

Not Reported in Cal.Rptr.3d, 2003 WL 22133183 (Cal.App. 4 Dist.)

**Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)**

(Cite as: 2003 WL 22133183 (Cal.App. 4 Dist.))

Only the Westlaw citation is currently available.

California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 2, California.

LOCKHEED MARTIN CORPORATION, Petitioner,  
v.

The SUPERIOR COURT of the County of San Bernardino, Respondent,

Karen ADAMS et al., Real Parties in Interest.

**No. E033201.**

**(Super.Ct.No.RCV31496).**

Sept. 16, 2003.

ORIGINAL PROCEEDINGS in mandate. [Ben T. Kayashima](#), Judge. Petition granted.

Gibson, Dunn & Crutcher and [Robert S. Warren](#) and [Christopher L. Pitet](#) for Petitioner.

No appearance for Respondent.

Engstrom, Lipscomb & Lack and [Walter J. Lack](#) and [Richard P. Kinnan](#); Girardi & Keese and [Howard Miller](#) for Real Parties in Interest.

#### OPINION

[RICHLI](#), Acting P.J.

\*1 Petitioner and defendant Lockheed Martin Corporation ("Lockheed") seeks a writ of mandate to set aside the trial court's ruling that shifts the burden of proof to it to disprove plaintiffs' estimates of the levels and spatial extent of groundwater contamination in Redlands. We agree that the trial court erred and grant the petition.

#### FACTUAL AND PROCEDURAL BACKGROUND

This is yet another petition arising from a series of related actions that have been consolidated for pre-trial purposes under the caption *In re Redlands Tort*

*Litigation.* The plaintiffs claim to have suffered a variety of personal injuries, and also wrongful deaths due to exposure to toxic chemicals that entered Redlands's groundwater as result of the manufacturing activities of the defendants. Plaintiffs allege that Lockheed contaminated the groundwater from 1954 to 1975 when it owned and operated a research and production facility for solid rocket propulsion systems.

Contamination of Redlands's groundwater was discovered in 1980 and tests have been conducted since that time to measure the level of the various contaminants. Measurements were not taken prior to 1980 so that both plaintiffs and Lockheed have retained experts to estimate the historic concentrations of contaminants using computer models. It is not surprising that the estimates of the levels of contamination by the two groups of experts differ, and that plaintiffs' experts' estimates are higher than Lockheed's experts. Plaintiffs contend that Lockheed failed to preserve records of its purchase, use, and disposal of toxic chemicals at the site; failed to report its waste discharges to the regional water board; and deliberately failed to test the groundwater for contamination. Due to the absence of such records, plaintiffs contended that the burden of proof on certain matters should be shifted to Lockheed, and, accordingly, moved the trial court to rule that Lockheed has the burden of proving that (a) the levels of contamination claimed by plaintiffs to have been in the Redlands groundwater and distribution system were not in fact present at those levels, and (b) that plaintiffs' illnesses were not caused by their exposure to the contamination. Because of its destruction of records, plaintiffs also requested the imposition of discovery sanctions that Lockheed be precluded from introducing evidence rebutting plaintiffs' evidence on the issue of the levels of contamination, as well as the spatial extent of the contamination over time.

The trial court denied the request to issue a jury instruction shifting the burden of proof on medical causation to Lockheed, and also denied the request for the discovery sanction.

However, as to shifting the burden on the level of

Not Reported in Cal.Rptr.3d, 2003 WL 22133183 (Cal.App. 4 Dist.)  
**Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)**  
**(Cite as: 2003 WL 22133183 (Cal.App. 4 Dist.))**

contamination, the court made the following order: “If the jury in this matter finds that Plaintiffs have shown a prima facie case of violation of statute or negligence in contaminating the water table, the Court will provide a jury instruction that the burden of proof will be upon Lockheed to disprove the plaintiffs’ reasonable, scientifically based estimates of the level of contamination and spatial extent of contamination of the water table with TCE, Ammonium Perchlorate, TCA and other chemicals.”

\*2 The court opined that “generally the lack of records showing use and disposal of toxic wastes onto land that is situated over a groundwater table constitutes a sufficient public policy reason on which to base the shifting of the burden of proof as to the levels of chemicals. The plaintiffs’ inability to conclusively prove the levels of all chemicals and the spatial extent of the chemicals in the water is directly linked to the destruction or lack of preservation of records. In addition, because of Lockheed’s position, knowledge of the actions taken at the Lockheed site, and the consequences of the use of similar chemicals at other sites, Lockheed has access to more information and control of the information to reconstruct the levels of chemicals and spatial extent of the chemicals in the water than the plaintiff[s].”

