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Court of Appeal, Fourth District, Division 3, California.
Charles F. COOK etc., et al., Plaintiffs and Respondents,
v.
M. Stephen **COONTZ** et al., Defendants and Appellants.
No. G030959.
(Super.Ct.No. 00CC14440).

Jan. 14, 2005.

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed in part and reversed in part.

Horvitz & Levy, David M. Axelrad and Daniel J. Gonzalez, Sedgwick, Detert, Moran & Arnold, Gregory H. Halliday and Charles N. Hargraves for Defendants and Appellants.
Enterprise Counsel Group, David A. Robinson, Corey E. Taylor and Jeffrey Lewis for Plaintiffs and Respondents.

OPINION

SILLS, P.J.
***1** M. Stephen Coontz and his law firm, Coontz & Matthews (collectively, Coontz) represented Charles and Jean Cook and Susan Mulholland, as trustees of their respective trusts (collectively, the Plaintiffs), during the time they were improving their property with a two-unit condominium. When the Plaintiffs were sued by their neighbor over an easement dispute, they discovered they had no title insurance covering the easement, notwithstanding Coontz's representations that he had obtained it. After the Plaintiffs successfully defended the lawsuit, they sued Coontz for legal malpractice, fraud, breach of fiduciary duty, and breach of contract, claiming he told them he had secured insurance coverage for them. The jury found Coontz intentionally misrepresented he had obtained title insurance and negligently failed to inform and educate the Plaintiffs about the difference between a preliminary title report and a title policy; it awarded the Plaintiffs $561,171.57 in economic damages, $700,000 in noneconomic damages, and $368,016.29 in attorney fees.

Coontz contends he is entitled to a new trial because: (1) The trial court erroneously instructed the jury on causation; (2) the jury's findings on the Plaintiffs' theories of recovery were inconsistent; and (3) the trial court erroneously excluded evidence, to his prejudice. Coontz further contends he is entitled to a reversal of the judgment, in whole or in part, because (1) there is insufficient evidence that he caused actual harm to the Plaintiffs or had the intent to defraud them; (2) the Plaintiffs, who sued as trustees, have no standing to recover for their individual claims of emotional distress and defense costs; and (3) the attorney fee award was not authorized by the retainer agreement.

We find there is sufficient evidence in the record to support the jury's determinations on all causes of action except fraud. Accordingly, we reverse the award of noneconomic damages and affirm the remainder of the judgment.

FACTS

In September 1997, the Cooks and the Mulhollands (the Plaintiffs) agreed to buy a vacant lot near the beach in San Clemente. These two elderly couples

had been friends for years. They wanted to build a two-unit condominium on the property and live there during their retirement years. The property, known as 109 Boca de la Playa, was part of a 1927 subdivision and consisted of Lot 40 and a ten-foot wide strip of Lot 10. The seller of the property, Donald Bonanno, had paid the developer's successor-in-interest for a quitclaim deed to the strip of Lot 10 in 1992 and had effected a lot line adjustment.

Bonanno told the Plaintiffs that he had rejected a proposal several years before from his uphill neighbor, Real Ouimet, to enter into a joint venture for the development of a three-unit condominium on the property. Bonanno had later rejected another offer by Ouimet to buy the property. After these rejections, Ouimet threatened Bonanno that if he could not build on the property, no one else could either. In April 1997, Ouimet's "significant other," Doreen Talbot, wrote Bonanno a letter stating that a group of homeowners in the subdivision intended to "build stairs to gain access to the beach as the original owner planned it" on that portion of Lot 10 subsumed by the lot line adjustment. Talbot asserted, "It is the opinion of the group of lot owners that this right to use is granted to them per the original tract record and they have never renounced ... their right to use it. [¶] ... [¶] If we do not hear from you before the end of the month, we will have no other choice than taking legal procedures so we can exercise our rights without objections."

***2** During the negotiations for the sale of the property, Bonanno disclosed this history with Ouimet and Talbot to the Plaintiffs and gave them a copy of Talbot's letter. But the April deadline had come and gone without any lawsuit, and the Plaintiffs considered it "saber rattling" that was "way past."

Bonanno also advised Chicago Title Insurance Company, the Plaintiffs' proposed insurer, about the Talbot letter. Consequently, the owner's title insurance policy subsequently issued by Chicago Title excepted from coverage any claim arising by reason of "the effect of the dedication on the map of said tract ..., for the use of the lot owners of this subdivision...." Although the Plaintiffs received a copy of the title insurance policy, none of them was aware of the exception. Escrow closed in November 1997.

As the project got underway, the Plaintiffs needed a real estate lawyer to prepare the covenants, conditions and restrictions (CC & R's) for their condominium. Charles Cook, who was the spokesperson for the Plaintiffs, asked his banker for a referral. The banker referred Cook to Coontz, whom he described as having "a reputation of dealing in real estate matters."Cook interviewed Coontz, who confirmed his "familiarity with real estate matters" and indicated he had "connections ... with city council." The Plaintiffs retained Coontz in January 1998 to prepare the CC & Rs "and perform[ ] other services as you and I may agree."Coontz advised the Plaintiffs that he would wait to prepare the CC & Rs until their architect completed the city approval process for their project.

In July 1998, the Plaintiffs' grading engineer noticed the exception for Lot 10 in the Chicago Title policy and told them about it. The Plaintiffs called Coontz for help, filling him in on the background with the uphill neighbors.[FN1] Coontz said he would "handle it," and called Chicago Title to see if it would remove the exception. Chicago Title refused. Coontz visited the property and sent a memo to Cook on September 29: "It is obvious that the easement is impassable and has been for a very long time.... After seeing the property I have little concern about our ability to defend against an attempt to enforce the easement, but a quiet title action by us remains unfeasible because it would be prohibitively expensive."Coontz told Cook he had talked to a title officer who was a friend of his about eliminating the exception and was waiting for information. Coontz confirmed, "As we discussed, the main reason for getting the exception eliminated from the title policy is to enable you to obtain a construction loan."

