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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

BADRIA ELNAGGAR, et al., Plaintiffs, Cross-Defendants, and Appellants, v. GREGORY STANNARD, Defendant, Cross-Complainant, and Respondent.	B279522 (Los Angeles County Super. Ct. No. SC121825)

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

Badria Elnaggar and Eman Elamin, in pro per. for Plaintiffs, Cross-Defendants, and Appellants.

No appearance for Defendant, Cross-Complainant, and Respondent.

Plaintiffs, cross-defendants, and appellants Badri Elnaggar and Eman Elamin (plaintiffs) hired defendant, cross-complainant, and respondent Gregory Stannard (defendant) in 2008 to represent them in a personal injury lawsuit arising from an automobile accident. Although plaintiffs prevailed in that action, they alleged the award was woefully inadequate to cover their past and ongoing medical expenses. As plaintiffs attempted to ascertain their legal options in the posttrial phase, defendant allegedly abandoned them. Following complaints to the California State Bar, defendant was disbarred, and plaintiffs filed suit against him in 2013, asserting claims of malpractice and fraud. Defendant cross-complained for breach of contract, seeking reimbursement of costs advanced in his representation of plaintiffs in the underlying lawsuit.

By the time of trial, only plaintiffs' fraud claim and defendant's cross-claim remained. Following a one-day bench trial on August 15, 2016, the trial court found plaintiffs had failed to prove fraud and found in defendant's favor on his breach of contract cross-claim, awarding him $22,290.73. On appeal, plaintiffs assert numerous errors by the trial court—including denial of their right to a trial by jury.

We conclude that plaintiffs were deprived of a jury trial and therefore reverse the judgment. Because we remand for further proceedings, we also address plaintiffs' argument that the trial court erred in denying their motion for summary judgment of their fraud claim. We affirm that ruling because plaintiffs failed to produce evidence establishing a misrepresentation or concealment or reliance on any such misrepresentation or concealment. Finally, we conclude that any error in not continuing the trial while plaintiffs sought writ review of the

summary judgment denial was harmless because plaintiffs have now obtained appellate review of that ruling following trial.

FACTUAL HISTORY

On November 13, 2005, plaintiffs suffered injuries in a car accident that they contended required years of medical treatment and caused life-altering pain. In 2007, they filed an action for personal injuries resulting from the accident, *Elneggar*[1] *v. Elmohtaseb* (Super. Ct., Orange County, 2010, No. 07HL05322).

On June 26, 2008, plaintiffs hired defendant to take over their representation in the lawsuit. Plaintiffs and defendant signed a Contingent Fee Agreement (Agreement) on May 22, 2009. The Agreement provided plaintiffs would pay the "reasonable personal and trial expenses" incurred by defendant and his colleagues in advancing plaintiffs' case, as well as fees charged by expert witnesses and investigators. It further provided "[i]n the event no recovery is obtained on the claim that compromises [sic] the subject matter of this agreement," the attorneys would not charge for their services, but would be entitled to reimbursement for "any costs, disbursements or expenses." The Agreement permitted the attorneys to withdraw from the representation "at any time on reasonable notice" and stated that in the event of such withdrawal, the attorneys would be entitled to their costs and expenses.

The jury in *Elneggar v. Elmohtaseb* returned a verdict in favor of plaintiffs on February 8, 2010. According to a

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[1] The case title for the Orange County action includes this spelling of the plaintiffs' names.

February 9, 2010 email from defendant to Ms. Elnaggar, the jury awarded only $8,416 in damages. Defendant explained that "the defense had made a statutory offer in excess of these amounts" and therefore the *Elmohtaseb* defendants were entitled to deduct their legal costs from the award. Because those costs probably exceeded the damages awarded, defendant said, plaintiffs would likely have a judgment entered against them.

Two days later, Ms. Elnaggar emailed defendant: "It is understandable you don't wish to [pursue] appeal. We want to know whether you are going to file a motion for a new trial or not? Please be specific, this is important for us to know." Defendant responded: "I can continue to represent you up through the end of the case at the trial level. I won't be doing an appeal for you on this case, however. [It's] not part of the retainer agreement that we signed, and I just can't afford to do any appellate work on your case." On February 15, 2010, Ms. Elnaggar responded that defendant's reply didn't clarify whether he was willing to file for a new trial and said plaintiffs would prefer that he handle it. Defendant responded by explaining that, in his opinion, the judge had made no significant legal errors during the trial and defense experts presented "clear evidence" that plaintiffs suffered only "soft tissue" injuries. He added that filing a motion for a new trial was premature because defense counsel needed first to send him a proposed judgment and memorandum of costs. Plaintiffs would then be entitled to file a motion to tax costs.

