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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ROGER MAX GADOW,

Plaintiff and Appellant,

v.

PAUL REST et al.,

Defendants and Appellants.

A134646

(Sonoma County
Super. Ct. No. SCV246958)

Plaintiff Roger Gadow took out a mortgage on his previously unencumbered home and lent the proceeds to a group of business partners. The partners then used the money for a down payment on a winery. As part of the deal, the partners agreed to pay off the mortgage balance quickly. Although the partners kept the payments current, they failed to pay off the mortgage balance, their business went bankrupt, and Gadow's home remained encumbered years longer than was originally agreed. Gadow sued the partners, the mortgage company, and the company's loan agent. A jury found in his favor, and he obtained a judgment awarding him about three quarters of the amount he sought, with a portion attributable to the mortgage company and its loan agent. In this appeal, the mortgage company and loan agent contend that the jury improperly awarded duplicative damages, that the verdicts against them were inconsistent on two claims, and that most of Gadow's claims were barred by various statutes of limitation. We reject these arguments and affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

We summarize the facts in the light most favorable to the judgment. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 693-694 (*Roby*).

A. *The Facts.*

In 2004, Mark Ciddio, Donald Payne, and Michael Giacomini (the partners) formed a limited-liability company called True Spirits, LLC, with the purpose of producing distilled spirits and wine. They decided to purchase a winery near Graton but lacked the \$800,000 needed for a down payment. They discussed various financing options with appellant Paul Rest, a loan agent with AMC Financial, Inc.,¹ who also held a real estate salesperson license.

The partners ultimately purchased the winery in June 2005 for about \$3.8 million, with a down payment of \$800,000, and the remainder paid with loans to True Spirits from two different financial institutions. Part of the down payment came from proceeds obtained from one of the partners (Payne) by taking out a mortgage on his home. Another part came from Gadow, who became friendly with Payne when visiting Payne's business.

Gadow's portion of the down payment came from a \$415,000 loan that Rest helped him obtain from World Savings Bank, through AMC Financial. The loan was secured by a mortgage on Gadow's previously unencumbered Petaluma home. The partners agreed to pay all fees and costs associated with the mortgage. They first discussed the possibility of paying off the loan within 90 days, but they ended up agreeing to pay it off fully one year after escrow closed. In consideration for his loan to the partners, Gadow was given a two-percent interest in True Spirits. AMC Financial received \$8,700 in compensation for the loan, the maximum allowed by World Savings at the time.

¹ Appellant Analy Mortgage Center, Inc., did business as AMC Financial. We will generally refer collectively to these entities as AMC Financial.

Rest assisted and advised Gadow throughout the loan transaction. At trial, evidence was presented that Rest failed fully and timely to inform Gadow of the terms of the mortgage loan, such as the amount and variability of the interest rate; minimized the risks of the transaction; and encouraged Gadow to misrepresent his income when applying for the mortgage.

The partners could not repay the mortgage within the year, and the parties agreed to extend the due date at least a couple of times. All the while, the principal amount owed on the mortgage loan was growing because the interest rate had adjusted upward and the monthly payments did not cover the full amount of the interest due. Gadow was previously unaware of this loan feature, and he apparently learned about it not from Rest, but instead from one of the partners.

With Rest's help, Gadow refinanced his mortgage in January 2007. The new loan was made by Aegis Wholesale Corporation in the amount of \$450,000, and it was used to pay off the original loan from World Savings and to obtain more equity from the house. The partners agreed to continue to pay the monthly payments and to pay off the loan balance by January 1, 2012. At trial, evidence was presented that Rest again failed fully and timely to inform Gadow of the terms of the refinanced loan and again encouraged Gadow to misrepresent his income in applying for it. After the mortgage was refinanced, the parties repeatedly modified their understanding of how and when the loan was to be repaid, but they never extended the due date past 2012.

In September 2007, the winery property went into foreclosure after True Spirits failed to make timely payments to the primary lender of the original purchase money used to buy the property. Around this time, Rest asked Gadow for a personal loan so he could pay an expense he owed to his ex-wife, unrelated to Gadow's financial dealings with True Spirits. Gadow agreed to provide Rest with an interest-free, "friendly loan," and Rest offered to "work off this money" by helping Gadow with his dealings with True Spirits and the foreclosure. Eventually, Rest billed Gadow \$6,700 for his services, claiming that Gadow owed him more than the amount of the personal loan.

In December 2008, True Spirits filed for Chapter 11 bankruptcy. A debtor's reorganization plan filed in February 2010 reported that the winery was valued at \$2,980,000, with \$3,435,000 in encumbrances, including Gadow's loan. The plan called for Gadow's loan to be repaid within 25 years.

Gadow filed this action in March 2010 against Rest, AMC Financial, Analy Mortgage, the partners (Giacomini, Payne, and Ciddio), and others who—along with Ciddio—were later dismissed from the lawsuit. The trial took place in September 2011. At that time, True Spirits was in default to its other lenders and to Sonoma County for unpaid taxes, but it was current on Gadow's loan. The balance of Gadow's loan as of September 16, 2011, was \$424,008.42.

