S209927

In the

SUPREME COURT OF CALIFORNIA

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION ONE

CASE NO. B233189

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, CASE NO. BC436063
HON. JOHN SHEPARD WILEY

WILLIAM B. WEBB AND JACQUELINE V. WEBB,

APPELLANTS,

V.

SPECIAL ELECTRIC COMPANY, INC.,

RESPONDENT.

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review ("Petition") filed by Special Electric Company, Inc. ("Special Electric") raises clear-cut grounds for review, namely that the Court of Appeal decision is unprecedented as to its procedural and substantive holdings, and creates conflicts with existing case law from this Court and other Courts of Appeal. These raised are important questions of law that will affect numerous pending cases, and will arise again and again. They deserve the attention of this Court.

The Court of Appeal decision misstated what the trial court did, and then ruled it procedurally improper despite the lack of any appellate

precedent or statutory authority, and then reversed the judgment despite the lack of prejudice. In creating this new law out of whole cloth, the Court of Appeal has seriously diminished the discretion of the trial courts to run jury trials efficiently, with no demonstrable corresponding reduction of prejudice.

On the merits, the Court of Appeal vastly expanded a broker's and component supplier's duty to warn in conflict with *Johnson v. American Standard* ("*Johnson*") (2008) 43 Cal.4th 56, 67, and many Court of Appeal cases, none of which Plaintiffs discuss in their brief. These cases are addressed in the Petition, and in the letters to the Court supporting review and depublication. In addition, the Court of Appeal's Opinion neglected to consider the scope of products liability of a broker who does not manufacture the product and has no control over its distribution or safety. The duty to warn issue alone more than satisfies the "settle an important question of law" standard for review.

Further, despite Plaintiffs' contention to the contrary, Special Electric expressly raised and supported its positions on the erroneous ruling of the Court of Appeal that the motions granted by the trial court did not address the general negligence verdict. That issue was raised and supported both before the Court of Appeal and in the Petition. Special Electric never waived this issue.

Finally, the Court of Appeal's inferences of conspiracy and concealment, unsupported by any actual evidence, are part of the problem, not a reason for denying review. The court's comments on what the jury could have reasonably inferred from the evidence set the bar so low that future fact finders will be completely free to interpret wholly innocent behavior as sinister with no basis in the evidence.

II. REVIEW IS WARRANTED TO SECURE UNIFORMITY OF DECISION

Plaintiffs assert that the Petition lacks any analysis of the need for review to secure uniformity of decision, and assert that the Court of Appeal did nothing novel. The vigorous dissent obviously disagrees, variously characterizing the majority opinion as "unprecedented," "incorrect as a matter of law," without "authority or reasoning," and "extraordinary." (Dissent at pp. 4, 5, 6.) A cursory review of the decisions cited in the Petition, which Plaintiffs do not address, demonstrates the fallacy of Plaintiffs' position.

Plaintiffs assert they did not argue and the Court of Appeal does not hold that Special Electric had to warn Johns-Manville. (Answer at 8.)[1] Yet, that is precisely what the Court of Appeal holds when it says the jury was entitled to find Special Electric liable on either or both of two factual theories: the warnings given to Johns-Manville were inadequate or the failure to adequately warn Webb. (Op. at pp. 18-19.) Under the instructions and special verdict questions, "the jury could have imposed liability on Special Electric based on either theory." (Op. at p. 19.)[2]

The Court of Appeal cites *Johnson* as holding that "Special Electric's

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[1] Plaintiffs' assertion that they did not argue Special Materials had a duty to warn Johns-Manville is remarkable given their extensive arguments at trial and in the Court of Appeal directly to the contrary. Plaintiffs asserted that no warnings were given to Johns-Manville and/or the warnings given were inadequate because they should have included cancer risks, and that the trial court erred in holding no warnings to Johns-Manville were required. (See Appellants' Brief at 10-12, 47-50.) Those arguments raised the issue about whether OSHA mandated the language of the warnings and preempted cancer warnings, which was also briefed by Special Electric but ignored by the Court of Appeal. (See Respondent's Brief at 20-22.)

