H025585

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

ANTONIO LAICO, et al.,

Plaintiffs and Respondents,

vs.

CHEVRON U.S.A., INC.,

Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SANTA CLARA COUNTY (CV774305)
ROBERT A. BAINES, JUDGE

APPELLANT'S OPENING BRIEF

HORVITZ & LEVY LLP
DAVID M. AXELRAD (STATE BAR NO. 75731)
ANDREA M. GAUTHIER (STATE BAR NO. 158955)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157

STEPTOE & JOHNSON LLP
LAWRENCE P. RIFF (STATE BAR NO. 104826)
633 WEST FIFTH STREET, SUITE 700
LOS ANGELES, CALIFORNIA 90071
(213) 439-9400 • FAX: (213) 439-9599

ATTORNEYS FOR DEFENDANT AND APPELLANT
CHEVRON U.S.A., INC.

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INTRODUCTION

Chevron U.S.A., Inc. (CUSA) appeals from a $1.8 million premises liability judgment in favor of plaintiffs Antonio Laico and his wife Carol. A principal issue presented is whether CUSA, a corporation that owned property occupied and controlled by a separate and distinct corporation, can be liable for workplace injuries sustained by an employee of the other corporation, when there is no evidence CUSA had either control over the workplace conditions, or knowledge the conditions were unsafe.

From 1991 through 1997, Antonio Laico worked at laboratory research facilities operated by the Chevron Research and Technology Company (the

CRTC) as a Shift Technician. His work involved certain activities relating to the testing of lube oils and gasoline. Laico contends that exposure to benzene, a component in the gasoline tested at the facility, caused him to contract myelodysplastic syndrome (MDS), a malignant blood disorder.

For much of the time that Laico worked at the CRTC, 1993 through 1997, Laico's employer was CUSA, the Chevron entity that both owned the land on which the facility was located and supplied gasoline to the facility for testing. Thus, with respect to any workplace injuries sustained during those years, workers' compensation was Laico's exclusive remedy against any Chevron entity. But before that point, there was a 16-month period (from August 1991 through December 31, 1992) during which Laico's employer was the *CRTC*, a corporation which, for that brief time, was separate and distinct from *CUSA*, the corporation that owned the land and supplied gasoline for testing. Thus, with respect to his injuries claimed to have been sustained during those 16 months, Laico pursued *both* a workers' compensation action against the CRTC, his employer, and this civil action against CUSA in its capacity as a gasoline manufacturer and landowner. The workers' compensation claim was still pending as of the trial of this civil action.

During their case-in-chief in this civil action, plaintiffs presented no evidence that CUSA, during the relevant 16-month period, had any control over or knowledge of any unsafe conditions at the CRTC – evidence that was necessary to hold CUSA liable as a landowner. Plaintiffs' trial theory instead focused solely on proving CUSA's liability as a gasoline manufacturer under both design defect and failure to warn product liability theories. Nevertheless, despite plaintiffs' abandonment of their premises liability theory, the trial court *denied* CUSA's motion for nonsuit on that cause of action. Notwithstanding CUSA's lack of control and knowledge concerning any unsafe conditions at the CRTC, the trial court ruled that CUSA knew that it was supplying gasoline

to the CRTC for testing and therefore had an affirmative duty to inspect the premises to ensure they were safe. Thereafter, the jury returned a verdict concluding that, although the gasoline CUSA supplied was not defective on either a design defect or failure to warn theory, it was nevertheless liable as a landowner.

The judgment should be reversed in its entirety with directions to enter judgment for CUSA for three independent reasons.

First, as a matter of law, CUSA owed no duty to Laico in its status as a landowner. The trial court's ruling that CUSA had an affirmative duty to inspect the premises despite its lack of control over and lack of knowledge of any unsafe conditions at the CRTC was based on a misreading of a long line of California decisions, including a decision by this court.

Second, even assuming the existence of such a duty, plaintiffs failed to present any evidence that CUSA *breached* that duty. Plaintiffs' evidence focused instead on the products liability theories the jury ultimately *rejected*.

Third, assuming a duty and a breach, plaintiffs failed to present sufficient evidence that would permit the jury to find that this breach of duty *caused* Laico's injury.

If the judgment is not reversed with directions based on the absence of duty or plaintiffs' failure to prove the elements of breach or causation, the judgment should be reversed for a new trial limited to apportionment of fault. If CUSA was negligent at all, it was only in a derivative and passive sense in its capacity as a landowner that had relinquished possession to the CRTC, Laico's employer. Nevertheless, the jury apportioned *85 percent* fault to CUSA and only *13 percent* fault to the CRTC, the party primarily responsible for any injuries. The jury's decision, which was likely motivated by an improper concern that Laico could not recover damages from his employer, cannot be reconciled with the evidence and therefore cannot stand.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. CUSA and its relationship to the CRTC.

CUSA is a petrochemical refiner engaged in manufacturing, distributing, and selling vehicle fuels, including gasoline. (RT 1708.) The CRTC performs research and technology work for CUSA and other Chevron companies. (RT 213, 1708.) During the early 1990's, that research included the testing of both lube oils and gasoline. (RT 216.) The CRTC acquired about 70 to 80 percent of the gasoline it tested from CUSA and the remainder from CUSA's competitors. (RT 766-768,1794, 2218.)

From August 1991 through December 1992, the period at issue here, CUSA was the title owner of the land in Richmond, California on which the CRTC's facility was located. (RT 1710; see also Appellant's Appendix [AA] 86-91.) During this 16-month period, the CRTC (Laico's employer) and CUSA were separate corporations. (RT 1708-1710.) The record contains no explanation why, for these 16 months, there was a non-identity between the corporation that owned the land and the corporation that employed Laico. After that period, as of January 1, 1993, the CRTC was merged into CUSA. (See AA 87-88, 91.) Any personal injury claims after that date were subject to the exclusive remedy of workers' compensation. (See *post*, at pp. 10-11.)

B. Overview of OSHA standards concerning benzene in the workplace and the CRTC's compliance efforts.

As Laico's employer from August 1991 through December 1992, the CRTC was responsible for complying with standards imposed by the Occupational Safety and Health Administration (OSHA). (RT 309, 2090.)

One such standard was the Hazard Communication Standard, created by OSHA to ensure that employees had information about the hazards of chemicals in the workplace. (RT 309-310, 313.) The Hazard Communication Standard, which became effective before the events relevant in this lawsuit, requires that containers in the workplace be properly labeled and that employers make product information sheets known as Material Safety Data Sheets (MSDSs) available to workers. (RT 310.) With respect to specified chemicals that OSHA recognizes as a potential carcinogen, such as benzene, the standard requires that MSDSs for mixtures containing more than 0.1 percent of the chemical identify the existence of the chemical in the product and provide specified warnings. (RT 340; see 29 C.F.R. § 1910.1200 (g)(2)(i)(C)(1).) Because automotive gasoline typically contains between one to two percent benzene, the gasoline tested at the CRTC was subject to this requirement (RT 340, 1536), and the CRTC was responsible for teaching its employees how to understand the information (RT 310, 2090). (Note that the United States Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, has concluded that "there is no evidence that exposure to gasoline [as distinguished from benzene] causes cancer in humans." (RT 1417-1419 [plaintiffs' expert's testimony conceding the point].)

The CRTC, as Laico's employer, was also responsible for complying with OSHA standards for the maximum allowable airborne concentration of benzene. (RT 317-318.) OSHA's permissible exposure limit or PEL for benzene (the maximum allowable concentration averaged over an 8 hour workday) is 1 part per million. (RT 318-319.) The short term exposure limit or STEL (the maximum allowable concentration averaged over 15 minutes) is 5 parts per million. (RT 321.)

During the period relevant here, the CRTC had an Environmental Health and Safety Team that was responsible for ensuring compliance with the

OSHA standards, Hazard Communications training, and identifying safety hazards in the workplace. (RT 213-214, 218, 309-311, 317, 319, 367.) The team monitored the workplace by conducting air sampling and walk-through surveys. (RT 213-215, 218-220, 243, 329-334.) The team also held training sessions to educate employees on the CRTC's labeling system, MSDSs, and the potential hazards of benzene. (RT 248, 341, 348, 365-366.)

The CRTC also had a Facility's Operations Supervisor (FOS), an office that dealt with security issues and laboratory malfunctions both during the day and during off hours. (RT 306-307.) The FOS was in charge of initiating emergency responses from the hazardous materials team, fire responders, and emergency medical technicians. (*Ibid*.) Employees were required to report spills and other emergencies to the FOS. (RT 307-308, 574-578, 1788.)

C. Laico's employment at the CRTC.

In August 1991, Laico obtained a position at the CRTC through a temporary employment agency. (RT 439-441.) The CRTC assigned Laico to work in the "lube lab" as a Shift Technician. (RT 441.) The lube lab tested the performance of lube oils by running them through diesel and gasoline engines. (RT 216, 447-450.) As a Shift Technician, Laico monitored the testing of the oils during his shift. (RT 447-450.) His job involved a variety of tasks, including checking oil levels; providing fuel, oil, and coolant for the engines; draining the engines; replacing fuel filters; testing the engines for exhaust gas; and checking fuel inventories. (RT 450-480, 490-492.)

