NUMBER 13-15-00151-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JSC NIZHNEDNEPROVSKY TUBE ROLLING PLANT A/K/A NIZHNEDNEPROBSKY TRUBNY ZAVOD A/K/A INTERPIPE NTRP A/K/A NTRP, SEPCO TUBULARS, INC. N/K/A NORTH AMERICA INTERPIPE, INC., SEPCO SA N/K/A INTERPIPE EUROPE SA, AND PADRE TUBULARS, INC., **Appellants,**

v.

UNITED RESOURCES, LP N/K/A AUBRIS RESOURCES, LP, **Appellee.**

On appeal from the 49th District Court of Zapata County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Garza, and Longoria

Memorandum Opinion by Justice Garza

Appellee United Resources, LP n/k/a Aubris Resources, LP ("UR") sued appellants JSC Nizhnedneprovsky Tube Rolling Plant a/k/a Nizhnedneprobsky Trubny Zavod a/k/a Interpipe NTRP a/k/a NTRP ("NTRP"), Sepco Tubulars, Inc. n/k/a North America Interpipe, Inc. ("Sepco"), Sepco SA n/k/a Interpipe Europe SA ("Sepco SA"), and Padre Tubulars, Inc. ("Padre"), for various causes of action arising out of alleged casing pipe failures at UR's Garcia No. 1 oil and gas well in Zapata County, Texas.

Following a three-week trial, a jury found that Padre was liable for breach of contract; that NTRP, Sepco, and Sepco SA were liable for fraud; and that Padre, NTRP, Sepco, and Sepco SA were liable for breach of an implied warranty of fitness for a particular purpose. The jury also found Sepco, Sepco SA, and NTRP liable on a products liability theory based on alleged factual misrepresentations which UR relied on and which caused the damages. The final judgment awarded UR nearly $3 million in actual and exemplary damages, as well as interest and attorney's fees.

On appeal, appellants contend by six issues that: (1) the judgment impermissibly awarded a double recovery; (2) UR cannot recover on its breach of contract claim; (3) UR cannot recover on its fraud claim; (4) UR cannot recover on its breach of warranty claim; (5) UR cannot recover on its manufacturing defect claim; and (6) the damages, interest, and attorney's fees awards were improper. UR raises a conditional cross-issue.

Because we conclude that the jury's findings were supported by evidence but the trial court's judgment improperly awarded a double recovery, we will reverse and remand for entry of a new final judgment.[1]

---

[1] This appeal was transferred from the Fourth Court of Appeals pursuant to a docket equalization order issued by the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 73.001 (West, Westlaw through

I. Background

NTRP is a Ukraine-based manufacturer of casing pipe used in oil and gas wells. NTRP sells pipe through Sepco SA, based in Switzerland, to Sepco, a Texas corporation, which in turn supplies pipe to Padre, which is based in Corpus Christi. In April 2005, after testing the Garcia No. 1 well and determining that it was viable, UR purchased 292 joints—or around 11,680 feet[2]—of P-110[3] casing from Padre for $154,213.98.

After the well at issue was drilled and the casing was installed, UR ran a pressure test on May 3, 2005 which resulted in the pipe bursting at a depth of 380 feet. UR pulled out ten joints of the casing at issue and was then able to install two new joints along with eight of the original joints. The new casing was successfully tested and the well continued producing.

Rick Allen, UR's Vice President of Operations, testified that he notified Padre of the blowout and requested Mill Test Reports ("MTRs") from Padre which would show metallurgical information for the casing at issue. He stated that he received the MTRs by fax on May 5, 2005. The MTRs confirmed that the pipe conformed to UR's requested specifications. UR sent the two removed casing joints for testing, and it sent the MTRs to a metallurgist.

According to Allen, production from the Garcia No. 1 well began to decline rapidly around May 15, 2005. UR ran several tests and determined that the casing had collapsed or split at a depth of 8,816 feet. UR later decided to "sidetrack" the Garcia No. 1 well by

---

2015 R.S.).

[2] Each joint of casing is around 38 to 40 feet long.

[3] P-110 refers to a pipe grade with a certain weight and strength as specified by the American Petroleum Institute ("API").

abandoning the portion of the pipeline below the burst and installing new casing that would reach the same target. Allen testified that UR was able to drill into a shallower level and achieve a consistent flow.

Production continued to decline, and UR filed suit on December 19, 2005. UR's fourth amended petition, filed in August of 2011, asserted eight causes of action against all defendants: (1) products liability; (2) negligence; (3) breach of express and implied warranties; (4) negligent misrepresentation; (5) breach of contract; (6) fraud and fraudulent inducement; (7) fraud by non-disclosure or partial disclosure; and (8) conspiracy.[4] UR later non-suited its negligence claims.

At trial, appellants alleged that the casing which collapsed was not manufactured and sold by them—instead, they argued that it was a "mixed string" of casing from various manufacturers. Appellants further argued that the problems with the well were not caused by defective casing, but were rather caused by other factors such as environmental issues and operator error. Appellants' expert witness Gary Wooley testified that, although there was an obstruction in the well, there was nothing to indicate that a casing collapse caused the obstruction. He testified that UR had cemented the casing improperly, resulting in deformation in the area where there was no cement. Wooley further testified that he would expect very little production from the area where the well was drilled, and a well would not be commercially viable there. He opined that there was no defect at 8,816 feet.

The jury answered twenty-three charge questions in reaching its verdict. As to the breach of contract claim, the jury found that: (1) Padre agreed to provide P-110 casing

---

[4] UR's live petition also named Allied Steel SA, CJSC Nikopolsky Seamless Pipe Plant a/k/a Nikopolsky Zavod Besshovnykh Trub, Nikopol Tube Company a/k/a Nikopol Trubnaya Company, and JSC Novomoskovsky Pipe Producing Plant a/k/a Novomoskovsky Trubny Zavod as defendants. These defendants were either non-suited or found not liable by the jury, and are not parties to this appeal.

to UR for use in the well at issue, but Sepco did not; (2) Padre failed to comply with the agreement; (3) Padre's failure to comply resulted in damages to the well; (4) $1,300,000 would reasonably compensate UR for its loss as a result of Padre's breach; and (5) UR incurred $350,000 in reasonable attorney's fees.

