SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Southwest District, Torrance Courthouse, Department E

BC475956 December 12, 2023
JOEL HERNANDEZCUEVA ET AL VS AMERICAN STANDARD INC ET AL 8:30 AM

Judge: Honorable Cary Nishimoto
Judicial Assistant: Michelle Milligan
Courtroom Assistant: None

CSR: Alicia Renee Desmond, CSR#13037
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

Other Appearance Notes: For Plaintiff(s): Benjamin H. Adams, Rachel A. Gross, Jonathan George; For Defendant E.F. Brady Company, Inc.: Jerry Popovich; For Defendant Elementis Chemicals, Inc.: Heather L. Weakley, William H. Armstrong; For Defendant Union Carbide Corporation: Mary T. McKelvey, David Schultz, Andrew D. Silverman, Amari L. Hammonds.

NATURE OF PROCEEDINGS: Hearing on Motion to Tax Costs Jointly filed by Defendants Elementis Chemicals Inc., Union Carbide Corporation, and E.F. Brady Company, Inc. / Short-Cause; Hearing on Motion for Judgment Notwithstanding the Verdict by Defendant Elementis Chemicals, Inc.; Hearing on Motion for Judgment Notwithstanding the Verdict by Defendant E.F. Brady Company, Inc.; Hearing on Motion for Judgment Notwithstanding the Verdict by Defendant Union Carbide Corporation; Hearing on Motion for New Trial - Joint Motion by Defendants Union Carbide Corporation, E.F. Brady Company Inc., and Elementis Chemicals, Inc. (Re: Hernandezcueva BC475956)

The Hearing on Motion for Judgment Notwithstanding the Verdict by Defendant E.F. Brady Company, Inc. scheduled for 12/12/2023 is 'Held - Motion Granted' for case BC475956.

The Hearing on Motion for Judgment Notwithstanding the Verdict by Defendant Elementis Chemicals, Inc. scheduled for 12/12/2023 is 'Held - Motion Granted' for case BC475956.

The Hearing on Motion for Judgment Notwithstanding the Verdict by Defendant Union Carbide Corporation scheduled for 12/12/2023 is 'Held - Motion Granted' for case BC475956.

The Hearing on Motion for New Trial - Joint Motion by Defendants Union Carbide Corporation, E.F. Brady Company Inc., and Elementis Chemicals, Inc. scheduled for 12/12/2023 is 'Held - Motion Granted' for case BC475956.

The Hearing on Motion to Tax Costs Jointly filed by Defendants Elementis Chemicals Inc.,

BC475956 December 12, 2023
JOEL HERNANDEZCUEVA ET AL VS AMERICAN STANDARD INC ET AL 8:30 AM

Judge: Honorable Cary Nishimoto
Judicial Assistant: Michelle Milligan
Courtroom Assistant: None

CSR: Alicia Renee Desmond, CSR#13037
ERM: None
Deputy Sheriff: None

Union Carbide Corporation, and E.F. Brady Company, Inc. / Short-Cause scheduled for 12/12/2023 is 'Held - Motion Granted' for case BC475956.

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Alicia Renee Desmond, CSR#13037, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

Matters are called for hearing.

Counsel are given a copy of the court's tentative for review in open court.

Superior Court of California, County of Los Angeles
South-West District, Torrance Courthouse, Department SWE

JOEL HERNANDEZ**C**UEVA, Deceased, JOVANA COLLANTES, Individually and As Successor -In-Interest To JOEL HERNANDEZ**C**UEVA, Deceased; JOANNA HERNANDEZ, JOEL HERNANDEZ, JENNY HERNANDEZ, NOHELY HERNANDEZ,
Individually and As Heirs To JOEL HERNANDEZ**C**UEVA, Deceased
vs.
E.F. BRADY COMPANY, INC., ELEMENTIS CHEMICALS, INC., UNION CARBIDE CORPORATION
Case Number BC475956

JOINT MOTION of defendants Union Carbide Corporation, Elementis Chemicals, Inc., and E. F. Brady Company, Inc. for NEW TRIAL and vacatur or, alternatively, REMITTITUR of excessive damages. Moving parties contend and argue, and the court finds as set forth hereinbelow:

1. JUROR MISCONDUCT: Quotient Verdict and Jury Consideration of Inadmissible Evidence.

a. Two of the jurors testified to an improper damages verdict. Jurors #5 and #12 attested by declaration that the jury was told by one of the jurors during deliberations to submit a paper containing a dollar figure that each thought the damages should be. The amounts were added and divided by twelve to reach the verdicts, conduct which occurred without further deliberation. This constitutes a "quotient verdict" which is prohibited expressly by the court's jury instructions. CACI 5009. CCP §657(2). Chronakis v Windsor (1993) 14 Cal.App.4th 1058, 1064 (Quotient Verdict); Dixon v Pluns (1893) 98 Cal. 384, 387 (Chance Verdict). Declarations of Jurors #5 Jackie Margetts and #12 Michael Tamer.

b. Jurors also attested that Juror #8 withheld during voir dire that her father died when the juror was very young, that the mother made no claim and never remarried, resulting in financial hardship. She lamented to other jurors during deliberations that she resented the trial defendants

for having caused plaintiff's decedent's death and wanted them to pay for it. Acting as plaintiffs' advocate for punishing defendants based on wholly inflammatory, irrelevant and prejudicial, non-evidentiary information, all contrary to the court's jury instructions. Juror #8 demonstrated that she had a state of mind preventing her from "acting with entire impartiality, and without prejudice to the substantial rights of any party." In re Manriquez (2018) 5 Cal.5th 785, 798; People v Nesler (1997) 16 Cal.4th 561, 581. A juror who conceals information during voir dire commits misconduct and undermines the jury selection process. CCP §677(2) In re Hitchings (1993) 6 Cal.4th 97, 111. Wiley v Southern Pacific Transportation Co. (1990) 220 Cal.App.3d 177, 180. Jurors #5 & #12 further attested that Juror #8 wanted to punish defendants because she (the juror) and her mother did not receive money after her father's passing, that defendants needed to be punished because they would repeat this conduct, that they were going to pay.

