87 Cal.App.5th 939
Court of Appeal, Second District, Division 8, California.

LAOSD ASBESTOS CASES.
Fermin Ramirez, Individually and as Personal Representative, etc., Plaintiff and Appellant,
v.
Avon Products, Inc., Defendant and Respondent.

B313982
|
Filed January 23, 2023

Synopsis

Background: User of talcum powder and her husband brought action against manufacturer for negligence, design defect, strict liability, failure to warn, fraud, fraud by non-disclosure, and negligent misrepresentation, alleging that user developed mesothelioma after exposure to asbestos in talcum powder. The Superior Court, Los Angeles County, Nos. 20STCV22671 and JCCP4674, David S. Cunningham, J., granted summary judgment to manufacturer. User and husband appealed, and user died while appeal was pending.

[Holding:] The Court of Appeal, Stratton, P.J., held that manufacturer's designated corporate representative for deposition was not exempted from personal knowledge requirement for testimony by non-expert witness.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (16)

[1] **Summary Judgment**👉Burden of Proof

From commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.

2 Cases that cite this headnote

[2] **Summary Judgment**👉Shifting burden
Summary Judgment👉Prima facie showing

The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact, and if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. Cal. Civ. Proc. Code § 437c.

[3] **Summary Judgment**👉Essential elements; burden of proof at trial

When the party moving for summary judgment is a defendant, it must show that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. Cal. Civ. Proc. Code § 437c.

[4] **Summary Judgment**👉Speculation or conjecture; mere assertions, conclusions, or denials

When a defendant moves for summary judgment, the defendant must present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. Cal. Civ. Proc. Code § 437c.

[5] **Summary Judgment**🔑Essential elements; burden of proof at trial
Summary Judgment🔑Admissions

When a defendant moves for summary judgment, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action, and the defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence, as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing. Cal. Civ. Proc. Code § 437c.

[6] **Summary Judgment**🔑Admissibility

On a motion for summary judgment, matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions, or impermissible opinions must be disregarded in supporting affidavits. Cal. Civ. Proc. Code § 437c(d).

1 Case that cites this headnote

[7] **Appeal and Error**🔑Review of lower court's proceedings concerning question

Rulings on evidentiary objections made in connection with a motion for summary judgment are reviewed for abuse of discretion. Cal. Civ. Proc. Code § 437c.

4 Cases that cite this headnote

[8] **Evidence**🔑Questions and answers based on personal knowledge of expert
Pretrial Procedure🔑Corporate officers, agents, and employees

Designation as corporate representative for deposition testimony is not a special category of witness who allegedly would be exempted from personal knowledge requirement for testimony from a non-expert witness. Cal. Civ. Proc. Code § 2025.230; Cal. Evid. Code §§ 702(a), 801.

[9] **Evidence**🔑Questions and answers based on personal knowledge of expert
Pretrial Procedure🔑Corporate officers, agents, and employees

Even if corporation's designated representative for deposition, whose employment with corporation did not begin until halfway through plaintiff's multi-decade use of talcum powder manufactured by corporation, conducted an "independent review" on behalf of corporation regarding events before her employment, designated representative was not exempted from personal knowledge requirement for testimony from non-expert witness, in action alleging that plaintiff developed mesothelioma after exposure to asbestos in talcum powder. Cal. Civ. Proc. Code § 2025.230; Cal. Evid. Code §§ 702(a), 801.

[10] **Pretrial Procedure**🔑Corporate officers, agents, and employees
Pretrial Procedure🔑Admissibility in general

The mere fact that a corporation's designated representative is asked about a matter at a deposition and provides information in response does not make that testimony admissible at trial.

Cal. Civ. Proc. Code §§ 2025.230, 2025.620.

[11] **Evidence** Private Memoranda and Statements in General

Memoranda summarizing telephone conversations between corporate employees were not admissible under business records exception to hearsay rule, when offered by corporation in support of its motion for summary judgment in action brought by user of talcum powder manufactured by corporation, which allegedly contained asbestos, in absence of a showing that such type of memo was prepared in ordinary course of business by corporate employees. Cal. Evid. Code § 1271.

[12] **Appeal and Error** Summary judgment

Manufacturer of talcum powder forfeited for appellate review, on appeal by powder user from grant of summary judgment to manufacturer in user's action alleging that she developed mesothelioma after exposure to asbestos in talcum powder, contention that discovery responses of user and her husband were factually devoid, as purported basis for upholding grant of summary judgment, where manufacturer did not adequately raise such ground in its notice of motion; manufacturer made at best a brief conclusory argument, unsupported by any legal authority. Cal. Civ. Proc. Code § 1010.

[13] **Appeal and Error** References to Record
Appeal and Error Points and arguments

Appellate courts are not required to develop a party's argument for it nor to search the record on their own seeking deficiencies.

1 Case that cites this headnote

[14] **Appeal and Error** Summary judgment

Manufacturer failed to develop, on appeal by user of manufacturer's talcum powder from the grant of summary judgment to manufacturer in action alleging user's exposure to asbestos in talcum powder, and Court of Appeal therefore would not consider, manufacturer's arguments that user's responses to interrogatories were deficient because they simply restated the claims and gave a "laundry list" of documents and that responses to requests for document production identified only two declarations, where manufacturer summarized what appeared to be more than 20 pages of interrogatory responses in less than a paragraph in its brief, and then complained the responses lacked detail.

[15] **Summary Judgment** Shifting burden

While circumstantial evidence supporting a defendant's summary judgment motion can consist of factually devoid discovery responses from which an absence of evidence can be inferred, the burden of production should not shift without stringent review of the direct, circumstantial, and inferential evidence. Cal. Civ. Proc. Code § 437c.

[16] **Appeal and Error** Defects, objections, and amendments

The Court of Appeal may disregard conclusory arguments that are not supported by pertinent legal authority or that fail to disclose the reasoning by which the appellant reached the conclusions the appellant wants the Court of Appeal to adopt.

****181** APPEAL from an order and judgment of the Superior Court of Los Angeles County, David S. Cunningham III, Judge. Reversed. (Los Angeles County Super. Ct. No. 20STCV22671, Case No. JCCP4674)

Attorneys and Law Firms

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Opinion

STRATTON, P. J.

***943** This case highlights the difficulties both sides encounter when litigating a latent injury possibly caused by exposure to a toxic substance 50 years ago. After Alicia Ramirez developed mesothelioma, she and her husband Fermin Ramirez (the Ramirezes) brought this action in 2020 against a number of entities, including respondent Avon Products, Inc. (Avon).[1] Relying on a declaration from Lisa Gallo (Gallo Declaration), an employee who did not begin work at Avon until 1994, halfway ****182** through Alicia's alleged exposure period, Avon moved for and obtained summary judgment in its favor.

The Ramirezes appeal, contending the trial court erred in overruling their objections to the Gallo Declaration. The trial court found this declaration was the sole evidence which shifted the burden to the Ramirezes to produce evidence sufficient to create a triable issue of material fact. We agree the trial court abused its discretion in overruling the Ramirezes' objections.

Avon contends that even if the Gallo Declaration was erroneously admitted, summary judgment should still be affirmed on the ground that the Ramirezes' discovery responses were factually devoid. We find Avon failed to adequately develop this theory in the trial court and on appeal. It is forfeited. Because we find Avon did not shift the burden to the Ramirezes, we need not and do not consider the Ramirezes' argument that the trial court erred in finding they failed to create a triable issue of material fact when they did not offer a statistical analysis showing it was more likely than not asbestos were in the Avon containers actually used by Alicia.

