was $514,234, and the total damages were $1,164,254 (actually $1,164,234). Thomas's testimony is substantial evidence supporting those damages. Accordingly, we affirm the damages award.[14] (*Rony v. Costa, supra,* 210 Cal.App.4th at pp. 753-754.)

Maxima contends the proper amount of damages should have been a discounted license fee and not a full license fee. It argues the evidence showed Glovia routinely waived assignment fees when its customers changed corporate form or gave Glovia additional business after the assignment triggering event. A discounted license fee would have been far less than the "windfall" damages the jury awarded.

In effect, Maxima argues that having used Glovia's software without permission for over 10 years, refused to pay Glovia's offered license assignment fee once Glovia discovered Maxima's conversion, and taken its chances at trial and losing, it should only have been assessed as damages a discounted license fee—presumably the assignment fee Glovia would have charged Maxima Technologies, Inc. had Maxima Technologies, Inc. requested an assignment when it was "converted" into Maxima. Defendants cite no authority for the proposition that, as a matter of law, a party whose software has been converted may recover compensatory damages only in the amount it would have charged a favored customer had such a customer requested to assign its license for the same software.

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14 The jury initially awarded Glovia $1,960,000. Based on defense counsel's post verdict discussions with the jury, it was determined that the jury intended to award $1,196,000. Based on the agreement of the parties, the verdict was remitted to that sum, with defendants reserving their right to appeal. On appeal, defendants note the "disconnect" between Thomas's damages calculation of $1,164,254 and the remitted award of $1,196,000, but do not contend the damages award must be reduced by the difference.

Finally, defendants contend the jury's mistaken award of $1,960,000 is evidence the award was the product of passion and prejudice because Thomas testified Glovia's damages were only $1,164,254. That the jury's award was the product of passion and prejudice was "magnified," defendants contend, by the jury's $650,000 punitive damages award, which they characterize as "double dipping." Defendants' contention is deficient because they do not explain why the jury's mistake in stating its compensatory damages award or in awarding $650,000 in punitive damages demonstrates the jury acted with passion or prejudice in awarding compensatory damages.

DISPOSITION

The punitive damages and attorney fees awards are reversed. The judgment is otherwise affirmed. Actuant and Maxima are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.