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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

PATRICIA CASEY, Plaintiff and Appellant, v. KAISER GYPSUM COMPANY, INC., Defendant and Appellant.	A133062 (City & County of San Francisco Super. Ct. No. CGC-10-275517)

I. INTRODUCTION

Kaiser Gypsum Company, Inc. appeals from a judgment entered in favor of plaintiffs John Casey and Patricia Casey on claims for personal injuries and loss of consortium stemming from Mr. Casey's alleged bystander exposure to a Kaiser Gypsum product containing asbestos and subsequent diagnosis with mesothelioma.[1] Following a two and a half-month long trial, the jury returned special verdicts finding Kaiser Gypsum 3.5 percent comparatively at fault for plaintiffs' injuries and awarding plaintiffs approximately $21 million in compensatory damages. The jury, however, could not reach a verdict with respect to whether Kaiser Gypsum acted with malice, oppression, or fraud. The trial court then ordered a limited retrial on the issue of malice, oppression, or fraud, and, if necessary, the amount of punitive damages. The second jury awarded plaintiffs $20 million in punitive damages, which the trial court reduced to just under $4 million.

[1] Mr. Casey died in 2011.

On appeal, Kaiser Gypsum contends reversal is required because the trial court committed evidentiary and instructional errors; improperly limited the scope of the retrial; and miscalculated the amount of settlement credits. Kaiser Gypsum also claims the evidence of malice or oppression was insufficient to support an award of punitive damages.

On cross-appeal, plaintiffs challenge the trial court's reduction of the amount of punitive damages.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Pretrial Proceedings

In 1955, Kaiser Gypsum, a drywall manufacturer, began manufacturing joint compound. The joint compound contained asbestos. The asbestos content in Kaiser Gypsum's 1955 joint compound was 15 percent. By 1958, due to cost efficiency reasons, the asbestos content dropped to about five percent. In the 1960s, Kaiser Gypsum began making "pre-mixed" joint compounds, which were packaged in buckets. The asbestos content of the pre-mixed joint compounds ranged from 1.5 to six percent.

From 1962 to 2001, John Casey worked as a plumber and pipefitter at numerous construction sites. In 2010, he was diagnosed with mesothelioma, a type of cancer usually caused by exposure to asbestos.

In March 2010, plaintiffs filed their complaint for personal injury and loss of consortium against more than 60 defendants, which included various asbestos suppliers, as well as contractors and subcontractors. The complaint alleged that Mr. Casey's mesothelioma resulted from his exposure to asbestos products. The plaintiffs sought compensatory and punitive damages.

B. Trial

Prior to trial, the Caseys entered into settlements with several defendants. As a result of the settlements and other dispositions, on November 30, 2010, at the commencement of jury selection, Kaiser Gypsum was one of 14 remaining defendants in the action. Trial was bifurcated with respect to punitive damages. However, when the

jury was unable to reach a verdict on the issue of whether Kaiser Gypsum acted with malice or oppression, the trial court granted a partial retrial.

1. First Trial

a. The Caseys' Evidence

Plaintiffs presented evidence about various studies and research papers from around the world, dating back to the 1920's. Plaintiffs' experts testified that researchers determined in the 1930's that prolonged exposure to asbestos could cause asbestosis, a scarring of the lungs. They further testified that medical and scientific literature established a connection between asbestos exposure and lung cancer in the 1940's. Additionally, animal studies confirmed a connection between asbestos exposure and mesothelioma as early as 1960. Plaintiffs also presented evidence on Kaiser Gypsum's knowledge about the dangers of asbestos.

John Casey worked as a plumber and pipefitter from 1962 to 2001. His responsibilities included installing and removing gaskets and packing containing asbestos. The air he breathed often became dusty when he scraped away at old gaskets and packing and replaced them. At times, he used a rope-like gasket that contained asbestos. He also worked with asbestos-containing insulation and asbestos-containing cement pipes.

In addition to directly working with asbestos-containing products, Mr. Casey was present when other tradesmen mixed, sprayed, and/or disturbed fireproofing materials. He was also present during the cutting, removing, and installing asbestos-containing insulation. At times he was present when others swept up asbestos-containing dust and debris. At other times, Mr. Casey was in the vicinity of other tradesmen who were installing asbestos-containing gaskets and packing. In addition, he was present during the mixing, applying, and sanding of asbestos-containing joint compounds.

Mr. Casey did not use joint compound himself; rather, he was present as a bystander when other workers used joint compound. He was unable to identify the joint compound brands that were in use. He remembered seeing boxes of joint compound labeled with red and green symbols. When shown the label of Hamilton joint

compound—containing a capital "H" and a red dot—he said that was the logo he saw on boxes of joint compound at construction sites in the 1960's and 1970's. He had not seen any joint compound without the Hamilton logo on it. When asked whether he worked with any Kaiser Gypsum products, he said no. He did not know whether anyone used Kaiser Gypsum products in his presence. Richard Bauer testified that he had worked with John Casey from summer 1967 through winter 1972 at numerous jobsites. When asked at trial about this experience 40 years earlier, Bauer identified one site—the Hyatt Union Square—where he specifically remembered seeing Kaiser Gypsum products. Bauer said he worked with John Casey at two other jobsites (Crocker Plaza and the Chinese Cultural Center) where he saw John Casey around workers using unidentified joint compound. As for those two jobsites, Bauer estimated that Kaiser Gypsum made 70 percent or 75 to 80 percent of the drywall products used at those sites. Mr. Casey worked at these locations during 1968 through 1972.

Both Bauer and John Casey observed only the pre-mixed "wet" form of joint compound, not the dry powdered form. Bauer saw dust in the air when workers were sanding the joint compound after it dried. The dust fell on Bauer and John Casey. John Casey said he worked around drywall workers "all the time." He was sometimes present for two minutes, sometimes all day. He tried to stay away from them as much as possible when they created dust.

Mr. Casey was never warned about the dangers of asbestos and he never wore a mask in the dusty environments where he worked. In January 2010, he learned that he had mesothelioma.

2. Kaiser Gypsum's Evidence

To rebut Bauer's testimony that he saw workers using Kaiser Gypsum joint compound around John Casey, Kaiser Gypsum planned to present testimony from Ed van der Bogert, an expert on construction sequencing. Mr. van der Bogert is a college professor who teaches construction management and who spent 23 years as president of a company that provided construction management services for residential and commercial construction. Mr. van der Bogert would have testified about the order in which different

tasks are performed in construction projects, to demonstrate that plumbers like Mr. Casey would rarely be present during the sanding of joint compound.

However, several days into the defense case, plaintiffs moved to exclude Mr. van der Bogert's testimony on the ground that he lacked any expertise that would be helpful to the jury's understanding of the case. The court granted the motion, finding that Mr. van der Bogert lacked personal experience in high-rise construction.

Other defense experts testified that epidemiological studies of drywall workers—the direct users of joint compound—showed no increased risk of mesothelioma. They opined that Mr. Casey's exposure to amphibole asbestos (not found in Kaiser Gypsum joint compound) was sufficient to cause his mesothelioma and that no evidence in the scientific and medical literature supported the conclusion that Mr. Casey's low-dose bystander exposures to chrysotile caused his mesothelioma. X-rays of Mr. Casey's lungs showed a low level of asbestos exposure; defense experts testified that only amphibole asbestos is capable of causing mesothelioma at low doses.

The defense experts further testified that exposure levels to bystanders like Mr. Casey would be much lower than those experienced by the users: A bystander would experience 50 percent of the user's exposure at 1 to 5 feet away, 30 to 35 percent of the user's exposure at 5 to 10 feet away, and 10 percent of the user's exposure at 30 feet away.

The defense experts testified that, until the 1970's, it was believed that asbestos posed a hazard only in situations involving large-dose exposures such as those experienced by miners and millworkers. Before that time, research suggested that even shipworkers directly exposed to asbestos insulation were not at risk, and no studies suggested any risk to bystanders.

3. Verdict

By the time the jury began its deliberations in the first phase of trial, Kaiser Gypsum and FDCC California, Inc. (formerly known as Dinwiddie) were the sole remaining defendants. The jury returned special verdicts in favor of the Caseys on their claims for personal injury and loss of consortium. The jury found that John Casey had

suffered $1,018,421 in economic damages, as well as $255,000 in medical expenses, and $15 million in noneconomic damages. The jury also found that Patricia Casey had suffered $5 million in noneconomic damages for loss of past and future consortium. The jury allocated Kaiser Gypsum a 3.5 percent share of comparative fault. The jury, however, was unable to reach a verdict on whether Kaiser Gypsum had acted with malice or oppression.

The trial court ordered a limited retrial on the issue of malice or oppression.

4. Second Trial

a. First Phase

At the start of the limited retrial, Kaiser Gypsum had asked the court to advise the second jury about the first jury's allocation of fault and its compensatory damages award. The trial court denied the request. Rather, the trial court advised the second jury that a prior jury had found Kaiser Gypsum's products were defective, that it failed to warn, that it was negligent, and that it caused Mr. Casey to develop mesothelioma.

The trial court ruled that the evidence in the second trial would be the same as the first trial. However, when Kaiser Gypsum sought to introduce evidence about Mr. Casey's exposure to asbestos from sources other than its joint compound, the trial court excluded such evidence.

Plaintiffs presented evidence that by 1965, the risks posed by asbestos, including the risk of mesothelioma, were well understood in industry circles—indeed, "obvious." In 1965, the Gypsum Association, an industry trade association in which Kaiser Gypsum participated, sent Kaiser Gypsum, information on the latest scientific reports concerning the risks posed by asbestos, particularly the risk of construction tradesmen developing mesothelioma. One study, for example, found that whereas mesothelioma accounted for only one in 10,000 deaths in the general population, it accounted for one in 30 deaths among tradesmen who worked at least occasionally with asbestos insulation—suggestive of a 300-fold increase in risk of developing this inevitably fatal disease. Leonard Flicker, Kaiser Gypsum's safety officer, forwarded this information to Kaiser Gypsum's top officials on March 1, 1965. Flicker recommended that Kaiser's employees be given

respirators equipped with filters "especially designed for asbestos dust," which was promptly done. Kaiser Gypsum did not warn its customers and/or the end users of its product about the dangers associated with asbestos.

Over the next decade, Kaiser Gypsum took various other measures to protect its employees. For example, in 1966 Flicker emphasized the need to "[b]e certain that all persons who work in the vicinity of asbestos are wearing a proper respirator . . . ." In 1967 Flicker again emphasized this point during a plant visit. Following the promulgation of safety regulations by the Occupational Safety and Health Administration (OSHA) in 1971, Kaiser Gypsum began to take various precautions to safeguard its workplace. For example, in 1972 a Kaiser Gypsum safety officer emphasized the need "to avoid getting asbestos dust in the air" and to "wear efficient and reliable respirators", as well as the need for cleanup to be done "by vacuum cleaners" rather than by dry sweeping. Also, in 1972, Kaiser Gypsum started taking air samples at its plants, to ensure its workers were being protected. It also began issuing increasingly detailed safety directives for the handling of asbestos. Beginning in 1973 it put up strongly worded warning signs in areas of its plants where asbestos was used. In 1974, it even started giving plant employees physicals to check for possible asbestos-related disease.

High-ranking Kaiser Gypsum manager George Kirk admitted that in 1965 Kaiser "knew that taking precautions to avoid breathing asbestos dust was the main protection for industrial workers" recommended by experts, but it did not "place any warnings on any of its products," did not "issue any instructions" to its "sales force to educate customers about the suspected hazards of asbestos inhalation," and did not label its products to recommend the use of face masks. Nor did it hire anyone to measure the asbestos levels generated by the use of its products. Nor did it "prepare any bulletins" for "the salesmen that made reference to the hazards of asbestos."

In October 1968, Union Carbide sent Kaiser Gypsum information on the importance of controlling "asbestos dust exposure" among workers, the value of "adequate exhaust ventilation" and "environmental monitoring," and the need for tradesmen to "wear respirators where dusting occurs in finishing products such as

sanding taped joints." Kaiser Gypsum, however, did not pass this information along to its customers.

