IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

BECHTEL CORPORATION et al.,

Appellants,

v.

RICHARD BATCHELOR and
REGINA M. BATCHELOR,

Appellees.
_____/

Case No. 3D16-2624

L.T. Case No. 2016-12-CA-01
(11th Jud. Cir. Ct.)

INITIAL BRIEF OF APPELLANTS BECHTEL CORPORATION AND BECHTEL CONSTRUCTION COMPANY

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PRELIMINARY STATEMENT REGARDING RECORD

In this brief, Appellants Bechtel Corporation and Bechtel Construction Company will be collectively referred to as "Bechtel." Appellee Richard Batchelor will be referred to as "Batchelor," and both Appellees will be collectively referred to as "the Batchelors." All emphasis in this brief is added unless otherwise indicated.

With the filing of this Initial Brief, Bechtel has filed a Supplemental Record and an unopposed motion for leave to file the Supplemental Record. The Supplemental Record materials are consecutively paginated in the format "SR ___" and will be cited as such in this brief.

Bechtel has also filed with this brief an Appendix containing certain of the record materials cited herein. The Appendix pagination in the electronic pdf file and on the individual pages matches the record on appeal pagination for the same materials. As a result, the record and appendix utilize the same page citations. Materials cited herein that are contained in both the record on appeal and the Appendix are cited in the format "R/A ___," with the page number reflecting the specific page of both the record and appendix. Record materials not contained in the Appendix are cited in the format "R ___."

INTRODUCTION

Before turning to the facts, the unique nature of this case bears early emphasis. It is brought by a plaintiff who experienced a variety of different asbestos exposures throughout his life and now has been diagnosed with mesothelioma. But, unlike the usual asbestos case, it is not a products liability case against a company that manufactured and sold asbestos or asbestos-containing products. Nor is it a negligence case against a contractor for exposing the plaintiff to, or failing to warn of, dangerous levels of asbestos created by the contractor's own work.

Rather, this case was tried as a ***premises liability*** case against a contractor who did not own or lease the premises or have any agreement with language giving it a right, or a duty, to control the premises. It merely had general agreements to perform maintenance work as requested by the landowner—a highly regulated utility company. Nonetheless, the contractor has been held liable based on all asbestos exposures the plaintiff experienced throughout the utility plant during the entire six-year period he worked there, including asbestos released by other contractors and by the landowner itself.

The facts material to the issues on appeal are as follows.

STATEMENT OF THE CASE AND FACTS

In January 2016, the Batchelors sued Bechtel and 24 other defendants for allegedly exposing Batchelor to asbestos and causing him to develop mesothelioma, a terminal disease. R/A 44. Batchelor's statutorily-required sworn information form, which was admitted as evidence at trial, asserted under oath that he may have been exposed to over a dozen different asbestos-containing products at eleven different locations. R/A 97-100; R 12825, 15055-56.

The Batchelors pled no general negligence claim. R/A 44-68. In connection with Batchelor's work at three FP&L power plants, the complaint's first count asserted premises liability claims against (1) Bechtel, an engineering firm that constructed FP&L's Turkey Point plant and later performed maintenance on equipment there, and (2) FP&L, the property owner and Batchelor's employer. R/A 55-59, 80. At trial, the Batchelors advanced this claim only as to Bechtel and the Turkey Point plant. R 13859.

The only other counts in the complaint asserted negligent products liability and strict products liability claims against all defendants. R/A 59-67. The Batchelors expressly abandoned those claims against Bechtel and also acknowledged that they were not asserting construction defect claims. R 13835.

The Batchelors requested priority status for their lawsuit due to Batchelor's age, 67, and medical condition. R 121. The trial court granted that request and set

the case for an expedited trial in August 2016. R 670. Before trial, the Batchelors settled with or dismissed every defendant except Bechtel and another maintenance contractor at Turkey Point, Foster Wheeler. R 3, 13571. Foster Wheeler participated as a defendant at trial but settled the day before trial ended. R 14917.

1. *Asbestos*

Asbestos is a naturally occurring fibrous mineral that resists heat. R 14137-38; R/A 14316-18. Asbestos fibers are present in the air everyone breathes; they are smaller than visible dust and invisible to the human eye. R 13863, 14123-24, 14188; R/A 14330. Everyone's lungs contain millions, if not billions, of asbestos fibers. R 14188-89. As one of the Batchelors' experts testified, a billion respirable asbestos fibers are "not a lot of fibers" and would fit "into a thimble." *Id.*

Most inhaled asbestos fibers are cleared by the body's defense mechanisms. R 14153-54. Where large quantities are inhaled over time, however, they can reach the pleura, a lining that surrounds the lungs. R 14120-21, 14174-75, 14188. Mesothelioma is a cancer of the pleura's mesothelial cells; it takes decades to manifest. R 14171.

The Batchelors asserted below that medical science has not established a "safe" level of asbestos exposure. *E.g.*, R 13864; R/A 14327. There was no evidence, however, that asbestos exposure is dangerous at every level. The Occupational Safety and Health Administration has long established "permissible

exposure" limits for workplace exposures, which at all material times in this case included an "exposure ceiling." R/A 12829-31 (37 Fed. Reg. 11318 (June 7, 1972) (adopting 29 C.F.R. § 1910.93a (b)(1)-(2) (1972))); R 13915; R/A 14353.

The federal regulatory standards regarding asbestos evolved during the 1970s—the time period at issue here. R 13915-18. OSHA's 1972 regulations set permissible exposure limits and provided an eight-hour time-weighted average limit that would decrease as of July 1976. R/A 12831.

To determine whether exposures to employees are above the permissible limits, OSHA requires employers to conduct air monitoring where asbestos fibers are being released; OSHA also requires employers to post warning signs and take multiple other precautions if excess levels are present. R/A 12829-31; R 14895-903. Bechtel had a safety program to comply with OSHA in place in 1972. R 14876-80. There is no evidence that FP&L or Bechtel was ever found by OSHA or any other regulator to have excessive levels of asbestos at Turkey Point.

2. *Richard Batchelor*

Throughout his life, Batchelor worked directly with numerous products that exposed him to asbestos. For instance, he worked as a "shadetree" mechanic, performing brake repairs on automobiles from the time he was in high school and throughout the 1970s and 1980s. R/A 14333, 14588-14592. Because that work involved sanding or filing the old brake shoes, it created dust, and Batchelor's

causation expert, Dr. Finkelstein, testified that all brakes contained asbestos through the mid-1980s. R/A 14349, 14592.

Batchelor testified that he performed numerous brake jobs using Ford, NAPA, and Bendix brakes. R/A 14588, 14592-93. He inhaled the dust while doing so, and he never saw asbestos warnings for those products. R/A 14588-93.

Batchelor also spent a year between 1967 and 1968 finishing a basement in his first home, including the drywall work. R 12826; R/A 14334-35. To smooth the drywall joints, he used Georgia-Pacific joint compound, sanding it repeatedly and creating dust. R/A 14335, 14588-89. Batchelor testified that he inhaled that dust and saw no asbestos warning on the containers. R/A 14588, 14594. Dr. Finkelstein testified that the joint compound contained asbestos. R/A 14349.

Dr. Finkelstein performed risk assessments for Batchelor's asbestos exposures from those products and determined they were causes of Batchelor's mesothelioma. R/A 14375, 14377. Those opinions were unequivocal:

> Q: [D]id you reach an opinion within a reasonable degree of medical certainty as to whether Mr. Batchelor's work doing his shade-tree mechanic work doing those brake jobs would have been a substantial contributing cause to his mesothelioma?
>
> A: Yes, I think he would have inhaled enough asbestos fibers from that brake work to increase his risk of developing mesothelioma.
>
> * * *
>
> Q: [D]o you believe within a -- do you believe that the joint compound may have been a substantial contributing cause?

A: Yes, I think it took him a year to complete his basement in his first home. He installed all the drywall, did all the application of the joint compound, all the sanding. Not only did he inhale the dust as he was sanding it, but he contaminated his basement. And so he would have continued to breathe the dust using the basement. I think he had adequate exposure to increase his risk to mesothelioma.

* * *

Q: You performed a risk assessment for brake work?

A: Yes.

Q: Saying that was causative?

A: Yes.