As to the fraud claim, the jury found: (1) fraud by Sepco, NTRP, and Sepco SA proximately caused the damage to well, but there was no fraud by Padre; and (2) there was no conspiracy among the appellants to provide non-compliant casing. The jury further found that Padre, Sepco, Sepco SA, and NTRP breached an implied warranty of fitness for a particular purpose, and it apportioned 10% responsibility for the breach to Padre, 20% to Sepco, 20% to Sepco SA, and 50% to NTRP. The jury found that $1,300,000 would reasonably compensate UR for damages to the well resulting from breach of warranty or fraud.

As to UR's products liability claim, the jury found that there was a manufacturing defect which caused UR's damages and that NTRP was a manufacturer of the defective casing, but Sepco, Sepco SA, and Padre were not manufacturers. It found that all appellants were engaged in the business of selling casing, were sellers of the defective casing at issue, and made factual misrepresentations about the casing which UR relied on and which caused damages to the well. It also found that Sepco, Sepco SA, and NTRP had actual knowledge of the defect in the pipe at the time it was supplied, though Padre did not. As to the products liability claim, the jury assessed $1,300,000 in damages, with responsibility apportioned 20% to Sepco, 20% to Sepco SA, and 60% to NTRP. Finally, the jury found by clear and convincing evidence that UR's damages

resulted from fraud or malice, and it assessed exemplary damages of $210,000 against NTRP, $70,000 against Sepco, and $70,000 against Sepco SA.

The final judgment awarded UR a total of $2,950,000. Specifically, as to the contract claim against Padre, the judgment awarded $1,300,000 in actual damages and $350,000 in attorney's fees. As to the "tort claims," the judgment awarded $260,000 in actual damages against Sepco, with NTRP jointly and severally liable; $260,000 in actual damages against Sepco SA, with NTRP jointly and severally liable; $780,000 in actual damages against NTRP alone[5]; $70,000 in exemplary damages against Sepco; $70,000 in exemplary damages against Sepco SA; and $210,000 in exemplary damages against NTRP. The judgment further stated, under a section entitled "Alternative Recovery For Tort Claims," that "[s]hould the jury's findings of fraud and misrepresentation . . . be overturned on appeal," UR may recover, in the alternative, on its breach of warranty claim as follows: $130,000 in actual damages from Padre; $260,000 in actual damages from Sepco SA; $260,000 in actual damages from Sepco; and $520,000 in actual damages from NTRP. This appeal followed.

II. Discussion

A. Double Recovery

Appellants argue by their first issue that the trial court "did not follow the law when it entered judgment." *See* Tex. R. Civ. P. 301 ("The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so

[5] The judgment states that "NTRP is jointly and severally liable to [UR] for all Tort Claim damages hereinabove award to [UR] and therefore [UR] shall have and recover against [NTRP] the sum of [$1,300,000]." This amount includes the amounts previously awarded for the "tort claims" against Sepco and Sepco SA, for which NTRP was found jointly and severally liable. The judgment then states: "Provided, however, the sums [UR] shall have and recover from NTRP shall be reduced by those amounts, if any, [UR] recovers from either [Sepco SA] or [Sepco]."

framed as to give the party all the relief to which he may be entitled either in law or equity."). In particular, appellants contend that the judgment's award of damages for both breach of contract and tort claims constitutes an impermissible double recovery.

When a defendant commits the same, or even differing, acts resulting in a single injury, a plaintiff is permitted to allege alternative theories of recovery. *See Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184–85 (Tex. 1998) (per curiam); *see also Crown Life Ins. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000). But under these circumstances, the plaintiff may not recover damages on both theories. *Waite Hill Servs., Inc.*, 959 S.W.2d at 184 (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex. 1991)). This would amount to a "double recovery" for a single injury, which is clearly prohibited under the law. *See id.* However, a judgment that awards damages based upon two theories does not amount to a double recovery if the theories of liability arise from two separate and distinct injuries, and there has been a separate and distinct finding of damage on both theories of liability. *Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987); *see Berry Prop. Mgmt., Inc. v. Bliskey*, 850 S.W.2d 644, 664–66 (Tex. App.—Corpus Christi 1993, writ dism'd by agr.); *see also Fed. Deposit Ins. Corp. v. White*, No. 13-08-00263-CV, 2011 WL 4998515, at *5 (Tex. App.—Corpus Christi Oct. 20, 2011, no pet.) (mem. op.).

Appellants argue that UR "tried the case asserting a single injury"—i.e., "the loss of the Garcia No. 1 Well allegedly caused by defective pipe." They point to various instances in the record where it claims UR's counsel acknowledged that there was only one injury. In its live petition, UR argued that, "[a]s a result of the collapse of the defective casing provided by Defendants, [UR] was forced to abandon the Garcia Well which was

a total loss." Moreover, UR's counsel agreed at trial that UR was seeking damages for "the amount of money [it] put into drilling that hole" and elaborated as follows: "Drilling and completion and attempt to remediate the first failure, and then attempt to investigate the second failure. . . . So our measure of damages is what were we out when the well—when their product, their defective product failed. That's what the measure of damages is." At the charge conference, counsel agreed that there was only "one transaction" or "one sale" of pipe involved and there was only "one misrepresentation." And in his closing argument, UR's counsel asked the jury to "render a verdict and award [UR] its damages for the loss of the Garcia No. 1 Well. . . . Our injuries and our damages are for the well . . . ."

