Filed 10/4/19 LAOSD Asbestos Cases CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LAOSD ASBESTOS CASES.	B276252 JCCP 4674 (Los Angeles County Super. Ct. No. BC460121)
SHARRON LINSOWE et al., Plaintiffs, Respondents and Cross-Appellants, v. HENNESSY INDUSTRIES, INC., Defendant, Appellant and Cross-Respondent.	

APPEAL and cross-appeal from postjudgment orders of the Superior Court of Los Angeles County, Charles Palmer, Judge. Affirmed in part and remanded in part.

Gordon & Rees, James G. Scadden, Don Willenburg and Robert A. Rich, for Defendant, Appellant, and Cross-Respondent Hennessy Industries.

Heubeck Law, John C. Heubeck and Marc A. Lowe, for Plaintiffs, Respondents, and Cross-Appellants Sharron Linsowe and Henry Linsowe, Jr.

INTRODUCTION

As a lengthy wrongful death trial was winding down, counsel met with the trial court to craft a special verdict form. The task took more than a day to accomplish. The jury subsequently deliberated for several days and rendered a special verdict in favor of one plaintiff, awarding substantial economic and noneconomic damages. The trial court, however, signed a judgment in favor of defendant. Postjudgment, the trial court denied plaintiffs' motion for judgment notwithstanding the verdict (JNOV), but granted their motion for a new trial, finding the verdict inconsistent and against the law. Both sides appeal. After independently examining the record, we agree with the trial court that the special verdict findings are inconsistent and a new trial is required. Accordingly, we affirm the postjudgment orders granting the motion for a new trial and denying the motion for JNOV.[1] We remand for a new trial.

PROCEDURAL BACKGROUND and TRIAL EVIDENCE

Plaintiffs Sharron Linsowe and her sons, Henry Linsowe, Jr., and Eric Linsowe, sued a number of defendants for the wrongful death of their husband and father, Henry Linsowe.[2] The complaint alleged Mr. Linsowe, a career brake mechanic at Downey Ford, died of mesothelioma after years of asbestos exposure as a result of working with a brake shoe grinder manufactured by Ammco Tools, Inc. Hennessy Industries, Inc., sued and identified as defendant Doe 3, was Ammco's corporate successor. The Linsowes sought general and punitive damages on strict product liability and negligence theories.

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[1] As the Linsowes acknowledge, this disposition moots their protective cross appeal, as no judgment is now in effect. (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 60.)

[2] Eric Linsowe is not a party to this appeal. We will refer to Sharron Linsowe and Henry Linsowe, Jr., collectively, as the Linsowes, and to decedent Henry Linsowe as Mr. Linsowe. We previously reversed a summary judgment in favor of another defendant. (*Linsowe v. BorgWarner Morse Tec Inc.* (Dec. 7, 2016, B263726) [nonpub. opn.].)

Trial evidence established that Mr. Linsowe began his employment with Downey Ford in the 1960's. Mr. Linsowe specialized in brake repairs and replacements and worked on as many as eight vehicles per day. It was necessary to grind replacement brake shoe linings, which contained asbestos, to fit the brake drums. Mr. Linsowe used the patented Ammco brake shoe grinder for this purpose.

Mr. Linsowe's work exposed him to asbestos when he removed worn brake drums that captured "wear dust;" when he used the Ammco brake shoe grinder to fit the new brake shoe linings; and when he emptied the Ammco brake shoe grinder collection bag. Ammco's brake shoe grinder was designed with a vacuum system and canvas bag to collect dust and asbestos particles, but to allow air to recirculate. Mechanics manually emptied the bag. Evidence demonstrated the canvas bag was permeable enough to allow asbestos particles to escape during the brake shoe grinder's operation. Mechanics were also exposed to asbestos when they shook the bag to release asbestos-containing dust particles caked on the inside.

