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 REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Perhaps the most striking feature of the Respondent's Brief is its herculean determination to distract attention from the real issues in this appeal. Those issues address: (1) Collins's failure to prove its contractual indemnity cause of action against D.J. Plastering; (2) the complete absence of any damages encompassed in Collins's settlement with UCW that Collins could legally recoup from D.J. Plastering, as evidenced by the jury's critical findings that while Collins was strictly liable to UCW, the latter's only stucco damages consisted of economic loss, which isn't legally recoverable in strict liability; (3) the trial court's devastating misstep in permitting UCW to appear at trial as an apparent plaintiff after it had settled every justiciable controversy that had ever existed between it and Collins;

(4) the various developer entities' failure to introduce evidence supporting each one's entitlement to indemnity from D.J. Plastering; and (5) Collins's failure to allege and prove it had a valid contractor's license during times relevant to this lawsuit, precluding it from pursuing any contract-based claims against D.J. Plastering.

The opening brief provided a detailed exposition of the reasons why each of these issues mandates reversal of the judgment, and why several of them call for reversal with directions to enter a new judgment in D.J. Plastering's favor. The Respondent's Brief, by contrast, emphasizes everything else under the sun. For example, it:

- Labors to defend the trial court's determination that the indemnity agreements in the stucco subcontracts were Type I (as opposed to some other type), when categorization of the indemnity agreements is irrelevant to any issue raised on appeal.
- Serves up passionate endorsements of the trial court's decisions not to make a good faith settlement determination or a pretrial apportionment of the settlement proceeds as between stucco damages and other damages, when these too aren't issues on appeal.
- Wastes entire pages distinguishing case authorities and arguments that D.J. Plastering may have used in the trial court, but on which, again, it places no reliance in this Court.

Moreover, to the extent Collins[1/] does bother to address the controlling legal issues actually raised on appeal, it is utterly obfuscatory. For example, it:

- Touts the substantiality of evidence that D.J. Plastering was negligent, and of the parties' competing assessments of the cost of stucco repair, as if these sufficed in themselves to entitle Collins to indemnity for the full amount of its settlement payment to UCW, a settlement that encompassed, to use Collins's own characterization, a "multitude" of non-stucco defect claims.
- Stresses the reasonableness of its settlement with UCW, as if that factor alone was determinative of how much of the settlement was allocable to stucco repair.
- Identifies supposed evidence of compensable property damage (i.e., lath and paper damage) caused by the stucco defects, but completely glosses over not only the fact that such evidence consists chiefly of testimony presented by UCW *before* it radically downsized its views concerning the scope of necessary stucco repairs and the fact that UCW's scaled-back theory (endorsing repair by application of a stucco hardener) signaled a complete retreat from such testimony, but also the fact that, whatever the *evidence*, the *verdict* is expressly limited to pure economic damages.

[1/] As the Court knows, UCW (not Collins) actually prepared and filed the Respondent's Brief. However, because it did so as Collins's assignee, and because UCW and Collins ostensibly were separate parties throughout the trial, for clarity's sake we treat the Respondent's Brief's arguments as having been made by Collins.

- Insists the trial court properly elected to go forward with the trial of UCW's complaint based on "real" ongoing disagreement between Collins and UCW concerning stucco repair cost, overlooking the crucial detail that, whatever their remaining *factual* differences, their settlement had resolved every *legal* dispute between them, leaving no justiciable controversy to litigate.
- Avoids the reality engineered by Collins's cozy settlement with UCW, whereby UCW not only used Collins's illusory guarantee of a post-trial $600,000 contingency payment as a ticket to full participation at trial, but also, having already received $5 million (including $4.079 million from Collins) in settlement of *all* its claims—including stucco claims—arising out of the Project, now stands to gain roughly an additional $3.4 million (i.e., the amount of the judgment against D.J. Plastering) for a repair job whose cost it concedes didn't exceed $3.97 million.

Furthermore, the Respondent's Brief is as revealing for what it does *not* say as for what it does. Specifically, for example, Collins does not contest that the trial was narrowly limited to the parties' competing theories of stucco repair cost and that evidence of all the non-stucco defect claims resolved by the settlement (again, characterized by Collins as a "multitude") was strictly excluded. Without saying so in so many words, Collins has tacitly admitted it failed to litigate the key element of its indemnity cause of action—namely, the extent to which the millions it paid UCW in settlement of this wide-ranging construction defect litigation were based on and allocable to D.J. Plastering's negligent work.

The weakness of Collins's position is evident in its chosen briefing strategy of misdirection from, and distortion and avoidance of, the real

issues. The principal objectives of this reply, therefore, will be to refocus the appeal on the controlling substantive legal questions governing each issue raised on appeal, to explode the many myths expounded in the Respondent's Brief, and to further expose how Collins's and UCW's joint manipulation of the trial resulted in this litigation fiasco. In so doing, we shall demonstrate further that 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.

LEGAL DISCUSSION

I.

COLLINS HAS NOT COME CLOSE TO REFUTING THE OPENING BRIEF'S DEMONSTRATION THAT IT FAILED TO PROVE ITS INDEMNITY CASE. SINCE IT NEVER INTRODUCED EVIDENCE FROM WHICH ANYONE COULD DETERMINE HOW MUCH OF THE PRETRIAL SETTLEMENT WAS ALLOCABLE TO STUCCO DAMAGES AND HOW MUCH TO OTHER CONSTRUCTION DEFECTS, AND FAILED TO OBTAIN A VERDICT ON ALLOCATION, THE JUDGMENT MUST BE REVERSED WITH DIRECTIONS.

Of the various errors undermining the indemnity judgment in this case, one stands out as shockingly fundamental: Collins's utter failure to prove up an indemnity cause of action against D.J. Plastering. Such proof would have entailed establishing the existence of Collins's own liability to UCW and the extent to which the $4.079 million it paid UCW in settlement of this wide-ranging construction defect litigation was based on and allocable to D.J. Plastering's negligent conduct. Collins did not even attempt such proof at trial.

Instead, at Collins's and UCW's insistence, the trial focused narrowly on 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.

As the opening brief demonstrates in careful detail (AOB 15-27), this was clear prejudicial error. In fact, absent evidence of what fraction stucco damage constituted of the whole construction defect claim, Collins's showing at trial amounted to a complete failure of proof, entitling D.J. Plastering to reversal of the judgment with directions.

Collins has strikingly little to say in response. The Respondent's Brief essentially avoids the issue and instead devotes its attention to irrelevant tangents.[2/] As we shall demonstrate, nothing in its various scattered points salvages the judgment in the wake of the opening brief's demonstration that Collins resoundingly failed to prove its indemnity case against D.J. Plastering.

A. Whether The Indemnity Agreements Were Type I Or Some Other Type Is Irrelevant To The Issues On Appeal.

Collins contends the trial court was correct in determining that the indemnity provisions of the subcontracts between itself and D.J. Plastering provided for Type I indemnity, as opposed to Type II or Type III. (RB 21-22.) Assuming that's true, so what? The distinctions among the various types are irrelevant to the issues raised in this appeal.

