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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF POMONA, Plaintiff-Appellant, v. SQM NORTH AMERICA CORPORATION, Defendant-Appellee.	No. 18-55733 D.C. No. 2:11-cv-00167-RGK-JEM MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted December 10, 2019
Pasadena, California

Before: WARDLAW and LEE, Circuit Judges, and KENNELLY,** District Judge.

The City of Pomona appeals from a jury verdict in favor of SQM North America Corporation (SQM) on Pomona's strict product liability claim that fertilizer manufactured by SQM contaminated the city's water supply with a toxic

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

chemical called perchlorate. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand for a new trial.

1. Pomona principally argues that the district court incorrectly instructed the jury on the risk-benefit test used to evaluate design defect claims under California law. SQM has forfeited its argument that Pomona should have raised this point in its appeal from the first trial because SQM did not argue forfeiture in the district court before the second trial and instead litigated the jury instructions on the merits.[1] *See Tokatly v. Ashcroft*, 371 F.3d 613, 618 (9th Cir. 2004); *see also Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("As a general rule, we will not consider arguments that are raised for the first time on appeal.").

2. We review de novo whether a jury instruction "correctly states the law." *Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 951 (9th Cir. 2018). We conclude that the district court misstated the law when it departed from California's pattern jury instructions and instructed the jury to weigh the risks and benefits of the design of SQM's fertilizer "at the time the product was in use."

Under California law, the jury must determine "through hindsight" whether "the risk of danger inherent in the challenged design outweighs the benefits of such design." *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 430 (1978). This rule allows

[1] SQM's motion for judicial notice of Pomona's brief from the previous appeal is **DENIED** as moot.

jurors to consider risks that were not, and could not have been, known to the manufacturer at the time of manufacture. *Kearl v. Lederle Labs.*, 172 Cal. App. 3d 812, 822 (1985) ("Strict products liability . . . in effect imputes to the manufacturer knowledge—as of the time of trial—of any risk posed by his product."), *overruled on other grounds by Brown v. Superior Court*, 44 Cal. 3d 1049, 1061 (1988); *see also Carlin v. Superior Court*, 13 Cal. 4th 1104, 1117 (1996). Thus, the fact that a manufacturer "acted as a reasonably prudent manufacturer would have under the circumstances, while perhaps absolving the manufacturer of liability under a negligence theory, will not preclude the imposition of liability under strict liability principles, if, upon hindsight, the trier of fact concludes that the product's design is unsafe." *Barker*, 20 Cal. 3d at 434.

Instead of allowing the jury to consider modern-day knowledge about the harms posed by perchlorate, as California law permits, the risk-benefit instruction given by the district court restricted the jury to weighing the risks and benefits of the fertilizer "at the time the product was in use"—i.e., the 1930s and 1940s, when it was undisputed that the harmful effects of perchlorate were unknown. This was error.[2]

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[2] Unlike our dissenting colleague, we see no reason to certify this question to the California Supreme Court. No party has asked for certification, which would only further delay a final resolution of this long-running case. As the dissent acknowledges, multiple California Supreme Court cases contemplate that a manufacturer can be held liable on a design defect theory for harms that could not

3. This error was not harmless. "An error in instructing the jury in a civil case requires reversal" unless the appellee can show that "it is more probable than not that the jury would have reached the same verdict had it been properly instructed." *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009).

SQM contends that the jury would have been bound to find in its favor because it was infeasible in the 1930s and 1940s to manufacture fertilizer with lower perchlorate levels. But while the "mechanical feasibility of a safer alternative design" is one factor that can be considered as part of the risk-benefit test, *Barker*, 20 Cal. 3d at 431, the parties presented conflicting factual evidence on this point that must be resolved by the jury at trial. Next, SQM argues that the jury would have been compelled to find that Pomona's claim was barred by the statute of limitations. But in a previous appeal in this case, we held that there is a triable issue of fact on SQM's statute of limitations defense. *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1051–53 (9th Cir. 2014). That decision is law of the case, and we see no reason to depart from it here. *United States v. Jingles*, 702 F.3d 494, 499–500 (9th Cir. 2012).

