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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOSEPH D. DAVIS, Plaintiff, Cross-defendant and Appellant, v. JOHN C. HEUBECK, Defendant, Cross-complainant and Appellant.	B225432 (Los Angeles County Super. Ct. No. SC086323)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cesar C. Sarmiento, Judge. Affirmed.

Law Offices of Joseph D. Davis, Joseph D. Davis; and Charlotte E. Costan for Plaintiff, Cross-defendant and Appellant.

Heubeck Law, John C. Heubeck and Marc A. Lowe for Defendant, Cross-complainant and Appellant.

In *Davis v. Nadrich* (2009) 174 Cal.App.4th 1, we addressed a dispute between Joseph D. Davis and Jeff Ira Nadrich, in which Davis contended that Nadrich interfered with his partnership agreement with John C. Heubeck by referring cases to Heubeck, individually, instead of to Davis & Heubeck. This case addresses the dispute between Davis and Heubeck over attorney fees generated from those referral cases, and other cases handled by the firm before dissolution, along with Heubeck's obligation to pay winding-up expenses. After a jury trial, the jury determined by special verdict that both Davis and Heubeck breached their fiduciary duty, concluding Heubeck acted with malice or fraud. The jury further concluded Heubeck did not usurp partnership opportunities, Heubeck was not owed additional fees on two other cases, and Davis wrongfully exercised control over fees owed to Heubeck. In the accounting phase of the trial, the court concluded that because the partners formed a limited liability partnership, Heubeck was not individually liable to reimburse Davis for funds he expended in winding up the partnership. Davis appealed from the judgment, and Heubeck filed a notice of cross-appeal.

This case presents three legal issues. First, we must determine the effect of a jury instruction that stated a business opportunity, such as a lawsuit, is not a partnership opportunity when the offeror is unwilling to deal with the partnership. Second, we consider whether Davis & Heubeck, LLP, lost its limited liability protection under partnership law because it failed to register with the State Bar of California. Third, we must determine the consequences of failing to present the issue of damages to the jury on Heubeck's conversion claim. As we explain further, there was no prejudicial instructional error, the failure to register with the State Bar of California did not alter the rights or obligations of the partners between themselves or to the partnership, and absent a finding of damages by the jury, the special verdict does not support a judgment in Heubeck's favor for conversion. Thus, we affirm.

BACKGROUND

On or around September 1999, Davis and Heubeck entered into a law partnership, forming a limited liability partnership to focus on the prosecution of asbestos cases. Davis and Heubeck did not have a written partnership agreement. Their oral agreement addressed only a few matters. They agreed that Davis owned a 60 percent financial interest in the partnership, and Heubeck owned a 40 percent financial interest in the partnership. They also agreed that Davis would continue to prosecute *Gass v. Nissan (Gass)*, a case from his former firm, and Heubeck did not have a financial interest in that case. They did not agree that the partnership was for a particular term or did not discuss whether any events would result in a winding up of the partnership. Davis & Heubeck, LLP registered with the State of California on October 15, 1999 as a limited liability partnership (hereafter Davis & Heubeck).

Absent a partnership agreement stating otherwise, their limited liability partnership was governed by applicable California partnership law.[1] Partners owe to the partnership and to each other fiduciary duties, including a duty of loyalty and care. (Corp. Code, §16404, subd. (a).)[2] Section 16404 identifies the duty of loyalty, which encompasses "account[ing] to the partnership and hold[ing] as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property or information,

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[1] As Davis & Heubeck was formed before January 1, 2008, the partnership was governed by the California Revised Limited Partnership Act, Corporations Code, §§ 15611-15723 (CRLPA). (Corp. Code, § 15714.) Any matter not addressed by the CRLPA is governed by general partnership laws. (Corp. Code, § 15722.) General partnerships are governed by the Uniform Partnership Act of 1994, commencing with Corporations Code section 16100. As of January 1, 2010, the Uniform Limited Partnership Act of 2008 (Re-RULPA) (Corp. Code, §§ 15900-15912.07) governs all limited partnerships in California. (Corp. Code, § 15912.06.) Thus, on January 1, 2010, Corporations Code sections 15611 et seq. was repealed. The partnership issues in the bifurcated trial were resolved by special verdict on October 30, 2007.

[2] Unless otherwise stated, all further statutory references are to the Corporations Code.

including the appropriation of a partnership opportunity." (§ 16404, subd. (b)(1).) Section 16404 also identifies "refrain[ing] from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership," and "refrain[ing] from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership," as aspects of the duty of loyalty toward the partnership and the other partners. (§ 16404, subd. (b)(2), (3).) A partner owes a duty of care "to the partnership and the other partners in the conduct and winding up of the partnership business" and that duty is limited to "refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." (§ 16404, subd. (c).)

