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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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BRIAN ALTMAN et al.,

Plaintiffs and Appellants,

v.

JOHN MOURIER CONSTRUCTION, INC.,

Defendant and Appellant.

C064340

(Super. Ct. No. 06AS01823)

Plaintiffs, homeowners Brian Altman et al.,<sup>1</sup> filed suit against home designer/builder, defendant John Mourier Construction, Inc. (JMC), alleging that design defects and construction defects of their homes allowed water intrusion causing damage. Plaintiffs alleged theories of strict products liability (design defect), breach of express and implied warranty, breach of contract, and negligence.

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<sup>1</sup> Plaintiffs are Brian and Kristen Altman at 2073 Tarbolton Circle in Folsom, Bruce and Christine Magnani at 2045 Tarbolton Circle, Richard and Suzanne Sparacio at 2064 Tarbolton Circle, Randolph Pedigo and Lisa Senter at 2128 Tarbolton Circle, Aaron and Gwen Cullen at 1976 Tarbolton Circle, and Steve and Margaret Fairchild at 1964 Tarbolton Circle.

By special verdicts, the jury rejected the strict liability and warranty claims, finding the houses did *not* fail to perform “structurally” as an ordinary consumer would have expected or as represented. The jury nevertheless found JMC breached contracts and was negligent in the design *or* construction of the houses. The jury awarded plaintiffs damages for negligence and breach of contract.

In a bifurcated bench trial, the trial court awarded plaintiffs some but not all of their investigative costs as damages for successfully prosecuting a tort claim in a construction defect case pursuant to *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611 (*Stearman*).

JMC appeals from the judgment, arguing evidentiary error, insufficiency of the evidence, inconsistency of the verdicts, and duplicative damages. JMC also appeals from the trial court’s refusal to offset the judgment by an amount plaintiffs received from subcontractors’ good faith settlements. (Code Civ. Proc., § 877.)<sup>2</sup>

Plaintiffs separately appeal from the trial court’s partial denial of investigative costs.

We reverse that portion of the judgment that awarded damages for breach of contract, because there was no substantial evidence of contract. We affirm the trial court’s ruling regarding investigative costs. We otherwise affirm the judgment.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **Plaintiffs’ Claims**

In May 2006, plaintiffs filed this lawsuit against JMC and subcontractors who are not parties to this appeal.<sup>3</sup> Some plaintiffs bought their homes directly from JMC

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<sup>2</sup> Undesignated statutory references are to the Code of Civil Procedure.

<sup>3</sup> Subcontractors (Alliance Building Products; Beutler Corporation; Cedar Valley Concrete; Harris Plumbing; H&M Roofing; Jose Sandoval dba JS Painting; Merzon Industries dba Atmos Corporation; Paint Works, Inc.; Philips Alarm; Philips Products,

between 2000 and 2001, before the homes were completed, after seeing model homes. These plaintiffs asserted claims for strict products liability, breach of express warranty, breach of implied warranty, breach of contract, and negligence. The plaintiffs who bought their homes from original buyers sued JMC for strict products liability and negligence only.

### **Plaintiffs' Evidence**

Plaintiffs presented evidence of *design* defects and *construction* defects by JMC, resulting in water intrusion causing cracks and leaks. *Design* defects involved wind deflection standards and framing. *Construction* defects involved framing and roofing. Thus, there was an overlap of framing issues -- some attributed to *design* defect and some attributed to *construction/installation* defects. Roofing was presented as a separate issue, with separate witnesses and repair costs.

Plaintiffs' expert architect and general contractor Norbert Lohse opined the design plans were defective in calling for wind deflection criteria of "L [length] over 240" (exposure B) which is 50 percent less stiff than L over 360 (exposure C). Exposure C was required to make the buildings stiff enough so that wind would not cause the framing to bow. Lohse said the deficient wind deflection criteria resulted in water intrusion and cracks in the stucco. Lohse also considered the design plans defective in allowing "conventional" braced framing of the second floors, rather than "engineered" framing. The framing is too weak for the wind load. Lohse opined that plywood shear panels were improperly installed with inadequate spacing to allow the wood to expand and contract in response to movement and moisture; he described this as a failure in both design and construction. Lohse also said nails were placed too close to the edge of the plywood,

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Inc.; Sacramento Insulation Contractors; Sherwood Tile Company, Inc.; Stucco Works, Inc.; and Vasilou Construction) were brought in as doe defendants and/or as cross-defendants in JMC's cross-complaint, but the subcontractors obtained court approval of good faith settlements or were otherwise dismissed.

which can happen if workers are not paying attention to what they are doing. Lohse also opined the roofs were improperly installed, with inadequate stapling, which allowed water to get under the roofs. Lohse attributed stucco cracks to the fact the buildings were failing, and “The structural components of the building are failing due to poor design *and* poor construction of the framing.” (Italics added.)

Plaintiffs also presented, as an expert in building standards, George Thomas, the chief building safety official for the City of Pleasanton, who does separate consulting work as a civil engineer. He said building officials do not check everything on design plans for multiple-unit developments; they rely on the engineers who signed and stamped the plans. He opined the design plans used the wrong wind deflection criteria and erroneously called for conventional braced framing on the second floors. As a result, the buildings are too flexible, causing brittle materials like stucco to break.

Plaintiffs’ expert on repair costs, William Thomas, developed two sets of repair estimates, excluding the roof problems, one for wind exposure B and the other for wind exposure C. The total cost for repairs, excluding the roofs, for all plaintiffs was \$1,332,592.58 for wind exposure B, and \$1,600,607.34 for wind exposure C.

Plaintiffs presented evidence that the total repair cost for all *roofs* was \$124,670.85. At trial, JMC’s own expert agreed the roofs needed repair, but disputed what needed to be done to repair the roofs and the cost.

The express warranty admitted into evidence said, “your new home . . . represents the finest achievement in workmanship and design. It is built to last and complies with the rigid building and material standard of [JMC]. [¶] . . . [JMC’s one-year warranty] will warrant that we have built your home in compliance with local, state, and federal codes. We will correct, upon notification, defects in your home during the first year of your ownership. [¶] JMC Homes is noted for quality. . . .” The warranty documents also stated, however, that JMC was not responsible for wind damage beyond its control,

damaged roof tiles, or hairline cracks in stucco, and referred homeowners to the manufacturer's warranty for window problems.

### **Defendant's Evidence**

JMC presented its own expert engineer, Stephen Pelham, who opined the wind exposure and framing were fine in design and installation and did not cause the stucco cracks. As we discuss *post*, the trial court prevented the defense from calling as a witness the expert of the stucco subcontractor who settled out of the case.

### **Jury Instructions**

The parties stipulated to the instructions.

The trial court instructed on strict liability -- that plaintiffs claimed JMC “defectively designed and constructed”<sup>4</sup> the houses; that each plaintiff could recover under strict liability when a defect in one component of the house causes injury to other components of the house, even though the damage is not to persons or property apart from the structure; and that “[e]ach plaintiff claims their home’s design was defective because the homes did not perform as an ordinary consumer would have expected it to perform.”

The court instructed on liability for *design* defects: “Each plaintiff claims that their home was improperly *designed and constructed* by [JMC], which caused the defects and damages alleged. In determining if [JMC] is liable, you should decide if each plaintiff has proved that the *design* was improper. In deciding whether the homes were designed improperly you may consider the actions of the [JMC] design department and/or the conduct of the engineers hired by [JMC].” (Italics added.)

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<sup>4</sup> Although the instruction mentioned both design *and construction*, the title of one of the instructions specified “DESIGN DEFECT--CONSUMER EXPECTATION TEST” (italics added) and the jury verdict form said “STRICT PRODUCTS LIABILITY -- DESIGN DEFECT” (italics added).

## **Jury Deliberation and Verdicts**

During deliberations, the jurors asked if they could award damages for incidentals and were told yes.

In special verdicts -- approved by counsel for both sides -- the jury found as follows as to the individual homes purchased directly from JMC:

### “STRICT PRODUCTS LIABILITY - DESIGN DEFECT

“1. Did [JMC] manufacture or sell the house?

“X Yes \_\_\_ No

“If your answer to question 1 yes, then answer question 2. . . .

“2. Did the house fail to structurally perform as an ordinary consumer would have expected?

“\_\_\_ Yes X No

“. . . If you answered no, then go to the next section -- Implied Warranty.

