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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DAVID KELEMEN et al., Plaintiffs and Appellants, v. JOHN CRANE, INC., Defendant and Appellant.	B221778 (Los Angeles County Super. Ct. No. BC384059)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Affirmed in part, reversed in part, and remanded with directions.

Simon, Eddins & Greenstone and Brian P. Barrow for Plaintiffs and Appellants.

Farella Braun & Martel, John L. Cooper, Victor J. Haydel III, and Racheal Turner for Defendant and Appellant.

After David Kelemen, a former Navy machinist mate, developed mesothelioma, an asbestos-related cancer, he and his wife, Paula Kelemen, filed suit against numerous manufacturers of asbestos-containing products, alleging negligence and strict liability. Defendant John Crane, Inc. (JCI) was the only remaining defendant at trial.

After a three-day trial, the jury found JCI liable for negligence and strict liability. Ultimately, judgment was entered in favor of plaintiffs for compensatory and punitive damages.

JCI appeals, raising the following arguments: (1) The punitive damage award must be stricken because (a) there is no evidence that JCI acted with the malice or oppression necessary to support a punitive damages award, (b) plaintiffs failed to present meaningful evidence of JCI's financial condition, and (c) it is unconstitutional; (2) The jury's award of $14 million in future noneconomic damages (pain and suffering) must be reversed as excessive; (3) The jury's allocation of 70 percent fault to JCI must be reversed because it is not supported by the evidence; (4) The jury's finding of liability must be reversed because the trial court refused to instruct the jury on JCI's sophisticated user defense; and (5) Considered cumulatively, the numerous errors had a prejudicial effect on the outcome of the trial and caused a miscarriage of justice.

Plaintiffs filed a cross-appeal, challenging the trial court's reduction of the punitive damage award from $18.3 million to $4.5 million. They ask that we reinstate the jury's original award.

We agree with JCI that the award of future noneconomic damages is excessive, and reverse the judgment and remand the matter to the trial court with directions to enter an award of $1 million for future noneconomic damages. Moreover, while we conclude that substantial evidence supports the jury's finding that plaintiffs are entitled to punitive damages, we reverse the judgment with instructions for a limited retrial as to the amount of punitive damages. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The Instant Lawsuit

On January 24, 2008, the plaintiffs filed this personal injury action against more than 40 manufacturers of asbestos-containing products, alleging that Mr. Kelemen was exposed to over 50 different asbestos-containing products. Before trial, plaintiffs settled with or dismissed all other defendants, leaving JCI as the only defendant at the jury trial.

Evidence Presented at Trial

JCI and Its Products

JCI is an expert in gaskets, packing, and mechanical seals. Since its founding in 1917, JCI has manufactured and sold packing and distributed gaskets. Packing and gaskets are engineered mechanical seals that fill the space between two surfaces to prevent leakage. Packing is primarily used in valves or pumps; gaskets are used in flanges and pipe systems.

JCI sold packing and gaskets to the Navy during Mr. Kelemen's naval service (1967-1975). It manufactured the packing, but did not make the gaskets. Contemporaneous Navy specifications required asbestos to be used in many ship parts, including packing, gaskets, and insulation. Some of the packing and gaskets JCI sold to the Navy contained asbestos that was encapsulated along with lubricants, binders, and adhesives to prevent its release. Those products contained chrysotile asbestos, which is the least potent of the three types of asbestos fibers for potentially causing mesothelioma. JCI never manufactured or sold asbestos-containing insulation, which contained the much more potent amosite asbestos.

Harmfulness of Insulation Dust Relative to Dust from Packing and Gaskets

Amosite asbestos dust from insulation is far more likely to cause mesothelioma than chrysotile asbestos dust from packing and gaskets. In fact, while certain asbestos-containing products, including insulation and spray-on fireproofing products, have been banned, asbestos-containing packing and gaskets have never been banned in the United States.

JCI's and the Navy's Knowledge of Asbestos Dangers

The Navy began studying the hazards of asbestos in the 1940's and stationed doctors and industrial hygienists at its shipyards in the 1960's and 1970's. By 1968, the Navy was aware of the dangers associated with exposure to asbestos-containing insulation products. Nevertheless, the Navy continued to specify asbestos in those products, as well as in packing and gaskets throughout Mr. Kelemen's service. The Navy never told Mr. Kelemen to take precautions or warned him that working with these products could be hazardous.