Upon the dissolution of Davis & Heubeck, Davis filed suit against Heubeck, asserting numerous causes of action. By the time of trial, Davis asserted a cause of action for breach of fiduciary duty, and he also sought an accounting. Davis's theory throughout trial was Heubeck usurped partnership opportunities by individually accepting asbestos lawsuit referrals before dissolution and taking Davis's share of the attorney fees. Specifically, Davis sought to recover: (1) his share of $674,666 in fees that Heubeck obtained in *Johnson v. Chevron* (*Johnson*); (2) his share of $1.6 million in fees that Heubeck split with the referral attorney in *Schneider v. Rapid American* (*Schneider*); and (3) his share of $489,467 in fees that Heubeck obtained in *Stewart v. Farmer John* (*Stewart*).

Heubeck filed a cross-complaint, alleging causes of action for breach of fiduciary duty and conversion. He also sought an accounting. Heubeck's conversion cause of action alleged that Davis converted Heubeck's share of attorney fees (40 percent) obtained in *Lane v. Flexitalic* (*Lane*). Heubeck also alleged that Davis breached his duty by not paying Heubeck's share of attorney fees obtained in the *Gass* case. By the time of trial, Heubeck also sought a percentage of fees generated in the Texaco litigation, contending this was a negotiated term of their oral partnership agreement.

With this background, our recitation of the facts is limited to the evidence presented to the jury addressing these six cases. We have disregarded the ad hominem attacks and the extraneous facts presented by both parties in their briefs and during trial. We present the facts in the light most favorable to the judgment. (*Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 462-463.)

FACTS AND PROCEEDINGS

1. *Davis's Claims*

Davis & Heubeck dissolved on May 11, 2005.[3] Heubeck received asbestos referrals that Davis claims were partnership opportunities prior to dissolution.

a. *Nadrich Referral Cases*

In 2004, Nadrich began referring asbestos leads to Heubeck. Nadrich told Heubeck that he would not refer cases to Davis, or to Davis & Heubeck. Heubeck told Nadrich that Davis & Heubeck had dissolved the partnership, and he had started his own law firm. Nadrich and Heubeck agreed that Nadrich would receive one-third of the attorney fees, and Heubeck would receive two-thirds of the attorney fees obtained in any referral case.

Heubeck told Davis that Nadrich would not refer cases to Davis. Heubeck and Davis discussed that Heubeck would file the cases on behalf of the Law Offices of John C. Heubeck, and Davis was aware that the Nadrich cases were filed in Heubeck's name.

i. *Johnson*

Charles and Karen Johnson entered into an asbestos contingency fee agreement with the Law Offices of John C. Heubeck and the Law Offices of Nadrich & Associates on November 12, 2004. The Johnsons also signed two fee sharing agreements. The first agreement stated that Heubeck would receive two-thirds of the fees, and Nadrich would receive one-third of the fees. The second agreement stated Heubeck, Nadrich, and the Law Offices of Joseph Davis would each receive one-third of the fees generated from their representation of the Johnsons. Davis did not work on the *Johnson* case.

The *Johnson case* settled for $2.5 million. The Johnsons approved the distribution of settlement funds on April 28, 2005, before the date of dissolution. Pursuant to the

[3] The special verdict listed two possible dates, January 1, 2004 or May 11, 2005.

retainer agreement and the first fee-sharing agreement, Heubeck netted $674,666 in attorney fees.

ii. *Schneider*

Heubeck testified that he agreed to represent the Schneiders in June 2005 and filed the complaint in July 2005, after the partnership dissolved. The case settled for $4 million. Heubeck split $1.6 million in the attorney fees generated from that case with Nadrich, pursuant to their fee-sharing agreement.

b. *Stewart Referral*

Russell Nordstrom referred *Stewart* to Heubeck in the summer of 2005. They agreed that each attorney would receive 50 percent of the fees, and Nordstrom would be the trial attorney. When *Stewart* settled, Heubeck received $489,467 in fees.

2. *Heubeck's Claims*

Heubeck sought to recover fees generated in *Gass* and the Texaco litigation, and alleged that Davis wrongfully exercised control of his portion of the *Lane* fees.

a. *Gass*

Gass was Davis's case. Heubeck sought fees because the *Gass* plaintiffs filed a malpractice lawsuit against Davis & Heubeck, and individually named Heubeck. Heubeck believed it became a partnership case when the malpractice lawsuit was tendered to the partnership's insurance carrier.

b. *Texaco Litigation*

Davis and his former firm, Davis & Thomas, accepted a referral to prosecute personal injury cases arising from a Texaco refinery explosion, known as the "Texaco Refinery litigation." While employed as an associate at Davis & Thomas, Heubeck worked on the Texaco Refinery litigation. The Texaco Refinery litigation settled without Davis's knowledge, and the settlement spawned litigation in which Davis & Thomas sued the referring attorney, and also filed a separate action against Texaco to recover fees. Davis & Thomas prevailed in both cases. In the suit against Texaco, the firm obtained a $1.7 million judgment. While the case was on appeal, Heubeck filed a lien, claiming a financial interest in the Texaco judgment. Heubeck agreed with Thomas to release his lien for the payment of $200,000.[4] Davis also gave Heubeck $300,000 from his portion of the Texaco judgment.

