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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NICHOLAS ANTONIADES,

Plaintiff and Appellant,

v.

LA JOLLA LAW GROUP et al.,

Defendants and Respondents.

D071986

(Super. Ct. No. 37-2014-00014642-
CU-PN-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith
Hayes, Judge. Affirmed.

Miller & Steele and Robert M. Steele for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Lann G. McIntyre and Tim J. Vanden Heuvel
for Defendants and Respondents.

Plaintiff Nicholas Antoniadis appeals from a judgment in favor of defendants
La Jolla Law Group and Kent L. Sharp (collectively, Sharp), plaintiff's former trial
attorneys. The judgment was entered after the trial court in the instant action employed
the "case-within-a-case" method and determined plaintiff could not show that, but for the

alleged malpractice of Sharp in connection with the appeal in the underlying action, it was "more likely than not that the plaintiff would have obtained a more favorable result." (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1244 (*Viner*).) We affirm.

OVERVIEW¹

In May 2014, plaintiff filed the instant case alleging professional malpractice against Sharp arising out of case number 37-2010-00069842-CU-FR-EC (underlying action) that was the subject of a bench trial in May 2013.

"The allegations as pled in the complaint in the 2010 case involve the 2006 purchase by Plaintiff Antoniadis of a vacant lot located in Lemon Grove [(vacant lot)] for the purpose of developing it as a single[-]family residence to be sold for profit. The issue presented was whether Defendant Sellers (Lantis) and real estate agent (Rostart) negligently or intentionally failed to disclose to Plaintiff that there was no utility access to the lot, and the amount of resulting damages, if any, that were incurred by Plaintiff.

"Plaintiff testified at trial [in 2013] that Defendants' failure to disclose the absence of utility easements delayed the project for 6 months while he negotiated the purchase of utility easements at an additional cost of \$10,000. Plaintiff claimed that the delay and added expense caused him to lose the property in foreclosure and to file for personal bankruptcy. Plaintiff claimed as damages the cost of the property plus development costs as well as lost profits from the inability to market the property.

¹ This overview is substantially derived from the court's 11-page July 22, 2016 statement of decision in the instant action, and from the court's June 13, 2013, 25-page statement of decision in the underlying action (2013 SOD).

"In his complaint in the underlying action Plaintiff alleged causes of action for: [¶] 1) Breach of Written Contract against Defendants Lantis; [¶] 2) Breach of Implied Covenant of Good Faith and Fair Dealing against Defendants Lantis; [¶] 3) Intentional Misrepresentation against Defendants Lantis and Rostart; and, [¶] 4) Concealment against Defendants Lantis and Rostart.

"On July 8, 2013, after the matter had been tried to the Court and a tentative decision issued and objections overruled, the Court issued its [2013 SOD]. Judgment was entered in favor of Defendant sellers and against Plaintiff buyer . . . on August 16, 2013.

"Plaintiff herein alleges professional negligence and breach of fiduciary duty on the part of trial counsel in the underlying action based on counsel's allegedly negligent advice regarding the likelihood of success on appeal in the 2010 case. . . . Plaintiff alleges that because of his attorney's professional negligence, no appeal was filed or perfected.

"The parties herein have agreed that in order to succeed on his professional negligence claim in the instant case Plaintiff must establish, by a preponderance of the evidence, that had an appeal been timely filed in [the underlying action], the decision of the lower court would have been overturned and remanded for retrial.

"Counsel have jointly requested, and this court agreed to, a bifurcation of the issues to be tried to allow determination of the issue as to whether an appeal, if timely filed, would have resulted in reversal of the trial court's decision. (*Kurini v. Hann & Morton* (1997) 55 Cal.App.4th 853[;] *Pete v. Henderson* (1954) 124 Cal.App.2d 487.)

"The court has read and considered the pleadings and arguments of counsel in this case and has reviewed and considered the pleadings, trial transcripts and exhibits, in [the underlying action] and as though sitting as a reviewing court hereby finds:

"The trial court's decision of July 8, 2013 is not subject to reversal, and would be affirmed."

The court next turned to the standard of review that would govern in applying the case-within-a-case method, which is the overarching issue raised by plaintiff on appeal:

"Plaintiff argues the applicable standard is de novo review, since the question to be decided is a pure question of law. He argues Civil Code section 3306, dealing with the measure of damages caused by the breach of an agreement to convey real property, was not followed by the court [in the underlying action]. He claims Plaintiff was charged with the burden of proving an element not a part of any cause of action in the complaint, that is, he was required to prove the source of the funds used to purchase and develop the lot in question.

