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In the

SUPREME COURT OF CALIFORNIA

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

WILLIAM B. WEBB AND JACQUELINE V. WEBB,

APPELLANTS,

V.

SPECIAL ELECTRIC COMPANY, INC.,

RESPONDENT.

PETITION FOR REVIEW

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James C. Parker [Bar No. 106149]
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I. ISSUES PRESENTED

1. Is it a tort not to warn a manufacturer of hazards the manufacturer already knows?

2. Is it a tort not to impose a contractual obligation to warn upon a manufacturer, when the manufacturer already owes a tort duty to warn?

3. May those associated with but not actually part of the chain of distribution, such as a broker, rely upon those within the chain, such as the manufacturer, to warn end users of hazards, especially when those outside the chain have no reasonable means to warn the end users?

4. Absent a reason to believe otherwise, may a broker presume a manufacturer will warn end users of hazards, especially when the broker has no reasonable means to warn the end users?

5. If they are not in the chain of distribution and do not profit from the end product, are brokers subject to strict products liability?

6. If there was no duty to warn, can a general negligence verdict be sustained if the only form of negligence was a failure to warn?

7. If there is no prejudice, may a trial court rule after a verdict upon otherwise valid pre-verdict motions for nonsuit and directed verdict?

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?

II. WHY REVIEW SHOULD BE GRANTED

This case presents major issues of compelling interest to litigants across California. The primary issues are:

1. Whether a broker to a sophisticated manufacturer is subject to a duty to warn that manufacturer of hazards the manufacturer already knows; and

2. How and when a trial court may rule on timely submitted motions for nonsuit, directed verdict, and JNOV.

In a 2-1 published decision, the Second District reversed the judgment of the trial court and reinstated a $5,004,695 jury verdict against Special Electric Company, Inc. ("Special Electric"). The trial judge, the Hon. John S. Wiley, had post-verdict granted Special Electric's timely filed motions for nonsuit and directed verdict, which he had deferred so as not to delay the trial and to give the parties ample opportunity to fully brief the issues. Deeming them motions for JNOV, he granted that motion as well.

On the merits, the trial judge found that Johns-Manville, a sophisticated, knowledgeable company concerning asbestos, did not need to have its asbestos brokers warn it of the hazards of asbestos. And, in the absence of any evidence to the contrary, the broker could rely on Johns-Manville to discharge its own independent duty to warn those end users.

The Court of Appeal reversed on both procedural and substantive grounds. It held that since they were heard post-verdict, the previously filed motions for nonsuit and directed verdict, though timely and proper, had to comply with the procedural requirements for a JNOV. According to the majority, the trial court's pragmatic deferral meant that it could no longer decide those motions under their own procedures, and it was

premature to decide them under JNOV procedures. No court has ever found the procedures here constitute reversible error. Yet the majority not only found them reversible error, it do so without any finding that they had caused any prejudice. Its procedural rulings limit trial court discretion, and threaten to lengthen trials and impose additional burdens on jurors.

On the procedural points, the dissent characterizes the majority's opinion as having "no legal precedent," as being "implausible," and relying on "technical errors" that were "undeniably harmless". (Dissenting Opinion ("Dis. Op.") at p. 8, 9, 10, 11.)

The majority's reasoning on the merits is equally flawed. The majority acknowledged that "No one on this appeal doubts that Johns-Manville was a sophisticated user of asbestos, who needed no warning about its dangers." (Op. at p. 17) Nonetheless, Special Electric owed a tort duty to warn Johns-Manville. This holding conflicts with the basic principle that obvious hazards need not be warned of, and with *Johnson v. American Standard* ("*Johnson*") (2008) 43 Cal.4th 56, 67 ("there is no need to warn of known risks under either a negligence or strict liability theory"). The majority also held Special Electric had an independent duty to warn Mr. Webb, the end user of Johns-Manville's products, even though Plaintiffs themselves disclaimed that position, and even though Special Electric could not know who the end user would be nor ever reach the end users such as Mr. Webb. These holdings impose an impossible duty upon defendants like Special Electric and cannot be reconciled with prior case law. (*Fierro v. International Harvester* Co. (1982) 127 Cal.App.3d 862 [no duty to warn knowledgeable company of flammability properties of gasoline; *Groll v. Shell Oil Co.* (1983) 148 Cal.App.3d 444, 449 ["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."]; *Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 178 [no duty of ski binding manufacturer to warn ultimate user].)

The dissent is appalled. "The 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." (Dis. Op. at p. 1.) Requiring Special Electric to warn Webb meant that holding "Special Electric liable on the basis of a theory that plaintiffs themselves have never advanced." (Dis. Op. at p. 3, 4.) The majority view conflicted with the general rule that "'every person has a right to presume that every other person will perform his duty and obey the law . . . .'" (Dis. Op. at p. 4.) Moreover, there was no evidence of causation to support the theory that the failure to warn Johns-Manville or to try and warn Webb through Johns-Manville had any connection to Webb's injuries. There was also no evidence that Webb was exposed to asbestos attributable to Special Electric.

The dissent variously characterized the majority opinion as "unprecedented," "incorrect as a matter of law," without "authority or reasoning," and "extraordinary." (Dis. Op. at pp. 4, 5, 6.)

At least one defendant in toxic tort litigation has already requested de-publication of the Opinion. If the decision is not reversed, or de-published, considerably confusion and unnecessary litigation will result, both on the heretofore unknown-to-be-erroneous procedural issues and the scope of the newly expanded duty to warn.

This matter requires Supreme Court guidance.

III. STATEMENT OF THE CASE

A. TRIAL COURT PROCEEDINGS

Plaintiffs' complaint named 11 defendants. At trial, only three remained. When Plaintiffs rested, Special Electric timely moved for nonsuit on the failure to warn theories. In the interests of efficiency, and so the parties could brief the issues (which even Plaintiffs requested), the trial court deferred ruling on the motion. The parties then briefed the issues. (1 Appellants' Appendix ("App.") at 62, 77, 151; 18 RT 6602:7-6603:1; see also 11 RT 3003:28-3304:3.)

When both sides rested, Special Electric moved for a directed verdict. The court deferred ruling on that motion as well so it could be briefed, which it was. (1 App. at 68, 176.)

Before any hearings on the two pre-verdict motions could be held, the jury returned a verdict in favor of Special Electric on Plaintiffs' design defect (consumer expectations) theory, but against Special Electric on the failure-to-warn and negligence theories. (1 App. at 143.)

Thereafter, the trial court indicated its intent to grant Special Electric's motions. At Plaintiffs' request, the matter was set for further briefing and argument. Supplemental briefs on both motions were filed and a further hearing was held. (1 App. at 196; 2 App. at 309.) The trial court then granted both motions. The court also deemed them to be a motion for JNOV, and granted that motion as well. (2 App. at 383). Judgment was entered and Plaintiffs appealed. (2 App. at 384; 404)

B. COURT OF APPEAL OPINION

1. THE MAJORITY DECISION

Addressing the JNOV motion, the appellate court treated it as having been made on the trial court's own motion, although the order and judgment state that the trial court deemed Special Electric's motions to also

be a JNOV motion. (2 App. at 383, 401.) The appellate court held that for a trial court to grant a JNOV on its own motion it must give five days written notice of its intent to do so, and must provide written notice of the grounds for the motion. Further, it must not grant the motion before 15 days after entry of judgment, which is the time within which to move for a new trial. It held the trial court's grant of JNOV was beyond its authority and impermissibly premature. Further, after the verdict, the nonsuit and directed verdict motions had to satisfy the procedural requirements of a JNOV motion. In short, the trial court was tardy on ruling on the pre-verdict motions and premature in ruling on them as post-verdict motions. Yet, there was no finding of prejudice.

On the merits the appellate court held that Special Electric had a duty to warn Johns-Manville, and an independent duty to warn Webb, notwithstanding Webb never took the position Special Electric had to warn him directly and Webb's counsel at oral argument disclaimed he was so contending. (The majority apparently did not accept Webb's argument that Special Electric had a tort duty to contractually force Johns-Manville to warn the end users.)

The appellate court also found that Special Electric's motions did not reach the general negligence verdict, just the strict liability and negligent failure to warn claims.

2. THE 13-PAGE DISSENT

Justice Rothschild advanced full-blown reasoning for his disagreement with the majority.

There was no failure to warn Johns-Manville because it is not a tort to fail to tell someone something they already know. There was no failure to warn Webb because Webb never contended Special Electric could or

should have warned him, and Johns-Manville already had a tort duty to warn, on which Special Electric could rely. Special Electric had no duty to seek a contractual agreement, and there is no evidence that Special Electric had reason to know Johns-Manville would not fulfill its duty to warn.

Further, there is no causal relationship between Special Electric's alleged failure to warn and the injuries to Webb. No warning to Johns-Manville would have told it anything it did not already know, and there is no evidence a contractual duty would have made a difference. None of Special Electric's acts or omissions cited by the majority made any difference to Webb's injuries.

There were no procedural errors, and no prejudice. Plaintiffs had ample notice and opportunity to be heard on all arguments. There is no authority to eliminate a need for showing prejudice by concluding the trial court's holding was "procedurally impermissible", and Plaintiffs did not take that position. In addition, the statute does not say the court has no power to rule on a JNOV motion before the time for filing a new trial motion ends. There is no written notice requirement for *sua sponte* motions, and, in any event, reversal would depend on prejudice. Finally, imposing JNOV requirements on the nonsuit and directed verdict motions is unprecedented.

As to the general negligence claim, there was no negligence claim except negligent failure to warn.

3. PETITION FOR REHEARING

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

IV. STATEMENT OF FACTS

A. WEBB WAS EXPOSED TO ASBESTOS FROM SEVERAL SOURCES

William Webb, age 67, was diagnosed with mesothelioma, which he claimed was caused by asbestos exposure from the mid-1950's to the 1970's. (3 RT 606:2-616:6, 621:7-11, 624:17-626:27, 628:24-630:1.)

From 1969 to about 1980, while working at Pyramid Pipe & Supply ("Pyramid") in Canoga Park, CA he occasionally handled Transite pipe, an asbestos pipe manufactured by Johns-Manville typically in five-foot lengths for hot water heater venting. (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.)

B. JOHNS-MANVILLE WAS SOPHISTICATED ABOUT ASBESTOS

The Transite pipe was manufactured at Johns-Manville's Long Beach plant. Johns-Manville had been manufacturing asbestos-containing products since the 1850's. (9 RT 2644:22-2645:1, 2645:14-18.) Johns-Manville made many asbestos-containing products, including cements, millboard, residential siding, roofing products, flooring, insulation, asbestos cement pipe, and Transite pipe. (5 RT 1443:26-1444:25; 9 RT 2627:7-14, 2619:25-2620:7.)

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 asbestos sources. (9 RT 2616:20-2617:6; RT 2645:4-12; 5 RT 1441:25-1442:2.) Its pipe division consisted of six plants processing a variety of types of asbestos for manufacturing asbestos cement pipe. (9 RT 2627:7-14, 2619:25-2620:7.) Johns-Manville's state of the art research and development department knew "all the characteristics of asbestos, even chemically-

wise." (9 RT 2645:19-2646:13.)

Johns-Manville bought "a lot of types of fiber from a lot of different sources." (9 RT 2642:5-8.) As a mine owner, manufacturer, and consumer, Johns-Manville had developed superior knowledge about the hazards of asbestos. It knew how to safely handle asbestos, and long before the 1970's had well-established asbestos safety practices in place. (9 RT 2647:1-9.) Johns-Manville did not look to brokers, including Special Materials, for information or warnings about asbestos. (9 RT 2647:10-19.) Special Materials could not have told Johns-Manville anything about asbestos or its hazards that Johns-Manville did not already know. (9 RT 2651:3-6.) In fact, Johns-Manville educated Special Materials about asbestos. (9 RT 2646:14-21.)

Plaintiffs' industrial hygiene expert, John Templin, opined that Johns-Manville knew the potential health hazards of asbestos by at least the 1930's. (8 RT 2104:1-9.) Plaintiffs' epidemiology expert, Murray Finkelstein, studied Johns-Manville, interviewed current and former employees, and toured and reported on 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.)Finkelstein agreed that 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.)

C. JOHNS-MANVILLE OBTAINED CROCIDOLITE FROM SEVERAL SOURCES

Crocidolite asbestos was never part of Johns-Manville's formula for Transite vent pipe; however, in practice employees at the Long Beach plant included in the mix discarded or scrap pipe ground up from many

different sources, which could include crocidolite. (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 [Templin].) However, not all scraps were used and some were disposed of at dumpsites. (RT 2454:9-17). Less than 1% of the actual blend for vent pipe could be blue fiber. (9 RT 2440:24-26.)

Johns-Manville had several suppliers of blue asbestos whose fiber may have been in the scrap and the mining company for whom Special Materials was the broker was not Johns-Manville's exclusive supplier of blue 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 Materials was ML-6 and MS-1 blue asbestos fiber. (9 RT 2642:27-2643:17.) All other non-crocidolite asbestos fibers, over 30 different types, were purchased through other brokers, or from other vendors and suppliers. (9 RT 2643:11-17: 9 RT 2639:8-2642:12, 2643:11-17; Exhibit 339.)[1]

D. Special Materials Brokered Asbestos Fiber

Special Electric Company, incorporated in 1957, was in the electrical insulation business. (6 RT 1652:16-17; 1667:25-26.) It did not sell or broker the sale of the asbestos fiber allegedly at issue in this case. (6 RT 1667:27-1668:3; 10 RT 2723:26-2724-3.) It shared a common partial owner, Richard Wareham, with Special Materials-Wisconsin, the actual entity that brokered the sale of asbestos.[2] (6 RT 1759:11-16.) The Johns-Manville employee that dealt directly with Special Materials described it as a "broker." (9 RT 2586:9-12, 2592:17-2593:2, 2595:2-14; 2638:19-2639:2.)

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[1] Trial Exhibit 339 is referred to in the testimony as Exhibit 4, as that was the number used in the deposition being read. (9 RT 2613:15-23.)

[2] Special Materials was incorporated in 1969 under the name Special Asbestos, changing its name in 1976.

Special Materials never took possession of any asbestos. (6 RT 1658:5-9.) Rather, as a broker, it brought together buyers and sellers of asbestos. Johns-Manville would issue a purchase order, Special Materials would provide Johns-Manville with shipment information, and the mining company, Central Asbestos Company in South Africa, would pay Special Materials a commission. (6 RT 1663:3-12; 9 RT 2592:17-2593:2.) The Johns-Manville purchase orders required the asbestos be shipped in special polywoven bags with the OSHA warning printed on them. (6 RT 1162:2-21; 1665:14-1666:3; 1670:6-20.) The bags and the billing papers were shipped directly from Central Asbestos to Johns-Manville facilities, including Long Beach. (6 RT 1658:1-9.)