2. Code of Civil Procedure §657(2) NEW TRIAL RELIEF, provides "misconduct of the jury: and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors".

Plaintiffs' opposition attempts to minimize the significance of these facts, ultimately concluding that there is no prejudice. This conclusion myopic with little or no value.

a. Additionally, plaintiffs failed to prove that Mr. HernandezCueva was exposed to defendants' products and that such products were a substantial factor in causing his mesothelioma. UCC Motion For New Trial, 3:3-9.

Elementis Chemicals, Inc. has contended from the outset, including in a mini-opening statement that lasted for 45 minutes, that it did not, nor did its predecessor HCP (Harrisons & Crossfield (Pacific) ("HCP"), ever sell any UCC Calidria asbestos to Hamilton. Plaintiffs' case against Elementis is based on the allegation that Elementis Chemicals, Inc.'s predecessor, HCP, sold UCC's Calidria Chrysotile to Hamilton, which incorporated it into joint compound in which decedent was supposedly exposed to when he cleaned debris at Park Place decades later. Motion, 2:5-9. In fact, and Elementis submits Exhibit A, trial transcript of May 23, 2023, and Exhibit B partial transcript of trial proceedings of May 22, 2023, appended to its motion for judgment notwithstanding the verdict, to establish that HCP never sold UCC's Calidria Chrysotile to Hamilton. The testimony from Robert Mann's deposition, was that UCC's SG-210 asbestos between 1970-1977, could be obtained either directly from UCC or from HCP. Discovery responses of UCC relating to its supply of UCC asbestos to Hamilton, read to the jury on May 22, 2023, was of the "standard Grade 210 Calidria Asbestos. (Transcript pp 1696:13-1704:24) but does not mention HCP. The only evidence of UCC Calidria asbestos to Hamilton Materials is that UCC supplied it directly to Hamilton Material, without any evidence that HCP supplied any UCC asbestos to Hamilton Materials. Further, Elementis presented witness Willis Hamilton who testified that this product consisted of between 2% and 4% asbestos, that Hamilton Materials' formula was 0%-3% asbestos. He also testified that, in accord with OSHA requirements, an asbestos warning was displayed on any Hamilton's joint compounds containing asbestos. *No*

witness testified at trial that asbestos warnings were seen on the joint compound used at Park Place.

Moreover, prior to decedent's employment at Park Place, State and Federal OSHA regulations required building owners and employers to take steps relating to potential as best those exposures. The Park Place owner established that there was no asbestos relevant to the claim in this case. Plaintiffs failed to produce any evidence to the contrary.

Further, there is no evidence that walls installed at Park Place by E.F. Brady were among those involved with subsequent remodeling work. No specific evidence indicated specifically which walls were remodeled. E.F. Brady installed the interior "outside" walls and only a few office walls.

Employers in the 1990 decade were required to test for asbestos to avoid exposure to employees. None of decedent's employers testified to any asbestos hazard or provided any asbestos precautionary measures.

b. It is without doubt that jurors were deprived of the deliberation process on certain issues. Substantive deliberations were precluded by one or more jurors whose command over other jurors suppressed individual initiative and expression. These incidents, individually or together as a group, constitute a denial of due process and warrant a new trial.

3. SURVIVAL DAMAGES:

The survival claim belongs to decedent's wife, Jovanna Collantes, not to the decedent's children. The jury awarded $534,149.00 in economic (medical) damages before decedent's passing and $2,271,895.00 for post death damages (financial support $1,383,000.00 and household services $888,895.00.) or a combined $2,806,044.00.

In addition, the jury awarded Jovana Collantes $29,530,000.00 in past and future noneconomic survival damages. The noneconomic damages awarded to Jovana Collantes was made before the predicate verdict questions about punitive damages which did not ask for a monetary assessment of punitive damages. This noneconomic survival damages award, standing alone, is unsupported by the evidence, is clearly excessive and warrants a new trial. The jury obviously substituted punitive damages for non-economic survival damages.

· ***PAST*** NON-ECONOMIC **SURVIVAL DAMAGES** to Jovana Collantes including loss of enjoyment of sexual relations for Jovana Collantes, $14,830,000.00. There may have been at most a scintilla of evidence to warrant what amounts to punitive damages under the guise of past noneconomic damages for loss of enjoyment of sexual relations, etc. The court finds that survival non-economic damages prior to death of $1,000,000.00, is more than reasonable amount for *past* survival noneconomic damages for Jovana Collantes.

· *FUTURE* **NON-ECONOMIC SURVIVAL DAMAGES** to Jovana Collantes $14,700,00.00. Again, there is

nothing in the evidence to warrant almost $15M in noneconomic future survival damages. Such damages are outside the bounds of the evidence and are excessive. The court finds that $1,000,000.00 is more than a reasonable amount for *future* survival non-economic damages for Jovana Collantes.

PUNITIVE DAMAGES Verdict: $75,000,000.00. As set forth in the motion for judgment NOV, there is insufficient evidence of malice, fraud or oppression by a Union Carbide officer, director or managing agent.

