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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LAUREN CAZDEN, Individually  
and as Trustee, etc.,

Plaintiff and Appellant,

v.

JOSUE CISNEROS ESPINOZA,

Defendant and Respondent.

B281837

(Los Angeles County  
Super. Ct. No. BC539462)

APPEAL from an order of the Superior Court for Los Angeles  
County, Howard L. Halm, Judge. Affirmed.

WLA Legal Services, Inc. and Steven Zelig for Plaintiff and  
Appellant.

Hollingshead & Associates and Anna J. Niemann for Defendant  
and Respondent.

Plaintiff Lauren Cazden<sup>1</sup> appeals from the trial court's order denying her post-judgment motions for judgment notwithstanding the verdict (JNOV motion) and for a new trial with regard to her negligence claim against defendant Josue Cisneros Espinoza.<sup>2</sup> Finding that substantial evidence supports the jury's verdict and no abuse of discretion by the trial court, we affirm the order.

## **BACKGROUND**

Cazden owned a home in Van Nuys (the property) that she rented to tenants. In March 2011, the tenants turned on the washing machine and left for work; when they returned home, the area containing the laundry room was flooded.<sup>3</sup> Cazden made a claim to her insurer and, after a period of time, the insurer paid the claim to allow her to repair the property.

In the meantime, Cazden hired Mike Nedobity, a construction project manager, to prepare a scope of repair and estimate of cost to

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<sup>1</sup> Cazden filed the instant lawsuit individually and as trustee of the Laurie Cazden 2008 Revocable Trust UTA December 29, 2008. For ease of reference, we refer to her solely as Cazden.

<sup>2</sup> Although Cazden's notice of appeal stated that she also was appealing from the judgment and from the motion for a new trial as to Espinoza's co-defendant Jereme James, her appellant's opening brief raises arguments regarding only the JOV motion and the new trial motion as to Espinoza.

<sup>3</sup> The laundry room was part of an addition to the property that contained the laundry room, the family room (sometimes referred to as the spa room), and a bathroom. The addition apparently was created in part by closing in a former patio, and was a step lower than the main house.

repair. In July 2011, at Nedobity's suggestion, she hired Fine Line Drafting and Design (Fine Line) to prepare the plans to rebuild the damaged area. Nedobity prepared the scope and estimate in October 2011. The estimated cost was approximately \$141,000.

At the suggestion of her attorney, Steven Zelig, Cazden hired general contractor Jereme James, a defendant in this case, to perform the repair work. She met with James at the property; James brought Espinoza with him. According to Cazden, James told her that Espinoza and he were "partners" on the project.<sup>4</sup> At that meeting, she entered into a contract with "Paint Boy," one of the names under which James did business.<sup>5</sup> The contract, on Builder Boy letterhead and dated September 18, 2012, stated: "We will follow the scope prepared by Mike Nedobity, prepared on 10/08/11. *Price does not include permits or additional architectural designs or stamps if needed.*" (Italics in original.) The contract was signed by James (as authorized agent for Paint Boy) and Cazden on September 20, 2012.

The contract did not have a completion date because, as James explained in his testimony at trial, the plans had not yet been approved,

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<sup>4</sup> Earlier in her testimony, Cazden testified that James told her that Espinoza was one of his employees.

<sup>5</sup> James did business under several "dba's," including Paint Boy, Builder Boy, and Stucco Boy; he used the various names for marketing purposes. In March 2013, Builder Boy was incorporated as Builder Boy, Inc., although James continued to operate under the dba's until Builder Boy, Inc. received its contractor's license in August 2013. Builder Boy, Inc. was a defendant in the lawsuit, but was dismissed when the trial court granted the company's motion for a directed verdict upon close of evidence.

the permits had not been pulled, and Cazden had expressed that she wanted to have some additional work done that was not identified in Nedobity's scope. As it turned out, according to James, the plans drawn up by Fine Line were incomplete, and he could not obtain a permit until additional plans were drawn up; he engaged another firm to draw up those addition plans.

Eventually, work began on the property. Espinoza, who testified that he was hired as one of the subcontractors for the project, was responsible for demolition of the old addition to the home, building the foundation for the new addition to bring it to the same level as the rest of the house, doing the plumbing for the installation of the bathroom in the new addition, doing the roof for the new addition (as well as for the main house and garage, which was beyond the Nedobity scope), and excavating the gas line trench. He testified that he spent approximately 30 days at the property, out of the approximately 240-day construction period.

