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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

GARY KOEPPEL et al, Plaintiffs and Respondents, v. JOHN O. BRONSON CO., INC., Defendant and Appellant.	H041697 (Monterey County Super. Ct. No. M117134)

A jury found insurance broker John O. Bronson Co., Inc. (Bronson) liable to gallery owner Gary Koeppel for damages resulting from an insurance carrier's denial of a dealer fine art policy claim. On appeal, defendant Bronson argues that the trial court erred by (1) instructing the jury on a "special relationship" duty, (2) recognizing a duty to advocate, and (3) allowing evidence of defendant's insurance liability coverage. Defendant also challenges (4) plaintiff's standing to sue on behalf of a limited liability company, (5) damages awarded for emotional distress, (6) attorney's fees awarded under the tort of another doctrine, (7) damages awarded for damaged posters by artist Herb Kane, and (8) the prejudgment interest rate. We find no error as to the standing, duty, emotional distress, and attorney's fees issues. But we find that the damages award for the Kane posters is not supported by substantial evidence and that the trial court applied the wrong interest rate to the award of prejudgment interest. Accordingly, we will reverse the judgment and remand with instructions.

I. BACKGROUND

The Coast Gallery in Big Sur suffered water damage in June 2010, prompting the gallery owner, plaintiff Gary Koeppel, to file an insurance claim for damaged artwork. Plaintiff reported the loss to his insurance broker, defendant John O. Bronson Company (broker), a Sacramento based company that had purchased Monterey Insurances Agencies in 2008. Plaintiff had purchased over 160 insurance policies from Monterey Insurance Agencies beginning in 1992, and broker had continued the local company's long-standing relationship with plaintiff.

Plaintiff's 2010 loss consisted largely of stored prints—posters and lithographs—that he had produced and published and featured at past art expositions. The lithographs were prints that were numbered and signed by the artist, and worth more than the posters, which were unsigned prints. After the 2010 water intrusion, the prints were sorted, moved to a warehouse, and inventoried. Prints that had first appeared to have been undamaged were later determined to be contaminated by mold.

Plaintiff had carried a fine art dealer insurance policy for several years with Lloyd's of London, and in 2009 he changed carriers to Praetorian Insurance Company (Praetorian), which had better transit coverage, obviating the need to purchase exhibition endorsements. Unbeknownst to plaintiff, the Praetorian policy had a nonstandard loss valuation clause. Instead of valuing an art loss at 80 percent of the retail price, the Praetorian policy valued art losses using a cost-plus-25-percent formula. Broker never informed plaintiff of the nonstandard clause, and plaintiff did not become aware of it until he filed his 2010 claim.

In November 2009, the wholesale broker involved in plaintiff's purchase of the Praetorian policy sent an e-mail to Amber Kastros, broker's customer service agent handling plaintiff's business. The subject line read "Valuation Loss Clause," and the body of the e-mail stated: "As we discussed. [¶] Let me know if you want to bind coverage for Coast Galleries." Broker had no documentation or recollection of that e-mail, which was produced by the wholesale broker in discovery, but broker's customer file on plaintiff contained a blank Praetorian valuation clause amendment endorsement valuing loss at the greater of selling price less 20 percent or cost plus 30 percent. The wholesale broker was aware of the nonstandard valuation clause, and had been working with Praetorian to change the clause to conform to industry standards since Praetorian had solicited the wholesale broker's dealer fine art policy book of business earlier that year. He did not recall a specific conversation with Kastros about the valuation clause, but he had no reason to believe that he would not have alerted broker to his ongoing efforts to have the valuation clause changed.

Upon learning of plaintiff's 2010 claim, the Praetorian underwriter who had solicited the wholesale broker's book of business e-mailed Praetorian's third-party claims administrator that she was "praying this isn't a big one." The day after learning that the claim could be a $1.2 million loss, the underwriter asked the wholesale broker for loss runs on plaintiff's Lloyd's policy, which showed a 2007 loss. Praetorian then identified an error on plaintiff's 2009 application, which had been filled out by Kastros. Kastros had inserted a "-0-" on the application, representing no losses over the last five years.

Plaintiff had been burglarized in 2007, and although Kastros had been aware of a 2007 business property loss claim, she did not know that plaintiff had also claimed a dealer fine art loss. She had indicated no losses on the 2008 application supporting the renewal of the Lloyd's dealer fine art policy without reviewing plaintiff's file, and she had carried over that error to the 2009 application submitted to Praetorian. She had e-mailed plaintiff the 2009 application, asking him to complete it and explaining that "the basic information [was] filled in." Plaintiff had returned the application after updating and signing the gallery inventory forms, without reading the portion of the application completed by Kastros. Plaintiff had valued the gallery's inventory at $1.6 million, with 19 percent of that value allocated to "[p]aintings, drawings, etchings, etc."

Broker informed Praetorian that it was Kastros who had made the mistake on the application, and it waited to see what action Praetorian would take. Broker did not believe the misrepresentation was material. The wholesale broker had not provided Praetorian with loss runs on the Lloyd's policy, even though loss runs were part of the application, and Praetorian did not follow up with the wholesale broker to obtain that information before issuing the policy. Praetorian had apparently issued dealer art policies even to the wholesale broker's other clients who had disclosed prior losses.

Broker did not tell plaintiff that Praetorian had discovered the mistake on the application. Plaintiff was examined under oath by Praetorian in July 2012, understanding the examination to be about his claim, not his policy application. Unprepared for questions about prior losses, plaintiff incorrectly told the examiners that he had not had a dealer fine art claim within 10 years before purchasing the Praetorian policy, and that he had put the zero on the form. He recalled the 2007 burglary but did not remember any payments from his fine art policy for that loss. Plaintiff contacted Kastros after his examination and at that time she explained to him that she had made the mistake. Praetorian declined the claim and voided the policy based on plaintiff's "fraud, intentional concealment and/or misrepresentation of a material fact." Kastros told plaintiff he could file a complaint with the Department of Insurance, and broker contacted its errors and omissions carrier.