Trial exhibit 633 was an Ammco patent application from the early 1970's for an improved brake shoe grinder. There, Ammco explained there was a "*serious* problem" with the design of the brake shoe grinder then in use because "the bad [*sic*] becomes filled with dust and/or the pores thereof become clogged with the dust particles . . . [which] are blown into the atmosphere. In fact, because of the inherent danger to the persons using this type of equipment, there are many localities which have banned the use of brake shoe grinding machinery which incorporates the prior art type of dust collector." Also in evidence was a brochure Ammco distributed for another product that warned, "Brake material and dust may contain asbestos fibers" and the "machine [was] not to be used with asbestos containing products[, which] . . . can cause cancer, lung disease, and other serious illnesses, including mesothelioma."

Hennessy did not rebut the Linsowes' evidence that Mr. Linsowe used the Ammco patented brake shoe grinder at Downey Ford. Rather, Hennessy urged that Mr. Linsowe was not diagnosed with, and did not die from,

mesothelioma.[3] Hennessy also argued that if the jury believed Mr. Linsowe died from mesothelioma, other nonparty entities, including Downey Ford and the manufacturers and suppliers of asbestos-containing brakes, were responsible for the Linsowes' losses.

The evidentiary portion of the trial exceeded the time estimate. At the five-week mark, as the parties neared the completion of testimony, the trial court and counsel cobbled together a 43-question special verdict form. The special verdict form included questions on three strict product liability theories (risk-benefit and consumer expectation tests and failure to warn), three negligence theories (design or manufacture, failure to warn, and failure to recall or retrofit), punitive damage prerequisites, decedent's comparative fault, apportionment of responsibility among various nonparties, and damages.

During deliberations, the jury asked two questions concerning the special verdict form. The jurors did not question the directions on the special verdict form itself.

The jury staunchly followed the instructions on the form, answered 30 questions, found the brake shoe grinder's design was "a substantial factor in causing [Mr. Linsowe's] harm," and calculated plaintiff Sharron Linsowe's economic and noneconomic damages as $532,685.37. The jury concluded the use of the brake shoe grinder had "potential risks that were known or knowable," but also found Hennessy neither knew nor reasonably should "have known that [the product] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner," nor did Hennessy become aware that the product "was dangerous or likely to be dangerous when used in a reasonably foreseeable manner." The special verdict concluded the grinder did not "fail to perform as safely as an ordinary consumer would have expected when used in an intended or reasonably foreseeable way" and the risks in the design of the brake shoe grinder did not outweigh the design's benefits.

The special verdict findings on all the negligence theories and the punitive damages questions were in Hennessy's favor. The jury determined

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[3] Hennessy asserted that "the diagnosis of mesothelioma [was] . . . a central theme of [its] case."

Mr. Linsowe and a number of nonparties were not negligent; but that Downey Ford was, although its negligence was not a substantial factor in contributing to his death. The jury nonetheless apportioned fault between Hennessy and Downey Ford at 60 percent/40 percent.

Polling of the jurors extended into what normally would be the noon recess. The trial court immediately discharged the jury, without first asking counsel if there was a reason to keep them; the attorneys did not volunteer any.

The trial court began the afternoon session by announcing, "In light of the verdict, the defendant will prepare the judgment." After a few housekeeping details, the Linsowes' counsel stated "for the record [that he] would take exception to the conclusions by the Court that it's a defense verdict. But I guess we can argue that point later." Counsel added, "it's an odd combination of things in the special verdict form . . . . There's a causation . . . but . . . it's . . . an odd collection of findings, which we'll bring up at another date."

Hennessy's counsel prepared a proposed judgment. The preamble recited that the "sworn . . . and duly instructed [jury] . . . returned into court with its special verdict . . . [and] [u]pon such verdict, judgment is entered." Although the jury determined the design of the brake shoe grinding machine was a "substantial factor" in causing Mr. Linsowe's illness and awarded Sharron Linsowe $532,685.37 in damages, for which Hennessey was 60 percent responsible, the proposed judgment was in favor of Hennessy, with all plaintiffs to take nothing.

The Linsowes filed written objections to the proposed judgment, arguing the jury's special verdict was "against the law because it contains inconsistent findings as well as findings contrary to (and sufficiently supported by) the evidence." Contending the jury's special verdict was "'hopelessly ambiguous,'" they sought a hearing before entry of the proposed judgment.

In a written response, Hennessy urged the trial court to enter the proposed judgment as submitted, arguing the Linsowes' objections were premature and "substantively meritless." Hennessy dismissed the Linsowes' claim of ambiguity and asserted the jury found in its favor "on the key

questions of liability [and] [t]he proposed judgment reflects the verdict that was reached."

There was no hearing on the Linsowes' objections. By minute order, the trial court overruled them "without prejudice" and signed the proposed judgment without any changes.

The Linsowes filed timely, alternative motions for a new trial and for a JNOV. The latter motion sought a partial JNOV on the issue of liability based on insufficiency of the evidence to support a judgment in Hennessey's favor under the risk/benefit and consumer expectation theories. Although the Linsowes did not make a motion for directed verdict at the close of the evidence, they also argued the trial court should have "direct[ed] the jury to answer question No. 19 in the affirmative" ["'After the brake shoe grinder was sold, did defendant become aware that the Ammco brake shoe grinder was dangerous or likely to be dangerous when used in a reasonably foreseeable manner?'"]." Noting the jury's inconsistency in the Downey Ford finding, the Linsowes asked for a partial JNOV and a reallocation of the percentage of fault attributed to Downey Ford so that Hennessey would become 100 percent liable.

The Linsowes' notice of intention to move for a new trial listed all statutory grounds. (Code Civ. Proc., § 657.)[4] In their memorandum of points and authorities, they argued the damages were inadequate, the evidence was insufficient to justify a verdict in Hennessey's favor, and the verdicts were inconsistent and against the law. (§ 657(5), (6), (7).)

Hennessy opposed both motions. Addressing the risk-benefit test, Hennessy argued it was not required to prove the benefit of the particular design of the brake shoe grinder outweighed the risk of asbestos exposure; rather, it only needed to present evidence that the grinders "improve[] the safety of automotive brakes–surely a benefit to be considered in any reasonable risk-benefit analysis."

Hennessy also sought to admit identical declarations from two jurors who averred under penalty of perjury, that, inter alia, based on their posttrial conversations with one of Hennessey's trial attorneys, they learned "the

[4] All undesignated code sections refer to the Code of Civil Procedure.

[Linsowes] are claiming that because the jury answered the damages questions . . . and apportionment of responsibility questions . . ., that this is inconsistent with the jury's finding of no liability. This is not true. During the deliberations, I and other jurors stated that we were perplexed and confused by the instructions on the verdict form [concerning damages and] discussed . . . that we would answer [the damages questions] hypothetically, as if we had found liability and fault against Hennessy, even though we had not."

After two rounds of supplemental briefing and two hearings, the trial court sustained the Linsowes' objections to the declarations, denied the motion for JNOV, and ordered a new trial on the ground that the jury returned an inconsistent verdict and the judgment was against the law. The trial court specifically found substantial evidence supported the jury's verdict. The trial court timely prepared, signed and filed a written specification of reasons for its decision. (Code Civ. Proc., § 657.)

Hennessy appealed from the order granting a new trial. The Linsowes appealed from the denial of their motion for JNOV and filed a protective cross-appeal to challenge the defense judgment. (Code Civ Proc., § 904.1, subd. (a)(4).)

DISCUSSION

The Linsowes, although they contend inconsistencies in the verdict are irreconcilable, ask this court to engage in a three-step analysis: First, find that "certain" special verdict findings on the issue of liability were not supported by substantial evidence; second, order the entry of a partial JNOV in their favor as to liability; and third, remand for "a partial new trial on compensatory damages, punitive damages and the apportionment of fault." Alternatively, they ask that we affirm the order for a new trial.

Hennessy insists the special verdict is entirely consistent and asserts "the jury clearly, explicitly and unequivocally found for [it] on all five theories of recovery." Hennessy asks this court to reinstate "the jury's verdict." Underlying this request, however, is an assumption that this court will ignore two significant elements of the jury's verdict–the contradictory $532,685.37 damages award to Sharron Linsowe and the proximate cause

finding. Viewed in context, Hennessy seeks a defense judgment notwithstanding a plaintiff's verdict for damages.

The parties deftly point to findings in the special verdict that support their respective positions. And that is precisely the problem. By asking this court to accept some of the jury's findings, but to reject others, both sides seek to have this court "'choose between inconsistent answers.'" (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092 (*Zagami*).) That we cannot do.

Resolution of the parties' appeals depends on whether the special verdict is inconsistent. "The standard of review for inconsistency in a special verdict is de novo." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 124, fn. omitted (*Trejo*).)

I. Effect of Order Granting a New Trial

Before we examine the special verdict for inconsistencies, a procedural comment is in order. The posttrial proceedings in this matter were somewhat unconventional. Section 624 defines a special verdict as one "by which the jury find the facts only, leaving the judgment to the [c]ourt. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law." A jury that enters a special verdict in favor of a plaintiff suing for damages must also determine the amount of damages. (§ 626.)

The words "verdict" and "judgment" are not synonymous or interchangeable. "An award or verdict without a judgment is merely symbolic." (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1331-1332.) Instead, the law contemplates the entry of a judgment that is in accord with the special verdict. (§ 625.) Before a judgment on a special verdict may be entered, the "jury's special verdict findings must be internally consistent and logical." (*City of San Diego v. D.R. Horton San Diego Holding Co.* (2005) 126 Cal.App.4th 668, 681 (*D.R. Horton*).)

A special verdict that requires the trial court to accept some of the jury's findings, but reject others because they are contradictory, is irreconcilably inconsistent; and no judgment on that verdict should be entered. Hennessy was "no more entitled than [the Linsowes] to have the

favorable [aspects of the] verdict credited and the unfavorable one[s] disregarded." (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1346 (*Shaw*).)

Under any standard, a finding that the brake shoe grinder's design was a substantial factor in causing harm to Mr. Linsowe, coupled with a $532,685.37 damages award, constitutes a verdict in Sharron Linsowe's favor.[5] Accordingly, at that point, the trial court had two options: (1) Enter judgment in favor of Sharron Linsowe and then entertain motions by the other parties or (2) forgo entry of a judgment in Sharron Linsowe's favor and entertain various motions, e.g., for a new trial on the ground that, based on inconsistent answers, the special verdict, was against the law (§ 657, subd. (a)(6)). Not included in the available options was what occurred here–the entry of a defense judgment unaccompanied by a motion (either by a party or the court) for JNOV. (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 179, 181, fn. 7.)[6]

At our invitation, the parties filed supplemental briefs to address the entry of a defense judgment and its effect, if any, on subsequent posttrial proceedings. Hennessy maintains the jury did not find any liability "and therefore, did not 'award' damages to anyone." The Linsowes assert the trial court's "judgment is a nullification of the jury's findings, so *in substance* it is a JNOV."

Although we conclude the defense judgment amounted to a JNOV in Hennessy's favor, entry of that judgment does not impact our analysis. When the trial court ordered a new trial, the judgment was vacated. (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 302.)

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[5] "To be considered a proximate cause of an injury, the acts of the defendant must have been a 'substantial factor' in contributing to the injury. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 969. . . .)" (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1303.)

[6] On the merits, a JNOV in Hennessy's favor could not stand in any event. A trial court may grant the defendant a JNOV only if no substantial evidence supports a verdict in the plaintiff's favor. (*Webb v. Special Electric Co., Inc.*, *supra*, 63 Cal.4th at p. 192.) The trial court expressly, if somewhat ambiguously, found "substantial evidence to support the jury's verdict."

Because we affirm the trial court's order for a new trial, the underlying defense judgment is not revived.

II. Special Verdict

A. *Overview*

Special verdicts are not required in civil cases. Trial courts have discretion to refuse litigants' requests for a special verdict; and such refusal "is rarely ground for reversal on appeal.' (Wegner, et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2015) ¶ 17:14, p. 17-6)." (*Hjelm v. Prometheus Real Estate Group, Inc.* (2016) 3 Cal.App.5th 1155, 1179.)

Appellate courts have heralded and reviled special verdicts. (Contrast, *McCloud v. Roy Riegels Chemicals* (1971) 20 Cal.App.3d 928, 937 with *Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 795 (*Crown Castle*).) As one Court of Appeal astutely observed, "it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221.) "Whatever the potential virtues of special verdicts when wisely employed, they also present 'recognized pitfalls.' [Citation.]" (*Crown Castle,* at p. 795.) Pitfalls include the "possibility of a defective or incomplete special verdict, or possibly no verdict at all." (*Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855.) Moreover, a judgment entered on a special verdict is more likely to be reversed. (*Crown Castle,* at p. 795; see also at p. 791, fn. 14 [recognizing that a "logical inconsistency" in the special verdict "probably rendered the verdict 'against the law'"].)

Apart from the specter of reversal, "special verdicts present challenges for trial courts when they are drafted by adversaries in litigation. They present an almost irresistible opportunity not only to guide the jury's determination of dispositive issues but to influence it, subliminally or otherwise, to decide the case a particular way. The court [may attempt] to obviate this concern by requiring counsel to jointly prepare the verdict form. But even if this provides some check against overreaching, it leaves open other hazards." (*Crown Castle, supra,* 6 Cal.App.5th at p. 796.) *Crown Castle's* concluding admonition would have been well-heeded here: "All litigation is ultimately a matter of striking a reasonable compromise among

competing interests, particularly the interest in resolving cases fairly and that of utilizing public and private resources economically. A special verdict is unlikely to serve either of these objectives unless it is drawn with considerable care. . . . [W]e hope [this reversal] may serve as an object lesson for bench and bar, the moral of which is to avoid [a special verdict] unless both court and counsel are prepared to invest the time and attention necessary to ensure that it helps rather than hinders the just and efficient resolution of the case." (*Ibid.*, fn. omitted.)

B. *Governing Principles – Inconsistent Special Verdict*

"A special verdict is inconsistent if there is no possibility of reconciling its findings with each other." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357.) "'The inconsistent verdict rule is based upon the fundamental proposition that a factfinder may not make inconsistent determinations of fact based on the same evidence.'" (*D.R. Horton, supra,* 126 Cal.App.4th at p. 682.) Where findings on material issues conflict, a special verdict cannot stand. (*Ibid.*) "'An inconsistent verdict may arise from an inconsistency between or among answers within a special verdict [citation] or irreconcilable findings. . . . [Under those circumstances,] all the questions are equally against the law.'" (*Trejo, supra,* 13 Cal.App.5th at p. 124.)

The law pertinent to our analysis has been summarized as follows: If the jury has been discharged, but the "verdict is not 'hopelessly ambiguous,' the [trial] court may "'interpret the verdict from its language considered in connection with the pleadings, evidence and instructions.'"" (*Zagami, supra,* 160 Cal.App.4th at p. 1092; see also *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 300.) On the other hand, if "the verdict is 'hopelessly ambiguous,' . . . a court reviewing a special verdict does not infer findings in favor of the prevailing party [citation], and there is no presumption in favor of upholding a special verdict when the inconsistency is between two questions in a special verdict. [Citation.] 'Where there is an inconsistency between or among answers within a special verdict, both or all the questions are equally against the law.' [Citations.] 'The appellate court is not permitted to choose between inconsistent answers.'" (*Zagami,* at p. 1092.)

C. *This Special Verdict was Irreconcilably Inconsistent*

As an aside, we note there is a distinction between a defective special verdict and a defective special verdict form. A special verdict may be inconsistent, i.e., defective, even though the verdict form itself is not.

The special verdict form in this case is defective in a number of respects.[7] In an effort to reduce the length of the special verdict form and eliminate some redundancy, trial counsel took shortcuts that set the stage for inconsistent answers. (*Crown Castle, supra,* 6 Cal.App.5th at p. 796.) But the parties do not directly challenge the special verdict form. Consequently, waiver or forfeiture is not an issue. (*Zagami, supra,* 160 Cal.App.4th 1083, 1093, fn. 6 ["inconsistent jury findings in a special verdict are not subject to waiver by a party[, but] if the form of a verdict is defective, the complaining party must object or risk waiver on appeal of any such defect"].)

Additionally, Hennessy's contention in the trial court that mistakes in the special verdict form "can be laid at [the Linsowes'] feet" is belied by the parties' on-the-record, last-minute, and generally unsatisfactory discussions to create the special verdict form. Both sides share responsibility for defects in the special verdict form.[8] (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1183.)

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[7] In its opening brief, Hennessy describes the special verdict form as having a "glitch" and mistaken routing instructions.

[8] Because we are remanding this matter for a new trial, one particular defect bears mentioning, however. CACI VF-1201 is designed to be a model for cases, like this one, where "the jury will decide design defect under both the consumer expectation and the risk-benefit tests." (CACI VF-1201, p. 792.) Question 6 in CACI VF-1201 is worded as follows: "Did the risk of the [product's] design outweigh the benefits of the design? In a posttrial hearing, the trial court challenged the accuracy of the question, reproduced verbatim as question 4 on the special verdict form in this case. We share the trial court's concerns.

Under the risk-benefit test for design defect, the plaintiff has the burden to prove the defendant was responsible for placing the product in the stream of commerce and the plaintiff was harmed, and the product was a substantial factor in causing the harm. (CACI No. 1204.) At that point, the burden shifts to the defendant, who has the burden to prove the benefits of the particular product's design (as opposed to the benefit of the product itself)

We begin our independent review of the special verdict with the award of $532,685.37 in economic and noneconomic damages to Sharron Linsowe. The damages award is entirely consistent with the jury's findings in question 2 ("the Ammco brake shoe grinder's design [was] a substantial factor in causing harm to decedent") and question 7 ("use of the Ammco brake shoe grinder [had] potential risks that were known or knowable . . . ").

The damages award is also consistent with the "no" answer to question 4 ("the risk of the Ammco's brake shoe grinder's design [did not] outweigh the benefits of the design"), if the "no" answer means the jury determined the risks and benefits of the brake shoe grinder's design balanced each other out. (See fn. 3.) But the damages award is inconsistent with this theory of liability if the jury concluded the benefits of the design outweighed the design's risk. Damages are also irreconcilable with the finding in question 3 concerning the consumer expectation test for design defect liability ("the Ammco brake shoe grinder [did not] fail to perform as safely as an ordinary consumer would have expected when used in an intended or reasonably foreseeable manner"). Question 7's finding that the potential risks were knowable is inconsistent with the finding in question 14 (Hennessy neither knew nor reasonably should "have known that the Ammco brake shoe grinder was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner").

There is no inconsistency between the findings in questions 36 and 37 that Downey Ford was negligent, but its negligence was not a substantial factor in causing Mr. Linsowe's harm. The finding in question 38 that

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outweigh the risks of the product's design. CACI No. 1204 correctly instructs the jury that the defendant has the burden to "prove[] that the benefits of the [product's] design outweigh the risks of the design."

CACI VF-1201, however, flips the question and asks whether the risks of the product's design outweigh the benefits of the design. A "yes" answer clearly signals that the defendant did not carry its burden of proof, resulting in a decision in the plaintiff's favor. But a "no" answer can produce a false result. It could mean, as it was intended, that the benefits outpace the risks, i.e., the defendant met its burden of proof and should prevail on the issue. Or, it could mean that the risks and benefits of the design balance each other out, i.e., that the defendant did not meet its burden and should not prevail.

Downey Ford was 40 percent responsible for damages, however, is irreconcilable with question 37.

Seeking to avoid a finding of hopeless ambiguity, Hennessy cites and selectively quotes from several decisions to argue the trial court erroneously failed to apply the "rule of reconciliation" to resolve any "apparent inconsistency": "If it is reasonable to draw conclusions that would explain the purported inconsistency, the special verdict is upheld." Hennessy's argument misstates the law. As this court recently held, the rule of reconciliation "applies when a special finding is alleged to be inconsistent with a general verdict, not when special verdict findings are inconsistent with other special verdict findings–a fact made obvious in portions of the quoted sentence [Hennessy] omits. The rule that 'a verdict should not be modified "if there is any 'possibility of reconciliation under any possible application of the evidence and instructions'" . . . [¶] applies only to inconsistencies between general and special verdicts, and inconsistencies between special findings rendered in support of a general verdict.' (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 302-303, [96 Cal.Rptr.2d 605].) 'With a special verdict, unlike a general verdict or a general verdict with special findings, a reviewing court will not infer findings to support the verdict.'" (*Trejo, supra,* 13 Cal.App.5th at p. 124, fn. 5; *D.R. Horton, supra,* 126 Cal.App.4th at p. 679.)

