SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/18/16			**DEPT.** 316
HONORABLE JOHN J. KRALIK	JUDGE	M. FREGOSO	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

4:00 pm	BC588866	Plaintiff Counsel	NO APPEARANCES
	LOUIS TYLER ET AL VS AMERICAN OPTICAL CORPORATION ET	Defendant Counsel	
	PREFERENCE CASE 11/19/15 COORDINATED WITH JCCP4674 8/11/		

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER;

Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, taken under submission on July 15, 2016, are ruled upon this date.

ORDER PARTIALLY GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT; CONDITIONAL ORDER GRANTING PARTIAL NEW TRIAL; STATEMENT OF REASONS, is signed and filed this date and incorporated herein by reference.

A conformed copy of the Court's ruling is mailed to each side.

The clerk is directed to give notice.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the
MINUTE ORDER & COPY OF COURT'S RULING
upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in LOS ANGELES,

MINUTES ENTERED
07/18/16
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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4:00 pm BC588866

LOUIS TYLER ET AL
VS
AMERICAN OPTICAL CORPORATION ET

PREFERENCE CASE 11/19/15
COORDINATED WITH JCCP4674 8/11/

Plaintiff Counsel

NO APPEARANCES

Defendant Counsel

NATURE OF PROCEEDINGS:

California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: 7/18/16

Sherri R. Carter, Executive Officer/Clerk

By: _____
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MINUTES ENTERED
07/18/16
COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

LOUIS TYLER AND BECKY TYLER, Plaintiffs, v. AMERICAN OPTICAL CORPORATION, et al., Defendants.	CASE No. BC 588866 ORDER PARTIALLY GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT; CONDITIONAL ORDER GRANTING PARTIAL NEW TRIAL; STATEMENT OF REASONS

In 1972, as an extremely young man, Louis William Tyler, known as "Bill," went to work as a machine operator at a small company named Foundry Service and Supply ("Foundry Service") in Torrance. One of the principal activities at Foundry Service was the sawing of asbestos boards. The boards were then incorporated into products such as stoves, which were finally manufactured by others.

Johns Manville Corporation ("Johns-Manville" was the source of the asbestos boards sawed at Foundry Service. Indeed, Foundry Service was an authorized Manville distributor.

The machinery and equipment were housed in a single main area at Foundry Service, and, except when on break, Mr. Tyler worked in that area. The sawing of the asbestos boards created a great deal of dust. Although steps were taken to remove or clean the dust, it was apparent from the testimony that these efforts were not completely effectual, and did not prevent the ongoing exposure of the workers to asbestos dust. The dust collected on their person and on the surfaces; as part of the cleanup they would attempt to sweep it away with brooms. The workers wore respirators or masks only when the machines were on, or during what they thought was a dusty operation. Although there was a collection system, the employees, including Mr. Tyler, were assigned to empty the collected dust into a dumpster.

For the first three years of his work at Foundry Service, Mr. Tyler used a paper mask manufactured by 3M Company, and approved for use with asbestos dust by the National Institute of Occupational Safety and Health ("NIOSH").[1]

In 1975, Foundry Service made the decision to change respirators and to use a product identified by most witnesses at trial as the R2090N, a respirator then manufactured by defendant American Optical Corporation ("American Optical"). There was never any evidence as to how the R2090N was chosen by Foundry Service. It looked more substantial to Mr. Tyler than the masks he had been using.

As the regulatory bans on asbestos became more widespread, the demand for it in end products decreased. Sometime during the early 1980's Foundry Service stopped processing asbestos boards. (4/5/16 T.T. at 113:21- 114:1; 4/18/16 T.T. at 102:12-14.) The

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[1] 3M Company was not a party to the case, but apparently settled with Mr. Tyler after the case. This is not a matter of direct concern on this motion. The Court will consider credits against the verdict in connection with a separate motion.

R2090N continued to be used by Foundry Service until Mr. Tyler left the company in 1992, and beyond.

The R2090N was not approved for use with asbestos dust by NIOSH, and was not marketed specifically for that purpose. Nevertheless, Plaintiff's counsel argued that it was foreseeable to American Optical that some distributors and end users might use the R2090N in an environment containing asbestos dust, and that this misuse of the product was encouraged by American Optical's loosely-worded advertisements and its failure to warn that the product should not be used with asbestos. Apart from a brief period of time in 1979 and 1980, the packaging and labelling of the R2090N did not represent that the product could be used in an asbestos environment. Nevertheless, it did not specifically warn against such use. Plaintiffs' counsel also claimed that American Optical's marketing materials and packaging amounted to fraudulent representations that the product could be used with asbestos and that American Optical fraudulently concealed that the R2090N should not be used with asbestos.

