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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

DONNA GRAHN et al.,

Plaintiffs and Respondents, **A098818**

v. **(San Francisco Super. Ct. Nos. 922682 & 966531)**

EXXON MOBIL CORPORATION,

Defendant and Appellant.

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The survivors of Robert Grahn (respondents) filed a complaint against Exxon Mobile Corporation (Exxon) seeking damages caused by Grahn's wrongful death due to asbestos induced lung cancer. A jury hearing the case awarded respondents a net of nearly $200,000 in damages. Exxon now appeals contending (1) the jury's verdict was not supported by substantial evidence, and (2) the trial court instructed the jury incorrectly. Respondents have filed a cross appeal contending the trial court erred when calculating pretrial settlement credits. We reject the arguments advanced on appeal and affirm that portion of the judgment. However, we agree the court calculated the pretrial settlement credits incorrectly and remand the case so the judgment can be revised accordingly.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert Grahn worked as a brick mason for the J.T. Thorpe Company from 1954 to 1985. He started as an apprentice, and was promoted to foreman in 1956, general foreman in 1964, and superintendent in 1974.

Over the years, Grahn worked at many different sites throughout the Bay Area including, in 1968 and 1969, the Exxon Oil refinery located in Benicia. Exxon was building a new facility in Benicia and J.T. Thorpe was hired to perform refractory work for the project. Grahn was J.T. Thorpe's superintendent for the job.

While Grahn was working at Exxon's Benicia facility, others were working nearby installing asbestos-containing pipe insulation. The installation created a "visible dust" that covered Grahn. Several workers described the process. Carl Ramsey, who worked as a foreman for Owens-Corning at the Benicia refinery, said his crews used asbestos containing cements, insulation and mud to insulate various components. Whenever pipes came in contact with supports or hangers, Ramsey's workers had to saw the insulation to accommodate the connection. This created dust. Ramsey's workers also used mallets to ensure the insulation fit tightly. Workers would say, "if you don't make a lot of dust [the insulation] is not tight."

Charles Ay installed asbestos containing pipe insulation at Exxon's Benicia refinery for a company known as Western Asbestos. According to Ay, each stroke of a saw or tap of a mallet created asbestos-containing dust.

Albert John Kiss worked as an insulator for Plant Asbestos at the Benicia facility. He estimated that about half of the time, he used pipe insulation that contained asbestosis. The process of installing pipe insulation created a "heck of a lot of dust." According to Kiss, J.T. Thorpe employees were usually there when he was installing insulation because "it seemed to be that their type of work was done around the time ours was done. [¶] I always remembered them being there."

After Grahn was diagnosed with asbestos related disease, he and his wife filed a complaint against Exxon and others seeking damages for personal injuries. When Grahn died of lung cancer in 1994, his heirs were substituted as plaintiffs asserting Grahn's

causes of action in a survivors' action and the heirs filed a new wrongful death complaint on their own behalf.

The case was tried to a jury in 1996. At the close of respondents' case, Exxon moved for a nonsuit arguing respondents had not presented sufficient evidence to support a judgment in their favor. The trial court granted the motion. Respondents filed an appeal to this court. We reversed, ruling respondents had presented sufficient evidence to allow the case to go to the jury.

The case returned to the trial court for a new jury trial. As is relevant here, respondents proceeded on a negligence theory contending that Exxon, as the owner of the Benicia property, had a duty to maintain its property in a condition that was safe for invitees, including those who worked for various contractors. Most of the defendants settled and the case went to trial against Exxon and one other defendant Dillingham Construction (Dillingham.) Exxon and Dillingham defended the suit arguing that Grahn's cancer was not caused by his exposure to asbestos, but by his 30 year smoking habit. The jurors found in favor of respondents concluding they were entitled to $690,950 in economic damages plus $1,000,000 in noneconomic damages for which Exxon and Dillingham were 8 percent and 2 percent responsible respectively. The jurors also found that Grahn was 25 percent responsible for his own injuries and that other entities were responsible for the remaining 65 percent. Based on those findings and after deducting for settlement credits, the court entered a judgment in favor of respondents stating that Exxon and Dillingham were jointly and severally liable for $174,988.91 in economic damages; that Exxon was responsible $80,000 in noneconomic damages, and that Dillingham was responsible for $20,000 in noneconomic damages.