Q: You performed a risk assessment for joint compound work, claiming that was causative?

A: Yes.

Q: Still your opinion in this case?

A: They were contributing causes, yes.

R/A 14334-35, 14377.

3. *FP&L's Turkey Point Power Plant*

Bechtel is an engineering company that constructed FP&L's Turkey Point plant in the 1960s and early 1970s. R 13873, 14438. Located on Biscayne Bay, the 3,306-acre plant had four power-generating units and utilized 400 FP&L workers on any given day on the nuclear side alone. R 13872-73; R/A 14331, 14472. The fenced plant was accessible only through security. R/A 14466.

Units 1 and 2 were conventional units powered by natural gas and oil. R/A 14338. Each had a giant boiler, 200-250 feet high, manufactured by Foster

Wheeler. R 14436; R/A 14493. Units 3 and 4 were nuclear units. R/A 14338. The reactors were in buildings with their own additional security. R/A 14337, 14604. The boilers and turbines for both sides were located outdoors and thus exposed to rain, wind, and dust from the environment. R/A 14465, 14485, 14603.

Turkey Point utilized an extensive pipe system to carry water and steam. R/A 14594. The hot pipes were insulated, as were the boilers and turbines. R/A 14318, 14342, 14492. The Batchelors introduced original construction documents at trial showing that asbestos was used to insulate the boilers (*e.g.*, R 9296), turbines (*e.g.*, R 9303-04), and other items (*e.g.*, R 9334-35). The evidence also showed that some items were insulated with materials other than asbestos, R 14271, 14319, 14437-38, and some with asbestos and mineral wool. R 14791.

Dr. Finkelstein explained that chrysotile asbestos is white and was used 95 percent of the time when asbestos was used in the United States. R/A 14317. The fact that dust from insulation was white did not mean it contained asbestos, however, as insulation usually contained calcium silicate. R/A 14318-19. Rather, knowing whether particular insulation contained asbestos "requires actually either knowledge from the order sheets, what was used" or inspecting it under a microscope. R/A 14319. Batchelor admitted that he did not know which insulation at Turkey Point contained asbestos and which did not. R/A 14600-01.

The conventional units became operational in 1967 and 1968, and the

nuclear units in 1972 and 1973. R 14276-77, 14697. FP&L entered agreements with Bechtel to perform maintenance at FP&L's request. *See* R 13260-567. Such agreements generally provided terms that governed the relationship, while stating that particular projects would be the subject of individual work orders from FP&L. *E.g.*, R 13262, 13275, 13362.

Some maintenance work could be performed only when a unit was not in operation. Accordingly, on the nuclear side, individual units were shut down every 18 months, usually for 30 to 60 days. R/A 14473-75. On the conventional side, shutdowns were more frequent but could be as short as a day. R/A 14487. Other units remained operational when one unit was shut down. R/A 14474, 14488.

Some maintenance required insulation to be removed to access an insulated item. R/A 14602. For a "small job," FP&L itself could remove insulation. R/A 14492. For a "big job," FP&L had "contractors" do the work. *Id.* At trial, the Batchelors focused on the unit shutdowns, saying they were the "biggest" time when insulation was removed. R/A 14477. Batchelor recalled that Bechtel was "the contractor" performing maintenance work during shutdowns. R/A 14477-78, 14492. There is no dispute Bechtel was an important contractor doing such work.

But the record is clear that Bechtel did not perform all of the maintenance on FP&L's insulated equipment. The giant boilers were lined with insulation, R/A 14318, and FP&L contracted directly with Foster Wheeler to perform maintenance

on them during shutdowns as well as other maintenance. *E.g.*, R 9821, 9828, 9833-36, 9840-63, 9985-90, 14266. FP&L made numerous such agreements directly with Foster Wheeler, and issued work orders directly to it. *Id.*

Bechtel had numerous employees performing maintenance at Turkey Point and at times had trailers there. R 14626-27; R/A 14478. No witness testified, however, that Bechtel controlled the plant premises when units were taken offline for maintenance or at any other time following the original construction.

4. *Batchelor's Work at Turkey Point*

Batchelor worked as an instrument technician for FP&L at Turkey Point. R/A 14469. From 1974 to 1976, he worked primarily on the nuclear side. R/A 14598, 14609. From 1976 to 1980, he worked on the conventional side. R 14354, 14535.

Batchelor received work instructions daily from FP&L. R/A 14468. He took orders only from FP&L and his union—contractors could not tell him what to do. R/A 14538, 14541. As a union worker who performed only designated assignments, he worked solely with FP&L employees, not contractor employees, and he himself never touched insulation. R/A 14344, 14601-03, 14608.

If Batchelor needed insulation removed to work on instruments, then his supervisor would assign someone from the appropriate trade to do so. R/A 14602. When that occurred, they were "all pretty close together" and he "could be right

near them on something else." R/A 14478, 14608. But Batchelor testified that he never worked on equipment while others were removing insulation from it, R/A 14607-08, and he did not testify how often that happened or how long any such exposure would last.

Batchelor also described the outside of the boilers as having grated floors so that if people were "working on top, like for example removing insulation," material could come down through the grates. R/A 14494. He did not, however, testify that this in fact happened to him, much less state how often it happened.

Batchelor did not recall any signs warning about asbestos or anyone monitoring air quality. R/A 14494-96, 14594. Nor did he recall seeing anyone wear a respirator when insulation was removed on the conventional side of the plant. R/A 14494, 14538. He acknowledged, however, that respirators were required in the nuclear containment buildings. R/A 14604-05.

The Batchelors presented deposition testimony from a former boilerworker at Turkey Point, Alfredo Fernandez, who declared that removing insulation from the boilers produced airborne asbestos. R 14222-33. His testimony was admitted under an instruction that it could be considered as to Foster Wheeler but not as to Bechtel. R 14223-24.

Batchelor acknowledged that, because the conventional side of the plant was outdoors, natural dust was present and it was "much, much dustier" than on the

nuclear side. R/A 14492, 14603. Dust got in his hair and nose and on his clothes. R/A 14479. Batchelor did not know if the dust was from insulation, saying: "It could be from anywhere. It's just dust. I mean, it could be stuff that's been there for months being shaken loose. It could be new dust being created." R/A 14480.

Batchelor's wife remembered him coming home during the shutdowns with "whitish, dusty" clothing, though she did not know what the dust was. R 14671. The Batchelors' expert testimony established that white dust did not necessarily signify asbestos-containing insulation. R/A 14318-19.

5. *The Batchelors' Premises Liability Claim at Trial*

At trial, the Batchelors confirmed that they were pursuing a premises liability claim. R 14574. Specifically, the Batchelors contended that Bechtel had possession or control of the Turkey Point plant between 1974 and 1980 and therefore owed premises liability duties to Batchelor. R 15013, 15183.

(i) Possession or Control of the Premises

In closing argument, the Batchelors asserted that the written agreements between FP&L and Bechtel established Bechtel's control over FP&L's premises during shutdowns: "They're clear. Bechtel controlled that job site during those overhauls." R 15183. On their face, however, the written agreements contain no language granting Bechtel any right to control the premises during shutdowns or otherwise. *E.g.*, R 13262, 13275, 13362.

The Batchelors also argued in closing that Bechtel was "in charge" during shutdowns and "everybody else" performing maintenance was Bechtel's subcontractor. R 15084. No witness testified, however, and no document provided, that Bechtel was "in charge" or in control of the plant premises during shutdowns or otherwise. Moreover, "everybody else" performing maintenance was not Bechtel's subcontractor. FP&L removed insulation when it was "a small job," R 14492, and Foster Wheeler maintained the boilers under arrangements it made directly with FP&L. *E.g.*, R 9821, 9828, 9833-36, 9840-63, 9985-90.

(ii) Condition on the Premises Known at the Time to be Dangerous

Prior to 1983, when Bechtel began conducting air sampling, FP&L conducted air sampling at its plant when asbestos removal was required. R 13200, 14874. No air monitoring reports from 1974 to 1980 were presented at trial, however, and the only evidence of the actual levels of airborne asbestos at the plant was as follows.