Ms. Elnaggar replied on February 19, 2010, with a long email offering her opinion of the trial and witnesses. On March 2, 2010, Ms. Elnaggar wrote defendant again: "We haven't heard from you for a long time. Is there anything new

regarding our case?" Ms. Elnaggar followed up on March 15, 2010, noting that plaintiff had not returned her phone call. Two days later, Ms. Elamin wrote defendant to report that plaintiffs had called the trial court and had been shocked to hear that a judgment had already been filed. Plaintiffs did not hear from defendant again.

From the trial court docket, plaintiffs learned on March 29, 2010 that a notice of entry of judgment had been filed. They requested an "extension" to permit a new attorney to review their case; the trial court denied their motion.

On April 21, 2010, plaintiffs filed a complaint with the California State Bar, stating that defendant had abandoned them in the posttrial phase. The State Bar responded on June 15, 2010 that it had advised defendant to contact plaintiffs within 10 working days to discuss the status of their case.

On July 6, 2010, plaintiffs wrote the State Bar again to report that defendant had not contacted them. They also reported that they had received documents leading them to believe defendant had "mishandled" their case. They complained that he failed to submit their itemized medical expenses to the jury, pointing out that when jurors asked about itemized expenses, the trial judge responded: "No document was received in evidence that itemizes 'actual medical expenses' for either plaintiff. You must rely on your notes and/or memory of the testimony of various witnesses that did testify regarding past medical expenses." (Boldface omitted.) Plaintiffs cited other complaints about the witness list and defendant's apparent approval of the form of judgment without their knowledge. Finally, plaintiffs complained that defendant had not returned

their case file, including an expensive scarf used as an exhibit at trial.

The State Bar responded on August 25, 2010. It explained that following a review and evaluation of the circumstances, it had decided to issue a warning letter to defendant.

Over two years later, the Bar wrote plaintiffs again on December 18, 2012, apparently in response to a new complaint.[2] The Bar reported that the State Bar Court had recommended that defendant be disbarred and that he was no longer eligible to practice law in California. The Bar also stated that it had attempted, unsuccessfully, to obtain plaintiffs' documents and other items.

PROCEDURAL HISTORY

Acting in propria persona, plaintiffs filed the current case against defendant on December 23, 2013. Their original complaint asserted claims for (1) failure to communicate in violation of Business and Professions Code section 6068, subdivision (m); (2) failure to perform competently; (3) repeated failure to perform legal services competently; (4) failure to return clients' file and exhibit; and (5) intentional infliction of emotional distress. The complaint requested a jury trial. On the same day, plaintiffs filed a court fee waiver request, which was granted.

Defendant demurred to the complaint on February 25, 2014, arguing that all of plaintiffs' causes of

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[2] There is no third complaint to the Bar in the record on appeal, but the letter recited: "The State Bar of California is in receipt of your complaint" and listed a complaint number different from the complaint number listed on both of plaintiffs' 2010 letters.

action alleged legal malpractice and therefore were barred by the applicable one-year statute of limitations in Code of Civil Procedure section 340.6, subdivision (a). Defendant contended that the statute of limitations began to run, at the latest, on April 21, 2010—the date of plaintiffs' first complaint to the California State Bar.

Before the demurrer was heard, plaintiffs filed their first amended complaint on September 2, 2014. Although the first amended complaint lists six causes of action in its caption, the body of the complaint includes only four: (1) breach of retainer agreement in violation of Business and Professions Code section 6068, subdivision (m); (2) fraud; (3) intentional failure to return client's file and item; and (4) intentional infliction of emotional distress. Plaintiffs based their fraud claim upon defendant's statements to them in his 2010 posttrial emails and his alleged concealment of facts surrounding an alleged failure to submit itemized medical expenses at trial. Plaintiffs averred that on April 7, 2014, they had received for the first time a minute order, filed on February 8, 2010 in the *Elneggar v. Elmohtaseb* case directing plaintiffs to prepare the judgment—which contradicted defendant's 2010 email statement that the defendants in that case were required to prepare the judgment. Plaintiffs once again demanded a jury trial and requested relief in the form of (1) the return of the clients' file and exhibit; (2) general, special, actual, punitive, and statutory damages; and (3) costs of suit.