Exxon then filed the present appeal. Respondents filed a cross appeal challenging the trial court's calculation of settlement credits to offset economic damages in the wrongful death/survival action.

II. DISCUSSION

A. Appeal

1.Sufficiency of the Evidence

Respondents sought damages from Exxon under the premises liability theory articulated in *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373 (hereafter *Grahn*) overruled on other grounds *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245; and overruled on still other grounds in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 209-214. The jurors were instructed that "[a] property owner who hires an independent contractor owes no duty of care to the contractor's employees unless there was a pre-existing dangerous condition on the property that (1) was not known or reasonably discoverable by the contractor and (2) was not the subject of at least part of the work for which the property owner hired the contractor." The special verdict form tracked the instruction. As is relevant here, it asked the jurors, "When Robert Grahn worked at Exxon's Benicia refinery, was there a pre-existing dangerous condition that was (a) not known or reasonably discoverable by Mr. Grahn's employer, J.T. Thorpe & Sons, and (b) not the subject of at least a part of the work for which Mr. Grahn's employer, J.T. Thorpe & Sons was hired?" The jurors answered that question affirmatively.

Exxon now contends the jury's verdict must be reversed because none of the *Grahn* elements are supported by substantial evidence.

The standard we use to evaluate this argument is familiar. On appeal, "all conflicts must be resolved in favor of [respondents], and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the [trier of fact]. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions

for those of the [trier of fact.]" (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

Applying that standard we conclude the jury's verdict was supported. Turning to the first element,[1] Exxon concedes there was "much evidence about possible asbestos disturbance contemporaneous with Mr. Grahn's work as to which he was a bystander." However, it argues that "[a]ny disturbance of asbestos that might have affected Mr. Grahn was obviously done while he was present; there was no evidence that asbestos products had been disturbed before Thorpe arrived, and that some lingering asbestos was a cause of harm to Mr. Grahn."

The first half of appellant's argument is valid. There was abundant evidence that Grahn worked at Exxon's Benicia facility and that while he was working there, other workers were installing asbestos products in such a way that they created dangerous asbestos laced dust. However, is not true that "[a]ny disturbance of asbestos that might have affected Mr. Grahn was obviously done while he was present . . . ." Expert testimony presented at trial showed that asbestos has unique characteristics. Tiny and yet dangerous particles of the mineral become airborne easily and, once airborne remain airborne a long period of time. According to the expert, even in still air with no turbulence, asbestos will only settle to the ground at a rate of about one foot per hour. Jurors hearing this evidence could reasonably draw an inference that at least some of the asbestos to which Grahn had been exposed had been launched into the air prior to the time when he was present, and that it remained airborne and dangerous when Grahn arrived. There was substantial evidence of a "pre-existing" dangerous condition.

Next, Exxon contends there was no evidence to support the jury's conclusion that the danger posed by asbestos in Exxon's Benicia facility was not known or reasonably discoverable by J.T. Thorpe. Again, Exxon is correct in part. Grahn himself admitted that J.T. Thorpe "started" warning him about the danger posed by asbestos "in the late 1960's." In addition, a substantial amount of evidence, much of it introduced by

respondents, showed that the dangers posed by asbestos were gradually becoming understood. As early as 1918, the United States Bureau of Labor Statistics published an article about the potential hazards of asbestos. In 1942, the federal government conducted a conference on minimum safety standards for asbestos in shipyards. In 1952, the Encyclopedia Britannica listed asbestos as a cause of cancer. In 1964, Dr. Irving Selikoff published an article in which he reported an increased risk of mesothelioma and lung cancer among those who worked with asbestos pipe insulation.

