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IN THE SUPREME COURT OF CALIFORNIA

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WILLIAM B. WEBB and JACQUELINE V. WEBB
Plaintiffs and Appellants,

v.

SPECIAL ELECTRIC COMPANY, INC.,
Defendant and Respondent.

SUPREME COURT
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AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B233189

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

Special Electric, a small Wisconsin company, brokered the sale of asbestos from a South African mining company to Johns-Manville, one of the largest, most sophisticated manufacturers of asbestos-containing products the world has ever known. Did Special Electric commit a tort by not telling Johns-Manville about asbestos hazards already known to Johns-Manville? Did Special Electric commit a tort by failing to do the impossible—issue asbestos warnings to anyone around the world who might use a Johns-Manville product containing asbestos sold through Special Electric's services? Did Special Electric commit a tort by not imposing a contractual duty on Johns-Manville to do something

Johns-Manville was already required by law to do—warn its own customers of hazards known or knowable to Johns-Manville?

The Court of Appeal majority answered yes to these questions. But the court also acknowledged that Johns-Manville was, undeniably, "a sophisticated user of asbestos, who needed no warning about its dangers." (Typed opn. 17.) That undisputed fact precludes liability against Special Electric as a matter of law. Whether viewed under a duty analysis or a causation analysis, the placement of a sophisticated manufacturer like Johns-Manville between a raw material broker like Special Electric and the end-users of Johns-Manville's products should defeat any failure-to-warn claim against Special Electric.

In *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56 (*Johnson*), this Court held that a defendant owes no duty to warn a sophisticated product user of dangers that the user would already be expected to know. The failure to provide warnings about risks already known cannot be a *cause* of the plaintiff's injuries in any meaningful sense. (*Id.* at p. 65.)

The same principles apply here. Johns-Manville knew the hazards of asbestos, Special Electric had no role in how Johns-Manville used the asbestos it purchased, and Special Electric could not possibly have warned Johns-Manville's customers, much less end-users like Mr. Webb. Any purported failure to warn by Special Electric therefore cannot be the legal cause of Mr. Webb's injuries.

Plaintiffs' brief attempts to avoid this result by drawing artificial distinctions between the sophisticated user defense and the sophisticated intermediary defense, and then arguing that

Special Electric initially picked the wrong doctrine when presenting its case below. Plaintiffs' arguments are misguided, because the sophisticated user/purchaser/intermediary defenses are overlapping concepts based on the same principles of public policy. The different iterations of the defense all arise from the fundamental notion that the law does not impose liability for failing to tell someone something they already know. In any event, the undisputed evidence requires application of the sophisticated intermediary defense even as narrowly construed by plaintiffs—Special Electric sold to a sophisticated purchaser; Special Electric could not itself warn downstream purchasers or end-users; and Special Electric could reasonably rely on Johns-Manville to warn.

Plaintiffs, not Special Electric, have changed their theory of the case. In the trial court plaintiffs argued they were *not* asserting that Special Electric had a duty to warn Johns-Manville, or that Special Electric had a duty to warn Mr. Webb directly. (18 RT 6904.) Their sole "theory of the wrong" was that Special Electric failed to contractually compel Johns-Manville to fulfill its preexisting tort duty to warn customers. (*Ibid.*) They have abandoned that theory in this Court, making it difficult to discern what they now contend Special Electric should have done.

Plaintiffs further contend the trial court used a defective procedure to grant posttrial relief and enter judgment for Special Electric. However, because plaintiffs had ample opportunity to address all of the arguments before the court granted judgment for Special Electric, they were not denied proper process. Moreover, this Court may affirm the trial court's judgment for Special Electric

because the trial court erroneously failed to grant judgment for Special Electric at an earlier stage of the case, when Special Electric moved for nonsuit and directed verdict. (Code Civ. Proc, § 906.)

For these reasons, this Court should reverse the majority opinion of the Court of Appeal, and reinstate the judgment in favor of Special Electric.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED JNOV BECAUSE THE UNDISPUTED FACTS DEMONSTRATE THAT SPECIAL ELECTRIC IS NOT LIABLE AS A MATTER OF LAW.

A. A broker or supplier should have no duty to warn a sophisticated manufacturer of hazards that are at least as readily known to the manufacturer.

This Court held in *Johnson*, *supra*, 43 Cal.4th 56, that a product manufacturer had no duty to warn someone who needed no warning. That holding was based on comment k to section 388 of the Restatement Second of Torts, and on the "obvious danger rule." Comment k states that a duty to warn arises only if a product supplier "has no reason to expect that [the item's user] will . . . realize the danger involved." (Rest.2d Torts, § 388, com. k., pp. 306-307.) The obvious danger rule likewise provides that there is no need to warn of known risks. (*Johnson*, at pp. 66-67.)

In *Johnson*, the person who needed no warning happened to be the user of the product, but the rationale of *Johnson* applies equally to other situations. It would be pointless to require a warning to *anyone* who needs no warning, whether that person be an end-user or a manufacturer like Johns-Manville. (*Johnson, supra,* 43 Cal.4th at p. 67 ["there is no need to warn of known risks"].) Indeed, *Johnson* cited with approval to cases finding a defendant had no duty to warn someone who was a non-user of the product. (*Id.* at pp. 66-69, citing *Akin v. Ashland Chemical* (10th Cir. 1998) 156 F.3d 1030, *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862 and *In re Related Asbestos Cases* (N.D.Cal. 1982) 543 F.Supp. 1142.) Accordingly, this Court used language applicable to sophisticated *purchasers* as well as sophisticated users: "The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated *purchaser* usually is not a proximate cause of harm resulting from those risks . . . .' " (*Johnson,* at p. 65, emphasis added, quoting *Billiar v. Minnesota Mining and Mfg. Co.* (2d Cir. 1980) 623 F.2d 240, 243.)