B. The Trial.

Two issues arose during the trial that concern this appeal. The first involved the jury instructions and special-verdict forms addressing damages, and the second involved a defense based on the statutes of limitation.

On the issue about the instructions and special-verdict forms, the trial court asked the parties to meet and confer about jury instructions before discussing them with the court, and they did so. At one point, the trial court gave the parties an excerpt from the California Civil Jury Instruction Companion Handbook. Although a copy of the excerpt itself is not in the appellate record, the trial court explained that the excerpt was an example of a verdict form that could be used in a case with different theories of recovery. After they rested their cases, the parties discussed the proposed jury instructions and verdict forms with the trial court. No objections relevant to the issues on appeal were raised regarding the special-verdict forms.

On the issue involving the statutes of limitation, Rest and AMC Financial filed a written motion for nonsuit, which True Spirits partners Payne and Giacomini joined. The motion does not appear in the record on appeal, but comments in the transcript of the hearing suggest that it was originally based on Gadow's alleged failure at trial to prove damages and was orally supplemented to include "statute of limitations grounds." In their oral supplement, counsel for Rest and AMC Financial argued that Gadow's claim

for negligent misrepresentation was barred by a two-year statute of limitations and that his claims for intentional misrepresentation, concealment, and promise without intent to perform were barred by a three-year statute of limitations. Counsel also argued that Gadow was unable to prove damages, because True Spirits was current on all loan payments.

The trial court denied the motion. On the issue of damages, the court rejected the argument that Gadow suffered no damages simply because the mortgage was current. It explained that “the jury could find that [Gadow] did not bargain for nor was it ever [his] intent to end up in a situation where at his age and his particular situation that he would have a home now encumbered by a mortgage in excess of \$400,000 where only a few years ago his home was free and clear.” On the issue of the statutes of limitation, the court found there were factual questions because “there’s so much dispute with regard to factually what took place between these parties, what the relationship was of the parties, and when in fact [Gadow] had come to certain conclusions or in the language of [Gadow], had discovered that there were certain things that had taken place that he was not aware of.” The trial court noted that the attorneys would be allowed to argue the issue of the statutes of limitation to the jury.

When it came time for closing arguments, counsel for Rest and AMC Financial discussed the timing of the loans but never specifically argued that Gadow’s claims were time barred. At one point counsel argued, “If [Gadow] was defrauded out of the gates, how come he didn’t file a lawsuit in year one; in 2006 or 2007? Why did he wait until March 4th of 2010?” Later, counsel emphasized that an agent’s duty ends when a transaction closes, which meant that Rest had no further duties to Gadow after the loans closed in 2005 and 2007. This argument apparently was directed at Gadow’s claim that Rest continued to act as Gadow’s fiduciary even after the loans closed, because counsel later stated that Rest acted as a fiduciary in connection with those loans, “[n]othing more, nothing less.” None of the instructions or special-verdict forms, however, was tailored to address the accrual of Gadow’s claims or other factual issues that would inform the application of the statutes of limitation.

The trial court instructed the jury that Gadow was seeking the following amounts in economic damages: \$424,009.42 for the existing deed of trust, \$8,700 for the commission AMC Financial received in connection with the 2005 mortgage, \$6,933 for Rest’s commission on that same loan, \$8,665.75 for AMC Financial’s commission on the 2007 mortgage, \$4,735.83 for Rest’s commission on that second loan, and \$6,700 that Gadow paid to Rest for consulting services. In other words, the jury was instructed that Gadow was seeking a total of \$459,744 in economic damages.

The jury found in favor of Gadow and awarded him the same amount of damages, \$15,663, on nine of his eleven claims against appellants Rest and AMC Financial: (1) breach of fiduciary duty, (2) intentional infliction of emotional distress, (3) intentional misrepresentation, (4) concealment, (5) negligent misrepresentation, (6) aiding and abetting tort, (7) failure to use reasonable care, (8) “Tort Liability,” and (9) ratification.

Rest and AMC Financial’s arguments on appeal about the damages center on the special-verdict forms that jurors were asked to complete, and we therefore describe them in some detail. On the verdict form for the first claim against Rest and AMC Financial (breach of fiduciary duty), the jury was asked several factual questions related to the claim, such as whether Rest was Gadow’s real estate agent, whether he owed Gadow a fiduciary duty, and whether he acted as a reasonably careful real estate agent would have acted. Depending on the findings it made, the jury was then asked to determine Gadow’s damages, and jurors awarded \$15,663 in economic damages on this first claim. For each subsequent claim against those defendants, the special-verdict form read as follows:

“What are Roger Gadow’s damages?

“\$ _____ Non-economic

“\$ _____ Economic

“In determining damages, you are not to duplicate any damages previously awarded on other claims.”

As it had done for the first claim, the jury awarded \$15,663 in economic damages for each of the subsequent claims in which it found against Rest and AMC Financial.

