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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

MT. TAM LASER AND  
SKIN CARE CORPORATION et al.,  
Plaintiffs and Appellants,  
v.  
RONALD P. GOLDMAN et al.,  
Defendants and Respondents.

A141939

(City and County of San Francisco  
Super. Ct. No. CGC-12-521973)

Mt. Tam Laser and Skin Care Corporation (Tam Laser), a medical corporation, and two of its directors, nurses Jan Meier and Sandi Selig-Farney (the Tam Laser parties), brought this legal malpractice action against Ronald P. Goldman and his law firm (collectively, Goldman). Goldman represented the Tam Laser parties as insurer-retained counsel in a prior medical malpractice action. Goldman's representation ended when a conflict of interest arose between the Tam Laser parties and a third director, also a defendant in the action. The Tam Laser parties insisted upon retention of independent counsel of their choosing. The insurer agreed to appoint independent counsel but objected to their chosen counsel and refused payment of his fees.

The Tam Laser parties pursued arbitration against the insurer to recover their independent counsel fees and, in this action, sued Goldman. They contend Goldman failed to disclose a conflict of interest among the insured directors and failed to provide competent representation, necessitating the retention of independent counsel. The Tam Laser parties seek recovery of attorney fees and costs incurred in the underlying medical

malpractice action unpaid by the insurer and the cost of prosecuting proceedings against the insurer to recover those defense costs. They also seek recovery for intentional infliction of emotional distress.

The trial court entered summary judgment for Goldman, concluding that the undisputed facts establish that no damages were caused by the alleged legal malpractice, misrepresentation and breach of fiduciary duty. The court also concluded that as a matter of law the undisputed facts do not establish severe emotional distress. We shall affirm the judgment.

### **Statement of Facts<sup>1</sup>**

#### The underlying medical malpractice case

Tam Laser operates a clinic in Marin County that provides cosmetic services, including laser hair removal. In June 2010, Lauren Killips received a laser hair removal treatment at Tam Laser. Killips claimed the treatment was performed improperly and resulted in second-degree burns on her legs. In April 2011, Killips filed suit against Tam Laser in Marin County Superior Court alleging claims for medical negligence, unlawful business practices, false advertising and other causes of action, both individually and on behalf of a purported class of consumers who received hair removal services at Tam Laser (*Killips*).

Three of Tam Laser's directors were also named as defendants: Laurence Engler Wolf, M.D., a plastic surgeon, and two registered nurses, Meier and Selig-Farney. Wolf was Tam Laser's medical director at the time. He provided "medical supervision and guidance." Meier and Selig-Farney are "practice managers" who, to this day, provide patient care and manage the clinic.

Wolf was insured by The Doctors Company, a professional liability insurer (TDC or the insurer), under a policy with coverage for medical negligence claims. Meier and Selig-Farney are additional insureds under the policy. In May 2011, Wolf tendered the

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<sup>1</sup> The statement of facts is based upon the parties' statements of undisputed facts and evidence submitted in connection with the motion for summary judgment.

defense of the Killips case to TDC and the insurer appointed Goldman to represent all defendants.

Discord among the directors developed when an issue arose concerning the formation of the corporation. The plaintiff in *Killips* propounded discovery requests seeking information on Tam Laser's ownership. The *Killips* action included the allegation that Tam Laser's stock was owned by one physician and two nurses, making it "defectively formed" as a corporation. A majority of a professional medical corporation's shares must be owned by a physician and the number of non-physicians owning shares may not exceed the number of physician shareholders. (Corp. Code, §§ 13401, subd. (d), 13401.5.) Wolf, Meier and Selig-Farney told defense counsel that Drexel Bradshaw and his law firm Bradshaw and Associates, P.C. (collectively, Bradshaw) was Tam Laser's corporate counsel and custodian of its corporate records. Bradshaw had prepared Tam Laser's documents of incorporation, was its registered agent for service of process, and had represented the company in connection with a previous patient grievance.

Goldman asked Bradshaw to provide "the complete corporate records" for Tam Laser. Although not providing Goldman with complete records, as Drexel Bradshaw later admitted, Bradshaw provided Goldman with the articles of incorporation, a stock transfer ledger and stock certificates. These corporate documents indicate that on July 15, 2004, Wolf, Meier, and Selig-Farney were issued ownership shares in Tam Laser, with Wolf owning 51 percent and Meier and Selig-Farney each owning 24.5 percent.