Beyond past and future non-economic damages, the punitive damage award also is excessive on its face. Constitutional due process establishes that such damages be less than $2.5 million, i.e. [R]atios of punitive damages to compensatory damages that greatly exceed 9 or 10 to 1 are presumed to be excessive and therefore unconstitutional. Nickerson v Stonebridge Life Ins. Co. (2016) 63 Cal.4th 363, 367. So excessive as to be unconstitutional. There is an no standard to assess punitive damages except what is a reasonable amount. The punitive damages awarded would enable plaintiff Jovana Collantes to buy twenty Mar-a-Lago properties or buy a large chunk of General Motors and luxury properties bordering Central Park in New York City. The award of punitive damages is so extraordinarily exaggerated as to be excessively unreasonable, unconstitutional overkill. There was no evidence that the conduct of defendant would warrant this punitive damage award which would permit decedent's wife to live like royalty nor is there any substantial evidence to justify $75,000,000.00. The court finds that a total of $10,000,000.00 is more than reasonable amount for survival punitive damages to punish defendants.

4. WRONGFUL DEATH DAMAGES:

CCP §377.61: damages recoverable "may not include damages recoverable under §377.34", that is, punitive damages. The jury verdict for the *wrongful death claim* of noneconomic damages was $14,830,000.00 for past noneconomic loss plus $14,700,000.00 for future noneconomic loss for a total award of $29,530,000.00. The five plaintiffs would receive $5,906,000.00 each. Such damages are unreasonable and not warranted by the evidence to compensate for *society, comfort and protection*. See CCP §657(5)-(6) or remittitur under CCP §662.5. Such a large award is in fact a disguised punitive damage award which is statutorily prohibited. Although this was a close-knit family, the valuation or evaluation by the jury is supposed to be the *value of "society, comfort and protection" lost* through the wrongful death of decedent, *not the "grief or sorrow" upon the death of decedent or the mental and emotional distress.* The jury obviously failed to comprehend the difference or completely ignored the difference. Corder v Corder (2007) 41 Cal.4th 644, 662; Krause v Graham (1977) 19 Cal.3d 59, 72; *sentimental value* of decedent's loss is not a component of wrongful death noneconomic damages, Nelson v City of Los Angeles (2003) 113 Cal.App.4th 783, 793. Such statutory damages *must also be reasonable* (Civil Code §3359) as well as *fair and reasonable* (Pearl v City of Los Angeles (2019) 36 Cal.App5th 475, 485; See also CCP §§657, 662.5.

The court is granting a new trial and/or reduction of damages to an amount it "determines from the evidence to be fair and reasonable. The court has the discretion to grant a new trial or remittitur for excessive damages or if damages are untethered from evidence and reality. It is clear from the verdict that the jury rendered what for all intents and purposes constituted punitive damages which is statutorily prohibited by CCP §377.61 in a wrongful death action. For the wrongful death claim by Jovanna Collantes and decedents four children, ***remittitur*** is warranted for a total amount of wrongful death damages of $6,906,000.00 to be divided among the five plaintiffs. This amount is subject to set off for prior settlements.

Pervasive misconduct by plaintiffs' counsel. In Having been admonished prior to trial, plaintiffs' counsel engaged in preconditioning the jury during opening statement that counsel is seeking $55 Million dollars, to which the jury gasped. Plaintiffs' counsel also argued for sending a message to impact the community, return a verdict with "big, big consequences" for our society" and for this community", seeking grief and emotional distress damages under the wrongful death claim. Throughout the jury trial, plaintiffs' counsel and repeatedly elicited impermissible causation testimony prohibited by pretrial motions, from Dr. Arthur Frank and Dr. William Longo. Outrageous misconduct by plaintiffs' counsel during trial and closing argument appealed to the passions and prejudice of certain jurors.

FAULT ALLOCATION CCP §657(6):

a. Inexplicitly, in allocating fault, the jury ignored undisputed liability evidence of toxic exposure caused by several non-party entities similarly situated as the three defendants in this trial. The jury allocated 46.4% of the fault to Union Carbide, 10% to E.F. Brady and 5% to Elementis Chemicals, Inc. or 61.4% of the total fault to three defendants.

b. The only other entities cited for fault included Hamilton Materials which manufactured the joint compound which was the sole basis for fault designation of Union Carbide and Elementis. Zero% fault was designated by the jury for Expo Industries which sold the subject material to E.F. Brady. Zero% fault was direct to Kaiser Gypsum, which manufactured over one million square feet of allegedly asbestos containing drywall at Park Place. Decedent's employers Fluor Maintenance Services was given 10% and 6% to Fluor Corporation. Zero% was given to American Janitorial, decedent's legal employer during his alleged exposure. Zero% for Winthrop Management which managed Park Place during decedent's alleged exposure. Undisputed evidence involving specific entities contributing to decedent's alleged exposure were given Zero% by the jury.

CCP §657(7) "a new trial shall not be granted on the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, *unless* after weighing the evidence the court is convinced from the entire record, including reasonable inferences there from, that the . . . jury clearly should have reached a different verdict or decision."

5. REMITTUR.

In total this court is convinced from the and tire record that the jury clearly should have reached a different verdict or decision. Misconduct and other irregularities support a new trial or reduced award. Jury influenced by improper considerations, Bigler-Engler v Breg, Inc. (2006) 7 Cal.App.5th 276, 299; improper emotions Buell-Wilson v Ford Motor Co. (2006) 141 Cal.App.4th 525, 552. Plaintiffs may remit all damages awarded by verdict except for $18,906,000.00.

The rulings on Motions for Judgment Notwithstanding the Verdict, the Joint Motions for New Trial and the Joint

Motions to Tax are incorporated herein as though set forth at length.