The jury awarded Gadow no noneconomic damages. As for Payne and Giacomini, the

jury found them liable under the theory that they intentionally or carelessly created the impression that Rest was their agent. Jurors awarded Gadow \$215,202 in damages on this theory.

After the jury's verdict was announced, the trial court proceeded to the second phase of the trial, which was to resolve whether punitive damages would be imposed against Rest and AMC Financial. Rest was the only witness to testify in this phase. During closing arguments on this phase, Rest's counsel argued that one factor for the jury to consider in deciding punitive damages was the amount of the damages already awarded. In doing so, he stated that the *total* amount awarded by the jury in compensatory damages was \$15,663: "You made your decision. \$15,663. In all likelihood, it seems to me a discouragement [*sic*] of commissions. That's just my thinking." During his brief rebuttal, Gadow's attorney stated, "I don't interpret your [the jury's] award the same way [defendants' counsel] does. It looks to me like you awarded Mr. Gadow \$15,663 a number of times according to the verdict. You didn't duplicate it. So it's like eight times \$15,663."

After the jury began deliberating on the second phase of the trial, counsel for Rest and AMC Financial continued to contend that the jury had awarded a total of only \$15,663, and he indicated he would address the issue in written posttrial motions because "[o]bviously, it's better to do a written brief." The trial judge observed that, although it had been "quite a while" since he had considered this legal issue, it was his understanding that where there are multiple theories of recovery, the plaintiff must elect an amount awarded on one of them. The court directed counsel to address the issue in posttrial briefing.

During the same discussion with the trial court, Payne and Giacomini moved to amend the judgment to reduce damages. At one point, their counsel raised the possibility of asking the jury about the issue of "the \$215,000 versus the 15 versus the 15 times eight or 15 times four before the jury got dismissed," but the trial court declined to do so, stating that it "would be an inappropriate invasion of the jury's province." The trial court asked the other attorneys if they wished to be heard on the issue, but they declined.

The jury thereafter submitted the following question during its deliberations on punitive damages: “Please clarify the total amount of economic damages as determined by the jury, awarded against AMC and Rest. We heard different numbers in the closing statement.” (Original underline.) When asked for a proposed response to the question, Gadow’s counsel argued that “clearly” the jury had awarded “I think it’s eight or nine times \$15,663. And in my closing argument, they—when I clarified that; they nodded in assent.” The trial court stated that although there might be legal arguments as to the amount of the award, “the jury makes the decision.” The trial court proposed responding to the jury’s question by telling the jurors that they should focus on the issue before them and that the amount of the economic-damage award was for the court to determine. Counsel for Rest and AMC Financial stated he agreed with that approach, but he noted that his research revealed that a plaintiff may receive only one set of damages on multiple theories of recovery. The judge responded that this was his understanding of the law as well, but that Gadow would be allowed to argue the issue in posttrial briefing, and he anticipated that Gadow would argue “that perhaps one distinguishing factor [was that the jury was told] do not duplicate the damages. And we’ll just have to see if that’s factually different.”

The court proposed the following response to the jury: “Thank you for your question. Please focus your current deliberations on the question of punitive damages. You have completed the original verdict form. The total amount of economic damages awarded is a question the Court will address if necessary.” All parties agreed to that response, which was then given to the jury.

The jury determined that Rest should not have to pay punitive damages, but it awarded Gadow \$25,000 against AMC Financial.² The trial court then thanked and discharged the jury.

C. The Posttrial Proceedings.

The parties filed a number of posttrial motions. Rest and AMC Financial first filed a two-page demand that Gadow elect that a judgment be rendered against either Rest or AMC. A few days later, they filed a longer, more detailed motion to amend the verdicts, for a judgment notwithstanding the verdict, and for a demand that Gadow elect judgment. Among other things, they contended that the jury awarded duplicative damages for different theories of liability, and that Gadow's total compensatory damages were limited to \$15,663. In his opposition, Gadow argued that the jury had in fact awarded a total of \$356,169—\$215,202 against Payne and Giacomini, plus nine separate, nonduplicative awards of \$15,663 against Rest and AMC Financial. In support of his position, Gadow submitted declarations of both his attorney and the jury foreperson. According to those declarations, after the trial the foreperson responded to an inquiry at the courthouse from counsel for Payne and Giacomini about how the jury arrived at its award by explaining that the awards of \$15,663 were not duplicative and that the jury intended to award Gadow a total of \$140,967 against Rest and AMC Financial. The foreperson called Gadow's attorney the day after the trial ended and expressed a willingness to sign a declaration in support of the jury's verdict. In their reply, Rest and AMC Financial asked that the foreperson's declaration be stricken.

