Filed 12/21/16 Baeza v. Special Electric Co. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DAVID BAEZA et al., Plaintiffs and Appellants, v. SPECIAL ELECTRIC COMPANY, INC., Defendant and Respondent.	B264220 (Los Angeles County Super. Ct. No. BC537791)

APPEAL from a judgment of the Superior Court of Los Angeles County, Peter J. Mirich, Judge. Affirmed.

Farrise Law Firm, Simona A. Farrise, and Alina Guzman, and The Arkin Law Firm and Sharon J. Arkin for Plaintiffs and Appellants.

Hugo Parker, James C. Parker, Shaghig D. Agopian and Tina Glezakos for Defendant and Respondent.

This is a strict product liability action against defendant Special Electric Company, Inc. (Special Electric), a distributor of raw crocidolite asbestos fibers called ML-6. After the late David Baeza was diagnosed with mesothelioma, he and his wife, Vana Baeza,[1] sued various defendants including Special Electric. Special Electric had supplied ML-6 raw asbestos fibers to Johns-Manville beginning in the mid-1970's. David's father had worked at a Johns-Manville plant in Long Beach, and David was exposed as a child to asbestos dust that clung to his father's shoes, clothes, hair, and skin.

Plaintiffs raised several legal theories in their complaint. On the eve of trial, plaintiffs filed a fourth-amended complaint which eliminated their causes of action for negligence, breach of express and implied warranties, false representation, and premises owner/contractor liability. The only causes of action that remained were strict product liability based on the consumer expectation test for defective design and loss of consortium.

Under the consumer expectation test, "a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413,

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[1] We refer to the Baezas by their first names, with no disrespect intended. According to the opening brief, David died while the appeal was pending, and Vana has filed a motion for substitution as his successor-in-interest.

432 (*Barker*).) The jury found by special verdict that David was exposed to asbestos supplied by Special Electric, the asbestos was not modified or misused after it left the possession of Special Electric, and the asbestos did not fail to perform as safely as would be expected by an ordinary reasonable consumer. Because the latter finding disposed of the sole liability theory, the court entered a defense judgment. On appeal, plaintiffs raise issues of attorney misconduct in closing argument and judicial error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

According to the general allegations of the operative fourth amended complaint, David was then a 54-year-old male with mesothelioma who was environmentally exposed as a bystander to asbestos fibers supplied by Special Electric. The exposure to Special Electric's product occurred during the mid-1970's, when David was a child and his father, Ruben Baeza, worked at a Johns-Manville pipe manufacturing plant in Long Beach. His father worked with and near raw asbestos fibers, including some that Special Electric supplied to Johns-Manville, and David was exposed to asbestos fibers that clung to his father's body, hair, clothes, and shoes. Asbestos fibers contaminated the family's vehicle, home, and furnishings, particularly when the father's clothes were laundered by David's mother. As a result of his bystander exposure, David developed mesothelioma which was diagnosed in December 2013.

The strict liability cause of action alleged that Special Electric had supplied Johns-Mansville with a defectively designed product, raw asbestos. The following claims were alleged in the charging pleading. The raw asbestos was defective

because it was not as safe as an ordinary consumer would have expected, and because of the serious potential harm resulting from its use. Special Electric was aware that raw asbestos was dangerous and defective when used in the intended or reasonably foreseeable manner. David was exposed to Special Electric's raw asbestos fibers, and such exposure was reasonably foreseeable to Special Electric. David was unaware of the dangers inherent in breathing asbestos dust. David was never warned that he could contract any disease or injury as a result of being in the vicinity of asbestos dust. The defect in the asbestos was a substantial factor and legal cause in David's injuries. Special Electric was aware of the risk of harm to those exposed to its product and was indifferent to David's health, safety, and welfare.

Before trial, plaintiffs moved to bifurcate the trial into two phases. During the proposed liability phase, the anticipated defense evidence—OSHA[2] regulations, Johns-Manville's knowledge about the dangers of asbestos, and the warnings and safety equipment that the workers received—would be excluded as irrelevant to the consumer expectation test, which is based on the expectations of the ordinary lay consumer. During the proposed second phase, the defense would present its evidence in order to apportion damages. (See *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 596–600 [Proposition 51 eliminated third-party defendant's liability for employer's actions, even though employer had no liability for plaintiff's injuries beyond payment of workers' compensation benefits]; *Arena v. Owens-Corning*

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[2] The Occupational Safety and Health Act (29 U.S.C. § 651 et seq.) (OSHA or Act). The Act authorizes the Secretary of Labor to establish safety and health standards, which are binding on affected employees and employers. (29 U.S.C. § 655.)

Fiberglas Corp. (1998) 63 Cal.App.4th 1178, 1198 [applied Proposition 51 to strict liability asbestos case].)

Defendant opposed bifurcation, arguing that because workers are the ordinary consumers of asbestos, evidence of the information, warnings, and safety equipment they received is relevant to the consumer expectation test. The trial court denied the motion for bifurcation.

Plaintiffs' Trial Evidence

Testimony of Raymond Dascenzo. Dascenzo, a former Johns-Manville employee, testified that raw asbestos was used at the Johns-Manville plant in Long Beach from 1960 until the plant closed in 1981. The plant used a wet mixture of raw asbestos and cement to manufacture transite pipes. After the mixture was dried in an autoclave it was shaped and cut with lathes into finished lengths of pipe.

The transite pipes were manufactured with both raw chrysotile (white) asbestos fibers and raw crocidolite (blue) asbestos fibers. Special Electric's raw crocidolite asbestos—ML-6 blue fiber—first appeared at the Johns-Manville plant in Long Beach in 1974.

Dascenzo worked with David's father, Ruben Baeza, at the Long Beach plant from the late 1960's to 1980. Ruben Baeza held various positions including curer, curer hoist operator, knifer gauger, lathe operator, coupling operator, willows operator, and apprentice electrician. All of these positions involved exposure to

asbestos dust.[3] In about 1976, Johns-Manville "outlawed the brooms because when you sweep, it kicks dust into the air."

David's Videotaped Deposition. David's videotaped deposition was taken six months after he was diagnosed with mesothelioma in December 2013.

David testified that when he was six years old, his father began working at Johns-Manville. His father was dusty and dirty after work, and would wipe the dust off his boots on the porch. David swept the porch at least three times a week between 1970 and 1981, and inhaled a lot of dust. David also inhaled dust when he embraced his father and when his mother washed his father's clothes in the kitchen.

David also went to the Johns-Manville plant on a regular basis to bring his father a meal. David and his siblings would run to hug their father, who was wearing dusty work clothes, as he walked toward their car. While their father ate his meal, the children would sit in the car with him and were exposed to the dust from his shoes and clothes.

David testified his grandfather, Sabino Barbosa, who lived next door, also worked at the Johns-Manville plant. Before his grandfather left work, he would always shower and change his clothes. His grandfather brought his work clothes home in a bag,

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[3] According to Dascenzo, a curer would be in constant contact with transite pipes, and because the pipes are dusty and pieces fall to the floor, there is a lot of dust. A lathe operator would cut grooves and taper the ends of 800 to 1,000 pieces of pipe in a single shift, and a willows operator would slice open a bag of ML-6 fiber every five minutes. All of these jobs left dust on the employee's clothing. Willows operators were required to wear respirators and coveralls, but their hair and shoes were not covered.

and his grandmother would wash them. Unlike his grandfather, David's father never showered at the plant.