[2/] This tactic is the Respondent's Brief's leitmotif. Since Collins, almost without exception, avoids confronting the appellate issues head-on, it becomes tempting simply to repeat the opening brief's discussions. We shall resist to the extent possible, and instead simply try to summarize points previously briefed, citing the germane pages in the opening brief.

Here's why: As pointed out in the opening brief (AOB 17, fn. 12), *no matter which type they were*, the subcontracts' indemnity agreements obliged D.J. Plastering to indemnify Collins *only* for Collins's liability *arising out of D.J. Plastering's work.* (See RB 22 [conceding this point].) The pretrial settlement between Collins and UCW, however, covered much wider ground than that. (See RB 25 [conceding this point, too].) It embraced the entire panoply of construction defects originally at issue in the litigation. (See, e.g., AOB 23-24.) Collins failed to prove an entitlement to indemnity because it failed to introduce any evidence—let alone preponderant evidence—establishing how much of the millions it paid in settlement were earmarked for resolving stucco damage claims, and how much went to resolve the myriad other claims originally at issue in the case. (See AOB 15-18, 21-24; RB 25 [referring to "the multitude of non-stucco defect claims which had been settled by the parties"].)

B. Mere Proof That D.J. Plastering Was Negligent Doesn't Establish Collins's Entitlement To Indemnity.

The Respondent's Brief makes much of the trial court's ruling that indemnity issues didn't come into play until Collins had introduced substantial evidence that D.J. Plastering was negligent in performing its stucco work. (RB 22, quoting RT 172.) The brief then declares that as a result of this ruling, "COLLINS was held to a strict burden of proof, a burden which it met at trial." (RB 22.) Again, so what? There are *two* elements to an indemnity cause of action, and proof that D.J. Plastering was negligent at most satisfies only one of them.

As discussed in the opening brief (AOB 15-16), 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; see *Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484, 1498 ["in a contractual indemnity action, the indemnitee must prove that liability is covered by the contract, that liability existed, and the extent thereof"].) Assuming for the sake of discussion that Collins *did* prove D.J. Plastering was negligent, that satisfies, at most, only the first element of the indemnity cause of action—fault on the part of the indemnitor (here, D.J. Plastering). It doesn't begin to address the *second* element—resulting damage to the indemnitee (here, Collins) for which the indemnitor contractually should be responsible.

Irrespective of whether Collins proved by preponderant evidence that D.J. Plastering was negligent in performing its stucco work, it failed to prove its entitlement to indemnity, because, again, it failed to introduce any evidence establishing how much of its settlement payment was allocable to stucco damages, and how much went to resolve the myriad other claims originally at issue in the case. (See, e.g., *Gouvis Engineering v. Superior Court*, *supra*, 37 Cal.App.4th 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"].)

C. Whether The Trial Court Was Right Or Wrong In Rejecting Pretrial Allocation Of The Settlement Proceeds Is Irrelevant To This Appeal.

Collins vigorously defends the trial court's decision to refrain from making a pretrial apportionment of the settlement proceeds as between stucco damages and other damages. (RB 22-24.) However, as Collins actually recognizes (see RB 23), D.J. Plastering doesn't challenge this ruling on appeal. (See AOB 19-23 [explaining that *with or without a pretrial allocation*, Collins bore the burden of proving at trial each and every element of its indemnity claim—including the allocation necessary to establish the extent of its damages resulting from D.J. Plastering's conduct].) Thus, once again, Collins wastes its time on a non-issue.

D. That The Settlement May Have Been Reasonable Doesn't Establish How Much Of It Was Allocable To Stucco Repair.

Collins emphasizes that "in '*an indemnity action, the critical issue is not good faith, but reasonableness.*'" (RB 24, quoting *Peter Culley & Associates v. Superior Court*, *supra*, 10 Cal.App.4th at p. 1498 [emphasis supplied in RB].) But what is Collins getting at? Its point is far from clear. Yes, the reasonableness of the settlement for which the indemnitee seeks indemnity is relevant in an indemnity action, but it isn't the action's alpha and omega. As discussed, the *elements* of the indemnity cause of action must be proved.

Thus, there must be evidence establishing how much of the settlement for which indemnity is sought is attributable to claims for which

the indemnitor is responsible. Indeed, it is difficult to see how the reasonableness of the overall settlement could ever be determined absent such evidence. (E.g., *Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc.* (1998) 64 Cal.App.4th 264, 276 ["(T)he 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 first had to decide what had been paid by those parties toward that claim"].)[3/]

No matter how lavishly the trial court indulged the parties in permitting them to introduce evidence of their competing theories of stucco repair methods and costs, such evidence, standing alone, was just one piece of the construction defect puzzle. By Collins's own admission, the settlement with UCW encompassed a "multitude of non-stucco defect claims." (RB 25.) Without evidence of the nature of those other claims and the damages associated with them, there was no basis in the trial record on which to determine whether the settlement was reasonable or how much of it was fairly attributable to the stucco claim against D.J. Plastering. (See AOB 20-24.) Thus, Collins failed to prove its right to any indemnity from D.J. Plastering.

[3/] Collins essentially admits that the trial court overruled D.J. Plastering's objections to the manner in which it and UCW insisted the case was to be (and ultimately was) tried. (E.g., RB 17, 9, 5.) As discussed in the opening brief (AOB 23-24), D.J. Plastering repeatedly tried to bring out proof of what Collins now describes as the "multitude of non-stucco defect claims" (RB 25) encompassed in the Project, but was precluded from doing so by the trial court's rulings in favor of the structure that Collins and UCW had engineered. Collins/UCW now must live with the record it/they created.

E. That It Would Have Prolonged The Trial To Establish The Full Scope Of The Settlement Absolutely Does Not Excuse The Trial Court's Failure To Require Collins To Prove Every Element Of Its Indemnity Claim.

Collins argues it would have taken too long to establish how stucco damages fit into the whole settlement picture, and defends on that ground the trial court's limitation of proof to the parties' competing theories of stucco repair:

> "The judge declined to turn a trial of several weeks into a six-month marathon, which would have happened if he had permitted the introduction of evidence on the multitude of non-stucco defect claims which had been settled by the parties. (Record citations.) One purpose of settlement, after all, was to preclude the necessity for a trial of the settled issues. To open up the trial to hear matters already settled would have constituted a serious misuse of limited judicial resources." (RB 25, citing RT 253, 262, 1350, 3402-3403.)