The trial court held a hearing on the posttrial motions on December 2, 2011, but no transcript of the hearing is included in the appellate record. In its written decision following the hearing, the trial court sustained defendants' objections to the foreperson's

² The trial court excluded this punitive-damage award from its final judgment on the ground that Gadow had failed to meet his burden of proof to establish the financial condition of AMC Financial. Although Gadow cross-appealed from the judgment and argued in his opening brief that the trial court erred in excluding the punitive-damage award, he subsequently withdrew his argument. We therefore do not review the trial court's ruling on this issue.

declaration and to the paragraphs of counsel's declaration describing conversations with the foreperson. It then granted in part and denied in part Rest and AMC Financial's motion to amend the verdict, for a judgment notwithstanding the verdict, and for a demand for Gadow to elect judgment. In doing so, it amended the verdict to strike the jury's award of \$15,663 for Gadow's cause of action for intentional infliction of emotional distress because it found that there was insufficient evidence to support the claim, but it denied the motion to strike the \$15,663 awarded in damages for the *other* causes of action. As for those identical awards, the court reasoned that the special-verdict forms instructed jurors not to duplicate any damages, and defendants had failed to overcome the presumption that the jury followed that instruction. The trial court amended the jury's verdict to award Gadow \$340,506: the \$215,202 awarded against Payne and Giacomini, plus eight separate awards of \$15,663 against Rest and AMC Financial. The court denied the demand that Gadow elect judgment among defendants. Finally, the trial court denied the motions of Payne and Giacomini. Neither one of them has appealed.

Gadow prepared a judgment, which the trial court filed on December 14, 2011. Perhaps not realizing that the court had filed the judgment, Rest and AMC Financial objected to Gadow's "proposed" judgment on December 20. The next day, Gadow filed a notice of entry of judgment. Over the next several weeks, Rest and AMC Financial filed objections to the judgment, and they also filed a motion to vacate the judgment under Code of Civil Procedure section 663a, arguing (among other things) that all except one of Gadow's causes of action were time barred, and that some of the jury's findings were inconsistent. The trial court denied the motions on February 17, 2012, for the "reasons [stated] on the record." Again, however, the appellate record does not contain a transcript of the hearing on the motions, and there is no written record of the denial other than the court's minute order. Rest and AMC Financial timely appealed from the judgment, and Gadow cross-appealed.

II. DISCUSSION

A. *Rest and AMC Financial Fail to Establish that the Jury Awarded Duplicative Damages or Rendered Inconsistent Verdicts.*

Rest and AMC Financial argue that the jury improperly awarded duplicative damages and that two of the verdicts supporting these awards were inconsistent. They contend that these damages and verdicts were the result of the trial court improperly instructing the jury and failing to correct the verdicts after they were rendered. We address these related arguments together, and we reject them.

We begin by discussing the law governing duplicative and inconsistent awards. As a general proposition, a plaintiff may not be compensated more than once for the same injury. “Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence.” (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158.)

Not only must a jury avoid awarding duplicative damages, but its verdicts must also be consistent. Inconsistent verdicts are considered “against law” (Code Civ. Proc., § 657, subd. 6) and thus are grounds for a new trial. “A special verdict is inconsistent if there is no possibility of reconciling its findings with each other.” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357 (*Singh*)). If a verdict is inconsistent or ambiguous, the party adversely affected should “ ‘request a more formal and certain verdict. Then, if the trial judge has any doubts on the subject, he may send the jury out, under proper instructions, to correct the informal or insufficient verdict.’ [Citations.] But where no objection is made before the jury is discharged, it falls to ‘the trial judge to interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.’ [Citations.] Where the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation. [Citations.] If the verdict is hopelessly ambiguous, a reversal is required, although retrial may be limited to the issue of

damages.” (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457, fn. omitted; see also *Singh* at pp. 357-358; Code Civ. Proc., § 619 [if jury’s verdict is “informal or insufficient,” trial court may advise jury to correct it, or jury “may be again sent out”].) “ ‘Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law.’ [Citations.] ‘The appellate court is not permitted to choose between inconsistent answers.’ ” (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092; see also *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682; Code Civ. Proc., § 663, subd. 2 [party may seek to vacate judgment where it is not consistent with special verdict].) We review a special verdict de novo to determine whether its findings are inconsistent. (*Singh* at p. 358.)

In an apparent effort to guide juries in cases where damages are recoverable under multiple legal theories, the California Judicial Council added CACI No. 3934 (Damages on Multiple Legal Theories) in December 2010, less than a year before the trial in this case. (See Directions for Use and Sources and Authority, 5 Cal. Forms of Jury Instns. (2013 ed.) foll. CACI No. 3934, pp. 39-104.3 to 39-104.5, citing *Roby, supra*, 47 Cal.4th 686; *Tavaglione v. Billings, supra*, 4 Cal.4th 1150; *Singh, supra*, 186 Cal.App.4th 338.) This instruction is for cases, such as this one, that involve multiple causes of action seeking different recoveries under different legal theories, where potential damages may be different on some or all of those theories.³ (5 Cal. Forms of Jury Instns., *supra*, at p. 39-104.3.)