V. ARGUMENT

A. THERE SHOULD BE NO DUTY TO WARN A SOPHISTICATED MANUFACTURER OF DANGERS IT ALREADY KNOWS

Johns-Manville was one of the most knowledgeable companies in the world 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* (2009) 557 U.S. 137, 129 S.Ct. 2195, 2198.) The Court of Appeal acknowledged: "No one in this appeal doubts that Johns-Manville was a sophisticated user of asbestos, who needed no warning about its dangers." (Op. at p. 17.)

Johns-Manville was fully aware of the hazards of asbestos, and there was nothing Special Materials could warn it about that Johns-Manville did not already know. Johns-Manville prescribed to Special Materials not only the special bags that the asbestos was to be shipped in – specially designed

to contain the fiber – but also the language of the warnings to be printed on each and every bag. (1 AA 208:21-23 and Exh. E thereto at 2 AA 284-285.)[3] Johns-Manville was obviously aware of what the warnings should say.

A plaintiff bears the burden of proving that product warnings were required to come from the defendant, here Special Materials. (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 576.) Warnings are not legally necessary and serve no purpose when the hazard is already known or is obvious. (*Id.* at 577; *Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930, 933 [dangers of slingshots so obvious warnings are unnecessary].) The "obvious danger" rule holds that "there is no need to warn of known risks under either a negligence or strict liability theory." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 67; Comment k to Section 388 subdivision (b) of the Restatement (Second) Torts.)

The obvious danger rule has been extended in California to those users already sophisticated or knowledgeable about product hazards. "[S]ophisticated users need not be warned about dangers of which they are already aware." (*Johnson, supra,* 43 Cal.4th at 65.) The sophisticated user/obvious danger defense negates the causation element of a failure to warn theory. Pre-existing "knowledge of the dangers is the equivalent of prior notice" (*Id.* at 65), and failure to warn of a risk already known cannot be a legal or proximate cause of injury. (*Id.* at 67.)

For example, in *Fierro v. International Harvester, supra,* 127 Cal.App.3d 862, International Harvester sold a truck body to decedent's

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[3] In the post-trial arguments, Plaintiffs stated "we actually had evidence in this case where Johns-Manville contractually required a warning to be on a bag of asbestos." "Johns-Manville required that the South African mining concern put a particular warning on the bag of asbestos." (See 18 RT 6916:4-22.)

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 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 liability of the manufacturer to the ultimate user.

Here, Johns-Manville knew the risks from asbestos. They "weren't looking to Special Materials to" give them warnings. (9 RT 2647:10-13.) As the trial court aptly said, warning Johns-Manville about asbestos would be like "telling the Pope about Catholicism." (18 RT 6618:4-12.)

The trial court ruled that Special Electric had no duty to warn Johns-Manville. "The law does not require . . . a 25-person operation to tell the world's premier asbestos corporation about asbestos." (18 RT 6618:24-26.) The absence of warnings from Special Materials, if any, did not increase the danger to Webb, or affect any warnings required of Johns-Manville. Warnings to Johns-Manville would have made no difference and were not a proximate or legal cause of injury to Webb.

Plaintiffs and the Court of Appeal rely on *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23. *Stewart* is the polar opposite of this case. There, Union Carbide sold raw asbestos to a drywall company, and argued that the purchaser should be *presumed* to know the dangers of the asbestos.

(*Id.* at 29.) In contrast, no presumption is required here: Johns-Manville in fact and without dispute *knew* of the hazards and had *in fact* acquired its own knowledge. The trial court distinguished *Stewart* because there a knowledgeable company was seeking to absolve itself of the duty to warn a customer regardless of the customer's actual knowledge or sophistication. (18 RT 6619:14-6621:4.) Whereas here, "Telling somebody something they already know is pointless." (18 RT 6618:22-23.)

B. THE SUPPLIER TO A SOPHISTICATED MANUFACTURER SHOULD NOT HAVE A DUTY TO WARN AN END USER WHEN THERE IS NO REASONABLE MEANS TO DO SO AND WHEN THERE IS A PRESUMPTION THE MANUFACTURER WILL PERFORM ITS DUTY TO WARN

1. SPECIAL MATERIALS HAD NO MEANS TO WARN WEBB, AND EVEN PLAINTIFFS DID NOT ASSERT THE BASIS OF LIABILITY IMPOSED BY THE COURT OF APPEAL

The Court of Appeal also erroneously held that Special Materials had an independent duty to warn Webb. As Justice Rothschild points out in Dissent, Webb never contended Special Materials had a duty to directly warn him. When asked at oral argument whether Plaintiffs contended that Special Electric was supposed to warn Webb directly, Plaintiffs' counsel answered, "Of course not." (Dis. at p. 3.) Nor could he. The un-contradicted evidence is that Special Materials could not even know whether asbestos attributed to it was in the products with which Webb came into contact. The crocidolite asbestos in the Transite pipe, if any, was only there because of scraps from other pipe. Special Materials could not trace any particular crocidolite asbestos into the Transite pipe in general or into particular batches sold to Familian and bought by Pyramid. There is no evidence in the record that suggests Special Materials could know 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 has held Special Materials/Special Electric liable on a theory not even advanced by Plaintiffs.

Further, Special Materials had no means of giving notice to end users of Johns-Manville products. The asbestos was removed at Johns-Manville's plant from the bags it was shipped in. Special Materials could not label or inspect Johns-Manville products even if it knew which products had asbestos it brokered.

Plaintiffs argued in the trial court and in their appellate brief that Special Materials should have contractually compelled Johns-Manville to warn consumers. No evidence or law supports that suggestion and the trial court correctly 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 that Special Materials, a small company, had sufficient bargaining power to compel Johns-Manville, an international behemoth, to submit to a warning program on Special Materials' terms. No contractual requirement could have been made practically enforceable. "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. '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.' (Rest.2d Torts, § 388, com. n, p. 308.)" (*Persons v. Salomon North America, supra,* 217 Cal.App.3d at 178 [no duty of ski binding manufacturer to warn

ultimate user].)

Special Materials had no duty to warn Johns-Manville customers or their customers. "Understandably, the law does not require a manufacturer to study and analyze the products of others and to warn users of risks of those products." (*Powell v. Standard Brands Paint Co.* (1985) 166 Cal.App.3d 357, 364.) There is "no duty to warn of risks arising from *other manufacturers'* products." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 348.)

> 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.

(*Groll v. Shell Oil, supra,* 148 Cal.App.3d at 448-49.)

Here, Special Materials had no way of giving warnings that could reach the end user.

The Court of Appeal sidesteps all this authority by holding in general there was a duty to warn Webb and then leaving it to the jury to decide the scope of that duty. That holding abdicates the role of the court to the jury. The trial court properly exercised its authority in deciding there was no duty. It was error for the Court of Appeal to rely on the jury to make that decision, and its doing so greatly and unreasonably expands the concept of the duty to warn.

2. THE LAW PRESUMES JOHNS-MANVILLE WOULD PERFORM

ITS DUTY TO WARN WEBB

Judge Rothschild's dissent called the majority opinion "unprecedented" and "incorrect as a matter of law" because Johns-Manville had a duty to warn users of its products concerning their dangers. (*Johnson, supra,* 43 Cal.4th at 64.) (Dis. Op. at p. 4.) "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, 58-59; *Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523.) There was no evidence that Special Materials had reason to believe Johns-Manville would not perform this duty (assuming it did not). "[N]egligent conduct with full realization of the danger may properly be considered highly extraordinary." (*Stewart v. Cox* (1961) 55 Cal.2d 857, 865.) (See *Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467-68; and *Dodge Center v. Superior Court* (1988) 199 Cal.App.3d 332 [defendant could expect others to use reasonable care].) There is no basis on which to impose on Special Materials a duty to contractually require Johns-Manville to do what it already had a tort duty to do.

The Court of Appeal majority imposed on Special Materials, at best a component part supplier, an independent duty to warn end users irrespective of warnings the manufacturer might give, another basis of liability not advocated by Plaintiffs. Creating a jury question for every instance in which a component supplier relies on the manufacturer to warn the end user flies in the face of modern practices and reality.

The Court of Appeal majority eviscerates the presumption that every other person will perform his duty by requiring Special Materials to

have proven its actual expectation and reliance on Johns-Manville's notice. That turns the presumption on its head.

3. THERE IS NO CAUSAL RELATIONSHIP BETWEEN ANY ACT OR OMISSION OF SPECIAL ELECTRIC AND WEBB'S INJURIES

There must be a causal connection between any alleged act or omission of Special Materials and Webb's injuries. Here there is none.

There is no evidence that warning Johns-Manville would have had any impact on Webb's injuries because there was nothing Special Electric could tell Johns-Manville about asbestos that it did not already know. Nor would attempting to warn Webb have made any difference. There was nothing Special Electric could do to directly warn Webb (and Plaintiffs did not claim that Special Electric had such a duty). There was no evidence that Johns-Manville would have heeded a contractual duty any more than its already existing tort duty to warn.

The obvious danger rule is based in part on the recognition that not telling someone something they already know does not increase the danger to anyone. "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*, 43 Cal.4th 56, 65 [emphasis added]. See also *Fierro v. International Harvester, supra*, 127 Cal.App.3d at 866.)

None of the acts cited by the Court of Appeal as supposed breaches of the duty to warn had any causal relationship to Webb's injuries. (See *Stultz v. Benson Lumber Co.* (1936) 6 Cal.2d 688 [seller not liable for injury to buyer's employee from defective condition of product known to seller and buyer]; 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."].)

The burden is on plaintiffs to show that the negligence of the intervening actor was foreseeable by defendants such that they should not be absolved of liability. (*Asbestos Cases, supra,* 543 F. Supp. at 1150-51; CACI No. 411 [every person has a right to expect that every other person will use reasonable care].) CACI 411 and the superseding cause instruction were given. (1 AA 108, 111.) Plaintiffs did not meet this burden.

C. A Broker Of A Component Part Should Not Be Subject To Strict Liability

Defendant timely moved for directed verdict on the ground that Special Materials was only a broker and therefore had no 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.

Special Materials merely acted as a broker; it never owned or possessed the asbestos sold to Johns-Manville, never controlled or influenced manufacturing, and was not involved in the sale or distribution of any Johns-Manville product. Special Materials helped arrange for shipments from the mine in South Africa to the plant in Long Beach. It provided a service, and was no more in the chain of distribution than other service providers, such as the ship that carried the asbestos or the warehouse that stored it (both of which had actual possession of the asbestos, unlike Special Materials). Johns-Manville itself thought of Special Materials as a "broker." (9 RT 2586:9-12, 2592:17-2593:2, 2595:2-14; 2638:19-2639:2.)

Strict 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

Bay Summit set forth three factors required for strict liability: (1) defendant received a direct financial benefit from its activities and from the sale of the product; (2) defendant's conduct was necessary 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. The mere fact an entity "promotes" or "endorses" or "advertises" a product does not automatically render that entity strictly liable for a defect in the product. (51 Cal.App.4th at 775-76).

In *Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1538, a finance lessor was held not strictly liable because the finance lessor 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 all the policy considerations for strict liability. It could not assert pressure on the manufacturer to enhance safety.

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 was not strictly liable for injury suffered by plaintiff on a travel bus]; *Haynes v. National R.R. Passenger Corp.* (C.D. Cal. 2006) 423 F.Supp.2d 1073,

1085, [Amtrak not strictly liable for the configuration of the seats incidental to it providing transportation services.)

No California court has held that a broker, even if theoretically part of the chain of distribution, can be strictly liable for manufacturing defects or warnings, and other jurisdictions have rejected that contention. In *Oscar Mayer Corp. v. Mincing Trading Corp.* (D.N.J. 1990) 744 F.Supp. 79, 84-85, the court held a broker of a food product could not be held to be within the "chain of distribution" as was not "in a position to exert pressure to ensure the safety of the product."

Other cases reach the same result where the broker never owns, controls or possesses the product. (*Lyons v. Premo Pharmaceutical Labs, Inc.* (1979) 170 *N.J.Super.* 183, 406 *A.*2d 185, 196-197 (App.Div.), *cert. denied,* 82 *N.J.* 267, 412 *A.*2d 774; *Balczon v. Machinery Wholesalers Corp.* (W.D. Pa. 1998) 993 F. Supp. 900; *Musser v. Vilsmeier Auction Co., Inc.* (1989) 522 Pa. 367, 562 A.2d 279, 283; *Ames v. Ford Motor Co.* (S.D. Tex. 2003) 299 F. Supp. 2d 678; *Massey v. Cassens & Sons, Inc.* (S.D. Ill., Sept. 13, 2007, 05-CV-598-DRH) 2007 WL 2710490.)

The reasoning of these courts applies here. Special Materials provided a service. Johns-Manville determined what kind of asbestos it wanted, and the mining company put it into the stream of commerce. Special Materials simply brokered the sale. Its money was not even used, as was the finance lessor's money in *Arriaga.* Special Materials played no role in bringing the vent pipe to the market, especially since crocidolite was not part of the formula. Special Materials was not in any position to enhance public safety by exerting pressure on the South Africa mine that produced the asbestos or on Johns-Manville in the manufacture of its pipes. And there is no continuing relationship between Special Materials

and the entities in the chain of distribution so as to adjust the costs of protection between them. Special Materials never owned the asbestos and never took possession of it. Even though Special Materials received financial benefit from the brokerage activities, its role was as a facilitator. As the provider of a brokerage service, Special Electric should not be subject to strict liability and had no duty to warn.

D. A General Negligence Claim Cannot Be Sustained Based On Complaint Allegations Rather Than Facts Established At Trial

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

The only evidence the Court of Appeal cites is the supposed selling point that blue asbestos was safer. However, as pointed out in Defendant's Court of Appeal brief (Respondent's Brief at p. 12, 37), 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. This person never sold any asbestos to Johns-Manville. (6 RT 1677:5-7, 1689:20-25, 1692:22-24.) There is no evidence of any such pitch to Johns Manville or that it was aware of or influenced by any such pitch, and given John's Manville's admitted sophistication about all aspects of asbestos it would

not have made any difference. Moreover, Johns-Manville had a duty to warn about the asbestos in its Transite pipe regardless of whether it contained trace amounts of blue asbestos. The law required the same warning regardless of the type of asbestos used.[4] 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 in order to support a negligence verdict. As Justice Rothschild says, the majority's argument "founders on the issue of causation." (Dis. Op. at p. 11.)

Further, marketing a product as safe, if it happened, is part and parcel of failing to warn about the product's dangers. Such marketing, if it occurred, would be negligent only because it fails to warn. It is not evidence of general negligence other than failure to warn.