[¶] . . . [¶]

### “IMPLIED WARRANTY

“6. Did MR. & MRS. ALTMAN buy the house from [JMC]?

“X Yes \_\_\_ No

“If your answer to question 6 is yes, then answer question 7. . . .

“7. At the time of purchase, did [JMC] know that MR. & MRS. ALTMAN were relying on [JMC’s] skill and judgment to design or structurally design or construct the house that was suitable for the particular purpose?

“X Yes \_\_\_ No

“If your answer to question 7 is yes, then answer question 8. . . .

“8. Did MR. & MRS. ALTMAN justifiably rely on [JMC’s] skill and judgment?

“X Yes \_\_\_ No

“If your answer to question 8 is yes, then answer question 9. . . .

“9. Was the failure of the house to be structurally suitable a substantial factor in causing harm to MR. & MRS. ALTMAN?

“  Yes  No

“ . . . If you answered no, then go to the next section -- Express Warranty.

[¶] . . . [¶]

“EXPRESS WARRANTY

“11. Did [JMC] warrant to MR. & MRS. ALTMAN the home was properly designed or structurally designed or constructed?

“  Yes  No

“If your answer to question 11 is yes, then answer question 12. . . .

“12. Did MR. & MRS. ALTMAN rely on [JMC’s] design or structural design or construction in deciding to purchase the house?

“  Yes  No

“If your answer to question 12 is yes, then answer question 13. . . .

“13. Did the house fail to structurally perform as represented?

“  Yes  No

“ . . . f you answered no, then go to the next section -- Breach of Contract.

[¶] . . . [¶]

“BREACH OF CONTRACT

“[¶] . . . [¶]

“16. Did MR. & MRS. ALTMAN and [JMC] enter into a contract?

“  Yes  No

“If your answer to question 16 is yes, then answer question 17. . . .

“17. Did [JMC] fail to do something that the contract required it to do in the design or structural design or construction of the house?

“  Yes  No

“If your answer to question 17 is yes, then answer question 18. . . .

“18. Were MR. & MRS. ALTMAN harmed by that failure?

“X Yes \_\_\_ No

“If your answer to question 18 is yes, then answer question 19. . . .

“19. What are MR. & MRS. ALTMAN’s damages?

“a. Economic loss (cost of repair) \$24878.16.

“CONTINUE TO THE NEXT SECTION

“NEGLIGENCE

“20. Was [JMC] negligent in the design or structural design *or construction* of the home owned by MR. & MRS. ALTMAN?<sup>[5]</sup> [Italics added.]

“X Yes \_\_\_ No

“If your answer to question 20 is yes, then answer question 21. . . .

“21. Was [JMC’s] negligence a substantial factor in causing harm to MR. & MRS. ALTMAN?

“X Yes \_\_\_ No

“If your answer to question 21 is yes, then answer question 22. . . .

“22. What are MR. & MRS. ALTMAN’s total damages?

“a) Economic loss (cost of repair) \$25321.25.”

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<sup>5</sup> No jury instruction explained the difference between “design” and “structural design.” Jeffrey Hofmann, the engineer hired by JMC, testified he did the “structural design,” meaning “I sized beams, designed the buildings for the wind and earthquake loads to resist those. Floor joice [*sic*] and supporting the foundations.” Plaintiffs’ opposition to posttrial motions urged the following distinction between design, structural design, and construction: “With regard to design Plaintiffs presented evidence that JMC failed to prepare the plans to include specifically required details which would have kept the walls from leaking, the stucco from cracking, the windows from gapping and leaking and the roof from leaking. With regard to structural design the Plaintiffs presented evidence as to proper calculation for the stucco system, the wall strength, the wind zone designation and the placement of structural supports. With regard to construction, plaintiffs presented evidence with regard to failure by JMC in the framing of the homes and the roofing and flashing of the homes.”

The jury returned the same findings for the other plaintiffs, but with differing amounts of damages.

Thus, the jury found against plaintiffs on the claims for strict products liability and breach of warranty, finding the houses did not fail “to structurally perform” as an ordinary consumer would expect or as represented, but the jury found in favor of plaintiffs for breach of contract and negligence. Each special verdict awarded an amount for contract damages for “Economic loss (cost of repair)” and a different amount for negligence damages for “Economic loss (cost of repair).”

As for the other plaintiffs, the jury awarded the following damages:

For Bruce and Christine Magnani, the jury awarded \$35,572.45 for contract damages and \$35,252.13 for negligence damages.

For Richard and Suzanne Sparacio, the jury awarded \$24,248.56 in contract damages and \$29,252.20 for negligence damages.

For Randolph Pedigo and Lisa Senter, the jury awarded \$13,454.41 in contract damages and \$25,303.88 for negligence damages.

For Aaron and Gwen Cullen, the special verdict covered only (1) strict liability -- design defect, which the jury rejected with a finding that the house did not fail to perform structurally as an ordinary consumer would expect, and (2) negligence in the design or structural design or construction of the home, which the jury found true and awarded \$29,225.20 in damages for economic loss (cost of repair).

For Steve and Margaret Fairchild, the jury found no strict liability, but did find liability for negligence with damages of \$6,093.34, corrected to \$20,755.60 by interlineation.

In November 2009, the trial court entered a “JUDGMENT ON VERDICT,” stating the trial court accepted the verdict rendered by the jury, for plaintiffs to recover from JMC “the sum of (See attached individual verdict forms), with interest . . . .”

JMC filed motions for judgment notwithstanding the verdict (JNOV) (§ 629), for a new trial on damages (§ 657), to vacate the judgment and enter a new judgment (§ 663), and to set off the judgment by the settlement amounts paid by the settling subcontractors (§ 877). JMC claimed, among other things, that the jury's verdicts were inconsistent in that they relieved JMC of liability for strict products liability and breach of warranty but found JMC liable for breach of contract and negligence. JMC acknowledged plaintiffs presented the roofs as distinct from the other problems. JMC argued the distinction was between (1) "[s]tructural design and construction" and (2) "[r]oof construction." JMC asked the trial court to enter judgment in its favor as to the breach of contract cause of action, or at least to reduce the judgment to \$124,670.85 for the roof repairs, though JMC argued plaintiffs could not recover roof repairs under a negligence theory because the "economic loss rule" requires construction defects to cause damage to other property in order to warrant an award.

Plaintiffs opposed JMC's motions and filed their own motion for new trial regarding damages. Plaintiffs opposed the setoff motion on the ground that the jury heard evidence *only* of damages not covered by the settlements.

The trial court denied the posttrial motions. The court's written ruling denying setoff said the purpose of setoff under section 877 is to prevent double recovery, which was not at issue here, because the subcontractors' settlements were for claims different than the claims that were tried to this jury. As to the other motions, the trial court said the verdicts were not inconsistent, because the jury could find that despite an absence of *design* defects, there were problems that were not design defects. Notably, at the hearing on the motions, JMC's attorney admitted that JMC's own expert "agreed there are roof problems," though he disagreed with what repairs were required and the cost. JMC's counsel also admitted the need for roof work in closing argument to the jury. *Although the jury awarded more than the amount requested by plaintiffs for roof repairs, the trial court indicated the jury may have found some of the nonroof problems to be defects in*

*construction rather than defects in design.* The court stated there was no inconsistency between the jury finding the houses did not fail “to structurally perform” for the warranty claims, and the jury award for construction defects in the contract and negligence claims. The court observed the contract and negligence verdicts referred not only to “structural” (design) defects, but to “structural design *or construction.*” (Italics added.)

Meanwhile, plaintiffs sought to recover investigative costs of \$287,195.11 as damages, pursuant to *Stearman*. Pursuant to stipulation, the trial court conducted a bench trial on declarations and in April 2010 issued a ruling awarding plaintiffs only \$82,334.

An amended judgment filed May 7, 2010 reflected the November 2009 judgment awarding \$263,263.84 to plaintiffs, and added investigation costs of \$82,334, plus other costs of \$14,685.53.

JMC appeals from the amended judgment and the denial of its posttrial motions.

Plaintiffs appeal from the postjudgment order denying in part their *Stearman* motion.

## **DISCUSSION**

### **I. JMC’s Appeal**

JMC raises a variety of contentions -- (1) evidentiary error; (2) no substantial evidence supports the award for breach of contract; (3) the jury awarded double recovery for contract and tort; (4) the verdicts are inconsistent in awarding damages despite jury findings that the houses did not fail to perform structurally; (5) there is no substantial evidence the roof problems caused damage to other parts of the house to support the negligence award, as assertedly required by the “economic loss rule”; and (6) the trial court declined a setoff for the subcontractors’ good faith settlements.

