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Opinion following remand

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RAY KINSMAN et al., Plaintiffs and Respondents, v. UNOCAL CORPORATION, Defendant and Appellant.	A093424, A093649 (San Francisco County Super. Ct. No. 308646)

This case returns to us on a remand from the Supreme Court. In the first appeal, we reversed a judgment in favor of plaintiffs Ray and Jo Kinsman because we concluded instructions read to the jury did not reflect the limitations on premises liability required by *Privette v. Superior Court* (1993) 5 Cal.4th 689 and related cases. The Supreme Court granted review, and in *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, the court announced a new rule for determining a premises owner's liability for injuries to an independent contractor's employee caused by a dangerous condition on the property.[1]

[1] The court held that a landowner who hires an independent contractor may be liable for injuries to the contractor's employee if "the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition." (*Kinsman v. Unocal Corp.*, *supra*, 37 Cal.4th at p. 664, footnote omitted.)

Although the Supreme Court also concluded a new trial was required due to instructional error (*id.* at pp. 682-683), the court remanded the case to us to decide a sufficiency of evidence issue we did not reach in our first opinion. (*Id.* at pp. 683, fn. 8 and 684.)

Defendant Unocal Corporation (Unocal) contends insufficient evidence supports the jury's finding of negligence, and therefore it is entitled to prevail as a matter of law. Specifically, based on an industry standard in the 1950s regarding what was believed to be a safe level of asbestos exposure, Unocal argues no evidence was presented showing that Kinsman's work as a carpenter exposed him to asbestos levels above this limit, or that Unocal knew or should have known Kinsman's exposure to asbestos levels below this limit was actually hazardous. We conclude substantial evidence supports the jury's verdict of negligence and the trial court properly denied Unocal's motion for judgment notwithstanding the verdict. Accordingly, we remand the matter for a new trial to be conducted in accordance with the principles set forth in the Supreme Court's opinion. (See *Kinsman v. Unocal Corp.*, *supra*, 37 Cal.4th at pp. 678-683.)

BACKGROUND

During the 1950s, Ray Kinsman worked on many occasions as a carpenter at Unocal's refinery in Wilmington, California. Kinsman was employed by Burke & Reynolds, an independent contractor Unocal had hired to perform scaffolding work during periods of "shut down" and repair at the refinery. Kinsman built and dismantled scaffolding used by other trades, including pipefitters and insulators. This work exposed him to airborne asbestos, which was produced by other trades — particularly insulators— during their application and removal of asbestos-containing insulation from pipes and machinery. Though Kinsman did not work directly with such insulation, the evidence showed he was exposed to asbestos dust in three ways. First, when he dismantled scaffolding previously used by insulators, Kinsman encountered asbestos-containing debris that had accumulated on the planks. Second, some asbestos dust was produced when Kinsman attached ("tied-in") scaffolding to insulated pipes or equipment. Third, asbestos fibers released by the work of other trades "float[ed] in the air" of the refinery,

exposing Kinsman as he worked nearby. Kinsman did not wear a mask or respirator during his work at Unocal, and he received no warnings about the danger of asbestos from Burke & Reynolds, Unocal, or anyone else.

Decades later, Kinsman developed mesothelioma, an asbestos-induced malignant cancer of the lining of the lungs. He sued scores of product manufacturers and distributors, as well as several premises owners. Ultimately, the case proceeded to a jury trial against Unocal, a "premises defendant," alone. The parties stipulated that Kinsman was exposed to asbestos during his work at Unocal. In addition, following uncontroverted expert testimony that labeled this exposure a "substantial factor" contributing to Kinsman's development of mesothelioma, the trial court granted a directed verdict for Kinsman on the issue of causation. Because the parties also stipulated Kinsman bore no contributory fault, the only disputed issues before the jury concerned whether, and to what extent, Unocal was negligent, whether Kinsman's wife suffered a loss of consortium, and the amount of damages suffered by the Kinsmans.

On the subject of Unocal's negligence, the parties introduced extensive "state of the art" evidence about industry knowledge in the 1950s. Relying on several published articles and oil industry reports from the 1930s through the 1950s linking asbestos with lung disease, Kinsman argued Unocal knew or should have known that asbestos was hazardous. Given this knowledge, Unocal should have warned him or his employer about the dangers of asbestos exposure and should have adopted various safety measures to reduce the hazard. For its part, Unocal conceded it was aware that asbestos was hazardous but argued the question in the 1950s was *how much* asbestos exposure put a person at risk. Industrial hygiene research of the time had identified 5 million particles per cubic foot (ppcf) as a safe level of asbestos exposure for workers, and Unocal asserted there was no evidence Kinsman was exposed to higher asbestos concentrations during his work at the refinery.

