4th Civil No. D028673

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

COLLINS DEVELOPMENT COMPANY,

Cross-Complainant and Respondent,

vs.

D.J. PLASTERING INC.

Cross-Defendant and Appellant.

Appeal from the San Diego Superior Court,
San Diego Superior Court Case No. 670465,
Honorable Robert E. May, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

The trial between Collins Development Company and D.J. Plastering was supposed to be about indemnity: What percentage of the $4.079 million that Collins paid University Canyon West Homeowners Association (UCW) in settlement of this wide-ranging construction defect litigation was allocable to stucco defects? But this issue simply was not tried. Instead, the trial was about something different and far narrower, namely, the parties' competing assessments of the extent of stucco damage and cost of its repair. The trial court permitted no evidence concerning non-stucco damages, but rather, simply allocated to D.J. Plastering as its indemnity obligation the amount the jury had determined to be the cost of stucco repair, minus the degree of fault assigned to Collins.

This was clear error. In fact, absent evidence of what fraction stucco damage was of the whole construction defect claim, Collins's showing amounted to a complete failure of proof. Collins having had its

opportunity to prove its case and failed to do so, D.J. Plastering is entitled not just to reversal, but to entry of judgment in its favor.

Furthermore, the judgment fundamentally lacks foundation because the jury determined Collins's liability to UCW to rest solely on the theory of strict liability, but assessed damages consisting solely of purely economic loss--specifically, the cost of repairing the stucco and relocating the homeowners during the stucco repairs. However, California law makes crystal clear that purely economic losses are *not recoverable* in a strict liability action. The verdict against Collins and in favor of UCW therefore is insupportable as a matter of law, and, in turn, there is no legally cognizable damage award that D.J. Plastering can be required to indemnify. Accordingly, the judgment against D.J. Plastering must be reversed; and, once again, since Collins had its opportunity to put forward its best case against D.J. Plastering and failed to establish any entitlement to indemnity, the reversal must be with directions to enter judgment in favor of D.J. Plastering.

Even if it were possible to overlook Collins's fundamental failure of proof, reversal still would be required because additional significant errors also undermined the trial. For instance, once plaintiff UCW settled with Collins, it should not have been permitted to appear at trial to litigate an apparent dispute with Collins over the cost of stucco repair. Following settlement, there really was no litigable controversy remaining between UCW and Collins, since the extent of both UCW's and Collins's ultimate recovery under the settlement's sharing agreement was dependent upon the outcome of the cross-action *between Collins and D.J. Plastering*, not trial of the UCW's complaint against Collins. Indeed, the special verdict, while eliciting the jury's determination of whether Collins's obligation to the association was founded on strict liability or negligence, tellingly omitted any mechanism whatsoever for awarding the association any recovery.

Moreover, UCW's erroneous presence was prejudicial to D.J. Plastering, notwithstanding the disclosure to the jury that a settlement had taken place. UCW spent virtually the entire trial urging a hugely-inflated repair cost, only to do an about-face at the 11th hour, suddenly endorsing the repair method advocated by Collins and lopping several million dollars off its original repair cost estimate for a revised figure that was still almost two million dollars higher than Collins's figure, which was itself millions of

dollars higher than D.J. Plastering's estimate. Whether or not Collins and UCW orchestrated this scenario, the effect was to unfairly create the indelible impression for the jury that the most reasonable approach was to accept UCW's revised proposal--which is essentially what the jury did.

Additionally, judgment was entered against D.J. Plastering in favor of "developer entities" other than Collins based on essentially no evidence. The jury flagged this problem by sending the court a note in the course of its deliberations lamenting that it lacked information sufficient to evaluate the conduct of those entities. Yet the court let deliberations continue. The ensuing judgment lacks evidentiary foundation, and accordingly must be reversed.

Finally, when D.J. Plastering brought out in its new trial motion that Collins's contractor's license was invalid during the period relevant to the lawsuit, the trial court should have vacated the judgment based on this newly-discovered evidence. An unlicensed contractor cannot prosecute construction litigation. For this additional reason, D.J. Plastering is entitled to reversal with directions.

For each of these reasons, all to be addressed in this brief, the judgment against D.J. Plastering in favor of Collins Development Company should be reversed, and the trial court directed to enter a new judgment for D.J. Plastering. Short of that, the judgment should be reversed and the case remanded for retrial.

STATEMENT OF THE CASE

A. Material Facts And Procedural History.

1. The University Canyon West Project Is Built.

University Canyon West (sometimes called "the Project") is a condominium development located in San Diego. (Clerk's Transcript [CT] 2; see, e.g., Reporter's Transcript [RT] 1014 [opening statement].) The Project consists of 212 duplex units in 106 buildings. The buildings feature stucco exteriors and concrete tile roofs. The condominium units are typically two stories, with attached garages in front and patios in back. (E.g., RT 1266.) The Project was built in the mid 1980s; Collins Development Company ("Collins") was the general contractor. (E.g., CT 1215, 1323; RT 728.)[1/]

2. The Project's Homeowners Association Sues The General Contractor, Collins, For A Broad Spectrum Of Construction Defects; Collins Cross-Complains Against Numerous Subcontractors For Indemnity.

In 1993, the homeowners association for the development, University Canyon West Homeowners Association ("UCW"), sued Collins for damages based on theories of breach of implied warranties, strict liability and negligence, and alleging a whole panoply of construction defects in the Project. No subcontractors were named as defendants in UCW's complaint; however, Collins, in turn, cross-complained against some 28 subcontractors for indemnity. One of these was the stucco subcontractor,

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1/ More specifically, the Project was constructed by a joint venture partnership known as University Canyon, with Collins serving as general contractor; the partners were Collins, John Bogaert, Boriver, Boriver Corp., and San Diego Boriver Associates. (E.g., CT 1323, 3201, 3519; see RT 728.) At trial, these were sometimes referred to collectively as "the developer entities." (E.g., CT 3201; RT 728.) In this brief, except where otherwise specified, references to Collins include all of the developer entities.

D.J. Plastering, Inc.[2/] (See CT 1 [complaint], 47 [cross-complaint], 601-602 [joint disposition conference report]; RT 1014 [UCW opening statement], 1034 [Collins opening statement].)

3. UCW And Collins Reach A Pretrial Settlement, As Do Collins And 17 Subcontractors, Not Including D.J. Plastering.

Before the case came to trial, UCW reached a settlement with Collins, and Collins settled with 17 cross-defendant subcontractors, but not with D.J. Plastering. (See, e.g., CT 1169-1170, 1217; RT 14-30.) The settlement terms required that Collins pay UCW $5.6 million, consisting of an immediate $5 million non-contingent cash payment (of which $920,500 was contributed by the settling subcontractors), with the remaining $600,000 to be placed in an interest-bearing trust account within 75 days after service of notice of entry of judgment in a trial concerning stucco repair issues, for distribution in a manner dependent upon the outcome of that trial.

Specifically, if Collins obtained a judgment against D.J. Plastering of up to $600,000, the judgment amount would be paid to UCW directly out of the trust account, with any balance being remitted to Collins, and UCW receiving all interest earned by the account. The agreement further provided that Collins and UCW would share any recovery awarded to Collins against D.J. Plastering in excess of $600,000 as follows: The next $400,000, up to $1 million, would be paid to Collins, and any amount in excess of that would be paid 10 percent to Collins and 90 percent to UCW. (See CT 1169-1172, 1415-1435, 2008-2039, 2680-2683; RT 729-731.)

2/ D.J. Plastering was a business owned and operated by the Dilger family for some 23 years, until its dissolution in 1993. (See CT 1124.) Robert Dilger was its president, his son Paul was vice-president. (E.g., RT 2364-2370, 2387.) Collins has pursued the Dilgers personally, as well as D.J. Plastering; however, the action against the Dilgers was severed from this matter and stayed. (See, e.g., CT 1123-1126, 3771; RT 4900-4905, 5265-5270.) The trial under review here involved only D.J. Plastering.

4. The Settlements Are Placed On The Record, But There Are No Good Faith Settlement Proceedings And No Allocation Of Damages Is Made Pretrial.

The settlements between UCW and Collins, and between Collins and the subcontractors, were placed on the record at a hearing on January 19, 1996. (CT 1418-1434; RT 14-30.) At the hearing, the trial court decided, "so that everybody doesn't have to file for a good faith motion at this point" (RT 24-25), to give D.J. Plastering until the next Friday, January 26, to submit any objection it had to the settlements being held in good faith. (CT 1428; RT 25.) On January 29, D.J. Plastering submitted a notice of nonobjection to the subcontractors' settlement, but explained that it had not had an opportunity to review the settlement between UCW and Collins, and therefore could not waive objection to that settlement. (CT 1169-1172.)

The settling parties never invoked the good faith settlement procedures set forth in Code of Civil Procedure section 877.6. (See, e.g., RT 97, 179-181.) Apparently for that reason, and based on its understanding of what was to be accomplished in the trial of the indemnity cross-action, the trial court declined to make any pretrial allocation of the settlement amount as between stucco claims and other damages. (See, e.g., RT 97-125, 705-706; CT 1637 [Collins: "It is clearly and unequivocally stated in the terms of the agreement that plaintiff and COLLINS fully intend to have the allocation litigated *at the time of trial* at which time D.J. PLASTERING can dispute any allocation sought by plaintiff and/or COLLINS" (original emphasis)].)

5. D.J. Plastering Argues That The Settlement Between UCW And Collins Extinguishes UCW's Litigable Interest In The Lawsuit.

The issues were framed for trial at a two-day hearing on pretrial motions of limine held in September 1996. (See generally RT 31-235.) There D.J. Plastering ultimately argued, among other points, that the agreement between Collins and UCW constituted a sliding-scale agreement

that had been reached without adherence to governing statutory provisions, that the settlement extinguished any real controversy between Collins and UCW, that UCW had no reason to participate at trial other than to double-team with Collins against D.J. Plastering, and that, therefore, only the cross-action for indemnity should go to trial. (E.g., CT 1459-1472, 1474-1488; see RT 83-124, 227-230.) Collins and UCW denied any collusion and argued that UCW retained a litigable interest because of the sharing agreement and because the fate of the remaining $600,000 settlement amount hinged upon the outcome of the trial. (E.g., CT 1673-1687, 2445-2453; see RT 83-124, 227-230.)

6. The Trial Court Agrees With UCW And Collins That UCW Retains An Interest And Holds That UCW Can Participate As A Party At Trial, So Long As The Jury Is Made Aware Of The Settlement.

The trial court indicated it might consider UCW's participation questionable if the contingent payment had been lower (RT 107) and expressed some concern that the motivation behind the deal's structure may have been simply in order to keep UCW in the lawsuit. In the court's words:

> "Now, I tried to look at this, analyze it where what if they had said, 5 million and then 50,000 in this contingency, is that enough to keep them in. You kind of wonder, 200,000, kind of wonder, 600,000, you kind of wonder.
>
> Is it a scam? A scam in order to keep the plaintiff in by allowing any type of contingency amount out there? It could possibly be, I don't know the answer to that."

(RT 107; see RT 114-115 ["The only issue that concerns me out of this is the issue regarding whether or not from the setup as far as paying 5 million and resolving 600,000, based upon this trail, whether of not that was done just to keep the plaintiffs in. That fact does concern me"].)

