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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

BRIAN MITTELDORF and TRACY MITTELDORF, Plaintiffs and Appellants, v. B&W APPRAISAL SERVICES, INC., and ROBERT EYNON, Defendants and Respondents.	B263835 (Los Angeles County Super. Ct. No. BC499364)

APPEAL from a judgment of the Superior Court of Los Angeles County, Malcolm H. Mackey, Judge. Affirmed in part, reversed in part, and remanded.

Smith Law Firm and Craig R. Smith for Plaintiffs and Appellants.

Garrett & Tully, Scott B. Mahler and Brian W. Ludeke, for Defendants and Respondents.

Tracy Mitteldorf and her husband Brian Mitteldorf (plaintiffs) purchased a multi-million dollar home and became concerned about the purchase soon thereafter. They sued B&W Appraisals, the appraisal firm hired by their mortgage loan broker, and Robert Eynon, an appraiser at B&W Appraisals (collectively, defendants), alleging Eynon intentionally or negligently inflated the market value of the home in preparing the appraisal.[1] The case proceeded to trial, and after the presentation of evidence, the trial court granted a directed verdict for defendants. The court found—as a matter of law—that the property valuation in defendants' appraisal report was a non-actionable opinion and that plaintiffs could not justifiably rely, and did not actually rely, on the appraisal to proceed with the purchase of the property. The trial court further found there was no evidence that would allow the jury to find the appraisers misrepresented the value of the property. We consider whether the trial court correctly took the case from the jury to enter a directed verdict.

I. BACKGROUND

In accordance with the applicable standard of review, discussed *post*, we recite the pertinent facts in the light most favorable to plaintiffs.

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[1] Plaintiffs' complaint also names several other defendants. Proceedings against these other parties were stayed pending the outcome of this case against the appraiser defendants.

A. The Agreement to Purchase the Subject Property

For approximately a year-and-a-half, plaintiffs looked for a home in the Hidden Hills area of Southern California. In late spring of 2011, they made an offer on a six bedroom, 5,146-square-foot home on Jim Bridger Road (the Property). After an exchange of several counteroffers that incorporated most terms of the first offer but haggled over the price, the seller of the Property accepted plaintiffs' offer to purchase it for $2.9 million. Catherine "Kay" Fields and Valerie Punwar were the real estate agents assisting plaintiffs with their search for a house and the negotiations concerning the Property that ensued.[2]

Plaintiff's purchase offer, as later accepted by the seller, was conveyed on a standard California Association of Realtors (CAR) form Purchase Agreement (Agreement). The Agreement incorporated several contingency provisions that would permit either plaintiffs or the seller to cancel the deal if the specified conditions went unfulfilled. Two of these provisions are relevant to the issues we decide. The first, described in the form agreement as a "LOAN CONTINGENCY," obligated plaintiffs to act diligently and in good faith to obtain the $1 million-plus mortgage loan specified in the Agreement, and made obtaining that loan a condition of the Agreement. The second, designated by the heading "APPRAISAL CONTINGENCY AND REMOVAL," provided as follows: "This Agreement is . . . contingent upon a written appraisal of the Property by a licensed or certified appraiser at no less than the specified

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[2] In advising plaintiffs in connection with whether to make an offer on the property, Fields told Brian Mitteldorf that she thought the Property was "probably worth somewhere between 2.9 and $3 million."

purchase price. If there is a loan contingency, Buyer's removal of the loan contingency shall be deemed removal of this appraisal contingency . . . ."

Under the Agreement, plaintiffs had 17 days in which to remove all the contingencies, including the loan contingency and the appraisal contingency, or to cancel the agreement for the reasons specified in those contingencies. The Agreement was not automatically void, however, if plaintiffs did not release the contingencies by the deadline. Rather, upon expiration of the 17-day deadline, the seller would have to first deliver to plaintiffs a Notice to Perform that provided at least two additional days for plaintiffs to release the contingencies. Only if plaintiffs failed to release the contingencies within that specified time could the seller cancel the agreement.

B. The Release of Certain Contingencies

When the 17-day time frame for plaintiffs to remove the contingencies in the Agreement had elapsed or was close to elapsing, the seller's agent, Marc Shevin, became anxious and pressed Fields (plaintiff's agent), to have plaintiffs remove the contingencies. At that time, however, plaintiffs had not yet been able to secure a mortgage loan to finance the purchase of the Property, and no Property appraisal had yet been ordered.

Shevin held off on taking steps to cancel the Agreement, but urged Fields to encourage plaintiffs to apply for a loan from a mortgage broker he recommended at C.S. Financial, Inc. and remove all contingencies but the loan contingency in the interim. Fields conveyed the proposal to plaintiffs and they agreed to proceed with C.S. Financial Inc. rather than the mortgage broker they had been using to that point. When Fields emailed Shevin on June 18, 2011, she informed him she planned to have "all contingencies except loan & appraisal removed" that same day.

Removal of the contingencies was in fact accomplished that same day via another CAR form document. Section A.2 of the form includes the following statement, using several checkboxes to be filled in as appropriate: "□ ALL Buyer contingencies are removed, EXCEPT: □ Loan Contingency (Paragraph 3H); □ Appraisal Contingency (Paragraph 3I); (NOTE: Unless separately selected in the Agreement, the appraisal contingency is removed when the loan contingency is removed); □ Contingency for the Sale of Buyer's Property . . . ." On the form plaintiffs signed, which Fields delivered to Shevin, the first box in section A.2 was checked to signify all buyer contingencies were removed, but the only box checked to signify an exception to this otherwise wholesale removal was the box pertaining to the loan contingency; the box next to the appraisal contingency exception was left blank.

At trial, Fields and plaintiffs explained why only the loan contingency exception box was checked despite Fields's earlier email to Shevin stating plaintiffs intended to retain the loan and appraisal contingencies. Fields testified that, as a practical matter, "the appraisal contingency is automatically protected under the . . . loan contingency because you can't get a loan unless the property appraises, so therefore it's almost redundant to have to mark . . . both [boxes on the form]. [Plaintiffs] were still protected for the appraisal and the loan at that moment in time."[3] Plaintiffs similarly testified this is what Fields told them

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[3] Alan Wallace, an expert witness for plaintiffs, also testified that an appraisal contingency is "normally contained in the loan contingency." He explained it is buyers who agree to an all cash

when advising them to sign the contingency release form. As Brian Mitteldorf explained, it was his understanding that he and his wife maintained the loan and the appraisal contingencies following their signature on the form.