Plaintiff filed a complaint in the trial court alleging tortious bad faith against Praetorian, and negligence against broker and the wholesale broker. The wholesale broker was dismissed from the case, and plaintiff settled with Praetorian for $800,000.[1] Plaintiff advanced three theories of liability against broker at trial: ordinary negligence, professional negligence, and breach of special relationship duties. The parties' experts

[1] Plaintiff also settled with Praetorian's claims adjustor (Vericlaim, Inc.) and a remediation company (Disaster Kleenup Specialists) for $15,000 each on claims related to storage of the damaged artwork.

agreed that broker had not met the standard of care when it represented to Praetorian that plaintiff had no prior losses. Plaintiff pressed that he was harmed by broker's negligence and by broker's failing to advocate to have his claim honored, knowing that the claim was at risk because of broker's own error. He also argued that broker was negligent in failing to advise plaintiff about the nonstandard valuation clause.

Broker minimized its culpability, arguing that it had handled plaintiff's claim reasonably. Broker cast Praetorian as the "villain" for denying the claim based on an immaterial omission, particularly since it had issued the policy without obtaining plaintiff's loss runs. Broker argued that the wholesale broker was also negligent for failing to provide the loss runs to Praetorian. At the same time, broker conceded that Kastros had breached the standard of care by offering the Praetorian policy without comparing the loss valuation clause to the Lloyd's policy,and that it "has some responsibility for the situation [plaintiff] is in."

In a special verdict, the jury found that broker had been negligent and had breached a special relationship duty of care, and that broker's negligence and breach of duty were substantial factors in causing harm to plaintiff. The jury awarded plaintiff over $1.475 million in damages, including $45,000 for serious emotional distress, $45,000 for damage to reputation and/or credit, $88,753 for expenses (other than attorney's fees) incurred pursuing his claim against Praetorian, and $1,296,434 for the damaged prints, using an 80 percent of retail value formula. The jury found that plaintiff was entitled to prejudgment interest as of November 4, 2010 (the date Praetorian denied the claim) and that broker's negligence or breach of duty was a substantial factor in plaintiff's decision to pursue the lawsuit against Praetorian.[2] The jury found plaintiff not negligent; it assigned 85 percent fault to broker, 10 percent fault to Praetorian, and 5 percent fault to the wholesale broker.

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[2] Based on that finding, the court increased the damages award by $320,000 for the attorney's fees plaintiff incurred pursuing the lawsuit against Praetorian.

The trial court reduced the non-economic damages from $90,000 to $76,500 (reflecting the jury's 85 percent apportionment of fault to broker) and it calculated prejudgment interest at $496,907.40, for a subtotal of $2,278,594.40. That amount was offset by $830,000 (the Praetorian, Vericlaim, and Disaster Kleenup Specialists settlements), and augmented by $7,103.80 (20 days post-verdict interest) for a total judgment of $1,455,698.20.

II. DISCUSSION

A. STANDING

Plaintiff and his wife transferred all Coast Gallery property to a limited liability company, Koeppel Enterprises, LLC, two weeks before the June 2010 loss. Broker argues that plaintiff lacked individual standing to recover damages for the loss because "any claims for injury or damage to a limited liability company or its property belongs only to the LLC, not to its members," citing *PacLink Communications Internat., Inc. v. Superior Court* (2011) 90 Cal.App.4th 958 (*PacLink*). In broker's view, plaintiff was not a real party in interest because he lacked an insurable interest in the art at the time of the loss.

PacLink does not control here. The plaintiffs in *PacLink* were equity members of an Internet service limited liability company seeking to recover their share of the company's assets that had been transferred to a second company and then sold to a third company. (*PacLink*, *supra*, 90 Cal.App.4th at p. 961.) The *PacLink* court looked to " 'the gravamen of the wrong alleged in the pleadings' " to determine whether the causes of action against the third company were individual or derivative of the limited liability company. (*Id*. at p. 965.) The essence of the plaintiffs' claim was the fraudulent transfer of the limited liability company's assets by the company's other members, which caused injury to the company by diminishing its value. (*Id*. at pp. 964–965) In contrast, the instant case involves an insurance loss, not fraud against business entities formed by members of a fractionalized limited liability company. Koeppel Enterprises did not consist of equity investors but was formed by plaintiff and his wife, who owned the Coast Gallery inventory before transferring it to their company.

" 'Generally, "the person possessing the right sued upon by reason of the substantive law is the real party in interest." ' [Citations.] " (*Gantman v. United Pacific Ins. Co.* (1991) 232 Cal.App.3d 1560, 1566.) The substantive law regarding an insurable interest, Insurance Code section 281, states, "Every interest in property, or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest." The court in *International Service Ins. Co. v. Gonzales* (1987) 194 Cal.App.3d 110, 118 explained that "[a]n insurable interest exists when the insured has a direct pecuniary interest in the preservation of the property and will suffer a pecuniary loss as an immediate and proximate result of its destruction." A contemplated peril to the artwork would have a direct and proximate pecuniary impact on plaintiff and his wife, as sole owners of the company. Thus, plaintiff has an insurable interest in the artwork and the corollary right to sue for its loss in his individual capacity.

