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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHAWN FERNANDEZ et al., Plaintiffs and Appellants, v. LESTER MARSTON, et al., Defendants and Respondents.	F084993 (Super. Ct. No. MCV084912) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Michael J. Jurkovich, Judge.

The Reich Law Firm, Jeff Reich and Paul Hager for Plaintiffs and Appellants.

Collins + Collins and James C. Jardin for Defendant and Respondent Lester Marston.

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INTRODUCTION

Plaintiffs Shawn Fernandez and Brian Auchenbach appeal from the trial court's order granting defendant Lester Marston's motion for summary judgment. Plaintiffs were employed as tribal police officers by a faction of tribal members of the Picayune Rancheria of the Chukchansi Indians Tribe (Tribe) ultimately led by Tex McDonald (McDonald faction). The McDonald faction had asserted it was the governing Tribal Council for the Tribe in opposition to other members of the Tribe. Acting as the governing Tribal Council, the McDonald faction retained defendant Marston as counsel to represent it in its intra-tribal dispute over control of the Tribe's bank accounts and investment funds. Defendant was later asked by the McDonald faction to draft ordinances authorizing the creation of a tribal police force and a self-help eviction process that allowed tribal police officers to remove trespassers from Tribal property. The intra-tribal dispute escalated over control of certain gaming offices inside the casino, and the McDonald faction hired plaintiffs in October 2014 as tribal police officers. At the direction of the McDonald faction, the tribal police officers participated in an eviction operation on October 9, 2014, designed to remove opposing faction members from inside the casino, among other things.

As a result of their actions as tribal police officers conducting the eviction, plaintiffs were arrested by deputies of the Madera County Sheriff's Office (MCSO) and were charged with multiple crimes stemming from their participation in the eviction. In 2015, plaintiffs filed suit against defendant and Mark Levitan, another attorney for the faction, for negligence, malpractice and fraud, alleging the attorneys falsely and misleadingly counseled plaintiffs regarding the legality of the eviction operation. Defendant filed summary judgment, which the trial court granted.

For the reasons discussed below, we conclude the trial court properly sustained defendant's objections to portions of the declaration evidence offered by plaintiffs. Moreover, we conclude defendant did not owe a duty of care to plaintiffs necessary to

establish claims for negligence, malpractice or negligent misrepresentation. As for the fraud claim, plaintiffs failed to establish any disputed issue of fact regarding whether any representations of fact were communicated to plaintiffs, and, thus, that defendant communicated statements of fact with an intent to deceive plaintiffs.[1]

FACTUAL BACKGROUND

This case was originally filed in Madera Superior Court in 2015, but was subsequently transferred to Mendocino Superior Court, where defendant and then codefendant Levitan filed an anti-SLAPP motion pursuant to Code of Civil Procedure section 425.16.[2] That motion was granted by the trial court, but the order was reversed on appeal to the First District Court of Appeal. The case proceeded in Mendocino Superior Court until the matter was transferred back to Madera Superior Court, and that court subsequently granted defendant's motion for summary judgment, which plaintiffs now appeal.

I. General Factual Background

The underlying events concern an intra-tribal dispute in 2014 regarding which group of tribal members represented the legitimate Tribal Council for the Tribe, which is the owner and operator of the Chukchansi Gold Resort and Casino. Defendant is a California attorney who represented one of the disputing factions.

In February 2013, defendant was retained by Nancy Ayala, a member of the Tribe who regarded herself as the chairperson for the Tribe's governing council. She represented to defendant that former members of the Tribe's governing council were claiming to be the lawful, governing council for the Tribe (Lewis faction). Defendant

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[1] The summary judgment issues presented by this unfortunate situation plaintiffs were caught up in are only a very narrow and discrete piece of the contentious and wide-ranging underlying dispute over tribal authority that resulted in separate federal court proceedings.

[2] All further statutory references are to the Code of Civil Procedure unless indicated otherwise.

agreed to represent the group then aligned with Ayala (which was later chaired by successor Tex McDonald)[3] (McDonald faction) in connection with the leadership dispute with the Lewis faction.

At the time defendant was retained, the McDonald faction was in control of the Tribe's governmental center, which consisted of a group of buildings, including the Butler Building. At some point after defendant was retained, supporters of the Lewis faction "broke in" and occupied the Butler Building. In response to this event, defendant drafted an ordinance for approval by the McDonald faction (purporting to be *the* legitimate Tribal Council for the Tribe) that provided for the creation of a tribal police department; the adoption of peace officer standards; and allowed for the negotiation of a deputization agreement with the Department of the Interior to have tribal police officers commissioned as federal officers with the authority to enforce federal—and with the consent of the Tribe—tribal law. Defendant also drafted a self-help eviction ordinance to allow tribal police officers to take possession of buildings under the occupation of trespassers, provided those officers did not breach the peace. According to defendant, the Lewis faction voluntarily vacated the Butler Building at some point after defendant drafted the ordinances and submitted them for approval.[4]

In a declaration subsequently filed in November 2014,[5] defendant described the advice and opinions he gave to the McDonald faction (holding itself out as the legitimate

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[3] At the time of the October 9, 2014, eviction raid on the casino's gaming offices, Ayala was apparently aligned with the Lewis faction on a "Unification Council," which was purportedly in control of the casino's gaming offices.

[4] Defendant's declaration does not specify when he first drafted the "Self-Help Eviction Ordinance." The unsigned copy of the self-help eviction ordinance provided in defendant's compendium of evidence in support of the motion for summary judgment includes a date of August 27, 2014, in the footer of the document; and the certification section of the draft ordinance has a place for insertion of an unspecified date in August 2014 ("August __, 2014"). It is unclear exactly when the draft was submitted to the McDonald faction for consideration.

[5] This declaration was included in plaintiffs' compendium of evidence in support of their motion. While it is signed, the record on appeal does not make clear what the declaration was

Tribal Council) as follows: he "rendered a number of legal opinion's [*sic*] to the Tribal Council. In those opinions, I advised the Tribal Council that the present Tribal Council, chaired by Tex McDonald, was the duly elected Tribal Council of the Tribe, that the Tribal Council had the authority to establish its own police department; that the Tribe had criminal jurisdiction over Indians and, in certain circumstances, non-Indians on the Tribe's reservation, and that the Tribal Council had the authority to authorize its Tribal Police department to enforce Tribal law against all persons subject to the Tribe's jurisdiction."

During the time defendant was advising the McDonald faction on these issues, Gary Montana served as the faction's general counsel and maintained an office in a building on the Tribe's reservation. Later, the McDonald faction also hired attorney Levitan to provide it with legal advice in the ongoing intra-tribal dispute.

In August 2014, defendant was asked to contact Tom Slovak, counsel for the MCSO.[6] Defendant sent an email to Slovak on August 27, 2014, on which Levitan was copied:

> "I want to clear up some confusion that the Sheriff may have regarding the Tribe's criminal jurisdiction. Public Law 280 did not divest Picayune of criminal jurisdiction over Indians on its Reservation. The federal courts [citations], state attorney generals [citation], Solicitor's Office for the Department of the Interior [citation] and legal scholars [citation] all agree that P.L. 280 did not divest Indian tribes of criminal jurisdiction over Indians within Indian Country. Thus, Picayune does have the right to establish a police force and to deputize its officers with the powers of arrest and to enforce tribal law. Please forward this information

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prepared for or where it may have been filed, although defendant's reply brief in support of the motion for summary judgment indicates it was "submitted in support of Tribal Council members Tex McDonald and Vernon King …."

[6] This contact was discussed at defendant's deposition where defendant indicated it was precipitated by a call from John Oliveira; excerpts of the declaration were filed in support of plaintiffs' opposition to the motion for summary judgment.

to the Sheriff. I will let you know in advance if the Tribe decides to establish its own police force."

Meanwhile, at some point in September 2014, the Lewis faction began occupying the Tribe's gaming offices located within the Chukchansi Gold Resort and Casino. Among other things, the McDonald faction wanted access to the gaming offices to obtain records necessary to keep the casino open. The McDonald faction hired Oliveira in September 2014 as police chief for the McDonald faction's police force (ostensibly created by certification of the ordinance defendant had drafted), and between September 12, 2014, and October 2, 2014, Oliveira developed the plan to evict the Lewis faction from the gaming offices. As part of the plan, Oliveira hired plaintiffs as tribal police officers. According to Oliveira's declaration, he never obtained any legal advice from defendant verbally or in writing about the development or the implementation of the eviction plan, nor was defendant present when Oliveira presented the plan to the McDonald faction for authorization (again, purporting to act as *the* legitimate and governing council for the Tribe).[7]

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[7] The plan developed by Oliveira described the situation precipitating the eviction and the goals of the eviction:

"The National Indian Gaming Commission (NIGC) threatens the Chukchansi Gold Resort and Casino (CGRC) with closure after several warnings of compliance violations. The current Tribal Gaming Commission (TGC) has failed to submit financial audit reports to the NIGC for almost two years, which has resulted in a notice of temporary closure on October 27, 2014.

"In the midst of a tribal political dispute, the CGRC has hired a private security company, Security Training Concepts (STC), which has subjectively provided security for two other tribal factions (aka Unification Council) that has seized and occupied the 9th and 11th floor of the CGRC. Over the past several months there [have] been several complaints regarding STC to include excessive force, threats of force, and carrying firearms in the CGRC in direct violation of the law and tribal compact. IN addition, STC has utilized a very high profile, militaristic approach to their security techniques resulting in fear amongst patrons and high rollers. This approach has severally [*sic*] impacted the business of the CGRC."

Oliveira's plan described "Operation 'Sovereign Return'" as a "straightforward, tactical law enforcement operation involving securing the Tribal Gaming Commission (TGC) offices located at the Chukchansi Gold Resort and Casino. The secondary mission of this operation is two part: 1) Assist in providing those audits necessary to meet compliance with the NIGC

An "ASSUMPTIONS/EXPECTATIONS" section of the plan contained the following statement, among others: "Based on the MCSO['s] complete lack of understanding of PL 280 and tribal sovereignty, they may attempt to arrest tribal police officers for 'false imprisonment' or 'kidnapping.' Tribal police officers will not submit to arrest in the performance of their duties. The MCSO has an option of filing complaints with the Madera County District Attorney's Office. Tribal attorney Mark Levitan will be onsite and will address the issue, if necessary."