Goldman produced to the plaintiff in *Killips* the corporate documents —showing shares owned by two non-physicians and one physician—and amended defendants' answer to assert an advice-of-counsel defense. The amendment alleged that defendants relied on legal counsel (Bradshaw) for business practices alleged to be "improper or unlawful." In January 2012, Goldman responded to interrogatories in the *Killips* case, stating the shareholders of Tam Laser to be Wolf, Meier and Selig-Farney. Meier and Selig-Farney reviewed the responses before they were submitted and verified their accuracy. At Wolf's deposition the following month, he testified that Meier and Selig-Farney initiated formation of Tam Laser in 2004 and employed Bradshaw "to assist with

incorporating the company.” Meier was deposed the next day and testified that Tam Laser’s shareholders were Wolf, Meier and Selig-Farney—“two nurses and one doctor.” Killips’s attorney asked Meier if she understood it is “illegal to set up a medical corporation with two nurses and one doctor as owners?” Goldman instructed Meier not to answer.

About a week after Meier’s deposition, Bradshaw wrote to Goldman asserting that there was a conflict between the interests of Wolf, on one hand, and Tam Laser, Meier and Selig-Farney on the other. The nature of the perceived conflict was unstated but appears to be that Wolf might deny liability arising from any deficiency in Tam Laser’s ownership structure by blaming Meier and Selig-Farney. Bradshaw asserted that the Tam Laser parties were entitled to independent (*Cumis*)<sup>2</sup> counsel and had retained the Bradshaw law firm to represent them. TDC agreed to appoint *Cumis* counsel for the Tam Laser parties but objected to Bradshaw’s retention, asserting that Bradshaw had previously represented Wolf and thus could not undertake adverse representation of the Tam Laser parties. The Tam Laser parties nonetheless insisted upon retaining Bradshaw and a formal substitution of counsel was filed in late February 2012. The insurer refused to pay Bradshaw.

In May 2012, Goldman, on Wolf’s behalf, filed a motion in *Killips* to disqualify Bradshaw as counsel for the Tam Laser parties, and the court granted the motion. The court’s June 2012 order stated that the Bradshaw attorneys were potential witnesses because the firm performed work in advising Wolf “in setting up the business” of Tam Laser. The court also found that Bradshaw “was privy to confidential client communications involving” Wolf. Bradshaw, representing the Tam Laser parties, filed a notice of appeal from the disqualification order. (*Killips v. Mt. Tam Laser and Skin Care Corp.* (Nov. 20, 2012, A135689) [nonpub. opn.] )

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<sup>2</sup> *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 364; Civ. Code, § 2860.

The parties do not explain who represented the Tam Laser parties in the *Killips* case after Bradshaw's disqualification. There is evidence in the record, however, that on at least two occasions the Bradshaw firm acted on behalf of the Tam Laser parties despite the firm's disqualification.<sup>3</sup>

While appeal of the disqualification motion was pending, in October 2012, the *Killips* case settled pursuant to a confidential settlement agreement between Killips and Wolf. The action was dismissed in its entirety. The Tam Laser parties were dismissed with prejudice without contributing any money to the settlement. Wolf's motion to dismiss the appeal as moot was granted in November 2012.

#### The legal malpractice case

In June 2012, shortly after Goldman succeeded in having Bradshaw disqualified as counsel in the *Killips* case, the Tam Laser parties, represented by Bradshaw, filed the complaint against Goldman that is now before us. The complaint alleges legal malpractice and also includes claims for intentional misrepresentation, negligent misrepresentation, breach of fiduciary duty, and intentional infliction of emotional distress.<sup>4</sup>

The malpractice cause of action is based on several assertions of attorney negligence and misconduct. A central allegation is that Goldman "failed to properly investigate the status of [Tam Laser's] shareholder ownership percentages prior to preparing discovery responses." Remarkably, the Tam Laser parties claim Goldman should not have relied upon the corporate documents that Bradshaw gave him or upon their own verified responses acknowledging ownership of the corporation by Wolf, Meier and Selig-Farney. They contend that Tam Laser was owned only by Wolf and Meier, and

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<sup>3</sup> The Bradshaw firm submitted corrections to a deposition transcript in July 2012 and a firm attorney attended a settlement conference in the fall of 2012.

