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SUPREME COURT
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Deputy

IN THE SUPREME COURT OF CALIFORNIA

WILLIAM B. WEBB and JACQUELINE V. WEBB,

Plaintiffs, Appellants, and Respondents,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Defendant, Respondent, and Petitioner.

AFTER DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION ONE, NO. B233189;
ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,
HONORABLE JOHN SHEPARD WILEY, JUDGE, NO. BC436063

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INTRODUCTION

Special Electric asks this Court to negate its liability, as decided by a jury, for exposing plaintiff William Webb to asbestos and causing his terminal disease. This Court should decline.

The evidence shows that Special Electric sold ultra-dangerous crocidolite asbestos to Johns-Manville, who used the crocidolite in Transite pipe to which Webb was exposed continually for eight years. The jury rested liability on findings that Special Electric negligently exposed Webb and failed to adequately warn him of its product's dangers.

These findings are now beyond dispute. And they are fully supported by evidence that Special Electric acted with total disregard for end users like Webb. Special Electric knew that its asbestos was extremely hazardous. But it acted not to protect users but to avoid "product liability," concealing the hazard, failing to warn users, and even selling its crocidolite with false claims that it was "safer" than the more common chrysotile asbestos. In truth, it was five to 500 times more toxic.

Johns-Manville was also a bad actor, putting asbestos (including Special Electric's) in its pipes and selling them to retailers, and eventually to end users, also without a warning.

The jury properly held both tortfeasors responsible: Special Electric 18% and Johns-Manville 49%.

But Special Electric asserts that it was all Johns-Manville's fault, and that, despite its misconduct, it bears no responsibility as a matter of law. This argument convinced the trial court, which granted JNOV. But the appellate court reversed, ruling that the JNOV was substantively erroneous and procedurally invalid. Now Special Electric asks this Court to reverse again, negating its liability.

This Court should affirm the Opinion. Special Electric's brief, peppered with inaccurate factual claims and forfeited legal claims, fails to warrant reversal of the Opinion or the jury's fully supported verdict.

1. The sophisticated-intermediary defense: Special Electric's primary contention is that the JNOV on failure to warn should be reinstated because Special Electric had no "duty" to warn Webb. Because it sold its asbestos to Johns-Manville, who assertedly already "knew" the hazards, Special Electric contends that it had no duty to warn under the "sophisticated user" defense adopted by this Court in *Johnson v. American Standard* (2008) 43 Cal.4th 56.

The Opinion correctly reversed the JNOV on this ground. "Sophisticated user" is a factual defense that negates a supplier's failure-to-warn liability when the product's injured end user already knew or should have known the hazards, on the rationale that the failure to warn does not cause the harm. But this case does not invoke that defense; no one contends that end user Webb was "sophisticated" about asbestos.

Instead, this case's circumstances potentially invoke the discrete sophisticated-intermediary defense, which allows a product supplier to argue factually that it fulfilled its duty to adequately warn by warning an intermediary (like Johns-Manville here). But that defense applies only when (1) the supplier warned the intermediary, or the intermediary was "sophisticated" about the hazard, and (2) the supplier actually and reasonably relied on the intermediary to pass on the warning. These are factual questions for the jury.

This articulation of the sophisticated-intermediary defense, rooted in the Restatement of Torts and followed by numerous California decisions (culminating in *Pfeifer v. John Crane, Inc.* (October 29, 2013) 220

Cal.App.4th 1270, 164 Cal.Rptr.3d 112), should now be adopted by this Court as California law.

The defense does not aid Special Electric here:

a. Special Electric forfeited the established factual defense by never raising it at trial, neither arguing it to the court nor presenting it (or "sophisticated user") to the jury (in instructions or the verdict).

b. Special Electric failed to present evidence of any of the defense's elements: that it gave a warning; that Johns-Manville was "sophisticated" about crocidolite asbestos; or that it actually or reasonably relied on Johns-Manville to warn end users.

Under these circumstances, no factual or legal reason exists to exempt Special Electric from liability for failing to warn Webb. *See* Argument Part I below.

2. The procedurally invalid JNOV: The Opinion correctly reversed the judgment NOV also because it was procedurally invalid.

Before the verdict, Special Electric raised its "sophisticated user" defense in a motion for nonsuit on the failure-to-warn claim. But it never obtained a ruling on the motion, allowing that claim to go to the jury.

After the verdict, Special Electric declined to bring a procedurally-proper JNOV motion, opting instead to press its pre-verdict nonsuit motion. It then shifted and expanded its arguments far beyond the sophisticated-user defense its motion had rested on.

The trial court ultimately adopted these expanded arguments, not only granting nonsuit but "treating" the motion as a JNOV (that was never brought) and granting that too.

None of this was proper. Pre-verdicts motions for nonsuit (and directed verdict) to keep claims from the jury cannot be granted after the

jury's verdict – as the governing statutes indicate and this Court should now rule. Nor could the trial court simply convert the pre-verdict motions to a motion for JNOV, which cannot be granted unless specific procedural requirements are met, and here they were not. Moreover, neither a nonsuit nor a JNOV can properly grant relief on grounds never asserted in the original motion, as the trial court did here.

Further, contrary to Special Electric's claim here, plaintiffs were prejudiced by the erroneous JNOV: (1) if JNOV had not been granted, the verdict would have remained intact; and (2) granting JNOV on grounds never raised at trial deprived plaintiffs of the opportunity to present evidence addressing those grounds. *See* Argument Part II below.

3. The unaffected negligence verdict: Even if the JNOV was neither substantively nor procedurally improper, it was impermissibly broad. At most, the nonsuit/JNOV could have negated the failure-to-warn verdict. But the judgment for plaintiffs rested independently on a verdict on their claim for general negligence unrelated to failure to warn. *See* Argument Part III below.

4. The abandoned directed-verdict motion: Special Electric asserted on directed-verdict that it could not be subject to strict liability because it was supposedly "just a broker" who did not sell asbestos. But the jury rejected this claim, finding (on ample evidence) that Special Electric sold asbestos. Moreover, Special Electric abandoned this claim after the verdict, pressing only its failure-to-warn arguments (from nonsuit). *See* Argument Part IV below.

5. The unavailable factual claims: Finally, this appeal is limited to the propriety of the JNOV on the failure-to-warn claim. Because Special Electric failed to file a protective cross-appeal from the underlying judgment

on the verdict, reversal of the JNOV automatically reinstated the verdict, leaving Special Electric without standing to challenge any other part of the verdict – including the findings on Webb's exposure and causation. *See* Argument Part V below.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The pleadings.

Plaintiffs' complaint (April 2010) alleged claims against Special Electric including negligence and strict liability. 1 AA 1-43.

Special Electric's answer generally denied plaintiffs' allegations and asserted numerous affirmative defenses, including (1) superseding cause, and (2) sophisticated user (under "*Johnson v. American Standard* (2008) 43 Cal.4th 56"). 1 AA 53:12-19, 56:19-57:2.

B. Trial: The evidence fully supported plaintiffs' claims against Special Electric.

1. Special Electric sold ultra-dangerous crocidolite asbestos with false safety claims.

a. 1969: Special Electric began to import and sell crocidolite asbestos – the most dangerous type.

In 1957, Richard Wareham formed Special Electric to sell machinery. 6 RT 1667:22-26, 1758:3-4, 1690:13-23.

In 1969, Special Electric began importing blue "crocidolite" asbestos from South Africa and selling it through a new entity ("Special Asbestos"). 6 RT 1661:5-16, 1667:8-21, 1673:12-1674:1.

Crocidolite is the most dangerous asbestos type, from five to 500 times "more toxic" than the more-common "chrysotile." 4 RT 962:19-24, 1096:7-10.

b. Special Electric knew its asbestos was hazardous but marketed it with false claims of safety.

Wareham always knew that asbestos is very hazardous, telling employees that crocidolite "would be a hard sell because [of] the name 'asbestos.'" 6 RT 1681:1-6, 1681:28-1682:5, 1683:3-10.

Despite this knowledge, Special Electric marketed its asbestos with false claims of safety. On Wareham's instruction, the salesmen pitched their "crocidolite asbestos" as "much safer than chrysotile." 6 RT 1683:6-28, 1693:6-10; *see* 6 RT 1728-1732, 6 RT 1746:12-25. This was of course false. 4 RT 962:19-24, 1096:7-10.

But Special Electric used this false safety pitch to entice users of other products to switch to "crocidolite." 6 RT 1684:1-4, 1685:7-27, 1705:13-1706:5, 1717:2-17.

Special Electric also took steps to minimize "product liability." When it entered the asbestos business in 1969, an "attorney" advised forming "Special Asbestos" to "separate the companies" due to "concern about product liability." 10 RT 2725:9-23; *see* 6 RT 1755:1-4. In 1976, it was renamed the more benign "Special Materials." 6 RT 1673:12-1674:1, 1759:8-10, 1760:16-18.

Despite the names, the "Special" entities "were the same company," with the names used "interchangeably."[1] 6 RT 1705:13-21, 1714:9-11, 1742:21-26, 1747:27-28, 1748:3-6.

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[1] The jury accordingly found the three "Special" entities all "joint venturer[s] in the sale of asbestos" (1 AA 147:1-3) – a finding not challenged here.

c. Special Electric sold asbestos.

Special Electric claimed at trial that it was a mere "broker" who did not "sell" asbestos. *E.g.*, 1 AA 68-76; 16 RT 4729:14-28; 17 RT 4833:20-4834:13.

But the jury rejected this claim, finding that Special Electric "sold or supplied" asbestos. 1 AA 144.

We show in Argument Part IV below that this finding was supported by ample evidence.

d. 1974-1981: Special Electric sold crocidolite asbestos to Johns-Manville.

In 1974, Special Electric began selling crocidolite to Johns-Manville's Long Beach plant. 6 RT 1659:10-16, 1661:3-22. Over eight years, these sales to Johns-Manville totaled about 7,000 tons of crocidolite asbestos. 8 RT 2356:1-2358:23; 9 RT 2558:26-2559:1; Opinion at 3.

2. 1974-1982: Webb was exposed to Special Electric's asbestos in Johns-Manville's Transite pipe.

From the 1960s through the 1980s, Webb worked for retail store Pyramid Pipe & Supply ("Pyramid"), which bought Johns-Manville's Transite pipe exclusively from supply store "Familian" and resold it. 3 RT 642-643, 652:5-18, 653:24-27, 665:7-18.

At trial, Special Electric did not dispute that (from about 1974 to 1982) this pipe contained a small percentage of its crocidolite asbestos. *See* 17 RT 4815:12-15, 4832:1-5.

"[A]t least ten times a year," Webb personally bought the asbestos pipe from Familian, a "couple hundred feet" at a time. 3 RT 654-656. Back

at Pyramid, he "unloaded" the pipe and later retrieved it for customers. 3 RT 656:25-657:18.

These processes all generated asbestos dust. The pipe would sometimes "break" and release dust. 3 RT 658:19-25. Each month, Webb would "clean the area up, sweep it up, and unload the new pipe and put the older [pipe] on the top." 3 RT 658:13-18, 658:27-659:7, 665:19-25.

Webb was exposed to Transite asbestos in these ways from 1969 until the early 1980s. 3 RT 657:19-658:12, 665:28-666:5.