FN1. Coontz denies knowing about the

neighbors' challenge at that point.

Coontz's friend, Gordon Anderson, worked for South Coast Title/Northern Counties Title Insurance Company. South Coast issued a preliminary title report in September that stated it was "prepared to issue, or cause to be issued, at the date hereof shown, a policy or policies of title insurance of Northern Counties Title Insurance Company, describing the land and the estate or interest therein hereinafter set forth, insuring against loss which may be sustained by reason of any defect, lien or encumbrance not shown or referred to as an exception below or not excluded from coverage pursuant to the printed schedules, conditions and stipulations of said policy forms."There was no exception for Lot 10.

***3** Coontz sent the preliminary title report to Cook on October 7, 1998. Cook testified he was "ecstatic" when he got it. He did not know the difference between a preliminary title report and a title insurance policy; he believed the document he received was "title insurance with the exception removed."Coontz never explained the document to him.

Coontz testified after Chicago Title refused to remove the exception from its owner's title insurance policy, he came up with a plan that would allow the Plaintiffs to "get the plans going with the city...." He felt it was not feasible to get another owner's policy for Lot 10 because "[title insurance policies] were only issued in connection with some sort of event. An owner's policy in connection with the purchase and sale of property or a lender's policy in connection with some kind of a loan transaction. Typically, either refinancing the property or building on it where you need a construction loan."Coontz's plan was to go to a different title insurer and try to get another preliminary title report without the exception so the project could continue through the city process. "[T]he actual title policy would be in the form of a lender's policy and that would not come until they got their final approval from the city which was quite a ways away yet and that would actually be a lender's policy of title insurance in connection with a construction loan...." According to Cook, Coontz never explained that his plan to get a lender's policy would leave the owners "without any protection against a prohibitively expensive lawsuit."

In March 1999, the city requested a preliminary title report no older than 60 days. Coontz contacted Anderson, who arranged for an updated report from Northern Counties. A few days later, however, the insurer notified Coontz it would except Lot 10 in any policy it would issue. Coontz sent the notice to Cook, who asked Mulholland to call Coontz for an explanation because he and his wife were leaving on a trip. Coontz told Mulholland he had talked to Anderson and "[t]hey had used the wrong language and that there was really no problem, they were going to correct it and issue a new policy with the correct language and we were still covered, there was no problem."Northern Counties issued a new preliminary title report without the exception on April 29, which Coontz sent to the Plaintiffs on May 19. Mulholland "looked specifically for the language referring to the exemption" but found it confusing, so she called Coontz for help. He agreed the language was confusing but reassured her "we still had coverage" and "we were okay."

In May 1999, the Plaintiffs' project was considered at a city planning commission meeting. An attorney opposed the project and threatened a lawsuit on behalf of a group of neighbors, including Ouimet and Talbot. Notwithstanding, the planning commission approved the project, and it went to the city council for a hearing on August 4. Coontz attended and advised the council, "We have a title commitment that makes no mention of that ten-foot strip. And we have discussed that issue with the title company. And they are satisfied that the ten-foot strip is not a legitimate title issue."The city denied approval of the project, however, because the proposed building was too big for the site. The Plaintiffs were not present at the meeting; however, they viewed a videotape of the proceedings and discussed them

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with Coontz.

***4** After downsizing the project, the Plaintiffs again brought it before the city council on November 3. Ouimet spoke in opposition and pointed out that Lot 10 was not covered by a title insurance policy. "We have here a preliminary offer of title report, which says, 'It is important to note that this preliminary report is not a written representation as to the condition of title and may not list all liens, defects, and encumbrances affecting title to the land.' It is even more kind of worrying when you go to the notes and requirements page, which says, 'Note No.1. No policy of title insurance has been issued on this property within the last five years.' " FN2 Upon hearing this, Mulholland "leaned over and asked [Coontz], 'What is he talking about? We have title insurance, don't we?' [¶] And he said, 'Don't worry, you're okay.' " Cook, who was standing in the back during the meeting, approached Coontz outside the meeting room afterwards and said, "What's this all about, and in response, [Coontz] said, don't worry about it, I've got you covered." Later that evening, the City approved the project.

FN2. Somewhere between April and September of 1999, Anderson moved from South Coast/Northern Counties to American Title Company. His new company issued a preliminary title report in September 1999 with no exception for Lot 10.

The next month, Ouimet and Talbot filed a lawsuit against the Cooks, Mulholland, and the owners of Lot 10, seeking to quiet title to an alleged public walkway across Lot 10 (the *Talbot* lawsuit). Cook called Coontz to advise him the complaint was being sent to him and told him to "hand it over to the title insurance company."Coontz told Cook they had no title insurance. Shortly thereafter, the Plaintiffs terminated Coontz's representation and hired another attorney to defend them. They were ultimately successful in the *Talbot* lawsuit, but expended close to $600,000 to defend themselves. The Plaintiffs filed this action against Coontz to recover the costs of the defense and damages for emotional distress.

The Plaintiffs' first amended complaint pleaded professional negligence, breach of contract, breach of fiduciary duty, and fraud. They alleged they counted on Coontz to deal with the exception of Lot 10 from their title insurance policy; he told them he could get insurance without the exception and led them to believe he had done so. Coontz never explained the difference between a preliminary report and a policy, why he believed they could not obtain a new owner's policy, or that they would be without insurance if they were sued by their neighbors.