B. LIABILITY ISSUES

1. Special Relationship Duty

Broker contends that the court erred by instructing the jury on breach of a special relationship duty.[3] Citing *Jones v. Grewe* (1987) 189 Cal.App.3d 950 (*Jones*), broker

[3] The special relationship instruction stated: "The parties to a business relationship may develop a special relationship as a result of factors or circumstances arising out of the nature, extent and duration of their dealings with each other, the extent that either has reasonably placed trust or confidence in the other and the extent to which there have been any representations or promises made by either to the other. If such a special relationship exists then a party owes special duties of care to the other consistent with the nature of their special relationship and any promises made during such relationship. [¶] You may consider in determining whether such a special relationship existed evidence of any statements made by [defendant] in any of its communications to its customers and members of the public and any testimony of any of its officers or managing agents."

argues that the court essentially instructed on a fiduciary duty which as a matter of law does not exist between a broker and an insured. Thus, broker presses, the instruction confused and misled the jury by allowing for liability beyond broker errors sounding only in negligence. We review independently whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

In *Jones*, the appellate court upheld an order of dismissal entered after the trial court sustained a demurrer against insureds who had sued their broker for negligence, alleging breach of a fiduciary duty in selling them liability insurance that was insufficient to protect their personal assets. (*Jones*, *supra*, 189 Cal.App.3d at p. 953.) The *Jones* court observed that an insurance agent ordinarily assumes only those duties normally found in any agency relationship, duties which did not include the obligation to procure a policy affording the insured complete liability protection. (*Id.* at p. 956.) But the court also recognized that an agent may "assume additional duties by an express agreement or a holding out," and that "the agent may be liable to the insured for losses which resulted as a breach of that special duty." (*Id.* at pp. 954–955.) The court concluded that "[t]he mere allegation in a complaint … that an insured has purchased insurance from an insurance agent for several years and followed his advice on certain insurance matters [was] insufficient to imply the existence of a greater duty." (*Id.* at p. 956.) *Jones* recognizes tort liability based on the breach of a special relationship, and we discern no error in the jury instruction in light of that opinion.

The jury was also instructed on breach of a special relationship: "[Plaintiffs] claim that they were harmed by [defendant's] breach of the duties owed to [plaintiffs] arising out of their special relationship. [¶] To establish this claim, [plaintiffs] must prove all of the following: [¶] 1. That [defendant] was [plaintiffs'] insurance agent and a special relationship existed between them; [¶] 2. That [defendant] knowingly acted against [plaintiffs'] interests; [¶] 3. That [plaintiffs] did not give informed consent to [defendant's] conduct; [¶] 4. That [plaintiffs] were harmed; and [¶] 5. That [defendant's] conduct was a substantial factor in causing [plaintiffs'] harm."

In contrast to the complaint reviewed in *Jones*, here evidence was presented at trial to support the jury instructions. Plaintiff had placed trust and confidence in broker to handle his many insurance needs, which included insuring exposition prints, many of which plaintiff himself had printed. Broker's claims handling webpage included the following representations: (1) "An insurance policy is a promise. It's a promise that someone will be there to assist when you've had an accident, experienced a loss or been sued"; (2) "Anyone can sell you an insurance policy. The true measure of your insurance agent is what happens when you report a claim"; (3) "We're there to be an advocate for our client throughout the claims process"; and (4) "**At John O. Bronson Company, we keep our promises.**" (Original boldface.) Broker held itself out on a YouTube video as providing "personal care and service," and "attention to detail," in order to "recommend the right coverage." Broker had provided specialized treatment to plaintiff in 2008 by writing a letter to the adjuster handling plaintiff's 2007 claim. That letter explained that Monterey Insurance Agencies had handled plaintiff's gallery and exposition insurance needs for over 20 years, and that plaintiff was "one of [its] most important clients." The letter urged the claims adjuster to convince the insurer "to do something special" for plaintiff to assure his continued business. Broker requested that the insurer drop requirements regarding building mortgage information, allow payment for appraisal of a safe and installation of an upgraded safe, and write a letter to plaintiff apologizing for the claims delay.

Further, broker has failed to demonstrate prejudice from the challenged jury instructions, given broker's concession that plaintiff's injuries were at least in part attributable to its negligence, and given the jury's special verdict finding of negligence apart from any special relationship duty. (Cal. Const., Art VI, § 13; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 939 [error is harmless unless " 'there is a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached.' "].)

2. Duty to Advocate

In a related argument, broker asserts that the trial court erred by recognizing a duty to advocate, a duty which in its view is not recognized under the law and required wholesale speculation about causation. But plaintiff presented evidence that broker had promised to advocate on behalf of its clients, and, as we have explained, the special relationship jury instructions, which would encompass any advocacy duty, were proper.

The extent to which broker's failure to advocate contributed to plaintiff's harm was a factual question for the jury. Although broker acknowledged that Kastros breached the standard of care by submitting plaintiff's application to Praetorian without confirming past losses, broker did not concede that mistake alone was a substantial factor in causing plaintiff's harm. In line with that argument, the jury could have found that broker's conduct following plaintiff's 2010 loss was a substantial factor in Praetorian's decision to void the policy. Further, broker's advocacy (or lack thereof) was relevant to apportioning fault between broker and Praetorian.

C. BROKER'S LIABILITY INSURANCE COVERAGE

Broker argues that the trial court committed prejudicial error by allowing evidence of its errors and omissions liability insurance coverage as "integral to" plaintiff's theory of liability, and in denying the remedy of a mistrial. Evidence Code section 1155 precludes admission of evidence that a person was covered by liability insurance to prove that person's negligence or wrongdoing. In our view, no error occurred because plaintiff was not seeking to establish broker's liability by the existence of its liability policy.

Evidence of broker's liability insurance was first referenced by Kastros who testified, in the context of discussing how broker assessed insurance carriers, that broker's professional liability policy precluded it from placing coverage with a financially challenged carrier. Broker did not object to that testimony. Later, plaintiff's counsel asked Kastros at what point broker had notified its liability carrier about "the problems that seemed to be brewing or potentially could brew for [plaintiff] and maybe even for [broker]" from the mistake on the application. Broker objected on relevance grounds, to which plaintiff responded that broker's errors and omissions insurance claim was relevant to explain broker's failure to help plaintiff. The objection was overruled, and plaintiff established through Kastros that broker's insurance carrier was involved within two weeks after Praetorian denied the claim. Broker's claims supervisor acknowledged that Kastros's mistake was potentially problematic when Praetorian's adjustor had contacted her about plaintiff's prior loss, and broker's errors and omissions carrier was notified after the claim was denied. The claims supervisor was unaware of broker ever hiring legal counsel to challenge a carrier's decision to void a customer's policy. Instead, she explained that it was proper procedure for broker to put its errors and omissions carrier on notice to protect it from the mistake, and once that happened it was broker's practice not to advocate for the client.

