

Filed 3/17/17

**CERTIFIED FOR PARTIAL PUBLICATION\***

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

CHARITY FAITH PHILLIPS et al.,

Plaintiffs and Respondents,

v.

HONEYWELL INTERNATIONAL INC.,

Defendant and Appellant.

F070761

(Super. Ct. No. 12CECG04055)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Horvitz & Levy, Lisa Perrochet, Robert H. Wright, Curt Cutting; Perkins Coie, Brien F. McMahon and Daniel D. O’Shea for Defendant and Appellant.

Simon Greenstone Panatier Bartlett and Brian P. Barrow for Plaintiffs and Respondents.

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\* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II, IV, and V of the Discussion.

Defendant Honeywell International Inc. (Honeywell) appeals from a judgment of over \$5.8 million awarded to the spouse and surviving children of a man who died of asbestos-related cancer. The jury found the mesothelioma contracted by James Lester Phillips (Phillips) was caused in part by exposure to asbestos contained in Bendix brakes.

Honeywell contends a new trial is warranted because (1) the jury's special verdict was fatally inconsistent; (2) the trial court erroneously refused to give its proposed jury instruction on the factors relevant to causation; and (3) the trial court erroneously admitted prejudicial evidence. Moreover, Honeywell contends judgment should be entered in its favor because the verdict was based entirely on a failure to warn theory that lacked sufficient evidentiary support. If judgment is not entered in its favor, Honeywell contends the \$3.5 million award of punitive damages must be reversed because plaintiffs failed to introduce sufficient evidence of malice or oppression.

In the published portion of this opinion, we reject Honeywell's claims of evidentiary error. The trial court properly admitted—subject to a limiting instruction—a 1966 letter of a Bendix employee sarcastically addressing an article in Chemical Week magazine that stated asbestos had been accused, but not yet convicted, as a significant health hazard. The letter is circumstantial evidence relevant to the issue of Bendix's awareness of asbestos's potential to cause cancer. The Illinois and Florida cases holding admission of this letter was prejudicial are distinguishable because they did not include a limiting instruction.

In addition, the trial court properly admitted the testimony of plaintiffs' expert about causation and the contributions to Phillips's risk of cancer from every identified exposure to asbestos that Phillips experienced. In the context of this case, the every-identified-exposure theory is distinguishable from the every-exposure theory and we join courts from other jurisdictions in recognizing that distinction. Furthermore, we conclude the application of every-identified-exposure theory in this case was consistent with

California law addressing proof of causation in asbestos-related cancer cases.

Consequently, we need not address the every-exposure theory that the Second District allowed to be presented to the jury in *Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, review denied May 25, 2016 (*Davis*)<sup>1</sup> and Honeywell's contention that this court should split with *Davis*.

In the unpublished portion of this opinion, we reject Honeywell's other contentions. First, the jury's answers to questions in the special verdict about causation are not inconsistent. Second, the trial court properly rejected Honeywell's proposed instruction about the factors relevant to causation of asbestos-related cancer. Third, as to the sufficiency of the evidence, we conclude there was adequate evidentiary support for the jury's findings that (1) Honeywell was liable under a failure to warn theory and (2) Honeywell's predecessor, Bendix, acted with malice—that is, a willful and conscious disregard of the safety of others. (Civ. Code, § 3294, subd. (c)(1) [definition of malice].)

We therefore affirm the judgment.

## FACTS

### *Bendix and Asbestos*

In 1939, The Bendix Corporation (Bendix) began manufacturing friction products, including automotive brakes, that contained asbestos.<sup>2</sup> Until 1983, Bendix manufactured its brakes using 25 to 50 percent asbestos with other ingredients bound in a resin. In

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<sup>1</sup> The court in *Davis* concluded that the trial court did not abuse its discretion in allowing the plaintiff's medical expert to present opinion testimony under the every-exposure theory. (*Davis, supra*, 245 Cal.App.4th at p. 480.) The court reviewed the commentary and scientific literature cited by the parties, concluded “the theory is the subject of legitimate scientific debate,” and stated it was for the jury to resolve the conflict among the competing expert opinions. (*Ibid.*)

<sup>2</sup> “In 1985, Allied Corporation purchased Bendix. Later, Allied Corporation changed its name to Allied Signal, Inc., and in 1999 changed it to Honeywell International, Inc.” (*Dukes v. Pneumo Abex Corporation* (2008) 386 Ill.App.3d 425 428 [900 N.E.2d 1128, 1131] (*Dukes*).)

