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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DAVID J. PALOMARES,

Plaintiff and Appellant,

v.

THOMAS DEE ENGINEERING  
COMPANY,

Defendant and Respondent.

A131745

(San Francisco City and County  
Super. Ct. No. CGC10-275463)

Plaintiff David J. Palomares appeals from the trial court's grant of summary judgment to defendant Thomas Dee Engineering Company and the resulting judgment. The parties raise numerous issues in this case, which involves a claim by plaintiff that several decades ago, he was exposed as an industrial laundry worker to asbestos that came from clothing of defendant, a customer of Sequoia Laundry (Sequoia), and that this was a substantial factor in his development of mesothelioma. We focus on the issue of causation, and conclude that plaintiff is unable to prove it. Therefore, we affirm the judgment.

**BACKGROUND**

In January 2010, plaintiff filed suit alleging various causes of action against numerous defendants, including defendant, alleging that they were liable for his asbestos-related mesothelioma. Plaintiff brought claims against defendant for negligence and strict liability, and sought punitive damages.

Defendant answered, and subsequently moved for summary judgment or summary adjudication on a number of grounds. These included that plaintiff could not prove

causation because there was not sufficient evidence that he was exposed to asbestos from defendant. Defendant further argued that if he was exposed to asbestos from defendant, plaintiff could not show that it was a substantial factor in causing his mesothelioma. Plaintiff opposed the motion.

Defendant is a refractory subcontractor that has been in business since the early 1900s. It is not an asbestos manufacturer. In support of its summary judgment motion, defendant contended that there was no direct evidence that plaintiff was exposed to asbestos from defendant. Defendant acknowledged that plaintiff contended that he was exposed to asbestos from asbestos-containing clothing sent by defendant to be laundered at Sequoia between 1963 and 1968, and in particular from asbestos-containing clothing sent to Sequoia between 1965 and 1966, when plaintiff worked there. Plaintiff further alleged that he was exposed to asbestos from clothing worn by employees of companies defendant contracted with, which clothing was delivered to Sequoia for laundering, and from the clothing of his sister and mother, who also worked at Sequoia. He did not have information that he worked around any other materials installed or removed by defendant.

Defendant also pointed out that plaintiff did not present any direct evidence, such as eyewitness testimony, that he was exposed to asbestos from defendant. Neither plaintiff, his sister, nor his mother provided any information that linked defendant to any asbestos exposure suffered by plaintiff. Furthermore, the owner of Sequoia during the time plaintiff worked there had died, all documents relating to Sequoia during the relevant time period had been destroyed, and neither the owner's daughter nor two coworkers of plaintiff recalled anything about defendant. Thus, defendant contended, plaintiff could not produce sufficient evidence to establish that he was exposed to asbestos that came from defendant.

In his opposition to defendant's motion, plaintiff claimed that a combination of circumstantial evidence, inferences and expert testimony created at least a triable issue of material fact regarding whether he was exposed to asbestos from clothing at Sequoia that came from defendant, which we now review.

### *Plaintiff's Job Responsibilities*

Plaintiff focused his contentions on the year he worked at Sequoia, from 1965 to 1966. He contended that Sequoia was an “industrial wash site.” His duties during that year included sometimes unloading dirty laundry from trucks and placing dirty clothes in a cart to move to the wash area. The dirty clothes he loaded into the cart included dirty and dusty shirts, pants, and coveralls, which he loaded into washers. He was also responsible for cleaning up the premises, including sweeping dirty, dusty floors three to four times a week, as well as vacuuming to clean out pockets of dust, dirt and lint around the premises.

### *Testimony of Martha Hickock*

Plaintiff relied on deposition testimony from Martha Hickock, who worked at Sequoia starting in 1963. She testified that from September 1964 until 1973, she assisted Sequoia’s accountant, sorting invoices and updating ledgers in Sequoia’s office. Hickock observed plaintiff sometimes unloading bundles of laundry from customers in the summer of 1965 and 1966, but could not identify from where the laundry came. She also saw plaintiff load dirty clothes into washers, and unload and hoist them into big dryers many times during his year of employment at Sequoia.