On October 8, 2014, defendant again demurred on statute of limitations grounds. On July 14, 2015, the trial court sustained the demurrer to the first, third and fourth causes of action, finding they were barred by the one-year statute of limitations contained in Code of Civil Procedure section 340.6 for

an action against an attorney for wrongful acts or omissions other than fraud.[3] On August 26, 2015, defendant filed a cross-complaint for breach of contract, alleging that under the Agreement, he was entitled to reimbursements for the costs he had advanced during his representation of plaintiffs.

Meanwhile, the parties filed case management statements on July 6, 2015, in which plaintiffs requested a jury trial and defendant requested a nonjury trial. The trial court conducted a trial setting conference on September 30, 2015.

While the matter was pending, plaintiffs filed three motions for summary judgment on July 6, 2015, September 28, 2015, and June 10, 2016. Plaintiffs styled their third motion as an "amended" motion, and noticed the hearing on that motion for the same date as the first motion: July 5, 2016. Following a hearing on July 5, 2016, the trial court denied the motion in an order dated August 9, 2016. The order stated that the motion "is only as to the Fraud claim which is the only claim that survived demurrer."

On August 9, 2016, the same day the trial court signed the summary judgment order, plaintiffs requested a stay of trial proceedings to permit them to file a writ of mandate challenging the summary judgment denial. Plaintiffs explained that defendant had failed to follow the trial court's order that he file a

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[3] See Minute Order dated July 14, 2015. In our letter dated May 14, 2018, we requested the Superior Court file to examine whether any minute order recorded a waiver by plaintiffs of their right to a trial by jury. We take judicial notice of the minute orders dated July 14, 2015; September 15, 2015; September 30, 2015; April 7, 2016; and July 5, 2016, which contain no such waiver.

proposed order on the summary judgment motion, and therefore they finally filed an order themselves in order to take a writ. The trial court did not act on the request until August 15, 2016—the day of trial. The trial court denied plaintiffs' request and proceeded to trial.

Although plaintiffs had previously submitted numerous exhibits with their summary judgment motions, the only exhibits admitted at trial were defendant's, to wit, the Agreement and an itemization of costs. At the conclusion of the trial, the trial court found that plaintiffs had failed to prove a claim of fraud against defendant and entered judgment on behalf of defendant on the amended complaint and the cross-complaint, awarding defendant $20,314.90 plus interest of $1,975.83.

Plaintiffs filed a notice of entry of judgment on November 15, 2016 and, again acting in propria persona, timely filed a notice of appeal on November 17, 2016. Plaintiffs filed their opening brief on October 6, 2017; defendant did not file a respondent's brief.

DISCUSSION

Plaintiffs raise six issues on appeal: (1) whether the trial court deprived plaintiffs of their constitutional right to trial by jury; (2) whether the trial court erred in failing to conduct pretrial procedures; (3) whether the trial court erred in denying plaintiffs' amended motion for summary judgment[4];(4) whether the trial court abused its discretion in denying plaintiffs' request for a stay to file a writ of mandate; (5) whether the trial court

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[4] Plaintiffs do not list this issue in their statement of issues raised on appeal but devote a significant portion of their opening brief to it.

erred in finding against plaintiffs' fraud claim; and (6) whether the trial court erred in finding in favor of defendant's claim for breach of contract.

Because we conclude that plaintiffs were deprived of their right to a jury trial and remand for further proceedings, we do not reach the issues pertaining to pretrial procedures and alleged errors by the trial court in reaching its decision following a bench trial.