We conclude the contract award must be reversed due to insufficient evidence of a contract. We conclude plaintiffs’ other contentions do not warrant reversal.

## A. Claims of Evidentiary Error

### 1. Exclusion of Evidence

JMC argues the trial court improperly refused to allow JMC to offer evidence of plaintiffs' settlements with the subcontractors or to show the stucco subcontractor as an alternate cause for the damages. Assuming the matter is not forfeited, as urged by plaintiffs,<sup>6</sup> we conclude JMC fails to meet its burden to demonstrate grounds for reversal.

#### a. Background

Before trial, plaintiffs' counsel submitted a declaration in connection with the stucco subcontractor's motion for good faith settlement. Plaintiffs' counsel attested plaintiffs would not assert any claims against JMC for damages arising out of the work performed by Stucco Works, Inc., and the only issues at trial would be unresolved claims caused by JMC or nonsettling subcontractors.<sup>7</sup> The trial court order approving the stucco subcontractor's good faith settlement for \$85,000 stated, "Plaintiff[s] are precluded from raising at trial any issues pertaining to stucco mix, curing, texture, or anything to do with stucco installation or any other work performed by Stucco Works. However, plaintiff[s] [are] not precluded from raising at trial issues of stucco cracks that may have resulted from other work, such as grading or framing."<sup>8</sup>

In motion in limine No. 15 (MIL 15), JMC sought to preclude "all parties and their attorneys" and "any party" from introducing evidence of defects for which plaintiffs had

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<sup>6</sup> In response to JMC's claim of evidentiary error, plaintiffs respond with a non sequitur that JMC never requested a jury instruction regarding prior settlements.

<sup>7</sup> The declaration spoke of homes of "the undersigned," but the only signature in our record is that of the homeowners' attorney, not the homeowners. The attorney also declared an intent at that time to inform the ultimate trier of fact that plaintiffs settled with Stucco Works, Inc., and was not claiming any damages resulting from its work.

<sup>8</sup> In denying an *earlier* motion for good faith settlement by Stucco Works, the trial court observed there was "no evidence of whose work caused the stucco cracks."

already been compensated in good faith settlements with subcontractors.<sup>9</sup> JMC's attorney argued, "There are stucco cracks which were related to the work of the stucco contractor that even plaintiffs' expert states there are some installation-related items that should not be in evidence in this case because they have settled." JMC's counsel agreed with the trial court that multiple actors can be responsible for the same injury, but stated, "... I still don't believe we can proceed in this trial without making sure we understand that there are ... stucco cracks attributable to contracted work that settled out of the case." Plaintiffs' attorney said his experts would testify that JMC's structural and framing deficiencies caused stucco cracks and other damage. JMC's counsel said, "I'm not so much concerned about what his experts are going to say, I'm concerned about the homeowners, who may get on the stand, talk about window leaks, talk about cracked stucco, or other things which they've already received compensation for." Plaintiffs' attorney said the homeowners would testify only about their percipient observations, not offer opinions about causation.

The trial court denied MIL 15 without prejudice.<sup>10</sup>

At trial, plaintiffs' expert, Norbert Lohse, testified he drew maps of stucco cracks - - "crack maps." The maps were not admitted into evidence, but were used during Lohse's testimony. Lohse testified the maps showed, highlighted in yellow, stucco cracks observed in 2006 or 2007 by him and his staff. The maps showed in red ink stucco cracks Lohse observed personally on July 10, 2009. Lohse opined that all of the

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<sup>9</sup> In concluding MIL 15, JMC wrote, "For the foregoing reasons, Defendant respectfully requests that the Court preclude *any party* from offering evidence or testimony of improper or defective window installation or any other settled and released issues/claims and/or any damages related to the same." (Italics added.)

<sup>10</sup> The court intended to allow the homeowners to testify about their observations of cracks and leaks, but reserved ruling in the event there was evidence related to "plumbing or concrete" work for which plaintiffs had settled.

stucco cracks about which he testified were the result of improper design and engineering and improper framing.

JMC sought to call a witness inadvertently omitted from its witness list, Alan Phillips, a general contractor, who had been a designated expert by the stucco subcontractor before the settlement. Phillips would testify that stucco cracks plaintiffs attributed to JMC were instead caused by improper stucco installation by the stucco subcontractor.

Plaintiffs objected, asserting that Phillips' testimony would be irrelevant, because "We're not allowed to provide testimony as to failures of the stucco subcontractor and any damage associated thereby. That's in fact, a jury instruction submitted by the defendants. [¶] And that it would just take up time and be prejudicial because it would distract the jury from what is relevant in the case which is the structural claims and damages associated therefrom."

JMC argued the primary issue in this case was the cause of the stucco cracks, which plaintiffs claimed were all related to the structural problems attributed to JMC, and which JMC claimed had other causes for which it was not responsible. Phillips would testify the stucco cracks resulted from poor workmanship by the stucco subcontractor.

Plaintiffs claimed JMC was trying to introduce the very same evidence it had sought to exclude in its prior motion, MIL 15. Plaintiffs' counsel said, "at numerous times throughout my case in chief I was prohibited from putting on evidence as to failures of the stucco contractor and the stucco work. [¶] We've had numerous side bars on that topic. We've had numerous objections on and off the record, and the only time I was allowed to continue on with regard to my expert witness[']s testimony and client[s'] testimony is if I was able to show the link between the failures in the framing or design that caused damage to stucco or windows or whatever else, tile and whatnot. [¶] So in my case in chief I was prohibited from putting on evidence as to failures of the stucco contractor in his work. [¶] And I was only allowed to put on evidence of damage caused

by alleged failures by JMC and its designers and engineers. [¶] And now . . . [JMC] seeks to put on evidence of that which I was prohibited.”

The trial court read aloud from the declaration of plaintiffs’ counsel in support of the stucco subcontractor’s good faith settlement -- stating that plaintiffs were not interested in advancing any argument or any claim or any entitlement to damages out of work performed by the stucco subcontractor. Plaintiffs’ counsel clarified he was fine with the prohibition against plaintiffs, because he considered evidence of the subcontractor’s fault irrelevant to the current claims, but the point was that JMC was now changing its position. If JMC was allowed to adduce evidence of failings by the stucco subcontractor, then plaintiffs would be forced to rebut the evidence and seek to void the settlement.

When the court asked the relevance of whether the stucco was properly applied, JMC’s attorney made an offer of proof that Phillips would testify that “Stucco workmanship was not up to par. . . . There are gaps in the joints of the foam boards, both vertical gaps and horizontal gaps. Those create a weak spot in the plane. Those, that allows [*sic*] the stucco to crack. [¶] There’s also the curing issues. There’s -- Mr. Lohse testified about curing issues. He testified about the lath not being properly embedded. [¶] And those are all the issues that Mr. Phillips will testify about that may be a cause of these stucco cracks. It’s the workmanship of the stucco contractor which is a potential cause. [¶] [Plaintiffs’] claim is that it’s structural. We don’t agree with that as you know. We think there [*is*] another cause, there is another cause or other causes that [*are*] resulting in stucco cracks . . . .”

JMC’s counsel pointed out he explored these other causes in the cross-examination of Lohse, who disagreed, as was to be expected. Counsel contended JMC had the right to present evidence refuting plaintiffs’ expert. Counsel said JMC was not seeking indemnity from the stucco subcontractor, and its cross-complaint against the stucco subcontractor had been dismissed. The attorney for the stucco subcontractor

announced her presence in the courtroom and said that, despite the full dismissal of her client on both the complaint and cross-complaint, she received an e-mail from plaintiffs' counsel threatening to sue the stucco subcontractor if the trial court allowed the stucco expert to testify.

The trial court asked if Phillips would testify to an opinion about whether the cracks were related at all to the engineering. JMC's attorney said yes. Phillips was not an engineer, had not been retained to evaluate the structural components, and did not study the framing. But he would testify that he did not see any structural reason for the stucco cracks and therefore did not recommend that his client obtain a structural analysis. JMC's attorney argued the good faith settlement precluded *plaintiffs* from presenting any claims relative to the stucco subcontractor's work, but it did not preclude the *defense* from doing so. JMC's attorney said the good faith settlement was between plaintiffs and the stucco subcontractor only; however, JMC's attorney conceded that JMC reached its own settlement of its indemnity cross-complaint against the stucco subcontractor and released the stucco subcontractor from any indemnity claim.