"The defense posits that [the] correct standard is substantial evidence, arguing the trial court weighed the evidence as to whether Plaintiff was credible in his assertion that he had personally suffered the damages alleged, (as opposed to related corporate or irrevocable trust entities), and determined that Plaintiff was not credible and that he had failed to prove standing to sue, causation, and damages.

"Plaintiff's argument that his issue on appeal [i.e., under the case-within-a-case method] concerns the purely legal question of whether the court correctly interpreted Civil Code section 3306 is without merit.

"At oral argument,[²] Plaintiff conceded that this section was never argued in the trial court. Section 3306 is a section dealing with the proper measure of damages in a real estate sales transaction. It states:

" 'The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, the expenses properly incurred in preparing to enter upon the land, consequential damages according to proof, and interest.'

"It is not a section dealing with burden of proof or standing issues. Even if the decision in this case was merely as to whether lost profits should be awarded, these were not 'expenses properly incurred in preparing to enter upon the land.' Development expenses cannot be recovered under this section.

"The decision of the trial court hinged on the court's determination of Plaintiff's credibility. The court did not believe the testimony of the Plaintiff buyer. It found Plaintiff was not candid in regard to the very issues before the court as well as in a parallel bankruptcy proceeding. Plaintiff failed to present persuasive evidence in regard to the issues of standing, causation, and damages.

"The trial judge who heard the testimony and observed the witnesses' demeanor while testifying [in the underlying action], was in a unique position to make credibility

² We note the appellate record does not include any hearing transcripts from the instant malpractice case, as opposed to transcripts from the underlying action.

determinations and his findings are supported by substantial evidence. The trial court's findings concerning credibility cannot be disturbed on appeal."

After discussing the substantial standard of review, the court in the instant action applied that standard and found there was sufficient evidence to support the judgment in the underlying action. The court first turned to the issue of standing, ruling as follows:

" 'Every action must be prosecuted in the name of the real party in interest.' (C[ode] C[iv.] P[roc., §] 367[.]) [¶] When any ground for objection to a complaint or cross-complaint does not appear on the face of the pleading, the objection may be taken by answer. ([*Id.*, §] 430.30[.]) [¶] In their answer as well as in motions in limine #1 and #2, Defendants [in the underlying action] raised the issue of standing and offered evidence that Plaintiff's claimed damages were sustained by other separate legal entities, including two corporations and an irrevocable trust.

"At the time of the lot purchase, Plaintiff Antoniades was the sole shareholder and president of two California corporations, 'Western Capital Associates' and 'Welcome Home Realty.'

"In his trial testimony [in the underlying action], Plaintiff acknowledged that \$58,000 of the down payment on the lot came from 'Welcome Home Realty' (Ex. 44), \$20,543.00 came from 'Western Capital Associates,' and \$10,000 came from the Antoniades Family Trust [(family trust)] (RT466, Ex. 28).

"Plaintiff testified at deposition that the corporate payments were either a distribution of income or a repayment of paid-in capital but that he had no knowledge as

to which it was and he didn't know whether he had any documentation to establish either (RT725).

"The only evidence presented to establish that he had personally suffered any losses consisted of Plaintiff's testimony to this effect and the presentation of 'disbursement' and 'loan' documents. These documents, on plain paper, were signed only by Plaintiff. Plaintiff failed to offer any explanation as to why the 'loan documents' were prepared other than for his use at trial, and failed to offer any reasonable excuse as to why these documents were not produced in discovery. These documents were produced for the first time literally on the eve of trial after motions in limine were filed. (See Appendix p. 70.) The alleged loans/disbursements to or from his corporate/trust entities were not reflected on any of Plaintiff's bankruptcy schedules (Ex. 536). At various times Plaintiff claimed to be the beneficiary or the trustee for the irrevocable trust.

"Plaintiff claimed to have paid construction costs, but presented no proof of his payment such as cancelled checks. When asked, '. . . And did you produce those (cancelled checks) in discovery?' Plaintiff's response was, 'I did not.' (RT 724 ll. 14-15). When asked at deposition as read at trial, 'Where do you have them?' his answer was, 'I don't know.' (RT 725 ll. 3-4).