In 1970, JCI learned that asbestos was dangerous and could cause deadly diseases. Upon gaining that knowledge, JCI took precautions to protect its employees from asbestos. Although it instructed its own workers as to the dangers of asbestos, JCI did not provide its customers with any warnings or conduct any tests to determine if its products were safe. Thus, JCI never warned Mr. Kelemen about asbestos gaskets or packing.

Mr. Kelemen's Exposure to Asbestos

Mr. Kelemen served in the Navy from December 1967 to October 1975. He was first exposed to insulation dust while scraping off insulation pads aboard the ship the U.S.S. Sperry. After two to three months on that ship, Mr. Kelemen went to nuclear school, and then served on a nuclear submarine, the U.S.S. Sam Rayburn, which was in the shipyard being overhauled for most of Mr. Kelemen's year of service. During that overhaul, Mr. Kelemen had daily exposure to dust from insulation replacement taking place in his area. He was also exposed to insulation dust when he brushed up against the insulation covering 90 percent of the submarine's piping.

Mr. Kelemen was then transferred to another nuclear submarine, the U.S.S. Ben Franklin, where he spent the remainder of his naval career. While on that submarine, he was exposed to dust from "a lot" of insulation replacement during the year and a half to two years the submarine was being overhauled.

While Mr. Kelemen did repairs to valves and pumps, he was exposed to insulation dust when removing any covering insulation.

Mr. Kelemen frequently worked with JCI's gaskets. In fact, he testified that they were the "primary" brand he worked with. He knew that they were from JCI because they either had the name stamped on them, or they came in an envelope or wrapping that had the name on it. Almost all of the gaskets that Mr. Kelemen worked with were made of asbestos. He explained that no matter the method used to remove an old gasket, "it was going to be flying in the air, and it was going to be dusty and filthy no matter what."

Mr. Kelemen also worked with JCI asbestos packing "numerous times."

The experts who testified at trial all agreed that Mr. Kelemen had been exposed to asbestos from JCI's products and that his work with JCI's gaskets and packing, which contain asbestos, was a substantial contributing factor to his development of mesothelioma.

Mr. Kelemen's Health

Mesothelioma is a latent disease that does not develop until decades after a person's exposure to asbestos. It is a dose-response disease, which means that the more exposure to asbestos, the greater the risk of developing the disease. According to plaintiffs' experts, each of Mr. Kelemen's exposures to dust from asbestos-containing products, including insulation and packing and gaskets, was a substantial factor contributing to his risk of developing mesothelioma.

Mesothelioma is a fatal disease with no known cure; only 25 percent of mesothelioma patients live two years after diagnosis and only 5 percent live three years. At the time of trial, Mr. Kelemen was 61 years old and had lived two years beyond his diagnosis. His life expectancy without mesothelioma would have been 14 to 15 years.

After Mr. Kelemen was diagnosed with mesothelioma in 2007, Mr. Kelemen underwent radical surgery at UCLA to remove his right lung and the tumor around it. After being hospitalized for nine days for the surgery, Mr. Kelemen "wound up in the hospital again [three days later] with an infection on the . . . incision." He spent another week in the hospital and then began 25 days of consecutive radiation treatments. After completing the radiation treatments, Mr. Kelemen began eight-hour chemotherapy treatments once a week for four weeks. At trial, his daughter described his symptoms,

including nausea, coughing; it was "agonizing." At one point, Mr. Kelemen broke down and started crying, saying that he could not "do this anymore."

Prior to his diagnosis and treatment, Mr. Kelemen led an active life, missing only three days of work in 18 years. He and his wife had been married for more than 40 years, and have close relationships with their two daughters and two grandchildren.

At the time of trial, Mr. Kelemen had no remaining tumor visible on a PET scan, but he had active lymph nodes in his abdomen. According to Dr. Eugene Mark, plaintiffs' medical expert, this shows that the tumor will eventually return and cause Mr. Kelemen's death. Sadly, while this appeal was pending, Mr. Kelemen passed away on February 13, 2011.