In January 1993, the lube lab was closed and the CRTC (which had been a separate corporate entity from CUSA from the inception of Laico's employment through December 1992) became part of CUSA. (RT 564; AA 87-88, 91.) Laico then moved to the CRTC's fuel lab, which tested the

performance of gasoline fuels as opposed to lube oils. (RT 494, 1756.) Laico continued to work as a Shift Technician, with his responsibilities remaining essentially the same. (RT 450, 564; see also RT 494-534, 1772-1773 [describing responsibilities of shift technicians].)

In 1995, the CRTC (then part of CUSA) hired Laico as a permanent employee. (RT 535.) Although Laico had nominally been a temporary agency employee from August 1991 until 1995, the trial court found as a matter of law that Laico was a "special employee" of the CRTC from 1991 through December 1992, and a "special employee" of CUSA (into which the CRTC had merged) from January 1993 to 1995. (RT 1490; see *post*, at pp. 10-11.)

During his years at the labs, Laico witnessed or was involved in a number of gasoline leaks and spills. (RT 470-471, 484, 534, 545-547.) When spills or leaks occurred, Laico and other workers would generally use rags to wipe them up. (RT 478-479, 1046, 1050.) Laico avoided reporting to his employer spills of even five to ten gallons because he "didn't want to get in trouble." (RT 547.)

While performing his duties, Laico smelled gasoline at times and occasionally experienced headaches and lightheadedness. (RT 493, 565-567, 1284.) He never felt nauseated, nor did he ever complain to the CRTC about the smell or about feeling sick. (RT 493, 564, 568, 2206.) Laico was given a respirator as part of his training, but was never told to use it on the job. (RT 480-482, 484, 513; see also RT 1202 [shift technicians were not required to wear respirators].)

D. Laico's diagnosis with MDS.

In 1997, while still employed by CUSA and working at the CRTC as a Shift Technician, Laico began noticing bruises on various parts his body. (RT

548, 1285.) He was referred to a hematologist, a doctor specializing in blood problems, and was eventually diagnosed with myelodysplasia, or MDS. (RT 550-551, 1249-1250.)

MDS is a dysfunction of the bone marrow characterized by the bone marrow's failure to produce the proper number or quality of blood cells. (RT 628, 1082-1083.) MDS can, over time, convert to a type of leukemia known as acute myelogenous leukemia, or AML. (RT 1085.)

Most cases of MDS and AML are "primary," meaning that they occur spontaneously, with no known cause. (RT 672-673, 836, 1995, 2006.) Both MDS and AML have also been associated with benzene exposure. (RT 615-617, 651-661, 1551, 1726-1727.) Since benzene is ubiquitous in air, and AML and MDS are relatively rare conditions, much of the evidence at trial consisted of scientific evidence drawn from the disciplines of epidemiology, toxicology, and industrial hygiene, and concerned the amount (dose) of benzene exposure thought to increase a human's risk of contracting AML or MDS. (See, e.g., RT 608-705, 783-862, 921-1015, 1077-1142, 1228-1271, 1327-1363, 1403-1432, 1506-1634, 1712-1750, 1835-1948, 1955-2052-2204.) Such competing evidence included studies of gasoline and petrochemical workers in the United States, Europe, and Australia. (RT 1559-1561, 1626-1634, 1889-1894, 1943-1946.) This appeal does not involve those medical causation disputes.

Because Laico did not have full-blown AML, his doctors recommended that he delay a bone marrow transplant, a potentially curative treatment with a relatively high risk of morbidity and mortality, and that his condition instead be monitored by taking blood counts every three months. (RT 1251, 1253,1256.) Laico continued to work at Chevron even after his diagnosis, but was reassigned to another position outside the fuel lab. (RT 551, 554.)[1/]

1/ As of trial, Laico's condition was relatively stable. (RT 1097-1099, (continued...)

E. The present lawsuit and the exclusive remedy issue.

In 1998, Laico and his wife Carol sued the CRTC, CUSA, Chevron Chemical Company, and various other Chevron entities for negligence, strict liability failure to warn, strict liability design defect, fraudulent concealment, breach of implied warranties, premises liability, and loss of consortium. (See AA 1-5; see also AA 6, 42.) Plaintiffs alleged that the gasoline tested at the CRTC contained substantial concentrations of benzene and that Laico developed MDS from exposure to benzene in the course of performing his job duties. (AA 10 [First Amended Complaint], 47 [Second Amended Complaint].) Only two Chevron entities, CUSA and Chevron Chemical Company (collectively, the Chevron defendants), answered the complaint. (See AA 30-31.)

Plaintiffs also named several additional gasoline manufacturers as defendants: Atlantic Richfield Company, Amoco Corporation, Exxon Corporation, Mobil Corporation, Shell Oil Company, Texaco, Inc., Union Oil (collectively, the Non-Chevron defendants). (AA 7-9.) Plaintiffs alleged that each of these entities supplied gasoline tested at the CRTC. (AA 10 [First Amended Complaint]; see also AA 47 [Second Amended Complaint].)

Because Laico was employed by one or more Chevron entities for at least part of the time he worked at the CRTC, an issue arose concerning whether Laico's claims were barred, in whole or in part, by the exclusive remedy provisions of California's workers' compensation statute, Labor Code section 3600 et seq., which provide that workers' compensation is the exclusive remedy for injuries arising out of and in the course of employment.

1/ (...continued)
1105, 1265, 2012-2013, 2016-2018.) His doctors had not suggested he undergo a bone marrow transplant, although they thought such a procedure would likely be warranted in the future. (RT 554-555, 653, 1109, 1136-1140.)

(See AA 32 [Answer to Complaint], 46-47 [Second Amended Complaint]; see Lab. Code, §§ 3600, 3602.) In fact, at all times during the pendency of this civil action, Laico was prosecuting a workers' compensation action against Chevron. (RT 559; see also RT 2215 [referring to deposition from workers' compensation proceeding].)

Acknowledging that any claims against Chevron as an employer had to be pursued through the workers' compensation system , plaintiffs clarified that they intended to pursue their civil action not against Laico's employer, but against the Chevron entities that, at a time they were not Laico's employer, manufactured and distributed gasoline and owned and/or occupied the land on which the research facility was located. (AA 98.) In turn, the Chevron defendants agreed that if any Chevron entity were found liable on a products or premises liability theory (whether named as a defendant or not), and if that entity were *not* immune from such liability under the exclusive remedy doctrine, any resulting judgment would be rendered against that party and the pleadings deemed amended. (AA 99.)

During trial, the court granted the Chevron defendants' directed verdict motion establishing that Laico, although nominally working for the employment agency that secured him the position at the CRTC, was in fact a "Chevron" special employee from 1991 through 1995 (the date he was hired as a permanent employee). (AA 68-85 [motion]; RT 1464-1478 [argument on motion]; RT 1485-1491 [ruling].) This ruling did not, however mean that the entire lawsuit was barred by the exclusive remedy doctrine. Evidence stipulated to by both plaintiffs and the Chevron defendants established that there was a brief window of time between August 1991 and December 31, 1992, during which the CRTC (Laico's employer) and CUSA (the corporation that owned the land on which the CRTC was located and which supplied gasoline to the CRTC for testing) were separate and distinct corporations,

meaning that CUSA was not entitled to workers' compensation immunity for that time period. (See RT 1709-1710; AA 86-91.) Based on the court's ruling and the stipulated evidence, the court concluded that plaintiffs could pursue their claims against CUSA, but only with respect to its conduct within that narrow window of time. (See AA 345 [ruling reflected in amended judgment]; see also RT 2224, 2229, 2356.) The court deemed all claims and causes of action against the other Chevron entities to be subject to a judgment of non-suit or directed verdict in favor of those entities. (See AA 345.)[2/]

F. Evidence concerning conditions at the CRTC and the absence of evidence concerning CUSA's liability as a landowner.[3/]

To avoid the exclusive remedy of workers' compensation, plaintiffs were required to establish CUSA's liability during the 16 months that it was not Laico's employer. In their pleadings, they pursued two primary routes. First, they alleged design defect and failure to warn product liability theories based on CUSA's role as a gasoline manufacturer. (AA 50-55.) As explained below, the jury rejected those theories. (See *post*, at p. 15; AA 167-168.) Second, they alleged a premises liability theory based on CUSA's role as a landowner. (AA 61-64.) As shown below, although plaintiffs adduced substantial evidence concerning the conduct of the *CRTC*, Laico's employer, as part of their effort to show that Laico was exposed to unsafe conditions on

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2/ Plaintiffs have not appealed the trial court's ruling.

3/ Consistent with the standard of review, which requires the court to view the evidence in the light most favorable to the plaintiffs, we concentrate on plaintiffs' evidence and do not summarize the contrary evidence presented by defendants.

the premises caused by high levels of benzene, they never connected that evidence to *CUSA*, the landowner, by showing CUSA's control over the premises (which it had relinquished to Laico's employer) or CUSA's knowledge of those conditions.

