S209927

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WILLIAM B. WEBB AND JACQUELINE V. WEBB,

APPELLANTS,

V.

SPECIAL ELECTRIC COMPANY, INC.,

RESPONDENT.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION ONE

CASE NO. B233189

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, CASE NO. BC436063
HON. JOHN SHEPARD WILEY

OPENING BRIEF ON THE MERITS

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8. Alternatively, if there is no prejudice, may a trial court deem otherwise valid motions for nonsuit and directed verdict as motions for judgment notwithstanding the verdict (JNOV), and rule upon them before expiration of the time for filing a motion for new trial?

I. INTRODUCTION

In the 1970's a South African mining company sold crocidolite asbestos to Johns-Manville Co. – at that time one of the most knowledgeable companies in the country concerning the hazards of asbestos. Some of that crocidolite may have found its way into vent pipe made at Johns-Manville's Long Beach, CA plant. The vent pipe was sold, indirectly, to a Canoga Park plumbing supply store which employed plaintiff William Webb. Four decades later Webb developed pleural mesothelioma, which he attributed, in part, to handling the Johns-Manville pipe. Plaintiffs sued a Wisconsin company that had brokered the mining company's sale of crocidolite to Johns-Manville.

Plaintiffs won a verdict against the broker, Special Electric Co. ("Special Electric"). After the verdict, the trial court granted Special Electric's timely filed and deferred motions for nonsuit and directed verdict and deemed them motions for judgment notwithstanding the verdict. The Court of Appeal reversed, 2-1, ruling that Special Electric owed a duty to (1) warn Johns-Manville of the potential hazards of asbestos, (2) contractually compel Johns-Manville to warn downstream users and consumers, and (3) warn William Webb personally of those hazards. As summarized by the dissent, "[t]he Majority holds that it can be a tort to fail to tell someone something they already know, and that it can also be a tort to fail to impose on someone a contractual duty to do something they already have a tort duty to do." (Dissent 1.)

The Court of Appeal also ruled that a trial court could not grant a JNOV before the time had expired to file a motion for new trial, or *sua sponte* grant a JNOV without first filing and serving a written notice. It found these technical errors required reversal even without addressing

prejudice. As the dissent aptly noted, Plaintiffs themselves did not advocate the position adopted and there is no legal precedent for it. (Dissent 9.)

The decision of the Court of Appeal should be reversed and the trial court's original rulings reinstated. This case squarely presents an opportunity for this Court to clarify the scope of the duty to warn, to expand the sophisticated user rule to include sophisticated purchasers/intermediaries, and to confirm the discretion of trial judges concerning the timing of rulings on nonsuit and directed verdict motions. Special Electric asks this Court to rule as follows:

1. A broker or supplier of a component or ingredient does not owe a duty to warn a sophisticated purchaser of the hazards of that component or ingredient when the purchaser already appreciates those hazards, nor is the broker or supplier required to contractually compel the sophisticated purchaser or manufacturer to communicate warnings to downstream users when the purchaser already owes a duty to warn, unless the broker or supplier has both reason to believe that the purchaser will not convey adequate warnings and a practical means of communicating warnings to downstream users.

2. A broker or supplier does not owe a duty to warn downstream users of the potential hazards in a finished product when the broker or supplier is not a part of the chain of distribution for the finished product, the manufacturer already owes a duty to warn, and the broker or supplier has no practical ability to communicate a warning to downstream users.

3. Absent a showing of undue prejudice, a trial court will not be reversed for having exercised discretion to delay, until after the jury has

returned a verdict, the grant of otherwise timely and proper motions for nonsuit or directed verdict.

II. STATEMENT OF FACTS

A. SPECIAL ELECTRIC WAS A BROKER OF ASBESTOS FIBER TO A SOUTH AFRICAN MINING COMPANY

Special Materials-Wisconsin brokered the sale of the crocidolite asbestos. (6 RT 1652:16-17; 1667:25-27-1668:3; 1759:11-16; 10 RT 2723:26-2724-3.) The Webbs alleged that Special Electric was a joint venturer with, and therefore responsible for all tortious conduct of, Special Materials; for purposes of this brief and without waiver or concession we refer to "Special Electric," though Special Materials was the company which actually handled the transactions. [1]

Special Electric was located in Wisconsin and acted as a broker for Central Asbestos Company, located in South Africa. The Johns-Manville employee that dealt with Special Electric considered it a "broker." (9 RT 2586:9-12, 2592:17-2593:2, 2595:2-14; 2638:19-2639:2.) When it wanted crocidolite, Johns-Manville would issue a purchase order, Special Electric would provide Johns-Manville with shipment information, and Central Asbestos would ship the crocidolite and pay Special Electric a commission. (6 RT 1663:3-12; 9 RT 2592:17-2593:2.)

The bags were shipped directly from South Africa to Long Beach. (6 RT 1658:1-9.) Special Electric never had possession of any asbestos. (6 RT

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[1] Special Electric Company, incorporated in 1957, was in the electrical insulation business. (6 RT 1652:16-17; 1667:25-26.) Special Materials-Wisconsin was incorporated in 1969 as "Special Asbestos;" the name changed in 1976. (6 RT 1673:21-1674:1, 1759:8-10, 1760:16-18.)

1658:5-9.) In the 1970's, Johns-Manville's purchase orders required that the crocidolite come shipped in special polywoven bags with a warning printed on them. (6 RT 1162:2-21; 1665:14-1666:3; 1670:6-20.)

As discussed below, Johns-Manville had numerous sources for the supply of crocidolite and the South African mining company was not an exclusive supplier to Johns-Manville.

B. JOHNS-MANVILLE WAS A SOPHISTICATED PURCHASER OF ASBESTOS AND A SOPHISTICATED MANUFACTURER OF ASBESTOS –CONTAINING PRODUCTS

Johns-Manville began manufacturing asbestos-containing products in the 1850's. (9 RT 2644:22-2645:1, 2645:14-18.) It made numerous asbestos-containing products, including cements, millboard, residential siding, roofing products, flooring, insulation and Transite pipe. (5 RT 1443:26-1444:25; 9 RT 2627:7-14, 2619:25-2620:7.) "Transite" was a Johns-Manville trademark that became a generic term for asbestos cement pipe. (8 RT 2105:23-2106:17.)

Johns-Manville's vast knowledge of asbestos is undisputed. By the 1970's, Johns-Manville had grown to 30,000 employees and operated numerous plants and asbestos mines in North America and overseas, including the Jeffrey Mine in Quebec, one of the world's largest sources of asbestos. (9 RT 2616:20-2617:6; RT 2645:4-12; 5 RT 1441:25-1442:2.) Its pipe division included six plants processing a variety of types of asbestos for manufacturing pipes. (9 RT 2627:7-14, 2619:25-2620:7.) Johns-Manville's research and development department knew "all the characteristics of asbestos, even chemically-wise." (9 RT 2645:19-2646:13.)

Plaintiffs' industrial hygienist agreed Johns-Manville knew the potential health hazards of asbestos by the 1930's. (8 RT 2104:1-9.)

Plaintiffs' epidemiologist studied Johns-Manville, interviewed its employees, and toured a Johns-Manville asbestos cement plant and asbestos mine and milling operation. (5 RT 1224:11-1225:15, 1439:1-1440:8, 1441:8-20, 1441:21-24, 1442:6-16.) He agreed Johns-Manville was an industry leader and no company in the United States had greater knowledge about asbestos. (5 RT 1446:18-1447:1, 1447:2-1447:10.)

As a long-time asbestos mine owner and manufacturer, Johns-Manville knew how to handle asbestos. By the 1970's it had well-established asbestos safety practices in place. (9 RT 2647:1-9.) Johns-Manville purchased "a lot of types of fiber" from numerous sources. (9 RT 2642:5-8.) Johns-Manville did not look to brokers, including Special Electric, for information about asbestos. (9 RT 2647:10-19.) Special Electric could not have told Johns-Manville anything about asbestos that Johns-Manville did not already know. (9 RT 2651:3-6.) Johns-Manville schooled Special Electric about asbestos. (9 RT 2646:14-21.) The Court of Appeal agreed: "No one on this appeal doubts that Johns-Manville was a sophisticated user of asbestos, who needed no warning about its dangers." (Opinion ["Op."] 17.)

C. IT IS SPECULATION THAT WEBB WAS EXPOSED TO CROCIDOLITE BROKERED BY SPECIAL ELECTRIC

At its Long Beach plant, Johns-Manville made a variety of products, including "Transite" vent pipe. The formula for Transite vent pipe included chrysotile but not crocidolite, though trace amounts of crocidolite may have found their way into the vent pipe because the plant would mix in scrap pipe whose formulas had included crocidolite. (8 RT 2365:21-2368:16; 9 RT 2423:4-2424:21, 2427:5-10, 2453:18-26; 8 RT 2106:28-2107:24.)

Not all scraps were recycled and some were disposed at dumpsites. (RT 2454:9-17). At most, less than 1% of the actual final blend of Transite vent pipe might be crocidolite. (9 RT 2440:24-26.)

Johns-Manville sold its Transite vent pipe to numerous companies, including Familian Pile & Supply, which in turn sold to Pyramid Pipe & Supply where William Webb worked. (3 RT 653:24-654:7; 4 RT 1166:23-1167:5.)[2] Transite pipe was a small percentage of Pyramid's overall sales, and among the smallest of the various pipes it marketed. (3 RT 686:1-8; 4 RT 1171:6-10.) Webb's "guesstimate" is that Pyramid carried the pipe for about ten years, maybe less. (3 RT 696:1-697:8, 697:13-25.) Starting in 1969, Webb at Pyramid occasionally handled Transite pipe, which he claims had no warnings. (3 RT 642:22-643:7, 649:19-21, 658:9-12; 650:6-10, 652:19-23, 685:17-28; 4 RT 1113:24-27, 1163:25-1164:1, 1170:19-24; 3 RT 667:17-24, 694:20-23.)

