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Court of Appeal, First District, Division 3, California.

Shirley HUBBARD et al., Plaintiffs and Appellants,
v.
CALIFORNIA WATER SERVICE COMPANY et al., Defendants and Appellants.

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(Alameda County Super. Ct. No. RG12646599)

Attorneys and Law Firms

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Opinion

Pollak, J.

***1** Plaintiffs Shirly Hubbard, Thomas Hubbard, Jr. and Ann Hensley, heirs of decedent Thomas Hubbard, appeal a judgment entered in favor of defendants California Water Service Company (Cal Water) and San Jose Water Company (San Jose Water) (collectively water companies) on plaintiffs' complaint for wrongful death. Plaintiffs contend the court erred in instructing the jury on their claim that the water companies negligently failed to warn decedent's employers, independent contractors E.T. Haas and Fairly Constructors (collectively Fairly), about the health risk posed by using a power saw to cut asbestos cement pipes (pipes). Plaintiffs argue further that there is no substantial evidence to support the jury's finding that Fairly reasonably could have been expected to know that cutting the pipes posed a health hazard at or before the time the water companies knew of the risk. We conclude there was no error in the court's instructions and that the jury's finding is supported by substantial evidence. Accordingly, we shall affirm the judgment.[1]

[1] The water companies have filed "protective" cross-appeals challenging the denial of their nonsuit and directed verdict motions and arguing additional instructional errors. They agree that the issues raised by the cross-appeals need not be reached if the judgment is affirmed.

Background

The following facts are undisputed for purposes of this appeal:

Fairly was a licensed contracting company whose primary business included underground "installation of piping systems." Between 1959 and 1974, Cal Water contracted with Fairly to install water and sewer lines. Between 1974 and 1989, San Jose Water contracted with Fairly for the installation of water and sewer lines. Under the terms of the contracts, the water companies agreed to supply "all materials to be incorporated into the project" and Fairly agreed to supply "all labor, tools and equipment" needed for their installation. Fairly was assigned "complete and authoritative control over the work done [under the contract] and of the manner of perform[ance]."

The decedent was exposed to asbestos dust while working for Fairly when Fairly employees used power saws to cut the pipes on the water companies' projects. This exposure contributed to his contracting mesothelioma, which ultimately resulted in his death.

Decedent's heirs filed the present action for negligence.[2] At trial, the parties presented conflicting evidence regarding when the water companies and Fairly learned of the risk created by cutting the pipes with a saw and, if Fairly did not know of the risk, when it reasonably could

have been expected to know of the risk. In returning a defense verdict, the jury the jury found that (1) the asbestos cement pipe concealed a condition that became unsafe when the pipe was cut; (2) the water companies knew of the unsafe concealed condition; (3) Fairly did not know of the unsafe concealed condition "on or before the date" the water companies knew; but (4) there was "a time" when Fairly "could reasonably be expected to know" of the unsafe concealed condition "on or before the date" the water companies' knew.

[2] The action was brought against numerous defendants but ultimately went to trial against only the water companies.

***2** Following entry of judgment, plaintiffs timely filed a notice of appeal.

Discussion

1. *The jury was properly instructed that the water companies were liable only if Fairly could not reasonably have been expected to know of the health risk posed by cutting the pipes with a power saw at or before the time the water companies knew of the risk.*

In *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (*Kinsman*), our Supreme Court observed that "when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, ... the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so." (*Id.* at pp. 673-674.) *Kinsman* goes on to hold that "the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, pre-existing hazardou s condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Id.* at p. 675.)

In *Kinsman*, the court explained in a footnote that it was using the term "landowner" to refer "to either an owner or a possessor of land that owes some kind of duty of care to keep the premises safe." (*Kinsman, supra,* 37 Cal.4th at p. 664, fn. 1.) Here, the court acknowledged that *Kinsman* did not "quite fit" the facts of this case because the water companies did not own the property on which the projects were completed. Nonetheless, the court found that a modified instruction based on *Kinsman* was appropriate because its holding is "somewhat broader" than just premises liability. We agree that the principles articulated in *Kinsman* apply to the situation before us.

The court instructed the jury with a modified version of CACI No. 1009A, which is based on *Kinsman*, as follows: "[P]laintiffs claim that decedent Thomas Hubbard was harmed by an unsafe concealed condition of the asbestos cement pipe when cut while employed by ... Fairly Contractors and working with Cal Water's and San Jose Water's asbestos cement pipe. [¶] To establish this claim, plaintiff must prove all of the following: One, that Cal Water and San Jose Water owned the asbestos cement pipe that was installed by decedent's employers; two, that Cal Water and San Jose Water knew of the unsafe concealed condition of the asbestos cement pipe when cut that was installed by decedent's employers; three, that decedent's employers neither knew nor could be reasonably expected to know of the unsafe concealed condition of the asbestos cement pipe when cut; four, that defendants failed to warn decedent's employers of the condition; and five, that Cal Water's and San Jose Water's conduct was a substantial factor in causing decedent's harm. [¶] An unsafe condition is concealed if it is not visible or its dangerous nature is not apparent to a reasonable person."