Hickock did not handle laundry herself. However, she recalled seeing “many of the invoices” for defendant among those she alphabetized from 1964 to 1971.<sup>1</sup> These invoices related to the cleaning of overalls, coveralls, shirts, pants, and towels. Hickock recalled that Sequoia’s trucks would drive to job sites to pick up dirty laundry and deliver clean laundry. A “few times,” she saw bundles of laundry marked with tags from “Dee Engineering” dropped off outside Sequoia. She did not know from where the bundles were picked up, did not see any bundles opened, and did not see anything inside the bundles. She did not know the locations where the laundry in the bundles had been worn or used, or whether any of it had asbestos on it. She further testified that she did not

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<sup>1</sup> Although plaintiff asserted in opposition to the motion that Hickock saw “many invoices” for defendant, she did not actually quantify the amount she saw in the testimony cited.

know of any documents or witnesses that would refresh her recollection regarding defendant.

***Evidence Regarding Defendant's Asbestos-Related Activities***

According to deposition testimony of Thomas Dee, Jr. (Dee), defendant's president, when Dee worked as a bricklayer for defendant, he did not wear a uniform. He also testified that defendant's employees did not ever wear uniforms indicating their names and defendant's name.

Dee further testified that between 1957 and 1975, defendant purchased block insulation and insulating cement for use in boilers, and purchased other insulating materials from several companies, including American Asbestos, Plant Asbestos Company, and Western Asbestos Company (from which defendant purchased Johns-Manville products). Dee said that the company used asbestos rope, and that some of the materials defendant installed "may have contained" asbestos. Dee also said that defendant sometimes sold materials as well, including materials referred to as "asbestos block" and "asbestos cement," although he was not sure of the composition of the materials sold because he was not the manufacturer of them.

Dee also testified that during this same period of time, defendant worked in San Francisco on various American President Lines ships removing old bricks and installation, rebricking furnaces and re-insulating overhead pipes and other equipment. Dee further recalled that defendant performed this type of work at the Bethlehem Shipyard, Pacific Ship Repair, and Triple A Machine in San Francisco, and for the City and County of San Francisco. Dee testified that defendant supplied labor and materials for these jobs.

In his opposition, plaintiff also submitted job site ledgers of defendant from 1965 and 1966, including pages listing work on American President Lines ships, and for Bethlehem Steel, Franklin Machine Shop, Triple A Machine Shop, and Pacific Ship Repair.

### *Plaintiff's Asbestos Exposure Contentions*

Plaintiff contended that as a result of the dusty work clothes and shop rags he unloaded and brought into the laundry, and the sweeping and vacuuming of the entire premises, Sequoia's premises and the clothing of the laundry employees were contaminated with the dust. Hickock recalled that the laundry was dusty and had lint everywhere, and that there was dust on her clothing and in her nose at the end of each workday, even though she worked in a separate bookkeeping area. Defendant also submitted testimony from three experts in support of his contention that from 1965 to 1966 he was exposed to asbestos from contaminated clothing as a result of his activities at Sequoia.

Based on this evidence, plaintiff contends in his opening brief "that [defendant] did a substantial volume of work on several different job sites throughout 1965 and 1966, removing old asbestos brick, cement and rope from boilers and replacing it with new asbestos brick, cement and rope and generally doing other removal and replacement of asbestos-containing insulation. Coupled with the evidence that [defendant] sent its workers' dirty work clothes, towels and shop rags to Sequoia to be laundered, there was at a minimum a triable issue of fact that defendant[']s employees worked with asbestos-containing insulating materials during the time that [defendant] was a customer of Sequoia Laundry, and that therefore their clothing, which was laundered by Sequoia, was contaminated with asbestos fibers."