In January 2011, William Webb was diagnosed with mesothelioma, a fatal cancer of the lining of the lung. He and his wife Jacqueline commenced this action against Special Electric and others for strict products liability and negligence, claiming that the mesothelioma was caused by exposure to asbestos from multiple sources, including crocidolite in Transite vent pipe. (3 RT 606:2-616:6, 609:12-24, 621:7-11, 624:17-626:27, 628:24-630:1.)

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[2] There are no records available at Pyramid or Familian to show when Pyramid purchased the Transite pipe. (3 RT 697:26-698:23.)

III. STATEMENT OF THE CASE

A. TRIAL COURT PROCEEDINGS

At trial, after Plaintiffs rested, Special Electric timely moved for nonsuit on Plaintiffs' failure-to-warn theories. The trial court deferred ruling on the motion. Subsequently, the parties briefed the issues. (1 Appellants' Appendix ("App.") at 62, 77, 151; 18 RT 6602:7-6603:1; 11 RT 3003:28-3304:3.) After both sides rested, Special Electric timely moved for a directed verdict. The court deferred ruling so the parties could brief that motion as well. (1 App. at 68, 176.)

The jury returned a verdict on February 17, 2011 in favor of Special Electric on Plaintiffs' design defect (consumer expectations) theory, but against Special Electric on strict liability failure-to-warn and negligence. (1 App. at 143.) The next day, February 18, 2011, Special Electric requested a hearing on its nonsuit and directed verdict motions, which the court set for March 16.[3] At the hearing the court at Plaintiffs' request set a further briefing schedule. Supplemental briefs were filed and at the subsequent hearing the court granted both motions and, in the alternative, deemed them a motion for JNOV, and granted that motion. (1 App. at 196; 2 App. at 309; 383.) Judgment was entered for Special Electric and Plaintiffs appealed. (2 App. at 384; 404)

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[3] The February 18, 2011 minute order states that Special Electric's motions were denied; they were not, as confirmed by the reporter's transcript. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.)

B. COURT OF APPEAL OPINION

1. THE MAJORITY DECISION

The Second District reversed, holding that Special Electric had a duty to warn Johns-Manville, and a duty to warn Webb. (Op. 18-22.) The majority also found that Special Electric's motions did not reach the verdict on negligence, and judgment in favor of Plaintiffs was warranted on that cause of action. (Op. 29-32.)

The majority also held that the trial court had no authority to rule on Special Electric's nonsuit and directed verdict motions once the verdict was returned; the trial court could rule on those motions once the time to move for a new trial had expired but failed to give proper written notice of intent to grant a JNOV on its own motion. (Op. 10-15.)

2. THE DISSENT

Justice Rothschild dissented to the entire Opinion.

There was no tortious failure to warn Johns-Manville because, as the majority admitted, "Johns-Manville was a sophisticated user of asbestos, who needed no warning about its dangers." (Op. 17.) (Op. 17), and it is not a tort to fail to tell someone something they already know. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 67.) (Dissent 2-3.) Not warning William Webb was not tortious because the Webbs had never contended Special Electric could or should have personally warned him,[4] and Special Electric could presume that, absent evidence to the contrary, Johns-Manville would honor its own pre-existing tort duty to warn Webb. (Dissent 3-4.) Moreover, any failure to warn Johns-Manville or impose a contractual duty on Johns-Manville to warn end-users was not a cause of

[4] Plaintiffs' counsel confirmed this disclaimer. (Answer to Petition for Review at 13-14.)

Webb's mesothelioma, as there was no evidence that Johns-Manville would have heeded a contractual duty any more than its tort duty. (Dissent 6-8.)

The majority's procedural holdings meant the trial court could grant timely motions for nonsuit and directed verdict *except*, oddly, during the interregnum between the return of the verdict and expiration of the time to move for a new trial. In the absence of authority or any showing of prejudice that holding is incorrect. (Dissent 8-11.)

Finally, the dissent agreed with Special Electric that there was no "substantial evidence that Webb was exposed to asbestos *supplied by Special Electric.*" (Dissent 12; emphasis in original.)

3. PETITION FOR REHEARING

A Petition for Rehearing was timely filed. The court changed a factual statement[5] in its Opinion but denied the request for rehearing.

IV. ARGUMENT

A. A BROKER OR SUPPLIER SHOULD NOT HAVE A DUTY TO WARN A SOPHISTICATED MANUFACTURER OF HAZARDS THE MANUFACTURER ALREADY APPRECIATES

1. THE PURPOSE OF THE DUTY TO WARN

Plaintiff bears the burden of proving that a warning was owed by a

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[5] According to the Order, "Asbestos" was removed from the company name "inferably in order to distance itself from what consumers were coming to learn was a dangerous product." (Order at 1.) No evidence supports the statement that the name was changed to "Special Electric" or the inference that "Asbestos" was removed for marketing reasons. (See n. 1 and Discussion at IV.E, *infra.*)

defendant. (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 576.) The purpose of a warning is to inform users of dangers unknown to them. "The user of the product must be given the option either to refrain from using the product at all or to use it in such a way as to minimize the degree of danger." (*Johnson, supra,* 43 Cal.4th at 65, citing *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1003.)

Products liability law has developed exceptions to this duty, including the obvious danger rule, the raw materials/ bulk supplier doctrine, and the sophisticated user and the sophisticated purchaser/learned intermediary doctrines.

Several California appellate courts have applied the raw materials/bulk suppler doctrine (e.g., *Groll v. Shell Oil* (1983) 148 Cal.App.3d 444, 448-449), and this Court has directly accepted the "obvious danger" and sophisticated purchaser defenses. The obvious danger rule holds that "there is no need to warn of known risks under either a negligence or strict liability theory." (*Johnson, supra,* 43 Cal.4th at 67; Comment k to Section 388 subdivision (b) of the Restatement (Second) Torts; *Taylor, supra,* at 577; *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930, 933-934 [dangers of slingshots so obvious warnings are unnecessary].)

The obvious danger rule is the basis of the sophisticated user defense: "A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Johnson, supra,* 43 Cal.4th at 71 [HVAC manufacturers and technicians have known of dangers of phosgene gas since 1931, hence no warning of phosgene gas was required for plaintiff-technician].) Both the sophisticated user and

obvious danger defenses negate the causation element of a failure-to-warn theory; not warning a sophisticated user about dangers he already appreciates is not a legal cause of any harm that may result. (*Id.*) "The user's knowledge of the dangers is the equivalent of prior notice." (*Id., citing Billiar v. Minnesota Mining and Mfg. Co.,* 623 F.2d 240, 243 (2nd Cir. 1980) ["[N]o one needs notice of that which he already knows"].)

The court below ruled that Special Electric owed a duty to warn Johns-Manville about the hazards of asbestos. The facts are indisputable, however, that Johns-Manville knew all about asbestos. "From the 1920s to the 1970s, Manville was, by most accounts, the largest supplier of raw asbestos and manufacturer of asbestos-containing products in the United States." (*Travelers Indem. Co. v. Bailey,* 557 U.S. 137, 140 (2009).) Johns-Manville was fully aware of the nature and hazards of asbestos. Johns-Manville prescribed not only polywoven bags specially designed to contain the fiber, but also the language of the warnings to appear on each bag. (1 AA 208:21-23 and Exh. E thereto at 2 AA 284-285.)[6] The Court of Appeal recognized Johns-Manville "was a sophisticated user of asbestos who needed no warning about its dangers." (Op. 17.) What could Special Electric have told Johns-Manville about asbestos that Johns-Manville did not already know? Under the reasoning of *Johnson,* Special Electric had no duty to warn a knowledgeable purchaser such as Johns-Manville.

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[6] Plaintiffs' counsel even argued: "Johns-Manville contractually required a warning to be on a bag of asbestos," and "Johns-Manville required that the South African mining concern put a particular warning on the bag of asbestos." (18 RT 6916:4-22.) Whether all the bags contained an adequate warning (Op. 17) is irrelevant; Johns-Manville's extraordinary knowledge of asbestos was so superior to that of Special Electric's that it already knew the warnings.

The sophistication of Johns-Manville brings us to a variation of the sophisticated user defense, often called the sophisticated purchaser or learned intermediary defense. A learned intermediary has been defined as "one who has knowledge of the danger and whose position vis-à-vis the manufacturer and consumer, confers a duty to convey the requisite warnings to the consumer." (*Brito v. County of Palm Beach,* 753 So.2d 109, 111 n. 1 (Fla. 4th DCA 1998).) "[I]f the employer/purchaser has 'equal knowledge' of the product's dangers, then the manufacturer may be able to rely on the employer/purchaser to protect its own employees from harm." (*Willis v. Raymark Industries, Inc.,* 905 F.2d 793, 796 (4th Cir., 1990).) The sophisticated purchaser defense "absolves suppliers of the duty to warn purchasers who are already aware or should be aware of the potential dangers." (*Akin v. Ashland Chemical Co.,* 156 F.3d at 1030, 1037 (10th Cir.1998).). This Court has previously acknowledged that defense. (*Macias v. California* (1995) 10 Cal.4th 844, 853 ["judicially created doctrines such as the 'sophisticated purchaser' and 'bulk supplier' defenses have become familiar maxims of product liability law"]; *Huynh v. Ingersoll–Rand* (1993) 16 Cal.App.4th 825) [intermediary provided vague or inadequate warning, and manufacturer could not necessarily rely on intermediary to convey warning to employees].)