On September 14, 2014, during the time Oliveira was preparing the eviction plan, defendant again emailed Slovak at the request of Oliveira, copying Levitan on the email:

> "Sorry to bother you on your Sunday but I am in the office working and I wanted to make sure that you were informed about a number of items pertaining to Picayune. First the Council has hired a new attorney to assist it on the Reservation. His name is Mark Levitan. He is a very good lawyer and is very professional. I am sure you will appreciate working with him. Also Sheriff Anderson will remember him. He worked for the Tribe a while back and helped the Tribe put together its loan for the hotel and casino.
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> "Second[,] the tribe has hired a new Chief of Police. His name is John Oliveria [*sic*]. He is a former Special Agent in Charge for the Department of Justice Services. For your reference I have attached a copy of the Police Ordinance establishing the Tribe's Police Department. The Ordinance sets forth Chief Oliveria's [*sic*] authority on the Reservation. I previously sent you citations to the legal authority that shows that P.L. 280 did not divest the Tribe of inherent criminal jurisdiction over its members. I want to make sure that you and the Sheriff are aware of this and that the Sheriff coordinates with the Tribe's Chief of Police so that the Sheriff does not interfere with Tribal Police in the lawful performance of their duties enforcing Tribal law.
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> "Also I have attached a copy of the Tribe's Eviction Ordinance. I think I sent this to you some time ago but I wanted to make sure you got it. Again, I want to make sure that you have provided a copy to Sheriff Anderson. Clearly under Federal law[,] the chief and his sworn officers, all

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request. 2) Investigate allegations of public corruption on the part of the Madera County Sheriff."

> of whom are retired law enforcement that meet the standards under the Ordinance, clearly have the authority to enforce the Eviction Ordinance. And any actions by Tribal Police enforcing the Ordinance would not subject Tribal Police to arrest by the Sheriff. The Sheriff has no authority to arrest for violations of the California Criminal Trespass Statute since my client and their officers have the right to occupy Tribal land. Moreover, any attempt by the Sheriff's Deputies to arrest Tribal Police Officers in the lawful performance of their duties would subject the Deputies to 42 U.S.C. Section 1983 liability. So we want to make sure that the Sheriff knows who the Tribal Police Officers are and that the two law enforcement agencies coordinate with each other. Finally, I have attached the letter that I sent on behalf of the Council to the [Bureau of Indian Affairs] responding to Robert Rosette's letter claiming that the so-called Unification Council is the governing body of the Tribe and the letter to the [National Indian Gaming Commission] responding to its Notice of Intent.
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> "Please keep all of these documents for your records. Please send me an email confirming that you got this email and [were] able to open the attachments. Please share copies of the attached documents with the Sheriff."

In declarations offered in support of plaintiffs' opposition to the motion for summary judgment, plaintiffs and two other police officers (John Cayanne and Ron Jones) who participated in the eviction raid, state they were concerned about the legitimacy of the McDonald faction, its newly formed police force, and the eviction plan. During training and educational sessions leading up to the eviction, Oliveira and Levitan addressed their concerns about the legitimacy and authority of the police force several times, and provided them with copies of the ordinances approved by Tex McDonald and others, which appeared to authorize both the creation of the police force and the eviction.

Plaintiffs' declarations both state (1) Oliveira and Levitan "assured us several times that these issues of the legitimacy of the police force itself and the operation for which we were preparing had been addressed by the expert on tribal governance and the formation of tribal police departments, Les Marston"; (2) "[b]oth Oliveira and Levitan assured us repeatedly that they were in frequent contract [*sic*] with Marston to get his advice on various legal issues relating to the police force and the anticipated effort to

remove individuals hostile to the [McDonald] faction seeking to control the casino"; (3) "At one point, Levitan wrote Marston's name and phone number on the whiteboard in the training room and invited us to call him if any of us had questions we thought had not been answered adequately by Oliveira or Levitan." All four officers explain in their declarations that Oliveira and Levitan both stressed to the police force defendant's expertise on tribal law, that defendant's opinions were the underpinning of the entire eviction operation, and that they were in communication with defendant about the eviction operation.

The declarations state defendant was touted for his legal expertise on the law supposedly relevant to the matter, and Levitan and Oliveira stated their reliance on defendant's advice and expertise. According to these declarations, the tribal police officers were told by Levitan and Oliveira that defendant had concluded the McDonald faction was the legitimate Tribal Council authorized to act for the Tribe; the McDonald faction's police force was legally constituted; that they were legitimate police officers of that force; and they could engage in the eviction effort without fear of any negative repercussions regarding the legality of their actions as police officers. The declarations state that Oliveira told them defendant was the expert whose opinions were the basis of the entire eviction effort.

The eviction operation was carried out on October 9, 2014, by a team of eight police officers, including plaintiffs and Oliveira. Attorneys Montana and Levitan were both present on the reservation throughout the day of October 9, 2014; and they provided Oliveira and the McDonald faction with legal advice. According to defendant and Oliveira's declarations, defendant was not present on the reservation and was not involved with implementation of Oliveira's plan or the eviction.

As a result of their participation in the eviction, plaintiffs were arrested by MCSO deputies and were charged with 29 felony counts.[8]

II. Procedural Background

A. Plaintiffs' Complaint

Plaintiffs filed suit against defendant and Levitan[9] in October 2015, stating claims for malpractice, negligence and fraud.

General Allegations

Plaintiffs allege defendant was retained by the McDonald faction in 2013 as special counsel to assist the faction in resolving an intra-tribal dispute that had arisen between members of the Tribal Council, the governing body for the Tribe. Defendant advised the faction that it had the authority to form a police department, had criminal jurisdiction over members of the Tribe, its hotel offices and casino, and that tribal police officers properly deputized would have all the privileges and immunities of a validly deputized police officer, and that these officers would be accepted by the Bureau of Indian Affairs (BIA) and relevant law enforcement agencies. The faction formed a police department on September 1, 2014, at defendant's direction and advice.

Plaintiffs were hired on approximately October 1, 2014, as police officers for the faction, and they were informed by defendant that they had the authority to take possession of a tribal office in the tribal hotel and casino that was occupied by an adverse group of tribal members. Plaintiffs, believing they were acting police officers with the newly formed tribal police department and at the direction of defendant, participated in

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8 The record on appeal does not contain information about what specific charges were filed against plaintiffs, nor does it supply details about how those charges were resolved. Interrogatory responses by Fernandez, submitted in support of defendant's motion, indicate the charges against Fernandez were eventually dropped. As to Auchenbach, his interrogatory responses reference settling to a plea for violation of Penal Code section 602 (misdemeanor trespass).

9 Levitan was later dismissed from this lawsuit.

an eviction operation on October 9, 2014, under the faction's direction to remove adverse tribal members from a tribal office inside the Tribe's hotel and casino. Plaintiffs allege defendant was present at the time of the operation, and insisted that the actions of the faction's police force were a lawful exercise of the Tribe's criminal jurisdiction. As a result of their participation in this eviction action, plaintiffs were arrested by MCSO deputies and were charged with 29 felony counts of criminal activity.

Malpractice

Plaintiffs allege defendant was retained by the faction to handle federal and state court litigation and to assist the faction in resolving an intra-tribal dispute that had arisen between members of the tribal council; and the engagement was specifically intended to and did affect and benefit plaintiffs. Plaintiffs allege "[t]he transaction between Defendants and the [McDonald] faction was specifically intended to affect and benefit Plaintiffs and the other tribal police officers. Defendants were specifically tasked with advising Plaintiffs as to the legality of their actions, their rights and responsibilities, and the proper course of conduct by Plaintiffs, and Defendants in fact undertook to advise Plaintiffs as to the legality of Plaintiffs' and the [McDonald] Faction's actions in connection with the self-help eviction action as alleged herein." Relying on such advice, plaintiffs allege they were arrested and prosecuted.

Negligence

Plaintiffs allege defendant and Levitan's representations were false: there was no recognition of the tribal police force by other law enforcement agencies; sufficient steps had not been taken to ensure the eviction action was a valid exercise of authority; and the faction did not have the authority to conduct the eviction action. Plaintiffs allege defendant's statements were fraudulent and knowingly false or, "at best for Defendants, there was a[n] unjustifiable degree of uncertainty as to that potential to fail to make full disclosure of the potential problem to Plaintiffs. In either case, Defendants concealed the true facts of the situation from Plaintiffs. Defendants did not disclose any such

uncertainty or risks to Plaintiffs, including but not limited to the risk that Plaintiffs would face criminal charges for their role in the self-help eviction/repossessions/ejection operation."

Defendant allegedly made the misrepresentations and concealed the risks associated with the operation "with the intention of inducing Plaintiffs to act in reliance on those representations in the manner herein alleged, and so as to induce Plaintiffs to take part in the self-help eviction/repossession/ejectment operation." Plaintiffs would not have participated in the eviction operation had they been advised of the possibility they would be charged with criminal offenses, and, as a result of their reliance on defendant's and Levitan's misrepresentations, they suffered damages resulting from their subsequent arrest for participating in the eviction operation.

Fraud

Under the fraud claim, plaintiffs allege defendant and Levitan made multiple false statements to plaintiffs during training sessions between October 1, 2014 and October 9, 2014, including that the tribal police force was a validly existing police force; that sufficient steps had been taken to ensure that the eviction operation was a valid exercise of authority that would not be subject to attack; and that the eviction operation was within the authority of the faction's power to authorize. Defendant and Levitan are alleged to have concealed existing potential problems with the operation, which they knew existed, including that the creation of the police force was beyond the power of the faction to authorize. Plaintiffs allege defendant and Levitan did not disclose any of the uncertainty or risks attendant to the faction's power to act, nor did they inform plaintiffs that they risked criminal charges if they participated in the eviction action. Defendant and Levitan allegedly made these misrepresentations and concealed the risks to induce plaintiffs to take part in the eviction operation, and, as a result of their reliance on the misrepresentations, plaintiffs took part in the eviction operation and were arrested and charged as a result, damaging them economically and emotionally.