In January 2013, a portion of the roof of the main house had to be removed in order to attach the roof of the new addition. While the roof was removed there was a rainstorm, which caused damage to the kitchen.<sup>6</sup> Cazden received additional funds from her insurer to repair the damage to the kitchen; Espinoza testified that he did not do any

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<sup>6</sup> James testified that the part of the kitchen that was exposed to the rain was scheduled to be demolished and replaced at the time of the rainstorm because it had been damaged during the demolition of the old addition; the insurer had already determined that it would pay for the work in the kitchen.

work on the kitchen. At some point Cazden, who was at the property almost every day during construction, noticed that Espinoza had installed Romex instead of conduit for the electrical wiring in the new addition.<sup>7</sup> She contacted James, who told her that since the walls were still open, he could have Espinoza change the Romex out and put in conduit at his own cost. James testified that Cazden told him not to worry about it, so no change was made.<sup>8</sup>

At some point, Cazden became dissatisfied with the work that was being done at the property. She hired a licensed electrician to look at the construction work. That electrician, William Ridge, visited the property on June 2, 2013 (a Sunday, when James and/or his contractors were unlikely to be at the site), and prepared an estimate for fixing various electrical issues he discovered with respect to the entire house, including the new addition.

Two weeks later, on June 15, 2013 (a Saturday), Cazden hired Lloyd Kurtz, a general contractor with a roofing license, to fix a leak in the roof. Kurtz reported that when repairing the leak he saw some rotten wood that was roofed over, and that there were incorrectly installed edge metals that would allow water to get into the house.

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<sup>7</sup> Romex is a non-metal flexible wiring system that is standard for residential construction. The Nedobity scope, however, called for conduit, which is metal tubing through which the wires are run.

<sup>8</sup> There was an issue whether Cazden was given a credit for the cost of the conduit, which is more expensive than Romex. That issue is not relevant to this appeal, however, because Cazden's contract was with, and all of her payments were made to, James, not Espinoza.

On June 20, 2013, Cazden's attorney, Zelig, wrote to James, expressing Cazden's dissatisfaction with James' work and terminating the contract. Eight days later, Zelig hired a consulting engineer to review the electrical work at the property; that engineer agreed with Ridge's assessment and raised two additional concerns. A week after that, Zelig's associate sent James a letter saying that Cazden "has hired other contractors to redo and repair the work [James had] done," and listing the damages Cazden asserted James had caused.

The roofer, Kurtz, returned to the property on July 21, 2013 to add two vents in the attic. He provided Cazden with a report on his observations regarding the new roof that had been installed as part of the construction project. He identified several items that he considered to be significant faults with the workmanship.

The next day, Cazden hired plumber David Sanchez to replace a water regulator for the house that had malfunctioned.<sup>9</sup> While he was there, he saw that there was water in the cleanout, which indicated there was a backup in the plumbing; he admitted there was no other evidence of a backup that he saw. He returned to the property on July 31 to run a camera through the pipes and to inspect the drain lines underneath the house; he found what he considered to be serious issues, including that there was back slope in the line from the toilet in the new addition.

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<sup>9</sup> Zelig's associate testified that, in fact, he hired Sanchez on Cazden's behalf.

Over the next few months, Cazden's attorneys and James attempted to resolve the dispute. James offered to come back to the property to repair the reported defects, but Cazden wanted to have other contractors do the repairs. In late October 2013, James agreed to meet with Cazden and her plumber (Sanchez) at the property to try to work some things out; Espinoza and Zelig's associate also attended the meeting. James was supposed to bring the plumber who did the work on the project, but he did not show up.

In March 2014, Cazden filed the instant lawsuit against James, his dba's, Espinoza, his company (7 Point Construction), and others. In the operative first amended complaint, Cazden alleged causes of action against all defendants for common law fraud, negligent misrepresentation, breach of contract, negligence, and fraud under Penal Code sections 496 and 484; she alleged additional causes of action against other defendants.

The case went to trial in December 2016. Plaintiff presented testimony from, among other witnesses, her electrician, roofer, and plumber (Ridge, Kurtz, and Sanchez), who testified about the defects and/or deficiencies each of them had identified in 2013. On cross-examination, each of them admitted that they did not know who did the work they were criticizing, and whether it was within the scope of the work that James had contracted to perform. Sanchez and Ridge also admitted that some of the deficiencies may have been part of the original construction of the house.