<sup>4</sup> The Tam Laser parties also sued TDC for breach of contract, bad faith and related claims. The matter was compelled to arbitration and an arbitration award in favor of the insurer was confirmed by the San Francisco Superior Court in March 2015. We grant Goldman's request for judicial notice of these matters. We also take judicial notice of the pending appeal.

that the July 2004 documents showing otherwise had been superseded by a later transfer of shares.

The Tam Laser parties also allege that Goldman did not obtain their consent before asserting an advice-of-counsel defense blaming Bradshaw for deficiencies in the formation of the corporation and improvidently permitted Meier to testify at her deposition about privileged attorney-client communications between herself and Bradshaw. It is also alleged that a conflict of interest between Wolf and the Tam Laser parties was apparent by the time of Wolf's deposition, when he testified that Meier and Selig-Farney were Tam Laser's founders, despite which Goldman continued to represent all defendants. Other claims of malpractice include allegations that Goldman failed to compel arbitration of the *Killips* claim and failed to obtain early dismissal of class claims.

The remaining causes of action are also founded on Goldman's legal representation of the Tam Laser parties. The misrepresentation causes of action rest on the allegation that Goldman falsely "informed [the Tam Laser parties] that [the firm] would represent [their] interests and provide a vigorous and zealous defense to Killips' [s] claims." Goldman is alleged to have breached his fiduciary duty "by accepting money for the defense of [the Tam Laser parties'] claims, but failing to provide them with adequate . . . counsel which would represent [their] interests over the interests of the [insurer] and/or Wolf." Goldman is also alleged to have intentionally inflicted emotional distress by acting "with the intention of causing, and/or reckless disregard for the possibility of causing, emotional distress to [Meier and Selig-Farney] when [Goldman] undertook representation of [them] without any intention to adequately represent [their] interest."

The Tam Laser parties assert, as damages, exposure to claims in the *Killips* case "potentially not covered" by insurance, legal fees incurred defending the *Killips* case that the insurer refused to pay, and legal fees incurred in prosecuting this action and their bad faith action against TDC.

#### The summary judgment motion

In September 2013, Goldman filed a motion for summary judgment. The Tam Laser parties asserted the need for additional discovery and the court continued the

hearing to permit completion of the requested discovery and submission of supplemental briefing. (Code Civ. Proc., § 437c, subd. (h).) Discovery and briefing were completed in February 2014.

In moving for summary judgment, Goldman asserted that the undisputed facts negated both liability and damages. Goldman argued that “[t]he crux of [the Tam Laser parties’] case is that The Goldman Law Firm transmitted discovery responses that showed [Tam Laser] was improperly structured because it had two non-doctor shareholders,” Meier and Selig-Farney. Goldman claimed it “adequately investigated and sought out information regarding the corporate structure of Tam Laser and reasonably relied on the information provided” by the Tam Laser parties and their corporate counsel. Alternatively, Goldman maintained that even if the firm were at fault for continuing to represent the Tam Laser parties, those parties suffered no damages from its representation because the case settled and all claims were dismissed with prejudice without any payment from the Tam Laser parties. “There is no better possible result that could have been obtained in the Killips Case,” Goldman argued, and no economic damages incurred. Goldman also argued that Meier and Selig-Farney did not suffer actionable emotional distress, citing plaintiffs’ discovery responses reporting nothing more than generalized worry and anxiety stemming from the *Killips* case.

The Tam Laser parties argued that triable issues of fact exist with respect to both liability and damages. They maintained that Goldman improperly relied upon their assertions of ownership and the documents received from the corporation’s attorney without making a further investigation that would have revealed Tam Laser to be properly formed. They concede that Tam Laser’s shareholders were initially comprised of one physician (Wolf) and two non-physicians (Meier and Selig-Farney) but claim the error was corrected years before the *Killips* case arose when Selig-Farney allegedly surrendered her shares.