Mr. Tyler may have read the packaging and the instructions at some point in his work at Foundry Service. Mr. Tyler wore his mask only during active dust producing events, and he failed to clean or replace it in accordance with the manufacturer's instructions. Nevertheless, he testified that if there had been a specific warning telling him not to wear the mask in an asbestos environment, he would not have done so. Likewise, Mr. Parnell testified that if he had reviewed an explicit warning against the use of the mask with asbestos, he would have discontinued the use of the mask at Foundry Service.

By 1978 Foundry Services was using knitted cotton face covers, which are also referred to as comfort socks or facelets, in conjunction with the 2090N respirators. (T.T. 4/5/2016 at 66:6-20.) There was testimony from Plaintiff's expert Darrell Beavis that the use of this facelet with the R2090N had the effect of destroying the seal, reducing the effectiveness of the mask.

After leaving Foundry Service, Mr. Tyler went on to a successful career at the Coca Cola Company. Beginning in 2015, Mr. Tyler began to suffer from asbestos-related diseases, including visceral pleural fibrosis, calcified pleural plaques, asbestosis and diffuse malignant mesothelioma. His cancer has spread to other organs. Although he was recovering from surgery and in the midst of chemotherapy, he testified stoically and affectingly at trial regarding the difficult course of his treatment and the poor outlook for his future.

Mr. Tyler married Elizabeth ("Becky") Tyler when they were both still in their teens. Mr. and Mrs. Tyler testified consistently to their ongoing, lifelong love, and the joys of the life they shared. They are soulmates. Mrs. Tyler claimed for her loss of consortium as the result of Mr. Tyler's illness and probable early death.

After a lengthy trial, the jury entered a very substantial verdict in favor of Plaintiffs and against American Optical Corporation. The jury found against American Optical on each of Plaintiffs' seven claims: 1) General Negligence; 2) Strict Product Liability (Manufacturing Defect); 3) Strict Liability (Design Defect); 4) Strict Product Liability (Failure to Warn); 5) Strict Product Liability (Negligent Failure to Warn); 6) Intentional Misrepresentation; and 7) Fraudulent Concealment.

With respect to economic damages, the jury awarded Mr. Tyler $1,800,000, an amount that represented his reasonable medical expenses, lost income and household services. It cannot be argued that this amount is excessive, as American Optical stipulated that these were the reasonable amounts of these losses.

The jury also awarded very significant amounts in non-economic damages. With respect to Mr. Tyler, the jury awarded $4 million in past pain and suffering, and $8 million in future pain and suffering. With respect to Mrs. Tyler, the jury awarded $3 million to compensate for her past loss of love and companionship and $6 million in respect of her future loss of love and companionship. Thus, the non-economic damages totaled $21 million.

The jury made findings that, in many cases, would have reduced the amount of the non-economic damages that would be paid by American Optical. Although the jury found that American Optical was 70% responsible for the Plaintiffs' loss, it assessed responsibility against other actors as well. It found that 3M Company, the maker of the mask that Mr. Tyler used for his first three years at Foundry Service, was 5% responsible, that Foundry Service was 20% responsible and that Mr. Tyler himself was 5% responsible. Significantly, the jury did not allocate any responsibility to Johns-Manville Corporation, the manufacturer of all of the asbestos that Mr. Tyler inhaled at Foundry Service. Nevertheless, because the jury had found that American Optical had committed the intentional torts of fraud and concealment, the Court did not reduce the amount of non-economic damages because Proposition 51 (Cal. Civ. Code § 1431.2) does not apply in favor of an intentional tortfeasor as against the plaintiffs or negligent tortfeasors. *Thomas v. Duggins Construction Co., Inc.* (2006) 139 Cal.App.4th 1105, 1109.

The jury also found that American Optical acted with malice, oppression and fraud, and awarded $10 million in punitive damages. The total verdict was thus $32.8 million.

American Optical moves for judgment notwithstanding the verdict as to all claims. As stated more fully below, the Court grants the motion for judgment notwithstanding the verdict with respect to the Intentional Misrepresentation and Fraudulent Concealment claims, but denies it otherwise.

I. ORDER FOR PARTIAL NEW TRIAL

American Optical also moves for a new trial or remittitur based on (1) irregularity in proceedings; (2) jury misconduct; (3) excessive damages; (4) insufficient evidence: and (5) legal errors. Cal. Civ. Proc. Code § 657(1), (2), (5), (6) and (7).

Pursuant to Cal. Civ. Proc. Code § 657 (5) and § 662.5, and the Court's inherent powers under the common law, the Court hereby makes an order conditionally granting the motion for new trial on the issue of punitive damages on the ground that the punitive damages awarded by the jury were excessive. A new trial on this issue will be granted

unless Plaintiffs, within 30 days of service of this order, shall file their consent to a reduction in the amount of punitive damages in the amount of $9,850,000. If the Plaintiffs file their consent to the remission in this amount within the specified time, the motion for new trial is denied and the judgment, as altered, will stand.[2]

II. REASONS FOR PARTIAL GRANTING OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The following are the reasons of the Court for granting, in part, the motion for judgment notwithstanding the verdict, and for otherwise denying the motion.

