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Metzger v. J-M Mfg. Co.

Court of Appeal of California, Second Appellate District, Division Seven

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Reporter
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GAIL METZGER et al., Plaintiffs and Appellants, v. J-M MANUFACTURING COMPANY, INC. et al., Defendants and Appellants.

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Core Terms

asbestos, juror, pipe, manufacture, concrete, trial court, misconduct, insulate, exposure, contractor, refinery, fault, install, power saw, tax fraud, deliberate, mesothelioma, dust, oil, new trial, bias, verdict form, expose, exposed to ***asbestos***, underground utility, fiber, foot, job site, sites, substantial evidence

Opinion

[*1] (Los Angeles County

Super. Ct. No.

19STCV27717)

APPEALS from a judgment and orders of the Superior

Court of Los Angeles County, Stuart M. Rice and Lawrence Cho,

Judges. Reversed with directions.

DeBlase Brown Eyerly, Patrick DeBlase; Law Office of

Ted W. Pelletier and Ted W. Pelletier for Plaintiffs and

Appellants.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Ernest

Slome and Daniel R. Velladao for Defendant and Appellant

J-M Manufacturing Company, Inc.

2

Horvitz & Levy, Curt Cutting, Rebecca G. Powell; Gordon Rees Scully Mansukhani and John P. Katerndahl for Defendant and Appellant George Dakovich & Son, Inc.

INTRODUCTION

This is an ***asbestos*** case. John Metzger worked as a laborer in three oil refineries in the late 1960's and early 1970's. There, he cleaned debris created by, among other things, workers removing and installing insulation around boilers and pipes. In the 1980's and 1990's John worked for the City of Newport Beach as a land surveyor.1 He frequently worked on underground utility construction sites and was nearby when workers used a power saw to cut utility pipes before installing them. In both settings John worked in dusty areas and without protective equipment. John **[*2]** was diagnosed with mesothelioma in 2019 and died a year later.

The plaintiffs, John's wife Gail Metzger and the Metzgers' daughter, alleged John was exposed to ***asbestos*** at the oil refineries and during his work for the City. One oil refinery owner, ExxonMobil Oil Corporation, went to trial in this case and prevailed on a motion for nonsuit. The remaining defendants are J-M Manufacturing Company, Inc., one of two manufacturers of ***asbestos*** concrete pipe used in the City's underground utilities, and a contractor, George Dakovich & Son, Inc., whose workers

1 We refer to John by his first name to avoid confusion. (See *In re Marriage of Patel (2025) 117 Cal.App.5th 262, 264, fn. 1*; *In re Marriage of Diamond (2024) 106 Cal.App.5th 550, 555*, fn. 1.)

used a power saw to cut ***asbestos*** concrete pipe. The Metzgers prevailed at trial against J-M Manufacturing and Dakovich on causes of action for strict products liability and negligence, and the jury awarded the Metzgers over $8 million. All parties appealed.

Dakovich argues substantial evidence did not support the jury's finding John was exposed to ***asbestos*** on a Dakovich job site. While it is true John could not recall working on a specific Dakovich job, there was substantial evidence from which the jury could reasonably have inferred John regularly worked on Dakovich job sites and was **[*3]** exposed to airborne ***asbestos*** generated by Dakovich's ***asbestos*** concrete pipe cutting operations. In addition, both defendants argue the trial court erred in denying their motions for a new trial based on juror misconduct. We conclude that, though the presiding juror committed misconduct by injecting specialized knowledge and opinions into the jury's deliberations, because the court admonished the presiding juror and the entire panel to disregard those opinions, the misconduct was not prejudicial.

We agree, however, that the court erred in omitting certain categories of third-party tortfeasors from the verdict form for purposes of fault allocation and that the defendants are entitled to a new trial on fault allocation only. We reject the Metzgers' challenge to the order granting Dakovich's motion for summary adjudication on the Metzgers' claim for punitive damages and do not reach the parties' remaining arguments. Therefore, we reverse the judgment with directions.

4

FACTUAL AND PROCEDURAL BACKGROUND

A. *John Is Exposed to **Asbestos** at Three Oil Refineries*

John was a construction laborer from mid-1968 to 1971. During that time several companies hired John to work at oil refineries operated by Shell Oil, Standard **[*4]** Oil, and Mobil Oil. At each refinery John worked five days a week, eight to nine hours a day, for three months.

John gathered and disposed of debris generated by other workers at the refinery. He frequently worked near and cleaned up after workers removing or installing insulation around pipes. Workers removed insulation with claw hammers, crowbars, knives, and hand saws-a process that created a lot of dust. John cleaned up the dust and pieces of insulation using a push broom, shovel, wheelbarrow, and his hands. No one told John to wear any kind of respiratory protection, and he breathed in a lot of dust.

B. *John Is Exposed to **Asbestos** While Working on Underground Utility Construction Sites in Newport Beach*

John worked for the City as an instrument worker on a land survey crew from 1981 to 2002. John surveyed property lines, made topographical surveys for the City's engineers, marked aboveground areas before work began on underground utility projects, and took measurements during construction of underground utility projects.

During John's tenure the City undertook 122 underground utility projects, and John worked on the vast majority (more than 100) of them. John typically visited an active construction **[*5]** 5 site three to four times a day to check the grade and alignment of pipes as the contractor installed them. The construction sites were dusty, especially when the contractors used a power saw to

cut or bevel pipes prior to installation. John estimated he was near workers who were cutting pipe five times a day. The City did not train John on the dangers of materials used at the construction sites, nor did it provide John with any protective gear.

C. *John Develops Mesothelioma, and He and Gail File This Action*

Doctors diagnosed John with mesothelioma in July 2019. He was 72 years old. In August 2019 John and Gail filed this action against numerous defendants, including ExxonMobil, J-M Manufacturing, and Dakovich. The Metzgers alleged, among other things, that John was exposed to ***asbestos***-containing materials as a laborer at certain oil refineries during the late 1960's and early 1970's and as a land surveyor for the City during the 1980's and 1990's and that those exposures caused his mesothelioma. After John died in 2020 the Metzgers' daughter joined the lawsuit as a plaintiff. The parties tried the matter to a jury over approximately five weeks, beginning in mid-May 2023.

6

D. *The Jury Finds in Favor of* ***[*6]*** *the Metzgers and Awards More Than $8 Million in Damages*

1. *The Metzgers Introduce Evidence John Was Exposed to* ***Asbestos*** *That Caused His Mesothelioma*

The Metzgers claimed John was exposed to ***asbestos*** in two situations. First, the Metzgers claimed John was exposed to ***asbestos***-containing dust and insulation when he worked at the oil refineries in the late 1960's and early 1970's.2 The Metzgers' industrial hygiene expert, Philip Templin, testified that, based on the time frame, the use of the insulation, and John's description

of the insulation material, the insulation John handled at the oil refineries contained ***asbestos***. According to Templin, there was no ***asbestos***-free insulation in the late 1960's or early 1970's matching John's description of the material he worked with during that time. Regarding the level of exposure, Templin

2 Mobil Oil's successor-in-interest, ExxonMobil, was a defendant at trial. ExxonMobil filed a motion for nonsuit arguing that, because Mobil Oil did not hire John to work at its refinery (rather, Mobil Oil hired the contractor that hired John), the doctrine under *Privette v. Superior Court (1993) 5 Cal.4th 689* shielded Mobil Oil from liability for John's work-related injuries. (See *Schurman Family Company TIC v. Superior Court* ***[*7]*** (2026) *122 Cal.App.5th 915, 919* [under "the *Privette* doctrine, a person or entity that hires an independent contractor 'is not liable for injuries sustained by the contractor or its workers while on the job' because the 'hirer generally delegates to an independent contractor all responsibility for workplace safety'"].) The trial court granted the motion for nonsuit. The Metzgers do not challenge that ruling in this appeal, which ExxonMobil is not a party to.

7

testified the process of removing insulation surrounding pipes at the refineries generated a lot of dust, resulting in ***asbestos*** exposure of 100 fibers per cubic centimeter of air, a level he described as "way, way above background."3 The Metzgers' medical expert, Dr. Barry Horn, testified to a reasonable degree of medical certainty John's exposure to ***asbestos***-containing insulation and dust at the refineries was a substantial factor in causing John's mesothelioma. Dr. Horn explained that ***asbestos*** exposure causes 90 percent of mesothelioma cases, that there is

no safe level of exposure to ***asbestos***, and that every exposure to ***asbestos*** contributes to the risk of developing the disease. Dr. Horn also explained that ***asbestos***-related disease has a latency period, i.e., a delay between **[*8]** exposure and the development of disease, of at least 10 to 20 years, and that John developed mesothelioma approximately 50 years after his exposure to ***asbestos*** at the oil refineries.