Plaintiffs' evidence concerning the employer's (not landowner's) conduct included testimony and documents concerning gasoline spills and fuel leaks (RT 269, 280-290, 733-734, 876-887, 1046, 1049-1050, 1815-1820) as well as recommendations from the employer's Environmental Health and Safety Team addressing problems related to workers feeling ill, inadequate ventilation during gasoline transfer, inadequately labeled gasoline containers, and the proper use of respirators (RT 244-248, 257-269, 295-301, 393-395, 872-875, 940, 1148-1167). Plaintiffs also presented evidence of the employer's industrial hygiene air monitoring results for two workers engaged in fuel blending and transferring activities in January 1992, focusing in particular on two occasions where the benzene readings for the peak and time-weighted averages exceeded OSHA's short term exposure limit of 5 parts per million. (RT 231, 235; see also RT 2198-2199.) There were no air monitoring results for the lube lab between 1991 and 1993, when Laico worked there (RT 403), nor was there any indication Laico had ever been monitored. (RT 1014-1015).

On the subject of employee training, plaintiffs presented evidence that the employer's program did not cover certain information about benzene, such as the possibility of contracting MDS and the need to wear respirators when the benzene concentration exceeded 5 parts per million, OSHA's short term exposure limit. (RT 408-427, 482, 539-540; see also RT 321.) The principal document on which plaintiffs relied was an October 31, 1997 report by a member of the employer's Environmental Health and Safety Team estimating that, under a worst-case scenario, two ounces of gasoline could create a 5 parts

per million benzene air concentration – information the employer did not convey to Laico or the other workers. (RT 276-277, 417, 539-540, 887-888, 1047, 1147-1158, 1201-1202, 1208-1209.) Plaintiffs also presented evidence that the employer did not provide Laico with any specific benzene training until 1995. (RT 407, 1205-1206.)

Plaintiffs presented no evidence to suggest that CUSA, the landowner, during the period from August 1991 through December 31, 1992, had any control over the employer or its operations, or that CUSA was aware of any unsafe conditions at the facility, any deficiencies in the employer's employee training, or any prior cases of blood-related diseases. Nor was there any evidence concerning the legal or functional relationship between the two entities during the period in question (August 1991 through December 1992) related to the employer's use of the property. Plaintiffs' evidence as to CUSA, like the evidence presented as to the other gasoline companies, focused on its potential liability as a manufacturer and supplier of gasoline, as opposed to its liability as a landowner under premises liability theories. (See, e.g., RT 1389-1390 [plaintiffs' expert's testimony that the MSDS provided by CUSA for its gasoline was inadequate].)

G. The nonsuit in favor of the Non-Chevron defendants and denial of CUSA's motion for nonsuit on premises liability.

Near the conclusion of plaintiffs' case-in-chief, the trial court granted the Non-Chevron defendants' motion for nonsuit on all remaining causes of action against them. (RT 1479-1485.) The court ruled that plaintiffs had failed to present sufficient evidence that exposure to the Non-Chevron defendants' gasoline was a substantial factor in causing Laico's injury. (*Ibid*.)

After plaintiffs rested, CUSA, the sole remaining defendant, moved for nonsuit on premises liability on the ground that it owed no duty to Laico in its status as a landowner during the relevant period. (RT 1642-1647.) Among other things, CUSA argued that there was no evidence it had any control over the activities of the CRTC, a separate and distinct entity, much less that it was aware of any unsafe conditions at the facility. (RT 1648-1649, 1695-1697.)

Agreeing that there was no evidence in the record that CUSA knew what "was going on [at] the premises," the court granted plaintiffs' motion to re-open the case to allow them to present deposition excerpts to support their offer of proof on this point. (RT 1658-1659.) After viewing plaintiffs' proposed deposition excerpts, however, the court determined that none of the excerpts were relevant to the issue at hand and therefore would not be read at trial. (RT 1693-1695.)

Despite the ruling precluding additional evidence and its acknowledgment that "the factual record [was] very sparse," the trial court ultimately denied CUSA's nonsuit motion. (RT 1696-1697.) Based on its interpretation of several Court of Appeal decisions, the court concluded that CUSA's role in supplying gasoline to the CRTC and its ownership of the land were sufficient to give rise to a duty on the part of CUSA to perform a reasonable inspection of the premises to ensure the premises were reasonably safe, and that it was up to the jury to determine whether CUSA breached that duty. (RT 1695-1697.)

H. The jury verdict and judgment on premises liability.

By the time the court submitted the case to the jury, only four of the original seven causes of action against CUSA remained: strict liability design defect, strict liability failure to warn, premises liability, and Carol Laico's

cause of action for loss of consortium. (RT 2356-2357, 2364-2365; AA 346.)[4/]

During deliberations, the jurors asked a question concerning the special verdict question number 11, which required them to apportion fault between Laico, CUSA, and "all other persons or entities." (AA 116 [jury note dated 11/20/2002].) The jury asked whether the CRTC was considered an "'other,'" and whether, "if damages are awarded, will the [plaintiff] collect only from Chevron or will he also collect from the entity specified in "'other'?" (*Ibid*.) The court responded that the CRTC was considered an "other" and that the jury should answer the question without considering who would be required to pay the damages. (AA 118.)

Later that same day, the jury returned a verdict in favor of plaintiffs finding that Laico had suffered $446,000 in economic damages and $1,500,000 in non-economic damages, and that his wife Carol had suffered $350,000 in non-economic damages. (AA 170.) The jury apportioned 2 percent fault to Laico, *85 percent* fault to CUSA, and *13 percent* to all other persons or entities (i.e., the CRTC, Laico's employer). (*Ibid*.) Premises liability was the sole basis of liability. (AA 166-167.) The jury found no design defect or failure to warn. (AA 167-168.)

Taking into account Laico's contributory fault and Proposition 51, which provides for several liability for non-economic damages in proportion to the defendant's percentage of fault (Civ. Code, § 1431.2, subd. (a)), the trial court entered a judgment for $417,480 in economic damages (the total award

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4/ The court granted CUSA's motion for nonsuit on fraudulent concealment (along with a directed verdict on punitive damages), and ruled that plaintiffs' negligence cause of action was subsumed within their cause of action for premises liability. (RT 1704-1705; AA 345 [ruling reflected in amended judgment].) Plaintiffs withdrew their cause of action for breach of implied warranties. (RT 1485.)

less Laico's 2 percent fault), $1,275,000 in non-economic damages (85 percent of the total award, reflecting CUSA's 85 percent fault), and $297,500 in non-economic loss of consortium damages (85 percent of the total award, reflecting CUSA's 85 percent fault). (AA 189.)

I. Post-trial proceedings and the appeals.

The trial court denied CUSA's motion for judgment notwithstanding the verdict on premises liability and its motion for partial new trial on apportionment of fault. (RT 2414-2415; AA 322-325, 328-336; see also AA 193-220 [JNOV and new trial motions].) The court granted CUSA's motion for a reduction in the economic damage award to reflect the maximum amount supported by the evidence, as reduced by an earlier stipulation that CUSA would be entitled to an offset for medical services for which it had already paid. (RT 2415-2416; AA 326-327, 337-342; see also AA 221-254 [motion].) The court entered an amended judgment awarding Laico $207,760 in economic damages. (AA 350.) The other awards remained the same, resulting in a final judgment in favor of plaintiffs totaling nearly $1.8 million. (AA 350.)

CUSA appealed from the judgment, the order denying its motion for JNOV, and from a post-judgment order awarding plaintiffs $48,821.99 in costs. (AA 352-353, 368; see also AA 356-357, 366-367 [ruling on costs].) Plaintiffs appealed from the judgment in favor of the Non-Chevron defendants but subsequently abandoned that appeal. (See Plaintiffs'/Appellants' Notice of Settlement; Notice of Abandonment of Appeal, on file in the Court of Appeal (June 16, 2003).)

STATEMENT OF APPEALABILITY

CUSA appeals from a judgment that finally disposes of all actions between the parties, the denial of its motion for judgment notwithstanding the verdict, and the post-judgment award of fees, all of which are appealable. (See Code Civ. Proc., § 904.1 subds. (a)(1), (2) & (4).)

LEGAL DISCUSSION

I.

THE JUDGMENT SHOULD BE REVERSED WITH DIRECTIONS BECAUSE CUSA OWED NO LEGAL DUTY TO LAICO.

A. A landowner not in possession of its property owes no duty of care with regard to an unsafe condition over which it has no control, and of which it has no knowledge.

Under Civil Code section 1714, which provides the foundation for California's negligence law, "[e]very one is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . . ." (Civ. Code, § 1714.) This principle is inapplicable, however, where the defendant owes no duty of care. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) The existence and scope of a duty is a question of law reviewed de novo. (*Id*. at p. 674; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.)

With respect to landowners, the scope and existence of a duty can vary significantly depending on whether the landowner has possession of the property. Landlord-tenant cases provide a good example of this principle.[5/] As one court has explained, "[h]istorically, the public policy of this state generally has *precluded* a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence *after* the tenant has taken possession. This is true even though by the exercise of reasonable diligence the landlord might have discovered the condition." (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510, italics added.)

