Case No. B303627

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION TWO

ARTHUR PUTT, et al.,
Plaintiff and Respondent,

vs.

CBS CORPORATION, et al.,
Defendants and Appellants.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR LOS ANGELES COUNTY, HONORABLE STEPHEN M. MOLONEY, JUDGE, CASE NO. 18STCV06912/JCCP NO. 4674.

***AMICI CURIAE* BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA AND THE U.S. CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT AND APPELLANT FORD MOTOR COMPANY.**

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INTRODUCTION

A. Background and Importance of Issue

The Civil Justice Association of California ("CJAC") and the Chamber of Commerce of the United States of America ("U.S. Chamber") welcome the opportunity to address as *amici curiae*[1] an important issue this case presents –

> Is a defendant in a negligence and strict liability asbestos exposure case – where multiple products from different manufacturers cause the plaintiffs' injuries and the evidence provides a basis to allocate liability for non-economic damages amongst them – entitled to a clarifying instruction that the jury should apply the same liability rules

[1] By separate accompanying application, amici request the court accept this brief for filing.

applicable to that defendant to the non-parties identified in the verdict form?

By tentatively reversing the jury's verdict allocating 100 percent of the $8 million non-economic damage award solely to Ford Motor Company ("Ford"), the trial court implicitly recognized jury confusion about what it was supposed to do. That verdict was rendered despite evidence showing a number of other defendants who settled with plaintiffs before trial were collectively responsible for the lion's share of their injuries. The trial court explained reversal was warranted because "based on the entire record, it was a *miscarriage of justice* for the jury to find that [Ford] was the sole legal cause of the plaintiffs injuries." AOB 26; emphasis added.

Unsurprisingly, the jury's failure to allocate responsibility amongst all defendants and responsible companies according to their respective degrees of "fault" for plaintiff Putt's exposure to asbestos is attributable to confusing jury instructions. Specifically, the trial court refused to instruct the jury "to apply the same liability instructions it applied to Ford to the non-parties identified in the verdict form." AOB 22; RB/XAOB 36.

By refusing to provide these illuminating instructions, the trial court deprived Ford of an "important check against excessive awards," (*Honda Motor Co., Ltd. v. Oberg* (1994) 512

U.S. 415, 433), enabling an obviously befuddled jury to saddle Ford with the entire $8 million verdict for plaintiffs' non-economic damages ($4 million for Putt's pain and suffering and another $4 million for his spouse's loss of consortium). Though implicitly admitting this error by its tentative decision, the trial court nevertheless reversed itself in its final decision, removing all the evidentiary citations supporting fault allocations to others and reverting to the jury's excessive non-economic damage verdict against Ford.

B. Interest of Amici

CJAC is a 40-year-old nonprofit organization whose members are businesses, professional associations and financial institutions. Our principal purpose is to educate the public on ways to make – more fair, certain, uniform and economical – laws for determining who gets paid, how much, and by whom when the conduct of some occasions harm to others. Toward this end, CJAC was an official sponsor of Proposition 51, the "Fair Responsibility Act of 1986," which figures prominently in this case by requiring an equitable apportionment of non-economic damages between various defendants based on each one's respective share of responsibility for the plaintiff's injury. We also often

participate as amicus curiae in public interest appeals, including those involving asbestos exposure.[2]

The U.S. Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. One of the Chamber's responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including cases before California courts. See, e.g., *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993; *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191; and *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159.

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[2] See, e.g., *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *O'Neil v. Crane Co.* (2012) 53 Cal.4th 535; *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987; *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165; and *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847.

SUMMARY OF ARGUMENT

The trial court's tentative decision was correct—the jury's imposition upon Ford for 100 percent of the non-economic damages for plaintiffs' injuries in this asbestos exposure case was a "miscarriage of justice." Other non-parties named in the special verdict instruction were indisputably responsible for a substantial amount of these damages.

Instructional error accounts for the jury's "confusion, worse confounded" (John Milton, *PARADISE LOST*, *Book II*, *Line* 995) verdict to the contrary. Specifically, the trial court refused to instruct the jury to use the same liability standards for the non-parties on the verdict form that it applied to Ford. This left the jury without guidance as to what "fault" means with respect to these non-parties, and confused as to whether it could find them "comparatively responsible" for plaintiffs' non-economic damages. That instructional error, combined with others, was then used by plaintiffs' counsel to further confound the jury about defendant's duty to prove the correct apportionment of damages for each responsible entity.

The judgment deserves to be reversed and the case remanded for a new trial before a properly instructed jury.

ARGUMENT

I. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY TO APPLY THE SAME LIABILITY RULES FOR NON-ECONOMIC DAMAGES TO NON-PARTIES RESULTED IN AN UNLAWFULLY TAINTED VERDICT.