C. Defendants' Appraisal Report

Shortly after plaintiffs signed the contingency release form, C.S. Financial, Inc. (plaintiffs' mortgage broker) made arrangements for defendant B&W Appraisal Services to appraise the Property in connection with plaintiffs' mortgage loan application.[4] Plaintiffs did not select or hire the appraisers, or communicate with them at any time during escrow. C.S. Financial paid the $715 cost of the appraisal to speed up the loan process and passed the cost on to plaintiffs, who reimbursed the full amount.

The owner of defendant B&W Appraisal Services, William Walsh, assigned primary responsibility for completing the appraisal to defendant Robert Eynon, a certified appraiser with 32 years' experience who worked extensively with B&W Appraisal Services as an independent contractor. Defendant

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deal (requiring no loan) who may want a separate appraisal contingency to be sure the deal "apprais[es] out."

[4] According to Marc Cohen, a mortgage banker and broker at C.S. Financial, the company contracts with an appraisal management company, and that company does the actual selection of the appraiser by rotating through a list of appraisal companies. Cohen testified that a "neutral third party" must be the one to actually select a particular appraiser as a result of real estate market reforms.

Eynon had done at least 100, and perhaps as many as 500, property appraisals for C.S. Financial. Walsh, who was a licensed real estate appraiser with 17 years of experience with properties in Hidden Hills, also assisted in the preparation and review of the appraisal.[5]

For use in preparation of the appraisal report, C.S. Financial provided defendants with a copy of the Agreement for the purchase of the Property (including the exchange of counteroffers), which as we have explained, included plaintiffs' names, the appraisal contingency and loan contingency provisions, and the sales price. Eynon acknowledged he reviewed the Agreement, but he testified at trial that he did not see the contingencies therein and was therefore unaware the agreement contained a loan contingency or an appraisal contingency. Although defendants had a copy of the Agreement, there is no indication defendants were provided with a copy of the contingency removal form plaintiffs executed shortly before the appraisal was commissioned.

When he received the assignment to appraise the Property, defendant Eynon, in consultation with Walsh, gathered a group of what he thought were potential comparable property sales ("comps") in the area. Eynon then went out and inspected the Property, including the interior of the house, on June 24, 2011—taking various pictures along the way for use in the forthcoming appraisal report. Shevin, the seller's agent, was present at least part of the time Eynon was on the Property to inspect it, and when Eynon had finished his walk-through of the Property, he told Shevin, "We are in business." Eynon then traveled to view

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[5] When asked at trial, Walsh agreed he had "much more superior knowledge" about real estate as compared to plaintiffs.

the exteriors of the homes he and Walsh identified as potential comps for use in determining the market value of the Property. After that, he began preparing the appraisal report.

Defendant Eynon, on behalf of defendant B&W Appraisal Services, later finalized and signed the appraisal report, which was made effective as of June 24, 2011, the date on which Eynon inspected the Property. Defendants' bottom line conclusion was that the market value of the Property was $2.9 million, an amount identical to the agreed-upon purchase price.

The details of defendants' appraisal analysis were presented over 50 pages using a standardized form: the Uniform Residential Appraisal Report (also known as a "Form 1004") developed by Fannie Mae. The appraisal report identified plaintiffs as the "borrower" and C.S. Financial as the "lender/client." The report stated the lender/client was the "intended user" of the report and explained the "intended use" of the report was for "the lender/client to evaluate the property that is the subject of this appraisal for a mortgage finance transaction."

By virtue of their use of the Form 1004, which includes a section entitled "APPRAISER'S CERTIFICATION," defendants "certifie[d] and agree[d]" that certain statements organized by numbered paragraphs were true. Three of these statements figure prominently in our resolution of this appeal. First, certification number 21 stated: "The lender/client may disclose or distribute this appraisal report to: the borrower; another lender at the request of the borrower;" and several other specified parties without need to obtain defendants' consent. Second, certification number 23 stated: "The borrower, another lender at the request of the borrower," and several other specified parties "may rely on this appraisal report as part of any mortgage finance transaction that involves any one or more of these parties." And third, certification number 25 acknowledged: "Any intentional or negligent misrepresentation(s) contained in this appraisal report may result in civil liability and/or criminal penalties . . . ."

Eynon acknowledged at trial that his signature on the report attested to the correctness of the certifications. Questioned specifically about certification number 23, which states the borrower "may rely" on the appraisal, Eynon agreed plaintiffs "can rely on [the appraisal report] given the intended use of this appraisal." Enyon described that intended use as use by the lender to evaluate a piece of property as security for a mortgage finance transaction. When asked about the same certification number 23, Walsh agreed plaintiffs could rely on the appraisal report "in the context of the entire appraisal." Walsh also conceded (consistent with the terms of certification number 21) he knew plaintiffs would be provided with a copy of the appraisal report.

Marc Cohen at C.S. Financial in fact did email a copy of the appraisal report to Brian Mitteldorf on June 30, 2011. Mr. Mitteldorf reviewed it, focusing on its bottom-line conclusion regarding the valuation of the Property.[6] He testified at trial that he relied on the appraised value, explaining it was "the most important thing" because it would validate whether the home

[6] Tracy Mitteldorf did not review the appraisal, but Brian Mitteldorf discussed its valuation with her.

was worth the purchase price plaintiffs had offered.[7] Among the reasons he felt he was entitled to rely on the appraisal was the language of certification number 23, which states the borrower "may rely" on the appraisal.

With the appraisal complete, and the corresponding financing to purchase the Property approved, plaintiffs removed the only remaining contingency, the loan contingency, on July 14, 2011. Two weeks later, escrow closed.

D. Plaintiffs Develop Concerns about the Purchase and Sue

Shortly after the close of escrow, plaintiffs became concerned they paid substantially more than the market value of the Property after having conversations with friends who had bought similar houses in Hidden Hills for significantly less money and after consulting with an experienced local general contractor about the Property and the economic value of certain renovations. In addition, plaintiffs encountered friction with their new neighbors because plaintiffs had begun extensive renovations on the Property and construction workers parked along a short, narrow access road, which impeded access to five nearby houses.

In November 2011, plaintiffs sent the seller of the Property a demand for rescission of the sale on the ground of

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[7] Mr. Mitteldorf elaborated as to why the appraised value was important to him. He explained he previously encountered difficulties in selling plaintiffs' former home in Sherman Oaks, which appraised for less than the purchase price he had negotiated with the buyer. As a result, the purchaser was not able to secure a loan, and plaintiffs had to discount the sales price in order to close the sale.

misrepresentation. Meanwhile, plaintiffs continued with renovations on the Property, the cost of which eventually totaled approximately $500,000, because they had decided to improve it and then sell it. When they were ready to sell, plaintiffs retained a different real estate agent, Lisa Gutman. She described being "a little shocked" when she learned the plaintiffs had paid $2.9 million (defendants' appraised value) for the property, which she felt was too much. Against Gutman's advice, plaintiffs insisted on listing the Property in April 2012 (five months after they moved in) at a sale price of $3.499 million, an amount she believed would be difficult to get but that plaintiffs felt necessary to be "made whole."