On damages, the Tam Laser parties claimed that Goldman’s malpractice and other wrongs “forced” them “to become liable for substantial lega[l] fees and costs in the Killips action, this action, and the arbitration involving [the insurer,] The Doctors

Company.” Meier and Selig-Farney declared they would not have had to pay fees for independent counsel to defend the *Killips* case “but for” the actions of Goldman. They each declared: “Although I have yet to pay the legal fees of the Bradshaw & Associates, P.C. firm, I am obligated to pay those fees and costs, as well as the legal fees and costs associated with this action and the arbitration involving The Doctors Company. I am informed and believe that those legal fees and costs in total currently well exceed \$500,000.” They also declared that they worried they might lose their company as a result of the legal actions and, as a result, suffer emotional distress marked by “loss of sleep, anxiety, headaches, and stomach discomfort.”

#### The summary judgment order

The court granted Goldman’s motion for summary judgment, concluding that the Tam Laser parties failed to produce evidence demonstrating a triable issue of material fact with respect to the damages claimed in any of their causes of action. The court explained that there was no evidence they could have achieved a better result in the *Killips* case in the absence of Goldman’s conduct, noting that all claims in *Killips* were dismissed with prejudice. The court also noted that the Tam Laser parties had not “paid attorneys’ fees to their current counsel as [a] result of [Goldman’s] alleged negligence.” Lastly, the court stated “severe emotional distress cannot be found as a matter of law.”

#### Motions for reconsideration, new trial and amendment of the complaint

A week after issuance of the summary judgment order, the Tam Laser parties paid Bradshaw \$10,000 in “partial payment” for its representation in *Killips* and then filed motions for reconsideration and a new trial claiming their payment constituted “newly discovered evidence” refuting the court’s finding of nonpayment. The Tam Laser parties also filed a motion for leave to amend their complaint to assert additional facts and legal theories. The motions were denied. The court entered judgment in favor of Goldman and the Tam Laser parties timely filed a notice of appeal.

## Discussion

### 1. General principles governing summary judgment

“The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) “[I]n moving for summary judgment, a ‘defendant . . . has met’ his ‘burden of showing that a cause of action has no merit if’ he ‘has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . . . may not rely upon the mere allegations or denials’ of his ‘pleadings to show that a triable issue of material fact exists but, instead,’ must ‘set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.’ ” (*Id.* at p. 849, quoting Code Civ. Proc., § 437c, subd. (o)(2).)

“On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California’s traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff’s case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law.” (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 334.)

### 2. Summary adjudication of the legal malpractice claim was proper because the undisputed facts establish that no damages were caused by the alleged malpractice.

The elements of a legal malpractice claim are: (1) the existence of a duty; (2) the breach of the duty; (3) damages; and (4) proximate cause. (*Lazy Acres Market, Inc. v. Tseng* (2007) 152 Cal.App.4th 1431 (*Lazy Acres*)). An attorney who commits legal malpractice is liable for all damages directly and proximately caused by his or her

negligence. (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045). The plaintiff is required to prove that but for the defendant's negligent acts or omissions, "the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred." (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241.)

The acknowledged facts establish that the Tam Laser parties would not have obtained a more favorable resolution of the case in the absence of the alleged malpractice. *Killips* was dismissed with prejudice without the Tam Laser parties admitting liability or making any contribution to the settlement. Such a resolution is the best a defendant may expect in most cases. (See *Lazy Acres, supra*, 152 Cal.App.4th at p. 1437 [no claim for malpractice where underlying case settled without contribution by client].)

The Tam Laser parties argue that a better resolution was possible here in that they might have obtained an award of costs as the prevailing parties. There is no suggestion that they paid, or incurred any obligation to pay, plaintiff Killips's costs, but they contend that in the absence of Goldman's alleged negligence they would have recovered their own costs. This possibility was mentioned only in a cursory fashion in the Tam Laser parties' opposition to the summary judgment motion, in which they argued only that they incurred "general damages" in the *Killips* case and became "liable" for costs. In their motion for a new trial the Tam Laser parties expanded their argument, submitting the memorandum of costs they filed in *Killips* listing defense costs of \$17,513.45 and the order denying them the recovery of their costs. Costs were denied them because Killips was the prevailing party as "[s]he settled the case on favorable terms with Dr. Wolf, who was the licensed medical director" of Tam Laser.<sup>5</sup> The Tam Laser parties apparently sought recovery of their costs as defendants against whom the plaintiff "recovered no relief." (Code Civ. Proc., § 1032, subd. (a)(4)). While the record is unclear on this point,

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<sup>5</sup> "[T]he party with a net monetary recovery" is the prevailing party (Code Civ. Proc., § 1032, subd. (a)(4)).

it appears from the court's order that Tam Laser and its directors Meier and Selig-Farney were denied costs because of their unity of interest with Wolf, who did make a payment to settle the case. (*Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 272.)

