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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOHN M. NOLEN et al., Plaintiffs and Respondents, v. FOSTER WHEELER ENERGY CORP., Defendant and Appellant.	B216202 (Los Angeles County Super. Ct. No. BC391649)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory Alarcon, Judge. Reversed and remanded.

Sedgwick, Detert, Moran & Arnold, Frederick D. Baker and Brian R. Thompson for Defendant and Appellant.

Waters Kraus & Paul, Paul C. Cook and Michael B. Gurien for Plaintiffs and Respondents.

Foster Wheeler Energy Corp. (Foster Wheeler) appeals from a judgment entered after a jury trial on John M. Nolen (John) and Sarah Nolen's (Sarah) (collectively the Nolens) claims of strict liability and negligence arising from John's exposure to asbestos during his work as a seller of water treatment chemicals for his employer Nalco Chemical Company (Nalco), from 1976 through 1979. The jury found Foster Wheeler liable to the Nolens and awarded them economic and noneconomic damages of over $8 million.

We find that under the recent decision of the California Supreme Court in *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335 (*O'Neil*), Foster Wheeler is not liable for injuries arising from asbestos-laden products to which John was exposed. Therefore we reverse.

CONTENTIONS

Foster Wheeler contends it is not liable as a matter of law because California imposes no liability on a manufacturer for injuries arising from products it did not manufacture, sell or distribute.

Foster Wheeler further contends that the trial court committed prejudicial error because it failed to instruct the jury on the sophisticated intermediary doctrine and contributory negligence; that the jury's special verdict is irreconcilably inconsistent with its findings on causes of action for strict liability and negligent failure to warn; and that, at a minimum, the jury miscalculated its damages determination and the Nolens's award must be reduced accordingly.

Because we reverse the judgment on liability, we do not reach the issues of instructional error or jury error.

FACTUAL BACKGROUND

John graduated from Cal Poly Pomona in 1968 with a degree in chemistry. He began working as a sales representative for Nalco in 1976. In 2008, he was diagnosed with mesothelioma.

Nalco's business was the manufacture and sale of chemicals to the power industry, including boiler treatment chemicals and cooling water chemicals. As a sales engineer for Nalco, John spent the majority of his time at various account locations providing service to those accounts. This service included testing and inspecting the industrial

boilers at the job site. John recalled seeing Foster Wheeler boilers at four job sites: (1) Nestle in Salinas, (2) Pacific State Steel in Fremont or Hayward, (3) Owens-Corning Fiberglass in Santa Clara, and (4) Chevron in Richmond.[1]

During his inspections of the Foster Wheeler boilers, John disturbed thermal insulating materials on the boilers. He described the boiler inspection process as follows: "To inspect the boiler, you have to crawl through a fairly small manhole, going in and out of both the mud drum and steam drum. And the manholes were covered on the outside with insulation." "[A]s you crawled over those areas, it was impossible not to rub off some insulation on your clothes and on your hands." "You get this stuff all of [*sic*] you. I didn't take insulation off. I didn't strip insulation off the boiler. But pieces of it came off on my clothes and my hands." This caused dust, which John breathed.

In addition to his exposure through the inspection process, John testified that while he was present on site for the boiler inspections, workers at the various sites would replace gaskets and repair insulation that was loose. This was done at the same time that the boiler was inspected, so that "they wouldn't have to bring the boiler down again at a later date." The maintenance included removing gaskets and "chipping and grinding" to get the gasket material off. This process created a lot of dust, which John breathed.

John described the insulation as "dry cake mud" that was "brownish in color." He offered no testimony that the insulation contained asbestos, and admitted that he was not trained to recognize asbestos. However, John testified that it was common knowledge that he would encounter asbestos at the various job sites he visited. He was specifically informed about the presence of asbestos at one job site.