Superior Court of California, County of Los Angeles
South-West District, Torrance Courthouse, Department SWE

JOEL HERNANDEZ**C**UEVA, Deceased, JOVANA COLLANTES, Individually and As Successor-In-Interest To JOEL HERNANDEZ**C**UEVA, Deceased; JOANNA HERNANDEZ, JOEL HERNANDEZ, JENNY HERNANDEZ, NOHELY HERNANDEZ,
Individually and As Heirs To JOEL HERNANDEZ**C**UEVA, Deceased
vs.
E.F. BRADY COMPANY, INC., ELEMENTIS CHEMICALS, INC., UNION CARBIDE CORPORATION
Case Number BC475956

MOTIONS of DEFENDANTS UNION CARBIDE CORPO RATION, ELEMENTIS CHEMICALS, INC. AND E.F. BRADY COMPANY, INC. for JUDGMENT NOTWITHSTANDING THE VERDICT
CCP §629(a).

JNOV is appropriate when the evidence most favorable to the party securing the verdict compels a verdict for the moving party as a matter of law. CCP §629(a). This is true where there is no substantial evidence supporting the verdict. Sweatman v. Dept. of Veterans Affairs (2001) 25 Cal.4th 62, 68. The jury may not indulge an "inference when it is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable people." UCC P&A P2:11-13; McRae v Dept of Corrections & Rehabilitation (2006) 142 Cal.App.4th 377, 389-90.

Plaintiffs contend that because U.C.C. bid on the Park Place contract and included therein the cost plus overhead of the material to be used on U.C.C.'s proposed work at Park Place, that UCC is not an end user but a distributor. However, this argument ignores the evidence.

UNION CARBIDE moves for judgment notwithstanding the verdict, granted:

1. Trial evidence is insufficient as a matter of law to support the jury's verdict as to liability or to support the verdict as to punitive damages. Plaintiff failed to establish that decedent's mesothelioma was caused by Union Carbide's asbestos.

2. There was *insufficient* evidence as a matter of law to support the jury's finding of clear and convincing evidence that an officer, director or managing agent of Union Carbide took action with malice, fraud, or oppression necessary to sustain punitive damages against Union Carbide. The punitive damages award is excessive and contrary to law. Union Carbide's management during relevant times are no longer living, as it has been at least sixty years.

Plaintiffs must first prove causation by exposure to asbestos from a *particular product that* was a *legal cause* of plaintiff's injury. UCC P&A P2:15-18. Rutherford v Owen-Illinois, Inc. (1997) 16 Cal.4th 953 establishing a "two-

part test" for this determination. Miranda v Bomel Constr. Co. (2010) 187 Cal.App.4th 1326, 1338. The mere 'possibility' of exposure to an asbestos containing product is insufficient to prove a reasonable inference of causation. Whitmire v Ingersoll-Rand Co. (2010) 184 Cal.App.4th 1078, 1093. Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure. Petitpas v Ford Motor Company (2017) 13 Cal.App.5th 261 HN10.

Plaintiffs must establish a reasonable medical probability and that a *particular exposure or a series of particular* exposures was a legal cause of the injury (meaning a substantial factor). Rutherford, supra 16 Cal.4th at 982. Here, no one tested the Hamilton products used at Park Place for asbestos. No witness with direct personal knowledge testified that Hamilton joint compound containing UCC asbestos was used. The jury was presented with circumstantial evidence which required the jury to speculate that any product installed or used by UCC was disturbed while decedent was working at Park Place. There is no substantial evidence that Hamilton joint compound itself contained UCC asbestos. The jury had to speculate that the decedent cleaned debris from walls that might have contained Hamilton joint compound which in turn might have contained UCC's asbestos. McGonnell v. Kaiser Gypsum Co. (2002) 98 Cal.App.4th 1098, 1105. Petitpas v Ford Motor Company (2017) 13 Cal.App.5th 261, 289 teaches that the outer limit of inference that may be submitted to the jury requires causation that is more likely than not. This is true where there are many possible causes but without reasonable causal justification.

There is no evidence that Hamilton joint compound containing Union Carbide asbestos was used by E.F. Brady to construct the building's *perimeter* original walls in 1975-1976. Mr. HernandezCueva worked at Park Place 1992-1995. During the intervening almost two decades, renovations and construction eliminated 25% of the original walls and new work offices were constructed. Since decedent *never described* the types or locations of units he cleaned up, whether offices, storage, cubby-hole work areas or recreation, it is just as likely that decedent cleaned up newer walls or original walls which did not contain Hamilton asbestos containing Joint compound. There is no direct evidence the plaintiffs' decedent worked in any areas where original walls were disturbed or that any such disturbed walls contained Hamilton joint compound containing asbestos. The jury was required to *speculate* to infer any conclusions about where and what type of debris materials were cleaned up by the decedent.

Plaintiffs did not establish that Hamilton joint compound *containing UCC* asbestos was used to construct the ORIGINAL INTERIOR walls at Park Place. It is undisputed that Hamilton Topping Compound and Hamilton All-Purpose Joint Compound was used but there is no evidence that the Hamilton Topping Compound that was used contained asbestos. Hamilton discovery answers confirmed that some versions of Hamilton All Purpose Joint Compound did not contain asbestos. *Mr. Hamilton testified that starting in the 1970s, if "there was a box of material and [it] didn't have any warning on it, [it] would …be asbestos-free."* Plaintiff's expert Dr. Longo acknowledged that the All Purpose Joint Compound ranged between 0 and 3 per cent asbestos. Hamilton joint compound used at Park Place by itself
could have been asbestos free. There is *no evidence that any bags or boxes of Hamilton joint compound delivered to Park Place contained an asbestos warning label*. Evidence presented to the jury to establish the contrary was speculative. Collin v CalPortland Co. (2014) 228 Cal.App.4th 582, 589, and 590, 592.