Over the years, the law has developed exceptions to this general rule of nonliability, such as "where the landlord covenants or volunteers to repair a defective condition on the premises" or "where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant." (*Uccello v. Laudenslayer*, *supra*, 44 Cal.App.3d at p. 511.) Nevertheless, courts have continued to draw a distinction between landowners that have possession of the property and those that do not have possession. (See *Preston v. Goldman* (1986) 42 Cal.3d 108, 119 ["we have placed major importance on the existence of *possession and*

5/ We cite the landlord-tenant cases because they constitute a well-developed body of law analyzing the duty of landowners with nonpossessory interests. (Cf. *Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 890 [using landlord-tenant cases as an analogy to determine existence and scope of bank's duty to former owners of foreclosed property who would not relinquish possession to the bank].) In the present case, however, there is no specific evidence establishing a landlord-tenant relationship. Plaintiffs adduced no evidence whatsoever on the legal or functional relationship between the CRTC and CUSA with respect to the property during the period in question. The only evidence on that point is contained in the stipulation proffered by the Chevron defendants, which simply stated that CUSA owned the land that the CRTC occupied. (RT 1707-1710.)

control as a basis for tortious liability for conditions on the land" (italics added)]; *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368 ["the duty to take affirmative action for the protection of individuals coming upon the land is grounded in the *possession of the premises* and the attendant right to control and manage the premises" (italics added)].) Thus, "those who hold only *nonpossessory* interests in land have not been fully bound" by duties imposed on those who have both possession and control. (*Leakes v. Shamoun* (1986) 187 Cal.App.3d 772, 776, italics added; see also *Mata v. Mata* (2003) 105 Cal.App.4th 1121, 1131 [the duty of a landlord who has relinquished possession of property "is attenuated as compared with the tenant who enjoys possession and control"].)

Under modern case law, whether a landowner not in possession of its property owes a duty of care depends on whether the landowner has retained sufficient *control* over the unsafe condition. Indeed, in the landlord-tenant cases, a "common element" found in the exceptions to the general rule of nonliability "is that either at or after the time possession is given to the tenant the landlord *retains or acquires a recognizable degree of control over the dangerous condition* with a *concomitant right and power to obviate the condition and prevent the injury.*" (See *Uccello v. Laudenslayer*, *supra*, 44 Cal.App.3d at p. 511, italics added.) Where this element of control is absent, there is no duty. (See *Leakes v. Shamoun*, *supra*, 187 Cal.App.3d at p. 778 ["[w]ithout some significant control over [the tenant] we do not believe that . . . it is possible for [the plaintiff] to state a claim against [the landlord]"]; *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 780 ["[i]t would not be reasonable to charge a lessor with liability if the lessor did not have the power, opportunity and ability to eliminate the danger"]; *Moreles v. Fansler* (1989) 209 Cal.App.3d 1581, 1587-1588 ["a landlord has no duty to [abate a dangerous condition] unless he or she has a degree of control over the tenant

so as to be able to remove the offending condition"]; *Uccello v. Laudenslayer*, *supra*, 44 Cal.App.3d at p. 512 ["a landlord should not be held liable for injuries from conditions over which he has no control"].)[6/]

But control is not the only prerequisite for finding a duty of care in this context. Courts have also consistently held that a landowner not in possession of its property should not be held to a duty of care where it lacked *knowledge* of the dangerous condition. (*Uccello v. Laudenslayer*, *supra*, 44 Cal.App.3d at p. 514.) Thus, before liability may be imposed on such a landowner due to a "dangerous condition on the land, the plaintiff must show that the [landowner] had *actual knowledge* of the dangerous condition in question, plus *the right and ability to cure the condition*." (See *Mata v. Mata*, *supra*, 105 Cal.App.4th at pp. 1131-1132, italics added; accord, *Martinez v. Bank of America*, *supra*, 82 Cal.App.4th at p. 891; *Resolution Trust Corp. v. Rossmoor Corp.* (1995) 34 Cal.App.4th 93, 102; *Rosales v. Stewart* (1980) 113 Cal.App.3d 130, 134.)

In short, where one or both of the elements of control and knowledge are absent, no duty and hence no liability can be found. (See, e.g., *Leakes v. Shamoun*, *supra*, 187 Cal.App.3d at p. 776 [landlord not liable for injuries to plaintiff caused by tenant's security guard because by giving up possession of

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6/ The importance of retained control has also been recognized in an analogous line of cases dealing with landowners that have hired independent contractors to perform work on the land. In those cases, the courts have held that, because of the availability of workers' compensation benefits, a landowner is not liable for workplace injuries sustained by the contractor's employees unless the landowner both retained control over the dangerous condition and exercised that control in a way that affirmatively contributed to the injury. (See *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210-211; *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225; *Kinsman v. Unocal Corp*. (2003) 110 Cal.App.4th 826, 830.) These cases are discussed below in connection with plaintiffs' theory that the CRTC was testing the gasoline for CUSA's benefit. (See *post*, at p. 23.)

the premises to the tenants, landlord "necessarily gave up the ability to directly and promptly control the condition which existed on his land at the time of [the plaintiff's] injury"]; *Bisetti v. United Refrigeration Corp.* (1985) 174 Cal.App.3d 643, 649-650 [landlord not liable for injuries caused when the plaintiff fell into a vat of acid maintained by the tenant for its metal stripping business; landlord was not aware of the existence of the vats and even if it was, the mere existence of the vats would not constitute a dangerous condition].)[7/]

As explained below, the instant case is one where the landowner lacked both knowledge and control and therefore cannot be held to owe a duty of care.

B. CUSA owed no duty to Laico because it neither had control over the CRTC nor any knowledge of any unsafe conditions.

Applying the above case law to the facts of this case, the only possible conclusion is that CUSA owed no legal duty to Laico for any injuries he incurred at the CRTC.

From August 1991 through December 1992, the period relevant here, CUSA was simply the title owner of the land on which the CRTC's research facility was located. (See RT 1710; AA 87.) The facility was occupied by the CRTC, which ran the facility and employed those, like Laico, who worked

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7/ See also *Mata v. Mata*, *supra*, 105 Cal.App.4th at p. 1132 (landlord not liable for injuries and deaths caused by shooting in bar; even assuming landlord was aware of prior fights, this did not amount to knowledge of dangerous condition and there was no evidence landlord had the ability to cure the condition); *Martinez v. Bank of America*, *supra*, 82 Cal.App.4th at pp. 890-894 (bank that owned property not liable for injuries caused by dogs belonging to previous owners who still occupied the property; bank did not have knowledge of the dangerous condition or the ability to prevent it).

there. (See RT 213, 311, 313, 315-316, 1708-1710; see also RT 1486-1491 [trial court's ruling that Laico was a special employee of the CRTC from August 1991 through December 1992]; AA 86-91.) Furthermore, despite the common word "Chevron" in both corporations' names, the parties stipulated that the two corporations were entirely separate and distinct, and the jury was so instructed. (RT 1709-1710, 2356; AA 136.) In fact, this corporate separateness is what allowed plaintiffs to avoid the exclusive remedy bar and pursue their action against CUSA in the first place. (See AA 345; see also RT 2224, 2229, 2356.)

Entirely absent from the record is any evidence concerning the terms of the arrangements between CUSA and the CRTC with respect to the land. There is no evidence of any lease agreement or any exchange of economic value between the CRTC and CUSA related to the premises, nor is there any other evidence to suggest that CUSA retained any control over the CRTC's facility, much less the right to inspect it. It cannot even be discerned whether the two entities were truly in a landlord-tenant relationship.

There is likewise no evidence that the unsafe conditions existed, prior to Laico's arrival, at the time CUSA relinquished the property to the CRTC (whenever that might have been), nor is there evidence that CUSA had the right or ability to prevent or cure any unsafe conditions, particularly considering that those conditions did not concern a feature of the land, but the CRTC's business operations. (See *Mata v. Mata*, *supra*, 105 Cal.App.4th at p. 1132 [affirming summary judgment in favor of landlord where plaintiffs had not set forth any provision of the lease showing landlord's ability to cure the unsafe condition and drawing a distinction between dangerous conditions that have "nothing to do with the land itself" but "the manner in which the proprietor of [the bar] ran his business"].) On all of these points, plaintiffs had the burden of producing evidence – a burden they failed to carry.

That the unsafe conditions arose from the CRTC's business operations as opposed to a condition on the land is also significant considering plaintiffs' argument that the CRTC was testing the gasoline for CUSA's "benefit." (RT 2226.) To the extent this was true, the legal significance is that CRTC was in the position of an independent contractor, meaning that CUSA could be liable to Laico, the contractor's employee, only if CUSA both *retained control* over the unsafe conditions and *exercised* that retained control in a way that *affirmatively contributed* to Laico's injuries. (See *Hooker v. Department of Transportation*, *supra*, 27 Cal.4th at p. 210 ["the imposition of tort liability on a hirer should depend on whether the hirer *exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee"]; *Kinsman v. Unocal Corp.*, *supra*, 110 Cal.App.4th at p. 839 ["a premises owner has no liability to an independent contractor's employee for a dangerous condition a contractor has created on the property *unless* the dangerous condition was within the property owner's control and the owner exercised this control in a manner that affirmatively contributed to the employee's injury"]; see also *McKown v. Wal-Mart Stores, Inc.*, *supra*, 27 Cal.4th at p. 225 [finding liability only where the owner affirmatively contributed to the injury by negligently furnishing unsafe equipment].)