In 1967, during the plant's construction, the Florida State Board of Health inspected the plant following complaints by workers about exposure to the spray application of a mixture of asbestos and mineral wool, the latter comprising 70% of the material. R 12818, 12820, 13197, 14798-800, 14893-94. The department tested the air during the work and determined that the exposure "would constitute more of a nuisance than a potential health hazard." R 12818, 14799.

The only other test result in the record involved the removal of insulation from a control room in the nuclear containment building in 1982. FP&L's test report acknowledged OSHA's permissible exposure limits and determined that exposures during that insulation removal were "well within [the] acceptable concentration." R 13201, 14875.

With respect to the years Batchelor worked at the plant, the Batchelors presented no evidence establishing the actual levels of any airborne asbestos there. Nor did any expert witness testify that removal of asbestos-containing insulation at the plant would have likely created levels of airborne asbestos fibers that a contractor like Bechtel should have known to be dangerous under any then-existing standard, requiring warnings and other precautionary measures.

The Batchelors' specific causation expert, R 14278, Dr. Finkelstein, stated that asbestos is "quite clearly a very dangerous material," R/A 14314, and that "insulation work is extremely hazardous." R/A 14412. He also testified that a person removing asbestos-containing insulation is exposed to 4.9 fibers per cubic centimeter of air and, if the removal took an hour, would be exposed to 10 million fibers, compared to general background exposure levels of about 1000 fibers per day. R/A 14392, 14412.

Dr. Finkelstein, however, never correlated those figures to OSHA's standards for permissible asbestos exposure in the workplace, which were

expressed in terms of an eight-hour time-weighted average exposure limit and a ceiling concentration. R/A 12831. Nor did he opine that asbestos levels at Turkey Point from 1974 to 1980 ever exceeded OSHA's permissible exposure limits or any other standard existing at the time. As discussed below, he was unable to perform a risk assessment on Batchelor's alleged exposures at Turkey Point.

(iii) Causation

Dr. Finkelstein's causation opinions were based on the entire period between 1974 and 1980, not merely during unit shutdowns, and they did not reference Bechtel at all. R/A 14346-48. Instead, he opined in the aggregate that all of Batchelor's presumed exposures to asbestos at the Turkey Point plant were a cause of his mesothelioma. R/A 14346-47. Dr. Finkelstein's opinion thus necessarily included Foster Wheeler's maintenance work on the boilers, which he separately opined was a cause of Batchelor's disease, R/A 14348, as well as FP&L's own work removing insulation.

Importantly, however, in giving his aggregate opinion, Dr. Finkelstein admitted that he did not have enough information to quantify the amount of asbestos to which Batchelor was allegedly exposed at the plant or the toxicity of such exposures. R/A 14375-80. Consequently, he could not perform a risk assessment in that regard. *Id.*

Instead, relying on the "enormous difference" between common background

exposures and exposures from directly removing asbestos-containing insulation for an hour, Dr. Finkelstein opined to a substantial degree of medical certainty that Batchelor, who never personally removed any insulation, was exposed to "high enough" levels of asbestos fibers to cause mesothelioma. R/A 14412.

In so opining, Dr. Finkelstein made multiple assumptions. He first assumed that the dust Batchelor recalled breathing was neither natural dust nor dust from non-asbestos-containing insulation, but rather was dust from insulation made with asbestos. R/A 14346. He admitted, however, that "one would require documentation to confirm that speculation." R/A 14346. Batchelor himself never identified the specific areas where he worked when insulation was being removed, and no witness connected any document relating to the asbestos-containing insulation originally installed at that plant with particular areas where Batchelor worked years later.

Dr. Finkelstein also assumed that Batchelor was always "standing within a few feet" of the person who was removing insulation. R/A 14345. But Batchelor never said that. He never quantified his distance from the person performing the insulation removal, merely saying they were "pretty close together" and he "could be right near" them. R/A 14478, 14608.

Dr. Finkelstein admitted that if someone is "about ten feet away the level is about half what it would be" for the person actually doing the work, and that being

outside would affect the flow of asbestos fibers in the air. R/A 14414-15. But Batchelor never quantified the distance between him and those removing insulation and he never testified that he was always within 10 feet of them.

Further, Dr. Finkelstein assumed that Batchelor was exposed to dust from asbestos-containing insulation often enough and long enough to cause his disease. Batchelor, however, never testified regarding how often insulation was removed in his presence or how long he was in the vicinity. While Dr. Finkelstein based his opinion on the difference between background exposures and exposures from directly removing asbestos-containing insulation for an hour, Batchelor never testified that he was present for an hour.

Bechtel objected that Dr. Finkelstein's causation opinion was based on hypothetical facts not in evidence. R/A 14347. The trial court overruled the objection. *Id*.

6. *Bechtel's Request For Apportionment of Fault*

Bechtel argued that Georgia-Pacific (for its joint compound) and Ford, NAPA, and Bendix (for their brakes) should be included on the verdict form as *Fabre* defendants. R 15047-48. Dr. Finkelstein had expressly testified that Batchelor's asbestos exposures from working with those products were causes of his mesothelioma. R/A 14334-35, 14377. Batchelor himself had testified that he used those products and they contained no warnings. R/A 14588.

Nonetheless, the trial court ruled that it would not include those manufacturers on the verdict form as *Fabre* defendants. R 15046-51. The court announced, "[Y]ou-all just don't g[et] to look through the documents and say, 'Well, were any of these other people ever mentioned?'" R 15047.

Bechtel sought to point out that more evidence existed and that Batchelor himself and Dr. Finkelstein had established that these products were causes of Batchelor's mesothelioma, but the trial court stated:

> Then you would basically sit up there and say that if he ever repaired a patch in his home and he used a joint compound and he testified that he did that and there was dust created back when joint compounds contained this dust, that regardless of how de minimis, you are basically saying, and regardless of what the evidence presented was here, you are basically saying they need to go on the verdict form. Not happening.

R 15048. The court permitted only Foster Wheeler and FP&L to be included on the verdict form as *Fabre* defendants. R 15049.

7. *The Trial Court's Adverse Inference Sanction*

By obtaining expedited treatment under section 415.1115, Florida Statutes, the Batchelors effectively represented that they had diligently investigated the case and were ready for trial. *Intramed, Inc. v. Guilder*, 93 So. 3d 503, 506 (Fla. 4th DCA 2012). Nevertheless, in July 2016, months after obtaining an expedited trial setting for August 22, the Batchelors noticed corporate representative depositions for Bechtel. R 15628, 15651. Those depositions took place on August 4 and 5,

less than three weeks before the expedited trial. R 15720, 15936.

On August 7, the Batchelors filed a motion asserting that all remaining defendants had failed to produce documents and witnesses regarding FP&L's power plants in the 1970s and so should be sanctioned with a negative inference instruction. R 6075. The Batchelors never suggested that they had been unable to obtain documents or information from FP&L itself. Instead, they argued that Bechtel's corporate representatives had been inadequately prepared for their depositions and that they "anticipated" the same would occur with "the remaining Defendants." R 6076.

The trial court heard the Batchelors' motion on August 17—five days before trial. Due to a mistaken belief that the hearing was being reported by a court reporter in the courtroom, no transcript exists. R 15032, SR 63-65. But the hearing was thereafter discussed on the record, R 15030-33, and the parties subsequently filed an agreed statement of proceedings, which the trial court approved. SR 108-13.

At the hearing, the Batchelors argued that Bechtel's corporate representatives had been inadequately prepared with documents and information regarding the Turkey Point plant between 1974 and 1980. SR 108-09. In turn, Bechtel argued that the time at issue was 36-42 years ago and the Batchelors had waited until the eve of trial to raise any concerns. SR 109.

The trial court asked Bechtel whether it had tried to locate its former employees at the plant to learn what information they might remember and suggested that Bechtel could have sent them postcards. SR 109. Bechtel explained it had not done so in part because it had been unsuccessful with such searches in litigation involving other plants. SR 109. Bechtel also maintained that, to prepare its corporate representatives regarding the company's knowledge, it was not required to search for former employees who worked at the Turkey Point plant decades ago and that sanctions were not appropriate. SR 109.