Avon requests that if we find erroneous the trial court's grant of summary judgment, we remand this matter for a ruling on Avon's motion for summary ***944** adjudication because this alternate motion is based on different facts, law and evidence. We do not agree and do not order a remand for this specific purpose.

We reverse the order granting summary judgment and the judgment and remand for further proceedings.

BACKGROUND

In her complaint, Alicia alleged she had been exposed to asbestos in several ways, including the use of asbestos-contaminated talcum powder produced by Avon.[2] Through her discovery responses, Alicia stated she had used Avon's Imari and Elusive talcum powder daily from the mid-1970's to 2007 and her daughter used Avon's Imari, Sweet Honesty and Odyssey talcum powder in the bathroom the two women shared from the 1990's to 2007.

Avon brought a motion for summary judgment on the ground that "Plaintiffs cannot prove that Alicia Ramirez came into contact with an Avon product contaminated with asbestos. Unlike the typical defendant in an alleged asbestos-related personal injury case, Avon is a cosmetics and fragrance company which has never included or used asbestos as an ingredient or component in its products. In other words, its products are designed to be asbestos-free. Thus, to succeed on their claims, Plaintiffs must prove that the Avon cosmetic talc products at issue more likely than not contained asbestos."

Avon also moved in the alternative for summary adjudication on the design defect claims in the first cause of action for negligence and the second cause of action for strict liability; the failure to warn claims in those causes

of action; the negligent misrepresentation claim in the third cause of action and the fraud by non-disclosure claim in the fourth cause of action.

In support of its motions, Avon offered the declaration of Lisa Gallo, who, at the time, was Avon's vice president of Global Innovation, Research, and Development. Gallo had worked in Avon's research and ****183** development department since January 1994. Apparently, Gallo had previously been designated by Avon as a person most knowledgeable for purposes of some categories of information for a deposition noticed by the Ramirezes pursuant to Code of Civil Procedure section 2025.230. In her declaration, Gallo stated: "I make ***945** the following statements based on either my investigation or my own personal knowledge." Virtually all of her statements, however, concerned activities at Avon in the 1970's, and all but two of the documents she attached were also from that decade. The Ramirezes objected to her declaration and attached exhibits on the grounds they lacked foundation, lacked personal knowledge, and contained hearsay.

The trial court overruled the Ramirezes' objections, found the Gallo Declaration shifted the burden of proof, found the Ramirezes had failed to show a triable issue of material fact, and granted summary judgment in favor of Avon. The court's amended March 2, 2021 order stated the reasons for the determination "are set forth by the Court in both the minute order **(Exhibit A)** and the hearing transcript **(Exhibit B)**."

The minute order states: "The motion for summary judgment is granted because Avon's affirmative evidence shifts the burden, and Plaintiffs' evidence fails to raise triable issues of asbestos content and exposure. Avon never included or used asbestos as an ingredient or component of its cosmetics products. Since the [early 1970's,] Avon has required its talc suppliers provide only asbestos-free talc. During the relevant time period, Avon had in place internal screening and testing programs as a quality assurance measure to ensure that the raw ingredient talc it received from suppliers was asbestos-free. No talc was used in an Avon cosmetic product if even a single asbestos fiber was detected during Avon's three-step screening program." There is no dispute that all of these facts come from the Gallo Declaration, and it was solely that declaration which shifted the burden of proof.

DISCUSSION

[1] [2]"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 107 Cal.Rptr.2d 841, 24 P.3d 493 (*Aguilar*).) "[T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*)

[3] [4] [5]When the moving party is a defendant, it must show that the plaintiff cannot establish at least one element of the cause of action. (*Aguilar*, *supra*, 25 Cal.4th at p. 853, 107 Cal.Rptr.2d 841, 24 P.3d 493.) "The defendant has shown that the plaintiff cannot ***946** establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Id.* at p. 854, 107 Cal.Rptr.2d 841, 24 P.3d 493.) The defendant must "present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Ibid.*) Thus, "the defendant *must* 'support[ ]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' ****184** (Code Civ. Proc., § 437c, subd. (b).) The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Id.* at p. 855, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

[6]"Supporting and opposing affidavits or declarations ... shall set forth admissible evidence." (Code Civ. Proc., § 437c, subd. (d).) "Matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or impermissible opinions, must be disregarded in supporting affidavits." (*Hayman v. Block* (1986) 176 Cal.App.3d 629, 639, 222 Cal.Rptr. 293.)

[7]Ordinarily, we review a trial court's rule on evidentiary objections for an abuse of discretion. There is a split of authority on evidentiary objections made in connection with a motion for summary judgment, however. As the Ramirezes point out, the Sixth District Court of Appeal and, to a more limited degree, the First District Court of Appeal have held that some or all written evidentiary

objections should be reviewed *de novo*. (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1450–1451, 198 Cal.Rptr.3d 900; *Strobel v. Johnson & Johnson* (2021) 70 Cal.App.5th 796, 816–817, 284 Cal.Rptr.3d 165.) We agree with the majority of courts which have held that the abuse of discretion standard applies.[3]

***947** I. *The Trial Court Erred in Overruling the Objections to the Gallo Declaration.*

The Ramirezes contend the trial court erred in overruling their objections to the Gallo Declaration and attached exhibits based on lack of foundation, lack of personal knowledge and the hearsay nature of the documents. We agree.

During oral argument, the court explained it was overruling the objections because Gallo "was offered as a designated corporate representative and person most knowledgeable, which does give a basis for her legally to obtain and provide the foundational testimony, based on her independent review, which I think she did indicate she had done. [¶] And also when I look at her title and her duties and responsibilities, that further suggests that the declaration is appropriately admissible and may be considered by the court as affirmative evidence."

The Ramirezes contend there are only two types of witnesses, lay or expert, and Gallo was not designated as an expert. She was therefore limited to testimony reflecting her personal knowledge and could not testify to hearsay. We agree.

****185** The Evidence Code recognizes only two types of witnesses: lay witnesses and expert witnesses. "Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." (Evid. Code, § 702, subd. (a).) Evidence Code section 801 governs the testimony of an expert witness, who may provide an opinion based on hearsay which need not always be based on personal knowledge.

[8] [9]There is no special category of "corporate representative" witness, as the trial court suggested. There is no exemption from the Evidence Code for a witness who has conducted an "independent review," whatever the trial court meant by that phrase. Gallo was certainly not an independent witness; she is an Avon employee who conducted her "investigation and review" on behalf of Avon, a party to this action. Even trained and sworn police officers who are authorized by the State of California to investigate crimes are not exempt from the requirements of the Evidence Code when testifying at trial in a non-expert capacity. Gallo was simply a lay witness, and as such she was limited to matters as to which she had personal knowledge.