The sophisticated user/purchaser/intermediary defense applies here, as we show next.

2. THERE IS NO DUTY TO WARN A SOPHISTICATED PURCHASER/INTERMEDIARY

In *Johnson,* this Court relied on several cases applying the sophisticated purchaser defense. *Johnson* cites with approval *In re Related*

Asbestos Cases, 543 F. Supp. 1142, 1150-51 (N.D. Cal. 1982), which held that manufacturers of asbestos-containing equipment could assert that the purchaser, the U.S. Navy, "was as aware of the dangers of asbestos as were defendants and that the Navy nonetheless misused the products, thereby absolving the defendants of liability for failure to warn the Navy's employees of the products' dangers." (*Id.* at 1151.) This Court found that "reasoning persuasive." (*Johnson, supra,* 43 Cal.4th at 69.)

In *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862, also cited with approval in *Johnson,* International Harvester sold a truck body to decedent's employer, who elected to run a power cable near the gas tank. The truck accidently overturned and caught fire, killing decedent. Appellants sued International Harvester, arguing it should have warned the employer, Luer, about the danger of running a power line near a fuel tank. The appellate court disagreed: "A sophisticated organization like Luer does not have to be told that gasoline is volatile and that sparks from an electrical connection or friction can cause ignition." (*Id.* at 866.) The "absence of a warning to Luer did not substantially or unreasonably increase any danger that may have existed in using the International unit [citations omitted] and Luer's failure to guard against those eventualities did not render the International unit defective." (*Id.* at 866-67.) Thus, the knowledge of the intermediary, the employer, foreclosed any liability of the manufacturer to the ultimate user.

Johnson also cites with approval to cases in other jurisdictions addressing situations involving intermediaries. In *Akin, supra,* 156 F.3d 1030, the court held there was "no duty to warn a purchaser as sophisticated as the United States Air Force of the potential dangers of low-level chemical exposure;" and even though the Air Force may not

have actually known of hazards, "[b]ecause of the wealth of research available, the ability of the Air Force to conduct studies, and its extremely knowledgeable staff" it was a "knowledgeable purchaser" that "should have known the risks involved with low-level chemical exposure." (*Id.* at 1037-1038; see also, *In re Air Crash Disaster,* 86 F.3d 498, 522 (6th Cir. 1996) [manufacturer could use sophisticated user defense against airline's failure to warn claim].)

Other California cases reach a similar result. (*Zambrana v. Standard Oil Co.* (1972) 26 Cal.App.3d 209, 218 [defendant installed stem extension on tire; danger obvious and defendant-installer not strictly liable]; *Wiler v. Firestone Fire & Rubber Co.* (1979) 95 Cal.App.3d 621, 629-630 [tire manufacturer could reasonably believe that a valve stem manufacturer and installer would take appropriate steps to insure proper design and installation of valve stem]; *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362 [manufacturer not strictly liable for patient's death from infection after doctor's implant procedure , despite lack of warnings, because a manufacturer need not "warn of a risk which is readily known and apparent to the consumer, in this case the physician"].) Still other California cases also support recognition of the sophisticated intermediary or sophisticated purchaser defense when the intermediary is knowledgeable. (See, e.g., *Groll, supra,* 148 Cal.App.3d at 448-49; *Walker, supra,* 19 Cal.App.3d at 674; *Carmichael v. Reitz* (1971) 17 Cal.App.3d 958, 989; cf., *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 662, in which the court held an asbestos supplier liable to the ultimate user of a product when there was no evidence the intermediary manufacturer of the product was warned or was aware of the dangers of asbestos. The implication is that those facts would change the result.)

Several federal courts have applied *Johnson* as supporting both the sophisticated user and sophisticated purchaser defenses. In *Hays v. A.W. Chesterton, Inc.*, 2012 WL 3096621 (E.D. Pa., May 1, 2012, MDL 875) the federal court interpreted *Johnson* as adopting the sophisticated user defense "even in cases involving an intermediary." In *Gottschall v. General Elec. Co.* (E.D. Pa., Dec. 9, 2011, MDL 875) 2011 WL 6424986, the federal court applied *Johnson* in a suit alleging plaintiffs' decedent was exposed to asbestos when working on Navy ships built by defendant. Summary judgment was granted on the sophisticated user doctrine since the uncontradicted evidence showed the Navy was a sophisticated user and the court rejected arguments that decedent was not a sophisticated user, or that defendant was really arguing for a "sophisticated intermediary defense" that should be left to the jury. (See also, *Donlon v. AC and S, Inc.*, 2013 WL 1880820 (E.D. Pa., Mar. 26, 2013, MDL 875), and *Aikins v. General Elec. Co.*, 2011 WL 6415117 (E.D. Pa., Dec. 9, 2011, MDL 875).)

Even the earliest federal asbestos appellate decision, *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), recognized the defense:

> In general, of course, a manufacturer is not liable for miscarriages in the communication process that are not attributable to his failure to warn or the adequacy of the warning. This may occur, for example, where some intermediate party is notified of the danger, or discovers it for himself, and proceeds deliberately to ignore it and to pass on the product without a warning.

(*Id* at 1091-92.)

Numerous jurisdictions have recognized a sophisticated purchaser or sophisticated intermediary defense. (*In re Asbestos Litigation*

(Mergenthaler), 542 A.2d 1205, 1211 (Del. Super. 1986); *Smith v. Walter C. Best, Inc.*, 927 F.2d 736, 741 (3d Cir. 1990); *Forest v. E.I. DuPont de Nemours and Co.*, 791 F.Supp. 1460, 1465-1467 (D. Nev. 1992); *Hoffman v. Houghton Chemical Corp.*, 434 Mass. 624, 631-634 (2001); *Kennedy v. Mobay Corp.*, 84 Md.App. 397, 413 (Md. Ct. Spec. App. 1990), *aff'd*, (1992) 325 Md. 385 ["the defense is not only logical but necessary"]; *Goodbar v. Whitehead Bros.*, 591 F.Supp. 552, 556-557 (W.D.Va. 1984), *aff'd sub nom. Beale v. Hardy*, 769 F.2d 213 (4th Cir.1985); *O'Neal v. Celanese Corp.*, 10 F.3d 249, 251-52 (4th Cir.1993); *Davis v. Avondale Indus.*, 975 F.2d 169, 172 (5th Cir.1992); *Apperson v. E.I. du Pont de Nemours & Co.*, 41 F.3d 1103, 1108 (7th Cir.1994).)

The sophisticated user/purchaser defense is also consistent with the Restatement Second of Torts, section 388, which has been adopted as law in California. (*Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64.) Comment k ("When warning of defects unnecessary") explains that a supplier has a duty to give an adequate warning "if, but only if, he has no reason to expect that those for whose use the chattel is supplied will discover its condition and realize the danger involved." The comments to section 388 suggest a number of factors to consider as to whether a seller may rely upon an intermediary to warn downstream users. Chief among them are the sophistication of the intermediary, the intermediary's duty to warn, and the feasibility of the seller giving notice to the downstream users. Here, Johns-Manville was clearly sophisticated, Johns-Manville had a tort duty to warn, and there was no practical way for Special Electric to communicate with Johns-Manville's customers or remote consumers. Johns-Manville actually knew the risks of asbestos in its pipes. Johns-Manville was not "looking to Special Electric to" give it warnings. (9 RT 2647:10-13.) As the trial court colorfully put it, warning Johns-Manville

would have been as superfluous as "taking coals to Newcastle" (18 RT 6618: 2-10) or "like telling the Pope about Catholicism" (18 RT 6618:11-12). Or as Justice Rothschild wrote, "It is not a tort to fail to tell someone something they already know." (Dissent 3.)

The oft-quoted passage in Comment n to section 388 is applicable here: "Modern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so." The Court of Appeal's expansion of the duty to warn to entities like Special Electric creates the exact intolerable environment the Restatement authors wisely rejected.

The Court of Appeal erred in ruling that Special Electric owed a legal duty to warn Johns-Manville of hazards it already fully appreciated.

3. *STEWART V. UNION CARBIDE* DOES NOT APPLY AND ITS DICTUM IS INCORRECT

The Court of Appeal relies on *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, which in dictum stated that "the sophisticated intermediary doctrine . . . applies only if a manufacturer provided adequate warnings to the intermediary." (*Id.* at 29.) This statement is not correct.

In *Stewart,* Union Carbide Corp. mined and sold raw asbestos to manufacturers of asbestos-containing joint compound. Union Carbide argued that it should have no duty to warn such manufacturer-purchasers because those entities "knew or should have known (from public sources) of the dangers of asbestos." (*Ibid.*) There was no evidence, however, of these manufacturers' actual knowledge. Thus, *Stewart* presents the situation of a knowledgeable company seeking to absolve itself of the duty

to warn a purchaser regardless of the purchaser's actual knowledge – the polar opposite of the situation here. (18 RT 6619:14-6621:4.) In contrast, no presumption is required here: Johns-Manville *knew* of the hazards and had *in fact* acquired its own knowledge – it needed no warning.

Stewart also considered Union Carbide's argument as an prohibited extension of the bulk supplier/component parts doctrine: "Asbestos suppliers have sought the protection of that rule, but it has not been afforded to them, because raw asbestos is a defective product. [Citation omitted.] Union Carbide does not address those cases with any specificity . . . ." (*Ibid.*) In contrast, Special Electric was never a "supplier" of raw asbestos; it was a broker acting for the supplier. Neither *Stewart* nor the bulk supplier cases concern the situation here, where the purchaser is already knowledgeable about the dangers of the raw material. Nor do we suggest that Johns-Manville's knowledge should be imputed to customers or remote consumers like Webb.