Here, there was no evidence of any retained control over the unsafe conditions at the lab – much less any evidence that CUSA exercised that control in a way that affirmatively contributed to Laico's injuries.

Plaintiffs not only failed to demonstrate control, they also failed to demonstrate the other requirement for imposing a duty – that CUSA had the requisite *knowledge* of any unsafe conditions. Plaintiffs presented no evidence that the CRTC reported any such conditions to CUSA or that CUSA was otherwise aware such conditions existed. Nor did plaintiffs present evidence

that any other CRTC employee had contracted MDS or any similar blood disorder.[8/]

Finally, the *employer's* knowledge of unsafe conditions of the workplace could not have been *imputed* to CUSA. Such an imputation would have effectively eliminated the very corporate separateness that allowed plaintiffs to avoid the exclusive remedy in the first place. If the parties were to be treated as separate entities for the purpose of allowing plaintiffs to bring suit, then that same corporate separateness necessarily had to be given its full legal effect. The plaintiffs cannot rely on the employer's knowledge to meet their burden of proving CUSA's knowledge.

In sum, based on an analysis of the case law and given the absence of both control and knowledge on the part of CUSA, an entity legally distinct from Laico's employer, the only possible conclusion is that CUSA owed no duty to Laico in its status as a landowner.

C. Additional considerations reinforce the conclusion that imposing a duty of care would be contrary to public policy.

In determining whether a duty exists, courts often balance the policy considerations the Supreme Court identified in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*). These are:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the

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8/ In fact, CUSA had intended to introduce affirmative epidemiological evidence as well as the results of a records search (conducted pursuant to a court order) to show the absence of cases of blood disease associated with the CRTC. (RT 7-15; see also AA 102-109 [opposition to plaintiffs' motion].) The trial court granted plaintiffs' motion to exclude such evidence. (RT 7-15.)

> moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

(*Rowland, supra*, 69 Cal.2d at p. 113.)

In a case such as this, involving a landowner not in possession of its property, the absence of evidence of control and knowledge necessarily negates the existence of a duty under the *Rowland* factors. (*Leakes v. Shamoun*, *supra*, 187 Cal.App.3d at p. 776 ["those who hold only *nonpossessory* interests in land have not been fully bound by [duty] obligations" under *Rowland* (italics added)]; see also RT 1642-1648 [counsel's argument on *Rowland* factors in trial court].) Absent the requisite knowledge and control, and given the absence of prior similar injury, the harm suffered by Laico was neither legally "foreseeable" to CUSA nor "closely connected" to CUSA's conduct. Nor would imposing a duty on CUSA further the policy of preventing future harm. Indeed, the employer already had plenary duties under law to provide a safe workplace and to provide information and training to employees concerning working with and around hazardous chemical products. Imposing a further duty on a landowner out of possession would not materially reduce a risk of harm.[9/]

9/ Courts that have considered the *Rowland* factors in similar contexts have consistently found no duty. (See *Mata v. Mata*, *supra*, 105 Cal.App.4th at p. 1133 [given landlord's lack of control over and knowledge of dangerous condition it "makes no sense" to conclude that landlord owed a duty of care under *Rowland*; landlord's connection to the shooting was "remote" and his moral blame was "tenuous" especially when compared to that of the tenant, the proprietor of the bar]; *Leakes v. Shamoun*, *supra*, 187 Cal.App.3d at p. 776 ["[g]iven the level of control that could be expected from [the landlord], a balancing of considerations set forth in *Rowland* relieves him of any liability"];
(continued...)

Three other *Rowland* considerations have particular significance here given the unusual facts of this case and reinforce the conclusion that imposition of a duty would be contrary to public policy.

The first is the absence of "moral blame," which, in the *Rowland* context, does not mean the moral blame that attends "ordinary negligence," but the higher degree of moral culpability such as where the defendant "'(1) intended or planned the harmful result [citation]; (2) had actual or constructive knowledge of the harmful consequences of their behavior [citation]; (3) acted in bad faith or with a reckless indifference to the results of their conduct [citations]; or (4) engaged in inherently harmful acts [citation].'" (*Martinez v. Bank of America*, *supra*, 82 Cal.App.4th at p. 896.) Here, no such "moral blame" can be attributed to CUSA, particularly since Laico's employer, the CRTC, had a mandatory legal duty to protect Laico from unsafe working conditions and there is no evidence CUSA, a separate corporation, had any knowledge of any such conditions. (See *ante*, at pp. 4-6, 13; see RT 1647.)

The "availability, cost, and prevalence of insurance for the risk involved" (*Rowland, supra*, 69 Cal.2d at p. 113) likewise weighs heavily in favor of finding no duty on the part of CUSA. As Laico's employer, the CRTC was required by law to retain workers' compensation insurance (or to be permissibly self-insured) for precisely the type of injuries alleged to have occurred here – injuries arising out of employment. (See Lab. Code, § 3700.) If, despite their lack of control over and knowledge of an employer's business operations, landowners were held to a responsibility *exceeding* that of the employer (since the landowners would not be entitled to the protection of the workers' compensation exclusivity), it would dramatically change the

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(...continued)
Bisetti v. United Refrigeration Corp., *supra*, 174 Cal.App.3d at p. 651 [finding no duty based on lack of knowledge and summarily concluding that there was likewise no duty under the *Rowland* factors].)

economics of leasing commercial property, forcing landowners to charge their tenants higher rent to cover the risk of being sued by the tenant's employees, which, in turn, could prompt layoffs or force the tenants out of business. (See RT 1647-1648.)

Finally, it follows from the above discussion that "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach" (*Rowland, supra*, 69 Cal.2d at p. 113) also weighs in favor of no duty. It would be extremely burdensome and costly to require a landowner with no control over or knowledge of a tenant's operations to be responsible for injuries to the tenant's employees. Furthermore, the consequences to the community, as already indicated above, would be detrimental, as landowners would inevitably have to shift these costs *back* to employers, who are already burdened with obtaining workers' compensation insurance intended for the same injuries. Imposing such a duty would therefore effectively undermine the workers' compensation bargain on which the exclusivity rule is based.[10/]

In the analogous line of cases involving landowners that hire independent contractors to perform work on the land, the availability of workers' compensation insurance was the critical factor that led the Supreme Court to conclude that a landowner could not be held liable for injuries to the contractor's employee for dangers in the work or the failure to protect against those dangers. As the court explained in *Toland v. Sunland Housing Group,*

10/ The Supreme Court has defined the "compensation bargain" as follows: "'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.'" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811.)

Inc. (1998) 18 Cal.4th 253, "'the property owner should not have to pay for injuries caused by the contractor's negligent performance of the work when workers' compensation statutes already cover those injuries.'" (*Id*. at p. 256; see also *Privette v. Superior Court* (1993) 5 Cal.4th 689, 699-700 [summarizing policy arguments against allowing employees of independent contractors to obtain a windfall denied to other workers by suing the person who hired the contractor]; see RT 1647-1648 [counsel's argument explaining analogy to the trial court].) Thus, an employee may recover in tort against the landowner only where the landowner both retained control over the dangerous condition and exercised that control in a manner that affirmatively contributed to the employee's injuries. (See *Hooker v. Department of Transportation*, *supra*, 27 Cal.4th at p. 210; *McKown v. Wal-Mart Stores, Inc*., *supra*, 27 Cal.4th at p. 225; *Kinsman v. Unocal Corp.*, *supra*, 110 Cal.App.4th at p. 830.) The same limitations should apply here.

In sum, the *Rowland* considerations discussed above reinforce what is already apparent from the case law: that CUSA owed Laico no duty as a matter of law.

D. The trial court misapplied the law in ruling that CUSA owed Laico a duty to conduct a reasonable inspection of the premises.

In ruling on CUSA's motion for nonsuit, the trial court understood there was no evidence CUSA knew "what was going on [at] the premises." (See RT 1659.) Indeed, it was the *absence* of such evidence that prompted the court to reopen the case to allow plaintiffs to present deposition testimony in support of this point. (RT 1658-1659.) Nevertheless, although the trial court ultimately decided to preclude the testimony when it turned out to be irrelevant

(RT 1693-1695), and though the court continued to acknowledge that "the factual record [was] very sparse," the court *denied* CUSA's motion for nonsuit on the issue (RT 1696-1697). Concluding that it was "established as a matter of law, that a landlord does have a duty of reasonable inspection of the premises" (RT 1696), the court held that CUSA's role in supplying gasoline to the CRTC (which made it something more than an "absentee landlord") and its ownership of the land were sufficient in and of themselves to create a duty on the part of CUSA to perform a reasonable inspection of the premises to ensure they were reasonably safe (RT 1696-1697).

The trial court's ruling, which was premised on the assumption that landowners have a general and continuous duty to inspect the premises during the term of an occupant's possession, was based on a misreading of two cases, one decided by this court, *Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128 (*Portillo*), and the other decided by Division Seven of the Second Appellate District, *Lopez v. Superior Court* (1996) 45 Cal.App.4th 705 (*Lopez*). Neither of these cases supports the trial court's reasoning. Indeed, in each case, the court made clear that the landowner's duty to inspect is limited and occurs only at specific points in time – typically *before* the landowner transfers possession to the tenant, or when a lease comes up for renewal and the landowner regains a right of re-entry.