As explained by our Supreme Court:

> A trial court must render judgment notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted. (*Code Civ. Proc., § 629.*) A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. (*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110 [120 Cal. Rptr. 681, 534 P.2d 377].*)

Sweatman v. Department of Veterans Affairs (2001) 25 Cal.4th 62, 68. The Court has a great deal of respect for the jury in this case. They listened patiently to depositions being read or played onscreen. They endured repeated delays in the proceedings that could not be fully explained to them. They spent considerable time in deliberation. Nevertheless, the Court disagrees with the jury's determination that there was sufficient evidence to find that there the elements of intentional misrepresentation or fraudulent concealment

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[2] The procedure by which a party accepts remission of the judgment is set forth in Cal. Civ. Proc. Code § 662.5.

were present in this case. A motion for directed verdict should have been granted on these causes of action.

A. The Court Grants the Motion for Judgment Notwithstanding the Verdict with Respect to the Claims for Intentional Misrepresentation and Fraudulent Concealment.

As the jury was instructed in this case, a Plaintiff seeking to prove fraud bears a heavy burden:

> "The elements of fraud are: (1) a misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Robinson Helicopter Co. v. Dana Corp., supra,* 34 Cal.4th at p. 990, 22 Cal.Rptr.3d 352, 102 P.3d 268.)

County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal.App.4th 292, 329. Here, there was no substantial evidence to support the elements of intent to defraud and justifiable reliance.

Plaintiffs' argument is that American Optical made statements to the effect that the R2090N could be used in an environment containing asbestos dust. Likewise, Plaintiffs argue that American Optical concealed the fact that the R2090N should not be used with asbestos.

There was no direct evidence of an intent to mislead Foundry Service, Mr. Tyler or anyone else, to use the R2090N in a setting with heavy asbestos dust. Likewise, there was no direct evidence of an intent to conceal the fact that it had not been approved for use with asbestos. Therefore, the inquiry must be as to whether there was sufficient circumstantial evidence of such an intent. In this regard, the Plaintiffs mainly relied upon the alleged misrepresentations themselves, as well as the method and mode of their distribution in asking the jury to find intent.

As Plaintiffs have pointed out, it is not necessary to find that American Optical intended to mislead Mr. Tyler personally.

> This district has previously quoted with approval the following language from the Restatement: "The maker of a fraudulent misrepresentation is subject to liability ... to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct ...." (Rest.2d Torts, § 533.) "It is not necessary that the maker of the representation 'have any particular person in mind. It is enough that he intends or has reason to expect to have it repeated to a particular class of persons and that the person relying upon it is one of that class.' (Id., com. g.)" (*Varwig v. Anderson-Behel Porsche/Audi, Inc.* (1977) 74 Cal.App.3d 578, 581, 141 Cal.Rptr. 539;[9] see also 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 469, p. 2730.

Barnhouse v. City of Pinole (1982) 133 Cal.App.3d 171, 191-92 (footnote omitted). *See also Boeken v. Philip Morris Inc.*, (2005) 127 Cal.App.4th 1640, 653, *citing Mirkin v. Wasserman* (1993) 5 Cal. 4th 1082. Nevertheless, even by this relaxed standard there is no substantial evidence that American Optical intended to mislead the class of end users of its respirators with respect to whether the R2090N should be used to protect against asbestos dust.

First, the very fact that American Optical is accused of misrepresenting or concealing—the status of its approval by a government agency—is a fact that it is peculiarly hard to misrepresent or conceal. The R2090N was certified for use with silica and other dusts, but not with asbestos. (Ex. 6106.) This status was a matter of public record, and was unquestionably available. Employers such as Foundry Service were

legally obligated to select a respirator that was suitable for the intended purpose, and thus under a legal duty to discover this information.[3]

Second, the method by which American Optical sold this and other products to Foundry Service or other end users was designed to aid in the selection of the proper product for the proper use. American Optical did not market directly to users or employers, but rather sold its product through authorized distributors that it educated in the proper use of its product. (E.g. April 13, 2016 T.T. at 22:21-23:10.) It provided these distributors with materials that would accurately allow for the proper choice of respirator. (E.g. April 8, 2016 T.T. at 98:24-99:2.)

In this case, it appears that Foundry Service bought the masks it used through a distributor named Vallen Safety and Supply. There was no evidence of statements from American Optical that were passed on by Vallen Safety and Supply to Foundry Service or Mr. Tyler. A mistake was made at this point in the supply chain, a mistake that the jury attributed to the failure to warn of a foreseeable misuse of the product. Even accepting that finding, the evidence did not establish fraud.

