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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HIROSHI HORIIKE, Plaintiff and Appellant, v. COLDWELL BANKER RESIDENTIAL BROKERAGE COMPANY, et al., Defendants and Respondents.	B290819 (Los Angeles County Super. Ct. No. SC110477)

APPEAL from judgment of the Superior Court of Los Angeles County, Gerald Rosenberg, Judge. Affirmed.

Schorr Law, Zachary D. Schorr, Stephanie C. Goldstein, for Plaintiff and Appellant.

Wilson Elser Moskowitz Edelman & Dicker, Martin K. Deniston, for Defendant and Respondent Coldwell Banker Residential Mortgage Company.

Klinedinst, Neil Gunny, Robert M. Shaughnessy, for Defendant and Respondent Christopher Cortazzo.

Christopher Cortazzo, a salesperson licensed under Coldwell Banker Residential Brokerage Company who was hired by the seller of residential property, told potential buyer Hiroshi Horiike and the Coldwell Banker salesperson assisting him that the property had approximately 15,000 square feet of living areas. After Horiike purchased the property, he learned that public records listed far less square footage for the house. He sued Cortazzo and Coldwell Banker for misrepresentation, intentional concealment, and breach of fiduciary duty. The trial court granted nonsuit on the cause of action against Cortazzo for breach of fiduciary duty, on the ground that the seller's agent did not owe a fiduciary duty to the buyer. This appellate court reversed the judgment and remanded for a new trial on the claim for breach of fiduciary duty. The Supreme Court affirmed, holding that Cortazzo had the same fiduciary duty to the buyer and the seller as Coldwell Banker to learn and disclose material information affecting the property's price or desirability, including facts that Horiike might reasonably have discovered himself. (*Horiike v. Coldwell Banker*

Residential Brokerage Co. (2016) 1 Cal.5th 1024, 1039–1042 (*Horiike*).)

At the conclusion of a second trial, the jury found Cortazzo did not breach a fiduciary duty to Horiike, did not make a false representation of fact, and did not intentionally fail to disclose a fact that Horiike could not reasonably have discovered. Horiike appeals from the judgment as to breach of fiduciary duty, contending that: (1) the trial court should have excluded expert testimony that Cortazzo did not owe a fiduciary duty to Horiike; (2) the trial court should have given Horiike's proposed jury instructions on dual agency and fiduciary duty; (3) the trial court should have directed a verdict that Cortazzo had a fiduciary duty to Horiike; (4) Cortazzo breached his fiduciary duty as a matter of law by failing to provide certain information to Horiike; and (5) the jury's findings do not establish the errors were harmless.

We conclude that any errors in the rulings about Cortazzo's fiduciary duty were harmless, because there was no evidence he breached his fiduciary duty in light of the jury's findings on other claims. Specifically, the jury found Cortazzo's statement that the property had approximately 15,000 square feet of living areas was not false. Horiike argued that Cortazzo was required to disclose documents that listed far lower square footage for the house, but the measurements in those documents were incomplete, misleading, and not material, considering the property had approximately 15,000 square feet of living areas. Additional advisements to verify the square footage were also not

material, since the square footage information that Cortazzo provided was not false. The errors that Horiike raised on appeal about the existence of Cortazzo's fiduciary duty were harmless, because given the jury's findings there was no evidence from which to conclude that Cortazzo breached his fiduciary duty. Therefore, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Undisputed Evidence

A. Construction of the Home

In 1998, Denis and Margaret Brown, as trustees of their family trust, hired architect Carl Volante to design a residence in the City of Malibu.[1] The city limited the total development square footage to 11,172 square feet. At the time, however, basements were not included in the total development square footage and did not count as a story of the house.

The residence that Volante designed is an irregular shape with three levels, including a basement level, an attached guest house, and two garages. The building permit listed total square footage of 11,050 as follows: 9,224 square feet for the single-family residence, 746 square feet for the

[1] Because more than one participant shares the last name Brown, they will be referred to individually by their first names for ease of reference.

guest house, 1,080 square feet for garage space, and no square footage for the basement level.

The basement has finished rooms, including a family room, billiard room, bar, and bathroom. After the house was completed, the city's ordinances were revised to include basements and areas covered with an impermeable surface in the total development square footage.

B. Initial Sales Effort

Cortazzo is a salesperson in Coldwell Banker's Malibu West office. In July 2006, the trust engaged Cortazzo to sell the Malibu property. Denis told Cortazzo that Volante said the house was approximately 15,000 square feet.