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.

E. Trial Courts Should Have Discretion As To When They Rule On Motions For Nonsuit And Directed Verdict And Procedural Errors Are Harmless Without Prejudice

1. The Court Of Appeal Wrongly Judged 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 judgment contrary to it 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. at p. 15.) Plaintiffs did not advocate this position. Justice Rothschild states,

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[4] Special Electric asserted that the warning required for all asbestos (blue, white or brown) was the warning mandated by OSHA, and that federal preemption precluded a finding that the warning was not adequate. The Court of Appeal did not decide this issue.

"The majority cites no legal precedent for that proposition, and I am aware of none." (Dis. Op. at p. 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 plainly not the trial court's intent by deferring consideration of the motions to deprive Defendant of procedural rights ("the defense has been most circumspect in preserving their rights" [11 RT 3001:16-17]; and "there's no question that Mr. Parker and his colleagues were vigilant and diligent." [18 RT 6602:21-22].) The majority's imposed waiver of procedural rights and imposition of additional procedural hurdles, is itself a denial of due process.

This ruling defies common sense and threatens to lengthen jury trials and the imposition on jurors. The trial court deferred ruling so as not to delay the trial and impose further on the jurors. (18 RT 6602:7-22.) The trial court pushed the parties to get through the evidence and did not want to stop the trial so the parties could brief and argue the motions. This is common in trials. Long trials are a burden on jurors. Requiring the motions to 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.

Plaintiffs never objected to deferring the rulings; in fact they asked for more time to brief the issues. (18 RT 6602:23-28; see also 11 RT 3003:28-3304:3, 3005:26-27.) Plaintiffs should have raised any concerns with the trial court then, not on appeal. (*John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161 [failure to request right to reopen waives this right].)

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

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

The trial court was well within its discretion to deem the motions to be motions for JNOV. A JNOV motion is to be granted "whenever a motion for directed verdict for the aggrieved party should have been granted had a previous motion been made." (Code of Civil Procedure §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 v. Allstate Ins. Co., supra,* 225 Cal.App.3d at 327.)

The court's power to grant a motion for JNOV is coextensive with the power to grant a directed verdict. (*Id.* at 328.) Motions for nonsuit, directed verdict, and JNOV all serve to challenge the legal sufficiency of the evidence. Thus, it is appropriate to deem a directed verdict or nonsuit motion to be a JNOV motion. (See, e.g., *Wilson v. County of Los Angeles* (1971) 21 Cal.App.3d 308, 311-13, *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].)

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 ruled that it had to be made on five (5) days notice in writing specifying the grounds. (Op. at 13-14.) Since Code of Civil Procedure Section 629

contains no such requirement for a written notice or specification of grounds, the Court looked to Section 1005(a)(13), making Section 1005's requirements apply. There is no authority imposing written notice requirements on *sua sponte* motions, and this ruling will create many issues for trial judges.

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 also 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.

Further still, Defendant's motions which the trial court deemed to be motions for JNOV were in writing, specified the grounds, and were served well more than five days before the ruling.

4. CODE OF CIVIL PROCEDURE SECTION 659 DOES NOT REMOVE A COURT'S POWER TO GRANT A MOTION JNOV PRIOR TO THE TIME TO FILE A MOTION FOR NEW TRIAL

The Court of Appeal held the trial court's ruling was "impermissibly premature" because it occurred before the expiration of the time to move for a new trial. (Op. at p. 12-13.) However, Code of Civil Procedure Section 659 does not remove the "power of the court" to rule on a motion for JNOV prior to expiration of the time to file a motion for new trial. That phrase is not in the relevant sentence, but is elsewhere. (Dis. Op. at p. 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 a presumed 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.

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. Moreover, that is not an issue with a motion for nonsuit or directed verdict, so there is no basis to apply that requirement to those motions as the Court of Appeal did.

5. PREJUDICE IS REQUIRED FOR REVERSAL

It is fundamental to a reversal on procedural grounds that the error be prejudicial. 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 that 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 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.*" (Emphasis added.) Prejudice cannot be presumed.

Had the trial court followed the procedure the Court of Appeal held should have been followed – stop the trial if necessary to make the ruling

pre-verdict or follow the timing and requirements for a JNOV-- *the same result would have obtained.* The trial court followed the procedure it did because it could see no benefit in more briefing. ("I don't think anything important or consequential turns on what the style of the motion is at this point." [18 RT 6935:13-15].) Its stated goal was to get the matter decided on the merits, appropriately. (*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].) No different result would 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. Even Plaintiffs did not raise all these grounds of error.

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 v. Rossini* (1966) 247 Cal.App.2d 40, 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.

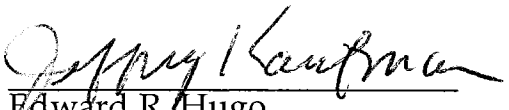
VI. CONCLUSION

The Court of Appeal majority has created new and unreasonable procedural traps for litigants and trial judges, and immeasurably expanded the scope of the duty to warn in conflict with prior California law. These issues more than satisfy the requirements of Rule 8.500(b)(1) of the California Rules of Court—"to secure uniformity of decision," and "to settle an important question of law."

Special Electric respectfully requests that this Court grant review.

Dated: April 22, 2013

BRYDON HUGO & PARKER

By: 

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CERTIFICATION OF WORD COUNT

I certify that this document contains 8,054 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

California Court of Appeal, Second Appellate District
Division One, Case No. B233189

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:

PETITION FOR REVIEW

on the following:

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Court of Appeals – Second Appellate District, Division One
Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013

X By placing the document(s) listed above in a sealed envelope and placing the envelope for collection and mailing on the date below following the firm's ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal service on the same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the above is true and correct. Executed on April 22, 2013, at San Francisco, California.

Josh Tabisaura

EXHIBIT A

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WILLIAM B. WEBB et al., Plaintiffs and Appellants, v. SPECIAL ELECTRIC COMPANY, INC., Defendant and Respondent.	B233189 (Los Angeles County Super. Ct. No. BC436063)

COURT OF APPEAL - SECOND DIS
FILED
MAR 14 2013
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. John Shepard Wiley, Judge. Reversed and remanded with directions.

Paul & Hanley, Dean A. Hanley, Anthony E. Vieira; Law Office of Ted W. Pelletier and Ted W. Pelletier for Plaintiffs and Appellants.

Brydon Hugo & Parker, Edward R. Hugo, James C. Parker and Jeffrey Kaufman for Defendant and Respondent.

In this action for strict liability and negligence (among other causes of action) plaintiffs William Webb (Webb) and Jacqueline Webb (collectively the Webbs) sought damages for personal injuries arising from conduct of defendant Special Electric Company, Inc. (Special Electric) (among others) in supplying and marketing products containing asbestos.[1] A trial resulted in a jury verdict against the Webbs and for Special Electric on the Webbs' product liability claim, and for the Webbs against Special Electric on the Webbs' claims for failure to warn and negligence. The verdict found damages of more than $5 million, holding Special Electric responsible to the Webbs for 18 percent of them.

After the verdict was rendered and the jury was discharged, but before judgment was entered, the court heard and granted Special Electric's pending pre-verdict motions for nonsuit and for directed verdict, and—deeming those motions to be a motion for judgment notwithstanding the verdict (judgment NOV or JNOV)—entered judgment for Special Electric. The Webbs appeal from the judgment. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant, William Webb, was diagnosed with mesothelioma, which he attributed to his exposure to asbestos products during various periods in his life.[2] His evidence showed that during his employment at Pyramid Pipe & Supply in Canoga Park, California (Pyramid), from 1969 through the late 1970s he regularly handled Transite pipe, an asbestos product manufactured by Johns-Manville at its plant in Long Beach, California, which contained a certain type of asbestos supplied to it by Special Electric

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[1] The Webbs alleged that Special Electric was responsible for the tortious conduct of various other entities with names such as Special Asbestos and Special Materials, Inc.-Wisconsin. Consistent with respondent's concession in this appeal, and because any distinction between the various "Special" entities is not at issue here, we refer to them as "Special Electric" without distinction.

[2] Mesothelioma is a form of cancer that grows in the mesothelium, a membrane that lines the chest cavity, the abdominal cavity, and the heart. It is causally linked to exposure to asbestos fibers. (*Hamilton v. Asbestos Corp., Ltd.* (2000) 22 Cal.4th 1127, 1135 & fn. 6.)

(among other suppliers). Transite pipe was four inches in diameter, and came in five-foot and sometimes ten-foot lengths. It was typically used for water-heater venting. Webb had used no gloves or respiratory protection when handling the pipe. Pyramid bought its Transite pipe from Familian, a pipe supply company.

From approximately 1974 through 1980, Special Electric supplied to Johns-Manville about 7,000 tons of crocidolite (or "blue") asbestos, a particularly dangerous type of asbestos. Although crocidolite asbestos was not part of the formula for Johns-Manville's manufacture of Transite pipe, there was evidence that crocidolite asbestos from discarded or scrap pipe was added to the mix for Johns-Manville's Transite pipe.

The Webbs' Complaint

The Webbs' complaint alleged causes of action against Special Electric (among other defendants) for damages and loss of consortium. So far as is relevant here, Webb claimed liability for negligence and strict liability, alleging that Special Electric was aware of the risks of injury and disease presented by use and handling of its asbestos, that Webb was unaware of those risks, and that Special Electric had failed to warn Webb or his employer of those risks. The Webbs also alleged Special Electric's liability on theories other than strict liability and negligent failure to warn, including "researching, manufacturing, fabricating, designing, . . . distributing, . . . supplying, selling, . . . marketing, . . . and advertising asbestos and asbestos-containing products" with knowledge of the resulting foreseeable risks of injury and death.

Motion for Nonsuit

After the close of the Webbs' evidence Special Electric moved orally for nonsuit, supporting its motion with a brief filed a few days later. The motion targeted only "the failure to warn cause of action, which runs across both strict liability failure to warn as well as any theory under a negligence or common law negligence theory of a failure to warn." It asserted two grounds for nonsuit: Undisputed evidence showed that all the asbestos shipped to Johns-Manville under Special Electric's auspices had been packaged with a printed warning about the hazards of asbestos, fulfilling its duty to warn. And Special Electric's only relevant customer was Johns-Manville, undisputedly "one of the

most sophisticated companies in the U.S. when it came to asbestos and asbestos-related products"; the sophisticated user doctrine therefore "absolves Special Electric of a duty to warn."

Opposing nonsuit, the Webbs' brief argued that conflicting evidence indicates that not all the asbestos delivered to Johns-Manville bore the printed warnings; that the printed warnings did not sufficiently identify the dangers of handling asbestos; that nonsuit can be justified only by a failure of the evidence to support the plaintiff's case, not by its failure to refute Special Electric's affirmative "sophisticated user" defense; and that the sophistication of Johns-Manville, an intermediary user, cannot absolve Special Electric of its duty to warn Webb, a foreseeable downstream user of its asbestos. The trial court did not rule on the nonsuit motion.

Instructions to the Jury[3]

The jury was instructed that Webb claimed he was harmed by a product "distributed, manufactured, or sold" by Special Electric, that was defectively designed or did not include sufficient instructions or warning of potential safety hazards. The court instructed the jury as to the factual elements required to find Special Electric liable under four legal theories: strict product liability for design defect,[4] strict liability failure to

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[3] Neither party claims error with respect to the instructions to the jury. The Appellant's Appendix contains what purport to be copies of written instructions given to each juror, but provides nothing (apart from the record citations in the parties' briefs) to identify their source, their authority, or who requested them. (See Cal. Rules of Court, rules 8.122(b)(3)(C), 8.124(b)(1)(B).) The reporter's transcript reflects the instructions given orally.

[4] The design-defect consumer-expectations claim required four factual elements: (1) that Special Electric manufactured, distributed or sold the asbestos; (2) that the asbestos did not perform as safely as an ordinary consumer would have expected; (3) that Webb was harmed while using the asbestos in a reasonably foreseeable way; and (4) that the failure of the asbestos to perform safely was a substantial factor in causing Webb's harm.

warn,[5] negligent design, manufacture, or supply of the asbestos,[6] and negligent failure to warn.[7]

Motion for Directed Verdict

On February 8, 2011, Special Electric filed a motion for directed verdict raising only liability based on a strict liability theory. The motion argued that strict liability theory was conclusively negated because the evidence showed that Special Electric had acted only as a broker, outside of the chain of distribution of the asbestos supplied to Johns-Manville.[8] The Webbs filed their opposition to the motion during the jury's deliberations. The trial court did not rule on the directed-verdict motion.

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[5] The claim that Special Electric failed to provide sufficient instructions or warnings of potential risks required seven factual points: (1) that Special Electric manufactured, distributed, or sold the asbestos; (2) that the asbestos had known or knowable potential risks; (3) that those risks presented a substantial hazard to users; (4) that ordinary consumers would not have recognized the potential risks; (5) that Special Electric failed to adequately warn of the risks; (6) that Webb was harmed while using the asbestos in a foreseeable way; and (7) that the lack of sufficient warnings was a substantial factor in causing his harm.

[6] Four factual elements were required to find Special Electric liable for negligence as a designer, manufacturer, or supplier: (1) that Special Electric had designed, manufactured or supplied the asbestos; (2) that it was negligent in doing so; (3) that the Webbs were harmed; and (4) that Special Electric's negligence was a substantial factor in causing the harm.

[7] The seven elements required to establish Special Electric's negligent failure to warn varied only slightly from those required to establish strict liability failure to warn.

[8] California law imposes strict liability in tort on participants in the chain of distribution of a defective product. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 63; *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262-263.) Strict liability is justified as a means to spread the costs of injuries resulting from dangerous and defective products among the products' manufacturers (*Greenman v. Yuba Power Products, Inc.*, *supra*, 59 Cal.2d at p. 63), retailers that are an integral part of producing and distributing the products (*Vandermark v. Ford Motor Co.*, *supra*, 61 Cal.2d at pp. 262–263), and all other defendants in the products' chain of distribution. (*Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 88-89.)

The Verdict

On February 17, 2011, the jury returned its verdict. By special verdict, it found that Special Electric's products suffered from no design defect. However, it also found that Webb was exposed to asbestos products sold or supplied by Special Electric, which had potential risks that were known or knowable to Special Electric, which presented a substantial danger that would not have been recognized by ordinary consumers; that Special Electric failed to adequately warn consumers of its products' potential risks; and that both Special Electric's failure to warn, and its negligence, were substantial factors in causing the Webbs' harm.

The jury found that the Webbs had suffered economic and noneconomic damages resulting from mesothelioma totaling $5,004,695, of which it attributed 18 percent to Special Electric, 49 percent to Johns-Manville, 0 percent to Webb, and 33 percent to third parties. The jury was discharged.