I. Plaintiffs Were Deprived of a Trial by Jury.

Plaintiffs argue that on the day of trial, the trial court "suddenly and unexpectedly . . . decided to forgo the jury trial" and "held a bench trial despite Appellants' protest." We review de novo whether a party was constitutionally entitled to a jury trial. (*Central Laborers' Pension Fund v. McAfee, Inc.* (2017) 17 Cal.App.5th 292, 344-345; *Caira v. Offner* (2005) 126 Cal.App.4th 12, 23.) If the issue is in doubt, it is resolved "in favor of preserving a litigant's right to trial by jury." (*Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654; *Central Laborers' Pension Fund* at p. 345.) Denial of the right to a jury trial is in excess of the trial court's jurisdiction and is reversible error per se. (*Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493; *Martin v. County of Los Angeles* (1996) 51 Cal.App.4th 688, 698; *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 863.)

A. Plaintiffs Were Constitutionally Entitled to a Trial by Jury.

As a "fundamental part of our system of jurisprudence," the California Constitution guarantees a right to jury trial.

(*Van de Kamp v. Bank of America*, *supra*, 204 Cal.App.3d at pp. 862-863; Cal. Const., art. I, § 16.) The right to trial by jury does not extend to all issues. As our Supreme Court has explained, California's constitutional right to jury trial "is the right as it existed at common law in 1850, when the Constitution was first adopted." (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8-9; see *Martin v. County of Los Angeles*, *supra*, 51 Cal.App.4th at p. 694.) A jury trial is therefore a matter of right in a civil action at law, but not in an action in equity. (*C & K Engineering Contractors*, at p. 8; see *Martin*, at p. 694.)

The determination of whether an action is an action at law or at equity is partly historical and partly legal: " ' "If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the *gist* of the action. A jury trial must be granted where the *gist* of the action is legal, where the action is in reality cognizable at law." ' " (*C & K Engineering Contractors v. Amber Steel Co.*, *supra*, 23 Cal.3d at p. 9, quoting *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 299; see *Martin v. County of Los Angeles*, *supra*, 51 Cal.App.4th at p. 694.)

The "gist" of an action depends in significant measure on the form of relief requested. (*Martin v. County of Los Angeles*, *supra*, 51 Cal.App.4th at pp. 695-696; *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, 283.) Generally speaking, actions at law seek a money judgment for damages, while equitable actions seek some form of specific relief and require the application of

equitable doctrines. (*C & K Engineering Contractors v. Amber Steel Co.*, *supra,* 23 Cal.3d at p. 9; *Martin*, at pp. 695-696.)

At the time of trial, plaintiffs' amended complaint consisted of a single cause of action for fraud. Their prayer for relief sought primarily monetary damages, as well as costs and the return of their legal file and exhibits. Defendant asserted a single cause of action for breach of contract and sought compensatory damages and costs.

California courts have repeatedly found suits to recover damages for fraud or money due under contract to be actions at law. (See *Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 670-671 [collecting fraud and contract cases]; *Hutchason v. Marks* (1942) 54 Cal.App.2d 113, 117 ["[T]rial by jury of the issues of fact as to fraud and damage is a matter of right"]; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 462 [cause of action seeking to recover money due as contractual right is action at law rather than equity]).

Here the relief the parties sought was almost entirely monetary damages. Although plaintiffs invoked the equitable powers of the trial court by requesting the return of their case file, the gist of their action was legal in nature. We therefore conclude that plaintiffs were constitutionally entitled to a jury trial.

B. Plaintiffs Did Not Waive Their Right Under the California Constitution to a Jury Trial.

In civil cases, the right to trial by jury is "inviolate" and can be waived only as specified by Code of Civil Procedure section 631, subdivision (f). (Code Civ. Proc., § 631, subds. (a), (f).) Subdivision (f) provides that such a waiver occurs only: "(1) By failing to appear at the trial. [¶] (2) By written consent

filed with the clerk or judge. [¶] (3) By oral consent, in open court, entered in the minutes. [¶] (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation. [¶] (5) By failing to timely pay [the jury fee], unless another party on the same side of the case has paid that fee. [¶] (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, [that day's fees and mileage of the jury, including the fees and mileage for the trial jury panel if the trial jury has not yet been selected and sworn]." (Code Civ. Proc., § 631, subd. (f).)