The Court further explained that it would be poor public policy to require defendants to needlessly provide information to someone who is expected already to have that information; such a requirement would promote contempt for warnings and undermine their efficacy altogether. (*Johnson, supra,* at p. 70.)

Plaintiffs engage in a hypertechnical analysis that ignores the underlying rationale of *Johnson.* According to plaintiffs, *Johnson* recognized a "sophisticated user" rule that applies only

when the sophisticated party is an end-user who claims injury from the defendant's product. (ABOM 27-29, 37.) Plaintiffs further contend that an entirely different doctrine, the "sophisticated intermediary" rule, provides a defense only narrowly, when the defendant both warns the intermediary (albeit unnecessarily) and also reasonably relies on the intermediary to pass along warnings to the end-user. (ABOM 30-34, 36-40, relying heavily on *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 28-30.)[1]

Plaintiffs' argument relies more on semantics than principles. The concepts of the sophisticated user, sophisticated purchaser, and sophisticated intermediary are not the mutually exclusive and independent doctrines that plaintiffs describe. They are "overlapping" concepts, all rooted in the basic principle that the law does not impose a duty to warn someone who needs no warning. (See *Pfeifer, supra,* 220 Cal.App.4th at pp. 1290-1292 [noting that courts have used the term "sophisticated user defense" in cases involving knowledgeable third parties as well as knowledgeable end-users].)

The facts here concerning the extended chain of mining and selling of raw asbestos, and manufacturing, marketing, distribution, and eventual sale of a separate product demonstrate just how indefinite are the lines between intermediaries, purchasers, and users. Plaintiffs wrongly presume that Mr. Webb is the only

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[1] This rule, stated in dictum in *Stewart,* was rejected by *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1297 (*Pfeifer*), which held there were "many ways" the defense could apply "[i]n lieu of showing that warnings were issued to the intermediary."

relevant "user" for purposes of the sophisticated user defense, and they point out that *he* was not sophisticated. (ABOM 37.) From Special Electric's perspective, however, *Johns-Manville* was the user of the raw asbestos that Special Electric provided in its broker role. Johns-Manville used that asbestos to manufacture finished products. Johns-Manville then marketed and sold those products to downstream consumers, like Mr. Webb's employer. Mr. Webb never used raw asbestos from Special Electric; he was the end-user of *Johns-Manville's* products.

A different scenario is presented when a manufacturer sells a finished consumer product to a wholesaler, distributor, or retailer, who then passes along the manufacturer's finished product to the end-user. That is the scenario contemplated by comment n to section 388 of the Restatement, upon which plaintiffs rely in their interpretation of the sophisticated intermediary doctrine. (See Rest.2d Torts, § 388, com. n, p. 307 ["Chattels are often supplied for the use of others . . . as when a wholesale dealer sells to a retailer goods which are obviously to be used by the persons purchasing them from him"].) In such situations, the manufacturer often can supply warnings to the end-user by printing warnings on the product or packaging.

But that is not our case. Here, Special Electric arranged for Johns-Manville to purchase raw asbestos, which was to be incorporated into a finished product. Johns-Manville knew far more than a broker like Special Electric about any potential hazards that might arise from Johns-Manville's use of asbestos. Johns-Manville created and controlled the manufacturing process, and designed,

packaged, and marketed the finished product. Johns-Manville was the only entity that could realistically evaluate and warn purchasers of any dangers associated with use of the manufactured product. (Cf. *Wood v. Phillips Petroleum Co.* (Tex.App. 2003) 119 S.W.3d 870, 874-875 [upholding summary judgment for a supplier of benzene that did not warn the purchaser of its potential to cause leukemia: "In some instances, a bulk supplier, who has no package of its own on which to place a label, may satisfy its duty to warn ultimate users of its product by proving that the intermediary to whom it sells the product is adequately trained and warned, familiar with the propensities of the product and its safe use, and capable of passing its knowledge on to users in a warning"].)

Whether or not Johns-Manville was in the classic sense a "user" of the raw asbestos sold by Special Electric, it was indisputably a "purchaser." As noted, this Court in *Johnson* described "sophisticated purchasers" among those who need not be warned of hazards they already know or should know. (*Johnson, supra,* 43 Cal.4th at p. 65; see also *In re Asbestos Litigation (Mergenthaler)* (Del.Super.Ct. 1986) 542 A.2d 1205, 1211 ["some version of a 'sophisticated purchaser' defense is the norm in most jurisdictions"].)

The sophistication of a user or purchaser will be a question of fact in many cases. (See *Amer. Mut. Liability 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"].) But the defense becomes a question of law when, as here, the relevant facts are undisputed. (See *Johnson,*

supra, 43 Cal.4th at p. 74 [sophisticated user defense applied, based on "undisputed evidence that HVAC technicians could reasonably be expected to know of the hazard of brazing refrigerant lines"]; see also *Chavez v. Glock* (2012) 207 Cal.App.4th 1283, 1313-1314 [defendant entitled to summary adjudication on failure-to-warn claim because undisputed evidence established that plaintiff, a former marine and a ten-year police officer, was a sophisticated handgun purchaser].)