Renewed Motions for Nonsuit and Directed Verdict

The next day, February 18, 2011, the trial court suggested it would deny Special Electric's outstanding motions for nonsuit and directed verdict without hearing argument. Its minute order for that date indicates that in fact it did deny the motions.

But contrary to the minute order, the reporter's transcript shows that the court instead deferred ruling on those motions at Special Electric's request, while suggesting that Special Electric "wrap the whole thing into one" with motions for new trial and judgment NOV. When Special Electric said it would not move for new trial and judgment NOV until after the nonsuit and directed-verdict motions had been denied and judgment had been entered, the court scheduled a hearing on the pending motions.

On March 10, 2011, the Webbs moved ex parte for entry of judgment. The court signed the judgment favoring the Webbs, but withheld its entry pending hearing on the pre-verdict motions.

At the March 16, 2011 argument on the pre-verdict motions, the grounds argued by Special Electric for its nonsuit and directed-verdict motions were not the same as those stated in its initial briefs. Unlike the motions it had earlier filed, it explained that its

nonsuit motion challenged its potential liability for failure to warn, based on the evidence that the asbestos shipped to Johns-Manville all bore warnings of asbestos's dangers in terms that were adequate as a matter of law according to OSHA regulations approving them. And unlike its earlier directed-verdict motion, it contended that a directed verdict was justified because "both failure to warn and negligence don't exist as against Special Electric in this case because there's no legal duty to have warned whatsoever." Thus according to Special Electric, both its motions contended that Special Electric had no duty to warn Johns-Manville of the dangers of asbestos, either because Johns-Manville had been warned of those dangers, or because the dangers were obvious and known to Johns-Manville, a sophisticated user of asbestos. Special Electric argued also that it had no duty to take measures to warn unsophisticated downstream users of products containing its asbestos, such as Webb, because Special Electric could rely on Johns-Manville to provide those warnings.

The Webbs argued in response that Special Electric's duty to warn Johns-Manville was not fulfilled, because the evidence was conflicting about whether all the asbestos shipped to Johns-Manville was packaged with warnings, and whether those warnings were adequate. And they argued that Johns-Manville's sophistication with respect to asbestos could not absolve Special Electric of its duty to warn Webb, because the evidence did not show, and the jury did not find, that Special Electric had reasonably relied on Johns-Manville to undertake those warnings.

The Trial Court's Rulings

The court found tentatively that because Johns-Manville knew that asbestos is a dangerous product, Special Electric, a much smaller and less sophisticated entity, had no legal duty to warn Johns-Manville of those dangers. Warning Johns-Manville about asbestos, the court explained, is unnecessary, because "[t]elling Johns-Manville about asbestos is like telling the Pope about Catholicism."[9]

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[9] The court and the parties assumed (perhaps with some evidentiary basis) that Special Electric was a firm of roughly 25 people, while Johns-Manville had worldwide

At the close of the March 16 hearing the court announced its tentative intention to rule that Special Electric owed no duty to warn Johns-Manville about asbestos, and therefore had no liability to the Webbs. However, acknowledging its inability to find authority squarely supporting its intended rulings, the court acceded to the Webbs' request for an opportunity to further brief and argue the issues.

The court heard further argument on April 18, 2011, after which it granted Special Electric's motions, and entered judgment.[10] It identified two analytical grounds for its ruling: First, although it would have been relatively easy for Johns-Manville to provide warnings to users of its products such as Webb, it would be unreasonable to obligate Special Electric to require Johns-Manville to do so.[11] Alternatively, the court found that the bags in which the asbestos was transported to Johns-Manville all bore warnings that satisfied any duty to warn.[12] The court made its ruling with a conscious awareness of the procedural posture in which its ruling left the case: "I've sought in the procedure of this case to present this legal question for a clear appellate shot so that if I'm wrong, judgment is simply entered for Mr. Webb and he does not have to endure any further fact-finding."

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operations, its own asbestos mines, and a workforce that numbered in the range of 30,000. (See *Travelers Indem. Co. v. Bailey* (2009) 557 U.S. 137, 140, 129 S.Ct. 2195, 2198 ["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."].)

[10] In addition to rejecting the Webbs' arguments on the motions' substantive merits, the court also overruled the Webbs' extensive objections to the court's procedure in ruling on the pre-verdict motions after the verdict had been rendered, depriving them of the opportunity to offer additional evidence to overcome the claimed deficiencies in their case, and to respond to a formal written motion for judgment NOV.

[11] The Webbs argued that Special Electric had done nothing to ensure that downstream users of products containing its asbestos would be warned of its risks, and that it could have and should have contractually required Johns-Manville to provide such warnings to users and purchasers of its Transite pipe.

[12] The court made this finding despite the existence of substantial conflicting evidence on this point, which is discussed later in this opinion.

The court confirmed that entry of a judgment consistent with the verdict must occur first, "and then there would be a judgment notwithstanding the verdict, which would come along after," adding "[t]hat's in the alternative, and I propose that that all happen today." The April 18, 2011 minute order recites that the nonsuit and directed-verdict motions "are treated as a Motion for New Trial and Motion for Judgment Notwithstanding the Verdict"; that they "are granted"; and that "[j]udgment is entered as to the jury verdict and is entered this date."

Judgment and Appeal

The court's April 22, 2011 minute order recites that its "order on motions for judgment of nonsuit and directed verdict and judgment on special verdict and for nonsuit, directed verdict, and JNOV are signed and filed this date."[13] The formal Order On Motions For Judgment Of Nonsuit And Directed Verdict was filed April 22, 2011, granting Special Electric's motions for nonsuit and directed verdict, deeming those motions to be a motion for judgment notwithstanding the verdict, granting that motion, and ordering judgment to be entered accordingly. Also filed April 22, 2011, was the court's Judgment On Special Verdict And For Nonsuit, Directed Verdict, and JNOV, incorporating the jury's special verdict, reciting the court's April 18, 2011 grant of the nonsuit and directed-verdict motions, and, after deeming those motions to be a motion for judgment notwithstanding the verdict, then granting that motion as well.[14]

The Webbs filed a timely appeal from the judgment on May 17, 2011. No protective cross-appeal was filed. (See Cal. Rules of Court, rule 8.108(g).)

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[13] The April 22, 2011 minute order also reflects the court's denial of the Webbs' ex parte application for clarification of the April 18 orders.

[14] Although the trial court repeatedly stated its intention to grant motions for both a new trial and judgment NOV, in the end it granted only judgment NOV. Accordingly, we ignore references to a supposed new trial motion. (See *Sturgeon v. Leavitt* (1979) 94 Cal.App.3d 957, 964 [a trial court lacks power to grant new trial on its own motion].)

DISCUSSION

Webb's appeal raises three primary contentions: (1) The trial court erred, both procedurally and substantively, by entering judgment for Special Electric on the Webbs' failure-to-warn claims notwithstanding the jury's verdict in the Webbs' favor. (2) Even if nonsuit or JNOV were proper with respect to the failure-to-warn claims, the court erred in setting aside the verdict favoring the Webbs on their claim that Special Electric was negligent in designing, manufacturing, or supplying the asbestos, because Special Electric's motions and arguments addressed only the failure-to-warn claims, and the evidence supported the jury's general-negligence findings. (3) The verdict for Special Electric on the consumer-expectations product liability claim is inconsistent with the finding that ordinary consumers would not have recognized the potential risks of Special Electric's asbestos, and inconsistent with the only evidence on the subject, and therefore should be set aside.

The Webbs' appeal challenges on both procedural and substantive grounds the order deeming Special Electric's motions for nonsuit and directed verdict to be a motion for JNOV, and its order granting that motion (or any of them). We conclude that the trial court erred in granting judgment notwithstanding the verdict, on both procedural and substantive grounds. We will order reinstatement of the verdict and entry of judgment consistent with the verdict in the Webbs' favor.

The Trial Court Erred By Granting Judgment NOV

A defendant may move for nonsuit after the plaintiff's opening statement or at the close of the plaintiff's evidence. (Code Civ. Proc., § 581c.)[15] After all parties have completed their presentation of evidence, any party may move for a directed verdict in its favor. (§ 630.) And either on the noticed motion of a party or on its own motion, the court is obligated to render judgment NOV whenever a directed verdict favoring the moving party would have been appropriate. (§ 629.)

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[15] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

Each of these motions tests the legal sufficiency of the evidence proffered or presented by the opposing party; each is governed in the trial court by the same evidentiary standard. (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 583; *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 Cal.App.4th 1320, 1328 [nonsuit]; *Estate of Easton* (1931) 118 Cal.App. 659, 662 [directed verdict]; *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110 [JNOV]; *Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 327 [JNOV].) A motion for judgment NOV may be brought after a verdict has been rendered, but before judgment has been entered on the verdict. (§§ 629, 659.)

This court reviews trial court rulings on each of these motions by applying the same standard that governs a trial court's hearing of the motion. (*Hauter v. Zogarts*, *supra*, 14 Cal.3d at p. 110.) We evaluate the evidence for sufficiency in the light most favorable to the party opposing the motion, without consideration of conflicting evidence. (*Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 839 [nonsuit]; *Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1521 [directed verdict]; *Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68 [JNOV].)

A. The Order Violated Statutory Procedural Requirements For A Motion For Judgment NOV.

Seeing that a post-verdict motion for judgment NOV could place before the court the same substantive issues as those raised by Special Electric's pre-verdict motions for nonsuit and directed verdict, the trial court deemed these motions to be interchangeable. (See *Beavers v. Allstate Ins. Co.*, *supra*, 225 Cal.App.3d at p. 328 [court's power to grant judgment NOV is the same as its power on motion for a nonsuit or for a directed verdict].) The court reasoned that the substantive issues had been sufficiently aired in the post-verdict briefing and argument on the pre-verdict motions; it therefore could bypass further briefing and argument without prejudicing the Webbs' rights, conserving time and resources by simply treating the pre-verdict motions as though they were a post-verdict motion for judgment NOV, to which the same standards apply. Without a motion for judgment NOV having been interposed, the court entered judgment on the jury's verdict

and ordered judgment NOV (and, somewhat inconsistently, nonsuit and a directed verdict as well) in Special Electric's favor.

A trial court may grant judgment NOV on its own motion. (§ 629.) However, before it may do so, it must provide the parties with at least five days' notice of the motion, and of the grounds on which the motion is brought; it may not grant a court-initiated motion for judgment NOV before the expiration of 15 days after entry of judgment, the time within which a party may serve and file a new trial motion (§ 659); and it must grant judgment NOV, if at all, before expiration of its power to rule on a new trial motion (§ 660). (*Sturgeon v. Leavitt* (1979) 94 Cal.App.3d 957, 963-964; see 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 442, p. 514.)

We conclude that the court's order for judgment NOV was procedurally impermissible, because the court lacked authority to grant judgment NOV when it did, and also because the court-initiated motion for judgment NOV lacked written notice of motion and notice of the grounds for judgment NOV, both of which the code requires.

1. The order granting judgment NOV was premature.

The verdict in this case was rendered by the jury and filed by the court on February 17, 2011, and the jury was discharged. According to its minute order, the next day, February 18, 2011, the court denied the unheard motions for nonsuit and directed verdict.

The transcript of proceedings for February 18, 2011 tells a different story, however: When the trial court announced its intention to "deny Special Electric's motion made at the close of plaintiff's case" (the directed-verdict motion), Special Electric requested a hearing on its nonsuit and directed-verdict motions, while declining to file a motion for judgment NOV.

On April 18, 2011, the court deemed Special Electric's pre-verdict motions to be "a Motion for New Trial and Motion for Judgment Not Withstanding the Verdict" and granted them, reciting that "[j]udgment is entered as to the jury verdict and is entered this date." And on April 22, 2011, the court signed and filed its orders for entry of the

judgment, granting the motions for nonsuit and directed verdict, again deeming them to be a motion for judgment NOV, and granting that motion as well.

The ruling was impermissibly premature. Section 659 prohibits a trial court from granting judgment NOV until the expiration of the time within which a motion for a new trial must be served and filed, which is 15 days after notice of entry of judgment. (§ 659; *Sturgeon v. Leavitt*, *supra*, 94 Cal.App.3d at pp. 963-964.)[16] But judgment had not yet been entered when the court ordered judgment NOV; the deadline for filing and service of a new trial motion—and therefore earliest date on which the court was empowered to grant judgment NOV motion—had not yet arrived. The Legislature has empowered courts to grant judgment NOV within certain time periods. (*Sturgeon v. Leavitt*, *supra*, 94 Cal.App.3d at p. 962.) Judgment NOV was beyond the court's authority to grant unless it acted within the legislatively imposed times.

2. The court-initiated motion for judgment NOV lacked the statutorily required written notice of motion and notice of its grounds.

Section 1005 provides the times and methods for providing notice for all "proceeding[s] under this code in which notice is required and no other time or method is prescribed by law or by court or judge." When the code requires notice but does not specify how notice must be given, the filing and service of written notice are required. (§ 1005, subd. (a)(13).)

Section 629 provides that a court-initiated motion for judgment NOV may be brought upon five days' notice, without specifying how that notice must be provided. Its five-day notice requirement therefore is governed by section 1005, subdivision (a)(13)'s requirement that the notice of motion must be filed and served. The court was required to

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[16] In *Sturgeon v. Leavitt*, *supra*, the court held that section 659's limit on the time within which a new trial motion must be brought does not limit the time within which a court-initiated motion for judgment NOV must be brought, because by its terms section 659 limits only the time within which *parties*, not the court, must initiate the motion. (94 Cal.App.3d at pp. 963-964.) That rule and that reason have no application to the issue addressed here, section 629's limitation on the earliest time a court is granted the authority to order judgment NOV.

provide the parties with at least five days' written notice of its intention to hear a motion for judgment NOV, and of the grounds on which the motion would be based. (See *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 903, quoting *La Manna v. Stewart* (1975) 13 Cal.3d 413, 418 [oral specification of reasons cannot amount to substantial compliance with statutory directive that specification of reasons must be in writing].)

The trial court did not file or serve any written notice of its intention to move for judgment NOV. The court first mentioned such a motion on March 16, 2011, when Special Electric advised the court that it would not move for judgment NOV until after entry of judgment on the jury's verdict. On April 18, 2011, the court invited the Webbs' counsel to identify "what would be the practical harm" if it were to enter judgment on the jury's verdict, then to grant both judgment NOV and a new trial based on Special Electric's pre-verdict motions. Neither of these oral inquiries constituted notice (much less written notice) that the hearings being conducted were hearings on a motion for judgment NOV.