The record contains no evidence of a waiver. On the contrary, it reveals that plaintiffs made a timely demand for trial by jury as required by Code of Civil Procedure section 631, subdivision (f)(4). Plaintiffs' original complaint included a jury demand, as did their first amended complaint. Plaintiffs additionally made a clear demand for a jury trial when the cause was first set for trial by requesting a jury trial on the case management statement they filed on July 6, 2015.[5] (See Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2017) ¶¶ 2:174 to 2:175, p. 2-39 [to announce that a jury is required "at the time the cause is *first set for trial*," parties must normally make the demand in the case management statement that must be filed and served 15 days before the case management conference or review].)

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[5] The first case management conference was originally scheduled for September 15, 2015 and continued to September 30, 2015.

Plaintiffs also satisfied the requirements under Code of Civil Procedure section 631, subdivisions (f)(5) and (f)(6), by seeking and receiving a waiver of the jury fees on the same day that they filed their original complaint. Plaintiffs did not fail to appear at the trial—an event that would have supported a waiver under Code of Civil Procedure section 631, subdivision (f)(1). The court's minute order for the day of trial states that Ms. Elnaggar testified. That minute order also does *not* indicate that plaintiffs orally consented in open court to waive their right to a jury trial pursuant to Code of Civil Procedure section 631, subdivision (f)(3).

Nor is there evidence that plaintiffs waived their right orally during any other appearance in the trial court or by written consent. We have examined all other minute orders included in the Superior Court file and none reports an oral consent. (See Code Civ. Proc., § 631, subd. (f)(3).) Nor does the clerk's transcript include a written consent to a bench trial filed by plaintiffs. (See Code Civ. Proc., § 631, subd. (f)(2.) Finally, the judgment in the case, signed by the trial court, states: "The jury trial was scheduled to begin on August 15, 2016"—effectively acknowledging that a jury trial had been demanded and anticipated up to the time of trial.

As noted above, where a party has not waived its right to a jury trial and the trial court has denied the party that right, the error is reversible per se and does not require a showing of actual prejudice. (*Martin v. County of Los Angeles*, *supra*, 51 Cal.App.4th at p. 698.) We therefore reverse the judgment in favor of defendant on plaintiffs' cause of action for fraud and defendant's cause of action for breach of contract.

II. The Trial Court Did Not Err in Denying Plaintiffs' Motion for Summary Judgment.

Plaintiffs additionally contend the trial court erred in denying their motion for summary judgment. An order denying summary judgment is reviewable upon appeal from a final judgment. (*Aas v. Avemco Ins. Co.* (1976) 55 Cal.App.3d 312, 323.) Review of such a denial is warranted where, as here, a final judgment adverse to the moving party is reversed without reaching the merits of the causes of action. In such instances, the outcome of the summary judgment appeal may preclude the need for another trial. (See *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 836; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 2:242.2, p. 2-148.)
We review a trial court's summary judgment ruling de novo, considering all evidence offered in connection with the motion and uncontradicted inferences the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; Code Civ. Proc., § 437c, subd. (c).)

In denying plaintiffs' motion, the trial court found (1) the amended notice of motion did not give the required 75 days' notice; (2) plaintiffs' separate statement failed to present evidence establishing fraud; and (3) defendant raised a triable issue as to whether the fraud claim was time barred because the complaint was filed more than four years after plaintiffs' first complaint to the State Bar. We conclude the trial court correctly denied summary judgment because plaintiffs failed to produce evidence establishing each element of their fraud claim, and therefore do not reach the trial court's other grounds for denying plaintiffs' motion.

A. Legal Standards

A trial court may grant summary judgment only when the papers submitted establish that no triable issue of material fact exists, and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) When plaintiffs are the moving party, they must produce admissible evidence on each element of a cause of action that entitles them to judgment. (Code Civ. Proc., § 437c, subd. (p)(1).) "[I]f a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment *as a matter of law*, but would have to present his evidence to a trier of fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) Only if a plaintiff carries this initial burden does the burden of production shift to the defendant "to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).)

To prevail, therefore, plaintiffs had to produce admissible evidence on each of the five elements of their fraud/deceit claim: (1) misrepresentation by defendant, (2) with knowledge of the representation's falsity, (3) with the intent to induce plaintiffs' reliance on the misrepresentation, (4) justifiable reliance by plaintiffs, and (5) resulting damage. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.)