In addition to those tradesmen, Cazden also presented expert testimony from Nedobity, who had provided the original scope of work

in 2011. Nedobity returned to the property in January 2016 “to evaluate the work of Mr. James.” He prepared an estimate of the cost to repair what he believed were defects in the construction.

In addition, Cazden herself testified extensively about the alleged defects in the construction, and also called both James and Espinoza under Evidence Code section 776.<sup>10</sup>

Among other things, James testified that some of the alleged defects involved items that were outside the scope of his contract with Cazden or were changes from the Nedobity scope that had been approved or accepted by Cazden. He also testified that Espinoza was a subcontractor for him, and that most of the major items that Cazden asserted needed to be fixed—a 125-amp electrical panel that was installed instead of the 200-amp panel that the Nedobity scope called for, the lack of a radiant barrier on the roof, and the plumbing for the bathroom in the new addition—were items that Espinoza worked on. He also asserted that he had asked to be allowed to go back and fix the problems, but was not allowed to do so.

Cazden’s counsel spent little time questioning Espinoza. During that questioning, Espinoza testified that he was one of the subcontractors on the project, although he admitted that he did not have a written subcontracting agreement with James. He also admitted that he signed the application for a building permit as an agent of the general contractor, James. He testified that he never saw

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<sup>10</sup> Cazden presented other witnesses, but their testimony is not relevant to the issues on appeal, so we do not discuss it.



the contract between Cazden and Paint Boy before the litigation started, and that he had not seen the Nedobity scope until sometime after the project started.

On his examination by defense counsel, Espinoza testified that all of the electrical work he did on the project was done at the direction of James. With respect to several of the items that Cazden complained about, he said that he was told by James either that that item was outside the scope of the construction or that Cazden had approved or accepted the way it was done. With regard to the roof, he testified that he had been told to “do a full tear-off” of the old roof, which he understood was a shake roof, and install a radiant barrier and a new composition roof. He explained that typically they installed a radiant barrier only when they removed an old shake roof, but it turned out that the old roof was not shake, so he just replaced any of the sheeting that was damaged and installed the new composition roof. With respect to the plumbing for the bathroom in the new addition, Espinoza testified that he did not learn of any issue with it until his deposition. Having watched Sanchez’s video of the pipes, Espinoza said that he believed the problem was caused when one of the fasteners holding the pipe came apart when they were pouring the concrete for the new foundation.

For the defendants, James called construction expert Gregory Nukes. Nukes was retained by James and Espinoza to determine the

amount of money owed to both Cazden and James.<sup>11</sup> He reviewed the contract, the Nedobity scope and his estimate of the cost to repair the alleged defects, the change orders, and the amounts that had been paid. He also visited the property to assess the work that had been done, what remained to be done under the scope of the contract and change orders, and what work was deficient.

Nukes disagreed with some of the assessments made by Cazden's tradesmen, although he agreed with some of the items they identified (most of which had to do with items that Espinoza did not work on). For example, Nukes found that the roof was adequate, but that the drain pipe from the bathroom in the new addition should be repaired (although he estimated that it could be repaired at far less cost than Nedobity estimated); he also noted that some of the alleged defects were the kinds of things that normally are taken care of with a punch list, but James was fired before he had a chance to address the punch list. In the course of his examination of the documents and property, Nukes also found some items that were within the Nedobity scope but had not been completed and had not been included in Nedobity's estimate of costs to repair the alleged defects from James' work.<sup>12</sup> Nukes then determined the cost to repair the various defects and complete the items that had not been completed. Taking into account the amount of money

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<sup>11</sup> James had argued that any damages for which he was liable had to be offset against money that he asserted Cazden still owed him.

<sup>12</sup> He testified that Nedobity estimated the cost to repair would be about \$70,000.

that Cazden still owed James under the contract and change orders (almost \$21,000), Nukes concluded that the amount James owed to Cazden for the repairs and to complete the unfinished work was \$20,088.02.

In his closing argument to the jury, Zelig (Cazden's attorney) treated James and Espinoza as essentially a single entity, as he did throughout the presentation of evidence. Indeed, he argued to the jury that Espinoza was not a subcontractor of James, but was instead James' partner, joint venturer, employee, or agent, and that James was liable for anything that Espinoza did. He did not specifically discuss Espinoza's liability, except to say that if Espinoza and James were partners, then Espinoza was liable for anything that James did; he also noted that Espinoza would not be liable for James's acts if he was an agent of James rather than his partner.