³ CACI No. 3934 provides: “[*Name of plaintiff*] seeks damages from [*name of defendant*] under more than one legal theory. However, each item of damages may be awarded only once, regardless of the number of legal theories alleged. [¶] You will be asked to decide whether [*name of defendant*] is liable to [*name of plaintiff*] under the following legal theories [*list*]: [¶] 1. [*e.g., breach of employment contract*]; [¶] 2. [*e.g., wrongful termination in violation of public policy*]; [¶] 3. [*continue*]. [¶] The following items of damages are recoverable only once under all of the above legal theories: [¶] 1. [*e.g., lost past income*]; [¶] 2. [*e.g., medical expenses*]; [¶] 3. [*continue*].” (Italics in original, boldface omitted.)

CACI 3934, however, was not used in this case. If it had been used, either in whole or in part, it might have helped to avoid some of the issues that Rest and AMC Financial complain about on appeal. The directions accompanying the instruction state that the full instruction need not be used if the same damages are recoverable on all causes of action, which Rest and AMC Financial apparently claim to be the case here. (See Directions for Use, 5 Cal. Forms of Jury Instns., *supra*, foll. CACI No. 3934, p. 39-104.3.) If the full instruction had been used, however, it would have identified specific types of damages recoverable under each legal theory (such as the amount of commissions and the total outstanding loan figure), leaving no room for ambiguity in determining the jury's award. The directions also state that where the same damages are recoverable on all causes of action, the opening paragraph of the instruction may be useful because it informs jurors that each item of damages may be awarded only once, regardless of the number of legal theories. (*Ibid.*) If this part of the instruction had been used, the instruction would have informed jurors explicitly that each item of damages could be awarded only once, a well-settled legal principle that indisputably applies in this case.

But neither side requested the instruction, and it was not given on the court's own initiative. At one point in *posttrial* briefing, Rest and AMC Financial argued that the jury's award was contrary to CACI No. 3934, but they have never explained why they failed to ask for it when the instructions were given. And on appeal they waited until their reply brief to argue that their failure to object to the instructions and verdict forms that *were* used did not amount to waiver. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3 [points raised for first time in reply brief not considered absent good cause].) While we recognize that it might have been better to have used CACI No. 3934,

we cannot conclude that the parties were required to request it or that the damage awards must be reversed because the agreed-upon forms were used instead.⁴

Rest and AMC Financial contend that the fact the jury awarded the same amount of damages (\$15,663) on multiple claims is itself evidence of impermissible duplicative damages. They point out that the jury was instructed to answer the questions on the verdict forms in the order in which they appeared. (CACI No. 5012.) The final question for the first cause of action simply asked for the amount of Gadow's damages, and it was not until the *second and subsequent* causes of action that jurors were directed on the verdict form not to duplicate damages. Based on this, Rest and AMC reason that if the jury had followed the instructions, it would have entered Gadow's total damages on the first verdict form, and it would have then either entered zero on the forms that followed or asked the court for "further instructions." In other words, they argue that if the jury had truly meant to set damages against Rest and AMC Financial at \$140,967 (nine separate awards of \$15,663), the jury was required to have entered the amount of \$140,967 in answering the questions on the first cause of action.

We are not persuaded. While it is true that the jurors were instructed to answer the questions on the verdict forms in the order they appeared, they were also told that they could "discuss the evidence and the issues to be decided in any order," and they were to "consider each question separately." Nothing prevented the jury from separately discussing all causes of action, including the need to avoid duplicating damages, *before* completing the verdict forms. We reject as speculation Rest and AMC Financial's

⁴ The trial court provided the parties with an excerpt from the California Civil Jury Instruction Companion Handbook containing an example of a special-verdict form to be used where there are multiple claims. Although we have no way of knowing what exactly was provided to the parties because the excerpt is not contained in the appellate record, we note that the 2009-2010 version of Retired Justice Elizabeth Baron's handbook contains a sample verdict with wording notably similar to what was used here. Justice Baron endorsed a verdict form that told jurors: "In determining damages, you are not to duplicate any damages . . . awarded on the [previous] claim [considered]." (Baron, Cal. Civil Jury Instruction Companion Handbook (2009-2010 ed.) Breach of Contract; Breach of Fiduciary Duty, § 7:2, p. 578; see also *id.* at p. 576.)

argument that the jurors “elect[ed] to impress their own rules on the completion of the [verdict] form.”

The cases relied on by Rest and AMC Financial do not compel a contrary conclusion. These cases essentially stand for the proposition that damage awards on different causes of action cannot be sustained when it is apparent from the record that they are duplicative or inconsistent. (See *Roby*, *supra*, 47 Cal.4th at pp. 702-703 [recognizing possibility of duplicative noneconomic damages because jury was instructed to assess them separately but given no direction on how to avoid possibility of overlapping damages on some causes of action]; *Tavaglione v. Billings*, *supra*, 4 Cal.4th at pp. 1156-1158 [concluding that multimillion dollar general verdict in a case involving many claims could not be sustained simply because a special verdict on one claim, awarding only a fraction of the total conferred by the general verdict, was valid]; *Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1613 [reversing an award for intentional infliction of emotional distress because the injury had been compensated in awards conferred on other claims for same conduct]; *Singh*, *supra*, 186 Cal.App.4th at p. 359 [concluding that special verdict that defendant made no misrepresentations was inconsistent with special verdict that defendant made intentional misrepresentations when both claims were based on same factual allegations]; *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 564-565 [ruling that duplicative damages were given because amount of the only damages plaintiff could have sustained was awarded on two separate counts, and jury effectively was told to award same amount on both].)