3. Special Electric failed to adequately warn about the dangers it knew existed.

Ample evidence supported a jury finding that Special Electric failed to adequately warn users about the known dangers of its asbestos.

First, evidence showed it gave no warning at all. Although Wareham claimed that a warning was given (6 RT 1665:14-26), Johns-Manville's Dascenzo disagreed: the bags almost always had no warning, which appeared only "close to the shutdown, the plant closure" in 1982. 9 RT 2402:11-2403:8, 2419:16-20; *accord* 9 RT 2563:19-22; *see* Opinion at 19 and n.19 (evidence "disputed").

Second, evidence showed that any warning given was inadequate. The only claimed "warning" was a tepid "OSHA" warning that never mentioned cancer or the extreme low-dose toxicity. *E.g.*, 3 RT 667:17-668:7; *accord* 6 RT 1665:14-26, 1672:22-1673:11; *see* Opinion at 19 and n.19 (evidence "disputed").

Although Special Electric insisted in the lower courts that it gave an adequate warning (*e.g.*, RB at 19-22), it has abandoned that assertion here.

C. Special Electric moved for nonsuit and a directed verdict but did not press for a pre-verdict ruling.

1. Nonsuit: Special Electric challenged only plaintiffs' "one cause of action" for "failure to warn."

On February 2, 2011, Special Electric announced it would move for "nonsuit on the cause of action for failure to warn" – just "the one cause of action." 11 RT 3002:14-15, 3003:25-27.

Two days later (February 4), Special Electric filed its motion for "nonsuit on plaintiffs' theory of failure to warn, in either negligence or strict liability." 1 AA 62:23-25.

The motion asserted two factual grounds:

(1) Warning given: Special Electric "always" gave an adequate warning, packing its asbestos "in plastic bags with a printed warning" (1 AA 63:1-17); and

(2) "Sophisticated user": Special Electric was "absolve[d]" of its "duty to warn" because its "only relevant customer" was Johns-Manville, who assertedly "already kn[ew]" everything about asbestos. 1 AA 63:18-64:6 and n.2 (limited to "Sophisticated User defense" pled in answer), 65:12-14; Opinion at 3-4.

2. Directed Verdict: Special Electric challenged only "strict liability."

Four days after the nonsuit motion (February 8), Special Electric moved for a "directed verdict on plaintiffs' theory of strict liability." 1 AA 68:23-24.

This motion asserted just one ground: Special Electric "was at most a broker of asbestos fiber" and thus "not in the chain of distribution." 1 AA 69:1-2.; Opinion at 5.

3. Plaintiffs' nonsuit opposition addressed the grounds raised in the motion.

Plaintiffs' nonsuit opposition highlighted their evidence that (1) Special Electric gave no warnings, (2) any warning given was inadequate, and (3) Johns-Manville's knowledge had nothing to do with the asserted sophisticated-user defense. 1 AA 77-85.

4. Special Electric did not obtain a ruling on its motions before submission to the jury.

The trial court did not rule on Special Electric's pre-verdict motions before the case was submitted to the jury.

The court deferred ruling on nonsuit for a few days to give plaintiffs a "chance in writing to respond." 11 RT 3002:14-15, 3003:25-3004:3.

But after plaintiffs responded on February 8 (1 AA 77), Special Electric failed to press for a ruling, allowing the case to be submitted to the jury (which returned its verdict on February 17). 1 AA 143.

D. Jury instructions.

On failure to warn, the jury was instructed under both negligence (CACI 1222) and strict liability (CACI 1205), instructions with similar but not identical elements. 1 AA 115, 121; 16 RT 4514, 4510-4511; Opinion at 18.

On general negligence, the jury received separate instructions (under CACI 1220) on negligence in "designing, manufacturing or supplying the product," unrelated to warnings or any "failure to warn." 1 AA 119, 120.

Although Special Electric had asserted on nonsuit that Johns-Manville was a "sophisticated user" of its asbestos, it did not seek or obtain an instruction on this factual defense (CACI 1244).

Instead, the only instruction pertaining to Johns-Manville addressed "superseding cause" (CACI 432). 1 AA 111. This instruction did not address purported Johns-Manville "sophistication" but instead focused on any "highly unusual" or "extraordinary" Johns-Manville conduct that caused "[un]expected" harm. *Id.*

E. Verdict form.

Special Electric acquiesced in the verdict form presented to the jury, a "verdict form acceptable to the plaintiffs and to Special Electric." 15 RT 4358:3-5, 4384:26-27.

Although the jury had been instructed on two different failure-to-warn theories (negligence and strict liability, 1 AA 115, 121), the agreed verdict form conflated the theories into one special verdict on failure to warn. 1 AA 145-146.1 (Questions 6-10).

The verdict form also tracked the instructions by presenting general negligence as a discrete claim, independent of failure to warn. 1 AA 145-146.1 (Questions 11-12).

Regarding Johns-Manville, the jury was allowed to allocate comparative fault. 1 AA 148. But Special Electric failed to seek or obtain a verdict form requiring findings on the sophisticated-user defense or its required elements. *See* 1 AA 143-149.

F. Closing arguments.

In closing arguments, both parties acknowledged that general negligence and failure-to-warn were separate claims.

Without objection, plaintiffs' counsel described general negligence as a "different variety of law" from failure-to-warn and argued that Special

Electric was negligent because it did not "perform to a reasonable standard of care," making "no attempts to do what they ought to have done to protect people." 16 RT 4699:21-4704:7, 4714-4715; *accord* 17 RT 4981-4982.

Likewise, Special Electric's counsel described the claims separately: it "failed to warn or was somehow negligent." 17 RT 4833:20-22 (emphasis added); *accord* 16 RT 4718:12-21, 4721:20-22.

G. Verdict.

The jury first found that Webb was exposed to Special Electric's asbestos, rejecting Special Electric's primary factual defense. 1 AA 144; *see* 17 RT 4813-4832.

On design defect (Questions 1-5), the jury found that Special Electric's asbestos did not "fai[l] to perform as safely as the reasonable consumer would have expected." 1 AA 144:19-23.

On failure-to-warn (Questions 6-10), the jury found for plaintiffs that Special Electric "fail[ed] to adequately warn of the potential risks." 1 AA 145:18-146.1:5.

On general negligence (Questions 11-12), the jury found that Special Electric was "negligent," which constituted negligence in "designing, manufacturing or supplying" its asbestos, unrelated to any failure-to-warn. 1 AA 119, 146.1:18-21.

Next, the jury found that Special Electric at "all relevant times" was "a joint venturer in the sale of asbestos with Special Asbestos/Special Materials." 1 AA 147:1-3.

The jury found Webb not "negligent." 1 AA 147:5-8.

The jury apportioned fault 49% to Johns-Manville and 18% to "Special Asbestos/Special Materials/Special Electric." 1 AA 148.

The jury found that plaintiffs suffered just over $5 million in damages. 1 AA 149.

Because Special Electric had failed to present its asserted "sophisticated user" defense in instructions or the verdict form, the jury made no factual findings on whether Johns-Manville was "sophisticated" about the dangers of Special Electric's crocidolite. 1 AA 143-150; 18 RT 6004-6010.

The trial court discharged the jury. 18 RT 6017-6020.

H. Despite the verdict, the trial court revived Special Electric's pre-verdict motions and granted them, expanding their scope and converting them to a never-brought "JNOV" motion.

1. February 18: The trial court initially denied the motions but then allowed a hearing.

On February 18, the day after the jury returned its verdict and was discharged, the court and counsel met, ostensibly to wrap up the case. In light of the verdicts, the court announced that it would "deny" Special Electric's pre-verdict motions. 18 RT 6301:25-27. But Special Electric requested "oral argument." 18 RT 6301:28-6302:6. After some discussion, the court set a hearing for March 16. 18 RT 6305:25-26.

2. February 18: Special Electric declined to move for JNOV.

At the hearing, the trial court suggested that Special Electric "file a motion" for JNOV and "wrap the whole thing into one." 18 RT 6302:7-9; Opinion at 6.

But Special Electric declined, suggesting it might file those motions "at a later date" but requesting only a hearing on its pre-verdict motions. 18 RT 6302:10-22, 6303:12-17; Opinion at 6.

3. March 9: Special Electric's nonsuit "reply" raised new grounds.

Special Electric's nonsuit reply shifted away from the "sophisticated user" defense, now arguing that it "could reasonably believe that [Johns-Manville] would adequately warn the end users" – an argument based on the previously unasserted sophisticated-intermediary defense. 1 AA 151:26-152:11.

Special Electric also asserted for the first time the "obvious danger" rule, *i.e.*, that it had "no need to warn" of risks that were supposedly widely "known." 1 AA 152:12-153:3; *cf.* 1 AA 62-67 (nonsuit).

4. March 10: The trial court signed a judgment for plaintiffs but did not enter it.

On March 10, the trial court signed a judgment for plaintiffs but ordered that it would not be "entered until all pending motions have been heard." 1 AA 174.

5. March 14: Plaintiffs' directed-verdict opposition showed that Special Electric's "just a broker" argument had been waived and rejected by the jury.

On March 14, plaintiffs filed their opposition to Special Electric's directed-verdict motion, which had challenged only "strict liability" on the sole ground that Special Electric was a mere asbestos "broker" who was "not in the chain of distribution." 1 AA 175-182; *see* 1 AA 68:23-69:2. Plaintiffs showed that (1) Special Electric had waived the motion by failing to obtain a ruling before the verdict, and (2) the jury had rejected the "just a broker" argument by finding that Special Electric sold or supplied asbestos. 1 AA 176-182.

6. The first hearing: Tentative ruling for Special Electric and supplemental briefing requested.

a. Special Electric abandoned its "just a broker" argument and thus its directed-verdict motion.

At the first post-verdict hearing, Special Electric shifted its arguments again: "the grounds argued . . . were not the same as those stated in its initial briefs." Opinion at 6. Now, Special Electric argued that (1) the "nonsuit" motion asserted that "warnings were given" (18 RT 6603:25-6605:9), and (2) the "directed verdict" motion asserted "no legal duty to have warned" – the two original grounds for nonsuit now purportedly split between the motions. 18 RT 6606:20-6609:2; Opinion at 6.

Special Electric discarded its original (and only) directed-verdict ground (no strict liability because it was "just a broker"), thus abandoning that motion. 18 RT 6601-6628.

b. Special Electric continued to expand its nonsuit arguments.

On the nonsuit grounds, Special Electric continued to expand its argument beyond the asserted "sophisticated user" defense.

Special Electric now invoked the discrete sophisticated-intermediary defense, arguing that it "legally may rely on . . . Johns-Manville to issue warnings" to end users. 18 RT 6608:26-6609:2. Special Electric now cited (1) Restatement (Second) of Torts section 388, comment *n*, and (2) *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, which both articulate that defense (as discussed in Argument Part I.A.2 below). 18 RT 6609:3-6610:8.

c. The trial court adopted the (unasserted) "obvious danger" defense.

The trial court announced that it intended to grant Special Electric's motions on one ground: the "obvious danger rule." 18 RT 6627:9-11.