Davis testified that he did not agree to give Heubeck a percentage of the Texaco judgment. The attorney handling the Texaco case also testified that Heubeck did not have any financial interest in the Texaco judgment.

c. *Davis's Control of the Lane fees*

On May 11, 2005, Heubeck learned that Davis had transferred all the *Lane* fees into Davis's personal account. Release of the funds had been delayed because the judgment debtor declared bankruptcy. Davis & Heubeck received $944,131.84, but the partnership had to give back $250,000 to the bankruptcy creditor's committee.

When Heubeck discovered that Davis transferred the *Lane* fees to his personal account, Heubeck left the firm. He returned to the offices after hours and took his files and his computer files, along with one of the firm's computer back-up tapes used to secure data on the firm's computer network.

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[4] Davis questioned Heubeck about the $200,000 payment: "Did you get $200,000 as a result of filing a lien? [¶] A. Your partner gave me $200,000, that's correct." Later, Davis resumed the questioning: "In any event, Mr. Heubeck, Tom Thomas gave you $200,000. You sign an agreement with him saying that, depending upon the outcome of this trial, you would give it back or not; true? [¶] A That's a short inaccurate version, but neither one of us would assert that that payment ended the dispute, that's correct. [¶] . . . [¶] Q By Mr. Davis: Mr. Heubeck, the payment to you is without prejudice to it being recovered in this case if the jury determined there wasn't a promise; correct? [¶] A That is absolutely correct."

Davis has filed a separate action to reclaim the $200,000 (*Davis v. Heubeck* (Super. Ct. L.A. County, 2009, No. SC104777)), and seeks judicial notice of the file, which includes Heubeck's deposition testimony. We grant the request and take judicial notice that a complaint and motion for summary judgment has been filed, but we cannot accept as true the contents of the complaint or evidence presented in support of or in opposition to the motion for summary judgment. (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120-121.)

3. *The Jury's Special Verdict*

The jury returned a special verdict finding both attorneys breached their fiduciary duty owed to one another, and Heubeck acted with malice or fraud. On Davis's claims, the jury concluded that *Johnson*, *Schneider*, and *Stewart* were not partnership opportunities. On Heubeck's claims, the jury concluded Davis wrongfully exercised control over Heubeck's share (40 percent) of the *Lane* fees. The jury also concluded Heubeck had no right to Texaco fees or fees generated in the *Gass* case.

4. *Accounting Trial*[5]

Almost two years after the jury verdict, the accounting trial commenced. Before trial, Heubeck contended that since Davis & Heubeck was a limited liability partnership, he was not personally liable to reimburse Davis for winding-up expenses. Initially, the court adopted Davis's position that Davis & Heubeck was not a registered limited liability partnership because it had not complied with the rules of the State Bar of California governing limited liability partnerships. After the presentation of evidence in the accounting trial, the trial court reversed its earlier decision, concluding the failure to register with the State Bar did not result in the loss of limited liability protection, except under narrow circumstances not applicable to this action. Thus, Heubeck was not individually liable to reimburse Davis for winding-up expenses.

5. *Judgment*

The trial court entered judgment that Davis was to "take nothing" from Heubeck. Heubeck submitted a statement of decision in which he was awarded $277,652.36 in fees on the *Lane* case. The trial court struck that portion of the decision, entering judgment

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[5] During oral argument and in post-argument letter briefs and motions, the parties presented evidence and argument to support, and to dispute, the assertion by Davis that this court must remand for a new accounting trial because Davis & Heubeck has $1.5 million in assets that have not been distributed. Davis has forfeited this issue. He did not raise this as grounds for reversal in his opening brief. (See *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685 ["Courts will ordinarily treat the appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge."].) Moreover, the issue was not presented to the trial court during the accounting trial, and our review is limited to the trial court record.

that "Heubeck is entitled to nothing because of the failure to comply" with Code of Civil Procedure section 626, which requires that in an action for the recovery of money, the jury must find the amount of recovery.

This appeal and cross-appeal followed.

DISCUSSION

1. *The Trial Court Did Not Commit Prejudicial Error in Giving the Refusal-to-Deal Instruction*

Davis contends the trial court erred by instructing the jury that a business opportunity is not a partnership opportunity when the offeror is unwilling to deal with the partnership.[6] The refusal-to-deal instruction is based upon the holding in *Rankin v. Frebank Co*. (1975) 47 Cal.App.3d 75 (*Rankin*). Davis presents numerous arguments as to why *Rankin* is not good law and should not have been the foundation for this erroneous instruction. None merits reversal.