Johns-Manville was unquestionably sophisticated with respect to asbestos—even the Court of Appeal majority opinion agreed. (Typed opn. 17 ["No one in this appeal doubts that Johns-Manville was a sophisticated user of asbestos, who needed no warnings of its dangers"]; see also typed dis. opn., 2-3 ["It is undisputed that at all relevant times Johns-Manville was among the most knowledgeable businesses in the world concerning asbestos"].)

Plaintiffs now argue that even if Johns-Manville was sophisticated about asbestos, there was no evidence it was sophisticated about *crocidolite*, the type of asbestos brokered by Special Electric. (ABOM 42-43.) The record defeats this argument. Johns-Manville bought over 30 different grades of asbestos from various sources, and had multiple suppliers of crocidolite. (8 RT 2108:6-17; 9 RT 2445:22-28, 2455:7-15, 2456:1-11, 2457:7-25, 2585:21-2586:12, 2615:24-2616:10, 2639:8-2642:12, 2643:11-17; exh. 339.) Plaintiffs' own experts opined that no company in the United States had greater knowledge about "asbestos," without limiting that opinion to any particular fiber type. (5 RT 1446:18-1447:10, 8

RT 2104:1-9.) In any event, the distinction between fiber types is irrelevant because Johns-Manville was obligated to issue a warning with all of its asbestos products.

Moreover, in *Johnson*, this Court applied the sophisticated user rule based on what the sophisticated user should have known, not what it actually knew. (*Johnson*, *supra*, 43 Cal.4th at p. 71.) Johns-Manville had 30,000 employees and operated numerous plants and asbestos mines in North America and overseas, including the Jeffrey Mine in Quebec, one of the world's largest asbestos sources. (5 RT 1441:25-1442:2; 9 RT 2616:20-2617:6, 2645:4-12.) At the very least, Johns-Manville *should have* known about the hazards of all types of asbestos, including crocidolite. It certainly should have known more than Special Electric, as a mere broker, could ever have known.

In the end, whatever label is given to the defense—sophisticated user, sophisticated purchaser, sophisticated intermediary, sophisticated manufacturer—the underlying principle is the same common-sense concept this Court embraced in *Johnson*. A defendant cannot be liable for failing to warn someone of something they already know. That bedrock principle required judgment for the defendant in *Johnson*, and it requires judgment for Special Electric here.

B. A broker or supplier to a sophisticated manufacturer should have no duty to warn end-users with whom the broker or supplier has no reasonable means of communicating.

1. The law does not impose a duty to warn where warnings are not feasible.

Special Electric's utter inability to warn Mr. Webb or others like him provides an independent reason for precluding failure-to-warn liability. Even plaintiffs conceded in the Court of Appeal that "of course" Special Electric did not need to issue a warning directly to Mr. Webb. (See typed dis. opn. 3.)

It is absurd to posit that Special Electric could have identified persons who might eventually encounter finished products that Johns-Manville manufactured using crocidolite asbestos from Special Electric. But even had it tried, Special Electric would never have focused on users of Transite pipe, like Mr. Webb. Crocidolite was not an ingredient in the formula for making Transite. (8 RT 2365:21-2368:16; 9 RT 2423:4-2424:21, 2427:5-10, 2453:18-26; see also 8 RT 2106:28-2107:24.) Crocidolite made its way into the Transite pipe only when scraps of other products were thrown into the mix. (Typed dis. opn. 1.) Thus, it was impossible on a number of levels for Special Electric to know about, much less warn about, hazards from crocidolite in Johns-Manville's Transite pipe.

Courts have recognized that the principles set forth in the Restatement Second of Torts do not support imposing a duty that cannot be honored:

> When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning.

(*Persons v. Salomon North America, Inc.* (1990) 217 Cal.App.3d 168, 178, citing Rest.2d Torts, § 388, com. n, p. 308.)

Likewise, comment i to section 2 of the Restatement Third of Torts states: " '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 . . . . The standard is one of reasonableness,' " and one factor is " 'the feasibility and effectiveness of giving a warning directly to the user.' " (*Pfeifer, supra*, 220 Cal.App.4th at p. 1297, fn. 7; quoting Rest.3d Torts, Products Liability, § 2, com. i., p. 30.) If giving a warning is not feasible, the law should not impose a duty to give it.

The issue is analogous to the component parts and bulk supplier doctrines under which courts recognize that the manufacturer of the final product is best suited to provide warnings to users. (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 93 [supplier of raw metal products owed no duty to warn plaintiff's employer because, among other things, employer-buyer was a "sophisticated industrial enterprise" with extensive experience processing metals with no design input from suppliers]; *Groll v. Shell Oil* (1983) 148 Cal.App.3d 444, 448-449 [supplier has no duty to inspect subsequent labeling of the packaged product];

Artiglio v. General Electric Co. (1998) 61 Cal.App.4th 830, 839 [" 'To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by manufacturers over whom the supplier has no control,' " a duty too onerous to impose].)