Plaintiffs contend the modified CACI No. 1009A instruction improperly required them "to prove that Fairly could not 'reasonably be expected to know' of the hazard." They argue that that Fairly's lack of actual or constructive knowledge is an affirmative defense for which the burden of proof should have been placed on the water companies. Plaintiffs acknowledge that CACI No. 1009A was modeled after *Kinsman*, but suggest that the instruction "arbitrarily assigned the burden to plaintiff, something *Kinsman* never specified." While the opinion in *Kinsman* does not explicitly address the burden of proof, it does not treat the contractor's lack of knowledge as an affirmative defense. *Kinsman* draws an exception to the general rule that a hirer has no duty to ensure the safety of an independent contractor's employees. To avoid this general rule, the burden of proving the exception properly is upon the party asserting the exception. (Evid. Code, § 500; *The Press Democrat v. Sonoma County Herald Recorder* (2012) 207 Cal.App.4th 578, 586-587; *Standard Pac. Corp. v. Superior Court* (2009) 176 Cal.App.4th 828, 834; *Norwood v. Judd* (1949) 93 Cal.App.2d 276, 282.) Accordingly, we find no error in the court's modified CACI No. 1009A

instruction.

2. *The trial court did not err in refusing the instruct the jury with CACI No. 1009D.*

***3** CACI No. 1009D reads: "[*Name of plaintiff*] claims that [he/she] was harmed by an unsafe condition while employed by [*name of plaintiff's employer*] and working on [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following: [¶] 1. That [*name of defendant*] [owned/leased/occupied/controlled] the property; [¶] 2. That [*name of defendant*] negligently provided unsafe equipment that contributed to [*name of plaintiff*]'s injuries; [¶] 3. That [*name of plaintiff*] was harmed; and [¶] 4. That [*name of defendant*]'s conduct was a substantial factor in causing [name of plaintiff]'s harm." Plaintiffs argue that CACI No. 1009D was applicable because the water companies negligently provided the pipes for installation without safety warnings.

The trial court rejected the requested instruction on the ground that the pipes were not "equipment" within the meaning of CACI No. 1009D. (See *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222 [One who hires an independent contractor "is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury."].) Although we agree with the water companies that the pipes are better characterized as materials than equipment, we fail to see the relevance of the distinction. One who hires an independent contractor may also be liable to an employee of the independent contractor if the hirer's provision of unsafe materials affirmatively contributes to the employee's injury. Nonetheless, we conclude for a different reason that the court properly refused to instruct with CACI No. 1009D.

Plaintiffs have consistently acknowledged that their claim is dependent on the water companies' failure to warn Fairly that the pipes posed a health hazard when cut with a saw. They do not claim that the water companies' selection and provision of the pipes was a basis for liability. The asbestos in the pipe allegedly created a safety hazard only when the pipe was cut. If Fairly could reasonably have been expected to know the dangers posed by cutting the pipes during installation and to take adequate measures to eliminate the risk, providing the pipe should not have been harmful. In that case, there is no reason to impose liability on the water companies because under *Kinsman* the responsibility for protecting the safety of Fairly's employees rested solely with Fairly. Fairly's lack of knowledge, actual or constructive, is an essential element of plaintiff's claim. Accordingly, the court properly instructed the jury with the modified version of CACI No. 1009A and not No. 1009D.

3. *Substantial evidence supports the jury's finding that Fairly could reasonably have been expected to know of the health risk posed by cutting the pipes with a power saw at or before the time the water companies knew of the risk.*

Plaintiffs contend there is no substantial evidence to support the jury's finding that there was "a time" "on or before the date" the water companies knew of the unsafe concealed condition when Fairly "could reasonably be expected to know" of it.[3] Plaintiffs argue that "substantial evidence" shows Cal Water knew of the hazard in "the late 60's to the early 70's" and that San Jose Water knew of the danger by "1968 or earlier." While the water companies dispute these dates, we may assume that plaintiffs' dates mark the earliest point in time in which the water companies can be charged with knowledge of the hazard. As detailed below, substantial evidence supports a finding that Fairly had constructive knowledge of the hazard by the late 1960's to early 1970's, at or before the time the water companies acquired that knowledge.

[3] At trial, the parties debated whether the jury should be asked to determine when each of the water companies knew of the unsafe concealed condition. Plaintiffs opposed including any dates on the special verdict form. They argued, "There just has to be a period of time for each [water company] where [it] knew and Fairly didn't know and couldn't reasonably be expected to know. [¶] ... [¶] ... [Even] if they feel that the water companies knew before Fairly either knew or reasonably could have known and that they weren't warned, ... we may never get nine votes on the date, and we shouldn't have to get nine votes on the date." The water companies argued that a date was important both to liability and to apportion damages. They argued that without dates, "one juror could think there is a one-day overlap, another juror could think there's a 32-year overlap and another juror could think there is whatever overlap." Ultimately, the court required only that the jury find that Cal Water knew of the unsafe condition "on or before May 31, 1974," the termination date of its last contract with Fairly.