Closing Argument

Following the presentation of evidence, counsel offered closing remarks to the jury. Plaintiffs' counsel argued that Mr. Kelemen would have lived another 15 years without mesothelioma and asked the jury to award future noneconomic damages of "a million dollars for each year of his remaining life."

Plaintiffs' counsel also asked the jury to allocate 60 percent of the fault for Mr. Kelemen's injuries to JCI.

Jury Instructions

In connection with one of its affirmative defenses, JCI requested a sophisticated user instruction. The trial court declined to give this instruction.

Also, as is relevant to the issues raised in this appeal, the trial court gave, over JCI's objection, plaintiffs' proposed instruction on the sophisticated intermediary defense.

Jury Verdict

The jury found JCI liable for negligence, strict liability failure to warn, and strict liability design defect. It awarded Mr. Kelemen $899,876.20 in economic damages, $2 million in past noneconomic damages, and $14 million in future noneconomic damages. It allocated 70 percent fault to JCI and 30 percent fault to all "Others." It also found that

JCI acted with malice, fraud, or oppression, necessitating a trial on the amount of punitive damages.

Punitive Damages Phase

After the jury returned its verdict, the trial court proceeded to the question of punitive damages. Outside the presence of the jury, the trial court asked whether plaintiffs had requested documents relating to JCI's financial condition. Plaintiffs responded that they had served JCI with a notice to appear at trial and produce documents, issued pursuant to Code of Civil Procedure section 1987. JCI replied that it had objected to this notice because under California law courts do not have jurisdiction to compel out-of-state defendants to produce documents pursuant to such a notice.

The trial court and counsel then discussed what sort of documents plaintiffs were seeking. JCI stated that it would not be obeying the court's order to produce tax returns or any other financial information.

Plaintiffs then indicated that they would like to offer expert testimony from Robert Neff, "who would be substituting for Drew Fountaine who was unable to testify as of Friday as a result of his professional activities." Plaintiffs acknowledged that he was not on their witness list, but he was a substitute for Mr. Fountaine. According to plaintiffs' offer of proof, Mr. Neff, a certified public accountant, would testify as to the net worth of JCI and its parent company; his testimony was based upon review of publicly available documents.

JCI objected to plaintiffs' request to allow Mr. Neff to testify. The trial court overruled JCI's objection, stating: "I might have sustained your objection if you had produced documents."

Mr. Neff's testimony then began. Plaintiffs' counsel asked: "Are you prepared to opine as to the net worth of [JCI]?" Mr. Neff replied: "I have not been supplied financial statements, and I haven't located those. However, I have rendered an opinion on the Smith Group, PLC's net worth." Mr. Neff then explained who the Smith Group, PLC is: "It is [a] company based in the U.K. [JCI] happens to be one of their division or subsidiaries, as mentioned in their annual report."

According to Mr. Neff, the net worth of the Smith Group, PLC as of July 31, 2009, was approximately $1.4 billion. John Crane Group's revenues were about 30 percent of the entire consolidated revenues, which he calculated to "be roughly $1.2 billion." When asked whether he had information regarding "John Crane's current net worth," Mr. Neff indicated that he did not.

Counsel then presented argument to the jury. Plaintiffs' counsel stated: "We know [JCI] is a large company that's part of a multinational corporation. You have just heard financial information as to the well-being of Smiths Company, as well as to the sales of John Crane—John Crane provides for that company. [¶] Mr. Neff told you that John Crane accounts for about $1.2 billion for the Smith Company." Plaintiffs then asked that JCI "be punished in the amount equal to what you have fairly compensated the family for."

Following deliberation, the jury awarded $18,333,333 in punitive damages.

Judgment

On October 22, 2009, the trial court entered judgment in favor of Mr. Kelemen in the amount of $24,663,246.14, plus interest, and in favor of Mrs. Kelemen in the amount of $100,000, plus interest.