Moreover, contrary to the dictum in *Stewart*, numerous cases have permitted a sophisticated purchaser/ intermediary defense even when the supplier had not warned the purchaser or intermediary. (See, e.g., *Fierro, supra,* 127 Cal.App.3d at 866-867 [the chassis manufacturer was afforded the defense without having warned the intermediary]; *In re Asbestos, supra,* 543 F.Supp 1151 [no requirement of warning the navy]; *Akin, supra,* 156 F.3d at 1037 [no need to warn a knowledgeable purchaser like the Air Force about the dangers of low-level chemical exposure]; *Strong, supra,* 667 F.2d at 686–87 [pipe manufacturer had no duty to warn a natural gas utility, or the utility's employee, of well known gas line dangers].)

The dictum in *Stewart*, that a supplier must always warn an intermediary/purchaser of a danger, cannot be reconciled with the obvious

danger/sophisticated user rule that a warning is unnecessary where the recipient of the warning already knows the danger. If "the user's knowledge of the dangers is the equivalent of prior notice" (*Johnson, supra,* 43 Cal. 4th at 65), then the knowledge of an intermediary-purchaser likewise must be the equivalent of prior notice. The cases cited in *Stewart* do not address the sophisticated intermediary doctrine per se, and none suggests the intermediary had the required knowledge without being warned.[7]

Nor can the dictum in *Stewart* be reconciled with the rationale for the sophisticated purchaser defense: "Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. (Owen, Products Liability Law (2005) 9.5, p. 599.) The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a *sophisticated purchaser* usually is not a proximate cause of harm resulting from those risks suffered by the *buyer's employees or downstream purchasers.*'" (*Johnson, supra,* 43 Cal. 4th at 65; emphasis added.)

Stewart also contradicts this Court's prior acknowledgement that manufacturers are held to the standard of experts in their fields and required to keep abreast of scientific advances regarding their products. (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113 n.3.) The manufacturer

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[7] See *Carmichael, supra,* 17 Cal.App.3d at 989 (drug manufacturers may discharge duty to warn by informing physician); *Persons v. Salomon North America, Inc. (1990)* 217 Cal.App.3d 168, 170–72; *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 21 ("Warnings to distributors may be sufficient if a manufacturer does not deal directly with the purchasers of its products.")

cannot be both an expert and yet need warnings from a supplier less knowledgeable that itself, at the peril of liability to the supplier; the courts cannot say that individuals such as Mr. Johnson are deemed to have knowledge of hazards because they are members of a group trained with that knowledge, yet not treat manufacturers the same.

Finally, *Stewart* did not address the additional issue present here – discussed extensively at IV.B.2 *infra* – as to the lack of opportunity or means for any warning to be given downstream users. *Stewart* does not apply here and its dictum, that a purchaser or intermediary must be warned by the supplier before the defense can apply, is inapposite.

B. A BROKER OR SUPPLIER TO A SOPHISTICATED MANUFACTURER SHOULD NOT HAVE A DUTY TO WARN END-USERS, WHEN THE MANUFACTURER ALREADY OWES A DUTY TO WARN AND THE SUPPLIER HAS NO REASONABLE MEANS OF COMMUNICATING A WARNING

1. JOHNS-MANVILLE OWED A TORT DUTY TO WARN CONSUMERS, A DUTY THAT THE LAW ALLOWS SPECIAL ELECTRIC TO PRESUME WOULD BE DISCHARGED

"The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.' [Citation.]" (*Harris v. Johnson* (1916) 174 Cal. 55, 58; *Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523; *In re Air Crash, supra,* 86 F.3d at 500 [applying BAJI 3.13 re reliance on another to perform their duty and holding sophisticated intermediary defense applies under California law].)

Special Electric had no reason to believe Johns-Manville would not warn downstream users of hazards with its various products. Indeed, the evidence is to the contrary. Johns-Manville owned and operated asbestos mines and manufactured numerous asbestos-containing products; it was an expert in the field of asbestos. Special Electric knew Johns-Manville to be one of the biggest users of asbestos in the world, which had numerous suppliers and brokers for the large volumes of asbestos Johns-Manville required. Special Electric also knew that Johns-Manville employed research and development people, who knew "all the characteristics of asbestos, even chemically-wise," and even met with Special Electric to discuss with them various aspects of asbestos and how to improve matters. (9 RT 2645:19-2646:21.) Johns-Manville imposed warning requirements on the bags of raw asbestos shipped to its Long Beach facility.

There was every reason for Special Electric to think that Johns-Manville knew or would determine the hazards associated with the potential release of asbestos in its products and then would accordingly convey an adequate warning. (*Stewart v. Cox* (1961) 55 Cal.2d 857, 865; *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467-468; *Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332, 342 [defendant could expect others to use reasonable care].) There is no basis on which to impose on Special Electric a duty to somehow police Johns-Manville's operations or require Johns-Manville to discharge its civil tort duties. (*Adams v. Union Carbide Corp.*, 737, F.2d 1454, 1457 (6th Cir.1984) [supplier could reasonably rely on an employer/purchaser to pass on warnings because of duty to provide safe work place]; *cf., In re Brooklyn Navy Yard Asbestos Litigation,* 971 F.2d 831, 838 (6th Cir. 1996) [no showing of reliance and any reliance would have been unjustified given Navy's "single-minded focus on building

warships"].)

The Court of Appeal's holding eviscerates the presumption that every person will perform his duty by requiring Special Electric to have proven its actual expectation and reliance on Johns-Manville. (Dissent 4-5.) That flips the presumption on its head. Commerce would be impossible without the ability to rely on others to do what they normally do and have a duty to do. (Restatement Second Torts §388, com. n, 308; *Persons, supra,* Cal.App.3d at 178).

The Court of Appeal majority attempts to rebut the presumption by pointing out that Special Electric was itself knowledgeable, may have attempted to market the crocidolite as safer, and that Johns-Manville was "evil." (Op. 25-26.) Special Electric's knowledge of the hazardous nature of asbestos reinforces the presumption that Johns-Manville would issue warnings. The alleged marketing of crocidolite as "safer" is irrelevant because there is no evidence that the one salesman involved ever spoke to anyone at Johns-Manville; indeed, he left the company before sales to Johns-Manville began and there is no evidence that Johns-Manville was ever aware of or influenced by any such pitch. (6 RT 1677:5-7, 1689:20-25, 1692:22-24.) Nor would Johns-Manville's duty to warn have changed based on the type of asbestos it put in its Transite pipe. The characterization of Johns-Manville as "evil" was the opinion of a former Johns-Manville employee looking back decades later, and not from Special Electric. Special Electric's supposed lack of concern about warnings is belied by the very 1975 correspondence from its president to which the majority refers, and, in any event, is the point of having a presumption.

In *Johnson,* this Court applied the sophisticated user rule based on an objective standard – whether the user knew or should have known of the

risk, harm, or danger – because "[i]t would be nearly impossible for a manufacturer to predict or determine whether a given user or member of the sophisticated group actually has knowledge of the dangers because of the infinite number of user idiosyncrasies." (*Johnson, supra,* 43 Cal.4th at 71.) The same is true here. The question is whether Johns-Manville was a sophisticated user/purchaser/intermediary. It does not matter whether Special Electric verified this fact any more than it mattered whether American Standard verified that Mr. Johnson was a trained HVAC technician. What matters is Johns-Manville was, or should have been, a sophisticated manufacturer/purchaser, just as Mr. Johnson was a sophisticated user.[8]

Johns-Manville was extremely knowledgeable about the hazards of asbestos and there was no reason for Special Electric to suspect that in researching, developing and manufacturing its products, Johns-Manville would not assess them to determine the proper set of cautions and warnings that should accompany them. Special Electric was entitled to rely on Johns-Manville to warn.

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[8] Some courts have required that the supplier know in advance that its purchaser was knowledgeable and "may not escape liability by reconstructing the past to show merely what the employer/purchaser knew."(*Willis, supra,* 905 F.2d at 797.) However, this requirement is unnecessary if in fact the purchaser is knowledgeable because causation is still cut off; but if it is necessary there was evidence that Special Electric was contemporaneously aware of Johns-Manville's sophistication. (9 RT 2645:19-2646:21.)

2. SPECIAL ELECTRIC HAD NO MEANS TO WARN WEBB, AND EVEN PLAINTIFFS DID NOT ASSERT THAT AS A BASIS OF LIABILITY

The Court of Appeal implicitly recognized the impracticality of imposing a separate duty on Special Electric to warn Mr. Webb personally, but brushed aside those concerns by pointing out that "whether reasonable efforts to warn downstream users could have been undertaken" were questions of fact on which Special Electric "apparently failed to persuade the jury." (Op. 17.) The Court of Appeal is wrong for several reasons.

Special Electric was one of multiple brokers for suppliers of asbestos to Johns-Manville. There was no practical way for Special Electric to know whether the asbestos it had brokered was in the products with which Webb came into contact. This was exquisitely true when it came to the Transite vent pipe Webb encountered. The Johns-Manville formula for Transite vent pipe did not call for the use of crocidolite asbestos – the only type of fiber Special Electric brokered. That fiber type found its way into the Transite vent pipe in minute quantities because during the manufacturing process Johns-Manville's employees recycled some scraps by blending them into the Transite vent pipe, including scraps with crocidolite. Under these circumstances, how could Special Electric have traced any particular crocidolite asbestos into the Transite pipe in general or into particular batches sold to Familian and later bought by Pyramid? There is no evidence suggesting Special Electric could know crocidolite asbestos was used in Transite pipe, or who Johns-Manville's customers were (especially remote ones like Webb), no less which products they bought and whether asbestos it brokered was in them. The majority held Special Electric/Special Electric liable on a theory not even advanced by

Plaintiffs.[9]

Comment n to the Restatement of Torts section 388 suggests that in situations where the material being supplied is highly dangerous and posing a risk of serious harm, a supplier should communicate a warning to the end user even if the intermediary can be trusted to do so as well; however, the authors recognized that their suggestion applies only where a warning would be practical:

> Many such articles can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with a substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great *and such means of disclosure are practicable and not unduly burdensome,* it may well be that the supplier should be required to adopt them. [...] When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning.