Appellants argue that this case is similar to *Waite Hill*, in which the Texas Supreme Court reversed a judgment on grounds that the trial court awarded a double recovery. 959 S.W.2d at 183. In that case, the plaintiff, a chrome plating company, sued its insurer for breach of contract, breach of the duty of good faith and fair dealing, deceptive trade practices, and insurance code violations. *Id.* The plaintiff alleged that the insurer wrongfully denied a claim arising from a hole in a chrome solution tank, which caused the plaintiff to lose thirty days of operation. *Id.* at 183–84. The trial court directed a verdict in favor of the plaintiff on the contract claim, and the jury found in favor of the plaintiff on the deceptive trade practices, insurance code, and good faith claims. *Id.* at 184. The jury charge contained two separate damages questions: the first—which was based on the directed contract verdict—asked what amount was payable under the policy; and the second—which the jury was instructed to answer only if it found liability on the deceptive trade practices, insurance code, or good faith claims—asked to assess the plaintiff's

damages for repairing the tank, replacing the lost chrome solution, and restoring lost profits. *Id.* The jury awarded identical damages in response to both questions. *Id.* The Texas Supreme Court concluded that this was an impermissible double recovery, because the jury's two damages findings "were conclusively for the same loss." *Id.* The Court noted that, while the award under the first damages question "could only have been for the money [plaintiff] was due under its policy," the "specific damages elements listed under [the second question] are the same damages covered under the policy: repair and restoration of property, lost profits, and replacement of lost solutions." *Id.* at 184–85. Although the plaintiff "may have suffered some tort losses, distinct from its claims on the policy," it offered no evidence or sought a jury charge question on any such losses. *Id.* at 185.

UR contends that *Waite* is distinguishable because, in that case, the jury awarded damages for (1) losses payable under the insurance policy *and* (2) amounts incurred for specific losses. UR argues that the case is more akin to *Medical Air Services Ass'n v. Kebert*, in which the plaintiff was awarded (1) damages against one defendant for breach of contract, and (2) damages against a second defendant for fraud. 26 S.W.3d 663, 667–68 (Tex. App.—Corpus Christi 2000, pet. denied). Both awards were for lost commissions, but this Court held that, because there was evidence of "additional commissions" lost by the plaintiff because of the fraud, there was no double recovery. *Id.* at 668. UR notes correctly that, as in *Medical Air Services*, the two awards here were assessed against distinct defendants: the breach of contract award was against Padre, but the tort damages award was against NTRP, Sepco, and Sepco SA. UR cites several other cases in which this Court found that it was not improper to award both breach of

contract damages and tort damages. *See Valley Nissan, Inc. v. Davila*, 133 S.W.3d 702, 714–15 (Tex. App.—Corpus Christi 2003, no pet.) (finding no improper double recovery where court awarded damages for breach of contract and negligent misrepresentation); *Balogh v. Ramos*, 978 S.W.2d 696, 702 (Tex. App.—Corpus Christi 1998, pet. denied) (same where damages awarded for breach of contract and fraud); *see also White*, 2011 WL 4998515, at *5 (same where damages awarded for breach of contract and conversion); *Tristan v. C.A. Walker, Inc.*, No. 13-01-410-CV, 2003 WL 21212342, *1–2 (Tex. App.—Corpus Christi May 27, 2003, pet. denied) (mem. op.) (same where damages awarded for breach of contract and fraud).

UR contends that the jury made two damages findings based on two separate and distinct injuries: (1) economic loss resulting from the breach of contract, and (2) injury to real property—i.e., the well. It argues that there was evidence that it lost its original investment in the well, that it spent large sums to sidetrack the well, and that it lost profit on the sale of the well. It contends that "[t]he jury was free to review this evidence and to determine which expenses/losses were properly categorized as real-property damage to the well and which were properly categorized as economic losses resulting from Padre's breach of contract."

Considering the factual circumstances of this case, we agree with appellants that there was only one separate and distinct injury underlying the breach of contract and tort claims. UR's live petition sought damages for "the loss of the Garcia Well and cost associated with attempts to salvage the Garcia Well." But "the loss of the Garcia Well and cost associated with attempts to salvage the Garcia Well" were both caused by a

single underlying problem, which is that the pipe was defective.[6] Similarly, each of the specific elements of damages identified by UR—such as its original investment in the well, its cost to sidetrack the well, and its loss upon sale of the well—arose from the pipe failures. This is not a case such as *Medical Air Services*, 26 S.W.3d at 668, in which there were *additional* losses caused by fraud that were not caused by the breach of contract, or vice versa; instead, here, the damages allegedly caused by the breach of contract were identical to the damages allegedly caused by the fraud. Both were the result of defective pipe.

UR notes correctly that the jury was instructed in the charge not to "compensate twice for the same loss" and that, generally, we presume that the jury followed the court's instructions. *See Davis v. Nat'l Lloyds Ins. Co.*, 484 S.W.3d 459, 470 (Tex. App.—Houston [1st Dist.] 2015, pet. filed) (citing *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 771 (Tex. 2003) (holding that, unless record demonstrates otherwise, we must presume jury followed instructions given)). But that instruction was given only within the context of one charge question, number 20, which asked what sum would fairly and reasonably compensate UR for damage to the well, and which was conditioned on a manufacturing defect finding. The instruction was not made explicitly applicable to the entire charge. Moreover, in its preamble, the charge instructed the jury not to "increase or reduce the amount in one answer because of your answer to any other question about

[6] The evidence indicated that there were two pipe failures: one at a depth of 380 feet and one at a depth of 8,816 feet. However, UR did not argue that it suffered separate and distinct damages as a result of each failure. Instead, it argued that the various forms of damages it suffered—including both "injury to real property" and "economic loss"—all resulted from the collective effect of both failures, and both failures were caused by defective pipe.

damages." This supports appellants' contention that the jury reasonably believed that it was not prohibited from "compensat[ing] twice for the same loss."