Plaintiffs' counsel argued that, since Phillips did not do any structural analysis, he could not say that structural issues did not cause cracks. Plaintiffs argued the court should exclude his testimony under Evidence Code section 352 as more prejudicial than probative. It had minimal probative value due to Phillips' limited qualifications, and it would require plaintiffs to call rebuttal witnesses.

Defense counsel said that, after calling Phillips to testify, he would have the engineer, Mr. Pelham, testify about structural integrity, that the houses are not moving such as will result in the damages as described by plaintiffs.

The trial court granted plaintiffs' motion to exclude Phillips as a witness, not because of his omission from the witness list, but in an exercise of the trial court's discretion under Evidence Code section 352. The court ruled that the testimony would be time-consuming, confusing and irrelevant given the stucco subcontractor's good faith

settlement barring plaintiffs from introducing evidence concerning the stucco contractor's workmanship and because Phillips was not an engineer who could testify about the framing. The court further ruled that it was not going to have a "mini-trial" about the application of the stucco and the materials used. As for the good faith settlement, the trial court further stated, "it seems fundamentally unfair to preclude one party from introducing evidence and then allowing another party to do the opposite, that is, in light of the good faith settlement order previously issued by the law and motion Judge."

**b. Analysis**

JMC's complaint on appeal is that the jury heard evidence about damages for which plaintiffs had been compensated by the subcontractors' settlements, but JMC was not allowed to tell the jury that plaintiffs had already been compensated for these particular damages.

Even assuming JMC did not forfeit the contention, e.g., by stating in the trial court that its only concern was about homeowner testimony rather than expert testimony, JMC fails to demonstrate grounds for reversal.

The standard of review for a trial court's ruling to exclude evidence under Evidence Code section 352 is abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

Some cracks were caused by the stucco subcontractor; some cracks were caused by JMC's defective installation of the framing.<sup>11</sup> Plaintiffs put on evidence of the cracks which, according to plaintiffs' witnesses, were all caused by JMC.<sup>12</sup> JMC fails to show

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<sup>11</sup> We discount any possibility that cracks were caused by defective *design*, because the jury rejected that theory of liability.

<sup>12</sup> During the in limine hearing on MIL 15, counsel for JMC drew the following analogy: "[I]t's like . . . if they have two broken arms, the right arm settles out of the case, the left arm is still broken, why can you talk about the right arm anymore? It's settled."

its proposed evidence would rebut plaintiffs' expert. JMC wanted to call Phillips, but his area of expertise was limited to stucco installation. JMC's counsel admitted to the trial court that Phillips was not an engineer and had not been retained to evaluate the structure of the homes. The best JMC could offer was that Phillips did not see any reason to recommend that his client, the stucco contractor, obtain a structural analysis.

Accordingly, JMC failed to show that Phillips could rebut the testimony of plaintiffs' expert that the crack maps he drew were of cracks caused by JMC.

We observe that, during JMC's cross-examination of plaintiffs' expert, George Thomas, JMC's counsel asked if the witness was aware of Alan Phillips, the stucco expert. The witness said he had heard the name. JMC's counsel asked, "is it fair to say, you would agree with me that some of the cracks are resulting from the work installing the stucco by the stucco contractor?" The trial court sustained plaintiffs' objection. Nevertheless, the witness was allowed to testify that he did not believe all of the cracks were the result of building movement; he assumed there were other causes. The witness also testified that it is highly unusual to have cracks in the one-coat stucco material (a fiber-reinforced proprietary material with Elastomeric paint) specified in the plans in this case, as long as the stucco was installed correctly. JMC's counsel asked, without objection: "[I]f there is a possibility, as you have acknowledged, that some of the cracks may not be the result of building movement, doesn't that suggest that perhaps the stucco installation wasn't exactly per the documents you have just referenced [the plans]?" The witness said, "I didn't see cracks that I could attribute to poor installation, but that is why I left it open that there is a possibility that there are other cracks that aren't related to building movement."

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Extending counsel's analogy, the evidence suggests that the plaintiffs' experts testified about the various fractures (cracks) to the left arm, not other fractures to the right arm.

This testimony supports a conclusion that the cracks about which plaintiffs' experts testified were cracks attributable to JMC, but those were not the only cracks. We observe there was testimony about different types of cracks having different causes.

JMC's counsel also asked Thomas if a gap present in the joint of a horizontal foam board could be the cause of stucco cracks on these houses. The trial court overruled plaintiffs' objection, and Thomas answered, "The foam board is not a structural member, and although cracks can occur at those levels, it's not causing -- it's not causing cracking unless there is building movement." The witness did not believe that the gap in itself could result in any cracking of the stucco. The stucco fills the gap, making that location thicker and stronger. It does, however, create a discontinuity, "[s]o if the building moves, it cracks at that location. Like having a little bulge, it's going to be more rigid. The force will be there, and it will crack parallel to that thicker portion of the stucco."

We conclude JMC fails to demonstrate that plaintiffs put on evidence of damages for which plaintiffs had already been compensated. We further conclude that the trial court did not abuse its discretion in precluding Phillips' testimony.

## **2. Contention that Jury Saw Excluded Evidence -- Exhibit 36**

JMC complains the trial court let the jury see excluded portions of Exhibit 36 ("PRELIMINARY LIST OF CONSTRUCTION PROBLEMS with RECOMMENDED REPAIRS"), by sending the entire exhibit to the jury deliberation room without redacting portions for which the trial court had sustained JMC's evidentiary objections. However, JMC fails to prove that the entire exhibit went into the jury room. JMC relies on the fact that, when asked to produce the exhibit for this appeal, plaintiffs produced the entire document. This does not prove the entire document went into the jury room. The reporter's transcript shows the trial court, in ruling on which exhibits would go to the jury room, said, ". . . Trial Exhibit number 36, but limited to pages -- the cover page, pages 16 through 18 and pages 22 through 46." We presume that official duty was regularly performed. (Evid. Code, § 664.)

Moreover, even assuming for the sake of argument that the entire exhibit went into the jury room, JMC fails to show any possible prejudice, as required by California Constitution, article VI, section 13 (no judgment shall be set aside for improper admission of evidence unless the error “resulted in a miscarriage of justice”) and Evidence Code section 353.<sup>13</sup> JMC merely says, without explanation, that the excluded portions contained plaintiffs’ expert opinions, fact statements, building code interpretations, and other hearsay relating to issues not cross-examined or argued by JMC because of the trial court’s ruling.

We conclude JMC fails to show grounds for reversal based on Exhibit 36.

### **B. Evidence of Contract**

JMC argues no substantial evidence supports the awards for breach of contract because there was no evidence of the existence and terms of any written contract, and the trial court should have granted JMC’s motion for JNOV (§ 629)<sup>14</sup> as to the breach of contract claims. We agree.

“Where appropriate, a partial JNOV may be granted.” (*Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510, italics omitted.) In deciding a motion for JNOV, the trial court cannot reweigh the evidence or witness credibility. (*Ibid.*) A motion for JNOV may be granted “ ‘only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence

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<sup>13</sup> Evidence Code section 353 says a verdict shall not be set aside, nor a judgment reversed, on the ground of erroneous admission of evidence unless “(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.”

<sup>14</sup> Section 629, subdivision (a) provides in part, “The court, before the expiration of its power to rule on a motion for a new trial . . . shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made.”

to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.’ ” (*Ibid.*) On review, we must resolve any conflict in the evidence, and draw all reasonable inferences in favor of the jury’s verdict. (*Ibid.*)

A judgment awarding breach of contract damages to a plaintiff must be reversed where there is no substantial evidence of a contract. (*Sublett v. Henry’s Turk & Taylor Lunch* (1942) 21 Cal.2d 273, 276-277.) Additionally, a trial court errs in denying a JNOV on a breach of contract action where the evidence is insufficient to establish a contract. (*Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1326-1328.)