Posttrial Motions

Motion for Judgment Notwithstanding the Verdict (JNOV)

On November 6, 2009, JCI filed a motion for JNOV. It argued that it was entitled to judgment on plaintiffs' punitive damage claim because plaintiffs failed to present evidence warranting an award of punitive damages; there was no evidence "establishing that [JCI] deliberately exposed workers to known health risks from its encapsulated gaskets and packing products." Additionally, JCI contended that plaintiffs did not present evidence of JCI's net worth. After all, Mr. Neff mixed "net worth" with "revenues" and "sales," miscalculated mathematical percentages, and confused JCI with its parent and John Crane Group, which is not the same entity as JCI. Finally, JCI asserted that the jury's award of over $18 million in punitive damages was excessive. "While no punitive award in any amount was warranted on the evidence in this case, and

plaintiffs' effort to establish a net worth standard for a punitive award was fatally flawed, at a minimum constitutional considerations mandate that the court exercise its independent authority to remit the jury's punitive award from $18.3 million to a figure not to exceed" $1 million.

JCI also argued that the jury's award of future noneconomic damages should be reduced. "The foundation for the jury's award of future non-economic damages was fatally flawed because the jury calculated future damages based on Mr. Kelemen's statistical life expectancy, ignoring his prognosis." Thus, JCI asked that his future noneconomic damages should be reduced to, at the most, $2 million.

Motion for New Trial

JCI also filed a motion for a new trial. In the motion, JCI argued that the evidence did not support a 70 percent allocation of comparative fault to JCI. JCI also challenged plaintiffs' entitlement to punitive damages as well as the amount awarded. And, JCI asserted that the award of $14 million in future noneconomic damages was excessive.

Amended Judgment

On December 11, 2009, the trial court entered an amended judgment for $30,350,913.20 in favor of Mr. Kelemen and $70,000 in favor of Mrs. Kelemen.

Trial Court's Ruling on Posttrial Motions

Although the trial court entered an amended judgment, JCI did not file new postjudgment motions. Instead, the trial court conducted a series of hearings on JCI's original motions challenging the original judgment that had been entered. Ultimately, the trial court denied all of JCI's posttrial motions, other than ordering a reduction of the punitive damages award to $4.5 million, pursuant to Code of Civil Procedure section 662.5.

Appeal and Cross-Appeal

JCI filed a timely notice of appeal challenging both the original and amended judgments, as well as the orders denying its posttrial motions. Plaintiffs subsequently filed a timely notice of cross-appeal from the trial court's postjudgment orders reducing the jury's punitive damages award and from the judgment modified by that order.

DISCUSSION

I. *JCI's Appeal*

A. Punitive Damages

JCI argues that the punitive damage award must be reversed because (1) plaintiffs did not present evidence that JCI acted with malice or oppression, (2) plaintiffs failed to present meaningful evidence of JCI's financial condition, and (3) it is unconstitutional. We address each of these arguments in turn.

1. *Evidence of malice or oppression*

Civil Code section 3294 permits an award of punitive damages "for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) On appeal, a jury's award of punitive damages must be upheld if it is supported by substantial evidence.[1] (*Baxter v. Peterson* (2007) 150 Cal.App.4th 673, 679.) "As in other cases involving the issue of substantial evidence, we are bound to 'consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment.' [Citation.]" (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891 (*Shade Foods*).) However, as "the jury's findings were subject to a heightened burden of proof, we must review the record in support of these findings in light of that burden. In other words, we must inquire whether the record contains 'substantial evidence to support a determination by clear and convincing evidence . . . .' [Citation.]" (*Shade Foods*, *supra*, at p. 891.)

Civil Code section 3294 defines malice as "conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294, subd. (c)(1); see also *College Hospital, Inc. v. Superior Court* (1994) 8

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[1] We reject JCI's claim at oral argument that we review this issue de novo. The appropriate standard of review is substantial evidence, as JCI represents in its opening brief.

Cal.4th 704, 725.) Oppression under the statute "means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." (Civ. Code, § 3294, subd. (c)(2).) A conscious disregard of another's rights is demonstrated when the defendant "'"is aware of the probable harmful consequences of its conduct and willfully and deliberately fails to avoid those consequences."'" (*Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 330–331.) Mere carelessness or ignorance on the part of the defendant, on the other hand, is insufficient to support an award of punitive damages. (*Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1287.) "'Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, . . . a fraudulent or evil motive on the part of the defendant, *or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.*' [Citation.]" (*Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894–895.)