Here, the jury would have to find that American Optical made public statements or statements to distributors with the intent that companies like Foundry Service and users like Mr. Tyler get a message that the R2090N should be used with asbestos. The statements themselves belie such an intent.

Plaintiffs point to two advertisements for the R2090N. The first, Plaintiffs' Ex. 696 classifies R2090N as a "dust/mist respirator" that provides "dependable protection in atmospheres containing hazardous dusts and mists, including lead, and other pneumoconiosis-producing dusts." (Ex. 696.) Plaintiff alleges this is misleading because pneumoconiosis-producing dusts could include asbestos dust. Pl's Opp'n. to JNOV 3:2-5.

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[3] "Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended." Cal. Code Regs., tit. 8, § 5144 (a)(2)).

The advertisement states that the respirator is "NIOSH-Certified," but there is also a statement from which an industrial hygiene professional could discern the limitations on the certification. (April 14, 2016 T.T. at 214:23 to 215:1.) The advertisement makes no explicit reference to asbestos.

Additionally, the Plaintiffs assert that another AO advertisement constitutes a fraudulent misrepresentation when it states that "AO respirators screen out everything from common dust to uncommon vapors." Plaintiffs state that this claim is misleading because it implies the respirator R2090N could be used to screen out 'everything,' including asbestos. (Pl's Opp'n. to JNOV 2:16-17; Ex. 528.) However, the text of the ad shows that the advertisement was referring to all AO respirators, and indeed the ad mentions two models of AO respirators. (Ex. 528.) Once again, there is no explicit reference to asbestos. For "complete details," the reader is directed to an American Optical distributor or to call the "AO Safety Products Service Center."

There was no evidence that Ex. 696 and Ex. 528 came to the attention of Vallen Supply, Foundry Service or Mr. Tyler. There was no evidence that they read, or would have read, the trade journal in which they were published. These advertisements are a far cry from the "extensive efforts. . . to mislead the public about the adverse health effects of smoking cigarettes through press releases, publications advertising, and other means" that justified a finding of fraud in the absence of direct communication in *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 676.

The R2090N materials themselves (the labels on the box and the instructions) provide some information directly to the customers about how to use the respirator safely. (Ex. 6131; Ex. 6090.) The R2090N label reads "NIOSH approved," but recommends the user "always consult your industrial hygienist, safety engineer or supervisor to be sure you are wearing the proper respirator for the protection needed." (Ex. 6131.) The box indicates that the respirator provides "protection against dusts and mists having a time weighted average not less than 0.05 milligram per cubic meter or 2 million particles per cubic foot."

Additionally, AO created literature to describe their respirators and the respirators' appropriate uses. (April 14, 2016 T.T. at 215:22-216:13.)

Plaintiff also makes the argument that AO was misrepresenting their products because R2090Ns were mislabeled between 1979 and 1980. On these mislabeled packages the words "asbestos containing dusts and mists" were added to approval labels on both the R2090N respirator and filter packaging" from 1979 to 1980. (Ex. 787.) However, in a letter addressing this mislabeling, AO's Group Product Director advised the sales representatives to "continue to advise your customers, as you and our product literature have in the past, that the R2090N is not currently approved for use in asbestos dust and mist containing atmospheres." *Id.* Foundry Service's mistaken decision to use the R2090N was made long before this mislabeling incident, and there is no evidence that a mislabeled box reached the company.

Plaintiffs also place reliance upon American Optical's Price Guides which listed a cotton facelet as a replacement part. The knitted cotton face covers appear in the *AO Price Guides* from 1976-1980 under the "replacement parts" section for the R2090N. (Exs. 745, 748, 750, 754, 756.) The price guides do not advocate the use of the R2090N, with or without the facelet, in an asbestos environment.

Even considered collectively, these communications do not constitute substantial evidence of an intent to fraudulently represent that the R2090N should be used in an asbestos environment, or an intent to conceal that it should not be so used.

Neither is there any significant evidence of reasonable reliance by Foundry Supply or Mr. Tyler. There is no evidence that Either Mr. Parnell or Mr. Tyler had any knowledge of how the R2090N was chosen, by a Mr. Ron Rapp, for use at Foundry Supply. They simply used and kept using the mask that had been previously selected by others at the company. Mr. Parnell, while sure he had seen the price guides for the knitted cotton face covers, was unable to recognize the 1976 AO Price Guide when presented with it at trial. (T.T. 4/5/2016 at 69:1-4, 70:23-71:8; Ex. 745.)

Mr. Parnell and Mr. Tyler testified that they would have altered their behavior with an explicit and prominent warning that the product should not be used with asbestos. This seemed unlikely given their response to the warnings that did reach them, but even viewing this evidence in the best possible light for the Plaintiffs, it does not constitute substantial evidence that they were deceived by the actions of American Optical.