We initially reject Davis's contention that the evidence did not support this instruction. Although Heubeck defended on the grounds that Davis & Heubeck dissolved before he received the Nadrich referrals, he also defended Davis's claims for fees generated on the Nadrich referrals (*Johnson* and *Schneider*) by presenting testimony that Nadrich would not refer cases to Davis or to Davis & Heubeck. "A party has the right to have the jury instructed on the law applicable to all theories of the case supported by the evidence." (*Estate of Mann* (1986) 184 Cal.App.3d 593, 612.)

We independently review claims of instructional error. (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 163.) In civil cases, even if a trial court gives an erroneous jury instruction, we do not necessarily reverse the judgment. We only reverse if the error is prejudicial. (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 707.)

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[6] The special instruction as read to the jury stated: "A business opportunity is not available to the partnership when the offeror of the opportunity is unwilling to deal with the partnership. For such business opportunities, the partner who was offered the business opportunity may pursue the opportunity independent of the partnership."

a. *Refusal-to-Deal Instruction*

Rankin, *supra*, 47 Cal.App.3d 75, articulated an equitable defense to the usurpation of a corporate opportunity, concluding, among other things, that a corporate opportunity does not exist if the opportunity is not available to the corporation. (*Id.* at p. 88.)[7] A corporate opportunity is not available when the party offering the opportunity is unwilling to offer it to the corporation. (*Ibid*.; see also 9 Witkin, Summary of Cal. Law (10th ed. 2005) Corporations, § 91, pp. 864-865; 3 Fletcher, Cyclopedia Corporations (2010 rev.) § 862.10, pp. 334-342.)

The corporate opportunity doctrine " 'prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence.' " (*Kelegian v. Mgrdichian* (1995) 33 Cal.App.4th 982, 988.) A " 'corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage.' " (*Ibid*.) Whether or not a given business opportunity is a corporate opportunity is a question of fact. (*Id*. at pp. 988-989.)

As Davis concedes, based upon the fiduciary nature of partnerships, there also exists a similar partnership opportunity doctrine. (See 9 Witkin, *supra*, Partnership, § 13, pp. 588-589.) In *BT-I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, the court distinguished taking advantage of a business opportunity under the partnership

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[7] Davis's challenge to the viability of *Rankin*, *supra*, 47 Cal.App.3d 75, has been considered and does not sway us that this legal principle was dicta or generally unsound. Additionally, we have considered and rejected Davis's estoppel arguments, including his contention that Heubeck should be estopped from asserting the refusal-to-deal defense because Heubeck used "corporate assets to develop" the Nadrich business opportunities. (3 Fletcher Cyclopedia Corporations, *supra*, § 861.10, pp. 304-305.) Davis contends that "no instruction informed the jury of this principle," yet he did not present this argument to the trial court and has raised it before this court for the first time in his reply brief. We do not consider issues raised for the first time in a reply brief, absent a good reason for failing to present the issue earlier. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894-895, fn. 10.)

opportunity doctrine from the refusal-to-deal defense stated in *Rankin*. "The business opportunity doctrine allows a partner or corporate officer to take advantage of a partnership or corporate opportunity if he [or she] first offers it to the entity . . . ." (*Id.* at p. 1415.) *Rankin*, by contrast, "held a corporate officer was free to acquire a note without offering it to the corporation because 'there was no corporate opportunity.' " (*BT-I v. Equitable Life Assurance Society*, *supra*, at p. 1415.)

Davis contends the refusal-to-deal instruction citing *Rankin* is erroneous because a partner must consent to his or her partner pursuing the offered business opportunity. This argument blurs the distinction between a partnership opportunity and the refusal to deal with the partnership, and incorrectly assumes a partnership opportunity existed. Although Davis also argued this point in the trial court, he did not present an alternative instruction including the consent requirement.[8] On appeal, Davis offers what he contends is a legally correct instruction: " 'A business opportunity is not available to the partnership when the offeror is unwilling to deal with the partnership. However, the partner who was offered the business opportunity may pursue the opportunity *only with the express and informed consent of his partners* that he may keep all the profits of the new opportunity.' "

Davis presents no persuasive authority for the additional "consent" requirement. Davis's California authorities address consent of the partners when a co-partner individually competes with the partnership to pursue a partnership opportunity. *Leff v. Gunter* (1983) 33 Cal.3d 508, concludes that when a partnership is pursuing an opportunity, a partner's duty not to compete with the partnership with respect to that opportunity survives withdrawal from the partnership. (*Id.* at p. 514.) *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, addresses partnership dissolution, and

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[8] Davis claims he offered, and the trial court refused, two special instructions that would have "mitigated" this erroneous instruction. One instruction is cumulative, addressing the date of dissolution. The other instruction states "A partner who seeks a business advantage over another partner bears the burden of showing complete good faith and fairness to the other." This instruction addresses the duty of loyalty, not whether the business opportunity was a partnership opportunity.

in an earlier opinion the same court determined the obligations of dissolving partners of a partnership at will. (*Id*. at pp. 1041-1042.)