There also is defendant's industrial hygiene expert Dr. White who concluded, "even under worst case assumptions" decedent's exposure would have been no more than background levels and insufficient to "increase his risk of developing mesothelioma. Plaintiffs' expert Dr. Frank testified that lower levels such as background levels "like in

this courtroom" are not going to get people sick.

There is no substantial evidence that Union Carbide asbestos was a substantial factor in causing decedent's mesothelioma. Plaintiffs' counsel's hypothetical questions to his expert Dr. Frank all contained the same assumption, that decedent's exposure to asbestos containing material at Park Place caused his mesothelioma. Dr. Frank was never asked about non-asbestos material. All of plaintiffs' counsel's leading hypothetical questions to Dr. Frank contained the answer. "An expert opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities." Petitpas v Ford Motor Co. (2017) 13 Cal.App.5th 261, 288. Jennings v Palomar Pomerado Health Systems, Inc. (2003) 114 Cal.App.4th 1108. CACI 430 explains that a substantial factor "must be more than a remote or trivial factor."

Civil Code §3294 is restrictive more than it is permissive. Section 3294 provides "the *level of proof* required to be established by plaintiffs, which *actors* in the organization are relevant and the *type of conduct* which plaintiff must demonstrate. (Emphasis added.) Specifically, plaintiffs must show (1) by clear and convincing evidence (2) that an officer, director, or managing agent of the defendant (3) acted with malice, fraud or oppression." UCC P&A P11:11-15. Clear and convincing means "evidence so clear as to leave no substantial doubt; sufficiently strong to command the unhesitating assent of every reasonable mind." Shade Foods, Inc. v Innovative Prods. Sales & Mktg, Inc. (2000) 78 Cal.App.;4th 847, 891.

Which 'officer, director or managing agent' can commit the required act is restricted to those whose exercise of discretion could result in the employers' liability for punitive damages. White v Ultramar, Inc. (1999) 21 Cal.4th 563, 572 established that the terms *"managing agent" includes 'only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determined corporate policy*." (White, supra, at 566-67. That a supervisory employee has the authority to hire and fire or that an employee supervises a large number of employees, does not render the employee a 'managing agent'. CRST, Inc. v Superior Court (2017) 11 Cal.App.5th 1255, 1273.

Plaintiffs' evidence of corporate managing agent focused on Mr. Rhodes, Mr. Sayers, Mr. Myers, Dr. Dernhel and Mr. Ingalls. Despite job titles, such as "director", "Dr.", "research engineer", "technology manager", "marketing manager", "manager". *No evidence was presented as to the roles and specific job duties and authority* of each such individual such as to be able establish corporate policy during the specified time period at issue nor does it constitute willful and despicable conduct by clear and convincing evidence. Plaintiffs' evidence simply names individuals without supporting evidence to qualify or quantify any of them an "officer, director, or managing agent" within the meaning of punitive damages. Plaintiffs presented no evidence to the jury to warrant a finding of the required management conduct.

2020 Cal. App. Unpub. LEXIS 3919 *. Pursuant to California Rules of Court Rule 81115(a) an unpublished case cannot be cited except as provided in Rule 81115(b) "as law of the case. . . ". However, Collantes v Elementis was a summary judgment case, holding only that there were triable issues of fact and burdens were not carried. This finding included UCC.

At this juncture, reference is made to the tentative ruling on the Joint Motions for New Trial Or Vacatur, Remittitur of Union Carbide, Elementis Chemicals, Inc. and E. F. Brady, all of which is incorporated herein by reference as though set out verbatim.

LEMENTIS CHEMICALS, INC. ("ELEMENTIS") MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, granted.

ELEMENTIS CHEMICALS, INC. contends and argues as set forth hereinafter:

Initially, plaintiffs argue that the law of the case is that held in JOVANA COLLANTES et al., Plaintiffs and Appellants, v. ELEMENTIS CHEMICALS, INC. Second District **(2020)** 2020 Cal . App. Unpub. LEXIS 3919 *. Pursuant to California Rules of Court Rule 81115(a) an unpublished case cannot be cited except as provided in Rule 81115(b) "as law of the case. . . ". However, Collantes v Elementis was a summary judgment case, holding only that there were triable issues of fact and burdens were not carried.

Elementis contends that plaintiffs' claim against it is solely focused on an allegation that its predecessor, Harrisons and Crossfield (Pacific) ("HCP") sold Union Carbide's Calidria Chrysotile to Hamilton which in turn put it into its joint compound which decedent reportedly exposed to when he cleaned the debris in the Park Place complex decades later. Elementis then contends there is no evidence that its predecessor HCP sold any Union Carbide Calidria Chrysotile to Hamilton.

Testimony of Robert Mann clarified that customers using Union Carbide's Calidria chrysotile *could obtain it either directly* from Union Carbide *or* through Elementis' predecessor HCP. However, the only evidence demonstrates that Union Carbide sales were made only directly from Union Carbide to Hamilton Materials, transactions not involving Elementis or its predecessor HCP. There is no evidence that HCP sold anything to Hamilton Materials.