"Some of the construction invoices presented indicated the developer was one of the corporate entities, not Plaintiff (RT 495). Exhibits 48, 50, 51, 52, all identify the individual to be billed for engineering services as 'Nick Antoniades, aka Na Properties, LLC' with the business address of 2425 Camino Del Rio S. Ste. 150.

"The court [in the underlying action] found that 'Plaintiff failed to carry his burden to show that he, as opposed to his [two] corporations or his Trust, suffered damages as a result of Defendant[s] Lantis' failure to perform as obligated.' (SOD [2013] p. 14. ll. 16, 17[.]) In the course of the trial, the court gave Plaintiff notice of his concerns regarding the standing issue, 'The one thing I did want to mention is that the invoice is not to Mr. Antoniades personally. It's to one of his corporate entities. . .' (RT 495 ll. 21-22[.]) The Court challenged Plaintiff to provide some corroboration for his testimony as to the source of payments Plaintiff allegedly made. The Court stated, ' . . . Provide me with a listing of each of the payments that Mr. Antoniades has put at issue, and I want to know what the source is as reflected in the corroboration, not what Mr. Antoniades is testifying to, but to the extent there is corroboration, what is reflected on the piece of paper that has been produced by Mr. Antoniades' (RT 511 ll. 14-19).

"Plaintiff was merely a shareholder in his corporations. Shareholders, in their individual capacities, have no standing to sue for wrongs done to the corporation. The claim belongs to the corporation, not its stockholders. *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93. Evidence established that Plaintiff's two corporations were in suspended status at the time of trial and were therefore unable to file or maintain any lawsuit. (Appendix of exhibits to motions in limine pp. 36 and 37[.])

"Likewise, as Defendants argued, the beneficiary of a trust generally is not the real party in interest on claims belonging to the trust and may not sue in the name of the trust. (*Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419, 427[(*Saks*).]) Plaintiff presented no documentary proof that he made any payments for development costs or payments on

the construction loan. In regard to construction invoices Plaintiff testified at trial [in the underlying action] that he paid the invoices but did not obtain receipts because 'canceled checks served just as well as receipts.' (RT 724 11-12[.]) Undermining his credibility was the fact that Plaintiff not only failed to produce any of his canceled checks at trial even when requested by the court, even though he admitted having access to this information, but he also failed to produce these materials in discovery. The Court ultimately rejected Plaintiff[']s testimony concerning standing and damages, finding:

" 'Plaintiff suggested that he has cancelled checks to corroborate his payment of these costs as well as interest costs on the property but did not present them at trial. Plaintiff chose to present "weaker" evidence when he could have presented stronger evidence. Accordingly, the Court chooses to distrust Plaintiff's "weaker" evidence. [Judicial Council of California Civil Jury Instruction] CACI 203.'

"Exhibits 539-542 are the indictment, change of plea, and judgment in Federal District Court Case No. 07-0890 in which Plaintiff entered a plea of guilty to felony counts of Making and Subscribing False Tax Returns. These charges stemmed from Plaintiff's action in filing federal income tax returns on behalf of the same two corporations he admitted to have been the source of the purchase and development funds in this case. In the federal case it was alleged that Plaintiff intentionally falsely characterized his personal income as corporate distributions on federal tax returns. . . .

"In 2008, when Plaintiff filed his claim against the City of Lemon Grove for what he alleged was their role in representing to him that the lot in question was buildable, he

filed a statement under oath valuing his resulting damages at \$175,000 (RT 590, ll 24-26; Ex. 534).

"Thereafter in his bankruptcy schedules, filed under oath on 11/27/09, Plaintiff valued his claim against the Defendants at only \$5,000, well within the jurisdiction of small claims court. In connection with this claim Plaintiff listed each cause of action later alleged in his complaint. (Ex. 536, p. 9[.])

"Less than one year later in November 8, 2010, in his first amended verified complaint [filed in the underlying action], Plaintiff claimed his damages totaled \$325,000. In his second amended verified complaint filed on or about April 5, 2011, Plaintiff claim[ed] damages in the amount of \$505,000.

"The court, in considering all of this evidence, concluded that Plaintiff's trial testimony in regard to standing, causation, and damages was not credible.