Expert Testimony on Causation. Dr. Barry Horn, a pulmonologist and critical care specialist in Oakland, has treated numerous patients who, like David, developed mesothelioma 30 to 50 years after being exposed to raw asbestos as bystanders. The asbestos fibers that cling to a worker's clothing are invisible. Once the fibers become air-borne inside a home or car, they can remain suspended in the air for several hours, endangering anyone who enters that space.

Cumulative exposure to asbestos fibers can alter the DNA and result in cancer 10 to 60 years later. After conducting a clinical study of two groups—shipyard workers who directly handled asbestos-containing materials and bystanders who shared the same environment—Dr. Horn found that bystanders and workers had an equal risk of developing asbestos-related diseases.

According to Dr. Horn, chrysotile asbestos is less dangerous or potent than crocidolite asbestos. However, both can cause mesothelioma. On a scale of zero to 10, the risk of developing mesothelioma as a result of exposure to chrysotile asbestos is only 2, while the risk of developing mesothelioma from exposure to crocidolite asbestos is 10.

There is no safe level of exposure to raw asbestos fibers. No study has determined a level of exposure below which the risk of developing mesothelioma disappears. To the contrary, studies have shown that even a very short period of bystander exposure may substantially increase the risk of developing mesothelioma. In one follow-up study of 3,000 bystanders who were exposed for only a few months to asbestos-contaminated clothing, there were

500 deaths and five of those deaths involved mesothelioma. This far exceeded the risk of mesothelioma in the general population, which is one in one million.

Based on hypothetical facts that tracked the evidence in this case, Dr. Horn found to a reasonable degree of medical probability that David's exposure to his father's asbestos-contaminated clothing was a substantial factor and contributing cause to his development of mesothelioma. He testified: "In the United States there was no other known cause of mesothelioma in a man other than prior exposure to asbestos. The likelihood of developing mesothelioma in the absence of exposure to asbestos is extraordinarily remote, one case per million people per year. In this man's case, there is just no question that his exposure to asbestos caused this illness."

Expert Testimony on Asbestos and Mesothelioma. Arnold Brody, Ph.D., a pathologist and expert on mesothelioma, testified that chrysotile asbestos, which comes from Canada, is the most common type of asbestos. Crocidolite asbestos, which comes from South Africa, is less common. Crocidolite, which is in the amphibole group, is the most potent in terms of causing mesothelioma. Most people, no matter how great their exposure to asbestos, will not contract mesothelioma because their immune system protects them. But some people are susceptible to mesothelioma. Cigarette smoke, silica, and asbestos are analogous in that their toxicity increases with increased exposure.

Asbestos fibers that are visible to the naked eye are too large to be inhaled into the lungs. But if fibers are visible in the air, microscopic fibers also are present, and these can be inhaled. Mesothelioma can be caused by "take home" exposure, which can

be significantly above "background" exposure. These are the bystander cases.

By the late 1930's, companies using raw asbestos should have known that it can cause asbestosis, which can cause death. By the early 1960's, companies should have known that raw asbestos can cause mesothelioma. In 1960, Dr. Wagner, a scientist in South Africa near a mining community, discovered a link between asbestos and mesothelioma. By the 1960's, scientists understood that mesothelioma was caused by exposure to excessive levels of asbestos, and that chrysotile, even though less potent than other forms of asbestos, can cause mesothelioma by itself.

All asbestos has a half-life and is eventually cleared out of the body, but crocidolite has a much longer half-life than chrysotile. Because the blue fibers do not clear the body as quickly, they are more potent. Asbestos can cause a fatal cancer at extraordinarily low levels.

Chain of Distribution. Plaintiffs presented evidence that Special Electric, formerly known as Special Materials, distributed ML-6 asbestos to the Johns-Manville plant in Long Beach beginning in the mid-1970's.[4]

Plaintiffs introduced the deposition testimony of Richard Wareham, a Special Electric manager. Wareham testified that

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[4] In a pretrial summary judgment motion, Special Electric unsuccessfully argued that as a broker to a South African mine, it was not in Johns-Manville's chain of distribution and thus was not subject to strict liability for any defects in the asbestos. The jury's resolution of that issue—that Special Electric had distributed asbestos to Johns-Manville—is not at issue on appeal.

while working for a company called Central Asbestos, he was involved in a 1974 sale of asbestos to Johns-Manville. He testified that "Cape Blue" asbestos was sold to Johns-Manville in poly-woven bags that contained a standard OSHA warning: "Caution. Contains asbestos fibers. Avoid creating dust. Breathing asbestos dust may cause serious bodily harm." He stated that Johns-Manville required that asbestos fibers be shipped in poly-woven bags, which was the industry standard. In 1975, he visited a Johns-Manville facility and saw a machine that stretched plastic wrapping around the entire pallet of bags of asbestos.

Defense Evidence

Special Electric sought to prove that by the mid-1970's, knowledge of the dangers of asbestos had grown to the point that no ordinary consumer (in this case, the workers at the Johns-Manville plant) could have held an objectively reasonable belief that asbestos was safe. Special Electric also sought to prove that third parties, including Johns-Manville and Ruben Baeza, were negligent in exposing David to asbestos fibers. In presenting its defense, Special Electric relied on the cross-examination testimony of Dascenzo, his testimony in the *Webb*[5] case, his notes,

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[5] In *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167 (*Webb*), the plaintiff William Webb, had worked as a warehouseman and truck driver for Pyramid Pipe & Supply Co. Between 1969 and 1979, Webb was exposed to asbestos pipes manufactured at Johns-Manville's Long Beach plant. After he was diagnosed with mesothelioma in 2011, he sued Special Electric for failing to warn him about the dangers of asbestos. (*Id.* at p. 178.) The jury found "Special Electric liable for failure to warn and negligence, but not liable for supplying a defectively

a health memo by Johns-Manville to its workers, and several OSHA regulations.

Cross-Examination of Dascenzo. Dascenzo testified that in the early 1970's, in response to OSHA regulations issued in 1972, Johns-Manville provided its workers with extensive warnings, safety equipment, and safety rules that specifically addressed the health risks of asbestos. The company held employee meetings regarding proper handling of asbestos fibers.[6] And as employee knowledge of the risks increased, employees began calling OSHA and CAL/OSHA to report violations of dust standards for asbestos. This led to on-site inspections by OSHA/CAL OSHA.[7] Johns-Manville closed its plants in 1981 because of the rising number of employee lawsuits for asbestos-related claims.

Dascenzo's January 22, 1973 memo titled, "Rules and Regulations" and "Review of OSHA letters 8 and 9," was

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designed product. It apportioned 49 percent of fault to Johns-Manville, 18 percent to Special Electric, and 33 percent to other entities." (*Id.* at p. 179.) The jury verdict against Special Electric was set aside by the trial court, but reinstated on appeal. (*Id.* at p. 193.)

[6] This testimony was admitted over plaintiffs' objection that it was irrelevant to *plaintiffs'* claims. No objection was made as to the relevance of this testimony to the *defense* theories, including third-party negligence and notice.