In her closing argument, Espinoza's attorney emphasized Espinoza's testimony that he did his work on the property as he was instructed to by James. With regard to the problem with the pipes from the bathroom, counsel argued that the video taken by Cazden's plumber, Sanchez, was misleading because there was no evidence of an actual backup. She noted that Cazden testified that Sanchez had instructed her to put toilet paper in the toilet and flush it a couple of times, and she contended that had Sanchez scoped the pipes without having done that the back slope, or dip, in the pipe probably would not even have been seen. She also noted that Nukes testified that the alleged defect could be repaired without having to dismantle the bathroom or laundry room, as Cazden contended. Finally, she argued

that, under Nukes's determination, the most in damages that could be assessed against Espinoza, if the jury found liability against him, was approximately \$9,100.

The jury returned a verdict finding James was liable for negligence, breach of contract, and negligent misrepresentation.<sup>13</sup> It found that Espinoza was not negligent and was not liable on any claim. Judgment was entered on the verdict, and Cazden filed a JNOV motion as to the verdict on the negligence claim against Espinoza, a motion for a new trial as to most of the claims against James, and a motion for a new trial as to the negligence claim against Espinoza.

The trial court denied all three motions.<sup>14</sup>

As to the JNOV motion, the court noted that Cazden's argument that the unrebutted testimony at trial established that Espinoza was negligent as a matter of law was supported mostly by her counsel's recollection of the testimony, without reference to the trial transcript. The court found that, in any event, the testimony referred to did not conclusively establish each of the elements of the negligence claim. Moreover, the court found that Cazden failed to cite to any evidence at trial establishing that Espinoza did any work at the property that was not done pursuant to James's instruction. Under those circumstances, the court found it was reasonable for the jury to conclude that even

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<sup>13</sup> On the negligence claim, the jury awarded Cazden \$50,000 for the cost of repairing or restoring the property and \$5,000 for emotional distress/inconvenience.

<sup>14</sup> We do not address the court's ruling on the new trial motion as to the claims against James, since it is not at issue in this appeal.

though James was negligent, Espinoza was not. The court rejected Cazden's argument that the verdict in favor of Espinoza was the result of jury confusion and misunderstanding of the law, finding that the argument was not supported by admissible evidence and was improper. Finally, the court rejected Cazden's argument that Espinoza was judicially estopped from benefiting from the jury's verdict because he (or his counsel) admitted that he had made mistakes; the court found that judicial estoppel did not apply under these circumstances.

With regard to the motion for new trial as to Espinoza, the court noted that the motion was brought "on the grounds that (1) there was insufficient evidence to justify the verdict, (2) the verdict is 'against law,' (3) the jury awarded inadequate damages, (4) there was irregularity in the proceedings of the jury, and (5) there was jury misconduct." The court denied the motion for the reasons it discussed in denying the JNOV motion. The court concluded that "[b]ased on the evidence presented at trial, it was reasonable for the jury to conclude that James was negligent, but not Espinoza. It is not clear from the record that the jury should have reached a different verdict." As to the arguments regarding jury confusion or irregularity, the court found that the arguments were not supported by admissible evidence and were improper because they constituted improper probing of the jurors' mental processes.

Cazden timely filed a notice of appeal from the order denying her motions.<sup>15</sup>

## DISCUSSION

As noted, Cazden challenges the trial court's order denying her JNOV motion and her motion for a new trial. Under a separate heading in her appellant's opening brief, Cazden also argues that Espinoza is judicially estopped from benefitting from the jury's purportedly faulty verdict. We address each issue in turn.

### A. *Denial of JNOV Motion*

Cazden argues on appeal that the trial court erred in denying her JNOV motion because (1) it relied upon a theory that was not presented at trial and for which there was no evidence in support; (2) Espinoza did not present evidence sufficient to prove that he was not negligent and did not cause damage to Cazden; and (3) the verdict in favor of Espinoza was contrary to uncontradicted evidence that he was negligent. She is mistaken.