Is this ignorance or arrogance? A settlement may indeed obviate the need to try the settled issues, but Collins seems to overlook that *D.J. Plastering wasn't a party to the settlement!* Accordingly, the settlement did not resolve *any* issues encompassed in Collins's indemnity cause of action against D.J. Plastering.[4/] On the contrary, it remained Collins's burden to

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[4/] Of course, Collins is correct in asserting that the settlement *did* obviate the necessity of holding a trial of the settled issues. That is precisely one of the reasons why, as we discuss in Section III, *infra*, UCW (continued...)

introduce evidence at trial sufficient to prove each and every element of its indemnity claim. (E.g., *Peter Culley & Associates v. Superior Court, supra*, 10 Cal.App.4th at p. 1498; *Mullin Lumber Co. v. Chandler* (1986) 185 Cal.App.3d 1127, 1134-1135 ["party seeking indemnity must prove payment of the settlement amount (citation) and that the settlement amount was reasonable"]; *Gouvis Engineering v. Superior Court, supra*, 37 Cal.App.4th at p. 651 [confirming that the burden of proof is on the indemnitee]; *Hartford Accident & Indemnity Co. v. Superior Court* (1995) 37 Cal.App.4th 1174, 1182 [same].) That is precisely what Collins admits it did not do.

The key issue in Collins's indemnity case against D.J. Plastering—an issue it was squarely Collins's burden to prove—was how much of the $4.079 million Collins paid in settlement was attributable to stucco defects for which D.J. Plastering was rightly contractually responsible. By Collins's own admission, the settlement also resolved a "multitude of non-stucco defect claims." (RB 25.) Collins could not prove its case without establishing what percentage of its payment resolved stucco issues and what percentage resolved that non-stucco "multitude." It cannot be excused from shouldering and satisfying that burden simply because to do so would have increased its and the trial court's workload.[5/]

[4/](...continued)
had no business appearing at trial to litigate illusory disputes between itself and Collins. (See also AOB 36-44.)

[5/] The trial court's refusal to permit introduction of evidence germane to the issue of how much of the settlement was really allocable to stucco defects can also be viewed as denying D.J. Plastering due process. (E.g., *Nissan Motor Corp. v. New Motor Vehicle Bd.* (1984) 153 Cal.App.3d 109, 113 ["It is well settled that a fair trial in a fair tribunal is a basic requirement of due process"]; *Bank of America v. City of Long Beach* (1975) 50 Cal.App.3d 882, 886 ["A full opportunity to present a defense is (continued...)

As Division Three of this Court recently explained in rejecting an analogous argument in the context of a notorious child custody dispute:

> "[T]he trial court . . . gave the undue consumption of time as a reason to avoid considering the murder of the mother. Given the overwhelming relevance of the issue, it is impossible to avoid the conclusion that the consumption of *time* as a reason to avoid it is simply untenable. A trial judge's discretionary authority in the management of evidence does *not* extend to arbitrarily refusing to consider the most salient issue in the case."

(*Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 936 (original emphasis); see, e.g., *O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 575-576 [abuse of discretion to exclude as more prejudicial than probative evidence which "is the very core of the case"].)

F. The Jury Should Have Made The Allocation Because The Jury—Not The Trial Judge—Was The Factfinder In This Case.

Turning from evidence to procedure, Collins asserts it was perfectly acceptable for the judge rather than the jury to make the allocation of the settlement proceeds as between stucco damages and other damages. (RB 26-27.) Indeed, it takes D.J. Plastering to task for arguing to the contrary, declaring: "DJP cites no apposite authority for its contention that the jury,

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[5/](...continued)
an essential ingredient of due process"]; 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 503, p. 695 [the right to a hearing includes the rights to produce evidence and to cross-examine adverse witnesses].)

rather than the judge, should have made the allocation, an argument which is particularly specious in light of the fact that the judge made his allocation in accord with the jury verdict as to the stucco damages, and the liability of the respective parties for those damages." (RB 26.) This angry argument makes no sense.

For one thing, the Respondent's Brief itself acknowledges, perhaps inadvertently, that allocation is to be made by *the trier of fact*. (E.g., RB 24 ["A pre-trial settlement, even if an allocation is made, is not binding *on the trier of fact*" (emphasis added)].) The trier of fact in this case was *the jury*. Not the trial judge. Thus, it was for the jury—not the trial judge—to perform the allocation of settlement proceeds. (See, e.g., *Dillingham Construction, N.A., Inc. v. Nadel Partnership, Inc., supra,* 64 Cal.App.4th at p. 276 [because the settlement was an unallocated lump sum, "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" (emphasis added)].)

For another thing, it's simply false to say that D.J. Plastering fails to support this proposition—that allocation was an exercise for the trier of fact—with any apposite authority. The opening brief devotes several pages to exploring the many authorities supporting D.J. Plastering's position. (See AOB 19-23, 24-26.)

Furthermore, that the trial judge may have made the allocation based on the jury's determination of stucco repair damages and the various parties' liability for those damages doesn't excuse the usurpation of the jury's role. (E.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 766 ["The trial court may not . . . usurp the jury's ultimate factfinding power"]; *People v. Hawkins* (1995) 10 Cal.4th 920, 948 [same]; *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 59 [neither trial court nor appellate court can invade province of the jury]; cf. *Summers v. A.L. Gilbert Co.* (1999) 69

Cal.App.4th 1155, 1182, 1185 [expert's testimony is inadmissible if it "invades the province of the jury to decide a case"].)

Moreover, to reiterate a key point, it is nonsense to defend the allocation as being based on the stucco repair verdict. Collins wasn't entitled to recoup the full cost of repair, but rather, only whatever fraction of its settlement payment was allocable to such repair. That issue, of course, was never tried.

G. If The Jury's Findings And The Trial Court's Allocation Were Fully Supported By The Evidence, Why Doesn't The Respondent's Brief Cite The Evidence?

Collins rounds out its discussion with a series of proclamations, namely, that the jury's findings were fully supported by the evidence, that the court's allocation was consistent with those findings and was "totally reasonable, as supported by the evidence." (RB 27.) The supposed evidence, however, goes unidentified. There are no record citations whatsoever in this passage. Indeed, of the precious few record citations appearing throughout Collins's entire argument, virtually all refer to statements made by the trial judge or various counsel—not to any evidence.

That, no doubt, is because evidence supporting the court's allocation does not exist in the record.[6/] Indeed, Collins essentially admits as much, earlier in its discussion, when it defends the trial court's refusal to "permit[]

[6/] The absence of evidence supporting Collins's positions perhaps also helps explain why the Respondent's Brief contains no Statement of Facts.

the introduction of evidence on the multitude of non-stucco defect claims which had been settled by the parties." (RB 25.)

Collins tacitly made the same admission at trial's end: When it moved for court allocation of damages, 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 AOB 24-26.) It simply couldn't have established a proper basis for allocation based on the evidence at trial: No such evidence was introduced.[7/]

In sum, the judgment is insupportable. Collins failed to prove its case at trial. There was no evidence of allocability. Collins failed to obtain a determination from the trier of fact—the jury—on the allocation issue. The trial court's post-trial allocation was against the law. For all the reasons addressed above and in the opening brief, the judgment must be reversed. Moreover, because Collins has had its full and fair opportunity to prove its case (see AOB 26-27),[8/] the reversal should be with directions to enter judgment for D.J. Plastering.