Second, the Metzgers claimed John was exposed to ***asbestos*** at underground utility construction sites when he worked for the City. The Metzgers claimed John inhaled ***asbestos***-containing dust generated when certain contractors, including Dakovich, used a power saw to cut ***asbestos*** concrete pipe, contrary to industry standards and the City's contractual directive that contractors follow the pipe manufacturer's installation instructions. Between 1981 and 2001 the City awarded 122 underground utility contracts, of which at least 32 required workers to use ***asbestos*** concrete pipe. The City awarded Dakovich six of those contracts, and Dakovich completed those

3 Templin testified background or ambient levels of ***asbestos*** range from 0.0001 to 0.00000001 fibers per cubic centimeter of air.

8

projects between 1984 and 1988. Dakovich used more than 18,000 linear feet of ***asbestos*** concrete pipe manufactured by J-M Manufacturing or CertainTeed on those projects. Dakovich workers always used a power saw to cut ***asbestos*** concrete pipe on the job site, **[*9]** and John recalled Dakovich workers cut ***asbestos*** cement pipe near him.

Templin, the industrial hygienist, testified cutting ***asbestos*** cement pipe with a power saw would produce "very high

concentrations of respirable ***asbestos*** fibers," up to 200 fibers per cubic centimeter of air. Dr. Horn testified, to a reasonable degree of medical certainty, exposure to dust generated by cutting ***asbestos*** cement pipe with a power saw contributed to John's risk of developing mesothelioma.

2. *J-M Manufacturing Introduces Evidence John Was Not Exposed to* ***Asbestos*** *That Caused His Mesothelioma*

J-M Manufacturing did not dispute that it sold ***asbestos*** concrete pipe until 1988 or that contractors used that pipe in the City's underground utility projects. J-M Manufacturing argued, however, it was unlikely John was exposed to dust from its ***asbestos*** concrete pipes in an amount sufficient to contribute to his risk of developing mesothelioma. First, J-M Manufacturing claimed John spent very little time on underground utility construction sites. For example, Vladimir Popovich, Dakovich's vice president, testified much of John's work took place before construction began, when John surveyed the site and made

9

markings for the contractors. **[*10]** Popovich stated he saw John often, but usually for just a few minutes at a time.

Second, J-M Manufacturing claimed contractors did not need to cut ***asbestos*** concrete pipes very often. Michael Stone, an underground utility contractor, and John Orkish, a salesperson for J-M Manufacturing during the 1980's, testified that, in addition to the standard 13-foot length pipes, the manufacturers made shorter three- and six-foot lengths a contractor could use to reduce the number of times the contractor would need to cut ***asbestos*** concrete pipe. Popovich stated the shorter lengths nearly eliminated the need to cut pipe on the job site. Stone

testified that, with some exceptions, underground utility plans often allowed for some flexibility in the exact placement of elements such as valves, which reduced the need to cut pipes. Third, J-M Manufacturing introduced the testimony of two expert witnesses, Dr. Jennifer Pierce and Dr. Michael Holland. They stated that, even if John was exposed to dust when a contractor cut ***asbestos*** cement pipe with a power saw, any such exposure did not contribute to his risk of developing mesothelioma.

3. *Dakovich Introduces Evidence John Was Not Exposed to* ***Asbestos*** *That Caused His Mesothelioma* ***[*11]***

Dakovich claimed the evidence did not show John was exposed to ***asbestos*** on any of Dakovich's job sites. John recalled the details of his work for the City very generally, but did not identify a specific Dakovich contract he worked on or a specific date he worked on a Dakovich job site. In addition, John testified that, when he observed workers cutting pipe, they did so

10

alongside the utility trenches and that they swept the dust generated by cutting pipes into the trenches. Popovich testified, however, Dakovich did not do either of those things. According to Popovich, Dakovich cut its pipes in a dedicated cutting area near each project's starting point (away from the trenches) and gathered any dust generated by the cutting process into large trash bags. Dakovich also claimed it used a novel cutting method that prevented dust from going into the air during the pipe cutting process. Popovich testified that workers poured water on the ***asbestos*** concrete pipes immediately before cutting them and that they used a three-sided cardboard or plywood shield during

the cutting process to prevent dust from becoming airborne. Finally, Dakovich claimed that, even if John had been within 10 to 15 feet of its cutting **[*12]** operation during the five years it performed work for the City, such exposure would not have caused his mesothelioma. Dakovich's expert on industrial hygiene, Timothy Borman, testified John's cumulative ***asbestos*** exposure resulting from Dakovich's cutting method was likely 0.0006 fibers per cubic centimeter of air, which Borman testified was within the range of ambient levels of exposure. And Dakovich's medical expert, Dr. James Caplan, testified to a reasonable degree of medical certainty such a low exposure to airborne ***asbestos*** fibers would not have increased John's risk of developing mesothelioma.

4. *The Jury Finds for the Metzgers*

The jury found in favor of the Metzgers on their causes of action for products liability (product defect and failure to warn) and negligence. The jury awarded $874,741 in economic damages: $270,000 in past medical expenses, $376,378 in past

11

and future loss of income; and $228,363 in past and future loss of household services. The jury also awarded $8 million in noneconomic damages: $3 million for John; $4 million for Gail; and $1 million for the Metzgers' daughter. The jury allocated fault as follows: J-M Manufacturing, 27 percent; Dakovich, 27 percent; CertainTeed, 27 percent; **[*13]** and the City, 19 percent. The jury found against the Metzgers on their claim for punitive damages against J-M Manufacturing.

E. *The Trial Court Denies the Defendants' Motions for Judgment Notwithstanding the Verdict and for a New Trial*

Dakovich filed a motion for judgment notwithstanding the verdict. Dakovich argued substantial evidence did not support the jury's finding John was exposed to ***asbestos*** on a Dakovich job site. Dakovich argued that no eyewitness testified John was present on a Dakovich job site when a Dakovich worker cut ***asbestos*** concrete pipe with a power saw and that Dakovich did not use the cutting method John testified he witnessed on City job sites.

Both defendants filed motions for a new trial making two arguments. First, the defendants argued the jury engaged in two forms of misconduct: the presiding juror shared with the other jurors information and expertise regarding possible tax fraud by J-M Manufacturing, and another juror concealed bias during voir dire. Second, the defendants argued the trial court erred in omitting from the verdict form's fault allocation section several third-party tortfeasors the defendants had asked the court to include.

12

The trial court denied Dakovich's motion **[*14]** for judgment notwithstanding the verdict. The court ruled that, though there was no direct evidence John was present on a job site when a Dakovich worker cut ***asbestos*** concrete pipe, substantial circumstantial evidence supported the jury's exposure finding. The court ruled the evidence that John worked on every Dakovich job, that he visited active job sites multiple times a day, that Dakovich used only a power saw to cut ***asbestos*** concrete pipe (while other contractors used a snap cutter or a combination of the two methods), and that Dakovich installed far more ***asbestos*** concrete pipe than any other contractor between 1983 and 1989 supported the reasonable inference John was present when

Dakovich workers cut ***asbestos*** concrete pipe.

The trial court also denied the defendants' motions for a new trial. On the issue of jury misconduct, the court ruled the presiding juror engaged in misconduct by discussing with the other jurors his suspicion J-M Manufacturing may have committed tax fraud. The court further ruled that, because the other jurors told the presiding juror the issue was not relevant to the issues in the case, the misconduct did not prejudice the other 11 jurors on the panel. Regarding the presiding **[*15]** juror, the trial court ruled the misconduct was not prejudicial because the court twice instructed him (once in isolation, and once in the presence of the entire panel) tax fraud was not at issue in the case. The court found those instructions cured any prejudice from the presiding juror's conduct. Regarding the other allegation of juror misconduct, the court ruled there was no misconduct. Finally, on the issue of the allocation of fault on the verdict form, the court ruled the defendants failed to prove the culpability of the entities

13

the defendants claimed were erroneously omitted from the fault allocation section of the form.