In late 1971, Kaiser wrote to each of its asbestos suppliers, inquiring into "[w]hat precautions should be recommended to the contractors and workmen who use and apply our products containing asbestos fibers," including joint compound. In response, Carey-Canadian Asbestos wrote, regarding the use and application of joint compounds, that one should "[a]void creation of visible dust when mixing dry materials with water," and that "[a]n approved mask should be worn by all people working in the area of hand sandpapering . . . ." Pacific Asbestos Corporation recommended asbestos-level monitoring and "[r]espirators where dust prevails." Kaiser Gypsum passed none of this information along to its customers.

In a June 27, 1973, inter-office memorandum, addressed to sixteen other Kaiser Gypsum managers, Kirk highlighted the need to clarify governmental regulations regarding asbestos. He attached a proposed "Merchandising Bulletin": which "would disseminate the information to our sales personnel and would be available through our sales people to contractors." The proposed "Merchandising Bulletin" identified the need for "workers to use proper respirators," and for them to take care in disposing of empty bags. However, John Crum, one of Kaiser's top salesmen in California, testified he never received any such document, and he was never verbally informed that the joint compound he sold for years contained asbestos.

b. Second Phase

Before the final phase of the second trial—dealing with the amount of punitive damages—plaintiffs' counsel asked the trial court to modify CACI No. 3949, which lists five factors that the jury should consider in evaluating the degree of reprehensibility of the defendant's conduct. Plaintiffs' counsel asked the trial court to delete two factors for which there was no evidence; Kaiser Gypsum objected, arguing that it should be able to tell the jury that the absence of those two factors demonstrated a lower degree of reprehensibility compared to other punishable conduct. The trial court modified CACI No. 3949 as plaintiffs requested.

James Mills, a forensic economist, testified on behalf of plaintiffs regarding Kaiser Gypsum's financial condition. After examining a series of asset sales occurring in the late 1970's and early 1980's and applying basic economic principles, he opined that Kaiser Gypsum's net worth in 2011 dollars was an estimated $229 million.

The jury awarded plaintiffs $20 million in punitive damages against Kaiser Gypsum.

C. Judgment and PostJudgment Orders

On May 12, 2011, a judgment was entered in favor of the Caseys, awarding compensatory damages totaling $21,273,421, plus $20 million in punitive damages. The trial court deferred determining the extent to which the pre-verdict settlements required an adjustment of the jury's award of economic damages to John Casey.

On June 17, 2011, the trial court entered a judgment nunc pro tunc on the special verdicts, which awarded Kaiser Gypsum a settlement-based offset of $380,480 against the economic damages to John Casey The court later reduced the amount of punitive damages to $3,982,352.50, and granted Kaiser Gypsum's motions for a new trial and judgment notwithstanding the verdict.

In late August 2011, Patricia Casey became the personal representative for John Casey, who died on July 27, 2011. Kaiser Gypsum timely appealed from the judgment and certain related orders. The plaintiffs timely noticed their cross-appeal from the judgment and the related orders.

III. CONTENTIONS ON APPEAL

On appeal, Kaiser Gypsum contends the trial court erred in 1) excluding its construction sequencing expert; 2) limiting the scope of the retrial; 3) calculating the amount of settlement credits; and 4) modifying the jury instruction of punitive damages. Kaiser Gypsum also challenges the sufficiency of the evidence supporting the punitive damages award.

A. Exclusion of Construction Sequencing Expert

Kaiser Gypsum contends the court prejudicially erred by excluding the testimony of its construction sequencing expert, Ed van der Bogert. According to Kaiser Gypsum, Mr. van der Bogert would have explained to the jury that, according to the custom and practice in the construction industry, a plumber like Mr. Casey would not have been present when drywall workers were sanding joint compound.

1. Background

Kaiser Gypsum designated Mr. van der Bogert as "a construction expert who specializes in construction contract administration, site management (including inspection and supervision), and construction safety." Kaiser Gypsum anticipated that "Mr. van der Bogert will review the plaintiff's testimony and the testimony of any co-workers to assess the work completed. He will testify on residential construction generally, and on related issues including those connected to the application of plaster and drywall." Mr. van der Bogert's deposition testimony revealed the following information:

a. Proffered Opinion

Mr. van der Bogert was given a "pretty general, broad" task: "Read the testimony and form an opinion relative to the interactions or potential interactions between, in this case specifically, a plumber and drywall work." When asked whether he had formed any opinions after completing his assignment, he replied, "[J]ust generally, my understanding from observations and experience relative to the task that plumbers do on the kinds of jobs that Mr. Casey describes, . . . those tasks typically are not performed in the same area of a building where drywall finishing is taking place."

Mr. van der Bogert further testified that, "Mr. Casey does describe being around what he calls drywallers, and . . . it is common that drywallers will be hanging drywall and plumbers will sometimes be required to be in that work area to perform repairs, perhaps, that sort of thing. [¶] But once . . . the drywall has gotten to the finish stage, there's really nothing for a plumber to be doing. And I think Mr. Casey . . . generally throughout his testimony, supports that opinion. And he does describe his interactions as

being [a] passerby, 'passing through' kind of thing. [¶] And in several places, he talks about the need to sequence things correctly and that his rough plumbing work would have to be done and inspected before [s]heetrock is hung and . . . so the rough plumbing is completed, and then the drywall is hung. [¶] And then he describes his . . . trim-out, or plumbing finish task, as being performed after the walls have been painted and tile floors have been set."

When asked to explain the " 'specifics' " supporting his opinion, Mr. van der Bogert explained that "spots" in Mr. Casey's testimony are "very straightforward and supporting the opinion I have that the sequence that's observed on construction site does not put plumbers and drywall finishers in the same areas of a building." Mr. van der Bogert further testified that Mr. Casey "at various points talks about how things would get fouled up if drywall was hung early and that the drywallers were very good about not hanging drywall early or out of sequence. [¶] Mr. [Bauer] supports that as well. He says that . . . the inspections would have to be completed before drywall is put up or the drywall would have to be torn down."

Mr. van der Bogert added that Mr. Casey described "the construction sequence [] very accurately and talks about the role of the inspector and that the inspector would have to inspect and sign off the plumbing work before the [s]heetrock could be hung. [¶] . . .[W]hat Mr. Casey leaves out . . . is the fact that there are a whole set of inspections that take place at that time. There's . . . electrical, mechanical, and plumbing [inspections] tak[ing] place at that time. And then after those are successfully passed, there's a building inspection. [¶] . . . [T]he building inspector . . . comes through and verifies that the electrical, mechanical, and plumbing inspections have been made and then goes ahead and makes a further inspection."

Mr. van der Bogert testified Mr. Casey was "very accurate" in his description of the construction sequence. Without citing to specific places in Mr. Casey's testimony, Mr. van der Bogert added that there are "numerous spots where [Mr. Casey] says things that are supportive of the sequencing—observations of sequence that I've made."

b. Experience and Qualifications

Mr. van der Bogert has a bachelor's degree in psychology and a master's degree in education. He also has an associate of technical arts degree in construction management.

Although not licensed in any particular trade, Mr. van der Bogert is "extensively experienced in many trades," including painting, drywall hanging, tile setting, and carpentry. He has "supervised a lot of plumbing work[,]" but personally has only done "a little plumbing work[.]" He has never worked, in any capacity, on a construction project in California. Rather, his hands-on construction experience is limited to New York state and Washington state; his supervisory experience is exclusively limited to Washington state. He has done work in both residential and commercial construction. The tallest building he has worked on as a tradesperson (carpentry) was the Kings County Jail in Seattle, which he estimated was approximately six or seven stories tall.

Mr. van der Bogert had never worked as a general contractor on a large office building and he described his experience as a tradeperson in such structures as being "very, very limited." With respect to the sequencing of trades in large office buildings, his experience is strictly "academic." In Edmonds, Washington, Mr. van der Bogert serves as the department head at Edmonds Community College in the construction management department. In this capacity, he has made "observations in the field" and "site visits," and has talked "extensive[ly]" with people who work in large office buildings.

Mr. van der Bogert had not visited any of the job sites where Mr. Casey had worked nor had he reviewed any construction plans or subcontractor schedules for the sites in question. Specifically, he was unfamiliar with the Fox Plaza Building in San Francisco, and did not know how many stories that building has. He had no specific knowledge about the number of trades that might have been employed during the construction of that building. He was also unfamiliar with construction of the other job sites and had no knowledge about the type and number of trades employed at these sites.

c. Plaintiffs' Motion to Exclude and Trial Court Ruling

Plaintiffs sought to exclude Mr. van der Bogert's testimony on the grounds that his percipient recollections of jobsites was wholly irrelevant to any disputed issue (Evid. Code, §§ 350, 801) and that he lacked expertise in any subject matter actually at issue (Evid. Code, §§ 720, 801)

After hearing argument, the court granted plaintiffs' motion to exclude, ruling that Mr. van der Bogert did "not possess sufficient knowledge or expertise." The court explained that it had read Mr. van der Bogert's deposition and "was impressed by the incredible lack of experience in high-rise construction. It seems to me he has no pertinent knowledge concerning high-rise construction." When defense counsel argued that Mr. van der Bogert's "credentials clearly showed something further," the court responded, "What credentials show something further? . . . [Y]ou have someone who has never worked in a high-rise construction, never supervised, never consulted on, especially any of the subject buildings, and then he's going to be talking about how the trades interacted [?] It's impossible."

2. Analysis

" 'There is no bright line that divides evidence worthy of consideration by a jury, although subject to heavy counter-attack, from evidence that is not.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 769 (*Sargon*) quoting Judge Friendly's opinion in *Herman Schwabe, Inc. v. United Shoe Machinery Corp.* (2d Cir. 1962) 297 F.2d 906, 912.) As such, trial courts have a substantial " 'gatekeeping' " responsibility. (*Sargon, supra*, 55 Cal.4th at p. 769.) Pursuant to Evidence Code sections 801 and 802,[2] the trial court fulfills it gatekeeper

[2] Evidence Code section 801 provides: " If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion

role, by excluding "expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon Enterprises, Inc. v. University of Southern California* (2013) 215 Cal.App.4th 1495, 1504-1505.)

"The competency of an expert 'is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement.' [Citation.]" (*Huffman v. Lindquist* (1951) 37 Cal.2d 465, 476-477.) In deciding when an individual can testify as an expert, the court must ascertain if he has "special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) In each case, the determinative factor comes down to "whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth . . . . [Citation.] Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility. [Citation.]" (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38; Evid. Code, § 801, subd. (a).)

However, " '[e]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.].' " (*Dee v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390, 404.) Rather, the trial court must assure that the proffered expert testimony " 'both rests on a reliable foundation and is *relevant* to the task at hand.' [¶] 'Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and

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upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." Pursuant to Evidence Code section 802, "[a] witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based."

experience of the relevant discipline.' " (*Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.* (9th Cir. 2013) 738 F.3d 960, 969, fns. omitted, italics added; see *Folger v. Richfield Oil Corp.* (1947) 80 Cal.App.2d 655, 664-665 [testimony deemed immaterial where proffered expert had never driven same type of truck; "Proper practice in driving one size or type of truck would not necessarily be proper practice in operating a different size or type"].)

We review a court's execution of these gatekeeping duties for an abuse of discretion. (*Sargon, supra,* 55 Cal.4th at p. 773.) "A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citation.]" (*Ibid.*)

Against this backdrop, we conclude the trial court did not abuse its discretion in rejecting Mr. van der Bogert's opinion. Although Kaiser Gypsum professes that the trial court erred in excluding Mr. van der Bogert's testimony because he lacked "personal experience" in high-rise construction, we do not share such a limited view of the trial court's ruling. Rather, the record reflects that the court excluded the proffered testimony on the grounds that Mr. van der Bogert did not possess "pertinent" experience, i.e.—relevant experience. As discussed, Evidence Code section 802 authorizes the trial court to assess the reasons for an expert's opinion. "This means that a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning. 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.' [Citation.]" (*Sargon, supra,* 55 Cal.4th at p. 771.) This is such a case. The court inquired into the basis of Mr. van der Bogert's opinion that, as a plumber, Mr. Casey, would not have been in the vicinity of drywall hangers and tapers and the products used by such trades. The goal of this testimony was to challenge the *fact* of Mr. Casey's exposure based on the sequencing of the construction. On this record, the trial court acted well within its discretion in finding that the analytical gap between the data and the opinion proffered was "simply too great" to allow such testimony.