The Evidence Code also does not recognize a special category of "person previously designated as most knowledgeable" witness. "Person most ***948** qualified" is a term from the Code of Civil Procedure pertaining to depositions of entities which are not natural persons. Code of Civil Procedure section 2025.230 provides: "If the deponent named is not a natural person, the deposition notice shall describe with reasonable particularity the matters on which examination is requested. In that event, the deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent." (Code Civ. Proc., § 2025.230)

[10]This section is part of the Civil Discovery Act. (Code Civ. Proc., § 2016.010 et seq.) To state what should be obvious, the purpose of discovery is to permit a party to learn what information the opposing party possesses on the subject matter of the lawsuit, and the scope of discovery is not limited to admissible evidence. (Code Civ. Proc., § 2017.010 [discovery must be relevant but may be of "matter [that] either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."].) Thus, the mere fact that a person is asked about a matter at a deposition and provides information in response does not make that testimony admissible at trial. As section 2025.620 makes clear, deposition testimony "may be used against any party who was present or represented at the taking of the deposition ... *so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness*." (Code Civ. Proc., § 2025.620, italics added.)

While discovery in general aids both plaintiffs and defendants equally, the tools of discovery are intended to benefit the party utilizing those tools. The purpose of a deposition is not to aid the party whose witness is being deposed; it is to aid the opposing party taking the deposition. More specifically, the primary purpose of section 2025.230 is not to aid corporate entities. Rather, it is intended to simplify discovery for the party seeking information from a corporation. "As one treatise explains, '[t]he purpose of this provision is to eliminate the

problem of trying to find out who ****186** in the corporate hierarchy has the information the examiner is seeking. E.g., in a product liability suit, who in the engineering department designed the defective part?' (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2001) ¶ 8:474, p. 8E-18.) The authors of the treatise explain that '[u]nder former law, the entity was required only to designate "one or more" officers or employees to testify on its behalf. This permitted considerable "buck-passing" and "I don't know" answers at deposition.' (*Ibid.*) Under the current law, '[i]f the subject matter of the questioning is clearly stated, the burden is on the entity, not the examiner, to produce the right witnesses. And, if the particular officer or employee designated lacks personal knowledge of all the information sought, he or she is supposed to find out from those who do!' (*Id.*, ¶ 8:475, ***949** p. 8E-18.)" (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1395-1396, 115 Cal.Rptr.2d 137.)

Avon does not cite any California case or statutory law holding that notwithstanding the above clear statutory law, a person deposed as a corporate person most qualified (PMQ deponent) may testify at trial unrestrained by the rules of evidence which apply to ordinary lay witnesses. Instead, Avon simply argues that the Ramirezes' "one-sided interpretation of the law as requiring corporate PMQs to testify at deposition to provide admissions that Plaintiffs can use against the corporation, but precluding corporations from offering a declaration or even trial testimony to defend against Plaintiff's claims flies against fundamental concepts of due process. Under both the state and federal Constitutions, defendants in civil actions are entitled to procedural due process protections which 'ensure a fair adjudicatory process before a person is deprived of life, liberty or property.' "

What Avon is in effect suggesting is that if a party deposes a corporate entity, the corporate entity is no longer bound by the rules of evidence at any subsequent trial or hearing. This is simply nonsense. This would not only eliminate depositions of corporations as a practical matter and thereby frustrate the Civil Discovery Act, it itself would violate due process, since it would place natural persons at a clear disadvantage in defending or prosecuting lawsuits where the opposing party is a corporation.

Avon's suggestion that it is being treated unfairly because it is a defendant or a corporation is simply not true. First, any restrictions on the testimony of a PMQ deponent at trial apply regardless of whether the corporation is a defendant or a plaintiff. The rules relating to witness testimony at a trial or hearing also apply equally to defendants and plaintiffs. Second, the described situation also applies to parties who are natural persons. A "natural person" party may be required to testify at a deposition to provide admissions which the opposing party can use against the "natural person" party. The "natural person" party is not then entitled to offer inadmissible evidence at trial to defend against his or her own deposition admissions.

Avon next claims that, in truth, due process requires corporations to receive special treatment under the rules of evidence simply to place them on a level playing field with natural persons. Avon argues: "Whereas natural persons may often resort to firsthand testimony about events to mount a defense, corporations, especially when defending against latent injury claims from decades-old exposure, cannot do the same. When corporations have existed for generations and the claims are based on long-ago activities, it is impossible to mount an effective defense ****187** the same way that a natural person would. ***950** For example, many of the individuals who may have contributed to the collective knowledge of the entity at one point may be unable to attend trial, may be impossible to locate or may have passed away. Further, the corporation's knowledge is not unified: unlike a single person's recollection, the corporation's information is stored in fragments and excerpts, requiring synthesis and analysis to be meaningful."

To begin with the obvious: the burden is on the plaintiff to prove those "long-ago activities" occurred. The plaintiff will be at least as handicapped as the corporate defendant by the unavailable corporate witnesses who undertook those long-ago activities. Similarly, the plaintiff can only prove the corporation's knowledge through those same fragments and excerpts that the corporation complains about.

Moving to the perhaps less obvious: The problem is not that Avon is a corporation, the problem is that this case involves a latent injury which began almost 50 years ago. This is equally a problem for the Ramirezes, however. While Alicia may have been able to rely on her recollection that she used Avon's products, proving the contents of those products is an entirely different matter. If anything, the problem is more acute for the Ramirezes, who bear the burden of proving the contents of those products. Indeed, the Ramirezes have had to look outside Avon for proof that the raw talc Avon used contained asbestos, relying on expert analysis of the sources of the talc used by Avon. Avon was free to do the same in response, but did not offer any such expert testimony in support of its motion.

Ending with the least obvious: If anything, the passage of time gave Avon an advantage here because, unlike Alicia, Avon knew in the early 1970's that some sources of talc were contaminated with asbestos, and that at a minimum there were concerns in the scientific community that asbestos in talc presented a potential health hazard. Alicia did not have such knowledge. According to the Gallo Declaration, Avon almost immediately took steps to use only asbestos-free talc, yet Avon apparently chose not to document its efforts, or not to preserve that documentation. If there is an explanation for this omission, it is not found in the record on appeal. At the same time, Avon faults Alicia for not keeping the containers she used in the past, when Alicia had no reason to suspect there was anything wrong with the contents.

After arguing for special treatment for corporations, Avon attempts to explain why it would be acceptable to give corporation witnesses special privileges under the Evidence Code: "The corporate witness is a channel through which compiled corporate information is conveyed: the proposed affirmative testimony is not mere speculation, but rather, can be corroborated by underlying evidence which, itself, is admissible. Concerns over unreliable ***951** testimony—those which animate the personal knowledge rule—are thus not implicated by the corporate witness's testimony. Rather such testimony calls for the court to engage in the conventional 'practical compromise' as it would when, for example, a person is asked to testify about his 'own age.' "

Assuming for the sake of argument that a corporate witness completely lacking in personal knowledge of a subject could testify based on "underlying evidence which, itself, is admissible," we do not see how such a rule would aid Avon here. Avon has not shown that the evidence underlying the Gallo Declaration would itself be admissible. Although Gallo does not identify any source at all for most of her information, ****188** given that she did not work at Avon until 1994, her statements involving activities before that time cannot be based on personal knowledge and must be based on hearsay.

Even assuming for the sake of argument that Gallo could "channel" information received from individuals who had personal knowledge of events and could testify as witnesses, there is no indication that such persons were the source of Gallo's information.[4] Given the time frame involved, Gallo is most likely "channeling" information from people who not only lacked personal knowledge themselves, but acquired their information from people who also lacked personal knowledge.[5] This oral passing of information raises exactly the reliability concerns which animate the personal knowledge requirement, not to mention the rule against hearsay. The trial court had no way of evaluating the reliability of the information Gallo received. Further, Gallo's repetition of that information was not reliable simply because she was repeating it as a corporate representative rather than on her own behalf. She is still a natural person, subject to the foibles of her own memory and understanding. Thus, the trial court abused its discretion in overruling the Ramirezes' objections to Gallo's statements in her declaration.

