

243 Cal.App.4th 249  
Court of Appeal,  
Second District, Division 4, California.

Jovana HERNANDEZCUEVA, Individually and as  
Successor in Interest, etc. Plaintiff and Appellant,  
v.  
E.F. BRADY COMPANY, INC., Defendant and  
Respondent.

B251933  
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Filed December 22, 2015  
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As Modified January 15, 2016  
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Certified for Partial Publication.\*

#### Synopsis

**Background:** Janitor sued subcontractor, which bought and installed asbestos-containing drywall and joint compound products in commercial building in which janitor worked, for negligence and strict liability, alleging that asbestos released from products installed by subcontractor caused janitor's mesothelioma. The Superior Court, Los Angeles County, No. BC475956, Joseph Di Loreto, J., granted subcontractor's motion for nonsuit on janitor's claim for strict products liability and related claims, and following jury trial, entered judgment against janitor on negligence claim. After janitor's motion for new trial was denied, he appealed.

**Holdings:** The Court of Appeal, Manella, J., held that:

[1] evidence was sufficient to show that subcontractor was involved in stream of commerce relating to products, and thus was subject to strict liability, and

[2] subcontractor was barred from shielding itself from strict liability by identifying asbestos bankruptcy trust system as alternative compensation source.

Affirmed in part, reversed in part, and remanded with directions.

[1]

#### **Trial**

⚙️Hearing and determination of motion

Defendant is entitled to a nonsuit if trial court determines that, as a matter of law, evidence presented by plaintiff is insufficient to permit a jury to find in his favor.

Cases that cite this headnote

[2]

#### **Trial**

⚙️Substantial evidence

If plaintiff's claim is not supported by substantial evidence, then defendant is entitled to a judgment as a matter of law, justifying the nonsuit.

Cases that cite this headnote

[3]

#### **Appeal and Error**

⚙️Cases Triable in Appellate Court

Court of Appeal reviews rulings on motions for nonsuit de novo, applying the same standard that governs trial court.

Cases that cite this headnote

[4]

#### **Products Liability**

⚙️Persons Liable

Under stream-of-commerce approach to strict liability, no precise legal relationship to the member of enterprise causing defect to be manufactured or to the member most closely connected with customer is required before courts will impose strict liability. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[5] **Products Liability**  
⚙️Persons Liable

Under stream-of-commerce approach to strict liability, it is defendant's participatory connection, for his personal profit or other benefit, with injury-producing product and with enterprise that created consumer demand for and reliance upon the product, and not defendant's legal relationship, such as agency, with manufacturer or other entities involved in manufacturing-marketing system, which calls for imposition of strict liability. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[6] **Products Liability**  
⚙️Persons Liable

Imposition of strict liability under stream-of-commerce theory is not limitless. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[7] **Products Liability**  
⚙️Persons Liable

To be subject to strict liability under stream-of-commerce theory, party must play more than a random and accidental role in the overall marketing enterprise of product in question. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[8] **Products Liability**  
⚙️Persons Liable

Strict liability is not imposed under stream-of-commerce theory even if defendant is technically a link in the chain in getting the product to the consumer market if judicially perceived policy considerations are not satisfied; thus, defendant will not be held strictly liable unless doing so will enhance product safety, maximize protection to injured plaintiff, and apportion costs among defendants. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[9] **Products Liability**  
⚙️Persons Liable

Generally, imposition of strict liability hinges on extent to which party was responsible for placing products in the stream of commerce. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[10] **Products Liability**  
⚙️Persons Liable

When purchase of a product is the primary objective or essence of the transaction, strict liability applies even to those who are mere conduits in distributing product to consumer. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[11] **Products Liability**  
⚙️Services as distinguished from products

Doctrine of strict liability is ordinarily inapplicable to transactions whose primary objective is obtaining services and to transactions in which service aspect predominates and any product sale is merely incidental to provision of service. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[12]

**Products Liability**

☞ Services as distinguished from products

In a given transaction involving both products and services, liability in strict products liability action will often depend upon defendant's role. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[13]

**Products Liability**

☞ Components and raw materials; bulk suppliers

Generally, manufacturers and suppliers of a component to be integrated into a final product may be subject to strict liability when component itself causes harm. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[14]

**Products Liability**

☞ Services as distinguished from products

**Products Liability**

☞ Components and raw materials; bulk suppliers

Parties involved in passing a defective component to ultimate user or consumer are not

subject to strict products liability when their sole contribution to the pertinent transaction was a service, namely, the installation of the component into the pertinent final product. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[15]

**Products Liability**

☞ Persons Liable

**Products Liability**

☞ Asbestos

Evidence was sufficient to show that subcontractor, which bought and installed asbestos-containing drywall and joint compound products in commercial building in which janitor worked, was involved in the stream of commerce relating to products, and thus was subject to liability in janitor's strict products liability suit, alleging that asbestos released from products caused janitor's mesothelioma; evidence concerning subcontractor's practices in submitting bids demonstrated that subcontractor was more than just an occasional seller of drywall and joint compounds, and evidence showed that subcontractor was capable of bearing costs of compensating for injuries due to products and that subcontractor was in a position to exert pressure on manufacturer to improve product safety. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[16]

**Bailment**

☞ Condition of and defects in property, and negligence of bailor

Party that buys defective product and leases it to others, or offers its use for payment, may be subject to strict liability for injuries arising from product's defect. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[17]

### **Bailment**

Condition of and defects in property, and negligence of bailor

Party's payment of sales tax in buying defective product to be leased or offered for use cannot be regarded as precluding the imposition of strict liability. Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[18]

### **Courts**

Dicta

Dictum of Supreme Court, while not controlling authority, carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic.

Cases that cite this headnote

[19]

### **Bankruptcy**

Construction, execution, and performance

#### **Damages**

Reparation by wrongdoer

The asbestos bankruptcy trust system did not give rise to a public policy precluding janitor from recovering under a theory of strict products liability for his mesothelioma, from a subcontractor that bought and installed asbestos-containing drywall and joint compound products in commercial building in which janitor worked, absent evidence that janitor had received compensation from any bankruptcy trust. 11 U.S.C.A. § 524(g); Restatement (Second) of Torts § 402A; Restatement (Third) of Torts § 19(b).