We also find Davis's citations to legal treatises unpersuasive because no California authority is cited to support the additional consent requirement. Other cited authorities Davis relies on require disclosure to the partnership of the refusal to deal, not consent. (See *Energy Resources Corp., Inc. v. Porter* (1982) 14 Mass.App. 296 [438 N.E.2d 391, 395] ["We conclude that before a person invokes refusal to deal as a reason for diverting a corporate opportunity he [or she] must unambiguously disclose that refusal to the corporation to which he owes a duty, together with a fair statement of the reasons for that refusal"]; see also 3 Fletcher Cyclopedia Corporations, *supra*, § 862.10, p. 338 ["Where an officer claims the reason he or she appropriated the opportunity is that the other party would not have dealt with the corporation anyway, the business transaction will not be immune from attack unless the officer unambiguously discloses to the corporation the fact of the other party's refusal to deal, along with a fair statement of the reasons for that refusal."].)

In sum, we are not convinced that Davis's proposed instruction is a correct recitation of California law, or that as stated, the refusal-to-deal instruction given to the jury was erroneous. We need not resolve this issue, however, because Davis cannot show prejudicial error. The jury concluded that all the referral cases (*Johnson*, *Schneider*, and *Stewart*) were not partnership opportunities, and was never asked to consider whether Heubeck had established the refusal-to-deal defense.

b. *No Prejudicial Error*

"Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.] Of course, that determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his [or her] full case before the jury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) When deciding whether an instructional error was prejudicial, we must also evaluate "(1) the state of the evidence,

(2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was mislead." (*Id*. at pp. 580-581.)

Davis contends the refusal-to-deal instruction was prejudicial because the determination of whether the Nadrich referral cases were partnership opportunities solely turned on the date of dissolution. This argument ignores Davis's contention that the refusal-to-deal instruction was erroneous, and the jury should have been given his "correct jury instruction" on what constitutes a partnership opportunity.

Without objection, the jury was instructed that "[a] partnership opportunity is a business opportunity, such as a potential lawsuit, presented to the partnership or a partner on behalf of the partnership, prior to dissolution." As previously noted, the question of whether a business opportunity is a partnership opportunity is a factual one. (*Kelegian v. Mgrdichian*, *supra*, 33 Cal.App.4th at pp. 988-989.) Thus, in addition to determining the date of dissolution, the jury also had to determine whether the *Johnson*, *Schneider*, and *Stewart* cases were presented to the partnership, or to Heubeck on behalf of the partnership.

Here, it does not seem probable the jury's verdict was based upon the refusal to deal with the partnership, but rather on the evidence presented regarding a partnership opportunity, unrelated to the date of dissolution.[9] As summarized above, Davis understood that Nadrich referred both the *Johnson* and *Schneider* cases to Heubeck, although Davis testified he believed both cases would be treated as partnership cases. In the *Johnson* matter, the Johnsons signed a retainer agreement with the Law Offices of John C. Heubeck, not Davis & Heubeck, and signed a fee sharing agreement that split the fees among Heubeck, Nadrich, and the Law Office of Joseph Davis, not Davis &

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[9] When considering the state of the evidence, our review is in the light most favorable to Davis. (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 322.) The jury heard testimony that *Johnson* and *Schneider* were referred before May 11, 2005, and Heubeck was working on *Stewart* before he left the firm. Heubeck's challenge to the sufficiency of the evidence on the date of dissolution is not an appropriate response to instructional error. Nevertheless, there is sufficient evidence in the record from which the jury could determine May 11, 2005 was the date of dissolution.

Heubeck. The fee-sharing agreement was not consistent with the Davis & Heubeck partnership agreement in which Davis had a 60 percent financial interest and Heubeck had a 40 percent financial interest in partnership cases. While this presents a conflict in the evidence, the jury could have concluded that the cases were Heubeck's, and he could pursue these cases on behalf of the Law Offices of John C. Heubeck, not Davis & Heubeck. The evidence presented at trial also did not establish that the oral partnership agreement between Davis and Heubeck precluded either partner from accepting individual referrals.

