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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WILLIAM MOLINA et al., Plaintiffs and Appellants, v. SHELL OIL COMPANY et al., Defendants and Respondents.	B213451 (Los Angeles County Super. Ct. No. BC367800)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carolyn B. Kuhl, Judge. Affirmed.

Paul & Hanley, Deborah R. Rosenthal, and Dean A. Hanley for Plaintiffs and Appellants.

Horvitz & Levy, David M. Axelrad, Dean A. Bochner, Mary-Christine Sungaila; Steptoe & Johnson, Lawrence P. Riff, and Ruth D. Kahn, for Defendants and Respondents.

Plaintiffs William and Angela Molina appeal from the judgment entered after a jury found that chemicals in solvents made by three oil companies that William Molina had used while working at a tire company did not cause him to incur non-Hodgkins lymphoma. We hold that the trial court did not err by refusing to give a causation instruction geared toward multiple-defendant toxic tort cases where the defendants contest whether exposure to their particular products actually contributed to a plaintiff's illness. Instead, because the defendants in this case conceded exposure to their products, and their proportionate share of their contribution, but claimed their products were not capable of causing William Molina's illness at all, the trial court properly gave the standard pattern instructions on causation. The Molinas also contend that the trial court's pretrial ruling eliminating the consumer expectations theory of product liability was error. We need not address the issue because the jury's finding that defendants' products did not cause William Molina's illness would have been the same regardless of which products liability theory was presented to the jury.

FACTS AND PROCEDURAL HISTORY

William Molina sued Chevron, U.S.A., Shell Oil Company, and Unocal, alleging that exposure to chemicals in petroleum distillate solvents they sold to his employer, Firestone Tire Co., caused him to incur non-Hodgkins lymphoma during the 17 years he worked at Firestone.[1] Molina alleged various theories of product liability. The trial court granted defendants' motion in limine to prevent Molina from seeking recovery under the consumer expectation theory of product liability, and the case was tried under the product

[1] William Molina's wife, Angela, also sued for loss of consortium. Because her claim rests on the viability of her husband's claims, our discussion is limited to Mr. Molina. When we refer to Molina, we mean William Molina only. We will refer to Chevron, Shell and Unocal collectively as defendants.

liability theories of defective design and the failure to warn of known dangers inherent in the use of defendants' products.[2]

Defendants were represented by the same lawyer and presented a joint defense: although the chemicals in their products – primarily benzene and toluene – had been scientifically linked to leukemia and other diseases, they did not cause non-Hodgkins lymphoma. The evidence showed that from the 1960's through 1980, defendants sold chemical solvents containing 2 percent or less benzene to Firestone. As part of defendants' opening statement, they conceded the amounts each sold to Firestone during the relevant time period: 1.4 percent each by Shell and Unocal, and the rest, approximately 97 percent, by Chevron. The solvents were a necessary part of the tire manufacturing process, and were also used by Firestone employees to clean machinery and wash their hands, although their use for handwashing was not recommended. Molina worked at Firestone from 1963 to 1980 in various capacities, where he was directly and indirectly exposed to defendants' solvents. In 2006, he was diagnosed with non-Hodgkins lymphoma, a type of cancer that affects the immune system.

A pathologist with expertise in the causes of cancers such as lymphoma and leukemia testified for Molina that exposure to chemical solvents was a substantial contributing cause of Molina's illness. An epidemiologist testifying for Molina also stated that exposure to mixed petrochemical solvents caused Molina to contract non-Hodgkins lymphoma. On cross-examination, Molina's expert admitted that non-Hodgkins lymphoma was the fifth most common cancer in the United States, and its incidence was increasing at epidemic proportions. In half the cases, the causes were unknown, but risk factors included age, being male, being greatly overweight, smoking, and pesticide exposure.

Defendants' toxicology expert testified that although high doses of benzene have been shown to cause a particular form of leukemia, studies showed no increase in non-

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[2] We discuss these theories in more detail later.