John could not identify the manufacturer or the distributor of the asbestos products to which he was exposed. Nor could he identify the manufacturer or distributor of the gaskets which he encountered, or whether they had ever been replaced prior to the time he was present at the various worksites. There was no evidence that Foster Wheeler

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[1] John survived long enough to testify at the trial of this action, but died on August 25, 2009, after judgment. Judgment had been entered on February 18, 2009.

manufactured, sold, distributed, or supplied the asbestos insulation to which John was exposed.

John testified that during the entire time that he worked at Nalco, he never received any warnings that asbestos exposure could cause asbestosis, lung cancer or mesothelioma. The first time he learned anything about asbestos hazards was in the 1980's, when he read newspaper articles that referenced asbestos hazards and saw people using respiratory protection for asbestos removal. When he was working at Nalco, no one wore respirators or warned that respirators were necessary.

PROCEDURAL HISTORY

The Nolens initiated this action on May 29, 2008, against Foster Wheeler and numerous other defendants, alleging causes of action for negligence, strict liability, false representation, intentional tort/intentional failure to warn, premises liability, and loss of consortium. By the time the case went to trial, Foster Wheeler was the only remaining defendant.

Foster Wheeler moved for summary judgment, and later for judgment notwithstanding the verdict (JNOV), on the ground that it owed no duty to the Nolens for harm caused by asbestos-containing affixed parts that it did not manufacture, sell or distribute. At the time, *O'Neil* had not been decided therefore Foster Wheeler relied on *Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564. Foster Wheeler's motions were denied.

After trial, the jury returned a special verdict against Foster Wheeler. The jury found that Foster Wheeler's boilers failed to perform as safely as an ordinary consumer would have expected and that Foster Wheeler was negligent in failing to warn John of the danger. The jury did not find Foster Wheeler strictly liable for failure to warn, because it found that the boilers' risks were not known or knowable at the time of manufacture.

The jury awarded economic damages consisting of medical expenses in the amount of $225,000, and awarded $296,887 for "household services" damages. It awarded noneconomic damages to John in the amount of $2,500,000 and noneconomic damages to Sarah in the amount of $5,000,000. The jury apportioned 20 percent of the

fault for John's injuries to Foster Wheeler, and apportioned 80 percent of the fault to "all others." The jury apportioned no fault to John for his injuries.

Foster Wheeler's posttrial motions for JNOV and for a new trial were denied on April 16, 2009.

On May 14, 2009, Foster Wheeler filed its notice of appeal from the judgment.

DISCUSSION

I. Standards of review

This is an appeal from a jury verdict and denial of a JNOV motion.

"A party is entitled to a judgment notwithstanding the verdict on a timely motion if there is no substantial evidence to support the verdict and the evidence compels a judgment for the moving party as a matter of law. (Code Civ. Proc., § 629; *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 877-878.) If the motion challenges the sufficiency of the evidence to support the verdict, we review the ruling under the substantial evidence standard. (*Clemmer, supra,* at pp. 877-878; *Shapiro v. Prudential Property & Casualty Co*. (1997) 52 Cal.App.4th 722, 730.) If the motion presents a legal question based on undisputed facts, however, we review the ruling de novo. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284.) If we determine that the trial court denied a motion for judgment notwithstanding the verdict that should have been granted, we must order the entry of judgment in favor of the moving party. (Code Civ. Proc., § 629.)" (*Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1043-1044.)

II. *O'Neil* is controlling

While this appeal was pending, the California Supreme Court issued its decision in *O'Neil,* in which the court held "that a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." (*O'Neil, supra,* 53 Cal.4th at p. 342.) We requested additional briefing from the parties as to how

the Supreme Court's holding in *O'Neil* affected the issues presented in this appeal. Both parties submitted supplemental letter briefs for our consideration.

We find that the *O'Neil* decision directs that Foster Wheeler may not be held liable for the Nolens's injuries on any theory advanced by the Nolens, and that the judgment must be reversed and remanded for entry of judgment notwithstanding the verdict in favor of Foster Wheeler.