The court concluded that there was no valid public policy reason to shift the burden of proof on medical causation, noting that shifting the burden is an extraordinary measure. By shifting the burden on the level and spatial extent of contamination, the “playing field made uneven by the destruction of records has been leveled. Neither party has more information than the other on the issue of medical causation. There is no evidence that the destroyed records would have shown medical causation. The destroyed records related only to the levels and spatial extent of the contaminants in the water. There was no action taken by Lockheed that independently made medical causation more difficult to prove.”

It is noteworthy that the court did not find any intentional wrongdoing in the destruction of records. In ruling on the sanctions issue, the court stated that “there is no evidence that Lockheed willfully destroyed or failed to preserve any evidence with knowledge of this litigation. The documents and testing at issue are more than 25 years old. Although the

fact that the records were not kept is a consideration when deciding this motion because it tends to indicate which party has more knowledge or had more knowledge at one time of the levels of contamination; it is not evidence or indicative of any wrongdoing on the part of Lockheed.”

Lockheed seeks a writ of mandate to set aside this ruling to the extent it has the burden to disprove plaintiffs’ estimates of the level of and spatial extent of contamination.

## DISCUSSION

### A. Appropriateness of Writ Review.

As a general practice, appellate courts do not entertain writ review of pretrial rulings such as this even when the trial court has erred. Appellate courts “will not use their scarce resources to second-guess every ruling and order of the trial court...” ( [Omaha Indemnity Co. v. Superior Court](#) (1989) 209 Cal.App.3d 1266, 1272.) First, permitting writ review in all such cases would lead to piecemeal litigation and possible appellate gridlock. Second, there is the possibility that the trial judge may cure his error prior to trial or that the ruling will have little or no effect on the trial or can be considered on appeal. (*Id.* at pp. 1272-1273.) Appeal is not considered an inadequate remedy simply because additional time and effort would be consumed.

\*3 We depart from our general practice because of the exceptional circumstances concerning this action. This is a complex litigation, and the issue arises in a test case involving only a few of the plaintiffs. The trial court’s ruling seems clearly erroneous, and deferring review until after trial would cause undue delay not only with respect to these plaintiffs but the hundreds of remaining plaintiffs as well. Thus, we exercise our discretion to review the ruling by extraordinary writ.

### B. Shifting the Burden of Proof.

“Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense that he is asserting.” ([Evid.Code, § 500.](#))

Not Reported in Cal.Rptr.3d, 2003 WL 22133183 (Cal.App. 4 Dist.)  
**Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)**  
**(Cite as: 2003 WL 22133183 (Cal.App. 4 Dist.))**

The burden of proof may be shifted in certain narrowly defined circumstances. “The general rule allocating the burden of proof applies ‘except as otherwise provided by law.’ The exception is included in recognition of the fact that the burden of proof is sometimes allocated in a manner that is at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. In determining the incidence of the burden of proof, ‘the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.’ 9 Wigmore, Evidence § 2486 at 275 (3d ed.1940).” (Cal. Law Revision Com. com., 29B pt. 1, West’s Ann. Evid.Code (1995 ed.) foll. § 500, p. 554.)

A doctrine has evolved in negligence and products liability cases that the burden of proof on the issue of causation may be shifted to defendant under certain conditions. “ [T]he shift of the burden of proof ... may be said to rest on a policy judgment that when there is a substantial probability that a defendant’s negligence was a cause of an accident, and when the defendant’s negligence makes it impossible, as a practical matter, for plaintiff to prove “proximate causation” conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was *not* a cause of the injury.’ ( [Haft v. Lone Palm Hotel](#) (1970) 3 Cal.3d 756, 774, fn. 19 [*Haft* ]); see also [Simmons v. West Covina Medical Clinic](#) (1989) 212 Cal.App.3d 696, 703; [Smith v. Americana Motor Lodge](#) (1974) 39 Cal.App.3d 1, 6.)” ( [Thomas v. Lusk](#) (1994) 27 Cal.App.4th 1709, 1717 (*Thomas* ).)