The court purported to grant judgment NOV on its own motion the same day, and just three days later it actually signed the order and entered judgment for Special Electric notwithstanding the jury's contrary verdict. But it lacked the statutory authority to do so, because the court did not comply with the Legislature's explicit requirement that such an order must be preceded by five days' written notice.[17]

3. The judgment in Special Electric's favor cannot be saved by treating the order granting judgment NOV as though it granted nonsuit or a directed verdict.

The court's alternative orders granting nonsuit and directed verdict cannot overcome the court's failure to provide the notice that the law requires before the court

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[17] Because the failure to provide sufficient written notice of the motion for judgment NOV is fatal to the court's authority to act, we do not address whether the grounds on which the court ultimately granted judgment NOV were the same as those raised by Special Electric's nonsuit and directed-verdict motions.

may grant judgment NOV. In section 629 the Legislature empowered trial courts to grant judgment contrary to a jury's verdict, based on the same grounds that might earlier have been available to it upon motions for nonsuit and directed verdict. But although the substantive grounds for each of these motions may be the same, their procedural requirements are not.

We need not address whether a court's powers to grant motions for nonsuit or directed verdict expire automatically when a verdict is rendered (as the Webbs contend), or may be exercised until judgment is entered (as Special Electric argues). In either event, the Legislature has imposed limitations on the court's power to enter a judgment contrary to that called for by the jury's verdict. (§ 629.) These legislatively imposed requirements do not disappear if the motion is characterized as being for nonsuit or for a directed verdict, rather than for judgment NOV. Whatever the motion's label, the requested relief is the same: entry of a judgment contrary to the jury's verdict. For that reason, the legislatively imposed requirements for entry of a judgment notwithstanding the jury's verdict must be met.

B. The Order Granting Judgment NOV Was Unjustified On Its Merits.

Even if prematurity of the order granting judgment NOV and the absence of the notice required by law could be disregarded, the judgment in Special Electric's favor could not be sustained on its merits. The trial court's ruling that Special Electric's duty to warn Webb of the dangers of its asbestos was discharged is not supported by the record, and therefore is unjustified by the law.

Both Johns-Manville and Special Electric had a duty to provide reasonable warnings to users of their asbestos and asbestos products, about the dangers of handling asbestos. California law imposes that duty on anyone who puts a dangerous product into the market. The Restatement Second of Torts, section 402A, provides in part: "'(1) One who sells any [dangerous] product . . . is subject to liability for physical harm thereby caused to the ultimate user or consumer . . . if . . . (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.'" This rule applies even if "'. . . (b) the user or consumer has not bought the product from or

entered into any contractual relation with the seller.'" (*Jenkins v. T&N PLC* (1996) 45 Cal.App.4th 1224, 1228.) California has adopted the Restatement Second of Torts, Section 402A. (*Jenkins v. T&N PLC*, *supra*, 45 Cal.App.4th at p. 1228; *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 61 (*Johnson*).

The raw asbestos supplied by Special Electric to Johns-Manville constitutes a "product" under the negligence and strict liability provisions of California law. (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 29 (*Stewart*); *Jenkins v. T&N PLC*, *supra*, 45 Cal.App.4th at pp. 1228-1232 ["As a matter of law, a bulk supplier of raw asbestos fiber incorporated into a finished product can be subject to strict products liability to an individual suffering from a disease caused by exposure to the supplier's asbestos"].)[18]

To justify its ruling that as a matter of law Special Electric's duty to warn Webb of the dangers of its asbestos was discharged, the trial court relied on the settled rule that sophisticated users of dangerous products need not be warned about dangers of which they are already aware. (*Johnson, supra,* 43 Cal.4th at p. 67) [failure to warn of a risk that is already known to the user cannot be the legal cause of injury].) In *Johnson*, the court affirmed the rule, derived from Restatement Second, Torts, section 388, that suppliers of products that they know are dangerous may be liable to their products' foreseeable users for injuries caused by their products' use, unless they have exercised reasonable care to provide a warning of the products' dangers to those to whom the products are supplied. But while affirming that rule, the court adopted the "sophisticated user" defense to liability on that basis, holding that sophisticated users need not be warned about dangers of which they are or should be aware. (*Johnson, supra,* 43 Cal.4th at p. 65; *Stewart*, *supra*, 190 Cal.App.4th at p. 28.)

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[18] The court apparently denied the Webbs' request for an instruction to the jury that it is the supplier's duty to warn ultimate users of its product; however, that ruling has not been raised as an issue in this appeal.

Requiring Special Electric to tell a company like Johns-Manville about the dangers of the asbestos, the trial court concluded, therefore would be carrying "coals to Newcastle." It concluded that the dangers of asbestos were obvious to Johns-Manville, and "Special [Electric] could not have harmed Mr. Webb by failing to tell Johns-Manville what it already knew."

In *Stewart*, the court affirmed a judgment holding a supplier of asbestos liable, on a failure-to-warn theory, for harm suffered by a user of a product of another manufacturer that incorporated the defendant's asbestos. While confirming that "sophisticated *users* need not be warned about dangers of which they are already aware or should be aware," (190 Cal.App.4th at p. 28), the *Stewart* court also held that those who provide dangerous products do "'have a duty to warn *consumers* about the hazards inherent in their products'"; and that is true even where—as in that case—it is downstream users and consumers, not the products' initial purchasers, who are deserving of the warnings. (*Ibid.*; *Johnson*, *supra*, 43 Cal.4th at p. 64; see also Rest.2d, Torts, § 402A [One who sells dangerous product is subject to liability for harm to ultimate user, even if the user "has not bought the product from or entered into any contractual relation with the seller"].)

The trial court's rulings that as a matter of law Special Electric had no duty to warn foreseeable users about its asbestos, and bore no liability to the Webbs, was based on a number of conclusions: that warnings were printed on the packaging for most or all of the asbestos supplied by Special Electric to Johns-Manville; that as a sophisticated user of asbestos, Johns-Manville needed no warnings in any event; and that it would have been difficult or impossible for Special Electric to warn downstream users of Johns-Manville's products containing its asbestos, such as Webb. No one in this appeal doubts that Johns-Manville was a sophisticated user of asbestos, who needed no warning about its dangers. But whether all the asbestos shipped to Johns-Manville had warnings, whether the warnings were adequate, and whether reasonable efforts to warn downstream users could have been undertaken by Special Electric, are issues of fact. Special Electric has made no showing that the evidence on these issues was undisputed, and apparently failed to persuade the jury.

Just as in *Stewart, supra*, 190 Cal.App.4th at pp. 29-30, Special Electric's duty to warn users such as Webb of its asbestos was not necessarily discharged by its provision of warnings to Johns-Manville. And Special Electric obtained no instruction to the jury that its duty to warn would be discharged if it were found to have provided adequate warnings only to Johns-Manville, an intermediary consumer. (Whether it would have been entitled to such an instruction is an issue that is not raised by this appeal.)

A number of jury instructions address the Webbs' failure-to-warn theories of liability against Special Electric. The jury was instructed that to recover under his strict liability and negligence theories, Webb must prove that Special Electric manufactured, distributed, or sold a product with known or knowable potential risks, which presented a substantial danger to its users; that the product's users would not recognize the potential risks; that Special Electric failed to adequately warn or instruct about the product's potential risks; and that the lack of sufficient instructions or warnings was a substantial factor in causing harm to Webb. The jury was also instructed to determine whether fault on the part of "third persons," or "others" had caused Webb's harm, and to determine the amount of fault and responsibility attributable to such a cause.

The jury's special verdict resolved these issues. The jury found that Webb had been exposed to asbestos sold or supplied by Special Electric; that the risks of its asbestos products were known or knowable to Special Electric; and that the risks of Special Electric's asbestos products presented a substantial danger to consumers, that ordinary consumers would not recognize. The jury then found that Special Electric had failed to adequately warn of the potential risks of its asbestos products, that Special Electric was negligent, that Webb was not negligent, and that Special Electric's negligence was a substantial factor in causing Webb's harm.

These instructions and special verdict questions entitled the jury to find Special Electric liable to Webb for providing inadequate warnings about the dangers of its asbestos, on either (or both) of two factual theories: because the jury found that the warnings it gave Johns-Manville were inadequate; or because the jury found that Special

Electric failed to adequately warn Webb. The special verdict did not ask the jury to identify on which of those theories its findings rested.

Under the instructions and the special verdict questions, the jury could have imposed liability on Special Electric based on either theory. The evidence does not show with certainty that all the packaging for asbestos shipped to Johns-Manville bore printed warnings, and whether the wording of the printed warnings was adequate was a disputed fact at trial.[19] Either way, the issue was for the jury to determine.

Special Electric argues that its duty to warn consumers such as Webb evaporated because Johns-Manville also failed to warn consumers such as Webb. It argues that the jury was correctly instructed in CACI No. 411 that "[e]very person has a right to expect that every other person will use reasonable care, unless he or she knows, or should know, that the other person will not use reasonable care or will violate the law."[20] Based on this jury instruction, Special Electric contends that it was entitled to expect that Johns-Manville would fulfill its duty to warn, in the absence of evidence that Special Electric knew or should have known that Johns-Manville would breach that duty. It "could not have foreseen that Johns-Manville . . . would not warn about its Transite pipe. What could be more 'highly extraordinary'?" Johns-Manville had a duty to warn, "and nothing indicated it would not." Because there was no evidence that Special Electric knew that Johns-Manville would not fulfill its duty to warn users of its asbestos, Special Electric

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[19] Despite Special Electric's contrary contentions, the evidence was disputed, both as to whether warnings were on *all* the asbestos shipped by Special Electric to Johns-Manville, and whether the warnings were adequate. The jury resolved that issue in Webb's favor, expressly finding that Special Electric's warnings were not adequate. That finding is binding on us, for we must construe the evidence most favorably to the jury's original verdict. (*GAB Browser Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 423, disapproved on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154 [in appeal from JNOV, appellate court construes disputed facts in appellant's favor].)

[20] Judicial Council of California Civil Jury Instructions, 2013 (CACI).

contends, the trial court was correct in ruling that as a matter of law Special Electric could not be held liable for failing to warn Webb.

We disagree. The *Johnson* and *Stewart* cases (as well as many others) hold that when a manufacturer or supplier places dangerous products into the stream of commerce, a duty arises to warn foreseeable consumers of those products about their products' hazards. Under those cases, that duty is owed not just to the product's initial purchaser, but also to a downstream user or consumer, such as Webb. (*Stewart*, *supra*, 190 Cal.App.4th at p. 28; *Johnson*, *supra*, 43 Cal.4th at pp. 64-65; see also Rest.2d, Torts, § 402A.) As in any negligence trial, it is the plaintiff's burden to prove facts sufficient to persuade the jury not only that such a duty arose on Special Electric's part, but also that Special Electric failed to perform that duty, that its failure to perform resulted in harm to the plaintiff, and the degree of harm attributable to that failure.

In this case, the jury heard evidence, and found, that Special Electric had supplied a dangerous product, with knowledge that it was dangerous and with knowledge that consumers such as Webb would not know it was dangerous. Based on these facts, Special Electric's duty to warn potential consumers such as Webb arose as a matter of law, establishing the first element of Webb's prima facie case of negligence.

The second element of Webb's prima facie case—breach of duty—was established by evidence that Special Electric did nothing to warn downstream users such as Webb about the dangers of its asbestos products. The jury heard evidence that Special Electric did not place warning labels on the asbestos packaging it sent to Johns-Manville until it was required it to do so (by Johns-Manville and by government regulations) some (disputed) time in the 1970s. The evidence was also disputed both about whether, even after the warnings began, all the asbestos packaging bore the warnings, and whether the warnings were adequate.[21]

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[21] There was evidence that from 1974 to 1980, Special Electric supplied about 7,000 metric tons of blue asbestos to Johns-Manville's Long Beach plant. Special Electric's evidence was that beginning in 1974, the bags of asbestos supplied to Johns-Manville bore warning labels.

There was evidence, also disputed, that Special Electric had marketed its crocidolite asbestos as "much safer than chrysotile asbestos, or than fiberglass," although it actually was more dangerous. From this evidence the jury was entitled to find, and did find, that Special Electric's conduct—wrongly marketing its asbestos as safe, placing warnings on just some of the asbestos supplied to Johns-Manville, and making no effort to warn other potential users—was not adequate to fulfill its duty to warn about the dangers of its dangerous asbestos product, thereby establishing the second element of Webb's prima facie case of negligence.

The third element of the prima facie case of negligence—causation—was established by evidence that Webb was exposed to the asbestos supplied by Special-Electric, which caused his mesothelioma. Evidence was presented that Webb's employer bought Johns-Manville's Transite pipe, which contained asbestos supplied by Special Electric from about 1974 to 1982, and that Webb handled that pipe and cleaned up the dust resulting from its breakage during that period.[22] By expressly finding that Webb

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But Special Electric's evidence was contradicted. The jury heard other evidence that the bags of blue asbestos supplied to Johns-Manville began having warnings only shortly before the Johns-Manville plant closed in 1981 and 1982. And according to the Johns-Manville employee who handled the asbestos received from Special Electric, not every bag of blue asbestos received by Johns-Manville bore a warning label.

The Johns-Manville employee had testified in another forum that "all" bags of crocidolite asbestos bore warnings after the mid-1970s but in this trial he testified that "I was misunderstood." Here, he testified that sometime in the mid 1970s blue asbestos started coming in plastic bags instead of burlap bags. When asked if "every plastic bag" containing blue asbestos "also had a warning label," his answer was "No." The jury had the option to choose between these conflicting statements.

[22] Substantial evidence supports the jury's finding that Webb was exposed to Special Electric's asbestos. For example, there was evidence that Special Electric supplied thousands of tons of blue asbestos to Johns-Manville between the mid-1970s and 1982, that Webb handled Johns-Manville's Transite pipe for his employer three to five times a week between 1975 and 1980, and that the Transite pipe Webb's employer received from Johns-Manville had no warnings, at least until the early 1980s.

Special Electric admitted in its argument to the jury that some of Special Electric's asbestos was in pipe that went to Webb's employer in 1978 and 1979, and argued that

suffered harm and that Special Electric's failure to warn was a substantial factor in causing Webb's harm (and separately finding that Special Electric's negligence was a substantial factor in causing Webb's harm), the third and fourth elements of the prima facie case were met.

Webb thus established all the elements of his prima facie case to the jury's satisfaction. It was therefore Special Electric's burden to present evidence and to persuade the jury that, notwithstanding the prima facie showing that Special Electric had breached its duty to Webb by failing to adequately warn about the dangers of its asbestos, and that its breach had caused Webb's harm, it nevertheless should not be liable to Webb, for a number of reasons.