[7/] By the same token, the fact finder itself (i.e., the jury) could not have returned a competent allocation verdict on this record, had it been asked to do so. There being no evidence, *any* finding on allocability would be insupportable.

[8/] See, 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. 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 . . .").

II.

THE JUDGMENT LACKS LEGAL FOUNDATION: THE ECONOMIC LOSS FOR WHICH THE JURY FOUND COLLINS STRICTLY LIABLE TO UCW ISN'T RECOVERABLE 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 opening brief also detailed a second basis on which the judgment irretrievably crumbles. To recap, Collins's liability to UCW, according to the verdict, is founded exclusively on strict liability, and consists solely of stucco repair and associated relocation costs. (AOB 27-29.) California law makes clear that purely economic damages are not recoverable in a strict liability cause of action. (AOB 29-30; see also *Casey v. Overhead Door Corp.* (Aug. 12, 1999) 99 Daily Journal D.A.R. 8315, 8318 ["A consumer may not recover economic loss damages against the manufacturer of a defective product in a cause of action for strict liability or negligence"].) The stucco repair and relocation costs assessed by the jury constitute purely economic damages, and therefore are not recoverable by UCW. (AOB 31-32.) 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. (AOB 32-34.) Accordingly, the indemnity judgment must be reversed with directions to enter judgment for D.J. Plastering. (AOB 34-36.)

The Respondent's Brief tries but fails to refute the opening brief's analysis. Here is a summary of its response: Collins apparently concedes economic loss is not recoverable in a strict liability action. (RB 28-30, discussing *Sacramento Regional Transit Dist. v. Grumman Flxible* (1984) 158 Cal.App.3d 289, 293 and *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227-228.) It further seems to concede that the cost of repairing a defective product generally constitutes unrecoverable economic loss[9/] and that liability is available only where the defective product causes physical damage to other property. (RB 28-32.) Collins contends, however, that certain testimony "makes it abundantly clear that there was evidence of physical damage to the property beyond the economic damage to the stucco itself." (RB 32.) It also attempts to liken this case to a couple of readily distinguishable toxic contamination cases, *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318 (concerning asbestos) and *Transwestern Pipeline Co. v. Monsanto Co.* (1996) 46 Cal.App.4th 502. (See RB 32-34.)

Collins is grasping at straws. In the end, the lengths to which the Respondent's Brief must stretch the facts and law in order even to attempt to mount a rebuttal only confirm that the judgment is irremediably flawed.

[9/] The Respondent's Brief is silent on the matter of relocation costs. As established in the opening brief, and recently confirmed by the Supreme Court, such costs constitute pure economic damage; accordingly, they are unrecoverable in strict liability. (See AOB 32; *Erlich v. Menezes* (Aug. 23, 1999) __ Cal.4th __, 99 Daily Journal D.A.R. 8687, 8689 ["(T)he Erlichs could have . . . mov(ed) out of the house until necessary repairs had been completed. If they had, relocation expenses would have been part of their damages. In any event, the general measure of damages where injury to property is capable of being repaired is the reasonable cost of repair together with the value of lost use during the period of injury"]; *Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 857.)

A. The Snippets Collins Quotes From The Record Don't Come Close To Establishing That The Jury Awarded Damages For Anything Other Than The Unrecoverable Economic Costs Of Stucco Repair.

Collins asserts that D.J. Plastering is "very much in error" in claiming the jury awarded only economic damages, because "(t)he record is replete with evidence of the impact of the stucco defects on other parts of the dwellings." (RB 30.) It then offers sound bites from testimony of UCW's architectural expert, David Kuivanen, and Collins's stucco expert, Bruce Greene, to the effect that there were some places in the Project where stucco damage resulted in damage to the underlying lath and building paper. (RB 30-32, citing RT 1287, 1291, 1313, 1337, 1343-1344, 2111, 2118, 2120, 2191.) There are several reasons why this evidence, given all the weight to which it is entitled, doesn't undermine D.J. Plastering's demonstration that the jury awarded only unrecoverable economic loss.

1. Whatever else the *evidence* may have encompassed, the *verdict* was expressly limited to economic damages. (CT 3099.) Indeed, the verdict form included no other category of potential recovery. It expressly directed the jury to determine only "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.) Thus, necessarily, the only damages the jury awarded were for purely economic loss.

2. The limitations in the verdict form were completely consistent with the structure of the entire trial, which focused narrowly and exclusively on competing theories of stucco repair cost. (See, e.g., RT 3834 [UCW argues to the jury that "Collins admitted that there are stucco

defects. *Really what that boils down to is the type of repair and the scope of repair.*" (Emphasis added)], 3847-3848 [Collins argues to the jury that "(i)n this case as it relates between plaintiffs (UCW) and my clients, liability is not disputed by my clients. We came forward and *we have our own repair, and we said, yes, there is a defect out there*, we disagree with plaintiffs how much it costs, but *we say yes there is the defect out there and we've put forward our experts and our cost of repair* to see what it was." (Emphasis added)], 3849 [Collins continues, "This is about sand-to-cement ratios in stucco as applied by D.J. Plastering"], 3856-3858 [Collins compares the parties' competing theories of repair cost].)[10/]

3. The Kuivanen testimony, on which Collins places heavy reliance (see RB 30-31), comes from UCW's case-in-chief, in which UCW took the radical position that stucco failure was so pervasive in the Project that complete replacement was necessary, at a cost of $5.79 million. (See, e.g., RT 1340, 1530, 1601-1602, 1607, 1721.) That repair theory did contemplate some replacement of lath and building paper. (E.g., RT 1390 [Kuivanen testimony from UCW's case-in-chief].) However, let's not forget that UCW backed off that position completely, before the case ever reached the jury. In the end, UCW no longer advocated replacement of the stucco or underlying materials. Rather, like Collins, it advocated a pure stucco repair job, to be accomplished by application of a stucco hardener,

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[10/] See also, e.g., RT 1034 (Collins's opening statement, "Now let's focus in just on the stucco"), 1350 (sustaining UCW's objection, trial court precludes D.J. Plastering from questioning witness about other 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), 2471-2473 (trial court excludes written evidence documenting defects other than stucco), 3402-3403 (court precludes witness from testifying about anything apart from stucco damage).