The Property remained on the market without any offers for nine months. The plaintiffs eventually sold the property for $2.7 million in November 2012. Less than a year later, plaintiffs sued the appraisers (among others), alleging causes of action against them for fraud, i.e., intentional misrepresentation, and negligent misrepresentation.

E. Evidence at Trial Concerning the Appraisal Report and the Value of the Property

The parties presented conflicting testimony on the issue of whether defendant's appraisal misrepresented the market value of the Property as $2.9 million.

Witnesses at trial for each side agreed the real estate market in Hidden Hills was in decline at the time of the appraisal. The crux of their disagreement, however, was over whether defendants used appropriate comparable property sales (comps) in their appraisal, particularly on the question of whether defendants should have included more distressed sales[8] as comps.

Plaintiffs' expert witness, William Willson, is a licensed appraiser who has appraised several thousand single-family homes and authored "a couple textbooks" on appraisal methods. In preparing his own appraisal of the Property, he compiled a list of homes with a comparable square footage that were sold in the year before plaintiffs bought the Property, which included a number of distressed sales, and he used this list in selecting comps. Willson believed distressed sales must be included in an analysis of comparable sales because accepted appraisal standards maintained it is "misleading not to use [distressed sales] as part (or in some cases all) of the basis for a value conclusion" where "there's a glut of distressed sales in the marketplace, and those properties are truly comparable to the subject." As Willson calculated it, the market value of the Property at the time of sale to plaintiffs was only $1.7 million.

Willson reviewed defendants' appraisal report and concluded it was unreliable and misleading. In Willson's view, defendant Eynon's selection of comparable sales was unacceptable. Willson conceded that a "couple" of the comps Eynon selected were "good," but he faulted Eynon for almost entirely excluding otherwise comparable distressed sales from his analysis, which in Willson's view violated accepted appraisal

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[8] "Distressed sales" include the sale of properties owned by a bank after foreclosing on the borrower (also called REOs) and sales where, with the consent of the lender that holds a security interest in the property, a property is sold for less than the full amount due on the mortgage loan (a short sale).

standards.[9] Willson took particular issue with a statement in defendant's appraisal report asserting there were very limited recent sales of similar size homes in the neighborhood of the Property. In Willson's view, the statement was not just an error; Eynon either "did not review the total available sales or he specifically excluded them for some reason—it's just not an accurate statement. It's purposely misleading."

Willson also found defendants' appraisal misleading in failing to adjust for the use of significantly superior comps, which produced a valuation range he found "outrageous" and impossible to use to reasonably estimate the Property's value. Willson opined that if Eynon had not limited his analysis of comps in the way that he had, he would not have reached a valuation of $2.9 million, over $1 million higher than Willson's.

Defendants, of course, defended the valuation they reached in the appraisal report, as did a defense appraisal expert and the real estate agents involved in the transaction (Fields, Punwar, and Shevin). The defense also presented testimony from the principal of another appraisal company retained by plainitffs' lender (Pacific Trust Bank) to do a "desk review" of defendants' appraisal report during the escrow period. In the opinion of the appraiser performing the desk review, defendants' appraisal report "support[ed] a final value estimate based on good data and solid reasoning."

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[9] Willson explained over 50 percent of the potential comps compiled on a list Eynon used in his analysis were distressed sales, which should have led Eynon to conclude there was a "glut" of distressed sales in the market place requiring use of such sales to make an accurate valuation.

F. The Trial Court Directs a Verdict for Defendants and Orders Plaintiffs to Pay Defendants' Costs, Including Expert Witness Fees

After the close of evidence but before closing argument, defendants moved for a directed verdict. The trial court heard extensive argument on the motion and made findings and rulings from the bench as argument progressed. The court then memorialized its ruling in summary form in a brief minute order, which incorporated its oral findings at the hearing by reference. In pertinent part, that minute order provides as follows:

> "The Court finds that there is insufficient evidence to support a finding in favor of the Plaintiffs. The Court weighing all the facts and giving legitimate inference in favor of the Plaintiff, the Court finds there is not sufficient evidence to support a verdict for intentional misrepresentation, punitive damages and negligent misrepresentation. The appraised value cannot be an actionable misrepresentation. The appraisal was performed for the bank/lender and . . . not for the plaintiff/buyer. The Court finds that this was not a bogus appraisal. The Court finds the road [leading to the Property] was not a factor, in this case.
>
> "The Court finds that the Plaintiffs failed to produce evidence that the appraisal was relied upon to purchase the property. Plaintiffs' statement of reliance on the appraisal is self-serving.
>
> "The Court finds disregarding conflicting testimony [sic] and using every inference in favor of the Plaintiff, there is insufficient evidence to support

a verdict in favor of the Plaintiffs. The Court grants Directed Verdict in favor of Defendants."

The trial court's comments from the bench elaborated on (and in some respects contrasted with) its written ruling.

The trial court believed defendant's appraisal was a mere opinion, not a representation of fact that could support a cause of action for negligent or intentional misrepresentation, by relying on a recently decided foreclosure case, *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594 (*Graham*).

As to the negligent misrepresentation cause of action, the trial court gave several additional reasons for directing a verdict for defendants. First, relying on *Willemsen v. Mitrosilis* (2014) 230 Cal.App.4th 622 (*Willemsen*) and distinguishing *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760 (*Soderberg*), the court found plaintiffs did not establish the requisite justifiable reliance on the appraisal report because they "failed to produce the evidence that the appraisers intended to supply [the report to plaintiffs] to influence [their] decision on whether to buy the property." Second, the trial court found plaintiffs presented insufficient evidence that they actually did rely on defendants' appraisal. When plaintiffs' attorney argued Brian Mitteldorf had expressly testified he relied on the appraisal report to move forward with the deal, the trial court dismissed that testimony as "self-serving." Third, and not reflected in the court's minute order, the court concluded plaintiffs had not produced sufficient evidence that the appraisal actually misrepresented any facts. In the court's view, Eynon "reasonably believed this statement was true in the appraisal report . . . and it was backed up by, I guess, four or five witnesses." The court acknowledged there was evidence to the contrary, including the testimony of plaintiffs' expert Willson and that of Brian Mitteldorf, but the court again characterized Mr. Mitteldorf's testimony as "self-serving" and discounted Willson as "a paid hired gun."

As to plaintiffs' intentional misrepresentation (fraud) claim, the trial court gave an additional reason (beyond the finding that the appraisal was a non-actionable opinion) for entering a directed verdict on that claim. The trial court found there was no evidence of "sufficient substantiality" to support a verdict in favor of plaintiffs. The court concluded the uncontradicted evidence established Eynon "honestly believed the statement of value set forth in the appraisal report" and "did an honest job."