[7] This testimony also was admitted over plaintiffs' objection that it was irrelevant to *plaintiffs'* claims. No objection was made as to its relevance to the *defense* theories.

admitted over plaintiffs' hearsay objection for purposes of notice.[8] According to the memo, Dascenzo held a safety meeting at which he reviewed OSHA letters 8 and 9 with his crew. His crew was told about special clothing and lockers to prevent contamination of street clothes. Each worker was to change into work clothes and place his street clothes in a locker, to avoid contaminating the street clothes he would wear home. Each worker was warned to wash his contaminated clothes in a manner that did not cause asbestos fibers to be released from the clothes. If someone else was washing their contaminated clothes, the workers were to inform that person not to cause asbestos fibers to be released from the clothes. Workers were required to transport their contaminated clothing in impermeable containers that were closed and labeled with a warning. Caution signs about asbestos dust were placed around the plant by September 29, 1972.

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[8] In response to the trial court's inquiry whether the jury should consider the information given to the Johns-Manville workers, plaintiffs' counsel, Simona Farrise, provided a qualified "yes." She stated that "[t]he court should instruct the jury to consider the expectation of the general public. Within that construct, the jury could also consider what workers knew." She explained that plaintiffs wanted the court "to instruct the jury to consider the expectation of the general public as a hypothetical reasonable consumer. If the jury finds some workers fit within that, okay, then their expectations can also be considered. That would be okay. But the jury first has to consider what the general public's expectations are. . . . And if the jury finds that these workers fit within that umbrella, then they can consider their expectations. But what the defense is doing is saying to the jury, these are the consumers who define the expectation to the exclusion, if you will, of the general public. Which is problematic."

Dascenzo testified that by November 1973, if not before, he was aware that excessive exposures to airborne asbestos fibers could cause mesothelioma. During that same month, Johns-Manville issued a health memo to its workers on the dangers of asbestos. The memo, which the jury was instructed was admitted only for purposes of "notice," stated: "The inhalation of excessive quantities of free asbestos fibers over prolonged periods of time can increase the risk of developing certain diseases of the lungs within 20 or 30 years. The three diseases associated with inhalation of asbestos fiber are: Asbestosis, a non-malignant fibrotic lung condition; Bronchogenic lung cancer; and Mesothelioma, a rare cancer of the lining of the chest or abdominal cavities." "Regulations to protect you. . . . To ensure the safety of all, occupational standards for exposure to asbestos dust were published in June 1972 by the Occupational Safety and Health Administration (OSHA) of the United States Labor Department. These standards have been designed to protect you from exposure to potentially hazardous amounts of asbestos and are being carefully observed by the company."

After November 1973, Johns-Manville placed warnings on its products which stated that "[a]sbestos-containing products may release free asbestos fiber in excess of the standard during handling, application, fabrication or disposal." Between 1973 to 1975, warning labels began to appear on the bags of raw asbestos that were coming into the Johns-Manville plant. Johns-Manville required that empty bags of raw asbestos be placed within another disposal bag that also had a warning label. The purpose of the warning label on the disposal bag was to alert others that "asbestos fibers could be loose and get into the air and could be breathed."

In the mid-1970's, as workers who were cutting the pipes produced at the plant began contracting asbestosis and mesothelioma, warnings were placed on the pipes themselves. By about 1976, sales of transite pipe began "going downhill." According to Dascenzo's testimony in the *Webb* lawsuit, Johns-Manville was panicking about asbestos lawsuits between 1974 to 1976. A "crackdown" occurred at the plant. Respirators became mandatory, as did coveralls, in certain areas. Workers were provided with disposable coveralls, showers, and lockers. Workers were fired for not using a respirator or coverall in compliance with the safety rules. By the mid-1970's, OSHA rules prohibited sweeping asbestos dust with brooms.

According to Dascenzo's notes[9] from a July 1, 1976 safety meeting at the Johns-Manville plant in Long Beach, Dascenzo

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[9] During cross-examination of Dascenzo, plaintiffs sought an instruction that limited the consideration of his notes to the third party negligence claim of Special Electric. The trial court inquired whether that was the purpose for which the notes were being submitted. Defense counsel, James Parker, responded "[y]es, and it goes directly to the consumer's expectations, but that's an argument that I will make." The trial court stated, "All right." The court told the jury that it had been instructed on the elements of the consumer expectation test, that Special Electric had an affirmative defense with respect to "other entities that may be liable," and that the notes were being admitted for the purpose of showing "notice."

Later, while the jury was on a break, Farrise objected to the word "notice." She claimed the word "notice" was misleading because although it is applicable to a strict liability claim for failure to warn, it is not applicable to the consumer expectation

told everyone about a new type of respirator with a new type of filter for use at the plant. Ruben Baeza was present at that meeting.

Dascenzo testified that initially, workers felt harassed by the new safety requirements. He held a meeting at which he reminded the workers: 1) they should place all loose fibers in plastic bags; 2) everyone has to be responsible and abide by the new regulations in order to avoid unnecessary risks and hazards; 3) the new rules are designed to protect lives, not harass people; 4) shortcuts will lead to lying to cover up violations of rules; don't take shortcuts; don't lie; protect yourself.

By the mid-1970's, Johns-Manville workers were concerned about the health risks of asbestos. Many, including Ruben Baeza,
belonged to AFL-CIO Chemical Workers union. Because workers were being told by their doctors that they needed medical tests in light of their exposure to asbestos, the union held a meeting with Dr. Irving Selikoff, who discussed the health risks of asbestos. Some union members requested that the company provide better health care, physical examinations, and clothing to cover every

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test. Farrise argued that injecting the concept of notice could mislead the jury to believe that workers are ordinary consumers, which is not true.

Parker argued that notice to consumers is relevant to the consumer expectation test, because "one of the things that forms a consumer's expectation is what information he or she actually receives." Parker argued that his cross-examination of Dascenzo revealed the information the workers received, and that information was relevant to the formation of their expectations about asbestos.

worker at the plant.

As a result of concerns about asbestos and its proper handling at the plant, the union went on strike in July 1976. Dascenzo did not strike because he was management. During the strike, he saw picket signs stating "Company physicians are not adequate"; "JM workers need sputum cytology"; and "Am I killing my family with asbestos?" The strike went on for some period of time and received "quite a bit of publicity" in newspapers and on television. The defense presented a photo depicting a coffin in front of striking workers.

Dascenzo stated that by 1976, he knew that some workers had died from cancer due to asbestos exposure. He testified that by then, "everyone was really aware" of the hazards of asbestos.

OSHA Regulations. At various times during trial, the jury was instructed that OSHA regulations concerning asbestos were relevant only for "purposes of notice." Near the conclusion of the defense case, Parker asked that the jury be reminded of the limiting instruction because he was going to read several OSHA regulations to the jury. The court reminded the jury that OSHA regulations "are to be considered by you for the purposes—they're not the law, but are to be considered for the purposes of notice." Parker then read several OSHA regulations to the jury.

Plaintiffs' Rebuttal Evidence

During rebuttal, additional OSHA regulations were read to the jury by Farrise's associate, Benjamin Adams. Pursuant to a stipulation of counsel, the OSHA regulations that each side had presented were admitted into evidence.