Sinak. (E.g., RT 3728-3729 [UCW's stucco expert, Jay Richard Gorman, does an about-face and recommends repair by application of Sinak throughout the entire Project]; 3846 [UCW argues to the jury in closing that "Sinaking the entire project makes sense"]; cf., *Casey v. Overhead Door Corp.*, *supra*, 99 Daily Journal D.A.R. at p. 8318 [plaintiffs who sought compensation for defective windows were bound by admission that their selected repair method didn't contemplate drywall work they had previously claimed was necessary].)[11/]

4. In any event, even if the repair method ultimately selected had encompassed incidental spot repair to building paper or lath, and even if such spot repair might constitute recoverable "damage to other property," UCW still isn't entitled to recover damages from Collins for repairing or replacing the defective stucco itself. Where stucco is the defective product, stucco repair undeniably is pure economic loss, and, equally undeniably, it is not recoverable in strict liability. Moreover, California law is quite clear that "the plaintiff cannot use the property damage to bootstrap recovery for the economic loss in a strict liability action." (*Transwestern Pipeline Co. v. Monsanto Co.*, *supra*, 46 Cal.App.4th at pp. 525-526; *Pisano v. American Leasing* (1983) 146 Cal.App.3d 194, 197 [applying same principle]; see *Casey v. Overhead Door Corp.*, *supra*, 99 Daily Journal D.A.R. at p. 8317 [evidence of economic loss is irrelevant to trial of strict liability or negligence cause of action].) There is simply no question that the

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11/ It bears mention that the ironic ultimate effect of UCW's last-minute tactical decision to embrace Collins's Sinak repair theory is to make quite clear that only stucco repair costs—i.e., pure economic damages, were at issue.

In any event, as addressed in Section III, *infra*, and in the opening brief (AOB 36-44), UCW had no litigable interest and should not even have been allowed to participate in the trial. Its witnesses' testimony rightly should be disregarded.

$3,180,000 the jury assessed for cost of repair was directed at *stucco* repair. Such damages constitute economic loss. By Collins's own admission, such loss is unrecoverable in strict liability.

B. The Toxic Contamination Decisions On Which The Respondent's Brief Relies Are Not Analogous To The Present Case And Therefore Lend No Support To Collins' Position.

Collins relies on two toxic tort decisions to fashion an alternative theory for its proposition that the cost of repairing defective stucco somehow does not constitute pure economic repair cost. (RB 32-34, discussing *San Francisco Unified School Dist. v. W.R. Grace & Co.*, *supra*, 37 Cal.App.4th 1318 and *Transwestern Pipeline Co. v. Monsanto Co.*, *supra*, 46 Cal.App.4th 502.) Neither decision really lends Collins any support.

The first of the two, *San Francisco Unified School Dist. v. W.R. Grace & Co.*, *supra*, 37 Cal.App.4th 1318, involved asbestos and focused on limitations issues, the court holding "that the owner of a building containing asbestos cannot state a cause of action in tort against an asbestos manufacturer until contamination occurs." (*Id.* at p. 1322.) The pivotal question was whether the presence of asbestos in the San Francisco schools, *per se*, constituted property damage recoverable in a strict liability claim. The court held it did not—that until the asbestos fibers became friable and thus contaminated the buildings in a manner posing physical danger to persons occupying the buildings, all the school district had sustained was unrecoverable economic loss. (*Id.* at pp. 1327, 1329-1330.)

There are at least two reasons why this decision doesn't help Collins establish that the amounts designated in the stucco trial verdict for "Cost of Repair" and "Relocation" pertain to anything but pure economic damage. First, the decision is harmonious with D.J. Plastering's position, not Collins's. Just as the presence of asbestos *per se*, without resulting damage to property, constitutes mere economic loss, so does the presence of defective stucco absent demonstration of resulting damage to other property. As discussed, Collins has not made, and cannot make, a convincing showing that the trial focused on anything but repairing defective stucco *per se*.

Second, to the extent, if any, it may be possible to read *San Francisco School Dist.* to support Collins's position, the decision is readily distinguishable from the present case on its facts, and therefore should be disregarded. The decision itself makes this clear, by declaring in no uncertain terms that "asbestos cases are unique in the law." (*Id.* at p. 1325; see *ibid.* ["The nature of the defect and the damage caused by asbestos differs from the defects and damages found in most other strict liability and negligence cases"].) Any special spin put on the law to facilitate resolution of toxic contamination lawsuits has no proper application in a garden variety construction dispute.

The other toxic tort decision, *Transwestern Pipeline Co. v. Monsanto Co.*, *supra*, 46 Cal.App.4th 502, is equally unhelpful to Collins. Transwestern was in the business of transporting natural gas interstate. It caused damage to a gas company's pipeline by transporting gas contaminated with polychlorinated biphenyls (PCB's). After settling the gas company's damage claim, Transwestern sought equitable indemnity from the PCB manufacturer, Monsanto, on theories that included strict liability. Monsanto appealed from a judgment for Transwestern, and the Court of Appeal affirmed. (*Id.* at pp. 508-509.)

The outcome turned on the case's unusual facts, which bear no resemblance to those here. Specifically, the contamination of the gas company's pipelines didn't "damage" the pipes in the usual sense. (*Id.* at p. 524 ["The pipes still piped, the pumps still pumped and the meters still metered just as well as they had before"].) Monsanto seized upon these circumstances to argue that the gas company hadn't really sustained any property damage, but rather only economic damage in the form of increased routine business costs once it became known that the pipelines were contaminated with PCB's. (*Ibid.*) The appellate court rejected that approach, endorsing instead the jury's practical determination that "Monsanto's negligent failure to warn Transwestern about the environmental hazards of PCB's was a direct and proximate cause of the harm to SoCalGas. This harm was clearly in the nature of property damage because the PCB's contaminated the SoCalGas pipelines and the condensate within the pipelines, both of which were the property of SoCalGas." (*Id.* at p. 530.) In essence, the appellate court used the presence of a contaminant (the PCB's) to get around the issue of "unrecoverable economic loss." (*Id.* at pp. 530-531.)

This case involves nothing like that scenario. Rather, much more mundanely, the argument was simply that some of the stucco at the Project didn't comply with the Uniform Building Code's sand-to-cement ratios. Collins contended all along that merely hardening the stucco—i.e., repairing it—would cure the defect; UCW abandoned its more radical damage theory at the eleventh hour and embraced Collins's view. Thus, by the trial's end there was no remaining claim in the case asserting that the stucco damage resulted in damage to other property. Accordingly, there is no doubt whatsoever what the jury's verdict here was for; it contemplated application of a hardening product to in-place stucco—a purely economic repair job.

In sum, the present case presents a traditional, unexceptional construction defect scenario. The defective product was stucco. The damages consisted of the cost of stucco repair. Such repair costs are nothing more than the usual type of pure economic loss that is unrecoverable as damages in a strict liability action.

Collins has failed to refute the opening brief's demonstration that the only damages assessed against it arising out of D.J. Plastering's work were unrecoverable economic damages in the form of stucco repair costs. Accordingly, for all the reasons addressed in this brief and in the opening brief, judgment must be reversed. Moreover, for the reasons addressed at length in the opening brief (AOB 35-36), the reversal must be with directions to enter judgment 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.

The settlement between UCW and Collins left no legal dispute between them unresolved. UCW therefore had no business participating at trial as an apparent plaintiff. The trial court erred in permitting its participation, and the error prejudiced D.J. Plastering. The opening brief explains all of this at length. (AOB 36-44.)