In [Haft, supra](#), 3 Cal.3d 756, a father and five-year-old son were found drowned in a motel swimming pool. There were no witnesses, and the motel had failed to provide a lifeguard or a warning sign as required by statute. The Supreme Court held that the burden of proof on causation should be shifted to the

defendant motel because its negligent failure to provide a lifeguard not only stripped decedents of a significant degree of protection, but also deprived the present plaintiffs of a means of definitively establishing the facts leading to the drownings.

\*4 In contrast, [Fagerquist v. Western Sun Aviation, Inc.](#) (1987) 191 Cal.App.3d 709, was a wrongful death action brought by the survivors of a commercial pilot killed in a plane crash. Experts concluded that the left engine failed because of a hole in a cylinder caused by defective casting in the manufacturing process. Plaintiffs sued the owner/operator for negligence, asserting that the defect would have been discovered if it had performed adequate inspections and maintenance. Plaintiffs contended that defendant had not complied with FAA inspection and maintenance procedures including a failure to perform a checklist procedure. The trial court erroneously instructed the jury that the burden of proof on negligence shifted to the defendant owner on proof of violation of the regulations. The Court of Appeal distinguished [Haft, supra](#), 3 Cal.3d 756, noting that the evidence was not destroyed in the crash and engine tests performed showed the defect in the cylinder. “Second, the regulation violations here do not directly go to the inability of plaintiff to establish proximate causation. Here, contrary to the facts in *Haft*, compliance with the regulatory requirements would not have eased plaintiff’s evidentiary burden in proving [defendant’s] negligent inspection and maintenance proximately caused the accident.” (*Fagerquist v. Western Sun Aviation, Inc., supra*, at p. 726.)

“The essential principle underlying this narrow exception to the usual allocation of proof is that the burden of proving an element of a case is more appropriately borne by the party with greater access to information.” ( [Thomas, supra](#), 27 Cal.App.4th 1709, 1717.) *Thomas* was an attorney malpractice action based on the loss of a hammer in a products liability case. The court held that, presuming the defendant’s negligence, that negligence did not make proof of causation impossible as a practical matter. Identical hammers were still available to respondent along with the testimony of witnesses to the accident to prove a defect in the product. The court stated that the burden of proving causation is not transferred merely upon testimony that the defendant’s negligence may have compromised the plaintiff’s ability to establish a products liability case, but only where

Not Reported in Cal.Rptr.3d, 2003 WL 22133183 (Cal.App. 4 Dist.)  
**Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)**  
**(Cite as: 2003 WL 22133183 (Cal.App. 4 Dist.))**

there is a substantial probability that the defendant's negligence makes it impossible as a practical matter for plaintiff to prove proximate causation conclusively. (*Id.* at p. 1718.)

In our view *Thomas's* value is not affected by [Galaneck v. Wismar \(1999\) 68 Cal.App.4th 1417 \(Galaneck\)](#), which was also an attorney malpractice case based on spoliation of evidence. In the latter decision the Court of Appeal stated the burden of proving causation shifted to defendants because requiring plaintiff to establish this element would have allowed defendants to take advantage of the lack of proof resulting from the attorney's own negligence. However, *Galaneck* involved an appeal following a nonsuit and not following a jury trial as in *Thomas*. The Court of Appeal in *Galaneck* held only that the trial court erred in granting the nonsuit because the facts stated in the plaintiff's opening statement, if proved, would warrant a shifting of the burden of proof to the defendant. It offered no opinion whether a shift in the burden of proof would actually be warranted based on the evidence admitted at trial. (*Id.*, at p. 1428, fn. 9.)

\*5 Plaintiffs contend that they find themselves in the same situation as the plaintiff in *Haft*. Just as those plaintiffs were deprived of the ability to prove causation due to the absence of a lifeguard, they are unable to prove the nature and extent of contamination due to Lockheed's failure to conduct tests of the groundwater during its tenure. There are significant differences between the facts here and those in *Haft*, not the least of which is the fact that the trial court did not base its ruling on Lockheed's failure to conduct tests-but only on the lack of records of its use and disposal of toxic waste. Although the issue of testing was raised in the trial court, there are no findings that Lockheed was negligent or violated any statutes or regulations in not performing tests. Moreover, even assuming that Lockheed should have conducted some testing, the amount and nature of required testing is undeterminable and it is unclear whether such testing would have yielded sufficient information for plaintiffs' present purposes. In sum, we conclude that the facts are not comparable to those in *Haft* where there was clear evidence of a violation of statute which also led to plaintiffs' inability to prove causation. In that limited circumstance the court held the burden of proof of causation should be shifted. Here there is no showing of wrongdoing by Lockheed that will result

in plaintiffs' inability to prove causation.

