SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/20/10			**DEPT.** 49
HONORABLE CONRAD R. ARAGON	JUDGE	P. SOLIS	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
J. HERNAND C.A.	Deputy Sheriff	NONE	Reporter

BC418867

RHODA EVANS ET AL
VS
A W CHESTERTON COMPANY ET AL

Plaintiff Counsel

(No appearances)

Defendant Counsel

NATURE OF PROCEEDINGS:

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RULING ON SUBMITTED MATTERS:
RULING ON NEW TRIAL/JNOV MOTIONS

Defendant CertainTeed Corporation ("CertainTeed") moves for a new trial and for judgment notwithstanding the verdict. Plaintiffs Rhoda and Bobby Evans and defendant City of Los Angeles ("DWP") oppose. The matters came on for hearing, were argued, and submitted for decision on July 16, 2010. The motion for a new trial is granted on the issue of the allocation of fault to third persons and is denied as to all other issues on all other grounds (except as noted below). The motion for judgment notwithstanding the verdict is granted upon the issue of the unconstitutionality of the jury's award of punitive damages, and such damages are reduced to $5,821,015.00.

1. Substantial Evidence Does Not Support the Jury's Finding on the Issue of Comparative Fault.

(a) Jury Instruction on Comparative Fault and Jury's Findings. The court instructed the jury on comparative fault pursuant to CACI 1207B, "Fault of Others," advising the jury that DWP and Certainteed claimed "that the fault of others also contributed to Rhoda Evans' harm," and that the jury should "decide how much responsibility each has by assigning percentages of responsibility to each person listed on the verdict form. The verdict form delivered to the jury contained the following

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verbatim language:
"What percentage of responsibility, if any, for plaintiffs' harm do you assign to the following entities. The total percentage allocations must be 100%: [¶] Certainteed: __% [¶] DWP: __% [¶] Johns Manville: __% [¶] Kubota: __% [¶] Crane: __%"
The jury responded by allocating no fault to any of the named nonparties (Kubota, JM, Crane), allocating, instead, 100% of fault to Certainteed (70%) and to DWP (30%). This "no fault" finding as to the third persons is not sustainable against the substantial evidence adduced at trial, and is, furthermore, against the clear weight of the evidence.

Plaintiffs argue that Certainteed did not offer any evidence to satisfy their burden of proof against the third parties. This overlooks not only the evidence Certainteed did in fact present at trial, but it also ignores the substantial evidence on the subject of JM's and Kubota's fault presented by plaintiffs' and DWP's witnesses and documents. The entire record, and not just Certainteed's evidence at trial, is to be considered in determining if the jury's finding of no fault as against the third parties is against the weight of the evidence.

(b) Product Liability Instructions. Under the instructions administered to the jury, the jury was to decide (1) whether the asbestos-containing water pipe ("AC pipe") was defectively designed; and or

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(2) whether there was a failure to warn of the potential risks of AC pipe; and (3) whether a "third person" was at fault in defective design or failure to warn (CACI 1207B, above); and or (4) whether the AC pipe was negligently manufactured or supplied; and or (5) whether the manufacturer or seller of the AC pipe negligently failed to warn of the danger of use of the AC pipe.

(c) Evidence of Third Persons' Fault. The evidence conclusively established that DWP purchased, and that its employees worked with (and cut), AC pipe supplied to DWP by Kubota, JM and Certainteed. Substantial evidence also established that Mr. Evans cut AC pipe supplied by Kubota, JM and Certainteed with an abrasive saw and that he was exposed to dust particles released from the cutting process and by sweeping up dust in the "yard" and in the locker rooms. The evidence was also uncontradicted that Mr. Evans' work clothes were laden with dust both from his janitor duties, and later, when his job duties changed, from cutting AC pipe, and that his wife, Mrs. Evans, was exposed to airborne asbestos fibers when she laundered Mr. Evans' work clothes at the Evans' home.