The Respondent's Brief comes to grips with none of it. It doesn't even come close to refuting the opening brief's demonstration that UCW's

participation at trial was serious, prejudicial error. Indeed, the Respondent's Brief avoids confronting virtually every point in the opening brief's analysis. Instead, it devotes most of its response to setting up straw men just to knock them down—and it doesn't even do that convincingly, as we now demonstrate.

A. The Settlement Agreement Between Collins And UCW Cannot Legitimize UCW's Participation In The Trial, When Such Participation Contravenes California Law And Prejudiced D.J. Plastering's Rights.

Collins argues that UCW's participation at trial was legitimate and permissible because the settlement agreement required it. (RB 7-10.) It cites no authority for this proposition, no doubt because none is available. On the contrary, as the opening brief addresses in detail, there is no right to trial in the absence of a justiciable controversy. (AOB 36-37; e.g., *National Assn. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746 [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 at issue in the case before it"].)

Collins insists its dispute with UCW "over the stucco issue was genuine." (RB 8; see also RB 2 [dispute "was real, and required adjudication"].) Perhaps Collins and UCW did have genuine differences of opinion over the cost and allocability of stucco repair. For the sake of

argument, assume for the moment that they did.[12/] Even so, that does not come close to legitimizing UCW's participation at trial, for several reasons.

For instance, the Respondent's Brief characterizes the disagreement between Collins and UCW like this:

> "A *factual* dispute existed between the Association and COLLINS as to how much of the settlement of $5,600,000 should be allocated to stucco. COLLINS believed the correct figure to be $1,900,000, whereas the UCW believed it should be at least $4,220,000. (C.T. 1997) Each of the two proposed a different cost and method of repair (R.T. 1601-02, 1721, 2146-49)." (RB 8, emphasis added.)

As this passage and others in the Respondent's Brief concede, whatever dispute remained between Collins and UCW was *factual*. (See also RB 8 ["A substantial *factual* dispute existed between UCW and COLLINS which needed to be sorted out at trial" (emphasis added)].) That is, following settlement, Collins and UCW no longer had a *legal* dispute. There was nothing left to be adjudicated between them. (See AOB 38-39.)

True, these parties asserted, and still do, that UCW's negligence and strict liability causes of action required adjudication. (RB 2, 8.) They are wrong, however, because absolutely nothing rested on the outcome of the trial of those causes of action.[13/] UCW had given Collins a full release and

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[12/] But see the opening brief's discussion (AOB 36-37, 42-43) concerning the collusive character of the UCW/Collins settlement and of UCW's participation at trial, as California law defines "collusion."

[13/] The closest the Respondent's Brief comes to confronting questions about the genuineness of the controversy on which the trial court permitted UCW's continued participation in the lawsuit is to quote at length from the trial court's remarks determining that issues remained to be

(continued...)

a Civil Code section 1542 waiver (see, e.g., RT 16; CT 1420, 2020-2024), and, tellingly, the special verdict form addressing the UCW/Collins causes of action did not even contain a mechanism for awarding relief to UCW based on a finding in its favor under its causes of action (see CT 3095-3103 [special verdict form].) The opening brief pointed this out (AOB 38); the Respondent's Brief studiously ignores it.[14/]

Since the settlement left no justiciable controversy alive under UCW's complaint against Collins, the question conceivably may arise whether UCW's participation at trial might be justified within the context of the indemnity cross-action. The answer is no. Only Collins, not UCW, was a party to the indemnity cross-action against D.J. Plastering. As the Respondent's Brief itself points out repeatedly, UCW did not sue D.J. Plastering and simply had no claim at issue against it. (E.g., RB 7 ["UCW, plaintiff in the case, sued only COLLINS, the developer entity. (C.T. 1) DJP was in the case only by way of COLLINS' Cross-Complaint against DJP for indemnity on the stucco matter"]; RB 8 [noting that D.J. Plastering was "in the case only on COLLINS' indemnity claims"], RB 13 ["UCW sued only COLLINS, pleading causes of action in strict liability and

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[13/](...continued)
resolved at trial between Collins and UCW. (RB 9-10.) This is classic question-begging. We know what the trial court concluded. The question on appeal is whether its conclusions were legally sound. The Respondent's Brief fails to refute D.J. Plastering's demonstration that they were not.

[14/] The Respondent's Brief mentions that "[t]he *verdict* for UCW against COLLINS was not appealed." (RB 6, emphasis added.) How could it have been? Appeal lies only from a *judgment* or other appealable order—not from a verdict. (See, e.g., Code Civ. Proc., § 904.1.) There is no judgment against Collins. No damages were awarded to UCW, as discussed above, and the verdict on UCW's complaint was never reduced to judgment. (See CT 3513-3516.) Thus, significantly, there was nothing for Collins to appeal.

negligence. COLLINS was the sole defendant. COLLINS, in turn, by Cross-Complaint, sued DJP and other subcontractors in indemnity"].) Thus, UCW was a stranger to the indemnity cross-action. As such, it had no legitimate say in how much of Collins's settlement payment D.J. Plastering might be required to repay.

Collins argues that the settlement agreement's sharing provisions gave UCW a stake in the outcome of the trial. (RB 8-9.) Not so. Since UCW was not a party to the indemnity cross-action and did not become one by virtue of the sharing agreement in the settlement it reached with Collins, UCW simply had no litigable interest in the indemnity cross-action.

Moreover, again as addressed in the opening brief (AOB 38-39), absolutely nothing in the settlement's sharing agreement hinged on the outcome of a trial of UCW's own complaint. Rather, each and every contingency in the settlement was determinable by the outcome of the indemnity cross-action between Collins and D.J. Plastering. Thus, UCW had no litigable stake in either aspect of the trial, and accordingly had no legitimate business participating in it as an apparent party plaintiff.

B. D.J. Plastering Has Not Argued On Appeal That A Good Faith Settlement Determination Was Necessary, So Collins's Denunciation Of Such An Argument As "Specious" Makes No Sense.

The Respondent's Brief denounces D.J. Plastering for making a "specious argument in contending that a good faith settlement determination was necessary." (RB 10-12; quote at RB 10 [heading].) It never identifies a page in the opening brief, however, where this argument might be found.

No wonder: D.J. Plastering simply does not argue in this appeal that a good faith determination of the UCW/Collins settlement was necessary.

Of course, it is true that no good faith settlement determination was made here. And D.J. Plastering has pointed out, among various other challenges to UCW's trial participation, that when appellate decisions have approved a settling party's continued participation at trial, the settlement in question invariably has been one that did receive judicial scrutiny by means of a good-faith settlement determination. (AOB 40; see, e.g., *Alcala Co. v. Superior Court* (1996) 49 Cal.App.4th 1308, 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.) Collins has not shown otherwise, nor has it shown that such appellate decisions would have reached the results they did, had the settlements in question not been tested in the good faith crucible. Thus, such decisions do not legitimize UCW's participation at trial in this case.