In *Portillo*, *supra*, 27 Cal.App.4th 1128, for example, this court addressed whether a landlord who leased land on which a liquor store was located was responsible for injuries to a third party caused by the tenant's dog. Although the dog had attacked another patron just two weeks before the lease had last been renewed, the landlord failed to conduct an inspection of the premises before renewing the lease and therefore was not aware of the dog's vicious nature. (*Id*. at p. 1132.) The jury found the landlord liable, concluding that, although the landlord did not have actual knowledge of the dog's

dangerous propensities, it would have learned of these propensities had it performed a reasonable inspection prior to renewing the lease. (*Ibid*.)

In affirming the judgment on the jury's verdict, this court held that "[w]here there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability." (*Portillo*, *supra*, 27 Cal.App.4th at p. 1134, italics added.) The court did not, however, hold that this duty to inspect existed continuously throughout the term of the tenant's lease. To the contrary, the court explained that "'[w]hen there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection *before passing possession to the tenant*.'" (*Id*. at p. 1136, italics added, quoting *Mora v. Baker Commodities, Inc.*, *supra*, 210 Cal.App.3d at p. 782.) The court's analysis thus tied the duty of inspection to the execution or renewal of the lease – the time during which the landlord has a *right of entry* and therefore has the opportunity to obviate any unsafe condition. (See *Portillo*, *supra*, 27 Cal.App.4th at p. 1133, fn. 4 [explaining that the landlord had not "raise[d] any issue relating to whether he had the right to have the dog restrained or removed from the premises *before the lease was renewed*" (italics added)].)

This court's decision in *Portillo* was directly in line with an earlier Court of Appeal decision, *Mora v. Baker Commodities, Inc.*, *supra*, 210 Cal.App.3d 771, which this court cited with approval. *Mora* made clear that a landlord's duty to inspect is not a continuous one that exists in the abstract throughout the lease term, but must be tied to specific lease provisions, such as those providing a right of entry to make repairs (assuming the landlord has "some reason to know there was a need for such action"), or to the execution or renewal of the lease, when the "landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the

premises reasonably safe from dangerous conditions." (*Id.* at p. 781.) Neither *Mora* nor *Portillo* creates an affirmative duty on the part of the landlord to inspect the premises during the lease term when the contractual conditions for inspection are not present and the landlord has no right to re-enter.[11/]

Lopez, *supra*, 45 Cal.App.4th 705, the other decision on which the trial court relied in denying CUSA's motion for nonsuit, likewise does not create the type of broad-based duty contemplated by the trial court. At issue in *Lopez* was whether the owner and lessor of a commercial premises on which a market was located could be held liable for injuries caused by a slip and fall on the allegedly defective marketplace floor. The tenant's lease permitted the landowner "to enter the premises at any time for inspection, or for any reasonable purposes" and was "subject to annual renewal." (*Id.* at p. 712.) The court reversed a summary judgment in favor of the landowner observing,

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11/ None of the other decisions cited in *Portillo* create such a duty either. (See *Becker v. IRM Corp.* (1985) 38 Cal.3d 454, 468-469 [holding that a "landlord *at time of letting* may be expected to inspect an apartment to determine whether it is safe" and distinguishing those cases where the defect developed *after* the landlord relinquished possession (italics added)], overruled on other grounds in *Peterson v. Superior Court* (1995) 10 Cal.4th 1185; *Burroughs v. Ben's Auto Park, Inc.* (1945) 27 Cal.2d 449, 453-454 ["lessor who leases property for a purpose involving the admission of the public is under a duty . . . to exercise reasonable care to inspect and repair the premises *before possession is transferred*" and again upon expiration, when it re-gains the "right to enter" (italics added)].) Other cases are consistent with this line of reasoning, linking the duty to inspect to specific lease provisions. (See, e.g., *Resolution Trust Corp. v. Rossmoor Corp.*, *supra*, 34 Cal.App.4th at p. 102 [landlord had right to enter premises when it learned of fuel leaks pursuant to specific lease provisions requiring lessee to comply with all pertinent laws].)

The result in *Swanberg v. O'Mectin* (1984) 157 Cal.App.3d 325, another decision cited in *Portillo*, was not based on the landlord's duty to inspect the tenant's premises but on its nondelegable duty to maintain the safety of the physical perimeter of the land to avoid injury to those outside the perimeter. (*Id.* at p. 331.) That duty is not at issue here as the unsafe condition did not concern a physical condition on the perimeter of the land, but the way the occupant conducted its business.

among other things, that it had failed to present evidence on whether it could be charged with knowledge of the floor's condition "due to its right to inspect the premises under the lease." (*Id*. at p. 716.) Citing *Mora v. Baker,* the court explained that the landowner's "showing was insufficient to meet its burden as it did not show that *at the time the lease was executed and renewed* there was an inspection, nor 'were facts presented bearing on the necessity for an inspection . . . .'" (*Id*. at p. 717, italics added.) Thus, *Lopez* reaffirms that the duty to inspect is not a general one that exists in the abstract – it is based on the landowner's right of entry under the lease at the time of execution and renewal or on specific lease provisions allowing a right of entry.

In the present case, plaintiffs presented no evidence of any lease, much less the dates of execution or renewal, or any terms relating to inspections or right of entry. Nor did plaintiffs offer any evidence or case authority suggesting that CUSA's role in supplying gasoline to the CRTC, an entirely separate entity, created a right of inspection or entry into the premises. Indeed, though the trial court stated in its ruling that CUSA's role in supplying gasoline made it more than an "absentee landlord" (RT 1696), there was no evidence to suggest that the supply of gasoline had any connection at all to CUSA's rights and duties in its capacity as a landowner or that CUSA could even properly be considered a "landlord." Accordingly, in ruling that CUSA had a general duty to perform a reasonable inspection of the premises, the trial court departed significantly from controlling precedent.

The trial court's ruling also overlooked the second and necessary element of control. Even if the requirement of *knowledge* may be satisfied where there is a duty to inspect and the inspection would have revealed the dangerous condition (*Portillo*, *supra*, 27 Cal.App.4th at p. 1134), there still can be no finding of a legal duty toward a plaintiff absent the landowner's *control* over the dangerous condition and its right and ability to prevent it. (See cases

cited *ante*, section I.A., discussing the necessity of control in addition to knowledge).[12/]

Here, despite their burden of proof on the issue, plaintiffs failed to present any evidence that CUSA had any right or authority to prevent or cure any of the allegedly unsafe conditions in the CRTC, either under the terms of a lease or otherwise. The absence of evidence on the issue of control therefore precludes a finding of duty toward Laico, *even assuming a general duty to inspect the premises.* (See *Davis v. Gomez* (1989) 207 Cal.App.3d 1401, 1406-1407 [judgment in favor of landlord was proper where plaintiff failed to show "what action the landlord could have taken, *even with a reasonable investigation*" (italics added)]; see also RT 1695 [argument of CUSA's counsel emphasizing importance of control as the "preeminent" factor].)

The absence of evidence of control is also significant to the extent the court was relying on the theory that CUSA supplied gasoline to the CRTC for research undertaken for CUSA's benefit. (See RT 1696-1697.) Under that interpretation of the evidence, Laico would be in the position of the employee of CUSA's independent contractor, meaning that CUSA could not be liable to Laico unless it retained control over the unsafe conditions and affirmatively exercised its control in a way that affirmatively contributed to Laico's injury. (*Hooker v. Department of Transportation*, *supra*, 27 Cal.4th at pp. 210-211; *Kinsman v. Unocal Corp.*, *supra*, 110 Cal.App.4th at p. 830.) As explained above, no evidence supported either requirement. Thus, based on the absence of control alone, the trial court should have granted the motion for nonsuit.

12/ Control was not an issue in *Portillo* as the landlord did not deny he had "the right to have the dog restrained or removed from the premises before the lease was renewed." (*Portillo*, *supra*, 27 Cal.App.4th at p. 1133, fn. 4.)

In sum, the trial court's ruling that CUSA owed a legal duty to Laico in its status of a landowner is contrary to law. Because no such duty was owed, the judgment, including the post-judgment cost award, should be reversed with directions to enter judgment for CUSA. (See *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 557 [orders must fall with the judgment upon which they rest].)

II.

THE JUDGMENT SHOULD BE REVERSED WITH DIRECTIONS BECAUSE PLAINTIFFS FAILED TO PRESENT ANY EVIDENCE THAT CUSA BREACHED ANY DUTY OF CARE.

A. Plaintiffs presented no evidence on whether CUSA did or did not conduct an appropriate investigation.

In this section, we assume for the purpose of argument that CUSA did owe Laico a duty to conduct a reasonable inspection of the premises. We show, however, that the judgment should still be reversed because plaintiffs failed to present evidence that CUSA *breached* that duty. Choosing to focus on CUSA's *product* liability as a supplier of a gasoline as opposed to its *premises* liability as a landowner (see, e.g., RT 1389-1390 [testimony on adequacy of CUSA's MSDSs for gasoline]), plaintiffs presented no evidence concerning whether CUSA did or did not inspect the property during the 16-month period at issue here, much less whether any such inspection was reasonable.