The evidence was uncontradicted that DWP bought some 460,000 linear feet of AC pipe (for about $1,200,000.00) from JM from 1974 to 1983. There is no (numerical) evidence of the sales volume as to Kubota or any other manufacturer, other than Certainteed. (The inconclusive testimonial evidence, and the exhibit that was not received in

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evidence cited and relied upon by plaintiffs does not furnish the missing evidence as the quantities sold by Certainteed or Kubota.) But the sole witness as to JM's and Certainteed's sales (Ambler) could not opine as to how JM's sales volume compared to the sales of Certainteed AC pipe to DWP during the same period. (Motion, Ex. 12, RT 74:12-14.)

The evidence was uncontradicted that JM's AC pipe was of the same composition as Certainteed's AC pipe. But the sole witness on the point (Ambler, again) could not say whether Kubota's (or any other manufacturer's) AC pipe was of the same composition as Certainteed's. (Id., 34:11.)

The evidence (e.g., plaintiffs' expert, Dr. Horn) was persuasive and preponderant in establishing that Mrs. Evans' mesothelioma was "caused" by exposure to JM and Kubota pipe. While Certainteed did challenge plaintiffs' evidence that her mesothelioma was caused by exposure to Certainteed pipe, the jury found otherwise, and their finding on this point was amply supported by the evidence.

(i) Failure to Warn. The evidence was uncontradicted that Certainteed first issued warnings about the hazards of cutting its AC pipe in 1979. But there was no evidence in the record establishing that either Kubota or JM failed to issue product warnings (a factual point necessary to Certainteed's failure to warn claims as against third parties). The best evidence Certainteed can cite is testimony that Mr. Evans and Mr. Groth

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"never saw or received any warnings or other information about the hazards of asbestos from any manufacturer or from the DWP." (Motion, 5:17-20.) This, however, falls far short of affirmative evidence that neither Kubota nor JM issued product warnings, or that their warnings were too late to avoid liability for failure to warn. Certainteed's best evidence on this subject is that Certainteed's warnings preceded those of its competitors (which supports an inference that Kubota and JM did issue warnings).

(ii) JM's Design Defect Liability. The jury, then, erred when it determined that JM was not comparatively at fault in manufacturing and selling defectively designed AC pipe. (There was no evidence as to Crane's product, and a negative finding of fault as to Crane is supported by the evidence.) The uncontroverted evidence established that JM was privy to the same industry-wide state-of-the-art information as Certainteed, because both belonged to the same industry associations where (and at the time that) such knowledge was being disseminated and discussed.

The evidence established that the "defect" in design was such that JM's and Certainteed's AC pipe did not perform "as safely as an ordinary consumer would have expected it to perform." Both JM and Certainteed sold their AC pipe to DWP, and Mrs. Evans was harmed by the release of free asbestos fibers in a reasonably foreseeable way. (On this point, the court rejected Certainteed's argument, at

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trial, that it did not owe a duty of due care to Mrs. Evans. The court rejected that argument then and sees nothing in the current motions to alter that ruling.)

(iii) Kubota Not At Fault for Design Defect. These same conclusions (as to JM's design defect) are not all supported by the evidence, however, as against Kubota. As noted above, there is no evidence of what quantity of Kubota pipe was supplied to DWP and no evidence of its composition; i.e., the percentage and type of asbestos in the product. There is no citation by Certainteed to evidence showing when Kubota learned of the hazards of AC pipe or that Kubota was on the same "information network" as Certainteed and JM. Mr. Templin and Dr. Castleman gave expert opinions tending to prove that "all manufacturers either knew or should have known of the risks of asbestos" by the mid-1970s. But, because there was no evidence as to Kubota's access to, or acquisition of developing research in asbestos, the jury could reasonably disregard that expert testimony, at least as to Kubota. Moreover, while Dr. Horn gave his opinion that Mrs. Evans was harmed by exposure to a Kubota product, the jury was entitled to, and did, disregard that opinion in light of the lack of evidence on the several points just mentioned.