B. Defendant's Motion for Summary Judgment

Defendant sought summary judgment on each of plaintiffs' claims. With respect to the claims for malpractice and negligence, defendant argues he owed plaintiffs no duty of care because they were not his clients and they were not in privity of contract: plaintiffs never formed an attorney-client relationship with him; defendant interacted solely with the Ayala (and subsequently McDonald) faction purporting to be the Tribal Council, and his involvement in the October 9, 2014, eviction was limited to drafting a tribal police ordinance and a self-help eviction ordinance. Defendant claims no attorney-client relationship exists with plaintiffs merely by virtue of their employment with defendant's client, and he had no involvement in the transaction (the eviction operation) that gave rise to plaintiffs' arrests; he did not render advice to the McDonald faction or Oliveira about the eviction operation plan or its implementation; he was not on the Tribe's reservation on the day of the eviction operation; and he has never met with plaintiffs or communicated with them whatsoever.

With respect to the fraud claim, defendant argues he never made any statements of opinion or fact to plaintiffs, the Tribe or Oliveira about Oliveira's plan or the eviction; and there is no evidence showing he intended to induce the reliance of plaintiffs regarding the authority of the tribal police to perform the eviction that led to this lawsuit. He maintains that under these circumstances, there is no authority imposing liability against an attorney to nonclients for statements of fact or opinion rendered solely to the attorney's client.

C. Plaintiffs' Opposition

Plaintiffs acknowledge they were not in privity of contract with defendant, but argue privity of contract is not strictly necessary to establish a duty of care. Plaintiffs maintain defendant is liable for making negligent misrepresentations, which does not require privity of contract and is actionable regardless of whether defendant dealt directly with plaintiffs or whether defendant was present on the reservation on the day of the

eviction. Plaintiffs assert that a balance of the relevant factors supports the imposition of a duty of care under these circumstances.

Plaintiffs argue the specific operational details of the eviction were not the cause of their injuries—the injuries were caused by defendant's misstatements of law and fact that the McDonald faction was the legitimate Tribal Council; that it had the authority to create a police force; that the police force would be recognized as legitimate by local law enforcement agencies; and that the police force could lawfully evict from the Tribe's property persons deemed trespassers by the McDonald faction. According to plaintiffs, it does not matter analytically if defendant did not review the specific eviction plan document when he provided all of the opinions and advice that underpinned the eviction plan, and it was foreseeable plaintiffs would rely on those opinions.

In arguing defendant lacked any reasonable belief in the accuracy of his professional opinions regarding the authority of the McDonald faction and its police force, plaintiffs reference the First District Court of Appeal decision regarding defendant's anti-SLAPP motion pursuant to section 425.16. In deciding that motion, the appellate court explained "[t]he BIA regional director notified the warring factions [in his February 11, 2014, decision that] because the situation has deteriorated so badly in more than two years of tribal infighting, and it was essential for a government to be recognized, the BIA decided, on an interim basis, to conduct business with a tribal council comprised of the people elected to the tribal council in December 2010, which was the last uncontested election, until the leadership dispute could be resolved by the tribe itself in accordance with tribal law."[10]

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10 In support of the anti-SLAPP motion, the appellate court indicated defendant and Levitan had submitted documents from various judicial and administrative proceedings, including one before the BIA that concerned requests for a new tribal contract with the BIA for fiscal years 2013–2014. The court recited that three competing factions had submitted contract requests to the BIA; in rejecting all of the requests, the regional director noted the BIA "did not have the authority to decide the tribe's permanent leadership because disputes concerning the tribe's

Plaintiffs argue defendant intended that his advice and opinions to the McDonald faction be relied upon by plaintiffs because he freely passed his advice along to Oliveira, whom he knew to be planning the eviction operation with the officers. Plaintiffs point to defendant's deposition, where he acknowledged knowing Oliveira was planning the eviction operation. According to plaintiffs, even though defendant claimed he had no involvement in anything related to the eviction after he drafted the ordinances for the faction, his September 14, 2014, email to Slovak provides differing inferences—that email contains opinions about the legitimacy of the police force that defendant, based on his references in the email, apparently believed had already been authorized by the McDonald faction acting as the Tribal Council. Plaintiffs argue the advice and misleading statements in the email were sent to Levitan, the McDonald faction's attorney, and "were, as anyone would have foreseen, then communicated to the people whose lives and careers depended upon the soundness of the advice—the police officers."

Plaintiffs point out the officers were urged by Levitan and Oliveira to rely on defendant's advice as to the legitimacy of the faction, its police force, and the police force's authority to evict trespassers; the officers were repeatedly told Levitan and Oliveira were in continued contact with defendant and he was advising them regarding the legitimacy of the eviction operation. As plaintiffs' reliance on defendant's advice was foreseeable and defendant knew it to be likely, this is evidence defendant intended to induce plaintiffs to rely on his advice. Plaintiffs also argue it is clear from the timing of the drafting of the eviction ordinance and the email defendant sent to Slovak that he knew the faction was planning to conduct the October 9, 2014, eviction, and, thus, he knew his advice would be relied on by plaintiffs to conduct that eviction—regardless of whether defendant had reviewed the specific, written plan developed by Oliveira.

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leadership fall within the tribe's exclusive jurisdiction. But because the situation had deteriorated so badly … it was essential for a government to be recognized …."

D. Defendant's Reply

Defendant filed numerous objections to the declarations of Auchenbach, Fernandez, Cayanne and Jones, arguing their inclusion of statements Levitan and Oliveira made repeating to the officers what defendant had told them was hearsay.[11]

In his reply brief, defendant argues his representation of the McDonald faction does not create an attorney-client relationship with the faction's employees, i.e., plaintiffs. Defendant maintains none of the evidence plaintiffs presented supports an inference that the McDonald faction retained defendant to provide advice for the benefit of plaintiffs, and the inherent conflict of interest between plaintiffs and the McDonald faction precludes the imposition of any duty of care. According to defendant, his November 2014 declaration indicates only that he rendered advice to his client, not that he did so for the benefit of plaintiffs or the McDonald faction's police officers as a group. Defendant's communications with Slovak also support no inference that defendant's services were engaged for the benefit of plaintiffs—Slovak did not represent plaintiffs and the emails were never communicated to plaintiffs. Defendant maintains the statements Oliveira and Levitan purportedly made to the officers, even if admissible, confirm that defendant's services were rendered for the benefit of the McDonald faction rather than plaintiffs. Finally, defendant argues there is no evidence defendant provided the draft ordinances, opinions and/or advice to his client with the expectation or understanding they would be communicated to prospective tribal police officers to induce them to accept employment or conduct the eviction.

E. Trial Court's Ruling

The trial court issued a tentative ruling granting the summary judgment motion and, after a hearing, adopted the tentative ruling as the order of the court. The court first granted defendant's hearsay objections as to the declarations of Jones, Cayanne and

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11 The objections filed are not contained in the record on appeal.

plaintiffs to the extent they discussed statements made or information conveyed by Oliveira or Levitan before the eviction took place. The court explained these statements were offered in an attempt to demonstrate that defendant provided the advice on which plaintiffs relied. "To do the work for which this evidence is proffered, it is not enough to simply say Oliveira and Levitan said something based on something [defendant] said, and Plaintiffs relied on that to take the actions they did. To establish claims for professional negligence, it is necessary to know that [defendant] actually gave the bad advice he was purported to have given, and that the advice was, in fact, transmitted to Plaintiffs. The content of the statements matters even if they were lies. Therefore, the statements are in fact offered for the truth of the fact that [defendant], Levitan, or Oliveira said them, not whether the statements they made were in fact accurate."

With respect to the August 27, 2014, and September 14, 2014, emails defendant sent to Slovak, those emails were submitted as exhibits to defendant's deposition, but there was no indication they were ever sent to any of the officers or plaintiffs who submitted declarations, or that any of them had any personal knowledge of those emails separate from this litigation. The court granted defendant's objections to the declarations' references to these emails for lack of personal knowledge.

On the malpractice and negligence claims, the trial court noted plaintiffs did not dispute they were not defendant's clients, but claimed defendant was still liable for negligence in the absence of privity under a theory of negligent misrepresentation. The court explained such a claim required proof the misrepresentation was made with the intent to induce the recipient's reliance on it. The trial court concluded plaintiffs had supplied no admissible evidence that tended to indicate the allegedly misrepresented information was transmitted to plaintiffs from defendant, even indirectly. Moreover, none of plaintiffs' admissible evidence supported the proposition that defendant intended or knew his advice or opinions would be transmitted to nonclient police officers such as plaintiffs. Finally, the court balanced relevant factors to find defendant did not owe

plaintiffs a duty of care. On this ground, the trial court concluded plaintiffs failed to establish a dispute of material fact as to the negligence and legal malpractice causes of action.

On the fraud claim, the court reiterated plaintiffs had not offered any admissible evidence demonstrating that any advice or opinions defendant rendered were transmitted to plaintiffs. Finding no material disputed issue of fact, the trial court granted summary judgment as to plaintiffs' fraud claim.

DISCUSSION

I. Legal Principles and Standard of Review

Summary judgment is granted when "there is no triable issue as to any material fact and … the moving party is entitled to judgment as a matter of law." (§ 437c, subd. (c); accord, *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

As in the trial court, we first look to the pleadings to identify the elements of the cause of action for which relief is sought. (*Ryan v. Real Estate of Pacific, Inc.* (2019) 32 Cal.App.5th 637, 642; accord, *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) Then, we determine whether the moving party has met its initial burden to establish facts justifying judgment in its favor. (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 630.) For a defendant to prevail on such a motion, the defendant must show that the plaintiff "has not established, and reasonably cannot be expected to establish, one or more elements of the cause of action in question." (*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 500.) The motion must be supported with evidence, including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (§ 437c, subd. (b)(1).) If the defendant fails to make this initial showing, the motion must be denied. However, if the moving party makes a prima facie showing that justifies a judgment in the defendant's favor, then the burden shifts to the plaintiff to

make a prima facie showing of the existence of a triable issue of material fact. (*Id.*, subd. (p)(2); accord, *Aguilar, supra*, 25 Cal.4th at p. 849.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted.)