Hodgkins lymphoma among those workers. No amount of benzene exposure has been shown to cause, or increase the risk of contracting, non-Hodgkins lymphoma. He believed that the amount of benzene to which Molina was exposed during his years at Firestone was significantly less than that required to increase the risk of developing leukemia. Even though benzene was known to cause leukemia, that disease was very different from non-Hodgkins lymphoma and involved completely different organ systems. He did not believe Molina's illness was caused by exposure to defendants' chemical solvents. Instead, he believed Molina fell into that large group of persons for whom there was no known cause of the disease. According to the toxicologist, Molina had several of the risk factors for the illness: obesity, a longtime history of smoking, and lengthy use of non-steroidal anti-inflammatory pain medications.

Molina had various physical ailments that he did not attribute to defendants' products: obesity, kidney cancer, heart disease, and diabetes. He smoked cigarettes for 25 years, but quit in 1989. His kidney tumors were surgically removed in 2008 and he was free of that cancer. Molina began receiving chemotherapy for his non-Hodgkins lymphoma within a month of the diagnosis. By the time of trial, the disease was in remission.

The jury found by special verdict that: (1) in regard to the design defect claim, defendants' products did not cause Molina's disease; and (2) in regard to the failure to warn claim, that Shell had adequately warned of its products' cancer risks, and that Chevron's and Unocal's failure to give a proper warning did not cause Molina's disease.

Molina had asked the trial court to instruct the jury with pattern instruction CACI 435, which was designed to address the causation issue when multiple defendants were sued for exposure to toxic substances they had manufactured and the plaintiff could not show with certainty that any particular product actually caused the onset of a disease. The trial court refused, and instead gave pattern instructions dealing with causation generally. Molina contends this was error. He also contends the trial court erred by using a motion in limine as the procedural device by which it eliminated the consumer

expectations theory, and that, regardless of the procedure used, the ruling was wrong on the merits.

DISCUSSION

1. *The Court Properly Instructed on Causation*

A. *The Instructions Given, and Those Requested but Denied*

Under California law, a product manufacturer may be held strictly liable for injuries caused by its product if it was: (1) manufactured with a defect; (2) designed with a defect; or (3) distributed without adequate warnings or instructions of its potential for harm. (*Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 715.) There are two ways of showing a design defect. The risk-benefit test balances the risk of harm inherent in the product's design against the feasibility and cost of a safer design and the degree of potential harm. The consumer expectations test requires proof that the product did not perform as safely as an ordinary consumer would expect when using the product in an intended or reasonably foreseeable manner. The failure to warn test looks to whether the manufacturer failed to warn of any known or knowable dangers inherent in the product. (*Id.* at pp. 715-716.) As with most tort claims, product liability plaintiffs bear the burden of proving that a defendant's product caused their injuries under the substantial factor test. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968 (*Rutherford*).) Under that test, a cause in fact of a plaintiff's injuries is something that was a substantial factor in bringing them about. Although a precise definition is neither possible nor desirable, the concept excludes forces that play no more than an infinitesimal or theoretical part in bringing about injury. (*Id.* at p. 969.)

The jury in this case was given pattern instruction CACI No. 430, the general instruction on the substantial factor test: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." The jury was also given a slightly modified version of CACI No. 431, concerning multiple

causes of harm: "A person's negligence may combine with another factor to cause harm. If you find that a defendant's conduct with respect to its products was a substantial factor in causing the plaintiff's harm, then a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing plaintiff's harm."

The trial court refused Molina's request to instruct instead with CACI No. 435, a special causation instruction formulated in *Rutherford*, *supra*, 16 Cal.4th 953, where a plaintiff sued multiple manufacturers of asbestos-containing products for causing him to develop lung cancer. The instruction states: "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm. [¶] [Plaintiff] may prove that exposure to asbestos from [defendant's] product was a substantial factor causing [his] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his] risk of developing cancer."[3]

CACI No. 435 was endorsed for use in a case involving cancer allegedly caused by exposure to multiple toxic chemicals in *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79-80 (*Bockrath*), and Molina contends it should have been given here because without it, the jury was misled to believe it could find causation only if defendants' products actually contributed to his illness, when it merely had to find that exposure to the products increased his risk of becoming ill. However, there are significant differences between this case and the facts of both *Rutherford* and *Bockrath* that make CACI No. 435 inapplicable.