1983, Bendix began offering asbestos-free brakes for some vehicles, but continued to manufacture and sell asbestos-containing brakes until 2001.

Bendix operated a manufacturing facility in Troy, New York. By 1944, Bendix had installed a ventilation system at the facility to assist in the removal of dust. Also, duct work was hooked up to grinding machines to remove the grinding dust from the workplace. Sometime during the 1950's, Bendix began giving employees at the facility annual chest x-rays.

In 1956, New York's Department of Labor adopted regulations setting a maximum allowable concentration for airborne asbestos at 5 million particles per cubic foot. These regulations applied at Bendix's Troy plant.

In March 1966, the New York Times published an article titled, "Asbestos Dust Called a Hazard To at Least One-Fourth of U.S." The title's reference to a quarter of the pollution was described as a preliminary finding by Dr. Irving J. Selikoff, who announced the establishment of an environmental health laboratory at Mount Sinai Hospital to further investigate the dangers of asbestos and other contaminants. The article mentioned Dr. Selikoff's finding of a link between cancer and asbestos in asbestos workers and his belief that the dangers extended to contiguous trades, such as construction workers. The article also stated that asbestos was used in fireproof materials, asphalt tile, dental cement, brake linings, beer filters, gas masks and paper.

Later in 1966, the publication of *Asbestos: Awaiting 'Trial'* (Sept. 10, 1966) Chemical Week, at page 32 caused E. A. Martin, director of purchases at Bendix's Troy facility, to write a now-infamous letter to Bendix's asbestos supplier (Martin letter). The letter was dated September 12, 1966, and addressed to Noel Hendry of Canadian Johns-Manville Asbestos Limited at Asbestos, Quebec, Canada.<sup>3</sup> A box appearing immediately

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<sup>3</sup> The Chemical Week article, Martin's letter, and Hendry's September 29, 1966, reply are discussed in Castleman, *Asbestos: Medical and Legal Aspects* (5th ed. 2005) p. 534.

above the article's title listed sources of airborne asbestos, including "Motor vehicle brake linings and clutch plates." The contents of the Martin letter are quoted in full in part III.A.1, *post*. The Martin letter plays a role in this appeal because Honeywell contends its admission into evidence was prejudicial error.

Honeywell's corporate representative testified that in 1973 Bendix began placing warning on the cartons for asbestos-containing brake pads. The warning label used the exact language prescribed by newly enacted OSHA regulations and was placed on the side of the box so it would be visible when the boxes were stacked. The warning stated: "Caution: Contains asbestos fibers, avoid creating dust. Breathing asbestos dust may cause serious bodily harm."

In December 1975, Jacob W. Tawiah presented Bendix with a review of the medical literature addressing the health hazards of asbestos. The executive summary of the review stated that medical knowledge at that time associated asbestos with three primary diseases: asbestosis, lung cancer and mesothelioma, a rare form of cancer that is the most deadly of the three. It also described the general agreement that the diseases are positively correlated to the intensity and duration of exposure to asbestos dust, but noted "there is no conclusive proof of a safe threshold level of exposure." The summary stated that there have been cases of mesothelioma that cannot be linked to asbestos, but exposure to asbestos dust is the only known cause of mesothelioma. The commentary section of the executive summary stated: "The medical literature is full of solid evidence linking asbestos to disease. Eliminating the emission of asbestos dust into the working environment appears to be an obvious way of dealing with the problem. This, however, may not be the most feasible approach in light of economic considerations. It then becomes necessary to examine what other alternatives exist." Many of the references listed at the end of the review predate the 1970's.

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