B. Plaintiffs' Showing on Summary Judgment

In their summary judgment motion, plaintiffs alleged that in the February 9, 2010 and February 15, 2010 emails,

defendant made the following misrepresentations about the *Elneggar v. Elmohtaseb* case:[6]

1. The jury "was not convinced by the evidence that neither [sic] of you were entitled to an award of any monetary significance." According to plaintiffs, defendant concealed that he had not offered the jury information about their past medical expenses and "stipulated" with opposing counsel not to offer that information. In support of this alleged misrepresentation, plaintiffs submitted a minute order from the *Elneggar v. Elmohtaseb* case, dated February 8, 2010, showing that, in response to a jury note during deliberations, counsel stipulated to a proposed response stating: "No document was received in evidence that itemizes 'actual medical expenses' for either plaintiff. You must rely on your notes and/or memory of the testimony of various witnesses that did testify regarding past medical expenses."

2. The defense had made "a statutory offer" to settle in excess of the amount awarded by the jury. According to plaintiffs, "the so called 'statutory offer' mentioned in the Defendant's email (which was made on January 13, 2010) was nothing more than a faxed letter from a non-party to the action offering to pay a certain amount of money to Plaintiffs[;] it did not make any reference to Section 998." Plaintiffs claim that defendant knew there was no statutory offer.

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[6] We note that although the emails were attached as exhibits to plaintiffs' separate statement of undisputed facts, none of the alleged misrepresentations was listed in the statement as an undisputed fact. (See Code Civ. Proc., § 437c, subd. (b)(1).)

3. Defendant was waiting for the opposing party to send him a proposed judgment and pretrial motions were therefore premature. The February 8, 2010 minute order showed that the trial court directed plaintiffs, not defendants, to prepare the judgment.

4. Defendants in the *Elneggar v. Elmohtaseb* case were supposed to prepare a memorandum of costs. Plaintiffs point out that as the prevailing party, their counsel should have prepared a memorandum of costs.

As for the first alleged misrepresentation, defendant's email statement makes no representation about what evidence was before the jury—only that such evidence failed to convince the jury that plaintiffs were entitled to significant monetary damages. By itself, the statement does not amount to a concealment of defendant's alleged failure to offer evidence of plaintiffs' past medical expenses at trial or of any stipulation with opposing counsel *not* to offer such evidence.

Moreover, plaintiffs offered no evidence with their summary judgment motion, in their declaration or otherwise, as to what defendant did or did not inform them about the damages evidence offered at trial—and thus provided no basis for establishing that defendant fraudulently misrepresented or concealed that information. Plaintiffs claimed that "Defendant was fully aware that no one has ever testified with respect to the total dollar amount of Plaintiffs' past medical expenses, nor has anyone given the jury a single document pertaining to the amount of Plaintiffs' past medical expenses." Plaintiffs did not offer evidence that defendant misrepresented any of these alleged facts to them. Although the February 8, 2010 minute order provided evidence that no itemized list of plaintiffs' medical

expenses was offered at trial, it did *not* show that defendant secretly "stipulated not to give the jury Plaintiffs' past medical expenses without Plaintiffs' knowledge or authorization." (Boldface omitted.) The minute order established only that defendant stipulated with opposing counsel as to the wording of a response to a jury note.

Finally, plaintiffs failed to offer evidence that they relied upon these email statements to their detriment. "Actual reliance occurs when a misrepresentation is ' "an immediate cause of [a plaintiff's] conduct, which alters his legal relations." ' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976.) Plaintiffs did not specify, much less offer evidence of, what they did or did not do in reliance on plaintiff's statements or how any such reliance altered their legal or financial position.[7] Thus plaintiffs did not establish the elements of fraud as to the first alleged misrepresentation.

As for the second alleged misrepresentation, plaintiffs offered no evidence supporting their assertion that the purported pretrial settlement offer did not satisfy the requirements of Code of Civil Procedure section 998—such that defendant

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[7] Plaintiffs do state: "Plaintiffs relied on Defendant to give the jury all the evidence pertaining to their injury and expenses, they had faith in him when they provided him with whatever document they have pertaining to their medical and all other expenses, they had faith in him and had no reason to doubt him when he asserted that he would obtain the rest of their medical expenses from their physicians' offices." Plaintiffs' reliance on defendant's skills as an attorney does not amount to reliance on allegedly fraudulent statements. For example, plaintiffs have not alleged that defendant represented to them that he *did* obtain information about their medical expenses.

misrepresented their position following the verdict. Nor did they offer evidence that defendant, who undertook their representation when the lawsuit had been underway for seven months, actually *knew* the offer didn't meet the section 998 requirements when he emailed plaintiffs shortly after trial in 2010. Plaintiffs likewise failed to offer evidence that they relied in any fashion on the purported misrepresentation and suffered harm thereby.