Stewart was referred to Heubeck by his former colleague. Based on Heubeck's agreement with the referring attorney, the referring attorney intended to act as the lead trial attorney. Davis testified that in his partnership with Heubeck, he was the only one who took the cases to trial. The jury could have concluded that since Davis was not the trial attorney, *Stewart* was Heubeck's case, not a Davis & Heubeck case. The special verdict is supported by substantial evidence that *Johnson*, *Schneider*, and *Stewart* were not presented to Davis & Heubeck, or to Heubeck as a partner of Davis & Heubeck.[10]

As for the remaining *Soule* factors, no other instruction addressed the refusal-to-deal defense. Heubeck's counsel argued Nadrich would not refer cases to Davis or to Davis & Heubeck, but counsel also argued that the Nadrich referrals were never presented to the partnership. There was no evidence of jury confusion regarding the instruction; the jury did not ask questions about it or request a rereading of testimony. We reject Davis's argument that the record established the refusal-to-deal instruction "thwarted [the jury] in their attempt to award Davis compensatory damages." Davis's contention cites to his characterization of the jury's verdict, not to the record. Finally, the verdict was not close; 11 of the jurors voted that *Johnson* was not a partnership

10 Davis also contends that Heubeck had a duty not to compete with the partnership, but Davis understood that the Nadrich referrals were not business opportunities presented to the partnership, only to Heubeck. Davis's analysis that since Davis & Heubeck was an asbestos litigation firm, Heubeck could not individually pursue any asbestos case is too broad and is inconsistent with Davis's contention that Heubeck had to obtain consent before taking a partnership opportunity.

opportunity, and the jury unanimously voted that *Schneider* and *Stewart* were not partnership opportunities.

Davis claims the jury's determination that Heubeck breached his fiduciary duty and acted with malice or fraud, indicates that but for the refusal-to-deal instruction, the jury would have concluded Heubeck usurped the Nadrich referrals. There is nothing in the record to support this contention. The jury also was instructed that Heubeck's fiduciary duty encompassed a duty to act in good faith. During trial, Davis dredged up numerous incidents of Heubeck's conduct during the period before and after the partnership dissolution, including eliciting testimony that Heubeck took computer files, stole partnership assets, engaged in midnight raids after the partnership dissolved, and misrepresented the status of the partnership. The jury might well have concluded Heubeck breached his fiduciary duty based upon conduct unrelated to the Nadrich referrals.

Davis next contends the instructional error was prejudicial because he was deprived of an opportunity to prove punitive damages despite the jury's determination that Heubeck breached his fiduciary duty and acted with malice or fraud. This error was not instructional, but arose from an erroneous special verdict form, which neglected to include a finding of damage or harm caused by that breach. Harm is an essential element of a cause of action for breach of fiduciary duty. (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1086.) Unlike a general verdict, a special verdict presents to the jury each ultimate fact in the case, and the court may not imply findings on all issues in favor of the plaintiff. (See Code Civ. Proc., § 624.) Since the special verdict did not ask the jury whether Davis suffered harm caused by the breach of fiduciary duty, there was no conclusion of fact on an essential element of the cause of action. Thus, there was no basis to recover punitive damages. (Civ. Code, § 3294, subd. (a).)

We find no prejudicial instructional error that warrants reversal.

2. *The Trial Court Did Not Err in Concluding Davis & Heubeck was a Limited Liability Partnership, Despite its Failure to Obtain State Bar Certification*

Davis contends Heubeck is individually liable for expenses Davis incurred in winding up the partnership because the limited liability protection in the partnership laws does not apply to a limited liability partnership providing legal services unless the partnership registers with the State Bar. The interplay of partnership law and the State Bar rules is an issue of statutory interpretation that we independently review. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.) We are guided by the well-established principle of statutory construction that "[i]f the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls." (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature[.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) We must accord significance, if possible, to "every word, phrase and sentence in pursuance of the legislative purpose," and "[a] construction making some words surplusage is to be avoided." (*Dyna-Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1386-1387.) "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Id.* at p. 1387.) With these principles in mind, we begin with the language of the Corporations Code.

A limited liability partnership is a general partnership with the feature of providing a partner with a liability shield for certain forms of debts and obligations. To become a registered limited liability partnership, the partnership files a completed registration with the California Secretary of State and submits the required fee. (§ 16953, subd. (c).) Section 16953, subdivision (e) determines status as a registered limited liability partnership.

With notable exceptions, section 16306, subdivision (c) provides that a partner in a registered limited liability partnership is not liable or accountable for debts, obligations or liabilities chargeable to the partnership or another partner in the partnership whether "arising in tort, contract, or otherwise, that are incurred . . . while the partnership is a registered limited liability partnership . . . ."[11] Subdivision (c) contains an exception applicable to attorneys. The limitation of liability "shall not" apply to claims based upon acts, errors, or omissions arising out of the rendering of professional legal services provided by a registered limited liability partnership "unless that partnership has a currently effective certificate of registration issued by the State Bar." (§ 16306, subd. (f).)[12]

The State Bar has formulated limited liability partnership rules and regulations to obtain a certificate of registration. (See Bus. & Prof. Code, § 6025.) To secure the limited liability protection omitted from section 16306, subdivision (c), the State Bar rules require that a limited liability partnership must satisfy the registration requirements of the California Secretary of State (§ 16953), *and* also satisfy the requirements for initial and annual renewal registration with the State Bar. (Partnership Rules and Regs. of State Bar, former rules 3.0, 5.0, 10.0 [renumbered as rules 3.171, 3.176, 3.177].)[13] The annual