Cases that cite this headnote

[20]

### **Appeal and Error**

Demurrer or exception and rulings thereon

#### **Pleading**

Failure to demur

Generally, when a complaint's allegations are ambiguous or uncertain, a defendant must raise the defect by demurrer, and failure to do so works a forfeiture of contentions based on the defect; for that reason, such contentions may not be raised for the first time on appeal.

See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1438.

Cases that cite this headnote

**\*\*596** APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph Di Loreto, Judge. Affirmed in part, reversed in part, and remanded with directions. (Los Angeles County Super. Ct. No. BC475956)

### **Attorneys and Law Firms**

**\*\*597** The Arkin Law Firm and Sharon J. Arkin; Farrise Firm and Simona A. Farrise, for Plaintiff and Appellant.

Sherman Breitman, Jerry C. Popovich and N. Asir Fiola, Santa Ana, for Defendant and Respondent.

Crowell & Moring and Kevin C. Mayer, Los Angeles, as Amicus Curiae Coalition for Litigation Justice, Inc. in support of Defendant and Respondent.

Crawford & Bangs and E. Scott Holbrook, Covina, as Amicus Curiae for American Subcontractors Association, The Association of the Wall and Ceiling Industry, and The Roofing Contractors Association of California in support of Defendant and Respondent.

### **Opinion**

MANELLA, J.

**\*252** Joel and Jovana Hernandezcueva asserted claims for negligence and strict products liability, together with several related claims, against respondent E.F. Brady

Company, Inc. (E.F. Brady), alleging that asbestos-containing products it distributed caused Joel Hernandezcueva's mesothelioma. At trial, following presentation of the Hernandezcuevas' case-in-chief, the court granted E.F. Brady's motion for nonsuit on their claim for strict products liability and some related claims. After the jury returned special verdicts against the Hernandezcuevas on their negligence claim, they filed an unsuccessful motion for a new trial.

**\*253** Appellant Jovana Hernandezcueva challenges the rulings on the motions for nonsuit and a new trial.<sup>1</sup> In the published portion of this decision, we conclude the trial court erred in granting a nonsuit on the strict products liability claim because the Hernandezcuevas' evidence sufficed to show that E.F. Brady, while acting as a subcontractor in the construction of a commercial building, was in the stream of commerce relating to the asbestos-containing products, for purposes of the imposition of strict liability. In the unpublished portion of this decision, we conclude the court properly denied a new trial. We therefore affirm in part, reverse in part, and remand the matter for further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Pretrial Proceedings

E.F. Brady is a subcontractor engaged in drywall installation and plastering. During the mid-1970's, E.F. Brady participated in the construction of a complex of buildings in Irvine for the Fluor Corporation (Fluor). In the 1990's, Joel Hernandezcueva worked as a janitor in the Fluor complex. In or after 2011, he was diagnosed as suffering from mesothelioma, which is a cancer of the "pleura" of the lung.

In December 2011, the Hernandezcuevas initiated the underlying action against several defendants. In February 2013, E.F. Brady was added as a Doe defendant. The Hernandezcuevas' first amended complaint, filed May 6, 2013, asserted claims for negligence, strict liability, misrepresentation, intentional failure to warn, premises owner and contractor liability, and loss of consortium against numerous manufacturers, suppliers, and distributors of asbestos-laden products. The complaint alleged that Joel Hernandezcueva's mesothelioma resulted from his exposure to asbestos from the defendants' products. The Hernandezcuevas sought compensatory and punitive damages.

### **\*\*598 B. Trial**

By September 19, 2013, when the Hernandezcuevas began presenting their case-in-chief, only E.F. Brady and two other defendants remained in the action, Expo Industries (Expo) and Kaiser Gypsum Company (Kaiser).

### 1. Hernandezcuevas' Evidence<sup>2</sup>

E.F. Brady was founded in 1946. As a subcontractor, it focused on plastering and the installation of drywall and fireproofing materials. By the **\*254** early 1970's, it employed 350 to 1000 "field employees," that is, plasterers, drywall hangers, and workers in related trades. In 1972 or 1973, E.F. Brady first became aware that asbestos in materials that its employees used was potentially hazardous. E.F. Brady never tested the materials it used to determine whether they contained asbestos.

In the early 1970's, Fluor initiated the construction of a complex of buildings in Irvine to house the engineering facilities of its southern California division. The complex was to occupy approximately 600,000 square feet on a 104-acre lot in Irvine. C.L. Peck was the project's general contractor. In August 1974, construction of the Fluor complex commenced.

According to Vincenzo Lombardo, who testified as the person most knowledgeable regarding E.F. Brady, the company submitted a bid to install the fireproofing, metal stud framing, and drywall. Because subcontractors were ordinarily required to provide construction materials, the bid included labor and material. Although E.F. Brady's profits arose from its provision of labor, the bid included the costs E.F. Brady would incur in purchasing the materials, plus a "one or two percent" charge for "escalation of cost[s] of the material[s]." E.F. Brady generally bought the drywall and fireproofing materials it installed from supply houses.

E.F. Brady was engaged as the drywall subcontractor for the Fluor complex project. Under the contract, E.F. Brady was to be paid \$2,024,272. The contract obliged E.F. Brady to select the drywall and related materials in accordance with the general contractor's plans and specifications. The specifications called for asbestos-free fireproofing and insulation, but contained no analogous requirement regarding the drywall material and joint compound (also called "taping mud").

E.F. Brady installed drywall made by Kaiser, and initially used Kaiser's "all purpose" joint compound to finish the

drywall joints. When that joint compound proved to be ineffective, E.F. Brady substituted a joint compound made by Hamilton. E.F. Brady bought the drywall and joint compounds from Expo, which delivered those materials to the work site.

William Longo, a material scientist, testified that Kaiser drywall and the Hamilton joint compound installed by E.F. Brady in the Fluor complex contained asbestos. Neither the drywall nor the joint compounds were labeled as containing asbestos. Warren Bozzo, who supervised E.F. Brady's work on the Fluor complex, testified he was unaware that the drywall and joint compounds used in the project contained asbestos.

Joel Hernandezcueva was born in 1968. From 1992 or 1993 to 1995, he worked as a janitor at the Fluor complex. During that period, areas of the \*255 complex were remodeled, and certain walls within the complex were continuously under repair. E.F. Brady did not participate in those activities.

**\*\*599** Hernandezcueva's duties included cleaning up drywall debris and other rubbish from areas where E.F. Brady had installed the original drywall and fireproofing. While performing those duties, he inhaled dust. In or about 2011, he was diagnosed as suffering from mesothelioma.