Cortazzo created a listing on a multiple listing service (MLS). The listing initially populated with information from the public record that the living area was 9,434 square feet, the residence was one story, the parking area was a carport, and there was no pool. Cortazzo changed the listing information to state that the property was 15,000 square feet and that the owner was the source of the square footage information. He added a remark: "Situated on an ocean view knoll with over 5 acres of landscaped grounds, this newly completed custom home designed by renowned Malibu architect Carl Volante offers approximately 15,000 sq ft. of living areas." At the bottom of the listing, an advisement stated, "Broker/Agent does not guarantee the accuracy of the square footage, lot size or other information concerning the

conditions or features of the property provided by the seller or obtained from Public Records or other sources. Buyer is advised to independently verify the accuracy of all information through personal inspection and with appropriate professionals."

Cortazzo prepared a marketing flyer that also stated "Situated on an ocean view knoll with over 5 acres of landscaped grounds, this newly completed custom home designed by renowned Malibu architect Carl Volante offers approximately 15,000 sq ft. of living areas."

The original listing price was $16,750,000. In December 2006, Cortazzo withdrew the listing. Cortazzo listed the property again in January 2007, at a reduced price of $14,995,000.

Denis asked Volante to write a letter with information about the size of the house under the current city ordinances. Volante gave a letter to Denis on February 1, 2007, addressed "To Whom It May Concern." He made several statements about the property, including: "The size of the house, as defined by the current Malibu building department ordinance, is approximately 15,000 square feet;" "The maximum size house allowed to be built in Malibu today is 11,270 square feet;" and "Finding a lot of comparable size, view and location in Malibu is practically impossible today."

On February 15, 2007, potential buyers submitted an offer through their agent June Ahn. The sellers and the buyers agreed on a purchase price of $13,500,000. Cortazzo

prepared a real estate transfer disclosure statement on March 14, 2007. In the space for disclosure by the seller's agent based on a visual inspection, Cortazzo wrote, "Adjacent parcels are vacant land and are subject to future development/Buyer is advised to hire a qualified specialist to verify the square footage of home. Broker does not guarantee or warrant square footage." Cortazzo also faxed Volante's letter to the buyers' agent on March 15, 2007, with a handwritten cover sheet stating, "Please find attached the letter from the Architect stating that the house is apx 15,000 square feet. I suggest you hire a qualified specialist to verify the square footage."

After reviewing the documents, Ahn requested the certificate of occupancy and the architectural plans. Ahn noted on the real estate disclosure statement, "Architectural plans have been requested from the seller, but not available at the present time, agents have highly recommended that the buyer have a professional inspect[ion] or investigation at the buyer's cost, prior to close of escrow."

The buyers asked to extend the date for the property inspection to March 23, 2007, and the date for removal of contingencies to March 29, 2007. The sellers would not extend the date to remove contingencies beyond March 23, 2007. The transaction was cancelled.

In July or August 2007, the listing price was reduced to $12,995,000. Cortazzo changed the MLS entry to state that the approximate square footage was "0/OT," by which he

meant other He deleted the square footage from the remarks.

C. Sale to Horiike

Horiike is a resident of Hong Kong. In 2003, he began working with Chizuko Namba, a salesperson in Coldwell Banker's Beverly Hills office, to buy a residential property in Los Angeles. Namba arranged to view the property with Horiike and his assistant Tsutomo Yokoi on November 1, 2007. At the house, Cortazzo gave them copies of the MLS sheet stating the square footage was zero and the marketing flyer stating the home offered approximately 15,000 square feet of living areas.

During the tour, Namba translated for Horiike and Yokoi. Cortazzo stated several times that the home had 15,000 square feet of living area. He explained that after the house was built, the city changed the building regulations. Cortazzo explained that the maximum square footage was limited to about 11,000 square feet, so no house as large as 15,000 square feet could ever be built again in Malibu. Namba translated his explanation, and Horiike and Yokoi nodded to indicate that they understood.

While they toured the property, Horiike and Yokoi were not thinking about which areas were considered living areas or included in the square footage. Horiike was familiar with real estate terms such as "gross square footage" and "living area square footage." To Horiike, the

term "living area" meant the area that a person could actually live in. Anything outside of the house, such as a garage, a patio, or a machine room, would not be considered living area. As they walked through the billiard room and the media room on the basement level, Horiike assumed the rooms were part of the living area. Horiike did not ask what areas of the home were included in the living area, because he thought the term was common knowledge.