"We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale." (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1092; accord, *Beebe v. Wonderful Pistachios & Almonds LLC* (2023) 92 Cal.App.5th 351, 369.) We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 39.) A grant of summary judgment is reviewed de novo, "considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*); accord, *Aguilar, supra*, 25 Cal.5th at p. 860.) We also independently review any subsidiary legal questions, such as whether a duty of care exists. (*Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213.)

II. Evidentiary Issues

As we do not consider evidence to which objections were made and sustained by the trial court (*Guz, supra*, 24 Cal.4th at p. 334), we begin with plaintiffs' arguments that portions of their declaration evidence was improperly ruled to be inadmissible hearsay. The declarations plaintiffs submitted as to what Levitan and Oliveira told plaintiffs about the legal advice defendant provided are the pivotal, if not the sole, evidence offered to show defendant's assertions actually reached plaintiffs, which is essential to plaintiffs' fraud claim. For purposes of fraud, the plaintiff must establish the defendant represented *to the plaintiff* that an important fact was true, even if the defendant's representation was made indirectly. (CACI No. 1900 (Intentional Misrepresentation); see *Thomas v. Regents*

of the University of California (2023) 97 Cal.App.5th 587, 637 [stating elements for claim of fraudulent misrepresentation].) Moreover, whether and under what conditions defendant provided statements of legal advice or opinion to plaintiffs (even indirectly) is relevant to plaintiffs' assertion defendant owed them a professional duty of care and whether defendant intended to benefit plaintiffs in making such statements. Thus, we start with the evidentiary issues before reaching the merits analysis.

"Although a court does not weigh the evidence at summary judgment, 'it does consider the competency of evidence presented.'" (*Forest Lawn Memorial-Park Assn. v. Superior Court* (2021) 70 Cal.App.5th 1, 8.) "'A party may not raise a *triable* issue of fact at summary judgment by relying on evidence that will not be admissible at trial.'" (*Ibid*.) When exclusion of evidence is challenged on appeal, the appellant must show both that the exclusion was erroneous and that it resulted in a miscarriage of justice. (Evid. Code, § 354; *In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 141–142.)

In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, the court declined to determine whether a de novo standard or an abuse of discretion standard applies in evidentiary rulings made in connection with motions for summary judgment. (*Id.* at p. 535.) "'[T]he weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard.'" (*In re Automobile Antitrust Cases I & II, supra*, 1 Cal.App.5th at p. 141, quoting *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694 & citing *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852.)

Here, the conclusions we reach *post* are the same regardless of which standard of review we apply. (See *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435–436 [trial court abuses its discretion if decision is based on an incorrect legal standard or assumption]; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 [evidentiary

ruling that "'"transgresses the confines of the applicable principles of law"'" is an abuse of discretion].)

A. Hearsay Statements

The trial court ruled that to the extent Jones, Cayanne, and plaintiffs' declarations "discuss statements made or information conveyed by Oliveira or Mark Levitan before the eviction took place, Defendant's objections are sustained as hearsay without an exception." (Footnote omitted).

In relevant part, plaintiffs' declarations state the following:

> "[Levitan and Oliveira] assured us several times that these issues of the legitimacy of the police force itself and the operation for which we were preparing had been addressed by the expert on tribal governance and the formation of tribal police departments, [defendant]. [¶]
>
> "Both Oliveira and Levitan assured us repeatedly that they were in frequent contact with [defendant] to get his advice on various legal issues relating to the police force and the anticipated effort to remove individuals hostile to the [McDonald] faction seeking to control the casino.… [¶] … [¶]
>
> "Before the eviction action, all of us newly sworn officers of the tribal police department discussed among ourselves the advice and statements [defendant] made which were relayed to us by Mr. Oliveira and Mr. Levitan, including that [defendant] was an expert on the legal issues concerning the legality of the police department and the legality of the eviction actions that we would be taking."

Plaintiffs' declarations also stated "Oliveira told all newly-hired officers … that he and Mark Levitan had been advised by [defendant]" as follows:[12]

> "The Tribal Council had the authority to create a Tribal Police Department;
>
> "The Tribe had criminal jurisdiction over the Indians (and certain non-Indians) on the Tribe's reservation;

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[12] Plaintiffs' declarations indicate these facts were contained in defendant's September 2014 email to Slovak, which were then communicated to the officers through Oliveira, indicating to the officers this is what defendant had advised.

"The Tribal Council had the authority to authorize its Tribal Police Department to enforce Tribal law against all persons subject to the Tribe's jurisdiction. [¶] … [¶]

"The 'Tribal Council' had established a new Police Department pursuant to an ordinance ….

"The Ordinance set forth Oliveira's authority on the Reservation.

"'P.L. 280 did not divest the Tribe of inherent criminal jurisdiction over its members.'

"The Sheriff should coordinate 'with the Tribe's Chief of Police so that the Sheriff does not interfere with Tribal Police in the lawful performance of their duties enforcing Tribal Law.'

"The McDonald faction of the Tribal Council adopted an Eviction Ordinance, which [defendant] had drafted ….

"'Clearly under Federal law the Chief and his sworn officers, all of whom are retired law enforcement that meet the standards under the Ordinance, clearly have the authority to enforce the Eviction Ordinance.'

"'[A]ny actions by Tribal Police enforcing the Ordinance would not subject Tribal Police to arrest by the Sheriff.'

"'The Sheriff has no authority to arrest for violations of the California Criminal Trespass Statute since [the McDonald faction] and their officers have the right to occupy Tribal land.'

"'[A]ny attempt by the Sherriff's Deputies to arrest Tribal Police Officers in the lawful performance of their duties would subject the Deputies to 42 U.S.C. Section 1983 liability.'"

Cayanne's declaration states, in relevant part,

"We police officers were told … by Chief Oliveira and by attorney Mark Levitan, that the reason this tribal project was sound and legitimate is that an absolute expert on tribal law, [defendant], who was retained by what I was told by was [*sic*] the recognized and legitimate Tribal Council, had rendered opinions validating the creation of our department, records recovery, and our eviction efforts. [¶]

"[As relayed by Oliveira and Levitan, defendant] claimed the police force was duly constituted and the ordinance creating the police force, the eviction ordinance, and other resolutions were both valid and the legal framework for our department's creation and to support law enforcement operations, including the recovery/eviction effort on October 9, 2014. [¶]

> "… I understood, because of representations by Oliveira and Levitan, that [defendant], the tribal judge, and the DA stood behind this effort."
>
> In an attachment to his declaration, Jones made the following relevant attestations:
>
> "Levitan told us we could confirm his information with 'the guru' of tribal law, [defendant]. [¶]
>
> "Oliveira and Levitan both said they were in direct communication with [defendant,] who was advising them on our operation and he would be able to answer any questions we had if Levitan was not able to do so. [¶]
>
> "Oliveira said he was assured by [defendant] that our operation was legally sound and that Oliveira had full authority as the newly appointed Tribal Police Chief to hire and swear in tribal police officers for the Chukchansi Tribal Police Department. [¶]
>
> "… Levitan said that [defendant] reminded him that the [memorandum of understanding between the Madera County Board of Supervisors and the Chukchansi Indian Tribe] was not council specific; it governed the entire Chukchansi Tribe. In other words, it didn't matter which council had legal authority at that time.…
>
> "[B]oth Oliveira and Levitan said that [defendant] was their source of legal advice and approved the documentation supporting our authority as tribal police officers …."

The court explained these statements were offered to demonstrate that defendant provided the advice on which plaintiffs relied. "To do the work for which this evidence is proffered, it is not enough to simply say Oliveira and Levitan said something based on something [defendant] said, and Plaintiff's relied on that to take the actions they did. To establish claims for professional negligence, it is necessary to know that [defendant] actually gave the bad advice he was purported to have given, and that the advice was, in fact, transmitted to Plaintiffs. The content of the statements matters even if they were lies. Therefore, the statements are in fact offered for the truth of the fact that [defendant], Levitan, or Oliveira said them, not whether the statements they made were in fact accurate."

Everything Levitan and Oliveira said to the declaration witnesses at their meetings constitutes out-of-court statements. When Levitan and Oliveira repeated to the

declaration witnesses the things defendant purportedly said to Levitan and Oliveira on different occasions, the declarations relate two layers of out-of-court statements. Each layer must be analyzed separately to determine whether it is offered for a nonhearsay purpose or falls within an established hearsay exception. (Evid. Code, § 1201; *People v. Ayers* (2005) 125 Cal.App.4th 988, 995.)

Hearsay is an out-of-court statement offered for the truth of its contents. (*Hart v. Keenan Properties, Inc.* (2020) 9 Cal.5th 442, 447 (*Hart*); Evid. Code, § 1200, subd. (a).) Conversely, "[w]hen an out-of-court statement is offered for any relevant purpose other than to prove the truth of the matter stated, the statement is not hearsay." (*People v. Wilson* (2021) 11 Cal.5th 259, 305.) When considering whether an out-of-court assertion is nonhearsay, "[t]he first, and most basic, requirement for applying the not-for-the-truth limitation … is that the out-of-court statement must be offered for some purpose independent of the truth of the matter it asserts. That means that the statement must be capable of serving its nonhearsay purpose regardless of whether the jury believes the matters asserted to be true." (*People v. Hopson* (2017) 3 Cal.5th 424, 432, citing 2 McCormick on Evidence (7th ed. 2013) The Hearsay Rule, § 249, p. 189, fn. 2 ["if in fact the statement must be true for the inference desired, then the ostensible nonhearsay use is invalid"]; accord, *Hart, supra*, at p. 447.)

The content of defendant's out-of-court statements to Levitan and Oliveira about the legitimacy of the McDonald faction and the authority of its police force's power to act were not offered for the truth of those matters. Plaintiffs are not offering defendant's statements to prove the McDonald faction and the tribal police force actually had the authority defendant purportedly claimed to Oliveira and Levitan. Moreover, as a party opponent, even if what defendant said had been offered for the truth of the matters asserted in those statements, they are admissible under Evidence Code section 1220 because defendant is a party opponent. (*Ibid.* ["Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which

he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."].) Defendant's statements are admissible.