The Plaintiffs' expert, Lore Hilburg, testified in her opinion the Plaintiffs could have gotten a title insurance policy without the exception in 1998. She based that opinion on the fact that three companies issued preliminary reports, which were indications of offers to issue policies. She continued, "I understand the argument that those were offers for a loan policy, but it's often set up that way. I mean, they come in and they need some kind of transaction or they need to have an explanation as to what kind of policy's going to be issued."

Hilburg opined that Coontz should have ordered an owner's policy as soon as he received the preliminary title report from South Coast in October 1998, notwithstanding that the order was for a lender's policy. "I believe it's more likely than not they would have issued a[n] owner's policy at his request."Even though the Plaintiffs' policy order was for a lender's policy of $700,000, she believed there would not have been a "whole new underwriting process" for an owner's policy. "[I]n the everyday issuance of these policies it never happens. They never would have revisited the underwriting issue of the dedication of the tract map. They were looking at that already in contemplation of issuance of the loan policy. [¶] Most title officers don't understand that there is a difference between an owners policy and a lenders policy in terms of underwriting[,] they just don't. They don't get into that kind of esoteric and sophisticated analysis. They're inter-

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ested in just issuing their prelim. That's how it would be. And if they've made an underwriting decision on the tract map dedication they're really not going to differentiate in that circumstance [ ] between an owner and a lender. It's my experience."

***5** Hilburg acknowledged that the California Land Title Association guidelines recommended an owner's policy not be issued without a recorded transaction, but she explained that title officers "have too much to do and they often don't even think about it at the time. [¶] So in a perfect world they might say, 'Okay, I don't have a transaction here. Stop. Look at this. Why am I issuing a policy?'[¶] And I don't think that would have happened because that doesn't usually happen. What happens is they get asked to issue a policy. It's mechanical."She continued, "[T]he guideline doesn't say never issue a policy when there is no transaction.... They're guidelines-that's their name. They're not rules. They don't say you can never do this. What they say is here's a flag, pay attention, find out why are they getting a policy. And if you can offer a reasonable explanation that's all the guideline wants. And then they'll go ahead and issue the policy."After reviewing exhibits from Northern Counties' files, Hilburg pointed out that company decided to eliminate the exception for Lot 10 in its preliminary report dated April 29, 1999, after conducting an "internal revisiting process" at Coontz's request.

Coontz's expert, Keith Pearson, testified in his opinion no title company would have given a substitute owner's policy to the Plaintiffs. He explained a company has more exposure under an owner's policy than under a lender's policy because a lien holder cannot make a claim until it exhausts all other means of collecting its debt. Applying for a new owner's policy when the Plaintiffs already had the Chicago Title policy plus the lack of a recorded transaction would raise a "red flag" to the title company that there was very big risk associated with the title. He testified it was the policy of his company, "as well as every other company that I know of," not to issue a title insurance policy unless there is a recorded transaction. Also, the existence of the known threat of litigation by the neighbors would cause a title company to turn down an application.

After a five-week trial, the jury returned a special verdict awarding the Plaintiffs $561,171.57 in economic damages, minus a setoff of $250,000 for failure to mitigate, plus $700,000 in noneconomic damages. The jury found that Coontz defrauded the Plaintiffs by "intentionally misrepresenting" and "negligently failing to disclose one or more material facts impacting the value, merits or reliability of [his] professional advice," and by "concealing material information necessary for [the Plaintiffs] to fully understand the risks and ramifications associated with [his] professional advice."It found Coontz was negligent in the performance of his duties as the Plaintiffs' attorney and that he breached "one or more fiduciary duties owed to [the Plaintiffs] as their attorney."It did not find, however, that Coontz's breach of fiduciary duty was intentional. The jury found Coontz's fraud, negligence, and breach of fiduciary duty caused harm to the Plaintiffs. Although the jury found Coontz entered into a contract to perform legal services for the Plaintiffs, it found he did not breach any duties under that contract.

***6** The Plaintiffs moved for attorney fees under the retainer agreement. The trial court awarded them attorney fees and costs in the amount of $368,016.29.

DISCUSSION

Inconsistencies in the Verdict

Coontz contends the inconsistencies in the verdict compel a new trial. He first argues all the Plaintiffs' theories of recovery were linked by the common allegation that Coontz assured them he would get a policy of title insurance and then failed to do so. Thus, Coontz argues, the jury's finding that he was

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not liable for breach of contract cannot be reconciled with the findings of liability for fraud, professional negligence, or breach of fiduciary duty.

In the breach of contract cause of action, the Plaintiffs pleaded that Coontz agreed to perform "legal and professional services in connection with the [property]," which included "tak[ing] all steps necessary to ensure that PLAINTIFFS had clear title to the [property]," and "tak[ing] all steps necessary to obtain final, binding title insurance on the [property] free of reference to any potential claims by other nearby property owners...." The only breach alleged was Coontz's failure to accept the offers to insure that were allegedly made by the title insurers when they issued the preliminary title reports. The jury was instructed they could only find a breach of contract if there was mutual consent as to Coontz' contractual duties. Coontz denied he agreed to obtain a new owner's policy, which the jury apparently believed. This supports the jury's finding there was no contract to do so.

In the tort causes of action, however, the Plaintiffs' allegations against Coontz were broader than the breach of his alleged promise to obtain title insurance. The Plaintiffs alleged Coontz committed malpractice because he "failed to exercise reasonable skill and care in [his] representation of Plaintiffs in that, *among other things,* [he] negligently and carelessly failed to follow through in carrying out their instructions to accept repeated written offers to insure Plaintiffs' title...." (Italics added.) In the breach of fiduciary duty cause of action, the Plaintiffs alleged Coontz not only had the duty to "take all steps to obtain title insurance," but to "act openly, honestly, in good faith and in the best interests of Plaintiffs,""[k]eep Plaintiffs reasonably informed about significant developments relating to their representation," and "[t]ruthfully communicate with Plaintiffs regarding the status of the efforts of Coontz to represent Plaintiffs in connection with the building of their retirement home."And the Plaintiffs alleged Coontz defrauded them because he was "under a duty to make full disclosure to Plaintiffs of all material facts within [his] knowledge, including, *but not limited to,* the fact that [he] had failed to accept the title companies' offers to insure the [property]"; despite this duty, he falsely represented he had obtained title insurance.