(Rest.2d Torts, § 388, com. n, 308; emphasis added.)

Under the holding of the Court of Appeal, however, a broker or

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[9] Moreover, there is no duty to warn where the product is not being put to its intended use. (*Sanchez v. Hitachi Koki, Co., Ltd.* (2013) 217 Cal.App.4th 948, 957 [no duty to warn of risk of saw blades in grinder for which they were not intended.].) Asbestos brokered by Special Electric was never intended for use in Transite pipe. "[A] product manufacturer participates substantially in creating a harmful combined use only if it specifically designs its product for the combined use."], citing *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 362.) Thus, there was no duty to warn Transite pipe users.

supplier will have a duty to assess potential hazards of components or ingredients in every product made by manufacturers, and then locate, track and communicate with every known user of those products the potential hazards. One cannot imagine a more unrealistic or onerous legal duty.

Numerous courts have declined to impose a warning duty on a supplier when such a duty would be onerous, impractical or infeasible. In *Persons, supra,* 217 Cal.App.3d at 178, the court held a ski binding manufacturer had no duty to warn ultimate users of possible dangers with the product, and could rely on the ski rental company to whom the bindings were sold, to provide necessary warnings. (*Cf. Willis, supra,* 905 F.2d at 797 [manufacturer never contended warnings on its products would have been unduly burdensome].) In *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, the Court, quoting a comment in the proposed Restatement (Third) of Torts, explained:

> "To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control. Courts uniformly refuse to impose such an onerous duty to warn."

(*Artiglio, supra,* 61 Cal.App.4th at 839.) [10]

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[10] *Artiglio* concerned a non-defective component. California, however, has held that raw asbestos is a defective product (*Arena v. Owens Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1190), even when incorporated into a finished product. (*Jenkins v. T&N PLC* (1996) 45 Cal.App.4th 1224, 1231.) *Jenkins* and *Arena* focused on whether a design defect theory could apply to a raw asbestos supplier; they did not address whether any intermediaries were sophisticated. They are also inapposite because the jury found in favor of Special Electric on Plaintiffs' design defect theory.

Likewise, in *Walker v. Stauffer Chemical Corp.* (1971) 19 Cal.App.3d 669, the Court of Appeal affirmed summary judgment for a sulfuric acid supplier on the consumer's strict-liability claim:

> We do not believe it realistically feasible . . . to require the manufacturer and supplier of a standard chemical ingredient such as bulk sulfuric acid, not having control over the subsequent compounding, packaging or marketing of an item eventually causing injury to the ultimate consumer, to bear the responsibility for that injury. The manufacturer (seller) of the product causing the injury is so situated as to afford the necessary protection.

(*Walker, supra,* 19 Cal.App.3d at 674; accord: *Torres, supra,* 49 Cal.App.4th at 21 [warnings to distributors may be sufficient if a manufacturer does not deal directly with the purchasers of its products].)

In *Groll, supra,* at 448-49, the court affirmed a nonsuit on a warning defect claim against a bulk supplier of BT-67 whose product was repackaged by the manufacturer:

> Cases which have imposed a duty on the manufacturer to warn the ultimate consumer have typically involved tangible items that could be labeled, or sent into the chain of commerce with the manufacturer's instructions [citations omitted]. . . . [¶] Since respondent manufactured and sold BT-67 in bulk, its responsibility must be absolved at such time as it provides adequate warnings to the distributor who subsequently packages, labels and markets the product. To hold otherwise, would impose an onerous burden on the bulk sales manufacturer to inspect the subsequent labeling of the packaged product.

In *Blackwell v. Phelps Dodge Corp.* (1984) 157 Cal.App.3d 372, 379, a supplier of sulfuric acid who filled a tank car had no duty to warn persons unloading the car about proper venting in order to prevent pressure build up which caused the acid to spray the plaintiff. The supplier had no

authority to place warnings or instructions on the tank car and therefore, as a matter of law, could not be liable for having failed to provide such warnings and instructions. (See also, *Stevens v. Cessna Aircraft Co.* (1981) 115 Cal.App.3d 431, 433-434 [aircraft manufacturer not liable for failing to post a warning inside the passenger compartment as to the total load capacity, since pilot responsible for that determination which depended on many factors beyond ability of a passenger to assess] *cf., Adkins v. GAF*, 923 F.2d 1225 (6th Cir. 1991) [defense not available due to failure by supplier to warn plus fact it was not precluded by the packaging from directly warning purchaser's employees].)

Plaintiffs themselves have never contended Special Electric had a duty to directly warn William Webb. (Dissent 3; see also Answer to Petition for Review 13-14.) To evade the practical problems of imposing on a broker a duty to warn ultimate consumers, Plaintiffs argue that brokers and suppliers should have a duty to contractually compel manufacturers such as Johns-Manville to warn consumers. No evidence or law supports that suggestion. The trial court rejected it as defying commonsense: "It's a pretty big regulatory compliance program for a fiber broker to undertake. I think it would have been such a startlingly and apparently irrational way to do business in the '70's, that it would have come as a genuine surprise to everybody involved . . . ." (18 RT 6934:17-23.) There was no evidence Special Electric, a small brokerage company, had sufficient bargaining power to compel Johns-Manville, an international behemoth, to submit to a warning program dictated by a broker like Special Electric. No contractual requirement would have been enforceable. (*Groll, supra,* 148 Cal.App.3d at 449 ["manufacturer would have severe enforcement problems if the bulk product purchaser failed to

adhere to the recommended warnings"]; *cf., McConnell v. Union Carbide Corp.*, 937 So.2d 148 (Fla. 4th DCA 2006) ["almost no burden" on supplier to contractually require manufacturer-purchasers to label end products with asbestos warning].)

The Court of Appeal sidestepped all these practical issues and foregoing legal authority by ruling that the jury should decide the scope of that duty. (Op. 17-18.) That holding abdicates the role of the court to the jury. The trial court properly decides the issue of duty, a question of law. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154, 1158-59; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 464–465.) The Court of Appeal erroneously relied on the jury to make that decision (see *Nalwa, supra,* 55 Cal.4th at 1158-59), which unreasonably expands a supplier's duty to warn to downstream users whom they can neither identify nor reach.

Under the circumstances of this case, where there was a sophisticated purchaser with a duty to warn downstream users, and no ability of Special Electric to warn those downstream users, Special Electric had no duty to warn.

C. THERE IS NO CAUSAL CONNECTION BETWEEN WEBB'S INJURIES AND ANY LACK OF WARNING FROM SPECIAL ELECTRIC

There must be a causal connection between a failure to warn and a plaintiff's injuries. Here there is none. The absence of warnings from Special Electric, if any, did not increase the danger to Webb, or affect any warnings required of Johns-Manville. Any warnings to Johns-Manville would have made no difference and were not a proximate or legal cause of injury to Webb because there was nothing Special Electric could tell Johns-Manville about asbestos the latter did not already know. "Sophisticated

users are charged with knowing the dangers, so that the 'failure to warn about those dangers is not the legal cause of any harm that product may cause.'" (*Johnson v. Honeywell Intern. Inc.* (2009) 179 Cal.App.4th 549, 558.)

A warning is effective and required if it changes someone's behavior; but if the person already appreciates the danger, harm from the danger coming to pass is not caused by the lack of a warning. "The rationale supporting the [obvious danger] defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the *buyer's employees or downstream purchasers*.'" (*Johnson, supra,* 43 Cal.4th 56, 65 [emphasis added]; see also *Fierro, supra,* 127 Cal.App.3d at 866.)

The lack of causal connection stemming from an obvious danger justifies absolving a manufacturer of its duty to warn. "If, despite deficient warnings by the manufacturer, a user is fully aware of the danger which a warning would alert him or her of, then the lack of warning is not the proximate cause of the injury." (*Strong, supra,* 667 F.2d at 688, citing *Nelson v. Brunswick Corp.*, 503 F.2d 376, 379 (9th Cir. 1974).) In *Stultz v. Benson Lumber Co.* (1936) 6 Cal.2d 688, the seller of a defective plank was not liable for injuries to the buyers' employee because the defective condition was known to the buyers, and the buyers' negligence in nonetheless using the defective plank broke the chain of causation. This Court later explained why the buyer's negligence in *Stultz* was not foreseeable. "[T]here the person whose conduct was held to be a superseding cause was fully aware of the danger involved, and negligent conduct with full realization of the danger may properly be considered highly extraordinary." (*Stewart v. Cox, supra,* 55 Cal.2d at 865.)

Here, too, it would be "highly extraordinary" for Johns-Manville not to warn downstream users of the known hazards of asbestos. (See also *Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1467 ["use of the article, knowing the danger posed by its defective condition, is an intervening cause of the plaintiff's injury."].)