(iv) Negligence as to JM, Not as to Kubota. The same evidence that supports the jury's finding of design defect against Certainteed (and should have led the jury to find JM at fault) should also

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have supported a jury finding of negligence in the manufacture and supply of AC pipe as against JM (but not as against Kubota, again, for the reasons discussed above).

(v) Neither JM nor Kubota is Liable for Failure to Warn. At the same time, the lack of evidence surrounding JM's and Kubota's efforts at issuing a product warning, discussed above, support the jury's finding that neither JM nor Kubota was at fault for failing to warn.

2. Substantial Evidence Supports the Percentage of Fault Finding Against DWP. Certainteed's case against DWP is as follows. (1) DWP was primarily at fault relative to Certainteed, and (2) DWP's conduct was a superseding cause that relieves Certainteed of liability. Among these arguments are those concerning the court's refusal to instruct on superseding cause, the "sophisticated user" defense (and related instructions), and refusal to allow evidence of DWP's knowledge of, and failure to comply with, Cal-OSHA standards.

(a) Cal-OSHA Compliance. The court engaged in extensive discussions with counsel as to the admissibility of evidence of DWP's compliance with Cal-OSHA requirements before opening statement and thereafter during the trial. The reasons for the court's decision are spread on the record, and the court will not restate them here. But even if the court erroneously disallowed this evidence, the error was harmless.

The jury not only heard what the standards

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were, and uncontradicted testimony as to industry standards (i.e., custom and practice) regarding the duty of all employers to inform and protect their employees concerning workplace hazards, but also heard a substantial amount of evidence, much of it uncontradicted, about DWP's knowledge of the hazards of AC pipe and DWP's efforts to inform and to protect its employees from the hazards of AC pipe, once knowledge of the hazards was accessible throughout the industry. The jury correctly found, on the substantial evidence in the record, that DWP was at fault for maintaining a dangerous condition upon public property. It was for the jury, and not for the court, to determine what percentage of fault should be allocated to DWP relative to the fault assigned to the AC pipe manufacturers. The court will not disturb the jury's allocation of fault as between Certainteed and DWP, except as noted below.

(b) Superseding Cause and Sophisticated User Defense. In making the argument that DWP's conduct was so egregious that it, alone, should be held liable, Certainteed ignores evidence in the record tending to show, on the one hand, that DWP did take steps to protect its workers from the hazards of cutting AC pipe and the consequent release of airborne fibers from the operation, and, on the other, that Certainteed's "warnings" about the use of an abrasive saw were both equivocal and tardy in relation to Mr. Evans' exposure (commencing in 1974) and in relation to the state of the art.

A complicating factor that pervades the

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resolution of these difficult issues is that Certainteed's warning was first placed on AC water pipe in 1979, some five years after Mr. Evans first exposure (in 1974). There was substantial evidence to support the jury's finding that Certainteed was fully aware of the dangers of cutting its AC pipe by 1974. By comparison, the documented evidence of DWP's knowledge about the dangers of cutting AC pipe (Trial Ex. 110) does not arise until around 1978. Thus, while it is arguable that Certainteed might "rely" on DWP to protect its (DWP's) workers after 1978, and that DWP's failure to do so relieves Certainteed of liability, the same conclusion does not apply to the years of Mr. Evans' exposure before 1978. This is a critical consideration since, under the uncontroverted medical testimony, Mrs. Evans could have had sufficient exposure from 1974 to 1978 to "cause" her illness.

The court therefore determined that neither the superseding cause nor the sophisticated user instructions were supported by the evidence, and, on that basis, concluded that the instructions should not be given. The court's ruling, when the arguments were joined, was also premised on the court's opinion that Mr. Evans, not DWP, was the "end-user," and, consequently, that it was Mr. Evans' sophistication, not DWP's, that was in issue.