Once again, the relaxation of the reliance in the tobacco marketing cases hardly represents a precedent on which the Court can find substantial evidence of reliance in this case. Those cases involved a "campaign of deception" targeted directly at smokers. *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, 1667.

How Foundry Service made the mistake of selecting the R2090N may never be known. Mr. Rapp, the person who made the choice for Foundry Service, had died by the time of trial. No representative of Vallen Supply testified. The circumstantial evidence may be sufficient to support a failure to adequately warn of a foreseeable misuse, but there is no substantial evidence that American Optical intentionally sought to defraud consumers, or that Mr. Tyler acted as the result of such fraud.

B. The Motion for Judgment Notwithstanding the Verdict is Denied as to all Other Causes of Action.

With respect the remaining causes of action, the motion for judgment notwithstanding the verdict is denied. Many of the arguments challenge rulings that were made and extensively discussed during the trial, and the Court rests on those rulings. While the Court thus declines to address every argument by American Optical, at least a few of these arguments are mentioned below because they were a focus of the briefing.

American Optical argues that the jury should not have been instructed under the standard for Asbestos-Related Cancer Claims, CACI 435, but rather that it should have been instructed under the ordinary causation standard contained in CACI 430. Further, they assert that this case required the addition of the optional sentence in 430, referred to as the optional "but/for" causation sentence. The Court believes that American Optical

has overstated the meaning, and importance, of the statements made by various committees considering the CACI jury instructions. Even if this were a situation in which CACI 430 was an appropriate instruction, the notes to CACI 430 advise that the "but/for" optional language should not be given. As these "Directions for Use" advise: "The 'but for' test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces in operation at the same time and independently each of which would have been sufficient by itself to bring about the same harm." Clearly, this is a case in which there were multiple and concurrent causes of Mr. Tyler's mesothelioma.

This Court believes that the causation standard set forth in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, contemplates that all tortious actors who contribute to the risk of a plaintiff developing an asbestos disease must be evaluated on the same causation standard. This is not an extension of liability. Indeed it is the way that the *Rutherford* causation scheme must work in order to provide some measure of fairness to asbestos defendants.[4] While a defendant can be liable merely for contributing to the risk of the plaintiff's disease, it can also use the same standard to push liability onto various other tortious actors who have allegedly have some responsibility for the plaintiff's exposure. These other tortious actors typically include employers, contractors and others who are not manufacturers or suppliers of asbestos, and often, as in this case, include the plaintiff himself. If there were two causation standards, the application of the *Rutherford* risk standard, already a difficult undertaking for juries, would become impossible. Such a

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[4] The availability of comparative fault for other actors was a key factor in the *Rutherford* Court's view that its relaxed causation standard was fair:

> And although a defendant cannot escape *liability* simply because it cannot be determined with medical exactitude the precise contribution that exposure to fibers from defendant's products made to plaintiff's ultimate contraction of asbestos-related disease, all joint tortfeasors found liable as named defendants will remain entitled to limit *damages* ultimately assessed against them in accordance with established comparative fault and apportionment principles.

Rutherford v. Owens-Illinois, Inc. (1997)16 Cal.4th 953, 958.

limitation might also spell the end of most of the second and nearly all of the third-wave of asbestos litigation. While the Supreme Court and the Courts of Appeal might want to adopt such a limitation as a matter of policy, the overall policy deducible from *Rutherford* and other appellate decisions in California is to do the opposite.[5]

American Optical also urges a sophisticated intermediary defense. This defense has received increased attention as the result of the California Supreme Court's recent decision in *Webb v. Special Electric Company, Inc.,* No. S209927, 2016 Cal. LEXIS 3591 (May 23, 2016). But this defense was not urged specifically at trial.

American Optical argues that, the jury's punitive damages verdict should be set aside because there was no substantial evidence of fraud. Despite the lack of evidence to support a fraudulent intent, when the facts are viewed in the light most favorable to plaintiff, a reasonable jury could frind that the marketing of the product showed a knowing disregard for the dangerous consequences of misuse of an item that is marketed as a safety product. There was more than the evidence of advertisements and marketing materials from which the jury could derive a finding that the defendant should be subject to punitive damages. The testimony of AO's corporate representative seemed confused at times, which may be a product of his advancing age, but the Court must consider his admissions in the light most favorable to the Plaintiff. Looked at in that light, the corporate representative seemed to admit that American Optical continued to use a supplier for the R2090N even though that supplier had provided defective face pieces for an extended period of time. The corporate representative's attempt to take back this admission was confused, and the jury was entitled to credit the admission instead. Moreover, the corporate representative contended that the entire affair wasn't the customer's business. While he may not have understood the context of the question, the jury could find that this remark showed a lack of care about the consumer's safety. The

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[5] "The thrust from our high court as a matter of first priority has been to maximize recovery for the victim." *Rawlings v. Oliver* (1979) 97 Cal.App.3d 890, 901.

evidence of the conditions at the Putnam plant, which went largely unrebutted at trial, could have confirmed to the jury that American Optical did not take the known dangers of asbestos seriously during a time that corresponded to Foundry Service's switch to the R2090N.