Ultimately, however, the court concluded that the fact that Collins and UCW were advancing such different theories regarding the stucco repair issues demonstrated that they were not in collusion against D.J. Plastering. (RT 101-102, 106.) Accordingly, the trial court ruled that trial could proceed on UCW's complaint as well as Collins's indemnity cross-complaint, and that D.J. Plastering's concerns about the potentially misleading appearance of UCW's participation at trial would be sufficiently addressed by informing the jury of the fact of the settlement and its principal terms. (RT 100.)[3/]

Trial commenced in October 1996. (See RT 260.) It encompassed UCW's causes of action against Collins for strict liability and negligence, and Collins's cross-complaint against D.J. Plastering for contractual and equitable indemnity. (See CT 3095-3107 [special verdict forms]; RT 727-728 [case overview for jury venire].) Right after the panel of prospective jurors entered the courtroom, the court read aloud a stipulation outlining the terms of the settlement between UCW and Collins. (RT 728-731; see CT 2680-2683.)[4/]

7. The Trial Focuses Exclusively On Stucco Repair Issues; Evidence Of Other Defects In The Project Is Excluded.

The trial focused exclusively on the extent of stucco damage at the Project and the cost of the necessary stucco repair. There were several allusions to the full range of construction defects at the Project, which, as originally alleged, encompassed far more than just stucco. (E.g., RT 1016-

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3/ In addition to matters connected to the settlement, the parties briefed and the trial court addressed literally dozens of pretrial motions in limine. (See generally RT 31-235 [hearings on multiple motions in limine].) Facts concerning some of those motions, as well as other additional facts, will be addressed in connection with particular arguments.

4/ The reading of the stipulation at this point did not include the proviso that the jury could consider the settlement's existence only as it might bear upon the credibility of Collins's and UCW's witnesses. However, a jury instruction to that effect was given at the conclusion of trial. (CT 3158; RT 3790-3791.)

1017 [UCW opening statement refers to $9 million in total repair costs, assertedly including $7 million in stucco repair], 1034 [Collins opening statement notes that lawsuit originally encompassed claims for "a wide range of alleged deficiencies"], 1063 [D.J. opening statement reveals that lawsuit originally was about "a myriad of other subjects"], 1134 [original claim was for $9 million or $11 million; settlement was for $5 million], 2106 [Collins's architect expert's original retention encompassed far more than just stucco problems], 4349 [Collins's counsel states that the lawsuit started out as a garden variety construction defect case in terms of its scope].)

However, the trial court steadfastly excluded evidence of any problems at the Project other than stucco. (See, e.g., RT 1350 [sustaining UCW's objection, trial court precludes D.J. Plastering from questioning witness about other categories of defects in the Project, commenting "let's talk about stucco"], 1796 [sustaining Collins's objection, trial court precludes D.J. Plastering from questioning witness about defects other than stucco], 2471 [trial court excludes written evidence documenting defects other than stucco], 3402-3403 [court precludes witness from testifying regarding defects other than stucco].)

The evidence concerning the stucco damage and repair-cost issues was copious on all sides.[5/] In general, the problem with the stucco at the Project was that the scratch and brown coats were too soft in places (e.g., RT 1305, 1323, 1590, 2170), with the result that the stucco spalled--that is, loosened and broke away from the buildings. The stucco also showed significant staining and arguably more than the normal amount of cracking.

5/ A short primer on stucco: "Stucco" is a vernacular term for exterior portland cement plaster. (RT 1571.) It consists of a mixture of portland cement, sand, aggregate material (that is, the rock and sand) and water. (RT 1363.) Stucco is applied in three layers, consisting of a base coat and two finish coats; the total thickness of the three coats together is about 7/8". (RT 1322, 1580, 1657.) The first coat, known as the scratch coat, is imbedded over metal wire reinforcement; it should be a mixture of 1 part cement to a maximum of 4 parts sand. The second coat, called the brown coat, is applied over that; it should be 1 part cement to a maximum of 5 parts sand. The first two layers together constitute the bulk of the stucco. The final coat--what you actually see on a building--is the color coat, which is about 1/8" thick. (RT 1322, 1580, 1595, 2128-2129, 2194-2200, 2394, 2413.)

(E.g., RT 1099-1102, 1126, 1145-1146, 1157, 1164-1167, 1186-1188, 1194, 1229-1231, 1238, 1250, 1272-1277, 1298-1309, 1364, 2183, 2432, 2613.)

The parties offered sharply varying assessments of the appropriate method of assessing the stucco damage, the extent of the damage and cost of its repair. In its case-in-chief, UCW took the admittedly radical position that failure of the stucco was so pervasive in the Project that complete replacement of all of the stucco was necessary, at a cost of $5.79 million. (E.g., RT 1340, 1530, 1601-1602, 1607, 1721.) Collins advocated application of a stucco hardener, called Sinak, in much of the Project, with other areas being limited to a staining repair or spot repair, at a cost of $1.97 million. (RT 2237, 2331.) D.J. Plastering advocated a combination of Sinak and other spot repairs, at a cost of just under $200,000. (RT 3548-3555.) Near the end of trial, after hearing D.J. Plastering's Sinak experts testify that a Sinak repair would come with a long-term guarantee (RT 3434-3436, 3777), UCW abruptly revised its recommendation, taking the position that application of Sinak would be an acceptable solution after all, but holding out for its application to the entire Project at a cost of $3.97 million, rather than the lower figure estimated by Collins for its application to portions of the Project. (RT 3727-3729, 3843.)[6/]

8. The Jury Returns Its Special Verdicts On The Complaint And Cross-Complaint.

The jury returned special verdicts on November 13, 1996. (CT 3095-3103, 3104-3107.) The verdicts were as follows:

- **UCW v. Collins**: The jury found Collins and all other Developer entities strictly liable for stucco defects in the Project, assessed the damages at $3,180,000 for cost of repair and $349,800 for relocation expenses, and attributed fault 95% to Collins (but not to any other Developer entity) and 5% to UCW. (CT 3095-3099.) The jury rejected UCW's negligence claim, finding for Collins. (CT 3100.)

6/ Both UCW and Collins took the position that it was necessary or advisable for the Project's residents to relocate during the stucco repair, at an additional cost of around $583,000 according to UCW (RT 1722), or $163,800 according to Collins (RT 2334).

- **Collins v. D.J. Plastering:** Turning to the indemnity cross-complaint, the jury found that the stucco damages were caused by the negligence of D.J. Plastering, Collins and the University Canyon Joint Venture,[7/] and that these same parties' negligence was a cause of damage to the Developer entities. (CT 3104-3105.) The jury found that the amount of damages for which the Developer entities were entitled to full or partial indemnity was $3,021,000 for stucco cost of repair and $332,310 for relocation expenses. (CT 3106.) Finally, "[a]ssuming that 100% represents the combined negligence of the 'Developer entities', D.J. Plaster (*sic*), and any other entities," the jury assigned this negligence 85% to D.J. Plastering, 10% to Collins, and 5% to University Canyon Joint Venture for the stucco cost of repair; and 100% to D.J. Plastering for the relocation expenses. (CT 3106.)[8/]

9. The Trial Court Allocates Damages Indemnifiable By D.J. Plastering Based On The Jury's Verdicts On The Cost Of Stucco Repair.

Once the verdicts were returned, Collins moved for "court allocation of damages to D.J. Plastering." (CT 3295-3330 [moving papers], 3331-3334 [UCW's lodgment in support of Collins's motion], 3376-3410 [D.J.

7/ But apparently not the other Developer entities, although the special verdict form is uncertain on this point. Evidently, the jury had first answered that the stucco damages were not caused by any negligence of developer entities John Bogaert, Boriver, Boriver Corporation and San Diego Boriver Associates, but the answers were crossed out and initialed by the jury foreperson. (CT 3104-3105, 3108; see RT 4300-4302, 4316-4318; see also RT 4468-4469 [juror criticizes quality of special verdict forms].)

8/ After reviewing the special verdicts, the trial court informed the jury that its further services would be required for some short additional issues between Collins and D.J. Plastering; these concerned attorneys' fees. (See RT 4322.) There then ensued further proceedings concerning whether and in what amount Collins incurred attorneys' fees and costs, including expert fees and costs, in the defense of the stucco issues. (See RT 4343-4459.) In a further special verdict, the jury determined that Collins incurred $107,420.51 in reasonable attorneys' fees and costs, and $40,000 in reasonable experts' fees and costs. (CT 3530-3532; RT 4461.)

Plastering's opposition], 3435-3438 [Collins's evidentiary objections to D.J. Plastering's opposition], 3439-3453 [Collins's reply papers].)

After making representations concerning the overall scope of the construction defects at the Project that were encompassed in the settlement, the motion proposed that the full amount of damages set forth in the jury's special verdicts on the stucco and attorneys' fees issues be allocated to D.J. Plastering as the portion of the settlement for which it was required to indemnify Collins. (See CT 3295-3330.) D.J. Plastering protested that the jury's determinations were neither conclusive nor even particularly instructive on the allocation issue, because neither the court nor the jury had received any evidence whatsoever concerning the full scope of defects in the Project (apart from stucco) that the settlement encompassed. (See CT 3376-3410.)

Following a hearing on January 10, 1997 (RT 4914-4928), the trial court agreed with Collins that even though the question of allocation was not put to the jury, the jury's verdict nevertheless provided a proper foundation for making an allocation of the settlement as between stucco damages and other damages. (RT 4921-4925.) Accordingly, the court ruled that Collins was entitled to judgment against D.J. Plastering in an amount of $3,449,312.15 on its claims of contractual and equitable indemnity, consisting of the sum of the jury's determinations of stucco repair costs ($3,021,000), relocation costs ($332,310), attorneys' fees and expert witness fees ($96,002.15--an amount reflecting the verdict of $147,420.51 minus an offset of $51,418.36 in defense costs paid by an insurance carrier); the court ruled further that the remaining Developer entities were entitled to equitable indemnity in the amount of $2,900,160, consisting of the $3,021,000 verdict on stucco repair cost reduced by 15% (based on the jury's assignment of fault), plus the $332,310 in relocation damages. (CT 3515-3516; see RT 4925.) At the court's order, the judgment provides that the judgments in favor of Collins and the other Developer entities are not several. (CT 3516; RT 4926.)

10. Judgment Is Entered For Collins After D.J. Plastering Unsuccessfully Moves For New Trial And Judgment Notwithstanding The Verdict, And This Appeal Follows.

D.J. Plastering moved for new trial and for judgment notwithstanding the verdict (JNOV). As it had done prior to and during trial, D.J. Plastering urged that the structure of the case had resulted in the trial's failure to address or resolve the salient allocation issue in either evidence or verdict. (See CT 3558-3559 [notice of intention to move for new trial], 3562-3624 [new trial points and authorities], 3625-3638 [JNOV papers], 3659-3697 [Collins's opposition papers], 3714-3737 [UCW's opposition papers].) On April 4, 1997, following a short hearing, the trial court denied the motions. (CT 3771; RT 5254-5270.)

Judgment was entered for Collins against D.J. Plastering on February 21, 1997. (CT 3513, 3543.) On April 24, 1997, D.J. Plastering, Inc. timely filed its notice of appeal from the judgment and from the order denying its motion for judgment notwithstanding the verdict. (CT 3775-3776.)