The problem, however, is that defendant's statements were relayed through Levitan and Oliveira in separate out-of-court statements. If Levitan's and Oliveira's statements are offered to prove the truth of the matter asserted—e.g., *that defendant made those statements to them*—then Levitan's and Oliveira's statements are hearsay. As an illustration, in *Sanchez v. Bezos* (2022) 80 Cal.App.5th 750, the plaintiff's declaration was offered to prove the defendants made defamatory statements about the plaintiff. (*Id.* at p. 764.) The declaration described not what the plaintiff heard the defendants say, but what reporters told the plaintiff the defendants had said. (*Id.* at p. 765.) The court explained the reporter's statements were offered for the truth of the matter asserted because if what the reporters told the plaintiff was not true, then there was no evidence of a publication. (*Ibid.*)

For Levitan's and Oliveira's hearsay statements to be admissible, they must either be offered for an independent and relevant nonhearsay purpose (*Hart, supra*, 9 Cal.5th at p. 447) or subject to a statutory hearsay exception (see *People v. Sanchez* (2016) 63 Cal.4th 665, 685). Plaintiffs argue the statements of Levitan and Oliveira are admissible for a nonhearsay purpose: to show plaintiffs' reliance on what Levitan and Oliveira said to them, which is relevant to their claims. Plaintiffs are correct in a general sense. "Evidence of an out-of-court statement may be admitted for the nonhearsay purpose of showing its effect on the listener so long as that effect is relevant to an issue in dispute." (*People v. Ramirez* (2022) 13 Cal.5th 997, 1115; accord, *People v. Montes* (2014) 58 Cal.4th 809, 863–864.)

Nevertheless, Levitan's and Oliveira's out-of-court statements cannot be offered to prove the truth of what they asserted. More specifically, just because an out-of-court statement may be offered for a nonhearsay purpose does not make that statement

admissible for every *other* purpose. (See *People v. Hopson, supra*, 3 Cal.5th at p. 437 [confession not actually used for any purported nonhearsay purpose, but was instead used improperly for the illegitimate purpose of establishing the defendant's role in the crime].) Plaintiffs cannot offer Levitan's and Oliveira's statements for the truth of what they assert—e.g., that defendant, in fact, made the statements they attribute to him. Yet that is precisely how the statements are offered: to create a dispute regarding whether defendant made any representations of fact directly or indirectly to plaintiffs.

Moreover, although justifiable reliance is an element of negligent and intentional misrepresentation claims (CACI Nos. 1900, 1903), plaintiffs' reliance is not relevant for purposes of this motion, which is a threshold requirement for admissibility. (*People v. Montes, supra*, 58 Cal.4th at p. 863 ["nonhearsay purpose must also be relevant to an issue in dispute"].)[13] Defendant's motion does not attack plaintiffs' ability to establish justifiable reliance; he argues plaintiffs cannot demonstrate that defendant made any representation to plaintiffs at all, even indirectly, or that any representations defendant made to (or on behalf of his client) were meant to benefit plaintiffs—i.e., that defendant owed no duty of care to plaintiffs, and did not intend to induce any reliance.[14]

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[13] Plaintiffs argue that a professional negligence claim requires justifiable reliance, but cite the Supreme Court's adoption of the Restatement Second of Torts, section 552, in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*), relating to negligent misrepresentation. (*Id.* at p. 392.) "Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit"; it is not a claim for general or professional negligence. (*Id.* at p. 407.)

[14] Plaintiffs do not advance the application of any other hearsay exceptions, nor did they do so before the trial court. Although a summary judgment motion is reviewed de novo, our review is limited to those issues that have been adequately raised and supported in plaintiffs' brief. (See *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979; see also *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 708 [judgment is presumed correct even on de novo review of a summary judgment].) Not only is the burden on the proponent of hearsay testimony to establish the foundational requirements for its admissibility by stating the specific hearsay exception or nonhearsay basis under which the proponent argues it is admissible (*People v. Mataele* (2022) 13 Cal.5th 372, 413; *People v. Livaditis* (1992) 2 Cal.4th 759, 778–779), it is plaintiffs' burden on appeal to affirmatively establish the trial court erred by demonstrating the admissibility of the proffered testimony (see *Serri v. Santa Clara University, supra*, 226 Cal.App.4th at p. 855 [the plaintiff did not meet burden on appeal of demonstrating admissibility

For these reasons, the trial court did not err in sustaining defendant's hearsay objections to the declarations' recitations of what Levitan and Oliveira said that defendant told the declaration witnesses.

B. Statements Lacking Personal Knowledge

The trial court also sustained objections to portions of those same declarations that included discussion of defendant's August and September 2014 emails to Slovak. The declarations of plaintiffs and Jones each attached defendant's August and September 2014 emails to Slovak as exhibits, and the declarations state these emails are confirmation that Oliveira and Levitan told the officers about the legal basis for the planned eviction and the source of that legal support. The trial court explained that "[a]lthough these emails have also been submitted as Exhibits to the Deposition of [defendant], there is no indication that they were ever sent to any of the Declarants, nor that any of the Declarants had any personal knowledge of these emails separate from this litigation. Therefore, Defendant's objections to the paragraphs of the Declarations discussing these emails are sustained."

Plaintiffs argue the trial court erroneously excluded the September 2014 email (attached to defendant's deposition transcript and offered in plaintiffs' compendium of evidence) because "it was unknown to the Plaintiffs prior to the litigation and, therefore, the Plaintiff[s] did not rely on them in deciding to participate in the Casino Raid."

Affidavits or declarations offered in conjunction with summary judgment motions "shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (§ 437c, subd. (d).) Under Evidence Code section 702,

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of handwritten notes necessary to establish trial court erred in sustaining objections to them]). Beyond the fact plaintiffs have not met their burden on appeal to affirmatively establish error in this regard, our review does not reveal any other applicable exceptions that would establish as a matter of law the admissibility of these portions of the declarations.

subdivision (a), "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter.…" Whether a witness has personal knowledge of a matter "may be shown by any otherwise admissible evidence, including his own testimony." (*Id.*, subd. (b).)

The trial court did not exclude the emails themselves (which were submitted by plaintiffs as exhibits to defendant's deposition testimony)—it ruled only that plaintiffs' and Jones's *declaration statements* about the emails were excluded for lack of personal knowledge as there was no evidence they had received the emails or had knowledge of them independent of the litigation. Indeed, the trial court considered the emails substantively and concluded they did not tend to indicate the allegedly misrepresented information was transmitted from defendant to plaintiffs, even indirectly. It was not error for the trial court to sustain defendant's objection to the declaration statements about the emails based on a lack of personal knowledge.

III. Duty of Care

The complaint alleges claims of malpractice and negligence, which requires a plaintiff to establish the following: (1) the duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) 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 negligence. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 [elements of claim for professional negligence (malpractice)].) "'"A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence." [Citation.]'" (*Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1294 (*Moore*).)

Defendant's summary judgment motion regarding plaintiffs' malpractice and negligence claims asserts that, as a matter of law, plaintiffs cannot establish the duty of

care element required by both claims. To the extent plaintiffs' negligence claim is based on a purported breach of the duty of care an attorney owes as a professional, it overlaps with the malpractice claim and similarly requires establishing defendant's duty of care to plaintiffs as nonclient third parties. While plaintiffs argue defendant owes a duty of care under a theory of negligent misrepresentation, that is not a theory of liability under the umbrella of negligence and/or malpractice—it is a different tort with distinct elements that will be addressed separately. (*Bily, supra*, 3 Cal.4th at p. 407.) As framed by the pleadings, the initial legal question presented is whether defendant owed a duty of care to plaintiffs as nonclient third parties for purposes of negligence and malpractice, and then we consider the duty of care regarding negligent misrepresentation separately.

A. Applicable Legal Principles

"'"The question of whether an attorney may, under certain circumstances, owe a duty to some third party is essentially one of law and, as such, involves 'a judicial weighing of the policy considerations for and against the imposition of liability under the circumstances. [Citation.]' [Citation.]"'" (*Moore, supra*, 109 Cal.App.4th at p. 1294, quoting *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342 (*Goodman*).) As a question of law, the issue of whether a duty is owed is "'particularly amenable to resolution by summary judgment.'" (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2019) 33 Cal.App.5th 70, 76.)

In general, an attorney owes a duty of competence and loyalty only to the client who retains that attorney. (*Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 529–530.) This is so because, typically, the client and the attorney have signed a retainer agreement and, thus, share privity of contract. (*Giacometti v. Aulla, LLC* (2010) 187 Cal.App.4th 1133, 1137 ["The general rule is that privity of contract is a requisite to a professional negligence claim."].) It is undisputed plaintiffs were not in privity of contract with defendant.

Privity of contract is not strictly required, and there are instances where courts have extended an attorney's duty of care to third parties in the absence of privity of contract. For example, an attorney has been held to owe a duty of competence and loyalty to third parties other than the client where the third party is the intended beneficiary of the legal work performed by the attorney, either because the attorney and the client have expressly designated that third party as an intended beneficiary of the retainer agreement (*Bily, supra*, 3 Cal.4th at pp. 406–407, fn. 16 [theoretically noting third party beneficiaries may be the practical and legal equivalent of clients]); or because the very nature of the work the attorney was retained to perform for the client is meant for the benefit of the third party (*Lucas v. Hamm* (1961) 56 Cal.2d 583, 590 (*Lucas*) [main purpose of testator in making agreement with attorney is to benefit persons named in will; thus, attorney owes duty to testator's beneficiary]); or where "'the end and aim of the transaction'" between attorney and client is for a third party to rely on the attorney's legal work (*Goodman, supra*, 18 Cal.3d at p. 343, fn. 4, citing *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 110–111 (*Roberts*) & quoting *Glanzer v. Shepard* (1922) 233 N.Y. 236, 238–239).