[2] The dissent also observes that the majority offered two grounds on which Special Electric could be liable – failure to warn Johns-Manville and failure to warn Webb. (Dissent at p. 2-3.)

duty to warn foreseeable potential users such as Webb (not just the initial user, Johns-Manville) arose as a matter of law . . . ." (Op. at p. 23. See also Op. at p. 20.) To the contrary, what *Johnson* holds is that "sophisticated users need not be warned about dangers of which they are already aware." (*Johnson, supra,* 43 Cal.4th at 65.) "[T]here is no need to warn of known risks under either a negligence or strict liability theory." (43 Cal.4th at 67.) The sophisticated user/obvious danger defense negates the causation element of a failure to warn theory. Pre-existing "knowledge of the dangers is the equivalent of prior notice" (*id.* at 65), and failure to warn of a risk already known cannot be a legal or proximate cause of injury. (*Id.* at 67.) Therefore, the Court of Appeal's holding that the jury could determine whether Special Electric's warnings to Johns-Manville were adequate was legally incorrect. It did not matter whether warnings were on every bag or no bags or what those warnings said. Johns-Manville was concededly "a sophisticated user of asbestos, who needed no warning about its dangers." (Op. at p. 17.)

Further, the Court of Appeal's holding that Special Electric had a duty to warn Webb is inconsistent with numerous decisions. In *Fierro v. International Harvester, supra,* 127 Cal.App.3d 862, the court held that defendant was not liable to plaintiff for failing to warn plaintiff's employer, a sophisticated organization, about the hazards of running a power cable near the gas tank of the truck defendant sold. (*Id.* at 866.) The "absence of a warning to Luer did not substantially or unreasonably increase any danger that may have existed in using the International unit [citations omitted] and Luer's failure to guard against those eventualities did not render the International unit defective." (*Id.* at 866-67.)

The Court of Appeal opinion also conflicts with other decisions that hold there is no duty to warn an end user when the manufacturer has no reasonable way to warn. Even Plaintiffs concede they did not argue Special Electric had to warn Webb directly. (Answer at p. 13.) The only argument Plaintiffs made was that Special Electric should have contractually required Johns-Manville to provide warnings. Yet, the Court of Appeal holds that Special Electric had a duty, independent of Johns-Manville, to warn Webb. As the dissent says, the majority holds Special Electric liable on a basis not asserted by Plaintiffs. (Dissent at p. 3, 4.)

There was no way for Special Materials to know whether asbestos attributed to it was in the products with which Webb came into contact. The crocidolite asbestos in the Transite pipe, if any, was only there because of scraps from other pipe. Special Materials could not trace any particular crocidolite asbestos into the Transite pipe in general or into particular batches sold to Familian and bought by Pyramid. There is no evidence in the record that suggests Special Materials could know who Johns-Manville's customers were (especially remote ones like Webb), no less which products they bought and whether asbestos it brokered was in them. Nor could it put warnings on the asbestos that was removed from the bags at the Johns-Manville plant.

Under these circumstances, many other opinions find no duty to warn as a matter of law. (*Groll v. Shell Oil, supra,* 148 Cal.App.3d 344, 448-49 [bulk supplier of BT-67 whose product was repackaged by manufacturer had no duty to warn ultimate consumer]; *Persons v. Salomon North America, supra,* 217 Cal.App.3d 168, 178 [no duty of ski binding manufacturer to warn ultimate user]; *Walker v. Stauffer Chemical Corp.* (1971) 19 Cal.App.3d 669 [no duty of bulk sulfuric acid supplier used by

manufacturer of drain cleaner to warn ultimate consumer]; *Artiglio v. General Electric Co.* (1998) 61 Cal.App. 4th 830 [bulk supplier of silicone to manufacture of breast implants owed no duty to warn ultimate consumer]; *Blackwell v. Phelps Dodge Corp.* (1984) 157 Cal.App.3d 372 [supplier of sulfuric acid who filled tank car had no duty to warn persons unloading the car about proper venting]; *Lee v. Electric Motor Division* (1985) 169 Cal.App.3d 375 [supplier of electric motor used in product it did not design, manufacture, or package had no duty to warn end user of that product that motor did not stop instantaneously]; *cf. Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 662 [asbestos supplier liable to ultimate user of product when there was no evidence that purchaser of asbestos was aware of the dangers of asbestos].)

Plaintiffs and the Court of Appeal principally rely on the *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, which held an asbestos supplier liable for injuries to an ultimate consumer. In *Stewart,* however, there was no evidence of the intermediate manufacturer's sophistication and knowledge. The court does say that the sophisticated intermediary doctrine applies only if a "manufacturer provided adequate warnings to the intermediary." (*Id.* at 29.) That comment makes no sense. The sophisticated intermediary doctrine is based on the logical conclusion that a sophisticated purchaser knows or should know of the hazards without having to be warned. If warnings are a prerequisite to using the doctrine, the doctrine has no effect. Moreover, *Stewart* did not address the issue here as to the lack of knowledge or means for any warning to be given to the end user where neither the end user, nor the end product, could be known by the asbestos supplier.