While some courts have declined to apply these defenses to hazardous component parts in the context of defective design claims (*Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1189-1190), there is no reason they should not apply to failure-to-warn claims. With defective design claims, the hazardous components' inclusion in the final consumer product is the reason the design is defective. With failure-to-warn claims, the manufacturer of the finished product can affix or include product warnings, which the component parts or bulk supplier cannot do.

2. The law does not require brokers or suppliers to impose a contractual duty to warn on others who already have a tort duty to warn.

Plaintiffs' counsel told the trial court that their *only* failure-to-warn theory was that Special Electric should have contractually required Johns-Manville to warn about health risks of crocidolite:

> I believe you said that the fundamental issue here is does tort law require that Special Electric warn Johns-Manville or tell Johns-Manville that asbestos is dangerous, and I think what we've expressed in our papers is *that's not our theory of the wrong.* [¶] Our theory of the wrong is that Special Electric had an obligation to the end user and failed to do anything to

> execute that obligation to the end user, and *what we have said specifically is they could of* [*sic*] *easily and with no burden essentially have contractually required Johns-Manville to make an adequate warning to the end user* . . . .

(18 RT 6904, emphasis added; see also 1 AA 208; typed opn. 8, fn. 11.)

As our opening brief explained, however, " 'every person has a right to presume that every other person will perform his duty and obey the law, and it is not negligence to assume that he is not exposed to danger which comes to him only from violation of law or duty by such other person.' [Citation.]" (OBOM 21, citing *Harris v. Johnson* (1916) 174 Cal. 55, 58; see also *Aetna Cas. & Sur. v. Ralph Wilson Plastics* (1993) 202 Mich.App. 540 [509 N.W.2d 520, 524] [upholding summary judgment for defendant who supplied raw material to a sophisticated purchaser, because "[t]hose with a legal obligation to be informed concerning the hazards of materials used in manufacturing processes must be relied upon . . . to fulfill their legal obligations"].)

That presumption would be meaningless if the law required suppliers of raw materials to impose a contractual duty on their customers to fulfill their preexisting duty to warn. As Justice Rothschild noted in dissent, commerce would be impossible without the ability to rely on others to fulfill their obligations. (Typed dis. opn. 5.)

Justice Rothschild also observed that this record contains no evidence that Special Electric had reason to believe Johns-Manville would *not* fulfill its duties to warn. (Typed dis. opn. 5-6.) As she

noted, "plaintiffs' counsel never claimed that there was any evidence that at any relevant time Special Electric had any reason to believe Johns-Manville was evil or would violate its duty to warn." (Typed dis. opn. 6.)

Plaintiffs appear to have abandoned the argument that Special Electric should be liable for not imposing contractual obligations on Johns-Manville. Without that theory, nothing remains of the failure-to-warn case they presented at trial.

3. The sophisticated intermediary defense, even in the narrow form envisioned by plaintiffs, precludes liability here because the undisputed facts establish that Special Electric reasonably relied on Johns-Manville to warn its own customers.

Plaintiffs agree that the sophisticated intermediary defense precludes liability when the defendant reasonably relied on an intermediary to make any necessary warnings to end-users. (ABOM 33-34.) For the reasons set forth above, that is not the *only* way Special Electric can defeat liability based on Johns-Manville's sophistication. But even that narrow interpretation of the sophisticated intermediary defense applies here.

As Special Electric knew, Johns-Manville employed researchers and developers knowledgeable of "all the characteristics of asbestos, even chemically[-]wise." (9 RT 2645:19-2646:13.) Johns-Manville prescribed to Special Electric not only the bags for

shipping asbestos—specially designed to contain the fiber—but also the warning language to be printed on the bags. (1 AA 208:21-23; 2 AA 284-285; 18 RT 6916:4-22.) Special Electric was thus aware of Johns-Manville's knowledge about asbestos and had no reason to doubt the company's warning efforts.

Pfeifer, upon which plaintiffs rely, recognized there are circumstances in which "the specific dangers were so 'readily known and apparent' to the intermediary that it would be expected" to warn. (*Pfeifer, supra*, 220 Cal.App.4th at p. 1297.) This case presents just such a scenario, given the undisputed evidence regarding Johns-Manville's awareness of asbestos hazards.

Plaintiffs contend that the application of the sophisticated intermediary defense is a factual issue, which Special Electric forfeited by not asking the jury to decide it. (ABOM 39-40, 41.) As noted, however, the defense becomes a question of law when the relevant facts are undisputed. (*Ante*, pp. 8-9.) On the facts here, Special Electric has *no choice* but to rely on Johns-Manville to provide any needed warnings to end users, depending on how the crocidolite was eventually incorporated into a given product, and how the product was packaged and marketed. That necessity, coupled with Johns-Manville's undeniable sophistication, make Special Electric's reliance reasonable as a matter of law.

Plaintiffs further contend there must be *subjective* evidence of Special Electric's reliance. In their view, Special Electric had to present contemporaneous evidence of its decision-making process from decades earlier, such as calling a witness to testify that it "chose not to warn because it was confident that Johns-Manville

would do so." (ABOM 45.) Plaintiffs cite no authority requiring such subjective evidence, and we know of none. The question is not whether a particular executive at Special Electric consciously decided to rely on Johns-Manville to warn. The question is an objective one—whether a broker in Special Electric's position could reasonably rely on Johns-Manville to warn. (Cf. *Johnson, supra*, 43 Cal.4th at p. 71 [adopting objective standard for issue of user sophistication].)