#### 1. *Law Governing JNOV Motions*

As the trial court noted in ruling on Cazden's JNOV motion, "[t]he purpose of a motion for judgment notwithstanding the verdict is not to afford a review of the jury's deliberation but to prevent a miscarriage of justice in those cases where the verdict rendered is without

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<sup>15</sup> See footnote 2, *ante*.

foundation.” (Citing *Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 743.) “The trial judge’s power to grant a judgment notwithstanding the verdict is identical to his power to grant a directed verdict. [Citations.] The trial judge cannot weigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations.] ‘A motion for judgment notwithstanding the verdict of a jury may properly 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 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.’ [Citation.]” (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110; accord, *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.) On appeal, “[a]s in the trial court, the standard of review is whether any substantial evidence—contradicted or uncontradicted—supports the jury’s conclusion.” (*Sweatman v. Department of Veterans Affairs, supra*, 25 Cal.4th at p. 68.)

## 2. Trial Court’s Theory

In its order denying the JNOV motion, the trial court noted that “[a] subcontractor’s obligation is completed by performing according to the plans and specifications prepared at the request of the owner, even erroneous ones.” (Citing *Sunbeam Construction Co. v. Fisci* (1969) 2 Cal.App.3d 181, 184-185 (*Sunbeam*).) Seizing on this citation and

statement, Cazden argues that the theory that the plans and specifications were the cause of Espinoza's mistakes was not argued during trial or by Espinoza in opposition to the JNOV motion and that there was no evidence to support it. Cazden misapprehends the trial court's reasoning.

Immediately following its citation to *Sunbeam*, the court made its ruling, stating: "In support of her motion, [Cazden] argues that certain un rebutted testimony at trial establishes that Espinoza was negligent as a matter of law. . . . [T]he testimony referred to by [Cazden] does not conclusively establish each of the essential elements of a negligence claim against Espinoza." The court noted that although Cazden's witnesses testified about various defective conditions in the house, they did not "render any opinion as to specific unreasonable conduct by Espinoza or damage to [Cazden's property] resulting from the same. [Citation.] Moreover, [Cazden] fails to cite to any evidence at trial establishing or suggesting that Espinoza did any work at [Cazden's] property that was not done pursuant to James' instruction. Under these circumstances, it was reasonable for the jury to conclude that James was negligent, but not Espinoza. [¶] All indications are that the jury's verdict of no negligence liability as to Espinoza followed [Cazden's] failure to adduce evidence [of] each of the essential elements of her negligence claim."

As is clear from the trial court's statement of reasons for its ruling, it did not base its ruling on a theory that the problem with the construction was the result of bad plans or specifications. Rather, it based its ruling *in part* on Cazden's failure to cite to evidence that



Espinoza did any work on the property that was not done in accordance with James's instruction. *This* theory—that Cazden failed to establish Espinoza's work was not done in accordance with James's instruction—was advanced by Espinoza in opposition to the JNOV motion.

It is true, as Cazden asserts, that a subcontractor can be liable to the owner of the property when the subcontractor is negligent in the performance of the work directed by the general contractor. But for the subcontractor to be found liable, the owner must establish that the work of the subcontractor—as opposed to the direction of the general contractor—was both performed in a negligent manner and was the proximate cause of the owner's damages. (See, e.g., *Stewart v. Cox* (1961) 55 Cal.2d 857, 861-863; *Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 748-749; *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1145.) As discussed in section A.4., *post*, Cazden failed to conclusively establish either.

### 3. *Espinoza's Burden*

Cazden's argument that the trial court erred in denying her JNOV motion because "Mr. Espinoza did not present evidence sufficient to prove that he was not negligent and did not cause damage to Ms. Cazden" ignores the burden of proof at trial and the standard for JNOV motions.

It is *the plaintiff* who bears the burden of presenting evidence at trial sufficient to establish every element of her claims against the

defendant. (Evid. Code, § 500.) On a JNOV motion challenging a verdict in favor of a defendant, the plaintiff bears the burden of establishing that no substantial evidence supports the jury's verdict. (*Sweatman v. Department of Veterans Affairs*, *supra*, 25 Cal.4th at p. 68.) "The elements of a negligence cause of action are duty, breach, causation and damages." (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 318.) Thus, to prevail on her JNOV motion, *Cazden* had the burden to show both that she presented evidence sufficient to establish (1) that Espinoza breached a duty owed to Cazden and that this breach was the proximate cause of her damages, *and* (2) that there was no substantial evidence to support the jury's verdict. Espinoza had no burden in opposition to the JNOV motion to prove that he was not negligent and did not cause damage to Cazden; he could merely point to the absence of evidence sufficient to establish one or more of the essential elements of negligence or to evidence that could support a reasonable jury's conclusion that one or more of the elements was not established. That is what Espinoza did in this case.