11. Collins Assigns Its Interest In The Judgment To UCW During Pendency Of This Appeal.

The settlement agreement between Collins and UCW permitted Collins to "opt out" of further participation in the case after (and only after) the stucco trial reached a verdict. (See CT 2016-2017, 2020.) Under the agreement's terms, if Collins opted out before funding the $600,000 contingent payment into a trust account, it would simply assign its rights to UCW; if the opt-out came after the account was funded, $600,000 would be returned to Collins. (CT 2016-2017.)

Collins did opt out. In July 1998, after this appeal was pending, UCW appeared in the trial court seeking an order substituting itself in place of Collins in this action based on an assignment of rights. Whether Collins ever funded the $600,000 payment is not discernible from the assignment agreement itself, which merely recites that UCW paid good and valuable consideration for the assignment, and that Collins has pledged full

cooperation in the prosecution of the assigned rights. However, UCW's papers supporting its request for substitution confirm that Collins never paid the money.[9/]

On July 10, 1998, this court entered an order substituting UCW in place of Collins in this appeal, based on the assignment.

B. Statement of Appealability.

The judgment, which disposes of all issues between the parties, is appealable under Code of Civil Procedure section 904.1, subdivision (a)(1). The order denying the motion for judgment notwithstanding the verdict is appealable under subdivision (a)(4) of the same section.

9/ An application to augment the Clerk's Transcript to the include the assignment agreement and related documents is being filed contemporaneously with this brief. See proposed Augmented Clerk's Transcript ["ACT"] 3880-3905.)

LEGAL DISCUSSION

I.

COLLINS FAILED TO PROVE ITS INDEMNITY CASE--IT NEVER INTRODUCED EVIDENCE FROM WHICH ANY FACTFINDER COULD DETERMINE HOW MUCH OF THE PRETRIAL SETTLEMENT WAS ALLOCABLE TO STUCCO DAMAGES AND HOW MUCH TO OTHER CONSTRUCTION DEFECTS, AND IT FAILED TO OBTAIN A VERDICT ON ALLOCATION; THE JUDGMENT THEREFORE MUST BE REVERSED WITH DIRECTIONS.

Collins sued D.J. Plastering for express and equitable indemnity;[10/] Collins bore the burden of proving those claims at trial. Such proof entailed establishing the existence of Collins's own liability to UCW and the extent to which the amount it paid UCW in settlement was based on and allocable to D.J. Plastering's negligent conduct. As we shall demonstrate, Collins failed to prove its indemnity claims at trial, failed to obtain a verdict supporting judgment in its favor, and therefore is not entitled to judgment against D.J. Plastering.

A. The Nature Of Indemnity And Elements Of An Indemnity Cause of Action.

"Indemnity means 'the obligation resting on one party to make good a loss or damage another party has incurred.'" (*Maryland Casualty Co. v.*

10/ Strictly speaking, the developer entities other than Collins (see note 1, *supra*) sued only for equitable indemnity; Collins pursued claims for both express and equitable indemnity, a strategy of questionable validity. (See, e.g., RT 3805-3806 [court's instructions to the jury]; *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 628 ["Where . . . the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty must be determined from the contract and not by reliance on the independent doctrine of equitable indemnity"].) D.J. Plastering also pursued a cross-claim against Collins for equitable contribution. (See, e.g., RT 3806-3807 [instructions].)

Bailey & Sons, Inc. (1995) 35 Cal.App.4th 856, 864, quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, *supra*, 13 Cal.3d at p. 628.) An indemnity may arise from either of two general sources--contract terms or equitable considerations. (E.g., *Maryland Casualty Co. v. Bailey & Sons, Inc.*, *supra*, 35 Cal.App.4th at p. 864.) Either way, the threshold prerequisite is that the law must have made the indemnitee (i.e., the party claiming entitlement to payment) liable to a third party for the obligation that is sought to be placed on the indemnitor's shoulders.[11/]

Consistent with that definition, the elements of a cause of action for indemnity are: "(1) a showing of fault on the part of the indemnitor . . . , and (2) resulting damage to the indemnitee . . . for which [the indemnitor] either contractually or equitably should be responsible." (*Gouvis Engineering v. Superior Court* (1995) 37 Cal.App.4th 642, 647-648.) More specifically, "in a contractual indemnity action, the indemnitee must prove that liability is covered by the contract, that liability existed, and the extent thereof." (*Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484, 1498; *Mullin Lumber Co. v. Chandler* (1986) 185 Cal.App.3d 1127, 1134-1135 ["party seeking indemnity must prove payment of the settlement amount and that the settlement amount was reasonable"]; *Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th at p. 651 [confirming that burden of proof is on the indemnitee]; *Hartford Acc. & Indemnity. Co. v. Superior Court* (1995) 37 Cal.App.4th 1174, 1182 [same].)

B. The Nature And Scope Of Collins's Indemnity Claims Against D.J. Plastering.

Collins's express indemnity claim was founded on contract language binding D.J. Plastering to indemnify Collins for Collins's liability to UCW arising out of D.J. Plastering's negligence in performing its stucco work; the equitable claim sought recovery for the same thing on a noncontractual

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11/ "An indemnitor is the party who is obligated to pay another. An indemnitee is the party who is entitled to receive the payment from the indemnitor." (*Maryland Casualty Co. v. Bailey & Sons, Inc.*, *supra*, 35 Cal.App.4th at p. 864.) Here, of course, Collins is the indemnitee and D.J. Plastering the indemnitor; UCW is the third party.

basis.[12/] Thus, consistent with the definition of indemnity, what Collins sought was reimbursement of the portion of its settlement payment to UCW that was allocable to damages incurred to repair defective stucco negligently installed by D.J. Plastering. This was clearly the understanding of both the trial court and the parties. (E.g., RT 172 [Trial court: Collins has the burden to prove it paid money because of damage caused by D.J. Plastering's negligence], 1040 [Collins's opening statement: D.J. Plastering is required to indemnify Collins for damages it incurred due to D.J. Plastering's negligence]; CT 2123 [D.J. Plastering's trial brief: objective of Collins's indemnity causes of action is to "attempt to recoup the amounts it paid in settlement to plaintiff for the stucco issues"].)

Unfortunately, this objective--reimbursement of the portion of the settlement allocable to stucco--became obscured at trial. As we shall see, the trial bogged down in the narrow question of how much it would actually cost to repair the stucco, to the exclusion of what should have been the dispositive questions: How big a piece of the whole construction-defect puzzle was the stucco repair, and, based on the ratio between total construction damages and stucco repair damages, how much of Collins's settlement payment was allocable to stucco repair? The trial focused exclusively and lavishly on determining the size of one puzzle piece--actual stucco repair cost--but paid no attention to the rest of the puzzle; without evidence addressing the larger questions, at the end of the day there was no basis on which to determine how much of its settlement payment Collins could legitimately recoup.

12/ There was repeated colloquy among the trial court and the parties over whether the indemnity agreement was properly classified as Type I, Type II, or a hybrid. (E.g., RT 163-173, 705-707; see, e.g., CT 1322-1330 [Collins trial brief], 1577-1582 [D.J. Plastering's opposition to same]; see generally *MacDonald & Kruse, Inc. v. San Jose Steel Co.* (1972) 29 Cal.App.3d 413 [describing three basic types of indemnity agreements].) The trial court was inclined to call it Type I, but observed that classification was less important than the reasonable interpretation of the particular language employed. (RT 163-166; see *Maryland Casualty Co. v. Bailey & Sons, Inc.*, *supra*, 35 Cal.App.4th at pp. 866-868 [endorsing view that particular language used determines operation of indemnity clause].) As we shall discuss, however, no matter how classified, the indemnity agreement obliged D.J. Plastering to indemnify Collins only for the latter's liability arising out of D.J. Plastering's work.

C. Collins Settles With UCW, They Decide Not To Make A Pretrial Allocation Of The Settlement Proceeds Between Stucco And Non-Stucco Claims, And Collins Fails To Obtain A Verdict On Allocation.

The focus of Collins's indemnity claim began to go astray in the pretrial handling of the Collins/UCW settlement and in choices then made about the structure of the indemnity trial. As we explain, that process resulted in Collins's failure to obtain a jury verdict that legitimately supports an indemnity judgment in its favor.

1. The Settlement Terms.

As noted, UCW settled with Collins before trial, and Collins in turn settled with some 17 of the 28 subcontractors it had sued--but not with D.J. Plastering. (E.g., RT 14-30 [hearing regarding settlement]; CT 1108-1129 [first amended cross-complaint], 1415-1435 [settlement record], 3158 [jury instruction concerning settlement].) The settlement required Collins to pay UCW $5.6 million, consisting of a $5 million non-contingent cash payment (of which $920,500 was contributed by the settling subcontractors), with the remaining $600,000 to be placed in an interest-bearing trust account after entry of judgment in the indemnity trial between Collins and D.J. Plastering, for distribution in a manner dependent upon the outcome of that trial. (See Statement of Facts, § 3; RT 729-731; CT 1169-1172, 1415-1435, 2680-2683.) Stripped of the contributions and contingencies, what Collins actually paid UCW was $4,079,500. (E.g., RT 1797.)

2. The Settling Parties' Election Not To Allocate The Settlement's Proceeds Before Trial.

There was no pretrial allocation of the UCW/Collins settlement proceeds between stucco and non-stucco damages. The parties, including D.J. Plastering, wrangled quite a bit over the allocation issue. (E.g., RT 90-104, 179-181, 245-248, 260-262.)

D.J. Plastering argued that the sliding scale aspect of the settlement mandated a good faith determination (e.g., RT 54, 93, 245-248; CT 1474-1488; see Code Civ. Proc., § 877.5) and that a pretrial allocation of the settlement proceeds between stucco and other damages was necessary in order to frame the issue of indemnity for trial, i.e., to give D.J. Plastering notice of precisely how much Collins was seeking to recoup from it. (E.g., RT 54, 93, 96-101, 245-248; CT 1459-1488; see, e.g., Code Civ. Proc., §§ 877.5 [rules governing sliding scale agreements], 877.6 [good faith settlement procedures for multi-defendant litigation]; *Regan Roofing Co. v. Superior Court* (1994) 21 Cal.App.4th 1685, 1703-1704 [opining that a settlement figure should be broken down into component parts so that subcontractors potentially liable for only one portion can predict their credit]; *Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th at pp. 649-650 [one purpose served by allocation is providing offset information to nonsettling parties]).

Collins and UCW, in contrast, together insisted that pretrial allocation was unnecessary and inappropriate. They argued that the proper course was for Collins's indemnity claim to be determined at trial, followed by a binding trial court allocation of damages as between stucco and non-stucco claims based on the jury's findings and the evidence introduced at trial. (E.g., CT 1633-1641 [Collins opposition to allocation], 1673-1687 [UCW's opposition to D.J. Plastering's positions on allocation and good faith].)

The trial court agreed with Collins and UCW and deferred allocation to later determination--not by the jury, but rather by the court after trial. (RT 710.) This was a serious mistake.

3. The Trial Court's Erroneous Decision To Make A Binding Allocation Of The Settlement Proceeds After Trial, And Collins's Concomitant Failure To Obtain A Jury Verdict On Allocation.

