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Court of Appeal, Second District, Division 3, California.

Rakash **PATEL** et al.,
Plaintiffs and Appellants,
v.
William GWIRE, Defendant and Respondent.

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APPEAL from a judgment of the Superior Court of Los Angeles County, Richard E. Rico, Judge. Reversed. Los Angeles County Super. Ct. No. BC581323

Attorneys and Law Firms

Timothy D. McGonigle, for Plaintiffs and Appellants.

Nemecek & Cole, Jonathan B. Cole and Mark Schaeffer, for Defendant and Respondent.

Opinion

EGERTON, J.

***1** Plaintiffs Rakash (**Ray**) **Patel** and the **Patel** Family Trust (collectively, the **Patels**) appeal from a summary judgment in a legal malpractice suit against their former attorney, defendant William Gwire. The **Patels** contend they presented sufficient evidence to raise a triable issue of fact about whether Gwire negligently failed to introduce critical evidence in an underlying arbitration and whether that failure caused the **Patels** to suffer a less favorable result than they otherwise would have obtained. We agree the evidence was sufficient to raise a triable issue on both disputed elements. We reverse.

FACTS AND PROCEDURAL BACKGROUND

We state the evidence the trial court admitted in the light most favorable to the **Patels**, as the nonmoving party, in accordance with the standard of review for summary judgments. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

1. *The Inverse Condemnation Action and Settlement*

In 2001, the **Patels** acquired the 55-room Golden Key Hotel in Glendale, California, for approximately $5.2 million. At the time, the hotel was in the footprint of an area designated as "blighted" and subject to condemnation to make way for a redevelopment project. Years later, a developer purchased all but two buildings in a complex of buildings located within this footprint. In 2005, the developer, in partnership with the Glendale Redevelopment Agency and the City of Glendale (collectively, the City), began work on what would become a multi-million-dollar shopping center and residential development known as The Americana at Brand (Americana). The hotel was located almost "dead center" in the footprint of the Americana development, and it was one of only two buildings that were not demolished to allow for construction. The other remaining building, located behind the hotel, was occupied by Backroom Entertainment (BRE) and consisted of a sound studio. The Americana development surrounded the hotel on three sides.

From the outset, demolition and construction of the Americana site played havoc with the hotel's operations. Guests were forced to endure around-the-clock demolition, pile-driving, banging, vibrations, horns, machinery sounds, offensive smells, rats, sewer breaks, construction worker trespasses, and dust that clogged door locks and air conditioning filters. The incessant noise, dust, and fumes resulted in numerous guest complaints and room vacancies. In 2007, the hotel lost its Best Western International affiliation.

In May 2008, the **Patels** retained Wasserman, Comden, Casselman & Esensten, LLP (WCCE) to represent them in an inverse condemnation and nuisance action against the City and the Americana developer. Under the terms of their contingency fee agreement, WCCE was to receive 40 percent of the **Patels**' "gross recovery" in the action. The **Patels** claimed approximately $16.3 million in total losses, consisting of $14.8 million in lost rental income, lost goodwill, physical damage to the hotel, and emotional distress

through 2009, plus two years of future losses totaling $1.5 million.

***2** In October 2008, the **Patels** consulted with Chuck LaPorte, a hotel broker with Brown Hotel Group, Inc., about the hotel's past and current value. Based on what LaPorte characterized as a "quick analysis" of the **Patels**' 2006 to 2008 operating statements, he determined the hotel's market value as of December 31, 2008 would be approximately $6.6 million or $120,450 per unit.

In October 2009, WCCE retained Jeff Lugosi of PKF Consulting to determine the value of the hotel under two scenarios: (1) as of January 1, 2007, assuming the hotel remained affiliated with Best Western and its operations suffered no impact from construction of the Americana; and (2) as of November 1, 2010, assuming the hotel continued to operate "as is" without the Best Western affiliation. In March 2010, Lugosi reported the hotel would have a value of $8 million under scenario one, but only $3.9 million under scenario two.

In December 2010, the Americana developer offered the **Patels** $6 million to purchase the hotel property. In connection with the offer, the developer claimed to have obtained a recent appraisal that estimated the hotel's value to be $4.9 million. After consulting with WCCE, the **Patels** rejected the offer as " 'woefully inadequate.' "

Also in late 2010, the City notified the **Patels** of a plan to acquire the hotel property through eminent domain for the purpose of transferring it to the developer to expand the Americana. In response, the **Patels** hired experts and submitted a counter proposal. The City scheduled a vote for February 15, 2011, and its staff announced its recommendation to accept the Americana proposal.