The trial court did not abuse its discretion by allowing references to broker's liability coverage (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 [evidentiary rulings review for abuse of discretion]) nor by denying broker's request for a mistrial. (*People v. Ayala* (2000) 23 Cal.4th 225, 284–285 [denial of motion for mistrial reviewed for abuse of discretion].) The fact that broker reported the matter to its insurance carrier was used by both parties to explain broker's conduct after Praetorian voided plaintiff's policy. In denying the mistrial motion, the trial court commented that the case was not an accident case "where people of limited means are suing for vast amounts of injury," and the jury, after learning that the defendant is insured, says "no problem, give them whatever they ask for." Rather, it said, "the whole case is about insurance."

Broker also fails to show prejudice from the references to its insurance coverage, given broker's concessions during closing argument and given that the jury was instructed not to consider testimony regarding broker's liability insurance in determining whether broker was negligent or breached any other duty owed to plaintiffs. We presume the jury followed the court's instructions. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.)

D. DAMAGES

1. Emotional Distress

Broker argues that the trial court erred by instructing the jury that emotional distress damages were recoverable, relying on the line of cases holding generally that emotional distress damages resulting from economic loss are not compensable. Plaintiff counters that his severe emotional distress is compensable under *Burgess v. Superior Court* (1992) 2 Cal.4th 1064 (*Burgess*) because broker breached a preexisting duty owed to him.

Our Supreme Court in *Burgess* addressed whether a mother could recover for emotional distress in a malpractice case against her obstetrician for injuring her baby during delivery. The court explained that emotional distress damages may be recovered in the absence of physical injury "in cases where a duty arising from a preexisting relationship is negligently breached." (*Burgess*, *supra*, 2 Cal.4th at p. 1074.) The court explained that a duty arose from the patient-physician relationship which recognizes both the physical and emotional realities of pregnancy and labor. (*Id.* at p. 1076.) It concluded that the mother could recover for emotional distress suffered as a result of the doctor's negligence because "[a]ny negligence during delivery which causes injury to the fetus and resultant emotional anguish to the mother … breaches a duty owed directly to the mother." (*Ibid*.)

The *Burgess* court further elaborated that "physical injury is not a prerequisite for recovering damages for *serious* emotional distress" where "there exists 'a guarantee of genuineness in the circumstances of the case,' " citing *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916. (*Burgess*, *supra*, 2 Cal.4th at p. 1079.) In *Molien*, a husband's negligence action against a doctor who misdiagnosed his wife with syphilis, the court criticized the physical injury requirement as an ineffective means of screening false claims. It dispensed with the requirement in favor of a “general standard of proof required to support a claim of mental distress [as] some guarantee of genuineness in the circumstances of the case.” (*Molien*, at p. 930.)

A year after *Burgess*, the high court affirmed that “ ‘physical injury is not a prerequisite for recovering damages for *serious* emotional distress,’ especially where ‘there exists a “guarantee of genuineness in the circumstances of the case.” [Citation.]’ ” (*Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal.4th 965, 986.) The court expressly stated that its reasoning in *Molien* for discarding the physical injury requirement remained valid. (*Id*. at p. 988.) The court has also long-since recognized that liability insurance is purchased to protect against the risks of accidental losses, including the mental distress which might follow, and that “[a]mong the considerations in purchasing liability insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss[.]” (*Crisci v. Security Ins. Co*. (1967) 66 Cal.2d 425, 434.)

We understand the Supreme Court’s decisions as permitting a plaintiff to recover for serious emotional distress resulting from economic loss. Here, sufficient evidence supports the award, and it will be upheld. The evidence showed a relationship formed between plaintiff and broker’s predecessor, Monterey Insurance Agencies, over 15 years before the June 2010 loss. Broker owed plaintiff a minimal duty of due care arising from that relationship, which continued after the ownership change. Broker’s president acknowledged that one buys insurance to have peace of mind, and plaintiff and his physician testified to stress, fatigue, depressed mood, increased blood pressure, malaise, and inability to focus attributable, at least in part, to the insurance claim.

None of the cases cited by broker compels a different result. *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033 was a legal malpractice action alleging negligence in the handling of a dissolution action. The court held that emotional distress damages were not recoverable, adopting the reasoning and analysis set forth *Merenda v. Superior Court* (1992) 3 Cal.App.4th 1 (*Merenda*).[4] (*Smith*, at pp. 1038–1039.)

The *Merenda* court explained that "damages for emotional distress … are recoverable only if the claimed emotional distress naturally ensues from the acts complained of[,]" and concluded that the plaintiff had made no showing that emotional distress "naturally ensues from the garden variety claim of legal malpractice involved here." (*Merenda*, *supra*, 3 Cal.App.4th at p. 6.) In rejecting a duty to protect the legal malpractice plaintiff against serious emotional harm, the *Merenda* court found "the foreseeability of serious emotional harm to the client and the degree of certainty that the client suffered such injury by loss of an economic claim are tenuous." (*Id*. at p. 10.) The court continued: "The expectation of a recovery is rarely so certain that a litigant would be justified in resting her peace of mind upon the assurance of victory. In the unusual case, where recovery is likely, emotional distress at the economic loss should not be severe, since the loss will presumably be easy to recoup from the blundering counsel. In our judgment a reasonable person, normally constituted, ought to be able to cope with the mental stress of loss of hoped for tort damages without serious mental distress." (*Ibid*.)