In the typical multi-party construction defect litigation, a pretrial settlement with less than all of the subcontractors is followed by a good faith settlement motion and hearing under Code of Civil Procedure section

877.6. That procedure entails, among other things, an examination of the settlement, including the settling parties' allocation of liability amongst those allegedly responsible for the injuries at issue. (See generally *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488.) Here, the trial court concluded that pretrial allocation was inappropriate because UCW had sued only Collins, and, as a result, the lawsuit was not multi-party litigation--i.e., was not one alleging "that two or more parties are joint tortfeasors" within the meaning of Code of Civil Procedure section 877.6, subdivision (a)(1). Whether or not that ruling was correct, the court's decision to make a binding allocation *after* trial was clear and fatal error.

When an indemnity trial *is* preceded by a pretrial settlement allocation, such allocation can sometimes constitute "'presumptive evidence of liability and the amount thereof'" at trial. (*Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th at p. 650, quoting *Peter Culley & Associates v. Superior Court*, *supra*, 10 Cal.App.4th at p. 1498.) But this is true only where the allocation in the underlying settlement was made "by parties with truly adverse interests in the allocation." (*Peter Culley & Associates v. Superior Court*, *supra*, 10 Cal.App.4th at p. 1498.)

Otherwise--that is, where it was not accomplished by parties with truly adverse interests--the allocation "should be given no special treatment in an indemnity action. Plaintiff should be required to prove the reasonableness of its proposed allocation by ordinary means." (*Ibid.*) As another appellate court recently elaborated:

> "Where a settling defendant is entitled to only partial indemnity, failure to allocate between claims in the settlement agreement means that damages must be proven without the presumptive evidence of the nonsettling defendant's liability afforded by a settlement agreement in which proceeds have been allocated. In that situation, the settlement amount works only to place an upper limit on the indemnity claim, and an undisclosed and possibly nonexistent allocation cannot be used to establish actual damages."

(*Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 284; see, e.g., *CC-California Plaza Associates v. Paller*

& Goldstein (1996) 51 Cal.App.4th 1042, 1053 [agreeing with *Peter Culley*]; *Slottow v. American Casualty Co.* (9th Cir. 1993) 10 F.3d 1355, 1359 [citing *Peter Culley*, holds that allocation not made by adverse interests isn't binding in subsequent indemnity proceedings]; *Regan Roofing Co. v. Superior Court*, *supra*, 21 Cal.App.4th at p. 1704 [noting that "the inquiry at the good faith settlement stage is not the same as the inquiry at (an indemnity) trial, *where complete precision of allocation could presumably be achieved*" (emphasis added)]; cf. *Erreca's v. Superior Court* (1993) 19 Cal.App.4th 1475, 1495-1496 [allocation made in good faith settlement proceeding ineffective absent demonstration that it was reached in a "sufficiently adversarial manner to justify the presumption that a reasonable valuation was reached"].)[13/]

Thus, pretrial allocation or none, Collins had the burden to prove each element of its indemnity claim--including the allocation necessary to establish the extent of its damages resulting from the indemnitor's conduct--*at trial*. Obviously, therefore, the trial court was not empowered to make a binding allocation *after* trial. Rather, Collins was required to prove its case to the jury, which should have been called upon to make the required allocation based on evidence introduced at trial.

That never happened. Collins failed to obtain a jury determination on allocation. The question simply was not put to the jury; rather, only the narrow issue of stucco repair cost was submitted for its determination. (See CT 3095-3106 [special verdicts]; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 961-962 ["Myers is attempting to enforce the judgment based on the special verdict and must bear the responsibility for a special verdict submitted to the jury on its own case"].) But repair cost and allocability are not the same thing, because

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13/ That is, pretrial allocation is never *conclusive* in the indemnity action. Rather, it constitutes presumptive evidence at best, and then only in the narrow circumstances described above. Thus, even if the trial court had made a pretrial allocation here, it would not have been binding on D.J. Plastering at trial. (See, e.g., *Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th at p. 650 ["We conclude . . . that the allocation and indeed the valuation put on the settlement by the settling parties and approved by the trial judge as 'good faith' have no binding or res judicata effect as to Gouvis (the indemnitor) in terms of the subsequent indemnity action"].)

settlement, of course, entails compromise. (See, e.g., *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, *supra*, 38 Cal.3d at p. 499 [good faith determination requires assessment of several factors, including "a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, *and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial*" (emphasis added)]; *Regan Roofing Co. v. Superior Court*, *supra*, 21 Cal.App.4th at p. 1704 ["The settlement should represent a rough approximation of the settlor's proportionate liability, as well as a recognition that a settlor should pay less in settlement than after a trial"]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1349 [quoting *Tech-Bilt*]; *L.C. Rudd & Son, Inc. v. Superior Court* (1997) 52 Cal.App.4th 742, 747 [same].)

Thus, Collins could establish an entitlement to indemnity from D.J. Plastering only by obtaining a verdict determining, irrespective of how much the stucco repair would cost, how much of the $4,079,500 it paid UCW in compromise of the original $9 or $ 11 million construction defect claim was allocable to stucco repair. Such a finding was essential to proving the element of "resulting damage to the indemnitee . . . for which the indemnitor either contractually or equitably should be responsible." (*Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th at pp. 647-648; *id.* at p. 651 ["At the trial of (an indemnitee's) indemnity action against (an indemnitor) the burden of proof will be upon (the indemnitee) to prove the amount that has been paid by virtue of injury caused by (the indemnitor's) fault"]; see *Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.*, *supra*, 64 Cal.App.4th at p. 276 ["However, the settlement here was a lump sum with no allocation made between claims. As a result, before reaching the issue of whether the amounts paid by (indemnitees) to settle the architectural defect claims were 'reasonable,' the jury had to first decide what had been paid by those parties toward that claim"].)

The verdict lends absolutely no insight into how much of the settlement is allocable to stucco claims. It thus affords no foundation for the judgment of indemnity in Collins's favor, which accordingly must be reversed.

Furthermore, as we next discuss, even if the question had been put to the jury, Collins introduced no evidence at trial on which the jury could have based a meaningful allocation of settlement proceeds to the stucco claim. That omission compounds the mandate for reversal.

D. The Trial Focuses Exclusively On Competing Theories Of Stucco Repair Costs, Lending No Insight Into How Stucco Repairs Fit Into The Complete Damage Picture At The Project.

The trial was supposed to be about indemnity. It wasn't. Instead, at Collins's and UCW's insistence and over D.J. Plastering's objections, the trial focused exclusively on the parties' competing positions on the projected cost of repairing stucco damage at the Project. (See Statement of Facts, § 7.)

In order for there to be a basis for allocation, there had to be evidence of the entire picture. (E.g., *Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.*, *supra*, 64 Cal.App.4th 264; *Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th 642.) What was the full scope of construction damage at the Project? Neither the court nor the jury was ever told. D.J. Plastering's efforts to broaden the scope of the proceedings to include such evidence were soundly rebuffed. (E.g., RT 1350 [sustaining UCW's objection, trial court precludes D.J. Plastering from questioning witness about other categories of defect in the Project, commenting "let's talk about stucco"], 1796 [sustaining Collins's objection, trial court precludes D.J. Plastering from questioning witness about defects other than stucco], 2471 [trial court excludes written evidence offered by D.J. Plastering documenting defects other than stucco], 3402-3403 [court precludes witness from testifying regarding defects other than stucco].)

As a result, the jury heard only allusions to the broad scope of the original lawsuit. (E.g., RT 1016-1017 [UCW opening statement referring to $9 million in total repair costs], 1034 [Collins opening statement noting that lawsuit originally encompassed claims for "a wide range of alleged deficiencies"], 1063 [D.J. Plastering opening statement revealing that lawsuit originally was about "a myriad of other subjects"], 1134 [original claim was for $9 million or $11 million; settlement was for $5 million],

2106 [Collins's architect expert's original retention encompassed far more than just stucco problems], 4349 [Collins's counsel describes lawsuit at its inception as a garden variety construction defect case in terms of its scope].) The evidence, however, focused on nothing but competing theories of stucco repair costs.[14/]

The jury heard nothing about allocation. It heard no evidence that would permit it to determine how much of the settlement monies that Collins paid to UCW were rightly allocable to claims against D.J. Plastering. Thus, if the construction defect claims concerning the Project were a jigsaw puzzle, the jury heard about only one piece. That piece was insufficient foundation for an indemnity judgment. (E.g., *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654-665 [judgment lacks substantial evidence and must be reversed where party with the burden of proof fails to introduce evidence supporting each element of its claim]; Evid. Code, § 500 [a party has the burden of proving all facts essential to the relief sought]; 1 Witkin, Cal. Evidence (3d ed. 1986) Burden of Proof and Presumptions, § 131, p. 116 [basic rule is that a party must prove what the party must plead].)

Collins simply didn't prove its case. Accordingly, the judgment must be reversed.

E. The Trial Court's Post-Trial Allocation Serves Only To Highlight Collins's Failure To Introduce Proof Of The Elements Of Its Indemnity Claims.

The events at trial's end only underscore Collins's failure to prove its case or obtain a viable verdict.

After the verdicts were returned, Collins moved for "court allocation of damages to D.J. Plastering." It supported its proposed allocation, not with evidence introduced at trial, but rather with declarations of its own counsel and experts (as well as repair estimates lodged in support of its position by UCW--see CT 3331-3332).

14/ That included UCW's highly-inflated recommendations. (See Section III, *infra*.)

D.J. Plastering rightly protested that only evidence introduced at trial could properly support allocation, making a legitimate allocation impossible because no such evidence was introduced. (E.g., RT 4916-4917 ["I do need to, for the record and for just myself, to say one last time that I don't think that this trial was about what Collins paid in settlement. I don't think there was anything in this trial that had anything to do with what they had paid plaintiff"], 4917 ["To say that the jury's verdict is instructive on what Collins paid, I would, with all due respect to his Honor, disagree that it is instructive of anything that has to do with what that negotiation process resulted in in (*sic*) a payment from Collins to plaintiff, for which I'm responsible in indemnifications"], 4918 ["The jury didn't hear it. They weren't aware of the other claims"].)

But Collins insisted the court could arrive at an allocation based on the papers it had submitted. The trial court agreed and, as Collins had proposed, "allocated" to stucco damage the full amount determined by the jury to constitute the cost of repairing such damage (including relocation costs). (See Statement of Facts, § 9; RT 4915-4928.)[15/]

In so doing, the trial court usurped the jury's task: As discussed, in the absence of a pretrial allocation accomplished by parties having truly adversarial interests, allocation was purely a jury question and could be founded only on substantial evidence introduced at trial. (See Section I(B)(3), *supra*.) Furthermore, a recent decision holds that, even at trial, "an attorney for the party seeking indemnification cannot be permitted to testify, after the fact, as to how he believes settlement proceeds would have been allocated had the parties negotiated and resolved the issue." (*Dillingham Construction N.A., Inc. v. Nadel Partnership, Inc.*, *supra*, 64 Cal.App.4th at p. 285; see *id.* at pp. 285-287 [full discussion].) Thus, Collins's counsel's post-trial submission is doubly improper and ineffectual as a foundation for allocating the settlement. Bottom line: the trial court

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15/ To be precise, the trial court allocated the full amount of the jury's verdict on repair and relocation costs to D.J. Plastering as against Collins Development Company; as against the remaining developer entities, the court reduced the repair cost (but not the relocation cost) by 15% to reflect negligence the jury had assigned to entities other than D.J. Plastering. (See CT 3515-3516, 3545-3546; RT 4925-4926.) The judgment against the developer entities other than Collins is discussed further in Section IV, *infra*.

couldn't make a binding allocation at all, and it certainly couldn't make one based on counsel's representations or anything other than on evidence introduced at the indemnity trial.