Later, Farrise moved to withdraw the OSHA regulations, explaining they were mistakenly admitted into evidence while

she was at another court hearing. The trial court denied her request. The jury received a copy of the OSHA regulations that were admitted into evidence.

Motions for Nonsuit and Directed Verdict

After both sides rested, Special Electric moved for nonsuit and directed verdict on the design defect claim. It argued that by the mid-1970's, the ordinary consumer—in this case, the Johns-Manville workers—no longer had an objectively reasonable expectation that asbestos was safe. The trial court denied the motions, stating there was sufficient evidence "to permit a jury to consider whether the employees at Johns-Manville were aware of the health hazards of asbestos."

Plaintiffs also moved for directed verdict. Citing Dascenzo's testimony—"that 200 JM employees got into their cars every day on each shift and had lunch with their children and their families with their work clothes on"—plaintiffs argued the evidence was uncontroverted that although the ordinary consumers "may have been aware of some risk to themselves from working in the factory, they were not aware that they could bring the fiber home to their families and cause incurable cancer to their children." The motion was denied.

Trial Court Rulings

Workers as Ordinary Consumers. Throughout trial, the parties disagreed whether workers were ordinary consumers of ML-6 asbestos. The court heard arguments on this issue several times.

Farrise contended that workers are not ordinary consumers as a matter of law. The relevant expectation, she argued, "is that

of the hypothetical reasonable consumer, not the expectation of the particular plaintiff in the case." (*Saller v. Crown, Cork & Seal, Co*. (2010) 187 Cal.App.4th 1220, 1232 (*Saller*).) She claimed that workers are not ordinary consumers because "the product must meet the safety expectations of the general public as represented by the ordinary consumer, not the industry or a government agency" (*Campbell v. General Motors Corp*. (1982) 32 Cal.3d 112, 126–127 (*Campbell*)).[10]

Parker argued that workers are ordinary consumers. Because the test is based on the expectations of the ordinary user of the product, and ML-6 is a specialized material used only in manufacturing finished goods, it is reasonable to conclude that

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[10] In *Campbell*, the plaintiff (Campbell) was injured while riding a bus made by General Motors Corp. (GM). Campbell was seated in a front row seat that had no safety rails or grab bars for the passenger. During a sharp turn, Campbell was thrown across the aisle where she landed on the floor, injuring her hip. (*Campbell, supra*, 32 Cal.3d at p. 117.) At trial, she presented no expert testimony to support her claim that the front row seats were unsafe because there was no handrail or guardrail that she could have used to steady herself. (*Id.* at p. 116.) The trial court granted GM's motion for nonsuit and entered judgment in its favor. (*Id.* at p. 117.) The Supreme Court reversed, holding that Campbell's lay testimony was sufficient to send the case to the jury on the consumer expectation test. The Supreme Court stated that Campbell not only testified "about the accident (her use of the product), but she also introduced photographic evidence of the design features of the bus. This evidence was sufficient to establish the objective conditions of the product." (*Id.* at p. 126.)

the ordinary consumers are the workers at the Johns-Manville plant who used the product.

In ruling that the jury would decide whether workers are ordinary consumers, the trial court relied on *Saller*, which treated workers as ordinary consumers of asbestos. (*Saller*, *supra*, 187 Cal.App.4th at p. 1227.)[11]

Johns-Manville Workers. Farrise sought to have the jury decide the design defect claim without considering the information, warnings, and safety equipment provided to the Johns-Manville workers. In support of her position that the expectations of the workers were not relevant to the consumer expectation test, she relied on *Campbell*, *supra*, 32 Cal.3d at p. 126, which stated that jurors must use their "own sense of

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[11] In *Saller*, *supra*, 187 Cal.App.4th 1220, the plaintiff (Saller) was exposed to asbestos pipe insulation while working at Standard Oil from 1959 to 1967. After being diagnosed with mesothelioma in 2005, Saller sued the manufacturer of the asbestos pipe insulation. At trial, the court instructed the jury on the risk/benefit test for design defect and negligent failure to warn, but refused to instruct on the consumer expectation test. (*Id.* at pp. 1229–1230.) The jury found for the manufacturer. On appeal, the failure to instruct the jury on the consumer expectation test was held to be reversible error. (*Id.* at pp. 1235–1237.) The evidence showed that during his employment with Standard Oil, Saller was not provided with any breathing protection or warned about the health risks associated with the pipe insulation. (*Id.* at p. 1227.) Stating that the "widespread use of asbestos at the plant warrants an inference that workers assumed the product was safe notwithstanding the amount of dust produced," the appellate court concluded the jury should have decided whether the product failed to perform as safely as the ordinary worker would have expected. (*Id.* at p. 1236.)

whether the product meets ordinary expectations as to safety under the circumstances presented by the evidence."

Parker argued that because the workers are the ordinary consumers of ML-6 raw asbestos, the information, warnings, and equipment they received was relevant to the determination of the consumer expectation test. He relied on *Campbell*, *supra*, 32 Cal.3d at p. 127, which stated that "if the product is one within the common experience of ordinary consumers, it is generally sufficient if the plaintiff provides evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety."

Farrise sought an instruction which stated "that for purposes of the consumer expectations test, [the jury is] to consider the hypothetical reasonable consumer and *not* the plaintiff or *the Johns Manville workers* or the government or the industry." (Italics added.) The trial court granted her request, but only in part. It instructed the jury that the ordinary consumer is the hypothetical reasonable consumer, but it did not preclude the jury from considering the expectations of the Johns-Manville workers. The final version of the instruction stated: "The ordinary consumer is a hypothetical reasonable consumer of the product, not the particular plaintiff in the case, or industry, or a government agency."

Final Instruction on Design Defect

To assist the jury in answering Question 7 of the special verdict form—"Did the asbestos fail to perform as safely as an ordinary consumer would have expected when used or misused in

an intended or reasonably foreseeable way?"—the trial court provided this final instruction on the consumer expectation test:

"David and Vana Baeza claim that David Baeza was harmed by asbestos supplied by Special Electric Company, Inc., which was defectively designed.

"David and Vana Baeza claim the product's design was defective because the asbestos did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, David and Vana Baeza must prove all of the following:

- "One, that Special Electric distributed or sold the asbestos;
- "Two, that the asbestos did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;
- "Three, that David Baeza was harmed; and
- "Four, that the asbestos's failure to perform safely was a substantial factor in causing David Baeza's harm.

"The ordinary consumer is a hypothetical reasonable consumer of the product, not the particular plaintiff in the case, or industry, or a government agency.

"The law relating to a defective product applies for the protection of not only purchasers and users of the product, but also for the protection of bystanders and non-users who may be injured by the defective product.

Final Limiting Instructions

Parker requested a final limiting instruction that would allow him to argue that union members, including Dascenzo

before he became part of management, were ordinary consumers and as a result of warnings from the union about the dangers of asbestos, they had "notice" of those dangers. The court granted this request and gave a final limiting instruction that allowed the jury to consider evidence of union activities for the purpose of "notice."

As a whole, the final set of limiting instructions stated:

"During the trial, I explained to you that certain evidence was being admitted for a limited purpose.

"You may consider that evidence only for the limited purpose that I described, and not for any other purpose.