Here, plaintiffs’ complaint alleged a written contract, consistent with the requirement that contracts for the sale of real property must be in writing. (Civ. Code, § 1624, subd. (a)(3).) To prevail on their claim for breach of contract, plaintiffs had to provide the written contracts or, under certain circumstances, admissible oral testimony as to their contents. (Evid. Code, §§ 1520-1523; Code Civ. Proc., § 1856; *Prato-Morrison v. Doe* (2002) 103 Cal.App.4th 222, 230.) Plaintiffs did not submit the contracts into evidence or justify their absence; nor did plaintiffs provide any evidence regarding contract terms allegedly breached.

On appeal, plaintiffs respond that a single page labeled “HOME WARRANTY” is “the portion of the written agreement which was entered into evidence at trial, which provides substantial evidence to support the jury’s verdict for breach of contract.” We disagree. The single page states in part: “We want you to be happy in your new home. It represents the finest achievement in workmanship and design. It is built to last and complies with the rigid building and material standard of [JMC]. [¶] At the close of escrow you will receive a one year warranty. This will warrant that we have built your home in compliance with local, state, and federal codes. We will correct, upon notification, defects in your home during the first year of your ownership. [¶] JMC Homes is noted for quality. . . .”

The breach of contract action was based, not on the home warranty, but on the alleged purchase contracts. The instructions for breach of contract refer to the “contract for the purchase of a single family residence.” The home warranty is not signed by plaintiffs or JMC. The jury expressly rejected plaintiffs’ warranty claims. The “HOME WARRANTY” document cannot be the basis for an award for breach of contract.

Plaintiffs also respond, without citation to authority, that they were not required to present a written contract at trial, because (1) evidence did exist in that the opening statement of JMC’s counsel informed the jury that plaintiffs went through a “process” to buy the homes, which plaintiffs apparently view as evidence of the existence of contracts; and (2) some plaintiffs testified they bought their homes from JMC.

However, the content of a writing must be proved by an admissible original, admissible secondary evidence or, in limited circumstances, by oral testimony. (Evid. Code, §§ 1520-1523.) Statements and arguments of counsel are not evidence (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 138-139), as this jury was instructed. Plaintiffs’ testimony that they bought their homes from JMC was insufficient to establish the terms of any contract to support the breach of contract claims.

We also observe that plaintiffs’ counsel did not argue breach of contract in closing argument to the jury. He focused on strict products liability, which he told the jury was “the most important cause of action, most important thing to think about when evaluating this case . . . .” In rebuttal argument to the jury, plaintiffs’ counsel said, “This case has several claims or causes of action that [defense counsel] identified for you. [¶] You are going to get instructed by the Judge as to what each of those claims or causes of action are. [¶] In my mind, there is only one that you need to consider yourself with [*sic*] strict liability.”

On appeal, plaintiffs fault defense counsel for failing to elicit contract terms on cross-examination. However, it was plaintiffs’ burden to prove each element essential to

their claims, including the existence and terms of the alleged contracts. (Evid. Code, § 500; *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 654.)

We conclude insufficiency of the evidence requires reversal of the awards for breach of contract. Accordingly, we reverse the judgment and remand to the trial court to enter a new judgment deleting the contract damages. (§ 906 [reviewing court may modify judgment]; *Munoz v. City of Union City* (2007) 148 Cal.App.4th 173, 183, 186 (*Munoz*) [judgment reversed and remanded to trial court with directions to enter new judgment]; 5 Cal.Jur.3d (2007) Appellate Review, § 693, p. 266.)

### **C. Double Recovery**

JMC argues plaintiffs received an unlawful double recovery because the tort and contract damages are duplicative. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360.) Since we are reversing the contract award due to insufficient evidence of breach of contract, we need not address this contention.

### **D. Claims of Inconsistent/Ambiguous Verdicts**

JMC argues the special verdicts are fatally inconsistent because the jury's findings that JMC is liable for negligence are inconsistent with the jury's express findings, in rejecting the products liability theory, that the houses did not fail "to structurally perform" as expected. JMC also argues the verdicts are ambiguous in awarding damages in excess of the roof repair costs, or that no substantial evidence supports the damages award. JMC claims the trial court abused its discretion in denying JMC's motion for new trial.

Plaintiffs respond JMC forfeited its claim of inconsistent verdicts by failing to object in the trial court before the jury was discharged.

We conclude the verdicts are not inconsistent but merely ambiguous; the ambiguity derives from the form of the verdicts submitted by the parties; JMC forfeited the ambiguity by failing to raise it before the jury was discharged; and even if not forfeited, the ambiguity may be resolved, as the trial court properly concluded, by

interpreting the verdicts as reflecting that the jury found *construction* defects -- *installation* defects in roofing and framing<sup>15</sup> -- but no *design* defects, and viewed the products liability and warranty claims as limited to design defects.

## 1. Standard of Review

Our standard of review of denial of a new trial motion is as follows: “[A] trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal. [Citations.] However, we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party [citation], including an order denying a new trial. In our review of such order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.” (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872, italics in original; see also *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1160-1161.)

Unlike a general verdict, which comes clothed with a presumption of correctness (see *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541 (*Hasson*), the correctness of a special verdict (§ 624)<sup>16</sup> “ ‘must be analyzed as a matter of law.’ [Citations.] . . .

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<sup>15</sup> Contrary to JMC’s implication, there was evidence, as we have recited, that the framing problems were both design *and* construction (installation) problems -- which also disposes of JMC’s complaint that the awards exceeded the roof repair costs.

<sup>16</sup> Section 624 provides, “The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.”

When a special verdict is involved . . . a reviewing court does not imply findings in favor of the prevailing party. [Citations.] This rule stems from the nature of a special verdict and its ‘ “recognized pitfalls,” ’ namely, that it requires the jury to resolve all of the controverted issues in the case, unlike a general verdict which merely implies findings on all issues in one party’s favor. [Citations.] Under these circumstances, ‘ “ [t]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings. . . . ’ ” ’ ” ( *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678, fn. omitted; see also *Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 303 (*Mendoza*).

## **2. Analysis**

Section 619 provides, “When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the Court, or the jury may be again sent out.”

Section 619 applies to “inconsistent” verdicts and also applies to “ambiguous” verdicts. (*Mendoza, supra*, 81 Cal.App.4th at p. 302.) “ [D]efects apparent when the verdict was read, and that could have been corrected, are waived [forfeited] by counsel’s failure to timely object . . . unless the verdict itself is inconsistent.’ ” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 265, italics added.)

Verdicts are inconsistent when the jury reaches different conclusions between two or more causes of action where the liability for each is necessarily the same. (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1182-1186 [where there is no evidence of negligence except negligent design, a finding that there was no design defect is irreconcilable with a finding of negligence].) Verdicts are deemed inconsistent when they are “beyond possibility of reconciliation under any possible application of the evidence and instructions.” (*Hasson, supra*, 19 Cal.3d at p. 540.) Where the jury’s findings are so inconsistent that they are incapable of being reconciled, the decision is

“ ‘ “against law” ’ ” warranting a new trial. (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 716.) “ ‘Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law. [Citation.] The appellate court is not permitted to choose between inconsistent answers.’ [Citation.]” (*Ibid.*)

If a verdict is not inconsistent but merely 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. [Citations.]” (*Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456-457, fn. omitted (*Woodcock*); accord, *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1091-1092 (*Zagami*).

Courts distinguish between “ ‘hopelessly ambiguous’ ” and “merely ambiguous” verdicts. If the verdict is “ ‘hopelessly ambiguous’ ” and the jury has been discharged, “the judgment must be reversed. [Citations.] A court reviewing a special verdict does not infer findings in favor of the prevailing party [citation], and there is no presumption in favor of upholding a special verdict when the inconsistency is between two questions in a special verdict. [Citation.] ‘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.’ [Citation.] In those instances, however, retrial may be limited to the issue of damages. [Citations.]” (*Zagami, supra*, 160 Cal.App.4th at p. 1092, fn. omitted.)

On the other hand, if a verdict is ambiguous but not “ ‘hopelessly ambiguous,’ ” the court may “ ‘ “interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.” ’ [Citations.]” (*Zagami, supra*, 160 Cal.App.4th at p. 1092.) “If the verdict is merely ambiguous, a party’s failure to request a correction or clarification of the verdict before the jury is discharged may amount to a waiver of the ambiguity or defect, particularly if the party’s failure to object was to reap a ‘ “technical advantage” ’ or to engage in a ‘ “litigious strategy.” ’ [Citations.]” (*Zagami, supra*, 160 Cal.App.4th at p. 1092, fn. 5.)