The trial court denied the motion insofar as it sought a negative inference instruction based a lack of documents from the 1970s. SR 109. The court ruled, however, that it would give the jury a negative inference instruction because Bechtel should have searched for former employees with relevant information to prepare its representatives for deposition. SR 109. Bechtel objected, and the court stated that it made the ruling over Bechtel's objection, which was preserved. SR 110. The court directed the parties to submit an instruction that complied with the court's ruling. SR 110.

Pursuant to the court's directive, Bechtel—now the last remaining defendant—submitted an instruction at the charge conference. R 15028. The court modified it, without objection, and ruled that it would instruct the jury as follows:

> If you find that Bechtel Corporation and Bechtel Construction's failure to produce persons employed at Turkey Point between 1974

> and 1980 to testify regarding Mr. Batchelor's work at Turkey Point is unreasonable and that their testimony would have been relevant to Mr. Batchelor's work activities, you are permitted to infer that the evidence would have been unfavorable to Bechtel.

R 15028-33, 15069. The trial court gave the jury this instruction immediately after instructing on the Batchelors' premises liability claim against Bechtel. R 15069.

8. *The Verdict*

The jury found in the Batchelors' favor. R 8948-49, 15211-12. It awarded Batchelor over $15 million, and additionally awarded his wife $6 million for loss of consortium. The jury apportioned fault 60 percent to Bechtel, 35 percent to FP&L, and 5 percent to Foster Wheeler.

9. *Bechtel's Directed Verdict & Post-Trial Motions*

To permit the case to proceed expeditiously before the jury, the trial court directed the parties to defer directed verdict motions, stating they were preserved. R 15053, 15214-15. The court then directed Bechtel to file its directed verdict motions in writing after trial, again stating they were preserved. R 15214-15.

Bechtel did so, arguing that the Batchelors failed to present competent substantial evidence to establish their premises liability claim and the derivative loss of consortium claim that depended on the premises liability claim. R 15525-72. Bechtel alternatively sought a new trial based on, among other things, the trial court's adverse inference instruction and the exclusion of various *Fabre* defendants from the verdict form. *Id.* The court denied Bechtel's motions. R 16349.

SUMMARY OF ARGUMENT

Point I—Judgment Is Required For Bechtel As A Matter Of Law

Although this is a case involving asbestos-related disease, it is not a products liability case against the manufacturers of asbestos-containing products that Batchelor used throughout his life. Nor is it a case alleging that Bechtel negligently exposed Batchelor to asbestos as a result of Bechtel's own removal of insulation during its maintenance work at the Turkey Point power plant.

Rather, the Batchelors claimed that Bechtel owed premises liability duties to Batchelor with respect to all asbestos exposures at FP&L's plant, regardless of who caused them. That claim fails as a matter of law.

First, and dispositively, Bechtel had no contractual right to control access to FP&L's power plant, and there is no evidence Bechtel ever assumed such control. Under Florida law, however, the right to control access to premises is a requisite foundation for imposing premises liability duties. This lack of duty, an issue of law for the court, is fatal to the Bachelors' premises liability claim.

That claim also fails for the independent reason that there is no evidence of the levels of airborne asbestos fibers actually existing at the plant between 1974 and 1980, and no expert testified that the levels of airborne asbestos fibers would have been so high during insulation removal as to constitute a known dangerous condition. But, that too is an essential element of a premises liability claim.

Finally, the Batchelors failed to demonstrate the toxicity of Batchelor's alleged asbestos exposures at the plant. That evidence was required under Florida law to establish causation. Further still, their expert's specific causation opinion rested on speculation and an impermissible pyramiding of inferences.

Point II—In All Events, A New Trial Is Required

The trial court erroneously refused to include as *Fabre* defendants the manufacturers of various asbestos-containing products Batchelor used over the years. Batchelor testified that he breathed dust when using those products, which contained no warnings, and his specific causation expert unequivocally opined that those products were causes of Batchelor's mesothelioma. Given that evidence, the *Fabre* issue should have gone to the jury, as a recent asbestos decision of the Fourth District has made clear.

Furthermore, the trial court erroneously sanctioned Bechtel by giving a jury instruction allowing the jury to draw inferences adverse to Bechtel. The court misapplied the rules of civil procedure in ruling that Bechtel had been required to search for former employees from 36-42 years ago in order to prepare its corporate representatives for deposition and in sanctioning Bechtel even though it had violated no order compelling it to make such a search. Lesser sanctions were available, and this severe sanction deprived Bechtel of a fair trial.

ARGUMENT

I. Bechtel Is Entitled To Judgment On The Batchelors' Premises Liability Claim.

The Batchelors made the strategic decision to proceed against Bechtel on a ***premises liability*** claim. They claimed Bechtel was liable for failing to warn Batchelor about, and protect him from, allegedly dangerous levels of airborne asbestos fibers at the Turkey Point plant between 1974 and 1980.

By advancing that claim, the Batchelors avoided having to show that Bechtel's own work caused Batchelor's disease, as would be required with a general negligence claim. Instead, they asserted Bechtel was liable even if his exposures were created by others, including (1) the premises owner who employed Batchelor, FP&L, or (2) the contractor FP&L hired for boiler maintenance, Foster Wheeler.

When the evidence is examined under controlling law, and the Batchelors' speculation is laid bare, their premises liability claim fails as a matter of law.

A. Standard Of Review

This Court reviews the denial of a motion for directed verdict or judgment as a matter of law de novo, taking the evidence in the light most favorable to the nonmoving party. *Fasani v. Kowalski*, 43 So. 3d 805, 812 (Fla. 3d DCA 2010).

B. No Evidence Showed That Bechtel Was In Possession Or Control Of FP&L's Premises From 1974 To 1980 And Bechtel Accordingly Owed No Premises Liability Duties To FP&L's Employees There.

Whether premises liability duties exist "is generally the court's responsibility to determine as a matter of law . . . ." *Jones v. Basha, Inc.*, 96 So. 3d 915, 916 (Fla. 2d DCA 2011). Such duties only exist if the defendant was in possession or control of the premises. *E.g.*, *Lisanti v. City of Port Richey*, 787 So. 2d 36, 37 (Fla. 2d DCA 2001). Specifically, the *sine qua non* of premises liability, and the basis for imposing a duty to protect persons from dangerous conditions on the property, is the right to control their access to the premises.

"***The duty to protect others*** from injury resulting from a dangerous condition on the premises ***rests on the right to control access to the property***." *Welch v. Complete Care Corp.*, 818 So. 2d 645, 649 (Fla. 2d DCA 2002); *see also Brown v. Suncharm Ranch, Inc.*, 748 So. 2d 1077, 1078 (Fla. 5th DCA 1999) (same); *Bovis v. 7-Eleven, Inc.*, 505 So. 2d 661, 663-64 & n.1 (Fla. 5th DCA 1987) (same).

In *Jones*, although a lease expressly made the tenant responsible for maintaining the premises in a safe condition, the Second District recognized that the property owner could have a concurrent duty to do so. The question for the court was whether the owner had in fact "exercised some control over the premises ***and the public access to it***." 96 So. 3d at 916. Because the owner did not do so, it was entitled to judgment on the premises liability claim of the tenant's customer.

For the same reason, judgment for Bechtel is required as a matter of law. In advancing their premises liability claim, the Batchelors argued that Bechtel had possession or control of FP&L's Turkey Point premises from 1974 through 1980. But no evidence showed that Bechtel was granted or had assumed the right to control access to FP&L's premises during that time period.

The evidence showed that Turkey Point was a secured and highly regulated power plant that included a nuclear facility, with hundreds of FP&L's own employees working on the site. Bechtel was merely one contractor, albeit a significant one, that FP&L permitted onto its premises to perform maintenance work on equipment there, at FP&L's explicit direction. Bechtel went only where FP&L told it to go, to do what FP&L told it to do, when FP&L told it to do so.

As such, controlling access to the plant premises was neither Bechtel's responsibility nor its right. Bechtel was certainly present on the premises, but presence does not establish a right to control access by others to the premises. Batchelor himself admitted that he took direction only from FP&L and his union. He did not take orders from contractors.

The Batchelors argued below that Bechtel could have concurrent premises liability duties with FP&L. Such duties have been imposed on a person other than the property owner where an agreement, such as a lease, provided the non-owner with control over the premises. *E.g.*, *Metsker v. Carefree/Scott Fetzer Co.*, 90 So.