Horiike, Yokoi and Namba saw the property again that night. Namba prepared a purchase agreement for an offer, which Horiike signed on November 1, 2007, before leaving on a flight to Hong Kong. The purchase agreement stated Coldwell Banker was the agent of the buyer exclusively.

Horiike also signed a "Buyer's Inspection Advisory" prepared by Namba. The form advised Horiike to have professionals conduct investigations of the entire property. It stated that numerical statements about the square footage were an approximation, had not been verified by the sellers, and could not be verified by the brokers. A box directly above the signature line stated that the buyer and seller acknowledged the broker was not responsible for verifying square footage, the representations of others, or information in reports. Horiike did not read the documents before he signed them.

After a counteroffer, Horiike and the trustees agreed on a purchase price of $12.25 million. The trustees signed the purchase agreement on November 7, 2007, and escrow was opened.

Cortazzo provided multiple documents to Namba, including the building permit for the property. Horiike acknowledged receipt of the reports, including the permit, on November 14, 2007. Horiike received a "Statewide Buyer and Seller Advisory" form, advising him that only an appraiser or surveyor could reliably confirm the square footage. It noted that representations in a MLS, advertisement, and from property tax assessor records were often approximations, or based on incomplete or inaccurate records. It warned that the broker had not verified any such representations, and the broker recommended the buyer hire an appraiser or surveyor if the buyer wanted information about the exact square footage. The box directly above the parties' signatures contained the acknowledgement that the broker was not responsible for verifying the square footage.

Horiike received a form entitled "Confirmation Real Estate Agency Relationships." The form stated Coldwell Banker, as the listing agent, was not exclusively the agent of the seller, but was the agent of both the buyer and the seller. It also stated that Coldwell Banker, as the selling agent, was the agent of both the buyer and the seller, not exclusively the agent of the seller or the buyer. Cortazzo signed the form on behalf of Coldwell Banker as the listing agent and Namba signed the form on behalf of Coldwell Banker as the selling agent.

Another form Horiike received was "Disclosure Regarding Real Estate Agency Relationships," which explained that "[a] real estate agent, either acting directly or

through one or more associate licensees, can legally be the agent of both the Seller and the Buyer in a transaction," in which case, the agent owes "[a] fiduciary duty of utmost care, integrity, honesty and loyalty in the dealings with either the Seller or the Buyer." Cortazzo signed the form on behalf of Coldwell Banker.

Horiike, as the buyer, and Cortazzo, on behalf of Coldwell Banker, signed the "Disclosure and Consent for Representation of More Than One Buyer or Seller." The form stated, "A real estate broker, whether a corporation, partnership or sole proprietorship, ('Broker') may represent more than one buyer or seller provided the Broker has made a disclosure and the principals have given their consent. This multiple representation can occur through an individual licensed as a broker or through different associate licensees acting for the Broker. The associate[] licensees may be working out of the same or different office locations. [¶] . . . [¶] Buyer and Seller understand that Broker may represent more than one buyer or seller and even both buyer and seller on the same transaction[.] [¶] . . . [¶] In the event of dual agency, Seller and Buyer agree that: (a) Broker, without the prior written consent of the Buyer, will not disclose to Seller that the Buyer is willing to pay a price greater than the offered price; (b) Broker, without the prior written consent of the Seller, will not disclose to the Buyer that Seller is willing to sell property at a price less than the listing price; and (c) other than as set forth in (a) and (b) above, a Dual Agent is obligated to disclose known facts

materially affecting the value or desirability of the property to both parties."

Horiike received a real estate transfer disclosure statement. In the space for an agent's disclosure based on a visual inspection, Cortazzo wrote, "See attached Agent's Inspection Disclosure." Cortazzo prepared a three-page "Agent Visual Inspection Disclosure." The form stated, "Agent will not measure square footage of lot or improvements, or identify or locate boundary lines, easements or encroachments." The agent was not obligated to pull permits or inspect public records. On the last page of the form, Cortazzo wrote under "Exterior Building and Yard" that the pool tiles at the water level were stained, and under "Other Observed or Known Conditions Not Specified Above," he wrote that the adjacent vacant lots were subject to building.