In any event, Collins is tilting at windmills. There is no argument in the opening brief contending that good faith settlement proceedings were required in this case.

C. D.J. Plastering Hasn't Argued On Appeal That The UCW/Collins Settlement Was A Sliding Scale Agreement, But Rather, That *With Or Without* A Pretrial Good Faith Determination And Allocation Of Settlement Proceeds, Collins Had The Burden To Prove Every Element Of An Indemnity Cause of Action At Trial.

Collins also says that D.J. Plastering "argues that a good faith settlement determination was required in this case because of the 'sliding scale aspect of the settlement.'" (RB 12, quoting AOB 19.) Wrong again. Collins fundamentally misconstrues our argument.

The quoted passage merely recounts the history of UCW's and Collins's election not to allocate their settlement's proceeds before going to trial. As noted, all the parties, including D.J. Plastering, wrangled quite a bit in the trial court over the allocation issue. (See AOB 18; e.g., RT 90-104, 179-181, 245-248, 260-262.) It was there, in the trial court, that D.J. Plastering took the position the sliding scale aspect of the agreement mandated a good faith settlement determination and a pretrial allocation of settlement proceeds. (AOB 19; e.g., RT 54, 93, 96-101, 245-248; CT 1459-1488; see Code Civ. Proc., § 877.5 [rules governing sliding scale agreements]; Code Civ. Proc., § 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 pretrial allocation is providing offset information to nonsettling parties].)

The trial court decided against requiring a good faith settlement determination and made no pretrial allocation of the settlement proceeds. (See AOB 18-19.) The opening brief does *not* renew the arguments D.J. Plastering made in the trial court that a pretrial good faith settlement determination and allocation were required. Thus, the four pages the Respondent's Brief devotes to this topic are wasted space.

What D.J. Plastering *does* argue on appeal is that *whether or not* a trial court makes a pretrial allocation of settlement proceeds (as occurs, for example, when there is a good faith determination pursuant to Code of Civil Procedure section 877.6), the plaintiff in an ensuing indemnity lawsuit carries the burden of proving every element of its indemnity cause of action to the fact finder at trial. (See AOB 19-24, and authorities cited there.) That, as discussed in the opening brief and in section I, *supra*, is precisely what Collins failed to do.

D. D.J. Plastering Hasn't Placed Reliance On *River Garden Farms* In This Appeal, So Collins's Vigorous Campaign To Distinguish It Is Mystifying.

The Respondent's Brief wastes two more pages on undermining D.J. Plastering's supposed reliance on *River Garden Farms, Inc. v. Superior Court* (1972) 26 Cal.App.3d 986. (RB 16-18.) That discussion is pointless, since D.J. Plastering hasn't placed any reliance on *River Garden Farms* in this appeal. None.

In fact, the opening brief cites *River Garden Farms* just once (AOB 43), and then only for its pithy quote about the relationship between profit motive and ingenuity. (*River Garden Farms, Inc. v. Superior Court*, *supra*, 26 Cal.App.3d at p. 997 ["When profit is involved, the ingenuity of man

spawns limitless varieties of unfairness"].) It is impossible to understand why Collins felt it necessary to distinguish the decision at all, much less in its own subsection of the brief.

In any event, in the course of discussing the case, Collins observes in passing that the trial court would have acted within its discretion in separating the trial of UCW's complaint against Collins from the trial of Collins's indemnity cross-complaint against D.J. Plastering, but "wisely" refrained from doing so in order to avoid running the risk of inconsistent verdicts. (RB 17.) This is an interesting point.

Maybe the decision not to sever the complaint and cross-complaint was not so wise: Had the trial court separated the two actions, it surely could not have missed the fact that following the settlement, UCW was no longer seeking *any* award of damages under its complaint. (See CT 3095-3103 [special verdict form contains *no* mechanism for actually awarding relief to UCW based on a finding in its favor].) Thus, with the two aspects of the litigation separated, the conclusion that UCW was a sham plaintiff, with no remaining legal controversy between itself and any other party in the case, would have become inescapable. As a bonus, presumably, D.J. Plastering then would have received the two-party trial to which it was entitled.

Collins's discussion of *River Garden Farms* is at most a diversion. It has nothing whatever to do with this appeal, and certainly doesn't help Collins establish UCW's participation at trial as anything but an indefensible sham.

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

As its fall-back, Collins insists D.J. Plastering wasn't prejudiced by UCW's participation at trial. (RB 18-21.) It supports this proposition with a lengthy exegesis on the legitimacy of UCW's change of heart about stucco repair cost, and concludes with the proclamation that D.J. Plastering actually benefitted from UCW's change of position, because that change "radically reduced the demanded repair cost for the stucco damages at UCW from the figure originally proposed by the homeowners." (RB 21.) Yet again, Collins's analysis completely misses the mark.

While there is ample reason to raise an eyebrow at the relationship between Collins and UCW as it relates to the structure of their settlement and the positions they took at trial (see AOB 42-43), let's assume *arguendo* that there was no collusion. UCW still had no business being at trial. As discussed above and in the opening brief (AOB 36-43), its participation was permitted in error because the settlement resolved all its legal claims, rendering them moot and nonjusticiable. (See AOB 43.)

Furthermore, the error was glaringly prejudicial to D.J. Plastering. The prejudice in UCW's participation at trial is not subtle or difficult to grasp. The opening brief lays it out, chapter and verse. (AOB 43-44.) The Respondent's Brief, with deafening silence, ignores that discussion. Its salient points, wholly unrefuted, bear repeating:

1. The indemnity claim was a dispute between Collins and D.J. Plastering *alone*. That 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 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.)

2. These inflated figures stem *directly* from UCW's participation. UCW argued vigorously throughout much of the trial that a $5.97 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).

3. *Had the jury heard only the actual disputants' evidence, it could not have returned a verdict in excess of Collins's figures, which were much lower than UCW's.* Thus, UCW's participation prejudiced D.J. Plastering to the tune of at least $1.2 million.[15/]

4. Moreover, the prejudice transcends arithmetic. UCW's 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.*, *supra*, 153 Cal.App.3d at p. 113; see, e.g., *Galvan v. Press* (1954) 347 U.S. 522, 530 ["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

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[15/] 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 often do, it selected 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 limited to Collins's and D.J. Plastering's evidence, the repair cost verdict very well may not have exceeded six figures.

by Collins and UCW throughout the trial.[16/] The illusory legal 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, and for all the reasons stated, 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 opening brief also exposed glaring infirmities in the judgment entered on behalf of the developer entities other than Collins. (AOB 45-

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[16/] For instance, UCW enjoyed the opportunity to present an entirely separate set of experts, in addition to those being presented by Collins, to criticize the work done by D.J. Plastering. That undeniably was a mission in which UCW and Collins were united throughout the trial—only UCW had no rightful business participating in it. While evaluating whether to permit UCW to appear as a party litigant, the trial court asked, "Is it a scam? A scam in order to keep the plaintiff in by allowing any type of contingency out there? It could possibly be, I don't know the answer to that." (RT 107.) By now, the answer should be clear.