3d 973, 977 (Fla. 2d DCA 2012); *Benton Inv. Co. v. Wal-Mart Stores, Inc.*, 704 So. 2d 130, 132-33 (Fla. 1st DCA 1997); *Craig v. Gate Maritime Props.*, 631 So. 2d 375, 377-78 (Fla. 1st DCA 1994); *Improved Benevolent & Protected Order of Elks of the World, Inc. v. Delano*, 308 So. 2d 615, 618 (Fla. 3d DCA 1975).

No such agreement exists in this case.

In opposing Bechtel's directed verdict motion, the Batchelors pointed to a 1978 services agreement between Bechtel and FP&L (R/A 13508-40), asserting that it made Bechtel "responsible" for maintaining steam generators at the plant. R 15582. As shown on its face, however, nothing in that agreement addressed control of the premises, much less gave Bechtel a right to control access by others while it was performing equipment maintenance there. R/A 13508-12. In fact, it did not even make Bechtel "responsible" for maintaining the generators but merely identified them as the subject of future FP&L work orders. R/A 13510-12.

The Batchelors also pointed to the agreement's requirement that upon its termination, Bechtel was to stop work and surrender to FP&L all equipment FP&L had provided, arguing this established Bechtel's control over the plant premises "until FP&L terminated the agreement." R 15582. But that provision simply required the return of equipment after the agreement was terminated, and it conferred no right of control over the premises during the agreement. R 13526.

In closing arguments to the jury, the Batchelors similarly argued that

Bechtel's agreements with FP&L placed Bechtel "in charge of" the plant premises. R 15084. As a matter of law, the agreements did no such thing. Nor could the jury otherwise speculate that Bechtel was "in charge of" and controlled the premises during unit shutdowns. As the authorities cited above establish, there must be evidence that FP&L granted Bechtel a right of control over FP&L's premises, including the right to control access thereto, or that Bechtel assumed such a right.

There was no such evidence. No witness testified, and no document showed, that Bechtel was "in charge of" or had assumed control over the plant premises themselves during shutdowns or otherwise. Nor did any witness testify, or any document show, that Bechtel had the right to control access to and exclude others, even from discrete areas where Bechtel itself was performing maintenance work. Moreover, the Batchelors' claim was not for Bechtel's own work but that Bechtel controlled the entire premises and was responsible for all airborne asbestos at the plant from 1974 to 1980, regardless of whose work produced it.

In opposing a directed verdict, the Batchelors also pointed out that Bechtel employees worked over a million hours at Turkey Point between 1976 and 1980. R 15582-83. That says much about the massive size of this plant and the amount of maintenance work it required. But Bechtel's presence on the premises does not establish it controlled the premises while the plant was being operated by FP&L.

Bechtel has searched for a Florida case where, in the absence of any

contractual or voluntary assumption of control of the business premises of a landowner, a contractor working on those premises was held to have premises liability duties to the landowner's employees. Bechtel has not found any such case, and the Batchelors cited none below. The law does not go so far.

Following trial, the Batchelors sought to avoid this failure of their evidence by asserting that they also prevailed on a general negligence claim wholly apart from their premises liability claim. R 15580-81. The record shows otherwise.

The Batchelors separately pled claims for negligent products liability (count II) and strict products liability (count III). R 59-67. They expressly abandoned those claims at trial. R 13835. They also stated that they were not proceeding on any claim based on Bechtel's original construction of the plant. *Id.*

That left only their premises liability claim in count I. As their counsel explained to the court during trial: "This case is about how they acted, knowing what they knew at the time and the premises part of it, did they control the premises during the time that Mr. Batchelor was there, and if they did, did they act as they should have given what they knew." R 14574.

Consistent with that theory of their case, the Batchelors' causation evidence did not address alleged exposures from Bechtel's own work in removing insulation at the plant, as a general negligence claim against Bechtel would have required. Instead, without referencing Bechtel at all, Dr. Finkelstein testified to causation

based on all of Batchelor's asserted exposures to all insulation removed at Turkey Point between 1974 and 1980. R 14346-47. Because Dr. Finkelstein did not opine that exposures Bechtel itself created during its maintenance work were a cause of Batchelor's disease, the Batchelors did not try, and as a matter of law did not prove, a general negligence claim based on Bechtel's own work.

Indeed, the jury instructions made clear that, to hold Bechtel liable, the jury had to determine as a "preliminary" matter that Bechtel was in "possession or control" of the premises. R 15067. Thus, although the instructions identified two "claims," one was a claim for alleged negligence in failing to warn Batchelor of the dangers of asbestos at the plant and the other was a claim for allegedly negligently failing to maintain the plant premises in a safe condition. R 15063-65. Both "claims" were premises liability theories encompassed within the only remaining count of the complaint—count I. Consistent with the complaint, the instructions did not set forth one claim for premises liability and a separate claim for general negligence based on Bechtel's own work removing insulation.

As such, the Batchelors' reliance below on *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), was misplaced. *McCain* addressed when a general duty of care exists based on the defendant's own conduct in creating a dangerous condition. It did not address the "additional" elements of a premises liability case: whether the defendant was in possession or control of the premises and had

knowledge of a dangerous condition thereon. *See Lisanti*, 787 So. 2d at 37.

For these reasons, the Batchelors failed to satisfy their burden of proof on the threshold element of possession or control. Judgment accordingly is required for Bechtel on the Batchelors' claims on this dispositive basis alone. As we now show, judgment for Bechtel is also required for two additional reasons.

C. Bechtel Also Is Entitled To Judgment Because No Evidence Showed That Asbestos Levels At Turkey Point Constituted A Condition Known At The Time To Be Dangerous.

The Batchelors also were required to prove that the levels of airborne asbestos levels at Turkey Point to which Batchelor could have been exposed were sufficiently high from 1974 to 1980 that they constituted a condition known at that time to be dangerous. *See Lisanti*, 787 So. 2d at 37 (knowledge of dangerous condition is essential element of premises liability claim). They failed to do so.

At the outset, it should be emphasized that Bechtel does not suggest that it was unaware at the time that asbestos could be dangerous. As OSHA explained in its 1972 promulgations, "[n]o one has disputed that exposure to asbestos of high enough intensity and long enough duration is causally related to asbestosis and cancers;" rather, "[t]he dispute is as to the determination of a specific level below which exposure is safe." R/A 12829.

Declaring that "the conflict in the medical evidence is resolved in favor of the health of employees," OSHA established "permissible exposure" limits over an

eight-hour work day, including a peak or "ceiling concentration." R/A 12831 (adopting 29 C.F.R. § 1910.93a(b)(1)-(2) (1972)). FP&L accordingly conducted air monitoring when asbestos was removed at the plant, but Bechtel had no records of those tests, which the trial court found was not unreasonable, given the passage of time. The Batchelors did not introduce any testimony or documents from FP&L or anyone else regarding test results from Batchelor's time at Turkey Point.

In fact, the only evidence at trial of the results of FP&L's air monitoring involved the 1982 test showing that there were no dangerous levels of airborne asbestos fibers when asbestos removal took place. Specifically, the 1982 tests found that, even during that indoor asbestos removal, the resulting asbestos levels were within OSHA's then-applicable permissible exposure limits, including the exposure ceiling. There was no evidence showing that, during the period Batchelor worked at Turkey Point, the levels of outdoor airborne asbestos fibers ever exceeded OSHA's permissible exposure limits.

The Batchelors argued below that "even if Bechtel never exceeded OSHA limits, that does not entitle Bechtel to a directed verdict." R 15586. The Batchelors correctly cited *Florida Power & Light Co. v. Glazer*, 671 So. 2d 211, 214 (Fla. 3d DCA 1996), for the principle that compliance with a regulatory standard "does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions." *Id.*

But that argument misses the point here. As FP&L's 1982 test shows, it cannot simply be assumed that removing insulation on the premises necessarily produced airborne asbestos fibers at levels known at the time to be dangerous. There had to be evidence that this was the case. The Batchelors presented none.

In particular, no witness testified that removal of asbestos-containing insulation at the plant would have likely created a condition for persons like Batchelor that would have been known to be dangerous under ***any*** applicable standard. Instead, the Batchelors relied on their specific causation expert, Dr. Finkelstein, regarding the dangers of asbestos. He identified figures with respect to exposures for persons who tear out insulation, but he never correlated those figures to OSHA's permissible exposure limits for the workplace or to any other then-existing standard of care.