The *O'Neil* matter involved facts that are similar to those before us. In *O'Neil*, Crane Co. (Crane) and its codefendant Warren Pumps made valves and pumps that were used with asbestos-containing external insulation or internal gaskets and packing, none of which were manufactured or distributed by the defendants. (*O'Neil, supra*, 53 Cal.4th at p. 342.) The defendants sold their valves and pumps to the United States Navy for use in steam propulsion systems on Navy ships. Navy specifications required the use of asbestos-containing insulation on all external surfaces of its steam propulsion systems as well as in the internal gaskets and packing materials in valves. (*Id.* at pp. 343, 344.)

The pumps and valves sold to the Navy were not made or shipped with external insulation. Such insulation was applied subsequently by the Navy. (*O'Neil, supra*, 53 Cal.4th at p. 349.) The valves sold to the Navy contained internal asbestos-containing gaskets and packing at the time they were sold; however, the Navy replaced the gaskets and packing from time to time during routine maintenance operations, and there was no evidence that the *O'Neil* defendants ever made or sold these replacement parts. (*Id.* at p. 344.)

The plaintiff in *O'Neil* served on a Navy ship from 1965 to 1967 and was exposed to asbestos fibers released from external insulation, gaskets and packing during repair and maintenance of the ship's equipment. The *O'Neil* defendants supplied equipment for the ship's steam propulsion system in 1943 or earlier, at least 20 years before the plaintiff worked aboard the ship. (*O'Neil, supra*, 53 Cal.4th at p. 345.) The plaintiff in *O'Neil* argued that the defendants were liable for his injuries caused by the asbestos exposures because their products included and were used in connection with asbestos-containing parts. The plaintiff also argued that the defendants should be held strictly liable for

failing to warn him about the potential hazards of breathing asbestos released from their products. (*Id.* at p. 348.)

The Supreme Court concluded the *O'Neil* defendants were not strictly liable for the plaintiff's injuries because (a) any design defect in the defendants' products was not a legal cause of injury to the plaintiff, and (b) the defendants had no duty to warn of risks arising from other manufacturer's products. (*O'Neil, supra*, 53 Cal.4th at p. 348.) The court reasoned that the plaintiff was not exposed to asbestos from a product made by the defendants. The evidence showed that plaintiff was exposed to asbestos dust released from exterior insulation the Navy had applied to the pumps and valves. None of the defendants manufactured or sold that insulation, and neither defendant required or advised that the insulation be used with its products. (*Id.* at p. 349.) The uncontroverted evidence also showed that the plaintiff had been exposed to asbestos from replacement gaskets and packing inside the pumps and valves that were not the original parts supplied by the defendants, but were replacement parts the Navy had purchased from other sources. (*Ibid.*) The *O'Neil* court therefore determined that "even assuming the inclusion of asbestos makes a product defective, no defect inherent in defendants' pump and valve products caused O'Neil's disease." (*Id.* at p. 350.)

The Supreme Court also rejected the plaintiff's argument that the products were defective because they were "designed to be used" with asbestos-containing components. (*O'Neil, supra*, 53 Cal.4th at p. 350.) The court stated: "The products were designed to meet the Navy's specifications. Moreover, there was no evidence that defendants' products *required* asbestos-containing gaskets or packing in order to function. Plaintiff's assertion to the contrary is belied by evidence that defendants made some pumps and valves without asbestos-containing parts. As alternative insulating materials became available, the Navy could have chosen to replace worn gaskets and seals with in defendants' products with parts that did not contain asbestos. Apart from the Navy's specifications, no evidence showed that the design of defendants' products required the use of asbestos components, and their mere compatibility for use with such components is not enough to render them defective." (*Ibid*., fn. omitted.)

Similarly here, Foster Wheeler made boilers that may have been insulated with asbestos-containing insulation or used with asbestos-containing gaskets. However, there is no evidence that Foster Wheeler ever made, sold, or distributed any of the asbestos-containing insulation or replacement parts to which John was exposed.

Given the similarities between the two cases, we find that the *O'Neil* case mandates a verdict in favor of Foster Wheeler.