Conversely, an attorney's duty of care to a corporation client has been held not to extend to minority shareholders. (*Skarbrevic v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 707.) *Skarbrevic* concerned the liability of counsel of a close corporation to a minority shareholder for professional negligence, and the liability of a corporate attorney for conspiring with majority shareholders to defraud the minority shareholder by wrongfully diluting his interest in the corporation. (*Id.* at p. 695.) In concluding the defendant attorneys owed no legal duty to the plaintiff, the court observed that an attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation benefit the stockholders. The court reasoned the corporate counsel's direct duty is to the client

corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders. (*Id.* at pp. 703–704.)

In *Goodman*, the purchasers of stock from a lawyer's corporate client sued the attorney, alleging he had negligently advised his clients the stock could be issued as dividends and sold to purchasers without jeopardizing the exemption from registration of the stock pursuant to federal securities laws. (*Goodman, supra*, 18 Cal.3d at p. 339.) The Securities and Exchange Commission later suspended the exemption, causing the purchased stock to lose value. (*Ibid.*) In concluding the attorney owed no duty of care to the plaintiffs, the court pointed out there was no allegation the advice had ever been communicated to the plaintiffs and hence no basis for any claim that they relied on it in purchasing or retaining the stock, nor was the advice given for the purpose of enabling the defendant attorney's clients to discharge any obligation to the plaintiffs. (*Id.* at pp. 343–344.) Moreover, "[t]o make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counselling role." (*Id*. at p. 344.)

What these various cases illustrate is this: whether an attorney's duty of care extends to a nonclient is a matter of policy and involves the balancing of various factors, including, but not limited to, the extent the transaction was intended to affect the plaintiff; the foreseeability of harm to him; the degree of certainty that the plaintiff suffered injury; the closeness of the connection between the defendant's conduct and the injury suffered; the moral blame attached to the defendant's conduct; and the policy of preventing future harm. (*Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 838 (*Goonewardene*); *Lucas, supra*, 56 Cal.2d at p. 588; *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650; *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) "[A] judicial conclusion that a legal duty exists in a particular context is '"only an expression of the sum total of those considerations of

policy which lead the law to say that the particular plaintiff is entitled to protection.'"" (*Goonewardene, supra*, at p. 837, quoting *Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) With this framework, we turn to the facts of this case.

B. Analysis

1. Defendant's Initial Burden

Defendant's motion for summary judgment asserts plaintiffs cannot establish defendant owed them any duty of care for purposes of their malpractice and negligence claims. In support of the motion, defendant states by declaration that he had no attorney-client relationship with plaintiffs; he provided no legal advice to the McDonald faction (acting for the Tribe as the Tribal Council) regarding the eviction that led to this lawsuit or to Oliveira about the eviction plan or its implementation; he was not present on the reservation on the day of the eviction; and he has never met or communicated with plaintiffs. Oliveira's declaration states he developed a plan designed to evict the Lewis faction from the casino's gaming offices; he presented it for review by the faction's Tribal Council in ongoing meetings in which defendant did not participate; defendant was not present on the reservation on the day of the eviction; and at no time did he "ever tell the plaintiffs that [defendant] had rendered a legal opinion verbally or in writing to me or the Tribal Council opining that the Tribe or the Tribal Police Department had the authority to prepare, approve and implement the Plan or conduct the Operation pursuant to the Plan."

Plaintiffs argue defendant's and Oliveira's declarations in support of defendant's motion are insufficient to meet defendant's initial burden. (*Aguilar, supra*, 25 Cal.4th at p. 854 [the moving defendant must show the plaintiff does not possess needed evidence and cannot reasonably obtain it].) According to plaintiffs, these declarations are narrowly tailored to state that defendant did not provide any legal advice to Oliveira or the faction regarding the plan, which was defined narrowly to mean the written operational plan Oliveira prepared. Plaintiffs maintain these declarations do not state defendant *never* gave Oliveira any advice about the eviction itself after the written plan was drafted, and it

cannot be inferred as an assertion defendant gave no advice underpinning the eviction. Moreover, plaintiffs argue, it is immaterial whether defendant advised Oliveira about his written plan because the operational details of the eviction were not the cause of plaintiffs' injuries—the entire underpinning of the faction's authority to conduct the eviction was predicated on legal advice and opinions defendant had provided on which he had reason to know plaintiffs would rely to conduct the eviction.

Defendant's declaration is not set out as restrictively as plaintiffs interpret it. It refers to the eviction itself, not just Oliveira's written operational plan—for example, defendant states he "only represented the Tribe on those matters that the Tribal Council specifically authorized [him] to represent the Tribe on, none of which included[] giving advice to the Tribe's Chief of Police or any police officers pertaining to the Plan of Eviction *or the Eviction*." (Italics added.) He also states he "provided no legal advice to … Oliveira … in the development, preparation, drafting or implementation of the Plan of the Eviction, nor did I give Mr. Oliveira any advice regarding the implementation of the Plan once it was prepared *or the Eviction*." (Italics added.) While Oliveira's declaration focuses on the fact defendant did not offer any advice on the development or implementation of the plan, this is responsive to the allegations of the complaint, which assert defendant directly offered advice to plaintiffs at their training meetings before the eviction.

Defendant's and Oliveira's declarations take aim at these allegations and effectively supply facts indicating, at least on a prima facie basis, that there is no factual basis to extend defendant's duty of care to his client to include plaintiffs—the facts indicate defendant was not in privity with plaintiffs, did not offer any advice or opinions to them regarding the eviction that led to this lawsuit, and did not perform any work for the McDonald faction with the intent to benefit plaintiffs. As such, defendant sufficiently met his initial prima facie burden to show plaintiffs could not obtain, or reasonably expect to obtain, evidence to establish defendant owed any duty of care to plaintiffs.

(§ 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 853–854, fn. omitted ["the defendant need not himself conclusively negate any such element—for example, himself prove *not X*"].)

2. No Duty of Care for Malpractice or Negligence

Although privity of contract is not strictly required for a duty of care to arise between an attorney and a third party, the circumstances here do not fit analogously within the recognized exceptions in the decisional law. For example, there is no evidence plaintiffs were express or intended third-party beneficiaries of defendant's retainer agreement with the McDonald faction. (*Zenith Ins. Co. v. O'Connor* (2007) 148 Cal.App.4th 998, 1008 ["An essential predicate for establishing an attorney's duty of care under an 'intended beneficiary' theory is that *both* the attorney … and the client … must have intended [the third party] to be a beneficiary of legal services [the attorney] was to render."].) Defendant was retained to provide advice and represent the faction with respect to the intra-tribal dispute over governance of the Tribe—not to supply advice or opinions for the benefit of the faction's employees, which is not analogous to situations where an attorney is retained to draft a will for the benefit of named beneficiaries. (Cf. *Lucas, supra*, 56 Cal.2d at p. 590 ["Since … the main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries."].) Plaintiffs' reliance on *Paul v. Patton* (2015) 235 Cal.App.4th 1088 and *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304 is misplaced, as these cases relate to the duty of care an attorney owes to intended beneficiaries of a trust or will document.

Additionally, there is no evidence the primary purpose for which the McDonald faction retained defendant was to create a benefit in favor of plaintiffs as police officers for the faction's police force. This aligns it with situations like *Goodman*, where the

attorney's work for the client was not meant to benefit the nonclient plaintiff, and no duty of care was recognized. (*Goodman, supra*, 18 Cal.3d at pp. 344–345.) Similarly, in *Johnson v. Superior Court* (1995) 38 Cal.App.4th 463, the court concluded an attorney owed no duty to nonclient limited partners under a third-party beneficiary theory where the general partner hired the attorney for purpose of swindling his partners rather than to create a benefit for them. (*Id.* at p. 472.) Here, defendant was retained in February 2013, well before the competing faction started occupying the gaming offices in September 2014. There is evidence defendant gave advice to *his client*, and supplied legal opinions on behalf of his client in the emails to Slovak, about the faction's authority and its police force's authority to act under the eviction ordinance, but nothing indicates the primary purpose of that email or defendant's overall engagement with the McDonald faction was to create a benefit in favor of plaintiffs.

The fact that plaintiffs potentially could or would incidentally benefit from defendant's competent advice to and representation of the faction is not enough to extend the duty of competence and loyalty to plaintiffs. (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 832; see *Moore, supra*, 109 Cal.App.4th at pp. 1299–1300, 1307 [attorney does not owe duty to *possible* will beneficiary who might benefit from attorney's duty to ensure testator is competent to execute will]; *St. Paul Title Co. v. Meier* (1986) 181 Cal.App.3d 948, 951–952 [attorney representing buyer in real estate transaction has no duty to escrow company in drafting escrow instructions].)

We conclude the balance of policy considerations identified in *Biakanja* does not favor extending a duty of care under the circumstances presented for reasons very similar to those presented in *Burger v. Pond* (1990) 224 Cal.App.3d 597 (*Burger*). In *Burger*, a husband retained an attorney to handle divorce proceedings against the husband's first wife. (*Id.* at p. 599.) At the time he was retained, the attorney knew the husband planned to remarry another woman and have children with her as soon as his first marriage was dissolved. (*Ibid.*) The court concluded the attorney was not liable in negligence to the

second wife when, as a result of the attorney's negligence, dissolution of the first marriage was set aside and invalidated the client's marriage to the second wife. (*Id.* at p. 602.) In holding the attorney had no duty of care to the second wife, the court emphasized the transaction between the husband and the attorney was not intended to benefit or affect the plaintiff—i.e., the second wife. (*Id.* at p. 605.) "Any benefit to, or affect on, [the] plaintiff resulted not as an intended objective or purpose of the legal services [the attorney] was retained to perform, but rather, from [the] plaintiff's relationship with [the client]." (*Ibid.*)

The court in *Burger* went on to explain that "sound considerations of policy" militated against the imposition of a duty of care in that case, which we conclude also exist here. (*Burger, supra*, 224 Cal.App.3d at p. 605.) Specifically, attorneys must have undivided loyalty to their clients, which should not be diluted by a duty owed to some other person. (*Ibid*.) The court explained that a marital dissolution is "rife" with instances in which the client's interests and those of the client's future spouse may diverge, but "the loyalty demanded by the attorney-client relationship dictates that the attorney consider only the interests of the client." (*Id.* at p. 606.) To extend the attorney's liability to the second wife for alleged professional negligence in handling the husband's divorce would result in "'both "an undue burden on the profession" [citation] and a diminution in the quality of legal services received by the client.'" (*Ibid.*)

Like in *Burger*, the McDonald faction's retention of defendant was not intended to benefit plaintiffs. Any benefit to or effect on plaintiffs was not an objective or purpose of the legal services defendant was engaged to perform for his client; they stemmed from plaintiffs' employment relationship with the McDonald faction. (See *Goonewardene, supra*, 6 Cal.5th at pp. 839–840 [payroll company had no special relationship with employer's employees that would support imposition of duty of care for alleged negligence in calculating wages due].)