A. Defendant is Entitled to Jury Instructions on all Legal Theories Advanced in the Case.

This court reviews *de novo* whether the trial court's refusal to give a requested jury instruction was improper. *D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 232 ("propriety of jury instructions is a question of law"). In doing so, however, the court evaluates the proposed instruction in the light most favorable to the appellant. *Ayala v. Arroyo Vista Family Health Ctr.* (2008) 160 Cal.App.4th 1350, 1358. The court assumes that the jury might have believed the evidence upon which the instruction favorable to the appellant was predicated. *Henderson v. Hamischfeger Corp.* (1974) 12 Cal.3d 663, 674; *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 5.

Refusing a jury instruction that is in proper form and supported by the evidence is error if it deprived the propounding party of the opportunity to have the jury consider a basic theory of his or her case. *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573-574. The trial judge has a duty "to instruct on all vital issues in the case." *Green*

v. State of California (2007) 42 Cal.4th 254, 266. This ensures that jurors have a full and complete understanding of the applicable law. *Thomas v. Intermedics Orthopedics, Inc.* (1996) 47 Cal.App.4th 957, 965. "Instructional error in a civil case is prejudicial where it seems probable that the error prejudicially affected the verdict." *Soule, supra*, 8 Cal.4th at 580. "To put it another way, [w]here it seems probable that the jury's verdict may have been *based* on the erroneous instruction *prejudice appears* and this court should not speculate upon the basis of the verdict." *Henderson*, *supra,* 12 Cal.3d at 670; emphasis added; internal quotes omitted.

The evidence necessary to justify giving an instruction need not predominate on the issue involved. Even slight or contradicted evidence may be sufficient. *Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1338. "Each party in the trial court is entitled to the same benefit that favors his cause or defense when produced by his adversary as when produced by himself." *Williams v. Barnett* (1955) 135 Cal.App.2d 607, 612; CACI No. 200 [Jury must "consider all the evidence, no matter which party produced the evidence."]. Though the credibility and weight of evidence on a particular issue are matters within the jury's province, the trial court may not refuse to instruct on a particular legal theory because the supporting evidence fails to "inspire belief"

or is "slight" as compared to other conflicting evidence. See *People v. Jeter* (1964) 60 Cal.3d 671, 674.

B. Defendants Are Entitled to a Jury Instruction that Apportionment of Non-Economic Damages Should be Made Among Each Entity Responsible for Plaintiffs' Injuries.

Proposition 51, codified as Civil Code section 1431.1 through 1431.2,[3] requires an apportionment of non-economic damages according to each defendant's degree of fault. "[E]ach defendant is liable for only that portion of the plaintiff's non-economic damages which is commensurate with that defendant's degree of fault for the injury." *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1198.

Under Proposition 51, "defendants no longer have to pay an injured employee's non-economic damages caused by the fault of another, and the employee, like any other tort victim,

[3] Section 1431.1 provides in part: "[D]efendants in tort actions shall be held financially liable in closer proportion to their degree of fault." Section 1431.2 provides that "(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."

bears the resulting risk of loss." *DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 603. "With respect to these non-economic damages, the plaintiff alone now assumes the risk that a proportionate contribution cannot be obtained from each person responsible for the injury. [Citation.]" *Id.* at 600. This apportionment requirement, which applies in any action for personal injury, property damage, or wrongful death that is based on principles of comparative fault, is consistent with the initiative's purpose: modifying the "unfairness" and "inequities" of the former tort recovery system where defendants with slight fault could be "saddled with large damage awards mainly attributable to the greater fault of others who were able to escape their full proportionate contribution. [Citation.]" *Id.* at 599; see *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1804-1805.

Proposition 51's limitation on non-economic damages among several tortfeasors applies, as here, to asbestos exposure cases based on both negligence and strict liability. *Wilson v. John Crane, Inc.*, *supra*, 81 Cal.App.4th 847, an asbestos exposure opinion, explains how section 1431.2's furtherance of the comparative fault doctrine "allocates liability not simply on the relative blameworthiness of the parties' conduct, but on the proportion to which their conduct

contributed to the plaintiffs' harm," a process it suggested is more accurately described as "comparative responsibility." *Id.* at 854; emphasis added. Further,

> Proposition 51 is applicable in a strict liability asbestos exposure case where multiple products cause the plaintiff's injuries and the evidence provides a basis to allocate liability for non-economic damages between the defective products. Where the evidence shows that a particular product is responsible for only a part of plaintiff's injury, Proposition 51 requires apportionment of the responsibility for that part of the injury to that particular product's chain of distribution.

Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal.App.4th 1178, 1198. Apportionment is applicable to defendants who settled before trial and non-joined alleged tortfeasors. *DaFonte v. Up-Right, Inc.*, *supra*, 2 Cal.4th at 603.

C. The Trial Court's Refusal to Accept Defendant's Requested Clarifying Instructions Resulted in Failure to Properly Apportion Non-Economic Damages and an Unfair and Excessive Verdict.