This lack of personal knowledge is not cured by the 15 documents which Gallo attached to her declaration in support of Paragraphs 7, 8, 10, 11, 12, 13,14, 16, 17, 18, 19, 20 and 21. Even assuming Gallo is "channeling" or commenting on these documents, the documents are all hearsay with no identified exception. Thus, they are not themselves admissible evidence.

In addition to being hearsay, four documents were not prepared by Avon and there is no indication of how or when Avon obtained two of those documents. Exhibit 1 appears to be a memorandum summarizing a 1971 ***952** symposium held by a division of the Food and Drug Administration; the document does not list Avon as a participant or addressee. Exhibit 12 appears to be a document prepared by an industry trade group; Avon is not cited in the document and is not an addressee. Exhibits 9 and 10 are from one of Avon's suppliers and were sent to Avon, but there is no context to the communications, and they do not directly correlate to the statements Gallo makes before citing them.

Exhibits 2, 3, 4, 6, 7, 8, 11, 13, 14 and probably 15 were prepared by Avon employees, but there is no indication that they fall under the business records exception or could satisfy even the basic requirements for documents to qualify for that exception. (See Evid. Code, § 1271 [a document is admissible notwithstanding the hearsay rule if: "a) The writing was made in the regular course of a business; [¶] (b) The writing was made at or near the time of the act, condition, or event; [¶] (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and [¶] (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."].)

[11]For example, Exhibits 4 and 8 are memoranda summarizing telephone conversations, but there is no testimony in the record on appeal that this type of memo was prepared in the ordinary course of business by Avon employees. A number of exhibits show on their face that they were ****189** not prepared at or near the time of events described in them. Exhibit 2 memorializes a meeting that

occurred 4 days earlier and Exhibit 7 is a letter from Avon to the OSHA Compliance Office, answering questions from OSHA. The letter is dated September 1976 but refers generally to activities dating back to 1973; it discusses in some detail a change of supplier six months earlier.[6] Exhibits 4 and 8 likewise refer to events months or years in the past. For Exhibits 3, 6, and 13, it is not possible to tell when they were prepared in relation to the activities described therein. Exhibit 15 is dated 1992 but makes assertions concerning the entire history of Avon's talc production.

Not only are the documents themselves hearsay, all contain hearsay statements made by someone other than the author. Some hearsay statements appear to be made by Avon employees, but their background and position at Avon are unknown. It is not possible to determine whether these sources of information were accurately cited, or if the sources are reliable or had ***953** personal knowledge of the matters discussed. At least four documents contain hearsay statements by persons who are not Avon employees.

Based on these flaws alone, the trial court abused its discretion in admitting the documents, and Gallo's testimony "channeling" those documents.

Further, even if all the internal documents were admissible (as opposed to Avon's broad claims to OSHA, the FDA, reporters and possibly the public)[7], the documents would not show that Avon's products never contained asbestos. These documents all cover a very limited early time span and only one supplier. They provide no basis for reasonable inferences concerning Avon's behavior during the entire 50-year period of Alicia's claimed exposure or the behavior of other suppliers.

For example, we note that Exhibit 15, the Pennisi statement, cited in support of Paragraph 21, is particularly problematic. In that paragraph, Gallo states: "No talc was used in a cosmetic product if even a single asbestos fiber was detected in Avon's three-step screening program." Gallo cites Exhibit 15 as a supporting document. This exhibit is a one-page document referred to as the Pennisi statement; it resembles a press release, and one in draft form at that. It begins: "There has been concern in certain countries over the presence of asbestos in cosmetic grade talc." The declaration continues: "As an industry leader, Avon has always been committed to ensure that the talcs we sell and use are free from asbestos." The statement contains general descriptions of the testing Avon conducts on talc, states that Avon requires its vendors to meet stringent standards and claims that "[n]o talc is sold if even a single asbestos fiber is detected." The unsigned unsworn statement is dated "April 1992" and attributed to "Stephen C. Pennisi, PhD DABT," but there is no indication of Pennisi's role at Avon or the length of his tenure there, nor is there any indication of the basis of his ****190** statements or the purpose for which the statement was prepared. Among the many, many flaws of this document is that it contains no date except the one underneath Pennisi's name.[8] There is thus no way to determine when the testing or vendor restrictions began or how long they continued.

The trial court abused its discretion in admitting all these hearsay documents, but the abuse of discretion was particularly egregious in the case of the Pennisi statement. Without the Gallo Declaration, Avon did not offer evidence which shifted the burden to the Ramirezes. Accordingly, we reverse the order granting summary judgment and the judgment.

***954** II. *Avon Did Not Adequately Develop Its Devoid Discovery Claim.*

[12]Avon contends that even if we find the trial court erred in finding the Gallo Declaration sufficient to shift the burden of proof, we should still affirm the summary judgment on the alternate ground that the Ramirezes' discovery responses were factually devoid. We find Avon has forfeited this claim.

Avon did not raise this ground in its notice of motion, as is required. (Code Civ. Proc., § 1010 ["notice of a motion, other than for a new trial, must state when, and the grounds upon which it will be made, and the papers, if any, upon which it is to be based."].) While this is not a fatal defect if the ground is adequately raised in the motion itself, Avon made at best a brief conclusory argument on this ground, unsupported by any legal authority. Avon contended: "Plaintiffs' responses to Avon's discovery requests infer that they have no evidence that proves that the Avon products at issue in this case more likely than not were contaminated with asbestos. [Citation.] Moreover, Plaintiffs have refused to disclose any testing that might show the Avon product at issue were [*sic*] contaminated with asbestos. [Citation.] If plaintiffs actually had tests that showed the Avon products at issue contained asbestos—a central fact of the case—they would have most certainly have disclosed them."

At the hearing on the motion for summary judgment, however, Avon stated: "As Your Honor is aware, there

has been some issues with the plaintiffs being a little not forthcoming in disclosing evidence to Avon. And at this point, plaintiffs still have not produced any testing documents, or any evidence that any of the products at issue in this case contain asbestos." Counsel for the Ramirezes replied: "Briefly just to address the ongoing discovery dispute with Avon, I believe that it is entirely irrelevant to the issues before the court today. While Avon may have the ability to move to exclude evidence at trial, due to an alleged failure to disclose during the course of discovery. [¶] There's no statute or case law that I'm aware of that creates a discovery sanction, which directs the court to grant a motion for summary judgment where there is an ongoing discovery dispute, separate and apart from the existence of a triable issue of fact." The court replied: "I'm not making the decision based on any discovery sanction or dispute."

[13]It seems clear from this exchange that there was an ongoing discovery dispute of some sort at the time of the motion for summary judgment. In light of this dispute, it would be unreasonable to infer a lack of evidence from any missing, devoid or incomplete responses. Without more information, ****191** it seems equally likely that any deficient responses were due to the then-ongoing dispute. Avon does not address this dispute at all on appeal, however, or explain why it would be more reasonable to infer a lack of ***955** evidence rather than an unwillingness to produce evidence due to a discovery dispute. We are not required to develop a party's argument for it nor to search the record on our own seeking deficiencies. (See *United Grand Corp. v. Malibu Hillbillies, LLC* (2019) 36 Cal.App.5th 142, 153, 156, 248 Cal.Rptr.3d 294 (*United Grand*).) For this reason alone, Avon has forfeited this claim.