None of the facts cited by the Court of Appeal as supposed breaches by Special Electric of the duty to warn or other negligence had any causal relationship to Webb's injuries.[11]

D. BECAUSE THE POLICY REASONS FOR STRICT PRODUCTS LIABILITY ARE INAPPLICABLE UNDER THE FACTS HERE, SPECIAL ELECTRIC, AS A BROKER, SHOULD NOT HAVE BEEN SUBJECT TO STRICT LIABILITY

Special Electric timely moved for directed verdict on the ground that as a broker it had no legal duty to warn. The trial court granted that motion. The Court of Appeal failed to address this issue, even after the omission was pointed out in the Petition for Rehearing at pages 7-8.

Special Electric acted as a broker, merely facilitating the sale of the crocidolite; it never owned or even possessed the asbestos sold to Johns-Manville, never controlled or influenced any manufacturing, and was not involved in the sale or distribution of any product. Johns-Manville itself thought of Special Electric as a "broker." (9 RT 2586:9-12, 2592:17-2593:2,

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[11] The Webbs did not assert the risk-benefit test for design defect, a test that one court has held is an exception to the sophisticated user defense. (*Johnson v. Honeywell, supra,* 179 Cal.App.4th at 558-559.) Rather, the Webbs asserted the more commonly used consumer expectations test, which the jury's verdict expressly rejected.

2595:2-14; 2638:19-2639:2.) Special Electric was no more in the chain of distribution than any other service provider, such as the ship that carried the asbestos from South Africa or the truck that drove the bags from the dock to Long Beach (both of whom had actual possession of the asbestos).

Strict products liability "is not limitless" and will not be imposed in the absence of the policy reasons underlying it, "even if the defendant could be technically viewed as a 'link in the chain' in getting the product to the consumer market." (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 774; see also *Peterson v. Superior Court* (1995) 10 Cal.4th 1185 [landlords and hotels are not strictly liable for product defects because the policy justifications are inapplicable]; *Tauber-Arons Auctioneers Co. v. Superior Court* (1980) 101 Cal.App.3d 268, 281-282 [secondhand dealer not strictly liable for a defective used product].)

The rationale for applying strict products liability principles was discussed in *Taylor, supra,* 171 Cal.App.4th 564. California's "rules of products liability 'focus responsibility for defects, whether negligently or non-negligently caused, on the manufacturer of the completed product.'" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 478-479, quoting *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 261.) "It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product . . . with the manufacturer or other entities involved in the manufacturing-market system [ ] which calls for imposition of strict liability." (*Taylor, supra,* 171 Cal.App.4th at 576.)

Strict liability should not be imposed on an entity "that is not a part of the manufacturing or marketing enterprise of the allegedly defective product that caused the injury in question." (*Peterson, supra,* 10 Cal.4th at

1188.) "Entities 'outside the original chain of distribution' of the allegedly defective product are not to be held strictly liable for defects because imposing liability on them would serve none of the policies that justify the doctrine." (*Taylor, supra,* 17 Cal.App.4th at 577, citing *Peterson, supra,* 10 Cal.4th at 1199, 1201-1201.)

As explained in *Bay Summit, supra,* strict liability may be imposed if the plaintiff's evidence establishes "(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process." (*Bay Summit, supra,* 51 Cal.App.4th at 776.) "It is plaintiff's burden to produce evidence of these factors linking the injury-producing product with a particular entity in the stream of commerce of that product." (*Taylor, supra,* 17 Cal.App.4th at 576.)

No California appellate court has ever imposed strict liability principles on a broker. In an analogous case, *Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1538, a finance lessor was held not strictly liable because it was in no position to exert pressure on the manufacturer to enhance the safety of the machine. Even though the lessor's financing role was critical, imposing strict liability would not further the policy considerations for strict liability. (*Id.*)

Likewise, those merely providing a service are not subject to strict liability. (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 258 [recreational rafting company not strictly liable for condition of raft, as that was incidental to provision of a service]; *Murphy v. E. R. Squibb & Sons, Inc.*

(1985) 40 Cal.3d 672, 677 [pharmacy's dominant role is to provide a service]; *Pena v. Sita World Travel* (1978) 88 Cal. App. 3d 642, 644 [travel agent not strictly liable for injury suffered by plaintiff on travel bus]; *Haynes v. National R.R. Passenger Corp.*, 423 F.Supp.2d 1073, 1085 (C.D. Cal. 2006) [Amtrak not strictly liable for the configuration of the seats incidental to providing transportation services].)

Oscar Mayer Corp. v. Mincing Trading Corp., 744 F.Supp. 79 (D.N.J. 1990) is instructive. There, the court held a broker of a food product was not within the "chain of distribution" as it could not "recapture the expense of an occasional defective product by an increase in the cost of the product" and was not "in a position to exert pressure to ensure the safety of the product." (*Id.* at 84-85) Other cases reach the same result where the broker never owns, controls or possesses the product. (*Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J.Super. 183, 406 A.2d 185, 196-197 (App.Div.1979), *cert. denied*, 82 N.J. 267, 412 A.2d 774 ["broker" could not be strictly liable because, though "in a sense, in the chain of distribution," it did not exercise control over the product and was a mere facilitator who arranged the sale, having never had physical control of the product].) In Pennsylvania, a broker that sold a defective press to the injured worker's employer had no control or involvement in its manufacture or design, made no representation as to its quality or soundness, never had physical possession of it, and therefore could not be strictly liable. (*Balczon v. Machinery Wholesalers Corp.*, 993 F. Supp. 900, 905 (W.D.Pa. 1998) ; see also, *Musser v. Vilsmeier Auction Co., Inc.*, 522 Pa. 367, 375 (Pa.1989) [auctioneers are agents for a seller for a specific purpose and bear no relationship to the manufacturer sufficient to impose strict liability].)

A customs broker that merely received invoices, prepared documents for the purchase of vehicles, but never took control or ownership of them, and never sold, marketed, promoted or distributed the vehicles, was not subject to products liability for injuries caused by the vehicles. (*Ames v. Ford Motor Co.*, 299 F. Supp. 2d 678 (S.D. Tex. 2003).) The court analogized to a finance lessor, which, just like in California, is not subject to strict liability.

An Illinois District Court also applied the financial lessor rationale to a broker, rejecting strict liability. The broker "had no input into the production or marketing of the rig," was described as "a paper shuffler," and had "never been involved with or exercised control over the design or manufacture of any Cottrell vehicle transport trailers." (*Massey v. Cassens & Sons, Inc.*, 2007 WL 2710490, p. 4-5 (S.D. Ill., Sept. 13, 2007, 05-CV-598-DRH) .)

The reasoning of these courts applies here. Special Electric provided a service – brokering the sale of a component material. Special Electric never owned the asbestos and never took possession of it. Unlike the mining company, Special Electric did not place the asbestos into the stream of commerce. Special Electric played no role in bringing the vent pipe to market and was in no position to exert pressure on Johns-Manville or its operations. Special Electric did not finance any part of the transaction and its money was not used, unlike the finance lessor's money in *Arriaga*. There was no continuing relationship between Special Electric and others in the chain of distribution so as to adjust the costs of protection among them. As the provider of a brokerage service, Special Electric should not be subject to strict liability.

E. A GENERAL NEGLIGENCE CLAIM CANNOT BE SUSTAINED MERELY ON ALLEGATIONS, INSTEAD OF THE FACTS ESTABLISHED AT TRIAL

The Court of Appeal held that the JNOV was not justified because the jury also found general negligence, which the pre-verdict motions purportedly did not reach. It concluded that negligence other than failure to warn was found by the jury because of arguments to the jury and the jury instructions. (Op. 29-32.) However, allegations, arguments and instructions are not evidence. Indeed, at trial Plaintiffs did not assert negligence on any basis unrelated to failure to warn (see 16 RT 4703:24-4704:11), even after Special Electric's trial counsel pointed this out in closing argument. (16 RT 4718:20-4719:1.)

The Court of Appeal asserts the jury could find negligence because Special Electric sold a type of asbestos type that was particularly dangerous. It is not negligent, however, to sell a dangerous product. (*Walker, supra,* 19 Cal.App.3d at 674 ["The mere fact that bulk sulfuric acid is potentially dangerous is no reason to render Stauffer liable to plaintiff in the instant case."].)

The Court of Appeal also cites Special Electric's supposed marketing of crocidolite as safer. However, as noted above, the only evidence of such a "selling pitch" was from a person who left the company in 1973, before any asbestos was sold to Johns-Manville, and who never dealt with Johns-Manville. (6 RT 1677:5-7, 1689:20-25, 1692:22-24.) There is no evidence of any such pitch to Johns-Manville, which regardless owed a duty to warn about the asbestos in Transite pipe (which included predominately chrysotile) regardless of whether it contained trace amounts of crocidolite. The law required the same warning regardless of the type of asbestos

used.[12] Thus, there is no nexus between any such supposed sales pitch and Johns-Manville's warnings or Webb's injuries. The alleged negligence has to be causally related to support a negligence verdict.

Further, marketing a product as safer would constitute a negligent failure to warn. (*Johnson v. Honeywell, supra,* 179 Cal.App.4th at 556-557 [plaintiff's expanded theory of negligence to include deficient MSDS sheets was a variant of negligent failure to warn, which the sophisticated user defense defeated].)

The Court of Appeal also asserts as negligence that the company's name changed from "Special Asbestos" to "Special Electric," "inferably in order to distance itself from what consumers were coming to learn was a dangerous product." (Op. 31, as modified.) Initially, as the Court of Appeal was advised, the entire premise is wrong since the name was never changed to "Special Electric", but rather to "Special Materials." (Petition for Rehearing at p. 9.) (6 RT 1673:21-1674:1, 1759:8-10, 1760:16-18.) Further, the Court of Appeal's inference is from whole cloth. The court took a completely neutral fact and ascribed a motive to it that is not based on anything in the record. Even a jury's finding must be based on substantial evidence that "clearly implies that such evidence must be of ponderable legal significance." (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336). Here, there is only the Court of Appeal's speculation. Moreover, there is no suggestion whatsoever the name change was casually related to Webb's injuries.