In its reply to plaintiff's opposition below, defendant contended plaintiff presented "only argument, speculation proffered by experts, innuendo and conjecture in an effort to raise a triable issue of fact." Defendant ultimately argued that plaintiff could not prove causation because he could not show that any of Sequoia's laundry contained asbestos that came from defendant.

Plaintiff and defendant filed numerous objections to the evidence submitted by their opponent. Defendant objected to the testimony of Hickock on the grounds that it was irrelevant, inadmissible, lacked personal knowledge, and was hearsay. Defendant

also objected to the declarations of plaintiff's experts on the grounds that their opinions lacked foundation.

### ***The Trial Court's Ruling***

At the hearing on defendant's motion, the trial court raised a number of questions about plaintiff's presentation. It indicated there was a "serious question" regarding whether Hickock's identification of defendant was possibly inadmissible hearsay. Regardless, the court indicated the evidence did not show how much defendant used asbestos, and that defendant could have sent clothes to Sequoia from projects in which none was used. It also found too many questions generally, characterizing plaintiff's case as a "stream of possibilities or even probabilities that narrow into conjecture." The court thought that the period during which plaintiff contended defendant bought and used certain materials, from 1957 to 1975, was a very broad period of time, and found there was no evidence that these materials were related to the laundry attributed to defendant at Sequoia. The court also did not think the evidence established that defendant sent any asbestos-containing clothes to Sequoia in the absence of evidence that it sent all its clothes to that one laundry. Accordingly, the court granted defendant's motion for summary judgment. The trial court did not rule on any of the parties' evidentiary objections.

The court subsequently issued a written order indicating that its grant of defendant's motion was supported by the facts asserted by defendant, followed by its issuance of a judgment. Plaintiff filed a timely notice of appeal.

### **DISCUSSION**

Plaintiff argues that the trial court erred in granting defendant's motion for summary judgment because plaintiff raised a triable issue of material fact in his opposition to the motion. Specifically, plaintiff contends he presented sufficient evidence that defendant was a regular customer of Sequoia; employees of defendant worked with asbestos-containing products; plaintiff was exposed to asbestos from the clothing of defendant's employees; and defendant is liable for harm resulting from its negligence and defective products.

In its reply, defendant argues that plaintiff did not and could not produce evidence sufficient to establish his negligence and strict liability claims. Regarding negligence, defendant argues that plaintiff did not prove causation because Hickock's testimony about the invoices she saw, the only evidence associating defendant with Sequoia, was inadmissible hearsay, was not admissible under the business records exception and, in any event, did not establish that defendant was a Sequoia customer during the approximately one year that plaintiff worked at Sequoia from 1965 to 1966. Defendant further argues that plaintiff did not produce evidence that any laundry of defendant's that might have been at Sequoia contained asbestos and, assuming he did, did not establish plaintiff was exposed to asbestos from this laundry for a variety of reasons, including evidentiary problems with the use of plaintiff's expert's opinions to establish certain facts. Defendant further argues that plaintiff did not establish two other elements of negligence, they being that defendant owed a duty to him and breached such a duty.

Regarding plaintiff's strict liability claim, defendant argues that strict liability is not an applicable standard for contractors who perform services related to asbestos products, whether or not they supply asbestos products in conjunction with those services. Defendant further argues that, even if strict liability is an applicable standard, plaintiff could not establish the necessary element of causation, as with his negligence claim.

We conclude that, assuming for the sake of argument that Hickock's testimony was admissible and strict liability was the applicable standard under the circumstances of this case, plaintiff nonetheless did not and could not establish causation regarding either his negligence or strict liability claim because there was no evidence from which a reasonable inference could be drawn that plaintiff was exposed to asbestos-containing laundry at Sequoia that came from defendant. Therefore, we affirm the judgment and do not address the other issues debated between the parties.