On February 10, 2011, the **Patels** retained Joe Thomas of the Thomas Whitelaw firm to defend against the City's efforts to condemn the hotel. In negotiating Thomas's retention, **Ray Patel** forwarded the WCCE fee agreement and a copy of the inverse condemnation complaint with the following directive: "I definitely do not want any financial gains from the eminent domain issue spilling over [to the] existing lawsuit." The reference to "financial gains from the eminent domain issue" was understood to refer to the purchase price **Patel** anticipated he would receive from the sale or condemnation of the hotel.

On February 11, 2011, unbeknownst to WCCE, Thomas opened confidential settlement negotiations with the Americana developer. Over the next few days, the parties exchanged written communications concerning purchase of the hotel and resolution of the inverse condemnation action. On the morning of February 15, 2011, the scheduled date for the City's vote on the competing redevelopment proposals, Thomas informed WCCE for the first time that the developer had expressed interest in discussing a settlement. Later that day, without WCCE's participation, the **Patels** executed a settlement agreement with the developer.

The settlement agreement provided for the developer to purchase the hotel property for $16.25 million, separately to pay $500,000 to settle the inverse condemnation action, and to grant the **Patels** lease-back rights valued at $1 million. The agreement also included the following provision: "The parties will agree to be silent on the allocation of purchase price above and agree not to refute each party's respective allocation. The Purchase Price is in consideration for the Property and for the settlement of the Litigation."

On the evening of February 15, 2011, **Ray Patel** informed WCCE that he had settled the case for $500,000.

2. *The Fee Dispute and Arbitration*

***3** On February 16, 2011, **Ray Patel** came to the WCCE offices and again reported that he had settled the inverse condemnation litigation for $500,000. He refused to disclose any other details of the settlement terms. The **Patels** tendered $200,000 to WCCE (40 percent of $500,000), asserting that was the full amount owed under the contingency fee agreement. They claimed the fee agreement was never intended to cover a sale of their property.

WCCE, on the other hand, asserted the "gross recovery" on the **Patels**' claims under the retainer agreement was $17.75 million: $500,000 plus the full $16.25 million allocated to the purchase price of the hotel, plus the $1 million valuation given to the lease-back rights.

Under the terms of the fee agreement, WCCE and the **Patels** submitted the dispute to arbitration before a panel of three retired judges of the Los Angeles County Superior Court. The **Patels** retained Gwire to represent them in the arbitration.

The arbitration took place over five days. On May 25, 2012, the panel issued a final binding arbitration award of $4.82 million in favor of WCCE. In rendering the award, the

panel stated it had considered all the evidence presented, the witnesses' credibility, and "more importantly, ... [its] individual and collective common sense and experience in coming up with [the award]." (Underlining omitted.)

The panel emphasized the **Patels** had consistently asserted the inverse condemnation lawsuit was worth between $15 and $17 million—a position the **Patels** supported with verified discovery responses in the litigation. Additionally, the panel observed the total value of the settlement agreement greatly exceeded (by a factor of three) the fair market value of the hotel as reflected in the various appraisals obtained during the litigation. Thus, the panel found the total consideration paid was necessarily the direct result of WCCE's efforts in the inverse condemnation litigation.

However, the panel concluded the "gross recovery" subject to the 40 percent contingency fee should not include the fair market value of the hotel property that the **Patels** conveyed to the developer. The panel reasoned: "To include the value of the Hotel as part of [the **Patels**'] 'gross recovery' would ignore the full consideration that [the **Patels**] contributed to the settlement—i.e., title to the Hotel *and* dismissal of [their] inverse [condemnation] lawsuit, and would result in a windfall to WCCE."

To establish the hotel's value, WCCE relied principally upon the Lugosi letter, which estimated the hotel to be worth $3.9 million as of November 1, 2010. To counter this valuation, Gwire, on behalf of the **Patels**, relied upon **Ray Patel's** testimony, as the hotel's owner, and the settlement term sheet to establish the hotel was worth $16.25 million to the developer at the time.[1]

The panel rejected both valuations, concluding the "best evidence" of the hotel's fair market value at the time of the 2011 settlement was the price the **Patels** paid to purchase the property in 2002. The panel explained: "Although various appraisals were introduced during the hearing relative to the fair market value of the Hotel, the Panel finds that the most reliable and probative reflection of true fair market value is that amount that a willing buyer would convey to a willing seller at arms length. While more dated than other figures presented, the Panel concludes that the amount **Patel** paid in 2002 to purchase the Hotel, is the best evidence of its value at the time of the settlement in 2011. Consequently, the Panel reduces the value that [the developer] paid to **Patel** by $5.2 million in order to arrive at the amount of the 'gross recovery' obtained by **Patel** as a result of WCCE's efforts in their representation of him."