"Evidence of union activities and evidence of Ruben Baeza's union membership has been admitted only for the limited purpose of considering whether and to what extent, if any, Ruben Baeza or other entities have notice of harmful effects related to asbestos.

"Evidence of Johns-Manville's conduct and/or knowledge had been admitted only for the limited purpose of considering defendant[ ] Special Electric's claim that other entities were at fault.

"Evidence of government regulations, including OSHA regulations regarding asbestos, has been admitted only for the limited purpose of considering defendant Special Electric's claim that other entities were at fault and to show notice to those other entities in order for you to decide if those other entities acted reasonably."

Plaintiffs' Closing Argument

Farrise argued that in the 1970's, the ordinary consumer was unaware that asbestos dust on a worker's clothing could be

dangerous to the worker's family. It was up to the jury to decide what the "hypothetical reasonable consumer"—"ordinary people, general public, regular people"—knew about asbestos in the 1970's. She argued that the knowledge of expert users, "super" users, particular plaintiffs, industries, or government agencies was irrelevant to plaintiffs' design defect claim. Farrise stated that under the consumer expectation test, "if a product does not perform like regular people think it should in terms of safety, it is defective under law."

Farrise argued that because so many workers continued having lunch with their families while wearing their dusty clothing, it was obvious the workers were unaware of any health risks to their families. She pointed out that all of the safety warnings were directed at the workers and not their families. Workers were never told, "'Do not go sit in the car with your children and your wives because, if you do, they may get mesothelioma 30 years down the road.'" She argued that based on the evidence, the only rational explanation for Ruben Baeza's conduct is that he did not know the asbestos fibers on his clothing could place his children at risk of cancer several decades later.

Defendant's Closing Argument

Parker argued that in this case, the hypothetical reasonable consumers were the workers at the Johns-Manville plant. Farrise objected that this misstated the law. To avoid disclosing to the jury that this objection had been previously overruled outside its presence, the trial court simply stated, "Okay. Thank you very much. I'll give you what the law is, folks."

After Parker referred to the jury instruction that asbestos was dangerous, Farrise objected that the instruction did not apply to plaintiffs' case and applied only to the defense claim of third party negligence. As before, the trial court thanked Farrise and told the jury that it would be given "the whole body of instructions together to look at."

Parker then displayed a "Power Point" slide (exhibit A in the appellants' opening brief) which stated:

ORDINARY CONSUMERS

JM managers: 1972	Longshoremen: 1974
Ray Dascenzo: 1973	LB Union Strikers: 1976
Sabino Barbosa: 1970s	Pipefitters & plumbers: mid-1970s

Each of these was discussed in turn:

Johns-Manville managers. Notwithstanding the title of the slide, Parker did not argue that Johns-Manville managers were ordinary consumers. Instead, he argued that in the 1970's, Johns-Manville provided its managers with information regarding OSHA and the dangers of asbestos. Johns-Manville told the managers "that warnings needed to be given; that masks and respirators and special clothing needed to be provided; that laundry techniques, special laundry techniques, needed to be developed; special equipment needed to be used when handling asbestos."

Dascenzo. Parker's reference to Dascenzo led to an objection by Farrise that the limiting instruction prohibited "information" from being "argued for purposes of determining who and what an ordinary consumer is." The trial court stated,

"Hold on. Hold on. You've had your chance to argue. He[] has his chance to argue." The court told the jury: "I've given you the total instructions to look at. Now it's up to you to determine at any time if an attorney is giving you what the law is or it's not in accordance with what the law is. But I'll give you what the law is, folks. Thank you." Farrise objected that the argument was improper. After acknowledging the objection, the court allowed Parker to proceed.

Parker did not refer to Dascenzo as an ordinary consumer. Instead, he told the jury that Dascenzo "was the only person still alive that we hear from the witness stand who was at the Long Beach plant. He was a user of the asbestos. He described starting his career at the plant in 1961, and that by the early '70s, he was a foreman of some type and later became a supervisor. And, in fact, he was promoted into management, and he had to leave the union." At this point, Farrise objected, and the trial court stated, "Very well." Parker continued: "So Mr. Dascenzo—and I put the year 1973 because I think a fair interpretation of the evidence, in fact what he actually said on the witness stand, is that certainly, without question, by that year he knew and was aware that asbestos was a health hazard." Farrise again objected, and the court noted the objection. Parker concluded his remarks about Dascenzo with this statement: "I think Mr. Dascenzo knew earlier than that because he was being provided copies of these OSHA regulations. But, you know, 1973 there can be no doubt about Mr. Dascenzo's level of knowledge."

Barbosa. When Parker stated that Barbosa was an "ordinary consumer," opposing counsel did not object. Parker argued without objection that Barbosa "knew David when he was a little boy and teenager, always showered, always changed his

work clothes, always put his work clothes in a special bag. And when he came home, he was always clean and had no dust on him and made sure that when his wife was washing the laundry, it was given to her as safely as he could."

Longshoremen. Parker admitted that longshoremen are not consumers of asbestos. But because they were lifting and moving bags of asbestos, they requested special straps to lift the bags. In addition, "we heard about shrink wrapping the bags so they were even more protected."

Striking Union Members. Parker's reference to striking union members drew an immediate objection. The trial court noted the objection and suggested that plaintiffs' counsel allow Parker to finish his statement. When Parker argued that union workers were "ordinary users of asbestos" and concerned about asbestos in the mid-1970's, Farrise objected that this was "an improper use of the consumer expectations test." The court replied, "Very well."

Pipefitters and Plumbers. There was no objection to Parker's argument that the workers who made the transite pipes were pipefitters and plumbers. Parker stated that in the mid-1970's, some of these workers "were getting sick from exposure to asbestos, and they began to file lawsuits against Johns-Manville. Now, that evidence came out through Mr. Dascenzo when his own counsel asked him about it. I followed up with it. But his own counsel brought that out. And this tells us that people who were working with asbestos products, who were getting sick from exposure to the asbestos, were aware and were claiming through the legal process that asbestos was a health hazard."

Objection to Slide Overruled. During the next recess, Farrise objected to the "Ordinary Consumers" Power Point slide.

She claimed the slide erroneously identified Johns-Manville managers, Dascenzo, Barbosa, longshoremen, union strikers, pipefitters and plumbers as ordinary consumers. Parker defended the slide. He asserted that workers were ordinary consumers and the expectations they had about asbestos should not be decided in a vacuum without any idea of how the product was actually used or thought of at the time. He argued that the circumstances surrounding the product's use—the OSHA regulations, warnings, safety requirements, and union strike activities—were relevant to the jury's evaluation of plaintiffs' design defect claim.

The court overruled Farrise's objection. The court stated that the jury had been properly instructed, further instructions were not necessary, and the jury would decide whether workers were ordinary consumers.[12] The jury returned to the courtroom and Parker resumed his argument.