The Hernandezcuevas' experts testified that Joel Hernandezcueva's exposure to asbestos released from the products installed by E.F. Brady caused his mesothelioma, which was well advanced at the time of trial. Longo stated that Hernandezcueva was exposed to asbestos from those products when he worked at the Fluor complex. Arnold Brody, a research scientist, testified that by 1974, it was well established that asbestos caused mesothelioma. According to Brody, there is no minimal threshold of exposure to asbestos below which the exposure is "safe." He opined that Hernandezcueva's exposure to asbestos from products installed by E.F. Brady significantly contributed to his risk of mesothelioma. Dr. William Salyer, a pathologist, also opined that to a reasonable degree of medical certainty, Hernandezcueva's mesothelioma was causally related to his exposure to asbestos. Dr. Reginald Abraham, a cardiovascular surgeon, testified that Hernandezcueva was likely to die within a year.

## 2. Motion for Partial Nonsuit

Following the completion of the Hernandezcuevas'

case-in-chief, E.F. Brady filed a motion for partial nonsuit on their claims for strict liability, misrepresentation, and intentional failure to warn, as well as their request for punitive damages. The trial court granted the motion with respect to the claims for strict liability, misrepresentation, and intentional failure to warn, but denied it with respect to the request for punitive damages. The negligence claim remained.

## 3. E.F. Brady's Evidence

When E.F. Brady began presenting its evidence, it was the sole defendant participating in the trial. E.F. Brady presented testimony from Lombardo, who stated that during the pertinent period, the uniform building code did not prohibit the use of drywall and joint compounds containing asbestos.

E.F. Brady also presented testimony from Gary Paoli, who was employed by Raymond Interior Systems, which engaged in the installation of metal stud framing and installation in the Los Angeles area. In 1973, Raymond Interior Systems submitted an unsuccessful bid to perform the work on the Fluor \*256 complex project ultimately done by E.F. Brady. Paoli testified that asbestos did not become a "hot topic" among drywall and plastering contractors in Southern California until the 1980's. According to Paoli, he first learned that asbestos caused cancer in the early 1980's.

## 4. Verdicts

In view of the ruling on the motion for partial nonsuit, the jury was instructed to return special verdicts relating solely to the Hernandezcuevas' negligence claim and request for punitive damages. The jury found that although Joel Hernandezcueva had been exposed to asbestos from a product installed by E.F. Brady, the company was not negligent regarding that exposure.

## C. Judgment and Motion for a New Trial

On October 9, 2013, the trial court entered a judgment in favor of E.F. Brady and against the Hernandezcuevas on their claims. The Hernandezcuevas filed a motion for a new trial predicated on judicial misconduct, which the trial court denied.

**\*\*600 DISCUSSION**

Appellant challenges the grant of nonsuit with respect to the claim for strict liability, and the denial of the motion for a new trial.<sup>3</sup> For the reasons discussed below, we conclude the trial court erred in granting a nonsuit, but not in denying a new trial.

**A. Nonsuit**

We begin with appellant's contention regarding the grant of nonsuit on the Hernandezcuevas' strict liability claim. Relying primarily on *Monte Vista Development Corp. v. Superior Court* (1991) 226 Cal.App.3d 1681, 277 Cal.Rptr. 608 (*Monte Vista*), E.F. Brady argued that it was entitled to a nonsuit because the Hernandezcuevas' evidence showed only that it was a subcontractor that had installed asbestos-containing products bought from other parties. The trial court agreed. Appellant contends that strict liability is properly imposed on E.F. Brady for injuries arising from asbestos released from the products it purchased and installed.

**1. Standard of Review**

[1] [2] [3] "A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a \*257 jury to find in his favor." [Citation.] In determining the sufficiency of the evidence, the trial court must not weigh the evidence or consider the credibility of the witnesses. Instead, it must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant, and must resolve all presumptions, inferences, conflicts, and doubts in favor of the plaintiff. If the plaintiff's claim is not supported by substantial evidence, then the defendant is entitled to a judgment as a matter of law, justifying the nonsuit. [Citation.]" (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541, 50 Cal.Rptr.2d 395, quoting *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291, 253 Cal.Rptr. 97, 763 P.2d 948.) We review rulings on motions for nonsuit de novo, applying the same standard that governs the trial court. (*Saunders v. Taylor*, *supra*, 42 Cal.App.4th at pp. 1541-1542 & fn. 2, 50 Cal.Rptr.2d 395.)

**2. Governing Principles**

The key question before us concerns the application of the doctrine of strict products liability under the circumstances established by the Hernandezcuevas' evidence. That doctrine is traceable to *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 59-60, 27 Cal.Rptr. 697, 377 P.2d 897, in which our Supreme Court held that manufacturers of defective products are subject to strict liability for injuries to consumers arising from their products. The court explained that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market[,] rather than by the injured persons who are powerless to protect themselves." (*Id.* at p. 63, 27 Cal.Rptr. 697, 377 P.2d 897.) Thereafter, the doctrine was extended to other parties involved in the vertical distribution of products such as retailers, wholesalers, and developers of mass-produced homes. (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 772-773, 59 Cal.Rptr.2d 322 (*Bay Summit* ).) Although not necessarily involved in the manufacture or design of the final product, those parties were subject to liability for "passing the product down the \*\*601 line to the consumer" because they "were 'able to bear the cost of compensating for injuries' [citation] and 'play[ed] a substantial part in insuring that the product [was] safe or ... [were] in a position to exert pressure on the manufacturer to that end.' [Citation.]" (*Id.* at p. 773, 59 Cal.Rptr.2d 322.)

[4] [5] "[U]nder the stream-of-commerce approach to strict liability[,] no precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer is required before the courts will impose strict liability. It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship (such as agency) with the manufacturer or other entities \*258 involved in the manufacturing-marketing system) which calls for imposition of strict liability." (*Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, 725, 101 Cal.Rptr. 314 (*Kasel* ).)

[6] [7] [8] Imposition of strict liability under the stream-of-commerce theory is not limitless. (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1535, 85 Cal.Rptr.3d 143 (*Arriaga* ).) To be subject to strict liability, a party must "play more than a random and accidental role in the overall marketing enterprise of the product in question." (*Garcia v. Halsett* (1970) 3 Cal.App.3d 319, 326, 82 Cal.Rptr. 420 (*Garcia* ).)

