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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PETER DICE,

Plaintiff and Respondent,

v.

X17, INC. et al.,

Defendants and Appellants.

B282448

Los Angeles County
Super. Ct. No. SC116581

APPEAL from a postjudgment order of the Superior Court of Los Angeles County, Craig D. Karlan, Judge. Affirmed.

One LLP, Christopher W. Arledge, Peter R. Afrasiabi and Joanna Ardalan for Defendants and Appellants.

Balesh Law Group and James R. Balesh for Plaintiff and Respondent.

INTRODUCTION

A jury found X17, Inc. liable to Peter Dice under Civil Code section 3344 (section 3344) for its knowing, unauthorized use of a video of Dice on its celebrity news website, as well as for defamation and common law misappropriation of likeness. The jury awarded Dice a total of \$10,000 in damages, mostly for past noneconomic loss.

X17 and its owner Francois Navarre (collectively, defendants) jointly appeal from the trial court's postjudgment order finding Dice the prevailing party against X17 under section 3344 for purposes of awarding him attorney fees. They contend he did not prevail on a practical level given he recovered only a fraction of the damages he sought. They also appeal from that order's denial of an attorney fees award to Navarre, whom the court found was the prevailing party against Dice after Dice dismissed him at the end of the trial.

We conclude the court did not abuse its discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *The underlying incident*

X17 is a celebrity media company that licenses content, photos, and video, and reports celebrity news through its website. Peter Dice is a recovering alcoholic and sobriety coach.

In August 2011, Dice, celebrity Lindsay Lohan, and a mutual friend were standing together outside a restaurant/bar on a street in Venice, California. X17 obtained a video and still pictures of the interaction between them and published the video, the photographs, and a story about the interaction on its website.

In the video, Dice is seen handing a clear, plastic bag containing a substance to Lohan and the friend, who inspected the bag's contents and then returned it to Dice. A voice—presumably from the videographer or photographer—can be

heard saying “cocaina” on the audio portion of the video at the point Dice hands the bag to Lohan and the friend. “Droga” also is heard on the video.¹ The headline to the story states, “‘Lindsay Lohan Makes Purchase in Venice.’” The story posted with the photographs and video said, “‘At one point, Lindsay can be seen taking a bag from a friend. Her friend checks out the contents of the bag and eventually, Lindsay takes a different bag from another guy and hands over the cash to pay for it. She then took time to chat with some young fans passing by.’”

The bag was not filled with cocaine. It contained “healing crystals” (rocks) Dice had purchased and was showing to Lohan and the friend. In the trial court’s words, the content published on X17’s website “clearly suggested [Dice] was selling drugs to Lindsay Lohan.”²

2. *Dice’s lawsuit*

In April 2012, Dice sued X17 and its president and sole shareholder Navarre for slander, libel, violation of his right of publicity (under section 3344 and the common law), false light invasion of privacy, and intentional infliction of emotional distress. His complaint sought both damages and injunctive relief.

On June 26, 2012, Dice served X17 with an offer to compromise under Code of Civil Procedure section 998 for \$250,000. X17 rejected the offer. The parties attended a mandatory settlement conference before trial on December 1,

¹ The individuals taking the video and photographs spoke in Portuguese. The audio portion of the video was removed after Lohan’s publicist contacted X17 about it.

² The jury found people understood X17’s statements to mean Dice had committed a crime.

2015. Defendants offered \$45,000 to settle the case, but Dice “required a settlement of at least \$75,000.”

The case was tried by jury beginning December 8, 2015. At the close of evidence, Dice stipulated to dismiss Navarre individually. In his closing argument, Dice’s counsel asked the jury to compensate Dice on his section 3344 claim for his past noneconomic loss, including humiliation, embarrassment, and mental distress, in the amount of \$200,000.³ The jury returned its special verdict on December 15, 2015, awarding Dice \$10,000 in total damages on three of his four claims tried to the jury, including his claims for misappropriation of name or likeness.⁴ On September 6, 2016, the trial court entered judgment in the amount of \$10,000 plus interest against X17 and in favor of Dice, and judgment against Dice in favor of Navarre.