B. Scope of New Trial

Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 115-116 (*Adams*).) In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295, which provides: "Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression or fraud." (Civ. Code, § 3295, subd. (d).) In this case, pursuant to Kaiser Gypsum's pretrial motion made pursuant to subdivision (d) of that section, the court deferred admission of this financial evidence until after the jury determined that punitive damages were warranted. However, the jury was unable to reach a verdict on whether Kaiser Gypsum acted with malice, oppression or fraud.

In cases where the jury is discharged without having rendered a verdict or is prevented from giving a verdict, by reason of accident or other cause during the trial or after the cause is submitted to them—i.e. when the jury is deadlocked on an issue—except where a motion for a directed verdict should have been granted, the action may be retried immediately or at a future time as the court may direct. (Code Civ. Proc., §§ 616, 630; *Barmas, Inc. v. Superior Court* (2001) 92 Cal.App.4th 372, 375 (*Barmas*).) "It is well settled that '[t]here is no constitutional impediment to a retrial of a limited issue, so long as that issue is sufficiently distinct and severable from the others that a limited retrial would not result in an injustice.' (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1478; see also *Cruz v. HomeBase* (2000) 83 Cal.App.4th 160, 165-166.)" (*Barmas, supra*, 92 Cal.App.4th at p. 375.)

1. Civil Code Section 3295

In the instant case, Kaiser Gypsum argues that the partial retrial violated Civil Code section 3295, subdivision (d), by having a separate jury decide the issue of punitive damages. According to Kaiser Gypsum, the "same trier of fact" language in that section means that issues of liability and the amount of punitive damages must always be decided by the same trier of fact and that such issues may never be decided by different juries.

Torres v. Automobile Club of So. California (1997) 15 Cal.4th 771 (*Torres*) is instructive. The issue before the court in *Torres* was whether Civil Code section 3295, subdivision (d) entitled the defendant to a new trial on liability and compensatory damages following the reversal on appeal of an award of punitive and remand for a new trial on punitive damages. (*Torres, supra,* 15 Cal.4th at p. 775.) The court concluded it did not. Reading the statute as a whole, the court construed the "same trier of fact" requirement as being "directly related to the consequences of a bifurcation. That is, the same trier of fact is required to resolve all of the bifurcated issues when a defendant has requested and obtained bifurcation. By requiring that the bifurcated issues be submitted to a single trier of fact, section 3295(d) promotes judicial economy and avoids delay." (*Torres, supra,* 15 Cal.4th at p. 778.) After reviewing the legislative history, the court reached the same conclusion—"that the provision requiring evidence of profit and financial condition to be 'presented to the same trier of fact that found for the plaintiff and found . . . malice, oppression, or fraud' is intended simply as a restriction upon a defendant's right to a bifurcation of the issues," that is, to prevent the defendant from seeking to empanel a second jury after losing before the first. (*Torres, supra,* 15 Cal.4th at p. 779.)

Another instructive case is *Barmas, supra,* 92 Cal.App.4th 372. *Barmas* involved a bifurcated trial in which the jury deadlocked on the issue of malice. (*Id.* at p. 374.) The trial court ordered a new trial limited to the issue of malice and, if applicable, punitive damages. (*Id.* at pp. 374-375.) *Barmas*, relying on *Torres*, rejected the defendant's argument that Civil Code section 3295, subdivision (d) required a new trial on liability as well. (*Barmas, supra,* 92 Cal.App.4th at pp. 375.) *Barmas* reasoned that "the Legislature was concerned about a defendant getting a second bite at the apple by impaneling a second jury to try the question of punitive damages, after one jury had found against the defendant in the first phase of the case. This is not an issue when a partial retrial is required, whether the retrial is ordered by the appellate court (as in *Torres*), or by the trial court (as in this case)." (*Barmas, supra,* 92 Cal.App.4th at pp. 375-376.) *Barmas* found "nothing in *Torres* to suggest that the Legislature intended to abrogate Code of Civil

Procedure section 616 or the power of trial courts to order partial retrials by the enactment of Civil Code section 3295, subdivision (d)." (*Barmas, supra*, 92 Cal.App.4th at p. 376.)

Barmas further explained that "[a] partial retrial that encompasses issues of both malice and punitive damages affords a defendant an even greater assurance of fairness than was found sufficient in *Torres.* In a retrial restricted to punitive damages, as in *Torres*, a new jury would receive an instruction that, in a prior proceeding, defendant's conduct was determined to be malicious. However, although the new jury will hear evidence concerning the defendant's conduct, it may not be apprised of the specific act or acts upon which the previous jury's finding of malice was based. In the *Torres*-type situation, there is a risk that the new jury could award punitive damages based on conduct the previous jury did not find malicious. Here, any such risk would be eliminated by the scope of the partial retrial. The new jury would determine whether [defendant] acted with malice and, if so, whether an award of punitive damages is warranted. Any award of punitive damages, therefore, would be made in light of specific conduct which the new jury found to be malicious." (*Barmas, supra,* 92 Cal.App.4th at pp. 376-377, fn. omitted.)

Kaiser Gypsum relies on this court's decision in *Medo v. Superior Court* (1988) 205 Cal.App.3d 64 (*Medo*) and the Second District's opinion in *City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272 (*City of El Monte*), which interpreted the "same trier of fact" requirement to preclude retrials limited to punitive damages where a trial court had prematurely discharged a jury. In *Medo,* the trial court announced at the outset of the trial that the issue of punitive damages would be bifurcated and tried to a separate jury, " 'unless there is strong objection from counsel.' " (*Medo, supra,* 205 Cal.App.3d at p. 69.) Counsel for plaintiff agreed. Defense counsel remained silent, allowed the liability phase to go forward, and said nothing when a verdict was rendered in plaintiff's favor and the jury was discharged. Defendant then moved for dismissal or, alternatively, for a mistrial, "on the ground that, the jury having been discharged, there was no way to comply with section 3295." (*Medo, supra*, 205 Cal.App.3d at p. 67.) We

found persuasive the defendant's argument that "[p]unitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case*." (*Medo, supra,* 205 Cal.App.3d at p. 68.) We held, however, that the defendant had waived his right to have the punitive damages phase of the case tried by the same jury which determined liability, because the trial court announced at the beginning of trial that it would order bifurcation and separate juries " 'unless there is strong objection from counsel,' " and defense counsel made no objection. (*Id.* at p. 70.) But we further clarified that the second jury could hear "evidence of conduct upon which liability was determined," and was precluded only from determining the issue of liability and compensatory damages. (*Ibid.*)

In *City of El Monte,* the jury in a bifurcated trial was discharged before plaintiffs offered evidence of the defendants financial worth. (*City of El Monte, supra,* 29 Cal.App.4th at p. 275.) Realizing their mistake, plaintiffs sought a directed verdict for " 'a specified amount of punitive damages.' " (*Ibid.*) The trial court instead decided to " 'just reconvene another jury' " to decide this issue. (*Id.* at 276.) The defendants sought a writ of mandate directing the trial court to vacate this order. (*Ibid.*) In issuing the writ of mandate, the appellate court explained that "it was the responsibility of plaintiffs' counsel to go forward with the evidence necessary to plaintiffs' case. In our adversary system, defense counsel had no obligation to help try plaintiffs' case by pointing out evidence which had been omitted. Nor do we believe that defense counsel was required to advise the court of this deficiency in plaintiffs' case. In fact, defense counsel would have violated his obligation to his clients had he done so." (*Id.* at p. 277.) *City of El Monte* concludes with the following admonishment: "*Medo* served as a warning to defendants, that the right to have the liability and punitive damages phases of the trial tried by one jury may be waived where the defendant knows up front that two juries will be employed, and fails to object when the first is discharged after the liability phase. This case should serve as a warning to plaintiffs that in the absence of a clear understanding that two juries will be employed, plaintiffs must put on their *entire* case, including evidence relevant to the amount of punitive damages, before the jury is discharged.

Failure to do so results in a forfeiture of the right to punitive damages." (*City of El Monte, supra,* 29 Cal.App.4th at p. 280.)

Medo and *City of El Monte* are distinguishable from the instant case. Neither case addressed whether Civil Code section 3295, subdivision (d) forbids a trial court from partially retrying a case when the jury has deadlocked on the issue of malice. Rather, those decisions considered the statute's application where juries were improperly discharged prior to determining the amount of punitive damages. It was in this context that the "same trier of fact" restriction was held to preclude a trial court from impaneling a second jury to determine the amount of punitive damages unless the restriction was waived by the defendant. (*Torres, supra,* 15 Cal.4th at p. 780.) Even assuming that these decision are relevant for purposes of this appeal, *Torres* makes clear that the Legislature, by enacting subdivision (d) of Civil Code section 3295 did not intend "to upset settled law regarding the power of appellate courts to affirm the liability and compensatory damage aspects of a judgment while ordering a retrial limited to punitive damages." (*Torres, supra,* 15 Cal.4th at pp. 780-781.)

Although *Torres* presented a different procedural posture, i.e. the reversal on appeal of an excessive punitive damages award, we find much of the court's reasoning for approving a retrial limited to punitive damages supports the partial retrial ordered by the trial court in this case. Moreover, *Barmas, supra,* 92 Cal.App.4th 372, illustrates why, in the context of partial retrials that encompass the issues of both malice and amount of punitive damages, it is unnecessary for the same jury to determine liability and punitive damages.

2. Other Considerations

Finally, Kaiser Gypsum argues that even setting Civil Code section 3295 aside, the partial retrial was unfair. According to Kaiser Gypsum, several factors establish that the partial retrial was prejudicially unfair, to wit: 1) the second jury was unaware of the first jury's allocation of fault and damages award; 2) the second jury heard evidence that Kaiser Gypsum sold asbestos-containing joint compound through 1978, whereas the first jury was told that the sales of such products ended in 1975; 3) the second jury had no way

of knowing what conduct the first jury found tortious; and 4) the second jury was unaware of the evidence regarding Mr. Casey's other exposures to asbestos. The gist of Kaiser Gypsum's claim is that absence of these mitigating factors in the second trial made it more likely for the second jury to want to punish the defendant. We disagree.

a. First Jury's Allocation of Fault and Compensatory Damages Award

Kaiser Gypsum contends the trial court erred in refusing to inform the second jury that the first jury awarded plaintiffs $21 million in compensatory damages and found Kaiser Gypsum's comparative liability was 3.5 percent. Kaiser Gypsum fails to show prejudice.

"A trial court ruling on a new trial motion may order a new trial on a limited issue if a trial on that issue alone would not prejudice any party. [Citations.] Similarly, an appellate court may order a new trial on a limited issue if a trial on that issue alone would not cause such uncertainty or confusion as to deny a fair trial. [Citations.] The primary reasons to order a new trial limited to an issue, or issues, that can be determined separately without prejudice to any party are to relieve the trial court and the parties of the unnecessary burden of relitigating issues that have been decided, and to respect and preserve the results of a trial on issues as to which the appellant has not shown error. [Citations.] Whether an issue can be tried separately without prejudice to any party depends on the particular circumstances of each case. [Citation.]" (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 696 (*Bullock I*). "The trial court in [a] new trial, in the exercise of its discretion, should admit evidence relevant to determining the amount of punitive damages in the same manner that a trial court in a new trial limited to the amount of compensatory damages should admit evidence relevant to determining that amount. . . . If the amount awarded by the jury in the new trial is excessive, an adequate remedy is available by way of a new trial motion and an appeal in which the appellate court must consider de novo the constitutional guideposts. [Citations.]" (*Id.* at p. 701.)