The court acknowledged that it was effectively creating its own rule: "There is no case that is on all fours for either side here." 18 RT 6627:2-3. But "Coals to Newcastle would be the three words I think stand for the reason that I would grant the motion for nonsuit"; and "[t]elling Johns-Manville about asbestos is like telling the Pope about Catholicism." 18 RT 6618:4-12; Opinion at 7. The court then announced its new rule: regardless of the circumstances, "it is not a tort to fail to tell someone something they already know." 18 RT 6618:14-15.

The court rested this new rule also on the tortfeasors' relative sizes: Special Electric is a "small operation," while Johns-Manville is the "bigg[est] asbestos operation anywhere ever." 18 RT 6617:25-28, 6620:24-6621:4. According to the court, the "law does not require . . . a 25-person operation to tell the world's premiere asbestos corporation about asbestos." 18 RT 6618:24-26.

Plaintiffs' counsel correctly noted that Special Electric was really asserting (beyond its sophisticated-user motion), and the court was ruling (in its relative-size analysis), that Johns-Manville was a sophisticated intermediary (between Special Electric and the product "user" Webb), but Special Electric had offered no evidence that it "reasonably relied" on Johns-Manville to warn. 18 RT 6621:7-6624:15.

In response, the trial court suggested that such reliance was a "reasonable inference": "if there's anybody in the world that you can trust on asbestos, it's got to be Johns-Manville. . . . That's a reasonable inference

from what the record has shown." 18 RT 6624:17-6625:1. The court did not address plaintiffs' response that, on nonsuit, the "inferences are supposed to be drawn in [plaintiffs'] favor." 18 RT 6625:2-9.

The court requested "further briefing." 18 RT 6627:16-25; 1 AA 193.

7. The supplemental briefing.

a. Plaintiffs' supplemental opposition.

Plaintiffs' supplemental opposition (1 AA 196-220) showed that Special Electric's pre-verdict motions should not be granted for numerous reasons:

1. A verdict cannot be challenged by pre-verdict motions, only by a statutorily authorized post-verdict motion (JNOV). 1 AA 219:23-220:10.

2. Nonsuit and directed verdict can be granted on <u>only</u> the specific grounds stated in the motion: here, the stated "sophisticated user" defense, not any unstated grounds like sophisticated-intermediary. 1 AA 205:8-206:18.

3. The court must construe the evidence favorably to plaintiffs. 1 AA 206-209.

4. The sophisticated-intermediary defense does not negate liability because Special Electric (1) did not warn (as the jury found) and (2) failed to show reasonable reliance on Johns-Manville to warn. 1 AA 209-219.

5. The jury rejected Special Electric's contention that Johns-Manville was a superseding cause of Webb's injuries. 1 AA 219:10-21.

b. Special Electric's supplemental reply introduced yet another nonsuit defense: "intervening" cause.

Special Electric's supplemental reply (2 AA 308) shifted its argument again, now asserting that Johns-Manville was an "intervening cause." 2 AA 317:22-319:8. But Special Electric failed to address that (1) this defense was not asserted in its motions, or (2) the jury had already considered and rejected it. *See* 1 AA 111, 146.1.

Special Electric also tried to revive its "just a broker" directed-verdict ground that it had abandoned in the prior hearing. 2 AA 329-330.

Finally, Special Electric asserted that granting nonsuit after the verdict was procedurally proper (2 AA 325-327), but if not, the court could simply "treat the nonsuit motion as a motion for JNOV." 2 AA 328:23-329:11. Special Electric conceded that it had not moved for JNOV but noted that the trial court could enter JNOV "on its own motion with five days notice." 2 AA 328:24-26; *see* Code Civ. Proc. § 629.

8. The final hearing: The trial court "treated" the pre-verdict motions as also for "JNOV" – and purported to grant all three motions.

At the final hearing (April 18), the trial court granted Special Electric's motions on two "alternative and independent" grounds:

1. No duty to warn: The "law of the State of California following the obvious danger rule does not require a warning in this situation from Special Electric to Johns-Manville."

2. Adequate warning given: The "warning that the record shows was given, that Special Electric did give, was adequate." 18 RT 6906:3-9, 6912:5-11.

Although these were the two basic grounds raised only on nonsuit (not directed-verdict), the court purported to grant both motions. 18 RT 6936:9-19; 2 AA 380.

Moreover, although neither Special Electric nor the court had moved for JNOV, the court proposed to "enter judgment as the jury found it" and "trea[t] today's ruling" as a "ruling on a JNOV." 18 RT 6902:26-6903:1. Counsel objected to this erroneous procedure, asserting plaintiffs' right to have the proper procedures followed, including every opportunity to brief Special Electric's ever-shifting arguments. 18 RT 6903:8-6904:4; *see* Opinion at 8 n.10. But the trial court rejected this argument, purporting to somehow grant nonsuit and a directed verdict <u>and</u> JNOV. 18 RT 6936:9-17.

I. April 18: Judgment entered on the jury verdict.

To enable a "JNOV," the trial court obviated the pre-verdict motions (to keep claims from the jury) by entering judgment on the jury's verdict. 2 AA 380; 18 RT 6936:14-17 Opinion at 9.

After entering judgment on the verdict, the court then purported to "gran[t]" all of Special Electric's motions: (1) the nonsuit and directed-verdict motions obviated by the new judgment, and (2) the JNOV motion that no one ever brought. 2 AA 380.

J. April 22: Judgment NOV entered.

On April 22, the court entered a formal "Order on Motions for Judgment of Nonsuit and Directed Verdict." 2 AA 382. This order again "granted" Special Electric's pre-verdict motions and "deem[ed]" them "to be motions for [JNOV], and that motion is granted." 2 AA 383:13-16. The court ordered that "judgment be entered accordingly." 2 AA 383:13-16.

Also on April 22, the court entered a new "Judgment on Special Verdict and for Nonsuit, Directed Verdict and JNOV." 2 AA 384-392.

K. May 17: Plaintiffs timely appealed from the judgment NOV.

On April 25, Special Electric served a "Notice of Entry" of the April 22 judgment NOV. 2 AA 393, 403.

On May 17, 22 days later, plaintiffs timely filed their notice of appeal from that judgment. 2 AA 404.

L. Special Electric did not file a protective cross-appeal.

After plaintiffs appealed from the April 22 judgment NOV, Special Electric failed to file a protective cross-appeal from the underlying April 18 judgment on the jury verdict. Opinion at 9.

M. The Court of Appeal reversed the judgment NOV, reinstating the judgment on the jury's verdict as final.

In its Opinion (March 14, 2013), Division One of the Second Appellate District reversed the judgment NOV on three grounds:

1. Procedural error: The judgment NOV "violated statutory procedural requirements." Opinion at 11-15.

2. Substantive error: The judgment NOV, resting on findings that Special Electric (a) gave an adequate warning, and (b) had no duty to warn, "was unjustified on the merits." Opinion at 15-29.

3. Incomplete JNOV: The judgment NOV, resting on rulings that affected the failure-to-warn claim only, improperly purported to overturn plaintiffs' negligence claim, which independently supported the verdict. Opinion at 29-32.

The court also rejected Special Electric's contention that the judgment NOV should be affirmed on the "independent ground" that the jury's finding that Webb was exposed to Special Electric's asbestos was not supported by "substantial evidence." Opinion at 32-33; *see* Respondent's Brief on Appeal (RB) at 39-45. As plaintiffs showed in their Appellant's Reply Brief below ("Reply"), Special Electric lacks standing to challenge the underlying judgment on the jury's verdict because it failed to file a protective cross-appeal. Opinion at 32; *see* Reply at 37-38. Moreover, Special Electric was wrong – the jury's exposure finding (1 AA 144) was supported by substantial evidence. Opinion at 32-33; *see* Reply at 38-41.

Accordingly, the appellate court reversed the judgment NOV, reinstating the "original judgment." Opinion at 34. Absent a cross-appeal, that original judgment was automatically final, "without further review" of any part of the underlying verdict. Opinion at 33.

One justice dissented, disagreeing with the majority on all grounds. Opinion, Dissent at 1-13.

ARGUMENT

I.

The JNOV's substantive error: Special Electric had a duty to warn, and whether it fulfilled that duty was a question of fact properly resolved against it.

Special Electric's primary contention is that it did not have a "duty to warn" end users of the hazards of its asbestos product. OB at 3, 10-30. Special Electric supports this contention with a mélange of sub-arguments that conflate and confuse various defenses (mainly sophisticated-user and sophisticated-intermediary).

To clear up this confusion, we first summarize the history of California law on failure-to-warn liability and the separate roots and elements of the distinct sophisticated-user and sophisticated-intermediary defenses. *See* Part A below.

Then, on that foundation, we show that this Court should affirm the Opinion's holding that the judgment NOV was substantively improper because "no legal basis" justified the trial court's conclusion that "Special Electric owed no duty to warn Webb" (Opinion at 23). *See* Part B below.

A. Governing legal standards: Failure-to-warn liability and the discrete sophisticated-user and sophisticated-intermediary defenses.

1. The duty to use reasonable care to warn of product dangers.

California's duty to warn is rooted in the Restatement (Second) of Torts, sections 388 (negligence) and 402A (strict liability), requiring product suppliers to take reasonable steps to give an adequate warning.

a. Restatement section 388: Negligent failure to warn.

Claims for negligent failure to warn arise from Restatement section 388, which imposes liability on a "supplier" who knows that its product is dangerous to end users but "fails to exercise reasonable care to inform them of its dangerous condition or of facts which make it likely to be dangerous."[2] Rest.2d (Torts), § 388 and subd. (c). It is not an absolute duty to assure that the warning is received by every end user. The duty is to "exercise reasonable care" to communicate the warning. *Id.*, subd. (c).

This duty originated in section 388 of the original Restatement of Torts, as this Court recognized as early as 1937 in *Stultz v. Benson Lumber Co.* (1936) 6 Cal.2d 688, 690. In 1947, this Court cited the original section 388 for the proposition that "a manufacturer must give an appropriate warning of any known dangers." *Tingey v. E.F. Houghton & Co.* (1947) 30 Cal.2d 97, 102.

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[2] Section 388, in Division 2 ("Negligence"), titled "Chattel Known to Be Dangerous for Intended Use," reads in full:

> "One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous."

The second Restatement (1965) retained section 388's duty to take "reasonable" steps to warn. Rest.2d (Torts) § 388, subd. (c). This Court adopted the section as California law in *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64-65.

The section 388 claim for negligent failure to warn is embodied in California jury instructions as CACI 1222.

b. Restatement section 402A, comment *j*: Strict liability failure to warn.

California's strict-liability law similarly requires manufacturers to warn of their products' dangers.

This duty arises from Restatement (Second) of Torts section 402A, comment *j*. Section 402A provides strict liability for products that are defective because they are "unreasonably dangerous," and comment *j* "require[s]" suppliers to give warnings that, if heeded, will "prevent the product from being unreasonably dangerous."[3]

This Court adopted the comment *j* warning duty in *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1000. *Anderson* limited the strict-liability duty to warn to only those product dangers that were scientifically "known or knowable" at the time of manufacture. *Id.*

The comment *j* claim for strict-liability failure to warn is embodied in California jury instructions as CACI 1205.

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[3] "*j. Directions or warning.* In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. * * * Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

c. The negligence and strict-liability theories share similar features – including the duty to warn adequately.