After entry of judgment, Dice, and X17 and Navarre, jointly, filed cross-motions for attorney fees and costs. Each claimed to be the prevailing party under section 3344, and Dice also claimed fees under Code of Civil Procedure section 2033.420 based on X17’s denial of certain requests for admission.

³ He asked for additional damages on Dice’s defamation claim and for punitive damages.

⁴ The jury awarded assumed damages of \$10,000 on Dice’s defamation per se cause of action, no damages on his defamation per quod cause of action, and \$7,500 for past noneconomic loss for his common law and statutory claims for misappropriation of his name or likeness. The jury broke down the total damages as \$7,500 for past noneconomic loss, “including mental suffering, harm to reputation, shame, mortification, or hurt feelings,” and \$2,500 for “[a]ssumed harm to reputation, shame, mortification or hurt feelings.”

The court found Dice was the prevailing party as against X17 under section 3344, awarded Dice \$137,595.20 in attorney fees, and denied X17's motion for attorney fees and costs. (The court denied Dice's request for fees under Code of Civil Procedure section 2033.420.) The court also found Navarre to be the prevailing party against Dice. It denied Navarre's request for fees, finding defendants did not allocate fees between them, categorize the fees, identify any legal work done solely for Navarre, or demonstrate that he incurred any fees of his own. Finally, after granting both sides' motions to tax costs, the court awarded Dice \$9,523.55 in costs against X17, and Navarre \$4,934.91 in costs against Dice.

X17 and Navarre jointly appealed from the court's order finding Dice was the prevailing party under section 3344 and awarding him attorney fees, and denying Navarre attorney fees after finding he was the prevailing party against Dice.

DISCUSSION

1. *Standard of review*

"Generally, the trial court's determination of the prevailing party for purposes of awarding attorney fees is an exercise of discretion, which should not be disturbed on appeal absent a clear showing of abuse of discretion. [Citations.] But the determination of the legal basis for an attorney fee award is subject to independent review." (*Kim v. Euromotors West / The Auto Gallery* (2007) 149 Cal.App.4th 170, 176; see also *Sharif v. Mehusa, Inc.* (2015) 241 Cal.App.4th 185, 191 (*Sharif*).)

" 'An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] This standard of review affords considerable deference to the trial court provided that the court acted in accordance with the governing rules of law.

We presume that the court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise. [Citations.]’ ” (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 153 (*Collins*).)

2. *The court’s award of attorney fees to Dice*

X17 contends the court erred in determining Dice was the prevailing party because (1) the court improperly considered Dice’s success on his other causes of action in determining Dice prevailed, and (2) Dice failed to achieve his monetary litigation objective and his alleged nonmonetary objectives were irrelevant to section 3344 and unsupported by the record. X17 challenges only Dice’s entitlement to attorney fees, not the reasonableness of the fee award itself.

a. Applicable law and the trial court’s application of it

“In general, a prevailing party may recover attorney’s fees only when a statute or an agreement of the parties provides for fee shifting.’ ” (*Sharif, supra*, 241 Cal.App.4th at p. 191.) “The prevailing party in any action under” section 3344 is “entitled to attorney’s fees and costs.” (§ 3344, subd. (a).) Section 3344 does not define the term “prevailing party.” Code of Civil Procedure section 1032, which governs the award of costs to the “prevailing party” defines that term as including “the party with a net monetary recovery.” (Code Civ. Proc., § 1032, subd. (a)(4).)

Courts, however, have “rejected the contention that the prevailing party definitions in . . . section 1032, subdivision (a)(4) ‘should be automatically applied in cases where the authorizing attorney fees statute does not define prevailing party.’ ” (*Sharif, supra*, 241 Cal.App.4th at p. 192.) In that situation, “ ‘prevailing party status should be determined by the trial court based on an evaluation of whether a party prevailed “ ‘on a practical level,’ ” and the trial court’s decision should be affirmed on appeal absent an abuse of discretion.’ ” (*Ibid.*; see also *MacQuiddy v. Mercedes-*

Benz USA, LLC (2015) 233 Cal.App.4th 1036, 1047 (*MacQuiddy*.) In so doing, the court considers “ ‘the extent to which each party . . . realized its litigation objectives.’ ” (*Sharif*, at p. 192.)