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11 Section 16306, subdivision (c) states: "Notwithstanding any other section of this chapter, and subject to subdivisions (d), (e), (f), and (h), a partner in a registered limited liability partnership is not liable or accountable, directly or indirectly, including by way of indemnification, contribution, assessment, or otherwise, for debts, obligations, or liabilities of or chargeable to the partnership or another partner in the partnership, whether arising in tort, contract, or otherwise, that are incurred, created, or assumed by the partnership while the partnership is a registered limited liability partnership, by reason of being a partner or acting in the conduct of the business or activities of the partnership."

12 Subdivision (f) of section 16306 states: "The limitation of liability in subdivision (c) shall not apply to claims based upon acts, errors, or omissions arising out of the rendering of professional limited liability partnership services of a registered limited liability partnership providing legal services unless that partnership has a currently effective certificate of registration issued by the State Bar."

13 The State Bar limited liability partnership rules were revised and renumbered effective November 4, 2011. <http://www.calbar.ca.gov/Rules/Title3ProgramsandServices.aspx> (as of May 21, 2012).

renewal provision states "the failure to timely file a completed Annual Renewal shall result in termination of the limited liability partnership." (Rules and Regs. of State Bar, former rule 10.0 [renumbered rule 3.176, subd. (B)].)

The State Bar registration requirements for a registered limited liability partnership performing legal services do not affect the rights or obligations of the partners among themselves or to the partnership. Section 16306, subdivision (f) is a narrow exception and requires State Bar registration to limit a partner's vicarious liability for claims based upon acts, errors, or omissions arising out of the rendering of legal services. It is apparent from the express language of section 16306, subdivisions (c) and (f) that the failure to register with the State Bar exposes partners in a registered limited liability partnership rendering legal services to malpractice claims against the partnership or any other partner in the partnership. Under the rules of statutory construction, *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another. As only acts, errors, or omissions arising from the rendering of legal services are named in the section, no other limitation of liability is affected by the failure to register with the State Bar. Failure to register with the State Bar narrows the general limit on liability, but does not completely eviscerate the partners' liability shield or terminate the registered limited liability partnership.

Citing section 16953, subdivision (h), Davis contends registration with the State Bar is mandatory to form a registered limited liability partnership providing legal services. Section 16953, subdivision (h) states "[a] limited liability partnership providing professional limited liability partnership services in this state shall comply with all statutory and administrative registration or filing requirements of the state board, commission, or other agency that prescribes the rules and regulations governing the particular profession[.]" As previously stated, registration with the State Bar is required under section 16306, subdivision (f) to ensure that a limited liability partnership providing legal services secures limited liability protection caused by "acts, errors, or omissions" arising out of the rendering of such services. Thus, when read in context, section 16953 does not require all limited liability partnerships providing legal services that are registered with the California Secretary of State to also register with the State Bar, only those law partnerships that seek limited liability protection omitted from section 16306, subdivisions (c) and (f). For this reason, we also reject Davis's argument that the failure to timely file an annual renewal results in the loss of limited liability status under section 16953.[14] The loss of limited liability status noted in the annual renewal provision of the State Bar rules refers to the limited liability protection of section 16306, subdivision (f), not to the status of the limited liability partnership registered with the Secretary of State under section 16953.

Davis cites to a section of Witkin, Summary of California Law, which he contends supports his interpretation of section 16306, subdivision (f). (9 Witkin, Summary of Cal. Law, *supra*, Partnership, § 130, p. 694.) Witkin cites to section 16306, subdivision (f) and explains "[t]he *general limitation of partner liability* does not apply to a limited liability partnership providing legal services if the partnership does not have a currently effective certificate of registration issued by the State Bar." (9 Witkin, *supra*, at p. 694, italics added.) As we have stated, section 16306, subdivision (f) provides an exception to the general limitation of partner liability unless the limited liability partnership providing legal services registers with the State Bar. Witkin does not state, as Davis claims, that a limited liability partnership rendering legal services loses all limited liability protection if it does not register with the State Bar.[15]

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14 We reject Davis's contention that Davis & Heubeck was not a limited liability partnership because it did not renew its malpractice insurance after December 2004. Section 16953, subdivision (h), requires compliance with section 16956, subdivision (a)(2)(A), the statutory provision to maintain legal malpractice insurance as security for claims against the limited liability partnership. Section 16956, subdivision (a)(2)(C) expressly states: "Nothing contained in this subparagraph shall affect or impair the rights or obligations of the partners among themselves, or the partnership, including, but not limited to, rights of contribution, subrogation, or indemnification."