With little elaboration, the Tam Laser parties argue they “were prevented from being the prevailing party in the *Killips* Action as a direct result of the manner in which [Goldman] settled the *Killips* Action.” This contention is rather incomprehensible since Goldman was not the Tam Laser parties' attorney at the time of the settlement. Moreover, there is no explanation, much less evidence, of how the “manner” of settlement caused disentitlement to costs. The case was settled in a customary manner by Wolf making a payment to Killips. The Tam Laser parties were denied costs not because of anything Goldman did or failed to do, but because of the parties' business relationship which the court deemed to create a unity of interest among all defendants.

The Tam Laser parties argue that they “would not be obligated to pay [their] costs if [Goldman] had not settled *Killips* by having Wolf pay plaintiff.” But there is no evidence that Killips would not have prevailed if the action had proceeded to trial or that the amount of the settlement was unreasonable, or that but for Goldman's alleged negligence dismissal could have been obtained without Wolf's payment. Killips claimed she received inadequate medical care at Tam Laser, a claim that was not generated or affected by Goldman's alleged malpractice — allegedly providing improper discovery responses concerning corporate structure, disclosing attorney-client communications concerning corporate formation, failing to compel arbitration, and failing to obtain early dismissal of class claims. Even if there is merit to any of these claimed deficiencies, there is no reason to believe that dismissal could have been obtained without payment to Killips for her claimed injuries.

The Tam Laser parties also argue that, but for Goldman's alleged malpractice, they would not have incurred *Cumis* counsel fees and costs defending the *Killips* action,

nor attorney fees in arbitrating the claim against their insurer to recover those expenses.<sup>6</sup> However, it is the insurer, not the attorney retained by the insurer, that is obligated to pay for independent counsel under proper circumstances. (Civ. Code, § 2860, subd. (a).) An insurer's duty to defend "is breached when an insurer furnishes defense counsel whose ability to represent the insured is impaired by a disqualifying conflict of interest." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group) ¶ 7:769.) A conflict of interest may arise when "[t]he insurer has employed a single defense counsel to represent several insureds whose interests differ." (*Id.*, ¶ 7:771.2.) In such a situation, the insurer is required to provide independent *Cumis* counsel to the insureds having differing interests. (*Id.*, ¶ 7:790.1.) An insured may retain *Cumis* counsel of his or her choosing at the insurer's expense, subject to reasonable limitations imposed by the insurer. (*Id.*, ¶¶ 7:791-7:805.) An insurer may refuse the insured's choice of *Cumis* counsel where, for example, chosen counsel is unqualified. (*Id.*, ¶ 7:796.)

The Tam Laser parties have provided no authority for the proposition that an insurer-retained attorney, rather than the insurer, may be held accountable for *Cumis* fees when an insurer rejects the insured's choice of counsel. There is clear authority to the contrary. In *Lazy Acres*, an insured sued its insurer-retained attorney for legal malpractice and breach of fiduciary duty upon allegations that the attorney failed to disclose a conflict of interest among the insureds and failed to provide competent representation. (*Lazy Acres*, *supra*, 152 Cal.App.4th at pp. 1433-1434.) The insured retained *Cumis* counsel whom the insurer refused to pay. (*Id.* at p. 1434.) The insured sought to recover the unpaid *Cumis* counsel fees and court costs from the insurer-retained attorney, alleging that the fees and costs incurred in the underlying action resulted from the attorney's misconduct. (*Id.* at pp. 1434-1435.) A demurrer to the complaint was sustained and the judgment affirmed on appeal. The stated facts were insufficient to show the attorney's alleged misconduct proximately caused any damages. (*Id.* at pp. 1433, 1436.) The insurer

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<sup>6</sup> We will assume, as the Tam Laser parties contend, that damages can be established whether attorney fees were paid or merely incurred.

had the duty to pay the fees and costs necessary to defend the action; any damage to the insured was not caused by the attorney but by the insurer's refusal to pay those expenses. (*Id.* at p. 1436.)