The trial court found Dice was the prevailing party under this standard. The court rejected X17’s argument that Dice’s recovery of significantly less than he had sought in his 998 offer meant he did not achieve his litigation objective. The court found Dice’s litigation objective was not only a monetary recovery, but also “to right a wrong and clear his reputation.” The court recognized Dice’s “recovery was significantly less than anticipated,” but concluded he achieved his litigation objectives “by proving X17’s liability” on his statutory misappropriation of likeness cause of action, as well as on his common law misappropriation of likeness and defamation causes of action.

b. *The court did not base its prevailing party finding on Dice’s success on his nonstatutory causes of action*

X17 contends the trial court erroneously found Dice prevailed based on his success on causes of action that do not provide a right to attorney fees. But that contention misreads the court’s ruling. The court did not find Dice prevailed based on his success on his defamation and common law misappropriation of likeness claims alone. The court found Dice “achieved his litigation objectives by proving X17’s liability on three of the four causes of action, *including* the two causes of action for appropriation of likeness.” (Italics added.)

Graciano v. Robinson Ford Sales, Inc. (2006) 144 Cal.App.4th 140 (*Graciano*) does not support X17’s contention. There, the trial court concluded the plaintiff was the prevailing party under two statutory causes of action providing for attorney fees. But, the court also found the defendant an “ ‘equally prevailing’ ” party based on the procedural outcome of her other

causes of action. (*Id.* at pp. 147-148.) The court of appeal concluded the trial court’s “prevailing defendant determination was erroneous as a matter of law” because the court determined the defendant “was the prevailing party on causes of action for which there was no entitlement to attorney fees.” (*Id.* at p. 151.)

That simply is not the case here. In its ruling, the court specifically noted the jury returned a verdict in favor of Dice on his statutory misappropriation of likeness cause of action. Thus, the court found Dice prevailed on the very cause of action entitling him to attorney fees. The defendant in *Graciano*, in contrast, “prevailed” *only* on causes of action that did not provide for attorney fees. (*Graciano, supra*, 144 Cal.App.4th at p. 151.)

Moreover, the trial court here appropriately considered Dice’s other causes of action in determining the “amount of fees and the question of whether [it] could apportion [Dice’s] requested fees between causes of action for which [he] was entitled to fees and those for which [he] was not.” (*Graciano, supra*, 144 Cal.App.4th at p. 152 [analysis of non-attorney fee causes of action “pertinent” to amount of fees and apportionment].) The court concluded that proving Dice’s successful section 3344 and common law causes of action “required virtually identical testimony and evidence,” so that it was not required to apportion attorney fees between Dice’s statutory and common law claims. The court also *reduced* the amount of attorney fees Dice requested that were not incurred to prevail on his section 3344 cause of action.⁵

⁵ For instance, while the court permitted Dice to recover his fees spent to successfully appeal the court’s order striking his section 3344 cause of action in response to defendants’ anti-SLAPP motion, it did not allow Dice to recover fees spent opposing defendants’ appeal from the court’s order denying the motion as to Dice’s other causes of action. After the court

In short, the court did not err in finding Dice the prevailing party simply because it also found Dice prevailed on his common law claims.

c. *The trial court did not abuse its discretion in finding Dice achieved his litigation objectives*

X17 essentially contends Dice did not succeed on a practical level as a matter of law—or the court’s finding he did “exceed[ed] the bounds of reason” (*Collins, supra*, 205 Cal.App.4th at p. 153)—given the jury awarded him a total of \$10,000 when he asked for “many hundreds of thousands of dollars.”⁶ X17 also contends the court’s analysis that Dice achieved nonmonetary objectives was wrong because section 3344 exists “to vindicate a plaintiff’s commercial rights in the use of their name, image, or likeness,” not a plaintiff’s reputation.⁷

reviewed a further breakdown of Dice’s fees, provided at the court’s request, it also reduced Dice’s attorney fees for “work specifically dealing with [his] claims against Navarre, [and] work specifically relating to [his] defamation cause of action.”