Horiike signed the disclosure forms on November 16, 2007. He did not read any of the disclosure forms that he was given to sign during escrow; he believed they were standard documents. Escrow closed on December 4, 2007. While preparing for work on the property in May 2009, Horiike reviewed the building permit and was shocked to see the square footage for the house listed as "a little over 9,400 square feet."

The First Trial and Appeal

On November 23, 2010, Horiike filed a complaint against Cortazzo and Coldwell Banker for claims based on misrepresentation and breach of fiduciary duty. A jury trial was held. The trial court granted Cortazzo's motion for nonsuit on the cause of action for breach of fiduciary duty against him, concluding that Cortazzo represented the seller exclusively and did not owe a fiduciary duty to Horiike. The jury returned a special verdict on the remaining causes of action in favor of Cortazzo and Coldwell Banker. The findings were internally inconsistent, however, because the jury found both: that Cortazzo had not made a false representation of material fact to Horiike (in connection with the claim for intentional misrepresentation) but also that Cortazzo had made a false representation of material fact (in connection with the claim for negligent misrepresentation). The jury imposed no liability for the negligent misrepresentation, however, finding that Cortazzo honestly believed, and had reasonable grounds for believing, his representation to be true when he made it.

This appellate court concluded that as a dual agent, Coldwell Banker had fiduciary duties to both buyer and seller, and Cortazzo, as a salesperson under Coldwell Banker's license, owed a duty to Horiike that was equivalent to Coldwell Banker's duty. The Supreme Court affirmed, holding that Cortazzo owed the same fiduciary duty to Horiike as his employing broker Coldwell Banker:

"specifically, to investigate and disclose all facts materially affecting the residence's value or desirability, regardless of whether such facts could also have been discovered by Horiike or Namba through the exercise of diligent attention and observation." (*Horiike*, *supra*, 1 Cal.5th at p. 1035.)

The Second Trial

In preparation for a new trial, Horiike filed a motion in limine to exclude evidence that the custom and practice in the industry at the time of the transaction were different than the legal requirements set forth by the Supreme Court in *Horiike*, *supra*, 1 Cal.5th 1024. The trial court denied the motion, stating that the jury would be instructed on the law and counsel could explain that the jury must follow the law. A jury trial began on March 19, 2018.

A. Additional Evidence Relevant to Fiduciary Duty

1. Malibu Ordinances

Under Malibu building ordinances, "total development square footage" is a measurement of the interior space of the primary and accessory structures, including guest houses, garages, barns, sheds, gazebos and cabanas. The term "living area" is defined as "the interior habitable area of a dwelling unit, including basements and attics, but does not

include a garage or accessory structures." Malibu's Zoning Ordinance Revisions and Code Enforcement Subcommittee, which is a quasi-legislative body for the city, has provided an interpretation of the building ordinances that refers to terraces and balconies as "outdoor living spaces."

2. Volante

The floor plan for construction of the property showed the total habitable square footage was 9,970 as follows: 7,146 square feet for the first floor, 2,078 square feet for the second floor, and 746 square feet for the guest house. No square footage was listed for the rooms on the basement level. The plan also listed nonhabitable square feet of 1,080 for garage space. The total listed for habitable and nonhabitable square footage was 11,030.

When Volante stated that the house was approximately 15,000 square feet under the current Malibu building regulations, he was referring to the total development square footage. He did not use the term "living area" and was not familiar with the city's definition of that term.

3. Horiike

Horiike testified that it is hard to assess the size of the house from a visual inspection, because of its irregular shape and levels. Horiike did not think that Cortazzo had

personally measured the square footage of the house. During the tour, Cortazzo did not discuss any discrepancies among the square footage measurements of the property. He did not explain the term living area, or state which areas were included or excluded from the square footage.

If Horiike had known the property had less than 15,000 square feet of living area, he would have negotiated a lower price or refused to buy it. But he would not have disputed a variation of three to five percent. In other words, he would have considered square footage from 14,250 to 15,750 to be normal, based on Cortazzo's representation that the square footage was approximately 15,000.

4. Namba

Namba was a salesperson for Coldwell Banker from 2001 until 2016. During the tour of the property, Cortazzo did not tell them which areas were included in the 15,000 square feet of living area. She assumed that he used the square footage from the property's public profile. Coldwell Banker trained her to exclude garages and guest houses from the living area square footage.

Namba did not look at the public record or do anything to investigate the square footage of the property prior to the close of escrow. Cortazzo did not point out any discrepancies between his advertisement of the square footage of the living area compared to the public record or the building permit.