The Court's ruling requires the reduction of the verdict to reflect the proportion of responsibility for non-economic damages as assigned by the jury. American Optical is ordered to file a proposed judgment making these reductions within ten court days. Plaintiffs will have ten court days to object to such a judgment.

III. THE MOTION FOR NEW TRIAL IS GRANTED IN PART AND DENIED IN PART.

The following is the Court's statement of reasons for conditionally granting the motion for new trial on the grounds stated above as required by California Code of Civil Procedure Section 657.

A. Review of Compensatory Damages.

While large (Defendant says "astounding"), the jury's verdict regarding compensatory damages is not out of proportion to the evidence of the losses suffered by the Plaintiffs. The testimony of Mr. and Mrs. Tyler regarding Mr. Tyler's illness was persuasive in portraying the painful course his life has taken since the diagnosis.[6] Mr. Tyler was diagnosed in May 2015 with extensive asbestos related disease including peritoneal mesothelioma. After six rounds of chemotherapy, he underwent an extensive surgery to remove as much of the cancer as possible. He suffered severe pain and digestive complications from this surgery. He will be required to undergo further rounds of chemotherapy. Despite undergoing these extreme treatments, Mr. Tyler's cancer has now spread to his heart, and his prognosis for continued life is highly uncertain.

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[6] See the more complete summary of this evidence in Plaintiffs' Brief in Opposition to the Motion for New Trial at 5-9.

Mr. and Mrs. Tyler are lifelong soulmates, having met and married while they were still teenagers. The most probable result of Mr. Tyler's asbestos related-diseases is that they will lose more than 19 years together. The opportunity to spend the last phase of one's life with a lifelong soul mate is the desire of most of humanity, and one of the most valued treasures of life. The strength of their love was apparent from their appearance on the witness stand as well as from the content of their testimony.

While the award appears high in relation to other personal injury awards in this judicial district and high in relation to the awards for economic damages in this case, a Court's own opinion of whether a particular verdict is high or low for a given injury is highly subjective, and anecdotal. The Court of Appeal has cautioned courts against giving too much weight to this type of comparison.

> "'For a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based up different evidence would constitute a serious invasion into the realm of fact finding.'"

Bigboy v. County of San Diego (1984) 154 Cal.App.3d 397, 406, *quoting Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn 12.

The suffering that arises from an early death and the loss of a loved one's consortium is uniquely within the knowledge of the jury. How jurors value such a loss differs over time, and in different parts of society. These jurors were selected from Mr. and Mrs. Tylers' community and required to make the unique judgment regarding the value of the loss of a phase of a man's life at this moment in time. The Court has the experience of one lifetime, not twelve, and is not inclined to second-guess the jury on this question. The amount awarded is not disproportionate to the damages suffered by the plaintiffs.

In view of the Court's order for a judgment notwithstanding the verdict on the fraud claims, it is the expectation of the Court that the award of non-economic damages will be reduced to 70% of the amount awarded by the jury. There is certainly a substantial

argument to be made that even an allocation of 70% to American Optical is excessive. But the jury had evidence to assess the role of the actors who preceded American Optical on the scene, and assessed a share of the responsibility to 3M Company, Foundry Service and Supply and to Mr. Tyler himself. In allocating damages, the jury could assess the relative blameworthiness as well as mechanics of exposure. The conduct of American Optical was a focus of the trial, and that focus was not significantly shifted by evidence presented by American Optical.

The jury's decision to allocate 0% to Johns Manville is concerning. As a matter of logic, Johns Manville was the source of 100% of the asbestos that Mr. Tyler inhaled during his working career, while American Optical was responsible for failing to prevent his inhalation of some fraction of that asbestos.

Nevertheless, American Optical had the burden of proof to present a case regarding the role of Johns Manville. While the relative role of Johns Manville might have been self-evident to the Court, and to all of the lawyers involved, it was not necessarily evident to the jury. The Court must review the jury's allocation in view of what the jury actually heard. A quantitative comparison of the exposures, and the relative responsibility for the volumes of asbestos to which Mr. Tyler was exposed, was not presented. Likewise, there was no presentation regarding Johns Manville's corporate culpability, whether Johns' Manville's asbestos was chrysotile or amosite, or whether it gave adequate warnings or advice regarding the effect of using the respirators then available to prevent exposure.

In view this record, the Court cannot say that the jury's allocation of 70% of responsibility to American Optical was not supported by substantial evidence.[7]

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[7] In the Court's view, the instructions given to juries in asbestos cases would be enhanced if they could be given some advice as to how to ground their judgment in the real world rather than in abstractions. As explained in *Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953,* asbestos causation presents a jury with questions involving "inherent practical difficulties," "uncertainty," and "abstraction." In a world where even a background-level exposure to asbestos can be argued to justify causation, the jury could be helped by an instruction such as that proposed in *Davis v. Honeywell* (2016) 254 Cal.App.4th 477, 494, n.10, which at least suggests that the jurors consider "the type of asbestos, the nature of the exposure, the frequency of exposure,

C. The Award of Punitive Damages Is Excessive.

With respect to the jury's award of $10 million for punitive damages, the Court finds that it is indeed excessive, and not reasonably related to the purposes for imposing punitive damages.

As the jury was instructed, the purpose of punitive damages is to further the state's policies of punishment for wrongdoers and deterrence of similar conduct in the future. CACI 3942. Nevertheless, this state has other policies with respect to insurance and indemnity of punitive damage awards that must also be respected. For example, the Insurance Code does not allow insurance for willful acts of the insured. (Cal. Ins. Code § 533 ("an insurer is not liable for a loss caused by the willful act of the insured").) Indemnities of unlawful acts are also subject to restrictions. (Cal. Civ. Code §§ 2773, 2774.) In this case, these policies come into conflict.

Like many companies faced with asbestos liabilities, American Optical Corporation has essentially gone out of business. It has no substantive operations. "American Optical neither makes a product, sells a product, nor has any income from patents or licenses . . . ." (T.T. 4/26/2016 at 63:16-18.) It has a negative net worth of $9.6 million. (Ex.4002.) It also passes off some liabilities to other companies, but there was no evidence that punitive damages claims could be subject to these indemnity arrangements. (T.T. 4/26/2016 at 21:15-16:22:4.) The company has a liability to its pension program in the amount of $10.4 million. It has no line of credit. Its only substantial asset is the cash in its accounts, approximately $1 million. Its continued existence indicates that it derives enough income from the management of its claims to avoid involuntary insolvency but American Optical seems to exist largely as an administrative convenience to the insurance companies that are paying its claims.

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the regularity of exposure, the duration of exposure, the proximity of the asbestos-containing product, and the type of asbestos-containing product."

Against this backdrop, it was very difficult to determine what evidence the jury could hear about American Optical's "wealth." Ultimately, the Court determined that it would allow the Plaintiff's expert to testify that the company paid its debts when they came due, but that there could be no mention of insurance or indemnity arrangements.

In the Court's view, insurance and indemnity arrangements were irrelevant to the "wealth" of American Optical. As noted above, insurance of punitive damages awards is prohibited by the Insurance Code of this state, and probably other states whose law would be implicated. Payment of punitive damages by insurance would defeat the purposes of punitive damages.[8]

Likewise indemnity of punitive damages awards is restricted in many states. Moreover, indemnity arrangements only become a source of funds when it is determined that there is a corresponding liability to which they would apply. Thus, the effect of these agreements on net worth is ultimately neutral. There was no evidence that any of these arrangements were available to pay a punitive damage award.

The Court allowed Plaintiff's expert to testify that the evidence indicated that American Optical paid its obligations when they came due because that is a recognized

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[8] The foregoing demonstrates that the policy of this state with respect to punitive damages would be frustrated by permitting the party against whom they are awarded to pass on the liability to an insurance carrier. The objective is to impose such damages in an amount which will appropriately punish the defendant in view of "the actual damages sustained," "the magnitude and flagrancy of the offense, the importance of the policy violated, and the wealth of the defendant." (Id:, at p. 501.) Consideration of the wealth of the defendant would of course be pointless if such damages could be covered by insurance. The onus of the award would depend entirely upon the amount of insurance coverage and not upon the legally relevant factors. We conclude, therefore, that the public policy of this state prohibits insurance covering the punitive damages levied against plaintiff.

City Products Corp. v. Globe Indemnity Company (1979) 88 Cal.App.3d 31, 42, *quoting Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 500.

indication of solvency.[9] But the Court also circumscribed this testimony, indicating that there was not to be mention of indemnities or insurance.

> "[W]e're not going to cover agreements to pay, we're not going to cover what's off the financial statements because it's covered by insurance or agreements to pay. . . . I don't want expert testimony on it because. . . his expert testimony is based on the financial ability of these other companies or insurers to pay, and that's what I'm ruling has to be excluded."

T.T 4/26/2016 at 27:3-18. Nevertheless, Plaintiff's expert testified that the company pays its liabilities through insurance.

> "What this says to me is that they get their money from insurance proceeds which are basically from claims, because that's what an insurance proceed is, and they utilize that money to handle whatever claims they had. So I would expect in an audited statement to see, well I've got income coming in, I'm paying off a specific claim or a series of claims or a total amount of claims."