We note that instead of addressing the discovery dispute, Avon makes a new argument on appeal: the responses to interrogatories are deficient because they simply "restated Plaintiffs claims" and gave a "laundry list" of documents, and the responses to request for document productions identified only of two declarations. Avon did not raise or develop this argument in the trial court; in it motion Avon did not cite the *Andrews v. Foster Wheeler* case on which it now relies. (See *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 107, 41 Cal.Rptr.3d 229 (*Andrews*) [referring to a plaintiff's "boilerplate answers that restate their allegations, or ... laundry lists of people and/or documents" as capable of shifting the burden to plaintiff on summary judgment].) This is another reason to decline to consider Avon's argument. (See *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 704, 282 Cal.Rptr.3d 457 [theories that were not fully developed or factually presented to the trial court cannot create a triable issue on appeal].)

[14]We also decline to consider this new argument because Avon has failed to develop it on appeal. Avon summarizes what appears to be more than 20 pages of interrogatory responses in less than a paragraph, then complains the responses lack detail. More than this is required.

[15]A defendant moving for summary judgment "may ... present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence—as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar*, *supra*, 25 Cal.4th at p. 855, 107 Cal.Rptr.2d 841, 24 P.3d 493.) While "circumstantial evidence supporting a defendant's summary judgment motion 'can consist of "factually devoid" discovery responses from which an absence of evidence can be inferred,' [it must be] noted 'that the burden should not shift without stringent review of the direct, circumstantial and inferential evidence.' " (*Andrews*, *supra*, 138 Cal.App.4th at p. 103, 41 Cal.Rptr.3d 229.)

[16]Avon's discussion on appeal of the Ramirezes' discovery responses more closely resembles an argument that the Ramirezes do not possess sufficient evidence to survive summary judgment than it is an analysis of the evidence actually identified in those responses. Again, we are not required to develop a party's argument for it nor to search the record on our own seeking deficiencies. (See *United Grand Corp.*, *supra*, 36 Cal.App.5th at pp. 153, 156, 248 Cal.Rptr.3d 294.) "We may and do 'disregard conclusory arguments that are not supported by pertinent legal authority or fail to disclose the reasoning by which the appellant reached the conclusions he wants us to adopt.' " (*Id.* at p. 153, 248 Cal.Rptr.3d 294.)

***956** III. *Avon's Motion for Summary Adjudication Is Premised on the Same Facts as Its Motion for Summary Judgment.*

Avon contends that if we reverse the grant of summary judgment we should ****192** remand this matter with directions to the trial court to consider Avon's alternative motion for summary adjudication. Avon claims that motion was based on different facts, law and evidence. We do not agree.

Four of the five claims that are the subject of the summary adjudication motion turn on Avon's knowledge: failure to warn; negligent misrepresentation; fraud; and

punitive damages. In both its notice of motion and its supporting memorandum, Avon contends the failure to warn claim fails because "Avon designed asbestos-free products and manufactured those products in a way to ensure that they did not contain asbestos." Avon's discussion of the next two claims, negligent misrepresentation and fraud, begin: "As noted above, Avon had no reason to believe its products were contaminated with any level of asbestos." Avon's discussion of the punitive damages claim states the claim cannot be proved by clear and convincing evidence "especially ... in light of the fact that Avon designed asbestos-free products and manufactured those products in a way to ensure that they did not contain asbestos." Even Avon's discussion of the design defect claim is premised on its assertion that it "designed asbestos-free products."

These arguments are simply variations of Avon's contention that its products were asbestos free. Without the Gallo Declaration these claims must all fail. Accordingly, we decline to direct the trial court to consider Avon's alternate motion for summary adjudication.

DISPOSITION

The order granting summary judgment and the judgment are reversed. The matter is remanded for further proceedings. Appellant to recover costs on appeal.

We concur:

GRIMES, J.

HARUTUNIAN, J.[*]

All Citations

87 Cal.App.5th 939, 304 Cal.Rptr.3d 179, 2023 Daily Journal D.A.R. 607

Footnotes

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

[1] Alicia died while this appeal was pending, and the action is now being prosecuted by Fermin in his individual capacity and as Alicia's successor-in-interest. Because we consider actions which predate Alicia's death, we continue to refer to her by her first name for clarity and to refer to appellants collectively as the Ramirezes for purposes of this appeal.

[2] The complaint alleged Alicia was also exposed to asbestos through her work in the garment industry and through her husband, who was directly exposed to asbestos in his automotive repair work and who brought asbestos into the home on his clothing and person.

[3] See, e.g., *Schmidt v. Citibank, N.A.* (2018) 28 Cal.App.5th 1109, 1118, 239 Cal.Rptr.3d 648; *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1169, 235 Cal.Rptr.3d 228; *Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 52, 220 Cal.Rptr.3d 170; *O'Neal v. Stanislaus County Employees' Retirement Assn.* (2017) 8 Cal.App.5th 1184, 1198–1199, 214 Cal.Rptr.3d 591; *Ryder v. Lightstorm Entertainment, Inc.* (2016) 246 Cal.App.4th 1064, 1072, 201 Cal.Rptr.3d 110; *Jones v. Wachovia Bank* (2014) 230 Cal.App.4th 935, 951, 179 Cal.Rptr.3d 21; *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852, 172 Cal.Rptr.3d 732; *Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133, 143–144, 166 Cal.Rptr.3d 852; *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 181, 153 Cal.Rptr.3d 693; cf. *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1122–1123, 146 Cal.Rptr.3d 154

(conc. opn. of Turner, P. J.) (*Howard*) [listing 13 decisions and stating the "unanimous" decisions from 2006 to 2012 applied the abuse of discretion standard].

[4] In that event, of course, the person should have provided his or her own declaration. The inconvenience of filing multiple declarations is not an exception to the hearsay rule.

[5] Since Gallo does not identify any individuals who are the sources of her information, it is not possible to be sure.

[6] Further, the letter appears to have been prepared as a response to a regulatory inquiry, rather than to facilitate Avon's business operations, which again would preclude its admission under the business records exception. (See, e.g., *People v. McVey* (2018) 24 Cal.App.5th 405, 415, 233 Cal.Rptr.3d 915 [" 'When a record is not made to facilitate business operations but, instead, is primarily created for later use at trial, it does not qualify as a business record.' "].) Exhibits 4 and 8, which memorialize conversations with the FDA, also appear to fall into this category.

[7] Exhibit 15, the Pennisi statement, falls into this category. Because it played a central role in the summary judgment proceedings, however, we discuss it briefly below.

[8] There is nothing on the face of the document to connect it to Avon apart from Pennisi's use of the pronoun "we."

2023 WL 6430088
Only the Westlaw citation is currently available.

Superior Court of New Jersey, Appellate Division.