OSHA. When Parker mentioned OSHA regulations, an objection was raised. The court acknowledged the objection and

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[12] The court said: "Well, we certainly have discussed this not just right now, but on several occasions throughout the trial when we were selecting jury instructions. But I did make my ruling. And we've given an instruction as to who the ordinary consumer is. [¶] It probably does need some clarification by the appellate court down the line. [¶]At this point . . . plaintiffs' motion is denied. It's up to both of you to argue to the jury who you believe the ordinary consumer is or isn't. And the best we have to do are the instructions that I think the Court has with respect to the cases that have been decided in this developing, highly complex area of the law. [¶] But your objections are all noted for appellate court review, and I appreciate the arguments of both of you."

informed the jury that all of the instructions including the limiting instructions would be available to them. Parker then referred to trial exhibits regarding the creation of OSHA. Farrise objected "that the Federal Register in 1972, OSHA, is being displayed to the jury as part of an improper argument for the purposes of OSHA."

At this point, the trial court prohibited further speaking objections and gave plaintiffs a running objection. The court told the jury to follow the limiting instructions and consider OSHA regulations solely for the purpose of notice. Farrise apologized, and the court responded, "That's all right. We have to get some fluidity here. But the jury has been instructed multiple times."

Parker argued that on December 7, 1971, there was a congressional enactment that defined asbestos as a health hazard, established permissible exposure limits, and mandated the following warning in the workplace: "'Caution, contains asbestos fibers. Avoid creating dust. Breathing dust may cause serious bodily harm.'" Farrise objected that this was a violation of the limiting instruction. The trial court reminded counsel that speaking objections were not allowed.[13] After a side-bar

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[13] "THE COURT: Okay. Hold on. Hold on. The jury instruction is being displayed, and your previous comments have been part of the record. And I have made rulings on them.
"MS. FARRISE: Your Honor, there's no –
"THE COURT: And you don't have to reargue that to the jury.
"MR. PARKER: Your Honor, I've been patient.
"THE COURT: Hold on.
"MR. PARKER: But at this point I need to say that it's improper to try to argue during my argument.
"THE COURT: Just a minute.
"MR. PARKER: Thank you.

discussion, the court instructed the jury to draw no conclusions from the objections themselves.[14]

Question No. 7. After discussing the warnings and safety equipment provided to workers at the Johns-Manville plant, Parker turned to Question No. 7 of the special verdict form which stated: "Did the asbestos fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?" Parker urged the jury to answer "no" to this question, which was "the heart of the case."

Hypothetical Factory Worker. Parker then asked the jurors to place themselves in the situation of a hypothetical factory worker whose "job is to open bags of raw asbestos, drop them into the hopper, into the machinery. And that's what you'll be doing

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"THE COURT: So if that's the case, I'll ask you not to – at this point I'll ask, if you do have an argument, that you no longer make a speaking objection in front of the jury, but you ask to approach the bench. And then I'll go out into the hall and hear it. But I don't want the jury to hear standing argument from either one of you as to—as to what is proper or improper. I'll rule on that, and then the jury can hear it."

[14] "Before we finish, before we started with the closing arguments, I told you that you may hear objections during closing arguments. And I just want to make sure that when you hear objections, that you're to draw no conclusions either way just because the objections are being made, no conclusions either way. And certainly never draw any conclusion that I have an interest in the outcome of this case. That's up to you, the triers of fact. You're the judges in this case."

for the first phase of your work there. [¶] So when you walk into the plant, you're handed a mask, you're handed coveralls. And when you get to the place where the bags of raw asbestos are, you're given a respirator. And you're fitted with a respirator, the special air thing to make sure you don't breathe anything except that air. [¶] And as you go to each bag to open it up, there's a warning on it, 'Health hazard. Be cautious.' [¶] And then you attend a safety meeting. You're handed a pamphlet, and it tells you all about these hazards. And it directs you to the change room and the locker area, and you see Mr. Sabino Barbosa. And he's in the shower, and he's taking a shower. And he's cleaning himself off."

Parker then asked, "What is your expectation for that hypothetical person?" Farrise objected that this was "an improper argument that improperly combines consumer expectation and exposure." The court stated: "Thank you. It is noted."

Resuming his argument, Parker inquired, "What is your expectation at that point? If your expectation is that this is perfectly safe and life is good, then I think that's an unreasonable conclusion. [¶] I think your expectation is 'I'm working with something that could kill me. I'm working with something that I'd better stay as far away from as I can, protect myself as best I can. And I sure as heck don't want to expose anybody else to this, be it my neighbors, be it the gentleman at the bar that I stop by on Friday night, be it my family.' [¶] That's 1973. I don't know that that was true, say, in 1964 for an ordinary user. But by 1973 wasn't it true?"

Plaintiffs' Rebuttal Argument

In plaintiffs' rebuttal closing argument, Farrise displayed Parker's Power Point slide titled "Ordinary Consumers." Farrise stated that the attitudes of the "the longshoreman and Johns-Manville managers and Mr. Dascenzo and all of these people" were irrelevant to plaintiffs' design defect claim against Special Electric. She reminded the jury that the ordinary consumer is the hypothetical reasonable consumer. She argued that defense counsel's references to "OSHA and what a government agency did or didn't do or did or didn't say" were relevant to the defense claims only. She pointed out there were separate questions on the special verdict form for plaintiffs' strict liability claim and defendant's third party negligence claim. She argued that the limiting instructions precluded the jury's use of OSHA regulations in determining the expectations of a hypothetical ordinary consumer.

Farrise argued that because workers were not warned about invisible fibers on their clothes that could place their families at risk of cancer, the workers had no expectation that family members would be at risk for mesothelioma. She claimed that the general public was unaware there was no safe level of exposure; to the contrary, the prevailing view was that "if people are not exposed to excessive amounts and prolonged exposure, we think they'll be okay."

Questions During Deliberations

The case was submitted to the jury on a Wednesday afternoon. On Friday, the jury sent two notes regarding Question 7 on the special verdict form ("Did the asbestos fail to perform as safely as an ordinary consumer would have expected when used

or misused in an intended or reasonably foreseeable way?"). The first note stated the jury was deadlocked on this question. After denying plaintiffs' request to instruct the jury that industry standards, warnings, knowledge and government regulations were not relevant to the consumer expectation test, the trial court gave a standard instruction for deadlocked juries (CACI No. 5013). The jury then resumed its deliberations.

Later that day, the jury sent a second note stating: "We all interpret the Question 7 different. We have tried to break down the verbiage of 7 [¶] 'asbestos failing to perform.' [¶] ? Product itself [¶] ? Result of the use [¶] How do we interpret 'would have expected' [¶] Do you have to have an expectation."

The trial court discussed this note with counsel. Farrise suggested the jury was confused by Parker's "Ordinary Consumers" Power Point slide and Parker's arguments that the jury could consider the knowledge and information of Johns-Manville, the union, and managers in determining the expectations of the ordinary consumer. Farrise requested two additional instructions. First, "that the product at issue is not the pipe. It is asbestos." And second, that it was for the jury to determine, as members of the general public, the safety expectations of the hypothetical consumer of asbestos.

Parker argued that additional instructions were not necessary. He pointed out that the jury's note—which did not mention his closing argument or the instructions—was directed at the special verdict form.

After hearing the views of both counsel, the trial court stated that on Monday each side would be allowed to present 15 minutes of additional closing argument to the jury in order to address the issues raised by the jury's note. Farrise objected that

because the jury was having problems with the instructions, additional closing arguments would not resolve anything because both sides would simply argue opposing legal positions. Instead, she requested a clarifying instruction on the parameters of the consumer expectation test. The trial judge invited the attorneys to email him their proposed additional instructions over the weekend.