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[12] Special Electric asserted that the language of the asbestos warning on the polywoven bags was mandated by OSHA, and that federal preemption precluded a finding that the warning was inadequate. (Respondent's Brief at 19-22.) The Court of Appeal did not address this issue.

The dissent had no problem understanding Special Electric's arguments as to why the negligence verdict was based only on failure to warn, which belies the majority's holding that Special Electric failed to explain away the cited evidence or provide cogent legal argument. (Compare Op. pp. 31-32 with Dissent pp. 11-12.)

The only evidence and argument on negligence was on failure to warn. Thus, the Court of Appeal erred in holding that Special Electric's motions did not resolve the general negligence claim.

F. TRIAL COURTS HAVE DISCRETION AS TO WHEN TO RULE ON MOTIONS FOR NONSUIT AND DIRECTED VERDICT, AND TECHNICAL TIMING ERRORS SHOULD NOT LEAD TO REVERSAL ABSENT UNDUE PREJUDICE

1. THE COURT OF APPEAL WRONGLY ASSESSED THE MOTIONS FOR NONSUIT AND DIRECTED VERDICT BY THE PROCEDURES APPLICABLE TO A MOTION FOR JNOV

The Court of Appeal ruled that once a verdict is rendered the limitations on a court's power to enter a contrary judgment is controlled by the procedures for a motion for JNOV, even if the motion actually addressed is a motion for nonsuit or directed verdict. (Op. 15.) Plaintiffs did not advocate this position. Justice Rothschild states, "The majority cites no legal precedent for that proposition, and I am aware of none." (Dissent 10.)

There is no requirement that courts rule on nonsuit motions at the time they are made. (*King v. Hercules Powder Co.* (1918) 39 Cal.App. 223, 224 [nonsuit ruling made after all evidence was in].) And it was not the trial court's intent by deferring consideration of the motions to deprive the

parties of procedural rights ("the defense has been most circumspect in preserving their rights" [11 RT 3001:16-17]; and the defense lawyers "were vigilant and diligent." [18 RT 6602:21-22].)

This ruling defies common sense and threatens to lengthen jury trials. The trial court deferred ruling to avoid that result. (18 RT 6602:7-22.) It pushed through the evidence and did not want to stop the trial to brief and argue the motions. This is common in trials. Long trials are a burden on jurors. Requiring the motions be ruled on before a verdict is rendered means at some point the trial will have to be halted so the motions can be addressed.

Beavers v. Allstate Ins. Co. (1990) 225 Cal.App.3d 310, 328, demonstrates the error of the Court of Appeal here in applying more restrictive procedural requirements on delayed nonsuit and directed verdict motions:

> If the power to grant judgment notwithstanding the verdict is not coextensive with the power to grant a directed verdict, then trial courts will be compelled to dispose of issues on motion for directed verdict out of fear of losing the authority to enter an appropriate disposition at a later time. Such a result serves neither the policy in favor of expeditious and efficient resolution of issues nor the clearly expressed legislative intent that the authority on a motion for judgment notwithstanding the verdict be coextensive with the power to direct a verdict.

As *Beavers* states, the JNOV statute requires that JNOV be granted "whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." (*Id.* at 328-29.) Here prior motions for directed verdict and nonsuit were made and

procedurally should have been granted. The Court of Appeal has created inconsistency in the procedures where the Legislature has mandated consistency.

Plaintiffs never objected to deferring the rulings; they wanted more time to brief the issues and agreed to a schedule for filing briefs after the jury verdict. (18 RT 6602:23-28; see also 11 RT 3003:28-3304:3, 3005:26-27; see 1 AA 151, 175.) Plaintiffs should have raised any concerns with the trial court then, not in arguments after the verdict or on appeal. (*John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161 [failure to request right to reopen waives this right].)

If the Court of Appeal correctly ruled the trial court's deferral of timely filed pre-verdict motions deprived Special Electric of the benefit of those motions, then the result should have been a reversal that would allow Special Electric to make post-judgment motions. Special Electric never declined to file a JNOV motion; to the contrary, it said it likely would file such a motion if judgment against it were entered. (18 RT 6302:2-13.) Since judgment against it was never entered, it did not have the opportunity to file a JNOV motion. Therefore, if the procedure followed by the trial court was impermissible, the matter should be returned to the trial court to allow Special Electric the opportunity to file a JNOV motion.

2. THE COURT OF APPEAL ERRONEOUSLY TREATED THE MOTION FOR JNOV AS HAVING BEEN MADE *SUA SPONTE*

The Court of Appeal majority treated the JNOV as having been entered on the trial court's own motion, when, in fact, the trial court deemed Special Electric's motions to be a motion for JNOV. (2 App. at 383, 401.1.)

The trial court was within its discretion to deem the motions a JNOV. A motion for JNOV may be granted "whenever a motion for directed verdict for the aggrieved party should have been granted had a previous motion been made." (Code of Civ. Proc. §629.) It functions the same as a motion for nonsuit or directed verdict and is based on the same principles as a nonsuit or directed verdict. (*Beavers, supra,* 225 Cal.App.3d at 327.)

The court's power to grant JNOV is coextensive with the power to grant a directed verdict. (*Id.* at 328.) Motions for nonsuit, directed verdict, and JNOV all challenge the legal sufficiency of the evidence, and thus may be treated interchangeably. (*Wilson v. County of Los Angeles* (1971) 21 Cal.App.3d 308, 312-13, *disapproved on other grounds by Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579 [motion under CCP §631.8 treated as motion for nonsuit]; *Herrill v. Rugg* (1931) 114 Cal.App. 492, 495-96 [motion for directed verdict treated as motion for nonsuit]; *Shell Oil Co. v. Harrison,* 425 So.2d 67, 69-70 (Fla. 1st DCA 1982), [directed verdict appropriate based on sophisticated purchaser defense].)

3. THE COURT OF APPEAL IMPOSED ERRONEOUS PROCEDURAL REQUIREMENTS ON A *SUA SPONTE* MOTION

Treating the JNOV motion as if made *sua sponte,* the Court of Appeal required it be made on five days written notice specifying the grounds. (Op. 13-14.) Since section 629 contains no requirement for a written notice or specification of grounds, the Court applied section 1005(a)(13). There is no authority imposing written notice requirements on *sua sponte* motions.

Moreover, Section 1005(a)(13) expressly applies only if "no other time or method is prescribed by law or by court or judge." Thus, it was within the judge's authority to use a different method.

The court cites *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 903, quoting *La Manna v. Stewart* (1976) 13 Cal.3d 413, 418, as supporting authority requiring written specification of grounds. But those cases dealt with new trial motions where the applicable code section expressly requires orders to specify the reasons. No such requirement is found in section 629 regarding *sua sponte* motions. (See *Sturgeon v. Leavitt* (1979) 94 Cal.App.3d 957, 961 [*sua sponte* JNOV affirmed based simply on notice of intent to grant it without specification of grounds].)

In any event, Special Electric's motions were in writing, specified the grounds, and were served more than five days before the ruling.[13]

4. THE TRIAL COURT HAD THE POWER TO GRANT A MOTION FOR JNOV PRIOR TO EXPIRATION OF THE TIME TO FILE A MOTION FOR NEW TRIAL

The Court of Appeal held the trial court's ruling was "impermissibly premature," and the court was not yet "empowered" to rule, because the time to move for a new trial had not expired. (Op. 12-13.)

Section 629 distinguishes between what a court has no power to do and what it is not supposed to do. The very first sentence mandates the court "shall render judgment" "before the expiration of its power to rule on a motion for new trial." There is no limitation on when that "power" starts. Later, the section expressly removes the "power of the court" to rule on a JNOV motion after expiration of the time to rule on a new trial motion. While the statute states a court shall not rule on a JNOV motion prior to expiration of the time for making a new trial motion, it does not

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[13] Well before the court ruled, the issue of treating the motions as a JNOV motion was raised by Plaintiffs (1 App. at 177:7-12) and defendant (2 App. at 328:23-329:11).

remove the power of the court to do so. (See Dissent 9.) When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621-22). A court may not rewrite a statute, either by inserting or omitting language, to make it conform to an intent that is not expressed. (*Cornette v. Dept. of Transportation* (2001) 26 Cal. 4th 63, 73-74). The Court of Appeal has done so in its opinion.[14]

Indeed, the purpose of synchronizing the motion for JNOV with the new trial procedures was to permit an aggrieved party to move for JNOV without forfeiting the right to a new trial (*Espinoza v. Rossini* (1966) 247 Cal.App.2d 40, 45-46), which is not the issue here.

The trial court had jurisdiction to grant a JNOV. "[T]here was substantial compliance with section 629." (*Espinoza, supra,* 247 Cal.App.2d at 46.) If it ruled prematurely, the error was technical and not prejudicial.

5. A Showing Of Undue Prejudice Is Required For Reversal

Reversal on procedural grounds requires prejudicial error. The Constitution allows reversal only if an examination of the entire cause shows there has been a "miscarriage of justice." (Cal. Const. Art. VI, §13.) Code of Civil Procedure section 475 requires a court "must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not

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[14] The only case cited by the Court of Appeal, *Sturgeon, supra* 94 Cal.App.3d 957 (Op. 13), dealt with the *end* of the period in which a motion for JNOV may be brought, not *when* that motion may be granted.

affect the substantial rights of the parties." Further, it prohibits reversal "unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial." Moreover, the party complaining must have "suffered substantial injury", and must show *"that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed."* (Code Civ. Proc. section 475, emphasis added.) Prejudice cannot be presumed.