Nor did the trial court err in sustaining the Linsowes' objections to the two juror declarations proffered by Hennessy. Under certain circumstances, a trial court may consider juror declarations to establish the invalidity of a jury verdict, e.g., to demonstrate juror misconduct. (Evid. Code, § 1150; *Guernsey v. City of Salinas* (2018) 30 Cal.App.5th 269, 284.) Declarations that reflect jurors' individual or collective reasons for a particular vote or their mental processes are not admissible, however. (*Id*. at p. 283.) "The 'mental processes' prohibition applies to juror affidavits conveying jurors' statements about their *understanding* of certain words in instructions." (*Ibid.*; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124-1125 ["Juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are inadmissible to the extent that they describe the effect of any event on a

juror's subjective reasoning process"].) The declarations here concerned only mental processes, e.g., their being "perplexed and confused" and ultimately deciding to answer the damages questions "hypothetically."

In any event, it also must be remembered that Hennessy offered the declarations after judgment had been entered in its favor, notwithstanding the finding of liability and the verdict of damages. (See Part IV, *post*.) As the declarations concerned apportionment of liability and damages only, Hennessy in effect was attempting to impeach the portion of the jury's verdict that the trial court already rejected.

Based on the foregoing, we conclude irreconcilable inconsistencies existed between and among the special verdict's answers.[9]

III. Order Granting New Trial

An inconsistent verdict is against the law and provides a ground for granting a new trial. (*Trejo, supra,* 13 Cal.App.5th at p. 124; Code Civ Proc., § 657(6).) Having concluded after an independent review that the special verdict is inconsistent, we agree with the trial court that the proper remedy was a new trial. (*Shaw, supra,* 83 Cal.App.4th at p. 1344.) An order granting a new trial will be affirmed on appeal "unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.) Hennessy has not done so.[10]

IV. Order Denying Motion for JNOV

"An order denying a JNOV motion is appealable even if the trial court granted a new trial motion." (*Hirst v. City of Oceanside* (2015) 236 Cal.App.4th 774, 781, fn. 3; § 629, subd. (d).) This rule does not mean, however, that an appellate court affirming an order granting a new trial on

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[9] A number of the inconsistencies would have been avoided had more care been taken in drafting the special verdict form. (*Crown Castle, supra,* 6 Cal.App.5th 775.) Our concern, however, is with the inconsistencies themselves, not how they came to be.

[10] Because we agree the special verdict is inconsistent and against the law, we do not address the Linsowes' alternative arguments in support of the order granting a new trial.

the ground the special verdict was inconsistent and against the law will review the order denying a JNOV on the merits. Such is the case here.

An appellate court's frame of reference for review of the denial of a motion for a JNOV is the special verdict itself. We examine the trial evidence in the light most favorable to the prevailing party to determine whether substantial evidence supports the jury's verdict. (*Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 49.) Where the special verdict is inconsistent and against the law, there is no way to tell which party prevailed and which inconsistent answers should be accepted. The inconsistencies in the special verdict that require a new trial preclude this court from ordering a JNOV on the issue of liability. The Linsowes are "no more entitled than [Hennessy] to have the favorable [aspects of the] verdict credited and the unfavorable one[s] disregarded." (*Shaw, supra,* 83 Cal.App.4th at p. 1346.)

DISPOSITION

The orders granting a new trial and denying a partial JNOV are affirmed. The matter is remanded to the trial court for a new trial. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DUNNING, J. *

We concur:

WILLHITE, ACTING P.J.

COLLINS, J.

*Retired Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.