Namba did not explain the buyer's inspection advisory to Horiike, although she acknowledged that it was the responsibility of the buyer's agent to explain it to him. Namba received the building permit from Cortazzo, but did not take the time to look at it and simply glanced through it. She did not notice the square footage numbers listed on the building permit. She understood that she was required to give all the information that she had to her client, and she thought Horiike and Yokoi read the permits before escrow closed.

5. Yokoi

Yokoi testified that Cortazzo did not explain which areas of the home were included in the 15,000 square foot of living areas. Cortazzo did not tell them that the public record and the building permit showed the square footage was under 10,000 square feet. Yokoi did not translate any of the documents prepared on November 1, 2007, for Horiike, because Namba said they were standard pre-printed forms used in residential purchase transactions. When Yokoi received the reports from Namba during escrow, he put them straight into a filing cabinet.

6. Torres

Horiike called real estate appraiser Barbara Torres for her expert opinion of the square footage of the property.

Torres does not have a definition of the term "living area," and does not think there is a uniform definition within the appraisal community. The tax assessor's definition of "living area" cannot be compared to her definition as an appraiser.

Torres measured the structures on the property and concluded the total living area was 12,350 square feet. Her measurements included the finished portions of the basement, the first floor, the second floor and the guest house. She excluded the square footage of covered patios, garages, and a utility room. She also deducted square footage attributable to architectural features, inaccessible spaces, and chimneys that did not add to the living area. She counted the square footage of stairwells on one floor only, not both floors.

7. Cortazzo

Cortazzo testified that "living area" is a generic term to describe the square footage of a house; it does not have exactly one meaning. He did not look at the definition in the Malibu ordinance.

Cortazzo did not consider the square footage listed in the public record to be a reliable measurement of the square footage of the house. There were multiple errors in the public record, including the number of stories, the type of parking, and the pool information. Cortazzo did not consider the information on the building permit to be a reliable measurement either, because it excluded the entire

basement level of the home. If the home were built in 2007, the basement level and covered terraces would be included in the city's square footage limit.

Cortazzo thought it was important to disclose discrepancies in the square footage information to the first potential buyers in the real estate disclosure statement. When Cortazzo realized there were discrepancies over the square footage calculation, he changed the MLS listing to say zero square feet, so he could explain the square footage calculation to every person who viewed the house. Cortazzo did not investigate the discrepancies, because he is not licensed as an appraiser and it was not his role.

During Horiike's tour of the home, Cortazzo explained the five areas included in the square footage calculation for the house, which were the covered terraces, the three floors of the house, the two garages and the guest house. He explained that there was a discrepancy between the public records, which reflected square footage under 10,000 square feet, and the size of the home.

Cortazzo understood that Coldwell Banker represented both buyer and seller in the transaction, carrying out the broker's duties through himself and Namba. He gave the building permit to Namba shortly after escrow opened. After looking at the permit, Namba called and asked Cortazzo to explain again the five areas that comprised the total square footage of the house, so that she could explain it to Horiike again. Cortazzo told her the five elements slowly, allowing time for her to write it down. Horiike was advised multiple

times in writing that brokers do not verify square footage, and if he wanted to verify the size, he needed to hire a specialist.

8. Lenkeit

Defendants' expert witness Colin Lenkeit works for Precision Property Measurement (PPM). PPM uses a three-dimensional laser scanner to measure structures that are already built. Lenkeit found the total development square footage of the home under the definition in the 2017 city ordinance was 16,921 square feet, including the garages, basement level, and attached covered terraces. Lenkeit found the square footage of the living area, as defined by the city ordinance, was 14,176 square feet. The measurement of 14,176 square feet included the three floors of the house and the guest house, but did not include garages or covered terraces. Lenkeit did not consider the guest house to be an accessory structure, because the guest house is not detached. The square footage of the three covered patios totaled 1,126.5 square feet. The square footage of unfinished spaces, including garages, totaled 1,618.5 square feet. The living area, patios and unfinished spaces added together resulted in the total development square footage of 16,921.

9. Schmitz

Horiike called development consultant Donald Schmitz as an expert witness. Schmitz was familiar with Malibu's definition of living area. Living area can also be analyzed based on the distinction between finished and unfinished spaces. Some of the areas of the property were not habitable living area, but were finished spaces. Most of the areas of this property, including the garages, were finished.