Substantial evidence supports the jury's determination that plaintiffs were entitled to punitive damages.[2] The jury heard evidence that JCI never took any steps to protect any of its customers from the known hazards associated with exposure to asbestos dust from its gaskets and packing. Specifically, according to the videotaped deposition of George Springs, the custodian of asbestos records and assistant corporate secretary of JCI, JCI knew that its asbestos-containing gaskets and packing would be replaced over time. According to JCI's instructions on how to remove gaskets, "'perhaps the most important factor in ensuring proper operating success from the new gasket is to make certain that the old gasket is completely removed and that the flange faces are clean. Often it is necessary to scrape flange faces.'" JCI admitted that wire-brushing or scraping an asbestos gasket released respirable asbestos dust.

Despite this knowledge, JCI never provided warnings to any of its customers or end-users. It never instructed consumers to reduce or eliminate dust. It never instructed

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[2] We reject JCI's claim that affirming plaintiffs' entitlement to punitive damages makes punitive damages the rule, as opposed to the exception to the rule.

its customers to use respiratory protection. And, it never instructed its consumers who had been working with its products to get chest x-rays.

In urging us to reverse the award of punitive damages, JCI argues that although it became aware of the dangers of asbestos in 1970, there is no evidence that JCI knew that its packing and gaskets containing *encapsulated* asbestos presented any risk of harm. The problem for JCI is that the jury heard evidence from plaintiffs' expert, Dr. Edwin Cosby Holstein, that the asbestos in JCI's gaskets and packing was not actually encapsulated. In fact, Dr. Holstein testified that scraping and wire-brushing of JCI's gaskets caused levels of asbestos to exceed background by more than 300,000 times. Repeated exposure to that level of ambient airborne asbestos concentration is capable of causing malignant mesothelioma.

JCI also directs us to evidence that suggests that its packing and gaskets were not a health hazard. We are bound by the applicable standard of review. That there may be conflicts in the evidence does not justify reversal of a judgment "'for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. *Evidence of JCI's financial condition*

"Evidence of the defendant's financial condition is a prerequisite for an award of punitive damages. [Citation.] 'Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive.' [Citation.] Plaintiff has the burden of proof. [Citation.] [¶] *Adams* [*v. Murakami* (1991) 54 Cal.3d 105] 'decline[d] . . . to prescribe any rigid standard for measuring a defendant's ability to pay.' [Citation.] In *Baxter v. Peterson* [*supra*, 150 Cal.App.4th 673], the court summarized the pertinent court of appeal authorities on the point: 'Net worth is the most common measure, but not the exclusive measure. [Citations.] In most cases, evidence of earnings or profit alone [is] not sufficient "without examining the liabilities side of the balance sheet." [Citations.] "What is required is evidence of the defendant's ability to pay the

damage award." [Citation.] Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income.' (*Baxter v. Peterson*, *supra*, 150 Cal.App.4th at p. 680.)" (*Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 452.)

Here, plaintiffs failed to present testimonial and documentary evidence of JCI's net worth. While their substitute damages expert, Mr. Neff, [3] testified that JCI's parent company had a net worth of approximately $1.4 billion, he offered no testimony as to JCI's net worth.[4]

As for plaintiffs' failure to present documentary evidence of JCI's net worth, this omission can be traced back to plaintiffs' request for documents pursuant to Code of Civil Procedure section 1987 and JCI's refusal to comply with both that request and the trial court's subsequent court order pursuant to *Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London* (1995) 34 Cal.App.4th 554, 559 (*Amoco*).

We agree with JCI that plaintiffs' request for financial documents pursuant to Code of Civil Procedure section 1987 was defective. (*Amoco*, *supra*, 34 Cal.App.4th at p. 559.) And, assuming the trial court's order that JCI produce financial records was made pursuant to that statute, then the trial court's order would have been erroneous as well. (*Ibid*.) But, the basis of the trial court's order to produce is unclear. And, once plaintiffs prevailed at trial, the trial court had the authority to order JCI to produce its financial records. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 609.) If a

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[3] In light of our conclusion that there must be a limited retrial on the amount of punitive damages, we need not address JCI's contention that the trial court abused its discretion by allowing plaintiffs to call Mr. Neff as an undisclosed expert witness. We also offer no opinion on JCI's argument that Mr. Neff improperly relied upon an Internet document or that his testimony that "John Crane" had a $180 million reserve for asbestos litigation was prejudicial.