46.) Not one of them established his or its role in constructing the Project. Not one introduced evidence establishing how much he or it paid in settlement and was therefore supposedly entitled to recover in indemnity from D.J. Plastering. Simply put, none tried, much less proved, an indemnity claim.

Collins responds, "The interest of the developer entities in the judgment was sufficiently proved at trial." (RB 27.) It supports its position with snippets from the record that, generously construed, establish merely that: (1) The named entities were partners in the partnership that developed the Project (RT 1760-1761); (2) they were parties to the settlement agreement (which never differentiates among them) (CT 2011-2036); (3) one of them, Bogaert, signed some contracts between Collins and D.J. Plastering (RT 1763-1766); (4) the partnership issued paychecks in connection with the Project's construction (RT 1864); (5) Collins's stucco expert also appeared on the other entities' behalf (RT 2099); and (6) the trial court ensured that the judgment avoided awarding a double recovery (RT 4925-4926; CT 3513-3516 [judgment]; see RB 27-28.)

Question: How does any of this threadbare showing establish an entitlement to indemnity? Answer: It doesn't. The Respondent's Brief only proves our point. Each of the developer entities was required to prove up an indemnity cause of action against D.J. Plastering. (E.g., *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654 ["Whatever plaintiff is obligated to plead, plaintiff is obligated to prove"]; 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]; Evid. Code, § 500 [a party has the burden of proving all facts essential to the relief sought].)

But none did.

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

individual proof at all. That in itself compels reversal of the judgment with directions. (See AOB 26-27 [explaining why complete failure of proof mandates reversal with directions].)

Moreover, Collins fails to come to grips with the fact that none of the developer entities introduced evidence—*any* 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. As established in the opening brief, each developer's indemnity rights was capped by the amount he or it paid in settlement. (See AOB 46 [citing authorities].) For example, if Collins paid the entire amount and the remaining entities contributed nothing, none of those entities incurred loss or damage for D.J. Plastering to indemnify, and none belonged at trial. Is that what happened? Who knows? There simply is no evidence addressing this key question. The failure to introduce evidence establishing this core element of each developer entity's indemnity claim completely undermines the judgment.

For all the reasons stated, 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.

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.

Business and Professions Code section 7031 bars unlicensed contractors from suing to recover compensation for any act or contract that requires a California contractor's license. D.J. Plastering discovered shortly after trial that Collins was unlicensed during periods relevant to this lawsuit, and moved for new trial on the basis of that discovery. Although plainly troubled by Collins's critical lapse (e.g., RT 5255), the trial court denied the motion. The opening brief explained why that ruling was error. (See AOB 47-49.) Collins's responses (RB 34-38) are ineffectual.

For instance, Collins protests that the evidence D.J. Plastering put before the trial court "did not conclusively establish that COLLINS was unlicensed." (RB 35.) That is utterly beside the point. First, Collins's status *was* conclusively established, because Collins conceded its licensing problems in the new trial proceedings. (See, e.g., CT 3692-3695 [blaming its deficiency on the licensing agency, and asserting substantial compliance]; RT 5262-5265 [confirming a longstanding problem that Collins was only then taking steps to correct].) Second, Collins has the law backwards. Business and Professions Code section 7031 required *Collins* to "allege and prove" it was duly licensed at all times during its performance as contractor for the Project. D.J. Plastering demonstrated that

Collins had failed to satisfy this requirement, and that it could not have done so, had it tried.

Collins also argues, as it did successfully in the trial court, that D.J. Plastering should have unmasked its unlicensed status sooner, because the truth was available from public records. (RB 35-36.) However, as pointed out in the opening brief (AOB 48-49), Collins represented in its contracts and its cross-complaints (into which the contracts were incorporated by reference) that it *was* licensed. D.J. Plastering acted reasonably in relying on Collins's representations. Collins offers no explanation whatsoever why D.J. Plastering's suspicions should have been aroused from the outset to doubt the veracity of Collins's statements.

While acknowledging the Supreme Court's declaration that Business and Professions Code section 7031 "bars all actions, however they are characterized, which effectively seek compensation for illegal unlicensed contract work" (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 997; quoted at RB 37), Collins insists there are exceptions to the statutory rule, finding support for this proposition in a decision nearly 40 years old. (RB 37, discussing *S & Q Construction Co. v. Palma Ceia Development Organization* (1960) 179 Cal.App.2d 364, 367.)

Hydrotech should have enlightened Collins to the modern reality, which places increasingly stricter emphasis on penalizing the failure to maintain a contractor's license. 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 service." (*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"].)

Finally, Collins makes a "no harm, no foul" argument based on this court's decision in *Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.* (1996) 49 Cal.App.4th 1397. (See RB 37-38.) Like Collins's other approaches, this one does not work.

Ranchwood held that while Section 7031 bars a *contractor* from pursuing any contract-based cause of action, including express indemnity, a *developer* is not bound by the statute and, accordingly, a contractor who also acts as developer may pursue relief in the latter capacity under whatever causes of action are available to it. (*Ranchwood Communities Limited Partnership v. Jim Beat Construction Co.*, *supra*, 49 Cal.App.4th at pp. 1413-1415; see *id.* at pp. 1416-1423.) Accordingly, Collins argues, even if Section 7031 bars its express contractual indemnity cause of action, no new trial is required, because it "could still recover on a theory of equitable indemnity, as did the other developer entities." (RB 36; see RB 37-38.)

One fatal weakness in this argument is the fact that Collins did not pursue equitable indemnity. Indeed, it stresses elsewhere in the Respondent's Brief that Collins's judgment against D.J. Plastering "*was based on the theory of express indemnity because of the written contracts executed between the two.*" (RB 3, emphasis added; see, e.g., RB 28.) Not on equitable indemnity, in other words. That Collins might have been able to recover under a different theory—one it did not pursue—is not a reason to deny D.J. Plastering's well-founded motion for new trial.

Moreover, there is substantial reason to conclude that Collins could *not* legitimately have pursued an equitable indemnity cause of action against D.J. Plastering. As the opening brief pointed out (in yet another discussion ignored by the Respondent's Brief), where the parties have contracted with respect to indemnity, the independent doctrine of equitable indemnity doesn't come into play. (AOB 15, fn. 10; e.g., *Rossmoor Sanitation, Inc. v. Pylon* (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 (emphasis added)].)

Simply put, 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 therefore should be reversed.

CONCLUSION

As D.J. Plastering has noted before, the deeply and prejudicially flawed trial in this case was very much the trial that Collins and UCW jointly demanded and fashioned. Now they should be made to live with that trial's rightful consequences.

For all the reasons stated in this brief and the opening brief, 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 new trial.

Dated: September 22, 1999

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