Had the trial court done what the Court of Appeal mandated – stop the trial to make the ruling pre-verdict or follow the timing and requirements for a JNOV - *the same result would have been obtained.* The trial court followed the procedure it did because it could see no benefit in more briefing. Its stated goal was to get the matter decided on the merits. (*Jahn v. Brickey* (1985) 168 Cal.App.3d 399, 405; *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 440 [disposition on merits preferred over procedural grounds].) A different result would not have been probable if it waited until after judgment to rule or filed a written notice of motion and grounds for a JNOV on five days notice.

The prejudicial error rule applies even when the trial court violates a statutory mandate. (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56 ["most procedural errors are not jurisdictional"].) The JNOV statute has been held to be directory, not mandatory. (*Espinoza, supra,* 247 Cal.App.2d at 46.)

Nowhere does the Court of Appeal address any alleged prejudice from the asserted procedural defects. Plaintiffs did not even assert, either in the trial court or on appeal, most of the positions on the procedure the Court of Appeal adopted.

G. THERE IS NO SUBSTANTIAL EVIDENCE WEBB WAS EXPOSED TO ASBESTOS BROKERED BY SPECIAL ELECTRIC

The lack of causal relationship between any act of Special Electric and Webb's injuries is also demonstrated by the lack of evidence crocidolite brokered by Special Electric was incorporated into vent pipe that then found its way into Webb's lungs.

Johns-Manville had at least three suppliers of crocidolite asbestos. (8 RT 2108:6-17; 9 RT 2445:22-28, 2455:7-15, 2456:1-11, 2457:7-25, 2585:21-2586:12, 2615:24-2616:10; 2640:2-24; 2641:24-2642:3.) The only product Johns-Manville purchased through Special Electric was ML-6 and MS-1 crocidolite. (9 RT 2642:27-2643:17, 2592:17-2593:2, 2595:2-19, 2601:23-2602:15.) Because Johns-Manville had several suppliers of crocidolite, and the mining company for whom Special Electric was the broker was not Johns-Manville's exclusive supplier of crocidolite, any of their crocidolite may have been in the scraps later blended into the Transite vent pipe.

Crocidolite was never part of the formula for Transite vent pipe, and was blended in serendipitously through scraps. (8 RT 2365:21-2368:16; 9 RT 2423:4-2424:21, 2427:5-10, 2453:18-26; see also 8 RT 2106:28-2107:24.) The amount of crocidolite that found its way into vent pipe was 1% at most. (9 RT 2440:24-26.) The remaining ingredients included other types of asbestos, including chrysotile from Johns-Manville's own mines. (9 RT 2443:10-2444:3, 2447:9-17.) There is no evidence that crocidolite was always in vent pipe, nor actually in the pipes Webb handled. (8 RT 2109:6-2111:3.).

Johns-Manville first received blue asbestos brokered by Special Electric in November 1976, designated as "ML6." (Exh. 339 at Bates No. 003119; 9 RT 2413:22-2414:13; Exh. 334 at Bates No. 003139; Exh. 339 at

Bates No. 003139.)[15] None of the ML6 was used until May 1977. (Exh. 340 at Bates No. 003412;[16] see also 9 RT 2416:16-2417:10.) Therefore, whatever pipes Johns-Manville made before May 1977 could not have in them any crocidolite brokered by Special Electric.

Transite vent pipe was four inches in diameter and most, if not all, vent pipe purchased by Pyramid, Webb's employer, was five feet in length. (3 RT 650:6-10, 652:19-23, 685:17-28; 4 RT 1113:24-27, 1163:25-1164:1, 1170:19-24.) Pyramid, usually sold only one five-foot piece at a time. (4 RT 1161:26-1162:5.)

Johns-Manville records show that there was only one shipment of 4"x 5' Transite pipe to Familian between May 1977 (the first use of ML6 asbestos) and the end of the records in December 1979 -- 77 pieces shipped on June 5, 1979. (Exh. 11010-A at Bates No. 000059-60.)[17] Thus, whatever five-foot Transite pipe Pyramid sold before June 1979 could not include any blue asbestos brokered by Special Electric.[18]

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[15] There is other evidence that "various entities" shipped blue asbestos to Johns-Manville in 1974 and 1977-1980. (8 RT 2354:17-2355:13, 2355:29-2358:26.) There is no evidence as to who shipped the asbestos, which Johns-Manville plant the asbestos was destined for, or when or in what products the asbestos was used.

[16] Trial Exhibit 340 is referred to in the testimony as Exhibit 5. (9 RT 2622:2-8.)

[17] There was one other shipment of 77 pieces on January 25, 1977, before any ML6 asbestos had even been used so it could not have been in this shipment of Transite pipe. (Exh. 11010-A at Bates No. 000523-25.)

[18] Only Webb thought Pyramid sold any 10-foot-long Transite pipe. Johns-Manville records show the first sale of 10-foot pipe to Familian after Johns-Manville started using ML6 fiber for other products was in July 1977, and there is no evidence asbestos brokered by Special Electric was included in it. (Exh. 11010, Bates No. 000316.)

Transite pipe was a small percentage of Pyramid's overall sales, and one of the smallest of the various kinds of pipe sold. (3 RT 686:1-8; 4 RT 1171:6-10.) Webb's "guesstimate" is that Pyramid carried the pipe for about ten years (he started in 1969), but he agreed he really did not know and it could have been less. (696:1-697:8, 697:13-25.) Thus, the end date for sale of the pipe was speculation. Plaintiffs provided no evidence of that end date.

On this record no reasonable inference can be drawn that Webb was exposed to asbestos brokered by Special Electric. Traces of crocidolite got into Transite pipe from scraps that came from numerous places and none has been traced back to Special Electric.

Asbestos brokered by Special Electric was not used until May 1977, and the first shipment thereafter to Familian of five-foot pipe was on June 5, 1979. There is only speculation that Pyramid was still selling Transite pipe at that time. Its sales having dwindled to nothing by then (3 RT 652:24-653:6, RT 659:19-22; 688:2-689:21; 700:7-14), it is illogical that Pyramid would be buying more. Thus, there is no actual evidence of exposure to any Transite pipe with blue asbestos brokered by Special Electric.

A plaintiff must establish actual exposure to the defendant's product and that the exposure was a substantial factor in the plaintiff's disease. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982.) The proof of actual exposure cannot be based on speculation. "The mere 'possibility' of exposure does not create a triable issue of fact." (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 108; *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098.)

Webb *might* have been exposed to Transite vent pipe after June 1979

that *might* have contained blue asbestos that *might* have come from scraps with blue asbestos brokered by Special Electric. This is conjecture, not evidence. (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1420-21 [nonsuit affirmed because it was only a mere possibility plaintiff's worksites contained defendant's asbestos]; *Dumin v. Owens-Corning Fiberglas Corp.* (1994) 28 Cal.App.4th 650, 655-56 [directed verdict affirmed as uncertain dating of presence of defendant's product and fact other products were also used made claim of exposure conjecture]; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078 [evidence of asbestos exposure insufficient].)

Substantial evidence "'clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case.'" (*DiMartino, supra,* 80 Cal.App.4th at 336.)

Here, there is no substantial evidence of Webb's actual exposure to asbestos brokered by Special Materials. The Court of Appeal's holding to the contrary sets a dangerously low bar. Moreover, it was based on a misreading of the record. The Court of Appeal cites a supposed admission of Special Electric's trial counsel during closing argument that Special Electric's asbestos was in the pipes. (Op. 21-22 n.22.) What counsel actually said was: "the chances of any fibers that are associated with our brokering operation, the chances of those reaching Webb are virtually nil." (16 RT 4722:24-26.) Nor does the volume of asbestos the Court of Appeal ascribed to Special Electric for use in products other than Transite pipe create a reasonable inference that Webb was exposed to it from Transite

pipe. Johns-Manville's records prove otherwise.

V. CONCLUSION

The Court of Appeal found a broker liable for not warning a sophisticated manufacturer or the manufacturer's remote consumer of the hazards of a finished product, even though the broker had no influence over the supply of the asbestos or the manufacture or sale of the finished product, and the broker had no way to warn the consumer. The ruling is unprecedented and cannot be reconciled with *Johnson*. The Court of Appeal also created unreasonable procedural hurdles for litigants and trial judges, without any showing of undue prejudice.

Special Electric submits that the trial court's original judgment should be reinstated.

Dated: September 10, 2013

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CERTIFICATION OF WORD COUNT

I certify that this Opening Brief on the Merits contains 13,812 words, including the footnotes but not including the tables, according to the Microsoft Word "Word Count" feature.

Jeffrey Kaufman

William B. Webb and Jacqueline V. Webb v. Special Electrict Company, Inc.
In the Supreme Court of California
Case No. S209927

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My electronic notification address is service@bhplaw.com and my business address is 135 Main Street, 20th Floor, San Francisco, California 94105. On the date below, I served the following:

OPENING BRIEF ON THE MERITS

on the following:

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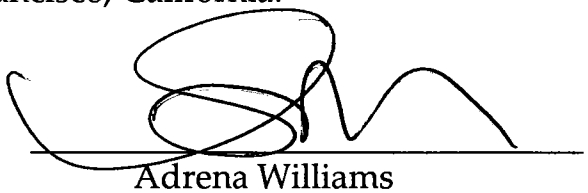
I declare under penalty of perjury that the above is true and correct. Executed on September 10, 2013, at San Francisco, California.



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