On Monday morning, the trial court reviewed the parties' proposed additional instructions.[15] The court declined to give the proposed additional instructions because of their similarity to the existing instructions. The court stated that its previous rulings

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[15] Plaintiffs' proposed additional instruction stated: "Under the consumer expectation legal test asbestos fiber 'failing to perform' should be interpreted in connection with the safety of the product, and not whether the product failed to perform in terms of product use or function.

"Asbestos fiber may perform exactly as intended as an ingredient added to a mixture to make a pipe product, but still be defective under law in terms of safety.

"'Failing to perform' under this legal test means that an ordinary consumer, who is a hypothetical product user, did not expect the asbestos to be unsafe as to serious injury or cancer when the asbestos fiber was used for its intended purpose.

"In order to interpret what 'would have been expected,' as jurors you are the factfinders and you may use your own sense of whether the asbestos fibers met ordinary expectations as to its safety under the circumstances presented by the evidence.

"Also, evidence of what the scientific or industrial community or a government agency knew about the dangers of asbestos and when they knew it is not relevant to show what the ordinary consumer of asbestos fibers reasonably expected in terms of safety at the time of David Baeza's exposure."

had covered all of the legal issues and that counsel would be free to argue those issues to the jury.

Plaintiffs' Additional Closing Argument. In her additional closing argument, Farrise argued that the "product" at issue in this case is "asbestos" rather than the finished pipes made by Johns-Manville. She argued that it was up to the jury to determine the expectations of the ordinary consumer with regard to the safety of asbestos. She claimed that the ordinary consumer expected asbestos to be safe.

Farrise argued that in the 1970's, the ordinary consumer was unaware that invisible fibers on a worker's clothing would place family members at risk of cancer. She stated that because the product fails the consumer expectation test, the jury should answer "yes" to Question 7 of the verdict form.

Farrise claimed that the workers would not have continued exposing their families to their dusty clothes unless they thought asbestos was safe. She asserted that Ruben Baeza did not violate the company's safety rules and expected the fibers on his clothes to be safe. Because the raw asbestos fibers were not safe, they were defective and the product fails the consumer expectation test.

Defendant's Additional Closing Argument. Parker argued that ordinary workers did not believe asbestos was safe in the mid-1970's. Just as some people continued smoking after hearing that cigarettes can cause cancer, some workers continued exposing their families to asbestos dust after hearing that asbestos was hazardous.

Farrise raised numerous objections to Parker's statements, such as:

- The only evidence presented at trial regarding the expectations of the consumer involved the expectations of the employees of Johns-Manville. (In response to Farrise's objection, the court stated, "Very well. I've ruled on it.")
- By 1980, the hypothetical reasonable consumer should have known about the hazards of asbestos (In response to Farrise's objection, the court stated, "It's ruled on. Thank you. Go ahead.")
- But before 1970, an ordinary consumer would not have had an expectation that asbestos was dangerous. (The court overruled Farrise's objection.)
- Johns-Manville workers were given safety pamphlets and information as a result of OSHA regulations. (The court overruled Farrise's objection and stated, "Read the limiting instructions.")
- Mr. Dascenzo testified that by the early 1970's, asbestos was a known health hazard. (The court overruled Farrise's objection and directed the jury to refer to the limiting instructions.)

Eventually, the court granted Farrise a "running objection." Later, Farrise requested that the jury be told to disregard Parker's statement that there was "an explosion of information" regarding the hazards of asbestos. The court reminded the jury to focus on the instructions given. When Parker referred to the OSHA regulations that had been admitted into evidence, Farrise objected that there was a limiting instruction and the OSHA regulations were not relevant to the consumer expectation test. The court stated: "Thank you. I have instructed already on that issue."

Parker concluded his remarks by stating there was no evidence that ordinary consumers in the 1970's believed asbestos was safe. Common sense tells us that by the 1970's ordinary consumers knew that asbestos was not safe. Plaintiffs did not meet their burden of proving that ordinary consumers continued to believe in the 1970's that asbestos was safe.

Motion to Strike. Farrise moved to strike Parker's entire additional closing argument as improper. Parker denied any impropriety. The motion to strike was denied.

Special Verdict Findings

The jury answered the first set of questions on the special verdict form in favor of plaintiffs. The jury found that Special Electric was a supplier of asbestos to Johns-Manville and was in the same chain of distribution, and that its asbestos was not misused or modified after it left its possession. However, the jury answered "no" to Question No. 7 on the consumer expectation test. In light of this answer, the jury followed the instructions and returned the form without answering any further questions.

Motion for Mistrial and Judgment

After the jury returned its special verdict responses, plaintiffs' counsel moved for a mistrial based on defense counsel's improper closing argument. The motion was denied.

The trial court polled the jury. The polling showed that nine jurors answered "no" to Question No. 7, and three answered "yes" to that question.

The trial court entered judgment for Special Electric based on special verdict finding number 7. This timely appeal followed.

DISCUSSION

Plaintiffs seek a reversal of the judgment, claiming "the jury was unduly, improperly and prejudicially confused about what evidence it should consider in making [its] determination [on the consumer expectation test]. That confusion resulted from two interconnected problems: (1) Defense counsel's misconduct in misleading the jury about what evidence was, in fact, relevant to that determination; and (2) The trial court's misconduct in failing to constrain the defense counsel's prejudicially erroneous arguments and its failure to correctly address the jury's resulting confusion through adequate jury instructions."

I

In order to place the misconduct allegation in its proper context, we begin by discussing the trial court's rulings and the evidence that supported the verdict.

Workers as Ordinary Consumers. The trial court ruled that the jury would decide whether the workers were ordinary consumers of ML-6 raw asbestos fibers. We agree with this ruling. Given the undisputed evidence that ML-6 is a specialized product used solely for manufacturing finished goods, the evidence showed that the users of the product were the workers at the Johns-Manville plant. The record therefore supports a reasonable inference that the workers are the relevant community of users of this particular product. (See *Saller*, *supra*, 187 Cal.App.4th at p. 1236 [ordinary consumer of defendant's asbestos insulation included refinery workers at a Standard Oil facility where the insulation was used].)

Circumstances of Use. The trial court ruled that evidence of the circumstances surrounding the use of ML-6 raw asbestos fibers at the Johns-Manville plant was relevant to the consumer

expectation test. This was a correct application of *Campbell*, *supra*, 32 Cal.3d at p. 127. In light of the scientific consensus that raw crocidolite asbestos is highly toxic, and in fact known to be so toxic that its use became subject to regulation in the workplace in the early 1970's, the trial court properly found that the dissemination of that information to the workers was relevant to the design defect claim. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317 ["Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion."].)

Notwithstanding that a jury may apply its "own sense" of what an ordinary consumer would expect (*Campbell*, *supra*, 32 Cal.3d at p. 126), *Campbell* does not prohibit objective evidence of the conditions of a product or its use. The same is true of *Saller, supra*, 187 Cal.App.4th 1220. In *Saller* there was no objective evidence of the conditions in which the product was used, and the court had no occasion to rule on its admissibility. Nevertheless, *Saller* correctly predicted that such evidence would be "useful" in another case. (*Id.* at p. 1236, fn. 11.)