***7** While the gist of the breach of contract cause of action was that Coontz promised to get title insurance and he did not, the gist of the tort causes of action was that Coontz represented he had taken care of the title problem and he had not. The finding of no liability for breach of contract does not preclude a finding of liability on the tort theories.

Coontz further contends the jury's finding that he acted intentionally when committing fraud cannot be reconciled with its finding that he did not act intentionally when breaching his fiduciary duty. He claims "there is no rational explanation in the instructions or the evidence for the conflicting findings with respect to Coontz's intent."But a look at the instructions reveals otherwise.

The jury was instructed that an attorney performing professional legal services for a client owes the client a "fiduciary relation of the very highest character and is bound to act with the most conscientious fidelity. [¶] A failure to so act is a breach of that duty."The scope of the fiduciary duty was defined for the jury as "determined by the Rules of Professional Conduct, which, together with statutes and general principles relating to other fiduciary relationships, define the duty component of fiduciary duty which an attorney owes to his or her client. [¶] In this regard, California's Rules of Professional Conduct state that an attorney shall keep a client reasonably informed about significant developments relating to the employment or representation. [¶] Similarly, the American Bar Association's Model Rules of Professional Conduct state that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Thus, the jury was told Coontz could have breached his fiduciary duty by failing to explain things to his

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clients or inform them about significant developments. Notably absent from these instructions is the suggestion that Coontz's intentional misrepresentation was related to a breach of fiduciary duty. The lawyers on both sides of this case acknowledged at trial and on appeal that “it goes without saying that an attorney's intentional misrepresentation also constitutes a breach of his or her fiduciary duty.”While we do not quarrel with this statement as a matter of law, it appears that no one informed the jury of this obvious legal principle. The jury's answers on the special verdict form show their consistent findings that Coontz intentionally misrepresented he had obtained title insurance and negligently failed to inform and educate the Plaintiffs. Given these instructions, it was reasonable for the jury to conclude that Coontz's intentional misrepresentation was not part of the breach of fiduciary duty cause of action.

Instructional Error

One of Coontz's theories at trial was that even if the Plaintiffs had known about the lack of title insurance, they could not have obtained an owner's policy without the exception for Lot 10. He contends the Plaintiffs had to prove that absent his breaches, they could have achieved a better result, i.e., that a title company would have sold them a policy and paid the cost of their defense in *Talbot.*Coontz proposed two alternative jury instructions: (1) “To show that defendants were a substantial factor in the lack of a title insurance policy which provided coverage for the right of way, plaintiffs must establish that defendants' conduct was a factor at all; that is, title insurance with coverage for the right of way would have been obtained in the absence of defendants' conduct”; or (2) “Defendants' conduct was not a substantial factor in bringing about plaintiffs' lack of insurance coverage if there would not have been insurance coverage in the absence of defendants' conduct.”

***8** The trial court rejected Coontz's proposed instructions and instead told the jury that the Plaintiffs “must prove that defendants' malfeasance was a ‘substantial factor’ in causing their damages.”It continued, “[The Plaintiffs] are not required to prove they would have obtained a ‘better deal’ or, in this case, that title insurers would definitely have issued title policies in accordance with the terms of the preliminary title reports obtained by [Coontz]. Rather, all [the Plaintiffs] need establish is that [Coontz'] alleged wrongdoing was a ‘substantial factor’ in causing [the Plaintiffs] to defend the *Talbot* lawsuit without insurance.” Coontz contends this instruction eliminates the need to prove a causal nexus between his breach and the Plaintiffs' harm.

Both parties rely on the recent case of *Viner v. Sweet* (2003) 30 Cal.4th 1232. There, the plaintiffs sued their lawyer for legal malpractice during their negotiations for a stock sale and employment termination agreement. The trial court refused to instruct the jury that the plaintiffs “needed to prove they would have received a better deal ‘but for’ defendant attorney['s] ... negligence.” (*Id.* at p. 1238.)The court of appeal affirmed, holding that the “but for” test did not apply to transactional malpractice as it does to malpractice in connection with litigation. The Supreme Court reversed.[FN3]

FN3. The court explained that the “but for” test and the “substantial factor” test were essentially two ways of saying the same thing. Quoting the Restatement Second of Torts, it stated, “ ‘[T]he actor's negligent conduct is *not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent.*’(Italics added.) [¶] Thus, ... Restatement section 432, subsection (1) adopts the ‘but for’ test of causation....” (*Viner v. Sweet, supra,* 30 Cal.4th at p. 1240.)

The court held there was “nothing distinctive about transactional malpractice” to justify relaxing the requirement of proof of causation. (*Viner v. Sweet, supra,* 30 Cal.4th at pp. 1240-1241.) “In both litiga-

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tion and transactional malpractice cases, the crucial causation inquiry is *what would have* happened if the defendant attorney had not been negligent. This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative. [Citations.]" (*Id.* at p. 1242.)

But the application of *Viner* to this case does not require, as Coontz urges, that the Plaintiffs prove they could have obtained an owner's title insurance policy without the exception. The *Viner* court explained, "In transactional malpractice cases, as in other cases, the plaintiff may use circumstantial evidence to satisfy his or her burden. An express concession by the other parties to the negotiation that they would have accepted other or additional terms is not necessary. And the plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only ' "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." ' [Citation.]"(*Id* . at pp. 1242-1243.)