Schmitz stated that the living area of the property could not be ascertained from the square footage listed on the building permit. Using Lenkeit's measurement of 14,176 square feet of living space, Schmitz excluded voids resulting from architectural features and false walls, omitted an area that extended to the exterior, and counted the stairwells on one floor only, to calculate the total living area was 13,003 square feet. Schmitz found the total development square footage for the home was 16,226 square feet under the standards of the Malibu Municipal Code in 2007.

Schmitz noted that at times, the city referred to attached covered terraces and similar areas as "outdoor living spaces." An outdoor area could be a living space from which to enjoy the day.

9. Wallace

The defendants also called expert witness Alan Wallace. Wallace testified about Cortazzo's fiduciary duties and the standard of care in the real estate industry in 2007.

B. Jury Instructions

Horiike requested a standard instruction on fiduciary duty in the language of CACI No. 4100, modified to state that the defendants owed Horiike a fiduciary duty. Horiike also requested 17 special instructions, including special instructions on dual agency and on the duties of a real estate broker representing a buyer. Horiike sought to have the jury instructions reflect, where appropriate, that a fiduciary duty existed between the defendants and Horiike. He argued that the existence of a fiduciary relationship was a question of law to be determined by the court, and in this case, the Supreme Court already found a fiduciary relationship existed. Defense counsel argued that the jury must decide whether a fiduciary relationship existed, and if Cortazzo had become a fiduciary, the date on which the relationship was established. The court concluded that the jury had to find a fiduciary relationship was established. The court agreed to instruct on fiduciary duty without directing the jury that a fiduciary relationship existed, and denied Horiike's special instructions on the grounds that they were either leading or duplicative.

The trial court instructed the jury on intentional misrepresentation in the language of CACI No. 1900, which required the jury to find that Cortazzo represented a fact was true, but the representation was false. The trial court provided instruction on concealment in the language of CACI No. 1901, which required the jury to find that Cortazzo disclosed some facts to Horiike, but intentionally failed to disclose other facts, making the disclosure deceptive. For negligent misrepresentation, the trial court used CACI No. 1903, which required finding that Cortazzo had represented a fact as true, but the representation was not true, and although Cortazzo may have honestly believed the representation to be true, he had no reasonable grounds for believing the representation was true when he made it.

C. Closing Argument and Judgment

In closing argument, Horiike's counsel explained the different duties that Coldwell Banker and Cortazzo owed to Horiike, including their fiduciary duties arising from dual agency. He also explained that a fiduciary was required to disclose all material information, not simply adverse information. The broker must place himself or herself in the client's position and consider the type of information that the client required to make an informed decision. The broker was equivalent to Cortazzo in this case. Horiike's counsel suggested Cortazzo should have told Horiike about Volante's letter and the issues with the prior potential buyers.

The jury returned a special verdict on April 5, 2018. The jury found that Cortazzo did not breach a fiduciary duty to Horiike. He did not make a false representation of fact to Horiike, and he did not intentionally fail to disclose a fact that Horiike did not know and could not reasonably have discovered. The trial court entered judgment on the jury's verdict on April 25, 2018. Horiike filed motions for judgment notwithstanding the verdict and a new trial, which the trial court denied. Horiike filed a timely notice of appeal from the judgment.

DISCUSSION

Standard of Review

A judgment will not be reversed based on an evidentiary error, unless the court finds the error has resulted in a miscarriage of justice. (*D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 231–232 (*D.Z.*).) Nor will a judgment be reversed for an instructional error unless the error resulted in a miscarriage of justice. (*Rosenfeld v. Abraham Joshua Heschel Day School, Inc.* (2014) 226 Cal.App.4th 886, 899 (*Rosenfeld*).) Evidentiary or instructional error requires reversal only if "'"there is a reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error."' [Citation.] [¶] Thus, a "'miscarriage of justice"' warranting reversal "'should be declared only when the

court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" [Citations.]" (*D.Z. v. Los Angeles Unified School Dist.*, *supra*, 35 Cal.App.5th at pp. 231–232 [evidentiary error]; see also *Rosenfeld*, *supra*, 226 Cal.App.4th at p. 899 [instructional error].)