None of these cases is controlling because, unlike in those cases, the record here does not support a conclusion that the jury awarded compensation for the same wrongdoing more than once or that any of its verdicts was necessarily inconsistent. First, evidence of many wrongs—both in connection with the original mortgage and the refinanced mortgage—was presented to the jury. Given the way in which the case was pleaded and tried, we are unable with certainty to discern which of these wrongs was attributed by the jury to particular causes of action. Thus, this case is unlike those in

which the same factual allegations are relied upon by a jury to award damages on different claims. “[W]here separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories.” (*Tavaglione v. Billings, supra*, 4 Cal.4th at p. 1159.)

Second, Gadow sought nearly \$460,000 in compensation for the damages he sustained as a result of the mortgages, the various commissions Rest and AMC Financial received on the loans, and other injuries. But the jury awarded him only a portion of that request—a total of \$340,506 when combining all of the special-verdict awards. Thus, unlike in cases such as *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc., supra*, 231 Cal.App.3d at pages 564-565, there is no way to be certain that the jury was conferring multiple awards for the same wrongdoing or injury.⁵

Third, the jury was specifically told not to duplicate its damages, and any assumption that this instruction was ignored would be speculative. In short, unlike in the cases relied upon by Rest and AMC Financial, the facts and record here leave us unable to conclude with any reasonable degree of certainty that the awards provided multiple compensation for the same injury or were necessarily inconsistent.

We recognize that the special-verdict forms here were not a model of clarity, and we are aware of authority suggesting that special-verdict forms should not, as they did here, ask the jury to quantify damages for each of multiple causes of action and simply direct the jury to avoid duplicative damages without an explanation. (See *Singh, supra*, 186 Cal.App.4th at pp. 360-361 [concluding that the “better practice” when a special-verdict form is used for multiple claims is to instruct jury to consider each question

⁵ For these reasons, we reject Rest and AMC Financial’s specific claim that the trial court was required to strike the jury’s awards for intentional misrepresentation, concealment, and negligent misrepresentation. We do not agree with Rest and AMC Financial’s argument that these claims *necessarily* “all relate to and are based upon the same acts and omissions alleged to have been committed by defendant Rest and all comprise a single case of action for Fraud.”

separately and let trial court eliminate any duplicative awards after verdicts are rendered]; *Plotnik v. Meihaus*, supra, 208 Cal.App.4th at p. 1612 [under “primary rights doctrine,” improper to award damages on different counts for same wrong, even where parties took steps to avoid award of duplicative damages].) But we need not and do not resolve here whether the forms of the instructions and verdicts were improper for these reasons because Rest and AMC have not made this argument on appeal, and they failed to make it below at the time the forms were given to the jury. (*Zagami, Inc. v. James A. Crone, Inc.*, supra, 160 Cal.App.4th at p. 1093, fn. 6 [although inconsistent jury findings in special verdict not subject to waiver, party must object to *form* of verdict or risk waiver on appeal of defect].)

Having concluded that Rest and AMC Financial failed to establish that the jury’s awards were improperly duplicative, we also conclude that there was nothing improper about the way the trial court addressed the issue after it became clear during the punitive-damages phase of the trial that the parties disagreed about the total amount awarded. Rest and AMC Financial concede that it would have been inappropriate to ask jurors to explain their reasoning. (Evid. Code, § 1150, subd. (a) [evidence of jurors’ mental processes inadmissible to impeach or support verdict]; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124-1125 [evidence of jurors’ subjective reasoning inadmissible].) But they argue that the trial court should have advised jurors of the “problems with their special verdict” and then sent them “back to the jury room to resolve the problem.”

As we understand it, Rest and AMC Financial argue that under *Woodcock v. Fontana Scaffolding & Equip. Co.*, supra, 69 Cal.2d 452 and Code of Civil Procedure section 619, the trial court should have directed the jury to correct its “defective” verdict. (Boldface omitted.) This is not the approach they advocated below. Perhaps because the trial court at first seemed inclined to agree that Gadow was entitled to only “one set of damages,” Rest and AMC Financial’s attorney raised no objection when the trial court declined *Payne and Giacomini’s* request to ask the jury for clarification about the damages award. In fact, the parties appeared to accept that the *trial court* would decide,

following the submission of posttrial briefing, whether the jury had awarded duplicative damages, with Rest and AMC Financial’s counsel stating that “[o]bviously” it was “better to do a written brief.” (E.g. *Singh, supra*, 186 Cal.App.4th at p. 358 [trial court must interpret special verdict in light of jury instructions and evidence].)