3. ***The Malpractice Action Against Gwire***

***4** On May 11, 2015, the **Patels** filed this action against Gwire. As relevant to this appeal, the **Patels'** operative first amended complaint alleged Gwire breached his professional duty of care and the terms of his retainer agreement by (1) failing to "present a sufficient alternative appraisal of the Hotel's value at the arbitration hearing," including "an independent appraisal of the Hotel at or around the time it was sold," and (2) failing to "present evidence regarding the comparable square footage price paid for the [BRE] property," despite its location "directly behind the Hotel." With respect to the BRE property, the **Patels** claimed the Americana developer had purchased the property in January 2011, at a price per square foot comparable to the $16.25 million purchase price the developer agreed to pay for the hotel property in the settlement agreement one month later. Based on these allegations, the complaint asserted causes of action for legal malpractice and breach of contract.

4. ***Gwire's Motion for Summary Judgment***

Gwire moved for summary judgment, arguing the undisputed facts established he did not breach a duty of care owed to the **Patels**, and his conduct did not proximately cause the **Patels** to suffer their alleged damages. In his supporting declaration, Gwire asserted he did not obtain an independent appraisal of the hotel's value at the time of the settlement because he had interviewed Lugosi and LaPorte, "both of whom confirmed that Mr. Lugosi's [$3.9 million] appraisal was accurate." He also was "aware" that the developer obtained an appraisal in connection with a 2010 offer to purchase the hotel, which put the property's fair market value at $4.9 million. Thus, Gwire "believed that any additional appraisals would have been consistent with Messrs. Lugosi's and LaPorte's valuations" and he "believed that an additional appraisal would have undercut [the **Patels**'] assertion that the [hotel's value] was the claimed $16.25 million sales price." He "also believed that trying to disavow Mr. L[u]gosi's appraisal after [the **Patels**] had relied upon that report in the Inverse Condemnation Action would appear disingenuous and create credibility problems for [the **Patels**]."

As for causation, Gwire maintained there was "absolutely no evidence to suggest that," had he "submitted a different appraisal," the arbitrators would have made "any different ruling." He emphasized that in rendering their award, the

arbitrators "expressly stated" they were "relying upon their equitable powers and their 'own individual and collective common sense and experience.' " Based on that statement, Gwire argued the **Patels**' allegation that other evidence would have resulted in a more favorable outcome was "entirely speculative." In his reply brief, Gwire added that the **Patels** could not show they would have obtained a more favorable outcome because the arbitrators "expressly determined": (1) the **Patels**' claimed $16 million in damages from the inverse condemnation; (2) the **Patels** asserted the developer's conduct rendered the hotel "valueless"; (3) **Ray Patel** was "not credible" in his testimony; and (4) **Ray Patel** intentionally structured the settlement to minimize WCCE's fee.

In opposition, the **Patels** offered the declarations of Steven Decker, a certified real estate appraiser, and Christopher Rolin, an attorney and certified legal malpractice specialist. Decker opined that the hotel's "retrospective investment value" to the Americana developer in 2011 was $15.6 million. Had he been retained in the fee arbitration to perform an appraisal, he would have "given an appraisal in this amount." Decker based his opinion on a number of factors that made the property particularly valuable to the Americana developer, including that it allowed the developer (1) to add a Nordstrom department store to the existing development that "would draw shoppers to the mall"; (2) to use a "more efficient parking structure" for the development; and (3) to acquire the street area between the property and the existing development "for free." Decker also opined that the Lugosi letter was inadequate to establish the value of the property at the time of the settlement because, among other things, the letter failed to support its "implied conclusion" that a hotel was "the highest and best use" of the property, despite the surrounding Americana development.

***5** Rolin opined that "an attorney comporting to the standard of care ... would have sought an independent appraiser such as Mr. Decker" in the arbitration, recognizing that "the goal in the attorney fee litigation was totally different from the underlying [inverse condemnation] dispute." He observed that WCCE had hired Lugosi to establish the "low value" of the property as a hotel "due to the diminished use during the [Americana's] construction phase," but a "better yardstick" for the fee litigation was the " 'investment value' " set forth in Decker's declaration. He also opined that Gwire's failure to obtain an independent appraisal led to the arbitrators' "excessively large" fee award.