Hamilton All Purpose Joint Compound & Asbestos: Willis Hamilton testified that his 'all purpose' joint compound contained 2-4% asbestos. In discovery, Hamilton Materials declared the formula as 0-3%. Mr. Hamilton also testified that during the subject relevant period, any of Hamilton's packaging of any of its joint compounds containing asbestos included the *required OSHA asbestos warning*. None of the trial witnesses testified to seeing any asbestos warning on joint compound used at Park Place. Further, there is no evidence, scientific or from other witness testimony, that the Park Place building owner(s) took steps to identify potential asbestos exposures. There is no evidence that a $150.00 test which Dr. Longo said would have corroborated the claim of no asbestos, plaintiffs failed to produce any such evidence.

Elementis incorporates and joins with Union Carbide's motion and points & authorities demonstrating insufficient evidence of liability. As in the discussion of Union Carbide's motion for judgment notwithstanding the verdict as well as that of E.F. Brady, the walls installed by E.F. Brady were not the subject of remodeling. Plaintiffs failed to present credible evidence on this issue but instead relied on current memory from almost three decades later, amounting to speculation and without evidentiary support, from those working at Park Place. Who is going to remember which walls were replaced or moved, then subsequently replaced or moved again. How credible is that?

Elementis further contends that before decedent worked at Park Place, employers & building owners were obligated by state and national regulations to ensure employees were not exposed to asbestos. Here, there is no evidence that owner(s) of Park Place took such steps and declared there was no asbestos relevant to plaintiffs' claims. Expert

witness Ken White, an industrial hygienist, was the only witness to testify that the debris from demolition of walls built with asbestos containing joint compound did not contain levels of breathable asbestos sufficient to increase risk of disease. This evidence was undisputed. "Even where every exposure to asbestos can contribute to the risk of mesothelioma, if there has been no exposure, there is no causation. Petitpas v Ford Motor Co. (2017) 13 Cal.App.5th 261.

E. F. BRADY COMPANY, INC's damage MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT, granted.

E.F. BRADY contends and argues:

Defendant EF Brady contends that it is not in the business of selling or distributing Kaiser Gypsum Null-A-Fire wallboard or Hamilton joint compound to end users. Because it acted at Park Place as a subcontractor who according to contract terms was required to arrange for the contract material from supplier Expo Industries, Inc. which in turn sold and delivered to Park Place the required materials. Pursuant to its subcontract, Brady then installed the wallboard and joint compound supplied by Expo. Brady argues it is not a seller or distributor of the subject Hamilton Joint Compound or Kaiser wallboard and made no profit from the subcontract requirement to arrange for the purchase and delivery of the material from Expo Industries, Inc., claiming the materials were simply a pass-through cost related to the installation labor. It is the labor from which Brady made a profit, not from the arranging for the Expos Industries material.

Witness Vince Lombardo was Brady's former Vice President of Operations and former president of Brady's San Diego operations. Lombardo testified that EF Brady was an end user when it purchased the products for installation at Park Place and never testified EF Brady was in the business of selling and/or distributing drywall or joint compound to end users. EF Brady contends that it did not design, manufacture, or distribute these products, but merely purchased them from suppliers. There is no evidence that EF Brady had knowledge that the products it used at Park Place contained asbestos until after its work on the Park Place project was finished. (Exh. 1, Trial Transcript, 1997:8-12, 1999:5-7; 2016:23-2017:23; 2019:8-18; 6349:23-26).

Warren Bazzo, EF Brady's field superintendent for the Park Place project, ordered supplies and materials for the drywall installation from Expo (Exh. 1 Trial Transcript 6219:13 6220:28). Included in the material Bozzo ordered from Expo were fireproofing for structural steel, metal framing studs and all of the nails, screws and connectors to perform all of the contracted work by EF Brady. (Exh. 1, Trial Transcript, 6218-13-6220: 11; 6321:21-5). Bozzo was no more than an ordinary consumer in the role of an employee. (Exh. 1, Trial Transcript, 8436:19-8437:6).

Gary Paoli was an estimator for a competitor of EF Brady. He testified that whenever a drywall sub-contractor at Park Place had an issue with a product used for its installation, sales representatives from the product manufacturer would come out to Park Place to address any concerns about the product (Exh. 1, Trial Transcript 6051:24-6052:13). EF Brady therefore contends that "involvement of the sales representatives in trouble shooting any concerns about the products it installed confirms EF Brady was the end user. (Brady JNOV Motion, P3:5-16.)

Robeert Gallucci, construction expert, testified that although subcontractors are required by the subcontract to purchase materials and shipped them to the job site. The subcontractor will then pay the supply house sales tax, just as if the materials were being purchased from a hardware store and pass through that cost to the general contract or without adding a 2nd sales tax to the cost. Exh. 1 Trial Transcript 6342:3-6342:22.) Gallucci, a construction expert,

contradicted plaintiff's expert Dr. Longo, who is not a construction expert, and explained that the subcontractor is not considered a seller or distributor. The emphasis must be on the quality of the evidence, not the quantity. "Substantial evidence is not synonymous with "any" evidence, but rather evidence which is "of ponderable legal significance" and "reasonable in nature, credible, and of solid value, and it must actually be "substantial proof of the essentials which the law requires in a particular case. (Toyota Motor Sales, USA, Inc. v Superior Court (1990) 220 Cal.App.3d 864, 871-872. EF Brady Mxn. JNOV P6:6-19). It cannot be stated that under the circumstances of the HernandezCueva case subcontractor evidence that EF Brady "had any control over, or a substantial ability to influence, the manufacturing or distribution process." Bay Summit Community Assn. v Shell Oil Co. (1996) 51 Cal.App.4th 762, 776; Taylor v Elliott Turbomachinery Co., Inc. (2009) 171 Cal.App.4th 564, 576, 579-580, 583.