### ***I. Standard of Review***

A trial court properly grants summary judgment if the record establishes no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of

law. (Code Civ. Proc., § 437c, subd. (c).) A party moving for summary judgment “bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*)). “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*, fn. omitted.) “A defendant bears the burden of persuasion that ‘one or more elements of’ the ‘cause of action’ in question ‘cannot be established,’ or that ‘there is a complete defense’ thereto. [Citation.]” (*Ibid.*)

Generally, “the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]” (*Aguilar, supra*, 25 Cal.4th at pp. 850–851, fn. omitted.) Although the burden of production shifts, the moving party always bears the burden of persuasion. (*Id.* at p. 850.) “There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Ibid.*) “Under the standard enunciated in *Aguilar*, . . . at pages 850-851, the defendant must make an affirmative showing that the plaintiff will be unable to prove its case by any means.” (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1439.)

The standard of review for an order granting or denying summary judgment is de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We are not bound by the trial court’s stated reasons for granting summary relief, as we review the trial court’s ruling, not its rationale. (*Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) In determining whether the parties have met their respective burdens, we consider “all of the evidence the parties offered in connection with the motion (except that which the court properly

excluded) and the uncontradicted inferences the evidence reasonably supports.” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) We view the evidence in the light most favorable to plaintiffs as the parties opposing summary judgment, strictly scrutinizing defendants’ evidence in order to resolve any evidentiary doubts or ambiguities in plaintiffs’ favor. (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

## II. Analysis

Plaintiff urges us to reverse the trial court without citing anything in the record that allows us, viewing the evidence in the light most favorable to plaintiff, to draw reasonable inferences that establish a triable issue of material fact regarding causation. Furthermore, in light of the evidence presented below, we have no reason to believe that he could. Therefore, defendant’s claim of error lacks merit.

Causation is a necessary element for negligence and strict liability claims. (See, e.g., *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 126 [indicating causation is an essential element of a negligence claim]; *Hunter v. Pacific Mechanical Corp.* (2005) 37 Cal.App.4th 1282, 1288 [a plaintiff alleging asbestos-related injury has the burden of proving that there is a reasonable medical probability based upon competent expert testimony that the defendant’s conduct contributed to the plaintiff’s injury], disapproved on other grounds in *Aguilar, supra*, 25 Cal.4th at pp. 854-855, fn. 23.) Generally, “[a] threshold issue in asbestos litigation is exposure to the defendant’s product. The plaintiff bears the burden of proof on this issue. [Citations.] If there has been no exposure, there is no causation. [Citation.] Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff’s . . . exposure to the defendant’s asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff . . . inhaled or ingested, and hence to the risk of developing asbestos-related cancer.” (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103.)

Plaintiff does not provide any evidence from which it can be reasonably inferred that he was exposed to asbestos-containing laundry at Sequoia that came from defendant during the approximately one year plaintiff worked there, or at any other time. From the

evidence he cites, it may be reasonably inferred that an undefined amount of defendant's business between 1957 and 1975 included the use and/or sale of asbestos products, and it may be reasonably inferred from this evidence that someone working for the company interacted somehow with these products. The evidence also indicates that defendant was a customer of Sequoia an undefined amount from 1964 to 1973, was invoiced for the laundering of clothing, among other things, and that Hickock saw a few bundles of laundry tagged as coming from Dee Engineering, but had no idea what was in these bundles or from where they came. That is all. Plaintiff has not presented any evidence for the relevant time period regarding numerous relevant matters, such as how much asbestos products defendant used or sold and where they were used or sold; how many employees, if any, interacted with these products; how employees might have interacted with these products; what clothing employees wore while interacting with the products; what, if any, employee clothing was sent out to be laundered by defendant and where it was sent; what amount of such clothing might have contained asbestos; and how much of any of these activities occurred between 1965 and 1966 in particular. As the trial court aptly noted, plaintiff's case is a "stream of possibilities or even probabilities that narrow into conjecture."

We conclude plaintiff did not and cannot raise a triable issue of material fact regarding an essential element of both his claims against defendant: causation. His appellate claims lack merit for this reason alone.

**DISPOSITION**

The judgment is affirmed. Defendant is awarded costs of appeal.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.