***4** With the Occupational Safety and Health Act of 1970, 29 United States Code section 651 et seq., Congress created the Occupational Safety and Health

Administration (OSHA). (Pub.L. No. 91-596, § 2 (Dec. 29, 1970) 84 Stat. 1590.) In December 1971, OSHA published an "Emergency Standard for Exposure to Asbestos Dust" that required, among other things, that "[a]ll hand and power-operated tools which produce asbestos dust such as saws ... be provided with local exhaust ventilation and dust collectors." Substantial evidence establishes that Fairly knew or should have known generally of the health risks of exposure to asbestos dust before the adoption of the emergency standard by OSHA. Plaintiffs' expert industrial hygienist William Ewing acknowledged that general information about the dangers of asbestos was available to employers such as Fairly for decades before the adoption of the standards by OSHA. He testified that as early as the 1940's the American Conference of Governmental Industrial Hygienists established a maximum allowable concentration for employee exposure to asbestos and encouraged practices to minimize exposure to industrial dust. As early as 1951, contractors hired by the federal government were governed by the Walsh-Healey Act, which also set maximum exposure levels for asbestos. Ewing testified that by the mid-1950's, exposure to asbestos was linked to cancer, but the level of exposure needed to cause cancer was not yet known. Glen Stimpson testified in his deposition, which was read to the jury, that he worked for Fairly on and off from 1959 to 1987 as a laborer, pipe layer, plumber, and eventually foreman. In his career, he worked with a lot of asbestos cement pipe and that "we all knew that asbestos is harmful to you, and we all knew that was asbestos cement pipe." When asked when he learned that asbestos was dangerous, he responded, "I think that I knew about it being harmful to you back in high school. It was before 1959."

Deposition testimony by another Fairly employee established that Fairly reasonably could have known of the specific risk from cutting the pipes by the late 1960's. Charles Oliver testified that he worked for Fairley for over 30 years starting in 1963. When he first started working for Fairly, he wore a wet towel or handkerchief around his head while cutting pipes because he did not want to breath the dust. He did not know at that time that asbestos dust could pose a health risk, he just did not like the dust. But sometime in the 1960's, a "little while after" he started working for Fairly, somebody from the "federal government and OSHA" came out to the jobsite and told the crew to wear a respirator mask, and "not to cut any more pipe without them."[4] They brought the Fairley crew instructions on how to protect yourself "from the dust particles" while cutting pipes. After that, his bosses at Fairly got the crew masks.

[4] Although the OSHA was not formed until 1970, Cal Water's expert industrial hygienist testified that many people use the term "OSHA" as a generic term to mean any government safety agency that pre-dates OSHA.

While plaintiffs offer conflicting testimony, this evidence supports the jury's finding that Fairly reasonably could have been expected to know by the late 1960's to early 1970's that cutting asbestos pipes without proper precautions posed a health risk to its workers.

Moran v. Foster Wheeler Energy Corp. (2016) 246 Cal.App.4th 500, relied on by plaintiffs, is factually distinguishable. In that case, the court reversed a judgment for the defendant on the ground that substantial evidence did not support the jury's determination that the plaintiff, who sold asbestos-containing insulation, was a sophisticated user of the asbestos products. (*Id.* at p. 510.) A sophisticated user is one who "by virtue of his or her specialized training or profession, knows or should know about the product's inherent hazards." (*Ibid.*) In finding an absence of evidence in the record to support the jury's finding, the court explained that "the general state of knowledge in science, medicine, and industry cannot be constructively imputed to Moran, without some explanation of how that knowledge (or relevant portions of it) was personally conveyed to him or generally conveyed to his peer group" (*id.* at p. 519) and that the defendant had "presented no expert testimony tending to show that in the relevant time period persons in Moran's peer group—salespeople of industrial insulation, including those who supervised the removal and installation of refractory—were generally aware of that risk." (*Id.* at p. 518.) The court noted, "Although expert testimony of peer group knowledge may not always be required to prove the sophisticated user defense, its absence here is notable." (*Ibid.*)

Unlike in *Moran*, the present case does not involve the constructive knowledge of an individual salesperson. Fairly was a licensed contracting company that specialized in installing asbestos pipes and was charged by contract with ensuring the safety of its employees. The expert testimony established constructive knowledge of employers such as Fairly. Accordingly, the jury properly found in favor of the water companies on plaintiffs' failure to warn claim.

Disposition

***5** The judgment is affirmed. The water companies shall recover their costs on appeal.

We concur:

Siggins, P.J.

Ross, J.[*]

[*] Judge of the San Francisco Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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