In any event, it is undisputed that the jury did, in fact, make multiple damages findings for the same injury. As noted, the jury made three separate damages findings. First, in response to charge question number 5, the jury found that $1.3 million would fairly and reasonably compensate UR for its loss as a result of Padre's breach of contract. Second, in response to charge question number 12, the jury found that $1.3 million would fairly and reasonably compensate UR for damages to the well. Third, in response to charge question number 20, the jury again found that $1.3 million would fairly and reasonably compensate UR for damages to the well. The jury was instructed to answer charge question number 12 only if it found liability for breach of warranty, fraud, or conspiracy; and it was instructed to answer question number 20 only if it found a manufacturing defect. Crucially, the final judgment did not award *both* the amount awarded in question 12 *and* the amount awarded in question 20—instead, along with the breach of contract damages, it awarded $1.3 million in damages based on "tort claims" and then provided for an "alternative recovery for tort claims" based on the $1.3 million in breach of warranty damages "[s]hould the jury's findings of fraud and misrepresentation[[7]] . . . be overturned on appeal." The judgment, which was drafted and proposed by UR, thereby acknowledged that the two damages awards compensated for the same injury. The record clearly demonstrates that the jury awarded multiple damages awards for the same injury. Therefore, even assuming that the instruction in charge

[7] The parties appear to agree that the judgment uses "misrepresentation" to refer to UR's products liability claims.

question number 20 not to "compensate twice for the same loss" was applicable to the entire charge, we need not presume that the jury followed that instruction. *See Golden Eagle Archery, Inc.*, 116 S.W.3d at 771.

Although there is evidence that UR's injury manifested itself in several different ways, there was nothing to indicate that the various causes of action were intended to compensate for separate and distinct injuries. In particular, there was no allegation or evidence that Padre's breach of contract caused any damages that were separate or distinct from those allegedly caused by the torts of the other appellants. As in *Waite Hill*, the two damages awards "were conclusively for the same loss." *See* 959 S.W.2d at 184. Accordingly, under the particular facts of this case, the trial court's award of both breach of contract damages and tort damages constituted an impermissible double recovery. *See id.* We sustain appellants' first issue.

B. Breach of Contract

Appellants argue by their second issue that UR cannot recover for breach of contract against Padre because "the contract between Padre and UR precludes recovery." We construe this as a challenge to the legal sufficiency of the evidence supporting the contract claim. A legal sufficiency challenge will be sustained when the record shows either: (a) a complete absence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). We view the evidence in the light most favorable to the finding, indulge every reasonable inference in support of the finding, credit favorable

evidence if a reasonable fact-finder could, and disregard contrary evidence unless a reasonable fact-finder could not. *Id.* at 807, 822.

"Our primary concern in contract interpretation is to ascertain the true intentions of the parties as expressed in the instrument." *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 63 (Tex. 2014) (citing *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). We consider the entire writing to harmonize and effectuate all provisions such that none are rendered meaningless. *Id.* Further, we "construe contracts from a utilitarian standpoint bearing in mind the particular business activity sought to be served." *Id.*

The contract between UR and Padre stated in relevant part as follows:

> 1. WORK:
>
> 1.1 This Agreement shall apply to all the services and goods provided by [Padre] at the request of [UR] during the term of this Agreement ("Work"), except for specific goods and services, if any, for which the parties may enter into a separate written contract.
>
> . . . .
>
> 1.4 The parties agree that [Padre]'s materials, equipment, and supplies used by [Padre] in the performance of Work shall be brought to the Work site in working order, kept in good repair and shall remain in [Padre]'s sole care, custody, operation, and control at all times.
>
> . . . .
>
> 12. RESPONSIBILITY FOR LOSS OR DAMAGE TO THE EQUIPMENT OR THE HOLE:
>
> . . . .
>
> 12.5 THE HOLE. IF THE HOLE SHOULD BE LOST OR DAMAGED WHILE [PADRE] IS WORKING, [UR] SHALL BE RESPONSIBLE FOR THE DAMAGE TO OR LOSS OF THE HOLE, INCLUDING THE CASING THEREIN, AS WELL AS FOR THE COST OF REGAINING CONTROL OF ANY WILD WELL, UNLESS SUCH LOSS IS DUE TO THE SOLE

NEGLIGENT ACTS OR OMISSIONS OR WILLFUL MISCONDUCT OF [PADRE].[[8]]

(Emphasis in original.) Appellants argue that, because there was no negligence or fraud finding against Padre, section 12.5 precludes recovery on any other theory, such as breach of contract.[9]

This argument is essentially that the evidence conclusively proved that UR released any breach of contract claim. *See City of Keller*, 168 S.W.3d at 819; *see also Whitney Nat'l Bank v. Baker*, 122 S.W.3d 204, 207 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("When, as here, an affirmative defense was not submitted to the jury, we review the record to determine whether the issue was disputed or whether the defense was conclusively established by the evidence."). But release is an affirmative defense that must be pleaded. TEX. R. CIV. P. 94. Appellants' live answer sets forth several affirmative defenses, but not waiver or release.

Even if appellants had properly pleaded the issue, it would lack merit. Section 12.5 of the contract releases any claims UR had against Padre that are not based on negligence or willful misconduct, but the section explicitly states that it is applicable only

---

[8] Additionally, the contract concluded as follows:

> EACH OF THE PARTIES HERETO SPECIFICALLY ACKNOWLEDGES AND AGREES . . . THAT IT RECOGNIZES THAT CERTAIN OF THE TERMS OF THIS AGREEMENT PROVIDE FOR THE ASSUMPTION BY ONE PARTY OF, AND/OR RELEASE OF THE OTHER PARTY FROM, CERTAIN LIABILITIES ATTRIBUTABLE TO THIS TRANSACTION OR THE PREMISES COVERED HEREBY THAT SUCH PARTY WOULD OTHERWISE BE RESPONSIBLE FOR UNDER THE LAW. EACH PARTY HERETO FURTHER AGREES THAT IT WILL NOT CONTEST THE VALIDITY OR ENFORCEABILITY OF ANY SUCH PROVISIONS OF THIS AGREEMENT ON THE BASIS THAT THE PARTY HAD NO NOTICE OR KNOWLEDGE OF SUCH PROVISIONS OR THAT SUCH PROVISIONS ARE NOT "CONSPICUOUS."