A rule that would require a defendant to present affirmative evidence of its subjective decision-making process would be impossible to satisfy in this case and most others. The events in question took place over 40 years ago. Special Electric is now a defunct corporation with no officers, directors, or employees. (*Melendrez v. Superior Court* (2013) 215 Cal.App.4th 1343, 1346.) The standard should not be impossible to meet.

The record here permits only one fair conclusion—that a broker supplying asbestos to a sophisticated asbestos manufacturer could reasonably rely on that company to warn its own customers.

4. Because of Johns-Manville's undisputed sophistication, there is no causal relationship between Mr. Webb's injury and a lack of warning from Special Electric to Johns-Manville.

In a failure-to-warn case, the plaintiff must prove not only that the defendant's product caused the plaintiff's injury—the plaintiff must prove that the *lack of a warning* caused the injury.

(See *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 556 [where minor plaintiff alleged a defect in an English-language warning, but plaintiff's mother did not speak English, "there is no conceivable causal connection between the representations or omissions that accompanied the product and plaintiff's injury"]; see also *Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1595, 1604 [no causation where evidence shows that warnings by the defendant would not have reached the plaintiff].)

This principle of "warning causation" further justifies the sophisticated purchaser/intermediary defense and its application to this case. When a supplier sells a product to a purchaser with equal or superior knowledge of the product's dangers, a warning from the supplier to the purchaser would not change anything. The purchaser (here, Johns-Manville) already has the knowledge the warnings would supply, and there is no logical reason to believe a redundant warning would make a difference in the purchaser's behavior.

As Justice Rothschild explained, those principles defeat plaintiffs' claims here: "There is no evidence that Special Electric's *failure to warn* Johns-Manville about asbestos dangers caused Webb's mesothelioma. Moreover, there cannot be such evidence—Johns-Manville already knew everything that Special Electric knew about the dangers of asbestos, so Special Electric's failure to tell Johns-Manville what it already knew cannot be the cause of anything." (Typed dis. opn. 6.)

That reasoning is also consistent with principles of proximate causation. "Because the purported causes of an event may be traced

back to the dawn of humanity, the law has imposed additional 'limitations on liability other than simple causality.' [Citation.] 'These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy.' [Citation.] Thus, 'proximate cause "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct." ' " (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1045.) This Court cited the proximate cause doctrine to support its adoption of the sophisticated user defense in *Johnson*. (See *Johnson*, *supra*, 43 Cal.4th at p. 65.)

This is precisely the sort of case where imposing liability would be contrary to public policy. As noted, this Court in *Johnson* observed that requiring a defendant to needlessly warn someone who needs no warning is bad public policy because it would make a mockery of warning law and undermine the legitimacy of warnings altogether. (*Ante*, p. 5.) For the same reason, public policy cannot favor imposing liability for failing to warn someone the defendant cannot possibly identify or reach with any message. Thus, even if the plaintiffs could posit a *but-for* causal connection between Special Electric's failure to warn and Mr. Webb's injury (they cannot, as Justice Rothschild explained), the public-policy-based doctrine of proximate cause weighs against imposing liability.

C. Regardless of Johns-Manville's sophistication, the policy reasons for strict liability are inapplicable to a broker.

Special Electric was a broker in Wisconsin. It was not the African mining company that dug out and milled the asbestos, and it played no role in the design, production, or distribution of the Transite pipe into which Johns-Manville's California plant incorporated the asbestos.

Special Electric argued to the trial court in its directed verdict motion (1 AA 68) and supplemental brief (2 AA 309), to the Court of Appeal in its respondent's brief (RB 22-27), and to this Court in its opening brief (OBOM 32-36) that a broker is not within the chain of distribution for purposes of strict liability law. Plaintiffs have never explained how Special Electric is wrong. (ABOM 60-62.) Instead, they assert that Special Electric waived or abandoned that argument. (*Ibid.*) They do not explain how that is so, and nothing in the record supports the notion.

Plaintiffs further contend that the jury must have determined Special Electric was not a broker when the jury determined Special Electric was "selling" asbestos. (ABOM 8, 60.) That is a nonsequitur. Whether a broker is in some sense "selling" someone else's product (here, raw asbestos) does not dictate whether the purposes of strict liability are served by subjecting the broker to strict liability (here, for injuries from Transite pipe exposure). The fact that Special Electric kept asbestos samples and arranged shipments—which is what brokers do—did not give it control or

influence over the myriad possible finished products, including the Transite pipe manufactured by Johns-Manville.

Special Electric provided a service, not a product. It was no more in the chain of distribution than the ships and trucks that carried the asbestos. Courts have recognized that transporters of products have no duty to warn of their dangers. (See *Lundy v. Cliburn Truck Lines, Inc.* (S.D.Miss. 2005) 397 F.Supp.2d 823 ["a deliverer of gasoline from the seller to the buyer" had no duty to warn because it "had nothing to do with the design, manufacture or sale of the gasoline"]; see also *Mechanical Rubber v. Caterpillar Tractor* (1980) 80 Ill.App.3d 262 [399 N.E.2d 722].)

Those decisions are consistent with California law excluding failure-to-warn liability for entities only peripherally related to the chain of distribution. For example, in *Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 775, the court noted that it "would be unfair" to hold the marketer or licensor of a product—entities generally considered to be in the chain of distribution—liable under strict liability where it "does not obtain a financial benefit or [its] activities *were peripheral to the distribution process*." (Emphasis added.)