Here, in the context of the limited retrial on malice and punitive damages, the trial court refused to advise the second jury about the amount of the compensatory damages award on Evidence Code section 352 grounds. In so ruling, the court reasoned: "[T]he

probative value is outweighed by the prejudicial risk to both parties. One to the plaintiff where the jury may say, 'Would you look, they already got $21 million, why should we give them anymore [in] punitive damages?' [¶] On the other hand, the prejudice to Kaiser may be the jury saying, 'Wow. The first jury awarded $21 million [.] Kaiser . . . [m]ust be . . . pretty' . . . [¶] [n]asty . . .[¶] 'And therefore, . . . we should just award the moon.' "

We find no abuse of discretion in excluding evidence of the specific amount of compensatory damages awarded by the first jury. California law requires that punitive damages bear a "reasonable relationship" to the actual injury or harm suffered by the plaintiff. (*Torres, supra*, 15 Cal.4th at p. 781.) Generally, upon retrial of the issue of punitive damages, the second jury is advised of the amount of general damages already awarded so that it may maintain a reasonable relation between such damages and punitive damages, if any, that it decides to award. (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801 (*Brewer*).) While "compensatory damages are a convenient measure of injury suffered by a plaintiff," some courts have reasoned that the focus should instead be on "the nature and degree of actual harm suffered, not some bottom-line amount of compensatory damages." (*McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1165; *Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1603-1604.) Here, there is no serious dispute regarding the tremendous pain and suffering Mr. Casey endured, which culminated in his death. In our view, these facts were sufficient for the jury to maintain a reasonable relationship between plaintiffs' actual harm and any punitive damages that it would award. If the jury awarded an excessive amount, there was an adequate remedy by way of post-trial motion and/or appeal. (*Brewer, supra*, 32 Cal.2d 791, 801; *Bullock I, supra,* 159 Cal.App.4th at p. 701.) Accordingly, we conclude excluding reference to the specific amount of compensatory damages did not prejudice Kaiser Gypsum.

We reach the same conclusion regarding Kaiser Gypsum's claim that the trial court erred in failing to mention the first jury's allocation of fault. According to Kaiser Gypsum, the second jury should have been instructed that it was only 3.5 percent

comparatively liable for plaintiffs' harm because this determination was relevant to the jury's assessment of reprehensibility of Kaiser Gypsum's conduct. Once again, we disagree.

The trial court, after noting that it had heard "two or three hours" of argument on the subject, declined to advise the second jury of the first jury's allocation of fault. The court found this information was "confusing, misleading and prejudicial[,]" and noted that the "post-trial protections" would address any "constitutional considerations and mandates."

We are aware of no requirement that the jury in a new trial must be informed of allocation of fault determined by the first jury in order to determine reprehensibility of a given defendant's conduct. Furthermore, Kaiser Gypsum had an adequate remedy to challenge the amount of the punitive damages award by way of post-trial motion and an appeal, which it pursued. (See *Bullock I*, *supra*, 159 Cal.App.4th at p. 701.) Accordingly, we conclude excluding reference to the first jury's determination that Kaiser Gypsum was 3.5 percent at fault did not prejudice Kaiser Gypsum.

White v. Ford Motor Co. (9th Cir. 2007) 500 F.3d 963 (*White*), cited by Kaiser Gypsum does not compel a contrary conclusion with respect to the exclusion of the amount of compensatory damages or the allocation of Kaiser Gypsum's comparative liability. In *White*, the parents of a three-year-old child brought a products defect/wrongful death action against Ford and other defendants after a parking brake on a Ford truck failed, causing it to run over the child. (*Id.* at p. 966.) The jury awarded compensatory damages as well as punitive damages to the parents. (*Id.* at p. 970.) On the first appeal, both damage awards were upheld, but the punitive damage award was later altered because the Ninth Circuit found the jury had punished Ford for out-of-state conduct. (*Ibid.*) As such, the Ninth Circuit remanded for further proceedings on the issue of punitive damages, without addressing whether the amount was excessive. (*Ibid.*) On remand the same district judge, who presided over the first trial, conducted a retrial limited to the amount of punitive damages before a new jury. (*Ibid.*) In the second trial, the district court advised the new jury that: 1) the first jury had found for the plaintiffs

and awarded compensatory damages; 2) Ford's liability for punitive damages had already been established by the first jury; and 3) the only remaining question for the new jury was to determine the amount of punitive damages. (*Id.* at p. 971.)

As relevant to our discussion here, the defendant car manufacturer in *White* sought reversal of the punitive damages award because the district court refused to advise the second jury about the compensatory damages award and failed to mention the first jury's determination that the parents were 40 percent at fault. (*White, supra,* 500 F.3d at p. 973.) In reversing, the Ninth Circuit held that withholding information about the amount of compensatory damages was an abuse of discretion. (*Id.* at p. 974.) The court reasoned that "[i]n a typical case, the same jury would award both compensatory and punitive damages. Here, because of this case's unique procedural history, the jury empaneled to award punitive damages was unfamiliar with the original jury's verdict and the amount of compensatory damages it awarded. Without knowing the amount of those damages, the punitive damages jury could not have come to a reasoned conclusion as to the amount of additional damages necessary to deter Ford from similar conduct in the future." (*Ibid*.)

The Ninth Circuit also held that the district court abused its discretion by not telling the second jury that the parents were 40 percent responsible for the accident. (*Id.* at p. 973.) The court explained, as follows: "We assess blame for tortious conduct in relation to other contributory causes. Likewise, criminal acts may result in lesser punishments when the actor is not wholly responsible for the harm. This is true even for extremely blameworthy cases, such as capital defendants being permitted to show mitigating circumstances caused by others in order to reduce their punishments. [Citation.] Thus, in determining punitive damages, the jury should be able to consider Ford's level of responsibility, as it bears directly on 'the reprehensibility of [its] conduct.' [Citation.] The district court should therefore instruct the jury that Ford was only 60 percent responsible for the accident, and plaintiffs bore the remaining 40 percent of the blame." (*Id.* at p. 975.)

We conclude *White* is not dispositive of the issues here. First, unlike in the facts of *White*, where the plaintiffs were found to be 40 percent at fault, in the instant case the Caseys bore none of the blame. To the extent that Kaiser Gypsum sought to introduce the fault of the settling defendants in order to minimize its own blameworthy conduct, nothing in *White* supports such a proposition. Second, the decision to admit evidence rests within the sound discretion of the trial court. (See *Bullock I, supra,* 159 Cal.App.4th at p. 701.) Although *White* found an abuse of discretion in that case, we do not read *White* as establishing any bright-line rules with respect to the admissibility of evidence. Indeed, such a pronouncement would result in an unworkable constraint of the trial court's discretion and would eviscerate the nuanced balancing required in applying Evidence Code section 352.

Finally and perhaps more importantly, the instant case is governed by California law. As such, the Ninth Circuit's interpretation of Nevada law has no bearing on whether a trial court committed evidentiary error, a position we reject, under California law.

2. Additional Evidence Presented in Second Trial

Kaiser Gypsum complains that the second jury heard evidence that it sold asbestos through 1978, whereas the first jury heard its sales lasted through 1975. According to Kaiser Gypsum, this three-year span represented "a critical time difference given the evolving information on asbestos hazards." Kaiser Gypsum insists that this additional evidence "invited the second jury to punish Kaiser Gypsum for conduct that unquestionably played no role in the first jury's verdict . . . ."

When an appellant challenges a trial court's evidentiary rulings, the appellant must demonstrate that the ruling was incorrect and, moreover, that the incorrect ruling was prejudicial to the appellant's case. Article VI, section 13 of the California Constitution provides that "[n]o judgment shall be set aside, or a new trial granted, in any cause, on the ground . . . of the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (See Code Civ. Proc., § 475, Evid. Code, §§ 353, 354.)

These constitutional requirements are reiterated in Evidence Code section 353, which provides in part: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, *by reason of the erroneous admission of evidence* unless . . . [¶] (b) [t]he court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Italics added.)

The California Supreme Court has interpreted the " 'miscarriage of justice' " phrase as prohibiting a reversal unless there is "a reasonable probability that in the absence of the error, a result more favorable to the appealing party would have been reached." (*Soule, supra,* 8 Cal.4th 548, 574.) In this context, a "reasonable probability" does not mean more likely than not, but merely a *reasonable chance,* which is more than an *abstract possibility.* (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.)

In this case, the admission of evidence regarding Kaiser Gypsum's sales of asbestos through 1978, even if erroneous, could not have affected the outcome of the trial. In light of the extensive evidence of Kaiser Gypsum's conduct dating back as early as 1965, we conclude that any error in the trial court's admission of Kaiser's Gypsum's conduct for an additional three-year period is harmless. In other words, there is no reasonable probability that in the absence of this error, a result more favorable to Kaiser Gypsum would have been reached. (*Soule, supra,* 8 Cal.4th at p. 574.)

3. Theory of Liability in First Trial

Kaiser Gypsum complains that the second jury had no way of knowing what conduct the first jury found tortious. According to Kaiser Gypsum, in the first trial, plaintiffs asserted three different theories for finding Kaiser Gypsum liable for failure to warn of the dangers of its product(s), to wit: Kaiser Gypsum either warned too late, warned inadequately, or never warned at all. Although the first jury found Kaiser Gypsum was liable for failing to warn, it did not specify the theory it adopted. Kaiser asserts that plaintiffs' counsel used this ambiguity in the second trial by suggesting that

the first jury necessarily found Kaiser Gypsum issued no warning at all. Kaiser Gypsum further asserts that it is "likely" the second jury punished Kaiser Gypsum on a theory that the first jury "may actually" have rejected. Not only is this argument purely speculative, it improperly intertwines the issues of liability and damages—an issue that Kaiser Gypsum by its request for bifurcation sought to keep separate.

In *Liodas v. Sahadi* (1977) 19 Cal.3d 278 (*Liodas*), the California Supreme Court stated that the defendant's liability was correctly determined, but nevertheless concluded that a new trial on compensatory and punitive damages must encompass liability as well. (*Id.* at pp. 283-285.) There, trial court had instructed the jury on the measure of damages for fraud by a fiduciary, but refused an instruction on the measure of damages for ordinary fraud. (*Id.* at. p. 283-284.) *Liodas* stated that there was conflicting evidence as to when the fiduciary relationship ended, and that it was impossible to determine whether the jury found the defendant liable for ordinary fraud or fraud by a fiduciary. (*Id.* at pp. 284.) *Liodas* stated further that numerous transactions were alleged to be fraudulent, that the evidence was in conflict, and that it was impossible to determine which transactions the jury found fraudulent. (*Id.* at p. 286.) *Liodas* stated that before awarding damages, the second jury must determine whether the defendant was liable for fiduciary or ordinary fraud and must determine which transactions were fraudulent. (*Ibid.*) Because those issues must be redetermined in the new trial, *Liodas* concluded that the issue of liability was inseparable from the issue of damages, that a partial new trial would be prejudicial to the defendant, and that a new trial on all issues therefore was required. (*Ibid.*)

Liodas is distinguishable from the present case because the new jury in *Liodas* had to determine which of the numerous transactions were fraudulent and whether the defendant was acting as a fiduciary at the time in order to apply the proper measure of compensatory damages to each transaction. Here, there was no error in the award of compensatory damages, and the jury in the new trial on punitive damages was not required to make any finding with respect to liability in order to determine the proper measure of damages. Accordingly, a complete retrial was not required.

4. Evidence of Other Exposure Not Presented in Second Trial

Finally, Kaiser Gypsum contends the trial court erred in preventing the second jury from hearing evidence that Mr. Casey was exposed to numerous asbestos products in his career. Kaiser Gypsum maintains that this evidence was relevant to the issue of malice and oppression. According to Kaiser Gypsum, "if the [second] jury had known that that numerous other manufacturers were producing asbestos . . . without any warnings, the jury would have been less likely to accept plaintiffs' . . . argument that everyone knew by 1965 that any exposure to asbestos could cause cancer." Kaiser Gypsum further asserts that evidence of Mr. Casey's other exposures "was also relevant to the issue of reprehensibility and the amount of punitive damages." According to Kaiser, the second jury "might have [ ] concluded" its "conduct was less blameworthy if they had known that many others had reached the same conclusions about the lack of low-exposure hazards."

We find no abuse of discretion in the exclusion of evidence pertaining to Mr. Casey's other exposures to asbestos. The salient inquiry for the jury was whether Kaiser Gypsum acted with malice and, if so, how reprehensibly did it act. That other manufacturers may have engaged in the same reprehensible conduct does not lessen Kaiser Gypsum's blame for Mr. Casey's personal injuries and death. Moreover, by the time of the first jury's verdict all of the defendants, except for Kaiser Gypsum and FDDC California, Inc. (formerly known as Dinwiddie) had settled. And of the two remaining defendants, the jury was unable to render a verdict as to whether Kaiser Gypsum acted with malice. Accordingly, the second trial proceeded on the limited issues of whether Kaiser Gypsum had acted with malice and, if so, the amount of punitive damages.