Roslyn BARDEN, individually and as Executrix and Executrix Ad Prosequendum of the Estate of Douglas Barden, Estate of Douglas Barden, Darlene Pastore Etheridge, individually and as Executrix and Executrix Ad Prosequendum of the Estate of David Charles Etheridge, Estate of David Charles Etheridge, D'Angela M. McNeill-George, and Elizabeth Ronning, individually and as Executrix and Executrix Ad Prosequendum of the Estate of William Ronning, and the Estate of William Ronning, Plaintiffs-Respondents,
v.
BRENNTAG NORTH AMERICA, INC., individually and as Successor-in-Interest to Mineral Pigment Solutions, Inc., as Successor-in-Interest to Whittaker Clark & Daniels, Inc., Brenntag Specialties, Inc., f/k/a/ Mineral Pigment Solutions, Inc., as Successor-in-Interest to Whittaker, Clark & Daniels, Inc., Cyprus Amax Minerals Company, individually and as Successor-in-Interest to American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc., Resource Processors, Inc., Sierra Talc Company, United Talc Company, Imerys Talc America, Inc., f/k/a Luzenac America, Inc., individually and as Successor-in-Interest to Windsor Minerals, Inc., American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc., Resource Processors, Inc., Imerys U.S.A., Inc., Imerys Talc Vermont, Inc., Whittaker Clark & Daniels, Inc., individually and as Successor-in-Interest to American Talc Company, Metropolitan Talc Company, Inc., Charles Mathieu, Inc., and Resource Processors, Inc., Union Carbide Corporation, Defendants,
and
Johnson & Johnson, Johnson & Johnson Consumer, Inc., f/k/a Johnson & Johnson Consumer Companies, Inc., Defendants-Appellants.

DOCKET NOS. A-0047-20, A-0048-20, A-0049-20, A-0050-20
|
Argued September 27, 2023
|
Decided October 3, 2023

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket Nos. L-1809-17, L-0932-17, L-7049-16, and L-6040-17.

Attorneys and Law Firms

Peter G. Verniero argued the cause for appellants (McCarter & English, LLP, and Sills Cummis & Gross, PC, attorneys; Peter G. Verniero, John C. Garde, and Michael S. Carucci, on the briefs).

Denyse Clancy (Kazan, McClain, Satterley & Greenwood) of the California bar, admitted pro hac vice, argued the cause for respondents (Szaferman, Lakind, Blumstein & Blader, PC, and Cohen, Placitella & Roth, PC, Denyse Clancy, and Chris J. Panatier (Simon Greenstone Panatier, PC) of the Texas, California, and Pennsylvania bars, admitted pro hac vice, attorneys; Moshe Maimon, Denyse Clancy, Christopher Placitella, Chris J. Panatier, and Robert E. Lytle, on the brief).

Before Judges Haas, Gooden Brown and Puglisi.

Opinion

PER CURIAM

***1** In these consolidated appeals, Johnson & Johnson (J&J) and Johnson & Johnson Consumer, Inc. (J&JCI) (collectively defendants) appeal from judgments dated July 24, 2020, which awarded plaintiffs[1] compensatory damages totaling $37,300,000 and punitive damages totaling $186,500,000. For the reasons that follow, we reverse and remand the matter to the trial court for a new trial.

I.

We begin by briefly summarizing the procedural history most pertinent to the issues raised on appeal.

Plaintiffs filed complaints alleging that defendants were involved in mining and processing asbestos-containing products, including Johnson's Baby Powder (JBP) and Shower to Shower (STS), which were sold and caused

them to develop mesothelioma following their long-term use of these products.[2] On February 1, 2019, the trial court issued a sua sponte order consolidating the four cases for trial.

By the time of trial, the only remaining claims against defendants were under the New Jersey Products Liability Act (PLA), N.J.S.A. 2A:58C-1 to -11, premised upon a failure to warn and design defect theories. In addition, McNeill-George presented a claim for defective manufacturing. Beginning on June 29, 2019, and lasting for approximately thirty-three non-consecutive days, the trial court conducted the liability and compensatory damages phase of the jury trial.[3]

On July 11, 2019, the trial court granted plaintiffs' motion in limine to preclude comments by defense counsel aimed at prejudicing the jury against plaintiffs' counsel. During the course of the trial, the court reiterated the terms of this order to defense counsel.

On July 15, 2019, the trial court denied defendants' motion in limine to exclude expert opinion from James Webber, Ph.D., and also denied defendants' request for an N.J.R.E. 104 hearing. Ten days later, the court denied defendants' motion in limine to exclude expert testimony from Jacqueline M. Moline, M.D. The court also denied defendants' request for an N.J.R.E. 104 hearing.

On August 5, 2019, the trial court denied defendants' motion to exclude expert testimony from William E. Longo, Ph.D. and their request for a N.J.R.E. 104 hearing. On that same date, the court denied defendants' motions to strike Webber's and Moline's expert opinions. The court later denied defendants' motion to strike Longo's expert opinion.

In response to remarks defense counsel made during closing arguments, the trial court struck defense counsel's entire summation for violating its prior rulings concerning the conduct of the attorneys. The court denied defendants' motion for a mistrial.

***2** On September 11, 2019, the jury returned verdicts in favor of plaintiffs and awarded them compensatory damages in varying amounts.[4] The trial court then excused the jury, having determined that the punitive damages phase of the trial would proceed before a new jury panel.[5] On February 9, 2020, the jury rendered verdicts awarding punitive damages to plaintiffs. The court denied defendants' motion for a new punitive damages trial. Later, the court reduced the amount of the punitive damages awards. These appeals followed.

On appeal, defendants allege that the trial court erred during the evidentiary trial when it: allowed plaintiffs' experts to testify that non-asbestiform versions of the six asbestiform minerals, called "cleavage fragments," could cause mesothelioma; sua sponte consolidated the trials of the four groups of plaintiffs; struck defendants' entire closing argument; and made cumulative errors as to the admission of evidence that enticed the jury to accept plaintiffs' allegations that defendants' products contained asbestos and caused plaintiffs' mesothelioma. As to the punitive damages phase of the proceedings, defendants contend that the court erred when it: empaneled a new jury to decide punitive damages; denied defendants' motion for a new punitive damages trial; and failed to conduct an appropriate post-trial review of the punitive damages awards.

II.

Defendants' primary argument is that the trial court erred by admitting expert testimony from Webber, Moline, and Longo. Specifically, defendants allege that the court abused its discretion when it denied their motions seeking N.J.R.E. 104 hearings because the testimony of Webber, Moline, and Longo was unreliable, not supported by generally accepted methodologies, and unsupported by the facts in the record. Additionally, defendants contend that the court failed to make sufficient findings under In re Accutane Litigation, 234 N.J. 340, 388 (2018), to justify its decision to admit the experts' opinions. Defendants rely on our decision in Lanzo v. Cyprus Amax Minerals Co., 467 N.J. Super. 476, 504-18 (App. Div. 2021) to further support these arguments.

Having considered defendants' contentions on this point in light of the record and the applicable law, we agree that the trial court misapplied the well-established judicial gatekeeping procedures required by our courts and that the error was not harmless in regard to the testimony of Webber, Moline, and Longo. Therefore, we reverse and remand for a new trial.

A. STANDARD OF REVIEW AND THE TRIAL COURT'S GATEKEEPER ROLE IN THE ADMISSION OF EXPERT TESTIMONY

A reviewing court will apply an abuse of discretion standard of review when "assessing whether a trial court has properly admitted or excluded expert scientific

testimony in a civil case." Accutane, 234 N.J. at 348, 392. On appeal, the trial court's ruling should be reversed only if it was "so wide off the mark that a manifest denial of justice resulted." Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999). Notably, harmless error should be disregarded and, instead, only errors "clearly capable of producing an unjust result" will cause the reversal of a jury verdict. Velazquez v. City of Camden, 447 N.J. Super. 224, 232 (App. Div. 2016) (quoting R. 2:10-2). A trial court's failure to perform its gatekeeping function by allowing experts to testify concerning untested opinions is error clearly capable of producing an unjust result. Lanzo, 467 N.J. Super. at 517-18.