III. The exceptions stated in *O'Neil* are not applicable here

The Nolens point out that the *O'Neil* court acknowledged two exceptions to its ruling. Specifically, the high court noted that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless [1] the defendant's own product contributed substantially to the harm, or [2] the defendant participated substantially in creating a harmful combined use of the products." (*O'Neil, supra*, 53 Cal.4th at p. 342.) In addition, the Nolens point out that the Supreme Court included a footnote describing circumstances that do not come within its holding. The court explained:

> "A stronger argument for liability might be made in the case of a product that *required* the use of a defective part in order to operate. In such a case, the finished product would inevitably incorporate a defect. One could argue that replacement of the original defective part with an identically defective one supplied by another manufacturer would not break the chain of causation. Similarly, if the product manufacturer specified or required the use of a defective replacement part, a stronger case could be made that the manufacturer's failure to warn was a proximate cause of resulting injury. In both contexts, however, the policy rationales against imposing liability on a manufacturer for a defective part it did not produce or supply would remain. [Citation.] These difficult questions are not presented in the case before us, and we express no opinion on their appropriate resolution."

(*O'Neil, supra*, 53 Cal.4th at p. 350, fn. 6.)

The *O'Neil* defendants had not substantially participated in the use of asbestos materials with their products, because the design choices dictating the use of asbestos

were made by the Navy. In other words, the "products were designed to meet the Navy's specifications." (*O'Neil, supra*, 53 Cal.4th at p. 350.)

The Nolens argue that here, unlike in *O'Neil*, there is evidence "from which the jury could conclude that Foster Wheeler specified the use of asbestos insulation on its boilers." Specifically, the Nolens point to the testimony of professional insulator and California Certified Asbestos Consultant Charles Ay (Ay). The Nolens claim Ay testified that, generally, the manufacturer of a boiler would specify how it wanted the boiler to be insulated. Prior to approximately January 1, 1973, when the use of the manufacturing of asbestos insulation was outlawed, it was industry standard for the insulation to contain approximately 15 percent asbestos.

Based on Ay's testimony, the Nolens claim, it is a "small inferential step" for the jury to conclude that it was Foster Wheeler, the boiler manufacturer, which specified the use of asbestos insulation on the Foster Wheeler boilers inspected by John. The Nolens claim they are entitled to all reasonable inferences in their favor. (*Community Cause v. Boatwright* (1987) 195 Cal.App.3d 562, 569.) However, a closer review of Ay's testimony reveals that it does not support a reasonable inference that Foster Wheeler specified the use of asbestos on or around its boilers at any of the locations where John worked in the 1976-1979 time period.

The Nolens's first citation to the record is to testimony given by Ay during an Evidence Code section 402 hearing which took place outside the presence of the jury. Thus, this testimony was not evidence that was considered by the jury. Further, the testimony primarily concerned the date when asbestos stopped being installed on boilers:

> "Q: Okay. In terms of -- you talked about the specifications. The boiler manufacturers actually specified the use of asbestos insulation up until '71?
>
> A: Well, that was -- the end of '71 is the last dates [*sic*] that I recall. In fact, it clearly stated that if you didn't follow these recommendations, you voided your warranty on the boiler.
>
> "Q: Okay. And this includes specifications that were done by Foster Wheeler?

"A: These are Foster Wheeler boilers, yes, sir."

The testimony suggests that, up until 1971, some boiler manufacturers, including Foster Wheeler, specified the use of asbestos insulation on their boilers.[2] It does not indicate that Foster Wheeler specified the use of asbestos on the boilers at the four locations John visited during the 1976-1979 time frame. Without further specific information regarding the date of manufacture of those boilers, or specific details regarding Foster Wheeler's instructions as to the care of those boilers, an inference that Foster Wheeler directed the use of asbestos on any specific boilers during 1976-1979 is not reasonable.

Next, the Nolens cite more testimony given outside the presence of the jury in an Evidence Code section 402 hearing. Again, this testimony was not evidence on which the jury relied. Further, the testimony is not sufficient to suggest that Foster Wheeler mandated the use of asbestos on the boilers at the four locations relevant to this matter. Ay testified that he worked on insulating boilers through 1973. He further testified:

"Q: Okay. And in terms of the insulation that was used on boiler systems, was that something that was -- that you chose how they were insulated?