[4] As set forth above, Mr. Neff testified regarding John Crane *Group*, presumably a different entity, not JCI.

defendant is ordered to produce evidence of its net worth, it is under an obligation to do so. (*StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 243; *Caira v. Offner* (2005) 126 Cal.App.4th 12, 41; Civ. Code, § 3295, subd. (c).) "Once the [trial] court makes the order there is no justification for not specifically following that order. [Citation.] If counsel has problems with the court's orders, he or she may seek a pretrial writ or argue the validity of that ruling on appeal." (*StreetScenes v. ITC Entertainment Group, Inc.*, *supra*, 103 Cal.App.4th at pp. 243–244.)

Following the foregoing legal authority, once the trial court ordered JCI to produce evidence of its net worth, JCI should have either (1) taken a writ to challenge the trial court's order, or (2) produced the requested information and then argued on appeal that the trial court order was defective. It could not do what it did, which was refuse to provide the information and then argue on appeal that plaintiffs failed to meet their evidentiary burden.

Accordingly, we reverse the award of punitive damages and remand the matter for a retrial on the limited issue of the amount of punitive damages.[5] (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶ 14:151.2, p. 14-52 (rev. #1, 2010); *Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 517 ["in the absence of any evidence of . . . wealth, the punitive damage award . . . must be reversed"].)

3. *Constitutionality*

JCI argues that the punitive damages award was unconstitutional. In light of our determinations that (1) plaintiffs proved their entitlement to punitive damages, and (2) there must be a limited retrial on the amount of punitive damages, we need not address this contention.

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[5] Remand is also appropriate in light of our conclusion, discussed below, that the award of future noneconomic damages must be reduced from $14 million to $1 million. (See, e.g., *Baxter v. Peterson, supra,* 150 Cal.App.4th at p. 679 [punitive damages should bear a reasonable relation to actual damages].)

B. Allocation of Fault

JCI argues that the jury's allocation of 70 percent fault to JCI must be reversed because it is not supported by substantial evidence.

The allocation of comparative fault is reviewed under the substantial evidence standard. (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 147.) "[T]he jury's power to apportion fault is as broad as its duty to resolve conflicts in the evidence and assess credibility." (*Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225, 1234.) Any conflicts are resolved in favor of the verdict, and a reviewing court "may not substitute its judgment for that of the jury or set aside the jury's finding if there is any evidence which under any reasonable view supports the jury's apportionment." (*Ibid*.)

Substantial evidence supports the jury's apportionment of fault. The jury heard that Mr. Kelemen personally worked with JCI's gaskets and packing while serving as a machinist's mate in the Navy. He described the process of scraping, wire-brushing, and otherwise manipulating JCI's gaskets and packing. He also described how such manipulation resulted in him inhaling dust from the gaskets and packing. Plaintiffs' experts then testified that the inhalation of such dust was a substantial factor in causing Mr. Kelemen's mesothelioma.

To the extent that JCI sought to place liability onto other entities, it had the burden to prove any fault attributable to others. "[JCI] undisputably had the burden to establish concurrent or alternate causes by proving: that [Mr. Kelemen] was exposed to defective asbestos-containing products of other companies; that the defective designs of the other companies' products were legal causes of the plaintiffs' injuries; and the percentage of legal cause attributable to the other companies." (*Sparks v. Owens-Illinois, Inc.* (1995) 32 Cal.App.4th 461, 478.) JCI had to do more than just show that other products may have contributed to Mr. Kelemen's injury. (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 367; CACI No. 406.)

Certainly other entities were at fault.[6] After all, there was evidence that the Navy knew more about asbestos than JCI but nonetheless continued to require asbestos in insulation, gaskets, and packing. And, JCI was not the only supplier of gaskets and packing to which Mr. Kelemen was exposed.[7] But, substantial evidence supports the jury's allocation of fault.

C. Future Noneconomic Damages

JCI argues that the jury's $14 million award for future noneconomic damages must be reversed because, given Mr. Kelemen's short life expectancy, the award is excessive.

Code of Civil Procedure section 657 sets forth the grounds for a new trial, stating in pertinent part: "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: [¶] . . . [¶] 5. Excessive or inadequate damages. [¶] . . . [¶] A new trial shall not be granted upon the ground of . . . excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."