"The Court found as to each cause of action that 'Plaintiff has failed to carry his burden of proof that it is more likely true than not true that he was harmed by Defendants Lantis' failure to perform as obligated under paragraph 10(c) of Exhibit "6," ' incorporating language from Defendants['] trial brief as follows:

" 'Even if Plaintiff could establish that he was defrauded, he has neither suffered nor produced evidence of any damages. Plaintiff Nicholas Antoniadis did not personally invest any monies in the purchase of the subject property. The funds came from corporations and a family trust. Those entities are separate legal entities under the law. [¶] As a general rule, a corporation is considered to be a legal entity that has an existence separate from that of its shareholders. [Citation.] [¶] A "corporation is a distinct legal

entity separate from its stockholders and from its officers." [Citation.] A corporation and a shareholder are distinct parties in contracts made by each other. [Citation.] "A corporation . . . in its corporate . . . rights and liabilities . . . is as distinct from the persons composing it, as an incorporated city is from an inhabitant of that city." [Citations.] Plaintiff, the corporations, and the trust are separate legal entities under the law.'

" 'Except as otherwise provided by statute, "[e]very action must be prosecuted in the name of the real party in interest.' ([Code Civ. Proc.,] § 367.) [¶] Standing to sue goes to the existence of a cause of action; that is, whether a plaintiff has a right to relief in court. [Citations.] [¶] Generally, the real party in interest is the person who has the right to sue under the substantive law. It is the person who owns or holds title to the claim or property involved, as opposed to others who may be interested or benefitted by the litigation. [Citations.]

"For the investments made by entities other than himself, Plaintiff has no right to recover damages. Accordingly, Plaintiff has no standing to recover for losses sustained or alleged to have been sustained by entities other than himself.'

"The court found: [¶] 'Plaintiff has failed to carry his burden to show that he, as opposed to his two corporations or his Trust, suffered damages as a result of Defendants Lantis' failure to perform . . . ; specifically, Plaintiff has failed to show that he suffered damages arising from the purchase of the vacant lot, the development of the lot, and the sale of a completed residence on the property. In the absence of damages, Plaintiff's claim . . . fails'

"Based on Plaintiff's prior inconsistent statements regarding his losses, his failure to produce corroboration for his claimed expenditures prior to trial, and his felony convictions for making false statements under oath on his tax returns[,], this court finds the trial court's decision in regard to standing is supported by substantial evidence."

The court in the instant case next addressed plaintiff's contention that Sharp, and not plaintiff, bore the burden to show there was no standing to sue. The court ruled that Sharp had met that burden with respect to this affirmative defense: "Once the issue of standing was raised and proof presented, the burden then shifted to Plaintiff to establish his standing to sue. Substantial evidence supports the court's conclusion [in the underlying action] that Plaintiff failed to present trustworthy evidence of standing at trial."

The court next turned to the issue of causation and damages, ruling plaintiff had failed to establish in the underlying action both of these elements and thus, was a separate ground to defeat his legal malpractice action against Sharp:

"It was incumbent on Plaintiff to prove that he suffered damage and that defendants['] actions were a substantial factor in causing such damage. After carefully weighing and considering the nature and quality of all of the evidence presented, the trial court found Plaintiff to be lacking in credibility in regard to the jurisdictional issue of standing, and found that Plaintiff lacked standing to sue. Once the issue of standing was decided adverse to Plaintiff there was no need to determine causation and damages. Nevertheless the court found that Plaintiff failed to establish that the collapse of his project was caused by Defendants['] misrepresentations as opposed to the general

speculative nature of the investment, the economic downturn (which was conceded by all involved), or the expenses Plaintiff experienced as a result of the federal litigation in which he was embroiled at the time. In his testimony Plaintiff admitted that even at the time he was seeking financing for the project the credit market was 'drying up.' (RT 529 ll. 23-25[.])

"The court concluded,

" 'As much as the Court empathizes with Plaintiff's circumstances, the Court cannot find, based on the totality of the evidence that Plaintiff's "financial hardships" were caused by Defendants' misrepresentation of an important fact. See, for example, Exhibits "539-542." In the absence of damages, Plaintiff's claim for intentional misrepresentation against Defendant[s] Lantis and Rostart fails' . . . 'In addition, as reflected above, the Court cannot find that, based on the totality of the evidence, Plaintiff's "financial hardships" were caused by Defendants' concealment of an important fact. See, for example, Exhibits "539-542." In the absence of damages, Plaintiff's claim for concealment against Defendants Lantis and Rostart fails.' "

Because the court in the instant case found the court's decision in the underlying action was supported by substantial evidence, the court concluded that decision "would therefore be upheld on appeal."