Special Electric has stated that no California appellate court has ever imposed strict liability on a broker. (OBOM 34.) Plaintiffs' brief does not dispute that statement. (See ABOM 60-61). Nor do plaintiffs make any effort to explain how the underlying policies of strict liability warrant imposition of liability here. Accordingly, Special Electric's status as a broker provides an independent basis

for concluding that plaintiffs' strict liability claims fail as a matter of law.

II. THERE IS NO PROCEDURAL IMPEDIMENT TO REACHING THE MERITS OF THE JUDGMENT IN FAVOR OF SPECIAL ELECTRIC.

A. The trial court had the authority to grant timely filed motions for nonsuit and directed verdict, and to treat them as JNOV motions.

1. Courts are duty bound to put aside non-prejudicial procedural irregularities to reach the merits of the issues presented to them.

Special Electric timely filed nonsuit and directed verdict motions challenging the legal sufficiency of plaintiffs' case. Plaintiffs had multiple opportunities to brief the issues presented in these motions, both before and after the verdict was rendered. (1 AA 77-85, 175-183, 196-221.) Plaintiffs concede that these timely filed pre-verdict motions are "analytically the same" as the JNOV motion the court ultimately granted. (ABOM 47.) Plaintiffs nevertheless argue that the trial court lacked authority to rule on *any* of these motions because, they say, the pre-verdict motions were "negate[d]" once the jury returned a verdict, and the trial court could not, as a matter of law, deem them JNOV motions. (ABOM 47-48.)

The Court of Appeal majority agreed, finely parsing the nonsuit, directed verdict, and JNOV statutes in a way that deprives Special Electric of its right to have its timely asserted arguments heard on the merits. But the role of an appellate court is to decide an issue on the merits unless some procedural anomaly prejudiced one of the parties, or the trial court was without jurisdiction to act. (Code Civ. Proc., § 475 [courts "must, in every stage of an action, disregard" irregularities in the proceedings that do "not affect the substantial rights of the parties"]; Cal. Const., art. VI, § 13 ["No judgment shall be set aside . . . for any error as to any matter of procedure, unless . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"].)

The Court of Appeal refused to engage in any prejudice analysis. Instead, as explained by Justice Rothschild in her dissent, the majority opinion "eliminates the need for a showing of prejudice" by explaining that "the [trial] court's procedural missteps deprived the court of 'the authority' to rule as it did." (Typed dis. opn. 9.) Most procedural irregularities, however, including those at issue here, do not deprive a court of the power to rule. (*In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56 ["most procedural errors are not jurisdictional"].)

Several cases have excused procedural irregularities in the granting of post-verdict motions to protect the parties' rights to have their case heard on the merits. For example, in *Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193 (*Sole Energy*), the trial court treated a procedurally defective reconsideration motion as a motion for new trial to preserve the

moving party's right to challenge a prior ruling of the court. In challenging the grant of the new trial, the defendants "argue[d] the court lost the power to decide this issue after entry of the judgment." (*Ibid.*) The Court of Appeal rejected the argument, noting that "[t]he trial court had the discretion to decide whether the motion before it was a motion for a new trial within its jurisdiction and, if so, to grant or deny it. The trial court did not abuse its discretion in exercising its responsibilities." (*Id.* at pp. 193-194; see also *Espinoza v. Rossini* (1966) 247 Cal.App.2d 40, 45-47 [trial court permissibly granted a new trial motion several days after granting JNOV, even though the rules require the motions be decided at the same time].)

As we now explain, the trial court properly exercised its discretion to rule on the merits of Special Electric's motions, while fully protecting plaintiffs' substantive right to oppose those motions.

2. Special Electric made timely motions for judgment as a matter of law through nonsuit and directed verdict motions. The trial court had authority to grant those motions even after the verdict was rendered.

Plaintiffs cite no authority supporting the conclusion that a trial court lacks the power to *grant* nonsuit or directed verdict motions after a verdict is rendered. (ABOM 48-49.) Instead, they cite dicta from a single case stating that nonsuit and directed verdict motions must be *filed* before the case is submitted to a jury.

(ABOM 48, citing *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750 ["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"].) There is, however, no dispute that Special Electric filed its motions for nonsuit and directed verdict before the case was submitted to the jury.

Plaintiffs next argue that because the directed verdict statute expressly authorizes a directed verdict after submission to the jury in one circumstance (where the jury is deadlocked), the statue necessarily *precludes* all other circumstances in which the court can grant the motion post-verdict. (ABOM 49, citing Code Civ. Proc., § 630, subd. (f).) They cite a subdivision that does not relate to motions timely made before verdict. As to such motions, nothing in the statute indicates that the Legislature intended to deprive courts of the power to decide a timely-filed motion that was never ruled on before the verdict.

Plaintiffs complain their rights were affected because they perceive Special Electric to have changed its argument from a "sophisticated user" defense to a "sophisticated intermediary" and then an "obvious danger" defense. (ABOM 55.) But as explained above, these are not independent defenses raising distinct arguments. These titles are variations on the same basic principles addressed in the authorities on which Special Electric has consistently relied—including *Johnson* and Restatement of Torts section 388. The core question that has always been at issue, and that plaintiffs fully briefed, is whether liability can attach to a

broker who deals with a sophisticated manufacturer, which in turn makes and sells a product that injures an end-user.