Special Electric argued that it should not be held liable to Webb, even though the jury believed the evidence that Webb was harmed by his failure to receive a warning about the dangers of the asbestos. It argued that it was entitled to rely on Johns-Manville to warn downstream users such as Webb. It argued that Webb's harm therefore resulted from Johns-Manville's breach of *its* own duty to warn, not from Special Electric's breach of duty. Special Electric obtained jury instructions on this theory (in part over Webb's objection). CACI No. 411 told the jury that Special Electric had a right to assume that Johns-Manville would perform its own duties (apparently including Johns-Manville's own duty to warn users of its asbestos products) unless Special Electric had some reason to doubt whether Johns-Manville would do so. And the superseding cause instruction (discussed below) identified exactly what facts the jury would be required to find in order to discharge Special Electric's liability.

The jury did apportion the liability for Webb's harm among the various entities that contributed to that damage. Under the instructions, it was told to find whether

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Webb's exposure to Special Electric asbestos was "negligible" or "insubstantial," but not zero.

When construed in Webb's favor, this constitutes substantial evidence sufficient to support the jury's determination that Special Electric is responsible for some portion of Webb's harm.

Special Electric's failure to warn was excused, because it had reasonably relied on Johns-Manville to perform that duty,[23] or because Webb's harm was attributable to causes other than Special Electric's negligence. And after deliberation, the jury assigned liability for just 18 percent of Webb's harm to Special Electric, while holding Johns-Manville liable for 49 percent of the harm, and attributing the remaining 33 percent to others. (It found that Webb was not negligent, and attributed none of his harm to Webb himself.)

In sum, the trial court had no legal basis (and articulated none) that could justify its determination that Special Electric owed no duty to warn Webb, as a potential user of its asbestos. Under the *Johnson* and *Stewart* cases, Special Electric's duty to warn foreseeable potential users such as Webb (not just the initial user, Johns-Manville) arose as a matter of law from the jury's fully supported findings. (*Johnson*, *supra*, 43 Cal.4th at p. 61; *Stewart*, *supra*, 190 Cal.App.4th at p. 28; *Jenkins v. T&N PLC*, *supra*, 45 Cal.App.4th at p. 1228; Restatement Second of Torts, section 402A [Supplier of dangerous product is subject to liability not just to the initial purchaser of the product but to the product's *ultimate user or consumer*].) Because Special Electric's duty existed as a matter of law, the jury was entitled to—and did—find from the evidence that Special Electric breached that duty and that its breach was a substantial factor in causing Webb's harm, whether some other factors (such as superseding cause) terminated Special Electric's share of liability, and the appropriate apportionment of liability between the various actors.

The instruction in CACI No. 411, that every person has a right to expect that every other person will use reasonable care unless he or she knows or should know that the other person will not, did not require the jury to find that Special Electric's reliance (if it existed) was reasonable, and did not justify the trial court's ruling that Special Electric

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[23] As discussed below, however, Special Electric never claimed to have relied on Johns-Manville to warn consumers, and the record contains ample evidence that any such reliance by Special Electric—if it had existed—would not have been justified.

had no duty to warn potential users, such as Webb, about the dangers of its asbestos.[24] There are a number of reasons this is so.

First, even if the instruction in CACI No. 411 afforded Special Electric a right to expect that Johns-Manville would use reasonable care (and therefore that it would warn potential users, such as Webb, of the dangers of its asbestos product), there was no evidence that Special Electric ever actually had any such expectation, and there was no evidence that it did in fact rely on Johns-Manville's performance of *its own* duty to warn. In other words, even if Special Electric had *a right* to expect that Johns-Manville would warn users such as Webb, its *right* to have that expectation is of no significance because there is no evidence it ever *did* have that expectation. The question never arose whether Special Electric knew or should have known Johns-Manville could not be relied upon to perform its duty to warn, because Special Electric did not rely upon Johns-Manville to do so.[25]

Second, the instruction in CACI No. 411 does not tell the jury that if Special Electric reasonably expected Johns-Manville to perform its duty to warn users of asbestos such as Webb, it would then have absolutely no liability for Webb's harm. Nor is that what the law provides. It is the jury's task to determine the extent to which Special

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[24] According to the use notes and authority for CACI No. 411, that jury instruction rests on the general rule that one is not negligent for assuming he is not exposed to "danger *which could come to him only from violation of law or duty*" by another person, unless he has reason to think otherwise. (*Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523, italics added [injured plaintiff does not assume risk of harm that could happen only from someone else's violation of duty].) Here, however, Special Electric could not reasonably have assumed that its danger (of liability) came only if Johns-Manville were to breach its duty. Under *Johnson* and *Stewart*, Special Electric owed its own separate duty to potential users of its asbestos, which arose as a matter of law without regard to Johns-Manville's conduct.

[25] Only Special Electric was in a position to tell the jury that it had relied on Johns-Manville to fulfill its duty to warn potential users like Webb, and the reasons that it believed its reliance on Johns-Manville was reasonable under the circumstances. Only Special Electric had knowledge of its expectations. The burden to produce evidence on that topic was Special Electric's. (See Evid. Code, § 550.)

Electric's reliance on Johns-Manville (or anyone else) justifies allocation of responsibility for Webb's harm; that is what the jury did when it allocated 18 percent to Special Electric, 49 percent to Johns-Manville, and 33 percent to others.

Third, the presumption contained in CACI 411 is rebuttable. (Evid. Code, § 602.) The record contains substantial evidence that would be sufficient to support a finding by the jury that Special Electric had ample reason to doubt that Johns-Manville was providing warnings to users of products containing Special Electric's asbestos (if such a finding were required in order to support the jury's verdict). There was substantial evidence that Special Electric (like Johns-Manville, and anyone else in the business of selling asbestos in the 1970s) knew or should have known of the dangers of handling asbestos, and also knew that ordinary consumers could not be expected to know of those dangers.

For example, the Webbs' expert, Barry R. Horn, M.D., testified that beginning before the 1920s (and even more so by the 1930s, 1940s, 1950s, and 1960s), there was "an enormous literature, just huge," that occupational exposure to asbestos posed a great risk of cancer, and that this information was readily available to any company that "was concerned about whether [its] product . . . would cause disease," (as any responsible manufacturer or supplier of asbestos products would be). The jury also heard evidence that Special Electric had instructed its sales force to market its asbestos as "safer" than other types of asbestos, though in fact it was not.

A former Johns-Manville employee testified that the asbestos supplied by Special Electric did not bear warnings until shortly before the Johns-Manville plant shut down in 1981 and 1982, and that Special Electric did not come to the plant to inspect what Johns-Manville did about warnings. He characterized Johns-Manville's conduct as "evil," testifying that Johns-Manville "started to panic" in the mid-1970s, when it "became aware that lawsuits were being filed concerning asbestos exposure." And 1975 correspondence from Special Electric's president discussed his continuing consultations with Johns-Manville's and Special Electric's attorneys about the potential liability of officers and agents of Special Electric and related asbestos suppliers, and the need to

identify each bag of asbestos as a hazardous material—indicating that such warnings were not previously given, even to Johns-Manville, despite the parties' long experience as merchants of asbestos and asbestos products. Indeed, there was evidence that even Johns-Manville's own workers had been led to believe that asbestos was safe enough to be played with like "snowballs," and that it did not begin to warn them (let alone users of its products) about the dangers of asbestos until sometime in the mid-1970s. And there was evidence that Special Electric had neither inquired of Johns-Manville about warnings to users of its asbestos products, nor had required that Johns-Manville place warnings to potential users in purchase orders or invoices.

On this record, the jury was entitled to infer that Special Electric could not reasonably have expected that Johns-Manville would warn users about the dangers of asbestos (even if Special Electric had expected that it would). The jury would be justified in concluding that, far from reasonably relying on Johns-Manville to warn potential users of it asbestos, Special Electric was itself engaged in an effort to conceal the dangers of its asbestos—dangers of which both it and Johns-Manville were, or should have been, well aware.

The jury found that Special Electric, like Johns-Manville, knew or should have known that asbestos posed dangers of which ordinary consumers such as Webb would be unaware unless they were warned. Under the evidence before it, the jury was entitled to conclude that Special Electric had not in fact relied on Johns-Manville (or anyone else) to warn potential users of its asbestos, that Special Electric had no intention of making any effort to warn potential users or obtaining Johns-Manville's aid in doing so, and that, indeed, Special Electric and Johns-Manville together engaged in efforts to prevent asbestos users from becoming informed of its dangers. On this record, the trial court would not be justified in ruling that Special Electric could, as a matter of law, bear no responsibility for Webb's harm.

The jury was also instructed on the "superseding cause" doctrine. Under that instruction, given at Special Electric's request, the jury was told exactly what findings would be required in order to find that Special Electric's liability to Webb was discharged

as a result of Johns-Manville's failure to fulfill its own duty of care. The instructions stated that a plaintiff's harm might result from multiple causes (some constituting negligence and some not); that a defendant is responsible for harm that results from its negligence that is a substantial factor in causing the harm; and that a defendant "cannot avoid responsibility just because some other person, condition, or event was also a substantial factor" in causing the harm. The superseding cause instruction told the jury that it must find four facts in order to establish that Johns-Manville's superseding conduct would absolve Special Electric from its legal responsibility to Webb. Specifically, the jury was instructed that "Special Electric Company, Inc. must prove all of the following: ¶1. That Johns-Manville Corporation's conduct occurred after the conduct of Special Electric; ¶2. That a reasonable person would consider Johns-Manville Corporation's conduct as a highly unusual or an extraordinary response to the situation; ¶3. That Special Electric Company, Inc. did not know and had no reason to expect that Johns-Manville Corporation would act in a negligent and/or wrongful manner; and ¶4. That the kind of harm resulting from Johns-Manville Corporation was different from the kind of harm that could have been reasonably expected from Special Electric Company, Inc.'s conduct.

Because the jury did not find that Special Electric was absolved of responsibility to Webb, it necessarily found that Special Electric had failed to establish one or more of these factual elements of its defense. Although not specifically stated in the jury's special verdict, perhaps it found that a reasonable person would not consider Johns-Manville's failure to warn Webb to be highly unusual or extraordinary, or that Special Electric should have known that Johns-Manville might "act in a negligent and/or wrongful manner" with respect to its duty to warn.[26] And surely the jury found that Special Electric had failed to prove that "the kind of harm" resulting from Johns-Manville's failure to warn was different from "the kind of harm that could have been reasonably expected" from Special Electric's failure to warn. Nothing in the evidence

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[26] The jury was instructed that in determining what conduct is reasonable and what is unreasonable, it could consider reasonable customs and practices.

could justify a finding that the harm to Webb resulting from Special Electric's failure to warn the end user about the dangers of its asbestos was different from the harm resulting from Johns-Manville's failure to warn Webb.

But whatever the jury found in rejecting Special Electric's superseding cause defense in whole or in part, the instructions empowered it to make those determinations. The jury was properly given the opportunity to determine that Special Electric's conduct was a substantial factor resulting in the harm suffered by Webb, and to find that it should bear responsibility for that harm. In allocating to Special Electric 18 percent of the total liability for Webb's harm, the jury did exactly as it was instructed to do.

We are not called upon to confront whether it would have been difficult or even impossible for Special Electric to effectively warn consumers of its asbestos, as the trial court apparently concluded. That question was not made an issue at trial. Special Electric offered no evidence that it would have been difficult or impossible to warn Webb, nor evidence that it had even considered that question. Special Electric did not request that the jury be instructed that a finding of reasonable efforts on its part would satisfy its duty to warn. Finally, Special Electric failed to request a finding by the jury, either that it could not reasonably have acted to warn Webb, or that it had acted reasonably in failing to do so.

Without that evidence and that finding, the trial court's conclusion that Special Electric's duty to Webb was discharged as a matter of law is without basis. The facts underlying the trial court's assumptions—if they existed—would have been elements of Special Electric's defense against liability on the Webbs' failure-to-warn claims. Those facts would have established that its duty to warn consumers of its products' dangers was discharged or satisfied, because it had provided Webb with adequate warnings, because it had acted reasonably in its failure to do so, or because Johns-Manville's failure to warn had absolved Special Electric of its obligation to warn. But under the instructions it was given, the jury affirmatively found that the warnings were not adequate, and that Special Electric was responsible to Webb for that failure.

We do not hold that an asbestos-supplier's duty to warn users of its asbestos cannot be obviated by proof that the users needed no warning, or that its duty may not be discharged by a showing of reasonable efforts to provide warnings, or by reasonable reliance upon others to do so. The effect of the trial court's ruling was to hold that—as a matter of law—Special Electric had no duty to warn foreseeable users of the dangers of its asbestos, even though Special Electric knew or should have known that those foreseeable users would be unaware of the dangers.

The conclusion that Special Electric had no such duty, or that its duty was discharged as a matter of law, is unjustified by the law and is contrary to the record in this case.

C. Judgment NOV Was Unjustified With Respect To The General Negligence Verdict.

We find above that the trial court was not justified in setting aside the jury's special verdicts that were grounded on the failure-to-warn theory. But even if judgment NOV had been justified on the failure-to-warn theory, the trial court's refusal to enter judgment in the Webbs' favor and its entry of judgment in Special Electric's favor nevertheless would not have been justified. The failure-to-warn claims were not the only grounds on which the jury imposed liability on Special Electric.

The first cause of action of the Webb's complaint, which names Special Electric as a defendant, alleges that Special Electric was negligent not just in failing to warn Webb of the dangers of its asbestos product, but also "researching, manufacturing, fabricating, designing, . . . distributing, . . . supplying, selling, . . . marketing, . . . and advertising asbestos and asbestos-containing products" with knowledge of the resulting foreseeable risks of injury and death. And in arguing the case to the jury, the Webbs' counsel explained that there were separate causes of action for failure to warn, for negligence, and for design defect.

Consistent with the claims pleaded and argued, the jury was instructed not only on the failure-to-warn theory, but was also instructed that Special Electric could be found liable for failure to use reasonable care in designing, manufacturing or supplying its

asbestos product. (CACI. 1220; 1221.) The jury was instructed that to establish that liability, it must find that Special Electric "designed, manufactured, or supplied the product"; that it was negligent in doing so; that Webb was harmed; and that Special Electric's negligence was a substantial factor in causing the harm. And the jury was also instructed that in order to determine whether Special Electric used reasonable care in designing, manufacturing or supplying the product, it "should balance what [Special Electric] knew or should have known about the likelihood and severity of potential harm . . . against the burden of taking safety measures to reduce or avoid the harm." The instructions did not require that the jury must make any finding about a failure to warn of potential risks in order to find that Special Electric was liable for acting negligently in designing, manufacturing or supplying the product.

The jury's special verdict included express findings—independent of its separate failure-to-warn findings—that Special Electric was negligent, and that its negligence was a substantial factor in causing the Webbs' harm.[27] Thus the jury found *both* that Special Electric was negligent in its failure to warn, *and* that it was negligent in its supply of the asbestos. And it separately found that *each* of these forms of negligence was a substantial cause of Webb's harm.