Notwithstanding the above discussion, because the court concludes that the jury erred in not assigning some percentage of fault to JM, the jury's 30% allocation of fault to DWP falls under scrutiny.

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It is pure speculation to conclude that the jury would have returned the same percentage of fault against DWP, or for that matter, against Certainteed, if it had correctly assigned some percentage of fault to JM, as it should have done.

Similarly, 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. Therefore, the jury's 30% fault allocation against DWP cannot stand, any more than the 70% allocation against Certainteed can stand; and the damages awards are similarly placed in doubt. A new trial as to fault, including the trial of both liability and damages, is required.

3. Compensatory Damages Not Excessive. The argument here is that by comparison to compensatory damages in reported cases, both the $6,000,000.00 award to Mrs. Evans, and the $2,000,000.00 award to Mr. Evans, are excessive. The "sampling" of thirteen published cases is not persuasive because the sample fails to consider damage awards in unpublished cases and does not provide data showing what the ratio of published to unpublished opinions is. If, for example, there are five or more unpublished opinions for every single published opinion, the data offered by Certainteed may well be meaningless.

In addition, the data provided by the published

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opinions is dated, the earliest was published in 1993, and trial therein apparently took place in 1990 (in Alameda County); the latest was published in 2008 and trial occurred in 2006 (again, in Alameda County). Certainteed omits a discussion of the claimants' circumstances as a determinant of the award amount. Here, the jury presumably concluded that Mrs. Evans' was a sympathetic and virtuous claimant as evidenced by her nurturing relationship with her husband and her children's children, factors the jury could reasonably consider in assigning a dollar value to her shortened life expectancy. The court agrees that the compensatory damage award was on the higher end of the spectrum of damages, but finds, nevertheless, that the award is not "excessive" as a matter of law. Again, however, because the comparative fault of DWP, Certainteed and non party persons must be retried, the damages awarded by the jury cannot stand.

4. Jury Commissioner. Certainteed argues that its objection to the constitution of the jury panel was timely because it was raised before opening statement. This does not, in the court's judgment, render it timely because the voir dire process had been concluded and the jury duly sworn. Certainteed also relies on the declaration of Ms. Frances Johnson. The declarant, Ms. Johnson, does not state that she "ignored" the stipulation as Mr. Sayers argues. (Sayers Declaration, ¶6.) What Ms. Johnson declares is that her office used the "approved procedures that were different from the

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criteria specified" in the Stipulation. This resulted, apparently, in the elimination of all potential jurors who had less than 25 days of paid jury leave. Whether this process resulted in prejudice to Certainteed, however, is in the realm of conjecture.

5. Counsel's Misconduct. Certainteed points to a number of instances where Mr. Levin, counsel for plaintiffs, engaged in what the court viewed, in some instances, as questionable conduct. (For example, the court repeatedly admonished Mr. Levin not to approach witnesses for the purpose of examining them about the content of documents without first identifying the document and allowing opposing counsel to raise objections. Some of the arguments Certainteed makes here involve just those situations.) In any event, when timely objections were made, they were sustained, and Mr. Leven was admonished in some instances to desist from an objectionable practice, and in other instances, there was no timely objection (or the objection was overruled). In the final analysis, however, the court is not persuaded that the cited conduct was so prejudicial that Certainteed was deprived of a fair trial.

6. Malice, Oppression and Fraud. On this issue of the jury's finding of malice, oppression or fraud, Certainteed does not deny that there was evidence of secondary (household) exposure, such as that presented by Mrs. Evans; it argues, however, that the emerging science was just not so clear that

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asbestos manufacturers could and should have tried to prevent or minimize the risk of such exposures. It was for the jury, however, relying upon community norms, to declare that Certainteed acted at its peril in not affixing a warning to its AC pipe until 1979, given what the jury presumably viewed as clear and convincing evidence of the hazards of exposure to airborne asbestos, including secondary (household) exposure.