The record shows plaintiff objected to the court's tentative July 22, 2016 statement of decision on the *same* grounds that he raised in this appeal: that the court should have applied a de novo, and not a substantial evidence, standard of review; and that if a de novo standard of review had been applied, the court in the instant action would have

found the court in the underlying action had committed legal error by requiring plaintiff to prove that he, as opposed to other entities not a party to the contract, "was the source of the funds that make up the damages he was entitled to recover for the sellers' breach of a contract" The court overruled plaintiff's objection and found its tentative was the final statement of decision. Judgment was entered for Sharp on January 25, 2017. This appeal followed.

DISCUSSION

Plaintiff contends this appeal presents a "simple legal issue," to wit: whether a party to a real estate contract is "precluded from recovering damages for breach of that contract if [the party] borrow[s] or [is] gifted funds used to purchase the property[.]"³ Plaintiff further contends, as discussed *post*, that this issue presents a pure question of law and that the trial court in the instant action therefore erred in applying a substantial evidence standard of review when it found plaintiff could not show that, but for his trial attorney's alleged malpractice in connection with the appeal in the underlying action, it was more likely than not that he would have obtained a more favorable result. We disagree.

³ With respect to plaintiff's premise that the funds used to purchase the vacant lot may have been *gifted* to him by the corporations and/or the family trust, we note the lack of evidence in the record in the underlying action to support such a finding. We thus find it unnecessary to address whether a party who uses *gifted* money to purchase real property can recover breach of contract damages against a defendant seller, as plaintiff posits in his issue statement.

A. Additional Background

The record shows at his deposition, plaintiff testified under penalty of perjury that the source of a portion of the money he used to purchase the vacant lot was from his two corporations, Welcome Home Realty and Western Capital Associates, in the amount of \$58,000 and \$20,543, respectively; that these payments were "either a distribution of income or a repayment of paid-in capital"; that he then was not sure whether he had documentation to support this claim; that, when asked if these funds were a loan, he stated, "I doubt it," and then promptly changed his testimony and stated, "It could have been"; but that he then confirmed to having "no understanding" which of the three (i.e., distribution of income or repayment of paid-in capital or a loan), or any combination thereof, was the source of such funds.

With regard to the \$10,000 he received from the family trust that went toward the purchase of the vacant lot, at his deposition plaintiff testified the \$10,000 was either a loan or a disbursement, but that he could not remember which; and he then had no documentation to show the legal arrangement between him and the trust which led the trust to make the earnest money payment.

The record also shows that, after defendants in the underling action filed motions in limine in November 2012 to exclude evidence of any losses or damages suffered by the two corporate entities and the family trust on the grounds of relevancy and lack of standing, plaintiff produced various " 'loan documents' " signed only by him. The court in the instant action noted these loan/disbursement documents to or from plaintiff's corporate entities and the family trust had not been included on any of plaintiff's

bankruptcy schedules and were only produced by plaintiff for the "first time literally on the eve of trial."

During the trial in the underlying action, plaintiff also testified that he paid various costs to develop the vacant lot. Plaintiff, however, was unable to produce *any* documentary evidence to corroborate this testimony, including a document as simple as a canceled check. The court ultimately found, after "scrutinizing" the evidence, that plaintiff failed to produce any such evidence, a finding plaintiff does not challenge on appeal.

As defendants continued to question plaintiff's credibility and to press the court on the absence of documentary evidence to support plaintiff's testimony, the record shows the court in the underlying action confirmed that defendants were contesting the source of *all* payments made by plaintiff. The court in the course of the trial in the underlying action unambiguously made plaintiff aware of its concerns regarding the lack of *any* documentary evidence proffered by him to show *he* had personally incurred losses to develop the vacant lot:

"All right. What I'm going to do is — now, putting aside the testimony, just looking at the corroboration, what I'll call corroboration, I am going to direct that one or both of you, if you can agree upon it, then one of you take the lead. If you can't agree upon it, provide me with a listing of each of the payments that Mr. Antoniades has put at issue, and I want to know what the source is as reflected in the corroboration, not what Mr. Antoniades is testifying to, but to the extent there is corroboration, what is reflected on the piece of paper that has been produced by Mr. Antoniades. [¶] All right, so what I

am anticipating, for example, from the defense, if not from both of you, is that on one or more of these payments, the source will be traced to his trust, for example, or [to] Welcome Home Realty or Western Capital Associates. I'm not trying to anticipate what all of these payments are, but I want a piece of paper that lays out all the payments, the date, the dates if possible, the amounts, of course, and then I want to know what the source is."

When the defense in response noted it had no evidence to show how plaintiff paid, if at all, these invoices, the court instructed the parties as follows:

"[L]eave it open, if you have any questions about the source. And this is not — the court's not receiving this for evidentiary purposes. I just need to have a guideline to be able to evaluate plaintiff's claim for damages and the defenses' objections. So — I mean, there's a lot of stuff that's coming at me right now. So when it gets to that last category of source, just leave it blank and I'll — I'll understand what you're saying and we'll argue it at the appropriate time."

As noted, ultimately the court in the underlying action found that plaintiff was not credible and that plaintiff failed to show that he, as opposed to the two corporations and/or the family trust, suffered damages arising from the purchase and partial development of the vacant lot. In making this finding, the court clearly relied on defendants' contention that plaintiff lacked standing to sue for any alleged losses sustained by his *separate* legal entities. In addition, the court in the underlying action clearly did not believe plaintiff's contention that the funds used to acquire and partially develop the vacant lot were loaned to him by his two companies and the family trust.

B. *Guiding Principles*

1. Professional Negligence and the Case-within-a-Case Requirement

"The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200.) "An attorney's liability [for professional negligence], ' "as in other negligence cases, is for all damages directly and proximately caused by his [or her] negligence." ' [Citations.] It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1507.)

"Proof of legal malpractice requires proof not only of negligence by the lawyer but also of causation, a trial within a trial to establish that, but for the lawyer's negligence, the client would have prevailed in the underlying action." (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 334 (*Garcin*), disagreed with on another ground as stated in *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 311; see *Viner, supra*, 30 Cal.4th at p. 1244; *California State Auto. Assn. Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey* (2000) 84 Cal.App.4th 702, 710 [noting a suit-within-a-suit involves " ' "a reconsideration of the previous legal claim, and only by determining whether or not the original claim was good can proximate damages

be determined" ' "], disapproved on another ground as stated in *Viner, supra*, 30 Cal.4th at p. 1244, fn. 5.)

"In conducting the 'trial-within-a-trial' in a legal malpractice case, 'the goal is to decide what the result of the underlying proceeding or matter should have been, an objective standard.' " (*Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 585–586, italics omitted.) "In the legal malpractice context, the elements of causation and damage are particularly closely linked. It is difficult to consider a plaintiff's claim that the defendant attorney's proper handling of an underlying matter would have resulted in a favorable judgment that could be collected, without evaluating the amount of such a favorable judgment. The plaintiff has to show both that the loss of a valid claim was proximately caused by defendant attorney's negligence, and that such a loss was measurable in damages." (*Id.* at p. 591.)

2. Standing — Real Party in Interest Requirement

Only a real party in interest has standing to prosecute an action, except as otherwise provided by statute. (Code Civ. Proc., § 367 [providing in part, "Every action must be prosecuted in the name of the real party in interest"].) "[T]he purpose of the statute is readily discernible It is to save a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand." (*Giselman v. Starr* (1895) 106 Cal. 651, 657; accord, *Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 149.)

A party who is not the real party in interest lacks standing to sue. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1004.) "A real party in interest

ordinarily is defined as the person possessing the right sued upon by reason of the substantive law." (*Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605.)

As particularly relevant here, a corporation exists as a separate legal entity. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1108 (*Grosset*).) As such, a corporation's shareholders "have no direct cause of action or right of recovery against those who have harmed it" (*ibid.*), but may instead "bring a derivative suit to enforce the corporation's rights and redress its injuries when the board of directors fails or refuses to do so" (*ibid.*). Thus, in the context of corporation law generally, individual stockholders and members may not maintain an action in their own behalf — because " 'such an action would authorize multitudinous litigation and ignore the corporate entity.' " (*Grosset*, at p. 1108, fn. 5.)