Coontz posits that the Plaintiffs had only two alternatives: find a title insurance policy that would provide a defense for claims to Lot 10 or pay for the defense themselves. But the Plaintiffs had other alternatives. They could have avoided litigation by stopping the project and selling the land (the "no deal" scenario) or by adapting their project to the demands of the neighbors (the "better deal" scenario).(*Viner v. Sweet, supra,* 30 Cal.4th t p. 1239.) The instruction given correctly required the Plaintiffs to prove that without Coontz' intentional and negligent breaches, they would have avoided the cost of the *Talbot* defense.

***9** Coontz also complains about two instructions given on the principle of estoppel, as set forth in Evidence Code section 623: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it ."The instructions explained that if Coontz intentionally and deliberately misled the Plaintiffs into thinking they had title insurance with respect to Lot 10, he was not permitted to contradict "such advice, statements or conduct" in this litigation if the Plaintiffs reasonably relied on his advice "to their injury." They also explained that if the Plaintiffs deliberately led Coontz to believe that they were unaware of threats relating to the property and Coontz acted on that belief, then the Plaintiffs were not permitted to contradict their statement in this litigation.

Coontz contends these instructions confused the jury into thinking that if it decided Coontz led the Plaintiffs to believe they had insurance covering Lot 10, then it should disregard evidence supporting his theory that such insurance was never available. Coontz claims this compromised the fundamental fairness of the trial because the jury could believe his evidence that no title company would have sold the Plaintiffs an owner's title insurance policy and, pursuant to the instructions, "ignore that truth, pretend insurance was available all along, and find Coontz liable for the harm plaintiffs suffered from not having it."

The instructions given are a correct statement of the law. (*Transport Clearings-Bay Area v. Simmonds* (1964) 226 Cal.App.2d 405, 427.) And Coontz is correct that they allowed the jury to disregard the evidence about the unavailability of an owner's title insurance policy, but only if the Plaintiffs first proved they relied on his misrepresentation *to their injury.*This means the jury could only disregard the evidence about the unavailability of an owner's title insurance policy if it *first* found Coontz's misrepresentation caused some injury to the Plaintiffs. The instruction allowed the jury to find the Plaintiffs were injured by their reliance on Coontz either because (1) they could have acquired an owner's policy had they known Coontz did not get one (which required the jury to consider Coontz's evidence about the unavailability of such a policy) or (2) they could have taken other steps to avoid the cost of defending the *Talbot* lawsuit. Fundamental

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fairness was not compromised.

Exclusion of Evidence of Underwriting Practices

Coontz offered the testimony of Cindy Fern, a title officer with American Title, and Jay Gendreau, vice-president of South Coast/Northern Counties, to show that the underwriting practices of those companies were contrary to Hilburg's opinion about what they would have done had Coontz asked for an owner's policy after the issuance of a preliminary title report. The Plaintiffs made a motion in limine to exclude the testimony, pointing out that Coontz had failed to list either of these witnesses as experts or as “percipient experts,” and, accordingly, they were not deposed. Furthermore, the motion claimed the proposed testimony was cumulative because Coontz had designated Pearson to testify regarding the title insurance industry custom and practice of policy issuance and preliminary reports. The trial court agreed with the Plaintiffs and granted the motion in limine.

***10** Coontz argues the trial court was wrong in concluding Gendreau and Fern would have to testify as experts in order to explain the policies and procedures of their companies and why the companies would have refused to issue a new owner's policy to the Plaintiffs. Citing *Wise v. Reeve Electronics, Inc.* (1960) 183 Cal.App.2d 4, Coontz contends the existence of a business practice is a matter of fact, not opinion. In *Wise,* the plaintiff introduced expert testimony of trade custom and usage in the electronics industry to imply a term in her employment contract that supported her claim to a commission. The court found the finding of custom and usage was totally without evidentiary support because “[c]ustom or usage must be established as a matter of fact and not of opinion, hence, witnesses must testify to its existence as a fact.”(*Id.* at p. 9.)

The weight of authority, however, disagrees with the *Wise* case and holds that expert opinion is admissible on the existence of a custom or usage in a particular trade. (*Ecco-Phoenix Elec. Corp. v. Howard J. White* (1969) 1 Cal.3d 266; *Balfour, Guthrie & Co. Ltd. v. Gourmet Farms* (1980) 108 Cal.App.3d 181; *Conolley v. Bull* (1968) 258 Cal.App.2d 183; *Anaheim Builders Supply v. Lincoln Nat. Life Ins. Co.* (1965) 233 Cal.App.2d 400; 1 Witkin, Cal. Evidence (4th ed.2000) § 73, p. 619.) Here, the testimony Coontz sought to introduce was clearly opinion evidence because he wanted the witnesses to respond to a “what if” question, i.e., how would the companies have reacted if they had been asked to issue an owner's policy under the circumstances in late 1998. Because Coontz failed to designate Fern and Gendreau as experts, their testimony was properly excluded. (Code Civ. Proc., § 2034.)

Furthermore, the evidence Coontz sought to introduce was put before the jury anyway. Pearson testified in his opinion the practices of South Coast/ Northern Counties and American Title would have precluded the issuance of a policy. He testified that his opinion was based on reading the declarations of both Gendreau and Fern, which had been previously submitted in the case to support Coontz's unsuccessful motion for summary judgment. And Gendreau, who was called as a percipient defense witness, testified when Hilburg asked him why a policy was never issued, he responded that there was no request for a policy but “there would have never been a policy issued because there was no transaction involved....” He also managed to tell the jury “in light of that [Talbot] letter there was no way in hell we'd issue a policy.”