In post-trial motions, plaintiffs argued that witness Michael Long, a CRTC employee, testified that he did not recall seeing representatives from

CUSA visiting the facility to observe gasoline testing. (AA 262 [citing RT 1820-1822].) Plaintiffs argued that, from this testimony, the jury could have *inferred* that CUSA performed no inspections during the relevant time period. (AA 262.)

Plaintiffs misread the record. What Long actually said was that "*if* any [CUSA] engineers came" down to observe the testing he "wouldn't be aware" of it. (RT 1822, italics added.) Thus, the *most* that can be said is that Long was not in a position to testify whether or not such inspections occurred – again reinforcing that there is no evidence one way or the other on this subject.

It was plaintiffs' burden to present affirmative evidence that CUSA breached its duty. No burden rested with CUSA to prove it did *not* breach its duty. (AA 137 [BAJI No. 2.60 on plaintiffs' burden of proof]; RT 2357.) The *absence* of evidence concerning whether an appropriate inspection was conducted is therefore no substitute for this required affirmative evidence, and cannot support a reasonable inference that CUSA *failed* to conduct such an investigation. Such an inference would be the product of speculation and guesswork and is therefore impermissible as a matter of law. (See *Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 289 [absence of evidence on what kind of warranty defendant provided did not support plaintiff's position that a special warranty had been written because it was plaintiff's burden to produce affirmative evidence on the issue]; *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1580-1581 ["[t]he decision about what inferences can permissibly be drawn by the fact finder are questions of law for determination by the court, inasmuch as an inference may not be illogically and unreasonably drawn, nor can an inference be based on mere possibility or flow from suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork"].)

B. Plaintiffs presented no evidence on the factors to be considered in assessing breach.

The trial court instructed the jury that, in assessing whether CUSA breached its duty, it could consider (1) the extent of CUSA's control over the conditions that created the risk of harm, (2) the likelihood and probable seriousness of the harm, and (3) the difficulty of protecting against the risk of harm. (See RT 2360; AA 142 [BAJI No. 8.01 identifying factors jury could consider in assessing whether CUSA breached the standard of care]; see also *Resolution Trust Corp. v. Rossmoor Corp.*, *supra*, 34 Cal.App.4th at pp. 103-104 [listing the same factors].) As there is no evidence concerning whether CUSA did or did not conduct the type of investigation the trial court believed CUSA had a duty to conduct, plaintiffs failed to establish the element of breach and the above factors are therefore irrelevant. Nevertheless, the absence of evidence on each of these factors further confirms that judgment should be entered in CUSA's favor.

1. Control. First, as explained above, there was no evidence CUSA had any control over the conditions that created the risk of harm. Plaintiffs' evidence as to safety conditions focused solely on the *employer's* conduct. (See *ante*, at pp. 11-13.) The evidence on this point, which did not include any testimony from CUSA personnel, demonstrated that, as the employer, the *CRTC alone* had control over its facility and was responsible for implementing and managing all safety programs and training its employees. (See generally RT 211-430, 864-896, 1058-1072, 1147-1220 [testimony of CRTC health and safety and management personnel].)

2. Likelihood and probable seriousness of harm. Second, as there was no evidence of CUSA's knowledge of the conditions within the CRTC when the CRTC employed Laico, CUSA could not have known that

harm to the CRTC employees would be either "likely" or "serious." Plaintiffs presented no evidence that the CRTC had ever been cited for any state or federal safety violations (much less that CUSA knew of such violations), nor did they present any evidence that any other CRTC employees had developed blood conditions comparable to Laico's.

In opposing CUSA's motion for JNOV based on insufficient evidence of breach, plaintiffs attempted to fill this evidentiary gap by suggesting that the mere fact that gasoline contains benzene, a chemical with the *potential* to cause acute myelogenous leukemia (AML), was sufficient to allow the jury to infer that CUSA, a sophisticated manufacturer of gasoline, knew it was likely the CRTC's workers would suffer adverse health effects from exposure. (See AA 261.) Plaintiffs are mistaken. Benzene, like many other potentially dangerous substances, is a common chemical found in nature and in a variety of products; its mere presence does not necessarily lead to any health effects. (See RT 671-672 [testimony of plaintiffs' expert that "we all are exposed to benzene all the time"]; RT 1722 [benzene is found everywhere]; RT 1726-1727 [most chemical workers do not have leukemia because they are not sufficiently exposed to benzene].) Indeed, the entire premise of plaintiffs' lawsuit is that Laico's injuries could have been *prevented* if the proper precautions had been taken. Because it is just as likely if not more likely that harm will *not* occur from benzene, and because there is no evidence CUSA knew of any safety violations at the CRTC, the mere presence of the benzene in the gasoline cannot lead to a reasonable inference that CUSA knew that harm was "likely," much less that the harm would be "serious."[13/]

13/ See *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483 ("Where, as here, the plaintiff seeks to prove an essential element of her case by circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. (continued...)

Furthermore, plaintiffs' argument, if taken to its logical conclusion, would effectively create strict liability for commercial landowners for any dangers that could foreseeably arise from the operation of any occupant's business. Courts have squarely rejected liability on this basis, emphasizing that "[a] landlord cannot be held to be responsible for all dangers inherent in a dangerous business." (*Mora v. Baker Commodities, Inc*., *supra*, 210 Cal.App.3d at p. 780; accord, *Resolution Trust Corp. v. Rossmoor Corp*., *supra*, 34 Cal.App.4th at p. 102.)

That both corporations had the word "Chevron" in their names does not change this analysis. That is, the employer's (CRTC's) knowledge is not imputed to the landowner (CUSA) by virtue of a shared word in their names. Given that it was the separate nature of the two entities that allowed plaintiffs to avoid the exclusive remedy rule as to CUSA in the first place, plaintiffs cannot contend that CUSA had imputed knowledge of any unsafe conditions, much less that CUSA is implicitly responsible for such conditions. Plaintiffs simply cannot have it both ways.

3. The difficulty of protecting against the risk of harm.

Finally, plaintiffs adduced no evidence as to what steps CUSA, the landowner, should or could have taken to reduce or avoid the purported risk of harm, much less whether those steps would have been burdensome. Plaintiffs' evidence focused instead on the employer, the CRTC (see generally RT 211-593, 705-778, 864-896, 1017-1072, 1147-1220), which was logically in the best position to address that risk. Accordingly, this factor, like the others, does not support a breach of duty.

(...continued)
Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her"); see also *People v. Tran* (1996) 47 Cal.App.4th 759, 772 ("'[W]here the proven facts give equal support to two inconsistent inferences, neither is established'").

In sum, even assuming CUSA had a duty to perform a reasonable inspection of the premises, plaintiffs failed to present any evidence that CUSA breached that duty. CUSA's motion for JNOV on this issue should have been granted and the judgment should therefore be reversed with directions to enter judgment in CUSA's favor. (Code Civ. Proc., § 629 ["the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal"]; *McCoy v. Hearst Corp*. (1991) 227 Cal.App.3d 1657, 1663 ["'a reversal on appeal for insufficiency of the evidence concludes the litigation just as it would have been concluded if the trial court had correctly entered [JNOV]'"].)

III.

THE JUDGMENT SHOULD BE REVERSED WITH DIRECTIONS BECAUSE PLAINTIFFS FAILED TO PRESENT ANY EVIDENCE THAT ANY BREACH OF DUTY WAS CAUSALLY RELATED TO LAICO'S INJURIES.[14/]

In this section, we assume for the purpose of argument that CUSA had a duty to perform a reasonable inspection and breached that duty. We show, however, that plaintiffs adduced no evidence that such breach caused plaintiffs' harm. (See *Resolution Trust Corp. v. Rossmoor Corp.*, *supra*, 34 Cal.App.4th at p. 103 [plaintiff must show that the breach caused its injury]; see also RT 2358; AA 138 [BAJI No. 8.00].)

14/ The argument here focuses on plaintiffs' failure to establish the necessary link between CUSA's alleged negligence and Laico's injury. We assume for the purpose of argument that plaintiffs established *medical* causation, i.e., that the benzene in the gasoline tested at the CRTC was a substantial factor contributing to Laico's injury.

In *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776, the Supreme Court held that proof of causation in the premises liability context must be based on "nonspeculative evidence" establishing "some actual causal link" between the plaintiff's injury and the defendant's act or omission. (*Id*. at p. 774.) The court explained that, "'[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to direct a verdict for the defendant*.'" (*Id*. at pp. 775-776; accord, *Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205-1206.)

Here, as in *Saelzler*, there is no evidence establishing a non-speculative causal link between the landowner's conduct and the plaintiffs' injury.

It is well-established that where a landlord has a duty to inspect, the duty is limited to "'those matters which would have been disclosed by a reasonable inspection.' . . . The landlord's obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant." (*Mora v. Baker Commodities, Inc.*, *supra*, 210 Cal.App.3d at p. 782; accord, *Resolution Trust Corp. v. Rossmoor Corp.*, *supra*, 34 Cal.App.4th at p. 103; *Portillo*, *supra*, 27 Cal.App.4th at pp. 1135-1136.)