In *Sharp v. Automobile Club of Southern California* (1964) 225 Cal.App.2d 648, 653-654 (*Sharp*), the court rejected the defendants' argument that for a jury in the new trial "to try the issue of amount of punitive damages separate and apart from the facts which are claimed to justify it" would deny the defendants a fair trial. *Sharp* stated that the jury had properly decided that punitive damages were warranted, that the issue need not be decided again in a new trial, and that, "nothing said in this decision is intended in any way to restrict the exercise of the discretion of the trial court as to the scope of the

evidence that may be introduced as to the proper amount of punitive damages notwithstanding that neither the issues of the fraud itself nor that plaintiff is entitled to such damages are to be relitigated." (*Id.* at p. 654.) Here, as in *Sharp*, the trial court acted well within its discretion in excluding evidence of Mr. Casey's other exposures.

In sum, we conclude that the partial retrial limited to the issue of malice and the amount of punitive damages was not prejudicially unfair to Kaiser Gypsum.

C. Allocation of Pre-verdict Settlement Proceeds

Under Civil Code section 1431.2, a defendant's liability for noneconomic damages is several only, and it is liable only for the portion of plaintiffs' noneconomic damages that corresponds to its percentage of fault. Here, the jury found Kaiser Gypsum to be responsible for 3.5 percent of plaintiffs' injuries. Defendant is jointly liable for plaintiffs' economic damages, and thus is entitled under Code of Civil Procedure section 877[3] to a credit for amounts previously recovered from other parties for these damages. Kaiser Gypsum challenges the trial court's calculation of its settlement credits under Code of Civil Procedure section 877.

"The well accepted framework for calculating settlement credits is found in *Espinoza v. Machonga* (1992) 9 Cal.App.4th 268, 276-277 [(*Espinoza*)], and *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 840-841 [(*Greathouse*].) When prior recoveries have not previously been allocated in a manner found by the court to be in good faith, the posttrial allocation of prior settlements should mirror the jury's apportionment of economic and non-economic damages." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 1006 (*Jones*).) The established method for allocating

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[3] Code of Civil Procedure section 877 provides in relevant part, "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect: [¶] (a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it, whichever is the greater."

proceeds of a prior settlement is to calculate the percentage of the jury award attributable to economic damages in relationship to the entire award, apply that percentage to the settlement amount to determine the portion of the settlement attributable to economic damages, and then reduce the judgment by the amount of the economic damages portion of the settlement. (See *Greathouse, supra,* 35 Cal.App.4th at p. 839; *Espinoza, supra,* 9 Cal.App.4th at p. 277.) The longstanding rules for calculating settlement credits were further refined in *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847 (*Wilson*) and *Hackett v. John Crane, Inc.* (2002) 98 Cal.App.4th 1233 (*Hackett*). (See *Jones, supra,* 132 Cal.App.4th at p. 1006.)

In *Wilson,* the jury rendered a verdict against Crane for damages based on the husband's asbestos-related personal injury and the wife's loss of consortium. Prior to trial, plaintiffs reached settlements with other defendants that purported to encompass the husband's personal injury claims, the wife's loss of consortium claim, and the potential future wrongful death claims of the heirs. The settlement agreements allocated the settlements pursuant to the same 60/20/20 ratio used in the present case. (*Wilson, supra,* 81 Cal.App.4th at p. 864.) Citing *Wilson,* the *Hackett* court held that the settlement credit should be calculated as follows: "First, excluding the wife's loss of consortium damages, determine the ratio of economic to total damages as awarded by the jury. Second, subtract from the amount of the pretrial settlement the portions of the settlement properly found to be allocable to the wife's loss of consortium claim and the heirs' potential wrongful death claims. Third, multiply the two figures together to determine the amount of the defendant's settlement credit for economic damages." (*Hackett, supra,* 98 Cal.App.4th at p. 1240, citing *Wilson, supra,* 81 Cal.App.4th at p. 864, fn. 18.)

In *Hackett,* the court applied the formula somewhat differently, but recognized that the result would be identical. (*Hackett, supra,* 98 Cal.App.4th at p. 1244, fn. 13.) However, *Hackett* addressed a question left unanswered in *Wilson* that is of particular importance in this case. The court held that in calculating the percentage of the settlement proceeds attributable to personal injury and loss of consortium claims, the trial court must rely on the proportion reflected in the jury verdict if the claims were submitted

to the jury and the trial court had not previously approved the good faith of the settlement. (*Hackett, supra,* 98 Cal.App.4th at pp. 1243-1244.) The court reasoned, "Loss of consortium is simply a label for one type of noneconomic damages. As long as claims for such damages were encompassed by the prior settlements and the amount of the damages were determined by the fact finder, they are logically indistinguishable from any other noneconomic damages." (*Ibid.*)

Here, plaintiffs settled with several other defendants for a sum totaling $6,686,226. Of this amount $5,468,980.80 was negotiated as resolution of the personal injury and loss of consortium claims. The balance of $1,217,245.20 was negotiated with respect to future wrongful death claims. In all but two of the settlements, the settling parties purported to allocate the settlement proceeds as follows: 60 percent to Mr. Casey's personal injury claims, of which 20 percent went to economic damages, 20 percent to Mrs. Casey's loss of consortium claim, and 20 percent to the potential future wrongful death claims of the heirs.[4]

The jury awarded plaintiffs a total of $21,273,421. Of this, 1,273,421 was for economic damages. In a post-trial motion, Kaiser Gypsum requested a settlement credit of $808,400 based on the purported allocations in the settlement agreements. Specifically, Kaiser first sought to apportion 60 percent of the total settlement to the personal injury claim ($6,686,226 x .60 = $4,011,735.60). Kaiser then sought to apportion 20 percent of the personal injury claim representing economic damages ($4,011,735.60 x .20 = $802,347.12). Kaiser Gypsum then rounded this calculation to arrive at the resulting figure of $808,400.

Alternatively, Kaiser Gypsum asserted that trial court should apply the *Greathouse* formula to the entire settlement amount, in the event the court disregarded the allocation of settlement proceeds specified in the settlement agreements. Kaiser Gypsum calculated a $579,695.79 credit against the economic damages in the following manner. First,

[4] Apparently, in the other two settlements, 100 percent of the proceeds went to Mr. Casey's personal injury claims, of which 60 percent was allocated to noneconomic damages and the remaining 20 percent went towards noneconomic damages.

Kaiser Gypsum determined that economic damages constituted 8.67 percent of Mr. Casey's personal injury damages by dividing the economic damages awarded to Mr. Casey ($1,300,000)[5] by the amount of noneconomic awarded to Mr. Casey ($15,000,000), effectively removing Mrs. Casey's loss of consortium damages ($5,000,000) from the settlement proceeds. Kaiser Gypsum then multiplied the total amount of pretrial settlements ($6,686,226) by 8.67 percent, which resulted in a $579,695.79 credit.

Kaiser Gypsum proposed a third alternative, in which the *Greathouse* formula would be applied to 95 percent of the total pretrial settlement proceeds. In support of this proposal, Kaiser Gypsum asserted that no more than five percent of the settlement proceeds should be allocated to claims that were not at issue in the instant case—i.e., the potential wrongful death claims by Mr. Casey's heirs. Under this alternative formula, Kaiser Gypsum calculated a $412,874.45 credit. Kaiser first multiplied the total settlement proceeds ($6,686,226) by 95 percent, effectively reducing the wrongful death claims to five percent of the proceeds ($334,311.30). The resulting figure is $6,351,914.70. Next, Kaiser determined that 6.5 percent of the damages awarded by the jury constituted economic damages for the personal injury and loss of consortium claims by dividing the amount of economic damages ($1,300,000) by the total amount of noneconomic damages awarded ($20,000,000). Finally, Kaiser Gypsum multiplied the remaining proceeds ($6,351,914.70 [$6,686,226 -$334,311.30]) by 6.5 percent, resulting in a total credit of $412,874.45.

Plaintiffs, on the other hand, argued that the *Greathouse* formula should not be calculated to include the settlement proceeds for the wrongful death claims ($1,217,245.20), but should be limited to the settlement proceeds for the personal injury and loss of consortium claims ($5,468,980.80), which worked out to be approximately 80 percent of the total pretrial settlement proceeds. Plaintiffs then determined that 5.99 percent of the damages awarded by the jury constituted economic damages for the

[5] The actual amount of economic damages awarded by the jury was $1,273,421.

personal injury and loss of consortium claims by dividing the amount of economic damages ($1,273,421) by the total amount of damages awarded to plaintiffs ($21,273,421). Finally, plaintiffs multiplied the remaining settlement proceeds ($5,468,980.80) by 5.99 percent, resulting in a total credit of $327,591.95.

The trial court disregarded the purported allocation of settlement proceeds that had never been judicially approved, and calculated a $380,480 credit against economic damages in the following manner. First, the court reduced the amount of the pretrial settlement proceeds by $334,311, effectively allocating five percent to wrongful death claims and, thus, reducing the total settlement proceeds to $6,351,915. Then the court determined that the economic damages awarded at trial constituted 5.99 percent by dividing the economic damages awarded to Mr. Casey ($1,273,421) by the total damages awarded to plaintiffs ($21,273,421). Next, the court multiplied the remaining settlement proceeds ($6,351,915) by 5.99 percent. The resulting figure is $380,480.

Kaiser Gypsum contends that the court erred in calculating its credits by rejecting the allocation agreed to by the settling parties, i.e. 60 percent for personal injury, 20 percent for loss of consortium, and 20 percent for potential wrongful death claims. We disagree.

"Absent a prior judicial determination of the good faith of allocations made in the settlement agreements, the trial court properly utilized the jury's verdict to allocate damage components as to which the jury made findings." (*Jones, supra,* 132 Cal.App.4th at p. 1008.) As required by *Hackett, supra,* 98 Cal.App.4th at pages 1243-1244, the court properly included the loss of consortium claims in allocating the settlement proceeds.

Nor did the trial court abuse its discretion in allocating five percent of the prior settlements to a potential wrongful death action. Unlike the loss of consortium claim, the jury of course made no findings with respect to the value of a potential wrongful death claim. Trial courts generally have wide discretion in allocating prior settlement recoveries to claims not adjudicated at trial. (*Hackett, supra,* 98 Cal.App.4th at p. 1242.) Here, the evidence at trial established that the potential wrongful death claimants would be Mrs. Casey, who had already received $5,000,000 and the plaintiffs'

two, adult children; the children were both gainfully employed. Mr. Casey testified at his deposition that was not financially supporting anyone. In fact, one of his children was a physician. Based on the minimal evidence presented on the family of Mr. Casey, it was not unreasonable for the trial court to allocate five percent of the settlement proceeds to potential wrongful death claims. (See *Jones, supra,* 132 Cal.App.4th at pp. 1010-1011 ["The determination of the value of potential wrongful death claims requires, at a minimum, some information regarding the number of the heirs and the nature of their relationship with the decedent. [Citation.]" (Fn. omitted.)]) Indeed, this was the exact position Kaiser Gypsum took below.

"Because the settlement agreements had not previously been judicially approved, the trial court was not bound by the allocations made in the agreements. (*Wilson, supra,* 81 Cal.App.4th at p. 866.) Instead, the court's task was to determine whether there was a reasonable basis on which to justify those allocations. (*Ibid.*)" (*Jones, supra,* 132 Cal.App.4th at p. 1009.) The court did not abuse its discretion in allocating the settlement credits in the manner that it did.

D. Substantial Evidence of Malice or Oppression

Kaiser Gypsum contends there is insufficient evidence of malice or oppression to support punitive damages. We disagree.

1. Governing Principles

Civil Code section 3294 authorizes an award of punitive damages if a plaintiff proves by clear and convincing evidence that defendant is guilty of oppression, fraud, or malice. "The clear and convincing standard ' "requires a finding of high probability . . . ' "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind." ' " ' " (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 715.)