Simply put, Collins got an indemnity trial tailored to its specifications, but it failed to prove its case at that trial: There was no evidence of allocability. Even if there was, Collins failed to obtain a jury determination on the allocation issue. The trial court's post-trial allocation was against the law. The judgment based on it therefore must be reversed. Moreover, as we next discuss, it must be reversed with directions to enter judgment for D.J. Plastering.

F. Collins's Complete Failure Of Proof Entitles D.J. Plastering To Reversal Of The Judgment With Directions.

After trial, D.J. Plastering moved for JNOV on the grounds the verdict lacked substantial evidence to support it and was erroneous as a matter of law. (See CT 3625-3638.) The trial court denied the motion. (CT 3771; RT 5254-5270.)

Collins had free rein to prove its indemnity claim at trial, including allocability of the settlement to D.J. Plastering. Collins got the trial it and UCW demanded, but, as we have demonstrated, Collins failed to deliver the goods. It never introduced any evidence to demonstrate how much of the amount it paid in settlement was reasonably attributable to stucco damage. Thus, the record affords no foundation whatsoever upon which any factfinder, whether judge or jury, could allocate the appropriate amount of settlement proceeds to D.J. Plastering's stucco repair work.

Since Collins failed even to address its evidence to the key issue of allocability, there is no evidentiary basis for an indemnity judgment against D.J. Plastering. Accordingly, D.J. Plastering's motion for JNOV should have been granted, and this court should reverse with directions to enter judgment in D.J. Plastering's favor. (E.g., *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1066 ["Having thus received a full and fair opportunity to prove her case, she is not entitled to a new trial"]; *McCoy v. The Hearst Corp.* (1991) 227 Cal.App.3d 1657, 1661 ["when the plaintiff has had full and fair opportunity to present his or her case, a reversal of a

judgment for the plaintiff based on insufficiency of the evidence should place the parties, at most, in the position they were in after all the evidence was in and both sides had rested. A judgment for defendant would then be entered. . . ."]; *Bank of America v. Superior Court* (1990) 220 Cal.App.3d 613, 624 [reversal for insufficiency of the evidence concludes the litigation as if the trial court had correctly granted JNOV]; see also *Selma Auto Mall II v. Appellate Department* (1996) 44 Cal.App.4th 1672, 1683-1684 ["When a court grants relief which it has no authority to grant, its judgment is to that extent void"; "The mere fact that the court has jurisdiction of the subject matter of an action before it does not justify . . . a grant of relief to a party that the law declares shall not be granted"].)

II.

THE JUDGMENT LACKS LEGAL FOUNDATION: THE JURY FOUND COLLINS STRICTLY LIABLE TO UCW EXCLUSIVELY FOR PURELY ECONOMIC LOSS, WHICH IS UNRECOVERABLE IN STRICT LIABILITY; SINCE UCW HAD NO LEGAL RIGHT TO RECOVER SUCH DAMAGES, COLLINS ACCORDINGLY HAS NO RIGHT TO BE INDEMNIFIED FOR THEM BY D.J. PLASTERING.

The judgment lacks foundation on another front, too. A judgment founded on a jury's special verdict is only as legally sound as the verdict itself. Where the verdict nakedly discloses that the jury assessed damages on an illegal basis, the ensuing judgment is also illegal and cannot stand.

Such is the case here. The special verdict reveals that the jury was given the following principal tasks:

- To determine whether Collins was liable to UCW for stucco-related damages under theories of strict liability and negligence, and, in so doing, to determine the cost of stucco repair at the Project, and relocation costs associated with the repair (CT 3095-3099); and

- To determine Collins's entitlement to indemnity from D.J. Plastering for the liability assessed in regard to UCW's claims against Collins (CT 3104-3106).

The judgment based on the determinations the jury reached in completion of these tasks is fundamentally unsound and must be reversed, for the following reason: The only damages the jury assessed against Collins were purely economic, and strict liability was the only basis the jury found on which to award them; however, California law flatly prohibits recovery of purely economic damages in a strict liability cause of action, and Collins therefore cannot be legally liable to UCW for such damages. At the same time, D.J. Plastering's obligation to indemnify Collins extends only to Collins's legal liability to UCW arising out of D.J. Plastering's stucco work. According to the verdict, however, the entire indemnity award is based on damages that are not legally recoverable, and thus, there is no such legal liability. The judgment for indemnity therefore lacks foundation and, once again, must be reversed with directions to enter judgment for D.J. Plastering.

A. According To The Verdict, Collins's Liability To UCW Is Founded Exclusively On Strict Liability, And Consists Solely Of Stucco Repair And Associated Relocation Costs.

If the trial between UCW and Collins served any legitimate purpose,[16/] it served to establish the basis for and extent of Collins's liability to UCW in connection with the stucco damage at the Project. (See, e.g., RT 728 [case overview for jury venire: "The remaining issues for resolution are plaintiff's claim of alleged stucco defects against Collins Development . . ."]; CT 3095-3107 [special verdict forms]; see also CT 1215-1218 [UCW trial brief].)

In this regard, the special verdict form required the jury to assess Collins's liability to UCW under theories of strict liability (CT 3095-3099)

16/ We address the illegitimacy of UCW's participation at trial in Section III, *infra*.

and negligence (CT 3100-3103), and to determine "the total amount of damages, if any, suffered by the University Canyon West Homeowners Association and caused by the defective stucco/plaster" for "Cost of Repair" and "Relocation." (CT 3099.) So doing, the jury found Collins to be strictly liable to UCW, but not negligent, and assessed the "total amount of damages" at $3,180,00.00 for cost of repair and $349,800.00 for relocation. (CT 3099.)[17/]

This verdict on its face reveals UCW's stucco damages to be unrecoverable against Collins. Why? Because, as we shall demonstrate, the "total amount of damages" awarded pertains exclusively to pure economic loss, and such loss is unrecoverable in a strict liability cause of action.

B. California Law Makes Clear That Purely Economic Damages Are Not Recoverable In A Strict Liability Cause Of Action.

Since 1965, California law has made clear that purely economic losses are not recoverable damages under a cause of action for strict liability. The Supreme Court so held in *Seely v. White Motor Co.* (1965) 63 Cal.2d 9, 18, and any number of decisions reaffirm this principle. (See, e.g., *Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, 364 ["Under California law, a manufacturer may be strictly liable for physical injuries caused to person or property, *but not for purely economic losses*" (emphasis added)]; *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1327-1329 [discussing *Seely* principle]; *Huang v. Garner* (1984) 157 Cal.App.3d 404, 421 ["The court expressly refused to allow recovery (in strict liability) for economic losses alone"]; *Sacramento Regional Transit Dist. v. Grumman*

17/ The jury also allocated fault between Collins and UCW, assigning 95% to Collins and 5% to UCW. (CT 3099.)

Flxible (1984) 158 Cal.App.3d 289, 298; 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1297, pp. 749-752.)[18/]

As *Seely* explains, the doctrine of strict liability in tort was designed "to govern the distinct problem of physical injuries." (*Seely v. White Motor Co.*, *supra*, 63 Cal.2d at p. 15. "'The rule imposing strict liability in tort for damage to property presupposes (1) a defect and (2) *further* damage to plaintiff's property caused by the defect.'" (*Fieldstone Co. v. Briggs Plumbing Products, Inc.*, *supra*, 54 Cal.App.4th at p. 366, quoting *Sacramento Regional Transit Dist. v. Grumman Flxible*, *supra*, 158 Cal.App.3d at p. 294, original italics, fn. omitted; see 6 Witkin, Summary of Cal. Law, *supra*, Torts, at § 1297, p. 751; see also *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224 [holding strict product liability theory available to property damage claims arising from defects in mass-produced construction].)

By contrast, the problems associated with a product's failure to perform as expected are properly addressed within the realm of contract law. (*Seely v. White Motor Co.*, *supra*, 63 Cal.2d at p. 15 ["The law of sales has been carefully articulated to govern the economic relations between suppliers and consumers of goods"].) "When the defect and the damage are one and the same, the defect may not be considered to have caused physical injury[,]" and such damage is not recoverable in strict liability. (*Sacramento Regional Transit Dist. v. Grumman Flxible*, *supra*, 158 Cal.App.3d at p. 294.) Yet, as we next address, that is the only type of damages the jury was asked to assess or purported to determine here.

18/ Courts of Appeal have split over the related question of whether economic loss is recoverable in construction defect actions based on claims of negligence rather than strict liability; that issue is pending resolution by the California Supreme Court in *Aas v. Superior Court*, Case No. S071258. Of course, the resolution of that issue is immaterial here, since the jury expressly rejected UCW's negligence claim, and assessed damages against Collins exclusively on the basis of strict liability. (See CT 3095-3103.)

C. The Stucco Repair Costs And Relocation Costs Assessed By The Jury Constitute Purely Economic Damages, And Therefore Are Not Properly Recoverable By UCW.

The jury expressly rejected UCW's negligence claim and held Collins liable to UCW exclusively on the basis of strict liability. At the same time, however, the jury determined that "the total amount of damages" suffered by UCW "and caused by the defective stucco/plaster" were for "cost of Repair" and "relocation." (CT 3099.) Indeed, the verdict strictly limited the jury's assessment of damages to these two precise categories--a limitation entirely consistent with Collins's and UCW's insistence that the trial focus on nothing else. (See Statement of Facts, § 7.)[19/] *Seely* and its progeny leave no doubt that these damages constitute purely economic loss, not legally recoverable in strict liability.

"Economic" loss or harm has been defined as "damages for inadequate value, *costs of repair* and replacement of the defective product or consequent loss of profits--without any claim of personal injury or damages to other property." (*Fieldstone Co. v. Briggs Plumbing Products, Inc.*, *supra*, 54 Cal.App.4th at p. 364 [emphasis added]; *Sacramento Regional Transit Dist. v. Grumman Flxible*, *supra*, 158 Cal.App.3d at p. 294 [same]; *San Francisco Unified Sch. Dist. v. W.R. Grace & Co.*, *supra*, 37 Cal.App.4th at p. 1327, fn. 5, ["'"[E]conomic loss generally means pecuniary damage that occurs through loss of value or use of the goods sold *or the cost of repair* together with consequential lost profits *when there has been no claim of personal injury or damage to other property*,"'" first emphasis added, citations omitted].)

To be sure, decisions interpreting *Seely* have sometimes noted that "the line between economic loss and recoverable physical property damage is not always easy to draw" (*Huang v. Garner*, *supra*, 157 Cal.App.3d at p. 420, citing Note, *Economic Loss in Products Liability Jurisprudence* (1966) 66 Colum.L.Rev. 917) or exposed gray areas in the demarcation between

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19/ D.J. Plastering had moved in limine to exclude all evidence of purely economic stucco-related damages. (CT 438.) Collins and UCW each opposed the motion (CT 1642 [Collins], 1700 [UCW]) and the trial court denied it (RT 34-36; see CT 2342.)

unrecoverable economic damage and recoverable consequential property damage (e.g., *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502, 523-532 [assessing whether damage to gas company's pipelines caused by transportation of gas containing PCBs constituted economic loss or property damage].) Even these decisions, however, confirm the enduring validity of the principle that costs incurred to repair a defective product constitute a classic form of economic damage, and are not recoverable in strict liability. (See *Transwestern Pipeline Co. v. Monsanto Co.*, *supra*, 46 Cal.App.4th at pp. 523 ["The parties agree economic loss is not recoverable in an action for strict products liability"]; 525-526 [discussing *Seely* and noting that repair costs are unrecoverable in strict liability]; *Huang v. Garner*, *supra*, 157 Cal.App.3d at p. 420 [concluding that trial court properly held repair costs to constitute pure economic loss].)