(Emphasis in original.)

[9] Appellants also made this argument in a motion for judgment notwithstanding the verdict, which the trial court denied.

to situations where "the hole [is] lost or damaged *while* [*Padre*] *is working* . . ." (emphasis added). Here, there is no allegation or evidence that Padre was "working" at the time of either of the alleged casing failures. Instead, it is undisputed that the only "work" done by Padre under the contract was to provide the casing. Padre's "work" was therefore complete when the casing was delivered to UR on April 25, 2005.

Appellants assert that Padre was "necessarily" "working" at the time of the casing failures because "[its] casing was being used in the Well when the alleged loss occurred and Padre was in sole care, custody, and control of the casing during that time" under section 1.4 of the contract. However, section 1.4 applies only to "materials, equipment, and supplies used by [Padre] in the performance of Work"—and, as noted, Padre's "work" was complete at the time the casing was delivered. Even if the already-installed casing were considered "materials, equipment, and supplies used by [Padre] in the performance of Work," the mere fact that Padre was contractually considered to be "in sole care, custody, and control" of the casing does not necessarily mean that Padre was "working" at the site at the time of the loss so as to render section 12.5 applicable. Moreover, section 1.4 stated that any "materials, equipment, and supplies used by [Padre] in the performance of Work" must be "brought to the Work site in working order," and the jury found that the casing was not, in fact, in working order.

For the foregoing reasons, appellants' second issue is overruled.

C. Products Liability

By their fifth issue, appellants argue that UR cannot recover on its products liability theory because "[t]he sellers made no express representations and had no knowledge of an alleged defect at the time they supplied the casing." Appellants further contend that

there is no evidence the casing was dangerous "to an extent beyond what an oil and gas operator would contemplate." Again, we construe this as a challenge to the legal sufficiency of the evidence supporting the claim. *See City of Keller*, 168 S.W.3d at 819.

To recover on a manufacturing defect claim against a manufacturer, a plaintiff must show that: (1) the "product deviates, in its construction or quality, from the specifications or planned output in a manner that renders it unreasonably dangerous"; (2) "the product was defective when it left the hands of the manufacturer"; and (3) "the defect was a producing cause of the plaintiff's injuries." *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 800 (Tex. 2006) (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004)). Here, the jury found that NTRP was a manufacturer and that there was a manufacturing defect.[10]

As to non-manufacturing sellers, section 82.003 of the Texas Civil Practice and Remedies Code provides as follows:

> A seller that did not manufacture a product is not liable for harm caused to the claimant by that product unless the claimant proves . . .
>
> (5) that:
>
> (A) the seller made an express factual representation about an aspect of the product;
>
> (B) the representation was incorrect;
>
> (C) the claimant relied on the representation in obtaining or using the product; and

[10] The charge instructed the jury as follows:

> A "manufacturing defect" means that the product deviated in its construction or quality from its specifications or planned output in a manner that renders it unreasonably dangerous. An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product, with the ordinary knowledge common to the community as to the product's characteristics.

(D) if the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm; [or]

(6) that:

(A) the seller actually knew of a defect to the product at the time the seller supplied the product; and

(B) the claimant's harm resulted from the defect . . . .

TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a) (West, Westlaw through 2015 R.S.). Here, the jury found that Sepco, Sepco SA, and NTRP were sellers of the subject pipe, that they made factual misrepresentations about the pipe which UR relied on and which caused damages to the well, that they had actual knowledge of a defect in the pipe at the time it was supplied, and that the defect caused UR's damages. *See id.* § 82.003(a)(5), (6).

First, as to the existence of a defect, appellants do not dispute that the subject pipe was defective, at least with respect to the initial burst at 380 feet; rather, they argue that there was no evidence that the defect rendered the pipe unreasonably dangerous. We disagree. The evidence established that wellbore drilling is a dangerous activity and that the failure of equipment used in that process can cause explosions, blowouts, or other accidents that may result in property damage, injuries, and death. Brad Watson, UR's president from 2000 to 2011, testified that casing is "a very, very critical piece of the well bore" and that UR "depend[s on] vendors who are experts in their area to give us what we ask for." When asked what makes it so critical, Watson explained that, "[f]or the casing, . . . what's involved is safety. If there's—if there's a casing problem, safety risks come into play. People can get hurt; people can get killed. So for that reason, we can't have one bad joint of pipe. It's got to be right." He stated that it is "very, very unusual" for casing to burst while it is being pressure tested in a well.

Salah Mahmoud, a metallurgical engineer, testified that his laboratory tested six joints of pipe that had been removed from the subject well after the initial burst, and that several joints "did not meet the specification for P-110." He stated that P-110 pipe specifications require a minimum yield strength of 110,000 pounds per square inch, but that the joint above the joint that failed, in particular, had a minimum yield strength of only 90,000 pounds per square inch and was therefore "softer" than it should have been. He stated that, from "the user['s] point of view," the failure rate "should be zero." Allen, UR's Vice President of Operations, testified that UR would not have purchased the pipe if it knew that there was a possibility that it did not meet P-110 standards. Viewing the evidence in the light most favorable to the verdict, *see City of Keller*, 168 S.W.3d at 807, we conclude that it is sufficient to support the jury's finding that the defect rendered the pipe unreasonably dangerous.

As noted, appellants do not dispute that the subject pipe was defective. On appeal, they also do not dispute that the defect caused UR's damages. Accordingly, having found that the evidence supported the jury's finding that the manufacturing defect rendered the pipe unreasonably dangerous, we find that the judgment against NTRP on the products liability claim was proper. *See Cooper Tire & Rubber Co.*, 204 S.W.3d at 800 (setting forth elements of manufacturing defect claim against manufacturer).

Next, as to Sepco and Sepco SA, UR was required to additionally show an express misrepresentation or actual knowledge of the defect. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(5), (6) (setting forth elements of manufacturing defect claim against non-manufacturing seller). We find sufficient evidence to support the jury's findings under both theories.