B. *The* Rutherford *Decision*

The plaintiffs in *Rutherford* were the survivors of a man who died of asbestos-related lung cancer. The decedent had been exposed to various asbestos products while

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[3] Molina proposed a modified version tailored to this toxic chemical exposure case.

employed as a sheet metal worker at the Mare Island shipyard for more than 40 years. Plaintiffs sued 19 manufacturers of asbestos-containing products to which the decedent was allegedly exposed. The trial was bifurcated, with the jury asked to determine in the first phase whether "exposure to asbestos was a proximate cause of injury (. . . whether . . . plaintiffs' decedent had died from asbestos-related disease)" and, if so, the total amount of resulting damages. (*Rutherford*, *supra*, 16 Cal.4th at p. 959.) Based on evidence that the decedent was heavily exposed to asbestos products in the shipyard, and had lung cancer, the jury determined that his cancer had been "legally caused by his inhalation of asbestos fibers," and awarded damages of nearly $560,000. (*Id.* at p. 962.)

In the second phase of the trial, the jury was asked to determine the defendants' percentage of fault, and apportion damages accordingly. Before that phase began, however, all the defendants settled except for Owens-Illinois. There was no evidence the decedent had been exposed to any one kind or brand of asbestos product more than the others, and Owens-Illinois presented evidence of shared comparative fault by other asbestos manufacturers, the decedents' employer, and the decedent himself based on his many years of smoking cigarettes. (*Rutherford*, *supra*, 16 Cal.4th at pp. 961-962.)

Because the plaintiffs proved that their decedent's injuries "were legally caused by asbestos exposure *generally*, and that he was exposed to asbestos fibers from the defendant's product," a local trial court rule shifted the burden to Owens-Illinois to prove that its product was not a legal cause of death. (*Rutherford*, *supra*, 16 Cal.4th at pp. 960-961.) The jury found that Owens-Illinois was at fault by little more than one percent, and awarded damages of nearly $180,000. Owens-Illinois appealed, contending that the instruction shifting the burden of proof on causation was improper.

The Supreme Court held that a burden-shifting instruction was not warranted, but affirmed the judgment because the instructional error was harmless. Shifting the burden of proof to asbestos manufacturers was wrong for several reasons, the court held. In most asbestos injury cases, not all the responsible manufacturers were capable of being brought into the action, meaning the actual tortfeasor might escape liability.

Furthermore, the toxicity of asbestos products differed widely depending on the type or brand of product, meaning that some created a much greater risk of harm than others. Last, and most fundamentally, are a host of uncertainties inherent in such cases. These include: (1) scientific uncertainty about the biological mechanisms by which inhalation of asbestos fibers leads to lung cancer and mesothelioma, because it was not yet known whether each episode of lung scarring caused by inhaling asbestos fibers contributed cumulatively to tumor formation, or whether only one fiber or group of fibers caused the tumors; (2) evidentiary uncertainty about whether the plaintiff was even exposed to asbestos fibers from a particular defendant's product, due to the long latency period of the disease and the associated loss of memories or records; and (3) uncertainty whether the risk of cancer created by exposure to a particular asbestos-containing product was significant enough to be a legal cause of the disease, after taking into account the nature and extent of exposure, the peculiar properties of the individual product, and any other potential causes of the disease. (*Rutherford*, *supra*, 16 Cal.4th at pp. 971-975.)

Even though asbestos-injury plaintiffs could not be "expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber[,] . . . the impossibility of such proof does not dictate use of a burden shift." Instead, plaintiffs can prove causation in asbestos-related cancer cases "by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the *risk* of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that *actually* produced the malignant growth." (*Rutherford*, *supra*, 16 Cal.4th at pp. 976-977, fn. omitted.) The standard causation instructions were insufficient because they did not inform the jury that in asbestos injury cases, a particular product is deemed to be a substantial factor in bringing about injury "if its contribution to the plaintiff or decedent's *risk* or *probability* of developing cancer was substantial. [¶] Without such guidance, a juror might well

conclude that the plaintiff needed to prove that fibers from the defendant's product were a substantial factor *actually contributing* to the development of the plaintiff's or decedent's cancer. In many cases, such a burden will be medically impossible to sustain, even with the greatest possible effort by the plaintiff, because of irreducible uncertainty regarding the cellular formation of an asbestos-related cancer." (*Id.* at p. 977.)