Plaintiffs did offer evidence that the third cited representation—that opposing counsel was to prepare the judgment—was false. They submitted the February 8, 2010 minute order directing plaintiffs to prepare the judgment. Even assuming that defendant *knowingly* misrepresented his responsibility for the judgment, rather than being merely forgetful or incompetent, plaintiffs again failed to establish any reliance on, or damage from that purported misrepresentation. They stated in their declaration that once they learned a judgment had been entered, they "asked the court for an extension to have other counsels review the case" and the court denied the request. This does not suffice to show that, had defendant not claimed that opposing counsel would prepare the judgment, they would have been differently situated once defendant disappeared—that is, they do not show that any inability to file posttrial motions stemmed from a fraudulently induced belief about who was preparing the proposed judgment other than their lack of counsel.

As for the fourth alleged misrepresentation, plaintiffs offered no evidence that defendant's statement that opposing counsel "will submit what is known as [a] 'memorandum of costs' " amounted to a misrepresentation. Plaintiffs noted that

under California Rules of Court, rule 3.1700, subdivision (a)(1), a "prevailing party" may submit a memorandum of costs and argued that defendant "intentionally concealed the fact that he should have been the one . . . who had the memorandum of costs prepared." (See Cal. Rules of Court, rule 3.1700(a)(1).) Defendant's email statement made no representation about plaintiffs' *own* memorandum of costs. It merely noted that the *Elneggar v. Elmohtaseb* defendants would prepare one. Under Code of Civil Procedure section 998, they may have been entitled to do so. (See Code Civ. Proc., § 998, subd. (c)(1) [if defendant's offer to compromise is not accepted and the plaintiff fails to obtain a more favorable judgment at trial, the plaintiff must pay the defendant's postoffer costs].)

Even if one could construe defendant's email statement as intentionally misleading about plaintiffs' right to file a memorandum of costs themselves[8], plaintiffs offered no evidence with their summary judgment motion that they relied on this statement in some fashion or that defendant *did* fail to seek any costs to which they were legally entitled, thereby injuring them.[9]

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[8] See Civil Code section 1710, subdivision (3) (deceit may consist of "[t]he suppression of a fact, by one . . . who gives information of other facts which are likely to mislead for want of communication of that fact").

[9] Plaintiffs appeared to interpret the "costs" that may be recovered by a prevailing party to include the medical costs they asserted as damages in their underlying lawsuit. The costs recoverable by a prevailing party are set forth in Code of Civil Procedure section 1033.5. (See Code Civ. Proc., § 998, subd. (c)(1) [if a plaintiff has declined a defendant's offer to compromise and does not obtain a more favorable award at trial, plaintiff may not recover postoffer costs].)

In sum, the evidence presented by plaintiffs would not have required a reasonable trier of fact to find that defendant knowingly made misrepresentations of fact upon which plaintiffs actually relied, and that plaintiffs suffered injury from any such reliance. (See *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 851.) Absent such evidence, plaintiffs were not entitled to summary judgment on their claims as a matter of law. The trial court properly denied their motion.

III. The Trial Court Did Not Abuse Its Discretion in Denying Plaintiffs' Request for a Stay While They Took a Writ.

Finally, plaintiffs argue that the trial abused its discretion in not granting their request for a trial continuance for the purpose of challenging the trial court's summary judgment ruling by way of writ. Even if, arguendo, denial of plaintiffs' request were an abuse of discretion, any such error is harmless because plaintiffs have not shown they suffered any prejudice by proceeding directly to trial and then seeking appellate review of the summary judgment ruling—which they have now received. (See *Rebney v. Wells Fargo Bank* (1990) 220 Cal.App.3d 1117, 1141-1142, overruled on other grounds in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 269-270.)

DISPOSITION

The judgment is reversed and the matter remanded for further proceedings. Each party is to bear its own costs on appeal.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.