“[S]trict liability is not imposed even if the defendant is technically a ‘link in the chain’ in getting the product to the consumer market if the judicially perceived policy considerations are not satisfied. Thus, a defendant will not be held strictly liable unless doing so will enhance product safety, maximize protection to the injured plaintiff, and apportion costs among the defendants. [Citations.]” (*Arriaga, supra*, 167 Cal.App.4th at p. 1537, 85 Cal.Rptr.3d 143.)

[9] [10] [11] [12] Our inquiry concerns the propriety of imposing strict liability on a subcontractor that bought and installed defective products in fulfilling its contract. Because E.F. Brady provided a service in passing the defective asbestos-products to the ultimate user, our focus is the principles governing such situations. Generally, the imposition of strict liability hinges on the extent to which a party was “responsible for placing products in the stream of commerce.” (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 344, 264 Cal.Rptr. 673 (*Pierson*), italics deleted.) When the purchase of a product “is the primary objective or essence of the transaction, strict liability applies even to those who are mere conduits in distributing the product to the consumer.” (*Ibid.*) In contrast, the doctrine of strict liability is ordinarily inapplicable to transactions “whose primary objective is obtaining services,” and to transactions in which the “service aspect predominates and any product sale is merely incidental to the provision of the service.” (*Ibid.*) Thus, “[i]n a given transaction involving both products and services, liability will often depend upon the defendant’s role.” (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 258, 38 Cal.Rptr.2d 65.)

These principles are reflected in section 402A of the Restatement Second of Torts (section 402A), which provides that strict liability may be imposed on a seller of a defective product “if [¶] (a) if the seller is engaged in the business of selling such a product, and [¶] (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.” (Rest.2d Torts, § 402A, \*\*602 subd. (1), p. 348.) Under section 402A, that rule is applicable even though “the user or consumer has not bought the product from or entered into any contractual relation with the seller.” (Rest.2d Torts, § 402A, subd. (2), p. 348.) Nonetheless, “occasional” sellers of products are \*259 not subject to the rule. (Rest.2d Torts, § 402A, com. (f), p. 350.) Comment (f) to section 402A states: “The rule ... appl[ies] to any person engaged in the business of selling products for use or consumption.... It is not necessary that the seller be engaged solely in the business of selling such products.... [¶] The rule does not, however, apply to the

occasional seller of food or other such products who is not engaged in that activity as a part of his business.” (Rest.2d Torts, § 402A, com. (f), p. 350.)

These principles also are reflected in section 19, subdivision (b), of the Restatement Third of Torts, which provides that “[s]ervices, even when provided commercially, are not products.” Comment (f) to that section explains: “[A]part from the sale of a product incidental to the service, one who agrees for a monetary fee to mow the lawn of another is the provider of a service even if the provider is a large firm engaged commercially in lawn care. Moreover, it is irrelevant that the service provided relates directly to products commercially distributed. For example, one who contracts to inspect, repair, and maintain machinery owned and operated by another is the provider of a product-related service rather than the provider of a product.” (Rest.3d Torts, § 19 com. (f), p. 271.)

[13] Under these principles, when injury arises from a component integrated in another product, the imposition of strict liability on a party hinges on its role in the relevant transaction. Generally, manufacturers and suppliers of a component to be integrated into a final product may be subject to strict liability when the component itself causes harm. In *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 477–481, 127 Cal.Rptr.2d 614, 58 P.3d 450 (*Jimenez*), two window manufacturers supplied windows for mass-produced homes in housing developments. (*Id.* at pp. 476–477, 479, 127 Cal.Rptr.2d 614, 58 P.3d 450.) The trial court granted their motion for summary adjudication on strict liability claims based on defects in the windows. Our Supreme Court reversed, stating that “[f]or purposes of strict products liability, there are ‘no meaningful distinctions’ between, on the one hand, component manufacturers and suppliers and, on the other hand, manufacturers and distributors of complete products....” (*Id.* at pp. 479–480, 127 Cal.Rptr.2d 614, 58 P.3d 450, quoting *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227, 74 Cal.Rptr. 749 (*Kriegler*).)

[14] In contrast, parties involved in passing a defective component to the ultimate user or consumer are not subject to strict products liability when their sole contribution to the pertinent transaction was a service, namely, the installation of the component into the pertinent final product. (*Pierson, supra*, 216 Cal.App.3d at p. 345, 264 Cal.Rptr. 673 [discussing cases].) In *Endicott v. Nissan Motor Corp.* (1977) 73 Cal.App.3d 917, 925–926, 141 Cal.Rptr. 95, an automobile manufacturer hired an independent contractor to install seat belts in the cars it sold in California. The manufacturer supplied the disassembled seat belts to \*260

the independent contractor, which attached them pursuant to the manufacturer's directions. (*Ibid.*) The appellate court held that the independent contractor was not subject to strict liability for injuries due to defects in the seat belts, concluding that it was "a mere \*\*603 provider of services...." (*Id.* at p. 930, 141 Cal.Rptr. 95.)

The propriety of imposing strict liability on a party that both supplies and installs a defective component hinges on the circumstances of the transaction. In *Barth v. B.F. Goodrich Tire Co.* (1968) 265 Cal.App.2d 228, 233–234, 71 Cal.Rptr. 306 (*Barth*), a tire dealer that supplied and installed a defective tire was determined to be a "seller" of the tire, for purposes of section 402A, even though the dealer received no direct payment from the tire's consumer. There, a large manufacturer and distributor of floor maintenance equipment leased a fleet of cars and made arrangements on a national basis for a tire manufacturer to supply replacement tires for the cars. The tire manufacturer's national fleet accounts of that type were serviced by its authorized dealers. (*Barth, supra*, 265 Cal.App.2d at p. 249, 71 Cal.Rptr. 306.) In connection with those accounts, the tire manufacturer's dealership agreements provided that when a dealer took a replacement tire from its inventory and installed it, the dealer was entitled to a credit for the value of the tire—the amount of which was determined by the manufacturer—and an installation fee. (*Id.* at p. 249 & fn. 8, 71 Cal.Rptr. 306.) The dealer received the credit and installation fee from the tire manufacturer, rather than the client of the national fleet account. (*Ibid.*)