As to the foreseeability of harm to plaintiffs, it is reasonably foreseeable that if defendant's opinions and advice to the faction about its authority to act as the governing Tribal Council and to create a police force were infirm, tribal police officers acting under that faulty authority could be subject to the damage that occurred here. But foreseeability is not sufficient on its own to impose a duty of care: "'"Foreseeability" … "is endless because [it], like light, travels indefinitely in a vacuum."' [Citation.] '"[It] proves too much.… Although it may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for non-physical harm." … It is apparent that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury…."' (*Bily, supra*, 3 Cal.4th at pp. 398–399.)

Even a high degree of foreseeability that the nonclient will suffer downstream effects of infirm or incompetent representation of the client is, by itself, an insufficient basis to extend the attorney's duty of care to a nonclient for purposes of negligence or malpractice claims where to do so would produce an undue burden on the profession and a diminution of the quality of legal services rendered to the client. (*Burger, supra*, 224 Cal.App.3d at p. 605 ["Any benefit to, or affect on, [the] plaintiff resulted not as an intended objective or purpose of the legal services [the attorney] was retained to perform, but rather, from [the] plaintiff's relationship with [the client]."]; *Schick v. Lerner* (1987) 193 Cal.App.3d 1321,1331 [attorney for psychologist owed no duty of care to psychologist's client when attorney advised psychologist he could execute declaration containing confidential information disclosed by the client in therapy].) Other policy concerns must be considered in addition to foreseeability.

Among these is the attorney's duty to the client. The loyalty demanded by the attorney-client relationship dictates the attorney consider only the interests of its client. (*Burger, supra*, 224 Cal.App.3d at p. 605.) Here, the McDonald faction had divergent interests from plaintiffs, particularly as it pertained to the eviction at issue. As defendant

points out, the McDonald faction had an interest in evicting the Lewis faction from the gaming offices to assert its control and to maintain the gaming records that were perceived as necessary to operate the Tribe's casino. The police force employees' primary interest regarding the eviction, according to plaintiffs' declarations, was to avoid arrest and prosecution while working at the behest of the McDonald faction. Due to the inherent conflict of interest, extending a duty of care to plaintiffs would potentially impede defendant's ability to provide loyal and quality representation to his client.

As our high court explained in *Goonewardene*, extending a payroll company's duty of care to its client's employees may distort the payroll company's performance to its client. (*Goonewardene, supra*, 6 Cal.5th at p. 840.) If, for example, the meaning or scope of a labor statute or wage order is ambiguous or uncertain, the payroll company may, given the generally greater liability in a tort action, place the employee's interest above those of the employer with whom the payroll company has directly contracted. (*Ibid.*) Analogously, the same type of issue arises here given the potential conflict of interest—if defendant were made liable to his client's employees in the event his legal advice proved incorrect regarding something that related to the employees, he might place the employee's interests above those of his own client, or it might otherwise impede his duty of loyalty to his client.

Extending an attorney's liability to nonclients who provide a service to the client through an employment relationship, would, like in *Burger*, result in an undue burden on the profession and a diminution of the quality of legal services rendered to the client. (*Burger, supra*, 224 Cal.App.3d at p. 606; see *Goodman, supra*, 18 Cal.3d at p. 344 ["To make an attorney liable for negligent confidential advice not only to the client who enters into a transaction in reliance upon the advice but also to the other parties to the transaction with whom the client deals at arm's length would inject undesirable self-protective reservations into the attorney's counselling role."].)

Further, declining to recognize a duty of care in this situation does not impede the policy of preventing future harm. Dissimilar to a will beneficiary, defendant's purported negligence was not discoverable only after the client has died; this is not a situation where recovery is precluded if the intended beneficiary were not allowed to recover. (See, e.g., *Lucas, supra*, 56 Cal.2d at p. 589; accord, *Heyer v. Flaig* (1969) 70 Cal.2d 223, 228, disapproved on another ground in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617.) Here, the client is still available and may hold defendant liable for any failure to perform his duties with reasonable competence; the goal of promoting competence and skill among attorneys in the performance of their duties is not diminished by refusing to extend the duty of care to plaintiffs in this situation. (*Burger, supra*, 224 Cal.App.3d at p. 606; *Goonewardene, supra*, 6 Cal.5th at p. 839 [as payroll company is presumably liable to the employer in negligence for failing to comply with applicable labor statutes and wage orders, imposing a duty on the payroll company to the employees will not appreciably increase the payroll company's incentive to avoid negligent conduct with respect to compliance with those applicable laws].)

In sum, there is little benefit, and considerable risk, to imposing a broad duty plaintiffs seek to establish. The strong public policy in maintaining and strengthening the attorney-client relationship weighs against the imposition of imposing a duty to a nonclient under the circumstances presented here. (*Goodman, supra*, 18 Cal.3d at p. 344.) This is especially so where the deterrent effect is negligible as the attorney is already obligated to act with due care in its relationship with the client. Defendant had no professional duty of care to plaintiffs for purposes of negligence and malpractice, and summary judgment was properly granted as to those claims.

3. No Duty of Care: Negligent Misrepresentation

"'The elements of a negligent misrepresentation are "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable

reliance on the misrepresentation, and (5) resulting damage." [Citation.] Negligent misrepresentation does not require knowledge of falsity [or an intent to deceive].'" (*Borman v. Brown* (2021) 59 Cal.App.5th 1048, 1060–1061; accord, *Tindell v. Murphy* (2018) 22 Cal.App.5th 1239, 1252; *Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 127.)[15] Although no claim entitled *negligent misrepresentation* was expressly pleaded, the allegations organized under the claim characterized as fraud set out all the elements of a claim for negligent misrepresentation.

Relying heavily on *Roberts*, plaintiffs argue an attorney owes third parties a professional duty of care for opinions rendered to the attorney's client that contain material misrepresentations when there is reason to believe those opinions will be shared with a third party. (*Roberts, supra*, 57 Cal.App.3d at p. 111.) Plaintiffs argue defendant gave inaccurate and incomplete legal opinions to the McDonald faction, which defendant should have reasonably expected would reach the tribal police officers and, thus, is liable under a claim for negligent misrepresentation.

In *Roberts*, a lender loaned money to a partnership, but the loan was not repaid. The lender sued the attorneys retained by the partnership, alleging they had negligently prepared and delivered to their client for transmission to the lender an opinion letter expressing the erroneous view the partnership was a general partnership. (*Roberts, supra*, 57 Cal.App.3d at pp. 107–108.) The court held the complaint stated a cause of action against the attorneys for negligent misrepresentation observing, "a legal opinion intended to secure benefit for the client, either monetary or otherwise, must be issued with due care, or the attorneys who do not act carefully will have breached a duty owed

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15 Although some courts have stated "there is no requirement of intent to induce reliance" with respect to negligent misrepresentation (see, e.g., *Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 845; *Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519), as explained in *Borman v. Brown, supra*, 59 Cal.App.5th at page 1060, these courts likely intended to state that an intent to *defraud* is not a required element of negligent misrepresentation, setting it apart from a fraud claim.

to those they attempted or expected to influence on behalf of their clients." (*Id.* at p. 111.) Later, in *Goodman*, the Supreme Court distinguished *Roberts* as a case where "an attorney gives his client a written opinion with the intention that it be transmitted to and relied upon by the plaintiff in dealing with the client." (*Goodman, supra*, 18 Cal.3d at p. 343, fn. 1.) The attorney was held to owe a duty of care "because the plaintiff's anticipated reliance upon it is 'the end and aim of the transaction' [citation]." (*Ibid.*, quoting *Glanzer v. Shepard, supra*, 233 N.Y. at pp. 238–239.)

Here, unlike in *Roberts*, there is no evidence defendant transmitted any opinions or advice to his client for the purpose of, or with the intention that, it be transmitted and relied upon by plaintiffs. The ordinances defendant drafted for the faction do not contain any statement of opinion or advice. According to defendant's declaration, they were drafted in response to the Lewis faction's occupation of one of the governmental buildings on the reservation—i.e., not in anticipation of the October 9, 2014, eviction effort. Indeed, the Lewis faction did not begin its occupation of the casino's gaming commission offices until sometime in September 2014. Moreover, even to the extent the ordinances were drafted in anticipation of the October 2014 event, that still supplies no evidence they were prepared for the benefit of plaintiffs such that plaintiffs' anticipated reliance was the "'end and aim of the transaction.'" (*Goodman, supra*, at p. 343, fn. 1.)

The same is true of defendant's emails to Slovak, particularly the email sent on September 14, 2014. Defendant's deposition transcript indicates these emails were precipitated by calls from Oliveira, and were meant to communicate to the sheriff that Oliveira had been hired by the faction and to reiterate the faction's position with respect to its police force and the self-help eviction ordinance. From this context, the emails were prepared as an attempt to prevent any interference by the sheriff with actions the McDonald faction and its police force might take with respect to the self-help ordinance, not to benefit plaintiffs. There is also no objective evidence defendant knew or believed it would be shared with plaintiffs—the email was sent before plaintiffs were hired, and

before any plan of eviction was completed by Oliveira. Indeed, plaintiffs did not receive it until it was produced in this litigation. Moreover, while Levitan was copied on the September 14, 2014, email, that fact does not indicate anything with respect to plaintiffs. Defendant knew Levitan was another attorney for the McDonald faction, and nothing indicates Levitan's inclusion was for any purpose besides including him on a confidential communication with an entity potentially adverse to their shared client. Unlike in *Roberts*, where the attorney was alleged to have known the opinion letter would be shared with the plaintiff to induce it to make a loan, sharing this email communication with Levitan supports no reasonable inference defendant knew it would be communicated to plaintiffs and that he prepared it for them to rely upon. (*Roberts, supra*, 57 Cal.App.3d at p. 107.)