Indeed, the 4.9 fibers per cubic centimeter of air figure Dr. Finkelstein cited for someone directly removing asbestos-containing insulation was not expressed as an eight-hour time-weighted average, as OSHA's permissible exposure limits are measured. In addition, that figure was significantly below the 10.0 fibers per cubic centimeter exposure ceiling that OSHA adopted in 1972.

Simply put, even if compliance with OSHA's permissible exposure limits were not enough to establish the absence of a dangerous condition, the Batchelors could not show that a dangerous condition actually existed without competent

substantial evidence that asbestos levels at Turkey Point violated some applicable standard. There is no such evidence.

In opposing Bechtel's motion for a directed verdict, the Batchelors relied on two internal Bechtel memoranda from 1980, the last year of Batchelor's employment at Turkey Point. They advised Bechtel employees working on a particular construction project on the nuclear side of the plant to take protective measures if they experienced "heavy" amounts of airborne asbestos fibers.

But Batchelor stopped working on the nuclear side of the plant in 1976, however, and there is no evidence he was ever around that construction project on the nuclear side. Those documents in no way showed that Batchelor's work at Turkey Point exposed him to a dangerous condition and thus required Bechtel to warn and protect him from that condition.

In short, the Batchelors impermissibly urged the jury to speculate that Bechtel knew or should have known that Batchelor was exposed to a dangerous condition in the form of airborne asbestos fibers and so should have taken steps to warn and protect him. No evidence supported such speculation. For this reason as well, the Batchelors' premises liability claim fails as a matter of law.

D. In Addition, Bechtel Is Entitled To Judgment Because The Bachelors' Causation Evidence Was Legally Insufficient.

Finally, the Batchelors failed to show, without speculation, that airborne asbestos fibers at the Turkey Point plant caused Batchelor's mesothelioma. Mere

exposure to asbestos is not enough to establish causation.

To prove that exposure to asbestos from asbestos-containing products "contributed substantially to producing the injury complained of," the plaintiff must show "sufficient exposure" to cause the disease at issue, not speculation or a pyramiding of inferences. *Reaves v. Armstrong World Indus.*, 569 So. 2d 1307, 1308-09 (Fla. 4th DCA 1990) (exposure and causation evidence in asbestos case rested on speculation and improper inferences); *Wiley v. U.S. Mineral Products Co.*, 660 So. 2d 1087, 1087-89 (Fla. 1st DCA 1995) (same in silica case).

1. Dr. Finkelstein failed to establish the toxicity of the insulation to which Batchelor was allegedly exposed.

In cases asserting that exposure to asbestos-containing products resulted in mesothelioma, Florida law requires evidence of both "***how often the products were used on the job sites, and the toxicity of those products as they were used.***" *Snoozy v. U.S. Gypsum Co.*, 695 So. 2d 767, 769 (Fla. 3d DCA 1997); *see also Lagueux v. Union Carbide Corp.*, 861 So. 2d 87, 88 (Fla. 4th DCA 2004); *W.R. Grace & Co.-Conn. v. Dougherty*, 636 So. 2d 746, 748 (Fla. 2d DCA 1994).

These cases addressed causation in the context of defendants' efforts to apportion fault to nonparties: because the defendants failed to present the requisite evidence of the toxicity of the asbestos-containing products as used by the plaintiffs, a directed verdict was required on their apportionment of fault defenses. Given the same lack of evidence of how often Batchelor was exposed to asbestos-

containing insulation at Turkey Point and the toxicity of any such insulation, Bechtel was entitled to a directed verdict on the Batchelors' claim against it.

Effectively conceding they did not satisfy these toxicity requirements, the Batchelors argued below that these requirements apply only to defendants seeking to apportion fault to nonparties, not plaintiffs seeking to prove a defendant's fault. R 15590. That would improperly hold defendants to a higher causation burden than plaintiffs, a position unsupported by the law.

Lagueux, *Snoozy*, and *Dougherty* are predicated on a fundamental and widely recognized principle with respect to suits for alleged injuries from toxic products: "[p]roof of substantial factor causation requires some quantification of the dose . . . ." *Georgia-Pacific Corp. v. Bostic*, 439 S.W. 3d 332, 355 (Tex. 2014). This principle is based on the recognition that "the dose makes the poison," which "impl[ies] that all chemical agents are harmful—it is only a question of dose." *Berry v. CSX Transp., Inc.*, 709 So. 2d 552, 559 (Fla. 1st DCA 1998). As the First District observed in *Berry*, "even water if consumed in large enough quantities can be toxic." *Id.*

Other cases make the same point. *See, e.g.*, *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 733 (Va. 2013) ("[E]xperts must opine as to what level of exposure is sufficient to cause [disease], and whether the levels of exposure at issue in this case were sufficient."); *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 278 (5th Cir.

1998) ("Because he had no accurate information on the level of [Plaintiff's] exposure . . . [Plaintiff's expert] necessarily had no support for the theory that the level of chemicals to which [Plaintiff] was exposed caused [his injury]."); *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 13 (D. Mass. 1995) (rejecting causation testimony in radiation exposure case that "[i]n layman's terms . . . assumes that if a lot of something is bad for you, a little of the same thing, while perhaps not equally bad, must be so in some degree.").

Significantly, *Lagueux*, *Snoozy*, and *Dougherty* are fully consistent with the Supreme Court of Florida's recognition in *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985), that asbestos products "have widely divergent toxicities, with some asbestos products presenting a much greater risk of harm than others." *Id.* at 538. Those decisions are fully applicable here. Because the Batchelors failed to establish the toxicity of Batchelor's alleged insulation exposures at Turkey Point, they did not satisfy their burden of proof.

2. Dr. Finkelstein relied on speculation and the improper pyramiding of inferences.

Florida law precludes stacking inferences on top of an initial inference unless the initial inference has been established to the exclusion of any reasonable doubt. *See e.g.*, *Broward Executive Builders, Inc. v. Zota*, 192 So. 3d 534, 537-38 (Fla. 4th DCA 2016); *Stanley v. Marceaux*, 991 So. 2d 938, 940 (Fla. 4th DCA 2008). But Dr. Finkelstein did exactly that.

First Inference

First, and critically, Dr. Finkelstein assumed that the dust Batchelor recalled was asbestos-containing insulation, further admitting there would have to be "documentation" to show whether such insulation in fact contained asbestos or else his opinion would be "speculation." R/A 14346. The Batchelors presented no documentation or other evidence establishing that asbestos-containing insulation was present in the particular areas where Batchelor worked at the time he worked there. Nor can it be said that the threshold inference Dr. Finkelstein made was reasonable to the exclusion of any reasonable doubt. To the contrary, other inferences were entirely reasonable, thereby precluding the stacking of inferences.

Indeed, as Batchelor himself acknowledged, there was natural dust around this open-air power plant, and he did not know whether the dust he remembered breathing even came from insulation. He likewise did not know whether the particular insulation removed around him contained asbestos.

Some insulation originally installed at the plant included asbestos. But other insulation did not include asbestos, and some was a mix of asbestos and mineral wool. No witness connected any document concerning the original installation of different kinds of insulation to Batchelor's claimed exposures years later.

To be clear, although Bachelor's own testimony showed that maintenance was regularly performed on the units, no evidence showed how much original

asbestos-containing insulation had been removed and replaced with non-asbestos insulation before Batchelor worked nearby. As of October 14, 1975, federal law provided that insulation installed after that date "shall contain no commercial asbestos." 40 Fed. Reg. 48292, 48301 (Oct. 14, 1975) (§ 61.22(i)); R/A 14353-54.

Furthermore, under the OSHA regulations, multiple safety measures were required if FP&L's air monitoring showed levels of asbestos exceeding permissible exposure limits. By Batchelor's own testimony, there were no warnings or respirators provided on the conventional side of the plant. It is a reasonable inference that a heavily regulated utility such as FP&L would have taken such measures if air levels at its plant exceeded those limits.