⁶ The court also found Dice was entitled to costs as the prevailing party against X17 despite having recovered a \$10,000 judgment that could have been achieved through a limited jurisdiction civil case. The court concluded Dice reasonably and in good faith believed his recovery would exceed the \$25,000 jurisdictional limit. The court was persuaded by Dice’s counsel’s declaration that he reasonably believed Dice’s potential recovery exceeded the \$25,000 limit in light of jury verdicts for significantly higher amounts in similar matters, and Dice’s \$250,000 offer to compromise.

⁷ X17 seems to ignore the court’s finding that Dice also sought to “right a wrong” through his lawsuit, including through his section 3344 cause of action, mentioning only the inapplicability of section 3344 to reputational harm.

First, we do not find Dice’s recovery of substantially less than he requested precluded the court from finding he was the prevailing party as a matter of law—or that the court abused its discretion—when the jury here made a liability finding in Dice’s favor on his section 3344 cause of action and awarded him some actual damages for it.⁸ (Cf. *MacQuiddy*, *supra*, 233 Cal.App.4th

⁸ Recently, in *Olive v. General Nutrition Centers, Inc.* (2018) 30 Cal.App.5th 804 (*Olive*), filed December 27, 2018, after defendants filed their opening brief but before they filed their reply brief, our colleagues in Division Four affirmed the trial court’s finding that no party prevailed in a section 3344 action where the plaintiff—a model with a contractual relationship with the defendant—obtained a lower damages award than he requested. (*Olive*, at pp. 808-809.) The jury awarded the model just over \$1 million of the \$3.5 million he had requested in actual and emotional distress damages, but found he was entitled to none of defendant’s profits as restitution, estimated between \$54 million and \$175.9 million. (*Id.* at p. 823.) The trial court concluded neither party prevailed in what it found to be a tie—the model achieved only a small fraction of his goal, and the defendant ended up with a significantly higher adverse verdict, having argued the model was entitled to less than \$5,000 in actual damages. (*Id.* at pp. 823, 827.) Applying the analysis used in contractual fee awards under Civil Code section 1717—suggested by both parties—the court of appeal concluded the trial court both had the discretion to find no party prevailed, and did not abuse its discretion in so finding given “the mixed results.” (*Olive*, at pp. 825-827, 829.)

We do not find it necessary here to employ the section 1717 analysis that our colleagues in *Olive* did—the trial court did not do so and neither side has advocated for such an approach. Nor does *Olive* affect our conclusion that the trial court did not abuse its discretion in finding Dice the prevailing party. We note a key difference between *Olive* and the case before us: X17 contested its liability to Dice whereas the defendant in *Olive* conceded

at p. 1048 [plaintiff who recovered stipulated amount from defendant to repurchase defective car did not prevail where he lost the only litigated claim of whether defendant was liable for a civil penalty]; *Sharif, supra*, 241 Cal.App.4th at p. 192 [finding plaintiff entitled to statutory attorney fees for her success on her Equal Pay Act claim, but defendant entitled to statutory attorney fees on plaintiff's wage claim where jury found defendant owed no wages].)

Second, we are not persuaded the court made a legal error or abused its discretion in finding Dice's success on his statutory misappropriation claim achieved his other objectives "to right a wrong and clear his reputation." X17 argues section 3344 "is concerned only with a party's ability to benefit monetarily from his or her name, image, or likeness," and protects only an "economic right."