Gonzales v. Personal Storage, Inc. (1997) 56 Cal.App.4th 464 involved a storage facility's negligence in releasing a tenant's personal property—including rare furniture, keepsakes, and heirlooms—to an imposter. In concluding that the plaintiff was not entitled to emotional damages, the court observed that neither the landlord-tenant relationship nor the terms of the lease gave rise to any duty to protect the plaintiff from emotional distress. (*Id*. at p. 474.) Finally, *Branch v. Homefed Bank* (1992) 6 Cal.App.4th 793, an employee's negligent misrepresentation case against his employer, is not persuasive as it was decided before *Burgess.*

[4] *Merenda* was disapproved on another ground in *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037.

2. Tort of Another Attorney's Fees

a. Legal backdrop

The tort of another doctrine is an exception to the general rule that attorney's fees are to be paid by the party employing the attorney. (*Prentice v. North American Title Guaranty Corp*. (1963) 59 Cal.2d 618, 620 (*Prentice*).) A plaintiff may recover attorney's fees under the tort of another doctrine "where a defendant has wrongfully made it necessary for a plaintiff to sue a third person." (*Id*. at p. 621.) The attorney's fees are recoverable as damages to compensate a plaintiff who is "required to act in the protection of his interests by bringing or defending an action against a third party." (*Id*. at p 620.) The *Prentice* court allowed tort of another attorney's fees as damages where "the natural and proximate consequence" of an escrow holder's negligence was to require the property vendor to bring a quiet title action against a third party to protect his interest in a deed of trust on the property. (*Id.* at p. 621)

The court in *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal.App.4th 34 (*Vacco*) held that *Prentice* fees were not recoverable against one defendant in a lawsuit where three defendants jointly committed tortious acts against the plaintiff: "There is nothing about [co-defendants'] relationship or their conduct that justifies singling out Van Den Berg as the one whose conduct caused Vacco to have to prosecute a legal action against the other two. Yet, this is the justification which Vacco offers for the imposition of *Prentice* fees against Van Den Berg. The rule of *Prentice* was not intended to apply to one of several joint tortfeasors in order to justify additional attorney's fee damages. If that were the rule there is no reason why it could not be applied in every multiple tortfeasor case with the plaintiff simply choosing the one with the deepest pocket as the '*Prentice* target.' " (*Id.* at p. 57.) The *Vacco* court continued: "As *Prentice* originally emphasized, there is no basis for awarding attorney's fees to a successful party in what is essentially a 'two-party' lawsuit. That is precisely what is presented here. Van Den Berg and his two codefendants jointly engaged in tortious misconduct for which they were sued by plaintiffs. There is no justification for the application of the third party tortfeasor doctrine as a basis for awarding attorney's fees to plaintiffs." (*Ibid*.)

In *Electrical Electronic Control, Inc. v. Los Angeles Unified School Dist.* (2005) 126 Cal.App.4th 601 (*Electrical Electronic*), the Second District Court of Appeal held that the plaintiff, an uncompensated subcontractor, could not recover *Prentice* fees against a school district (the recipient of a public works contract) for a related lawsuit against the district and two contractors. (*Id*. at pp. 607–608.) In the first lawsuit, the subcontractor had sued the district to enforce its stop notices, the initial contractor who had not paid him, and the new contractor assigned the contract. (*Id*. at p. 607.) In the second lawsuit, the subcontractor had sued the district for breaching its mandatory duty to require the initial contractor to obtain a payment bond. (*Id*. at p. 608.) The *Electrical Electronic* court concluded that the subcontractor was not entitled to *Prentice* fees in the second action as compensation for prosecuting the first lawsuit because the first lawsuit was not a "natural and probable consequence" of the district's negligent failure to secure a payment bond from the first contractor. (*Id*. at p. 617.) The *Electrical Electronic* court explained that the stop notice and payment bond claims against the district were cumulative, and that the subcontractor's claim against the new contractor—that it has assumed the first contractor's payables making the subcontractor a third party beneficiary of the assignment agreement—was the result of that contractor's breach of contract, not the district's negligence. (*Ibid*.) The action against the first contractor had been stayed as a result of bankruptcy proceedings (*id*. at p. 608), and the court did not analyze whether that action was a consequence of the district's negligence.

The subcontractor also argued that the first lawsuit was attributed to the district's negligence since the subcontractor would not have filed that action had the payment bond been in place. (*Electrical Electronic*, *supra*, 126 Cal.App.4th at p. 617.) The *Electrical Electronic* court rejected that argument, reasoning that the subcontractor was not required to bring the first action because it could have been made whole in the second action.

Specifically, no damages were recovered in the first action that could not have been recovered in the second action directly against the district for failing to require a bond. (*Ibid*.) The court observed that the subcontractor incurred attorney's fees in the first action as a result of its decision to pursue a joint tortfeasor (the second contractor), instead of seeking recovery based solely on the district's negligence. (*Ibid*.)

Less than two months after the Second District Court of Appeal issued *Electrical Electronic*, the First District Court of Appeal held that *Prentice* fees were recoverable under seemingly analogous facts. In *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311 (*Third Eye Blind*), members of a band were sued by a former band member for right of publicity and trademark violations. (*Id.* at pp. 1315–1316.) Their liability insurance carrier denied coverage, and the band members defended the lawsuit on their own, expending over $3 million to settle the case, including attorney's fees. (*Id*. at p. 1316.) Thereafter, the band members sued the insurance carrier for refusing to defend and to indemnify in the trademark lawsuit. (*Ibid*.) They also sued their broker for negligence, seeking " 'all covered defense costs' [they] had incurred." (*Ibid*.)