J-M Manufacturing filed a motion, which Dakovich joined, for reconsideration of the trial court's order denying the motion for a new trial on the ground of juror misconduct. The court denied the motion.

The court entered judgment in favor of the Metzgers on September 27, 2023. J-M Manufacturing and Dakovich timely appealed from the judgment and the order denying their motion for reconsideration of the order denying their motion for a new trial based on juror misconduct. In addition, Dakovich appealed from the order denying its motion for judgment notwithstanding

the verdict. **[*16]** The Metzgers cross-appealed from the judgment. The Metzgers filed a memorandum of costs in the trial court, and the defendants filed motions to tax. Dakovich moved to tax, among other items, the largest line item on the cost bill: $993,815.93 in prejudgment interest. The trial court granted the motions to tax costs in part. Dakovich appealed from the postjudgment cost order; the Metzgers did not.

DISCUSSION

A. *Substantial Evidence Supported the Jury's Finding Dakovich Exposed John to Airborne **Asbestos** Fibers*

1. *Applicable Law and Standard of Review*

"In the context of a cause of action for ***asbestos***-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective ***asbestos***-containing products, *and* must further establish in reasonable medical

14

probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury." (*Rutherford v. Owens-Illinois, Inc.* (1997) *16 Cal.4th 953, 982*, fn. omitted; accord, *Swanson v. The Marley-Wylain Co. (2021) 65 Cal.App.5th 1007, 1016-1017*.) The plaintiff may use either direct or circumstantial evidence to establish exposure. "[T]o establish exposure in an ***asbestos*** case a plaintiff has no obligation to prove a specific **[*17]** exposure . . . on a specific date or time. Rather, it is sufficient to establish 'that defendant's product was definitely at his worksite and that it was sufficiently prevalent to warrant an inference that plaintiff was exposed to it' during his work there." (*Turley v. Familian Corp.* (2017) *18 Cal.App.5th 969, 985*; see *Whitmire v. Ingersoll-Rand Co. (2010) 184 Cal.App.4th 1078, 1094* ["'[E]ven under the most

lenient causation standards, there must be proof that the defendant's ***asbestos*** products or activities were present at plaintiff's work site.'"].)

Citing *Scheiding v. Dinwiddie Construction Co.* (1999) *69 Cal.App.4th 64*, Dakovich argues the plaintiff must prove exposure to the defendant's ***asbestos***-containing product by proving "the time, location, and actual circumstances of exposure." Dakovich's reliance on *Scheiding* is misplaced. In that case, the defendant general contractor moved for summary judgment, arguing that, though the plaintiff identified the defendant in his response to interrogatories as one of numerous employers and at various worksites where the plaintiff claimed he was exposed to ***asbestos***, the plaintiff did not identify during his deposition any job site where the defendant was present. None of the attorneys asked the plaintiff to identify a job site where **[*18]** the defendant was present. In fact, counsel for the

15

defendant did not ask any questions during the plaintiff's deposition, and the defendant conducted no other discovery. (*Id.* at p. 67.) The plaintiff opposed the motion, arguing the defendant did not carry its initial burden to show the plaintiff would be unable to prove causation. But the plaintiff did not submit any evidence the defendant was present at any job site where the plaintiff worked. The trial court granted the motion for summary judgment. (*Id. at p. 68*.)

The court in *Scheiding* reversed, holding the absence of evidence connecting the plaintiff's alleged exposure to the defendant did not meet the defendant's initial burden to show the plaintiff would be unable to obtain sufficient evidence to prove causation. (*Scheiding v. Dinwiddie Construction Co.*, *supra*,

69 Cal.App.4th at p. 83.) In addressing that issue, the court discussed at length then-recent amendments to Code of Civil Procedure section 437c, which changed the type of evidence required to shift the parties' respective burdens in summary judgment or summary adjudication proceedings.4 The court in

4 In 1993 the Legislature added former subdivision (o) (now subdivision (p)) to Code of Civil Procedure section 437c. That provision provided in part: "For purposes of motions for summary judgment and **[*19]** summary adjudication: [¶] . . . [¶] (2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable

16

Scheiding analyzed circumstances where the absence of evidence, such as when the plaintiff responds to discovery with "factually devoid" responses that fail to connect a defendant to the plaintiff's alleged ***asbestos*** exposure, might satisfy a moving defendant's initial burden of production under the amended summary judgment statute. (*Id. at pp. 69-84*.) The court did not discuss the type of evidence the plaintiff must offer at trial to prove causation in an ***asbestos*** exposure case.

Finally, where "a party contends insufficient evidence supports **[*20]** a jury verdict, '[o]ur review "begins and ends with the

determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination.'" [Citations.] "'We must 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor.'"'" (*Carranza v. City of Los Angeles (2025) 111 Cal.App.5th 388, 399-400*, italics omitted.) "'Reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury verdict.'" (*Casey N. v. County of Orange (2022) 86 Cal.App.5th 1158, 1170-1171*.)

issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Stats. 1993, ch. 276, § 1; Assem. Bill No. 498 (1993-1994 Reg. Sess.), § 1.)

17

2. *Substantial Evidence Supported the Jury's Finding John Was Present When Dakovich Workers Cut **Asbestos** Concrete Pipe*

The Metzgers claimed John was exposed to airborne ***asbestos*** fibers when he worked for the City at underground utility construction sites. The Metzgers alleged that Dakovich's workers used a power **[*21]** saw to cut ***asbestos*** concrete pipe, that the cutting process generated high levels of airborne ***asbestos*** fibers, and that John inhaled those fibers when he worked on Dakovich's jobsites.

The evidence supported a reasonable inference John was exposed to airborne ***asbestos*** fibers on underground utility construction sites. John testified that he worked for the City for 21 years and that approximately 80 percent of his work for the

City related to underground utility construction projects. John estimated that, from 1981 to the mid-1990's, the vast majority (up to 90 percent) of those projects required the contractor to use ***asbestos*** concrete pipe. During an active construction project John would visit the jobsite several times a day to survey the contractors' work and would spend an hour or more each visit on the jobsite. On an average day John saw workers cutting ***asbestos*** concrete pipe five times and, more often than not, workers used a power saw (rather than a snap cutter) to cut the pipe. John was often within five to 20 feet of workers cutting ***asbestos*** concrete pipe. John observed that cutting ***asbestos*** concrete pipe with a power saw generated a lot of dust, and he could not avoid inhaling the dust while on **[*22]** the jobsites. The Metzgers' industrial hygiene expert testified cutting ***asbestos*** cement pipe with a power saw, dry or wet, would produce "very high concentrations of respirable ***asbestos*** fibers."

18

The evidence also supported a reasonable inference John was present when Dakovich's workers cut ***asbestos*** concrete pipe. Dakovich's workers always cut ***asbestos*** concrete pipe using a power saw. And John testified workers for Dakovich cut ***asbestos*** concrete pipe when he was nearby. John testified (at his deposition):

"Q: When you were working around [***asbestos*** concrete] pipe, did you ever see the pipes being cut?

"A: Yes.

"Q: And who would be doing this cutting to the pipe?

"A: The contractor.

"Q: Now, do you remember the names of the various contractors that cut the pipe around you?

"A: I remember some of them.

"Q: Okay. Which ones do you remember?

"A: I remember Colich & Son, R & L Sewers, Kennedy Pipeline, Dakovich & Son, Vido Artukovich, Dakovich & Son [*sic*]. I have a list."

Popovich corroborated John's testimony; he stated that John worked on all the jobs Dakovich had with the City and that he (Popovich) saw John on a regular basis. True, as Dakovich asserts, John could not remember specific details about Dakovich's **[*23]** jobs, such as whether or how often Dakovich installed ***asbestos*** concrete pipe and which specific Dakovich jobs he worked on. But John's failure to provide those details was not consequential; the contracts with information about Dakovich's work for the City were in evidence.

At a minimum, the evidence supported a reasonable inference John was exposed to airborne ***asbestos*** on a Dakovich jobsite between 1986 and 1988. Dakovich was the largest

19

installer of ***asbestos*** concrete pipe for the City by several measures. Dakovich installed 18,100 linear feet of ***asbestos*** concrete pipe as part of six projects with the City. No other contractor the City hired between 1983 and 1995 installed even half that amount of ***asbestos*** concrete pipe, and most of the other contractors installed less than 1,000 linear feet of ***asbestos*** concrete pipe and worked on only one project. At an installation rate of 150 feet per day, which John testified was typical for an underground utility contractor, Dakovich would have worked more than 120 days on City jobs between 1984 and 1988. In addition, between 1986 and 1988 Dakovich dominated the City's underground utility projects that used ***asbestos*** concrete pipe.

Dakovich installed 6,170 feet **[*24]** of ***asbestos*** concrete pipe in 1986; 4,185 feet in 1987; and 3,500 feet in 1988. In each of those years, only one other contractor also installed ***asbestos*** concrete pipe for the City. Those contractors installed 4,903 feet of ***asbestos*** concrete pipe in 1986; 150 feet in 1987; and 3,500 feet in 1998. Because John worked on every Dakovich job, because Dakovich performed the vast majority of the work involving ***asbestos*** concrete pipe for the City from 1986 to 1988, and because Dakovich workers always used a power saw to cut ***asbestos*** concrete pipe, the jury could reasonably infer John's exposure to cutting of ***asbestos*** cement pipe during that period-particularly during 1987-occurred on a Dakovich jobsite.

Dakovich argues the evidence, particularly John's testimony about the pipe cutting methods he recalled, supported a reasonable inference John was not present on a Dakovich jobsite when its workers cut ***asbestos*** concrete pipe. John testified he saw workers cutting pipe on the ground beside the open trenches and sweeping the dust generated during the

20

cutting process into the trench. Popovich testified, however, Dakovich used a different method. Dakovich's workers set up a cutting area away from the trench and cut **[*25]** all the pipes there. They also used a wet cutting method and a three-sided cardboard or plywood shield when cutting ***asbestos*** concrete pipe, something John did not say he ever observed.

The jury did not have to accept Dakovich's version of events. The jury could have disbelieved Popovich's testimony about its specialized cutting method. (See *People v. Collins (2025) 17 Cal.5th 293, 348, fn. 6* ["A jury may disbelieve a witness for any rational reason, including the witness's 'demeanor while

testifying' and the 'existence or nonexistence of a bias, interest, or other motive'"].) After all, Popovich testified no one at Dakovich in the 1980's knew ***asbestos*** was dangerous, even though the danger was well known by that time. Popovich also testified that, even though no one at Dakovich knew ***asbestos*** was dangerous, workers used a wet cutting method and a three-sided shield to reduce dust-but only to reduce the mess, not for worker safety. Michael Stone, an underground utility contractor, testified he "never heard of anybody doing what Dakovich was doing to cut pipe." He also testified that placing a cutting station some distance from the trench made little sense because it required the contractor to move the pipes more than necessary. Dakovich **[*26]** analogizes this case to three cases where the evidence did not support a reasonable inference the plaintiff was exposed to the defendant's ***asbestos***-containing product. The first case, *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, does not assist Dakovich. In *McGonnell* the defendants, Kaiser Gypsum and Kaiser Cement, moved for summary judgment and argued the plaintiffs could not prove the plaintiffs' decedent was ever exposed to their products. In support of the motion, the defendants submitted deposition testimony by the plaintiffs' decedent, who worked as a plumber and engineer at a medical complex from 1975 to 1999. The decedent testified that he had never heard of a company called Kaiser Gypsum and that, as far as he knew, he never worked with or around any Kaiser Gypsum products. Although he had heard of Kaiser Cement and had seen bags bearing the company's name at some point, he could not recall where he had seen those bags. (*Id. at p. 1101*.) In opposition to the motion, the plaintiffs submitted invoices

21

showing some Kaiser Gypsum products might have been delivered to the medical center in the 1970's. But Kaiser Gypsum's discovery responses showed that many of the products it manufactured at that **[*27]** time did not contain ***asbestos*** and that, though some compounds it manufactured contained ***asbestos***, Kaiser stopped using ***asbestos*** in those compounds in the early to mid-1970's. Regarding Kaiser Cement, the plaintiffs submitted evidence that the company manufactured two products with ***asbestos*** until the mid-1970's and that those products might have been used in construction at the medical center in the late 1970's. (*Id. at p. 1102*.) The trial court ruled the plaintiffs failed to demonstrate a triable issue of material fact regarding exposure to the defendants' ***asbestos***-containing products and granted the motion for summary judgment.

The court in *McGonnell* affirmed the order granting the motions by Kaiser Gypsum and Kaiser Cement for summary judgment. The court stated it was "within the realm of possibility" the plaintiffs' decedent encountered an ***asbestos***-containing product manufactured by the defendants. But the court stated the plaintiffs' evidence, at best, created only a

22

"'dwindling stream of probabilities that narrow into conjecture.'" (*McGonnell v. Kaiser Gypsum Co., Inc.*, *supra*, 98 Cal.App.4th at p. 1105.) The court stated: "All that exists in this case is speculation that at some time [the decedent] might have **[*28]** cut into a wall that might have contained Kaiser joint compound that might have contained ***asbestos***." (*Ibid.*) There was no such speculation here. As discussed, it was undisputed that Dakovich installed 18,100 linear feet of ***asbestos***-containing pipes, that when Dakovich's workers cut those pipes with a power saw the

process released high concentrations of ***asbestos*** into the air and onto the jobsite, and that John worked on every Dakovich jobsite on a regular basis.

The second case, *Lineaweaver v. Plant Insulation Co.* (1995) *31 Cal.App.4th 1409*, is also distinguishable. There, the court affirmed an order granting the defendant's motion for nonsuit on the ground the plaintiffs failed to present sufficient evidence of exposure to the defendant's ***asbestos***-containing insulation. One of the plaintiffs worked as a laborer at a naval shipyard from 1965 to 1986 sweeping and removing insulation debris from the shipyard and aboard ships during repairs. Another plaintiff worked in ship engine rooms from 1968 to 1990 and claimed he was exposed to the defendant's insulation at the naval shipyard where the other plaintiff worked. (*Id. at p. 1414*.) But during the relevant time frame, the defendant's products were used infrequently at the shipyard (on perhaps **[*29]** one of every three to four ships) and only as "'fill-in'" (10 to 15 percent of the total amount of insulation material used) when workers ran out of insulation manufactured by another company. (*Ibid*.) The court in *Lineaweaver* held the evidence, particularly the evidence the defendant's products were used infrequently in the plaintiffs'

23

work environments, did not support a reasonable inference either plaintiff was exposed to the defendant's products at the shipyard. (*Id. at pp. 1420-1421*.) This case does not present a similar issue. John worked on all Dakovich's projects, and Dakovich regularly used ***asbestos*** concrete pipe.

The third case, *Dumin v. Owens-Corning Fiberglass Corp. (1994) 28 Cal.App.4th 650*, is likewise distinguishable. There, the trial court granted the defendant distributor's motion for

directed verdict on the ground the plaintiff failed to prove exposure to insulation distributed by the defendant in 1953 and 1954. At that time the plaintiff worked with insulation materials on a ship with its home port in Norfolk, Virginia. But there was no evidence the insulation distributed by the defendant ever made it on board the plaintiff's ship. The insulation distributed by the defendant was used at the Norfolk shipyard "'somewhere in the **[*30]** late '40s or early '50s"' and some supplies (possibly including some insulation) might have been sent to the plaintiff's ship from the shipyard. But the shipyard serviced hundreds of ships, and the defendant's insulation was only one of many types of insulation used at the shipyard. There was no evidence the defendant's product was the "dominant" insulation used at the shipyard and, in any event, the defendant was not the only company to distribute the insulation in 1953 and 1954. (*Id*. at pp. 655-656.) The court in *Dumin* affirmed the order granting the motion for directed verdict, concluding a jury would need to engage in "a stream of conjecture and surmise" to find the plaintiff had been exposed to the product distributed by the defendant. (*Id. at p. 656*.) There is no similar gap in the evidence here. As discussed, Dakovich installed more ***asbestos***

concrete pipe than any other contractor, and John worked on all Dakovich's projects.

B. *The Trial Court Did Not Err in Denying the Motions for a New Trial Based on Juror Misconduct*

J-M Manufacturing and Dakovich argue the trial court erred in denying their motions for a new trial based on juror misconduct by the presiding juror, Adam Haiken. Substantial evidence supported **[*31]** the trial court's finding Haiken committed

misconduct by injecting external information and personal expertise into the jury's deliberations. On the issue of prejudice, however, we conclude there was no substantial likelihood any juror, including Haiken, was improperly influenced to the detriment of J-M Manufacturing or Dakovich.

1. *Applicable Law and Standard of Review*

"A trial court undertakes a three-step process to evaluate a motion for new trial based on juror misconduct" under section 657. (*Hernandez v. First Student, Inc.* (2019) 37 Cal.App.5th 270, 278.) "The trial court must first determine whether the declarations supporting the motion are admissible under Evidence Code section 1150. Second, if all or part of the declarations are admissible, the trial court determines whether the facts establish misconduct. If the trial court finds misconduct occurred the trial court then determines whether the misconduct was prejudicial." (*Ibid.*; accord, *People v. Stayner* (2026) 19 Cal.5th 395, 562; see *Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.) The moving party "bears the burden of establishing juror misconduct." (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 625; see *Barboni*, at p. 349 ["the

burden of establishing juror misconduct lies with the party moving for a new trial"].) The trial court's finding juror **[*32]** misconduct occurred gives rise to a rebuttable presumption of prejudice, and the opposing party must demonstrate there was no substantial likelihood any juror was improperly influenced to the losing party's detriment. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416-417, disapproved on another ground in *Soule v. General Motors Corp. (1994) 8 Cal.4th 548*; *TRC Operating Co., Inc. v. Chevron USA, Inc. (2024) 102 Cal.App.5th 1040, 1083*.)

"On review from a trial court's 'determin[ation of] whether misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence."'" (*Barboni v. Tuomi*, *supra*, 210 Cal.App.4th at p. 345; accord, *Hernandez v. First Student, Inc.*, *supra*, 37 Cal.App.5th at p. 278.) Where, as here, "the motion for new trial was a battle of the declarations," it is "'the trial court that must assess the credibility of affiants or declarants, and the trial court is entitled to believe one over the other.'" (*Toste v. CalPortland Construction* (2016) *245 Cal.App.4th 362, 372-373*.) The "appellate court defers to the trial court's factual findings and independently assesses prejudice." (*Id. at p. 373*.)

2. *Additional Factual Background*

a. *Trial and Deliberations*

J-M Manufacturing witness James Reichert testified that, effective January 1, 1983, Johns-Mansville sold its ***asbestos*** concrete pipe manufacturing business to two newly created **[*33]** subsidiaries, J-M Manufacturing and J-M A/C Pipe Corporation.

26

The purchase agreements included provisions allocating liability for personal injuries related to ***asbestos*** concrete pipe. During Reichert's testimony juror Haiken asked to speak to the court. The trial court spoke to Haiken outside the presence of the other jurors and in the presence of counsel. Haiken said the witness's testimony reminded him of a case study regarding tax evasion he reviewed in a business law class. Haiken said that he was "excited to dig into the amortization and depreciation" numbers in a joint income statement the witness discussed and that he planned to submit questions for the witness about the corporate

restructuring.5

After conferring with counsel, the court gave Haiken these instructions: "During the examination of Mr. James Reichert, he was shown various consolidated balance sheets and operating statements. The sole purpose of admitting those exhibits was to provide the jury with the gross profit recorded by J-M Manufacturing and J-M A/C during the years specified. There are no allegations of improper accounting practices or improper motives in the preparation of these documents, and you should not draw any inferences **[*34]** from the manner in which these statements were prepared." This discussion followed:

"Juror [Haiken]: I can have my own opinion,·right?

"The Court: Of course, you may have your own opinion.

"Juror [Haiken]: But you don't want me to vocalize those?

"The Court: Well, no, no. Let me be clear. Certainly, you can look at the evidence like everyone else and you can form your own opinions about the evidence and about the facts of what happened in this case in terms of reaching a verdict. And you

5 The trial court allowed the jurors to submit questions for the witnesses.

27

should vote . . . along with the jurors when it comes to the verdict form. The only thing that we ask that you not do is inject any of your specialized knowledge or specialized training that you have.

"Juror [Haiken]: And don't go through the income statement beyond the scope of the testimony?

"The Court: Let me put it this way: The instruction was to sort of let you know why those income statements were provided, and that the purpose of them was to just show you how much profit was recorded. Now, that's the only reason why it was put

into evidence. You're free to examine the evidence any which way you like, but the evidence was not presented **[*35]** to you to try and criticize at all the accounting methods that were utilized. And so I don't want to limit your ability to examine the evidence fully to try and answer the questions on the verdict form. I would ask, of course, if you have some opinions of your own that you happen to come across that have to do with the accounting methods, you do not share those with other jurors. I'm trying to be as clear as I can for you, that the accounting is really not at issue in this case. Really it's for the limited purpose of showing how much the two companies made during those times. And to the extent you find it relevant at all, you may utilize that for your determinations as to how you vote on the verdict form. Does that make sense?

"Juror [Haiken]: That's perfectly clear. If I draw an assumption based on that information, but it's beyond the scope, I should not repeat it. Correct?

"The Court: That's correct. You should not repeat it. That's right.

"Juror [Haiken]: Perfect."

28

The issue arose again during jury deliberations. Juror Sara Nix (who apparently left the jury room and found the trial court's chambers door open) told the court privately she believed the jury's deliberations were unfair to J-M Manufacturing **[*36]** because there was some suggestion the company may have been involved in tax fraud. After conferring with counsel the court questioned Nix outside the presence of the other jurors and in the presence of counsel. Nix said Haiken drew a flowchart to illustrate J-M Manufacturing was involved in tax fraud.

The court questioned Haiken again outside the presence of the other jurors. Haiken said another juror asked why Haiken stayed behind to speak with the court and the lawyers during the trial. Haiken said he explained to the other jurors that he had raised an issue regarding the accounting documents and that the court had instructed him not to consider the issue. Haiken denied discussing tax fraud with the other jurors during deliberations and said his flow chart illustrated the purchase of assets by J-M Manufacturing and J-M A/C Pipe.

The court randomly chose a third juror, Melinda Murray, and questioned her outside the presence of the other jurors and in the presence of counsel. According to Murray, one juror raised an issue about tax fraud by either Dakovich or J-M Manufacturing, but the other jurors did not discuss the issue. Murray also denied any juror offered specialized knowledge about accounting or **[*37]** financial practices.

The trial court called all the jurors into the courtroom. The court read them the same instruction the court had given Haiken.

29

b. *Posttrial Motions*

In support of their motions for a new trial, the defendants submitted declarations from four jurors: Nix, Kim Robertson, Nicholas Perzik, and Jake Elmstedt. According to Nix, Haiken raised the issue of tax fraud by J-M Manufacturing during deliberations, spoke about the issue for five to 10 minutes, and drew a chart to explain his theory. Nix said that the other jurors listened to Haiken and that a few jurors stated J-M Manufacturing seemed "shady." Robertson also said that Haiken flagged the issue of tax fraud and that he drew a graph showing the purchase of corporate assets by J-M Manufacturing

and J-M A/C Pipe. Perzik stated Haiken discussed possible tax fraud and avoidance of legal liability by J-M Manufacturing multiple times. Elmstedt said Haiken raised the issue in response to Elmstedt's question why Haiken had met with the judge during the trial. But Perzik and Elmstedt stated other jurors said the issue of tax fraud was "not what the case was about" and moved on with deliberations.

In opposition to the motions the Metzgers submitted **[*38]** a declaration by juror Murray. Murray, an attorney, said another juror asked Haiken why he had spoken with the judge during the trial. Haiken stated that he asked the judge about possible tax evasion by J-M Manufacturing and that the judge said "those sort[s] of considerations were irrelevant to the case." Other jurors said they agreed tax fraud was not an issue in the case and was irrelevant to their deliberations. Murray stated that the subject did not come up again and that Haiken did not claim to have any special expertise in finance or accounting. Murray also said Haiken prepared an organizational chart relating to J-M Manufacturing's products, knowledge, and warnings.

30

On the morning of the hearing on the motions for a new trial, the Metzgers filed a declaration by Haiken. Like jurors Elmstedt and Murray, Haiken said another juror asked him why he spoke to the judge earlier in the trial. Haiken stated he told the juror that he wondered about possible tax fraud by J-M Manufacturing. Haiken said that he told the jurors that the judge instructed him tax fraud was not at issue in the case and that the other jurors agreed the matter was irrelevant. Haiken said the issue did not come up again during **[*39]** deliberations. Haiken also said that he made a chart depicting the sale of

Johns-Mansville's ***asbestos*** concrete business, but that the chart had nothing to do with tax evasion or corporate profits and losses. As stated, the trial court denied the motions, and the defendants filed a motion for reconsideration of the order denying their motions for a new trial based on juror misconduct. The defendants submitted supplemental declarations by Nix, Robertson, and Perzik responding to Haiken's declaration. All three jurors said Haiken did not disclose, when he raised his suspicions about tax fraud and liability shifting by J-M Manufacturing, the trial court told him those issues were irrelevant.

3. *There Was Juror Misconduct*

Substantial evidence supported the trial court's ruling juror Haiken committed misconduct by using his specialized knowledge and injecting the (irrelevant) issue of tax fraud into the jury's deliberations. A "juror may not 'discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is

31

misconduct.'" (*Nodal v. CalWest Rain, **[*40]** Inc.* (2019) 37 Cal.App.5th 607, 611.) There was no evidence at trial J-M Manufacturing committed tax fraud. But it was undisputed Haiken discussed the issue of tax fraud with the other jurors during deliberations (though the jurors disagreed on how extensive those discussions were). Haiken told the court he based his suspicions about tax fraud on information he learned in a business law class, not on evidence presented at trial. The Metzgers concede Haiken committed misconduct.

4. *But It Was Not Prejudicial*

As discussed, juror misconduct raises a rebuttable presumption of prejudice. "The verdict will not be disturbed '"if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant."' [Citation.] The test is whether the juror's conduct or failure to disclose evidences or shows bias. [Citation.] 'The standard is a pragmatic one, mindful of the "day-to-day realities of courtroom life."' [Citation.] Because the jury is a 'fundamentally human' institution, it cannot be divorced from **[*41]** the fact that jurors will have different experiences, opinions, and personalities, which is both a strength and a weakness of having civilian juries. [Citation.] 'If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'" (*TRC Operating Co., Inc. v. Chevron USA, Inc., supra, 102 Cal.App.5th at p. 1084*.)

"'Some of the factors to be considered when determining whether the presumption is rebutted are the strength of the

32

evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued.' [Citation.] This list is not exhaustive, nor is it a set of elements that must be met to determine whether misconduct was prejudicial. All told, we must determine whether there was a substantial likelihood of actual bias, which would create a reasonable probability of actual harm to the complaining party." (*TRC Operating Co., Inc. v. Chevron USA, Inc., supra*, 102 Cal.App.5th at pp. 1084-1085.)

Because the evidence of Haiken's misconduct was strong

and the nature of the misconduct was relatively serious, the trial court focused on whether there was a substantial likelihood any of the jurors had an actual bias against J-M Manufacturing. The trial court ruled the Metzgers rebutted the presumption of prejudice for three reasons: Haiken's **[*42]** suspicions of tax fraud did not relate to a "'matter at issue'" in the case; the trial court instructed the entire panel during deliberations the case did not involve improper tax or accounting practices; and, because not a single juror voted in favor of awarding punitive damages against J-M Manufacturing, it was unlikely any juror was persuaded J-M Manufacturing had engaged in tax fraud.

The trial court properly presumed the jurors followed the court's curative instruction. "Absent evidence to the contrary, a jury is presumed to follow the instructions of the trial court. Having been given a specific admonishment in light of misconduct by one of their members, it seems probable the jurors would more closely adhere to the instructions of the trial court and thus reduce the chance for prejudice." (*People v. Harper (1986) 186 Cal.App.3d 1420, 1429-1430*; see *ibid.* [where a juror shared a dictionary definition of "murder" with the other jurors,

33

any presumption of prejudice was rebutted by the presumption the jurors followed the court's curative instruction]; see also *People v. Bryant, Smith and Wheeler (2014) 60 Cal.4th 335, 447* ["As we have consistently stated in numerous contexts we generally presume that jurors are capable of following, and do follow, the trial court's instructions."].)

As discussed, **[*43]** Haiken's misconduct came to light during deliberations, rather than after the jury rendered its verdict. The court took the matter seriously and instructed the jury not to

consider issues relating to improper accounting practices or motives in J-M Manufacturing's financial documents. "In this regard, it is crucial, if not determinative, to keep in mind that the misconduct in this case was brought to the attention of the trial court *before* the jury had returned a verdict. Obviously, if such misconduct had been discovered after the verdict was rendered, the seriousness of the misconduct and its prejudicial impact on the jury would be difficult, if not impossible, to assess; thus the prosecution's burden to show such prejudice was rebutted would be almost insurmountable. However, when as in the instant case juror misconduct surfaces during deliberations and the trial court takes the opportunity to do all in its power to correct the error and obviate the prejudice, these efforts by the trial court become part of the record reviewable on appeal." (*People v. Harper*, *supra*, 186 Cal.App.3d at p. 1427; see *People v. Pinholster* (1992) *1 Cal.4th 865, 927* [admonition to the jury was sufficient to rebut the presumption of prejudice arising from a juror's misconduct], **[*44]** disapproved on another ground in *People v. Williams* (2010) *49 Cal.4th 405, 459*; *Brassfield v. Moreland School Dist.* (2006) *141 Cal.App.4th 67, 73* [presumption of prejudice was rebutted where the trial court "swiftly and unambiguously instructed" the 34 jury to disregard improper input from alternate juror during deliberations].)

In addition, substantial evidence supported the trial court's finding the jurors followed the court's instruction to disregard any suggestion of financial impropriety by J-M Manufacturing. As discussed, each of the jurors said in his or her declaration Haiken raised the issue of tax fraud during deliberations. The jurors disagreed about certain particulars, such as how long

Haiken discussed the issue and how the issue arose. But the jurors agreed on something else: the other jurors responded to Haiken by saying the matter was not relevant to the issues they had been asked to decide. Those statements strongly support the court's conclusion there was no reasonable probability the other 11 other jurors were negatively influenced by whatever statements Haiken made about possible financial impropriety by J-M Manufacturing.6

That leaves the issue of whether juror Haiken was actually prejudiced against J-M Manufacturing. Though **[*45]** the issue is a close one, we conclude there is no substantial likelihood he was actually biased against J-M Manufacturing. In reaching this conclusion we defer to the trial court's assessment of Haiken's credibility, which was informed by the court's observations

6 As stated, the court also concluded Haiken's misconduct was not prejudicial in part because his comments related to an irrelevant issue. The court erred in that regard. Inflammatory information about a party, whether directly relevant to the material issues of the case or peripheral to those issues, may result in juror bias against that party. (See, e.g., *People v. Nesler (1997) 16 Cal.4th 561, 583-585* [juror was biased against the defendant after overhearing a conversation in a bar about the defendant's character, drug use, and parenting ability].)

during the five-week trial and during the court's two interviews of Haiken. (See *Weathers v. Kaiser Foundation Hospitals* (1971) *5 Cal.3d 98, 108* ["'When an issue is tried on affidavits . . . and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.'"]; *Grobeson v. City of Los Angeles* (2010)

190 Cal.App.4th 778, 794 [same]; *Wagner v. Doulton* (1980) *112 Cal.App.3d 945, 948-949* ["Weighing the credibility **[*46]** of conflicting declarations on a motion for a new trial is uniquely within the province of the trial court."].) The trial court found Haiken did not deliberately violate the court's admonition by intentionally injecting the issue of tax fraud into deliberations. The court found instead (and in the face of conflicting declarations on this point) Haiken disclosed his concern about tax fraud in response to a question from Elmstedt about why Haiken had spoken privately with the court and counsel during the trial. In making that finding, the court rejected the defendants' arguments Haiken intentionally violated the admonition because he was biased against J-M Manufacturing-arguments the defendants repeat here. The court also found credible, and gave substantial weight to, Haiken's statement in his declaration he "understood that [his] concerns about JMM's possible tax motives or actions were irrelevant and . . . should not play any part in [his] deliberations."

Citing *Clemens v. Regents of University of California* (1971) *20 Cal.App.3d 356*, J-M Manufacturing argues the trial court erred in finding Haiken's declaration credible. *Clemens* is distinguishable. In that case the court concluded one juror did not disclose relevant facts **[*47]** during voir dire and "concealed a substantial bias and prejudice against persons (including

36

plaintiff) who would prosecute medical malpractice litigation." (*Id. at p. 362*.) Seven other jurors signed posttrial declarations describing the juror's statements during the trial and deliberations. The juror's statements showed that he knowingly concealed relevant information because he believed he would not

have been selected as a juror or allowed to continue serving, that the juror repeatedly expressed hostility toward the plaintiff and her counsel during the trial, and that the juror prejudged the case from the start of the trial proceedings. (*Id. at pp. 362-364*.) The juror declarations were extensive, detailed, and consistent with one another. (*Ibid*.) Though the juror submitted a declaration denying he was biased or prejudged the evidence, the court in *Clemens* was not persuaded, "in view of the almost unanimity of his fellow jurors" regarding his "substantial bias and prejudice." (*Id. at p. 365*.)

The juror declarations here did not include extensive and overwhelming evidence of preexisting bias and prejudice by one juror. As discussed, the jurors in this case presented varying accounts of Haiken's statements about tax fraud during deliberations, and **[*48]** some of their accounts were consistent with Haiken's account. Moreover, the court in *Clemens* sanctioned the combination of questioning and curative admonitions the trial court used here: "In arriving at our decision we are not unmindful of the nature of the litigation, the fact that this jury trial consumed 33 actual trial days, over 3,400 pages of reporter's transcript, 4 years of appellate review, must now be retried and perhaps again appealed. Much of the enormous expense incurred and yet to be incurred by the litigants and by the citizen taxpayers supporting the existence of the courts could have been eliminated had this juror at the outset approached his task in the

37

manner contemplated by the constitutionally guaranteed right to all of a fair trial. We cannot help but feel that a more intensive *voir dire* examination by the court or counsel on the subjects of occupation, bias, prejudice and prejudgment might have avoided

these unfortunate consequences. In any event full consideration coupled with decisive remedial action by the court when presented with the problem during trial or on motion for new trial would have immeasurably benefited all concerned." (*Clemens v. Regents of University of California* ***[*49]*** *, supra*, 20 Cal.App.3d at p. 367.) The trial court here employed the very remedial measures the court in *Clemens* recommended for this kind of situation.

No trial is perfect, and this one had its blemishes. But the trial court, faced with a difficult situation in a long, highly contested trial, made the appropriate inquiries and gave appropriate instructions to minimize any prejudice resulting from juror Haiken's misconduct. "'Society has a manifest interest in avoiding needless retrials: they cause hardship to the litigants, delay the administration of justice, and result in social and economic waste.' [Citation.] Our Supreme Court has clearly noted it will not 'allow the impeachment of jury verdicts on a bare showing that some jurors failed to conform their conduct to the ideal standard of utmost diligence in the performance of their duties.' [Citation.] The court has commented that even conduct that cannot generally be condoned may still not warrant retrial, especially in long or complex cases, because doing so would be unworkable and would allow the perfect to become the enemy of

38

the just." (*TRC Operating Co., Inc. v. Chevron USA, Inc.*, *supra*, 102 Cal.App.5th at pp. 1084-1085.)7

C. *The Trial Court Erred in Refusing To Include Certain Third-party Tortfeasors on the Verdict Form for Purposes of Allocating* ***[*50]*** *Fault*

Both defendants argue the trial court erred in refusing to

include certain nonparty tortfeasors (John's employers when he worked at the oil refineries, the manufacturers of ***asbestos***-containing insulation used at the refineries, and other contractors that installed ***asbestos*** concrete pipe for the City) on the verdict form to allow the jury to allocate to those tortfeasors a portion of the fault for John's injuries. The defendants are partially correct. The court erred in refusing to include John's refinery employers and the general category of insulation manufacturers on the special verdict form, but it did not err in refusing to include other contractors hired by the City.

1. *Applicable Law and Standard of Review*

Civil Code section 1431.2, subdivision (a), provides the liability of a defendant for noneconomic damages in a personal injury action "shall be several only and shall not be joint," with each defendant "liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault" and "a separate judgment . . . rendered against that defendant for that amount." The Supreme

7 Because Haiken's misconduct was not prejudicial to J-M Manufacturing, Dakovich's argument the jury's **[*51]** bias against J-M Manufacturing "tainted the verdict as a whole," and to Dakovich's detriment, fails.

39

Court in *DaFonte v. Up-Right, Inc. (1992) 2 Cal.4th 593* explained: "The only reasonable construction of [Civil Code] section 1431.2 is that a 'defendant['s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault *as compared with all fault responsible for the plaintiff's injuries*, not merely that of 'defendant[s]' present in the lawsuit." (*Id.* at p. 603; accord, *Watts v. Pneumo Abex, LLC* (2024)

106 Cal.App.5th 248, 265.)

"A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted issue." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325; accord, *Rodriguez v. Parivar, Inc.* (2022) 83 Cal.App.5th 739, 751.) We review de novo the correctness of a special verdict form. (*Nigel B. v. Burbank Unified School Dist.* (2023) 93 Cal.App.5th 64, 74; *Rodriguez*, at p. 751; *Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 366.)

2. *Additional Factual Background*

Dakovich submitted a trial brief regarding allocation of fault under Civil Code section 1431.2. Dakovich asked the court to include on the verdict form John's employers when he worked for the oil refineries in the late 1960's and early 1970's (Bechtel, Fluor, and Procon Construction), insulation manufacturers whose products were used at the refineries, and 28 other contractors Dakovich represented installed ***asbestos*** concrete pipe for the City.

The trial court denied **[*52]** Dakovich's request in part. First, regarding John's employers at the oil refineries, because the court (incorrectly) recalled John could not remember which employers he worked for at the refineries, the court declined to include those employers (by name or as a category) on the special

40

verdict form. Second, the court ruled, regarding insulation manufacturers, the defendants did not offer substantial evidence of their fault. Third, the court declined to include all but three of the other contractors that installed ***asbestos*** concrete pipe for the City (by name or as a category) because there was no evidence of which of those contractors used a power saw to cut ***asbestos*** concrete pipe.

3. *The Trial Court Erred in Omitting*

Certain Third-party Tortfeasors From the

Special Verdict Form

In an ***asbestos*** exposure case, the defendant "may reduce its own comparative fault by pointing the finger at other tortfeasors, including those who are not party to the case." (*Soto v. BorgWarner Morse TEC Inc. (2015) 239 Cal.App.4th 165*, 202; see *Phipps v. Copeland Corp. LLC* (2021) 64 Cal.App.5th 319, 332.) "The comparative fault doctrine 'is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine "is a flexible, commonsense concept, **[*53]** under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an 'equitable apportionment or allocation of loss.'" [Citation.]' [Citation.] For this reason, comparative negligence 'does not lend itself to "the exact measurements of a micrometer-caliper."'" (*Pfeifer v. John Crane, Inc. (2013) 220 Cal.App.4th 1270, 1285*; accord, *Phipps*, at p. 332.)

"Generally, a defendant has the burden of establishing that some nonzero percentage of fault is properly attributed to the

41

plaintiff, other defendants, or nonparties to the action." (*Pfeifer v. John Crane, Inc.*, *supra*, 220 Cal.App.4th at p. 1285; accord, *Phippsv. Copeland Corp. LLC*, *supra*, 64 Cal.App.5th at p. 332; see *Blevin v. Coastal Surgical Institute* (2015) 232 Cal.App.4th 1321, 1329 ["'[u]nless there is substantial evidence that an individual is at fault . . . , there can be no apportionment of damages to that individual'"; the "burden is on the defendant to

prove that a nonparty tortfeasor was at fault"].) "A defendant seeking apportionment of fault in an ***asbestos*** case accordingly must demonstrate that the ***asbestos*** from a particular product or source '"was **[*54]** a substantial factor contributing to the . . . [plaintiff's] *risk* of developing cancer."'" (*Soto v. BorgWarner Morse TEC Inc.*, *supra*, 239 Cal.App.4th at p. 202; accord, *Wilson v. Ritto, supra, 105 Cal.App.4th at p. 367*; *Phipps*, at p. 332.) Because there was substantial evidence John's employers at the oil refineries were "at fault," the trial court erred in denying the defendants' request to include those employers on the special verdict form. There was substantial evidence that John was exposed to ***asbestos*** at the refineries and that such exposure contributed to his risk of developing mesothelioma. John testified that, when he worked at each of the three oil refineries, he spent at least four hours a day near workers removing insulation and that the process created a lot of dust. John cleaned up pieces of insulation and insulation dust and debris and breathed in dust from those materials. Templin testified the insulation John worked around at the refineries almost certainly contained ***asbestos***. Dr. Horn also testified John's exposure to insulation at the refineries was a substantial contributing factor that increased his risk of mesothelioma.

42

There was also substantial evidence John's employers should have known of the risks of working with ***asbestos*** and should have taken precautionary measures to protect John. John testified he **[*55]** did not work directly for the oil refineries. Rather, independent contractors Fluor, Bechtel, and Procon Construction hired him and sent him to the refinery jobsites. Dr. Allen Lemen, the Metzgers' expert epidemiologist, testified that as early as

1930 it was widely known that exposure to airborne ***asbestos*** could cause serious disease and that employers should provide mitigation measures in the workplace to reduce employees' exposure. But John's employers did not warn him about the dangers of working around ***asbestos***, instruct him to wear any kind of protection, or provide him with masks or respirators. Templin testified the failure to use mitigation measures while removing the insulation contributed to John's risk of developing mesothelioma. Templin also testified that, at the time John worked at the refineries, employers should have implemented precautions to protect workers from ***asbestos*** exposure. For example, Templin said, employers should have enclosed dusty work areas with scaffolding and plastic sheeting and exhausted air through an air cleaner to remove ***asbestos*** dust from the work area. In addition, someone should have monitored the air in the work area and provided workers with protective clothing, **[*56]** respiratory protection, and training on the safe handling of ***asbestos***.

The trial court also erred in omitting from the verdict form a general category for manufacturers of ***asbestos***-containing insulation used at the refineries. True, as the Metzgers argue, the defendants did not identify the particular insulation products found at the refinery or any specific manufacturer of insulation

43

used at the refineries. But they didn't need to. *Watts v. Pneumo Abex, LLC, supra, 106 Cal.App.5th 248* is instructive. In that case the plaintiff alleged two types of exposure to ***asbestos***. As a teenager during the 1970's, the plaintiff helped his father in residential remodeling work and worked with drywall and drywall compound. As an adult, the plaintiff repaired cars and

worked with a range of automotive products, including brake linings manufactured by the defendant. The trial court denied the defendant's request to include manufacturers of joint compound on the verdict form. In reversing the judgment, the court in *Watts* cited testimony by the plaintiff's expert that, "in the mid '70s, in all likelihood" joint compound would have contained ***asbestos*** and that, during remodeling work at the time, the plaintiff was exposed to ***asbestos*** from joint compound. (**[*57]** *Id*. at p. 267.) Because another expert testified the exposure to joint compound increased the plaintiff's risk of developing mesothelioma, the court held, "[j]oint compound manufacturers should have been on the verdict form." (*Id. at p. 268*.)

As in *Watts v. Pneumo Abex, supra, 106 Cal.App.5th 248*, there was substantial evidence here that the insulation John handled at the refineries contained ***asbestos*** and that John's exposure to the insulation increased his risk of developing mesothelioma. As discussed, Templin testified, based on John's description of the color and texture of the insulation he worked around at the refineries, the insulation almost certainly contained ***asbestos***. And Dr. Horn testified John's exposure to insulation at the refineries was a substantial factor in increasing his risk of mesothelioma.

Dakovich argues the court also erred in refusing to include on the verdict form every other contractor that installed ***asbestos***

44

concrete pipe for the City. Dakovich argues that, if "the mere fact that Dakovich installed [***asbestos*** concrete pipe] in the City during [John's] employment is sufficient evidence to allow a jury to find Dakovich liable, then the evidence of exposure is equally strong for all the *other* contractors that installed [***asbestos***

concrete **[*58]** pipe] during that period. . . . There is no defensible rationale for allowing the jury to rule against [Dakovich] based on speculative exposure evidence, while simultaneously preventing the jury from assigning fault to others based on the same sort of evidence." But Dakovich's liability in this case did not arise from the "mere fact" it installed ***asbestos*** concrete pipe. The Metzgers based their case against Dakovich on its cutting method: using a power saw to cut ***asbestos*** concrete pipe, a method that was contrary to the City's directions, the manufacturers' instructions, and industry guidelines. Because Dakovich used only a power saw, not a snap cutter, to cut ***asbestos*** concrete pipe, the jury could reasonably have inferred Dakovich exposed John to high levels of respirable ***asbestos*** fibers. There was no evidence, however, any other contractor always, or even frequently, used a power saw. And there was evidence that, after two 1977 studies showed how cutting ***asbestos*** concrete pipe with a power saw released high levels of respirable ***asbestos*** and after industry groups recommended the use of snap cutters instead of power saws, construction contractors no longer used a power saw to cut ***asbestos*** concrete pipe. **[*59]**

45

The trial court erred in excluding John's employers and ***asbestos*** manufacturers from the verdict form. The defendants are entitled to a partial new trial on the issue of allocating fault.8

D. *The Metzgers Forfeited Their Challenge to the Trial Court's Order Granting Dakovich's Motion for Summary Adjudication on Their Claim for Punitive Damages*

In their cross-appeal the Metzgers argue the trial court

erred in granting Dakovich's motion for summary adjudication on their claim for punitive damages. The Metzgers forfeited the argument for two reasons.

First, the Metzgers have not provided an adequate record of the summary adjudication proceedings. We presume the trial court's judgment or order is correct, and the appellant has the burden to demonstrate error. (*Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609; accord, *Family Violence Appellate Project v. Superior Court (2026) 20 Cal.5th 564, 575*; *Brockman v. Kaiser Foundation Hospitals* (2025) *114 Cal.App.5th 569, 588*.) The 8 Dakovich argues that the trial court erred in allowing the jury to hold it liable on the Metzgers' strict products liability causes of action and that the error prejudiced Dakovich by causing the jury to allocate to Dakovich a percentage of fault similar to the manufacturers of ***asbestos*** concrete pipe. In **[*60]** their cross-appeal the Metzgers argue the trial court erred in determining the date prejudgment interest on the judgment against Dakovich began to accrue and in denying their request to hold Dakovich liable for CertainTeed's share of fault. Because we are reversing the judgment and directing the trial court to conduct a new trial on the allocation of fault, and because the trial court will have to enter a new judgment, we do not reach these issues.

46

appellant has the burden of providing an adequate record to support his or her arguments, and failure to do so requires us to resolve the issue against the appellant. (*Blue Mountain Enterprises, LLC. v. Owen (2022) 74 Cal.App.5th 537, 557*.)

In an appeal challenging an order granting or denying a motion for summary judgment, """"[w]e review the trial court's

decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.'"" (*Hampton v. County of San Diego (2015) 62 Cal.4th 340, 347*; see *De Meo v. Cooley LLP (2025) 115 Cal.App.5th 17, 28*; *Wawrzenski v. United Airlines, Inc. (2024) 106 Cal.App.5th 663, 684*.) "'We apply the same three-step analysis required of the trial court. First, we identify the issues framed by the pleadings **[*61]** since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact.'" (*1 Community Compact v. City of Fresno* (2026) *122 Cal.App.5th 727, 757*; see *Miller v. Department of Corrections & Rehabilitation (2024) 105 Cal.App.5th 261, 273*.)

Because the record does not include all the evidence before the trial court when it ruled on Dakovich's motion for summary adjudication, we cannot evaluate whether the court erred in granting the motion. The record does not include Dakovich's separate statement or the evidence Dakovich submitted in

47

support of its motion. Therefore, it is impossible to determine whether Dakovich met its initial burden or whether the Metzgers created a triable issue of material fact.

Second, the Metzgers improperly rely on evidence that was not before the trial court when the court ruled on Dakovich's

motion for summary adjudication. To support their argument the court erred in granting Dakovich's motion, the Metzgers cite evidence **[*62]** from the trial. In reviewing the trial court's ruling on a motion for summary adjudication, however, "we consider only the evidence submitted to the trial court with the parties' summary judgment papers. We do not consider evidence presented at the subsequent trial or in connection with other proceedings in the case." (*Lewis v. City of Benicia (2014) 224 Cal.App.4th 1519*, 1524, fn. 4; see *1 Community Compact v. City of Fresno*, *supra*, 122 Cal.App.5th at p. 757 [in reviewing a summary judgment ruling, the appellate court "will consider only the facts properly before the trial court at the time it ruled on the motion"].)

48

DISPOSITION

The order denying Dakovich's motion for judgment notwithstanding the verdict is affirmed. The judgment is reversed. The trial court is directed to conduct a new trial limited to the allocation of fault among the defendants and third-party tortfeasors. The parties are to bear their costs on appeal.

SEGAL, J.

We concur:

MARTINEZ, P. J.

FEUER, J.