C. Rutherford *Is Not Applicable Here*

Molina contends that the general causation instructions given to the jury allowed it to find that defendants' products did not cause his illness unless those products *actually contributed* to it. Instead, he contends, the contribution to risk instruction first formulated in *Rutherford* and embodied in CACI No. 435 was required because it directed the jury to find causation if it determined that exposure to defendants' solvents increased his risk of getting "*cancer*." We quote and emphasize Molina's use of the word "cancer" for a good reason – to highlight the absence of any reference to non-Hodgkins lymphoma, the actual disease Molina claims was caused by defendants' products.

The three defendants in this case were the only manufacturers whose products allegedly harmed Molina. They were represented by the same lawyer and offered a unified defense that did not involve the usual finger-pointing directed at each other, or at any other manufacturers.[4] Instead, they contended, based on the testimony of their expert witnesses, that while the chemicals in their products had been linked to some cancers, they simply did not cause non-Hodgkins lymphoma. There was also no dispute about their proportional contribution to Molina's exposure to their products. They told the jury the exact numbers during their opening statement, and when Molina argued that the jury should use those figures to apportion liability, defendants did not object or raise a counter

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[4] They did, however, contend that Firestone bore a large share of the liability because it failed to protect Molina and its other employees by providing proper handling instructions or protective gear. Because the jury found that defendants did not cause Molina's illness, it never reached that issue.

argument. Instead, they argued that if the jury found them liable, it should do no more than fairly compensate Molina.

By contrast, the *Rutherford* court's holding arose in a case where the jury had already determined in the first phase of trial that asbestos exposure *in general* caused the decedent's lung cancer. (*Rutherford*, *supra*, 16 Cal.4th at pp. 957, 959-961 [in the first phase of trial, the jury was to determine whether exposure to asbestos was a proximate cause of injury, and the local rule's burden-shifting instruction came into play after plaintiffs proved the decedent's death was caused by asbestos exposure generally].) Therefore, "[t]he only remaining issue before the court was the proper standard to adopt for determining *who* manufactured or supplied the asbestos that caused the plaintiff's illness." (Loewen, *Causation in Toxic Tort Cases: Has the Bar Been Lowered?* (Spring 2003) 17 Nat. Resources & Env't. 228, 229 (Loewen).) This is made clear by not just the context of *Rutherford*, but its qualifying language. For instance, the *Rutherford* court framed the issue by turning "to the aspect of uncertainty about causation that *is* directly disputed by the parties here – the question of which exposures to asbestos-containing products contributed significantly enough to the total occupational dose to be considered 'substantial factors' in causing the disease." (*Rutherford*, *supra*, at p. 977.) Elsewhere, the court said it was disapproving a burden-shifting instruction "on a threshold *component* of proximate legal causation," (*id.* at p. 982, italics added), strongly suggesting that its holding affected only part of the causation requirement.

When viewed in context against the backdrop of this qualifying language, we conclude that the *Rutherford* court focused on the extreme difficulties faced by plaintiffs when trying to prove that a particular defendant or defendants manufactured the specific asbestos fibers that caused his asbestos-related illness, but did not purport to relieve plaintiffs from proving that the allegedly harmful substance to which plaintiffs were exposed was even capable of causing the injuries they had suffered. "Placed in context then, increased risk is only used to measure the significance of the quantity of asbestos fibers contributed by the defendant in proportion to the aggregate dose, not to determine

whether asbestos was the cause of the plaintiff's illness." (Loewen, *supra*, 17 Nat. Resources & Env't. at p. 230.)