The negligence and strict-liability theories of failure to warn are discrete claims that can be pursued simultaneously. *See Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717.

Although distinct, the claims have "significant overlap." *Id.* For example, although strict-liability theories generally disregard "reasonableness," they can still properly share features with "theories of negligence." *Anderson*, 53 Cal.3d at 1002; *Johnson*, 43 Cal.4th at 73 ("strict products liability law in California may incorporate negligence concepts without undermining the principles fundamental to a strict liability claim").

Accordingly, *Anderson* incorporated into the strict-liability warning theory a "known or knowable" standard – even though that standard rings in negligence.[4] *Anderson*, 53 Cal.3d at 1002.

Another "reasonableness" concept shared by both theories is that the warning must be "adequate," both in content and method of communication. Both governing CACI instructions ask whether the defendant "failed to adequately warn." CACI 1205, 1222. Hence, strict-liability warning claims incorporate the negligence-based concept of adequacy of warning, thus including section 388's duty to take "reasonable" steps to warn product users. *See Persons v. Salomon N. Amer., Inc.* (1990) 217 Cal.App.3d 168, 175-176 ("the touchstone of liability under a strict liability cause of action for failure to warn is reasonableness").

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[4] The difference between the theories is that, for such known or knowable risks, the strict-liability defendant must adequately warn, but the negligence defendant can argue that it was reasonable under the circumstances to choose not to warn. *Anderson*, 53 Cal.3d at 1003.

In both theories, "the adequacy of the warning is a question of fact for the jury." *Oxford*, 177 Cal.App.4th at 717; *accord Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 (strict-liability case).

2. "Sophisticated user" and "sophisticated intermediary": Discrete defenses with different roots and analytical frameworks.

Special Electric, asserting the "sophistication" of mid-stream pipe manufacturer Johns-Manville, invokes here what it calls the "sophisticated user/purchaser/intermediary" defense. OB at 13. Special Electric refers variously to both sophisticated "users" and "intermediaries" (and sometimes "purchasers" or "manufacturers"), confusing and conflating the terms and positing that they are essentially the same. *E.g.*, OB at 3, 5, 13.

They are not the same. They are discrete defenses with different origins, application, and elements.

a. Sophisticated user: No liability if the product's user knew or should have known the hazards.

(1) Comment *k*: Warning needed unless user knows the danger.

The sophisticated-user defense is rooted in Restatement section 388 and its comment *k*. Section 388 imposes liability for failing to adequately warn of a product's "dangerous condition" when the manufacturer or supplier "has no reason to believe" that the end user "will realize its dangerous condition." Rest.2d (Torts) § 388, subd. (b). Accordingly, if the user "will realize" the danger, a warning is not needed.

Comment *k* ("*When warning of defects unnecessary*") elaborates. Sometimes a dangerous condition is "one which only persons of special

experience would realize to be dangerous." *Id.*, cmt *k.* If the "supplier, having such special experience," has "no reason to believe that those who use it will have such special experience as will enable them to perceive the danger," the supplier must "inform them of the risk." *Id.* Hence, the contrary: if the supplier has reason to believe that the end user will "perceive the danger," it need not warn.

(2) *Johnson* adopted the sophisticated-user defense in California, applying a "knew or should have known" standard.

In 2008, this Court adopted comment *k*'s expression of the sophisticated-user defense in *Johnson v. American Standard.*

Johnson first noted that the defense "evolved out of" section 388 and comment *k.* *Johnson*, 43 Cal.4th at 65-66. The defense is factual and case-specific: "if the manufacturer [or supplier] reasonably believes the user will know or should know about a given product's risk, the manufacturer need not warn that user about that risk." *Id.* at 66.

The defense is rooted also in the "obvious danger rule, which provides that there is no need to warn of known risks." *Id.* at 67 (*citing Bojorquez v. House of Toys, Inc.* (1976) 62 Cal.App.3d 930, 933-934 (slingshot's danger of eye injury is obvious); *Holmes v. J.C. Penney Co.* (1982) 133 Cal.App.3d 216, 220 (pellet gun: same)). Sophisticated-user is a special strain of the obvious-danger defense. Although the "dangers associated with" some products (like heavy machinery) are "not obvious" to consumers generally, they are "obvious" to "those individuals or members of a profession who do know or should know" the dangers. *Johnson*, 43 Cal.4th at 67. These are

"sophisticated users," to whom "the dangers should be obvious, and the defense should [thus] apply." *Id.*

Johnson expressly declined to limit the defense to only those users who actually know the dangers. Instead, the "inquiry focuses on whether the plaintiff knew, or should have known, of the particular risk of harm from the product giving rise to the injury." *Id.* at 71. Hence, the user's sophistication can arise from learning the dangers himself or from being a "membe[r] of a sophisticated group of users" who declare that they "possess the level of knowledge and skill associated with that class." *Id.*

The defense applied in *Johnson*, where the plaintiff was an HVAC technician who knew or should have known of the danger to which he was exposed, *i.e.*, that heating "R-22" refrigerant can release hazardous phosgene gas. *Johnson*, 43 Cal.4th at 61-62. The evidence was "clear that HVAC technicians" like Johnson "knew or should have known" of this danger. *Id.* at 74.

(3) The defense applies to both negligence and strict liability failure-to-warn claims.

Johnson held expressly that the sophisticated-user defense applies to all failure-to-warn claims, whether rooted in negligence or strict liability. *Johnson*, 43 Cal.4th at 71. Again, although the "should have known" standard involves reasonableness concepts, California "strict products liability law" may properly "incorporate negligence concepts." *Id.* at 73 (*citing Anderson*, 53 Cal.3d at 1002-1003).

(4) The defense is a question of fact for the jury.

Under *Johnson,* the sophisticated-user defense is a factual question for the jury. *Johnson* affirmed summary judgment because the evidence of the HVAC-technician plaintiff's sophistication was "undisputed," leaving "no triable issue of fact." *Johnson*, 43 Cal.4th at 75; *accord American Mut. Lib. Ins. Co. v. Firestone Tire & Rubber Co.* (5th Cir. 1986) 799 F.2d 993, 994 ("Whether an individual is a sophisticated user is ordinarily a question of fact to be decided by a jury.").

Accordingly, the factual defense is now embodied in a California jury instruction, CACI 1244. Under that instruction, if the defense is found to apply, the supplier is "not responsible for any harm . . . based on a failure to warn." *Id.*

b. Sophisticated intermediary: The supplier can argue that it reasonably fulfilled its duty to warn the end user by giving a warning to the intermediary.

Distinct from sophisticated-user, the sophisticated-intermediary defense has different roots and a distinct analytical foundation. The defense arises from comment *n* (not comment *k*) to section 388. And the defense does not obviate duty or causation (like sophisticated user) but rather allows the supplier to argue that, under the circumstances, it fulfilled its duty by warning the intermediary.

(1) Comment *n*: Adequate warning <u>plus</u> reasonable reliance on the intermediary.

The sophisticated-intermediary doctrine is also rooted in Restatement section 388, but in comment *n*. Subdivision (c) requires suppliers to "exercise reasonable care" to warn end users of known product

dangers. Rest.2d (Torts) § 388, subd. (c).

Comment *n* ("*Warnings given to third persons*") elaborates. A supplier can sometimes fulfill its duty to take "reasonable care" by warning an intermediary (a "third person through whom the chattel is supplied"). The duty may be fulfilled if:

1. Warning given: The supplier first must give the intermediary an adequate warning: "all the information necessary to its safe use." *Id.*, comment *n* (2nd par.).

2. Reasonable reliance: Warning the intermediary is not enough – the supplier must also reasonably rely on the intermediary to pass on the warning: "The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends on their having it." *Id.*

Whether the supplier could reasonably so rely on the intermediary is a question of fact. Although it would be "impossible" to define a "set of rules" governing every case, comment *n* details "factors" to be considered:

a. *Reliability of intermediary*: "There is necessarily some chance that information given to the third person will not be communicated" to end users. *Id.* "This chance varies with the circumstances," including the "known or knowable character of the third person" – *e.g.*, whether the intermediary is an "ordinary normal man" or is instead "known to be careless or inconsiderate." *Id.* (2nd and 3rd pars.) Moreover, if the intermediary would be disadvantaged by providing the information, "as when goods so defective as to be unsalable are sold by a wholesaler to a retailer," the supplier has "reason to expect" that the intermediary will "fail" to pass the warning on. *Id.* (3rd par.).

b. *Severity of hazard*: The "care that must be taken always increases with the danger involved." *Id.* (4th par.) What constitutes "reasonable care" depends on the "magnitude of the risk" involved, *i.e.*, both "the chance that some harm may result" and the harm's "serious or trivial character." *Id.*

c. *Difficulty of warning directly*: A supplier can also argue that it was reasonable to warn the intermediary alone because it was difficult to warn the user directly. This too depends on the severity of the risk: "it may be that the supplier does not exercise reasonable care in entrusting the communication" of the warning "even to a person whom he has good reason to believe to be careful." *Id.* (last par.). If the product poses a "grave risk of serious harm," reasonable care may require the supplier not to rely solely on the intermediary but instead "to take precautions to bring the information home to the users." *Id.*(4th par.).[5]

Finally, comment *n* notes that reasonableness may require the supplier to label the product with a warning even if the intermediary knows the hazard, *i.e.*, "even though [the supplier] has disclosed [the product's] actual character to" the intermediary. *Id.* (last par.)

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[5] The proposed Restatement (Third) of Torts, Product Liability § 2, comment *i*, is in accord with comment *n*: "There is no general rule as to whether one supplying a product for the use of others through an intermediary has a duty to warn the ultimate product user directly or may rely on the intermediary to relay warnings. The standard is one of reasonableness in the circumstances. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user."

(2) California courts have followed comment *n* on the sophisticated-intermediary defense.

In the 1990s, several courts followed comment *n* and its factual "reasonableness" analysis in applying the sophisticated-intermediary doctrine.

In 1990, the appellate court in *Persons* cited comment *n* regarding "the reliability of a third party, *e.g.*, a business intermediary, to convey the warning to the ultimate user." *Persons*, 217 Cal.App.3d at 175.

In 1995, this Court in *Macias* cited comment *n* with approval regarding what it called the "sophisticated purchaser" defense, which assesses "under what circumstances a product manufacturer may reasonably rely upon an intermediary" to "convey any necessary warnings to the public." *Macias v. State of Cal.* (1995) 10 Cal.4th 844, 853. But there the defense was rendered "superfluous" by overriding "issues of legislative and public policy." *Id.* However, a detailed dissent by Justice Mosk presaged the adoption of comment *n* and its "required balancing of considerations" affecting reasonableness by "the trier of fact." *Id.* at 862-863.

In 1996, the appellate court in *Torres* followed *Persons* (which rested on comment *n*) to hold that whether a supplier's inclusion of "instructions" to "distributors" constituted "adequate warnings" is "an issue for the jury." *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 21.

(3) *Stewart*: Sophisticated-intermediary requires a warning and reasonable reliance.

In 2010, the appellate court in *Stewart* followed *Persons* and *Torres* to hold expressly that the sophisticated-intermediary defense is unrelated to the sophisticated-user defense adopted by this Court in *Johnson*. *Stewart*, 190 Cal.App.4th at 28-30.

In *Stewart*, Union Carbide sold asbestos to an intermediary, Hamilton Materials, who used it in joint compound to which the plaintiff was exposed. *Id.* at 26. Union Carbide sought an instruction, under the sophisticated-user "rationale" of *Johnson*, that "the sale of a raw material to a sophisticated intermediary purchaser who knew or should have known of the risks of that raw material cannot be the legal cause of any harm the raw material may cause" to an end user. *Id.* at 28.

Stewart affirmed the denial of that instruction, which "is not" supported by *Johnson* or the sophisticated-user defense. *Id.* Because "*Johnson* did not impute an intermediary's knowledge to the plaintiff," the user was not shown to be sophisticated. *Id.*

The proposed instruction actually invoked the "sophisticated intermediary" defense, which "applies only if" the supplier (1) "provided adequate warnings to the intermediary," and (2) could reasonably "rely upon the intermediary" to "pass on or give warnings."[6] *Id.* at 29-30.

In circumstances like the *Stewart* facts, both the supplier and the intermediary are at fault: "If both Union Carbide and the sophisticated intermediary failed to give warnings, that should not absolve Union Carbide of responsibility." *Id.* at 30.

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[6] Numerous out-of-state authorities are in accord with this two-element, warning-plus-reliance approach. *E.g.*, *McConnell v. Union Carbide Corp.* (Fla.App. 2006) 937 So.2d 148, 155-156; *Union Carbide Corp. v. Kavanaugh* (Fla.App. 2004) 879 So.2d 42, 44-45 (following comment *n* factors); *Swan v. I.P., Inc.* (Miss. 1993) 613 So.2d 846, 856 (reliance on the intermediary must be reasonable); *In re Brooklyn Navy Yard Asb. Lit.* (2nd Cir. 1992) 971 F.2d 831, 837-838 (actual and justifiable reliance required); *Adkins v. GAF Corp.* (6th Cir. 1991) 923 F.2d 1225, 1230 ("providing information" plus "reasonably rely"); *Willis v. Raymark Indus.* (4th Cir. 1990) 905 F.2d 793, 797 (comment *n* balancing of factors).

(4) *Pfeifer*: An end user's employer is an intermediary whose sophistication is not imputed to the user.

On October 29, 2013, Division Four of the Second District decided *Pfeifer*, 164 Cal.Rptr.3d 112,[7] which follows and builds on all of the foregoing authorities.

First, *Pfeifer* holds expressly that sophisticated-user and sophisticated-intermediary are discrete defenses with different roots and analytical underpinnings. *Id.* at 128-129. The former defense arises from comment *k* and *Johnson*; the latter arises from comment *n* and is properly described in *Stewart*. *Id.*

Second, *Pfeifer* holds that an intermediary's sophistication is not imputed to the downstream end user, even when the user is the intermediary's employee. *Id.* at 132. Under section 388, "to avoid liability, there must be some basis for the supplier to believe that the ultimate user knows, or should know, of the item's hazards." *Id.* Accordingly, the "intermediary's sophistication is not, as [a] matter of law, sufficient to avert liability." *Id.* Instead, "there must be a sufficient reason for believing that the intermediary's sophistication is likely to operate to protect the user." *Id.* "The fact that the user is an employee . . . of the sophisticated intermediary cannot plausibly be regarded as a sufficient reason . . . to infer that the latter will protect the former." *Id.* at 132-133.

This holding that an employer's sophistication is not imputed to its employee product-user, despite the relationship between the two, necessarily

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[7] Because the Cal.App.4th version of *Pfeifer* does not yet have pin cites, we cite to the Cal.Rptr.3d version.

means that an intermediary product manufacturer's sophistication is also not imputed to the end user (with whom the intermediary has no relationship).

(5) The Opinion below: Duty can be "discharged" by "reasonable efforts" to warn or "reasonable reliance" on the intermediary.

The Opinion below follows the *Stewart* formulation of the sophisticated-intermediary defense as a factual issue for the jury. *E.g.*, Opinion at 17. The Opinion properly holds that a supplier can avoid liability by showing factually that it "discharged" its duty to warn, "by a showing of reasonable efforts to provide warnings, or by reasonable reliance upon others to do so." *Id.* at 29.

But Special Electric at trial neither asserted nor showed factually that its duty was reasonably discharged (Opinion at 28), as we now show.

B. The Opinion correctly holds that the trial court had "no legal basis" to rule that Special Electric "owed no duty to warn Webb."

Under the foregoing standards, the Opinion correctly reversed the judgment NOV because "no legal basis" justified the trial court's conclusion that "Special Electric owed no duty to warn Webb."[8] *See* Opinion at 23.

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[8] Special Electric devotes significant discussion to arguing that it had no "duty to warn" Johns-Manville. OB at 10-21. This is a red herring. The Opinion does not hold that Special Electric had a "duty" to "warn Johns-Manville." OB at 2. The duty is to warn Webb; the Opinion merely states that the jury could have found breach of this duty because any warnings given to Johns-Manville "were inadequate." Opinion at 18-19.

1. This case provides a vehicle for this Court to adopt the sophisticated-intermediary defense as articulated in comment *k*, *Stewart*, and *Pfeifer*.

This case does not invoke the sophisticated-user defense. Special Electric has never contended that the end user here, Webb, was sophisticated about the hazards of its asbestos. *See Johnson*, 43 Cal.4th at 66.

Instead, Special Electric asserts the sophistication of mid-stream product manufacturer Johns-Manville – thus invoking the sophisticated-intermediary defense.

Rather than somehow "expand" the sophisticated-user defense (of *Johnson*) to "include" intermediaries (OB at 3), this Court should adopt the discrete sophisticated-intermediary defense as it is articulated in comment *n*, recognized in *Macias*, and followed in *Stewart* and *Pfeifer*.

The distinction is significant. The sophisticated-user defense nullifies liability on proof of just one element: the sophistication of the product's end user who was harmed. And this makes sense in the "user" context. The purpose of the warning requirement is to protect the end user. A user who knows the hazard needs no protection – and accordingly the supplier's failure to warn causes no harm. Thus, no matter the other circumstances, the factual finding of the end user's sophistication negates liability.[9]

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[9] Although the user's sophistication clearly obviates the supplier's failure-to-warn liability, *Johnson* leaves unclear whether this means that the supplier had "no duty" to warn, or that its failure to fulfill its duty did not proximately "cause" the user's harm. *Cf. Johnson*, 43 Cal.4th at 61, 65 ("negate a manufacturer's duty to warn"), 68 ("the failure to warn" is "not the legal cause of any harm"). CACI 1244 is noncommittal: supplier "not responsible." This Court should clarify that the defense rests on a lack of causation – not lack of duty. A supplier always has a duty to warn about its product's hazards. When a specific, injured user proves to have been

But that result does not make sense when the "sophisticated" entity is an intermediary. As comment *n* makes clear, even when an intermediary knows the "information" about the product's hazard, the "question remains" whether there is a "reasonable assurance" that the "information will reach those whose safety depends on their having it." Rest.2d (Torts) § 388, cmt. *n* (2nd par.). Thus, the sophisticated-intermediary defense properly requires two independent factual findings: (1) a warning; plus (2) reasonable reliance.[10]

Although Special Electric asserts that Johns-Manville's "sophistication" satisfied the first element (giving a warning), that is not enough. *Pfeifer* says it best: the "intermediary's sophistication is not, as [a] matter of law, sufficient to avert liability." *Pfeifer*, 164 Cal.Rptr.3d at 132. The supplier must show also that it had "sufficient reason for believing that the intermediary's sophistication [was] likely to operate to protect the user." *Id.*

Whether such reliance was reasonable varies with the circumstances. As comment *n* notes, when an intermediary would be "deprive[d]" of a business "advantage" by passing on a warning, the supplier has "reason to expect" the intermediary will <u>not</u> warn. Rest.2d (Torts) § 388, cmt. *n* (3rd

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sophisticated about the hazard, it does not suggest that the supplier had no duty to protect its customers. Instead, it establishes that, in the particular instance, the supplier's breach of its duty did not cause the particular user's harm. This is consistent with the defense's status as a fact question for the jury. *See Johnson*, 43 Cal.4th at 75; CACI 1244. A jury's factual finding of sophistication cannot properly be said to negate duty – a legal question for the court.

[10] *See Macias*, 10 Cal.4th at 853 ("reasonably rely upon an intermediary" to "convey any necessary warnings"); *Stewart,* 190 Cal.App.4th at 29-30 ("rely upon the intermediary"); *Torres*, 49 Cal.App.4th at 21 ("issue for the jury"); *Persons*, 217 Cal.App.3d at 175 (assess intermediary's "reliability").

par.). Moreover, if the potential harm is severe, a warning to the user is so important that it may be unreasonable ever to rely on an intermediary to warn. *Id.* (last par.).

These are all factual questions to be asked of the jury.

This Court should adopt the sophisticated-intermediary defense, as articulated in comment *n* and case law culminating in *Pfeifer*, as a factual question for the jury.[11]

2. The sophisticated-intermediary defense does not nullify Special Electric's liability for failure to warn.

Applied here, the sophisticated-intermediary defense does not nullify failure-to-warn liability because Special Electric (1) forfeited the defense by failing to present it to the trial court or the jury, and (2) failed to present evidence of the defense's elements (warning or reliance), let alone undisputed evidence warranting JNOV.

a. Special Electric forfeited the sophisticated-intermediary defense.

Special Electric forfeited the sophisticated-intermediary defense by failing to assert it in the trial court, to either the court or the jury.

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[11] This Court should reject the trial court's proposed rule, which deviated from *Stewart* based on the relative sizes of the supplier and intermediary. 18 RT 6617:25-28, 6618:24-26, 6620:24-6621:4 (*Stewart* facts "reversed in this case"). Under the proper rule, the relative size of the parties is just one fact that may affect the reasonableness of reliance on the intermediary to warn.

(1) Asserting the sophisticated-user defense alone was insufficient.

In the trial court, Special Electric on nonsuit expressly asserted only the sophisticated-user defense (under *Johnson*). 1 AA 65-67. By the time of that motion (February 2011), the discrete sophisticated-intermediary defense was well defined by comment *n* (1965) and California cases from *Macias* (1995) to *Stewart* (2010). But Special Electric ignored the defense. *Id.*

Indeed, when Special Electric was confronted with the defense (under *Stewart*), it insisted that the defense and *Stewart* do not apply. 2 AA 323:7-22 (nonsuit reply: "*Johnson* and the obvious danger rule control"); 323:7-22 (same). It continues to so insist in this Court. OB at 18-21.

Special Electric is wrong. The only potentially applicable defense here was sophisticated-intermediary, which does not arise from *Johnson* or the sophisticated-user rationale. *See Stewart*, 190 Cal.App.4th at 28.

Hence, Special Electric's assertion of the sophisticated-user defense did not suffice to preserve the sophisticated-intermediary defense, which Special Electric forfeited.

(2) Special Electric presented neither defense to the jury.

Even if asserting the sophisticated-user defense could somehow suffice to assert the sophisticated-intermediary defense, Special Electric forfeited both factual defenses by failing to present either to the jury.

A party asserting a factual claim or defense is responsible for obtaining an applicable jury finding. Evid. Code § 500; Code Civ. Proc. § 624. Even if the evidence (or instructions) "might support such a finding," if the finding is not part of the verdict, the claim or defense is forfeited. *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.* (1993) 13 Cal.App.4th 949, 961-

962; *see Behr v. Redmond* (2011) 193 Cal.App.4th 517, 530 (plaintiff is "responsible" for verdict form "on her case," but it is "incumbent on" defendant to "see that findings" on a proffered defense "were included in the verdict").

Without question, sophisticated-user is a factual defense to be decided by the jury (under CACI 1244).

Special Electric moved for nonsuit on the defense, asserting "no dispute" on Johns-Manville's sophistication. 1 AA 65-67.

But Special Electric never made that factual defense (or sophisticated-intermediary) part of its case to the jury. It did not request CACI 1244 or any other instruction embracing either defense. *See* Opinion at 18 ("no instruction" that "its duty to warn would be discharged" upon "adequate warnings" to the "intermediary"). Nor did it seek or obtain a verdict form addressing the defense.

Accordingly, that factual defense was simply not made part of the case. Special Electric thus forfeited the defense, which could not properly support a post-verdict order negating the failure-to-warn verdict.

b. Special Electric failed to prove the elements of either defense.

Next, even if Special Electric somehow preserved the sophisticated-intermediary defense by asserting sophisticated-user, it failed to prove the elements of either defense – let alone to present undisputed evidence justifying a nonsuit or JNOV.

An order granting either motion is reviewed under the same standards. The reviewing court evaluates the order "by applying the same standard that governs a trial court's hearing of the motion." Opinion at 11 (*citing Hauter*

v. Zogarts (1975) 14 Cal.3d 104, 110). Motions for nonsuit (and directed verdict) "test the sufficiency of the plaintiff's case," *i.e.*, whether "the evidence" could "justify a judgment for plaintiff." *Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, 272; *Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210; Opinion at 11. Likewise, JNOV is properly granted "whenever a motion for a directed verdict" would have been proper (Code Civ. Proc. § 629) – *i.e.*, when "there is no substantial evidence to support the verdict." *See Campbell v. Cal-Gard Surety Servs., Inc.* (1998) 62 Cal.App.4th 563, 570.

On all of these motions, the court must accept as true the "evidence most favorable to the plaintiff" and resolve any evidentiary conflicts and draw any reasonable inferences in the plaintiff's favor. *Loral Corp.*, 174 Cal.App.3d at 272; *Brassinga*, 66 Cal.App.4th at 210; *Fountain Valley Chat. Blanc Homeowner's Assn. v. Department of Vets. Affs.* (1998) 67 Cal.App.4th 743, 750; Opinion at 11.

Under these standards, the meager evidence adduced by Special Electric failed to warrant nonsuit or JNOV on the sophisticated-intermediary (or -user) defense.

(1) No warning given; sophistication not established.

The first element of the sophisticated-intermediary defense is that the supplier must give an adequate warning to the intermediary. *E.g., Stewart*, 190 Cal.App.4th at 29-30. Without dispute here, substantial evidence supported the jury's finding that Special Electric did not give such a warning to Johns-Manville. 1 AA 146; Opinion at 19 and n.19. Although Special Electric asserted below that it gave an adequate warning (*e.g.*, 1 AA 64-65;

RB at 19-22), it has abandoned that assertion here. *E.g.*, OB at 12 n.6 (now calling lack of warning "irrelevant").

Instead, Special Electric contends that its obligation to give a warning was satisfied because Johns-Manville was "sophisticated," *i.e.* it "already" knew everything about asbestos. *E.g.*, OB at 12.

The cases suggest that such sophistication, if established factually, could suffice as a substitute for giving the intermediary a warning. *E.g.*, *Pfeifer,* 164 Cal.Rptr.3d at 132 (discussing "intermediary's sophistication").

But Special Electric did not establish Johns-Manville's sophistication about Special Electric's asbestos. Specifically, although Johns-Manville was a large asbestos company, no evidence showed that it was sophisticated about Special Electric's crocidolite asbestos or that it was not susceptible to Special Electric's sales pitch that such asbestos was "safer" than the chrysotile Johns-Manville mined and sold.[12] *E.g.*, 6 RT 1683:6-28, 1693:6-10, 1731-1732.

Moreover, because Special Electric did not present the issue of Johns-Manville's sophistication to the jury, the evidentiary record was not developed. If the issue had been raised, plaintiffs could have proffered evidence that Johns-Manville was not "sophisticated" about crocidolite asbestos. But it was not raised, so plaintiffs did not present any such evidence.

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[12] Special Electric's claim that it "could not have told Johns-Manville anything about asbestos" (OB at 6) cites evidence from a Johns-Manville employee that (1) was specific to the employee and thus does not apply to Johns-Manville generally, and (2) did not address crocidolite. *See* 9 RT 2651:3-6.

(2) No evidence of reasonable reliance.

Next, even if the underdeveloped evidence of Johns-Manville's "sophistication" satisfied the first (warning) element, Special Electric presented zero evidence that it actually or reasonably relied on Johns-Manville to warn end users. *See* Opinion at 23 n.23 ("never claimed to have relied," and the "record contains ample evidence that any such reliance" would have "been unjustified"); OB at 22-24 (not claiming any actual reliance).

Moreover, the Opinion specifically notes ample evidence that Special Electric did not so rely on Johns-Manville: "far from reasonably relying on Johns-Manville to warn potential users of its asbestos, Special Electric was itself engaged in an effort to conceal the dangers of its asbestos" and had "no intention of making any effort to warn potential users or obtaining Johns-Manville's aid in doing so." Opinion at 26.

Further, a jury could find that, under the circumstances, Special Electric could not have relied on Johns-Manville reasonably, as comment *n* illustrates. Because Johns-Manville would lose a business "advantage" by warning downstream customers, it was not reliable to do so. Rest.2d (Torts) 388, cmt. *n* (3rd par.). And because the danger posed by the product was so "grave," a jury would be justified in finding that any actual reliance on Johns-Manville to warn was necessarily unreasonable. *Id.* (4th par.).

Lacking any evidence of reasonable reliance, Special Electric asserts that it could "presume" that Johns-Manville would warn, and it had "no reason to believe" it would not.[13] OB at 21-24. Indeed, Special Electric

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[13] Special Electric erroneously relies on the generic rule that people can "presume" that another will "perform his duty and obey the law" (OB at 21),

stresses, Johns-Manville "knew the hazards," so of course it "would accordingly convey a warning." OB at 22.

But Special Electric presented no evidence that Johns-Manville was reliable or that its hazard-knowledge made it reliable to warn. Indeed, Special Electric "knew the hazards," but it had no trouble selling the product without a warning. A jury could find Johns-Manville equally unreliable.[14]

Moreover, even if Special Electric could somehow "presume" Johns-Manville's reliability, it still presented no evidence that it actually relied. For example, a Special Electric witness could have testified that the company chose not to warn because it was confident that Johns-Manville would do so. No such evidence was presented.

c. No policy reason exists to exempt Special Electric from liability.

This Court should apply the existing, principled rules governing assertedly "sophisticated" intermediaries. No policy reason exists to exempt Special Electric here.

The record shows that Special Electric was highly culpable. It knew its asbestos was hazardous. But it made no effort to warn anyone – not end users or its direct customers. To the contrary, the evidence shows that it

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a concept that applies to assertions of comparative negligence. *E.g.*, *Celli v. Sports Car Club of Amer., Inc.* (1972) 29 Cal.App.3d 511, 523 (cited at OB 21). If this was the rule, upstream product suppliers could always avoid liability, not just regarding warnings but even by "presuming" that the mid-stream manufacturer would "perform his duty" and not market a defective product.

[14] Evoking the trial court's analogies (18 RT 6618:4-12), a jury could find it unreasonable to rely on Newcastle to warn about the dangers of coal or the Pope to preach against Catholicism.

generated business with false claims of safety that it knew were not true. In truth, Special Electric did not care one iota about product users.

But Special Electric now seeks to avoid liability by implicating Johns-Manville as the only cause of Webb's harm. Without a doubt, Johns-Manville was culpable too. But its culpability does not eliminate Special Electric's. *See Stewart*, 190 Cal.App.4th at 30 ("If both [supplier] Union Carbide and the sophisticated intermediary failed to give warnings, that should not absolve Union Carbide of responsibility.").

The jury properly apportioned the tortfeasors' relative culpability at 49% for Johns-Manville and just 18% for Special Electric. 1 AA 148. But the jury properly rejected Special Electric's claim that Johns-Manville was the sole ("superseding") cause of Webb's harm. *See* 1 AA 111 (instruction); *Jacoves v. United Merch. Corp.* (1992) 9 Cal.App.4th 88, 111 (if "intervening conduct is simply the failure to protect a person from a harm that was directly threatened by the defendant's prior negligence," it is "not a superseding cause").

Special Electric already avoided much greater liability by implicating Johns-Manville. No greater reduction, let alone elimination of liability, is warranted.[15]

This Court should affirm the Opinion's reversal of the JNOV on substantive grounds.

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[15] Special Electric also argues here, for the first time, that it had no warning duty because its asbestos was "not being put to its intended use." OB at 26 n.9. Never raised before, this factual claim is forfeited; nor was the asbestos (itself harmful) a mere part of a "harmful combined use." *See id.*

II.
The JNOV's procedural error: The Opinion correctly holds that the JNOV was procedurally invalid.

The Opinion correctly reversed the judgment NOV also because it was procedurally invalid.

Special Electric's only relevant motions were for nonsuit and directed verdict. Neither were ruled on before the verdict. But after the verdict, the court purported to grant both of these motions and to treat them as a "JNOV" motion that was never brought and grant that too.

The court could not properly grant them all because the pre- and post-verdict motions are mutually exclusive. A prerequisite for JNOV is a judgment on the jury's verdict; but such a judgment necessarily negates any pre-verdict motions to keep claims from the jury.

In any case, neither a nonsuit/directed verdict nor a JNOV was procedurally valid.

A. Legal standards: Nonsuits and directed verdicts keep claims from the jury; JNOV negates the verdict.

Motions for nonsuit and directed verdict are pre-verdict motions that seek to keep a claim from the jury because the evidence is insufficient to support a plaintiff's verdict. A nonsuit motion may be brought after the plaintiff's presentation of evidence is complete. Code Civ. Proc. § 581c. A directed-verdict motion may be brought after "all parties" have presented their evidence. Code Civ. Proc. § 630.

A JNOV motion is "analytically the same" as the pre-verdict motions, but it is brought "following an unfavorable jury verdict." *Fountain Valley*, 67 Cal.App.4th at 750.

B. Granting the pre-verdict motions was beyond the trial court's power.

The trial court could not properly grant nonsuit or a directed verdict because (1) Special Electric failed to obtain a ruling before the verdict, and (2) the trial court, as a predicate to entering a purported JNOV, entered judgment on the jury's verdict.

1. Special Electric forfeited its pre-verdict motions by failing to obtain a ruling before the verdict.

The trial court could not properly grant the pre-verdict motions to keep claims from the jury because Special Electric failed to obtain a ruling on those motions before the jury rendered its verdict.

The pre-verdict motions necessarily lie before the jury renders its verdict: the "defendant may move for a nonsuit if the case has not yet been submitted to the jury, [or] a directed verdict if the case is about to be submitted." *Fountain Valley*, 67 Cal.App.4th at 750. But once an "unfavorable jury verdict" has been rendered, the only proper challenge is a JNOV motion. *Id.*

The Opinion did not find it necessary to decide whether the court's "powers" to grant nonsuit or a directed verdict "expire automatically when a verdict is rendered." Opinion at 15. Special Electric insists that those motions can properly be "ruled on" after a "verdict is rendered."[16] OB at 39, 40.

Special Electric is wrong. The governing statutes (Code Civ. Proc. §§ 581c, 630) indicate that, once the jury has rendered its verdict, the court

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[16] Contrary to Special Electric's contention, plaintiffs at every level below "advocate[d]" that, "once a verdict is rendered," it can be challenged only by JNOV. OB at 39; *see* 1 AA 176-177, 219-220; AOB at 35-37; Reply at 6-8.

cannot grant either motion. Under both statutes, if nonsuit or a directed verdict is granted as to some but not all claims, "the action shall proceed as to the issues remaining." Code Civ. Proc. §§ 581c, subd. (b), 630, subd. (b). But if the court grants either motion after the verdict, there is no action left to "proceed."

Moreover, section 630 indicates that a directed verdict cannot be granted after a verdict. The section authorizes a directed verdict after the case is submitted – but only if the jury "has been discharged without having rendered a verdict." *Id.*, § 630, subd. (f). Under the principle of *expressio unius est exclusion alterius*, "the expression of one thing in a statute ordinarily implies the exclusion of other things." *Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 531. Here, the Legislature has declared one circumstance when a directed verdict can be granted after the jury is discharged: when it is "without having rendered a verdict." Code Civ. Proc. § 630, subd. (f). This expression "implies the exclusion" of the opposite – *i.e.*, the trial court cannot grant a directed verdict when the jury is discharged <u>having</u> rendered a verdict. If (as Special Electric now asserts) the court could always grant a directed verdict after the jury is discharged, there would be no reason to allow it expressly in a no-verdict situation – rendering subdivision (f) surplusage.

2. The trial court entered judgment for plaintiffs on the verdict, nullifying the pre-verdict motions.

Next, even if the trial court could somehow grant a pre-verdict motion after the verdict, it lost that power when it entered judgment on the verdict (to facilitate entering "JNOV"). 2 AA 380; 18 RT 6936:14-17.

This procedure, to which Special Electric did not object (18 RT 6936-6938), necessarily nullified the pre-verdict motions to keep claims from the jury. The judgment for plaintiffs preserved the verdict, with jury findings on all claims submitted including failure-to-warn. The pre-verdict motions to keep that claim from the jury had failed and could not later be granted.

After the judgment, the only possible relief available was a post-verdict motion (*e.g.* JNOV).

3. Plaintiffs did not acquiesce in deferring the rulings until after the verdict.

Special Electric is wrong to argue that plaintiffs "should have raised any concerns" in the trial court but "never objected to deferring the rulings" on the pre-verdict motion, even "agree[ing] to a schedule for filing briefs after the jury verdict." OB at 41.

Plaintiffs raised "extensive objections to the court's procedure in ruling on the pre-verdict motions after the verdict had been rendered." Opinion at 8 n.10. The only delay to which plaintiffs agreed was deferring the nonsuit motion for a few days, before the verdict, to give plaintiffs a "chance in writing to respond." 11 RT 3002:14-15, 3003:25-3004:3. Special Electric's counsel memorialized this limited deferral:

> [S]o we're clear, we're making this motion, but we understand the Court will not rule on it until it's had an opportunity to review the briefs.

11 RT 3004:6-8; *accord* 18 RT 6602:23-28 (deferral to "allow plaintiffs the opportunity to file written opposition"). On directed-verdict, the record contains no discussion of deferring the ruling.

Special Electric never requested, and the parties never discussed, deferring any rulings until after the verdict.

C. The trial court could not properly save its order by granting JNOV.

Next, the defects in the trial court's order purporting to grant the pre-verdict motions were not cured by its attempt to "treat" the motions as for JNOV. Opinion at 12-14.

1. A JNOV requires a noticed motion, which was never brought.

As the Opinion correctly holds, JNOV requires a noticed motion, either (1) "on motion of a party," or (2) "on [the court's] motion after five days' notice." Code Civ. Proc. §§ 629 (1st ¶), 1005, subd. (a)(13); *see* Opinion at 13-14.

Here, neither Special Electric nor the trial court ever moved for JNOV. When the trial court correctly suggested a JNOV motion, Special Electric expressly declined, opting to pursue its (moot) pre-verdict motions. 18 RT 6302:7-22, 6303:12-17. Nor did the trial court move for JNOV with five days' notice. Indeed, the court did not "move" for JNOV at all, instead deciding at the final hearing to "treat" Special Electric's pre-verdict motions as a "JNOV" motion. 18 RT 6902:26-6903:1; *accord* OB at 41.

Moreover, even if this could somehow constitute a sua-sponte "motion," the court did not give "five days' notice," instead entering JNOV that same day. 2 AA 380.

2. A "JNOV" was premature, occurring before the time to move for a new trial.

The Opinion correctly holds that the supposed "JNOV" was impermissibly premature. Opinion at 12-13.

"The trial court shall not rule" on a JNOV motion "until the expiration of the time within which a party may" move for a new trial, *i.e.*, 15 days after service of notice of entry of judgment. Code Civ. Proc. §§ 629, 659; *Sturgeon v. Leavitt* (1979) 94 Cal.App.3d 957, 963-964. Here, the trial court purported to grant "JNOV" on the same day that it entered judgment.

Special Electric's only response is that section 629's statement that the court "shall not" rule prematurely is somehow not a limitation on its "power" to do so. OB at 43-44. But Special Electric fails to explain the difference – "shall not" is most certainly prohibitive.

3. A JNOV may properly challenge only findings in the verdict.

The "JNOV" was invalid also because it rested on factual issues that were not put before the jury in the instructions or verdict.

As the name implies, a "judgment notwithstanding the verdict" attacks the verdict as lacking support in substantial evidence. "The trial court has limited discretion" to grant JNOV: "only when there is no substantial evidence to support the verdict." *Campbell*, 62 Cal.App.4th at 570.

As discussed above regarding substantive error, Special Electric failed to either (1) request an instruction on its factual sophisticated-user defense (CACI 1244), or (2) present that defense to the jury. Thus, the defense was not part of the verdict and accordingly was forfeited. Even a noticed JNOV motion attacking the verdict could not have revived the defense.

D. The order erroneously granted relief on grounds not asserted in the motions.

Next, the trial court's order, whether granting the pre-verdict motions or treating them as a JNOV, was invalid also because it improperly granted relief on grounds not asserted in Special Electric's motions.

The court's power to grant nonsuit and directed verdict is strictly limited to the "precise grounds" stated in the moving papers. *John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 161; *Loral Corp.*, 174 Cal.App.3d at 272-273; *Brassinga*, 66 Cal.App.4th at 210. The purpose of this strict requirement is to "giv[e] the plaintiff an opportunity to cure the defect by introducing additional evidence." *John Norton Farms*, 124 Cal.App.3d at 161; *accord Loral Corp.*, 174 Cal.App.3d at 272.

Here, Special Electric did not assert the sophisticated-intermediary defense that it now asserts in this Court. The nonsuit motion challenging failure-to-warn was expressly limited to the "sophisticated user" defense adopted in *Johnson*. 1 AA 56:19-57:2, 63:18-64:6 and n.2, 65:12-14. At that time, the discrete sophisticated-intermediary defense was well-established (by comment *n*, *Macias*, and *Stewart*), but Special Electric did not assert it.

Special Electric's assertion of the sophisticated-user defense cannot, and should not, be construed broadly to assert also sophisticated-intermediary, a defense that does not arise from *Johnson*. *See Stewart*, 190 Cal.App.4th at 28.

Nor was it enough for Special Electric, weeks after the jury rendered its verdict and was discharged (February 17), to shift its arguments to "sophisticated intermediary." *See* 1 AA 152:1-153:3 (March 9 reply); 18 RT 6608:26-6609:2 (March 16 hearing: first arguing that it "legally may rely on

. . . Johns-Manville to issue warnings"). As noted above, nonsuit can be granted only on the "precise grounds" stated in the motion, so that the plaintiff has an "opportunity to cure the defect by introducing additional evidence." *John Norton Farms*, 124 Cal.App.3d at 161. If Special Electric had invoked the sophisticated-intermediary defense on nonsuit, plaintiffs could have introduced evidence rebutting the defense, *e.g.*, exploring (1) Johns-Manville's "sophistication" about the hazards of crocidolite asbestos and the effect of Special Electric's "safety" claims," and (2) any "reliance" by Special Electric on Johns-Manville to provide warnings. But absent the assertion of the defense, plaintiffs had no reason or opportunity to present such evidence.

E. The faulty JNOV procedure prejudiced plaintiffs.

Finally, Special Electric is wrong to contend that the trial court's procedural error in negating the verdict should be overlooked because it supposedly did not "prejudice" plaintiffs. OB at 44-45.

A judicial error is prejudicial if "a different result would have been probable if" the error "had not occurred." Code Civ. Proc. § 475.

According to Special Electric, if the trial court had not granted an improper "JNOV" motion that was never brought but had instead (1) ruled before the verdict on nonsuit, or (2) ruled post-verdict on a properly noticed JNOV motion, the "same result would have been obtained." OB at 45.

But that is not how the "prejudice" inquiry works. Special Electric asks this Court to assess hypothetically what might have happened if Special Electric had followed some procedure it never followed, *i.e.*, obtained a ruling on nonsuit, or brought a proper JNOV motion. We do not know what would have happened then because Special Electric never followed those

procedures. Instead, in assessing a trial-court error for prejudice, the reviewing court asks simply: if the trial court had not made the erroneous ruling, would the outcome have been different?

Here the answer is indisputably "yes." The jury entered a verdict for plaintiffs. The trial court's erroneous ruling was granting an invalid JNOV. If that error "had not occurred," *i.e.*, the court had not granted a JNOV that vacated the verdict, then the verdict for Webb would have been left intact – a different result. That is prejudice.

Moreover, the entire procedure prejudiced Webb also because Special Electric's arguments continually changed, denying Webb the opportunity to properly oppose them. As the Opinion notes, the "grounds argued by Special Electric" after the verdict "were not the same as those stated in its initial briefs" – *i.e.*, in the only motions Special Electric ever brought. Opinion at 6.

Further, if Special Electric had pressed for a pre-verdict ruling on the nonsuit motion that was brought, Webb would have been afforded the "opportunity to offer additional evidence to overcome the claimed deficiencies in [his] case." Opinion at 8 n.10.

The procedurally invalid JNOV prejudiced plaintiffs and thus was properly reversed by the Opinion.