***3** Expert testimony is governed by N.J.R.E. 702, which states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." There are three prerequisites to determine whether expert testimony is admissible, namely:

> (1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony.
>
> [Accutane, 234 N.J. at 348 (quoting State v. Kelly, 97 N.J. 178, 223 (1984)) (Handler, J., concurring in part and dissenting in part).]

Importantly, the Accutane Court touched on an important distinction when a court is charged with determining whether to admit expert testimony: a trial court is tasked with making legal determinations about the reliability of an expert's methodology, which is not to be confused with a credibility determination in the province of the jury. Id. at 388. As a result, the Accutane Court "clarif[ied] and reinforce[d] the proper role for the trial court as the gatekeeper of expert witness testimony." Id. at 389. It instructed the trial courts "to assess both the methodology used by the expert to arrive at an opinion and the underlying data used in the formation of the opinion." Id. at 396-97. This "rigorous" role is critical because the court's gatekeeping function prevents the jury from exposure to unsound science that is labeled expert or scientific. Id. at 390.

When engaging in this analysis, the court must determine whether comparable experts accept the soundness of the presented methodology and evaluate the reasonableness of relying on the type of data and information underlying the expert's opinion. Id. at 390, 396-97. To aid in the evaluation of an expert's methodology, the Accutane Court encouraged trial courts to incorporate the Daubert[6] factors, which are both helpful and non-exhaustive. Id. at 398.

In general, several of the pertinent Daubert factors include:

> 1) Whether the scientific theory can be, or at any time has been, tested;
>
> 2) Whether the scientific theory has been subjected to peer review and publication, noting that publication is one form of peer review but is not a "sine qua non";
>
> 3) Whether there is any known or potential rate of error and whether there exist any standards for maintaining or controlling the technique's operation; and
>
> 4) Whether there does exist a general acceptance in the scientific community about the scientific theory.
>
> [Ibid.]

Thus, under the standard set forth in Accutane, the party seeking to admit the testimony must show that the expert "applies his or her scientifically recognized methodology in a way that others in the field practice the methodology." Id. at 399-400. Notably, an expert should not selectively choose from the scientific landscape. Id. at 400.

The Court has also provided guidance for evaluating expert testimony in Rubanick v. Witco Chemical Corp., 125 N.J. 421, 449 (1991), when it held that "a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately-founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field." It emphasized that "[t]he critical determination is whether comparable experts accept the soundness of the methodology, including the reasonableness of relying on this type of underlying data and information." Id. at 451.

***4** Overall, the proposed expert's testimony should be excluded when it does not satisfy our Court's standards for a sound methodology and the reasonable reliance on the type of data and information used by other experts in the field. Accutane, 234 N.J. at 400. When an expert's opinion lacks the requisite foundation, it is an inadmissible net opinion or a bare opinion that has no support in factual evidence or similar data. Pomerantz

Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011).

B. DEFENDANTS' CHALLENGE TO WEBBER'S TESTIMONY

Defendants claim that Webber provided unreliable opinions that non-asbestiform cleavage fragments cause cancer. Specifically, defendants contend that the court erred when it allowed Webber to testify that asbestos can include non-asbestiform minerals and all fibers and, also, that non-asbestiform cleavage fragments can cause cancer. Defendants allege that the court should have held an N.J.R.E. 104 hearing, Webber's opinions were unreliable, and his statements on these topics were unreliable net opinions unsupported by data or a sound methodology.

i. Webber's testimony at trial

After hearing oral argument on defendants' motion to exclude Webber's testimony and request for an N.J.R.E. 104 hearing, the court denied defendants' motion without analysis and stated that defendants' concerns could be addressed during cross-examination. During oral argument, plaintiffs' counsel noted that Webber had testified before the same court in other matters and that Webber's testimony would be "exactly" what he had done in Lanzo in terms of giving an opinion as to whether there is asbestos in JBP.

At trial, Webber testified that the geological definition of "asbestos" is a particle that contains long thin fibers that are flexible and have high tensile strength. However, Webber stated that a fiber that lacks high tensile strength and good flexibility can still be asbestos, be dangerous, and cause mesothelioma, but it would not be as commercially useful. For example, he claimed that "tremolite fibers" are asbestos.

Webber further explained that the definition of "regulated asbestos" is long, thin, individual fibers with an aspect ratio of 3:1 or greater and with substantially parallel sides. Fibers that meet the definition of regulated asbestos have been related to asbestos disease. Later in his testimony, Webber stated that "non-talc needles," elongated particles with parallel sides, are considered fibers by the regulated asbestos definition.

When asked about cleavage fragments, Webber testified that they could form by breaking an amphibole rock. Occasionally, an amphibole rock could break into elongated particles that could meet the definition of a fiber if the particles have an aspect ratio of greater than 3:1 and parallel sides. Webber explained that these particles would be counted as asbestos fibers because there would be no way to differentiate whether the particle came from a crushed amphibole rock or a fiber of asbestos.

Webber explained that he was aware of arguments about the hazardousness, toxicity, or dangerousness of the cleavage fragment fibers. He stated that a cleavage fragment lacks the properties associated with a geologist's definition of asbestiform. Also, a cleavage fragment would not meet the definition of asbestos or be hazardous in instances where a cleavage fragment formed a chunk and lacked the problematic aspect ratio. However, when a cleavage fragment forms a fiber, it would be considered hazardous from an environmental health perspective because it has an aspect ratio of greater than 3:1 and essentially parallel sides. Moreover, although most cleavage fragments would not be small enough to reach the alveoli part of the lungs, Webber stated that a cleavage fragment that was a fiber could reach the alveoli and be hazardous.

***5** To reach his conclusions, Webber generally relied upon "Surface Charge Measurements of Amphibole Cleavage Fragments and Fibers" published by the Bureau of Mines in 1980 (the Surface Charge Article). Webber did not discuss the details of the publication, the parameters of the study, or any of the scientific analysis. Without specifying, Webber stated that there is "some evidence" in the literature that the surface charge of a particle is a bio-activator that can cause the mesothelium or alveoli to react and lead to cancer. Webber cited only to the abstract of the publication to support his conclusion that the surface charge of asbestos fibers was the same as those of elongated cleavage fragments with the same aspect ratio.

Next, Webber generally cited to a United States Geological Survey entitled "Mineralogy and Morphology of Amphiboles Observed in Soils and Rocks in El Dorado Hills, California" dated 2006 (the 2006 Geological Survey). A small portion of the discussion section of the survey was read to the jury, and this passage stated that the definition of asbestos can vary based on the source of the particles and the purpose of the particles in an industry. Without discussing the details of the publication or any studies contained therein, Webber concluded that when a person is trying to define asbestos in

environmental terms, an analyst must look at the aspects of fibers that are pertinent to human health.

Next, over defendants' objections, Webber relied upon a United States Environmental Protection Agency (EPA) Region 9 report dated April 20, 2006, entitled "Response to the November 2005 National Stone, Sand, & Gravel Association Report Prepared by the R.J. Lee Group, Inc. 'Evaluation of EPA's Analytical Data from the El Dorado Hills Asbestos Evaluation Project' " (the 2006 EPA Region 9 Response) when forming his conclusions that the EPA made no distinction between fibers and cleavage fragments of comparable chemical composition, size, and shape. To support this conclusion, Webber merely read the same sentence from the publication to the jury and stated that he agreed with it. Further, to validate his notion that cleavage fragments could impact human health, Webber selected a few other sentences from the report that stated the cleavage fragment hypothesis needed to be studied further before experts could conclude that such particles are benign.