In any event, plaintiffs had ample opportunity to brief the issues, including supplemental briefing *after* the trial court made a tentative ruling. Plaintiffs' counsel asked for and was granted additional time to provide briefing in response to comments from the court (18 RT 6627), and was allowed to argue at an additional hearing. By the time of the ruling, plaintiffs' counsel had a month's notice of the trial court's tentative ruling. As the trial judge noted at the hearing in which he granted the motions, there was no "practical harm" in deciding the nonsuit and directed verdict motion instead of requiring that JNOV be filed where plaintiffs had already had two courses of written briefing on the issue and were then "appearing for [their] second oral argument on this core issue." (18 RT 6902-6903; see *Timmsen v. Forest E. Olson, Inc.* (1970) 6 Cal.App.3d 860, 868 (*Timmsen*) [procedural error in presentation of and ruling on nonsuit motion was rectified by giving plaintiffs' counsel an opportunity to argue the issues on the merits at the hearing on the new trial motion].)

3. The trial court had discretion to treat the nonsuit and directed verdict motions as motions for JNOV, which is properly decided after verdict.

The trial court had the authority to treat the nonsuit and directed verdict motions as JNOV motions, and to grant those motions as long as it did so before the last date in which the court

had the power to rule on a new trial motion. (Code Civ. Proc., § 629.) "The proposition that a trial court may construe a motion bearing one label as a different type of motion is one that has existed for many decades. 'The nature of a motion is determined by the nature of the relief sought, not by the label attached to it. The law is not a mere game of words.' " (*Sole Energy, supra,* 128 Cal.App.4th at p. 193, quoting *City & County of S.F. v. Muller* (1960) 177 Cal.App.2d 600, 603.) "The principle that a trial court may consider a motion regardless of the label placed on it by a party is consistent with the courts inherent authority to manage and control its docket." (*Sole Energy*, at p. 193, citing Code Civ. Proc., §§ 128, subd. (a), 187.)

Here, the trial court was well within its discretion to treat the timely filed nonsuit and directed verdict motions as motions for JNOV. In fact the case for such discretion is stronger here than in *Sole Energy*, where the court treated a reconsideration motion as a motion for new trial. The standards for reconsideration and new trial motions are distinct, but the standards for granting nonsuit, directed verdict, and JNOV motions are identical. (*Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 327-328.)

Plaintiffs have argued that even though the motion was granted within the time the court had to rule on a new trial motion, the trial court violated two other prerequisites to granting a JNOV motion: (1) the court failed to give proper notice of the motion and (2) the court prematurely ruled on the motion and did not wait until after the "expiration of the time within which a motion for a new trial must be served and filed." (ABOM 51-52; typed opn. 12-14.)

As noted, there was no possible prejudice from any lack of a formal notice of motion where the trial court provided plaintiffs an opportunity to brief and argue the issues after giving a tentative ruling on the nonsuit and directed verdict motions that became the basis for granting JNOV. (*Ante*, p. 26, citing *Timmsen, supra*, 6 Cal.App.3d 860 at p. 868.)[2]

Moreover, as explained by the dissent, plaintiffs fail to appreciate the different language the Legislature uses in section 629 regarding the "power" of the court.

> The distinction is significant, because Code of Civil Procedure section 629 expressly provides as follows: "The court shall not rule upon the motion for judgment notwithstanding the verdict until the expiration of the time within which a motion for a new trial must be served and filed . . . . The power of the court to rule on a motion for judgment notwithstanding the verdict shall not extend beyond the last date upon which it has the power to rule on a motion for a new trial." Thus, the statute expressly identifies the deadline for a JNOV ruling as relating to the "power of the court," but the statute does not refer to an early JNOV ruling in the same way, providing only that the court "shall not"

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[2] Plaintiffs contend they established prejudice by demonstrating that they would have won judgment if the JNOV ruling had not occurred. (ABOM 54-55.) But that tautology is not the test for undue prejudice; rather, the test is whether any irregularities or errors in the procedures "affected [their] substantial rights." (Code Civ. Proc., § 475 [appellant must show that the error "was prejudicial" *and* that he "suffered substantial injury" *and* that "a different result would have been probable if such error . . . had not occurred"].)

grant JNOV before expiration of the time to move for new trial.

(Typed dis. opn. 9, emphasis and fn. omitted.) The dissent thus properly concludes "that in the present case the trial court did not act in excess of its authority by granting JNOV too early." (*Ibid.*)

Not all supposedly mandatory timing requirements deprive a court of power to act. For example, Code of Civil Procedure section 664 requires that "judgment must be entered" within 24 hours of a verdict. "[T]he court does not, however, lose jurisdiction of the cause by a failure to enter the judgment within the time prescribed." (*Waters v. Dumas* (1888) 75 Cal. 563, 565.)

The "premature" granting of the motion caused no prejudice. The plain purpose of the rule requiring the trial court to wait to rule on JNOV is to coordinate the rulings on the JNOV and new trial motions, to avoid the confusion that could arise from seriatim rulings. But in this case, no new trial motion was ever brought, and there was thus no possible harm in the timing of the ruling on the JNOV motion.

B. Even if the trial court's order were procedurally invalid, this Court should affirm the judgment under Code of Civil Procedure section 906, because either the nonsuit or directed verdict motion should have been granted when originally filed.