As we have discussed, the jury was instructed that the ordinary consumer is the "hypothetical reasonable consumer" and not a manufacturer or a government agency. This instruction was based on *Campbell*, *supra*, 32 Cal.3d at pp. 126–127, and there is nothing in *Campbell* that precludes the jury from considering the information, warnings, and safety equipment that were provided to the workers who used ML-6. In order to determine the expectations of product safety held by the "hypothetical reasonable consumer," the jury is allowed to consider the relevant circumstances surrounding the use of the product. (*Campbell*, *supra*, 32 Cal.3d at p. 127.)

Insufficient Evidence. In their reply brief, plaintiffs challenge the assertion in Special Electric's respondent's brief that the verdict is supported by substantial evidence. According to plaintiffs, the record does not support a reasonable inference that the ordinary worker believed the dust on his clothing posed a risk to his family. Plaintiffs contend that even though Barbosa, David's grandfather, had showered and changed his clothes, this does not reasonably suggest that he did so because he thought the dust was hazardous to family members. We disagree.

Even assuming Barbosa's conduct is not sufficient by itself to support the jury's answer to Question 7 of the special verdict form, that was not the only circumstantial evidence relevant to that issue. Dascenzo's testimony showed, for example, that workers were told to bring their dusty clothes home in sealed bags and to warn the persons who washed their clothes to keep the dust from becoming airborne. When Ruben Baeza cut open bags of asbestos he was required to wear a respirator and coveralls. Brooms were outlawed because they kicked up more dust. Warnings were placed on the bags of raw asbestos that came into the plant, and the empty bags were placed into special disposal bags that also contained warnings. Warnings appeared all around the factory, and eventually on the transite pipes themselves. Workers were told they needed special medical tests because they worked with asbestos.

Saller is instructive and reinforces our determination that the jury's verdict is supported by substantial evidence: "*Barker* requires that the facts permit an inference that the product did not meet minimum safety expectations of its ordinary users. (*Soule*, *supra*, 8 Cal.4th at p. 568.) To establish this inference, the testimony of a single witness is sufficient. (See *People v.*

Richardson (2008) 43 Cal.4th 959, 1030–1031 [testimony of single witness is sufficient for proof of fact].) Furthermore, there was nothing in the record to support [the defendant manufacturer's] assertion that Saller's testimony was subjective. On the contrary, he testified to undisputed facts: the plants where he worked, the jobs he performed, the procedures of his coworkers, the use of asbestos insulation, and the dust in the air. Saller's work experience and exposure to the regular and systematic use of asbestos insulation could permit the jury to draw conclusions about whether the insulation performed as safely as an ordinary consumer (in this case a refinery worker) would expect." (*Saller*, *supra*, 187 Cal.App.4th at p. 1237.)

II

In closing argument, "'"[a]n attorney is permitted to argue all reasonable inferences from the evidence, . . ." [Citation.]'" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 795 [attorneys have wide latitude to fully discuss their views on what the evidence shows and what conclusions may be fairly drawn from the evidence].)

The record does not support the allegation that Parker improperly referred to evidence admitted for a purpose unrelated to the consumer expectation test. As we have discussed, the circumstances in which the product was used are relevant to the consumer expectation test. Because the relevant circumstances included the information, warnings, and safety equipment provided to the workers, Parker was free to argue that evidence to the jury. (*Saller*, *supra*, 187 Cal.App.4th at p. 1237 [injured plaintiff's "work experience and exposure to the regular and systematic use of asbestos insulation could permit the jury to draw conclusions about whether the insulation performed as

safely as an ordinary consumer (in this case a refinery worker) would expect."]; *Campbell*, *supra*, 32 Cal.3d at p. 127 [circumstances surrounding the injury are relevant to the consumer expectation test].)

Morton v. Owens-Corning Fiberglass Corp. (1995) 33 Cal.App.4th 1529, 1536, is distinguishable. In contrast to this case, there was no evidence that the workers in *Morton* had been warned about the risks of asbestos. Because the workers were not warned, the knowledge of the scientific community could not have influenced their expectations and therefore was not relevant to the application of the consumer expectation test in that case. (*Id.* at p. 1538.) But here, the workers were repeatedly warned that asbestos is hazardous, and the effect of those warnings on the expectations of the hypothetical reasonable consumer was correctly submitted for consideration by the jury.

The references to OSHA regulations were not improper. The regulations were relevant to the defense theory that by the time ML-6 arrived at the Johns-Manville plant in the mid-1970's, Johns-Manville had implemented the safety measures required by OSHA, and because of those measures the workers were aware of the dangers of asbestos.

The Power Point slide titled "Ordinary Consumer" was not improper. Contrary to plaintiffs' objection, Parker did not argue that all of the entities and persons listed on the slide were ordinary consumers. The slide was a timeline that demonstrated the growing awareness of the dangers of asbestos.

The objection to Parker's reference to striking union workers was properly overruled. The final limiting instruction was revised to accommodate Parker's argument that the union

activities were relevant to the issue of notice to workers regarding the hazards of asbestos.

Plaintiffs' reliance on *Granville v. Parsons* (1968) 259 Cal.App.2d 298 is misplaced. Unlike Parker, who made no improper argument, the defense attorney in *Granville* made a closing argument that violated an evidentiary ruling. An objection was raised, but the trial court did not give an instruction that would have addressed the issue. *Granville* is distinguishable because there was no misconduct in this case.

Love v. Wolf (1964) 226 Cal.App.2d 378 also is distinguishable because it involved egregious misconduct that permeated the entire proceedings. Nothing of the sort occurred in this case.

III

In response to the jury's note concerning Question 7 of the special verdict form, the trial court granted each side 15 minutes of additional closing argument. Plaintiffs contend this was error in light of the jury's confusion regarding the evidence that it was to consider in determining the design defect claim.

We are not persuaded the jury was confused by the instructions or the evidence it was to consider. The jury's note regarding Question 7 of the special verdict form did not refer to the instructions, the evidence, or the closing arguments. The note was directed at the special verdict form itself, and the trial court did not err in its determination that neither re-reading the instructions nor providing additional instructions (the proposed instructions by plaintiffs, which were similar to the instructions already given) was necessary.

Viewing the instructions as a whole, they provided a fair and correct statement of the applicable law. (*Sprague v. Equifax,*

Inc. (1985) 166 Cal.App.3d 1012, 1047–1048.) We assume, as we are required to do, that the jury understood and followed those instructions. (See *Roberts v. Del Monte Properties Co.* (1952) 111 Cal.App.2d 69, 78 [appellate court will assume the jury understood and followed instructions]; *Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 424 [same].)

"A judgment may not be reversed on appeal, even for error involving 'misdirection of the jury,' unless 'after an examination of the entire cause, including the evidence,' it appears the error caused a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) When the error is one of state law only, it generally does not warrant 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. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)" (*Soule*, *supra*, 8 Cal.4th at p. 574.) Based on our review of the record, we conclude that the response to the jury's note was proper, the jury was correctly instructed on the law, and its finding for Special Electric was supported by substantial evidence.

DISPOSITION

The judgment is affirmed. Defendant is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.