X17's assertion is not entirely accurate. Section 3344 does not limit a plaintiff's recovery to *economic* damages, as X17 seems to contend. Indeed, it permits a plaintiff to recover "*any damages sustained . . . as a result*" of the defendant's knowing, unauthorized use of the plaintiff's name, image, or likeness for a commercial purpose. (§ 3344, subd. (a), italics added.) A plaintiff

liability. The only issue litigated and tried, therefore, was the model's damages. (*Olive, supra*, 30 Cal.App.5th at p. 822.) Obtaining a finding of X17's liability under section 3344 could serve one of Dice's litigation objectives, however, as the court impliedly found and we will discuss. And, as noted by the court in *Olive*, "the trial court that presided over the matter is in the best position to determine the degree to which either party succeeded at trial, . . . each case must be evaluated individually, and . . . , under the relevant circumstances and the applicable law, the trial court here did not abuse its discretion." (*Olive*, at p. 829, fn. 15.)

can recover statutory damages of \$750 or his “actual damages” from a defendant found to have violated section 3344.⁹ (*Ibid.*)

Indeed, section 3344 was enacted “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.’” (*Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1002 (*Miller*) [quoting from legislative history of section 3344].) Its enactment, particularly the availability of statutory damages, “provided a practical remedy for a noncelebrity plaintiff whose damages are difficult to prove and *who suffers primarily mental harm* from the commercial misappropriation of his or her name.” (*Ibid.*, italics added.)

Moreover, that misappropriation of one’s likeness involves an economic right does not render Dice’s litigation objective “to right a wrong” inapplicable to his status as a prevailing party under section 3344. As courts have explained, “misappropriation has two aspects: (1) the right of publicity protecting the commercial value of celebrities’ names and likenesses, and (2) ‘the appropriation of the name and likeness that brings injury to the feelings, that concerns one’s own peace of mind, and that is mental and subjective.’” (*Miller, supra*, 159 Cal.App.4th at p. 1005, quoting *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 541-542.)

Contrary to X17’s assertion,¹⁰ for a noncelebrity like Dice, the objective behind a statutory misappropriation of likeness

⁹ A plaintiff also may recover “any profits from the unauthorized use that are attributable to the use.” (§ 3344, subd. (a).)

¹⁰ X17 quotes our Supreme Court’s explanation that the right of publicity is not a “right to control the celebrity’s image by censoring disagreeable portrayals,” but is “essentially an

claim is not simply to recover damages for economic harm, but to achieve some sort of remedy for the *mental harm* associated with a defendant's knowing, unauthorized commercial use of another's name or likeness. (§ 3344, subd. (a).) Thus, the trial court's conclusion Dice achieved his litigation objective to right a wrong through his success on his section 3344 cause of action was not erroneous as a matter of law. The court could have concluded that a finding of X17's liability—regardless of the amount of damages awarded—in and of itself provided Dice with “peace of mind” and an end to the worry about what others thought of him. In essence, the jury's finding that X17 violated section 3344—which required the jury to find X17 *knowingly*¹¹ misappropriated Dice's image—was a public vindication for Dice of X17's culpability.

X17 nevertheless contends the court erred because section 3344 cannot clear Dice's reputation. But even if Dice's concern

economic right.” (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 889.) X17 takes the quotation out of context. The passage is one of two “cautionary observations” the Court made relating to its test for “whether a work merely appropriates a celebrity's economic value . . . or has been transformed into a creative product that the First Amendment protects.” (*Id.* at pp. 888-889.) Dice of course is not a celebrity, whether the First Amendment protected X17's use of Dice's image was not before the jury, and the jury concluded X17 *did* engage in the unauthorized use of Dice's image or likeness.

¹¹ “To prove the statutory remedy [under section 3344], 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.’” (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 (*Orthopedic*).)

about harm to his reputation could not be remedied under section 3344, the jury's finding that X17 was liable to Dice under that section still could serve Dice's objective of righting X17's wrong. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [correct ruling will not be disturbed on appeal " 'merely because given for a wrong reason' " and " '[i]f right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion' "].)