However, other evidence suggested that the risk of danger for those who, like Grahn, did not work directly with asbestos but who worked near others who did, was not fully understood in the late 1960's. One of Exxon's experts conceded that the federal government did not promulgate standards limiting exposure to asbestos until 1972. According to the expert, that was the point when people's understanding really began to change. The expert also said that just because those who worked directly with asbestos became sick did not necessarily mean those with more indirect exposure were also at risk. "Anything in occupational medicine, it is important to consider dose.[¶] . . . [¶] So when you are trying to look at papers describing insulators, I think in the broadest sense, you could say, yes, asbestos could cause asbestosis, but we knew that from the textile plants. [¶] Yes. Heavily exposed insulators, technically those working in the 1920's, 30's [and] 40's got asbestosis. That doesn't really surprise us. Okay? [¶] But to extrapolate that out and say, well, on the other trades, who either don't use asbestos directly or do so much less frequently than insulators, to conclude they are at risk, it is an extrapolation you can't make. That's why the other studies are done." Again, the jurors considering this conflicting evidence could validly conclude the danger posed by the type of exposure Grahn experienced was not reasonably known by J.T. Thorpe.

Finally, Exxon contends there is no evidence to support the jury's finding that exposure to asbestos was not "at least part of the work" performed by J.T. Thorpe. We

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1 Respondents dispute whether a party must prove that the dangerous condition was "pre-existing." We need not resolve that issue and will assume that a "pre-existing" dangerous condition is one the elements of a cause of action under *Grahn*.

are unpersuaded. The evidence established that J.T. Thorpe performed refractory work at Exxon's Benicia facility. Exxon has not cited, and we are not aware of, any evidence that indicates J.T. Thorpe employees were required to install or remove asbestos containing products as part of their responsibilities. Clearly the jury's verdict on this point was supported by substantial evidence.

Exxon contends the evidence was insufficient because it showed that Grahn and other Thorpe employees typically worked "in conjunction with" insulators who worked at the Benicia facility. While that may be true, that is not the applicable standard. To establish liability under *Grahn,* respondents were obligated to show that the asbestos danger was not "at least part of the work" performed by J.T. Thorpe employees. The fact that Grahn may have worked near others whose work required them to install or remove asbestos does not make that task part of Grahn's own work.

In sum, we conclude the jury's verdict was supported by substantial evidence.

2. Jury Instructions

a. Whether a "Substantial Factor" Instruction was Appropriate

The trial court instructed the jurors on causation using "substantial factor" language derived from *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 (*Rutherford*). Exxon now contends the trial court erred because it should have instructed on causation using "but for" language derived from *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 (*Viner*).

In *Rutherford,* our Supreme Court explained that plaintiffs seeking damages caused by exposure to asbestos face several unique problems. First, there is scientific uncertainty regarding the method by which the inhalation of asbestos fibers leads to lung cancer. (*Rutherford*, *supra*, 16 Cal.4th at p. 974.) Next, given the long latency period of asbestos-related cancers, it is frequently difficult to determine if a particular plaintiff was exposed to dangerous fibers produced by a particular defendant. (*Id.* at p. 975.) In addition, in many cases, other factors such as cigarette smoking may have contributed to a particular plaintiff's lung cancer. (*Ibid.*) Given these difficulties, the court ruled the standard BAJI instruction on causation was inadequate. (*Id.* at p. 977.) Therefore, the

court formulated a special instruction for asbestos cases. Jurors should be told that "the plaintiff's or decedent's exposure to a particular product was a substantial factor in causing or bringing about the disease if in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer." (*Ibid.,* italics in original.) A version of that instruction was provided to the jurors in this case.[2]

We conclude the trial court correctly instructed with "substantial factor" language when that type of instruction was specifically mandated by our Supreme Court.

Exxon contends the court should have instructed on causation using a "but for" standard. It relies primarily on *Viner, supra,* 30 Cal.4th at page 1241, where our Supreme Court ruled a "but for" instruction on causation was proper in a case against an attorney based on transactional malpractice. We need not delve into the specific facts of *Viner* other than to state the obvious: it was a transactional malpractice case. We find nothing in *Viner* that suggests the court intended to overrule or modify the specific instruction on asbestos causation the court had formulated in *Rutherford.*

b. Whether the Court Instructed on *Rutherford* Correctly

Respondents and Exxon both submitted causation instructions to the court based on the *Rutherford* decision. Both stated that a plaintiff in an asbestos case is obligated to show the defendant's conduct contributed to his or her risk of developing cancer. However, the instructions defined the term "substantial factor" differently. As is relevant here, Exxon's instruction stated "In general, a cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm. Where the claimed injury is cancer, plaintiffs must show that defendant's negligence resulted in an asbestos exposure that, in reasonable medical probability, was a *substantial factor* in contributing to the aggregate dose of asbestos the decedent inhaled or ingested, and hence to the risk of developing the cancer." (Italics added.) By contrast, respondents' instruction stated "A person's exposure to a particular asbestos product is a

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2 Later in this opinion, we will discuss the precise instruction that was given and Exxon's argument that the trial court instructed the jury incorrectly.

substantial factor in causing or bringing about an asbestos-related disease if, in reasonable medical probability, the exposure contributed to the person's risk of developing that asbestos-related disease."[3] The court used respondents' version.[4]

After the parties had presented their final arguments, Exxon renewed its argument contending that by using respondents' instruction, and by eliminating the second reference to "substantial factor" that it had proposed, the court in effect eliminated the requirement that its conduct be a "substantial factor" contributing to Grahn's injuries. The court declined to revisit its ruling, however, it agreed to instruct with additional language derived from *Rutherford.* The court told the jurors, "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." (Paraphrasing *Rutherford, supra,* 16 Cal.4th at p. 969.)

Exxon now contends that by eliminating the second reference to "substantial factor" that it had proposed, the court effectively eliminated the requirement that its conduct be a "substantial factor" contributing to Grahn's injuries.

We reject this argument for two reasons. First, the Supreme Court observed in *Rutherford* that it was '"neither possible nor desirable to reduce [the term "substantial factor"] to any lower terms.' It expressly cautioned that the term should not be given "[u]ndue emphasis." (*Rutherford, supra,* 16 Cal.4th at p. 969.) Exxon's argument ignores this teaching and overemphasizes the importance that the term would play in a jury's calculus. Second, to the extent the term "substantial factor" needed further clarification, the court provided it using language the Supreme Court itself had chosen. We conclude any possible harm that arose from the court's omission of the language in

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3 The instruction respondents submitted is consistent with recently released California Jury Instructions drafted by the Judicial Council of California. CACI 435 states a plaintiff may prove causation in an asbestos case by showing there is a reasonable medical probability "that the exposure contributed to [his or her] risk of developing cancer."

4 Although the *Rutherford* decision was filed in 1997, BAJI did not formulate a specific instruction dealing with asbestos causation until 2002. (See BAJI No. 3.78.) This case was tried in 2001.

question was cured when the court instructed with clarifying language the Supreme Court approved in *Rutherford.*

B. Cross Appeal

As we have stated, the jurors found in favor of respondents concluding they were entitled to $690,950 in economic damages plus $1,000,000 in noneconomic damages for which Exxon and Dillingham were 8 percent and 2 percent responsible respectively. The jurors also found that Grahn was 25 percent responsible for his own injuries and that other entities were responsible for the remaining 65 percent.

After the jury rendered its verdict, respondents filed a motion asking the court to enter a judgment on the verdict. The trial court declined to enter a judgment at that point stating it did not have sufficient information to do so. It ordered respondents to identify all parties who had settled and the total amount of those settlements.

Respondents complied with that order. Their counsel filed a declaration in which he described two types of settlements. First, many defendants settled prior to Grahn's death and while the personal injury suit was still pending. According to their counsel, respondents received a total of $353,423 from those defendants. The settlements were allocated 60 percent to the personal injury case, 20 percent to loss of consortium claims, and 20 percent to potential wrongful death claims.

Respondents also settled with several defendants after Grahn died and while the combination survival/wrongful death suit was pending. According to counsel, those settlements totaled $486,576 and were allocated 70 percent to the wrongful death claim, 20 percent to loss of consortium, and 10 percent to the survival causes of action.

The trial court conducted a hearing to consider how the money received in settlement should be credited against the jury's verdict. After hearing argument from counsel, the court entered a detailed judgment. As is relevant here, the court noted that respondents had received settlements totaling $839,999 ($353,423 + $486,576.) Based on the ratio of economic to noneconomic damage that had been awarded by the jury (40.86% economic damages, 59.14% noneconomic damages) the court ruled that 40.86 percent of the amount received through settlement should be allocated to economic

damages. (See *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 841.) The court then deducted from the $690,950 awarded by the jury for economic damages $343,223.59 (40.86% x $839,999) and $172,737.50 (representing the 25% comparative fault found by the jury.) The result of these calculations was that the judgment awarded respondents $174,988.91 in economic damages for which Exxon and Dillingham were jointly liable.

Respondents now contend the trial court erred because it used the full amount received in settlement when calculating the net economic damages portion of the judgment. According to respondents, since the verdict was rendered on a wrongful death claim, the court could deduct from the jury's verdict only those amounts that had been allocated to the wrongful death claim. Thus, respondents contend the court could not validly deduct from the economic damage award those amounts that had been attributed to settlement of the Grahn's personal injury case.

We reject this argument because it is based on a false premise. While respondents did file a wrongful death claim on their own behalf, they also pursued a survival action on Grahn's behalf and asked the jury to award his heirs damages for the personal injuries he sustained which survived his death. Furthermore, the jury was instructed on loss of economic damages caused by personal injury. Thus the verdict here arguably included damages for both the wrongful death causes of action *and* economic damages for the personal injury causes of action. While the jury's verdict does not state how much of the award was attributable to the wrongful death causes of action and how much was attributable to the surviving personal injury causes of action, on appeal we are obligated to view the record in the light most favorable to the judgment. (*Crawford v. Southern Pacific Co., supra,* 3 Cal.2d at p. 429.) Viewed in that light, we conclude that at least some of the jury's verdict represented damages for the personal injuries Grahn had sustained. Under these circumstances, the court could validly deduct from the jury's award amounts respondents received for setting the Grahn's personal injury action. (See Code Civ. Proc., § 877 [a release given in good faith before verdict or judgment "to one

or more of a number of tortfeasors claimed to be liable for the same tort . . . (a) . . . shall reduce the claims against the others in the amount stipulated by the release . . . ."].)

Respondents also contend the court could not validly deduct from the jury award of economic damages amounts received in settlement for loss of consortium. We agree. It is well settled that damages for loss of consortium are considered to be noneconomic damages. (*Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 863.) The court erred when it deducted from the jury's award of economic damages, settlement amounts that are, by definition, noneconomic damages. We will remand for the appropriate correction.

Exxon contends the court's decision to deduct amounts received in settlement from the jury's economic award was a discretionary decision that must be affirmed on appeal because it is supported by substantial evidence. However, respondents do not attack any discretionary decision of the court. They challenge the *legal* basis for the court's ruling contending the court misinterpreted that controlling law. We consider legal issues *de novo* on appeal. (*Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212.)

Exxon also contends the trial court ruled correctly because respondents failed to present any evidence that showed how the prior settlements were allocated. This is simply incorrect. Counsel for respondent filed a declaration that explained how the settlements were allocated. We conclude counsel's declaration was sufficient.

III. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for the sole purpose of recalculating the judgment so that amounts received in settlement for loss of consortium are *not* deducted from the award of economic damages. In all other respects, the judgment is affirmed.

Each party shall bear its own costs on appeal.

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Jones, P.J.

We concur:

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Stevens, J.

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Simons, J.