A trustee is the real party in interest when an action is brought on behalf of an express trust. (*Pillsbury v. Karmgard* (1994) 22 Cal.App.4th 743, 753.) There is no evidence in the record that plaintiff brought the underlying action on behalf of the family trust, as opposed to himself. Moreover, a beneficiary of a trust has no standing to sue on behalf of an express trust. (See *Saks, supra*, 7 Cal.App.4th at p. 427 [noting the general rule that a trust beneficiary is not the real party in interest and therefore may not sue in the name of or for the benefit of the trust].)

3. Standards of Review

The parties dispute the standard of review we should apply in deciding whether the trial court in the instant action properly applied a substantial evidence standard in concluding plaintiff could not show that, but for defendant Shaw's alleged negligence in

the underlying action, it was more likely than not plaintiff would have obtained a more favorable result in that action. We note that in determining standing, we typically apply a de novo standard of review. (*San Luis Rey Racing, Inc. v. California Horse Racing Board* (2017) 15 Cal.App.5th 67, 73 (*San Luis Rey*).) However, where the court makes underlying factual findings relevant to the question of standing, such as occurred in the underlying action, we defer to the court and review those findings for substantial evidence. (See *Ibid.*)

The question of whether an attorney's conduct proximately caused injury to a plaintiff "is a question of fact [citation] that is ordinarily for the [trier of fact] [citation]." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 252; see *Garcin, supra*, 231 Cal.App.3d at p. 334 [noting the "question about what would have happened had [the lawyer] acted otherwise is one of fact unless reasonable minds could not differ as to the legal effect of the evidence presented"].)

Issues concerning the "credibility of the witnesses" — which appeared to be of substantial importance in connection with the resolution of the underlying action — or "conflicts in the evidence" are the exclusive province of the fact finder and will not be disturbed on appeal absent an affirmative showing of abuse. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518 (*Leff*).)

Of course, statutory interpretation, to the extent even relevant in this case, is de novo review. (See *Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1247 (*Weatherford*).)

C. Analysis

Plaintiff contends we should apply only a de novo standard of review because he allegedly is not challenging any of the factual findings made by the court, but instead only whether the court properly interpreted Civil Code section 3306 when it ruled he, as opposed to the corporate entities and/or the trust, did not personally suffer damages in connection with the purchase and partial development of the vacant lot. We reject this contention.

While it is undisputed that the interpretation of a statute is a question of law (see *Weatherford, supra*, 2 Cal.5th at p. 1247), we note the court in the underlying action did not rely on, and thus interpret, Civil Code section 3306 in finding against plaintiff. We further note the court in the instant case ruled that this statute was inapplicable to the transaction at issue, a conclusion we independently agree with, inasmuch as the plain language of this statute applies to an action for "breach of an agreement to *convey* an estate in real property." (Civ. Code, § 3306, italics added; see also *Giorgianni v. Crowley* (2011) 197 Cal.App.4th 1462, 1474 [noting where statutory language " 'is clear, its plain meaning should be followed' "].)

To apply the correct standard of review, it stands to reason we must establish that which we are called upon to decide or not decide, as the case may be. We note the court in the underlying action found plaintiff not credible when it rejected his contention that his two corporations and the family trust allegedly loaned, and/or were repaying loans, to him, which he then used to purchase and partially develop the vacant lot. The court also found — after "scrutinizing" the evidence — that plaintiff, as opposed to these entities,

had not personally incurred any losses or damages with respect to the purchase and development of the lot.

Although plaintiff contends that he allegedly is not challenging on appeal any such findings made by the court in the underlying action, we nonetheless conclude, as did the trial court in the instant action in connection with its case-within-a-case analysis, that there is ample evidence in the record to support these findings.

Indeed, the record shows, and the trial court in the instant action noted, that plaintiff produced the " 'loan documents' " in the underlying action in December 2012 as an attachment to his opposition to defendants' motions in limine; that this was the first time plaintiff had produced these documents, despite the fact the documents were dated late October 2006, or more than six years before their production, and despite the fact the lot was purchased in that same month and year; that plaintiff produced these documents "literally on the eve of trial," as noted by the trial court in the instant action; that the loan documents are on plain white paper, are each less than one page in length, and are only signed by plaintiff in his individual and/or corporate capacity; that before producing these documents, plaintiff testified at his deposition that the source of the money from the two corporations was either a distribution of income or a repayment of paid-in capital; that when asked if this money may also have been a loan to him, as opposed to repayment of a loan he made to the corporations as he ultimately claimed, plaintiff testified it was not, then abruptly changed his testimony and said that "[i]t could have been"; and that at no time did he list any of these alleged loans/disbursements on any schedule in the parallel bankruptcy proceeding, as the trial court in the instant action also noted.