#### 4. *Sufficiency of the Evidence*

Throughout her appellant's opening brief, Cazden asserts that there was overwhelming evidence showing that Espinoza was negligent and that his negligence caused her damage, and there was no evidence to support a verdict of no liability. She is only partly correct.

Cazden is correct that there was significant evidence showing that there were numerous issues with the work that was done on her

property. However, almost all of that evidence was presented in the context of questions from counsel directed to the liability of *James* or, at times, *James and Espinoza together*. There were no questions specifically directed at Espinoza's liability, other than questions that elicited testimony that Espinoza was the person who performed the electrical, plumbing, and roofing work. It appears that this failure to focus specifically on Espinoza's conduct and liability was due to Cazden's theory of the case, i.e., that James and Espinoza were partners or joint venturers, and therefore were jointly liable for all of the damages. Indeed, in her counsel's closing argument to the jury, counsel never specifically discussed Espinoza's liability other than to say that Espinoza was liable for anything that James did if the jury found they were partners; there was no discussion about Espinoza's liability if the jury found he was simply a subcontractor.

Despite Cazden's focus on James's liability, there is no doubt that the evidence nevertheless *could* support a negligence verdict against Espinoza, based upon the testimony that Espinoza was responsible for at least some of the work that purportedly caused damage to Cazden. But, contrary to Cazden's assertion, the evidence presented to the jury did not *require* such a verdict.

For example, Espinoza testified that he performed all of the electrical work at the direction of James. There also was testimony that some of items that Cazden alleged were not done were beyond the scope of the contract, and that some of the items that Cazden alleged were done not in accordance with the Nedobity scope had been approved or accepted by Cazden when James offered to change them. Based upon

this testimony, the jury could conclude that (1) some of the alleged defects were not the responsibility of James or Espinoza; (2) some of the alleged defects did not cause damage to Cazden because she approved them; and/or (3) although James negligently directed Espinoza with regard to the alleged electrical defects, Espinoza did not act negligently.

With regard to the roof, Cazden presented evidence that the Nedobity scope called for a radiant barrier, but that no such barrier was installed (on at least a part of the house<sup>16</sup>), and that overall, the roofing work was performed poorly.<sup>17</sup> But Espinoza testified that a radiant barrier typically is installed only when removing and replacing a shake roof with a composition roof; although he had been told the roof to be replaced was shake, he discovered that it was not, so he did not install the radiant barrier. Cazden did not present any expert testimony that failure to install a radiant barrier under these circumstances was negligent.<sup>18</sup> Moreover, defendants' expert, Nukes, testified that the

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<sup>16</sup> Cazden's roofer, Kurtz, testified that there was no radiant board installed, but clarified that his testimony was limited to the part of the roof that he worked on, which was the rear of the main house.

<sup>17</sup> We note that Cazden asserted that Espinoza also was negligent for failing to properly cover the open roof after a portion was removed to tie the roof on the new addition into the existing roof, which she asserted caused damage to the kitchen when there was a rainstorm. However, as we noted in footnote 6, *ante*, James testified that the portion of the kitchen that was exposed when the roof was open was scheduled to be demolished and rebuilt because it had suffered damage during the demolition of the old addition, and that the cost to do that work was paid by Cazden's insurer as unavoidable collateral damage from the repair of the original water damage.

<sup>18</sup> The only issue was whether Cazden was charged *by James* for a radiant barrier that was not installed.

construction done on the roof was adequate, and that some of the items regarding the roof that Cazden's experts cited as defects were items that were preexisting and were not within the scope of the work Cazden contracted for. Based on this evidence, the jury could conclude that Espinoza's work on the roofing was not negligent and/or that his work did not cause Cazden any damage.