To require a *Rutherford*-type instruction on the peculiar facts and evidentiary posture of this case would have allowed the jury to find that defendants' products caused Molina's non-Hodgkins lymphoma if it believed that exposure to those products did no more than increase his risk of contracting that disease. For the reasons just discussed, we do not believe the *Rutherford* court meant to go that far. Instead, before determining which, if any, of a defendant's products increased a plaintiff's risk of contracting an illness, the trier of fact must first conclude that the products themselves, in the abstract, were capable of causing that disease.[5] (See *Bockrath*, *supra*, 21 Cal.4th at p. 79 [while even a minor force can be a substantial factor, it must be a "force that does cause harm."]; *Rutherford, supra,* 16 Cal.4th at p. 957 [the erroneous burden-shifting instruction was triggered only after showing that plaintiffs were exposed to defendants' asbestos-containing products, and that "exposure to asbestos fibers generally was a legal cause of plaintiff's injury"]; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049, cited by *Rutherford, supra,* at p. 968 [if the conduct alleged to have injured plaintiff "had nothing at all to do with the injuries, it could not be . . . a substantial factor . . . ."].)

The second part of the causation inquiry was never at issue in this case, however. Based on defendants' evidence and arguments, the jury was asked to consider whether the chemicals in their products were capable of causing non-Hodgkins lymphoma at all. If they resolved that issue against the defendants, each one's proportional share of Molina's exposure had effectively been conceded, and was urged without dispute as the

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5 We do not hold, and do not mean to suggest, that a bifurcated proceeding like the one in *Rutherford* must be used. Instead, we believe that in cases such as this, where the defendants contend their products were not capable of causing a plaintiff's illness, the jury must resolve that issue as part of its causation analysis.

basis for apportioning liability. We therefore hold that the trial court did not err by refusing to instruct the jury with CACI No. 435.[6]

2. The Jury's Finding on Causation Means We Need Not Resolve the Ruling on the Consumer Expectations Theory

The trial court granted defendants' motion in limine to exclude evidence concerning the consumer expectations theory of strict product liability. Molina contends the court erred for two reasons: (1) it was improper to adjudicate such a disputed, evidence-based issue in a motion in limine; and (2) regardless of the procedure used, the consumer expectations test should have gone to the jury because it applied to the facts of this case. We need not resolve either issue, however. Even under the consumer expectations theory, the jury would have to determine that exposure to defendants' products caused Molina to contract non-Hodgkins lymphoma. (*Rutherford, supra,* 16 Cal.4th at p. 968 [product liability plaintiffs must show that defendants' products caused his injuries under the substantial factor test].) We have held that the jury was properly instructed on causation. Molina does not contend the evidence was insufficient

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[6] We agree with Molina that the *Rutherford* causation instruction may be appropriate in product liability cases based on exposure to allegedly toxic chemicals other than asbestos. The court in *Bockrath, supra,* 21 Cal.4th 71, endorsed its use in that context, as did the court in *Whiteley v. Phillip Morris Inc.* (2004) 117 Cal.App.4th 635, 700-701. Neither decision affects the outcome here, however. *Bockrath* reversed a trial court's order sustaining without leave to amend demurrers to a toxic chemical exposure complaint, and did no more than describe the pleading requirements for causation in such cases. *Whiteley* concerned an appeal by a tobacco company from a jury verdict for the plaintiff in an action claiming the defendant's cigarettes suffered from a design defect because they could have been made safer. Defendant challenged the jury verdict on that cause of action, and the court of appeal reversed because there was no evidence that a safer design, such as reducing the amount of nicotine or known cancer-causing substances, would have decreased the plaintiff's risk of contracting lung cancer. There was no dispute that cigarette smoking can cause cancer, however. Although the court believed a *Rutherford*-type instruction might be appropriate in such cases, it chose not to reach the issue because of the evidentiary deficiencies in plaintiff's case. (*Whitely, supra,* at pp. 700-701.) Therefore, neither decision concerned the issue raised here.

to support a finding that defendants' products did not cause non-Hodgkins lymphoma. Therefore, even if the jury had heard evidence about, and been instructed to consider, the consumer expectations theory, it would have made the same causation determination. Accordingly, we need not decide whether any errors occurred in connection with the consumer expectations theory because Molina could not have prevailed under any circumstances. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1595.)

DISPOSITION

The judgment is affirmed. Respondents shall recover appellate costs.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.