The jury here assessed damages for the cost of stucco repair, and relocation costs associated with the repair, the latter itself fairly constituting a "cost of repair." (E.g., *Abbott v. Taz Express* (Nov. 9, 1998) 1998 WL 777150, *2 [listing relocation expenses as an item of economic damages].) Thus, the only type of damages assessed against Collins on UCW's strict liability claim--and the only type addressed at trial--is precisely the type that California law squarely forbids awarding in strict liability. Thus, according to the special verdict's plain terms, there was no legal basis for holding Collins liable to UCW for stucco damages.

D. Since The Only Damages Assessed Against Collins Arising Out Of D.J. Plastering's Work Are Legally Unrecoverable, Collins Has Failed To Establish Any Basis Upon Which D.J. Plastering Can Be Called Upon To Indemnify It.

Collins's cross-action against D.J. Plastering was for express and equitable indemnity. (See, e.g., CT 3197-3206 [instructions on express and equitable indemnity].) As the trial court instructed the jury, "Indemnity is the right of one person/entity to be compensated *for the legal consequences* of the conduct of another person/entity." (CT 3197 [instruction on express indemnity, emphasis added]; see CT 3204 [parallel instruction on equitable

indemnity].) Accordingly, as the trial court further instructed the jury, Collins's entitlement to indemnity from D.J. Plastering hinged upon there being a threshold determination that D.J. Plastering's conduct had resulted in legal consequences to Collins--i.e., that Collins actually was liable to UCW. (CT 3197 ["If you reach a verdict in favor of the plaintiff (UCW) and against Collins Development, you must then decide whether Collins Development is entitled to be partially or fully indemnified by Cross-Defendant D.J. Plastering *for the damages Collins Development has sustained as a result of your verdict in favor of the plaintiff*" (emphasis added)]; see CT 3204 [parallel instruction on equitable indemnity].)

As just shown, however, the verdict reveals on its face that Collins was *not* legally liable to UCW for stucco repair-cost damages, and no other damages were proven or even suggested. Thus, in the language of the court's instructions, D.J. Plastering's "conduct" in performing the stucco work had no legitimate "legal consequences" to Collins. Accordingly, as we now elaborate briefly, there is nothing to indemnify and no legal basis for the judgment against D.J. Plastering.

1. Indemnity Is The Right To Be Compensated For Damages Legally Incurred As A Result Of Another's Conduct.

As noted, "Indemnity means 'the obligation resting on one party to make good a loss or damage another party has incurred.'" (*Maryland Casualty Co. v. Bailey & Sons, Inc.*, *supra*, 35 Cal.App.4th at p. 864, quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, *supra*, 13 Cal.3d at p. 628.) Further, whether contractual or equitable, there can be no indemnity unless the law makes the indemnitee (here, Collins) liable to a third party (UCW) for the obligation that is sought to be placed on the indemnitor (D.J. Plastering).

In regard to express indemnity, this is true as a matter of both statute and decisional law. "Under California law, an '[i]ndemnity is a contract by which one engages to save another from *a legal consequence* of the conduct of one of the parties or of some other person.'" (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*, 13 Cal.App.4th at p.

968, quoting Civ. Code, § 2772, emphasis added; see, e.g., *Peter Culley & Associates v. Superior Court*, *supra*, 10 Cal.App.4th at p. 1492 [same].)

The principle is equally well established in equitable indemnity. "'[I]n the case law of equitable indemnity . . . one point stands clear: there can be no indemnity without liability.'" (*Seamen's Bank v. Superior Court* (1987) 190 Cal.App.3d 1485, 1491, quoting *Munoz v. Davis* (1983) 141 Cal.App.3d 420, 425; see, e.g., *Alisal Sanitary Dist. v. Kennedy* (1960) 180 Cal.App.2d 69, 75 ["The right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible *by the law* to an injured party. It is a right which enures to a person who, without active fault on his part, has been compelled *by reason of some legal obligation*, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable" (original emphasis omitted, present emphasis added)]; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 89, p. 162 [quoting *Alisal* and collecting cases].)

Simply put, whether the cause of action rests in contract or equity, there can be no indemnity without liability. However, the jury's verdict demonstrates on its face the complete absence of any legal basis for imposing liability on Collins for UCW's stucco repair damages at the Project. As we next address, that fact completely undermines the judgment against D.J. Plastering.

2. Since The Verdict Demonstrates That Collins Was Not Properly Liable To UCW For The Cost Of Repairing Stucco Damage, The Indemnity Judgment Against D.J. Plastering Must Be Reversed.

Collins sued D.J. Plastering for express and equitable indemnity, and bore the burden of proving its causes of action at trial. (E.g., *Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th at p. 651; *Peter Culley & Associates v. Superior Court*, *supra*, 10 Cal.App.4th 1484.) Once again, it failed utterly.

There could be no liability under either cause of action without the prerequisite determination that Collins itself was legally liable to UCW.

However, Collins failed that prerequisite: The jury rejected UCW's negligence cause of action and assessed damages solely on the basis of strict liability--but the only damages it awarded are not recoverable in a strict liability claim. As a result, the special verdict conclusively precludes awarding Collins any judgment for indemnity against D.J. Plastering. (See, e.g., *Myers Building Industries, Ltd. v. Interface Technology, Inc.*, *supra*, 13 Cal.App.4th 949, 956-961 [reversing punitive damage award because special verdict failed to elicit findings on any tort cause of action that would support it].)

Not only did Collins fail to introduce evidence from which a factfinder could determine how the stucco repair costs fit into the whole construction-defect repair puzzle (see Section I, above), but the trial of UCW's causes of action against Collins established the absence of any legal basis for holding Collins liable to UCW for stucco repair costs at all.

In short, Collins failed to establish any basis for indemnity. Indeed, the special verdict negates any such possibility. For all the stated reasons, once again, the judgment against D.J. Plastering lacks legal foundation and must be reversed.

3. The Reversal Must Be With Directions To Enter Judgment For D.J. Plastering.

As noted, D.J. Plastering moved for JNOV on the grounds the verdict lacked substantial evidence to support it and was erroneous as a matter of law. (See CT 3625-3638.) The trial court denied the motion. (CT 3771; RT 5254-5270.)

As we have demonstrated, the jury's verdict reveals on its face the absence of any legal basis for imposing liability on Collins, and, as a result, there is no legal basis for an indemnity judgment against D.J. Plastering. Accordingly, once again, the motion for JNOV should have been granted, and this court should reverse with directions to enter judgment in D.J. Plastering's favor. (E.g., *Cassista v. Community Foods, Inc.*, *supra*, 5 Cal.4th at p. 1066 ["Having thus received a full and fair opportunity to prove her case, she is not entitled to a new trial"]; *McCoy v. The Hearst Corp.*, *supra*, 227 Cal.App.3d 1657, 1661 ["when the plaintiff has had full and fair opportunity to present his or her case, a reversal of a judgment for

the plaintiff based on insufficiency of the evidence should place the parties, at most, in the position they were in after all the evidence was in and both sides had rested. A judgment for defendant would then be entered . . ."]; *Bank of America v. Superior Court*, *supra*, 220 Cal.App.3d 613, 624 [reversal for insufficiency of the evidence concludes the litigation as if the trial court had correctly granted JNOV]; see also *Selma Auto Mall II v. Appellate Department*, *supra*, 44 Cal.App.4th at pp. 1683-1684 ["When a court grants relief which it has no authority to grant, its judgment is to that extent void"; "The mere fact that the court has jurisdiction of the subject matter of an action before it does not justify . . . a grant of relief to a party that the law declares shall not be granted"].)

To sum up, D.J. Plastering can be held to indemnify Collins only for damages that Collins was legally obligated to pay to UCW. However, the jury's determinations at trial established that UCW's damages lack foundation as a matter of law. Accordingly, Collins cannot recoup them from D.J. Plastering. Judgment therefore must be reversed and entered instead for D.J. Plastering.

III.

THE SUPERIOR COURT PREJUDICIALLY ERRED IN PERMITTING UCW TO APPEAR AT TRIAL AS AN APPARENT PLAINTIFF AFTER IT HAD SETTLED ITS CLAIMS AGAINST COLLINS UNDER TERMS LEAVING NO JUSTICIABLE CONTROVERSY TO BE TRIED.

A. There Is No Right To Trial In The Absence Of A Justiciable Controversy.

It is well settled that the duty of a judicial tribunal "is to decide actual controversies . . . , and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*National Assn. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746; see, e.g., *Klemme v. Hoag Memorial Hospital Presbyterian* (1980) 103 Cal.App.3d 640 [error to

permit plaintiff to elicit verdict apportioning comparative fault, where defendants objected and indemnity issues were not drawn in question].)

Long ago, our Supreme Court defined an action as "collusive" and therefore improper, if it is "not founded upon an actual controversy between the parties" but is pursued instead for some other purpose. (*Golden Gate Bridge etc. Dist. v. Felt* (1931) 214 Cal. 308, 316; see *Pellett v. Sonotone Corp.* (1945) 26 Cal.2d 705, 713; *Alcala Co. Inc. v. Superior Court* (1996) 49 Cal.App.4th 1308, 1318 [quoting *Golden Gate*].) As the Court of Appeal declared in *Paoli v. Cal. & Hawaiian Sugar etc. Corp.* (1956) 140 Cal.App.2d 854, 857:

> "'To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although a case may have originally presented such a controversy, if before the decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court, upon the fact appearing, to dismiss it.'"[20/]

In sum, where certain parties have fully resolved the issues between them, either by adjudication or settlement, no justiciable controversy exists and the courts should not entertain the action between such parties. (See *Crowley v. Modern Faucet Mfg. Co.* (1955) 44 Cal.2d 321, 324 [contract action dismissed a "sham" where issues previously determined]; *McKenna v. Elliott & Horne Co.* (1953) 118 Cal.App.2d 551, 555 [action to quiet title moot and properly dismissed where the issue of title had previously been conclusively determined]; *National Assn. of Wine Bottlers v. Paul, supra*, 268 Cal.App.2d at p. 746.) That was precisely the situation here.

20/ See also *National Assn. of Wine Bottlers v. Paul, supra*, 268 Cal.App.2d at p. 746 [same; held, appeal should be dismissed as moot where the order on which it was premised was withdrawn before appeal could be decided]; *Guardianship of Baby Boy M.* (1977) 66 Cal.App.3d 254, 276 ["a case may be deemed moot when although it initially presented an existing controversy, the passage of time, or the acts of the parties, or a court decision have deprived the controversy of its life"]; *Boccato v. City of Hermosa Beach* (1984) 158 Cal.App.3d 804, 808 [same].

B. UCW Had No Justiciable Controversy To Litigate After It Settled With Collins.

UCW sued only Collins, and it settled its suit before trial. However, citing the sharing agreement that was incorporated in the settlement, UCW persuaded the trial court that it retained sufficient ongoing interest in the litigation to justify its participation at trial as a party plaintiff, to try purported causes of action for strict liability and negligence. (E.g., CT 1673-1687, 2445-2453; see RT 83-124.) Its interest, however, was a sham and its participation therefore utterly unjustified and improper.