F. With the JNOV reversed, the underlying judgment is final.

Finally, Special Electric is wrong to contend that, if granting the pre-verdict motions as a JNOV was procedurally improper, the "result should have been a reversal that would allow Special Electric to make post-judgment motions." OB at 41. According to Special Electric, it "did not

have the opportunity to file a JNOV motion" because "judgment against it was never entered." *Id.*

This is wrong on both counts. Special Electric had the chance to move for JNOV. Indeed, the trial court encouraged a JNOV motion that would "wrap the whole thing into one," but Special Electric declined, insisting on an improper procedure. 18 RT 6302-6303, Opinion at 6. Moreover, the trial court did enter judgment against Special Electric – on April 18, as a necessary predicate to granting "JNOV." 2 AA 380; 18 RT 6936:14-17; Opinion at 9.

This case cannot be "returned to the trial court to allow Special Electric the opportunity to file a JNOV motion" (OB at 41) because Special Electric failed to cross-appeal. Plaintiffs properly appealed from the April 22 judgment NOV (2 AA 384), seeking to reverse the JNOV and reinstate the original judgment on the jury's verdict.[17] 2 AA 404. But Special Electric failed to file a protective cross-appeal from the underlying judgment.[18]

"In the case of a protective cross-appeal, the cross-appellant is appealing from a judgment . . . as protection in the event the appellate court reverses an order granting a new trial or judgment notwithstanding the verdict." *Ruiz v. Harbor View Comm'y Ass'n* (2005) 134 Cal.App.4th 1456, 1475. *Ruiz* cited with approval the leading Rutter Group treatise, which

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[17] *See Trujillo v. North Cty. Trans. Dist.* (1998) 63 Cal.App.4th 280, 285 n.2 ("The appeal is from the judgment entered after the grant of JNOV, not the order itself").

[18] *See* Rule of Court ("Rule") 8.108, subd. (g)(2) ("If an appellant timely appeals from an order granting [JNOV] . . . , the time for any other party to appeal from the original judgment . . . is extended until 20 days after the clerk serves notification of the first appeal.").

explains the effect of the failure to file a protective cross-appeal:

> If the party who prevailed under the original judgment successfully appeals the order vacating the judgment or granting a new trial or 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, Horvitz & Weiner, CAL. PRAC. GUIDE: CIVIL APPEALS AND WRITS (The Rutter Group 2013), § 3.169, p. 3-74 (emphasis in original); *see Ruiz*, 134 Cal.App.4th at 1475; *Savnik v. Hall* (1999) 74 Cal.App.4th 733, 739 n.5 (both citing treatise section with approval).

This rule was applied by this Court in *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, where the trial court had granted the defendant Bank a new trial, vacating the plaintiffs' judgment. *Id.* at 898. The plaintiffs appealed the order granting a new trial, but the Bank did not cross-appeal from the underlying judgment. *Id.* Accordingly, when this Court reversed the order granting a new trial and vacating the judgment, it ordered that, "[b]ecause defendant has failed to file a protective cross-appeal, reinstatement of [the original] judgment will automatically be final." *Sanchez-Corea*, 38 Cal.3d at 910 (emphasis added). Moreover, this result obtained in *Sanchez-Corea* even though the JNOV was reversed as procedurally "defective" and "invalid" (failing to specify proper grounds). *Id.*

The same result obtains here. Special Electric's failure to cross-appeal means that the Opinion's reversal of the "invalid" JNOV reinstated the original judgment on the verdict, which is automatically final.

The case cannot be remanded for another challenge to the verdict.

III.
The incomplete JNOV: The verdict rests independently on general negligence.

Next, even if the trial court was somehow correct to negate the failure-to-warn verdict, the Opinion's reversal of JNOV should still be affirmed because the underlying plaintiffs' judgment rests on their general-negligence claim, which was never challenged by Special Electric's nonsuit motion and thus stands independently.

As shown above, the jury was presented with separate causes of action for (1) failure to warn, and (2) general negligence in "designing, manufacturing or supplying" a product, unrelated to failure to warn. *See* Procedural History Parts D, E.

At most, the "JNOV" negating failure to warn could affect only the failure-to-warn claim, not general negligence.

First, the motion that was granted (nonsuit converted to JNOV) expressly challenged only the "one cause of action" for "failure to warn." 11 RT 3002:14-3003:27; 1 AA 62:23-24, 67:18. Accordingly, the court's order could affect only that "one cause of action."

Second, Special Electric acknowledged that these were separate claims at every stage of trial:

- Acquiescing in separate instructions on each claim. 1 AA 115, 121 (warning), 119-120 (negligence).
- Preparing a verdict form with separate findings on each claim. 1 AA 145-146.1.
- Arguing in summation that the claims were separate: "failure to warn" and "otherwise negligent." 16 RT 4718:12-21, 4721:20-22; 17 RT 4833:20-22.

Consistent with this trial theory, the jury rendered separate findings for plaintiffs on the failure-to-warn and general-negligence claims. Thus,

the JNOV order negating failure-to-warn liability could not affect the general negligence claim, as the Opinion correctly holds. Opinion at 29-32.

But Special Electric now contends that, contrary to every action it took at trial, there really was no separate general-negligence verdict. OB at 37-41. Apparently, that separate verdict was really just another failure-to-warn verdict, which was swept up in the JNOV. *Id.*

Not so. First, Special Electric cannot now challenge the verdict on the negligence claim. Because the nonsuit motion did not challenge that claim, the "JNOV" could not affect it. Accordingly, Special Electric is really now asserting that the negligence verdict was not supported by substantial evidence of negligence in the supply of asbestos. *See* OB at 37-39 (trying to minimize the evidence of its negligence). But having failed to cross-appeal, Special Electric has no standing to challenge the substantiality of the evidence supporting the negligence verdict. *See Sanchez-Corea* , 38 Cal.3d at 910; *Savnik*, 74 Cal.App.4th at 739 n.5). Its challenge here is limited to the grounds of its nonsuit motion.

Second, ample evidence allowed the jury to find Special Electric negligent in supplying its asbestos: from importing 15 million pounds of it to isolating the business in a separate legal entity to avoid "product liability" to generating business with false claims of safety. *See* Opinion at 31.

At a minimum, the Opinion should be affirmed because the "JNOV" negating the failure-to-warn claim could not affect the general-negligence verdict.

IV.

The directed-verdict motion: Special Electric's "just a broker" argument was abandoned and defeated by the evidence.

Next, Special Electric cannot obtain a reversal of the Opinion based on its argument, raised only on directed verdict, that it was supposedly "just a broker" who did not sell asbestos and thus "should not have been subject to strict liability. OB at 32.

First, neither the verdict nor the judgment subjects Special Electric to strict liability. On the only strict-liability claim, the jury found for Special Electric. 1 AA 144.

Second, this argument was long ago forfeited. After the verdict, Special Electric abandoned its "just a broker" argument (from directed verdict), pressing only its challenge to the failure-to-warn claim from nonsuit. 18 RT 6603-6609; Opinion at 6. Accordingly, the trial court's JNOV order had nothing to do with the abandoned "just a broker" argument, resting only on a ruling that Special Electric did not fail to warn. 18 RT 6912:5-11.

Third, the jury properly rejected the "just a broker" argument, finding that Special Electric "sold or supplied" asbestos to which Webb was exposed. 1 AA 144:1-6. That finding rested on substantial evidence:

1. Special Electric's principal Wareham admitted openly and repeatedly that his Special entities were "selling" asbestos. 6 RT 1655:8-13 (Wareham: "sells asbestos fiber"), 1664:20-22 ("selling asbestos"), 6 RT 1667:8-11 (Wareham "selling asbestos" since 1969), 1668:4-5 ("sell"), 1675:12-14 ("selling"). His employee Weesner agreed. 6 RT 1681:1-6, 1688-89, 1692:22-1693:1, 1693:11-14.

2. Contrary to Special Electric's claim (OB at 4, 32, 36), it "possessed" the asbestos it sold. The salesmen carried asbestos samples "provided" by "Special Electric" (6 RT 1693:24-1694:28), and it sent customers "sample order[s]" of asbestos (10 RT 2731:3-6). Some of its asbestos was even shipped, not from South Africa, but from Philadelphia. 6 RT 1702:2-17.

3. Special Electric was paid directly for the asbestos it sold. *E.g.*, 9 RT 2594-2595 (Special Materials invoice).

4. Special Electric indicated in discovery responses (read to the jury) that it did "import, export, ship, transship, or otherwise transport raw asbestos." 8 RT 2354:17-23, 2356-2358.

In sum, Special Electric's "just a broker" argument cannot support reversal of the Opinion.

V.

The exposure and causation challenges: Defeated by waiver (no cross-appeal) and substantial evidence.

Finally, Special Electric improperly tries to challenge two factual findings from the underlying verdict: (1) that Webb was exposed to its asbestos (1 AA 144; OB at 46-50); and (2) that Special Electric's failure to warn was a substantial factor in causing Webb's harm (1 AA 146.1; OB at 30-32).

Again, Special Electric's failure to cross-appeal bars this challenge. *Sanchez-Corea*, 38 Cal.3d at 910; *Ruiz*, 134 Cal.App.4th at 1475. The only issue in this Court is the propriety of the JNOV on failure to warn.

In any case, the exposure and causation findings are supported by substantial evidence, as the Opinion finds. Opinion at 21-22 and n.22; *see* Reply at 38-41 (summarizing exposure evidence). Indeed, Special Electric did not even argue to the jury that there was no evidence of exposure, only asking the jury to doubt the credibility of the exposure evidence because the exposure chain had "missing links" or the exposure was "negligible" or "insubstantial." *E.g.,* 17 RT 4816:23-25, 4825:26-28, 4832:3-6. Special Electric now argues a total lack of exposure – an argument it was unwilling to make at trial.

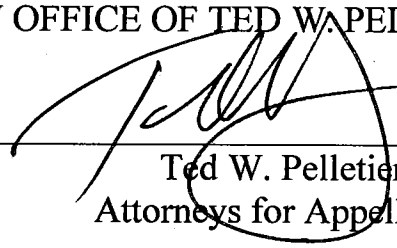
Likewise, the jury properly rejected Special Electric's claim that Johns-Manville was a "superseding" cause of Webb's harm (OB at 31-32), implicitly finding (under the instructions) that Johns-Manville's conduct was not "highly unusual" nor caused "[un]expected" harm. 1 AA 111.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Opinion, including adopting the factual sophisticated-intermediary defense (of comment *n*, *Macias*, and *Pfeifer*).

Dated: December 9, 2013 PAUL & HANLEY LLP

LAW OFFICE OF TED W. PELLETIER



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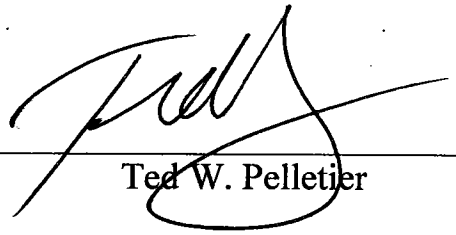

Ted W. Pelletier

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(C.C.P. §1013(a), 2015.5)

I, the undersigned, hereby declare under penalty of perjury as follows:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action; my business address is 22 Skyline Road, San Anselmo, CA 94960.

On this date I served on the interested parties in this action the within document:

ANSWER BRIEF ON THE MERITS

by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, in the United States Mail at San Anselmo, California, addressed as follows:

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