We believe that the trial correctly denied the motion with respect to medical causation on the ground that neither party has more information than the other on this issue and that there is no evidence that destroyed records would have shown medical causation. However, the trial court erred when it shifted the burden on an underlying factual matter because it wanted to "even" the playing field. It erred in doing so, taking language in various cases and applying it inappropriately to the facts of this case. First of all, the court found no wrongdoing on Lockheed's part in its failure to retain records. The records, which are over 25 years old, were lost through the passage of time. Thus, the difficulty of determining levels of contamination in past years results primarily from the passage of time rather than Lockheed's negligent acts. The loss of records because of the passage of time is not an adequate basis to shift the burden of proof. (Cf. [Sindell v. Abbott Laboratories \(1980\) 26 Cal.3d 588, 601.](#))

Moreover, before shifting the burden, it must be shown that the defendant's negligence makes it impossible as a practical matter for the plaintiffs to prove causation. The trial court here concluded that if the jury found that Lockheed was negligent, then the burden would be shifted. But any negligence or statutory violation involved in discharging chemicals was not connected with the loss of evidence. There must be such a connection between the defendant's negligence and plaintiffs' inability to prove causation. ( [Fagerquist v. Western Sun Aviation, Inc., supra, 191 Cal.App.3d at p. 726](#); [Smith v. American Motor Lodge \(1974\) 39 Cal.App.3d 1.](#) ) *Smith*, as *Haft* did, arose from a drowning in a motel swimming pool where there were no eyewitnesses. Plaintiffs contended that the burden of proving causation should be shifted to the defendant because it failed to provide a safety rope in the pool as required by law. The court refused to shift the burden of proof to the defendant because the alleged act of negligence had nothing to do with the absence of direct evidence. Compliance with the safety rope requirement would not have supplied the missing evidence nor did it make it more difficult for plaintiffs to prove their case. (*Id.*, pp. 6-7.)

\*6 Here, the trial court concluded that the burden of

Not Reported in Cal.Rptr.3d, 2003 WL 22133183 (Cal.App. 4 Dist.)  
**Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)**  
**(Cite as: 2003 WL 22133183 (Cal.App. 4 Dist.))**

proof should be shifted because Lockheed has greater access to information about its practices. It is said that a defendant who is in a better position to discover and preserve evidence should not be permitted to profit from the plaintiff's inability to produce it. Neither side in this case has the use and disposal records from the operation of this facility. The trial court noted that Lockheed has information about its past practices and operation of other plants, but this information is readily discoverable by plaintiffs. Indeed, considerable discovery has been conducted. Lockheed claims to have produced over a million pages of documents and has had 17 depositions of former employees taken-claims that plaintiffs do not dispute.

Neither side knows exactly the levels and extent of the contamination 25 years ago, but each side has expert witnesses who have made estimates based on computer models and assumed data. As Lockheed points out, plaintiffs have never claimed that its experts relied on evidence that was not available to their experts. Even if these records had been obtained and preserved, they would not have shown the levels and spatial extent of the contamination, but only provided more data for the experts to use. This situation is similar to the *Thomas* case where the court concluded that there was no basis to shift the burden because neither party had the hammer but both had equal access to hammers essentially identical to the one which injured the plaintiff. Thus, the defendant had no better means of negating causation than the plaintiff had of proving it. Under these circumstances, the burden-shifting ruling the trial court made was not necessary to even the playing field. We cannot conceive of any other public policy consideration that justifies according any special deference to plaintiffs' evidence on this particular factual issue. The jury should be allowed to exercise its fact finding function freely, and judge each parties' estimates on their own merit.

#### DISPOSITION

Let a peremptory writ of mandate issue as prayed. Each party to bear its own costs. Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

We concur: [HOLLENHORST](#) and [GAUT, JJ.](#)  
Cal.App. 4 Dist., 2003.  
Lockheed Martin Corp. v. Superior Court  
Not Reported in Cal.Rptr.3d, 2003 WL 22133183  
(Cal.App. 4 Dist.)

END OF DOCUMENT