Evidence to Support Causation

Coontz contends the judgment must be reversed because the Plaintiffs failed to prove that they would have either obtained title insurance covering their defense costs or avoided the Talbot litigation altogether but for his conduct. He correctly points out that “no liability attaches [to an actionable misrepresentation] if the damages sustained were otherwise inevitable....” (*Kruse v.. Bank of America* (1988) 202 Cal.App.3d 38, 60.)

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***11** Coontz argues the evidence was overwhelming that neither South Coast/Northern Counties nor American Title would have issued an owner's policy to the Plaintiffs without the exception for Lot 10. But our role is to search the record for any substantial evidence, contradicted or uncontradicted, that supports the judgment. (*Santa Clarita Water Co. v. Lyons* (1984) 161 Cal.App.3d 450, 457-458.) Furthermore, "[a]ll issues of credibility are for the trier of fact and all factual matters must be viewed most favorable to the prevailing party and in suport of the judgment."(*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

Hilburg's testimony constitutes sufficient evidence to support a jury finding that title insurance might have been available if Coontz or the Plaintiffs had asked for it. Although there was much evidence to the contrary, Hilburg's expert opinion was that once the preliminary reports were issued without the exception for Lot 10, it was "more likely than not" that a title policy would have been issued on the same terms. Even though the original order was for a lender's policy, Hilburg's experience was that title officers did not differentiate between a lender's policy and an owner's policy.

Coontz also argues there is no evidence the Plaintiffs would have abandoned the project had they known about the title insurance problem. He points out they never took the threats from Ouimet and Talbot seriously and were shocked when they actually sued. But the record contains substantial evidence that the Plaintiffs would have changed their behavior if they had known they were uninsured with respect to the threat of litigation by Ouimet and Talbot. Cook testified had Coontz told him that "clean" title insurance was not available, he would have "probably sought a second opinion" and if that did not work, he "absolutely would have sought another way to resolve the problem."

Proof of Fraudulent Intent

The jury awarded non-economic damages for emotional distress in the amount of $50,000 to Dr. Cook, $150,000 to Mrs. Cook, and $500,000 to Mrs. Mulholland. The non-economic damages were based on the jury's finding that Coontz defrauded the Plaintiffs by intentionally misrepresenting, negligently failing to disclose, and concealing material facts. Coontz contends these damages must be reversed because the Plaintiffs failed to prove he had the requisite intent to defraud. We agree.

Fraud requires proof of the "intent to induce [another] to alter his position to his injury or risk...." (Civ.Code, § 1709.)Thus, the requisite mental state of the defendant is the intent to change the behavior of the plaintiff."Under this section of the Civil Code the intent required to prove a cause of action for deceit is an intent to induce action. An 'intent to deceive' is not an essential element of the cause of action, and statements ... that such an intent is an essential element of deceit are erroneous...." (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 488, fn. 5; see also *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1046;Rest.2d Torts, § 531; 3 Levy et al., Cal. Torts (2003) Business Torts, § 40.05[1], pp. 40-28 to 40-29.) The focus is not the intent to cause the particular harm that the plaintiff ultimately suffers."Few defrauding defendants give any serious thought to the nature or quality of the harm which could befall the victims who rely on their deceptive acts."(*Lovejoy v. AT & T Corporation* (2001) 92 Cal.App.4th 85, 94 [rejecting *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 157 and *Carlson v. Murphy* (1935) 8 Cal.App.2d 607, 611].) Rather, the necessary intent is the *intent to induce reliance,* which can be proved by evidence of specific intent or evidence that it was reasonable to expect the reliance would occur. (*Id.* at p. 93.)

***12** Coontz testified he did not believe the Plaintiffs could obtain a substitute owner's policy and that there was nothing they could do to avoid their predicament. There is no evidence that Coontz believed otherwise. Further, there was no evidence that the Plaintiffs told Coontz they were worried

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about the threat of litigation or wanted to abandon the project because of the threat. This adds up to no evidence that Coontz intended to prevent the Plaintiffs from looking to another source for title insurance or from abandoning the project; thus there is no evidence to support the necessary finding that Coontz intended to bring about a change in the Plaintiffs' behavior.

The Plaintiffs argue that Coontz's actions support an inference that he intended to induce them to refrain from investigating the absence of title insurance. (*Continental Airlines v. McDonnell Douglas Corp.* (1990) 216 Cal.App.3d 388, 428.) But they point to nothing other than the misrepresentations themselves. Misrepresentations do not constitute actionable fraud. "It is the element of intent which makes the fraud actionable, irrespective of any contractual or fiduciary duty one party might owe the other."(*Lacher v. Superior Court, supra,* 230 Cal.App.3d at p. 1046.)

Because the verdicts on fraud cannot stand, there is no remaining support for the noneconomic damages. The jury was given the option to award noneconomic damages for the breach of fiduciary duty only if it found the breach was intentional. It did not.

Proof of Harm to Trust Property

Coontz also contends the damages for the costs of defense must be reversed because the Plaintiffs sued in their capacity as trustees of their trusts, not as individuals. He argues there was no evidence the costs of defense were paid from trust assets.[FN4]

FN4. We need not reach Coontz's contention that a trust cannot suffer emotional distress because that damage award is reversed.

Code of Civil Procedure section 367 provides that "[e]very action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."The real party in interest is generally defined as the person who owns or holds title to the claim or property involved, as opposed to others who may be interested or benefited by the litigation. (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566; Weil & Brown, Cal. Practice Guide: Civil Proc. Before Trial (The Rutter Group 2000) ¶ 2.2, pp. 2-1 to 2-2.) The purpose of the standing requirement is to assure that any judgment rendered will be res judicata against a subsequent suit by the owner of the claim. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1003, fn.2.)