No Miscarriage of Justice

Assuming, without deciding, that the trial court erred by admitting expert testimony about Cortazzo's fiduciary duty that was contrary to the law, refusing to give at least one correct instruction to the jury that Cortazzo had a fiduciary duty to Horiike, and denying Horiike's motion for a directed verdict on the issue of whether Cortazzo had a fiduciary duty, we conclude the errors were harmless and do not warrant reversal of the judgment. On appeal, Horiike asserted that Cortazzo breached his fiduciary duty by failing to provide certain information, namely, Volante's letter, a handwritten advisement to verify the square footage that he gave prior potential buyers, and an explanation that contradictory square footage measurements existed in publicly recorded documents. We conclude that although Cortazzo had a fiduciary duty to learn and disclose facts that were material to the price and desirability of the property, including facts that were reasonably discoverable by Horiike,

the information that Horiike contends Cortazzo failed to learn and disclose was not material to the transaction in light of the jury's finding that it is not a false statement to say that the property has approximately 15,000 square feet of living areas.

"[O]nly licensed real estate brokers may act as agents in real property transactions. (Bus. & Prof. Code, §§ 10130, 10131.) Real estate licenses may be issued to corporate brokerage firms, such as Coldwell Banker, in which case the corporation is the agent. (*Id.*, §§ 10158, 10159, 10211; 2 Miller & Starr, Cal. Real Estate (4th ed. 2016) § 4:17, p. 4-61 . . . .)" (*Horiike*, *supra*, 1 Cal.5th at p. 1031.) At the time of the transaction in this case, Civil Code section 2079.13, subdivision (d), stated that an agent could act as a dual agent of both the seller and the buyer in a real property transaction, "either directly or through an associate licensee." (Former Civ. Code, § 2079.13, subd. (d), added by Stats. 1995, ch. 428, § 2, pp. 3371–3373.)[2]

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[2] The terminology of Civil Code section 2079.13 has been revised, effective January 1, 2019, to provide that an agent may act as a dual agent for both the seller and the buyer, "either directly or through a salesperson or broker associate." (Civ. Code, § 2079.13., subd. (d), as amended by Stats. 2018, ch. 907, § 38, pp. 5859–5860.) Several provisions of the Civil Code that relate to real estate disclosures were amended effective January 1, 2019, but the Legislature expressly stated in Civil Code section 1102.1, subdivision (d), that none of the amendments were intended to affect a broker's fiduciary duties under existing statutory

It is undisputed that Coldwell Banker was a dual agent, and, as such, owed a fiduciary duty of disclosure to both Horiike and the trust. (*Horiike*, *supra*, 1 Cal.5th at p. 1036.) At the time of the transaction, Civil Code section 2079.13 stated, "When an associate licensee owes a duty to

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or common law, or the duties of a salesperson or broker associate: "Nothing in Assembly Bill 1289 of the 2017–18 Regular Session or Assembly Bill 2884 of the 2017–18 Regular Session shall be construed to affect any of the following: [¶] (1) A real estate broker's duties under existing statutory or common law as an agent of a person who retains that broker to perform acts for which a license is required under this division. [¶] (2) Any fiduciary duties owed by a real estate broker to a person who retains that broker to perform acts for which a license is required under this division. [¶] (3) Any duty of disclosure or any other duties or obligations of a real estate broker, which arise under this division or other existing, applicable California law, including common law. [¶] (4) Any duties or obligations of a salesperson or a broker associate, which arise under this division or existing, applicable California law, including common law, and duties and obligations to the salesperson's or broker associate's responsible broker. [¶] (5) A responsible broker's duty of supervision and oversight for the acts of retained salespersons or broker associates, which arise under this division or other existing, applicable California law, including common law. [¶] For purposes of this subdivision, references to 'existing statutory law' and 'existing, applicable California law' refer to the law as it read immediately prior to enactment of Assembly Bill 1289 of the 2017–18 Regular Session and Assembly Bill 2884 of the 2017–18 Regular Session." (Civ. Code, § 1102.1, subd. (d).)

any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the associate licensee functions." (Former Civ. Code, § 2079.13, subd. (b).)[3] A salesperson's duty in a real property transaction is "equivalent to" the duty of the broker under whom the salesperson is licensed. (*Horiike*, *supra*, 1 Cal.5th at p. 1035.) The California Supreme Court expressly found Cortazzo was responsible for carrying out Coldwell Banker's fiduciary duty to Horiike to learn and disclose facts material to the property's price or desirability, including facts that might reasonably have been discovered by Horiike or Namba through the exercise of diligent attention and observation. (*Id.* at pp. 1039–1042.)