In any event, Rest and AMC Financial fail to identify on appeal what specific directions jurors should have received to address any “defect” in their verdict. To the extent they contend that the court should have asked jurors whether they intended to award \$15,663 only once or multiple times, we note that the jury asked that *same question* during their deliberations on punitive damages, an indication the jurors themselves became confused after conflicting figures were discussed during closing arguments following the second phase of the trial. Although Rest and AMC Financial characterize the jury’s verdict as ambiguous, they fail to identify any “hopelessly ambiguous” inconsistency in the award of damages here (with one exception, which we address below). We appreciate that the jury’s award of the exact same monetary amount in damages for several claims cannot be readily explained by anyone who was not part of the jury’s deliberations. But there is nothing inherently *inconsistent* about those awards. Awarding Gadow \$15,663 on the cause of action for breach of fiduciary duty, for example, is not necessarily inconsistent with awarding him the same amount for intentional misrepresentation, because the jury may have been compensating Gadow for different injuries stemming from separate and independent facts. We reject Rest and AMC Financial’s argument that the trial court was required to direct the jury to clarify its

verdict because the same amount of damages was awarded on a number of causes of action.⁶

In a separate argument, Rest and AMC Financial contend that jury findings in connection with two causes of action, the aiding-and-abetting claim and the ratification claim, must be vacated because they were inconsistent. Again, we disagree.

Gadow alleged that AMC Financial was responsible for aiding and abetting Rest's breach of fiduciary duty and fraud, and the jury was so instructed. The jury found under CACI No. 3610 that AMC Financial knew that the breach and fraud were going to be committed by Rest, that AMC Financial gave Rest substantial assistance or encouragement, and that Rest's conduct was a substantial factor harming Gadow. Rest and AMC Financial contend that this finding meant that the jury found that AMC Financial knew Rest was going to harm Gadow *before* Rest did so. (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145-1146 [liability for aiding and abetting depends on proof defendant had actual knowledge of primary wrong defendant substantially assisted].)

The jury was separately instructed that Gadow claimed AMC Financial was responsible for the harm Rest caused Gadow because AMC Financial approved the conduct *after* it occurred (i.e., "ratified" it). (CACI No. 3710.) The jury found Rest intended to act on behalf of AMC Financial, that AMC Financial learned of Rest's conduct after it occurred, and that AMC Financial approved of Rest's conduct. Rest and AMC Financial contend this finding that AMC Financial learned of Rest's actions

⁶ In light of our conclusion that Rest and AMC Financial have failed to establish that the jury awarded duplicative damages, we need not address the parties' lengthy arguments about the jury foreperson's declaration submitted to explain the jury's award. Gadow devotes several pages of his opening brief in his cross-appeal to arguing why the trial court erred in striking the declaration and the portions of his attorney's declaration describing conversations with the foreperson. But we need not consider any such error because the question is moot in light of our decision sustaining the damage awards. Similarly, we need not address Rest and AMC Financial's contention that the submission of the jury foreperson's declaration amounted to attorney misconduct. And we flatly disagree with their speculative argument that the trial court might have been improperly influenced by the declaration given that it sustained their objections to it.

following the harm to Gadow is contrary to and inconsistent with the finding in connection with aiding and abetting, because “[n]o evidence was introduced at trial that there were two different fraudulent acts committed and that AMC Financial knew of and aided in the commission of one, while only learning of the other after the fact and approving of it.”

To be sure, no distinction was made at trial between acts that AMC Financial knew about in advance versus those that it did not. But the fact remains that there were *two* loan transactions at issue here, with multiple acts of alleged deception and fraud leading up to both. Thus, the jury’s findings do not necessarily conflict. It is possible that the jury concluded that AMC Financial ratified Gadow’s fraudulent acts after the first loan closed, then aided and abetted Gadow’s actions in securing the second loan. Moreover, we note that Rest and AMC Financial cite no legal authority for the proposition that liability based on both ratification as well as aiding and abetting in these circumstances is mutually exclusive *as a matter of law*. (Cf. *McChristian v. Popkin* (1946) 75 Cal.App.2d 249, 256 [if employer continues employing wrongdoer after learning of misconduct, continued employment may constitute *ratification* whereby employer becomes an *aider and abettor* subject to punitive damages].) In short, we see no reason to set aside the jury’s special verdict based on supposed duplicative or inconsistent awards.

B. Rest and AMC Financial Waived Defenses Based on Statutes of Limitation.

Rest and AMC Financial also contend that all of Gadow’s causes of action, with the exception of his claim for breach of fiduciary duty, were barred by various applicable statutes of limitation. We conclude, however, that they waived this argument by not submitting to the jury factual questions that would inform the application of the defense.

To properly plead a defense based on the statutes of limitation, a party must allege (1) facts showing that the action is time barred and indicate that the lateness of the action is being urged as a defense or (2) the specific statutory section and subdivision on which it relies. (*Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91; *Brown v. World Church*

(1969) 272 Cal.App.2d 684, 691; Code Civ. Proc., § 458.) In Rest and AMC Financial’s answer, they alleged the statutes of limitation as an affirmative defense, stating in the most general terms that Gadow’s action were “barred by the applicable statutes of limitation, including, but not limited to, Code of Civil Procedure §§ 337, 337.1, 337.15, 338, 339, 343, and Civil Code § 2079.4 and other applicable statutes of limitations” (italics added). They identify sections 338 (three-year limitations period) and 343 (four-year limitations period) again on appeal as barring various causes of action. Assuming this answer amounted to a sufficient pleading of the defense, they subsequently waived it.