Both parties claim support for their positions from the recent case of *Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523. There, the successor executor of an estate brought a malpractice action against the tax attorney who represented the previous executor in connection with the estate's tax matters. The attorney challenged standing on the part of the successor executor. The Supreme Court found that "an attorney will normally be held liable for malpractice only to the client with whom the attorney stands in privity of contract...." (*Id.* at p. 529.)When a trustee hires an attorney to perform work for the trust, the trustee is the attorney's client. "The trust is not the client, because 'a trust is not a person but rather "a fiduciary relationship with respect to property."' [Citation.] Neither is the beneficiary the client, because fiduciaries and beneficiaries are separate persons with distinct legal interests. [Citations.]"(*Ibid.*)The court later found the successor executor had the same power vis à vis the attorney as the original executor and thus had standing to sue him for malpractice.

***13** Unlike an estate or a traditional trust, a revocable living trust is an estate planning device allowing the trustors to provide a mechanism for managing their property during their lifetimes and designate the distribution of their property upon death. (*Torrey Pines Bank v. Hoffman* (1991) 231 Cal.App.3d 308, 317.) Because of the trustors' retained powers to amend and revoke, a revocable living trust does not prevent creditors of the trustors

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from reaching trust property (*Walgren v. Dolan* (1990) 226 Cal.App.3d 572, 578), nor does it have any substantive tax effects during the trustors' lifetimes (*Torrey Pines Bank v. Hoffman, supra,* 231 Cal.App.3d at p. 318).

The distinctions in the legal interests among the trustor, trustee and beneficiary of a revocable living trust are likewise blurred when it comes to standing. In *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, the court rejected a challenge to the standing of individuals to bring a trespass action because they had transferred the property on which the trespass occurred to their trust. "It appears that the subject property is owned by the Hassoldts as trustees of the Yankee Trust, and that the Hassoldts are the beneficiaries of such trust. Under these circumstances, the Hassoldts could maintain an action in their own name, i.e., without mentioning the trust."

The foregoing authorities lead us to conclude that the transfer of property into a revocable living trust where the trustor is also the trustee does not prevent it from being treated as the trustor's personal assets and vice versa. Thus, the Plaintiffs could maintain this action to recover the costs of defense from Coontz in their capacities as trustees and recover those costs whether paid from trust assets or personal assets.

Attorney Fees

Coontz contends the attorney fee award is not authorized under the retainer agreement, claiming the agreement provides for the recovery of attorney fees to the prevailing party only in a binding arbitration. Because both sides waived the right to compel arbitration, Coontz reasons, they also waived the right to recover attorney fees. "Stated differently, the election to arbitrate was a condition precedent to the recovery of attorney fees. Because neither side elected arbitration, the provision for fees never ripened into an enforceable right."[FN5]

FN5. The Plaintiffs explain there was no express waiver of arbitration. Both sides waived arbitration by actively participating in discovery and trial.

The retainer agreement consists of six paragraphs in two pages. The first four paragraphs deal, respectively, with the services to be rendered, billing, payment of a retainer, and the payment of fees and expenses. The sixth paragraph invites Dr. Cook to have independent legal counsel review the agreement and directs him to sign and return it if he agrees to its terms. Dispute resolution is addressed in the fifth paragraph: "If there is any controversy or claim arising out of or relating to our representation of you in this matter it will be settled by binding arbitration before J.A.M.S ./ ENDISPUTE or the successor thereof [or, if none exists,] the American Arbitration Association. The site of such arbitration will be the office of the appropriate arbitration authority nearest our firm's office, unless otherwise agreed. We and you agree that neither of us will be awarded any punitive or exemplary damages against the other. The prevailing party will be entitled to recover actual attorney's fees reasonably incurred. I and [other] attorneys in this firm will be permitted to represent ourselves and this firm in any such arbitration, and if we do we will be entitled to recover for our actual time reasonably spent, charged at our hourly rates then in effect."

***14** The trial court issued a tentative ruling to deny the motion for attorney fees, but after the court studied the briefing and listened to argument, it changed its mind. "I believe that that clause ... relating to arbitration, relating to the denial of punitive damages or exemplary damages and relating to the prevailing party be[ing] entitled to recover actual attorney's fees reasonably incurred, I think these are severable, and as such, I'm finding for the Plaintiff in this matter and awarding reasonable attorney's fees...."

Coontz argues that paragraph five is clearly an arbitration clause, not three separate clauses. He invokes a rule of contract construction that "the

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whole of a contract is to be taken together, ... each clause helping to interpret the other."(Civ.Code, § 1641.)Neither party has offered extrinsic evidence to interpret the agreement; rather, each urges that the plain meaning of the language supports his position. In such a case, we interpret the agreement de novo. (*Kalai v. Gray* (2003) 109 Cal.App.4th 768, 777.)

The agreement lends itself to two interpretations; thus, it is ipso facto ambiguous. This conclusion is borne out by the reaction of the trial judge, who first thought it related solely to arbitration and then changed his mind. Our primary task is to interpret the contract "so ... as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."(Civ.Code, § 1636.)In ascertaining contractual intent, we can look to the conduct of the parties subsequent to execution. "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent."(*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal .2d 744, 754.) In his answer to the first amended complaint, Coontz sought costs of suit, "including attorneys' fees." This raises an inference that he believed the fees were recoverable in the absence of arbitration.

Another maxim of contract construction applies to this situation: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."(Civ.Code, § 1654.)This maxim applies as a "tie breaker." (*Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal.App.4th 1102, 1112.) Coontz testified he unilaterally drafted the retainer agreement and presented it to the Plaintiffs without negotiation or discussion about its meaning. Because both interpretations are reasonable, we adopt the one adverse to Coontz.

DISPOSITION

The award of noneconomic damages is reversed. The remainder of the judgment in favor of Charles and Jean Cook and Susan Mulholland, as trustees of their respective trusts, is affirmed. Each of the parties shall bear his or her own costs on appeal.