As SQM has failed to carry its burden of establishing harmlessness, we

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have been foreseen at the time of manufacture in products liability cases. *See Carlin*, 13 Cal. 4th at 1117; *Barker*, 20 Cal. 3d at 434. In applying that rule to the facts before us, we simply take the California Supreme Court at its word.

reverse and remand for a new trial.[3]

4. The case must be retried on all issues. While Pomona argues that the jury's finding that SQM's fertilizer was a "substantial factor" in causing harm to the city's water supply should be retained, that issue is too intertwined with the issue of damages, which the jury did not reach at the second trial because it found no liability. *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (holding that a partial retrial is appropriate only if it "clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice"). Because both issues require a determination of the extent to which the harm to Pomona's water supply was caused by SQM's fertilizer, as opposed to another source of perchlorate, they should be decided by the same jury.

5. Because we remand for retrial, we need not reach SQM's arguments regarding Question 1 of the special verdict form. We note, however, that while the district court's formulation of the special verdict form was within its "complete discretion," *Mateyko v. Felix*, 924 F.3d 824, 827 (9th Cir. 1990), the district court

[3] We do not decide whether the district court abused its discretion by refusing to give Pomona's requested curative instructions. We note, however, that it would be inconsistent with our decision today for SQM to argue at the retrial—as it did at the prior trials—that it should not be held liable because it could not have known of the harms posed by perchlorate at the time the fertilizer was manufactured.

is free to modify the special verdict form upon remand as it deems appropriate.

6. Pomona has fallen far short of demonstrating that this is one of the "rare and extraordinary circumstances" that merits invocation of our supervisory authority to order reassignment to a different district judge. *Krechman v. County of Riverside*, 723 F.3d 1104, 1112 (9th Cir. 2013). The record shows that Judge Klausner treated both sides "evenhandedly and with respect," *McSherry v. City of Long Beach*, 423 F.3d 1015, 1023 (9th Cir. 2005), and we have no doubts about his ability to impartially preside over further proceedings in this case.

REVERSED AND REMANDED.

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Pomona v. SQM, No. 18-55733
LEE, Circuit Judge, dissenting:

The California Supreme Court's decision in *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413 (1978), is in some ways a conundrum. That decision states that a manufacturer who took "reasonable precautions" cannot escape liability "if, upon *hindsight*, the trier of fact concludes that the product's design is unsafe." 20 Cal. 3d 413, 434 (emphasis added). The majority accordingly holds that jurors can "consider risks that were not, and could not have been, known to the manufacturer at the time of manufacture." And under that rule, SQM in 2020 may be held liable for its use of percholate in the 1930s and 1940s, even though no one at that time knew that its use was harmful.

SQM argues that the use of the word "hindsight" in the opinion merely denotes the "inherently retrospective nature of fact-finding at trial." Perhaps its reading is plausible, though it isn't the most natural or most reasonable interpretation of that word. On the other hand, words in a judicial opinion are not subject to the same exacting scrutiny as those in a statutory text.

Notably, the City conceded at oral argument that it has not located a single California state court ruling — in the forty years since *Barker*'s issuance — that applied *Barker* to hold a party liable based on scientific knowledge that was unknowable at the time of the incident but known at the time of trial.

The majority opinion cites language from *Kearl v. Lederle Labs.*, 172 Cal. App. 3d 812 (1985) and *Carlin v. Superior Court*, 13 Cal. 4th 1104 (1996), that suggest an expansive strict liability doctrine in California akin. But those courts cited that language in ultimately narrowing the scope of strict liability in the context of prescription drugs.

In light of this ambiguity, I believe that this issue should be certified to the California Supreme Court. *See* Cal. R. Ct. 8.548(a). Accordingly, I respectfully dissent.

United States Court of Appeals for the Ninth Circuit

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Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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