The *Third Eye Blind* court held that attorney's fees incurred by the band members litigating the coverage dispute against their insurance carrier were recoverable under *Prentice* in the negligence action against their broker, provided they prevailed on that claim. (*Third Eye Blind*, *supra*, 127 Cal.App.4th at p. 1325.) The court reasoned that the band members were required to sue their insurance carrier for coverage as a direct result of their broker's failure to advise about coverage exclusions and the need for additional insurance. (*Id*. at p. 1325.)

b. Analysis

Broker argues that the trial court erred by allowing plaintiff to recover as economic damages the attorney's fees incurred pursuing his legal claims against Praetorian. Relying on *Vacco* and *Electrical Electronic*, and dispensing with *Third Eye*

Blind as wrongly decided, broker contends that *Prentice* fees do not extend to fees incurred pursuing claims against joint tortfeasors, regardless of whether the tortfeasors have acted in concert (as in *Vacco*) or independently (as is the case here) to produce injury. In broker's view, a plaintiff cannot recover *Prentice* fees against a codefendant contributing to a plaintiff's indivisible harm, regardless of whether the codefendants acted in concert or independently, because that would allow plaintiff to recover attorney's fees from *any* defendant in any case with multiple tortfeasors, abandoning the American rule that parties bear their own attorney's fees.

In our view, *Third Eye Blind* is sound, and it was properly applied in this case. *Third Eye Blind* does not upset the rule in *Vacco* that a defendant who jointly engages in culpable misconduct in what is essentially a two-party lawsuit cannot be held responsible for the attorney's fees a plaintiff incurs prosecuting the action against the codefendant. Nor does *Third Eye Blind* allow a plaintiff to recover *Prentice* fees against *any* defendant in a multi-defendant lawsuit. In multi-defendant cases where tortfeasors act independently of one another, as is the case here, the plaintiff may recover attorney's fees as economic damages only when they are incurred against a third party as a consequence of the *Prentice* defendant's negligence. Here, broker's negligence caused plaintiff to sue Praetorian to protect his interest in insurance coverage. But the converse is not true: Praetorian's negligence did not impair any interest implicating broker, and plaintiff could not recover *Prentice* fees against Praetorian for his claims against broker. Nor does the fact that bad faith was alleged against Praetorian militate against *Prentice* fees here, as broker argues. The *Third Eye Blind* court aptly observed that the plaintiffs' attorney's fees could be apportioned between the bad faith insurer and the *Prentice* defendant. (*Third Eye Blind*, *supra*, 127 Cal.App.4th at p. 1325; see also *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 819–820 [an insurer may recover attorney's fees expended in obtaining a denied benefit as an element of damages for tortious breach of the of the covenant of good faith and fair dealing].)

Broker cites to a footnote in *Mega RV Corp. v. HWH Corp*. (2014) 225 Cal.App.4th 1318 (a case holding that *Prentice* fees are not recoverable in warranty dispute cases) as "expressly affirm[ing] that the *Prentice* exception does not apply to cases with multiple alleged joint tortfeasors." But *Mega RV Corp*. does not make the sweeping legal conclusion that broker suggests. *Mega RV Corp*. impressed the rule that an exonerated *defendant* in a multi-defendant tort action cannot recover the cost of its defense from the defendant who is ultimately found negligent. (*Id*. at p. 1339, fn. 17.) That rule does not preclude a *plaintiff* from recovering attorney's fees as economic damages against a defendant whose negligence caused it to pursue a lawsuit against a third party to reasonably protect its interest. (*Ruth v. Lytton Sav. & Loan Assn.* (1968) 266 Cal.App.2d 831, 845 [attorney's fees are recoverable under *Prentice* when the tortfeasor "negligently and proximately cause[d] [the plaintiff] reasonably to protect his interest" by pursuing legal claims against third parties].)

Finally, we do not read *Prentice* as demanding a causation test different from the substantial factor test approved by the Supreme Court in *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049–1054), and we reject any suggestion of a heightened test by the *Electrical Electronic* court's comment that the first lawsuit in that case was not *required* because the subcontractor could have been made whole by pursuing the district alone in the second action. (*Electrical Electronic*, *supra*, 126 Cal.App.4th at p. 617.) Our Supreme Court has described the *Prentice* rule simply as allowing for "attorney fees incurred as a direct result of another's tort." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751; see also *Budd v. Nixon* (1971) 6 Cal.3d 195, 202 [a plaintiff "ha[s] a viable claim, as tort damages, for the fees he paid … his second attorney, to the extent that such fees compensated that attorney for his efforts to extricate plaintiff from the effect of [his first attorney's] negligence"].) It follows that a tortfeasor whose negligence is a substantial factor in causing third party injury to the plaintiff is subject to *Prentice* fees.

3. Herb Kane Lithographs

Herb Kane was a well-known creator of Hawaiian-themed art who passed away after the date of loss. Broker argues that substantial evidence does not support the jury's $582,173 damages award for the unsigned Kane prints. One thousand two hundred and twenty-one (1,221) Kane prints were among the damaged artwork. Of those prints, 61 were signed by the artist. Plaintiff presented evidence that the wholesale value of a signed Kane print was $298, and the retail value was double the wholesale value, or $596. The jury awarded 80 percent of the retail value for those posters, consistent with the 80 percent of retail valuation formula, and broker does not contest those damages. But the jury ascribed the same value to the remaining 1,160 unsigned posters, and broker argues that value is legally flawed because the wholesale value of an unsigned Kane poster had been established at $15.

We address the threshold issue whether broker has forfeited this issue by failing to move for a new trial. Such failure ordinarily precludes a party from challenging a damages award as excessive or inadequate on appeal. (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918 (*Schroeder*).) But the forfeiture rule, as discussed in *Schroeder*, is directed at the subjective claim that the excessive award was influenced by " 'passion or prejudice.' " (*Id.* at p. 919; *Bate v. Jolin* (1929) 206 Cal. 504, 508.) Given such a claim, the *Schroeder* court observed that it is for the trial court rather than the reviewing court to weigh the evidence, resolve credibility issues, and determine whether a damages award was influenced by passion or prejudice. (*Schroeder*, at p. 919.) But the *Schroeder* court also recognized that an award may be reversed when it appears excessive as a matter of law. (*Ibid.*) Indeed, under such circumstances, the appellate court has a duty to act. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 308.) Here, plaintiff has not forfeited his claim because a damages award not supported by substantial evidence would constitute an excessive award as a matter of law, without determining whether it was influenced by passion or prejudice.