When an employee of the floor maintenance equipment company suffered injuries from an accident due to a defective replacement tire, he asserted a strict liability claim against the dealer that had installed the tire. (*Barth, supra*, 265 Cal.App.2d at p. 233, 71 Cal.Rptr. 306.) In reversing a judgment in favor of the dealer, the appellate court rejected the dealer's contention that it was not a seller of the tire within the meaning of section 402A. In support of that contention, the dealer had argued that the underlying transaction was "analogous to [one] where [it] merely installed a tire ordered by a customer from another retailer or wholesaler" because it had installed the tire for a minor fee and realized no profit on the transaction. (*Id.* at pp. 251–252, 71 Cal.Rptr. 306.) The court concluded that the dealer was "[c]learly" part of the marketing enterprise for the tire, noting that the dealer benefited from servicing the manufacturer's national accounts (in addition to its wholesale and retail business), that it obtained the tire from its own inventory, that it had received a credit for the tire in addition to the installation fee, and that it had placed its name on the tire's warranty form. (*Id.* at p. 252, 71 Cal.Rptr. 306, italics deleted.)

In *Monte Vista, supra*, 226 Cal.App.3d 1681, 277 Cal.Rptr. 608, the appellate court reached a contrary conclusion regarding the imposition of strict liability on a subcontractor that had supplied and installed a defective product. There, a developer \*261 accepted a tiling firm's bid to install tiles in a residential housing project. (*Id.* at pp. 1683–1684, 277 Cal.Rptr. 608.) Pursuant to the terms of the bid, the tiling firm was to install soap dishes and other tile fixtures that it bought in bulk from a building supply company. (*Ibid.*) As the bid did not specify a type or brand of soap dish, in fulfilling the contract the tiling firm bought what it characterized as "generic" soap dishes. (*Id.* at p. 1684, 277 Cal.Rptr. 608.) To obtain payment for work performed, the tiling firm submitted invoices that did not set out separate charges for material or fixtures. (*Ibid.*)

After a purchaser of one of the homes was injured when a soap dish broke, she asserted a strict liability claim against the tiling firm; the court granted summary adjudication on the claim. ( \*\*604 *Monte Vista, supra*, 226 Cal.App.3d at p. 1684, 277 Cal.Rptr. 608.) The appellate court affirmed, concluding that the tiling firm was not a "seller" of the soap dishes for purposes of section 402A. (*Monte Vista, supra*, at pp. 1687–1688, 277 Cal.Rptr. 608.) The court stated: "[The tiling firm] was not in the business of selling soap dishes or any other fixtures. It purchased the soap dish that injured plaintiff, as well as other fixtures, in order to complete its subcontract.... Obviously, it mattered not to [the tiling firm] whether [the developer] or someone else supplied the tile fixtures. [The tiling firm's] job was to do the tile work." (*Id.* at p. 1687, 277 Cal.Rptr. 608.)

### 3. Evidence

We turn to the Hernandezcuevas' evidence regarding E.F. Brady's role in the transaction concerning the pertinent asbestos-containing products, namely, Kaiser drywall and Hamilton joint compound. According to Lombardo, who testified on behalf of E.F. Brady, in the late 1960's, E.F. Brady began performing work on "heavy commercial" projects such as high-rise office buildings and major shopping malls. By the mid-1970's, E.F. Brady's contract for the Fluor project, valued at more than \$2,000,000, was "a common job" for E.F. Brady. As E.F. Brady's operations manager at the time, Lombardo was responsible for the principal aspects of the Fluor project.

E.F. Brady's bids for work—including its bid regarding the Fluor project—always encompassed the materials

necessary for the project. Lombardo stated: "You couldn't get a job unless ... your bid included labor and material." Generally, 75 percent of the amount of a bid—which became the contract, if accepted—was allocated to labor, and the remaining 25 percent was allocated to materials. E.F. Brady's profits arose from the provision of labor. In determining the amount of the bid reflecting the provision of materials, E.F. Brady ordinarily included the costs of the materials it bought, including the sales tax, plus a one or two percent markup to cover "escalation of the costs of the materials."

\*262 E.F. Brady's selection of materials was regulated by the architect's specifications. Ordinarily, those specifications required the use of a particular brand of drywall or the "equal." In accordance with a common industry practice, when E.F. Brady used a manufacturer's drywall, it also elected to use that manufacturer's joint compound in order to avoid issues regarding the applicable warranties. An exception to that practice involved Hamilton joint compound, which most drywall manufacturers approved for use with their products.

During the mid-1970's, E.F. Brady did not buy products directly from manufacturers, but ordered them through supply houses. Although E.F. Brady ordinarily preferred to use drywall made by U.S. Gypsum, it used Kaiser drywall when necessary. E.F. Brady generally obtained Kaiser products from Expo or another supplier. The supplier was responsible for delivering the ordered products to the job site.

In the case of the Fluor project, E.F. Brady used Kaiser drywall, and thus initially selected Kaiser joint compound.

Shortly after E.F. Brady began installing drywall at the Fluor construction site, it discovered that Kaiser joint compound was not performing properly. E.F. Brady contacted Kaiser, which sent a representative to the job site for a meeting with Lombardo. Also present at the meeting was a Hamilton representative with whom E.F. Brady had a lengthy relationship. The Kaiser representative acknowledged that the Kaiser joint compound was ineffective, \*\*605 and recommended that E.F. Brady use Hamilton joint compound. E.F. Brady accepted the recommendation, and secured the architect's and the general contractor's approval of the change.

asbestos-containing products, our inquiry requires a fact-sensitive examination into whether the "service aspect predominate[d] and any product sale [was] merely incidental to the provision of the service." (*Pierson*, 216 Cal.App.3d at p. 344, 264 Cal.Rptr. 673.) We assess E.F. Brady's role in providing the products in light of the policy considerations underlying the imposition of strict liability, namely, whether E.F. Brady was in a position to enhance product safety or exert pressure on the manufacturer to promote that end, and bear the costs of compensating for injuries. (*Bay Summit*, *supra*, 51 Cal.App.4th at p. 773, 59 Cal.Rptr.2d 322; *Barth*, *supra*, 265 Cal.App.2d at p. 253, 71 Cal.Rptr. 306.) As explained below, we conclude the trial court erred in granting nonsuit on the Hernandezcuevas' strict liability claim.

In view of the evidence concerning E.F. Brady's practices in submitting bids, a jury could reasonably find that E.F. Brady was more than an \*263 "occasional seller" of drywall and joint compounds (Rest.2d Torts, § 402A, com. (f), p. 350) whose provision of those products was merely incidental to its services (*Pierson*, 216 Cal.App.3d at p. 344, 264 Cal.Rptr. 673). Like the dealer in *Barth*, E.F. Brady derived a considerable benefit from supplying the products, as that was essential to obtaining its subcontracting work. During the mid-1970's, E.F. Brady was a large drywall installation firm whose relevant contracts *always* involved the provision of drywall and related materials. Indeed, Lombardo stated that E.F. Brady could not have secured work without offering to provide the requisite materials and including the costs of those materials in its bids.

E.F. Brady's role in the stream of commerce relating to the products was significant in other respects. As in *Barth*, E.F. Brady's contract for the Fluor project was structured to recoup or defray the costs of the materials—without necessarily ensuring a profit regarding those costs—while providing for payment for the installation services. For E.F. Brady, however, those costs were substantial, as they ordinarily constituted 25 percent of the amount of a bid. Accordingly, in the case of E.F. Brady's \$2,024,272 Fluor project contract, the costs of the materials passed through to Fluor approximated \$500,000. Furthermore, although E.F. Brady had no dealership contract with Kaiser and Hamilton, E.F. Brady used their products when necessary to fulfill its contracts. That ongoing relationship was sufficient to command the personal attention of Kaiser's and Hamilton's representatives to E.F. Brady's concerns regarding the products. Thus, when Kaiser joint compound proved to be ineffective during the Fluor project, those representatives went to the jobsite to address the problem.

#### 4. Analysis

<sup>[15]</sup>Because E.F. Brady supplied and installed

Viewed in light of the policies underlying the doctrine of strict liability, the Hernandezcuevas' evidence sufficed to show that E.F. Brady was involved in the stream of commerce relating to the defective products. E.F. Brady was capable of bearing the costs of compensating for injuries due to the products, as it was a subcontractor specializing in heavy commercial projects, made sizeable purchases of the defective products, and always arranged to pass its material costs through to the ultimate user. Moreover, due to E.F. Brady's relationship with Kaiser and Hamilton, it was "in a position to exert pressure on the \*\*606 manufacturer" to improve product safety. (*Bay Summit*, *supra*, 51 Cal.App.4th at p. 773, 59 Cal.Rptr.2d 322.)

*Monte Vista*, upon which E.F. Brady and amici curiae rely, is distinguishable.<sup>4</sup> There, the appellate court declined to impose strict liability on a tiling subcontractor that supplied and installed a defective soap dish because there \*264 was no evidence that the subcontractor was a seller of the soap dish under section 402A. In so concluding, the court placed special emphasis on the fact that the evidence showed only that "it mattered not to [the subcontractor] whether [the developer] or someone else supplied the tile fixtures." (*Monte Vista*, *supra*, 226 Cal.App.3d at p. 1687, 277 Cal.Rptr. 608.) That is not the case here. As explained above, the Hernandezcuevas' evidence showed that E.F. Brady always provided materials in fulfilling its contracts. Lombardo stated: "You couldn't get a job unless ... your bid included labor and material." Moreover, when one of those materials proved unsatisfactory, E.F. Brady summoned assistance from the pertinent manufacturers and secured approval to use another product. E.F. Brady's substantial purchases of the defective products, coupled with its ongoing relationships with their manufacturers, thus support the imposition of strict liability.<sup>5</sup>

[16] [17] \*\*607 \*265 E.F. Brady and amici curiae contend that E.F. Brady was the "end user"—not the seller—of the defective products used in the Fluor project, arguing that E.F. Brady paid sales tax in buying the products from Expo. We disagree. The drywall and joint compound, after installation, passed into the possession of Fluor, which paid for the project. Furthermore, as explained above (see pt. A.2., *ante*), the imposition of strict liability hinges on a party's "participatory connection" to the stream of commerce regarding the defective product, rather than the party's "precise legal relationship" to members of that stream. (*Kasel*, *supra*, 24 Cal.App.3d at p. 725, 101 Cal.Rptr. 314.) Thus, a party that buys a defective product and leases it to others, or offers its use for payment, may be subject to strict liability for injuries arising from product's defect. (See *McClafflin v. Bayshore*

*Equipment Rental Co.* (1969) 274 Cal.App.2d 446, 452–453, 79 Cal.Rptr. 337 [equipment lessor properly subject to strict liability for defective rented tool]; *Garcia*, *supra*, 3 Cal.App.3d at pp. 326–327, 82 Cal.Rptr. 420 [owner of launderette properly subject to strict liability for defective coin-operated washing machines].) Accordingly, the party's payment of sales tax in buying the product to be leased or offered for use cannot be regarded as precluding the imposition of strict liability. We see no basis for rejecting the imposition of strict liability here, as E.F. Brady's bid regarding the Fluor project included the amount of sales tax it expected to pay, and thus effectively passed on the payment of that tax to Fluor.<sup>6</sup>

Pointing to *La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 261 Cal.Rptr. 146 (*La Jolla Village*), amici curiae contend that considerations of public policy dictate that subcontractors involved in construction projects should not be subject to strict liability when \*266 they provide products complying with the architect's specifications. There, the appellate court rejected the imposition of strict liability on subcontractors for defects in a residential housing project. (*Id.* at pp. 1144–1149, 261 Cal.Rptr. 146). Noting that subcontractors generally work \*\*608 under the supervision of the general contractor, have little control over the project's specifications, and are usually less well capitalized and insured than the developer, the court concluded subcontractors are properly immune from strict liability "regardless of whether they provided 'services' or a 'product.'" (*Id.* at pp. 1144–1148, 261 Cal.Rptr. 146.)

We decline to follow *La Jolla Village*, as the broad per se immunity it proposes is inconsistent with existing law, which predicates the imposition of strict liability on a party's "participatory connection"—rather than its "precise legal relationship"—to the stream of commerce. (*Kasel*, *supra*, 24 Cal.App.3d at p. 725, 101 Cal.Rptr. 314.) That principle dictates a fact-sensitive inquiry into the party's activities relating to the defective product, with due attention to the policies underlying the doctrine of strict liability. As explained above, the circumstances surrounding E.F. Brady's provision of the defective products are materially similar to those surrounding the dealer in *Barth*, which provided the defective tire in accordance with its dealership agreement with the tire manufacturer.

[18] We find additional support for our conclusion from *Jimenez*, in which our Supreme Court criticized the broad immunity proposed in *La Jolla Village*. Although the issues before the court concerned the imposition of strict

liability on the manufacturers of defective windows used in mass-produced homes, the court examined the then-existing case authority regarding the imposition of strict liability on subcontractors, including *La Jolla Village*. (*Jimenez, supra*, 29 Cal.4th at pp. 477–479, 127 Cal.Rptr.2d 614, 58 P.3d 450.) The Supreme Court observed that later decisions had rejected the broad immunity proposed in *La Jolla Village*, including the Court of Appeal in the underlying case, which also decided *La Jolla Village*. The Supreme Court noted with apparent approval that the underlying Court of Appeal had concluded that strict liability may be imposed on subcontractors providing products in mass-produced homes, subject to “the limitation, consistent with established law, that persons providing only services are not subject to strict products liability.” (*Id.* at p. 479, 127 Cal.Rptr.2d 614, 58 P.3d 450, italics added.) The Supreme Court also disapproved *La Jolla Village* to the extent it was inconsistent with the imposition of strict liability on manufacturers of components installed in mass-produced homes. (*Id.* at p. 481 fn. 1, 127 Cal.Rptr.2d 614, 58 P.3d 450.)<sup>7</sup>

[191] [20] \*267 Amicus curiae Coalition for Litigation Justice, Inc., also contends that considerations of public policy preclude the imposition of strict liability on E.F. Brady, arguing that there is an alternative source of compensation potentially available to the Hernandezcuevas, namely, the asbestos bankruptcy trust system created pursuant to federal bankruptcy law (11 U.S.C. § 524(g)). According to amicus curiae, the system includes trusts established by approximately 100 companies, including virtually all of the major asbestos product manufacturers, and operates to compensate plaintiffs claiming injuries due to exposure to asbestos. However, the contention fails, as amicus curiae has identified no evidence that the Hernandezcuevas have received compensation from any bankruptcy trust. (See *McCall v. Four Star Music Co.* (1996) 51 Cal.App.4th 1394, 1399, 59 Cal.Rptr.2d 829 [under California law, tortfeasor is not relieved of liability to \*\*609 plaintiff under judgment by joint tortfeasors’ partial payment of

plaintiff’s damages]; *Yates v. Nimeh* (N.D. Cal. 2007) 486 F.Supp.2d 1084, 1087-1088 [same]; *Winzler & Kelly v. Superior Court* (1975) 48 Cal.App.3d 385, 393, 122 Cal.Rptr. 259 [unsatisfied judgment against tortfeasor does not shield joint tortfeasors from liability to plaintiff]; *Paulus v. Crane* (2014) 224 Cal.App.4th 1357, 1367, 169 Cal.Rptr.3d 373 [plaintiff’s potential future recovery from asbestos bankruptcy trusts supported no reduction of damages tortfeasor owed under judgment]; *Hellam v. Crane* (2015) 239 Cal.App.4th 851, 872-873, 191 Cal.Rptr.3d 742 [same].) In sum, the trial court erred in granting nonsuit on the Hernandezcuevas’ claim for strict products liability.<sup>8</sup>

### \*268 B. Motion for a New Trial\*\*

### DISPOSITION

The judgment is reversed solely with respect to appellant’s claim for strict products liability against respondent, and affirmed in all other respects. The matter is remanded for further proceedings in accordance with this opinion. Appellant is awarded her costs on appeal.

We concur:

EPSTEIN, P.J.

COLLINS, J.

### All Citations

243 Cal.App.4th 249, 196 Cal.Rptr.3d 594, 15 Cal. Daily Op. Serv. 13,497, 2015 Daily Journal D.A.R. 13,599

### Footnotes

\* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part B of the Discussion and all its subparts.

<sup>1</sup> During the pendency of this appeal, Joel Hernandezcueva died. For purposes of the appeal, Jovana Hernandezcueva has been designated his successor in interest.

<sup>2</sup> We limit our summary to the Hernandezcuevas’ evidence supporting their claims against E.F. Brady, as some of their evidence was admitted solely against other defendants.

<sup>3</sup> Although nonsuit also was granted on other claims asserted by the Hernandezcuevas, appellant does not challenge that aspect of the trial court’s ruling.