Finally, as to plaintiffs' request for punitive damages, the court appeared to believe such damages would be available under a negligent misrepresentation theory. The court observed, however, that plaintiffs could only obtain such damages if the jury found for plaintiffs using the higher clear and convincing standard of proof, which in the court's view, the jury could not.

After the trial court rendered its verdict for defendants, they filed a memorandum to recover their costs of suit, including expert witness fees. Plaintiffs filed a motion to tax costs, arguing no award for expert witness fees should be made because the predicate for an award of such costs to defendants, their earlier Code of Civil Procedure section 998 offer to compromise that plaintiffs rejected, was an invalid joint offer by multiple defendants to multiple plaintiffs. The trial court rejected this argument and awarded defendants the full amount of costs sought, $68,233.67. Plaintiffs noticed appeals from the judgment on directed verdict and from the trial court's denial of their motion to tax costs. We consolidated the appeals and resolve them by way of this opinion.

II. DISCUSSION

The trial court directed a verdict for defendants on both of plaintiffs' causes of action. While we see no reason to reverse the verdict on plaintiffs' cause of action for intentional misrepresentation for reasons we shall explain, each of the four rationales the trial court relied on to direct a verdict on plaintiffs' negligent misrepresentation claim does not withstand scrutiny.

First, the trial court found defendants' appraisal report was mere non-actionable opinion, but this misapplies the pertinent case law, including our Supreme Court's decision in *Bily v. Arthur Young & Company* (1992) 3 Cal.4th 370, 414 (*Bily*). Second, the trial court found as a matter of law that plaintiffs could not *justifiably* rely on the appraisal valuation in proceeding with the purchase of the Property, but this disregards the terms of the appraiser's certification and other evidence on which the jury could rely to find defendants knew with substantial certainty that plaintiffs would rely on the appraisal report in the course of their mortgage finance transaction. Third, the trial court found, again as a matter of law, that plaintiffs did not *actually* rely on the appraisal report in purchasing the Property, but this disregards direct evidence to the contrary in contravention of the rules governing when a trial court may direct a verdict at trial. Finally, the trial court found there was insufficient evidence the appraisal report contained any statements that qualify as misrepresentations, but this again improperly disregards evidence to the contrary—most prominently, testimony by plaintiffs' expert Willson.

Plaintiffs' case for holding defendants liable on a negligent misrepresentation theory may not have been strong, but it was sufficient to go to a jury for decision. The trial court erroneously granted a directed verdict for defendants on that cause of action, and we therefore reverse and remand for a new trial.

A. Legal Background

1. The directed verdict standard, in the trial court and on appeal

Code of Civil Procedure section 630 empowers a trial judge to grant a directed verdict after all the evidence has been presented in a case tried to a jury. (Code Civ. Proc., § 630, subd. (a).) The effect of a court's decision to grant a motion for a directed verdict is akin to a court's decision to grant a demurrer: it is a determination that the evidence relied on by the party opposing the motion is legally insufficient to warrant a verdict in its favor. (*Eucasia Schools Worldwide, Inc. v. DW August Co.* (2013) 218 Cal.App.4th 176, 180 [motion for directed verdict is in the nature of a demurrer to the evidence]; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629 (*Howard*).)

Accordingly, courts in this state have consistently held for over a century that "[a] directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party." (*Howard*, *supra*, 72 Cal.App.4th at pp. 629-630; accord, *Newing v.*

Cheatham (1975) 15 Cal.3d 351, 358-359 (*Newing*); *Hunt v. United Bank & Trust Co.* (1934) 210 Cal. 108, 117 ["Unless it can be said that, as a matter of law, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal or a trial court set it aside, a court is not justified in taking a case from a jury and itself rendering the decision"]; *Ringgold v. Haven* (1850) 1 Cal. 108, 116; *Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1331, fn. 19.)

In applying this standard, a trial court may not weigh the evidence or judge the credibility of witnesses. (*Howard*, *supra*, 72 Cal.App.4th at p. 629; see also *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 745 ["'Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a motion for a new trial, it may not do so on a motion for a directed verdict' [Citation]"] (*Dailey*).) To avoid a directed verdict, however, the opposing party must have presented more than a "scintilla" of evidence, and inferences from the evidence that are mere speculation will not suffice. (*Newing*, *supra*, 15 Cal.3d at pp. 358, 365.)

On appeal, we decide de novo "whether sufficient evidence was presented to withstand a directed verdict. [Citation.] In that sense, we stand in the shoes of the trial court." (*Gelfo v. Lockheed Martin Corp*. (2006) 140 Cal.App.4th 34, 46-47.) We will uphold the judgment only if it is justified as a matter of law, that is, interpreting the evidence most favorably to plaintiffs' case and most strongly against defendants', and resolving all presumptions, inferences, and doubts in favor of the plaintiffs.

(*Baker v. American Horticulture Supply, Inc*. (2010) 186 Cal.App.4th 1059, 1072.)

2. Bily v. Arthur Young & Company

Our Supreme Court's decision in *Bily*, *supra*, 3 Cal.4th 370 discusses several issues central to our analysis in this case: whether a considered professional opinion can be an actionable assertion of fact; how claims for general negligence and negligent misrepresentation are distinct, and who may properly sue on either theory; and what evidence must be present for a jury to conclude the justifiable reliance element of the negligent misrepresentation tort has been satisfied. We therefore summarize the pertinent aspects of the *Bily* decision in some detail.

The Court in *Bily* was called to decide whether investors in a corporation properly recovered damages on a claim for general negligence against an auditing company. (*Bily*, *supra*, 3 Cal.4th at pp. 379, 416.) As framed by the Court itself, the question was "whether and to what extent an accountant's duty of care in the preparation of an independent audit of a client's financial statements extends to persons other than the client." (*Id.* at p. 375.) The Court summarized its holding as follows: "We conclude that an auditor owes no general duty of care regarding the conduct of an audit to persons other than the client. An auditor may, however, be held liable for negligent misrepresentations in an audit report to those persons who act in reliance upon those misrepresentations in a transaction which the auditor intended to influence in accordance with the rule of section 552 of the Restatement Second of Torts . . . . [A]n auditor may also be held liable to reasonably foreseeable third persons for intentional fraud in the preparation and dissemination of an audit report." (*Id.* at p. 376.)

One of the questions the Court confronted in reaching this result was whether statements made by the auditors in their audit report could be considered actionable representations. The Court reasoned that "[u]nder certain circumstances, expressions of a professional opinion are treated as representations of fact." (*Bily*, *supra*, 3 Cal.4th at p. 408.) The Court held such circumstances were present in *Bily*, explaining that "[w]hen a statement, although in the form of an opinion, is 'not a casual expression of belief' but 'a deliberate affirmation of the matters stated,' it may be regarded as a positive assertion of fact. [Citation.]" (*Ibid.*) "Moreover," the Court observed, "when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Ibid.*) The *Bily* court concluded the auditors' statements in their audit opinions fell within both categories.

In the course of its opinion, the *Bily* court also engaged in extensive discussion of whether anyone other than the client who actually contracts for or engages audit services can sue on a pure negligence theory, as opposed to a claim for negligent misrepresentation. (*Bily*, *supra*, 3 Cal.4th at pp. 397-406, 413-414.) Naturally, answering this question also required discussion of the distinction between tort claims for general negligence and negligent misrepresentation. (*Id.* at p. 407 ["Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit"].)

Bily holds that "an auditor's liability for general negligence in the conduct of an audit of its client financial statements is confined to the client, i.e., the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory." (*Bily*, *supra*, 3 Cal.4th at p. 406 & fn. 16.) The Court held, however, that "a further narrow class" of third parties who are "specifically intended beneficiaries" of an audit report may pursue a negligent misrepresentation claim against the auditor if they reasonably come to receive and rely on an audit report. (*Id.* at pp. 406-407.) Relying on the rule as formulated in the Restatement Second of Torts, the *Bily* opinion explains a non-client is entitled to assert a negligent misrepresentation claim if the non-client is among a specific class of persons engaging in a transaction that the supplier of information intends the information to influence. (*Id.* at pp. 408-409; see also *id.* at p. 392 [quoting principle in section 552 of the Restatement that permits imposing liability for losses suffered by "one of a limited group of persons for whose benefit and guidance [a negligent supplier of information] intends to supply the information or knows that the recipient intends to supply it"].)

In the Court's view, allowing limited third party recovery for negligent misrepresentation (but not general negligence) would emphasize in such cases the need for proof of justifiable reliance on the statements contained in an auditor's report. (*Bily*, *supra*, 3 Cal.4th at p. 413.) As the Court explained: "[A] general negligence [jury instruction] directs attention to [the] defendant's level of care and compliance with professional standards established by expert testimony, as opposed to [the] plaintiff's reliance on a materially false statement made by [the] defendant . . . . In contrast, an instruction based on the elements of negligent misrepresentation necessarily and properly focuses the jury's attention on the truth or falsity of the audit report's representations and plaintiff's actual and justifiable reliance on them." (*Id.* at p. 413.) For the guidance of trial courts, the *Bily* court accordingly suggested modifying the relevant jury instructions to specify a negligent misrepresentation made to a non-client plaintiff "must have been made with the intent to induce plaintiff . . . to act in reliance upon the representation in a specific transaction," and additionally that a defendant "is deemed to have intended to influence [its client's] transaction with [a] plaintiff whenever [the] defendant knows with substantial certainty that [the] plaintiff . . . will rely on the representation in the course of the transaction." (*Id.* at pp. 413-414.)

B. Defendants' Statements in Their Appraisal Report Are Actionable

In concluding defendants' appraisal report was a mere non-actionable opinion, the trial court did not adhere to the principles outlined in *Bily*. As we have just seen, *Bily* holds that a professional auditor's opinion in an audit report is actionable. (*Bily*, *supra*, 3 Cal.4th at p. 408.) The Supreme Court also took care to note that "[a]ccountants are not unique in their position as suppliers of information and evaluations for the use and benefit of others. Other professionals, including attorneys, architects, engineers, title insurers and abstractors, and others also perform that function. And, like auditors, these professionals may also face suits by third persons claiming reliance on information and opinions generated in a professional capacity." (*Id.* at p. 410.)

Four years after *Bily*, the Court of Appeal in *Soderberg v. McKinney* (1996) 44 Cal.App.4th 1760 (*Soderberg*) held appraisers fall within this class of professionals that can be liable for representations made in a considered professional opinion. (*Id.* at p. 1768 [cataloging sister state authority extending third party liability to real estate appraisers].) The *Soderberg* court recognized *Bily* involved the liability of accountants or auditors, but the Court of Appeal saw no reason why the principles our Supreme Court elucidated should be limited to those two classes of professionals. (*Ibid.*)

We, like the *Soderberg* court, conclude a professional appraiser's opinions set forth in a signed appraisal report are considered professional opinions actionable as positive assertions of fact. (*Bily*, *supra*, 3 Cal.4th at p. 408; *Soderberg*, *supra*, 44 Cal.App.4th at p. 1768.) Defendants' 50 page audit report was a "deliberate affirmation of the matters stated" and by no means a "casual expression of belief." (*Bily*, *supra*, 3 Cal.4th at p. 408.) In addition, Eynon had 32 years' experience as a licensed appraiser and defendants were in the business of providing professional opinions on appraised value using their specialized experience. Walsh, the owner of defendant B&W Appraisal Services, made this plain when asked whether there was any comparison between his 17 years' experience appraising Hidden Hills properties and plaintiffs' experience; his answer was, "I wouldn't think there would be." Defendants' statements in their audit report are therefore actionable. (*Id.* at p. 408; *Soderberg*, *supra*, 44 Cal.App.4th at p. 1768 ["*Bily* . . . applies to real estate appraisers"]; see also *Cohen v. S & S Constr. Co.* (1983) 151 Cal.App.3d 941, 946; CACI No. 1904.)

Defendants attempt to defend the directed verdict on this ground by citing the same case they cited to the trial court, *Graham*, *supra*, 226 Cal.App.4th 594. But defendants misread *Graham*, mainly by plucking one sentence out of the Court of Appeal's opinion and relying on it in isolation: "Statements regarding the appraised value of the property are not actionable fraudulent misrepresentations." (*Id.* at p. 606.) The missing context for the this sentence is apparent when one asks, "statements by whom?" The facts of *Graham* supply the answer.

Graham involved a lawsuit brought not against appraiser defendants but against personnel at lending banks and a loan brokerage who were alleged to have told the plaintiff that the value of his home would appreciate. (*Graham*, *supra*, 226 Cal.App.4th at pp. 600-601, 607 [allegations that "defendants told [Graham] the loan was 'good' for him or the market would 'increase' and allow him to turn it for a profit"].) Thus, the *Graham* court was right to observe that "[r]epresentations of opinion, particularly involving matters of value, are ordinarily not actionable representations of fact." (*Id.* at p. 606.) The key however, however, is the word "ordinarily," and ours is not the ordinary case. (See *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308 (*Neu-Visions*).) Rather, this case involves appraisers who are being sued by plaintiffs and who fall within the category of "certain circumstances" discussed in *Bily*—a case *Graham* never cites. (*Bily*, *supra,* 3 Cal.4th at 408 ["Under certain circumstances, expressions of professional opinion are treated as representations of fact"].)

Defendants' reliance on *Neu-Visions*, a case *Graham* does cite, is also misplaced. There, an accountant at an accounting firm, who never represented he was an appraiser, opined as to the likely *future* value of certain property. (*Neu-Visions*, *supra*, 86 Cal.App.4th at pp. 309-310.) Here, by contrast, defendants held themselves out as having specialized experience on precisely the matter that serves as the basis of plaintiffs' claims against them, namely, the *then-present* market value of the Property.

C. There Was Sufficient Evidence for a Jury to Conclude Plaintiffs Justifiably Relied on Defendant's Appraisal Report

The second ground on which the trial court directed a verdict for defendants was its conclusion plaintiffs "failed to produce . . . evidence that the appraisers intended to supply [their report] to influence [plaintiffs'] decision on whether to buy the property," i.e., that plaintiffs could not have justifiably relied on defendant's appraisal report. (*Mariani v. Price Waterhouse* (1999) 70 Cal.App.4th 685, 706 [justifiable reliance can only arise in the context of a duty existing between the parties].) The trial court was mistaken.

As *Bily* holds, a plaintiff who prevails on a negligent misrepresentation theory must prove the alleged misrepresentations were "made with the intent to induce plaintiff . . . to act in reliance upon the representation in a specific transaction"; a defendant "is deemed to have intended to influence [its client's] transaction with plaintiff whenever defendant knows with substantial certainty that plaintiff . . . will rely on the representation in the course of the transaction." (*Bily*, *supra*, 3 Cal.4th at pp. 413-414; accord, *Soderberg*, *supra*, 44 Cal.App.4th at p. 1768.) The question of whether a plaintiff's reliance is reasonable or justified is ordinarily a question of fact.

(*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 (*Alliance Mortgage*); but see *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 ["whether a party's reliance was justified may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts"].)

There was uncontroverted evidence at trial that defendants knew plaintiffs would be provided with a copy of their appraisal report. This fact, combined with the certifications in defendant's appraisal report, weigh heavily against the trial court's finding that defendants—as a matter of law—did not intend plaintiffs to act in reliance upon the appraisal report in their mortgage transaction.

Certification number 23, in particular, is an averment by defendants to those who receive a copy of the report and fall within the limited class of persons specified, including "the borrower." By adopting this certification, defendants knew that a borrower, like plaintiffs here, "may rely on [their] appraisal report as part of any mortgage finance transaction . . . ." As courts in our sister states have held, this gives rise to a duty of care to plaintiffs and a basis for a jury to find plaintiffs justifiably relied on the representations in defendants' appraisal report. (See, e.g., *Cumis Ins. Society, Inc. v. Massey* (2014) 155 Idaho 942 [318 P.3d 932, 938] [use of appraisal form containing same "Certification 23" at issue here gave rise to a duty of care on the part of the appraiser to those identified in the certification]; *Sage v. Blagg Appraisal Co., Ltd.* (2009) 221 Ariz. 39 [209 P.3d 169, 175-176] [borrower may pursue negligent misrepresentation claim against appraiser where appraiser used Form 1004 used by defendants here] (*Sage*).)

Indeed, the certifications in this case are the functional equivalent of the facts that prevented summary judgment for the appraiser in *Soderberg*. The plaintiff, Soderberg, submitted evidence indicating the appraiser had performed roughly 200 appraisals for his mortgage broker client and that the broker had always sent a copy of his appraisal reports to third party investors like Soderberg who were contemplating investing with the mortgage brokerage. This, plus the fact that the mortgage broker had occasionally asked questions of the appraiser on behalf of the investors, led the court to conclude the appraisers knew "a particular group or class of persons to which plaintiffs belonged—potential investors contacted by [the broker]—would rely on [the appraiser's] report in the course of a specific type of transaction [the appraiser] contemplated." (*Soderberg*, *supra*, 44 Cal.App.4th at p. 1771.) Here, the certifications by defendants when issuing the appraisal report, plus the knowledge that plaintiffs ("the borrower," as identified in the certifications themselves) would receive a copy of the report, are similarly strong evidence that defendants knew "with substantial certainty" that plaintiffs would rely on the appraisal in the course of purchasing the Property.

Defendants, however, contend the certifications in the appraisal report are of little significance because they "merely acknowledge[ ] that [plaintiffs] were among numerous other persons who 'may' rely on the appraisal" which is "a far cry from 'specifically telling [plaintiffs] to rely' on the appraisal or 'knowing' they would do so." In essence, defendant's argument is that the word "may" in certification number 23 is used in its conditional sense such that a jury could not find a reasonable appraiser in defendants' position would have known with substantial certainty that plaintiffs *would* rely on the appraisal. (Oxford English Dict. Online, <http://www.oed.com/view/Entry/115287?rskey=8D4Nu0&result=5&isAdvanced=false#eid [as of October 31, 2016] [various definitions of "may," including: "5. Expressing objective possibility, opportunity, or absence of prohibitive conditions; have the potentiality to, be at liberty to, be permitted by circumstances to"].)

There is no reason to believe, however, that certification number 23 uses the word "may" in its conditional sense. Rather, in context, "may" is used as a grant of authority, i.e., that plaintiffs as "the borrower" are *authorized* to rely on the appraisal in a mortgage finance transaction.[10] (Oxford English Dict. Online, <http://www.oed.com/view/Entry/115287?rskey=8D4Nu0&result]=5&isAdvanced=false#eid [as of October 31, 2016] [defining may in the sense of: "6. Expressing permission or sanction: be allowed (to do something) by authority, law, rule, morality, reason, etc."]; see also *In re Richard E.* (1978) 21 Cal.3d 349, 354 ["The ordinary import of 'may' is a grant of discretion"].)

Furthermore, there was additional evidence on which the jury could have relied in finding the element of justifiable reliance satisfied. In the appraisal report itself, and during his trial testimony, defendant Eynon acknowledged that he reviewed plaintiffs' purchase contract for the Property (the Agreement)

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[10] It would make little sense for an appraiser to "certif[y] and agree[ ]" that a borrower "may" rely on the appraisal report if the word "may" were used only in its conditional sense. We can think of no reason why it would be important for an appraiser to formally certify what would amount to an uninformed prediction about future events, i.e., that someone may (or may not) make a particular use of its appraisal report.

when preparing the appraisal report. As we have already explained, the Agreement includes an appraisal contingency which makes the Agreement contingent on a licensed appraiser's conclusion that the Property is worth no less than the purchase price. The inclusion of this contingency in the agreement would give a reasonable appraiser in Eynon's position even further reason to believe plaintiffs would rely on the conclusions reached in the appraisal report in deciding whether to proceed with the purchase of the Property.[11] Eynon claimed not to have seen the contingency provision when he reviewed the agreement, but even assuming his subjective state of mind were dispositive (contra *Bily*, *supra*, 3 Cal.4th at p. 410), the jury could have disbelieved this aspect of his testimony, especially in light of his concession that he recalled looking at the very page on which the appraisal contingency appears. All told, defendants knew plaintiffs were engaged in a mortgage finance transaction with C.S. Financial, knew the appraisal was being prepared in connection therewith, at least arguably knew the agreement to purchase the Property included an appraisal contingency, knew plaintiffs would receive a copy of the appraisal report, and certified plaintiffs "may rely"

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[11] Defendants' brief on appeal argues plaintiffs released their appraisal contingency before the appraisal was commissioned. This is an argument relevant to whether they actually relied on the appraisal, see *post* at pp. 33-34, but not whether defendants intended their appraisal to benefit a third party in the identified mortgage transaction. That question is assessed from the perspective of a reasonable appraiser in Eynon's position (*Bily*, *supra*, 3 Cal.4th at p. 410 [Restatement Second of Torts creates an objective standard]) and there is nothing in the record to indicate the appraisers were ever presented with a copy of the contingency removal form plaintiffs signed.

on the appraisal they prepared in connection with their mortgage finance transaction. This is substantial evidence that precludes a directed verdict for failure of proof on the element of justifiable reliance.

Defendants protest that focusing on the certifications in the appraisal report as we have ignores the report's provisions defining the intended user (C.S. Financial, as the lender/client) and the intended use of the appraisal (for the lender/client's use). At least in California, this argument fails. As *Bily* explains, a claim for general negligence is limited to the client who contracts for professional services. (*Bily*, *supra*, 3 Cal.4th at p. 413.) A claim for negligent misrepresentation, on the other hand, can be asserted by a broader but still limited class of individuals. (*Id.* at pp. 406-407.) Understood against this legal backdrop, the certification and intended use provisions of defendants' appraisal report exist in harmony. The intended user is lender/client C.S. Financial, and only C.S. Financial is entitled to sue on a general negligence theory. But defendants explicitly acknowledge in certification number 25 that "[a]ny intentional or negligent misrepresentation(s) contained in this appraisal report may result in civil liability . . . ." The conclusion a jury may accordingly draw is that defendants intended potential civil liability to extend beyond a claim for general negligence by the lender/client and include a claim for negligent misrepresentation by those named in certification number 23 (e.g., plaintiffs) who may also rely on the appraisal report. That is, in effect, the conclusion of persuasive cases that have rejected the argument defendants make, as do we. (*Sage, supra,* 209 P.3d at p. 175 [borrower may pursue negligent misrepresentation claim even though borrower not the lender/client as specified in "intended use" provision; form requires appraisers to certify their understanding that borrowers and a limited class of others "'may rely on this appraisal report'"]; *FDIC v. Masarsky* (N.D. Ill. 2013) 968 F.Supp.2d 915, 928 [FDIC sufficiently alleged appraiser owed duty of care to entity, even though another entity was identified as the only intended user of appraisal, because appraisers acknowledged in certification 23 that secondary market participants may rely on appraisal report].)

The trial court only came to a contrary conclusion by heavily relying on the Court of Appeal's decision in *Willemsen*, *supra*, 230 Cal.App.4th 622, reasoning at one point during the hearing on the directed verdict motion that "*Willemsen* knocks *Bily* out." The trial court was mistaken on several levels.

Most obviously, *Willemsen* is a Court of Appeal case that cannot "knock out" a decision by our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) More importantly, the trial court overlooked two key facts that defeated a showing of justifiable reliance in *Willemsen*—facts that are not present here. First, the terms of the appraisal report at issue in *Willemsen* were quite different, and there is no indication the report in that case included the appraiser certification provisions that are of substantial significance in this case. (*Willemsen*, *supra*, 230 Cal.App.4th at p. 628 ["Another portion of the report said: 'The report may not be used for any purpose by any person other [than] the party to whom it is addressed without the written consent of the appraiser and the appraiser specifically disclaims any liability to such unauthorized third parties'"].) Second, the property purchase contract in *Willemsen* included no appraisal contingency. (*Id.* at p. 630 ["[J]ust because Willemsen had a right to cancel the purchase if the bank was unwilling to provide satisfactory financing, that did not mean he had a right to cancel if he obtained a copy of the appraisal and did not like its contents. After all . . . he did not negotiate an appraisal contingency"].)

The question of whether plaintiffs justifiably relied on defendants' appraisal report was one of fact for the jury. No directed verdict should have been granted on this ground.

D. There Was Sufficient Evidence for a Jury to Conclude Plaintiffs Actually Relied on Defendant's Appraisal Report

The trial court found that defendants were entitled to a directed verdict on the additional and separate ground that plaintiffs failed to present sufficient evidence they actually relied on the appraisal report. The court erred in taking this question of fact from the jury.

The trial court concluded plaintiffs had not actually relied on defendants' appraisal only by weighing the evidence and discounting Mr. Mitteldorf's credibility as a witness—finding his testimony that he did rely on the appraisal (and his related testimony as to why the appraisal was in his view "the most important thing") was "self serving." That is a determination of credibility the trial court was not empowered to make in granting a directed verdict. (*Howard*, *supra*, 72 Cal.App.4th at p. 629 ["In determining [a motion for directed verdict], the trial court has no power to weigh the evidence, and may not consider the credibility of witnesses"].)

Defendants, however, offer an alternative argument in an effort to salvage the court's determination that plaintiffs could not have actually relied on the appraisal report. They argue plaintiffs released the appraisal contingency before defendants prepared their appraisal report and, thus, cannot have actually relied on the appraisal. This argument fails too in light of the standards for granting a directed verdict. Both plaintiffs testified it was their understanding in signing the contingency release form that the appraisal contingency was effectively preserved. That was also the testimony of their real estate agent at the time, Fields, who explained—consistent with her email to the seller's agent at the time—that plaintiffs would release all contingencies "except loan & appraisal." This is substantial evidence of actual reliance and it was therefore for the jury—not the trial court—to decide whether plaintiffs did actually rely on defendant's appraisal. (*Howard*, *supra*, 72 Cal.App.4th at p. 629.)

E. There Was Sufficient Evidence for a Jury to Conclude Defendants Made One or More Negligent Misrepresentations

In ruling from the bench, the trial court found plaintiffs' evidence insufficient for a jury to find defendants' appraisal report negligently misrepresented one or more facts. This too was error.

Willson's testimony—as grounded in and supplemented by plaintiffs' testimony, real estate agent Gutman's testimony, and the documentary evidence—was substantial evidence on which the jury could have found defendants misrepresented the value of the property or the quality of their appraisal analysis. Defendants do not contend otherwise. Instead, defendants are forced to argue, unconvincingly, that the trial court in effect excluded Willson's testimony as inadmissible.

So far as the record before us demonstrates, defendants did not move to exclude Willson's testimony nor did they object to his qualifications at trial. It is also indisputable that the trial court never intervened to cut short Willson's lengthy testimony. Instead, to argue the court effectively excluded Willson's testimony, defendants emphasize a snippet of the colloquy during the directed verdict hearing in which the court stated it "ha[d] a problem with the methodology [Willson] used." The full context of the trial court's comments, however, demonstrate the court did just what it may not do when confronted with Willson's testimony, namely, weigh it against the testimony of defendants' witnesses, judge Willson's credibility, and opt to believe defendants' evidence rather than plaintiffs'. Here is the relevant exchange:

> **The Court**: They [defendants] had three or four people testifying that [Eynon] was correct.
>
> Your only testimony—the testimony of your guy, Willson . . . he used short sales. He used other—different evidence.
>
> **[Plaintiffs' counsel]**: Let me go over that.
>
> First of all, Your Honor, I moved to exclude that [because] it's all cumulative and prejudicial to have them all stack up people saying the same thing.
>
> **The Court**: Well, that's the evidence.
>
> I mean, I listened to the evidence. I mean—
>
> **[Plaintiffs' counsel]**: But—
>
> **The Court**: They backed up—there's no question these people backed up Eynon.

> To me the—Willson's report, I have a problem with the methodology he used. He was a hired gun. He came in. He used short sales.
>
> The credible evidence, the court finds, was the testimony of Eynon and three or four people.

It is impossible to defend this exchange as an exclusion of Willson's testimony. Even if we were to myopically focus only on the court's complaint about Willson's methodology, it does not betray an intent to find the expert's entire testimony inadmissible. Rather, it is a reason why the court believed his testimony was entitled to lesser weight. (See, e.g., *Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 313 [discussing challenge to expert testimony that went to weight, not admissibility].) In directing a verdict, however, the court was not entitled to weigh the evidence or make findings about those witnesses who were credible and those who were not. (*Dailey, supra,* 2 Cal.3d at p. 745; *Howard*, *supra*, 72 Cal.App.4th at p. 629.)

F. The Court Properly Directed a Verdict for Defendants as to Intentional Misrepresentation

The court found there was no evidence of "sufficient substantiality" to support a jury finding that defendants intentionally misrepresented the value of the property. On this point, the trial court was correct.

Intentional misrepresentation, unlike its negligent cousin, requires proof that the maker of the representation knew it was false when made or had "'no belief in the truth of the statement, and makes it recklessly, without knowing whether it is true or false . . . .'" (*Bily*, *supra*, 3 Cal.4th at p. 415; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173.) There was no direct evidence that defendants made any knowingly false statements, or *recklessly* made statements without knowing whether they were true or false. Such direct evidence was not essential, but the only evidence plaintiffs do identify to support the contention that a jury could find defendants liable for making intentional misrepresentations is certain speculative aspects of Willson's testimony and Eynon's "we are in business" statement to the seller's agent when he finished inspecting the Property. Neither is sufficient.

Willson testified appraisers who fail to appraise a property at the agreed-upon purchase price can risk losing business from mortgage lender and broker clients. He testified appraisers therefore have a business incentive to "push value," that is, to inflate the market value of appraised property. While these statements could be true as a general matter, plaintiffs presented insufficient evidence to allow a jury to conclude any such incentives drove defendants to make knowingly or recklessly false statements in this case.[12] (*Newing*, *supra*, 15 Cal.3d at pp.

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[12] Plaintiffs argue Eynon had a motive to defraud because "he may have done as many as 500 appraisals for C.S. Financial" and, at a cost of $715 each, "as much as $375,500 ($715 * 500)" was at stake. This argument is defective for at least three reasons. First, it assumes without justification there were 500 appraisals and the cost of each was $715. Second, Willson undertook no analysis of the other appraisals Eynon prepared for C.S. Financial. Without such an analysis, and reason to believe there were similar defects in prior appraisal reports as those he identified in the appraisal report here, there is no sound basis to infer the appraisal report in this case contained intentional (rather than merely negligent) misrepresentations. Third, there was uncontradicted evidence at trial that C.S. Financial did not select defendants to be the appraisers for the Property; rather,

358, 365 [inferences from the evidence that are mere speculation will not suffice in opposing a motion for directed verdict].) Willson also testified the appraisal report's assertion that there were very limited recent sales of similar size homes in the neighborhood of the Property was "purposely misleading." This was mere conjecture, or perhaps rhetorical excess. There was no evidence that could serve as a proper basis to determine the statement in question was knowingly or recklessly false, as opposed to at most negligently made. (See *Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 253 ["An expert's opinion is only as good as the facts on which it is built"].)

Eynon's "we are in business now" remark is also insufficient to warrant a jury determination on the intentional misrepresentation claim. By the time Eynon made the statement, he had conducted a preliminary review of potential comparable sales with Walsh and completed an in-person inspection of the interior and exterior of the Property. Under these circumstances, the remark might support an inference that Eynon subsequently failed to exercise due care in examining comparable property sales and preparing a thorough appraisal report (relevant to a claim for negligent misrepresentation). Nothing about the statement, however, suggests "the fix was in," i.e., that Eynon had decided at the outset to make intentionally or recklessly false statements to reach a particular valuation. (*Newing*, *supra*, 15 Cal.3d at pp. 358, 365 [more than a mere "scintilla" of evidence must be present to avoid a directed verdict].)

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that selection was done by an outside appraisal management company.

The trial court was therefore right to direct a verdict for defendants on plaintiffs' intentional misrepresentation cause of action. The verdict on that claim also eliminates any basis on which plaintiffs might seek punitive damages against defendants. (*Alliance Mortgage*, *supra*, 10 Cal.4th at p. 1241 ["Punitive damages are recoverable in those fraud actions involving intentional, but not negligent, misrepresentations"].)

G. Award of Expert Witness Fees as Costs of Suit

We will reverse the directed verdict on plaintiffs' negligent misrepresentation claim and remand for a new trial. This renders plaintiffs' challenge to the award of expert witness fees moot. The award of costs is necessarily vacated to permit redetermination of the issue upon the entry of a new judgment.

DISPOSITION

The judgment for defendant by directed verdict on plaintiffs' intentional misrepresentation cause of action is affirmed. The judgment for defendant by directed verdict on plaintiffs' negligent misrepresentation cause of action is reversed. The matter is remanded for retrial of the negligent misrepresentation claim, and a redetermination of entitlement to costs of suit upon the entry of judgment. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

KUMAR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.