"As nonintentional torts support punitive damages when the defendant's conduct 'involves conscious disregard of the rights or safety of others,' our focus is on malice and oppression. (*Gawara v. United States Brass Corp.* (1998) 63 Cal.App.4th 1341, 1361.)" (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 (*Pfeifer*).) " '[M]alice'

encompasses " '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).) " '[O]ppression' 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).) "The term ' "despicable," ' though not defined in the statute, is applicable to 'circumstances that are "base," "vile," or "contemptible." ' [Citation.]" (*Pfeifer, supra,* 220 Cal.App.4th at p. 1299.)

Moreover, "malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]" (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1228.)

In addressing Kaiser Gypsum's challenge, we " 'inquire whether the record contains "substantial evidence to support a determination by clear and convincing evidence . . . ." [Citation].' (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891.) Under that standard, we review the evidence in the light most favorable to the [plaintiffs], give them the benefit of every reasonable inference, and resolve all conflicts in their favor, with due attention to the heightened standard of proof. (*Ibid.*)" (*Pfeifer, supra,* 220 Cal.App.4th at p. 1299.)

2. Analysis

We find guidance regarding Kaiser Gypsum's contention in *Pfeifer, supra,* 220 Cal.App.4th 1270. There, the evidence established that the defendant, a manufacturer of asbestos-containing products, was aware of the dangers of asbestos as early as 1970. (*Id.* at p. 1300.) In 1972, in compliance with OSHA regulations, the defendant began monitoring the air in its factories for asbestos levels, and used engineering controls to suppress dust levels. (*Ibid.*) The defendant warned its workers that asbestos caused asbestosis and cancer, but did not disclose the dangers of asbestos to the users of its products. (*Ibid.*) Although the defendant knew that users replaced gaskets using

methods that created asbestos dust, it never tested its products to determine whether those methods generated concentrations of asbestos exceeding regulatory limits. (*Ibid.*) In affirming the punitive damages award, the court concluded "the evidence was sufficient to show malice, that is, despicable conduct coupled with a conscious disregard for the safety of others . . . [Defendant] fully understood that asbestos dust endangered workers, but it did not issue warnings to customers until 1983, notwithstanding its awareness that they used the products in ways that generated considerable asbestos dust. Indeed, although [defendant] informed its employees that the asbestos used in making 2150 sheet gaskets caused cancer, [defendant] provided that information to customers only when they asked for the 2150 safety data sheet. The evidence thus established that [defendant] carried on despicable conduct with an awareness of the 'probable dangerous consequences,' and 'willfully fail[ed] to avoid such consequences.' (*Angie M. v. Superior Court*, *supra*, 37 Cal.App.4th at p. 1228.)" (*Pfeifer*, *supra*, 220 Cal.App.4th at pp. 1300-1301.)

The evidence below presented an analogous situation. To begin, the evidence showed that during the mid-1960's, Kaiser Gypsum knew that asbestos dust was hazardous and it took action to protect its own employees from the hazards. Specifically, an internal memorandum from 1965 detailed studies linking asbestos inhalation to lung cancer and mesothelioma, and advised that Kaiser Gypsum employees should "use a respirator with a filter especially designed for asbestos dust." Notwithstanding these internal measures, the evidence showed Kaiser Gypsum did nothing to warn its customers and/or the end users of its products about the dangers associated with asbestos.

For a ten-year period, Kaiser Gypsum took various precautions to protect its employees. By contrast, Kaiser Gypsum did nothing to inform its customers that its joint compound contained asbestos, to provide guidance for minimizing risk to the tradesmen working for them. As a result, tradesmen, as well as bystanders like Mr. Casey, were utterly unprotected, with no air monitoring, no respirators, and no cleanup precautions. The evidence showed that as late as 1973, Kaiser Gypsum refrained from giving its sales staff any warnings to convey to customers about the known hazards of asbestos.

We conclude that the evidence was sufficient to show malice, that is, despicable conduct coupled with a conscious disregard for the safety of others. In view of Kaiser Gypsum's compliance with the OSHA regulations regarding it own workplace, Kaiser Gypsum fully understood that asbestos dust endangered workers, but it did not issue warnings to its customers, notwithstanding its knowledge that they used the products in ways that generated asbestos dust. Indeed, although Kaiser Gypsum informed its employees that breathing in asbestos dusts was hazardous to their health, customers were unaware of such risks. The evidence thus established that Kaiser Gypsum carried on despicable conduct with an awareness of the "probable dangerous consequences," and "willfully fail[ed]" to avoid such consequences. (*Angie M. v. Superior Court, supra,* 37 Cal.App.4th at p. 1228.)

Kaiser Gypsum, like the defendant in *Pfeifer, supra,* 220 Cal.App.4th at page 1301, maintains that there is insufficient evidence of malice or oppression, pointing to evidence supporting the inference that Kaiser Gypsum sold its products with the good faith belief that they were safe. Kaiser Gypsum argues that "[e]ven today, every study on users of joint compounds (drywall workers), has shown no increase in the incidence of mesothelioma." Thus, according to Kaiser Gypsum, "it cannot be said that, during the time of [Mr.] Casey's alleged exposure 40 or more years ago, Kaiser Gypsum or anyone else was subjectively aware of a known occupational or bystander risk from drywall work." (italics omitted.)

In so arguing, however, Kaiser Gypsum "misapprehends our role as an appellate court. Review for substantial evidence is not trial de novo. [Citation.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 866.) When there is substantial evidence to support the jury's actual conclusion, "it is of no consequence that the [jury] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, italics omitted.)

The jury could have interpreted the evidence in the manner Kaiser Gypsum suggests, but the evidence also supports a different interpretation: that Kaiser Gypsum

did not share its knowledge of the dangers of asbestos with its customers or with individuals who would, predictably, be exposed to dust from its products, and that it instead sought to downplay the risk.

In sum, the jury rejected the inferences that Kaiser Gypsum proposes on appeal, and the trial evidence supports its decision to do so.

E. Modification of CACI No. 3949

Kaiser Gypsum next contends that the trial court committed prejudicial instructional error by modifying CACI No. 3949.[6] We disagree.

CACI No. 3949 is given in the second phase of bifurcated trials for the purpose of instructing juries on how to determine the amount, if any, of a punitive damages award. Specifically, it directs the jury to consider three factors: (1) the degree of reprehensibility of the defendant's misconduct; (2) the relationship between the actual or potential harm

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[6] CACI No. 3949 provides as follows: "You must now decide the amount, if any, that you should award [name of plaintiff] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future. [¶] There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount: [¶] (a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors: [¶] 1. Whether the conduct caused physical harm; [¶] 2. Whether the defendant disregarded the health or safety of others; [¶] 3. Whether [name of plaintiff] was financially weak or vulnerable and the defendant knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];[¶] 4. Whether the defendant's conduct involved a pattern or practice; and [¶] 5. Whether the defendant acted with trickery or deceit. [¶] (b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]'s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that the defendant knew was likely to occur because of [his/her/its] conduct]? [¶] (c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.] [¶] [Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]"

suffered by the plaintiff and the amount of punitive damages; and (3) the amount necessary to punish the defendant and discourage future conduct, considering the defendant's financial condition. (CACI No. 3949.)

Of particular relevance here is the first factor, which is comprised of five subsidiary factors. It provides as follows: "In deciding how reprehensible a defendant's conduct was, *you may consider, among other factors*: [¶] 1. Whether the conduct caused physical harm; [¶] 2. Whether the defendant disregarded the health or safety of others; [¶] 3. Whether [name of plaintiff] was financially weak or vulnerable and the defendant knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it]; [¶] 4. Whether the defendant's conduct involved a pattern or practice; and [¶] 5. Whether the defendant acted with trickery or deceit." (CACI No. 3949, subd. (a), Italics added.)

At trial, plaintiffs' counsel asked the court to delete subfactors 3 and 5, based on the undisputed lack of evidence supporting either subfactor. Although defense counsel agreed there was no evidence suggesting plaintiffs were financially vulnerable or that Kaiser Gypsum acted with trickery or deceit, counsel argued that these factors should be included in the instruction to illustrate the "relative reprehensibility" of Kaiser Gypsum's conduct. Defense counsel argued that the absence of these subfactors supported a decreased assessment of reprehensibility vis-à-vis Kaiser Gypsum's conduct.

On appeal, Kaiser Gypsum asserts that the trial court's modification of CACI No. 3949 "guaranteed a substantial punitive damages award by instructing the jury to consider only the factors that support a finding of heightened reprehensibility, without mentioning the factors that cut the other way."

Kaiser Gypsum further argues that the trial court's ruling was an "obvious error," in the light of the "constitutional dimension" of the reprehensibility factors. We disagree.

To be sure, the due process clause of the Fourteenth Amendment to the United States Constitution places constraints on state court awards of punitive damages. (See *State Farm Mutual Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418 (*State Farm*); *BMW of North America v. Gore* (1996) 517 U.S. 599, 568 (*Gore*); *Roby v.*

McKesson Corp. (2009) 47 Cal.4th 686,712 (*Roby*).) In *State Farm,* the high court articulated "three guideposts" for courts reviewing punitive damages: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm, supra,* 538 U.S. at p. 418; see *Gore, supra,* 517 U.S. at p. 575.)

Of the three guideposts that the high court outlined in *State Farm, supra,* 538 U.S. 408, the most important is the degree of reprehensibility of the defendant's conduct. (*Id.* at p. 419; *Gore, supra,* 517 U.S. at p. 575.) On this question, the high court instructed courts to consider whether "[1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident." (*State Farm, supra,* 538 U.S. at p. 419.) The high court further explained that "[t]he existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. [Citation.]" (*Ibid.*)

Contrary to Kaiser Gypsum's suggestion, the modified version of CACI No. 3949 was not unconstitutional because the factors listed therein did not track those articulated in *State Farm.* The purpose of reprehensibility analysis is to determine the "enormity" of the offense, which "reflects the accepted view that some wrongs are more blameworthy than others." (*Gore, supra,* 517 U.S. at p.575; see *Baker v. Mobile Exxon Corp.* (9th Cir. 2006) 472 F.3d 600, 617 opinion amended and superseded on denial of rehearing, 490 F.3d 1066 (9th Cir. 2007) vacated *sub nom. Exxon Shipping Co. v. Baker* (2008) 554 U.S.

471.) Consistent with this purpose, *State Farm* instructs that courts are to consider certain factors when reviewing a jury award, it does not, however, require that a jury be instructed on *each* individual reprehensibility factor. Rather, *State Farm* looks to the overall fairness of the punitive damages award—i.e. not only the jury's factual findings, but also the judicial review of that award. (*State Farm, supra*, 538 U.S. at p. 418 ["Exacting appellate review ensures that an award of punitive damages is based upon an ' "application of law, rather than a decisionmaker's caprice." ' [Citation.]"].)

Here, CACI No. 3949 reflects that the subsidiary reprehensibility factors are part of a nonexclusive list, which the jury "may consider, among other factors." We find nothing in this instruction or in trial court's modification thereto as infringing on Kaiser Gypsum's right to a fair trial.

Nevertheless, even assuming that the jury should have been given all five of the reprehensibility factors, any instructional omission was harmless. As stated in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548 (*Soule*), "there is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) . . . [¶] Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' [Citations.] Of course, that determination depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury. [¶] But the analysis cannot stop there. Actual prejudice must be assessed in the context of the individual trial record. . . . Thus, when deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Id.* at pp. 580-581, fn. omitted.)

Here, any error in modifying the instruction was harmless. The evidence at trial established that Kaiser Gypsum's tortious conduct caused Mr. Casey to endure great physical harm and endure a painful and horrible death. As one defense expert commented, "it was understood in the sixties that this was an invariably fatal condition that was a terrible way to die." Kaiser Gypsum had knowledge about the dangers of asbestos, yet took no action to protect its customers and end-users from such known hazards. Kaiser Gypsum kept this vital information to itself for at least over a decade. These factors weigh in favor of finding a moderately high degree of reprehensibility. That the jury was not instructed to consider whether Mr. Casey was financially vulnerable or whether Kaiser Gypsum acted with trickery or deceit does not lessen the otherwise high degree of reprehensibility. In other words, the absence of a financially vulnerable victim or trickery by Kaiser Gypsum does not lessen the high degree of reprehensibility of the tortious conduct that Kaiser Gypsum *did* engage in.