Here, plaintiffs presented no expert testimony (or any other evidence for that matter) as to what a "reasonable" investigation by CUSA would have entailed, nor what matters would have been disclosed by that investigation during the relevant time frame. Such testimony would have been essential as the subject matter would have been beyond the common knowledge of an ordinary lay juror. (See *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702 [expert testimony required where issue is "not within common knowledge of laymen"].) For example, there was no testimony as to

(1) how and when the inspections should have been conducted; (2) what conditions the inspections would have disclosed had CUSA conducted them on a periodic basis; (3) whether those conditions should have caused the CUSA inspector to conclude that some CRTC employees were exposed to benzene above the PELs; (4) what skill set and/or equipment the CUSA inspector would have needed to make that determination; or (5) whether the results of the inspection should have prompted a reasonable landowner to take further action. All of these subjects required expert testimony to assist the jury. None was provided. Absent such evidence, there can be no finding of a causal link between CUSA's conduct and Laico's injury.

Moreover, assuming a reasonable inspection would have revealed unsafe conditions at the CRTC, there was no evidence CUSA would have had the ability to *cure* or *prevent* those conditions. There was no evidence for example, as to what the terms of any lease were (assuming there was a lease), or whether CUSA would have the right to terminate the CRTC's possession of the property or take any other preventative action had any unsafe conditions been discovered. "Lacking any evidence on these specifics, no ability to cure the situation, and thus no causation, can be established." (*Mata v. Mata*, *supra*, 105 Cal.App.4th at p. 1132 [holding landlord could not be held liable for fights on his property based on absence of similar evidence: "What rights of entry did [the landlord] have, on what conditions? What was the term of the lease? Had these fights occurred before or after any term of renewal? What conditions triggered the landlord's right to terminate? What were the notice provisions?"].)

In short, even assuming the existence and breach of a duty, plaintiffs failed to meet their burden on causation. For this additional reason, CUSA is entitled to a reversal of the judgment and cost award with directions to enter judgment in its favor.

IV.

AT A MINIMUM, THE JUDGMENT SHOULD BE REVERSED FOR A PARTIAL NEW TRIAL LIMITED TO APPORTIONMENT OF FAULT.

This court reviews a jury's apportionment of fault under the substantial evidence standard. (See *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1056-1057; *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 147.) Where the evidence does not support the jury's finding, the court should reverse the judgment for a new trial limited to that issue. (*Ortega v. Pajaro Valley Unified School Dist.*, *supra*, 64 Cal.App.4th at pp. 1057-1058; see also *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 457 [approving new trial limited to apportionment of liability where amount of damages was supported by the evidence].)[15/]

Courts have found a jury's apportionment insupportable as a matter of law where it overlooks or minimizes the role of the party who played the most direct and culpable role in the injury. In *Scott v. County of Los Angeles*, *supra*, 27 Cal.App.4th 125, for example, the court addressed a jury's apportionment of fault in the case of a minor child whose grandmother had burned her with scalding water. The jury apportioned only *1 percent* fault to the judgment-proof grandmother (not named in the action) and the remaining *99 percent* fault to the County of Los Angeles and to the child's service worker for failing to adequately protect the child. (*Id*. at p. 147.) Although acknowledging that the evidence supported a finding of some fault on the part of the child service worker and the County, the court held that the apportionment of only 1 percent

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15/ Although CUSA contests liability, it is not challenging the total amount of damages as adjusted by the trial court at the post-trial hearing. (See AA 340, 350; see *ante*, at p. 16.) Accordingly, if liability is affirmed, CUSA requests that the new trial be limited to the issue of apportionment.

fault to the grandmother was "improper as a matter of law," and that "[n]o reasonable jury could conclude [the grandmother's] fault was as trifling as the jury's allocation would suggest." (*Id*. at pp. 147, 148.)

In explaining its decision, the *Scott* court compared the facts to those in another action, where a jury's apportionment of 95 percent fault to a landlord for its failure to take adequate security measures to prevent the rape of one of its tenants had been reversed as "'blatantly unfair, inequitable and unsupported.'" (*Scott v. County of Los Angeles*, *supra*, 27 Cal.App.4th at p. 147.) In comparing the two cases, the *Scott* court observed that the landlord in the other action "was guilty at worst of a passive omission" and that it had "only the general duty imposed upon a possessor of land to exercise ordinary care in the management of his property." (*Id*. at p. 148.) In contrast, the child service worker, whose primary duty was the protection of children in foster care, "had a duty to the plaintiff that was *greater* than the general duty of ordinary care." (*Ibid*., italics added.) Nevertheless, despite the defendants' "heightened duty to prevent" the plaintiff's harm, the *Scott* court concluded the jury's apportionment of fault, which minimized the role of the party immediately responsible for the injury, could not be supported by the evidence. (*Ibid*.; see also *Ortega v. Pajaro Valley Unified School Dist.*, *supra*, 64 Cal.App.4th at pp. 1057-1058 [jury's apportionment of 100 percent fault to school district for its negligent hiring, retention, training of a teacher who sexually molested a 12-year-old girl could not be reconciled with the evidence; the district's "negligent acts would not, and could not, have caused any injury to [the plaintiffs] *but for* [the teacher's] act of sexual molestation"].)

In the present case, CUSA is in a position similar to that of the landlord discussed in *Scott*, who was "guilty at worst of a passive omission" and who had, at most, a "general duty imposed upon a possessor of land to exercise ordinary care in the management of his property." (*Scott v. County of Los*

Angeles, *supra*, 27 Cal.App.4th at p. 148.) If CUSA is negligent at all, it is negligent only in a derivative and secondary sense for its failure to prevent harms that were the direct responsibility of the *employer*, the CRTC. CUSA's responsibility for Laico's injuries is necessarily *less* than that of the CRTC, which had direct and primary responsibility to Laico as the operator of the facility and as an employer with mandatory duties imposed by OSHA. (See, e.g., RT 309-310, 313, 317-318.) At the very least, there is no justification for awarding *85 percent* of the fault to CUSA and a mere *13 percent* to the CRTC, the party primarily responsible for the injuries. Just as in *Scott*, the result here is "'blatantly unfair, inequitable, and unsupported.'" (*Scott v. County of Los Angeles*, *supra*, 27 Cal.App.4th at p. 147.)

The sheer quantity of evidence introduced against the CRTC in comparison with the lack of evidence introduced against CUSA further demonstrates that the verdict cannot be reconciled with the evidence. Plaintiffs devoted most of their case to demonstrating that the CRTC failed to maintain safe work conditions and to adequately train its employees – duties imposed on employers by law.[16/] In contrast, plaintiffs presented no evidence to suggest that CUSA was aware of any unsafe conditions. The only evidence as to CUSA was that it supplied gasoline to the CRTC and that it was the title owner of the property on which the CRTC's facilities were located. (RT 766-768, 1710, 1794, 2218.) Although, as noted above, the trial court concluded, based on an erroneous reading of the case law, that this evidence was sufficient to impose a duty on CUSA, the court still acknowledged that the evidence was "very sparse" (RT 1696) and that there was "barely . . . evidence as to CUSA's involvement in the premises" (RT 1704).

16/ See, e.g., RT 211-304, 393-427, 470-471, 480-484, 534-547, 872-890, 895-896, 921-966, 1013-1015, 1046-1050, 1058-1072, 1147-1174, 1207-1222. The evidence is summarized at pages 11-13, *ante*.

Given the lack of evidence against CUSA, and the fact that CUSA's liability (if any) for plaintiffs' injuries could only be secondary and derivative in nature, the jury's finding that CUSA was 85 percent at fault could only have been based on passion and prejudice. The record provides independent corroboration that this was indeed the case. Just prior to returning its verdict, the jurors asked the court whether, if damages were awarded, the plaintiffs would collect only from CUSA or from the other entity to whom they were allocating fault (the CRTC). (AA 116.) Although the court responded that the jury should not consider who would be required to pay damages (see AA 118), the only reasonable conclusion to be drawn from the jury's note and from the subsequent verdict is that the jury was concerned that plaintiffs would not be able to recover from the CRTC and, as a result, awarded a much higher percentage of fault to CUSA than what was supported by the evidence. Indeed, the jurors were well aware that their award against CUSA would be reduced by Laico's own comparative fault (see RT 2362) and therefore could have easily (and correctly) assumed that the award would also be further reduced by the fault they allocated to "others" (see RT 2366).

Whatever the reason for the jury's decision, however, it cannot be squared with the evidence in this case. Accordingly, if this court concludes that CUSA owed Laico a duty of care and affirms the jury's finding on liability, it should reverse the judgment for a new trial limited to apportionment of fault.

CONCLUSION

The judgment, including the subsequent cost award, should be reversed in its entirety with directions to enter judgment in favor of CUSA based on the absence of a legal duty of care. (See section I.) In the alternative, the judgment should be reversed with directions based on lack of substantial evidence on the elements of breach and/or causation. (See sections II, III.) At a minimum, the judgment should be reversed for a new trial limited to apportionment of fault. (See section IV.)

Dated: September __, 2003

Respectfully submitted,

HORVITZ & LEVY LLP
DAVID M. AXELRAD
ANDREA M. GAUTHIER

STEPTOE & JOHNSON LLP
LAWRENCE P. RIFF

By:_____
Andrea M. Gauthier

Attorneys for Defendant and Appellant
CHEVRON U.S.A., INC.

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Andrea M. Gauthier