The trial court granted Judgment NOV based solely on the ground that Special Electric's duty to warn Johns-Manville and other foreseeable users of its asbestos was fully discharged. It apparently accepted Special Electric's assertion that the only claimed basis for liability in the case was the failure to warn; that the separate finding of general negligence was merely a mirror of that same finding. But as noted above, the pleadings, the jury instructions, the argument to the jury, and the special verdict all submitted the question of Special Electric's negligence liability to the jury on a theory of general

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[27] The record does not indicate the source of the instructions, and the final special verdict form was prepared by Special Electric. We are bound to presume that Special Electric was responsible for both. (See *Morehouse v. Taubman Co.* (1970) 5 Cal.App.3d 548, 559 [In absence of record showing which party requested jury instruction, it will be presumed to have been requested by party challenging it on appeal].)

negligence, relating to the design, manufacture, or supply of asbestos, in addition to negligence and strict liability on the failure-to-warn theory. But Special Electric's motions (for nonsuit and directed verdict) did not purport to challenge or address the general negligence verdict, and the trial court did not purport to rule on it.

On this record, we conclude that the jury was entitled to find, as it did, that Special Electric was liable to the Webbs for having supplied the knowingly dangerous asbestos, as well as for its failure to warn about its dangers. The Webbs' opening brief identified evidence in the record from which the jury could infer that Special Electric had marketed its asbestos with unreasonable disregard for its dangers. There was evidence that the blue crocidolite asbestos supplied by Special Electric was a particularly dangerous type of asbestos; but that as a "selling point," Special Electric's principal had told its salesmen that its crocidolite asbestos was "much safer" than other types of asbestos, because it supposedly "doesn't dust and get airborne and get in people's lungs." The evidence showed also that although it had initially supplied its asbestos through an entity with the name "Special Asbestos," it later changed the name of the supplying entity to "Special Electric" in order to distance itself from what consumers were coming to learn was a dangerous product.

Special Electric contends that this evidence shows no negligence apart from a failure to warn. But Special Electric does not explain why the cited evidence could not support the jury's findings that Special Electric acted negligently by marketing and supplying a particularly dangerous form of asbestos while representing in its marketing efforts that this asbestos was less dangerous rather than more dangerous than other forms of asbestos. This evidence supports a species of negligence in the products' supply and marketing that is somewhat different from the failure to warn that Special Electric argued (and the trial court found) was obviated by the printed warnings on the packaging to Johns-Manville. It tends to show not just that Special Electric failed to warn foreseeable users that asbestos is dangerous, but also that Special Electric attempted to affirmatively enhance its marketing of particularly dangerous asbestos by concealing the added danger and by marketing it as having lesser danger than other asbestos.

Special Electric offers neither case law nor any other authority on the subject to support its contrary contention that this evidence shows only a failure to warn. For that reason, it is insufficient to support that conclusion. (*Cahill v. San Diego Gas & Elec. Co.* (2011) 194 Cal.App.4th 939, 956 [Absence of cogent legal argument or citation to authority allows court to treat contention raised on appeal as waived].) We therefore conclude that the trial court erred in granting judgment notwithstanding the jury's verdicts of Special Electric's liability for its general negligence in supplying the asbestos, independent from its liability for strict liability and negligent failure to warn.

D. The Order Granting Judgment NOV Was Not Harmless Error.

Special Electric contends that the judgment in its favor should be affirmed even if the grounds on which the trial court granted judgment NOV were without legal basis. It argues that because there was no substantial evidence that Webb had been exposed to Special Electric's asbestos, or that Special Electric's breach of its duty to warn had caused his harm, any error in the trial court's ruling was harmless.

The Webbs dispute this contention on two independent grounds: They argue first that Special Electric's failure to file a protective cross-appeal from the original judgment precludes our consideration of the issue. (Cal. Rules of Court, rule 8.108(g)(2); Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 3:169, pp. 3-73 to 3-74 (rev. #1 2012) [unless respondent has filed protective cross-appeal from original judgment, the reinstated judgment is immune from challenge by respondent]; see *Sanchez–Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 910 [respondent's failure to cross-appeal from original judgment waives any claim of error in reinstated judgment].) And on the merits of the issue, the Webbs argue that in any event the record reflects substantial evidence supports the jury's determination that Webb was exposed to asbestos supplied by Special Electric and that his exposure was a substantial factor in causing his harm.

Our discussion of Webb's prima facie satisfaction of the causation element of his negligence cause of action, above, dispels the argument that substantial evidence of causation is lacking. We there identify evidence that Webb was exposed to asbestos

supplied by Special Electric, which was a substantial factor resulting in his mesothelioma. Having found that Special Electric failed to provide adequate warnings of that danger, the jury was entitled to conclude also that adequate warnings would have led to a better outcome for Webb, and therefore that Special Electric's failure to warn (as well as its general negligence in supplying and marketing the asbestos) was a substantial factor leading to that result.

The original judgment was a decision from which an appeal might have been taken, by virtue of rule 8.108 (g)(2) of the California Rules of Court. But no cross-appeal was taken by Special Electric. In the absence of a cross-appeal, our reversal of the order granting judgment NOV requires reinstatement of the original judgment without further review: "If the party who prevailed under the original judgment successfully appeals the order . . . granting . . . judgment NOV, the original judgment is *automatically revived* and is not subject to appellate review *unless there has been a separate cross-appeal from the original judgment*." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 3:169, p. 3-74 (rev. #1 2012).)

CONCLUSION

The trial court erred, both procedurally and substantively, by granting judgment notwithstanding the jury's verdict. The judgment must be reversed, automatically reinstating the original judgment entered on the jury's verdict.

Because the judgment must be reinstated in the Webbs' favor, we do not consider their appeal from the jury's verdict denying their consumer-expectation products-liability claim, which they made expressly contingent on this court's failure to "otherwise reverse and order judgment" on the failure-to-warn or general negligence claims.

DISPOSITION

The judgment NOV is reversed. The matter is remanded with directions to reinstate the original judgment entered April 18, 2011 in favor of the Webbs and against Special Electric. The Webbs are awarded costs on appeal.

CERTIFIED FOR PUBLICATION.

CHANEY, J.

I concur:

MALLANO, P. J.

Rothschild, J., dissenting:

The 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. I disagree with the majority's legal conclusions.

The majority also holds that a superior court acts in excess of its authority when it (1) grants a motion for judgment notwithstanding the verdict (JNOV) before expiration of the time to file a motion for new trial, or (2) grants a sua sponte JNOV motion without filing and serving written notice of the motion. Consequently, an order granting JNOV in either circumstance must be reversed regardless of whether it was correct on the merits, and regardless of whether the putative procedural errors were prejudicial. I disagree with the majority's procedural holdings.

In my view, appellants have failed to carry their burden of showing that the trial court prejudicially erred. I therefore believe that the judgment should be affirmed, and I respectfully dissent.

I. Factual and Procedural Background

Special Electric, acting as a broker for a mine in South Africa, was one of several suppliers of bags of crocidolite asbestos fiber to Johns-Manville. Johns-Manville manufactured various products using the crocidolite fiber. William Webb contracted mesothelioma because of exposure to asbestos contained in Transite pipe that was manufactured by Johns-Manville at its plant in Long Beach. Crocidolite was not part of the formula for Transite pipe. Johns-Manville did, however, make Transite pipe partly from ground-up scraps of other pipes, and those scraps may have contained crocidolite, which may have been supplied by Special Electric. Johns-Manville sold Transite pipe to Familian Pipe & Supply, which sold it to Pyramid Pipe & Supply. Webb, an employee of Pyramid Pipe & Supply, handled Transite pipe. It is undisputed that Johns-Manville knew the dangers of asbestos but, for at least the first several years of Webb's exposure, provided no warnings concerning Transite pipe.

Before the case was submitted to the jury, Special Electric filed written motions for nonsuit and directed verdict. Plaintiffs filed opposition to the nonsuit motion. The trial court did not rule on either motion and submitted the case to the jury, which returned its verdict on February 17, 2011, finding in favor of the Webbs on all but one of their claims. The court discharged the jury but did not immediately enter judgment on the jury verdict. The day after the jury returned its verdict, Special Electric requested a hearing ("oral argument") on its nonsuit and directed verdict motions, and the court set the hearing for March 16.[1] On March 9, Special Electric filed a reply in support of its nonsuit motion. On March 14, plaintiffs filed opposition to the directed verdict motion. The court heard both motions on March 16 but still did not rule on them. Instead, the court continued the hearing for another month and allowed both plaintiffs and Special Electric to file supplemental briefs, which they did. At the continued hearing on April 18, the court granted Special Electric's motions and, "in the alternative," entered judgment on the jury verdict, deemed Special Electric's motions to be a motion for JNOV, and granted it. Either way, the result was a judgment in favor of Special Electric on all claims.

II. The Majority's Substantive Grounds for Reversal

The majority offers two grounds on which *Special Electric* may be found liable for *failure to warn*. I disagree with both.

The majority's first theory is that Special Electric may be found liable because it failed to warn Johns-Manville of the dangers of crocidolite asbestos. (See, e.g., maj. opn. *ante*, at p. 18 [Special Electric could be liable because "the warnings it gave Johns-Manville were inadequate"].) But the majority concedes that "Johns-Manville was a sophisticated user of asbestos, who needed no warning about its dangers." (Maj. opn. *ante*, at p. 17.) It is undisputed that at all relevant times Johns-Manville was among the most knowledgeable businesses in the world concerning asbestos, Johns-Manville knew

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[1] The minute order for February 18, 2011, stated that Special Electric's pending motions were denied, but the order conflicts with the reporter's transcript, which is controlling. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.)

at least as much about the dangers of asbestos as Special Electric did, and there was consequently nothing that Special Electric could tell Johns-Manville about the dangers of asbestos that Johns-Manville did not already know. (Indeed, the warning that Special Electric allegedly failed to give Johns-Manville was actually requested by Johns-Manville, whose purchase orders required that the asbestos be shipped in bags displaying particular warning language.) 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 ["there is no need to warn of known risks under either a negligence or strict liability theory"] (*Johnson*).)

The majority's second theory is that Special Electric may be found liable because it "failed to adequately warn Webb." (Maj. opn. *ante*, at p. 19.) For several reasons, I disagree. First, plaintiffs have never contended that Special Electric could or should have personally warned Webb about the dangers of asbestos, and on appeal plaintiffs have expressly disavowed any such contention. When asked at oral argument how Special Electric was supposed to warn Webb, plaintiffs' counsel answered, "By warning Johns-Manville," and when asked whether plaintiffs contended that Special Electric should have warned Webb directly, plaintiffs' counsel replied without hesitation, "Of course not." Plaintiffs' closing argument at trial, plaintiffs' briefing on the post-verdict motions, and plaintiffs' appellate briefs are devoid of any suggestion that Special Electric could or should have warned Webb directly. Rather, plaintiffs' position in both the trial court and on appeal has been that Special Electric should have "contractually require[d] Johns-Manville" to provide adequate warnings with its products that contained crocidolite supplied by Special Electric. The majority cannot hold Special Electric liable on the basis of a theory that plaintiffs themselves have never advanced. Thus, when the majority concludes that Special Electric may be found liable because it "failed to adequately warn Webb" (maj. opn. *ante*, at p. 19), it must mean that Special Electric may

be found liable because it failed to impose on Johns-Manville a contractual requirement to provide adequate warnings with its products.[2]

Second, the majority's theory is unprecedented and, in my view, is incorrect as a matter of law. Johns-Manville had a duty to warn users of its products concerning those products' dangers. (See, e.g., *Johnson*, *supra*, 43 Cal.4th at p. 64.) "'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, 58-59; *Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523.) Consequently, because there is no evidence that Special Electric had reason to believe that Johns-Manville would fail to provide adequate warnings concerning its products, it was reasonable as a matter of law for Special Electric to rely on Johns-Manville to provide them, because Johns-Manville was under a legal duty to do so. Special Electric therefore cannot be held liable for failure to impose on Johns-Manville a contractual duty to provide warnings, because Special Electric's failure to impose such a contractual duty did not constitute a breach of any duty owed by Special Electric.

The majority offers three responses to the above, but each lacks support.[3] The first is that there is no evidence that Special Electric actually relied on Johns-Manville to

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[2] If the majority's conclusion that Special Electric is liable for failure "to adequately warn Webb" (maj. opn. *ante*, at p. 19) is based on some act or omission by Special Electric other than failure to impose on Johns-Manville a contractual requirement to provide warnings, then the conclusion is still incorrect because, as discussed *post*, there is no evidence of causation.

[3] I note that here and throughout its analysis, the majority extensively discusses both the jury instructions and the questions on the special verdict form. Special Electric's argument, however, is that on the record assembled at trial, plaintiffs' claims fail as a matter of law, so this case should never have gone to the jury. Because I do not see how the majority's observations about the instructions and the verdict form could, in principle, be responsive to such an argument, I will not address them. If plaintiffs' claims fail as a matter of law on this record for the reasons Special Electric has given, then Special

provide warnings, so the reasonableness of such reliance "is of no significance." (Maj. opn. *ante*, at p. 24.) The majority fails to recognize, however, that Special Electric's failure to try to warn Johns-Manville's customers is itself circumstantial evidence that Special Electric was relying on Johns-Manville to do so. More importantly, no evidence of actual reliance is necessary, because the law entitled Special Electric to presume that Johns-Manville would provide the warnings it was legally obligated to provide. The majority cites no authority to the contrary. Moreover, commerce would be impossible without the operation of such a presumption. "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. '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.' (Rest.2d Torts, § 388, com. n, p. 308.)" (*Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 178.)

The majority's second response is that even if Special Electric actually and reasonably relied on Johns-Manville to fulfill its legal obligation to provide warnings to consumers like Webb, and even though plaintiffs have never contended that Special Electric could or should have provided those warnings itself, Special Electric can still be held liable for failure to warn Webb. (Maj. opn. *ante*, at p. 24.) Again, the majority provides no authority or reasoning in support of this extraordinary proposition. Were it true, it would eviscerate the century-old legal principle that "'every person has a right to presume that every other person will perform his duty and obey the law.'" (*Harris v. Johnson*, *supra*, 174 Cal. at p. 58.) Again, plaintiffs themselves have expressly and summarily rejected any suggestion that Special Electric should have warned Webb directly ("Of course not").