The **Patels**' opposition brief characterized Gwire's failure to obtain an independent appraisal as his "most grievous error." They argued Gwire's stated reliance on Lugosi's and LaPorte's letters underscored his "failure to grasp the key issue at the Fee Arbitration, which was to parse the value of the inverse condemnation settlement amount from the proceeds of the hotel property sale[,] and then award [WCCE] its contractual share of the inverse condemnation settlement." Contrary to Gwire's assertion that he reasonably relied upon the **Patels**' testimony to establish the hotel's value, in lieu of an independent appraisal that he feared would "undercut" their valuation, the **Patels** emphasized that they "are not real estate appraisers or experts" and Gwire should have recognized "their personal opinions on such matters [would] lack any foundation in legal proceedings." As for causation, they argued evidence of "the unique location of the property, the Developer's dire need to acquire it for the Americana expansion, and inflation," all supported a finding that "the Hotel land value was worth exponentially more than what [the **Patels**] paid for it nearly a decade earlier."

5. ***The Ruling Granting Summary Judgment***

The trial court granted Gwire's motion for summary judgment, concluding the **Patels** could not establish the breach or causation elements of their claims. With respect to Gwire's alleged breach of his professional and contractual duties, the court credited Gwire's assertion that "there was no reason to believe that the valuations had changed from those relied upon by [the **Patels**] in the underlying [inverse condemnation] action" and his assertion that he "believed that additional fair market appraisals would undercut [the **Patels**'] defense and threaten their credibility." Based on those assertions, the court determined Gwire could not be held liable for "a tactical choice" not to obtain an independent appraisal.

As for causation, the court found that the **Patels** "merely speculate[d] that the arbitrators would have been persuaded by some other evidence without identifying what that evidence would have been." Contrary to the **Patels**' claims, the court determined "the evidence [was] indisputable that the cause of the arbitration award against [the **Patels**] [was] their own conduct in attempting to improperly withhold the attorney fees the [WCCE] firm had earned in representing [them]." The court continued: "In short, the [arbitrators] found that [the **Patels**] were not [credible] and also determined that [they] had wrongfully structured the settlement agreement to improperly minimize the [WCCE] firm's fees. Nothing [Gwire] did in choosing an expert caused

[the **Patels**] any harm. As a matter of law, nothing [Gwire] did in regards to use of an expert appraiser ... was a cause of any injury to [the **Patels**].”

The trial court entered judgment, from which the **Patels** appeal.

DISCUSSION

1. *Standard of Review*

“Summary judgment is appropriate when all of the papers submitted show there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law.” (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 492 (*Hutton*), citing Code Civ. Proc., § 437c, subd. (c).)[2] “The purpose of a summary judgment proceeding is to permit a party to show that material factual claims arising from the pleadings need not be tried because they are not in dispute.” (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 604-605; see also *Aguilar*, *supra*, 25 Cal.4th at p. 843.)

***6** “A defendant moving for summary judgment has the initial burden of showing a cause of action is without merit.” (*Hutton*, *supra*, 213 Cal.App.4th at p. 492.) “A defendant meets that burden by showing that one or more elements of the cause of action cannot be established, or that there is a complete defense thereto.” (*Ibid.*, citing § 437c, subd. (p)(2).) “If the defendant makes such a showing, the burden shifts to the plaintiff to produce evidence demonstrating the existence of a triable issue of material fact.” (*Hutton*, at p. 492, citing *Aguilar*, *supra*, 25 Cal.4th at p. 849.)

“The pleadings play a key role in a summary judgment motion.” (*Hutton*, *supra*, 213 Cal.App.4th at p. 493.) “ ‘The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues’ ” and to frame “the outer measure of materiality in a summary judgment proceeding.” (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381 (*FPI Development*); *Hutton*, at p. 493.) Thus, the moving defendant's burden “requires that he or she negate plaintiff's theories of liability *as alleged in the complaint.*” (*Hutton*, at p. 493; see also *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 169 (*Teselle*) [if the moving party does not address “the material facts of the complaint,” it “cannot meet its burden of persuasion”].)

“On appeal from a summary judgment, our task is to independently determine whether an issue of material fact exists and whether the moving party is entitled to summary judgment as a matter of law.” (*Hutton*, *supra*, 213 Cal.App.4th at p. 493.) In doing so, “[w]e apply the same three-step analysis required of the trial court. First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact.” (*Id.* at pp. 493-494.) In reviewing the summary judgment record, “we liberally construe the opposing party's evidence, strictly construe the moving party's evidence, and resolve all doubts in favor of the opposing party.” (*Id.* at p. 494.)