The Court of Appeal opinion conflicts with the obvious danger rule

adopted in *Johnson* and with most other cases involving a supplier to a sophisticated manufacturer who buys a product knowing its hazards and where the supplier has no reasonable means of warning end users. The Court of Appeal opinion greatly expands the duty to warn, essentially eliminating recognized exceptions involving obvious dangers and the right to rely on manufacturers to warn down stream users. This Court's review is needed to secure uniformity of decision.

III. REVIEW IS WARRANTED TO ADDRESS IMPORTANT QUESTIONS OF LAW

The issues raised in the Petition are important questions of law, as discussed above and in the Petition. As to the substantive rulings, the obvious danger/sophisticated intermediary issues are recurring. They are fundamental issues to products liability law in general and asbestos litigation in particular. The expansive view of the duty to warn imposed by the Court of Appeal will likely lead to more litigation against more remote defendants. As the dissent notes, the majority opinion "would eviscerate the century-old legal principle that 'every person has a right to presume that every other person will perform his duty and obey the law.'" (Dissent p. 5.) The majority opinion also dispenses with the need to show legal cause. (Dissent p.p. 6-8.) Contrary to Plaintiffs' belief, these are important concepts impacting many cases.

Additionally, the Court of Appeal failed to address the broker issue that was raised in the trial court by motion for directed verdict and on appeal. This is an important issue for defining the universe of people subject to strict liability. It is a question that has not been previously answered directly in any California case, though many out of state cases

hold brokers are not subject to strict liability. Plaintiffs' assertion that Special Electric abandoned the issue has no basis. The issue was raised in both sets of trial court briefs on the motion for directed verdict and in Respondent's Brief on appeal. (Respondent's Brief at pp. 22-27.) The motion for directed verdict was referenced in the trial court arguments and was granted by the trial court. There is simply no support for the premise that the issue was abandoned.

Further, the procedural issues raised in the Petition are not limited to this case as Plaintiffs suggest. The Court of Appeal's unprecedented interpretation of the statutes concerning JNOV motions and the court's power to rule on them, its imposition of written notice requirements for *sua sponte* motions, and its reversal for procedural error without any showing of prejudice, all have significance to many cases. Not only were the majority's holdings erroneous and without legal foundation, as demonstrated by the dissent, they could have wide ranging impact.

Plaintiffs' argue the circumstances of this case are unique and will never be repeated, and the procedure that should be followed is specified in *Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 328. Yet, that case demonstrates the error of the Court of Appeal here and its potential impact on trials. *Beavers* recognized that the "trial court's power on motion for judgment notwithstanding the verdict has long been said to be 'absolutely the same' as its power on motion for a nonsuit or for a directed verdict." (*Id.* at 328.) Not so, according to the Court of Appeal here, which held the trial court had no power to rule on the JNOV motion when it did. The impact of not allowing nonsuit and directed verdict motions to be handled later as JNOV motions was plainly stated by the *Beavers* court.

> If the power to grant judgment notwithstanding the verdict is not coextensive with the power to grant a directed verdict, then trial courts will be compelled to dispose of issues on motion for directed verdict out of fear of losing the authority to enter an appropriate disposition at a later time. Such a result serves neither the policy in favor of expeditious and efficient resolution of issues nor the clearly expressed legislative intent that the authority on a motion for judgment notwithstanding the verdict be coextensive with the power to direct a verdict.

(*Id.*)

As *Beavers* states, the JNOV statute, Code of Civil Procedure section 629, requires that JNOV be granted "whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." (*Id.* at 328-29.) Here prior motions for directed verdict and nonsuit were made and procedurally should have been granted. The Court of Appeal has created inconsistency in the procedures where the Legislature has mandated consistency. Trial courts "will be compelled to dispose of issues on motion for directed verdict out of fear of losing the authority to enter an appropriate disposition at a later time." (*Id.* at 328.)