The majority's third response is that the record does contain evidence that Special Electric had reason to know that Johns-Manville would not provide warnings. But the

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Electric's motions should have been granted, regardless of what the instructions and the verdict form did or did not say.

majority cites only evidence purporting to show that (1) both Special Electric and Johns-Manville knew that asbestos was dangerous, (2) a Special Electric salesman promoted crocidolite as safer than other forms of asbestos, (3) not all bags of crocidolite supplied by Special Electric to Johns-Manville carried warnings, and (4) Johns-Manville was "evil." (Maj. opn. *ante*, at pp. 25-26.) None of that evidence has any tendency to show that, at any relevant time, Special Electric had reason to know that Johns-Manville would not provide the warnings that it was legally obligated to provide. On the contrary, it was precisely because Special Electric knew that asbestos was dangerous that it was entitled to presume that Johns-Manville, with its undisputedly extensive knowledge, would warn its own customers about those dangers. (*Harris v. Johnson*, *supra*, 174 Cal. at pp. 58-59.) The evidence that Johns-Manville was "evil" is likewise of no consequence, because there is no evidence that at any relevant time Special Electric was aware that Johns-Manville was "evil." Indeed, plaintiffs' counsel expressly conceded the point at one of the hearings on Special Electric's motions. Counsel initially argued that "[t]he undisputed testimony in the case is that Johns-Manville—and this is testimony that Special [Electric] elicited—was an evil company. There was no affirmative evidence to demonstrate reasonable reliance. There wasn't." But the court then asked, "Was there testimony that Mr. Wareham [the founder, owner, and president of Special Electric] thought that Johns-Manville was evil?" Plaintiffs' counsel answered unequivocally, "No." In the remainder of the discussion, plaintiffs' counsel never claimed that there was any evidence that at any relevant time Special Electric had any reason to believe Johns-Manville was evil or would violate its duty to warn.

Both of the majority's theories—Special Electric is liable because it failed to warn Johns-Manville, and Special Electric is liable because it failed to impose on Johns-Manville a contractual duty to provide warnings—are incorrect as a matter of law for an additional reason: The record contains no evidence of causation to support either theory. There is no evidence that Special Electric's *failure to warn* Johns-Manville about the dangers of asbestos caused Webb's mesothelioma. Moreover, there cannot be such evidence—Johns-Manville already knew everything that Special Electric knew about the

dangers of asbestos, so Special Electric's failure to tell Johns-Manville what it already knew cannot be the cause of anything. (Cf. *Johnson*, *supra*, 43 Cal.4th at pp. 65, 67.) And there is no evidence that if Special Electric had imposed on Johns-Manville a contractual duty to provide warnings, it would have made any difference. That is, there is no evidence that Johns-Manville would have heeded such a contractual duty any more than it heeded its preexisting tort duty to warn. Plaintiffs have never argued that the record contains evidence of such a causal link. It contains none.

In describing the putatively substantial evidence on each element of plaintiffs' failure to warn claims, the majority identifies three acts or omissions by Special Electric that, according to the majority, constituted breaches of Special Electric's duty to warn: "wrongly marketing its asbestos as safe, placing warnings on just some of the asbestos supplied to Johns-Manville, and making no effort to warn other potential users." (Maj. opn. *ante*, at p. 21.) But, turning to causation, the majority cites no evidence that *those breaches caused Webb's damages*. There is no evidence that if Special Electric had not claimed that crocidolite is "safer" than other asbestos, then Webb would have been warned or would not have been injured. There is no evidence that if Special Electric had put warnings on all of the crocidolite it supplied to Johns-Manville, then Johns-Manville would have put warnings on its own products. And there is no evidence that had Special Electric made an "effort to warn other potential users" (for example, by contractually requiring Johns-Manville to provide warnings), those efforts would have made any difference. Instead, the majority cites only evidence that Webb's mesothelioma was caused by asbestos supplied by Special Electric. (Maj. opn. *ante*, at p. 21 [causation "was established by evidence that Webb was exposed to the asbestos supplied by Special Electric, which caused his mesothelioma"].)

As a matter of law, that is an inadequate showing of causation. For example, if the defendant in an automobile collision breached the duty of care by driving a car with nonfunctioning headlights, then the plaintiff cannot prove causation merely by demonstrating that the defendant's car caused the plaintiff's injuries when they collided. Rather, the plaintiff must show that the defendant's *driving with nonfunctioning*

headlights caused the plaintiff's injuries (because, for example, the accident happened in the dark of night rather than in broad daylight). This is not an obscure or novel legal technicality. It is hornbook law, and it has been in the Civil Code since 1872. (Civ. Code, § 3333 [recoverable compensatory damages in tort cases are those "proximately caused" by the defendant's "breach"]; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 835, p. 52 ["the breach as the proximate or legal cause of the resulting injury" is an element of actionable negligence]; Rest.2d Torts, § 430 ["In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm"]; see, e.g., *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [in a cause of action for negligence, the "breach" must be "the proximate or legal cause of the resulting injury" (italics and internal quotation marks omitted)].) Again, the record contains no evidence that any breaches by Special Electric—including those identified by the majority and by plaintiffs—caused Webb's mesothelioma.[4]

III. The Majority's Procedural Grounds for Reversal

The majority concludes that the trial court committed some procedural errors that require reversal. (Maj. opn. *ante*, at pp. 12-15.) In particular, the majority faults the trial court for (1) granting JNOV before expiration of the time to file a motion for new trial and (2) failing to file and serve written notice of the court's sua sponte motion for JNOV.[5]

The majority does not explain how either of those purported errors was prejudicial. In my view, both were undeniably harmless. Plaintiffs had ample notice and

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[4] For this reason and others, the defense of superseding cause is a red herring. Regardless of the presence or absence of any superseding cause, the record contains no evidence that the breaches identified by the majority (and by plaintiffs) caused Webb's mesothelioma.

[5] Because the trial court deemed Special Electric's nonsuit and directed verdict motions to be a motion for JNOV, the majority treats that motion as a sua sponte JNOV motion.

opportunity to be heard on all of Special Electric's arguments, through multiple rounds of briefing and two hearings that were one month apart.

The majority eliminates the need for a showing of prejudice by holding that it was "procedurally impermissible" for the trial court to grant JNOV because the court's procedural missteps deprived the court of "the authority" to rule as it did. (Maj. opn. *ante*, at pp. 12-14.) I disagree. Plaintiffs themselves have not advocated such a position, and I know of no legal precedent for it.

The only case cited by the majority is *Sturgeon v. Leavitt* (1979) 94 Cal.App.3d 957, but it does not support the majority's position. The case holds that the trial court has authority to grant a *sua sponte* JNOV motion that was made *after* expiration of the time in which a party may move for new trial, and the case also observes in dicta that the court lacks authority to grant a JNOV motion *filed by a party after* expiration of that period. (*Id.* at p. 962.) But the case does not hold that a court lacks authority to grant a sua sponte JNOV motion *before* the expiration of that period. The distinction is significant, because Code of Civil Procedure section 629[6] expressly provides as follows: "The court shall not rule upon the motion for judgment notwithstanding the verdict until the expiration of the time within which a motion for a new trial must be served and filed . . . . The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial." Thus, the statute expressly identifies the *deadline* for a JNOV ruling as relating to the "power of the court," but the statue does not refer to an *early* JNOV ruling in the same way, providing only that the court "shall not" grant JNOV before expiration of the time to move for new trial. I conclude that in the present case the trial court did not act in excess of its authority by granting JNOV too early (assuming that the court did grant JNOV).

The majority likewise cites no legal precedent for the proposition that the trial court's authority to grant a sua sponte JNOV motion is limited by a requirement that

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[6] All subsequent statutory references are to the Code of Civil Procedure.

written notice of the motion be served and filed. I know of no such precedent, and the proposition is implausible. Written notice ordinarily does not function that way—parties can and often do waive written notice of various matters, but they cannot waive limitations on the superior court's authority or jurisdiction. And technical violations of statutory notice provisions ordinarily are not reversible per se, but rather require a showing of prejudice. Again, no prejudice has been shown here.

In any event, it is not error to fail to file and serve written notice of a sua sponte JNOV motion. The majority cites section 1005, subdivision (a)(13), for the proposition that "[w]hen the code requires notice but does not specify how notice must be given, the filing and service of written notice are required." (Maj. opn. *ante*, at p. 13.) Section 629 requires notice of a sua sponte JNOV motion but does not specify how notice is to be given, so the majority concludes that filing and service of written notice is required. But in fact subdivision (a)(13) of section 1005 requires the filing and service of written notice only if "no other time or method is prescribed by law *or by court or judge*." (Italics added.) Thus, if a court or judge prescribes a different form of notice, then failure to file and serve written notice is not error at all, let alone prejudicial error.

Finally, the putative procedural errors that the majority has identified relate only to JNOV motions. But Special Electric timely filed written motions for nonsuit and directed verdict, which the trial court purported to grant on April 18. Plaintiffs contend that those motions were denied by operation of law when the jury returned its verdict, so the trial court had no authority to grant them thereafter. Special Electric contends, to the contrary, that the motions were still pending, and the court retained the authority to grant them until entry of judgment on the jury's verdict. The majority does not resolve that dispute. Instead, the majority holds that, assuming for the sake of argument that the trial court's authority to grant a nonsuit or directed verdict continues after the jury returns its verdict, the procedural requirements for a JNOV motion apply to any nonsuit or directed verdict motions that are still pending when the verdict is rendered. The majority cites no legal precedent for that proposition, and I am aware of none. Moreover, Special Electric did file and serve written notice of its nonsuit and directed verdict motions. Thus, assuming

that the majority is right that the procedural requirements for a JNOV motion applied retroactively to Special Electric's pending nonsuit and directed verdict motions, the only requirement that was violated was that the trial court could not rule until expiration of the time to move for new trial. That is, the majority's procedural holding creates the following procedural situation: (1) When Special Electric moved for nonsuit and directed verdict, the trial court had the power to grant those motions until the jury returned its verdict; (2) once the verdict was rendered, the court *lost authority* to grant Special Electric's motions; but (3) if the trial court had waited until the time to move for new trial had expired, the court would have *regained authority* to grant the still-pending nonsuit and directed verdict motions. Again, the majority cites no precedent for this, and I am aware of none.

For all of these reasons, I conclude that the majority's procedural holdings are incorrect.

IV. The Substantial Evidence Issues

The majority agrees with plaintiffs that the verdict against Special Electric on the general negligence claim can be sustained even if the verdicts on the failure to warn claims cannot. (Maj. opn. *ante*, at pp. 29-32.) Special Electric correctly points out, and the majority does not deny, that the only theory of negligence liability that plaintiffs argued to the jury was failure to warn. But the majority concludes that the general negligence verdict can be sustained nonetheless because the record contains evidence that Special Electric marketed its crocidolite as "safer" than other forms of asbestos, but it was actually more dangerous.[7] (Maj. opn. *ante*, at p. 31.) This argument, like those previously discussed, founders on the issue of causation, because the record contains no evidence that Johns-Manville was ever aware of or influenced by any such marketing. Moreover, as discussed above, Johns-Manville was concededly among the most knowledgeable enterprises in the world concerning all aspects of asbestos, and there was

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[7] Elsewhere, the majority asserts that Special Electric marketed its crocidolite as "safe." (See maj. opn. *ante*, at p. 21.) The record contains no evidence of any such marketing.

concededly nothing Special Electric could tell Johns-Manville about the dangers or safety of asbestos that Johns-Manville did not already know.[8]

Finally, the majority rejects Special Electric's argument that because there is no substantial evidence that Webb was exposed to asbestos supplied by Special Electric, any other alleged errors in the JNOV were harmless. According to the majority, the record contains "evidence that Webb was exposed to asbestos supplied by Special Electric." (Maj. opn. *ante*, at pp. 21-22, 32-33, & fn. 22.) In my view, the majority has not identified substantial evidence that Webb was exposed to asbestos *supplied by Special Electric*. The majority's analysis of the evidence is based on the assertion that Special Electric's counsel admitted in closing argument that Transite pipe sold to Webb's employer contained asbestos supplied by Special Electric, and that Webb was thereby exposed to Special Electric's asbestos. I disagree with the majority's analysis for two reasons. First, an unsworn statement by counsel is not evidence. Second, counsel did not admit that the Transite pipe obtained by Webb's employer contained asbestos supplied by Special Electric. Rather, he admitted that the pipe contained *crocidolite*, but Special Electric was only one of several suppliers of crocidolite to Johns-Manville, as counsel repeatedly emphasized throughout his argument. As noted earlier, crocidolite was not part of the formula for Transite pipe. Rather, Transite pipe was made partly from ground-up scraps of other pipes, which may have contained crocidolite, which may have been supplied by Special Electric. The record contains no evidence (or concessions by defense counsel) that Webb was exposed to asbestos supplied by Special Electric.

Neither of these substantial evidence issues has any bearing on the analysis in Parts II and III of this dissent.

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[8] In addition, the sole witness who testified that he marketed crocidolite in this manner left Special Electric in 1973. There is no evidence that Special Electric supplied any crocidolite to Johns-Manville's Long Beach plant before 1974. There is no evidence that any other Special Electric employee ever marketed crocidolite in this manner or was instructed to do so. And there is also no evidence that, at any relevant time, Special Electric *knew or should have known* that crocidolite was more dangerous than other forms of asbestos.

V. Conclusion

The 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 what they already have a tort duty to do. The majority further holds that an order granting JNOV before expiration of the time to move for new trial must be reversed even if the ruling is correct on the merits and the timing of the ruling caused no prejudice. Similarly, the majority holds that an order granting a sua sponte JNOV motion must be reversed without a showing of substantive error or prejudice if the court did not file and serve written notice of the motion. For the reasons discussed, both substantive and procedural, I cannot join the majority opinion. The judgment should be affirmed, and I respectfully dissent.

ROTHSCHILD, J.

EXHIBIT B

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL - SECOND DIS
FILED
APR 10 2013
JOSEPH A. LANE Clerk
Deputy Clerk

WILLIAM B. WEBB et al.,

Plaintiffs and Appellants,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Defendant and Respondent.

B233189

(Los Angeles County
Super. Ct. No. BC436063)

ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING
[no change in the judgment]

The last sentence of the first full paragraph on page 31 of the opinion of this court, filed March 14, 2013, is modified to read as follows:

> The evidence showed also that although the entity that had initially supplied the asbestos was named "Special Asbestos," the owner of that entity had changed the entity used to supply asbestos to "Special Electric," inferably in order to distance itself from what consumers were coming to learn was a dangerous product.

In all other respects the opinion remains unchanged. This modification does not effect a change in the judgment.

Respondent's Petition for Rehearing filed March 29, 2013 is denied.

MALLANO, P. J. CHANEY, J.

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Case Number B233189
Division 1

WILLIAM B. WEBB et al.,
Plaintiffs and Appellants,
v.
SPECIAL ELECTRIC COMPANY, INC.,
Defendant and Respondent.