Finally, contrary to Kaiser Gypsum's assertion, nothing in the record suggests that the Caseys' counsel misled the jury by focusing on the fact that Kaiser Gypsum's tortious conduct implicated all three factors, or a so-called "three for three" argument. Rather, counsel advised the jury that it could "also consider other factors in the evidence" in determining the degree of Kaiser Gypsum's reprehensible conduct.

On this record, there is no reasonable probability the jury was misled or the verdict was affected by the instructional omission.

IV. CONTENIONS ON CROSS-APPEAL

In their cross-appeal, plaintiffs contend the trial court erred in granting in part Kaiser Gypsum's judgment notwithstanding the verdict (JNOV) by reducing the amount of punitive damages awarded to them against Kaiser Gypsum from $20,000,000 to $3,982,352.50. They argue, among other things, that the court erred in calculating the ratio between the punitive damages award and the amount of compensatory damages.

A. Background

During the punitive damages phase of the trial, plaintiffs presented evidence regarding Kaiser Gypsum's financial condition. Their expert, forensic economist, James

Mills, opined that the $7.8 million Kaiser Gypsum had earned in net profits in 1978 translated to $229 million in 2011 dollars. For its part, Kaiser Gypsum did not call any witnesses (lay or expert) to discuss its financial condition. Rather, through cross-examination of Mills, Kaiser Gypsum established that Mills had reviewed the deposition and affidavit of Kaiser Gypsum's assistant corporate secretary, Amy Yi, and the depositions of other individuals presumably knowledgeable about its financial condition. Yi's affidavit indicated that Kaiser Gypsum's net worth was $17.4 million.

Mills, however, offered the jury three different measures of Kaiser Gypsum's net worth, all of which far exceeded $17.4 million. The jury awarded plaintiffs $20,000,000 in punitive damages against Kaiser Gypsum.

In granting in part Kaiser Gypsum's JNOV motion and reducing the amount of punitive damages to $3,982,352.50, the court took into consideration that although the compensatory damages award to plaintiff John Casey was "very substantial"—$15 million for noneconomic loss and $1.27 million for economic loss, Kaiser Gypsum's proportional liability for such damages was "far less"—$525,000 for noneconomic damages and $892,941 toward economic damages. Kaiser Gypsum claimed the total was $819,670.

The court then discussed the differing views of the parties regarding the appropriate ratio of punitive damages to compensatory damages: "Plaintiffs argue that the ratio is close to one to one. Plaintiffs compare the amount of punitive damages awarded to Mr. Casey ($20,000,000) with the total amount of compensatory damages awarded to Mr. Casey ($16, 273,421) and Mrs. Casey ($5,000,000). Plaintiffs thus compare $20,000,000 in punitive damages with $21,273,421 in compensatory damages and reach the conclusion that the ratio is roughly one to one. . . . [¶] Kaiser Gypsum apparently claims that that ratio is closer to 24.4 to 1 ($20,000,000 to $819,670) represents the ultimate amount Kaiser Gypsum claims that it is liable to pay . . . [¶] Another ratio to consider is the amount of the punitive damages ($20,000,000) to Mr. Casey's compensatory damages ($16,273,421). This yields a ratio of 1.29 to 1.0. Finally, there is the ratio of the amount of punitive damages assessed against Kaiser

Gypsum in the sum of $20,000,000 to Kaiser Gypsum's total liability to John Casey in the sum of $1,417,941 (892,941 in economic loss plus $525,000 in non-economic loss). This ratio is 14.1 to 1."

Ultimately, after reviewing the cases cited by the parties (see, e.g. *Clark v. Chrysler Corp.* (6th Cir. 2006) 436 F.3d 594, 606, fn. 16 [rejecting a ratio based on full compensatory award]; *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* (9th Cir. 2005) 422 F.3d 949, 963-964 [utilizing full amount of joint and several liability]), the trial court determined that the proper ratio to consider for punitive damages was $20,000,000 to $1,592,941 ($1,417,941 for Mr. Casey's combined economic and noneconomic loss plus $175,000 for Mrs. Casey's noneconomic loss) or 2.5 to 1. The court then explained: "Constitutional restraints simply do not permit such a high ratio. In this court's view, this is a case with high compensatory damages assessed against Kaiser Gypsum ($1,417,941). It is also a case where there is moderately high reprehensibility on Kaiser Gypsum's part. Even though the compensatory damages are high, a ratio of one to one would not be appropriate, because Kaiser Gypsum's degree of reprehensibility is moderately high. If this court found Kaiser Gypsum's reprehensible conduct to be only 'moderate'–which its does not–it would set the ratio at 2 to 1. In addition, if this court found Kaiser Gypsum's reprehensible conduct to be 'high'–which it does not–it would set the ratio at 3 to 1. In the final analysis, this court finds that the ratio of 2.5 to 1 is the appropriate ratio to use in this case . . . This amount is of sufficient magnitude that it will serve the purpose of punishing Kaiser Gypsum for its reprehensible conduct and, at the same time, not destroy the entity. The court recognizes that there is no need for such an award to also act as a deterrent against future conduct on Kaiser Gypsum's part or others: Kaiser Gypsum sold its business in the late 1970s and few, if any, companies make and/or sell asbestos containing products in California."

B. Governing Principles

Punitive damages may be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. (*Gore*, *supra*, 517 U.S. at p. 568.) The amount of punitive damages offends due process under the Fourteenth

Amendment as arbitrary only if the award is " 'grossly excessive' " in relation to the state's legitimate interests in punishment and deterrence. (*Id.* at p. 568; see *State Farm, supra,* 538 U.S. at pp. 416-417.)

A court determining whether a punitive damages award is excessive under the due process clause must consider three guideposts: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. [Citation.]" (*State Farm, supra,* 538 U.S. at p. 418.) The defendant's financial condition also is a permissible consideration under the due process clause in determining the amount of punitive damages necessary to further the state's legitimate interests in punishment and deterrence. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185-1186 (*Simon*).)

On appeal, we defer to findings of fact if they are supported by substantial evidence, and we independently assess each of the three guideposts to determine de novo whether the punitive damages award is excessive under the due process clause. (*State Farm, supra,* 538 U.S. at p. 418; *Cooper Ind., Inc. v. Leatherman Tool Grp.* (2001) 532 U.S. 424, 436; *Simon, supra,* 35 Cal.4th at p. 1172 & fn. 2.) The reviewing court's "constitutional mission is only to find a level higher than which an award *may not* go; it is not to find the 'right' level in the court's own view. While we must . . . assess independently the wrongfulness of a defendant's conduct, our determination of a maximum award should allow some leeway for the possibility of reasonable differences in the weighing of culpability. In enforcing federal due process limits, an appellate court does not sit as a replacement for the jury but only as a check on arbitrary awards." (*Simon, supra,* 35 Cal.4th at p. 1188.)

C. Analysis

1. Degree of Reprehensibility

As previously discussed, " '[t]he most important indicium of reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' "

(*State Farm, supra,* 538 U.S. at p. 419; *Gore, supra,* 517 U.S. at p. 575.) "In *State Farm,* the court summarized the subsidiary factual circumstances it believed particularly relevant to assessing reprehensibility: 'We have instructed courts to determine the reprehensibility of a defendant by considering whether: [1] the harm caused was physical as opposed to economic; [2] the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; [3] the target of the conduct had financial vulnerability; [4] the conduct involved repeated actions or was an isolated incident; and [5] the harm was the result of intentional malice, trickery, or deceit, or mere accident.' (*State Farm, supra,* at p. 419.)" (*Simon, supra,* 35 Cal.4th at p. 1180.)

Here, it is undisputed that Mr. Casey was not financially vulnerable and that the tortious acts of Kaiser Gypsum did not involve trickery or deceit. Indeed, plaintiffs requested that the trial court modify CACI No. 3949 based on the absence of evidence regarding these two subsidiary factors. And, in responding to Kaiser Gypsum's claim of instructional error, plaintiffs reiterate this position. Yet, in their cross-appeal, plaintiffs suggest that Kaiser Gypsum's conduct implicates an "extremely" high degree of reprehensibility based on all five factors. Even overlooking the obvious estoppel issue, this argument fails on the merits.

"The third reprehensibility factor, 'whether . . . the target . . . had financial vulnerability' (*State Farm, supra,* 538 U.S. at p. 419), ordinarily is relevant only if financial vulnerability made the target more vulnerable to the defendant's wrongful conduct or exacerbated the harm, such as where the harm caused by the defendant's conduct was economic. (See *Gore, supra,* 517 U.s. at p. 576 ['infliction of economic injury, especially when done intentionally through affirmative acts of misconduct [citation] or when the target is financially vulnerable, can warrant a substantial penalty'] . . . ." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 561-562 (*Bullock*).)

In *Bullock, supra,* 198 Cal.App.4th 543, the court, in assessing the reprehensibility of cigarette manufacturer Philip Morris, extended the third reprehensibility factor to a case involving physical harm: "We have no trouble concluding . . . that in a case

involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability. (Cf. *Gore, supra,* 517 U.S. at p. 576.) Because the evidence shows that nicotine is an addictive drug that makes smokers highly vulnerable to rationalization of their injurious behavior, and that Philip Morris for many years and through extensive efforts deliberately exploited that vulnerability through a deceptive, broad-based publicity campaign, manipulation of the narcotic effect of nicotine in cigarettes and other means, we conclude that this factor weighs in favor of high reprehensibility." (*Bullock, supra,* 198 Cal.App.4th at p. 562.)

Plaintiffs argue that Mr. Casey was highly vulnerable to the dangers presented by asbestos-containing products, yet Kaiser Gypsum did nothing to warn about such dangers. Although this argument militates towards a finding of reprehensibility with respect to the second factor ["the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others" (*State Farm, supra,* 538 U.S. at p. 419)] and possibly even the fourth factor ["the conduct involved repeated actions or was an isolated incident" (*ibid.*)], it does not support a finding that Kaiser Gypsum exploited any physical vulnerability (i.e., a nicotine addiction) of Mr. Casey. Accordingly, the third subfactor is inapplicable.

Similarly, although Kaiser Gypsum's conduct could be characterized as involving a malicious indifference or reckless vis-à-vis the health and safety of others, there is no evidence suggesting that the harm was the product of trickery or deceit. Unlike, for example, the cigarette manufacturer in *Bullock,* Kaiser Gypsum did not engage in efforts to disseminate misleading information regarding the adverse health effects of asbestos. (See *Bullock, supra,* 198 Cal.App.4th at p. 562.)

Finally, the first reprehensibility factor—whether the harm caused was physical as opposed to economic—clearly weighs in favor of high reprehensibility. Due to Kaiser Gypsum's conduct, Mr. Casey contracted mesothelioma and suffered a horrible and painful death.

In sum, of the five reprehensibility subfactors, three apply. In the universe of cases warranting punitive damages under California, the tortious conduct of Kaiser Gypsum has to be regarded as a moderately high level of reprehensibility.

2. Ratio of Punitive Damages to Compensatory Damages

Due process requires that punitive damages bear a " 'reasonable relationship' " to the actual or potential harm to the plaintiff. (*Gore, supra,* 517 U.S. at p. 580.) Thus, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (*State Farm, supra,* 538 U.S. at p. 426.)

The United States Supreme Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula." (*Gore, supra,* 517 U.S. at p. 582; *State Farm, supra,* 538 U.S. at pp. 424-425.) As *State Farm* explains, the due process limitation is elastic, rather than rigid, and depends on the circumstances: "[B]ecause there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' [Citations.] The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm, supra,* 538 U.S. at p. 425.)