15 Davis's additional arguments related to his construction of the applicable statutes are unpersuasive. Davis cites to a Colorado court's confirmation of an arbitration award against Davis, Heubeck, and Davis & Heubeck, in which the arbitrator interpreted the State Bar rules and concluded that to avoid personal liability, the partnership had to register with the State Bar. That decision is not binding and provides no useful analysis.

In light of our conclusion that the failure to register with the State Bar did not affect the rights and obligations of Davis and Heubeck as partners, section 16306, subdivision (c) states that a partner in a limited liability partnership is not liable or accountable for debts, obligations, or liabilities of or chargeable to the partnership or another partner, regardless of the basis of liability. Davis has no reimbursement claim against Heubeck for debts associated with the operation of the partnership or for the repayment of personal loans made to the partnership. We therefore need not address Davis's request for a new accounting trial on the grounds that the trial erred in excluding evidence it concluded was unrelated to his claim for reimbursement of winding-up expenses. Davis's recourse under section 16306, subdivision (c) to balance the partnership's capital accounts was to recapture those contributions from the partnership, not from Heubeck.

3. *The Special Verdict Does Not Support a Judgment in Heubeck's Favor on his Cause of Action for Conversion*

By special verdict, the jury concluded "Joseph Davis wrongfully exercise[d] control over Heubeck's 40% share of the *Lane* fees[.]" The jury was instructed on the essential elements of conversion, but was not asked in the special verdict to award damages. The trial court determined that since the jury did not determine damages, Heubeck was "entitled to nothing." Heubeck contends the judgment must be reversed and asks this court to direct the trial court to award him his share of the *Lane* fees.

Damages are an essential element of a cause of action for conversion. (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395.) "A cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's *possessory interest* in a specific, identifiable sum, such as when a trustee or agent misappropriates the money entrusted to him." (*Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 284.)

We also reject Davis's equitable, collateral, and judicial estoppel arguments; none advances the resolution of this legal issue.

Heubeck contends that since his portion of the *Lane* fees was a specific, identifiable sum, the jury did not have to separately assess damages. We disagree. Heubeck's argument focuses on the allegations of his cross-complaint, not the evidence presented at trial. Heubeck's cross-complaint alleged that Davis unlawfully converted Heubeck's share (40 percent) of $944,131.84 in attorney fees. Davis testified that the partnership had to return $250,000, and any fee distribution owed to Heubeck from the remaining *Lane* fees was based upon a net recovery. In his notice of intention to move for new trial, Heubeck did not account for these deductions. Heubeck claimed "the jury found that Davis had converted $377,652.74 (i.e. 40% of $944,131.84)," based upon its response to the special verdict. This is not an accurate statement of the jury's special verdict finding, and as Heubeck now concedes, would not have been an accurate sum without the $250,000 deduction.

Heubeck relies on the trial court's comments during trial that the dollar amount of the *Lane* fees was a "sum certain" to justify his failure to present the damages question to the jury.[16] Heubeck also cites to the trial court's comments addressing the scope of the trial, in which the court agreed that the jury would not decide "who owes money to whom."[17] These statements do not convince us that the trial court "ruled" the jury would not decide, or did not have to decide, damages on Heubeck's conversion claim.

Heubeck next contends that there was no need for the jury to determine damages because, based upon the trial court's statements, the accounting trial would determine the exact amount, after considering any offsets for winding-up expenses. Conversion is a legal remedy, not an equitable one. During the accounting trial, Davis presented

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16 When ruling on a judgment on the pleadings before trial, the court stated: "There is sum certain here. It's the pile of money that was in the account."

17 The court stated: "The accounting is an equitable cause of action. It is not relevant in the jury trial." After counsel further argued the scope of opening argument, Heubeck's counsel stated: "I'm putting my objection on the record. This jury is not deciding who owes money to whom." The court responded: "I already said that a number of times."

evidence on how he spent the *Lane* fees and when the *Lane* fees ran out to seek reimbursement from Heubeck for the amount Davis expended in winding up the partnership.[18] The trial court's task was to determine "who owes money to whom" for winding-up expenses, not to award Heubeck his damages for conversion. The jury already concluded the first two elements of his claim for conversion, and it was up to the jury to determine Heubeck's damages.[19]

Since the special verdict did not ask the jury to determine damages, it does not support a judgment in Heubeck's favor on his conversion claim. (Code Civ. Proc., §§ 624, 626; see also *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959-960.) The trial court did not err.

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[18] Davis also contends Heubeck did not state a cause of action because there can be no conversion of a partnership asset. (See §§ 16807, subd. (a), 16957, subd. (a).) This legal principle notwithstanding, Davis did not challenge the jury's verdict that he wrongfully controlled Heubeck's portion of the *Lane* fees.

[19] We have considered and rejected Heubeck's remaining legal and equitable arguments related to the judgment on his conversion claim.

DISPOSITION

The judgment is affirmed. No costs are awarded on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.