A jury may, in its substantive discretion, award a plaintiff reasonable compensation for noneconomic damages that he will suffer in the future as a result of the harm inflicted by the defendant. (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 103; *Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 38; *Garfoot v. Avila* (1989) 213 Cal.App.3d 1205, 1210; see *Loth v. Truck-A-Way Corp.* (1998) 60 Cal.App.4th 757, 766, fn. 10.) "A jury may award a plaintiff reasonable

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6 JCI offers no legal authority to support its suggestion that plaintiffs' counsel's comment in closing argument that 40 percent of the fault could be allocated to others precludes a finding that JCI was 70 percent at fault.

7 Mr. Kelemen testified at trial that JCI was the "primary" brand of gaskets that he encountered during his Navy career.

compensation for physical pain, discomfort, fear, anxiety and other emotional distress which he has suffered and which he will suffer in the future as the result of an injury. The law does not prescribe a definite standard or method to calculate compensation for pain and suffering. The jury is merely required to award an amount that is reasonable in light of the evidence." (*Damele v. Mack Trucks, Inc.*, *supra*, at p. 38.)

A plaintiff may recover for future suffering if he is "*reasonably certain*" to endure the harm. (*Hoy v. Tornich* (1926) 199 Cal. 545, 555; *Wiley v. Young* (1918) 178 Cal. 681, 686–687; *Garcia v. Duro Dyne Corp.* (2007) 156 Cal.App.4th 92, 97–98; *Loth v. Truck-A-Way Corp.*, *supra*, 60 Cal.App.4th at p. 766, fn. 10; CACI No. 3905A (2009 ed.).) "It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. [Citation.]" (*Garcia v. Duro Dyne Corp.*, *supra*, at p. 97.) In considering whether damages are excessive, we apply a deferential standard of review. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 61; *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506–508.) "A reviewing court must uphold an award of damages whenever possible [citation] and all presumptions are in favor of the judgment [citations]." (*Bertero v. National General Corp.*, *supra*, at p. 61.) "It must be remembered that the jury fixed these damages, and that the trial judge denied a motion for new trial, one ground of which was excessiveness of the award. These determinations are entitled to great weight. The amount of damages is a fact question, first committed to the discretion of the jury and next to the discretion of the trial judge on a motion for new trial. They see and hear the witnesses and frequently, as in this case, see the injury and the impairment that has resulted therefrom. As a result, all presumptions are in favor of the decision of the trial court [citation]. The power of the appellate court differs materially from that of the trial court in passing on this question. An appellate court can interfere on the ground that the judgment is excessive only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury." (*Seffert v. Los Angeles Transit Lines*, *supra*, at pp. 506–507.) "It is only in a case where the amount of the award of general damages is so disproportionate to the injuries suffered that the result reached

may be said to shock the conscience, that an appellate court will step in and reverse a judgment because of greatly excessive or grossly inadequate general damages." (*Daggett v. Atchison, T. & S. F. Ry. Co.* (1957) 48 Cal.2d 655, 666.)

According to plaintiffs' expert, Dr. Mark, Mr. Kelemen's life expectancy after trial was statistically unlikely to exceed one year. Indeed, plaintiffs' counsel told the jury in closing: "Mr. Kelemen is dying." Yet the jury awarded him future pain and suffering damages of $14 million, or $38,356 per day if he had lived another year. This award is excessive.[8]

The excessiveness of the $14 million award is established by comparing it to the jury's award of $2 million in noneconomic damages for the two years preceding trial, during which Mr. Kelemen had experienced considerable pain and suffering. His treatments included having fluid removed from his lungs through a needle several times, a biopsy through a scope, surgery to remove his right lung and surrounding tissue, 25 days of radiation, four chemotherapy treatments, and at least four one-week hospitalizations. During that two-year period, Mr. Kelemen became weak, short of breath, susceptible to illness, and unable to engage in physical activities he previously enjoyed. In addition, he struggled to care for his wife, worried about his family's financial well-being, and experienced strain in his familial relationships.

Regarding future treatments, Dr. Mark testified that Mr. Kelemen would not have more surgery, but might have a little more chemotherapy.