Certainteed also argues, again relying on a variant of the sophisticated user/superseding cause theories, that it was for DWP, not Certainteed, to protect against secondary exposure. But there was evidence that DWP did take preventive measures and that Certainteed's warnings to purchasers such as DWP were not clear or detailed about the hazards of (the cutting of) AC pipe.

Plaintiff also presented evidence of Certainteed's share of water pipe sales to DWP and the competitiveness of its prices relative to alternative water pipes of composition other than asbestos. The inference urged, and presumably adopted by the jury, was that Certainteed's warnings and recommended practices manuals were tailored to conceal or "downplay" the true nature of the risk to human health presented by its AC pipe in order to continue sales of AC pipe as long as possible. This finding, alone, would support the jury's conclusion that Certainteed was guilty of malice, oppression or fraud.

Notwithstanding that Certainteed's motions are

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denied, because the jury failed to consider the comparative fault of JM, its finding that Certainteed acted with malice, oppression and fraud is suspect, and is subject to retrial. A jury, squarely faced with the relative fault of a competitor manufacturer's fault, might well view Certainteed's conduct in a different light. For this reason, the issue of malice, oppression and fraud must also be retried.

7. Punitive Damages. All sides agree that the jury's punitive damage award was excessive under constitutional guidelines. As the court has noted, the pain and suffering damages of $6,000,000.00 awarded to Mrs. Evans were on the high side of the scale for such awards, suggesting that they may well contain a punitive element. While the court concludes that the jury's finding of malice, oppression and fraud is supported by the weight of the evidence, the court also notes a number of factors that tend to minimize the reprehensibility of Certainteed's conduct.

These factors include, by way of brief summary, the following: (1) The regulatory agencies charged with the protection of workers (NIOSH, Cal-OSHA, etc.) were as knowledgeable about the developing science relative to the hazards of asbestos as was Certainteed, and the evidence shows that Certainteed undertook efforts to comply with or exceed the developing agency standards. (2) DWP continued to purchase AC pipe despite its knowledge of the hazards associated with its installation, and

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Certainteed's competitors, such as JM and Kubota, were vigorously marketing AC pipe and competing with Certainteed. (3) Certainteed discontinued the manufacture and sale of AC pipe in 1985, some 25 years ago, and "deterrence," at least as to the use of asbestos, is a moot issue.

The court also concludes (1) that only the award of compensatory damages as to Mrs. Evans, and not what the jury awarded to Mr. Evans, should be considered in determining an appropriate punitive damage amount. (2) The amount of compensatory damages to Mrs. Evans ($6,000,000.00) must be reduced by 30% in order to account of the jury's 70% fault allocation to Certainteed. (3) Given the circumstances surrounding "reprehensibility" discussed above, in addition to the court's observations that compensatory damages were on the high side, the court concludes that the appropriate ratio of punitive damages to compensatory damages should be 1:1, or $5,821,015.00.

8. Summary. A new trial on all issues (liability and damages), including the punitive damages issues, is required because of the jury's erroneous finding of no fault as to JM. The court has reached legal conclusions as to the balance of issues raised in the event the matter is put before the appellate court for review. If there is no appeal, the matter will be set for retrial upon all causes of action against both DWP and Certainteed.

Finally, to avoid any confusion regarding the timing and scope of issues on appeal, Certainteed is

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directed to lodge with the court, and serve on the parties forthwith, a judgment upon the jury's (Phase I) verdict, including an award of punitive damages in favor of Mrs. Evans and against Certainteed in the reduced sum of $5,821,015.00. This is necessary to permit appeal of the jury's verdicts along with appeal of the court's ruling upon the motions for new trial and for judgment notwithstanding the verdict.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 7-20-10 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: 7-20-10

John A. Clarke, Executive Officer/Clerk

By: _____
P. Solis, Deputy

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