As a court of review, it is not our place to second guess a court's credibility determinations, particularly in the circumstances of the instant case when plaintiff provided conflicting testimony on the source of funds that he used to purchase and partially develop the vacant lot (see *Leff, supra*, 33 Cal.3d at p. 518); pleaded guilty in May 2012 to two counts of making and subscribing false tax returns; and produced documents on the eve of trial, which candidly, brought his credibility, or lack thereof, into sharper focus, as he sought to prove the money was either loaned to him, or were repayments of loans he had made to the corporations.

Nor is it permissible for this court to make new or contrary findings when there is more than sufficient evidence in the record to support the findings of the court that plaintiff did not personally suffer *any* damages in connection with the purchase and development of the vacant lot, which findings were confirmed by the court in the instant malpractice action. Based on these findings, we conclude the trial court in the instant action properly found that plaintiff could not satisfy the but-for requirement in support of his legal malpractice action against Sharp. (See *Viner, supra*, 30 Cal.4th at p. 1244.)

Our conclusion is dispositive of plaintiff's appeal. Nonetheless, we note these same factual findings also establish that plaintiff lacked standing to assert on behalf of the two corporations and/or the family trust the claims against the seller defendants, which we note was an alternative ground relied on by the court in the instant action in finding a lack of causation between Sharp's alleged malpractice and any resulting harm to plaintiff. (See *Grosset, supra*, 42 Cal.4th at p. 1108 [noting a corporation's shareholder has no "direct cause of action or right of recovery against those who have harmed [the

corporation]", but must instead "bring a derivative suit to enforce the corporation's rights and redress its injuries when the board of directors fails or refuses to do so"]; *Saks, supra*, 7 Cal.App.4th at p. 427 [noting the general rule that a trust beneficiary is not the real party in interest and therefore may not sue in the name of or for the benefit of an express trust].) For this separate reason, we independently conclude (see *San Luis Rey, supra*, 15 Cal.App.5th at p. 73) that plaintiff cannot show that, but for Sharp's alleged malpractice in the underlying action, it was "more likely than not that the plaintiff would have obtained a more favorable result." (See *Viner, supra*, 30 Cal.4th at p. 1244.)

Finally, the court in the underlying action also found, "based on the totality of the evidence," that the "financial hardships" plaintiff alleged he suffered were not proximately caused by defendants' alleged misrepresentations/concealment regarding the vacant lot's access to utilities. Although plaintiff claimed the misrepresentations/concealment of defendant sellers caused the harm because it delayed the development of the vacant lot for about six months and required him to spend an additional \$10,000, we note there is sufficient evidence in the record to support the finding of the court in the underlying action that plaintiff failed to prove the seller defendants' misconduct *caused* plaintiff injury. (See *Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 348 [noting " '[p]roximate cause . . . is generally a question for the jury' "], quoting *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 520.)

Specifically, the court in its 2013 SOD noted that when escrow closed on the vacant lot in October 2006, the real estate market was "hot"; that as plaintiff

acknowledged, there was a "cataclysmic meltdown of the credit market in the 2007-2008 timeframe"; that "[e]ven without the delay caused by Defendants Lantis and Rotsart's alleged breaches, it appears that the timing of Plaintiff's plan needed to have been accomplished in a nearly flawless world"; and that "[u]nfortunately few plans unfold as perfectly projected." For this separate reason, we conclude plaintiff cannot show with respect to his tort-based causes of action that, but for Sharp's alleged malpractice in the underlying action, it was "more likely than not that the plaintiff would have obtained a more favorable result." (See *Viner*, *supra*, 30 Cal.4th at p. 1244.)

DISPOSITION

The judgment in favor of defendants La Jolla Law Group and Sharp is affirmed. Each party to bear its own costs of appeal in the interests of justice. (Cal. Rules of Court, rule 8.278(a)(5).)

BENKE, Acting P. J.

I CONCUR:

NARES, J.

I CONCUR IN THE RESULT:

O'ROURKE, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

06/27/2018

KEVIN J. LANE, CLERK

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