Here, JMC argues the verdicts are inconsistent in finding JMC liable in negligence despite having found (regarding strict products liability) that the houses did not fail “to structurally perform” as an ordinary consumer would expect. We disagree.

The special verdicts are not inconsistent or hopelessly ambiguous. The verdicts for negligence expressly referred to design *or construction* defects, whereas the verdict forms for strict products liability may be interpreted as limited to *design* defect. As we have noted, the heading for the strict products liability questions read, “**STRICT PRODUCTS LIABILITY - DESIGN DEFECT.**”<sup>17</sup> (Boldface and underlining in

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<sup>17</sup> Although the fourth question under that heading asked if the house’s “design or structural design *or construction*” was a factor in causing harm, the jurors did not answer the question, because the verdict form told the jurors that if they answered no to the second question about whether the house failed “to structurally perform,” they should jump to the next section, “Implied Warranty.”

The jury instructions on strict liability began by saying plaintiffs claimed JMC defectively “designed and constructed” the homes but set forth specific instructions for design defect only, under the heading “**DESIGN DEFECT-- CONSUMER EXPECTATION TEST--ESSENTIAL FACTUAL ELEMENTS.**” (Italics added.)

original.) Defects in the *form* of the verdict are forfeited if not timely raised. (*Zagami, supra*, 160 Cal.App.4th at p. 1093, fn. 6, citing *Woodcock, supra*, 69 Cal.2d at p. 457.) Given the state of the verdict forms, the jury’s rejection of strict products liability, which was predicated on design defect, is not inconsistent with the jury’s findings that JMC was liable for negligence, predicated on *installation* defects in roofing and framing.

Indeed, it appears JMC itself views structural performance as design related, because JMC complains the verdicts are ambiguous in awarding negligence damages in excess of the roof repair costs, despite the jury’s findings of no structural performance problems in connection with the warranty claims. JMC does not contend the jury findings of no structural performance problems under the warranty theory are inconsistent with finding JMC liable in negligence.

We nevertheless observe that the jury’s warranty finding that the houses did not fail “to structurally perform” as represented is not inconsistent with findings that JMC was negligent or breached a contract in the houses’ “design *or* structural design *or* construction.” (Italics added.) Although the warranty verdict questions asked if JMC warranted or knew that plaintiffs were relying on its skill and judgment “to design or structurally design or construct” the houses properly, to which the jurors answered yes, the warranty verdict questions then asked whether the failure of the houses to be “structurally suitable” was a substantial factor in causing harm (implied warranty verdict) and whether the houses failed to “structurally perform” (express warranty verdict). The jurors answered no. The verdict forms linked the word “structural” to design only (“design or structural design or construction”). Neither the products liability nor the warranty verdicts asked the jury to answer whether there were any construction (installation)-related defects. In contrast, the negligence and breach of contract verdict questions did ask whether JMC was negligent or failed to do something required by contract “in the design *or* structural design *or* construction” of the houses, and the jurors answered yes. (Italics added.)

Though not mentioned on appeal by JMC, we recognize the written warranty submitted into evidence spoke of both “workmanship and design,” and plaintiffs’ counsel spoke of the roof problems in his closing argument to the jury regarding breach of warranty, and JMC’s counsel admitted to the jury in closing argument that work needed to be done on the roofs. Nevertheless, the jury answered the questions as they were presented in the verdict forms. It was not the jury’s job to assure that the questions were adequately framed. We also observe the express warranty was good for one year only, and the roof problems did not manifest themselves until later, according to the homeowners’ testimony.

Accordingly, JMC’s liability was not necessarily the same for all causes of action. There was evidence of negligence attributable to JMC, other than negligent design. There was evidence of negligence in installing the framing and roofing. Plaintiffs’ expert, Norbert Lohse, testified the framing problems were due to both design and construction (installation) defects. He also testified to the roof problems as installation issues, not design issues.

While a builder may be liable for both design and construction defects under theories of both negligence and breach of warranty, here the verdict forms linked the word “structural” to design only by referring to “design or structural design or construction.” The jury instructions spoke of design and construction and told the jurors to consider the actions of the design department and engineers in deciding design defects. No jury instruction spoke of a distinction between design and structural design. The jury may have found liability in negligence and breach of contract based on *construction (installation)* defects in roofing and framing, while rejecting the products liability and warranty claims on the ground the verdict questions made these claims seem predicated on *design* defects only.

“To preserve for appeal a challenge to separate components of a plaintiff’s damage award, a defendant must request a special verdict form that segregates the elements of

damages.” (*Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150, 1158.) That did not happen here.

We conclude JMC fails to show grounds for reversal based on inconsistent or ambiguous verdicts.

### **E. Economic Loss Rule**

JMC argues the negligence award violates the “economic loss rule” (*Aas v. Superior Court* (2000) 24 Cal.4th 627 (*Aas*), superseded by statute as stated in *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1202 (*Greystone Homes*),<sup>18</sup> which prohibits contract-type damages (economic loss) under a negligence theory in construction defect cases unless the loss is accompanied by some tort-type damages, i.e., physical harm to body or property other than the defective product. We decline the invitation in JMC’s reply brief to treat plaintiffs’ failure to respond to this contention as a concession of its merit and conclude the negligence award does not violate the “economic loss rule” but rather allows proper recovery where construction defects caused actual physical damage to the property.

The trial court instructed the jury: “Each plaintiff cannot recover cost of repair damages for [JMC’s] failure to comply with the building codes where those failures are not accompanied by damage to other parts of the house.”

The verdicts did not specify how the amounts were determined. As we have noted, the jury asked and was told it could award damages for “incidentals.”

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<sup>18</sup> In response to *Aas*, the Legislature in 2002 enacted the Right to Repair Act, Civil Code section 895 et seq. (Stats. 2002, ch. 722), abrogating the economic loss rule in homeowner actions against builders for violation of certain standards. (*Greystone Homes, supra*, 168 Cal.App.4th at p. 1202.) However, the legislation applies only to new residences purchased on or after January 1, 2003 (Civ. Code, § 938) and therefore does not apply to this case.

*Aas* held that construction defects that have not ripened into property damage, or at least into involuntary out-of-pocket losses, do not fit the definition of appreciable harm -- an essential element of a negligence claim. (*Aas, supra*, 24 Cal.4th at pp. 632, 640.) Appreciable, nonspeculative, present injury is an essential element of a tort cause of action. (*Aas, supra*, at p. 646.) *Aas* held that the trial court properly granted defense motions to exclude evidence of alleged construction defects that had not caused property damage or personal injury, e.g., building code violations including failure properly to construct shear walls and fire walls, failure to support electrical cables, and improper labeling of electrical circuits. (*Id.* at p. 633, fn. 1.)

The Supreme Court said of the economic loss rule: “Speaking very generally, tort law provides a remedy for construction defects that cause property damage or personal injury. Focusing on the conduct of persons involved in the construction process, courts in this state have found such a remedy in the law of negligence. [Fn. omitted.] Viewing the home as a product, courts have also found a tort remedy in strict products liability, [fn. omitted] even when the property damage consists of harm to a sound part of the home caused by another, defective part. [Fn. omitted.] For defective products and negligent services that have caused neither property damage nor personal injury, however, tort remedies have been uncertain. Any construction defect can diminish the value of a house. But the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer’s liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone. [Citation.]” (*Aas, supra*, 24 Cal.4th at pp. 635-636.) “Over time, the concept of recoverable physical injury or property damage expanded to include damage to one part of a product caused by another, defective part.” (*Aas, supra*, 24 Cal.4th at p. 641.)

“ ‘Economic loss [is] “marked by the loss of the benefit of the bargain for the goods purchased, lost profits, and replacement costs for ineffective goods. *Physical damage to property and personal injury, however, are not considered to be ‘economic loss.’* ” ’ ” (Stearman, *supra*, 78 Cal.App.4th at p. 617.) “Economic loss” is “ ‘[T]he diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. . . . “ ‘[It] generally means pecuniary damage that occurs through loss of value or use of the goods sold or the cost of repair together with consequential lost profits when there has been no claim of personal injury or damage to other property.’ ” . . . ’ [Citation.]” (*Id.* at pp. 620-621.)