Defendant asked the trial court to modify the standard CACI instruction (No. 1207B) on apportionment to better instruct the jury on the bases for finding "fault" or "negligence" against non-parties. Absent that clarifying instruction it could not have been sufficiently clear to the jury that the "fault" of non-parties includes the same strict liability design defect (consumer expectations) and strict liability

failure to warn claims asserted against Ford. AOB 35-36. Unfortunately, the trial court rejected any modification to CACI No. 1207B.

Neither did plaintiffs' multiple concurrent causation instruction, CACI No. 431, to which Ford objected, clarify that it also applied to non-parties and not just Ford. Nor did the court give, as Ford requested, CACI No. 401, defining negligence; instead limiting the meaning of "negligence" to negligent product design and negligent failure to warn (CACI Nos. 1220, 1221, 1222, and 1223) without clarifying that these theories were also applicable to the designated non-parties in the special verdict form. Consequently, the jury returned a verdict finding a zero allocation to all other "at fault" automobile and brake lining manufacturers and employers of plaintiff.

Cumulative jury instructions must be considered together for the jury confusion they may engender since "all language . . . takes its meaning from the context in which it appears." *Monterey Peninsula Management Dist. v. Public Utilities Com.* (2016) 62 Cal.4th 693, 699. Only a complete contextual reading can determine if cumulatively they are confusing or sufficiently ambiguous to constitute "a reasonable likelihood the jury misunderstood and misapplied the instruction." *People v. Rundle* (2008) 43 Cal.4th 76, 149 (disapproved on

other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22); *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82. Even "harmless" instructional error warrants reversal when the *cumulative* effect of the improper instruction combined with other "insubstantial" errors (instructional or otherwise) is prejudicial. See, e.g., *Taha v. Finegold* (1947) 181 Cal.App.2d 536, 543-544.

The jury's finding of "zero percentage" of liability to other entities highlights the importance of clear apportionment instructions. There was no dispute that entities other than Ford would be responsible for part of the plaintiff's injuries, if Ford were found liable under plaintiff's theory. Indeed, plaintiff testified that his asbestos exposure from his employment at Ford and working on Ford vehicles was minor compared to his asbestos exposure from his other work. AOB 14, 21, 26. Plaintiff's theory and evidence presented for his case against Ford were the same for the other parties. It defies common sense, the evidence, and fairness for one defendant to bear 100 percent of the non-economic damage liability under these circumstances. The verdict represents a flouting of evidence to arrive at a "greater apportionment of fault to [defendant] than might reasonably have been found by a properly instructed jury." *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 153.

II. A COMPLETE NEW TRIAL IS WARRANTED.

The jury's failure to allocate any fault to the other strictly liable product suppliers is contrary to the evidence and requires a new trial. *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 455-456; *Barrese v. Murray* (2011) 198 Cal.App.4th 494, 507-508.

But a new trial on apportionment of fault alone will not wash because the determination of the remittited punitive damage award is inextricably tied to the compensatory damage award, most of which here is for non-economic damages that should have been apportioned between all responsible non-parties. Where there is a new trial on the issue of compensatory damages, "[e]xemplary damages must be redetermined as well, as 'it would be improper and premature to assess such damages until or concurrently with the assessment of "the actual damages" ' [citation] and 'exemplary damages must bear a reasonable relation to actual damages' [citation] even though no fixed ratio exists to determine the proper proportion [citation]." *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 284; accord: *Auerbach v. Great Western Bank* (1999) 74 Cal.App.4th 1172, 1190.

In short, the appropriate amount of punitive damages to award plaintiffs turns on the amount of compensatory

damages Ford owes them. But that amount cannot be known until a new trial on apportionment occurs. That is best achieved by a complete new trial on all damage issues. Otherwise, this court could accept the trial court's original ratio of compensatory to punitive damages and order a limited retrial on the allocation of fault; and then, after Ford's share of non-economic damages is determined, apply that same ratio to calculate the proper punitive award.

CONCLUSION

For all the aforementioned reasons, amici urge the court to reverse the judgment allocating 100 percent of the responsibility to Ford for plaintiffs' non-economic damages and remand for a full new trial, or a retrial on allocation of fault and any other issues the court deems intertwined.

Dated: January 6, 2021

/s/
Fred J. Hiestand
Counsel for Amici

CERTIFICATE OF WORD COUNT

I certify that the word processing program used to compose this brief reports this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 3,400 words.

Dated: January 6, 2021

/s/
Fred J. Hiestand
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PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On January 6, 2021, I served the foregoing document(s) described as: AMICI BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA and THE U.S. CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT AND APPELLANT FORD MOTOR COMPANY in *Arthur Putt, et al. v. CBS Corporation, et al.*, B303627 on all interested parties in this action by placing a true copy thereof electronically or in the U.S. Mail (where indicated) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 6th day of January 2021 at Sacramento, California.

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