The same result obtains here. Even if, as the Tam Laser parties contend, Goldman failed to disclose a conflict of interest among the insureds and failed to provide competent representation, necessitating the retention of *Cumis* counsel, it was the insurer who became obligated to pay for *Cumis* counsel when a conflict arose. The record shows that TDC did in fact agree to appoint *Cumis* counsel but objected to the Tam Laser parties' choice of counsel, Bradshaw, because Bradshaw had previously represented Wolf and thus could not undertake representation of parties with whom his interests conflicted. Moreover, were an issue to arise concerning the formation of the corporation, Bradshaw undoubtedly would have been required to testify. The Tam Laser parties incurred fees only because they insisted on retaining Bradshaw over the insurer's objection. Whether TDC was justified in refusing to pay Bradshaw is an issue between the Tam Laser parties and TDC. In no event was Goldman the cause of the Tam Laser parties becoming responsible for the payment of Bradshaw's fees.

The Tam Laser parties assert that "but for [Goldman's] conduct in filing a motion to recuse [Bradshaw] on behalf of Wolf, [the insurer] would have paid [Bradshaw's] attorney's fees in *Killips*." But Goldman was not representing the Tam Laser parties when he filed the motion to disqualify Bradshaw. Moreover, passing over the absence of any evidence to support what TDC would have done absent the motion, it was not the motion or the court's order that caused TDC to refuse to pay the fees of the Tam Laser parties' independent counsel. Payment of those fees was denied because of the Tam Laser parties' insistence on hiring an attorney that TDC considered unqualified under the circumstances. Goldman's conduct clearly was not a proximate cause of any damages the Tam Laser parties suffered.

3. Summary adjudication of the misrepresentation and breach of fiduciary duty claims was proper for the same reason, because the undisputed facts establish that the alleged misconduct caused no damages.

To sustain “a cause of action for breach of fiduciary duty, there must be shown the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach.” (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.) Likewise, a cause of action for misrepresentation, whether intentional or negligent, requires proof of causation and damages. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962.)

The Tam Laser parties allege Goldman breached its fiduciary duty by engaging in the alleged malpractice and in otherwise “failing to provide them with adequate” counsel. The causes of action for intentional and negligent misrepresentation are founded on allegations that Goldman told the Tam Laser parties the firm “would represent [their] interests and provide a vigorous and zealous defense to Killips’ claims” when the firm was “solely concerned with representing the interests” of the insurer and Wolf. The damages alleged in these causes of action are the same as for the alleged malpractice, that but for the alleged breach of fiduciary duty and misrepresentations the Tam Laser parties would not have incurred *Cumis* counsel fees and costs defending the *Killips* action nor attorney fees in arbitrating a claim against their insurer to recover those expenses.

As with their legal malpractice cause of action, the Tam Laser parties fail to show the alleged wrongful acts by Goldman proximately caused these damages. As discussed above, the duty to pay fees and costs in defending the action rested with the insurer and any damage to the Tam Laser parties was caused by their insistence on retaining counsel that TDC considered disqualified. (*Lazy Acres, supra*, 152 Cal.App.4th at p. 1436.)

4. Summary adjudication of the intentional infliction of emotional distress claim was proper because the undisputed facts establish that there was no severe emotional distress.

“The elements of the tort of intentional infliction of emotional distress are:  
‘ “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of

the emotional distress by the defendant's outrageous conduct." ' ' (Christensen v. Superior Court (1991) 54 Cal.3d 868, 903, internal quotation marks omitted.)

Meier and Selig-Farney allege that Goldman's acts and omissions during his representation of them constitutes "extreme and outrageous conduct beyond all bounds of decency" that caused them "extreme mental distress" in the form of "worry and anxiety over the loss of their company, their money, and their property." In opposing summary judgment, they declared they worried that they might lose their company as a result of the legal actions and, as a result, suffer emotional distress marked by "loss of sleep, anxiety, headaches, and stomach discomfort." The evidence establishes, however, that neither Meier nor Selig-Farney received any medical care, treatment or medication for emotional distress nor have they been told they will need medical care in the future as a result of worry and anxiety over the state of their business.