Any error in allowing testimony contrary to the law, declining correct instructions, and refusing to direct that Cortazzo had a fiduciary duty to Horiike was harmless. Cortazzo told Horiike that the property had 15,000 square feet of living areas and the jury found that statement was

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[3] Civil Code section 2079.13, subdivision (a), currently provides in pertinent part, "The agent in the real property transaction bears responsibility for that agent's salespersons or broker associates who perform as agents of the agent. When a salesperson or broker associate owes a duty to any principal, or to any buyer or seller who is not a principal, in a real property transaction, that duty is equivalent to the duty owed to that party by the broker for whom the salesperson or broker associate functions." (§ 2079.13, subd. (a).)

not false. There is ample evidence in the record to support the jury's finding, and Horiike has not challenged the finding on appeal. Cortazzo used the term "living areas" in a general sense, rather than a specific legal sense, and Horiike never considered which areas of the property were included in the square footage or the term "living areas." Several witnesses testified that there was not one correct definition of the term living area. The jury could reasonably have accepted Cortazzo's common sense definition, including covered terraces, in an environment that transitioned from indoor to outdoor living spaces.

Horiike said that he would not have disputed a measurement that was five percent below 15,000 square feet, which is essentially the 14,176 square footage that Lenkeit measured under the definition of living area in the Malibu ordinance. The jury could reasonably reject the suggestion by Horiike's experts to exclude square footage attributable to voids created by architectural features and a machinery room where Horiike stored exercise equipment.

Cortazzo also explained that Malibu building ordinances do not allow for new construction larger than approximately 11,000 square feet, which meant a house of approximately 15,000 square feet could not be built again under the current ordinances. For the size comparison to be meaningful, the measurement of the square footage of the home had to refer to the same total development square footage as the construction limit. In fact, both parties' experts agree that the home has a total development square

footage of more than 16,000 square feet, which could not be built under Malibu ordinances as they exist today. Cortazzo's statement that the property had approximately 15,000 square feet of living areas was between the measurement of living area at 14,176 square feet and the total development square footage of more than 16,000 square feet.

In light of the jury's finding that it was a true statement that the property had approximately 15,000 square feet of living areas, Cortazzo was not required to provide a copy of Volante's letter to satisfy his fiduciary duty to Horiike. The statements in Volante's letter supported Cortazzo's statements and were cumulative of the information that Cortazzo gave Horiike during the tour. Horiike has not shown on appeal that there was any information in Volante's letter that was material to the price or desirability of the property which Cortazzo did not provide.

Horiike contends that Cortazzo breached his duty by failing to provide additional, handwritten advice to verify the square footage as he did for the potential buyers in the prior uncompleted sale. First, Horiike received advice to verify the square footage. The forms provided during escrow advised Horiike multiple times that the agent was not verifying the square footage and he should hire a professional. In addition, Cortazzo provided more extensive disclosure to Horiike than he had in the prior transaction. Cortazzo changed the MLS entry to say that the property

had zero square feet, which was a substantial signal that there were unusual circumstances. Instead of a few sentences written on the real estate transfer disclosure statement as he had done for the prior transaction, he wrote "See attached Agent's Inspection Disclosure" and prepared a three-page "Agent Visual Inspection Disclosure" which included the information that he would not measure square footage. Second, given the jury's findings that Cortazzo's statements were not false, the advice to seek verification of the square footage was not material, because verification would have simply confirmed that the living areas were approximately 15,000 square feet. Horiike's contention that Cortazzo breached his fiduciary duty by not drawing attention again to the need to verify representations about square footage has no merit.

Finally, Cortazzo did not breach his fiduciary duty to Horiike by failing to explain discrepancies in the publicly recorded documents. He provided the building permit, which clearly reflected that a far lower square footage had been assigned for a portion of the project. The square footage shown in the building permit and public record were not material, however, because the number was clearly incomplete, omitting the entire bottom floor of the house. The jury found the representations about the square footage of the living areas were not false. This finding necessarily means the far lower square footage shown for a portion of the house in the publicly recorded documents was not material.

We conclude that any evidentiary and instructional errors concerning the existence of Cortazzo's fiduciary duty to Horiike did not result in a miscarriage of justice, because there was no evidence from which the trier of fact could find that Cortazzo breached his fiduciary duty under the circumstances of this case.

DISPOSITION

The judgment is affirmed. Respondents Christopher Cortazzo and Coldwell Banker Residential Brokerage Company are awarded their costs on appeal.

MOOR, J.

We concur:

RUBIN, P. J.

BAKER, J.