Plaintiff's Exhibit 121 is a six-page summary of Coast Gallery's poster and lithograph loss prepared by plaintiff and his attorney. The exhibit provides two loss summaries based on different inventory counts: The summary based on a 2008 audit showed a $169,425 loss for posters and a $462,589 lithograph loss, and the summary based on the post-loss Vericlaim's inventory was $147,885 for posters and $379,888 for lithographs. Both inventories list as Kane lithographs 531 prints of a Hawaiian woman (The Girl) and 690 prints of an historic Hawaiian scene (Landscape). Exhibit 121 valued the wholesale loss of those prints at $97,753 ($48,204 for The Girl and $49,549 for Landscape), and it included a spreadsheet breaking down those figures into three categories: 61 artist-signed lithographs with a $298 wholesale value ($18,178); 829 estate-signed lithographs with a $90 wholesale value ($74,610), and 331 unsigned posters with a $15 wholesale value ($4,965). The spreadsheet showed a 1995 publication date for both prints, and it indicated that the artist-signed prints were verbally appraised by Louise Allrich. The $97,753 figure was incorporated into both loss summaries.

Plaintiff testified that he produced annual art expositions on Maui from 1984 to 1995. Plaintiff promoted each exposition by publishing a high quality poster of a featured artist's work, and a limited edition lithograph that was artist-signed and numbered. On average, plaintiff printed about 5,000 posters and 395 or 495 limited edition lithographs of the featured artist's work, and his inventory loss attributed to the June 2010 water intrusion consisted largely of unsold exposition prints.

Plaintiff testified that Exhibit 121 contained considerable information about the posters damaged by both water and mold. He acknowledged the inventory discrepancies but agreed that he had relied on Exhibit 121 at his deposition as the best estimate of his lost using Allrich's fair market values, and he thought that exhibit was accurate until Allrich testified at trial that the exhibit contained discrepancies as to prints by two artists unrelated to this appeal. Notwithstanding those discrepancies, plaintiff agreed with his attorney that they were "go[ing] with the figures" on Exhibit 121. Allrich testified that she determined the wholesale value of a print by calling the artist and galleries. Neither plaintiff nor Allrich mentioned the Kane spreadsheet in their testimony.

Exhibit 208 is a two-page spreadsheet showing a loss of over 10,000 prints comprised of 40 titled posters/lithographs. Plaintiff testified that Exhibit 208 was prepared by Vericlaim adjuster James Stewart. Stewart testified by deposition that he had evaluated the inventory for damage, not for value, and that testimony was read to the jury. Plaintiff testified that Exhibit 208 contained the retail price—the intended selling price had the prints not been damaged—for the damaged posters/lithographs, but he did not testify about the Kane prints specifically, or explain why the values for those prints in Exhibit 208 differed from the values shown in Exhibit 121.

Unlike Exhibit 121, Exhibit 208 did not differentiate loss by type of print (poster or lithograph). Instead, it showed the wholesale/retail loss for posters and lithographs collectively based on type of damage—water ($416,018/$832,036) and mold ($428,006/$856,012).[5] The 1,221 Kane prints were grouped under mold loss, with a $298/$596 wholesale/retail value, as if all had been artist signed.

Plaintiff relied on Exhibit 208 in closing argument to calculate 80 percent of retail damages at $1,350,438, with no objection from broker. Broker's argument drew the jury's attention to Exhibit 121 to show that the retail loss for The Girl was actually $96,408 (double the $48,204 wholesale cost shown on Exhibit 121), not $316,476 as shown on Exhibit 208, and the retail loss for Landscape shown on Exhibit 208 ($411,240) was actually $99,098. Thus, broker argued that the actual retail loss for the mold-damaged prints was $328,802, not $856,012 as shown on Exhibit 208. Broker also subtracted $54,000 from the water-damaged retail total on Exhibit 208 to adjust for a

[5] The "wholesale" and "retail" columns reflected damages from visible water loss, and the "no damage" columns reflected loss attributable to mold that was discovered in 2011, a year after the prints were moved to storage following the June 2010 water intrusion.

math error for a prints titled Max-92 Crop, bringing that total to $778,036. Discounting the corrected retail value for water-damaged ($778,036) and mold-damaged ($328,802) prints by 20 percent, broker calculated total damages at $881,470.

In rebuttal argument, plaintiff conceded the $54,000 math error, and recalculated the damages at $1,296,434.40.[6] But instead of conceding any error as to the Kane prints, counsel argued that "[plaintiff] had the right to have the unsigned become signed. He had the right to have them not just be [es]tate signed." He reasoned that plaintiff would have had the right "to have these $90 ones become $298" but for the fact that he was required to store the prints at DKS storage. He continued: "If you don't think that's evidence that's sufficient, that's fine. … It was in Miss Allrich's testimony that she said about his death and what it would be worth. And it's implied also from the evidence that is before you. … If you don't think that's what the evidence shows, then obviously we're stuck. But the fact is, I think, that is of course I know what is behind the scene in discovery, so that is what I believe the evidence will show. [¶] So all of this is premised on the idea that it's true. If it were only $90, that's right. But that is why the 298 was used for the third chart."

The $298/$596 wholesale/retail values for the Kane posters shown on Exhibit 208 is not supported by substantial evidence as to the unsigned posters. Vericlaim adjuster Stewart, who compiled the inventory shown in Exhibit 208, testified that he did not ascribe any monetary value to the loss. Plaintiff's appraiser Allrich calculated the loss as to the signed lithographs as shown in Exhibit 121, and broker's appraiser did not assess the Kane prints.

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[6] It appears plaintiff obtained that figure by subtracting $54,000 from his proposed $1,350,438.40 damages award. But the $54,000 should have been subtracted from the retail value of the water-damaged prints, not the 80 percent discounted value. Thus, the $54,000 error should have reduced plaintiff's proposed $1,350,438.40 damages award by $43,200, to $1,307,238.40.

Plaintiff argues that his own testimony regarding the value of the posters shown on Exhibit 208 is opinion testimony which alone may constitute substantial evidence to support the jury's award. But plaintiff's generalized testimony regarding that exhibit does not support a $298/$596 value for the unsigned Kane prints in light of the record. (*People v. Cuevas* (2013) 213 Cal.App.4th 94, 107 [substantial evidence is evidence " ' "of ponderable legal significance … reasonable in nature, credible and of solid value," ' " determined "in light of the entire record"].) There was no testimony that plaintiff retained any right to have his Kane overstock—overstock that had been in storage for 15 years—signed by the artist, and the evidence suggests the opposite. Plaintiff testified that he published a *limited* number of signed prints for each exposition. Allrich testified that Kane died after the date of loss, and that she had spoken to his widow, who was "very anxious to get [her] hands on pieces that were signed." But Allrich made no mention of any agreement Kane had had with plaintiff to sign his unsold prints. Plaintiff agreed with Allrich that the unsigned prints in his inventory were valued at $15/$30 wholesale/retail, and neither he nor Allrich made any exception for the Kane prints. Indeed, there is no evidence that plaintiff's relationship with Kane was any different than his relationship with the dozens of other artists plaintiff had worked with. There is no basis on this record for valuing his unsigned posters at anything other than the $15/$30 value Allrich placed on the roughly 10,000 other damaged unsigned posters.

Plaintiff argues that the jury could infer from the $90 value shown for an estate-signed Kane lithograph in Exhibit 121 that he had a right at the time of loss to have Kane sign the unsigned posters. This argument is factually and legally flawed. Plaintiff does not dispute that Kane was alive when the prints were damaged, and he acknowledges that none of the 829 prints identified on Exhibit 121 as estate-signed bore an estate signature. The fact that Exhibit 121 ascribed a $90 value to a non-existent print does not create an inference of a right to have the unsigned posters signed by the estate of a deceased artist, much less a right to have the posters signed by the living artist himself. Ultimately, there was insufficient evidence as a matter of law to support a damages award for the unsigned posters based on the value of either an artist-signed print or a non-existent estate-signed print.

We will direct the trial court to enter an amended judgment to correct the damages award for the prints. The $1,296,434.40 award should be reduced by $525,218, the difference between retail values of $30 and $596 for the 1,160 unsigned Kane posters. Correctly calculated, the damages for the unsigned posters is $27,870 (1,160 x $30 = $34,800 x .8 = $27,870), not $553,088 (1,160 x $596 = $691,360 x .8 = $553,088). We will also instruct the trial court to modify the award by adding $10,800 to reflect the 80 percent discount on the $54,000 retail calculation error on Exhibit 208 for the Max 92 Crop prints, as explained in footnote 6.

4. Prejudgment Interest

The jury awarded prejudgment interest as of November 4, 2010 (the date Praetorian denied plaintiff's claim) under Civil Code section 3288, which gives a jury discretion to award interest "[i]n an action for the breach of an obligation not arising from contract." The legal interest rate applicable to an award of prejudgment interest under section 3288 is 7 percent. (Cal. Const., art. XV, § 1; *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585.) Notwithstanding the jury's award, plaintiff prevailed in a post-trial motion for an award of prejudgment interest under Civil Code sections 3287,[7] arguing that his claim against broker "arose out of the contract by which [broker] agreed to secure for Plaintiffs a dealer fine arts policy of insurance that was at least equal to if not better for Plaintiffs than the expiring policy with Lloyds." Section 3289,

[7] Civil Code section 3287, subdivision (a) provides that "[a] person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled also to recover interest thereof from that day[.]"

subdivision (b) sets 10 percent as the legal interest rate for contracts entered into after 1986 with no stipulated interest rate.

Broker disputes plaintiff's characterization of this lawsuit as "an action for the breach of an obligation … arising from contract," thereby removing it from the ambit of Civil Code section 3288, because broker was found liable in tort, not for breach of contract. We independently review this predominately legal question. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [independent review of "inquiry requir[ing] a critical consideration, in a factual context, of legal principles and their underlying values"].)

Plaintiff sued broker for negligence, which requires a breach of the duty to use reasonable care, not breach of a contractual duty. (*Mark Tanner Construction, Inc. v. HUB Internat. Ins. Services, Inc*. (2014) 224 Cal.App.4th 574, 586.) Although the jury also found that broker breached special relationship duties, those duties are not necessarily grounded in contract, as they may be established by express agreement or by broker's holding out. (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954–955.) Plaintiff argued that a special relationship was created by broker who "didn't have to take on [additional duties], but it did," and that broker "elected to do it for its own marketing reasons and because it wanted to say it was carrying on the tradition of Monterey Insurance Agencies when it was a small locally owned partnership." Plaintiff did not plead or prove that the special duties were contractual, and the jury instructions did not include a contractual relationship as an element of breach of special relationship duty. Nor is a contractual relationship included in the definition of the basic standard of care, professional negligence, or special relationship. Plaintiff's authorities are inapposite, as none of them counters our conclusion that the gravamen of his lawsuit was breach of duty established by the standard of due care. We will instruct the trial court to modify the judgment to reflect a 7 percent prejudgment interest rate.

III. DISPOSITION

The judgment is reversed. The matter is remanded for the trial court to enter an amended judgment reflecting a $782,016.40 award for damage and/or loss of value of the fine art. The amended judgment shall include interest calculated at the rate of 7 percent per annum. All other aspects of the judgment shall be reinstated.

Broker's motions for judicial notice filed July 8 and December 10, 2015 are denied.

The parties shall bear their own costs on appeal.

Grover, J.

WE CONCUR:

Rushing, P. J.

Walsh, J. *

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