Meier and Selig-Farney have failed to raise a triable issue of material fact on the element of severe emotional distress. " 'It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed.' " (Fletcher v. Western National Life Ins. Co. (1970) 10 Cal.App.3d 376, 397.) "With respect to the requirement that the plaintiff show severe emotional distress, [the California Supreme Court] court has set a high bar. 'Severe emotional distress means " 'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.' " ' " (Hughes v. Pair (2009) 46 Cal.4th 1035, 1051.) The emotional distress reported by plaintiffs is not of this nature. It is common to worry about pending litigation and its impact on one's business. Such concerns do not constitute severe emotional distress sufficient to support a tort cause of action. " 'Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.' " (Fletcher, supra, at p. 397.) Summary adjudication of this cause of action was proper.

5. The trial court did not abuse its discretion in denying the Tam Laser parties' motions for rehearing, a new trial, and leave to amend the complaint.

Following issuance of the order granting summary judgment, the Tam Laser parties paid the Bradshaw law firm \$10,000 in “partial payment” for its representation in the *Killips* case and then filed motions for reconsideration and for a new trial, claiming their recent payment constituted new or different facts refuting the court’s finding of nonpayment. Goldman argues “[s]ince the \$10,000 payment was not in existence at the time summary judgment was granted and was created to circumvent summary judgment after-the-fact, it is not a ‘new or different fact’ warranting reconsideration or ‘newly discovered evidence’ warranting a new trial.” There is merit to the argument. (See *Cansdale v. Board of Administration* (1976) 59 Cal.App.3d 656, 667 [“Normally, to support a motion for a new trial on [the] ground [of newly discovered evidence], the court must determine if the evidence was in existence at the time of the trial and could not have been discovered with reasonable diligence.”].)

The more compelling argument, however, is that evidence of the \$10,000 payment is immaterial. “To justify a new trial, newly discovered evidence . . . must be shown to be material ‘in the sense that it is likely to produce a different result.’ ” (*In re Marriage of Smyklo* (1986) 180 Cal.App.3d 1095, 1101.) Although in explaining the basis for granting summary judgment the trial court did refer to the fact that Bradshaw’s fees had not been paid, as indicated by our discussion above—which proceeds on the assumption that incurring the obligation to pay fees may be sufficient to establish damages—the evidence of actual payment would not require a different result. The \$10,000 payment to Bradshaw does not show damages caused by Goldman, since it was the Tam Laser parties’ insistence on retaining Bradshaw and TDC’s refusal to pay for the retention of Bradshaw, not Goldman’s conduct, that caused the Tam Laser parties to bear the costs of that retention.

The trial court also denied the Tam Laser parties’ motion for leave to amend the complaint, filed almost two months after issuance of the summary judgment order and just days before entry of judgment. The proposed amended complaint alleged the recent

attorney fee payment and additional causes of action. The proposed amended complaint included a cause of action for intentional interference with prospective economic advantage, claiming that Goldman interfered with the Tam Laser parties' business relationships with Wolf, Bradshaw, and the insurer.

The court did not abuse its discretion in denying leave to amend. “[I]f a plaintiff wishes to introduce issues not encompassed in the original pleadings, the plaintiff must seek leave to amend the complaint *at or prior to the hearing* on the motion for summary judgment.” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1257, italics added.) The Tam Laser parties did not seek leave to amend until after the hearing and issuance of an order adjudicating all claims against them. They argue that a plaintiff may be allowed a post-order amendment to the complaint when summary judgment is granted on the ground that the complaint is legally insufficient. They rely upon authorities observing that “ ‘[a] motion for summary judgment may effectively operate as a motion for judgment on the pleadings.’ ” (*Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1067.) “Where the complaint is challenged and the facts indicate that a plaintiff has a good cause of action which is imperfectly pleaded, the trial court should give the plaintiff an opportunity to amend.” (*Ibid.*) That is not the situation here. The summary judgment motion was not based on imperfections in the pleadings but upon an extensive evidentiary record that demonstrated the Tam Laser parties' inability to raise a triable issue of fact on key elements of their claims. Those deficiencies could not be cured by artful pleading. “If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, as opposed to merely attacking the sufficiency of the complaint, the plaintiff forfeits an opportunity to amend to state new claims by failing to request it.” (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1664.) The Tam Laser parties' belated attempt to resuscitate their lawsuit by amending their complaint to allege new facts and causes of action was properly denied.

### **Disposition**

The judgment is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Siggins, J.