X17 also argues the record does not support the court's finding that Dice's litigation objectives included anything other than achieving a large monetary award. We disagree. As X17 notes, the court cited to Dice's deposition testimony, attached to his opposition to defendants' fee motion, in support of its finding Dice's litigation objectives included "to right a wrong and clear his reputation." In his deposition, Dice answered "[y]es" to the question: "You were thinking about the impact on your reputation and what the video could do to you; is that right?" When asked, "And so what were you thinking about that?"—Dice responded, "That I needed to take some action against this . . . You know, it wasn't right." X17 contends that testimony "does not concern [Dice's] goals when he filed the litigation and it does not support the conclusion that his goal in taking this matter through trial was to clear his reputation."

The deposition testimony in conjunction with testimony the court heard at trial supports the trial court's finding. At trial, Dice testified that he "felt that people had wronged" him. He felt "[h]orrified" when people mentioned to him that they had seen the video. He said he was "taken by surprise" and "was extremely angry" about X17 posting the video. He worried about what people thought of him; he thought "people would think that [he was] a drug dealer." Dice's AA sponsor also testified Dice was

“outrage[d]” by the video and had trouble dealing with it. The sponsor testified Dice had expressed his fears and concerns about what people in AA meetings would think and how it would affect his seeking work to be a sober companion. Dice testified he not only experienced worry when he learned of the video, but the trial itself also had “brought up so much emotional stuff. . . . I feel like I’m starting to have signs of traumatic stuff coming up inside of me again because of this.”

Based on this record, the court reasonably could conclude that, in addition to wanting to obtain a monetary award, Dice wanted to vindicate his rights.

Dice was awarded damages against X17 under section 3344, albeit for much less than Dice had requested, and achieved a public vindication that X17 was in the wrong by knowingly misappropriating Dice’s image for commercial purposes. On these facts, the court did not abuse its discretion in finding that Dice, a noncelebrity, was the prevailing party on his section 3344 claim.

3. *The court’s denial of Navarre’s request for attorney fees*

Navarre contends the court erred in declining to award him any attorney fees. He argues he cannot be denied attorney fees on the ground he did not personally incur them or “simply because he shared counsel with X17.”

a. *Applicable law and the court’s findings*

A party moving for statutory attorney fees bears the burden of proof. (*Corbett v. Hayward Dodge, Inc.* (2004) 119 Cal.App.4th 915, 926.) A prevailing party represented by the same counsel as a party not entitled to attorney fees “may recover only reasonable attorney fees incurred in his defense of the action.” (*Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 443 (*Zintel*).) “To the extent [the prevailing

party's] shared counsel engaged in litigation activity on behalf of [a codefendant] for which fees are not recoverable, the court has broad discretion to apportion fees.” (*Ibid.*) “‘A court may apportion fees even where the issues are connected, related or intertwined.’” (*Ibid.*) “The prevailing party therefore must generally allocate the attorney fees it incurred between” its defense on the cause of action subject to statutory fees and the defense of the jointly represented nonprevailing party, as well as defense of causes of action not eligible for attorney fees. (*Brown Bark III, L.P. v. Haver* (2013) 219 Cal.App.4th 809, 829-830.) “[A]llocation among jointly represented parties ‘is not required when the liability of the parties is “so factually interrelated that it would have been impossible to separate the activities . . . into compensable and noncompensable time units. . . . [Citation.]” ’ [Citations.]” (*Id.* at p. 830.)

The court here concluded Navarre—whom Dice dismissed at the close of evidence—was the prevailing party against Dice on his section 3344 claim. As the court stated, the only “issue is whether Navarre’s request for attorneys’ fees in the amount of \$226,456.50 is reasonable.” The court declined to award Navarre any attorney fees, impliedly finding the request unreasonable. The court explained,

“Navarre and X17 prepared a joint motion for attorneys’ fees and costs. However, Defendants did not allocate the fees between the two parties, categorize the fees by litigation stage or tasks, or even provide a total amount for their request. Defendants’ law firm appears to have sent its bills to X17, not Navarre, i.e., ‘Invoice submitted to X17.’ [Citation.] Defendants did not identify any legal work done solely on Navarre’s behalf. Nor did Defendants identify

any attorney's fees born[e] by Navarre. The evidence before the court indicates Navarre did not personally incur any attorney's fees. Thus, the Court declines to award attorney's fees in any amount to Navarre."