Finally, with regard to the plumbing, although Cazden's plumber Sanchez testified about many significant defects with regard to the plumbing, he admitted that many of those defects were found in the plumbing under the main house. Espinoza testified, however, that the only plumbing work he did was on the plumbing in the new addition and the connection from the addition to the main house; he did not have anything to do with any of the other plumbing under the main house. With regard to the plumbing for the new addition, Sanchez showed a video of the inside of the pipe coming from the toilet in the new bathroom, and testified that the pipe has a "back slope" in it (i.e., there is a portion of the pipe that has a dip in it, where water and waste can collect), which was causing "major backups." Although Espinoza acknowledged in his testimony that the video showed there was a slight dip in the pipe, which he believed was caused when one of the fasteners holding the pipe came apart when they were pouring the concrete for the new foundation, questions were raised about whether that dip was as harmful as Sanchez asserted and whether it had caused any backups at all. For example, Cazden testified that Sanchez asked her to flush several wads of toilet paper down the toilet because it was difficult to see the back slope. Sanchez also testified that he saw no indication of

any backups from the toilet; he only saw water when he looked at the cleanout in the back of the house. From this evidence, the jury could have found Sanchez not entirely credible, and could have concluded that the work Espinoza did, if defective, did not cause Cazden any damage.

Because, as we have demonstrated, there was sufficient evidence from which a jury could determine that although James was negligent, Espinoza was not, we conclude the trial court properly denied Cazden's JNOV motion. (*Hauter v. Zogarts, supra*, 14 Cal.3d at p. 110 [“If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied”]; *Sweatman v. Department of Veterans Affairs, supra*, 25 Cal.4th at p. 68.)

#### B. *Denial of Motion for a New Trial*

Cazden argues the trial court abused its discretion by denying her motion of a new trial as to Espinoza because (1) the evidence was insufficient to support the jury's verdict that Espinoza was not negligent; (2) the jury's verdict was against law because the evidence was without conflict on any material point and insufficient as a matter of law to support the verdict; and (3) there was irregularity in the proceedings of the jury and jury misconduct.

With respect to Cazden's first two arguments, we note that the trial court's denial of her motion was premised upon its conclusion that “[b]ased on the evidence presented at trial, it was reasonable for the jury to conclude that James was negligent, but not Espinoza. It is not clear from the record that the jury should have reached a different

verdict.” As discussed in Section A.4., *ante*, we agree with the trial court’s assessment. Thus, the court did not abuse its discretion by denying the motion under the first two grounds. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872 [“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”].)

With respect to Cazden’s third argument, Cazden asserts that the jury was confused, which she contends is evidenced by the lack of evidence to support the jury’s finding of no negligence and by statements of two jurors that the jury believed that Espinoza could not be liable because he was a subcontractor. We note that, as discussed in Section A.4., the first part of her assertion is incorrect. With regard to the second part of her assertion, Cazden does not at all address in her appellate briefs the trial court’s reasons for denying the motion on this ground: that Cazden’s assertion was not supported by admissible evidence, and that it constituted improper probing of the jurors’ mental processes. In fact, the only evidence upon which Cazden relied—a statement in her counsel’s declaration describing his post-trial conversations with two jurors—was excluded when the court sustained Espinoza’s objection on hearsay and relevance grounds, a ruling that Cazden does not challenge on appeal. Thus, the trial court properly denied Cazden’s motion on this ground as unsupported by any admissible evidence.

### C. *Judicial Estoppel*

Cazden argues that “Mr. Espinoza should have been barred from accepting the benefits of the jury verdict in this case under the doctrine of judicial estoppel” because Espinoza purportedly admitted fault with regard to “a significant number of repair issues.” Regardless whether Espinoza admitted fault, Cazden’s argument fails because judicial estoppel does not apply under these circumstances.

“Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] The doctrine’s dual goals are to maintain the integrity of the judicial system and to protect parties from opponents’ unfair strategies. [Citation.] Application of the doctrine is discretionary. . . . [¶] The party invoking judicial estoppel must show that (1) the party against whom the estoppel is asserted took an inconsistent position in a prior proceeding and (2) that the position was adopted by the first tribunal in some manner such as by rendering a favorable judgment.” (*People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.)

Here, Cazden fails to identify two inconsistent positions Espinoza purportedly took. That Espinoza may have admitted that he did some of the work that Cazden alleges is defective does not, by itself, render his position that he is not liable for negligence an inconsistent position. Moreover, both positions were made in the same trial, at the same time. Therefore, the trial court appropriately rejected Cazden’s judicial estoppel argument.



## **DISPOSITION**

The post-judgment order denying Cazden's JNOV motion and motion for a new trial as to Espinoza is affirmed. Espinoza shall recover his costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.