Careful examination of the sharing agreement makes this plain. Absolutely nothing in it rested on the outcome of a trial of UCW's strict liability and negligence causes of action; indeed, UCW had given Collins a full release and a Civil Code section 1542 waiver (see, e.g., RT 16; CT 1420, 2020-2024), and the special verdict form addressing the UCW/Collins causes of action contained no mechanism for actually awarding relief to UCW based on a finding in its favor (see CT 3095-3103). Rather, the settlement deal was structured so that the ultimate amount of UCW's recovery hinged entirely upon the outcome of the indemnity trial between Collins and D.J. Plastering.

These were the salient terms: As noted (see Statement of Facts, § 3), Collins was supposed to place $600,000 in an interest-bearing trust account, its ultimate distribution dependent on a series of contingencies. Specifically, if Collins obtained an indemnity judgment against D.J. Plastering up to $600,000, the judgment amount would be paid to UCW directly out of the trust account, with any balance being remitted to Collins and any earned interest going to UCW. If Collins reaped an award against D.J. Plastering greater than $600,000, UCW would share in the recovery in exceeding $600,000 as follows: The next $400,000, up to $1 million, would be paid to Collins, and any amount in excess of that would be paid 10 percent to Collins and 90 percent to UCW. (CT 1169-1172, 1415-1435, 2680-2683; RT 729-731.)[21/]

21/ At least that was the theory. The various payout permutations have a fictitious character to them, since Collins wasn't even required to fund the trust account until well after entry of judgment following trial.

(continued...)

Thus, each and every contingency in the settlement was to be determined, not by the verdict on UCW's causes of action--which the settlement had rendered moot from UCW's standpoint--but rather by the outcome of the indemnity cross-action. UCW was not a party to that action and had never possessed any justiciable interest in it. (See, e.g., *Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th at p. 647 [where homeowners association, like UCW, sued developer alone, "following settlement with Developers, the Associations had no further direct recourse against any of the participants in the construction"].) Lacking a justiciable interest, UCW had no business appearing as a party plaintiff to litigate moot claims at trial, and the trial court erred in permitting it to do so.

C. While Some Appellate Decisions Have Countenanced Trial Participation By A Settling Defendant, None Approves Such Involvement By A Plaintiff, Or By Any Party Like UCW That Has Completely Resolved The Only Justiciable Interest It Ever Had In The Case.

Collins will likely argue that this court's decision in *Alcala Co. Inc. v. Superior Court*, *supra*, 49 Cal.App.4th 1308, 1319, and other similar decisions, permit settling parties to participate at trial under certain circumstances. As we shall demonstrate, however, *Alcala* does not validate UCW's participation here.

For starters, *Alcala* cites with approval the principle noted above, that "'[A]n action not founded upon an actual controversy between the parties to it, and brought for the purpose of securing a determination of a point of law, is collusive, and will not be entertained.'" (*Id.* at p. 1318, quoting *Golden Gate Bridge Dist. v. Felt*, *supra*, 214 Cal. at p. 316.) After entering into its settlement with Collins, UCW was no longer a party

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21/(...continued)
Furthermore, Collins, which has since assigned its interest in this litigation to UCW, never put up the $600,000 at all; even if it had, the "opt-out" provisions of the settlement agreement provided for return of the money to Collins upon assignment of its rights to UCW. (See Statement of Facts, § 11.)

with active claims *against anyone*. In contrast, the settling *Alcala* defendants remained active parties to their cross-complaints for indemnity. (*Alcala v. Superior Court*, *supra*, 49 Cal.App.4th at pp. 1312, 1317.)

Additionally, *Alcala* and other decisions that have approved trial participation by settling defendants have stressed that the sliding-scale or other type settlements at issue had been tested for good faith under the procedures established by the Code of Civil Procedure and *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*, *supra*, 38 Cal.3d 488. (See, e.g., *Alcala Co. v. Superior Court*, *supra*, 49 Cal.App.4th at pp. 1313-1317; *Everman v. Superior Court* (1992) 8 Cal.App.4th 466, 470-474; cf. *City of Los Angeles v. Superior Court* (1986) 176 Cal.App.3d 856.) Here, UCW and Collins rejected the good faith settlement process, taking the position that their settlement neither addressed an action with multiple defendants nor constituted a sliding scale agreement within the meaning of Code of Civil Procedure section 877.5. (E.g., CT 1639-1640, 1677-1687, 1998-2005.) Neither *Alcala* nor the other cases cited hold or imply that continued participation by a settling defendant would pass muster without judicial scrutiny of the settlement for its good faith. Indeed, it is doubtful these courts would have endorsed such a conclusion in view of the acknowledged danger of collusion among settling parties to the nonsettling defendants' detriment (see, e.g., *Alcala Company, Inc. v. Superior Court*, *supra*, 49 Cal.App.4th at p. 1316 ["collusive nature and potential for fraud" of the sliding-scale agreement has been "well documented and recognized"]), particularly where, as here, the settling parties adamantly resisted judicial scrutiny of their agreement.

Moreover, and significantly, *Alcala* and the authorities on which it relies contemplate continued participation by a settling *defendant*. (See, e.g., *Alcala Company, Inc. v. Superior Court*, *supra*, 49 Cal.App.4th at p. 1312 ["'Mary Carter' agreements historically have been secret and have required *settling defendants* to remain in the lawsuit" (emphasis added); *id.* at p. 1317 ["Here, the *settling defendants'* interest lies in maximizing the damages recovered against themselves so that they may ultimately recover more in their own indemnity actions and the plaintiff's direct actions against the nonsettling parties" (emphasis added)]; *id.* at pp. 1318-1319 ["That settling parties are no longer involved in an actual controversy and their interests are no longer adverse, however, is not sufficient to preclude

settling defendants from participating at trial" (emphasis added)]; *Everman v. Superior Court, supra*, 8 Cal.App.4th at p. 473 ["We conclude a settlement such as the one before us that is otherwise within the good faith 'ball park' under *Tech-Bilt* is not subject to disapproval solely because it provides for continuing participation in the trial of the lawsuit *by a settling defendant*" (emphasis added)].)

None of these decisions involved or contemplated the present situation--that is, a *plaintiff* continuing to participate in a lawsuit after settling all its claims. Accordingly, cases such as *Alcala* are no authority for permitting such participation. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372 ["Obviously, cases are not authority for propositions not considered therein"]; *In re Tartar* (1959) 52 Cal.2d 250, 258 [same].)

Furthermore, *Alcala's* somewhat permissive approach to trial participation by settling defendants cannot be extended legitimately to settling plaintiffs. California law expressly requires that "'[e]very action must be prosecuted in the name of the real party in interest.'" (*County of Alameda v. State Bd. of Control* (1993) 14 Cal.App.4th 1096, 1103, quoting Code Civ. Proc., § 367.) "The real party in interest is one 'having an actual and substantial interest in the subject matter of the action and who would be benefitted or injured by the judgment in the action.'" (*County of Alameda v. State Bd. of Control, supra*, 14 Cal.App.4th at p. 1103, quoting *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 225; see, e.g., *Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605 ["A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law"].) A plaintiff like UCW that has settled its claims no longer satisfies this fundamental criterion.[22/]

For all the reasons given, plaintiff UCW's continued participation at trial after it had resolved any justiciable controversy it ever had with Collins was improper. And, as we next discuss briefly, the fact that the

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22/ Only Collins's indemnity causes of action went to judgment. Collins, not UCW, possessed "the substantive right sued on" in those causes of action; thus Collins, not UCW, possesses the "actual and substantial interest" in its subject matter and stands to "be benefitted or injured by the judgment."

settlement agreement contemplated Collins's assignment of its claim to UCW only compounded the impropriety.

D. Collins's Post-Trial Assignment To UCW Of Its Rights Against D.J. Plastering Confirms The Unity Of These Two Parties' Interests Following Settlement, And The Resultant Impropriety Of Permitting Them To Appear As Separate Parties At Trial Against D.J. Plastering.

On July 10, 1998, this court entered an order formally substituting UCW in place of Collins as the respondent in this appeal. The court did so based on the trial court's order permitting such substitution; that order, in turn, was founded on an assignment agreement entered between Collins and UCW. (See Statement of Facts, § 11.) The assignment between Collins and UCW confirms what D.J. Plastering urged at trial--that these parties' interests were actually aligned all along.

Collins and UCW entered the assignment agreement in furtherance of their existing settlement, for undisclosed "valuable consideration." (ACT 3889-3890 [Assignment Agreement, pp. 1, ¶ A; 2, ¶ B(2)].) Pursuant to the agreement, UCW has taken over Collins's interests in the judgment, this appeal and any retrial, and Collins has agreed to cooperate fully with UCW in prosecution of the assigned rights. (ACT 3891 [Agreement, p. 3, ¶ 3(D)].)

D.J. Plastering has long argued there was a collusive unity of interests between these two parties. (E.g., RT 83-90, 104-105; CT 1459-1488, 1934-1949.) The assignment agreement simply confirms it. UCW had no justiciable claims to litigate at trial; the real point of its participation at trial was to pump up the dollar value of Collins's indemnity claim. (See, e.g., RT 114-115 [trial court expresses concern that UCW and Collins may have deliberately structured the settlement "just to keep the plaintiffs in"].)

At the September 1996 argument of the pretrial motions that structured how this case would be tried, D.J. Plastering vigorously protested that UCW's active participation was a sham in light of the settlement--that the $600,000 contingency payment was a straw man that UCW and Collins had set up in order to buy UCW a seat at the trial. (RT

92-96, 227-230; see Statement of Facts, § 5.) The trial court recognized but dismissed the collusive possibilities and let UCW remain an active party on the strength of the $600,000 and related settlement terms. (RT 107-108, 114-115.) Two years down the road, Collins simply "opts out"--without ever paying the $600,000. (CT 2016-2017, 2020 [agreement terms].) Had the assignment been accomplished without the convenient time delay (that is, in 1996, before trial, rather than 1998, during this appeal), there is no question that UCW and Collins would have had to share a single chair at trial, rather than being permitted to double-team against D.J. Plastering. (See, e.g., *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986, 997 ["When profit is involved, the ingenuity of man spawns limitless varieties of unfairness"].)

Collins/UCW undoubtedly will continue to argue against collusion and unity of interest. Of course, what matters on appeal is error and prejudice. The fact is, even absent actual collusion, the settlement resolved UCW's claims and rendered them a moot, nonjusticiable sham (or, to use the trial judge's word, a "scam"; see RT 107). Accordingly, as discussed, the trial court erred in allowing UCW to appear as plaintiff at trial. Further, as we next address, the error was palpably prejudicial.

E. UCW's Illegitimate Participation At Trial Prejudiced D.J. Plastering And Mandates Reversal Of The Judgment.

The indemnity claim was a dispute between Collins and D.J. Plastering alone. That undeniable fact got lost in a trial structured as a three-way debate among Collins, D.J. Plastering *and UCW* over the cost of the stucco repair. Collins argued $1.97 million for repair (RT 2237, 2331) and $163,800 for relocation (RT 2334); D.J. Plastering argued $200,000 for repair and that relocation was altogether unnecessary (RT 3548-3555). Yet the jury returned a verdict of $3,021,000 for repair and $332,310 for relocation. (CT 3106.)