2. *Gwire Did Not Negate the Claim that He Negligently Failed to Offer Evidence of the BRE Property's Sale Price*

While Gwire's decision not to introduce an independent appraisal was the central focus of the parties' summary judgment briefing, the record shows the **Patels** also alleged in their complaint that Gwire breached his professional and contractual obligations by failing to “present evidence regarding the comparable square footage price paid for the [BRE] property,” despite its location “directly behind the Hotel.” In response to a special interrogatory asking the **Patels** to identify all facts supporting their claim that Gwire's conduct caused them to suffer a less favorable result in the underlying fee arbitration, the **Patels** stated the Americana developer had purchased the BRE property in January 2011—one month before the developer purchased the hotel property—for approximately $4 million, or $552 per square foot. Given the property's location, and the fact that the developer bought the BRE and hotel properties “strictly to expand the Americana,” the **Patels** asserted evidence of the BRE property's price per square foot, when applied to the 29,068 square feet the hotel property covered, would have demonstrated the hotel property was worth far more to the Americana developer in 2011 than the $5.2 million the **Patels** paid to purchase it in 2002.[3]

***7** In their opening brief, the **Patels** cite the BRE property sale price to argue a triable issue existed with respect to both the negligence and causation elements of their claims. In his respondent's brief, Gwire asserts the **Patels** “forfeited”

this argument by failing to raise it in either their opposition to his motion for summary judgment or in their response to his separate statement of undisputed facts. What Gwire fails to acknowledge, however, is that neither his summary judgment motion, nor his separate statement, addressed or even mentioned the complaint's material factual allegation regarding the BRE property sale price.

Gwire's forfeiture argument inverts the burden shifting analysis applicable to summary judgment motions, and it ignores the settled rule that, as the moving party, he had the "initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact" as measured by the complaint's allegations. (*Aguilar*, *supra*, 25 Cal.4th at p. 850; *FPI Development*, *supra*, 231 Cal.App.3d at p. 381.) "If a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them." (*Hufft v. Horowitz* (1992) 4 Cal.App.4th 8, 13 (*Hufft*).) In failing to address the factual allegations concerning the BRE property sale price, Gwire has effectively " 'permit[ed] that portion of the complaint to be unchallenged' " as a basis for relief. (*Ibid.*) Thus, regardless of whether the **Patels** raised the BRE property sale price in their opposition, Gwire failed to satisfy his initial burden to make a prima facie showing that no triable issue of material fact existed. (See *id.* at pp. 13, 23 [where the moving defendant failed to address what it knew about the alleged danger of its product, it was not entitled to summary judgment, even though the plaintiff failed to file an opposition]; see also *Teselle*, *supra*, 173 Cal.App.4th at pp. 169-173 [defendants were not entitled to summary judgment because they failed to address a material factual allegation of the complaint; thus trial court erred in granting summary judgment on the ground that plaintiff failed to file a timely separate statement response].)

Because Gwire made no showing to negate the material allegation that he negligently failed to present evidence of the comparable BRE property sale price, he was not entitled to summary judgment. (*Hufft*, *supra*, 4 Cal.App.4th at p. 23 ["Summary judgment is improper unless the moving party negates every alternative theory of liability presented by the pleadings."]; see also fn. 3, *ante.*)

3. ***A Triable Issue Exists as to Whether Gwire Breached His Duty by Failing to Obtain an Independent Appraisal***

" 'The general rule with respect to the liability of an attorney for failure to properly perform his duties to his client is that the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.... These principles are equally applicable whether the plaintiff's claim is based on tort or breach of contract.' " (*Kirsch v. Duryea* (1978) 21 Cal.3d 303, 308 (*Kirsch*).)

"In a legal malpractice action arising from a civil proceeding, the elements are (1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.)

***8** In his motion for summary judgment, Gwire argued the **Patels** could not establish the breach element of their claims, because his decision not to obtain an independent appraisal was protected under the "tactical immunity" rule. That rule recognizes that "[f]requently an attorney is confronted with legitimate but competing considerations," and, therefore, the attorney should be afforded a measure of "latitude ... in choosing between alternative tactical strategies." (*Kirsch*, *supra*, 21 Cal.3d at p. 309.) Under the rule, an attorney "is not liable for an *informed* tactical choice *within the range of reasonable competence.*" (*Barner v. Leeds* (2000) 24 Cal.4th 676, 690 (*Barner*), italics added.)

To obtain summary judgment under the tactical immunity rule, Gwire was required to demonstrate, as a matter of undisputed fact, that his decision not to obtain an independent appraisal was both an informed tactical choice and one within the range of reasonable competence. (*Barner*, *supra*, 24 Cal.4th at p. 690; cf. *Kirsch*, *supra*, 21 Cal.3d at p. 310.) He sought to make this showing through his declaration, wherein Gwire testified that he "interviewed both Mr. Lugosi and hotel broker, Chuck LaPorte, both of whom confirmed that Mr. Lugosi's [$3.9 million] appraisal was accurate." He added he "was aware that the Developer had also obtained an appraisal of the Hotel from a recognized local appraiser which put the fair market value of the Hotel at $4.9 million." Based on this information, Gwire "believed that any additional appraisals would have been consistent with Messrs. Lugosi's and LaPorte's valuations" and he "believed that an additional appraisal would have undercut [the **Patels**'] assertion that the value of the Hotel was the claimed $16.25 million sales price." Thus, Gwire maintained he could not be held liable

for deciding to rely solely upon Ray Patel's testimony and the settlement term sheet, while not obtaining an independent appraisal of the hotel at the time of the 2011 settlement.

We agree with the Patels that Gwire's declaration and his tactical immunity defense are subject to material factual disputes. First, a jury could reasonably conclude, based on the opinion of the Patels' legal malpractice specialist, that Gwire's consultations with Lugosi and LaPorte were inadequate to formulate an *informed* tactical choice. (See CACI No. 600 [instructing jury to assess attorney standard of care "based only on the testimony of the expert witnesses"].) As Rolin opined, an attorney comporting to the standard of care in Gwire's position should have recognized "the goal in the attorney fee litigation was totally different from the underlying [inverse condemnation] dispute." Rolin emphasized that WCCE had hired Lugosi in the inverse condemnation case to establish a "low value" for the property operating as a hotel "due to the diminished use during the [Americana's] construction phase." But, given the Patels' obvious interest in establishing the greatest possible value for their property to offset WCCE's fee claim, Rolin opined that Gwire should have recognized that a "better yardstick" for the fee litigation was the " 'investment value' " of the hotel property to the Americana developer at the time of the 2011 settlement. Based on Rolin's expert opinion, a jury could find that an attorney exercising ordinary skill, prudence, and diligence would not have relied solely upon interviews with Lugosi and LaPorte to assess the tactical value of obtaining an additional appraisal to challenge WCCE's/Lugosi's valuation.

The declaration of the Patels' certified real estate appraiser supports Rolin's standard of care opinion. Decker opined that, given the hotel's location and the existing Americana development, the property's investment value to the developer in 2011 was nearly four times what Lugosi estimated the property would be worth if the Patels continued to operate it as a hotel. A jury could conclude this was a distinction Gwire should have appreciated and investigated. In view of the stark contrast between Lugosi's valuation and the value assigned to the property in the settlement agreement, the substantial price per square foot the developer paid for the BRE property one month earlier, and the fact that the developer had offered $6 million to purchase the property in December 2010 ($2 million more than Lugosi's valuation), a jury could find Gwire breached his standard of care by failing to investigate whether an independent appraisal of the hotel's *investment value* to the Americana developer would in fact have been consistent with Lugosi's and LaPorte's valuations of the property as an operating hotel.

***9** Finally, there was evidence to dispute the reasonableness of Gwire's stated tactical choice. In his declaration, Gwire explained that he declined to obtain an additional appraisal because he "believed that trying to disavow Mr. Lugosi's appraisal after [the Patels] had relied upon that report in the Inverse Condemnation Action would appear disingenuous and create credibility problems for [the Patels]." But, as the Patels point out, this was exactly what Gwire did when he relied principally upon Ray Patel's lay opinion testimony to establish the property was worth more than four times the amount stated in Lugosi's letter for the inverse condemnation case. Given Gwire's admission that he understood the credibility problems that could arise from disavowing Lugosi's valuation, and Decker's opinion that an impartial appraisal would have independently corroborated Ray Patel's testimony, a jury might well find Gwire's decision to forgo consultation with an independent appraiser was not "within the range of reasonable competence." (*Barner*, *supra*, 24 Cal.4th at p. 690; see also *Smith v. Lewis* (1975) 13 Cal.3d 349, 358-359 (*Smith*), disapproved on other grounds in *In re Marriage of Brown* (1976) 15 Cal.3d 838 [even with respect to an unsettled area of law, an attorney can be held liable for failing to undertake reasonable research to make an informed decision about the best course to pursue for a client].)[4] The trial court erred in concluding there was no evidence to dispute Gwire's tactical immunity defense.

4. *A Triable Issue Exists as to Whether Gwire's Breach Caused the Patels' Alleged Damages*

"In a litigation malpractice action, the plaintiff must establish that but for the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. The purpose of this requirement ... is to safeguard against speculative and conjectural claims. [Citation.] It serves the essential purpose of ensuring that damages awarded for the attorney's malpractice actually have been caused by the malpractice." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 (*Viner*), italics omitted.)

A claim is not speculative or conjectural simply because some doubt remains about whether the defendant's negligence caused the plaintiff's harm. A "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." ' " (*Viner*, *supra*, 30 Cal.4th at p. 1243.)

The "trial-within-a-trial" method remains "the most effective" means for establishing whether damages were "actually *caused* by a professional's malfeasance." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 834 (*Mattco*).) That method "does not 'recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done ....' [Citation.] Even though 'should' and 'would' are used interchangeably by the courts, the standard remains an *objective* one. The trier of facts determines what *should* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular judge* or jury." (*Id.* at p. 840.)

***10** "Because causation is a question of fact for the jury, it ordinarily cannot be resolved on summary judgment. [Citation.] In legal malpractice claims, the absence of causation may be decided on summary judgment 'only if, under undisputed facts, there is no room for a reasonable difference of opinion.' " (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1583 (*Namikas*).)

In moving for summary judgment, Gwire emphasized that the arbitrators expressly relied upon "their equitable powers and their 'own individual and collective common sense and experience' " in rendering their award. Thus, he argued it would be "entirely speculative" to suggest that "other evidence may have swayed" them to accept a valuation more favorable to the **Patels**. In his reply brief, Gwire put a finer point on the argument, insinuating the panel would have rejected even an independent appraisal that agreed with the **Patels**' $16.25 million valuation because the arbitrators "expressly determined" that **Ray Patel** was "not credible" and that he intentionally structured the settlement to minimize WCCE's fee. The trial court adopted this argument as the basis for its causation ruling, concluding the evidence was "indisputable that the cause of the arbitration award against [the **Patels** was] their own conduct in attempting to improperly withhold the attorney fees [WCCE] had earned," and emphasizing the panel found the **Patels** "were not [credible] and also determined that [the **Patels**] had wrongfully structured the settlement agreement to improperly minimize [WCCE's] fees."

There are problems with this line of reasoning. To begin, it is analytically inconsistent with the trial-within-a-trial method for determining causation in a legal malpractice action. As discussed, under that method, the question is *not* what this *particular* arbitration panel would have done if presented with an independent appraisal of the hotel's investment value. Rather, the question is " 'what a *reasonable* judge or fact finder would have done.' " (*Mattco*, *supra*, 52 Cal.App.4th at p. 840, italics added.) Thus, even if this particular arbitration panel's award conclusively showed, as Gwire insinuates and the trial court accepted, that the panel based its valuation on a desire to punish the **Patels** for their bad behavior toward WCCE, that sort of animus driven decision plainly would not be evidence of what a *reasonable* arbitration panel would have done under the circumstances.

In any event, it is clear from our review of the panel's award that the arbitrators' decision to assign the hotel the value the **Patels** paid to purchase it in 2002 was not an act of improper retribution. To be sure, the panel did find that **Ray Patel** was not credible and that he structured the settlement to try to minimize WCCE's fees. But those findings logically explain why the panel rejected his testimony and the settlement term sheet as credible evidence of the hotel's value. The findings do not prove that the panel would have ignored an independent appraisal that *corroborated* **Ray Patel's** otherwise problematic account.[5]

***11** As for the panel's rationale, the award makes clear why the arbitrators felt compelled to rely upon the 2002 purchase price: "To include the value of the Hotel as part of [the **Patels**'] 'gross recovery' would ignore the full consideration that [the **Patels**] contributed to the settlement ..., and would result in a windfall to WCCE. Although various appraisals were introduced during the hearing relative to the fair market value of the Hotel, the Panel finds that the *most reliable and probative reflection of true fair market value* is that amount that a willing buyer would convey to a willing seller at arms length. While *more dated* than other figures presented, the Panel concludes that the amount [the **Patels**] paid in 2002 to purchase the Hotel, is the *best evidence* of its value at the time of the settlement in 2011." (Italics added.) In contrast to Gwire's insinuation, the award shows the arbitrators *reasonably* sought to credit the **Patels** with the "most reliable and probative reflection" of the hotel's true market value in 2011, based on the "best evidence" available to the panel.

Under the trial-within-a-trial method for establishing causation, " 'the jury's task is to determine what a reasonable judge or fact finder would have done' " in the absence of malpractice. (*Mattco*, *supra*, 52 Cal.App.4th at p. 840.) Based on the record before us, including the arbitration award and the **Patels**' expert declarations, we conclude a jury could rationally find that, more likely than not, an objectively reasonable arbitration panel would have used a recent independent appraisal of the hotel's investment value to the Americana developer in 2011 to offset WCCE's fee award, rather than use the decade-old sale price the **Patels** paid to purchase and operate the property as a hotel. This was all that was required to raise a triable issue of fact. (See *Viner*, *supra*, 30 Cal.4th at p. 1243 [a "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" ' "].) The trial court erred in concluding the **Patels**' evidence of causation was speculative.[6]

DISPOSITION

The judgment is reversed. Plaintiffs Rakash (**Ray**) **Patel** and the **Patel** Family Trust are entitled to costs.

We concur:

EDMON, P.J.

LAVIN, J.

All Citations

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Footnotes

1 Although the developer agreed to the allocation of settlement funds, he provided a declaration in the fee arbitration stating that he had "made no suggestion" regarding the allocation and had "merely acquiesced" to the **Patels**' request to allocate the funds as reflected in the settlement documents.

2 Statutory references are to the Code of Civil Procedure, unless otherwise indicated.

3 At $552 per square foot, the hotel property's valuation would have been just over $16 million. In their special interrogatory response, the **Patels** noted that at the "almost identical" price of $559 per square foot, the hotel's valuation would have matched the $16.25 million figure included in the settlement agreement with the developer. Thus, the **Patels** argue evidence regarding the BRE property sale price would have been independent evidence corroborating **Ray** **Patel's** testimony regarding the hotel's value to the Americana developer. We agree with the **Patels** that, had Gwire attempted to address the BRE allegation in his summary judgment motion, the **Patel's** evidence would have been sufficient to raise a triable issue of fact on the breach and causation elements of their claims.

4 The trial court reasoned *Smith* was distinguishable because Gwire had not made "a mistake of law" and, in the court's assessment, "there [was] no evidence that Gwire failed to make an informed decision." As discussed, we disagree with the court's evidentiary conclusion, and find there was sufficient evidence to question whether Gwire's decision was adequately informed to insulate him from liability. As for the distinction between a mistake of fact and a mistake of law, we conclude it makes no difference for the tactical immunity rule. The principle expressed in *Smith* with respect to the attorney's failure to research an unsettled question of law is just as applicable to an attorney's failure to investigate a critical factual issue: "Even as to doubtful matters, an attorney is expected to perform sufficient research to enable him to make an informed and intelligent judgment on behalf of his client," and where he fails to do so, the tactical immunity rule does not apply. (*Smith*, *supra*, 13 Cal.3d at pp. 359-360; see *People v. Ledesma* (1987) 43 Cal.3d 171, 222 ["Counsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts."].)

5 To the extent Gwire argues the **Patels** cannot rely upon Decker's declaration to prove causation because the arbitration panel "would (or should) have" sustained an evidentiary objection to an appraisal that "contradicted the evidence that **Patel** used to settle the inverse condemnation case," we agree with the **Patels** that Gwire forfeited this argument by failing to advance it in the trial court as a basis for summary judgment. The argument lacks merit, in any event. Gwire's premise appears to be that the arbitration panel would have deemed inadmissible any evidence of the hotel's value that contradicted Lugosi's letter, on the ground that it would be "wrong to consider" such evidence. However,

as Gwire's declaration admits, he was in fact permitted to introduce such evidence—namely, **Ray** **Patel's** testimony and the settlement term sheet, both of which put the property's value at more than four times what Lugosi estimated. Notwithstanding Gwire's seeming speculation, there is no indication in the record that the arbitration panel would have sustained an objection to an independent appraisal that corroborated evidence it had already admitted.

6 Gwire defends the court's ruling by highlighting the arbitrators' observation that, " '[i]f [the developer] were to purchase the Hotel without settling the inverse [condemnation] litigation, he would have faced litigation with alleged damages between $15 – 17 million.' " Based on this statement, Gwire argues "it is nothing but conjecture to assume" the arbitrators would have accepted Decker's $15.6 million appraisal had it been introduced in the underlying fee dispute. We disagree. The panel's observation plainly reflects its reasoned judgment that settlement of the inverse condemnation suit had value to the developer that factored into the settlement amount, but the observation in no way conclusively demonstrates that a reasonable panel presented with the same evidence would have categorically rejected any appraisal that assigned a greater value to the hotel than what the **Patels** paid to purchase it in 2002. We acknowledge the facts that supported the panel's observation could be advanced to dispute Decker's opinion to the extent his appraisal failed to account for the value settling the inverse condemnation suit had to the developer in acquiring the property. Those facts, however, are insufficient to establish, as a matter of law, that Gwire's failure to introduce an independent appraisal did not cause the **Patels**' alleged injuries. (See *Namikas*, *supra*, 225 Cal.App.4th at p. 1583.)

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