Although *Stearman* involved an award for strict products liability, it relied on *negligence* case law for the definition and application of the economic loss rule. (*Stearman, supra*, 78 Cal.App.4th at pp. 618, 620, citing, e.g., *San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318.) *Stearman* held that plaintiffs could recover under strict liability when a defect in one component part of a house (in that case, defective construction of the foundation) caused injury to other component parts of the house (slab movement and cracks throughout the interior and exterior surfaces of the home), even though the damage was not to persons or property apart from the structure. (*Stearman, supra*, at pp. 617-623.) For purposes of products liability law, a home is not the equivalent of, e.g., a toaster which, when it catches fire due to faulty wiring, can be said to have injured only itself. (*Id.* at pp. 622-623.) “When a defective foundation results in cracked walls, ceilings and countertops throughout the home, recovery of strict liability damages is not barred by the economic loss rule.” (*Id.* at p. 623.)

JMC argues it was improper for the jury to award damages for the roof problems, because the only damage was to the roofs themselves, which JMC contends is economic loss not recoverable in tort. JMC says plaintiffs’ expert, Lohse, did not “recall” any stained ceilings in the interior of the houses and did not identify compensable damage

other than the roofs themselves. However, JMC neglects to mention that, immediately before testifying that he did not recall stained ceilings in the interior of the houses, Lohse testified his photographs “showed water damage on the inside of the attic indicating water’s gone past the sheathing.” Additionally, Mrs. Altman testified she noticed water on the hallway floor, cleaned it up, later noticed more water, opened the closet and found it completely saturated with water, including the shelves. Mrs. Altman also observed a stain on the ceiling of the master closet, which was still there at the time of trial in 2009. Mr. Cullen testified that, in the winter of 2008-2009, water dripped through the ceiling light fixture in a bedroom closet, wetting the carpet. He went to the attic and found water coming between the roof deck joints dripping onto the drywall.

All this evidence shows physical damage to property other than the roofs themselves. Lohse also testified that, because of poor workmanship, the roofs leaked, damaging the plywood substraight. Water got “underneath the roof system,” and there should not be any water underneath the roof system. Obviously, the homeowner cannot leave water leaking underneath the roof and must fix it, thus requiring, at a minimum, “involuntary out-of-pocket losses” (*Aas, supra*, 24 Cal.4th at p. 646) that would constitute appreciable harm supporting a negligence award. The award does not violate the economic loss rule.

JMC, by stating that the cost of repairing the “original defect” is not recoverable in tort, appears to read *Aas* as allowing tort recovery *only* to fix physical damage to parts of the house *other than* the defective part. We see no such holding in *Aas*. Once there is physical damage recoverable in tort, JMC shows no reasons to exclude damages for the defective part itself. Indeed, there would be little point to fixing damage caused by a leaking roof and not the roof, only to experience additional future damages related to the leaking roof. Moreover, as the court in *Stearman* observed, “ ‘[t]he damaged property may consist of the product itself.’ ” (*Stearman, supra*, 78 Cal.App.4th at p. 619, italics omitted, quoting *Sacramento Regional Transit Dist. v. Grumman Flexible* (1984))

158 Cal.App.3d 289, 293 (*Grumman*.) The remedy to one whose property has been physically damaged is available where the property injured is the defective product. (*Stearman, supra*, 78 Cal.App.4th at p. 620.) Although *Stearman* predated *Aas*, *Aas* cited *Stearman* without criticism. (*Aas, supra*, 24 Cal.4th at p. 636, fns. 5 & 6, p. 639, fn. 9.)

Cases cited by JMC are distinguishable. For example, *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, held there was no cognizable damage in the cost of replacing defective pipes *that had not yet leaked*. (*Zamora, supra*, at pp. 208-211.) Here, the defective roofs *have* leaked.

In *Grumman*, the court held a transportation district could not recover in strict products liability for the cost of repairing defective bus parts (fuel tank supports) that had not caused further damage beyond cracks in the supports themselves. (*Grumman, supra*, 158 Cal.App.3d at pp. 293-298.) “[T]he line between physical injury to property and economic loss reflects the line of demarcation between tort theory and contract theory.” (*Id.* at p. 294.) Here, the water leaking underneath the roof system constituted physical injury.

We conclude the negligence award does not violate the economic loss rule.

#### **F. Offset for Subcontractors’ Settlements**

JMC argues the trial court abused its discretion in denying an offset for the subcontractors’ settlements pursuant to section 877,<sup>19</sup> because some of the damages awarded by the jury had to be for items for which plaintiffs already received payment

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<sup>19</sup> Section 877 provides, in pertinent part: “Where a release [or] dismissal . . . without prejudice . . . is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, *but it shall reduce the claims against the others in the amount stipulated by the release [or] dismissal . . . or in the amount of the consideration paid for it, whichever is the greater. . . .*” (Italics added.)

through the subcontractors' settlements. However, JMC fails to meet its burden as appellant to demonstrate that the jury awarded damages for items already compensated by settling subcontractors.

A defendant seeking offset has the burden of proving the offset. (*Textron Financial Corp. v. National Union Fire Ins. Co.* (2004) 118 Cal.App.4th 1061, 1077.) "We generally review a ruling granting or denying a section 877 settlement credit under the deferential abuse of discretion standard. [Citation.] To the extent that we must decide whether the trial court's ruling was consistent with statutory requirements, we apply the independent standard of review. [Citation.]" (*Wade v. Schrader* (2008) 168 Cal.App.4th 1039, 1044.)

JMC argues that by rejecting the strict liability and warranty claims, the jury necessarily rejected plaintiffs' big-ticket items (wind deflection and conventional framing). The jury awarded breach of contract damages in the exact amount sought by plaintiffs for the *roof* problems. The negligence awards were more than the contract awards, but not by much, suggesting the jury awarded negligence damages (1) duplicating the contract damages for the roofs and (2) adding in a little extra for stucco repairs etc., not realizing that plaintiffs had already received money for those repairs from the settling subcontractors.

JMC's argument is predicated on speculation and a refusal to acknowledge the probability that the negligence award exceeds the roof repairs because the jury found damages attributable to negligent *installation* defects -- as opposed to design defects -- in the framing, for which there was ample evidence.

JMC cites *Bobrow/Thomas & Associates v. Superior Court* (1996) 50 Cal.App.4th 1654, 1661-1662, for the proposition that defendants may be held jointly and severally liable for damages when one indivisible injury is caused by two or more parties. However, JMC fails to show the settling subcontractors were responsible for the negligence in installing the framing or for the specific cracks which were at issue at trial.

In support of its interpretation of the verdicts, JMC cites juror declarations which JMC submitted to the trial court with posttrial motions. The trial court ruled the declarations inadmissible under Evidence Code section 1150, subdivision (a), because they reflected the jurors' mental processes. We agree with the trial court and disregard the juror declarations.

We recognize that in some cases, special jury findings are not necessarily the only means to determine how much was awarded for particular injuries. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 661-662 (*Lakin*)). “ ‘Facts and circumstances peculiar to [the] case, possibly including such considerations as the parties’ theories of the case, uncontroverted evidence or jury instructions, may permit determination of the fact and amount of personal injury recovery.’ ” (*Lakin, supra*, at p. 662.) However, the trial court is usually better equipped than the appellate court to make this determination. (*Ibid.*) In this multilayered case, the trial court was better equipped to make this determination, and the able judge fully considered and rejected JMC’s contentions in the posttrial motions.

We conclude JMC fails to demonstrate on appeal that the judgment includes amounts already paid by the settling parties.

### **G. Conclusion -- JMC’s Appeal**

We conclude the judgment must be reversed as to breach of contract, because there was no substantial evidence of any contracts. This reversal will require deletion of the damages attributable to that cause of action. (§ 906 [reviewing court may modify judgment]; *Munoz, supra*, 148 Cal.App.4th at pp. 183, 186 [judgment reversed and remanded to trial court to enter new judgment]; 5 Cal.Jur.3d, *supra*, Appellate Review, § 693, p. 266.)

We reject JMC’s other contentions.

## II. Plaintiffs' Appeal -- Investigative Costs

Plaintiffs appeal from the trial court's denial of part of the investigative costs they sought as damages. Plaintiffs contend the trial court was required to award the entire amount they claimed. We disagree and conclude plaintiffs fail to show grounds for reversal regarding investigative costs.