Second, as observed by our high court in *Goonewardene*, "[t]o our knowledge, the only case that has indicated that a negligent misrepresentation cause of action may be permissible even though a negligence cause of action has been rejected because the relevant policy considerations weigh against the recognition of a duty of care is *Bily, supra*, 3 Cal.4th 370." (*Goonewardene, supra,* 6 Cal.5th at p. 842.) "In *Bily*, the court concluded, based upon a number of policy considerations, that 'an auditor's liability for general negligence in the conduct of an audit of its client['s] financial statements is confined to the client, i.e., the person who contracts for or engages the audit services' and that the auditor owes no duty of care to third parties who may have relied on the audit report and thus such third parties may not maintain a negligence action against the auditor. (3 Cal.4th at p. 406.) At the same time, however, the court in *Bily* held that a narrow class of third party users of audit reports may sue the auditor for negligent misrepresentation so long as they 'are specifically intended beneficiaries of the audit report who are known to the auditor and for whose benefit it renders the audit report.' (*Id.* at p. 407.)" (*Goonewardene, supra*, at p. 842.)

Even under the narrow category of negligent misrepresentation claims recognized in *Bily*, that case does not support the extension of a professional duty of care to third parties in this context. As discussed above, there is simply no evidence plaintiffs were intended beneficiaries of defendant's engagement with the McDonald faction. Even to the extent some of defendant's advice or opinions to his client reached plaintiffs—of which there is no admissible evidence—there is no evidence from which to infer that advice was given with the purpose of benefitting plaintiffs, which is what a negligent misrepresentation claim under *Bily* requires. (*Bily, supra*, 3 Cal.4th at p. 410 [adopting "'intent to benefit'" language of the Rest.2d Torts, § 552, com. (h), requiring indication a supplier of information has undertaken to inform and guide a third party with respect to an identified transaction or type of transaction].) Nothing here suggests defendant undertook any actions to inform and guide the tribal police force with respect to the eviction. Absent this, there is no basis to extend defendant's professional duty of care to plaintiffs for purposes of negligent misrepresentation.

IV. Fraud

Plaintiffs' final cause of action states a claim for fraud regarding statements defendant purportedly made to plaintiffs during meetings between October 1–9, 2014, about the McDonald faction's authority and that of the tribal police to conduct the October 9, 2014, eviction, including advising plaintiffs that they would not face any adverse legal consequences or charges so long as they followed defendant's directions.

To establish a claim for fraudulent misrepresentation, the plaintiff must prove (1) the defendant represented to the plaintiff an important fact was true; (2) the representation was false; (3) the defendant knew the representation was false when the defendant made it, or the defendant made the representation recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in

causing that harm to the plaintiff. (CACI No. 1900; see *Aton Center, Inc. v. United Healthcare Ins. Co.* (2023) 93 Cal.App.5th 1214, 1245–1246.)

A. Defendant's Initial Burden

Defendant argues in his motion that he never communicated with plaintiffs and never rendered any opinions regarding the authority of the tribal police to perform the eviction that led to this lawsuit. Based on these facts, defendant argues plaintiffs could not establish defendant intended to induce plaintiffs to rely on any statement of fact or opinion rendered to defendant's client. The trial court granted the motion as to the fraud claim, concluding there was no disputed material fact as to whether defendant communicated any opinions of fact to plaintiffs.

Defendant produced declaration evidence supporting the fact that he had never represented plaintiffs, had no communications with them whatsoever, and had never rendered any advice or opinions to the McDonald faction, Oliveira, or plaintiffs regarding the eviction on October 9, 2014. This evidence sufficiently states a prima facie case with respect to two elements of the fraud claim. It indicates defendant communicated no representation of fact to plaintiffs, and defendant made no statement of fact with an intent that plaintiffs rely on it.

B. No Disputed Issue of Fact

Plaintiffs argue that simply because defendant did not make his fraudulent misrepresentations directly to plaintiffs does not preclude recovery. (*Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 94 ["a knowingly false statement is no less actionable because it was made to an intermediary who then *conveyed it* to the party ultimately injured"].)

"California follows section 533 of the Restatement Second of Torts in imposing liability upon the maker of a fraudulent misrepresentation to A who intends that A repeat it to B, where B is the actor and injured party." (*The MEGA Life & Health Ins. Co. v. Superior Court* (2009) 172 Cal.App.4th 1522, 1530.) Under section 533 of the

Restatement Second of Torts, the maker of a fraudulent misrepresentation is subject to liability to another who acts in justifiable reliance upon it if the misrepresentation, "although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct …."

As already explained, however, the admissible evidence does not show the advice and opinions given to defendant's client were communicated to plaintiffs, even through an intermediary—e.g., Oliveira and Levitan. The ordinances defendant drafted were given to plaintiffs, but the ordinances make no representations about whether the McDonald faction was authorized to certify such ordinances or that the tribal police force was properly formed and/or whether it had the authority to conduct the eviction on October 9, 2014. The ordinances also do not address anything regarding whether the tribal police officers would be subject to arrest and prosecution. Nothing suggests the ordinances were drafted for the purpose of plaintiffs' reliance.[16] As for defendant's

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16 The crux of plaintiffs' claim against defendant is that, regardless of whether he gave any advice or opinion about this specific eviction operation, he provided the ultimate legal underpinning for the October 9, 2014, eviction, which was that the McDonald faction was the legitimate Tribal Council for the Tribe. That opinion was not communicated by the ordinances—they were just a mechanism by which the McDonald faction was exercising its purported authority. Moreover, defendant's opinion on the legitimacy of the McDonald faction as the governing Tribal Council was subject to an ongoing and well-known dispute. Even plaintiffs' declarations demonstrate that, due to the dispute, the officers were concerned about the McDonald faction's authority, and, as a result, that of its police force. Defendant's opinion on that issue, especially in the context of an unsettled legal dispute, could not have been understood as a guarantee. This is especially so when the eviction operation document Oliveira prepared indisputably contained a warning that local law enforcement did not understand the authority of the Tribe (or the McDonald faction), and there was a potential plaintiffs would be arrested and charged for participating in the eviction action. There is also no factual dispute plaintiffs knew defendant's opinion about the authority of the McDonald faction, expert attorney or not, was in question and vigorously disputed within the Tribe and not necessarily accepted by local law enforcement, either. Although plaintiffs' justifiable reliance was not placed at issue by defendant's motion for summary judgment, the evidence (considering all of plaintiffs' declaration evidence for its nonhearsay reliance purpose) reveals fundamental flaws plaguing any effort to establish a disputed issue of material fact on this element.

emails to Slovak, there is no evidence they were ever sent to plaintiffs outside of this litigation, and there is no evidence the emails were written with the knowledge or expectation they would be shared with plaintiffs. Defendant's deposition testimony supports an inference they were sent to a potentially adverse party on behalf of defendant's client to avoid any interference with the McDonald faction's ability to enforce its self-help ordinance.

The facts here are unlike those in *Varwig v. Anderson-Behel Porsche/Audi, Inc.* (1977) 74 Cal.App.3d 578 (*Varwig*), where an auto dealer (Anderson-Behel) resold a car with defective title to another dealer, knowing the second dealer (Autocar) intended to sell the car. (*Id.* at pp. 579, 581.) When Autocar resold the car to the plaintiff, and the car was repossessed by the holder of good title, the plaintiff sued Anderson-Behel and Autocar. (*Id.* at p. 580.) Although Anderson-Behel had not made any representation to the plaintiff and was not a party to the contract between the plaintiff and Autocar, the appellate court concluded there was sufficient evidence of a disputed issue of fact that Anderson-Behel knew its statements of good title would be passed on to the plaintiff by Autocar. (*Id.* at p. 581.) The sales contract and Anderson-Behel's concession it had "'wholesaled'" the car to Autocar evidenced Anderson-Behel's knowledge the car would be resold and that representations of good title would be made to the plaintiff by Autocar. (*Ibid.*)

Varwig illustrates that the intent to deceive—i.e., induce reliance—on an indirect misrepresentation theory must be evidenced by something more than awareness of the possibility that a misrepresentation might be repeated to a particular class of persons. The speaker of the misrepresentation must know or expect the misrepresentation will be repeated to a third person for the purpose of inducing reliance. There are no similar facts here to infer defendant's knowledge or expectation that his advice to or on behalf of his client would be repeated to plaintiffs for them to rely upon. There was no writing or other evidence like the sales contract in *Varwig* indicating defendant knew the McDonald

faction or its agents intended to forward or direct defendant's advice or opinions to plaintiffs for their reliance, and nothing indicates defendant stood to gain from having his communications repeated to plaintiffs.

In sum, without evidence that any of defendant's statements of legal advice or opinions reached plaintiffs, even indirectly, we agree with the trial court that defendant is entitled to summary judgment on the fraud claim. Beyond that, there is no evidence from which it can be inferred defendant gave any advice or opinions to his client with any intent or expectation those statements would be repeated to plaintiffs for the purpose of inducing their reliance. It is not enough that defendant was aware of the possibility his advice or opinions to his client would be repeated to plaintiffs—there had to be evidence he provided the legal opinions or advice with knowledge or an expectation it would be repeated to plaintiffs and that it would influence their conduct. Absent such evidence, plaintiffs have not established a disputed issue of material fact regarding their fraud claim.

DISPOSITION

The court's summary judgment order is affirmed. Defendant is entitled to his costs on appeal. (Cal. Rules of Court, rule 2.278(a)(1), (2).)

MEEHAN, J.

WE CONCUR:

POOCHIGIAN, Acting P. J.

DETJEN, J.