In *State Farm,* while still "declin[ing] . . . to impose a bright-line ratio which a punitive damages award cannot exceed," the court went on to hold that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*State Farm, supra,* 538 U.S. at p. 425.) The court also explained that past decisions and statutory penalties approving ratios of 3 or 4 to 1 were "instructive" as to the due process norm, and that while relatively high ratios could be justified when " 'a particularly egregious act has resulted in only a small amount of economic damages' [citation] . . . [t]he converse is also true . . . . When

compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." (*Ibid.*)

In *Simon, supra,* 35 Cal.4th 1159, the California Supreme Court expressed its understanding of the high court's statement in *State Farm* that " 'few awards' significantly exceeding a single-digit ratio will satisfy due process to establish a type of presumption: ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages significantly greater than 9 or 10 to 1 are suspect and, absent special justification (by, for example, extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages), cannot survive appellate scrutiny under the due process clause." (*Id.* at p. 1182, fn. omitted.)

Nevertheless, *Simon* instructed that "[m]ultipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm.* Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.' (*State Farm, supra,* 538 U.S. at p. 425.)" (*Simon, supra,* 35 Cal.4th at p. 1182.) *Simon,* however did not agree with the appellate court in *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1057, that " 'in the usual case' the high court's decisions establish an 'outer constitutional limit' of approximately *four* times the compensatory damages. Reviewing the history of double, triple and quadruple damages, the court in *State Farm* warned that 'these ratios are *not binding,'* but only 'instructive.' (*State Farm, supra,* at p. 425, italics added.) Moreover, their instruction, what '[t]hey demonstrate,' is simply that '[*s*]*ingle digit* multipliers are more likely to comport with due process' than ratios of 500 to 1, as in [*Gore*], or 145 to 1, as in *State Farm.* (*Ibid.*, italics added.)" (*Simon, supra,* 35 Cal.4th at pp. 1182-1183.)

"Measurement of damages is, of course, far from exact, a fact reflected in the high court's qualification of its single-digit presumption: only awards exceeding that level 'to a significant degree' are constitutionally suspect. (*State Farm, supra,* 538 U.S. at p. 425.) As due process does not entitle a tortfeasor to notice of the *precise* amount the state may

penalize him or her, '[t]he judicial function is to police a range, not a point' [citation.]." (*Simon, supra,* 35 Cal.4th at p. 1183.)

Generally, California courts "have adopted a broad range of permissible ratios—from as low as one to one to as high as 16 to 1—depending on the specific facts of each case." (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 88 (*Bankhead*),) Relevant considerations include whether the compensatory award included "a punitive element" in the form of substantial emotional distress damages, and the reprehensibility of the defendant's conduct. (*Id.* at pp. 88-90.) In *Roby,* the defendant's misconduct manifested a low degree of reprehensibility and approximately two-thirds of the award of compensatory damages was for the plaintiff's distress (which included a physical component). (*Roby, supra,* 47 Cal.4th at pp. 694-695.) Relying on *State Farm,* our Supreme Court held that a one-to-one ratio was the federal constitutional limit applicable in the case. (*Id.* at p. 719.) In contrast, in *Bullock,* the appellate court approved a punitive damages award exemplifying a 16-to-one ratio in a case involving extremely reprehensible conduct that resulted in the plaintiff's death, and an award of compensatory damages that included only a small amount for pain and suffering. (*Bullock, supra,* 198 Cal.App.4th at pp. 555, 563.)

Instructive here are *Bankhead*, *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, (*Stewart*) , and *Pfeifer*. In *Bankhead,* the jury awarded the plaintiffs $1.47 million in economic damages, $2.5 million in noneconomic damages, and $4.5 million in punitive damages. (*Bankhead, supra,* 205 Cal.App.4th at pp. 74, 76.) Following an adjustment reflecting the jury's determinations of comparative fault, the defendant was determined to be liable for $1.845 million of the damages, comprising $1.47 million in economic damages and $375,000 in noneconomic damages. (*Id.* at pp. 74, 90.) The award of punitive damages ($6 million) was thus approximately 2.4 times greater than the award of compensatory damages ($1.845 million). (*Id.* at p. 90.) Noting that the defendant's conduct was highly reprehensible, a different panel of this Division concluded that the ratio was "well within the range for comparable cases" and

"not extraordinarily high," even though the jury's award of compensatory damages contained a punitive component. (*Ibid.*)

In *Stewart*, the jury awarded the plaintiffs $2.2 million in economic damages, $1 million in noneconomic damages, and $6 million in punitive damages. (*Stewart, supra*, 190 Cal.App.4th at p. 27.) Following adjustments for the defendant's share of comparative fault, the defendant was responsible for compensatory damages totaling $1,267,625, comprising $417,625 in economic damages and $850,000 in noneconomic damages. (*Ibid.*) The appellate court approved the award of punitive damages of $6 million. (*Ibid*.) In so concluding the court rejected the defendant's contention that a one-to-one ratio was the federal constitutional maximum in the case, pointing to the defendant's reprehensible conduct. (*Id.* at p.28.)

In *Pfeifer*, the jury awarded $6.23 million in compensatory damages and $14.5 million in punitive damages. (220 Cal.App.4th at p. 1314.) Following adjustments for the defendant's share of comparative fault, the defendant was responsible for $2.69 million in economic and $3.54 million in noneconomic damages. (*Ibid.*) In upholding the punitive damages award, the court noted that the award of punitive damages ($14.5 million) was "approximately 2.3 times the *pertinent* amount of compensatory damages ($6.23 million)." (*Ibid.;* italics added, fn. omitted.) The court explained that although the jury's award of noneconomic damages was relatively larger than in *Bankhead* and *Stewart*, a one-to-one ratio was not the maximum allowable under the circumstances, in view of the defendant's highly reprehensible conduct. (*Ibid.*) In so concluding, the court reasoned that inasmuch as the overall ratio was "comparable to those cases and within the range of permissible ratios, the award of punitive damages was not excessive in relation to the award of compensatory damages." (*Pfeifer, supra*, 220 Cal.App.4th at p. 1314.)

Here, the jury awarded the plaintiffs $1,273,421 in economic damages (Mr. Casey's economic loss), $20 million in noneconomic damages ($15 million for Mr. Casey's personal injury and $5 million for Mrs. Casey's loss of consortium claim), and $20 million in punitive damages. Following adjustments for Kaiser Gypsum's 3.5 percent share of comparative fault and pretrial settlement credits, Kaiser Gypsum was

responsible for compensatory damages totaling $1,592,941, comprising $892,941 in economic damages and $700,000 in noneconomic damages ($525,000 for Mr. Casey and $175,000 for Mrs. Casey). The award of punitive damages ($20 million) was therefore approximately 12.5 times the pertinent amount of compensatory damages ($1,592,941). This ratio exceeded the bounds of due process.

Presented with this constitutionally disproportionate ratio, the trial court reduced the punitive damages to $3,982,352.50, representing a ratio of 2.5 to 1. Contrary to plaintiffs' suggestion, nothing in the record suggests that the trial court erroneously believed that a 3 to 1 ratio was the ceiling and that it made its flawed calculation through this limited prism. Rather, the trial court's ruling reflects that it considered the reprehensibility of Kaiser Gypsum's conduct, which it found to be moderately high, as well as its percentage of liability for plaintiffs' compensatory damages. Given the facts in this case, and our previous discussion of the guideposts prescribed by *State Farm* and *Gore*, we cannot conclude that the trial court's decision to reduce the punitive damage award amounted to an abuse of discretion.

3. Comparable Statutory Penalties

Plaintiffs acknowledge that the third guidepost pertaining to comparable civil penalties is typically "less useful" in a case involving common law tort duties than in a case where the tort duty closely parallels a statutory duty for breach of which a penalty is provided. (See *Simon, supra,* 35 Cal.4th at pp. 1183-1184; *Bankhead, supra,* 205 Cal.App.4th at p. 85, fn. 10.) Nevertheless, they attempt to argue that Kaiser Gypsum's concealment of the known dangers of asbestos is analogous to various criminal acts and also could be considered an unfair business practice in violation of Business and Professions Code section 17200. The gist of their position is that although the third guidepost may be of limited use it "certainly does not weigh in favor of any reduction" in the amount of punitive damages.

We see no reason to add to the ever burgeoning length of this opinion by discussing the application of inapposite statutory schemes. Here, as in *Bankhead*, we conclude that the factor of comparable statutory penalties is essentially irrelevant in

asbestos-related personal injury cases. (*Bankhead, supra,* 205 Cal.App.4th at p. 85, fn. 10; see also *Bullock, supra,* 198 Cal.App.4th at p. 570.)

4. Past Profits

Plaintiffs argue that Kaiser Gypsum's past profits from its malicious conduct, justified the jury's $20 million punitive damages award. As we explained in *Bankhead, supra,* 205 Cal.App.4th at pages 77 through 78, "[u]nder California law, '[w]ealth is an important consideration in determining the excessiveness of a punitive damage award. Because the purposes of punitive damages are to punish the wrongdoer and to make an example of him, the wealthier the wrongdoer, the larger the award of punitive damages. [Citation.]' (*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1099-1100, citing *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65.) '[O]bviously, the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.]' [Citation.] Moreover, '[b]oth California and the federal authorities agree that profits earned from tortious activity that supports an award of punitive damages are appropriately considered in the amount awarded. [Citations.]' [Citation.]" (*Bankhead, supra,* 205 Cal.App.4th at pp. 77-78. fn. omitted.) That said, the wealth of a defendant cannot justify a punitive damages award that is otherwise unconstitutional under the federal due process analysis discussed *ante.* (*Id.* at p. 78, fn. 8.)

Here, plaintiffs argue that they offered evidence that the present-day value of Kaiser Gypsum's sale of asbestos-containing products had grown to at least $229 million in 2011 dollars. Based on this figure, plaintiffs contend that the $20 million punitive damages award was not excessive because it represented only 9 percent of Kaiser Gypsum's net worth.

However, the issue before us on review is not whether the award exceeds some specified percentage of the company's net worth. Rather, it is whether the trial court abused its discretion in determining that the amount of punitive damages awarded by the jury was excessive. In this regard, our task simply is to determine whether, "[c]onsidering all the factors, the punitive damages award, 'in light of the defendant's

wealth and the gravity of the particular act,' . . . exceed[s] 'the level necessary to properly punish and deter.' [Citation.]" (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 625.)

As discussed *ante*, the trial court properly determined that the jury award exceeded the constitutionally permissible limits. Considering Kaiser Gypsum's past profits does nothing to transform the otherwise unconstitutional damages award. Accordingly, we are not persuaded that Kaiser Gypsum's past profits justified the $20 million punitive damages award.

5. Other Considerations

Finally, plaintiffs contend that the long delay in punishment justified the jury's $20 million punitive damages award. Plaintiffs further complain that the trial court erred in this regard by limiting its analysis to specific and not general deterrence. We disagree.

"Calculation of punitive damages 'involves . . . "a fluid process of adding or subtracting depending on the nature of the acts and the effect on the parties and the worth of the defendants." ' [Citation.]) These factors are not evaluated under a rigid formula. 'Whether punitive damages should be awarded and the amount of such an award are issues for the jury and for the trial court on a new trial motion. All presumptions favor the correctness of the verdict and judgment. [Citation.]' [Citation.] ' "Juries . . . have a wide discretion in determining what is proper. [Citation.]" [Citation.]' [Citation.]" (*Bankhead, supra,* 205 Cal.App.4th at p. 78.)

Plaintiffs argue that "further deference" to the jury's discretion is required where, as here, the setting of punitive damages required the jury to resolve contested issues of historical and "predictive" fact. The presumption of correctness, however, cannot and does not subsume the power of the trial court in reviewing the correctness of a punitive damages award. "In California, a trial court reviews a motion challenging the excessiveness of an award of punitive damages similar to other motions for new trial, as a 'thirteenth juror': 'The trial court is in a far better position than an appellate court to determine whether a damage award was influenced by "passion or prejudice." [Citation.] In reviewing that issue, moreover, the trial court is vested with the power, denied to us, to weigh the evidence and resolve issues of credibility. [Citation.]' [Citation.] We review

the trial court's determination for an abuse of discretion. [Citations.]" (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1689.)

Given the facts in this case and our previous discussion of the guideposts prescribed by the high court, we cannot conclude that the trial court's decision to reduce the punitive damages awards amounted to an abuse of discretion.

V. DISPOSITION

The judgment is affirmed. Each party to bear their own costs on appeal.

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REARDON, J.

We concur:

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RUVOLO, P. J.

_____
RIVERA, J.