Civil Code section 3333 provides, "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." In a construction defect case, prevailing tort plaintiffs may recover, as part of their tort damages, expert fees incurred for investigative services that are not recoverable as litigation costs. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 81-85 (*Gorman*); *El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1361-1362 (*El Escorial*); *Stearman, supra*, 78 Cal.App.4th at pp. 624-625.) Recovery of such fees as *damages* differs from recovery of such fees as *litigation costs*. (*Stearman, supra*, 78 Cal.App.4th at p. 625 [reversed the trial court's denial of fees as damages because the trial court erroneously concluded it lacked power to award such fees as damages].) For *litigation costs*, Code of Civil Procedure section 1033.5 limits recovery to fees of expert witnesses "ordered by the court," except where such fees are expressly authorized by law. (Code Civ. Proc., § 1033.5, subs. (a)(8), (b)(1).) One such law is Code of Civil Procedure section 998, which gives the court discretion to order a defendant to pay the plaintiff's expert witness costs if the defendant rejected the plaintiff's statutory settlement offer and fails to obtain a more favorable judgment at trial. (*Stearman, supra*, 78 Cal.App.4th at p. 624.)

Awarding expert fees as *damages* is proper where the expert charges the fees for making repair plans, evaluating a party's claim, or discovering construction defects. (*El Escorial, supra*, 154 Cal.App.4th at p. 1362.)

However, “ ‘repair costs are allowed only if they are reasonable . . . .’ [Citation.] ‘The rule is established that the plaintiff has the burden of proving, with reasonable certainty, the damages actually sustained by him as a result of the defendant’s wrongful act, and the extent of such damages must be proved as a fact.’ [Citations.]” (*Gorman, supra*, 178 Cal.App.4th at p. 83.)

In reviewing a trial court’s ruling on investigative costs as damages, we presume the trial court resolved all conflicts and inconsistencies in the evidence against the party challenging the trial court’s ruling. (*El Escorial, supra*, 154 Cal.App.4th at p. 1361.) The challengers -- plaintiffs in this case -- have the burden on appeal. They cannot prevail by citing only to evidence supporting their position and omitting evidence that supports the judgment. (*Ibid.*) While JMC says we must imply findings in support of the judgment due to plaintiffs’ failure to request a statement of decision, we have the trial court’s signed order explaining its reasoning.

Here, the parties stipulated to a bench trial on the issue of “*Stearman* damages” (investigative costs). Plaintiffs submitted documentary evidence in the form of billing invoices and declarations. Plaintiffs sought investigative fees of \$137,352.27 charged by expert Norbert Lohse, and \$149,842.84 charged by Affiliated Professional Services for William Thomas’s services, for a total amount of \$287,195.11,<sup>20</sup> less \$17,666 for *Stearman* damages plaintiffs recovered in prior settlements.

The trial court awarded only \$100,000, minus a setoff credited to JMC for prior settlements, yielding a final award of \$82,334.

The trial court explained its reasoning as follows:

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<sup>20</sup> Plaintiffs say they actually spent \$400,000 in expert investigative fees, but they voluntarily reduced the request, subtracting out what were perceived to be litigation costs not recoverable as damages and *Stearman* damages recovered from other defendants who settled out of the case.

Plaintiffs' major claim involved failure of the homes to withstand wind exposure, attributable to poor *design* (insufficient wind exposure criteria and improper use of conventional framing for second floors) and poor *construction* (framing), for which plaintiffs sought \$1.6 million in damages. Plaintiffs separately claimed damages of \$124,670.85 due to defective roof construction, for which there was clear evidence of liability and amount of damages.

The jury expressly rejected the *design* defects theory but apparently awarded some damages for *construction* defects regarding the framing of the houses, because the jury awarded a total of \$165,137.26, which was more than the cost of the roof repairs.

The trial court stated: "Based on the various types of damages that plaintiffs suffered, it was quite reasonable and necessary to conduct various forms of investigations and tests initially to identify the possible reason or reasons that caused the different types of damages to a number of mass produced homes. At some point, however, the costs for investigations must bear some relationship to the successful claims brought against JMC. In this case, the itemized costs in the invoices do not paint a clear picture for the continuous need for further continuing investigation, research, data review and calculations, report preparation, plan reviews, presentation preparations and conferences and discussions when the plaintiffs failed to prevail on their claim on the types of damages investigated. Additionally, it cannot be said that none of the investigation costs touched on the damage claims caused by the defective roof construction."

On appeal, plaintiffs argue the trial court was required to give them the full amount they requested because JMC did not present any opposing evidence. We disagree. A trier of fact may reject testimony of a witness even though the witness is uncontradicted, as long as the trier of fact does not act arbitrarily and has a rational ground for doing so. (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1204-1205.)

Here, the trial court had rational grounds. The jury rejected most of the damages claimed by plaintiffs, and the trial court found that more than \$86,000 of the costs itemized in plaintiffs' invoices "appear questionable" as "investigation" costs/damages and appeared to the trial court to be litigation costs nonrecoverable under section 1033.5.

Plaintiffs complain the trial court did not explain how it determined that \$86,000 of the fees were litigation costs. However, since plaintiffs did not request a statement of decision, the trial court was not required to explain. We presume the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) It is plaintiffs' burden on appeal to demonstrate insufficiency of the evidence.

As to the trial court's reasoning that the jury rejected most of plaintiffs' claims, plaintiffs argue the trial court erred in "apportioning" investigative fees between plaintiffs' successful negligence claim and their unsuccessful strict liability claim, because the jury did not reject "claims," but rather legal "theories." Plaintiffs argue apportionment is a concept relevant to matters such as statutory awards of attorney fees, and it is not relevant where the issue is proof of damages to make a tort plaintiff "whole." Plaintiffs also argue *all* of the investigative costs were necessary to determine what the damages were and what caused them.

However, "'repair costs are allowed only if they are reasonable . . . .'" (*Gorman, supra*, 178 Cal.App.4th at p. 83.) The trial court was therefore correct in saying that, at some point, "the costs for investigations must bear some relationship to the successful claims brought against JMC." Plaintiffs cite *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33 for the supposed proposition that, if the charges were paid, they were reasonable. (*Id.* at pp. 42-43.) However, the issue in *Drayage* related to the admissibility of invoices over a hearsay objection. The *Drayage* court said that, while invoices were inadmissible independently to establish reasonableness, where a party testifies he paid for repairs, invoices were admissible to corroborate his testimony,

and if the charges were paid, the testimony and documents are evidence that the charges were reasonable. (*Ibid.*) The court did not hold, however, that payment was conclusive proof of reasonableness. As the court stated in *Meier v. Paul X. Smith Corp* (1962) 205 Cal.App.2d 207, one of the cases cited in *Drayage*, “[t]he amount actually paid for repairs is *some* evidence of their reasonable value.” (*Meier, supra*, 205 Cal.App.2d at p. 222, italics added.) Moreover, though plaintiffs here claim there are investigation fees “which have been charged to and/or paid by the Homeowners,” plaintiffs give no cite to the record to show payment, and JMC says there is no evidence that plaintiffs actually paid any of the investigation fees.

Plaintiffs also argue that the wind shear design theory, which the jury rejected, accounted for only \$24,012 in investigation fees -- a pittance of the total amount of investigation fees. Plaintiffs fail to prove the point, which on its face strains credulity, that plaintiffs spent \$250,000 to investigate damages that cost \$165,000 to repair, yet spent only \$24,000 to investigate damages for which plaintiffs sought over a million dollars in damages. Plaintiffs merely offer a footnote with string citations to pages of the record on appeal, with no discussion as to the contents or how those contents prove that those were the only fees attributable to design defect. It appears plaintiffs merely added (without showing their work) invoice items which expressly referred to “B” or “C,” such as “Wall studs top and bottom - B & C.” This does not prove that none of the other items involved the design defect theory.

Moreover, wind exposure B versus C was not the only design defect claimed by plaintiffs and rejected by the jury. Plaintiffs claimed a design defect in that the design called for conventional framing for second floors, whereas nonconventional framing should have been used. Thus, it is immaterial to this appeal that the difference in repair costs between wind exposure B (the one used by JMC) and wind exposure C (the one suggested by plaintiffs’ expert) was only \$268,014.80, as stated by plaintiffs. Wind exposure C was not the only claimed design defect claimed by plaintiffs.

We conclude plaintiffs fail to show grounds for reversal in the trial court's order for *Stearman* damages.

**DISPOSITION**

The judgment is reversed and the matter remanded to the trial court with directions to enter a new judgment deleting damages for breach of contract. The judgment is otherwise affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

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MURRAY, J.

We concur:

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BLEASE, Acting P. J.

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HULL, J.