- 4 We granted requests from the Coalition for Litigation Justice, Inc., American Subcontractors Association, The Association of the Wall and Ceiling Industry, and the Roofing Contractors Association of California to submit briefs as amici curiae.
- 5 The other decisions upon which E.F. Brady and amici curiae rely are distinguishable or otherwise inapposite. In most of those cases, the reviewing court determined that imposition of strict liability was unwarranted because the defendant was not a seller of the defective product, or was primarily engaged in providing a service, although that service involved a defective product. (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1188–1189, 43 Cal.Rptr.2d 836, 899 P.2d 905 [hotel not liable for injuries arising from defective bathtub in room]; *Ontiveros v. 24 Hour Fitness USA, Inc.* (2008) 169 Cal.App.4th 424, 426–435, 86 Cal.Rptr.3d 767 [fitness club not liable for injuries arising from defective exercise machine]; *Hector v. Cedars–Sinai Medical Center* (1986) 180 Cal.App.3d 493, 502–503, 225 Cal.Rptr. 595 [hospital not liable for ordering defective pacemaker at physician's request and providing surgery room, technical services, and medical care related to its implantation]; *Silverhart v. Mount Zion Hospital* (1971) 20 Cal.App.3d 1022, 1027–1029, 98 Cal.Rptr. 187 [hospital not liable for injuries due to broken surgical needle hospital bought for use in surgical procedures].) As explained above, E.F. Brady's role in providing the defective products was not merely incidental to its services.
- In one of the cases, our Supreme Court declined to impose strict liability for defective drugs on pharmacies, even though they sell drugs and provide related professional services, because the statutory scheme regulating pharmacies shields them from such liability. (*Murphy v. E.R. Squibb & Sons, Inc.* (1985) 40 Cal.3d 672, 679–681, 221 Cal.Rptr. 447, 710 P.2d 247.) No analogous statutory scheme applies here.
- The remaining decisions involve doctrines not related to the issues presented. E.F. Brady and amici curiae purport to find support from *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 342–347, 135 Cal.Rptr.3d 288, 266 P.3d 987, in which the family of a deceased U.S. Navy seaman asserted claims for negligence and strict liability against manufacturers of pumps and valves used on warships, alleging that the serviceman's exposure to asbestos dust from asbestos-containing materials used in connection with the pumps and valves caused his fatal mesothelioma. (*Ibid.*) The court rejected the claims, concluding that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." (*Id.* at p. 342, 135 Cal.Rptr.3d 288, 266 P.3d 987.) Here, E.F. Brady provided the defective drywall and joint compound, rather than some other product used in connection with them.
- Amicus curiae Coalition for Litigation Justice, Inc., also argues that *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 66, 74 Cal.Rptr.3d 108, 179 P.3d 905, supports its claim that a plaintiff's status as a "sophisticated user" of product shields the products' supplier from liability. However, the record contains no evidence that Joel Hernandezcueva constituted a sophisticated user of the defective products at issue here.
- 6 In a related contention, amici curiae contend that E.F. Brady is not subject to strict liability because the Fluor complex is a commercial building, not a mass-produced home. They argue that only certain participants in the construction of mass-produced homes have been determined to be subject to strict liability, namely, developers of such homes (*Kriegler, supra*, 269 Cal.App.2d at p. 227, 74 Cal.Rptr. 749) and manufacturers of windows that are a component of the homes (*Jimenez, supra*, 29 Cal.4th at pp. 477–479, 127 Cal.Rptr.2d 614, 58 P.3d 450). However, the imposition of strict liability on E.F. Brady arises from its role as a supplier of mass-produced products, not from the work it performed in installing those products in the Fluor complex. As noted above (see pt. A.2., *ante*), in *Jimenez*, our Supreme Court stated that for purposes of the imposition of strict liability, there are no meaningful distinctions between, on the one hand, component manufacturers and suppliers and, on the other hand, manufacturers and distributors of complete products. (*Id.* at pp. 479–480, 127 Cal.Rptr.2d 614, 58 P.3d 450.) That rationale applies here, as there are no meaningful distinctions between E.F. Brady's conduct as supplier of the mass-produced drywall and joint compound and the dealer's conduct as supplier of the mass-produced tires in *Barth*. (See also *Peterson v. Superior Court, supra*, 10 Cal.4th at p. 1210, 43 Cal.Rptr.2d 836, 899 P.2d 905 [tenants and guests of a commercial building injured by a defective product installed in it may assert any available strict liability claim against the manufacturer, distributors, and retailers of the product.] )
- 7 Although the Supreme Court's discussion of *La Jolla Village* relating to subcontractors is dicta, that does not mean the discussion is "wrong, unreasonable, or should not be followed." (*Sargoy v. Resolution Trust Corp.* (1992) 8 Cal.App.4th 1039, 1045, 10 Cal.Rptr.2d 889.) A dictum of the Supreme Court "while not controlling authority, carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic. [Citations.]" (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297, 262 Cal.Rptr. 754.)
- 8 E.F. Brady contends the grant of nonsuit is properly affirmed on another ground, namely, that it was not named as a defendant with respect to the strict liability claim, as pleaded in the Hernandezcuevas' first amended complaint. For the

reasons discussed below, E.F. Brady has forfeited any contention of error predicated on that defect.

Generally, when a complaint's allegations are ambiguous or uncertain, a defendant must raise the defect by demurrer. (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 104, 214 Cal.Rptr. 561.) Failure to do so works a forfeiture of contentions based on the defect. (*Ibid.*) For that reason, such contentions may not be raised for the first time on appeal. (*Fenton v. Groveland Community Services Dist.* (1982) 135 Cal.App.3d 797, 810, 185 Cal.Rptr. 758, disapproved on another ground in *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328, fn. 30, 127 Cal.Rptr.2d 482, 58 P.3d 339.)

Here, the preliminary allegations of the Hernandezcuevas' original complaint identified a group of "manufacturing defendants," including Does 1 through 299. Although the caption of the strict liability claim states that it is asserted against that group of defendants, the claim's underlying allegations identify the pertinent defendants as those listed on Exhibit "B," which contains no reference to any Doe defendants. After amending the original complaint to identify E.F. Brady as "Doe-14," the Hernandezcuevas filed a materially similar first amended complaint.

The record reflects no demurrer by E.F. Brady based on uncertainty regarding its status as a defendant with respect to the strict liability claim. Instead, E.F. Brady answered the first amended complaint, and later filed its motion for partial nonsuit, which encompassed the strict liability claim. In the section of that motion entitled "Procedural History," E.F. Brady noted a potential deficiency in the first amended complaint distinct from the defect it asserts on appeal, but stated: "E.F. Brady makes this motion as though it is a generally named defendant." Because E.F. Brady first raised the pertinent pleading defect on appeal, its contention has been forfeited.

\*\* See footnote \*, *ante*.

List of 4 Citing References for Hernandezcueva v. E.F. Brady Company, Inc.

Citing References (4)

Treatment	Title	Date	Type	Depth	Headnote(s)
Cited by	<b>1. Appellant's Opening Brief</b> NORTH COUNTY COMMUNICATIONS CORPORATION OF CALIFORNIA, Appellant and Plaintiff, v. VAYA TELECOM, INC., Respondent and Defendant. 2016 WL 115804, *1+ , Cal.App. 4 Dist. (Appellate Brief)	Jan. 04, 2016	Brief		—
—	<b>2. Products liability: inhalation of asbestos</b> 39 A.L.R.4th 399  This annotation collects the state and federal cases in which the courts have discussed the liability of a manufacturer, distributor, or seller for personal injury or death...	1985	ALR	—	15 19 Cal.Rptr.3d
—	<b>3. Joinder of manufacturer or packer and retailer or other middleman as defendants in action for injury to person or damage to property of purchaser or consumer of defective article</b> 119 A.L.R. 1356  As to liability of manufacturer or packer of defective article for injury to person or property of ultimate consumer who purchased from middleman, see annotations in 17 A.L.R. 672;...	1939	ALR	—	15 19 Cal.Rptr.3d
—	<b>4. 45 Am. Jur. Proof of Facts 2d 1, Asbestosis</b> Am. Jur. Proof of Facts 2d  Asbestos is a general term describing several varieties of silicate minerals, all having certain properties in common. All forms of asbestos are separable into fibers, which can be...	2016	Other Secondary Source	—	15 19 Cal.Rptr.3d