(T.T 4/26/2016 at 63:19-64:1.)[10] After hearing this testimony, the jury apparently believed that American Optical could pay a punitive damage award of $10 million despite its negative net worth.

The financial condition of American Optical indicates that there is little that can be done at this point in its corporate history to advance the goals of punishment or deterrence. The offending conduct occurred nearly 40 years ago; in the ensuing

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[9] *See e.g.*, 11 U.S.C. §101 (32) under which a municipality is considered insolvent when it is "unable to pay its debts as they come due."

[10] Significantly Mr. Johnson gave this discussion after a timely objection prevented him from volunteering the reason why American's Optical's claims were not stated on the balance sheet. (T.T. 4/26/2016 at 62:8-23.) The reason the liabilities were not on the balance sheet was that they were covered by insurance. (T.T. 4/26/2016 at 12:16-23.) The Court notes that counsel's questions did not specifically call for this testimony.

years, the company has not only been deterred from producing products that might produce injury, it has been deterred from producing any products at all.

Where an award of punitive damages exceeds what is necessary to further the recognized purposes of a punitive damage award, an inference arises that the award is excessive.

> But an inference arises that the jury acted out of passion and prejudice if the award exceeds the amount needed to accomplish the goal of punishment and deterrence. (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1259, 1 Cal.Rptr.2d 301.)

Boeken v. Philip Morris Inc., (2005) 127 Cal.App.4th 1640, 1698. In assessing whether a given award is excessive when measured against the purposes of punitive damages, courts often consider the percentage of net worth represented by the award, allowing awards up to 10% of the defendant's net worth.

> California courts have routinely upheld punitive damage awards which amounted to a percentage of net worth from .005 percent (*Grimshaw, supra,* 119 Cal.App.3d at p. 820, 174 Cal.Rptr. 348), to 5 percent (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166, 74 Cal.Rptr.2d 510), and not exceeding 10 percent. (*Storage Services v. Oosterbaan* (1989) 214 Cal.App.3d 498, 515, 262 Cal.Rptr. 689.)

Boeken v. Philip Morris Inc., (2005) 127 Cal.App.4th 1640, 1697.

Plaintiffs argue, based on *Bankhead v. Arvinmeritor, Inc.* (2012) 205 Cal.App.4th 68, that net worth is not the sole measure of a defendant's ability to pay a punitive damage award. In that case, the First District allowed Mr. Johnson to testify that ArvinMeritor, Inc. was far wealthier than its negative net worth would indicate. In that case, Mr. Johnson searched for other indications of wealth, and he found some, including a cashflow profit of $211 million, a net profit of $12 million, CEO compensation of $7.6 million and

$343 million in cash. The First District thought this was sufficient to allow a punitive award of $4.5 million, less than half of what was awarded in this case.

In this case, Mr. Johnson put up his standard PowerPoint slide referring to other elements of wealth for the jury. (Exs. 4000, 9000.) But in contrast to the ArvinMeritor example, he could not identify any other item that showed a substantial measure of economic wealth. The analysis started with the large, negative net worth, $9.6 million. There was no evidence of dividends, stock repurchases, capital expenditures or research and development.

Only two items showed any promise as a source for payment of a punitive award. American Optical had cash on hand of approximately $1,000,000. Moreover, its CEO received compensation of $300,000, and there was a payment of $672,000 to a management company that he owned.

Because American Optical's financial statements were unaudited, the Court will construe the evidence in a light most favorable to the Plaintiffs. From this light, it appears that American Optical has $1,000,000 in cash, the availability of which was not explained. Assuming all of the payments to the CEO's management company constitute compensation, approximately $500,000 of his salary could be considered excessive. In view of American Optical's failure to explain the cash reserve and its failure to explain the CEO compensation, the jury could have found that $1,500,000 constituted available "wealth" despite the negative net worth stated by the unaudited financial statements. Ten percent of this amount is $150,000.

For these reasons, the Court finds that the punitive damages awarded were excessive, orders punitive damages conditionally reduced to $150,000 and orders, as stated above, that a remitter issue.

Plaintiffs' counsel should be advised that in any re-trial of this issue, Mr. Johnson's testimony will be presented by deposition, and edited prior to presentation to the jury.

The motion for a new trial is denied in all other respects. The Court believes that it made the proper decision in reseating Juror No. 2. The allegations of Juror No. 4 did not come to the Court's attention until after the jury had rendered its verdict on compensatory damages. The evidence offered in support of the motion for new trial is insufficient to show jury misconduct.

* * *

The clerk is ordered to file this order and serve it on the parties forthwith.

Dated: July 18, 2016

JOHN KRALIK

John J. Kralik
Superior Court Judge