We agree the court could not deny Navarre an award of attorney fees on the ground X17, not Navarre, was responsible for their payment. (See, e.g., *Lolley v. Campbell* (2002) 28 Cal.4th 367, 373 [employee represented without charge by Labor Commissioner entitled to award of attorney fees as prevailing party]; *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1409 [lessor who prevailed in action on lease entitled to award of attorney fees under contract provision even though insurer paid for his defense].) But that was not the only basis for the court's decision. Based on the record, we can infer the court was unable to determine what fees were incurred in support of Navarre's defense of Dice's section 3344 cause of action. In essence, the court impliedly concluded Navarre failed to meet his burden to demonstrate the fees he sought were reasonable. The record supports that conclusion.

Defendants moved jointly for attorney fees. They asked the court to find X17 and Navarre both prevailing parties or to decide no party prevailed. Attorneys' declarations filed with the moving papers described defendants' counsel's qualifications, efficiency, and reduced billing rates, and attached redacted invoices. But as the court noted in its order, defendants did not allocate the fees between them and failed to "categorize the fees by litigation stage or tasks, or even provide a total amount for their request."¹²

¹² Defendants' memorandum of points and authorities parenthetically states they incurred "about \$219,000 total" attorney fees, while a supporting attorney's declaration states

After the April 13, 2017 hearing on the parties' motions for attorney fees, the court apparently expressed concern that no time was billed to Navarre separately from the time billed to X17.¹³ Navarre submitted a supplemental brief arguing apportionment was not necessary because "the prevailing defendant would have been required to do the same legal research and analysis in preparing those defenses regardless of whether they applied to both defendants or whether they applied to only one prevailing party."

Attorney fees incurred for prevailing and nonprevailing joint clients need not be apportioned when the parties' liability is inextricably factually intertwined. But Navarre did not attempt to demonstrate allocation was not required other than to assert "[t]he fees incurred by the defense were necessary to Navarre regardless of whether X17 benefited from the shared work product or not." The court reasonably could have found otherwise.

Demonstrating Navarre did not knowingly¹⁴ misappropriate Dice's likeness did not necessarily require the

defendants were "billed at just a shade over \$200,000." The totals listed for attorney services on the billing records are \$25,122 and \$201,334.50.

¹³ The reporter's transcripts of the hearings on the attorney fee motions are not part of the appellate record. Defendants made this representation in their "Brief on New Issue Discussed at Hearing Regarding Francois Navarre's Motion for Attorneys' Fees," filed April 14, 2017.

¹⁴ As we have said, liability under section 3344, as opposed to the common law claim for misappropriation of likeness, requires, among other things, "a knowing use by the defendant." (*Orthopedic, supra*, 202 Cal.App.4th at p. 544.)

same work product and fact investigation as defending against the allegation X17 knowingly misappropriated Dice's likeness. Navarre's *individual* liability under section 3344 could be based only on his own knowledge and participation (or lack thereof) in posting the video, while X17's liability could stem from others' knowledge and participation in posting the video. At a minimum, defending X17 would seem to have required greater fact investigation and preparation than defending Navarre.

Navarre relies on *Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192 (*Hill*). That case is distinguishable. There, the trial court did not apportion between fees incurred by an LLC and one of its entity managing members (respondent), awarding respondent the full amount of its requested fees, even though the LLC was not a prevailing party. (*Id.* at pp. 1195-1196.) Respondent contended apportionment was neither possible nor required, because all of the LLC's defenses applied to and were jointly raised by the member. (*Id.* at pp. 1196-1197.) The court of appeal agreed apportionment was not required because the LLC and respondent asserted joint defenses, and "their counsel would have been required to do the same legal research and analysis in preparing those defenses regardless of whether they applied to both defendants or to [respondent] only." (*Id.* at pp. 1197-1198.)

But in *Hill* the trial court presumably had concluded the the joint defenses "were 'so interrelated that it would have been impossible to separate them into [time units billed on behalf of [respondent]] for which attorney fees are properly awarded and [time units billed on behalf of LLC] for which they are not.'" (*Hill, supra*, 226 Cal.App.4th at p. 1197.) Here, the trial court impliedly concluded Navarre failed to meet that burden. We cannot say the trial court abused its discretion. Although Dice asserted his section 3344 cause of action against both X17 and

Navarre, the level of effort and factual analysis required to defend against that cause of action was not necessarily the same for both defendants. At least Navarre failed to demonstrate it was.

Navarre also did not attempt to apportion the fees incurred for his defense at all, even after the court's tentative ruling. The attorney billing records make no distinction between fees incurred in X17's defense and Navarre's defense, nor do they indicate what work benefited both parties. For example, the attorney invoices include work performed on defendants' anti-SLAPP motion and the appeal from the court's order partially denying that motion, even though most of that work related to Dice's other causes of action not eligible for attorney fees.¹⁵ The bills also refer to drafting and responding to discovery, but do not state if that discovery related to both X17 and Navarre, only X17, or only Navarre, or whether it concerned Dice's section 3344 cause of action.

Navarre nevertheless contends the court was required to award Navarre its attorney fees, relying on *Zintel, supra*, 209 Cal.App.4th at p. 440. In *Zintel*, the trial court "declined to apportion fees or to make any award at all" to a prevailing defendant jointly represented with a nonprevailing defendant.¹⁶

¹⁵ The trial court denied defendants' motion as to Dice's non-section 3344 causes of action, which this court affirmed. We reversed the court's order granting the motion to strike Dice's section 3344 causes of action. (*Dice v. X17, Inc.* (Jan. 10, 2014, B243910) [nonpub. opn.])

¹⁶ The trial court concluded it was prevented from finding the successful defendant a prevailing party due to the " 'unity of interest' " between the two defendants, but even if it could, defense counsel's failure " 'to specifically apportion those fees spent solely defending' " the successful defendant precluded

(*Id.* at p. 444.) It found “defense counsel had failed ‘to specifically apportion those fees spent solely defending [the prevailing defendant] against plaintiff’s claims’ and that combining the fees incurred on behalf of both [jointly represented defendants] would result in unjust enrichment to [the nonprevailing defendant].”

(*Ibid.*) The court of appeal found the trial court’s “failure to exercise its discretion was error,” and remanded the matter to the trial court to determine “the reasonable attorney fees to which [the prevailing defendant] is entitled.” (*Ibid.*)

But in *Zintel*, defendants’ counsel had presented the trial court with two approaches to apportioning fees between his clients, and plaintiff’s counsel had suggested a third approach. (*Zintel*, *supra*, 209 Cal.App.4th at pp. 443-444.) The trial court had declined to apportion fees “[f]aced with these conflicting positions.” (*Id.* at p. 444.) Here, in contrast, defendants gave the court nothing to work with—they made no attempt to apportion their fees at all.¹⁷ And, as we have discussed, although they argued the defense of X17 and Navarre was intertwined, they did not demonstrate how.

The trial court did not refuse to give Navarre his attorney fees “simply because he shared counsel with X17.” We can infer the court denied Navarre his fees because it could not tell what fees were incurred on behalf of Navarre’s defense of the section 3344 cause of action, as opposed to those relating to only X17’s defense or Dice’s other causes of action. In other words, Navarre

the award of fees. (*Zintel*, *supra*, 209 Cal.App.4th at p. 437.) The court of appeal also rejected the trial court’s application of the defunct unity of interest principle. (*Id.* at p. 442.)

¹⁷ Defendants’ motion did not even request a specific amount of fees—they merely attached billing statements totaling the amount of fees incurred.

failed to meet his burden of proof to establish the reasonableness of the billed attorney fees. The court therefore did not abuse its discretion in declining to award Navarre his attorney fees.

DISPOSITION

The trial court's April 27, 2017 order is affirmed.
Respondent is to recover his costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P.J.

LAVIN, J.