Regardless of any alleged procedural defects in the trial court's posttrial ruling, the judgment must still be affirmed if the previously denied nonsuit and directed verdict motions should have

been granted and would have provided the same relief. In this circumstance, no separate appeal or cross-appeal is required to challenge adverse rulings on pre-verdict motions.

This rule is codified in Code of Civil Procedure section 906, which states: "The respondent, or party in whose favor the judgment was given, may, *without appealing from such judgment*, request the reviewing court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken." (Emphasis added.) Here, for the reasons discussed above regarding the merits of this case, nonsuit or directed verdict should have been granted, and the trial court's error in failing to grant them renders any subsequent procedural error non-prejudicial.

Plaintiffs claim that the nonsuit and directed verdict motions cannot afford a basis to affirm the judgment because the relief granted in the judgment is broader than requested in the nonsuit and directed verdict motions. (ABOM 53-54.) To the contrary, the pre-verdict motions raised arguments to cut off any liability based on lack of a duty, just as the post-verdict JNOV ruling did. Thus, the trial court would have arrived at the same result had it not erroneously failed to grant the motions pre-verdict, when made. That is precisely the circumstance for which section 906 was designed.

As for the absence of a protective cross-appeal, at most that would preclude Special Electricfrom bringing a subsequent appeal from the original judgment if it is reinstated on procedural

grounds—a party cannot appeal a judgment that could have previously been appealed. (*Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1749.) But in the event the judgment is reinstated, Special Electric should be provided an opportunity to file a JNOV motion on remand, because it never had an opportunity to file a motion that complies with the rules plaintiffs seek to impose. When the trial court entered judgment and then simultaneously granted JNOV, Special Electric had no opportunity thereafter to file a JNOV motion challenging the judgment that had already been vacated.

C. The jury's negligence finding does not provide an independent basis to support the verdict.

Plaintiffs argue that even if the trial court's rulings negated the failure to warn claims, the JNOV ruling should be reversed "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." (ABOM 58.) Plaintiffs argument suggests that two entirely independent causes of action were brought to the jury—a "warning claim" and a separate "negligence" claim—and that the JNOV/nonsuit motion attacked only the warning claim. (*Ibid.*)

Plaintiffs' argument is a mischaracterization of the record. The nonsuit/JNOV motion clearly indicated that Special Electric was moving "for nonsuit on plaintiffs' theory of failure to warn, *in either negligence or strict liability*." (1 AA 62, emphasis added.) The jury was then instructed on four separate product liability theories

of liability, including two *separate* failure-to-warn theories: (1) strict liability design defect (1 AA 114); (2) strict liability failure to warn (1 AA 115); (3) negligent design, manufacture or design of a product (1 AA 119); and (4) negligent failure to warn (1 AA 121).

But while the verdict form separately asked about strict liability design defect and strict liability failure to warn, the form asked just a single question about negligence. (1 AA 144-147.) The jury found there was *no* design defect, but then found Special Electric failed to warn under a strict liability standard and was negligent. (*Ibid.*)

The only question for this Court then is, when the jury found Special Electric "negligent," did it determine that Special Electric was negligent in supplying the product, in failing to warn, or both? The only reasonable conclusion is that the jury found only a negligent failure to warn.

Negligent failure to warn was the only theory argued to the jury. Plaintiffs' counsel told the jury in closing argument, "Then we go on to negligence, and I know it may sound like we've asked some of these questions before, but negligence is a little bit different variety of law." (16 RT 4703:26-4704:1.) Plaintiffs' counsel continued, "is what they did reasonable under the circumstances[?] "We've talked about that. We've talked about the vast amount of knowledge going way back in time *and no warnings*, no attempts to do what they ought to have done to protect people." (16 RT 4704:3-4704:7, emphasis added.) Plaintiffs' counsel then went on to ask the jury, "Was the failure to warn a substantial factor in causing harm to William Webb? I think we already answered that in the context of

the products liability instruction." (16 RT 4704.) That was the extent of plaintiffs' argument on negligence.

Moreover, the jury could not have found that Special Electric was negligent in supplying the product because the jury found the product was not defective. (1 AA 144.) In light of that finding, the only possible theory of liability would be a failure to warn—the jury necessarily must have found that Special Electric was negligent for failing to warn, not for otherwise supplying a defective product.

CONCLUSION

For the reasons stated above and in the opening brief, the judgment granted by the trial court in favor of Special Electric should be reinstated.

March 21, 2014

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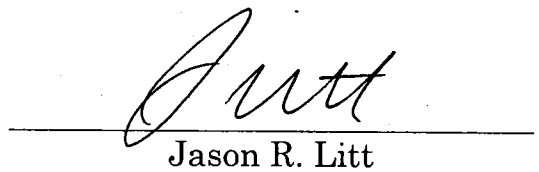
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 7,964 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: March 21, 2014



Jason R. Litt

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

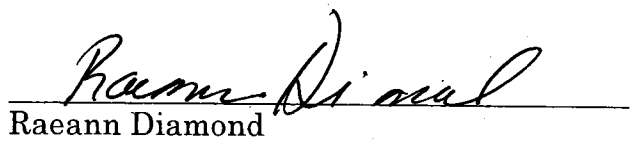
On March 21, 2014, I served true copies of the following document(s) described as **REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on March 21, 2014, at Encino, California.



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