"A: No.

"Q: How did you determine how they were to be insulated?

"A: Well, what predicates the insulation is the k-factor of the insulation and the temperature of the boiler. So you can't put something that holds 200 degrees on an 800- degree boiler. So you have to match the insulation with the boiler. The standard rule in the industry, if you don't have a set of documents, is that -- it's a slang. It's called 'lag to the existing.' 'Lag' is the slang for 'lagging,' i.e., insulation. Whatever you took off, you put back. That is the -- that's the accepted practice. That way

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[2] Earlier testimony suggests that asbestos was not the only material recommended by the boiler manufacturers. Ay testified "the boiler manufacturers recommended the products that you use on their boiler. And again, depending on the boiler, depending on the temperature of the boiler and the k-factor of the material as to what you used. Obviously, if you use the wrong material, it wouldn't hold up."

you know you're right. So it was lag to the existent, or the k-factor of the product, that it met the temperatures and pressures of the boiler.

"Q: Okay. And the specifications for the temperatures and the pressures and insulation for the -- let's put just -- start at this: for the original insulation of the boiler, where did those come from?

"A: From the boiler manufacturers."

This evidence is insufficient to support a reasonable inference that Foster Wheeler directed the use of asbestos on any specific boilers during the years 1976 through 1979.

Ay's testimony, as summarized by the court, was that asbestos-containing insulation was "industry-wide standard pre-1972, based on his training and experience, but not necessarily specific to the defendant." When asked whether he had ever seen a manual specific to the boilers at the four sites relevant to this matter, Ay admitted: "I have not seen a manual specific to any of those four sites you've mentioned in my entire life." Ay further admitted that he has never seen a Foster Wheeler manual for a Foster Wheeler packaged boiler for the years 1973, 1974, or 1975. Again, Ay's general testimony that manufacturers, including Foster Wheeler, specified the use of asbestos insulation up until 1971 does not lead to a reasonable inference that asbestos was specified by Foster Wheeler at the four sites relevant to this appeal during the time that John was employed by Nalco.

The Nolens cite to no evidence presented to the jury from which the jury could reasonably infer that Foster Wheeler specified the use of asbestos in connection with its boilers located at Nestle in Salinas, Pacific State Steel in Fremont or Hayward, Owens-Corning Fiberglass in Santa Clara, or Chevron in Richmond, during the time period in question. As pointed out by Foster Wheeler in its supplemental briefing, there would be no foundation for any such testimony because Ay testified that he had never seen a Foster Wheeler manual during the relevant time period, nor had he ever seen a manual specific to the boilers located at the four relevant work sites. At oral argument, counsel for the Nolens emphasized Ay's general testimony that, prior to 1973, it was industry standard

for boiler manufacturers to specify the use of asbestos insulation on boilers. We reiterate that this general testimony, relating to an earlier time period, is insufficient to create a reasonable inference that Foster Wheeler specified the use of asbestos in its boilers after 1976.

IV. Conclusion

"A manufacturer is liable only when a defect in its product was a legal cause of injury [Citation.]" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) As explained in *O'Neil*, "[t]he defective product in this setting was the asbestos insulation, not the [boilers] to which it was applied after defendants' manufacture and delivery." (*O'Neil, supra*, 53 Cal.4th at pp. 350-351.) Foster Wheeler did not manufacture, sell, or distribute the asbestos products which caused the Nolens's injuries, and the Nolens presented no evidence that Foster Wheeler specified the use of asbestos on or around its boilers at the four sites where John worked during the years 1976-1979. Under the circumstances, we find that *O'Neil* mandates a judgment in favor of Foster Wheeler.

DISPOSITION

The judgment is reversed, and the matter is remanded for entry of judgment notwithstanding the verdict in favor of Foster Wheeler. Foster Wheeler is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST