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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

BOBBY EVANS, as successor-in-interest, et al., Plaintiffs and Appellants, v. CERTAINTEED CORPORATION, Defendant and Cross-Appellant; LOS ANGELES DEPARTMENT OF WATER AND POWER, Defendant and Cross-Respondent.	B227075 (Los Angeles County Super. Ct. No. BC418867)

APPEAL from an order of the Superior Court of Los Angeles County. Conrad R. Aragon, Judge. Affirmed.

Levin Simes, William A. Levin, Laurel L. Simes; Kaiser & Gornick, Jeffrey A. Kaiser; The Ehrlich Law Firm, and Jeffrey Isaac Ehrlich for Plaintiffs and Appellants.

Reed Smith; Margaret M. Grignon; McKenna Long & Aldridge, William J. Sayers, David K. Schultz and Mark S. Geraghty for Defendant and Appellant CertainTeed Corporation.

Carmen A. Trutanich, City Attorney, Richard M. Brown, General Counsel of Los Angeles Department of Water and Power, and Lisa S. Berger, Deputy City Attorney, for Defendant and Cross-Respondent Los Angeles Department of Water and Power.

K & L, Robert E. Feyder; K & L Gates, Nicholas P. Vari, Michael J. Ross; and Fred J. Hiestand for Amicus Curiae Civil Justice Association of California.

This appeal arises from a "secondary or 'take-home'" asbestos exposure case. (See, e.g. *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 33.) A jury returned a verdict in favor of a plaintiff homemaker who suffered personal injuries caused by her exposure to asbestos dust carried home on her spouse's body and clothing from his work-place. The jury also awarded loss of consortium damages to the plaintiff's spouse. The jury awarded punitive damages. The trial court granted a motion for new trial by a defendant asbestos company. Plaintiffs appeal the order granting a new trial; the asbestos company cross-appeals. We affirm the order granting a new trial.

FACTS

The Asbestos Exposure

Bobby and Rhoda Evans were married in March 1965.[1] In 1974 or 1975, the Los Angeles Department of Water and Power (DWP) hired Bobby as a janitor. In the early 1980's, Bobby became a "maintenance construction helper." Bobby continued to work for DWP until sometime during the 1990's.

Throughout the years that Bobby worked for the DWP, the department used both metal water pipes and asbestos cement (AC) water pipes in its operations. The evidence at trial showed that approximately 25 to 30 percent of the work done by DWP workers involved AC pipe, and that AC pipe came predominantly from two asbestos companies, Johns Manville (JM) and CertainTeed Corporation (CTC). AC pipe stopped "coming to the job" sometime in the early 1980's, but workers still worked with AC pipe that had

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[1] We use first names in this opinion for purposes of clarity. No affinity or disrespect is intended.

been put in the ground earlier. AC pipes came in differing lengths depending upon the manufacturer. Cutting a piece of AC pipe to the length needed for a particular repair or construction job was a two-worker task; one worker rotated the pipe inside a rig holding it in place, while a second worker cut the pipe with an abrasive disc saw. Cutting a piece of AC pipe was "very messy" and "very dusty." When workers cut AC pipe, dust from the sawing got "all over everything."

As a janitor, Bobby swept areas where AC pipes were cut, and personally joined in to help cut AC pipes in the yard where he worked. Bobby "cut pipe day one to '92 or 3." Bobby's job responsibilities also included cleaning a locker room where dozens of workers who may have cut AC pipe during the work day changed out of their work clothes. The workers' clothes were often covered in dirt and dust, and workers would shake out their clothes in the locker room. Bobby would sweep up the debris with a broom and a dust pan.

When cutting AC pipe, workers sometimes used an air compressor line to "blow dust away from the guy that was cutting" the pipe. On other occasions workers tried to control the dust problem by pouring water on a pipe as they cut it, but this created a "muck" that got on the workers and their clothing, and clogged the insides of their saws. Because of the problems associated with using water, workers usually cut the pipe dry. Workers typically wore goggles and paper masks to try keeping dust out of their eyes, noses and mouths, but the masks did not seal out dust completely. Workers sometimes tried to improvise their own dust protection, for example, by taking "a bunch of napkins or something," and stuffing then into a spot on a mask that was letting in dust. No matter what workers did when they cut AC pipe, dust always ended up clinging to their faces, eyes, ears, and clothing.

During his work as a maintenance construction helper, Bobby performed repairs on AC pipe and installed AC pipe at work locations in the "field." This work included repairs of leaking water pipe lines that were already installed, and also installing new water lines at sites such as new housing tracts. Workers regularly cut AC pipe while performing this work.

In the late 1970's, the DWP began supplying its crews with coveralls or jumpsuits that it would wash for them at their option. The DWP laundry, however, did not always return the same clothes that a worker turned in. Clothes that came back were often in less desirable condition ("tattered") or different size. These matters were a problem for some workers, including Bobby, because they were bigger than their co-workers, and substitute coveralls would not fit. A lot of workers, including Bobby, often took their coveralls from work to clean in their home laundry. Bobby would typically arrive at home covered in dust and dirt, and change out of his coveralls in the garage. Rhoda would shake off as much dust and dirt as she could. Sometimes before putting them in the washing machine she would hose them off on the fence because she did not want to get the thick crud on any other clothes.

For much of the time that Bobby worked for the DWP, the Evans family only owned one car, which Bobby would drive to and from work, wearing his dirty coveralls on the trip home. As a result, the car seats were often covered in dust. Rhoda kept an old towel in the car so she could brush the dust off the seats when she drove it to run errands or go to church.

In April 2009, Rhoda was diagnosed with mesothelioma.

The Litigation

In July 2009, Rhoda and Bobby Evans filed an action for personal injury damages and loss of consortium against the DWP and numerous asbestos companies, including CTC and JM. In December 2009, the Evanses filed their operative first amended complaint (FAC). Summarized, and as eventually submitted to the jury, the FAC alleges the following causes of action: (1st) by Rhoda against the DWP for maintaining public property in a dangerous condition in that the department did not warn of known dangers posed by the asbestos dust that was present on its property; (2d) by Rhoda against the asbestos companies for strict product liability; (3d) by Rhoda against the asbestos companies for product liability based on failure to warn; (4th) by Rhoda against the asbestos companies for negligence based on failure to warn; and (5th) by Bobby for loss of consortium.

The DWP settled before trial. The remaining part of the action was tried to a jury in March and April 2010, with a special verdict form indentifying makers or distributors of asbestos products to which Bobby was allegedly exposed: CTC, JM, Crane Co., and Kubota Corporation. The parties appearing at trial were the Evanses, CTC and DWP. As we view the record on appeal, the trial was largely comprised of three elements: (1) the historical facts of Bobby's and Rhoda's exposure to asbestos dust, including which asbestos companies manufactured or distributed which asbestos products vis-à-vis Bobby's and Rhoda's exposure to asbestos dust; (2) a contest of medical experts on the issue of whether Rhoda's mesothelioma was, in fact, caused by her exposure to asbestos dust; and (3) an extensive history of when and to what extent the asbestos industry in general, and CTC in particular, knew the dangers posed by asbestos, and the manner and scope in which such information was disseminated or kept hidden from the users of asbestos products. Ancillary to the evidence on these issues was the issue of the DWP's comparative liability based upon evidence about what it knew of the dangers posed by asbestos, and how it maintained its property, including its warnings (or lack thereof) about the dangers of asbestos, and its efforts to protect (or its failure to protect) its own employees against the dangers of asbestos. At the conclusion of trial, the Evanses' counsel argued that the jury should allocate damages 90 percent to CTC and 10 percent to DWP because CTC had not proven that JM shared in fault. In the event the jury found JM also shared in the harm caused to the Evanses based on the evidence that JM sold AC pipe to DWP, counsel argued for an allocation of 70 percent to CTC, 20 percent to JM, and 10 percent to DWP.

On April 28, 2010, the jury returned a special verdict finding in favor of Rhoda and Bobby Evans on every cause of action. As to damages, the jury awarded Rhoda a total of $6,821,015, as follows: past medical expenses of $125,000, future medical expenses of $200,000, future lost social security earnings of $96,015, loss of household services of $400,000, and past and future pain and suffering $6 million. The jury awarded Bobby $2 million for loss of consortium. As to comparative fault, the jury found CTC 70 percent responsible for damages and DWP 30 percent responsible for

damages. Although the remaining asbestos companies were listed on the special verdict form, including JM, the jury gave no answer as to their measure of fault. The jury also found it was appropriate to award punitive damages against CTC, and later returned verdict fixing punitive damages against CTC in the amount of $200 million.

On May 28, 2010, CTC filed a motion for judgment notwithstanding the verdict (JNOV) challenging the amount of punitive damages awarded by the jury on the ground they were excessive under constitutional guidelines. On the same date, CTC also filed a motion for new trial.

On July 20, 2010, the trial court granted CTC's motion for JNOV, ruling, in substance, that punitive damages would be fixed at a 1:1 ratio with the compensatory damages. In the same order, the court granted CTC's motion for new trial, ruling that a new trial would be on all issues, expressly including liability, comparative fault, compensatory damages, and punitive damages. In sum, the order for new trial expressed the court's conclusion that the jury's decision to allocate zero percent fault to JM was not supported by the trial evidence. The court ruled that a new trial would be on all issues because, in the court's view: "It falls in the zone of pure conjecture to opine whether, had the jury assigned fault as against JM, as it should have done, the jury's total compensatory damages would have been the same as, or greater than, or less than, the amounts the jury declared in the verdict."

On July 27, 2010, the trial court entered judgment in favor of Rhoda and Bobby Evans in accord with the jury's special verdicts.[2] After making adjustments to account for the DWP's settlement, the jury's allocation of fault, and the trial's order on CTC's motion for JNOV, the judgment reads:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that, subject to the Court's July 20, 2010 Order on [CTC]'s Motions for JNOV and New Trial, the allocations of fault, the settlement credit and the

[2] We understand the judgment to have been entered as a protective measure, in the event the order for new trial was subsequently vacated.

reduction of punitive damages to their constitutional maximum, THE COURT HEREBY ENTERS JUDGMENT, as follows: (1) against Defendant [CTC] and in favor of Plaintiff Rhoda Evans for noneconomic damages of $4,200,000 and punitive damages of $5,021,015; (2) against Defendant [CTC] and in favor of Plaintiff Bobby Evans for noneconomic damages of $1,400,000; and (3) against Defendant DWP and in favor of Plaintiff Rhoda Evans for noneconomic damages of $1,800,000."

Rhoda and Bobby Evans filed a timely notice of appeal from the order granting a new trial. CTC filed a timely cross-appeal.

DISCUSSION

The Evanses' Appeal

I. The New Trial Order

Rhoda and Bobby Evans (hereafter Evans) contend the trial court erred in granting CTC's motion for new trial based on the jury's failure to allocate any fault to JM. Under the long-established standard of review applicable to an order granting a new trial, we must reject this contention.

The Governing Law

An order granting a new trial allows for the re-examination of an issue of fact in the same court after a trial and decision by a jury. (Code Civ. Proc., § 656.) "Unlike nonsuits, directed verdicts, and judgments notwithstanding the verdict, . . . granting a new trial does not entail a victory for one side or the other. It simply means the reenactment of a *process* which may eventually yield a winner. Accordingly, the judge has a much wider latitude in deciding the motion . . . which is reflected in an abuse of discretion standard when the ruling is reviewed by the appellate court. A new trial motion allows a judge to disbelieve witnesses, reweigh evidence and draw reasonable inferences contrary to that of the jury, and still, on appeal, retain a presumption of correctness that will be disturbed only upon a showing of manifest and unmistakable abuse." (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67

Cal.App.4th 743, 751.) An order granting a new trial does not mean a plaintiff's case does not have merit; it means the merit of the case will be decided upon a new trial. (*Id.* at pp. 751-752.) Because an order for new trial does not finally resolve the merits of a case, a trial court in effect sits as a "thirteenth juror" when ruling on a motion for new trial, with discretion to reject the jury's verdict. (See, e.g., *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 507.)

When, as in the current case, a trial court orders a new trial upon concluding that the evidence does not justify the jury's verdict, the court's order is reviewed on appeal for an abuse of discretion. (*Jiminez v. Sears, Roebuck & Co*. (1971) 4 Cal.3d 379, 387.) As explained by the Supreme Court: "The determination of a motion for a new trial rests so completely within the [trial] court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for the action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside." (*Ibid.*) Framed from another perspective, a new trial order must be sustained on appeal unless a party opposing a new trial order demonstrates that no reasonable judge, sitting as a trier of fact, could have found for the movant. (See *Lane v. Hughes Aircraft Co*. (2000) 22 Cal.4th 405, 412.) In short, " 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the . . . order [granting a new trial].' " (*Ibid*.)

The standard of review is different when an appellant claims the trial court based an order granting a new trial "exclusively upon an erroneous concept of legal principles applicable to the cause." (*Conner v. Southern Pacific Co*. (1952) 38 Cal.2d 633, 637.) Upon the demonstration of such exclusive legal error, an order granting a new trial "will be reversed." (*Ibid.* [reviewing court reversed new trial order upon finding that the trial court had granted a motion for new trial based on the trial court's mistaken conclusion that its instructions to the jury misstated the law, which they had not].)

Analysis

We read Evans's arguments to present an amalgam of the two standards of review noted above. Evans's first argument is that the trial court's order for a new trial order, on its face, demonstrates that the court misunderstood controlling legal principles applicable to the case. In particular, Evans assigns error because the court's order for new trial does not include express language to the effect that it was CTC's burden to prove the amount of fault attributable to JM. We understand Evans to be arguing in this respect that when the court was evaluating whether to grant the motion for new trial, the court should have, in acting as a thirteenth juror, had in mind that CTC bore the burden of proof of the issue of JM's shared fault. Further, that because the court's order does not acknowledge the burden of proof, the court must have misunderstood the burden of proof. In this vein, Evans also argues that CTC did not present substantial evidence proving the specific percentage of JM's fault. It appears that Evans argue there was no room for any reweighing of evidence by the court on the issue of JM's fault because there was no conflict in the evidence on the issue. As a result, there must have been legal error. In short, Evans argues it was legal error, in the context of his case, for the court to act as a thirteenth juror on the issue of JM's fault.

We reject Evans's claim that the trial court's order for new trial demonstrates on its face that the court misunderstood the law applicable to case regarding the burden of proof of comparative fault. The absence of express language in the court's order to the effect that CTC had the burden to prove a precise, numerically stated percentage of JM's comparative share of fault does not demonstrate a misunderstanding of the law on the part of the court. At best, it demonstrates that the court did not feel the need to expend ink and paper expressing the law governing the burden of proof. We see nothing in the record on appeal which tends to suggest that the trial court did not know the law. Indeed, the court properly instructed the jury in accord with standard jury instructions (see CACI Nos. 406, 1207B) that CTC had the burden to prove (1) that JM shared fault for Evans's injuries, and (2) that JM's fault was a substantial factor in causing Evans's harm.

We find it implausible that the court properly instructed on the applicable law during the trial, but, shortly after trial, misunderstood the law.

Apart from this, the entire point of the court's new trial order involves the burden of proof. The court found that CTC had shown JM shared fault for Evans's injuries, and, for this reason, found the jury's decision to assign zero percent fault to JM was not justified by the evidence. Thus, assuming as Evans argues, that CTC had the burden to prove JM was 5 percent or 10 percent or whatever numeric percent at fault, it does not follow that the trial court erred in rejecting the jury's finding of zero percent fault. The burden to prove the exact amount of JM's fault (if, indeed, that was the burden of proof borne by CTC) has no bearing on the correctness of the court's evaluation of the trial evidence as it related to the jury's finding of zero percent fault attributable to JM. The court viewed the evidence to have proved *some measure of fault more than zero percent* as to JM, contrary to the jury's finding of zero percent as to JM. The court's finding as a thirteenth juror of some measure more than zero percent fault as to JM is all that is important for purposes of the legal soundness of the court's new trial order.

This leaves Evans's second argument — that the trial court abused its discretion in evaluating the evidence and deciding to grant CTC's motion for new trial. We discern no abuse of discretion. As the trial court noted in its order for new trial, there was evidence at trial, notably the testimony of Lloyd Ambler, which showed that the DWP purchased more AC pipe from JM (460,000 feet) during the period from the mid 1970's to the mid 1980's than it did from CTC (280,182 feet). In addition, Bobby Evans and his supervisor at the DWP, Albert Groth, both testified that AC pipe supplied by JM was regularly used on jobs. This evidence of purchases of AC pipe by the DWP from CTC and JM respectively, and use of AC pipe from JM by Bobby Evans, standing on its own, is sufficient to support the trial court's finding that more than zero percent fault should have been attributed to JM. And there is more.

The court's order granting a new trial cited the following factors to justify its decision to grant a new trial: (1) the DWP purchased, and its employees worked with and cut, AC pipe supplied by JM; (2) Bobby Evans cut AC pipe supplied by JM; (3) Bobby

Evans's work clothes were laden with dust from AC pipe, and Rhoda Evans was exposed to asbestos from Bobby's work clothes; (4) JM's AC pipe was of a similar composition as CTC's AC pipe; (5) plaintiffs' own expert on medical causation, Barry Horn, M.D., expressly testified that Rhoda's mesothelioma was caused by exposure to JM's AC pipe; (6) JM was privy to the same industry-wide information as CTC concerning the dangers of asbestos; and (7) product liability rested as much with JM's AC pipe as with CTC's AC pipe in that no manufacturer's AC pipe performed as safely as an ordinary consumer would have expected. The trial court's new trial order must be affirmed because substantial evidence presented at trial supports the trial court's finding that some measure of fault should be allocated to JM.

Evans's contention that Lloyd Ambler's testimony should not be considered as substantial evidence in support of the trial court's order for new trial is unpersuasive. First, there is sufficient evidence apart from Ambler's testimony to sustain the order for new trial. Second, regardless of whether or not Ambler's testimony contained hearsay, it was admitted at trial without objection. Because Ambler's testimony was put before the jury, it was properly put before the trial court for purpose of the motion for new trial, and, thus, supports the trial court's order for new trial.

II. The Scope of the New Trial Order

Evans contends next: to the extent we find the trial court properly ordered a new trial, we should find the court abused its discretion by failing to circumscribe its order so that the new trial is limited solely to the issue of allocating fault. Evans argues the trial court should not have ordered a new trial of CTC's liability, nor should it have ordered a new trial of the amount of compensatory damages. We disagree.

Citing three cases – *Schelbauer v. Butler Manufacturing Co*. (1984) 35 Cal.3d 442 (*Schelbauer*); *O'Kelly v. Willig Freight Lines* (1977) 66 Cal.App.3d 578 (*O'Kelly*); and *Collins v. Plant Insulation Co*. (2010) 185 Cal.App.4th 260 (*Collins*) – Evans argues it is "settled law that when the only defect in [a jury's] verdict relates to the apportionment of fault, a trial court abuses its discretion if it orders a new trial on all issues." Evans reads *Schelbauer*, *O'Kelly*, and *Collins* too broadly.

In *Schelbauer*, the Supreme Court held that a reviewing court "should not modify an order granting a new trial on all issues to one granting a limited new trial 'unless . . . an order [for a limited retrial] should have been made [by the trial court] as a matter of law.'" (*Schelbauer*, *supra*, 35 Cal.3d at p. 456, quoting from *Baxter v. Phillips* (1970) 4 Cal.App.3d 610, 617.) The Court then ruled that a limited new trial should have been ordered as a matter of law in the first instance in that there was no "reason to subject the parties and the courts to the expense and delay of retrial of those issues *on which the jury and the trial court agreed* and which are supported by the evidence. Where, as here, the trial court has reviewed the jury's special verdicts and has properly concluded that the jury's apportionment of damages is erroneous but that the damage award *is incorrect only to the extent that it reflects an improper apportionment of liability*, the trial court should have limited its new trial order to that issue. Accordingly, the new trial order is modified to limit the new trial to the issue of apportionment of liability." (*Schelbauer, supra*, 35 Cal.3d at p. 457, italics added.)

Schelbauer does not help Evans in the current case because the trial court here did not find that the jury's verdict was defective *only* as to the apportionment of liability. The trial court's order granting a new trial expressly stated that the jury's unsustainable apportionment of liability also "placed in doubt" the jury's assessment of the measure of compensatory damages, and the jury's consideration of the punitive damages issue. In short, the record does not support a conclusion that the jury and the trial court disagreed only on the apportionment of liability, but otherwise agreed on the issues of the measure of compensatory damages, and on the propriety for, and amount of, punitive damages. Absent such agreement, *Schelbauer* does not guide us to reverse the new trial order on all issues.

In *O'Kelly*, an automobile case involving a single plaintiff and single defendant, the trial evidence "was conflicting both as to the conduct of the [two] parties and as to the extent of the personal injuries." (*O'Kelly, supra*, 66 Cal.App.3d at p. 581, fn. omitted.) The jury returned a special verdict with a finding that the plaintiff's damages totaled $16,147.43. The special verdict further included a finding that the plaintiff was 50

percent negligent. The trial court entered judgment for the plaintiff in the sum of $8,073.72, but subsequently granted the plaintiff's motion for new trial. On appeal, the defendant argued that the new trial order had to be interpreted as "being limited to a new trial solely on the question of apportionment between the parties of the total damage." (*Id*. at p. 583.) The Court of Appeal agreed, ruling that the total amount of damages, i.e., $16,147.53, had been fixed at the first trial, and was not a basis of the new trial order, and, thus, should not be the subject of relitigation at a new trial. (*Id*. at pp. 583-584.) *O'Kelly* is not helpful to Evans in the current case because here, the trial court did question the amount of damages when ordering a new trial. *O'Kelly* only involved one plaintiff and one defendant, and a simple issue of the comparative fault of the two parties in an auto accident. In the case before us today, the causation and damages issue are much more complex, involving more potential parties sharing comparative fault. The trial court's decision for a retrial on a clean slate was reasonable.

That leaves *Collins*. In *Collins*, there was no motion for new trial by any party. In other words, the *Collins* court did not review the correctness of an order granting a new trial, limited or not. On the contrary, in *Collins*, the defendant asbestos company took an appeal from a final judgment in favor of the plaintiff, arguing the trial court had wrongly excluded the United States Navy from the list of entities identified on a special verdict form as to which the jury could apportion fault. (*Collins, supra,* 185 Cal.App.4th at pp. 263-264.) The Court of Appeal ruled this was error, and remanded for a retrial. (*Id*. at pp. 265-277.) In that context, the Court of Appeal ruled that a retrial was to be limited to the issue of apportionment of fault because the defendant had raised "no challenge to the jury's liability verdict" on appeal. (*Id*. at p. 276.) *Collins* is not helpful to Evans in the current case because CTC did raise a challenge, and the trial court ruled that a new trial on all issues was required. We may not limit the scope of the trial court's new trial order unless such an order should have been made in the first instance as a matter of law. (*Schelbauer, supra,* 35 Cal.3d at pp. 456-457.) For the reasons explained above, that is not the situation in the current case.