EF Brady argues that there is no evidence that it had any part in the production or marketing of Hamilton joint compound or Kaiser Gypsum wallboard, nor any financial benefit from Expo delivering product to Park Place. In fact, Kaiser Gypsum joint compound was found to be faulty and failed. *Kaiser investigators then visited the site to verify, then recommended Hamilton as the replacement*. (Exh. 1 Trial Transcript 6221:17-6223:27). All construction material used by EF Brady at Park Place was bought from Expo and shipped by Expo to Park Place.

The evidence warrants the conclusion that EF Brady was a "supplier of services" and not a seller or distributor of asbestos-containing" material. There is no evidence that any conduct of EF Brady at Park Place demonstrated control over the selection, quantity or quality of materials mandated by the subcontract. Any such determinations and decisions were made only by the project architect and/or owner. See Petitpas v Ford Motor Co. (2017) 13 Cal.App.5th 261, 274.

CCP §629(d) is not an impediment to the grant of both motions for new trial and motions for judgment notwithstanding the verdict.

Superior Court of California, County of Los Angeles
South-West District, Torrance Courthouse, Department SWE

JOEL HERNANDEZ**C**UEVA, Deceased, JOVANA COLLANTES, Individually and As Successor-In-Interest To JOEL HERNANDEZ**C**UEVA, Deceased; JOANNA HERNANDEZ, JOEL HERNANDEZ, JENNY HERNANDEZ, NOHELY HERNANDEZ,
Individually and As Heirs To JOEL HERNANDEZ**C**UEVA, Deceased
vs.
E.F. BRADY COMPANY, INC., ELEMENTIS CHEMICALS, INC., UNION CARBIDE CORPORATION
Case Number BC475956

JOINT MOTION of DEFENDANTS UNION CARBIDE CORPORATION, ELEMENTIS CHEMICALS, INC., AND E.F. BRADY TO TAX COSTS.

Defendants Jointly Move to Tax Costs as follows:
ITEM #8 "WITNESS FEES" of $135,741.45. Should be taxed because:

a. Not ordered by the court. CCP §1033.5(b)(1);
b. Not recoverable because of plaintiffs' defective CCP §998 offers;
c. Plaintiffs' Memorandum of Costs fails to identify or prove that expert witness fees were reasonable and limited to post-offer fees under CCP §998(d).

ITEM #16 "OTHER" $7,471,368.52 Pre-Judgment Interest should be taxed because of plaintiffs' improperly served and unreasonable CCP §998 offers.

ITEM #11 "COURT REPORTER" $58,438.15 should be taxed because the amount seeks costs of over 60 transcripts not ordered by the court and thus not recoverable under CCP §1033.5(b)(5).

FINDINGS AND ORDERS OF THE COURT

Plaintiffs have the burden to prove each of their claims is legally recoverable and reasonable. The court finds as set forth hereinbelow.

ITEM 8 for "EXPERT FEES" of $135,741.45 for thirteen experts. These experts as listed on plaintiffs' Memorandum of Costs were not ordered by the court and not allowed under CCP §1033.5(b)(1). Plaintiffs' §998 offers to EF Brady of $5M, to UCC $5M and to Elementis $500K were not made with a reasonable expectation they would be accepted *when made years before trial*. In fact **plaintiffs** themselves objected to a defense §998 offer on this very ground, contending it was premature even though the defense offer was served long after plaintiffs' §998 offers.

ITEM #11 "COURT REPORTER" $58,438.15 should be taxed because the amount seeks costs of over 60 transcripts from between 6.13.2018 to 8.02.2023 *not* ordered by the court and thus not recoverable under CCP §1033.5(b)(5). Transcripts prepared for matters heard in 2018 through 2022 were before trial. Defendants contend further that any transcripts prepared during and after trial, not having been ordered by the court, were also merely convenient or beneficial to plaintiffs.

Plaintiffs' conclusory opposition merely contends that they are entitled to court reporter fees as a matter of statutory right. CCP 1033.5(a)(11). California Rules of Court, Rule 2.956(c)(1) provides, inter alia, that the court reporter expense "*may* be recoverable". (Emphasis added.) This does not authorize a party to order partial trial transcripts for a party's convenience or benefit as the trial moves along.

ITEM #16 "OTHER" $7,471,368.52 Pre-Judgment Interest should be taxed because of plaintiffs' improperly served unreasonable CCP §998 offers.
1) An offer of $5 million against EF Brady on September 5, 2018;
2) An offer of $5 million against UCC on July 9, 2020;
3) An offer of $500,000.00 against Elementis Chemicals, Inc. on November 8, 2022.

FIRST, pursuant to the Schultz declaration as Exhibit E showing docket pages MyFikle&Serve for the months of

September 2018, July 2020, and November 2022, plaintiffs failed to serve their 998 offers on all parties nor were they posted on the court ordered MyFile&Serve. Plaintiffs failed to comply with the mandatory general order governing all asbestos actions, requiring all documents to be served on all parties through the courts' required procedure of MyFile&Serve. (October 25, 2011, Order, Exhibit C at 5:6-10, 7:7-10, 11:1-10; July 8, 2022, Order, Exhibit D at 4:10-16. Lee v Placer Title Co. (1994) 28 Cal.App.4th 503, 509 establishes that failure to properly serve a document deprives the court of jurisdiction to act. Accord, Dorbrick v Hathaway (1984) 160 Cal.App.3d 913, 921. The court's general orders applying to all asbestos cases are pursuant to inherent powers of the court to control litigation and conserve judicial resources authorize it to conduct hearings and formulate rules of procedure as justice may require. Coshow v City of Escondido (2005) 132 Cal.App.4th 687, 701.

Plaintiffs argue this is a mere technical violation of JCCP 4674 and that there is no prejudice to any of the parties. Shearman v Jorgensen (1895) 106 Cal. 483, 485. However, plaintiffs' 998 offer to U.C.C. was not served on Elementis Chemicals or EF Brady. The consequence of which is that none of the numerous parties, and neither of the two other parties to these motions, would have any information concerning settlement credits. As one of many examples, in 2023, plaintiffs refused to produce evidence of settlements, as required, in violation of service orders governing asbestos litigation. Plaintiffs, as all parties, are bound by the court's general orders in coordinated asbestos litigation pursuant to JCCP 4674. Moving parties were thus prejudiced.

Plaintiffs' §998 offers to EF Brady of $5M, to UCC $5M and to Elementis $500K were not made with a reasonable expectation they would be accepted *when made years before trial*. In fact **plaintiffs** themselves objected to a defense §998 offer on this very ground, contending it was premature even though the defense offer was served long after plaintiffs' §998 offers.

The reasonableness of a §998 offer is determined by examining circumstances *when the offers were made*. Elrod v Oregon Cummins Diesel, Inc (1987) 195 Cal.App.3d 692, 699. Plaintiffs' §998 offers were made even though EF Brady won the first trial, U.C.C. and Elementis won summary adjudications and all defendants prevailed on most claims after they were dismissed and not challenged on appeal. Thus, when plaintiffs' §998 offers were made, defendants had already prevailed against most of plaintiffs' causes. "Good faith requires that the settlement offer be 'realistically reasonable' under the circumstances of a particular case (citations omitted) 'The offer must, therefore, carry with it some reasonable prospect of acceptance. (citations omitted) As such, this offer is premature and not made in good faith . . .which is ineffective and unenforceable." Defense Motion to Tax Costs, P14:5-14.

Plaintiffs contend their §998 offers were reasonable and in good faith. Plaintiffs misplace emphasis on Santantonio v Westinghouse Broadcasting Co. (1994) 25 Cal.App.4th 102, 117 in contending that a result more favorable than the offer is prima facie evidence that the offer was made in good faith. This argument does not focus on the circumstances of the litigation at the time of service of the §998s. Referring to unrelated litigation does not support plaintiff's position on this matter.

Plaintiffs reject the contention that the plaintiffs 2018 §998 demands were premature, again, referring to unrelated litigation. The HernandezCueva litigation is before a different jury in a different district, likely some different evidence, and there is no reasonable expectation that similar verdicts may result.

Further, the testimony of John Sorich, which plaintiffs relied on for or their exposure claim was deemed, mostly

inadmissible due to the thin foundation and credibility of his testimony, and that UCC and Elementis were not even present at Sorich's deposition, and those present did not have the same motive and interest to satisfy Evid. Code §1292(a)(3).

Plaintiffs' decedent failed in his deposition to testify that he worked with asbestos containing debris at Park Place, not having described specific information as to what and where he worked at Park Place saying only that his work "might have" involved the subject drywall.

Over 20 other entity defendants were cited by plaintiffs' discovery responses admitting that many others caused decedent to be exposed to asbestos debris. Hence, Propositiion 51's fault allocation is relevant to strict liability asbestos cases. Hackett v John-Crane Inc. (2002) 98 Cal.App.4th 1233, 1239. Fault and plaintiffs' non-economic damages "must be apportioned among [the] universe of tortfeasors." DaFonte v Up-Right, Inc (1992) 2 Cal.4th 593, 603. These discovery admissions existed when plaintiffs will served their §998 offers.

If costs are not statutorily authorized, the court has no discretion to award costs. Ladas v California State Auto Assn. (1993) 19 Cal.App.3d 618, 624. See also CCP §1033.5(c) (3) and (4) which all require costs to be reasonable and may be granted or denied if authorized, in the court's discretion. CCP§1033.5(b) lists cost items not allowable unless expressly authorized by law. Ripley v Pappadopoulos (1994) 23 Cal.App.4th 1616, 1623, 1624. Included in fees and costs not authorized by the court or statute are plaintiffs' expert witness fees. Plaintiffs' §998 offers were not reasonable when made.

Defendants' motion to tax is granted on the grounds stated for the reasons set forth hereinabove. Further, item #16 "Other" is $7,471,368.52 in pre-judgment Interest and should be taxed because of plaintiffs prematurely served unreasonable CCP §998 offers.

It is so ordered.

Date: 12/12/2023 /s/ Judge Cary Nishimoto

Plaintiff's objection to Defendant Union Carbide Corporation's Motions for New Trial is heard, argued and overruled.

The Court grants both Motions for New Trial and Motions for Judgment Not Withstanding the Verdicts, as modified.

The Court grants the Motion to Tax Cost, without modifications.

Order granting Defendant's Motion to Tax Cost is signed and filed.

BC475956 December 12, 2023
JOEL HERNANDEZCUEVA ET AL VS AMERICAN STANDARD INC ET AL 8:30 AM

Judge: Honorable Cary Nishimoto
Judicial Assistant: Michelle Milligan
Courtroom Assistant: None

CSR: Alicia Renee Desmond, CSR#13037
ERM: None
Deputy Sheriff: None

Counsel for Defendant, Union Carbide Corporation, is ordered to give notice, prepare a Proposed Order of the Court's ruling and an Amended Judgment.

A copy of this minute order is mailed via United States Mail as follows:

Mary Mckelvey
Polsinelli LLP
2049 Century Park East, Suite 2900
L.A., CA 90067

A copy of this minute order will append to the following coordinated case under JCCP4674: BC475956.