IV. THE GENERAL NEGLIGENCE VERDICT WAS BASED ONLY ON ALLEGED FAILURE TO WARN

Plaintiffs assert there was an independent jury finding of general negligence that supports the reversal and was not challenged in the Petition. (Answer at 10-12.) This position ignores the discussions in the Petition here (at pages 22-23) and in Respondent's Brief (at pages 12, 37) and Motion for Rehearing (at pages 11-12) below of precisely this issue.

As set forth in those discussions, the general negligence claim was based on nothing other than the negligent failure to warn. The jury verdict found the product was not defectively designed by Special Electric, and there was no evidence (or argument) of any negligent "supply of asbestos" unrelated to failure to warn.

The "evidence" which Plaintiffs cites proves this point. First, they cite evidence that Special Electric sold an asbestos type that was particularly dangerous. It is not negligent, however, to sell a dangerous product. (*Walker v. Stauffer Chemical Corp.* (1971) 19 Cal.App.3d 669, 674 ["The mere fact that bulk sulfuric acid is potentially dangerous is no reason to render Stauffer liable to plaintiff in the instant case."].) What makes such a sale negligent is the failure to warn.

Second, Plaintiffs assert Special Electric marketed the asbestos as safer than other types. However, the reasons this evidence is inconsequential for showing negligence relevant here are fully explained in the Petition at pages 22-23, to which Plaintiffs do not respond.

Third, Plaintiffs assert Special Electric sought to "distance itself" from its product by selling it through the entity "Special Electric" instead of "Special Asbestos." Plaintiffs do not cite to the record because there is no supporting evidence. Instead, they cite to the Court of Appeal opinion as modified which states the name of the entity changed from "Special Asbestos" to "Special Electric" "inferably in order to distance itself from what consumers were coming to learn was a dangerous product." (Op. at p. 31, as modified.) Initially, as the Court of Appeal was advised by the Petition for Rehearing, the entire premise is wrong since the name was never changed to "Special Electric", but rather to "Special Materials." (Petition for Rehearing at p. 9.) Further, there is no evidence on which to

base the sinister inference the Court of Appeal makes. It is an inference from whole cloth. The court took a completely neutral fact and ascribed a motive to it that is not based on anything in the record. Even a jury's finding must be based on substantial evidence which "'clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case.'" (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336). Here, there is only the Court of Appeal's speculation.

Next, even assuming this ascribed motive is true, the alleged effort to conceal the danger in the product is part and parcel of the alleged failure to warn of the danger. It is not some other form of negligence.

Finally, the name change could not have had any effect on Johns-Manville which already was fully aware of the hazards of asbestos or on Webb who never knew what asbestos was in the Transite pipe.

So none of this asserted negligence could possibly be causally related to Webb's injuries.

The dissent had no problem understanding Special Electric's arguments as to why the negligence verdict was based only on failure to warn, which belies the majority's holding that Special Electric failed to explain away the cited evidence or provide cogent legal argument. (Compare Op. at pp. 31-32 with Dissent at pp. 11-12.)

V. THE PETITION DOES NOT MISSTATE THE FACTS OR ISSUES

Plaintiffs final argument for denying the Petition asserts there are misstatements and issues not properly raised. (Answer at pp. 12-18.) These assertions are addressed in the order they appear in the Answer.

1. Plaintiffs take issue with statements in the Petition concerning warnings given. Every factual statement in the Petition to which Plaintiffs cite is supported by record citations. The point is, however, that the sophistication of Johns-Manville is the equivalent of notice. "[T]he user's knowledge of the dangers is the equivalent of prior notice." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 65.) Johns-Manville's sophistication and lack of need for notice have been conceded both by Plaintiffs and the Court of Appeal. Therefore, the holdings that absolve a supplier upon giving notice or allow a supplier to rely upon the intermediary to provide warnings apply here because Johns-Manville's sophistication and knowledge satisfy the notice requirement.

2. There is no real dispute between the parties' positions on what Plaintiffs argued as to a duty to warn Webb. Plaintiffs acknowledge that they did not argue there was a duty to warn Webb directly. (Answer at p. 13.) They argued that Special Electric should have contractually obligated Johns-Manville to warn its end users. The Court of Appeal, however, went beyond that argument and held that Special Electric had a duty independent of Johns-Manville to warn Webb. As the dissent notes, that is a significantly broader duty that not even Plaintiffs asserted. (Dissent at p. 3.)

3. The Court of Appeal held there was a duty to warn Johns-Manville and a duty to warn Webb. It failed, however, to apply legal principles to define the scope of that duty, such as the obvious danger

exception to the general duty to warn and the principle that presumes every other person will perform his duty and obey the law. Instead, in the guise of sustaining a jury decision on the question of breach, it allowed the jury to decide legal questions as to the scope of the duties. These questions should never have been submitted to the jury in the first place.

4. While Plaintiffs now claim they did not agree to defer ruling on the pre-verdict motions until after the verdict, they can cite to no such statement in the record. To the contrary, the trial court knew why it deferred ruling, to allow briefing and to not interrupt the trial, and to reach the merits of the motions, not to create procedural issues. (18 RT 6602:7-28.) The briefing schedule agreed to by the parties provided for filing Special Electric's Reply Brief on the nonsuit motion on March 9, 2011 (1 AA 151), and Plaintiffs' Opposition to the directed verdict motion on March 14, 2011 (1 AA 175), both after the verdict, and then at Plaintiffs' request a later second round of briefs was filed. Plaintiffs waited until after the verdict to raise their procedural objections to timing.

5. Plaintiffs assert Special Electric is responsible for the procedural issues created. That is untrue, as well as unfair. There was no claim by Plaintiffs prior to the verdict, when the parties discussed briefing the motions, that the pre-verdict motions would become moot after the verdict. The trial court bent over backwards to avoid any procedural issues and rule on the merits. It gave the parties the opportunity to brief the issues, and stated on the record that "Mr. Parker and his colleagues were vigilant and diligent." (18 RT 6602:21-22.) Clearly the trial court believed there were no procedural traps.

Moreover, Special Electric never refused to move for JNOV. At the time of the exchange between the trial court and counsel for Special

Electric, no judgment had been entered. Special Electric merely said that it would not move for JNOV prior to judgment. Once the nonsuit and directed verdict motions were granted, there was no reason for Special Electric to move for JNOV.

6. As the dissent stated, the purported procedural errors "were undeniably harmless." (Dissent at p. 8.) Plaintiffs' analysis of prejudice is faulty. The procedural errors, according to the Court of Appeal, were not in granting the motions, but in how they were granted – without 5 days written notice setting forth grounds and prematurely. It is undeniable that if the trial court had given the 5 days written notice and deferred ruling until after expiration of the time for moving for a new trial, as the Court of Appeal says it should have done, the trial court's decision would have been the same. No different result would have been probable without those purported errors. (Code of Civ. Proc. section 475.)

7. Special Electric is not asserting the lack of exposure evidence as a separate ground for seeking review. The dissent agreed with Special Electric that there was insufficient exposure evidence, which was an independent basis on which to uphold the judgment. (Dissent at p. 12.) That is an issue subsumed within other issues raised in the Petition.

8. As discussed above, Special Electric never abandoned the broker issue raised in the directed verdict motion.

VI. CONCLUSION

Review should be granted to secure uniformity of decision, and to settle important questions of law. The Court of Appeal decision errs in both its procedural and substantive holdings, and in doing so creates conflicts in the case law and confusion in the handling of pre and post-trial

motions. The strong dissent highlights the errors. The matter is deserving of this Court's attention.

Special Electric respectfully requests that this Court grant review.

Dated: May 23, 2013

BRYDON HUGO & PARKER

By: _____
Edward R. Hugo
James C. Parker
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SPECIAL ELECTRIC
COMPANY, INC.

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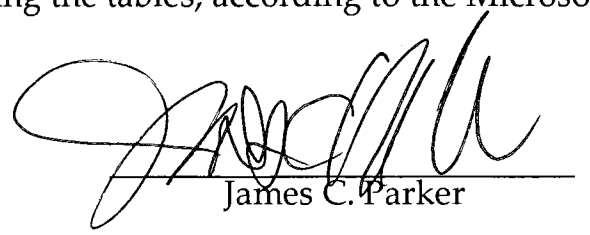

James C. Parker

William B. Webb and Jacqueline V. Webb v. Special Electrict Company, Inc.
In the Supreme Court of California

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

PROOF OF SERVICE

I am a resident of the State of California, over the age of 18 years, and not a party to the within action. My electronic notification address is service@bhplaw.com and my business address is 135 Main Street, 20th Floor, San Francisco, California 94105. On the date below, I served the following:

REPLY TO ANSWER TO PETITION FOR REVIEW

on the following:

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

I declare under penalty of perjury that the above is true and correct. Executed on May 23, 2013, at San Francisco, California.

Josh Tabisaura