We disagree with Evans that CTC's liability and the amount of compensatory damages should be off limits in a new trial, leaving a retrial limited to allocating fault as between the DWP, CTC, and other asbestos companies, namely JM. The trial court found reasonable grounds for a new trial of all issues — the jury's failure to allocate any fault to JM compromised all of the jury's findings regarding liability and the amount of damages — and Evans's arguments on appeal do not persuade that the court's decision rose to the level of an abuse of discretion. (*Gouskos v. Aptos Village Garage, Inc*. (2001) 94 Cal.App.4th 754, 762 [an appellant demonstrates an abuse of discretion he or she shows that a trial court's decision was arbitrary or capricious or beyond the bounds of reason, all circumstances considered].) It is the marked distinction between appellate review of a trial court order for new trial, and review of a judgment after trial, that dictates the result we reach on the current appeal. (See, e.g., *Gonzales v. Nork* (1978) 20 Cal.3d 500, 507 ["As with all actions by a trial court within the exercise of its discretion, as long as there exists 'a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action.'"].) Evans's arguments on appeal are well-presented but do not overcome the standard of review. We do not view the trial court as having acted irrationally in granting a new trial on a wider range of issues than solely apportionment of fault.

III. Punitive Damages

Because we have affirmed the trial court's order granting a new trial on all issues, we decline to address Evans's contention that the trial court abused its discretion when it reduced punitive damages to an approximate 1:1 ratio with compensatory damages. In the event a jury imposes punitive damages upon a new trial, we have no doubt the trial court will instruct the jury on the appropriate factors to be considered in evaluating any award of punitive damages, and that the trial court will, if so asked, review any decision on punitive damages in light of the constitutionally-based due process constraints on the amount of the award. (See *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003)

538 U.S. 408; *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559; *Simon v. San Paolo U.S. Holding Co., Inc*. (2005) 35 Cal.4th 1159.) Until such time, it is premature to address punitive damages. We note only that it is proper for a court, in addressing the amount of punitive damages, to relate such damages to the actual conduct of the party subject to the award, say as opposed to the party's industry collectively or to other parties in the same industry. (See *State Farm Mut. Automobile Ins. Co. v. Campbell, supra*, 538 U.S. at p. 424.) Whether CTC has already been assessed punitive damages in another action or faces the possibility of multiple punitive damages awards in different cases for the same conduct (*id*. at p. 423), is an examination better left for another day, if and when necessary.

CTC's Cross-appeal

In its cross-appeal, CTC challenges the trial court's rulings not to instruct the jury on the defenses of (1) superseding cause, and (2) sophisticated intermediary user. In light of our decision to affirm the trial court's order granting a new trial, we decline to address CTC's instructional claims. Although a reviewing court has discretion to address a claim of instructional error after an order for new trial where guidance would be helpful for retrial (see, e.g., *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 286-287), we find this case does not fit such a situation. The issues in this case are complex and heavily fact-dependent, and instructional issues may differ in light of the trial evidence. In addition, the law in asbestos exposure cases continues to evolve. (See *Campbell v. Ford Motor Co.*, *supra,* 206 Cal.App.4th 15.) We are reluctant to bind the trial court's ability to control retrial new trial by rendering advisory discussions on the subject of appropriate instructions. The orderly administration of trial would be better served by allowing the trial court, with appropriate input from the parties, to compile instructions as suited to any retrial.[3]

[3] After oral argument, we received notice that Rhoda recently passed away. This, too, may have an effect on the scope and issues involved at a new trial.

In its cross-appeal, CTC challenges the trial court's ruling to exclude any evidence that the DWP violated asbestos regulations promulgated by the California Occupational Safety and Health Administration. As we did with the instructional issues, we find the orderly administration of justice would be better served by allowing the trial court to have the flexibility to address admissibility issues in the first instance, depending upon the circumstances presented by trial.

DISPOSITON

The trial court's order granting CTC's motion for new trial is affirmed. Each party to bear its own costs on appeal.

BIGELOW, P. J.

We concur:

FLIER, J.

SORTINO, J.*

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