Mahmoud testified that, in order to meet API standards for yield strength and other properties, pipe must undergo a three-step heat treatment process: first, it is heated to 1600 to 1800 degrees Fahrenheit for one hour per inch of thickness; second, it is quenched in water; and third, it is reheated at a lower temperature of around 1200 degrees, again for one hour per inch of thickness. However, he stated that, according to tests performed by Metallurgical Consultants, Inc. ("MCI"), a company retained by Sepco to test samples from the NTRP mill from 2003 to 2005, pipes manufactured by NTRP during that time were subject to "improper heat treatment" that caused "low yield strength" and insufficient wall thickness. Mahmoud identified several reports from MCI indicating that pipes manufactured by NTRP from 2003 to 2005 failed tests for yield strength, tensile strength, hardness, and impact resistance.

According to a 2004 email sent by Mark Buehler of MCI to Tor Vatne, Sepco's president, Sepco and MCI representatives intended to meet with NTRP's representatives to discuss "some of the conditions observed by [MCI] in NTRP products, such as the variation in mechanical properties." Buehler suggested in the email that the parties "discuss[] tube properties that are important for oil country tubular goods, such as uniform, controlled strength and hardness, and satisfactory fracture toughness." The email stated: "As you and I have already discussed, the selection by NTRP of a carbon-manganese steel for high-strength tubes is challenging for the consistent achievement of the desired properties, cited above." Buehler testified that, as of December 2004, MCI knew that customers had made claims based on manufacturing problems at the NTRP mill.

Buehler travelled to the Ukraine in August of 2005 to meet with NTRP's metallurgical department because NTRP officials were "concerned about claims" arising

from “pipe failures.” After visiting the mill, Buehler provided a report to Michael Volodarsky of Sepco SA, detailing the problems he observed at the mill. The report stated in part as follows:

> The quality issues followed ongoing discussions between [Sepco] and [MCI] concerning problems experienced with different sizes of high-strength casing, primarily API SCT Grade P110, manufactured and processed by NTRP. Some problems were failures due to heat treatment irregularities, and other problems, as determined from testing new casing, were unsatisfactorily high and low yield strengths and inadequate Charpy fracture toughness. The high yield strength was associated with insufficient tempering of a chemical composition that exceeded the maximum carbon limit by a large measure; the low yield strength was associated with inadequate quenching for the chemical composition, or overtempering. The low fracture toughness was also a result of inadequate quenching of the tube for the chemical composition, and in one case of insufficient tempering for the out-of specification carbon content previously described.
>
> The current steel used by NTRP for these grades is a GOST carbon-manganese steel 32Г2, similar to AISI 1532, both of which have limited hardenability; the limited hardenability reduces the volume fraction of martensite produced upon cooling. The lower amount of martensite limits potential yield strength and Charpy toughness upon tempering.

Buehler testified that, in his meetings with NTRP officials, he learned that “the status of the mill was a little peculiar” because “[i]t had been privatized, and . . . there was some contention about really who owned the mill.” Additionally, “[t]here were . . . some improvements that were delayed because of the reluctance, you know, for investment.”

We find that the foregoing evidence, taken together and viewed in the light most favorable to the verdict, *see City of Keller*, 168 S.W.3d at 807, was sufficient to support a reasonable inference that Sepco and Sepco SA actually knew of a defect in the pipe at the time it was supplied. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(6).

Additionally, invoices and other documents introduced as evidence showed that Sepco SA, in selling the subject pipe to Sepco, and Sepco, in selling the subject pipe to Padre, represented that the pipe was P-110 grade. And, as noted, Allen testified that UR

would not have purchased the pipe if it knew there was a possibility that the pipe did not meet P-110 standards. This evidence supported the jury's findings under section 82.003(a)(5). *See id.* § 82.003(a)(5).

Because the evidence was legally sufficient to support the products liability findings against Sepco and Sepco SA, appellants' fifth issue is overruled.[11]

D. Fraud or Malice

Appellants contend by their third issue that UR's fraud claim fails for several reasons. First, appellants argue that the judgment "improperly uses the jury's products liability percentages of responsibility to apportion responsibility to the defendants on the fraud claim." However, the actual damages awarded in the judgment for "tort claims" were based on both the fraud and products liability findings, and we have already found that the evidence was legally sufficient to support the latter findings. Accordingly, we need not address this part of appellants' third issue; nor need we address UR's cross-issue, which asks us to modify the judgment to assess joint and several fraud liability among the defendants found liable for fraud if we were to conclude that there was no proportionate liability question applicable to the fraud claim. *See* TEX. R. APP. P. 47.1; *Corpus Christi Day Cruise, LLC v. Christus Spohn Health Sys. Corp.*, 398 S.W.3d 303, 314 n.11 (Tex. App.—Corpus Christi 2012, pet. denied).

Appellants also argue by their third issue that the evidence did not support the jury's finding in response to charge question number 22, upon which the exemplary damages award was based, that UR's harm resulted from fraud or malice. *See* TEX. CIV.

---

[11] In light of our conclusion, we need not address appellants' fourth issue, arguing that UR cannot recover on its breach of warranty claim, because the damages awarded in connection with that claim constituted an "alternative recovery" predicated on our reversal of both the fraud and products liability judgments. *See* TEX. R. APP. P. 47.1.

PRAC. & REM. CODE ANN. § 41.003 (West, Westlaw through 2015 R.S.) (stating that exemplary damages may only be awarded upon a showing by clear and convincing evidence that the harm resulted from fraud, malice, or gross negligence). To support an exemplary damages award, a finding of fraud or malice must be supported by clear and convincing evidence. *See id.* "Clear and convincing" means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *Id.* § 41.001(2) (West, Westlaw through 2015 R.S.).

Appellants contend that they had no "special relationship" with UR that would give rise to a duty to disclose. *See Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) ("Generally, no duty of disclosure arises without evidence of a confidential or fiduciary relationship."). Appellants further argue that there was no evidence they had knowledge of any defect in the subject pipe.

To show fraud by omission or non-disclosure,[12] a plaintiff must show that the defendant had a duty to disclose. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d

[12] Jury charge question number 22 asked: "Do you find by clear and convincing evidence that the damage to [UR] resulted from malice or fraud?" The question was accompanied by an instruction defining "fraud" as "fraud other than constructive fraud." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(6) (West, Westlaw through 2015 R.S.). This instruction differs from the instruction given with charge question number 6, which asked the jury whether the defendants' fraud caused the damage to the well, and defined "fraud" as follows:

Fraud occurs when:

1. A party fails to disclose a material fact within the knowledge of that party, and
2. The party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth, and
3. The party intends to induce the other party to take some action by failing to disclose the fact, and
4. The other party suffers injury as a result of acting without knowledge of the undisclosed fact.

Fraud by non-disclosure is only one subcategory of fraud, *see Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997), and question number 22 did not explicitly limit the jury's consideration to only

171, 181 (Tex. 1997); *Guevara v. Lackner*, 447 S.W.3d 566, 578 (Tex. App.—Corpus Christi 2014, no pet.). But a duty to disclose may arise in situations not involving a confidential or fiduciary relationship. In particular, a duty to disclose may also arise: (1) when one voluntarily discloses information, in which case the whole truth must be disclosed; (2) when one makes a representation, in which case new information must be disclosed when the new information makes the earlier representation misleading or untrue; and (3) when one makes a partial disclosure and conveys a false impression. *Guevara*, 447 S.W.3d at 578 (citing *Brown & Brown of Tex., Inc. v. Omni Metals, Inc.*, 317 S.W.3d 361, 384 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (op. on reh'g); *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 635 (Tex. App.—San Antonio 1993, writ denied)).

Here, as detailed above, NTRP, Sepco, and Sepco SA represented at each step of the supply chain that the subject pipe met API P-110 specifications, even though there was evidence that they were aware of manufacturing problems at the plant as early as 2003. Specifically, according to Mahmoud, Sepco obtained reports from MCI indicating that samples of pipe produced at NTRP between 2003 and 2005 were subject to improper heat treatment and failed to meet specifications. Buehler testified that NTRP was concerned about claims arising from pipe failures, and he later stated in a report to Sepco SA that P-110 pipe manufactured at NTRP had various problems including "failures due to heat treatment irregularities." We conclude that, from this evidence, the jury could have formed a "firm belief or conviction" that appellants had a duty to disclose and knew of the

this type of fraud. Nevertheless the parties appear to agree that "fraud" as used in question number 22 contemplated only fraud by non-disclosure.

defect in the subject pipe. *See Guevara*, 447 S.W.3d at 578; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(2).[13] Appellants' third issue is overruled.

E. Damages, Attorney's Fees, and Interest

In an unenumerated issue, appellants argue that UR's actual damages are limited to $200,000 because Watson, UR's president, testified that UR "may have made $200,000 or lost $200,000, or broken even" on the Garcia No. 1 Well. Appellants are referring to the following colloquy that occurred during Watson's cross-examination at trial:

> Q. You previously testified under oath that with regard to the Garcia 1 . . . , you only made about 200,000, or broke even, or at most lost 200,000 on this well with the sale of the asset.
>
> A. No. I don't think that I said we lost at most 200,000. If I did it was taken out of context in that deposition.
>
> . . . .
>
> Q. Do you recall taking a deposition July 27, '11?
>
> A. Yes, sir.
>
> . . . .
>
> Q. July 27th. Line 14, you're saying the odds are you broke even, you may have made a little money, you just don't know. What's your answer on Line 17? Can you read it?
>
> A. That's right.
>
> Q. You're not saying specifically to the ladies and gentlemen of the jury based on [UR]'s 32 million profit and its allocation of those monies that [Garcia] 1 lost money, are you? What's your answer on Line 22?
>
> A. Yes. I am saying it could have.

[13] Because appellants' arguments as to the sufficiency of the evidence supporting fraud by non-disclosure lack merit, we need not address whether the evidence supported a finding of malice. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West, Westlaw through 2015 R.S.); TEX. R. APP. P. 47.1.

Q. What else do you say?

A. I don't know.

. . . .

Q. All right, sir. Do you recall testifying, basically, with regard to this well and the sale, did [UR] book this as a loss, a break even, or a profit for the sales transaction? What was it?

A. There was no booking associated with this well. Maybe in my deposition I accidentally misunderstood you or said something different, but we didn't book individual wells.

Q. Do you recall testifying as to whether or not you stated clearly under oath that you don't remember specifically, but it was either slightly uneconomic or slightly economic, which means making a profit; right? Is that correct?

A. I remember saying that. Yes.

Appellants argue that this testimony constitutes "conclusive" evidence that UR's actual damages were no more than $200,000. *See City of Keller*, 168 S.W.3d at 819.

In response, UR asserts that there was evidence of damages beyond $200,000 and beyond the amount actually awarded. We agree with UR. UR paid over $154,000 for the pipe itself, and Watson testified that UR spent an additional $179,000 for testing and storage of the pipe after the initial failure at 380 feet. Watson further stated that UR had invested an additional $2.697 million in drilling and completion of the well as of February 2006, and that "the profit would have been 4 million or more if we hadn't had all the problems with the well." This testimony did not conclusively establish actual damages of $200,000 or less. *See id.*; *see also Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002) ("In determining damages, the jury has discretion to award damages within the range of evidence presented at trial.").

Finally, appellants argue by a multifarious sixth issue[14] that, if we were to conclude that UR is able to recover, actual damages must be modified, attorney's fees and exemplary damages are not both recoverable, and pre-judgment interest should be recalculated.

Appellants first argue the judgment for damages should be $1.3 million or $200,000, and pre-judgment interest should be recalculated on that amount. We have rejected the argument that damages were capped at $200,000, but we agree with appellants that pre-judgment interest should be recalculated because the judgment improperly awards a double recovery. On remand, UR must elect one form of recovery—based on either breach of contract or products liability—and pre-judgment interest should be assessed only on the actual damages awarded in the form of recovery selected. Moreover, attorney's fees will be recoverable only if UR elects the breach of contract recovery, *see* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West, Westlaw through 2015 R.S.), and exemplary damages will be recoverable only if UR elects the products liability recovery. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) (noting that exemplary damages are unavailable for breach of contract). We sustain this part of appellants' sixth issue.

---

[14] The issue is presented as follows:

> If UR can recover, actual damages must be modified, no attorneys' fees or exemplary damages are recoverable, pre-judgment interest can only be assessed once (not multiple times as in the current judgment), and interest must be re-calculated to account for reduced damages and/or an 18-month delay in filing suit against certain defendants, and to correct calculation errors in the judgment.

Although the issue is multifarious, we choose in our sole discretion to address it. *See Hamilton v. Williams*, 298 S.W.3d 334, 339 n.3 (Tex. App.—Fort Worth 2009, pet. denied) ("An issue is multifarious when it generally attacks the trial court's order with numerous arguments. . . . We may disregard any assignment of error that is multifarious.")

Second, appellants contend that pre-judgment interest against NTRP and Sepco SA cannot begin to accrue earlier than the date they were joined as defendants. The judgment states that pre-judgment interest on all of the actual damages awards begins to accrue as to December 19, 2005, the date UR first filed suit against Sepco and Padre. However, NTRP and Sepco SA were not added as defendants until May 7, 2007, and appellants argue that UR submitted no written notice of their claim to NTRP or Sepco SA. *See* TEX. FIN. CODE ANN. § 304.104 (West, Westlaw through 2015 R.S.) (providing that pre-judgment interest generally begins to accrue "on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed . . ."). This issue has been waived because appellants never objected on this basis in any post-judgment motion. *See Allright, Inc. v. Pearson*, 735 S.W.2d 240 (Tex. 1987) (holding that the plaintiff "waived any claim for prejudgment interest by failing to preserve her point of error on appeal")); *Morton v. Nguyen*, 369 S.W.3d 659, 677 (Tex. App.—Houston [14th Dist.] 2012) ("A complaint regarding the award of pre-judgment interest must be preserved in the trial court by a motion to amend or correct the judgment or by a motion for new trial."), *rev'd in part on other grounds*, 412 S.W.3d 506 (Tex. 2013); *Keith v. Keith*, 221 S.W.3d 156, 173 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also* TEX. R. APP. P. 33.1(a)(1).

Finally, appellants contend that an award of pre-judgment interest for damage to real property is governed by equity and the amount awarded here—$585,000 on each $1.3 million actual damages award—is inequitable because of delays in bringing the case to trial. *See Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998) ("There are two legal sources for an award of prejudgment interest: (1)

general principles of equity and (2) an enabling statute."). Appellants note that the trial did not begin until September 2014, which is more than nine years after suit was filed, and that UR did not seek the entry of a judgment until over one month after the verdict was rendered. However, pre-judgment interest in a property damage case is governed by statute. *See* TEX. FIN. CODE ANN. § 304.102 (West, Westlaw through 2015 R.S.) ("A judgment in a wrongful death, personal injury, or property damage case earns prejudgment interest."). The rate and the accrual date for pre-judgment interest are also governed by statute. *See id.* § 304.003 (West, Westlaw through 2015 R.S.); *id.* § 304.104. Appellants do not argue that the amount of interest awarded in the judgment was more than that required by statute, and they have cited no authority, and we find none, indicating that the trial court has discretion to disregard these statutes in determining the amount of pre-judgment interest.[15] We therefore overrule the remainder of appellants' sixth issue.

III. CONCLUSION

The evidence supported the jury's findings. However, because we have found that the award of both breach of contract and tort damages constitutes an improper double recovery under the facts of this case, we reverse the trial court's judgment and remand for the entry of a new final judgment consistent with this opinion. On remand, the trial court is instructed to direct UR to elect one of the following forms of recovery: (1) $1.3 million in actual damages and $350,000 in attorney's fees against Padre on UR's breach

---

[15] Appellants also contend by their sixth issue that the award of pre-judgment interest in connection with the breach of warranty claim is erroneous. We need not address that argument because, as noted, the breach of warranty damages constituted an "alternative recovery" predicated on our reversal of both the fraud and products liability judgments, and we have already affirmed the products liability judgment. *See supra* n. 11; TEX. R. APP. P. 47.1.

of contract claim; or (2) $1.3 million in actual damages (comprising $260,000 against Sepco with NTRP jointly and severally liable, $260,000 against Sepco SA with NTRP jointly and severally liable, and $780,000 against NTRP alone) and $350,000 in exemplary damages (comprising $70,000 against Sepco, $70,000 against Sepco SA, and $210,000 against NTRP) on UR's products liability claim.[16] *See Kish v. Van Note*, 692 S.W.2d 463, 466–67 (Tex. 1985) ("If the jury verdict contains more than one acceptable measure of damages, a plaintiff may be forced to elect prior to judgment the recovery he wants by waiving the surplus findings with respect to the damages."). Pre-judgment interest shall be assessed on the actual damages portion of the elected form of recovery as provided by statute. *See* TEX. FIN. CODE ANN. §§ 304.012, .014.

DORI CONTRERAS GARZA
Justice

Delivered and filed the
21st day of December, 2016.

[16] Ordinarily, when "the prevailing party fails to elect between alternative measures of damages, the court should utilize the findings affording the greater recovery and render judgment accordingly." *Birchfield v. Texarkana Mem'l Hosp*., 747 S.W.2d 361, 367 (Tex. 1987); *see Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex. 2006) (noting that the prevailing party is "entitled to judgment on the most favorable theory supported by the pleadings, evidence, and verdict".). Here, the judgment for breach of contract (with its attendant attorney's fees award) and the judgment for products liability (with its attendant exemplary damages) are equal, but are against different defendants. Accordingly, UR is entitled to elect its preferred form of recovery.