It also is reasonable to assume that workers at the plant would have complained to regulators or their union if airborne asbestos appeared to be heavy during maintenance, just as they had during the original construction. There is no evidence, however, of any regulatory citation or union complaint at Turkey Point in this regard during the years Batchelor worked there.

Given all this, it is, at a bare minimum, a reasonable inference that not all insulation removed around Batchelor contained asbestos, let alone sufficient amounts of asbestos to create dangerous levels of airborne asbestos fibers. Accordingly, Dr. Finkelstein's inference to the contrary was not established to the exclusion of any reasonable doubt and could not support the multiple additional

inferences he then had to make to reach his causation opinion.

Further Inferences

Next, after making his initial inference that Batchelor was exposed to asbestos-containing insulation, Dr. Finkelstein impermissibly further assumed that Batchelor always was "within a few feet" of someone removing insulation. But the evidence did not establish any such thing.

Batchelor said that he and the persons removing insulation were "pretty close together" and that he "could be working right near them on something else." But he never said he was always "within a few feet" of them. Importantly as well, he never said that he always was less than "ten feet" away, a distance that Dr. Finkelstein admitted would have cut a bystander's exposures in half.

Further still, Dr. Finkelstein necessarily assumed that such close exposures to asbestos-containing insulation occurred with sufficient frequency and duration to cause mesothelioma. Yet there was no evidence establishing how often Batchelor worked around persons removing insulation or how long the removal took. Batchelor gave no testimony in that regard and never suggested he stood there for an hour—the figure on which Dr. Finkelstein relied. Dr. Finkelstein also admitted that the units being outside would affect the airflow of asbestos fibers, and he did not realize that those units were in fact outdoors. R/A 14415.

As such, the evidence does not support the multitude of factual assumptions

that Dr. Finkelstein stacked to opine that Batchelor's mesothelioma was caused by exposure to asbestos-containing insulation. Thus, even apart from the toxicity requirements that Dr. Finkelstein failed to satisfy, his speculative testimony cannot constitute competent substantial evidence of causation. *E.g.*, *Arkin Constr. Co. v. Simpkins*, 99 So. 2d 557, 561 (Fla. 1957) ("It is elementary that the conclusion or opinion of an expert witness based on facts or inferences not supported by the evidence in a cause has no evidential value.").

Accordingly, judgment as a matter of law is required for Bechtel for this additional reason. Notably, that would be so even had the Batchelors pursued a general negligence claim based on Bechtel's own removal of insulation, as Dr. Finkelstein's causation opinion never established Bechtel's own work released asbestos in levels sufficient to be a cause of Batchelor's mesothelioma.

II. At The Very Least, Bechtel Is Entitled To A New Trial.

Bechtel should, at the very least, receive a new trial. The trial court erroneously excluded Ford, NAPA, Bendix, and Georgia Pacific from the verdict and unfairly tilted the playing field in the Batchelors' favor by erroneously giving the jury an adverse inference instruction.

A. The Trial Court Erred In Excluding Certain *Fabre* Defendants From The Verdict Form.

1. Standard of review

An order excluding *Fabre* defendants from the verdict is, in legal effect, a

directed verdict, and on this issue the Court must view all evidence in the light most favorable to Bechtel. *San Marco Realty, Inc. v. Dopierala*, 14 So. 3d 1108, 1109 (Fla. 2d DCA 2009). The sufficiency of the evidence to support a directed verdict is a question of law that this Court reviews de novo. *John Moriarty & Assoc. of Fla. v. Murton Roofing Corp.*, 128 So. 3d 58, 59 (Fla. 3d DCA 2013).

2. The evidence supported apportionment of fault to the nonparty manufacturers of asbestos-containing products.

At trial, Bechtel requested that the verdict form include as *Fabre* defendants certain manufacturers of products that Batchelor admitted he used during personal work. The trial court refused that request, suggesting any such exposures were "de minimis." To the contrary, the Batchelors' own expert testified that Batchelor's exposures to asbestos from those products were causes of his mesothelioma. Those manufacturers accordingly should have been included on the verdict.

In *Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016), the Fourth District held that a plaintiff's causation expert's testimony should have been excluded because it was legally insufficient to establish causation. *Id.* at 110. The court explained that, if the expert's testimony were legally sufficient, then that testimony, together with the plaintiff's testimony about his various exposures, would have provided a sufficient basis for "at least six *Fabre* defendants" to be included on the verdict, and the court would have reversed for failure to include them. *Id.* at 106 n.10.

That is exactly the case here as well. The trial court ruled that the testimony from Dr. Finkelstein and Batchelor was sufficient to create a jury question on Bechtel's liability. If so, then the more explicit evidence provided by those same witnesses with respect to Batchelor's joint compound and brake work was sufficient to create a jury question on the fault of those products' manufacturers.

Batchelor testified that he performed dozens of automotive brake jobs using Bendix, Ford, and NAPA brakes, that he breathed dust the work produced, and that he never saw any warnings on the products. Dr. Finkelstein testified that all brakes in that time contained asbestos, and he opined that asbestos exposure from that brake work was a cause of Batchelor's mesothelioma.

Significantly, that causation testimony was far stronger than his causation testimony on the Batchelors' premises liability claim against Bechtel, as Dr. Finkelstein acknowledged that Batchelor was directly exposed to asbestos from using those asbestos-containing products himself. Dr. Finkelstein also performed an actual risk assessment with respect to the brake exposures.

The Batchelors cannot have it both ways. If Dr. Finkelstein's causation testimony was sufficient to permit their claim to proceed against Bechtel, then the trial court necessarily erred in failing to include Bendix, Ford, and NAPA on the verdict form as *Fabre* defendants to whom the jury could also apportion fault.

Furthermore, Batchelor also admitted that he used Georgia-Pacific joint

compound when installing drywall in his basement over the course of a year, that he never saw any warnings on the containers, and that sanding the joint compound produced dust that he inhaled. Dr. Finkelstein testified that Batchelor's joint compound work exposed him to sufficient asbestos to be a cause of his disease.

Here too, if Dr. Finkelstein's causation testimony was sufficient to permit the Batchelors' claim to proceed against Bechtel, then it was sufficient for Georgia-Pacific to be included on the verdict form as a *Fabre* defendant.

Following trial, the Batchelors argued that excluding the *Fabre* defendants from the verdict form was appropriate because Bechtel purportedly failed to establish the toxicity of those product exposures, as required by *Snoozy*, *Lagueux*, and *Dougherty*. R 15591-92. But the Batchelors' own expert did so. Dr. Finkelstein testified that he quantified Batchelor's exposures from brakes and joint compound and performed a risk assessment for each. He then opined that Batchelor's exposures from those products were sufficient to cause mesothelioma.

In stark contrast, Dr. Finkelstein admitted that he was unable to quantify Batchelor's supposed exposures to asbestos from insulation at the Turkey Point plant or conduct a risk assessment for that alleged exposure. Nonetheless, the trial court ruled that Bechtel could be held liable.

In the same vein, the trial court also allowed Foster Wheeler to be included on the verdict form as a *Fabre* defendant, based on the causation opinion

Dr. Finkelstein gave at trial in support of the Batchelors' then-pending claim against Foster Wheeler. Yet Dr. Finkelstein did not establish the toxicity of exposures attributable to Foster Wheeler or perform a risk assessment for them.

Once again, the Batchelors cannot have it both ways. If their expert's causation evidence was sufficient as to Bechtel as a defendant and Foster Wheeler as a *Fabre* defendant, the trial court necessarily erred by excluding Ford, NAPA, Bendix, and Georgia-Pacific from the verdict form as *Fabre* defendants.

B. The Trial Court Erred In Sanctioning Bechtel With An Adverse Inference Jury Instruction.

On a motion for sanctions heard five days before trial began, the trial court ruled that, in order to prepare its corporate representatives for their depositions, Bechtel had been required to search for former Bechtel employees who worked at Turkey Point between 1974 and 1980 to determine if any had relevant information. As a sanction, the court instructed the jury that if it found Bechtel unreasonably failed to produce persons who could have provided relevant testimony about Batchelor's work at Turkey Point, then the jury could infer that evidence would have been unfavorable to Bechtel. This was error.