Kinsman submitted his case on two theories of Unocal's liability: (1) negligence "in the use, maintenance or management of the areas where Ray Kinsman worked," and (2) negligence in the exercise of retained control over "the methods of the work or the

manner of the work performed by . . . Ray Kinsman." The jury rejected the retained control theory, finding Unocal did not retain control over the methods or manner of Kinsman's work, but found in Kinsman's favor on the premises liability theory. It assigned Unocal 15 percent of the fault in causing Kinsman's mesothelioma, with the remaining 85 percent of fault attributable to "all others," and awarded the plaintiffs over $3 million in compensatory damages. Thereafter, the trial court denied Unocal's post-trial motions for new trial and for judgment notwithstanding the verdict.

We consolidated Unocal's separate appeals from the jury verdict and from the denial of the motion for judgment notwithstanding the verdict, and we reversed the judgment in a published opinion. Having concluded a premises owner's liability for injuries sustained by an employee of an independent contractor is limited by the doctrine set forth in *Privette v. Superior Court, supra*, 5 Cal.4th 689 and subsequent Supreme Court cases, we determined the generic jury instructions on premises liability were prejudicially erroneous as applied in this context, and we remanded for a new trial. The Supreme Court granted review, and on December 19, 2005, the court issued an opinion affirming our decision in part and reversing in part. (*Kinsman v. Unocal Corp., supra*, 37 Cal.4th at p. 684.) The Supreme Court also concluded a new trial was appropriate due to instructional error; however, the court remanded the case to us to address Unocal's claim that it is entitled to judgment as matter of law due to insufficiency of the evidence. (*Id.* at pp. 682-684.)

DISCUSSION

Based on evidence presented about prevailing medical and scientific knowledge in the 1950s, Unocal asserts it neither knew nor could have known that exposure to low levels of asbestos—such as Kinsman would have encountered in his work as a carpenter—was dangerous. The Supreme Court's decision in this case confirmed that a landowner cannot be liable for injury to one on the premises unless it knew or should have known of the existence of a concealed hazard. (*Kinsman v. Unocal Corp., supra*, 37 Cal.4th at pp. 664, 672-675; see also *Rowland v. Christian* (1968) 69 Cal.2d 108, 119.)

Similarly, a product manufacturer cannot be held liable for failure to warn (under a strict liability or negligence theory) unless the manufacturer had actual or constructive knowledge of the potential hazard. (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002-1003.) Unocal contends the notion of what constitutes a "hazard" must be understood in light of the prevailing medical and scientific knowledge at the time the condition was encountered. (See *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483-1484 [observing that, "[u]nder a negligence standard, a reasonable manufacturer would not be charged with knowing more than what would come to light from the prevailing scientific and medical knowledge"]; see also *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1113, fn. 3 ["constructive knowledge" for failure-to-warn claims means "reasonably scientifically knowable"].) If the medical and scientific community did not consider exposure to small concentrations of asbestos to be hazardous, Unocal argues, a reasonable premises owner could not be expected to foresee, and prevent, injury to workers who were exposed to such small concentrations.

We review Unocal's claim that the evidence does not support the jury verdict of negligence under familiar principles. "Where the appellant challenges the sufficiency of the evidence, the reviewing court starts with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant's affirmative burden to demonstrate otherwise. [Citations.]" (*Garlock Sealing Technologies v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 951.) In accordance with this presumption, when we review the sufficiency of the evidence, "we must consider all of the evidence in the light most favorable to the prevailing party, accept as true all the evidence and reasonable inferences therefrom that tend to establish the correctness of the trial court's findings and decision, and resolve every conflict in favor of the judgment. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.) 'It is not our task to weigh conflicts and disputes in the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment.' (*Ibid.*) [¶] 'We emphasize that the test is not the presence or absence of a substantial

conflict in the evidence. Rather, it is simply whether there is substantial evidence in favor of the respondent. If this substantial evidence is present, no matter how slight it may appear in comparison with the contradictory evidence, the judgment must be upheld.' [Citations.]" (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 369.) Applying these principles, we conclude substantial evidence supports the jury's finding of negligence.

Substantial evidence showed the hazardous nature of asbestos was well known by the time Kinsman worked at Unocal in the 1950s. In a lengthy videotaped deposition played for the jury, Kinsman's expert witness Barry Castleman, Ph.D., traced the development of medical and scientific knowledge about asbestos health risks. After some scattered reports around the turn of the century describing respiratory disease in asbestos factory workers, asbestosis was recognized as a distinct condition in the 1920s.[2] In 1930, a British scientist named Merewether published a landmark medical article finding that asbestosis was widespread among textile workers. Merewether also demonstrated that there is a latency period between the time a worker is exposed to asbestos and the time disease develops. Based on his historical research, Castleman testified it was well understood by doctors in 1935 that a person exposed to asbestos could develop asbestosis. In the late 1930s and thereafter, the medical community came to understand that asbestosis was a risk not just for people who worked in asbestos mines and manufacturing plants, but also for people who worked with manufactured products containing asbestos, such as insulation workers, and bystanders who were exposed to asbestos dust released into the air. The first reports positing a link between asbestos and cancer were published in the late 1930s and 1940s, and in 1949 the British government reported finding a high incidence of lung cancer and mesothelioma (cancer of the pleural lining of the lungs) in people with asbestosis. An epidemiological study by Richard Dahl

[2] "Asbestosis" describes a scarring condition of the lungs that is uniquely caused by inhalation of asbestos fibers.

in 1955 provided more definitive evidence establishing asbestos as a cause of lung cancer.

Expert witnesses for both sides focused particular attention on a "medico-safety survey" prepared in 1937 by Roy S. Bonsib of Standard Oil Company (commonly known as the "Bonsib Report"), which evaluated the health risks associated with several dust-producing operations in an oil refinery and recommended measures for reducing "the dust hazard." Bonsib measured dust concentrations as high as 18 to 24 million ppcf created by insulation-related activities in the refinery, and he stated these levels were "considered too high for working without adequate protection." In its concluding section, the Bonsib Report described several measures to reduce the health hazards posed by asbestos and other industrial dusts. These included designing plants for dust control, providing ventilation and exhaust systems, enclosing dusty materials, isolating dusty processes, using wet methods and good housekeeping procedures, providing respirators (the report discussed several types), and scheduling regular physical examinations of people who worked in dusty occupations. The jury could infer that Unocal was aware of the risks and remedial measures discussed in the Bonsib Report because the report was intended to "serve as a guide to operating executives and safety engineers" in the oil industry.

Based on the Bonsib Report and the published scientific literature available to them, Castleman gave the opinion that oil companies such as Unocal knew or should have known in the 1950s that asbestos was a harmful material to which workers in their refineries were being exposed in the course of handling insulation materials. Given this knowledge, Castleman opined that the companies should have warned or protected the workers or substituted insulation materials containing less dangerous substances than asbestos. Substantial evidence therefore supports a finding that Unocal knew or should have known Kinsman would be exposed to asbestos, a hazardous substance, during his work at the refinery.

However, the jury also heard considerable testimony about threshold limit values (TLVs), and Unocal relied heavily on this concept in its defense. Castleman explained the concept using lead as an example: "Threshold limit value is a term used to describe

occupational exposure limits for toxic substances in the workplace air. The idea is that we have a body of scientific knowledge about lead dust, for example, and the literature shows that exposure to certain concentrations or more of lead in the air are attributed to eventually causing lead poisoning. So, by knowing this, if you do sampling and you find these concentrations present in the workplace air, you know that you are dealing with a dangerous situation, even before anybody gets sick. So, the idea of these threshold limit values or maximum allowable concentrations, as they were sometimes called, is to set some kind of maximum limit on the amount of exposure of workers given that we know something about the substances [to] which they are exposed." In 1946, an organization called the American Conference of Governmental Industrial Hygienists (ACGIH) published a list of recommended exposure limits for approximately 140 substances, including asbestos. Their recommended TLV for asbestos was 5 million ppcf of dust, which Castleman stated "is not a visibly dusty concentration." The asbestos TLV remained at 5 million ppcf, an amount approximately equivalent to 30 asbestos fibers per milliliter, from 1946 until 1971. In 1971, ACGIH's recommendation became irrelevant because the newly formed Occupational Safety and Health Administration (OSHA) instituted a standard of 5 fibers per milliliter. OSHA reduced this level to 2 fibers per milliliter in 1976, then to 0.2 fiber per milliliter in 1986, and finally to 0.1 fiber per milliliter in 1994.

Unocal asserts the evidence does not support the jury's finding of negligence because the TLV of 5 million ppcf represented the state of the art in the 1950s for what was believed to be a "safe" level of asbestos exposure. Major epidemiological studies in the 1940s and 1950s endorsed this standard, Unocal argues, and Kinsman offered no evidence of any lower standard of exposure in effect at that time. However, Kinsman presented testimony from several witnesses suggesting the TLV was not a reliable guarantee of safety, even based on what was known in the 1950s. Dr. William Nicholson testified that, despite the organization's name, the ACGIH was mostly comprised of representatives from industry, not government health officials. Professor James Hammond also described the ACGIH as a voluntary group that tried to establish exposure

guidelines but neither had nor wanted any policing power to ensure compliance. Even Dr. William Hughson, Unocal's expert witness, observed the ACGIH was not a government agency, and no agency attempted to regulate workplace dust hazards until Congress created OSHA in 1970. Although the 5 million ppcf TLV remained in place for several years, the jury could infer that this standard was known to be seriously flawed because when OSHA got involved it immediately reduced this maximum exposure limit to *one-sixth* of its former level (i.e., from 30 fibers per milliliter to 5 fibers per milliliter).

Dr. Nicholson testified that the 5 million ppcf TLV was "arbitrary." He explained the TLV for asbestos was "flawed from the start" because it was based on studies that did not take into account the latency period between exposure and the development of asbestosis. Thus, workers exposed below the TLV might appear to be healthy five or 10 years later, but that was only because the disease took 20 or 30 years to develop. Moreover, Nicholson explained that the TLV was developed as a way to prevent non-malignant disease, specifically asbestosis. Once asbestos was identified as a cause of cancer, there was no reason to believe the TLV would protect against this entirely different disease. Based on this evidence and Castleman's testimony that cancer was linked with asbestos in the 1940s and 1950s, the jury could have concluded it was unreasonable for Unocal to rely on the 5 million ppcf TLV as a safe level of asbestos exposure for workers in its facility.

Furthermore, as Kinsman points out, there was no evidence Unocal actually did rely on the asbestos TLV, or even knew about it, during the time Kinsman worked at the Wilmington refinery. Unocal's sole witness, Dr. Hughson, had not talked to anyone from Unocal or looked at any Unocal documents from the 1950s, and he admitted he knew nothing about Unocal's corporate knowledge regarding TLVs. Dr. Hughson also did not know whether Unocal took air samples at its refineries to determine what the actual dust levels were relative to the TLV.[3] Because the jury heard no evidence showing Unocal in

[3] This absence of evidence about safety procedures at Unocal stood in marked contrast to Professor Hammond's description of the Exxon Company's approach.

fact relied on the 5 million ppcf TLV, and took steps to ensure asbestos emissions remained within a "safe" exposure level, it could have reasonably rejected Unocal's defense based upon the TLV.

In a related point, Unocal contends it is entitled to judgment as a matter of law because Kinsman did not prove he was exposed to asbestos in amounts exceeding 5 million ppcf during his work at the Wilmington refinery. This argument misconstrues the parties' burdens at trial. Kinsman presented evidence showing: (1) he was previously exposed to substantial amounts of asbestos dust at Unocal's refinery; (2) he was suffering from a type of cancer caused by inhalation of even small amounts of asbestos; and (3) his asbestos exposure at the refinery was a substantial factor leading to his development of cancer. Kinsman did not have to prove he was exposed to asbestos levels above the TLV in order to establish Unocal's negligence. Rather, because Unocal asserted its reasonable reliance on the TLV as a defense to Kinsman's negligence claim, it was Unocal's burden to show it was aware of this standard and complied with it by taking steps to make sure Kinsman's exposure was below the threshold. Unocal failed to do so, and substantial evidence supports the jury's finding of negligence.

Hammond, who was the chief industrial hygienist for Exxon, explained in a deposition that was read to the jury that his company required the use of respirators for all dust-generating activities, regardless of whether the dust level was above 5 million ppcf, or even 1 million ppcf. The jury could infer from this evidence that a prudent oil company would have taken such precautions to protect the workers in its refineries.

DISPOSITION

The order denying Unocal's motion for judgment notwithstanding the verdict is affirmed. In accordance with the Supreme Court's directions, the matter is remanded for a new trial to be conducted in accordance with the principles set forth in *Kinsman v. Unocal Corp., supra*, 37 Cal.4th 659.

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Parrilli, J.

We concur:

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McGuiness, P. J.

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Siggins, J.