I CONCUR: O'LEARY, J.
RYLAARSDAM, J., dissenting:
***15** I respectfully disagree with my colleagues and am of the opinion that the judgment should be reversed.

The core issue in the case is whether a new title insurance policy would have been issued, had Coontz applied for it. If no such policy was available, Coontz's conduct did not damage plaintiffs. Under the circumstances presented here, I cannot believe that any title insurer would have issued a title policy, without the exclusion contained in the policy issued by Chicago Title Insurance Company.

We start with the proposition that an applicant for insurance has a duty to make full disclosure. "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining."(Ins.Code, § 332.)"Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."(Ins.Code, § 331.)And "[n]eglect to communicate that which a party knows, and ought to communicate, is concealment."(Ins.Code, § 330; also see *Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 827.)

In order to accept the probability that an insurer would have issued a new policy that would defend against the threatened litigation, we must accept something like the following scenario:

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Applicant to title insurer: "I would like to buy a policy of title insurance on the house I bought some time ago."

Title insurer:"Why? Didn't you obtain a title policy when you bought the house?"

Applicant:"Yes, but my present policy does not cover me for the lawsuit my neighbor is threatening to file and my lawyer tells me that it will be very expensive to defend that lawsuit. So I thought it would be nice to get an insurance policy that will pay for these expenses."

Title insurer:"Well, of course; we know how expensive this type of litigation is. And we are always ready to be of service. Would it be OK if we charged a one-time premium of $500? And then you will no longer have to worry about those huge legal expenses you are facing."

Applicant:"It certainly is a pleasure doing business with such a generous company. I will definitely recommend you to my friends and business associates if they are ever threatened with litigation"

But, the counterargument goes, Coontz's friend was willing to have his companies issue preliminary title reports, without the exclusion, when such a report was necessary to obtain city approval. There is, however, a big difference between a preliminary title report and a policy of title insurance. A preliminary title report does not create any liability for or impose any duties upon the issuer. Preliminary title reports "are not abstracts of title, nor are any of the rights, duties or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. Any such report shall not be construed as, nor shall constitute, a representation as to the condition of title to real property, but shall constitute a statement of the terms and conditions upon which the issuer is willing to issue its title policy...." (Ins.Code, § 12340.11.)

***16** We may question the ethics surrounding the issuance of this "wink, wink" preliminary title report. But plaintiffs were not damaged by the issuance.

I fully realize that Hilberg testified on behalf of plaintiffs that they could have obtained a title policy without the exception. She based this opinion upon the fact that the preliminary title report did not contain the exception and was an offer to issue a policy. Under the circumstance here presented I find her opinion not credible and therefore insufficient to constitute substantial evidence. "Substantial evidence means such evidence as a reasonable fact trier might accept as adequate to support a conclusion; evidence which has ponderable legal significance, which is reasonable in nature, *credible and of solid value.*[Citations.]" (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 142, italics added.) Considering a title insurer's almost certain exposure to expenses far in excess of the cost of the policy, I find Hilberg's opinion incredible and therefore insufficient to support the judgment.

Although I would reverse the judgment, I am of the opinion that my colleagues should, at least, order a new trial because of the exclusion of the testimony of the underwriters, including one employed by the very company that issued the preliminary title report. These underwriters would have testified that it was their companies' practice not to issue a title insurance policy under the circumstances of this case. The evidence was excluded because the court concluded the witnesses were undisclosed experts. But these witnesses were not offered to render an opinion with respect to underwriting practices employed by the title insurance industry in general, but merely to testify to their companies' existing underwriting practices.

The cases cited by my colleagues to support their conclusion that a witness testifying to "custom and practice" necessarily expresses opinions, and therefore they are expert witnesses whose identities should have been disclosed, do not support that conclusion. Three of the cited cases, *Ecco-Phoenix Electric Corp. v. Howard J. White, Inc.* (1969) 1

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Cal.3d 266, 271, *Balfour, Guthrie & Co. v. Gourmet Farms* (1980) 108 Cal.App.3d 181, 190, and *Conolley v. Bull* (1968) 258 Cal.App.2d 183, 191, dealt with the issue whether expert opinions on the issue of custom and practice in particular industries could be admitted. None of them involved the issue whether the particular evidence was, in fact, opinion testimony. But, because in each case the testimony referred to industry-wide practices, opinion evidence was, in fact, required.

The fourth case, *Anaheim Bldrs. Supply, Inc. v. Lincoln Nat. Life Ins. Co.* (1965) 233 Cal.App.2d 400, 412-413, involved false statements and omissions in an application for life insurance. Again, the issue on appeal was not whether four witnesses who testified to underwriting practices did so in an expert witness capacity, but rather whether the evidence was properly admitted. (It was.) The court did not discuss the character of the testimony. Two of the witnesses at issue, who were employed by other insurers, would seem to qualify as expert witness testifying to industry practices. But the other two, defendant's underwriter and medical director, testified to underwriting practices in their own company. This would not be a matter of opinion but a matter of observation.

***17** So here, the questions proposed to be asked of the witnesses related, not to industry-wide practices, which would be a subject for expert testimony, but rather whether the very title insurers that employed these witnesses, and to whom presumably the application for a new title insurance policy would be submitted, would make a practice of issuing title policies under the circumstances presented by this case. The underwriting practices of these title insurers were not matters of opinion but matters of fact.

As plaintiffs' case hangs entirely on the thin thread of Hillberg's testimony, the exclusion of evidence concerning underwriting practices constituted highly prejudicial error. At a minimum, defendants should be entitled to a new trial where they would be permitted to counter Hillberg's testimony with evidence of the actual underwriting standards that would have been employed had Coontz submitted an application for title insurance on behalf of plaintiffs.

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