These inflated figures stem directly from UCW's participation. UCW argued vigorously throughout much of the trial that a $5.79 million complete stucco replacement was imperative (e.g., RT 1340, 1530, 1601-1602, 1607, 1721), retreating at the 11th hour to the comparative bargain

figure of $3.97 million (RT 3727-3729, 3843); it pegged the cost of relocation, which it joined with Collins in deeming necessary, at around $583,000 (RT 1722). Had the jury heard only the actual disputants' evidence, it could not have returned a verdict in excess of Collins's much lower figures. Thus, UCW's participation prejudiced D.J. Plastering to the tune of at least $1.2 million.

Furthermore, anyone with a rudimentary familiarity with jury trials must understand that the damage quite likely runs deeper. The jury didn't make a black-and-white choice among the three competing cost theories; instead, as juries commonly do, it settled on figures somewhere in the middle. (See, e.g., RT 98 [remarks of Collins's counsel, citing this principle].) Had it done the same thing after a trial properly limited to Collins's and D.J. Plastering's evidence, the verdict on repair cost very well may not have exceeded six figures.

Moreover, the prejudice transcends mere arithmetic. UCW's inappropriate participation tainted the trial process to D.J. Plastering's detriment. "It is well settled that a fair trial in a fair tribunal is a basic requirement of due process." (*Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109, 113; see, e.g., *Galvan v. Press* (1954) 347 U.S. 522, 530 [98 L.Ed. 911, 74 S.Ct. 737, 742] ["fair play . . . is the essence of due process"].) UCW's presence could only have given the jury the impression the homeowners wouldn't be compensated, but for a verdict in favor of UCW against D.J. Plastering. Moreover, D.J. Plastering was subjected to an unfair, crippling dual attack by Collins and UCW throughout the trial. The illusory dispute between UCW and Collins illegitimately upped the ante in the indemnity claims and served no purpose for UCW but the illegitimate one of enhancing its return in the settlement's sharing agreement, the outcome of which was supposed to hinge on the outcome of the dispute between Collins and D.J. Plastering. (See, e.g., *Albrecht v. Broughton* (1970) 6 Cal.App.3d 173, 178 ["neither side is entitled to litigate a nonexistent issue for no purpose other than to alter the decisional context in his favor"].)

D.J. Plastering was entitled to a fair trial of the issues raised by Collins's indemnity claims. Because of UCW's illegitimate participation, it didn't get one. Accordingly, the judgment must be reversed.

IV.

THE JUDGMENT MUST BE REVERSED BECAUSE COLLINS AND THE OTHER DEVELOPER ENTITIES FAILED TO INTRODUCE EVIDENCE SUPPORTING EACH ONE'S ENTITLEMENT TO INDEMNITY.

The judgment against D.J. Plastering was won not only by Collins Development Company, but also by the other "developer entities"--John Bogaert, Boriver, Boriver Corp. and San Diego Boriver Associates. (E.g., CT 1323, 3201, 3519; see RT 728.) However, each of the developer entities failed to introduce evidence establishing how much he or it was entitled to recover in indemnity from D.J. Plastering; indeed, the entities other than Collins failed completely even to establish their role in the construction of the Project. Accordingly, the judgment must be reversed for failure of proof.

Each of the developer entities, individually, was a cross-complainant in the indemnity cross-action against D.J. Plastering. (See, e.g., CT 47-64 [original cross-complaint].) Therefore, to be entitled to judgment, each of them had to prove up an indemnity cause of action against D.J. Plastering. (E.g., *Roddenberry v. Roddenberry*, *supra*, 44 Cal.App.4th at p. 654 ["Whatever plaintiff is obligated to plead, plaintiff is obligated to prove"]; 1 Witkin, Cal. Evidence, *supra*, Burden of Proof and Presumptions, at § 131, p. 116 [basic rule is that a party must prove what the party must plead]; Evid. Code, § 500 [a party has the burden of proving all facts essential to the relief sought].)

The jury instructions acknowledged this. (See CT 3197-3206.) However, as D.J. Plastering pointed out in the new trial proceedings (CT 3751-3753), Collins and the remaining developer entities failed to differentiate among themselves at trial, with the result that none of the entities proved its indemnity case.

John Bogaert, Boriver, Boriver Corp. and San Diego Boriver Associates--the developer entities other than Collins--simply put on no

individual proof at all.[23/] That in itself compels reversal of the judgment with directions. (See Section I(F), *supra*.) Moreover, none of the cross-complainants introduced evidence to establish how much it contributed to the $4,079,500 that Collins paid UCW in settlement, let alone how much of the amounts (if any) they paid was allocable to stucco repair.

Each developer entity's indemnity rights was capped by the amount that entity paid in settlement. (E.g., *Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th at pp. 648 ["Developers' cross-complaint is limited to the amount it has paid in settlement to Association"], 651 ["At the trial of Developers' indemnity action against Gouvis the burden of proof will be upon Developers to prove the amount that has been paid by virtue of injury caused by Gouvis's fault"].) Thus, for example, if Collins paid the entire amount and the remaining entities contributed nothing, then none of those entities incurred loss or damage for D.J. Plastering to indemnify, and none belonged at trial. (E.g., *Maryland Casualty Co v. Bailey & Sons, Inc.*, *supra*, 35 Cal.App.4th at p. 864, quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, *supra*, 13 Cal.3d 622, 628 ["Indemnity means 'the obligation resting on one party to make good a loss or damage another party has incurred'"].) The failure to introduce evidence establishing this core element of each developer entity's indemnity claim completely undermines the judgment. Accordingly, the judgment should be reversed. The trial court should directed to enter judgment instead for D.J. Plastering; at the least, D.J. Plastering is entitled to a new trial.

23/ The jury noticed the absence of proof on behalf of the developer entities other than Collins. During deliberations, it sent the court a request for clarification of the special verdict form as it related to the developer entities. (CT 3108.) The court responded by directing the jury to consider Collins the general contractor and to lump the others together as developers. (RT 4300-4301.) The resulting verdict is opaque regarding the jury's conclusions concerning the developer entities on the cross-complaint (see CT 3104-3105) and was not clarified by the court's examination of the jury on the point during the jury poll (RT 4316-4318).

V.

COLLINS'S FAILURE TO ALLEGE AND PROVE IT HAD A VALID CONTRACTOR'S LICENSE DURING ITS PERFORMANCE OF THE CONTRACTS UNDERLYING THIS LITIGATION PRECLUDES IT FROM PURSUING CONTRACT CLAIMS AND REQUIRES REVERSAL OF THE JUDGMENT.

During the period relevant to this lawsuit, Business and Professions Code section 7031 stated "that one may not sue in a California court to recover 'compensation' for 'any act or contract' that requires a California contractor's license, unless one 'alleges and proves' he was duly licensed at all times during the performance." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 991-992; see *Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.* (1996) 49 Cal.App.4th 1397.)[24/]

Although Collins's cross-complaints incorporated subcontracts which declared that Collins possessed a valid contractor's license (see CT 50, 70, 1144-1145; RT 5256), Collins failed to prove its status, and D.J. Plastering discovered shortly after trial that Collins's contractor's license actually had expired on March 31, 1986. Collins therefore was an unlicensed contractor while performing at least some of its work on the Project, including at the point when it entered into some of the subcontracts on which its indemnity claim against D.J. Plastering was founded. Based on this discovery, D.J. Plastering moved for new trial on the ground of newly-discovered evidence, pointing out that the subcontracts dating from the expiration period were invalid and that Collins therefore was foreclosed from pursuing its contractual remedies. (See CT 3620-3622 [new trial motion], 3748-3751 [reply papers].)

24/ The statute has been amended several times since the Project was completed. In general, the amendments limit the ability of an unlicensed contractor to save a lawsuit based on the argument that Collins made here, namely, substantial compliance with the licensing laws. (See generally *Construction Financial v. Perlite Plastering Co.* (1997) 53 Cal.App.4th 170 [reviewing statutory history].) Decisions construing the statute have held that the version operative at the time of contract performance is controlling. (*Id.* at p. 178, fn. 3.)

Collins protested that D.J. Plastering should have discovered this evidence sooner. On the merits, it blamed its delinquency on a "routing error" by the licensing agency, and claimed it substantially complied with the law by allegedly attempting correct the problem when notified of the lapse. (CT 3692-3695 [opposition], 3704-3705 [supporting declaration].) However, as D.J. Plastering pointed out in its reply (CT 3748-3751), its communications with the licensing board had elicited that Collins actually did not rectify the suspension before the Project was completed, nor for years thereafter.

The trial court agreed with D.J. Plastering that Collins appeared to be unlicensed for at least some of the relevant period. (RT 5255.) Collins's own remarks at the new trial hearing confirm a longstanding problem that Collins was only then taking steps to correct. (See RT 5262-6263.) The trial court remarked that the deficiency was significant: "It also would appear to me that yes, it could have been material from the standpoint of the breach of contract issues or breach of express indemnity issues." (RT 5255.) Nevertheless, the trial court denied the new trial motion, concluding that D.J. Plastering could have found the information sooner and therefore did not merit relief on the "newly-discovered evidence" ground. (RT 5255-5256, 5264-6265.)

This ruling was error for several reasons:

- As D.J. Plastering pointed out (RT 5256-5258; CT 3621-3622, 3750), Collins had represented in its contracts and its cross-complaints (into which the contracts were incorporated by reference) that it was licensed, and D.J. Plastering acted reasonably in relying on Collins's representations. The trial court abused its discretion by denying D.J. Plastering a new trial and thereby effectively rewarding Collins for its misrepresentations that it had a contractor's license.

- Even if the trial court was within its discretion in denying D.J. Plastering relief on the ground of newly-discovered evidence, the motion could and should have been granted on a different ground. D.J. Plastering moved for new trial on all the statutory grounds, including insufficiency of the evidence and verdict against the law. (CT 3558-3559.) Either of these amply supported a grant of new trial, because Business and Professions Code section 7031 required Collins to plead and prove its licensure status, and it failed to do so. (E.g., *Jones v. City of Los Angeles* (1951) 104

Cal.App.2d 212 [trial judge should grand new trial on ground of insufficient evidence if he conscientiously believes verdict is against the truth of the case of the weight of the evidence]; 8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in the Trial Court, § 39, pp. 544-546 [describing court's *duty* to grant new trial where evidence doesn't support verdict].)

- Finally, the public policies underlying Business and Professions Code section 7031 should have led the trial court to resolve any doubt about Collins's license status in favor of a new trial. As the Supreme Court has noted, "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services." (*Hydrotech Systems, Ltd. v. Oasis Waterpark, supra*, 52 Cal.3d at p. 995.) "Section 7031 advances this purpose by withholding judicial aid from those who seek compensation for unlicensed contract work." (*Ibid.*) Accordingly, "[b]ecause of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor." (*Ibid.*; see, e.g., *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 151 ["Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state"].)

Collins failed to carry its burden under Business and Professions Code section 7031 of pleading and proving it was a licensed contractor. D.J. Plastering brought the deficiency to the trial court's attention in a timely new trial motion. That motion should have been granted; the judgment should therefore be reversed.

CONCLUSION

The deeply and prejudicially flawed trial in this case was very much the trial that Collins and UCW jointly demanded and fashioned. For all the reasons stated, the judgment against D.J. Plastering should be reversed and the trial court directed to enter judgment for D.J. Plastering. At the least, the judgment should be reversed and the case remanded for a new trial.

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