“Generally, the bar of the statute of limitations is raised as an affirmative defense, *subject to proof by the defendant.*” (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174, italics added.) Code of Civil Procedure section 458 specifically provides that if an allegation that a cause of action is barred by the statutes of limitation is controverted, “the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.” Here, whether Gadow’s claims were time barred was clearly controverted, as the trial court ruled that there were disputed issues about when Gadow learned of various issues and denied a motion for nonsuit on this basis. Despite being specifically told by the trial court that the parties could argue the issue to the jury, they did not do so. Nor did they request a relevant jury instruction, such as CACI No. 454 (Affirmative Defense—Statute of Limitations), which asks jurors to determine if a plaintiff’s harm occurred before a certain date. (See also CACI No. 1925 (Affirmative Defense—Statute of Limitations—Fraud or Mistake) [to prove lawsuit time barred, defendant must prove harm occurred before certain date, but lawsuit still timely if plaintiff establishes reasonably delayed discovery].) Under these circumstances, the defense is waived. (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1232 [if party thought claims were time barred, “it was required to offer the appropriate jury instructions to the trial court in order to preserve the issue for appeal”].)

We are not persuaded by the argument, raised in Rest and AMC Financial’s reply brief, that we are obligated to review de novo the trial court’s ruling on their posttrial statutes-of-limitation motion because “the jury gave the issue [no] consideration

whatever.” They rely on *M&F Fishing, Inc. v. Sea-Pac Ins. Managers, Inc.* (2012) 202 Cal.App.4th 1509, which held that although resolution of a defense based on the statutes of limitation is typically a question of fact for the jury, a reviewing court may determine the issue as a matter of law when the facts are susceptible of only one legitimate inference. (*Id.* at p. 1531.) But in *M&F Fishing*, unlike here, the defense was litigated in the trial court and thus not waived. (*Id.* at pp. 1530-1531.) Had Rest and AMC Financial believed that the timeliness of Gadow’s claims could be decided as a matter of law, they could have raised the issue by way of a demurrer or motion for summary judgment. Having failed to do so, and having subsequently failed to submit factual questions to the jury that would have informed the application of the defense, such as those related to when Gadow’s causes of action accrued, we consider the defense to be waived. We therefore reject this claim of error.

C. Rest and AMC Financial Inadequately Raise Several Issues on Appeal.

Finally, we reject several claims of error that Rest and AMC Financial present in a perfunctory manner and without adequate legal support. To begin with, we decline to address arguments in which Rest and AMC Financial fail to make the necessary connection between an alleged error, how the error may have prejudiced them, and how the facts demonstrate that a reversal is required. (*Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, 658, fn. 2.) This includes their single-sentence argument that “the \$215,202 award for ‘ostensible agency’ against Payne and Giacomini has no substantial evidence to support it and cannot be imputed to Appellants.”

As for the amount of damages awarded, Rest and AMC Financial apparently claim that the jury had no choice but to award damages in the amount of any combination of the various commissions earned on the relevant loan transactions, the consulting fee paid to Rest, and the outstanding amount on the loan. They contend that the jury’s awards “cannot remain as a matter of law,” because a single award of \$15,663 is “very close” to the combined commissions on the first loan (\$15,633). They cite no authority, however, for the proposition that we may reverse a judgment where the damages do not add up to a

specific sum. It was of course the jury's function to set the amount of damages, and we will not disturb the award. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 820 [amount of damages is fact question, first committed to jury's discretion]; *Souza v. Richardson* (1960) 177 Cal.App.2d 93, 95 [same].)

In an argument that appears to be at odds with their position on the applicability of the statutes of limitation, Rest and AMC Financial also contend that Gadow's lawsuit was actually *premature* because payments on the loan on his house were current, and he could not recover for money that was not due at the time suit was filed. They simply ignore the trial court's ruling, with which we agree, that Gadow claimed damages because his previously unencumbered home now has a large mortgage on it. In any event, we may disregard their conclusory argument that the denial of their motion for nonsuit on this ground "was prejudicial error on the trial court's part," because it is not adequately supported by legal authority. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.)

Finally, we also treat as waived the undeveloped argument that the trial court erred in denying Rest and AMC Financial's motion for nonsuit on the breach-of-fiduciary-duty cause of action because the testimony of their expert witness was the only evidence presented on the applicable standard of care and the expert opined that there had been no breach of it. (*People v. Jones* (1998) 17 Cal.4th 279, 304 [claims presented "perfunctorily and without supporting argument" may be rejected in similar fashion].) In any event, the jury was not obligated to accept the testimony just because it was presented on these issues. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632.)

III. DISPOSITION

The judgment is affirmed. Gadow shall recover his costs on appeal.

Humes, J.

We concur:

Ruvolo, P.J.

Reardon, J.