1. Standard of review

This Court reviews a discovery sanction for an abuse of discretion. *Toll v. Korge*, 127 So. 3d 883, 886-87 (Fla. 3d DCA 2013). A trial court's construction and interpretation of the rules of civil procedure, however, is a pure question of

law, subject to de novo review on appeal. *Bank of New York Mellon v. Condominium Assoc. of La Mer Estates, Inc.*, 175 So. 3d 282, 285 (Fla. 2015).

2. The rules of civil procedure did not require Bechtel to search for former employees who worked at Turkey Point 36-42 years ago to prepare its corporate representatives for deposition.

Under rule 1.310(b)(6), a corporate representative witness is required to give deposition testimony "about matters known or reasonably available to the organization." Fla. R. Civ. P. 1.310(b)(6). Thus, "[t]he [organization] must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources." *Carriage Hills Condo., Inc. v. JBH Roofing & Const., Inc.*, 109 So. 3d 329, 336 (Fla. 4th DCA 2013).

The Batchelors made no showing that any former Bechtel employees who worked at Turkey Point 36-42 years ago were reasonably available to Bechtel and had relevant information for purposes of a rule 1.310(b)(6) deposition. Although their counsel later said at the charge conference that they had identified a former Bechtel employee who worked at the plant, R 15027-28, they never made any showing regarding what relevant information they thought he might provide.

This is not a case, then, involving known material witnesses who are former employees. Instead, the Batchelors contended that rule 1.310(b)(6) required the defendants to search for former employees on the off chance someone might recall something responsive to the issues in the Batchelors' corporate deposition notices.

The trial court agreed and, in sanctioning Bechtel, stated that it could have mailed out "postcards" to all former employees who worked at Turkey Point between 1974 and 1980 and, if any were located, conducted follow-up interviews to determine if anyone had any information regarding the topics identified in the Batchelors' deposition notices. But rule 1.310(b)(6) cannot be read to impose such an obligation regardless of the passage of time, and no Florida case has required a corporation to take the steps required by the trial court to prepare a corporate representative for deposition about events decades earlier. Bechtel should not have been sanctioned for failing to take these steps.

3. In all events, the trial court erred by imposing this sanction.

In addition, the trial court's sanction was impermissible under the circumstances. Although trial was set to begin on August 22, 2016, the Batchelors did not send their deposition notices until July 2016 and did not depose the representatives until August 4 and 5, just weeks before the expedited trial date they previously sought and obtained. Given the Batchelors' failure to seek discovery in a timely manner, it was unreasonable to require Bechtel to have launched a search for former employees from 36-42 years ago to prepare for the noticed depositions.

Furthermore, because the goal of Florida Rule of Civil Procedure 1.380 is "not penal," but rather "compliance" with the discovery rules, sanctions should be imposed only after the party has been given a reasonable opportunity to comply

with the discovery requirements. *Florida Physicians Ins. Reciprocal v. Baliton*, 436 So. 2d 1110, 1112 (Fla. 4th DCA 1983). As this Court has held, "[a] sanction remedy for failure to allow discovery is legally unavailable to a party until the opposing party is first subject to and violates an order to provide such discovery." *Saewitz v. Saewitz*, 79 So. 3d 831, 835 (Fla. 3d DCA 2012).

Here, no prior order had compelled Bechtel to search for former employees to prepare its corporate representatives for deposition. Hence, Bechtel could not be sanctioned for not having done so.

Finally, any sanction should have involved lesser relief. Had some sanction been appropriate, the trial court could have awarded fees for the second round of corporate representative depositions that in fact were taken, *see* R 16158-295, or required Bechtel to attempt an immediate search for former employees before those depositions occurred. The court instead erroneously leapt straight to giving the jury an adverse inference instruction.

In *Jordan v. Masters*, 821 So. 2d 342 (Fla. 4th DCA 2002), the trial court similarly instructed the jury that where a party fails to produce evidence within its control, an adverse inference can be drawn that the evidence would have been unfavorable to that party. *Id.* at 346. The Fourth District reversed, observing it had found no case approving such an instruction. It then held:

> ***For the court to tell a jury that an adverse inference may be drawn from the failure to produce evidence invades the province of the***

> ***jury. . . .*** Lawyers are entitled to argue adverse inferences from the evidence as part of their closing arguments.

Id. at 346-47.

The Fourth District stated that the trial court should have first determined whether the allegedly missing evidence existed or should have existed and then determined whether its absence hindered the plaintiff's ability to proceed. Because that was not done, a new trial was required. *See also Lowder v. Economic Opportunity Family Health CT.*, 680 So. 2d 1133, 1135 (Fla. 3d DCA 1996) (affirming trial court's decision not to give an adverse inference instruction); Fla. Std. Jury Inst. (Civ.) 601.2 (Committee Note 3) (stating inferences from the failure to produce a witness "are more properly referred to in counsel's argument").

Just as in *Jordan*, the instruction required by the trial court's sanction ruling in this case was precisely an improper comment on the evidence. *See also Hamilton v. State*, 109 So. 2d 422 (Fla. 3d DCA 1959) (explaining why judicial comments on the evidence destroy the impartiality of the trial).

Significantly, even in the very different context of spoliation, this Court has agreed with the Fourth District in *Jordan* and held that a trial court erroneously invaded the province of the jury by giving an adverse inference instruction. *Palmas y Bambu S.A. v. E.I. DuPont de Nemours and Co., Inc.*, 881 So. 2d 565, 579-83 (Fla. 3d DCA 2004). That is even more the case here, where there was no evidence of improper spoliation of evidence by Bechtel.

Furthermore, just as in *Jordan*, there is no evidence that any former Bechtel employee with relevant information about Batchelor's work at Turkey Point was reasonably available to Bechtel. Nor was there any showing that the Batchelors' ability to proceed at trial was hindered by any failure of Bechtel to search for persons employed decades earlier. The Batchelors themselves were free to search for and interview former Bechtel employees, as they were not under Bechtel's control at the time of this lawsuit, and to call them as witnesses at trial. Yet they did not even call the one former Bechtel employee they said they had located.

The Batchelors likewise could have sought such information from FP&L, who, as a highly regulated utility, would have been the best source of documents and information about asbestos levels at its own plant. Yet the Batchelors did not depose any FP&L personnel in this case or call them as witnesses at trial. Nor did they call any representative of Batchelor's union about conditions at the plant.

This is not a case where Bechtel's former employees alone could have knowledge about the conditions at FP&L's plant. Bechtel's decision not to search for former employees who worked there 36-42 years ago to prepare its corporate representatives for depositions on Bechtel's knowledge cannot be said to have hindered the Batchelors' ability to proceed with their case at trial.

Indeed, when the Batchelors obtained an expedited trial months earlier, their request effectively represented that they had diligently investigated the case and

were ready for trial. *Intramed*, 93 So. 3d at 506. On that basis, they forced Bechtel to prepare for an expedited trial regarding matters occurring decades earlier, and they should not have needed such discovery on the eve of that trial.

The adverse inference instruction unfairly tipped the case in the Batchelors' favor. It permitted the jury to infer the existence of harmful evidence, called into question Bechtel's conduct in the litigation itself, and effectively shifted the burden to Bechtel to prove it was not liable. Because the trial judge himself gave that instruction to the jury just before closing arguments, the Batchelors' counsel did not even feel the need to mention it in closing.

The Batchelors cannot credibly suggest that the trial court's error was harmless beyond any reasonable doubt. *Special v. West Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014) (placing burden on party benefiting from error to prove it was harmless beyond reasonable doubt). In fact, in opposing Bechtel's new trial motion, they admitted that "there is no way to know" if the jury drew an adverse inference. R 15602. A new trial is thus required.

CONCLUSION

For all of these reasons, Bechtel is entitled to judgment as a matter of law on the Batchelors' premises liability claims, including Regina Batchelor's derivative loss of consortium claim, which rested entirely on the premises liability claim. At a minimum, a new trial should be held on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2017, a true and correct copy of this Appendix was served via email on Juan P. Bauta (ncb@ferrarolaw.com, jpb@ferrarolaw.com), and Paulo R. Lima (prl@ferrarolaw.com, jcf@ ferrarolaw.com), of The Ferraro Law Firm, 600 Brickell Avenue, Suite 3800, Miami, Florida 33131, counsel for Appellees.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210.

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