After hearing this evidence, the jury awarded Mr. Kelemen $2 million for his past pain and suffering, or $2,740 a day. Its award for his future pain and suffering equaling $38,356 a day for one year was 14 times greater than that figure and is excessive in comparison. Unquestionably, Mr. Kelemen suffered in the last year of his life, and he is entitled to compensation for that excruciating pain. However, the $14 million award cannot stand.

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8 We reach this conclusion without regard to JCI's comparison of the instant award to those in other mesothelioma cases.

The record suggests that the jury's $14 million award represented $1 million for each of the 14 years he was statistically likely to have lived without mesothelioma and was thus based on a misunderstanding of the law and the evidence presented. Plaintiffs' counsel's argument to the jury may have invited this confusion: "You have heard testimony Mr. Kelemen has—if he wasn't sick would have about 15 years left on his life. I would suggest a reasonable amount of money to compensate the Kelemens to be a million dollars for each year of his remaining life." Although Mr. Kelemen's 14 to 15 year life expectancy without mesothelioma was relevant to his economic damages, it was not relevant to his noneconomic damages.

If the jury's $14 million award was not the result of a misunderstanding, then it must have been the result of passion or prejudice, because it is inconsistent with the evidence that Mr. Kelemen was unlikely to live more than one year after trial. Accordingly, the award must be reversed.

Given Mr. Kelemen's life expectancy of one year, the award of future noneconomic damages is reduced to $1 million.[9]

D. Jury Instruction on JCI's Sophisticated User Defense

JCI argues that the trial court's refusal to instruct on its sophisticated user defense and its misleading instruction on the inapplicable sophisticated intermediary defense require reversal. As pointed out by plaintiffs, this argument is moot.

This defense (JCI had no duty to warn because his employer already knew the dangers of asbestos) only applied to Mr. Kelemen's failure to warn claims, not his separate claims of design defect. Mr. Kelemen prevailed on his design defect claim, a finding that JCI does not challenge on appeal. Thus, the question of whether the jury should have been instructed differently on any purported sophisticated or intermediary defense is moot.

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[9] In its opening brief and at oral argument, JCI represented that it does not contest the $2 million award for past noneconomic damages and agrees to a remittitur of $1 million.

In its reply brief, JCI contends that this instruction prejudiced it in connection with its defense on plaintiffs' punitive damages claim.

"Alleged instructional error is reviewed under the prejudicial error standard. Under this standard, the judgment is affirmed unless the appellant can show an error that was so prejudicial a miscarriage of justice occurred." (*Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 306.) "Thus, when the jury receives an improper instruction in a civil case, prejudice will generally be found only '"[w]here is seems probable that the jury's verdict may have been based on the erroneous instruction. . . ."'" (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) When determining whether an error of instruction and/or instructional omission was prejudicial, the court must evaluate the state of the evidence, the effect of other instructions, the effect of counsel's arguments, and any indications by the jury itself that it was misled. (*Id.* at pp. 580–581.)

Assuming without deciding that the trial court erred in refusing JCI's proposed jury instruction and in giving, over JCI's objection, plaintiffs' proposed instruction on the sophisticated intermediary defense, JCI has not demonstrated reversible error. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.) As set forth above, there is ample evidence to support the jury's finding of malice and oppression. Other instructions set forth the law of negligence, allowing the jury to have found mere negligence. JCI's counsel presented compelling closing argument on its theory of the case. And, there is no indication that the jury was misled.

E. Cumulative Effect of Numerous Errors

Finally, JCI argues that the cumulative effect of numerous errors requires reversal of the judgment. We disagree. As set forth above, we conclude that the future noneconomic damages and punitive damages must be reduced. In all other regards, no reversible error occurred.

II. ***Plaintiffs' Cross-Appeal***

In their cross-appeal, plaintiffs argue that the jury's original punitive damage award of $18.4 million should be reinstated. In light of our decision that the amount of punitive damages is subject to retrial, plaintiffs' cross-appeal is moot.

DISPOSITION

The award of future noneconomic damages is reversed with directions to the trial court to enter an award of $1 million. The matter is remanded for a limited retrial as to the amount of punitive damages. In all other respects, the judgment of the trial court is affirmed. The parties to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD