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California Appellate Court Gets One Right In *Watts* Opinion

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Commentary

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[Editor's Note: Mr. Love is a partner with Hawkins Parnell & Young, and partner in charge of their San Francisco office. He has handled the defense of asbestos cases for over 30 years. Any commentary or opinions do not reflect the opinions of Hawkins Parnell & Young or LexisNexis®, Mealey Publications™. *Responses are welcome.]*

Introduction

Asbestos trials in California present risk for both sides, as both juries and occasionally judges can be unpredictable. The *Watts v. Pneumo Abex* matter went to trial in Alameda County in 2022. The jury returned a verdict in favor of plaintiffs and found the lone remaining defendant (Abex) 60% at fault. Abex appealed. On October 29, 2024, division two of the first appellate district issued a published opinion finding that Abex had a right to a new trial following several errors in the trial court. As discussed below, the appellate court got it right.

I. The *Watts* case – factual background and verdict

Plaintiff Steven Watts trained in auto repair in college, obtained a license from the California Bureau of Automotive Repair in 1983, and opened an automotive repair shop. He operated an auto repair business until 2006. It was a small shop, but did have one or two employees at any given time. The shop did four to five brake repair jobs each week, and also did brake inspections.

In 2019, Watts was diagnosed with mesothelioma. He was only 57. (Watts' brother also had mesothelioma, and had his own case a couple years before Steven's).

As is typical of asbestos cases, there were several (36) defendants named and active in the case, but come time of trial, there was one remaining defendant: Abex. Abex was a manufacturer of brake linings which were sold to various entities including Ford, GM, and brake manufacturers. Their biggest purchaser was Rayloc, who made brakes sold through the National Automotive Parts Association (NAPA). Abex was the majority supplier to Rayloc 1982-84; they ceased including asbestos in the brake linings in 1987.

Watts purchased most of the parts needed from the local NAPA store, though did buy from other stores occasionally after 1986.

Additionally, Watts' father did construction and home remodeling work in the 1970s, and there was testimony that plaintiff had been present and helped on some of those projects. (This work was the focus of Watts' brother's mesothelioma case a couple years earlier).

Trial began in July 2022. After several weeks of trial, the jury returned a verdict awarding $2,943,653 in economic damages (which are joint and several in California), and $6,750,000 in noneconomic damages, plus another $1,000,000 in loss of consortium damages. The jury found Abex 60% at fault, with 25% apportioned to other brake manufacturers, and

15% to plaintiff Steven Watts. Judgment was entered September 15, 2022.

The verdict was appealed, and on October 29, 2024, the appellate court issued its opinion certified for publication (A166781, A167476), finding the trial court erred in several rulings.

II. The sophisticated user defense

Defendant Abex raised a sophisticated user defense at trial. Plaintiffs moved for directed verdict on the defense, which the trial court granted. The appellate court found that this was in error, and granted a new trial.

In California, a "manufacturer is not liable to a sophisticated user who knew or should have known of that risk, harm, or danger." (*Johnson v. American Standard, Inc.*)[1] This defense is considered an exception to a manufacturer's duty to warn consumers and acts as an affirmative defense. As the court stated in the *Watts* decision, "the rationale behind Johnson is that because a sophisticated user is charged with knowledge of the hazards of the product, the manufacturer's failure to warn is not the proximate or legal cause of any injury resulting from the product, thereby negating the justification for imposing a duty to warn in the first place."[2]

The appellate court in Watts determined that there was substantial evidence to support a sophisticated user defense in the case. Watts had studied auto repair in community college, and applied for a license with the state representing that he would comply with California regulations and procedures. The state's department of public health had distributed a letter to vehicle repair shops stating that they had a responsibility to prevent cancer from handling of brake linings that contained asbestos. Further, Cal-OSHA had workplace regulations in place regarding asbestos exposure levels on the work site, and Watts, as a business owner and employer, had a responsibility to comply with those regulations. Indeed, Watts had testified that he was aware that brakes contained asbestos, and made a practice of avoiding creating dust.

The appellate court determined there was sufficient evidence to support the reading of the sophisticated user jury instruction in this case. The jury found Watts 15% at fault without the instruction, so a jury properly instruction may have found that the defense applied.

III. Allocation of fault

Per California *Proposition 51,* defendants have a right to a finding of allocation of responsibility for non-economic damages. Economic damages in California remain joint and several, but a defendant is only responsible for their allocated share of fault for non-economic damages.

As noted above, the jury allocated Abex 60% fault. On appeal, Abex argued that this was not supported by the evidence, and the appellate court agreed. The evidence presented was that Abex was the at most a 62% supplier to Rayloc in the 1982-84 period, and stopped making asbestos containing brake linings in 1987. Watts testified that he bought parts from NAPA 75% of the time, but not all NAPA brakes are Rayloc, and not all Rayloc brakes have Abex linings. *Nemeth* should also have a major impact on the talc-mesothelioma docket in New York. Watts operated his shop for 24 years, but the potentially Abex asbestos-containing Rayloc brakes would be been in the approximate period of 1983-87.

The court found that the "evidence cannot support the 60% allocation."[3]

IV. The exclusion of plaintiff's verified discovery responses

Plaintiff had provided verified responses to interrogatories in discovery. These verified responses included admissions that plaintiff was exposed to asbestos from other sources, including joint compound from various local retailers, and to purchase of brake parts from several different stores, and included identification of brands of brakes other than Rayloc. The trial court ruled that Abex would need to offer other specific and independent evidence establishing the asbestos content in the products identified by Mr. Watts in the interrogatory responses before they could come into evidence. On sustaining plaintiff's objection to the use of the interrogatories, the trial court interjected, "Whoa, you're going to take Mr. Watts' word that he was exposed to asbestos?"[4]

It's well established California law that verified responses to interrogatories are admissible as a party

admission (Cal. Evidence 1220), and as an opponent interrogatory response in the discovery portion of California's Code of Civil Procedure (section 2030.410). The exclusion of plaintiff's admissions in written discovery prevented Abex from putting on evidence of other exposures of not just other types of exposure, but also of other sources and manufacturers of the replacement brakes plaintiff installed. As the *Watts* court noted, "the evidence from the interrogatory responses would have filled any gaps in the proof the trial court perceived that joint compound also contributed to Watts's disease."[5]

V. The failure to give jury instruction on employer responsibility

Defendant Abex has proposed a special instruction as follows: "*An employer has a duty to its employees to furnish them with a safe place to work. The employer's duty to maintain a safe workplace encompasses many responsibilities, including the duty to inspect the workplace, to discover and correct a dangerous condition, to give adequate warning of dangers conditions, to use safe practices and procedures, and to provide and use appropriate safety devices and safeguards*."[6]

There was no contention that this was a misstatement of California law. Plaintiff objected to the instruction on the grounds that plaintiff did not owe a duty to himself as both employer and employee, and the trial court agreed. However, The *Watts* court noted that comparative fault principals apply in strict liability actions, and the jury may allocate fault to the plaintiff. Without this instruction, the jury was just left with simple comparative fault principles without any instruction about the responsibilities of an employer. As it was, the jury found plaintiff 15% at fault, but may have found a higher share if properly instructed.

VI. Discussion

Sophisticated User Defense: In decades past, plaintiffs in asbestos litigation were typically shipyard and insulation workers who installed asbestos insulation in the 1940s-50s. Little was understood about the dangers at the time, and the workers were not well-informed about the risks. Today, most plaintiffs began their working careers after the implementation of the OSHA standards of the 1970s, and are often licensed contractors or tradesmen who underwent asbestos training, are aware of the OSHA guidelines, and have hazards certifications. This more recent generation of asbestos plaintiffs typically have much lower amounts of lifetime exposure, and worked in controlled environments in which they often had some responsibility for work site safety. Many are indeed highly sophisticated specialists and business owners. It makes sense that the sophisticated user instruction apply in many of these cases. It would be up to the jury to make the decision whether to find that a given plaintiff was a "sophisticated user" under the law, but juries should be given that task in cases where they could infer that plaintiff knew or should have known of potential hazards related to his work.

Use of a party's discovery responses against them at trial: Under California's Proposition 51 apportionment rule[7], Defendants bear the burden of providing evidence of plaintiff's other exposures such that a jury has evidence to support apportionment of fault to others. (Apportionment in California only applies to noneconomic damages; economic damages remain joint and several). Asbestos cases often start with 50+ defendants only to have one or two in at the time of trial. Throughout the discovery process, there are typically allegations of numerous different avenues of asbestos exposure, but come time of trial, plaintiffs will focus on the specific exposure source of the remaining defendants. One of the best sources of evidence of alternate exposure sources comes from plaintiff's own responses to the written discovery of other defendants.

These are allegations which are verified by the plaintiff, and often have specifics about products or contended exposures events, making them the most efficient manner of putting on evidence of alternate entities and exposures for apportionment purposes. As a verified party admission, they should be admissible for any purpose, regardless of whether the party's statement is reliable or has adequate foundation.

Special jury instruction regarding employer responsibility: California allows parties to propose jury instructions which are not part of the standard set (CACI). These proposed "special" instructions must be supported by state law and not already be covered by one of the standard CACI instructions. The instruction proposed by the defendant in the Watts matter reflected the fact that Cal-OSHA regulations directed employers in the state to provide a safe work

space for employees, including setting a permissible exposure limit for asbestos dust. Employers are charged with knowing and applying these regulations. As most cases now involve exposures well into years after the enactment of OSHA and it's asbestos-specific regulations, a plaintiff who was an employer would be responsible for compliance with it. This can tie in with the sophisticated user defense and comparative fault issues discussed above – employers who have employees working with our around asbestos-containing materials within the last 50 years would be expected to be aware of the regulations and their responsibilities.

Conclusion

The appellate court in *Watts* understood the issues in play. We are now some 50 years out from the promulgation of OSHA and numerous scientific studies regarding asbestos exposure. States have been requiring asbestos hazards training and licensing for decades. The application of the sophisticated user defense and jury instructions about employer responsibility are more applicable than ever. Further, the use of plaintiff's own responses to interrogatories are needed for demonstrating other exposures, and should come into evidence. The appellate court in *Watts* got it right.

Endnotes

1. *Johnson v. American Standard, Inc*. (2008) 43 Cal. 4th 56.
2. *Cindy J. Watts v. Pneumo Abex, LLC* (October 29, 2024) California Court of Appeal A166781
3. Id. at 20.
4. *Id*. at 24 (quoting the trial court).
5. *Id*. at 25
6. Id. at 27
7. California Civil Code section 1431.2(a). ■

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