Again over defendants' objections, Webber next relied upon a 2009 article by Gregory Meeker from the United States Geological Survey (the Meeker article) as the basis for his conclusion that using the term "asbestiform" to differentiate a hazardous from a non-hazardous substance has no foundational basis in medical sciences. During cross-examination, Webber admitted that: he did not perform any exposure analysis or research to see if there were any trace amounts of asbestos in JBP; there was no scientific study published in peer review literature that concludes that JBP or STS increases a person's risk of mesothelioma; and there have never been any published papers or studies that have concluded that cleavage fragments have the same health effects as asbestos or increase a person's risk for mesothelioma.

In addition, Webber admitted that: the Occupational Safety and Health Administration (OSHA) concluded that there was not enough substantial evidence to conclude that non-asbestiform versions of tremolite, anthophyllite, and actinolite present the same health effects as asbestos; and OSHA concluded that cleavage fragments do not have similar health effects as asbestos. Finally, when confronted with his prior publication from 2004 where he stated that not all particles with 3:1 aspect ratios are asbestos fibers, Webber explained that his prior statement was not "well-advised."

ii. The Lanzo court's analysis of Webber's prior testimony

***6** In Lanzo, we agreed with J&JCI and Imerys Talc America, Inc., the defendants in that case, that the trial court erred by abusing its discretion, and that the error was not harmless, when it allowed the jury to hear Webber's opinion that non-asbestiform minerals that are similar in size to asbestiform minerals can cause mesothelioma. Lanzo, 467 N.J. Super. at 503. During that trial, the court did not hold an N.J.R.E. 104 hearing to perform the analysis required by Accutane, failed to assess Webber's methodology, and did not consider Webber's underlying data. Id. at 507.

In front of the Lanzo jury, Webber stated that cleavage fragments had the same potential to cause disease as asbestos fibers with similar aerodynamic dimensions and, also, that he was not aware of any studies showing that non-asbestiform cleavage fragments can cause mesothelioma. Id. at 508-09. Further, Webber failed to cite to any authority for his claims that cleavage fragments present the same risk as asbestos fibers because of their identical chemical composition and bio-durability. Ibid.

We further took issue with the sources that Webber relied upon. Id. at 509. First, we held that a study by the pathologist Victor Roggli was insufficient to support the conclusion that non-asbestiform tremolite causes mesothelioma because the study did not distinguish between asbestiform and non-asbestiform fibers. Ibid. Second, we found that Webber's decision to cite a single quote from a paper entitled "Differentiating Non-Asbestiform Amphibole and Amphibole Asbestos by Size Characteristics" published in the December 2008 Journal of Occupational and Environmental Hygiene co-authored by Dr. Martin Harper and the National Institute of Occupational Safety and Health (NIOSH) was insufficient to explain the scientific basis for Webber's opinion that non-asbestiform amphibole particles could meet the definition for a fiber. Ibid. Moreover, a later NIOSH publication clarified that the inclusion of non-asbestiform minerals in the definition of airborne asbestos fibers was based on inconclusive evidence. Id. at 509-10.

Third, we ruled that Webber's reliance on the 2009 Meeker article was flawed. Id. at 510. In particular, the 2009 Meeker article's claim that using the term asbestiform to differentiate between hazardous and non-hazardous substances had no basis in the medical science. Ibid. Meeker failed to report a scientific study and the article was not peer reviewed. Ibid. Finally, we held that Webber's reliance on the 2006 EPA Region 9 Response was problematic because the publication

claimed that the EPA made no distinction between fibers and cleavage fragments of the same chemical composition, size, and shape. Ibid. Notably, the EPA publication did not cite to any studies and Webber failed to discuss any details in his testimony. Ibid.

As to Webber's testimony specifically, we explained that his opinion that non-asbestiform cleavage fragments could cause mesothelioma was untested and he failed to show that his theory was generally accepted in the scientific community. Id. at 511. Further, we ruled that the trial court erred because it failed to establish that Webber's methodology involved data and information of the type reasonably relied upon by experts in the field, failed to assess Webber's methodology, and failed to consider the underlying data that Webber used to form his opinion. Ibid.

iii. In the present case, the trial court erred by admitting Webber's expert testimony and the admission of this testimony was not harmless error

***7** Here, as in Lanzo, the trial court failed to perform its gatekeeping role in assessing the underlying reasonableness of Webber's methodology and underlying data in forming his opinion. When citing to a limited number of publications, Webber failed to identify the data he used to form his opinion and did not discuss how the authorities he relied upon provided comparable data from other experts in the same field. Rather he only generally stated, without explanation or discussion, that the sources he relied upon were similarly relied upon by other unspecified experts.

Tellingly, when discussing the Surface Charge article, Webber did not discuss the details of the study or the parameters under which surface charges were evaluated. Webber only briefly referenced one sentence from the abstract to support his conclusion that cleavage fragments could cause cancer. Similarly, when discussing the 2006 Geological Survey, Webber extrapolated his idea that when studying asbestos in the environment, an analyst should look at the effects of asbestos on human health. There was no support in Webber's testimony that the 2006 Geological Survey made this connection or explained how he reached his conclusion.

Significantly, two of Webber's sources in the present case were explicitly criticized in Lanzo: the 2009 Meeker article; and the 2006 EPA Region 9 Response. In Lanzo, we stated that the 2009 Meeker article did not report the results of a scientific study, was not peer reviewed, made controversial claims, and did not support the proposition that non-asbestiform minerals can cause cancer. Id. at 510-11. Further, we explained that the 2006 EPA Region 9 Response provided no details of any studies, made no distinctions between asbestiform fibers and cleavage fragments; and did not state that exposure to cleavage fragments caused mesothelioma. Ibid. Webber's testimony as to these two sources is similarly faulty in the present case.

As to the trial court's gatekeeping function, it failed to hold an N.J.R.E. 104 hearing and made no legal determinations of reliability about Webber's methodology. Rather, the court allowed the jury to hear unsound science labeled as expert and scientific when it allowed the jury to make credibility determinations, contrary to the explicit instructions in Accutane.

Further, an application of the Daubert factors does not support the admission of Webber's testimony as his theories were untested, not subject to peer-review, and not generally accepted in the scientific community. Importantly, Webber did not explain the standards he applied to reach his conclusions and instead set forth bare conclusion in the form of an unsupported opinion. For the court's part, it did not assess Webber's methodology or underlying data used to form his opinion. Therefore, the court mistakenly exercised its discretion when it admitted Webber's testimony.

The trial court's error in admitting the testimony was harmful error because it was "so wide off the mark that a manifest denial of justice resulted." Green, 160 N.J. at 492. Webber theorized that cleavage fragments could cause mesothelioma without support and the testimony bolstered plaintiffs' claims that their illnesses were linked to particles that could have been present in talcum powder. Although Webber did not opine that cleavage fragments were in JBP or STS, he linked the existence of cleavage fragments to mesothelioma.

Moreover, the jury heard testimony from Longo, another of plaintiffs' experts, that the tool he used to identify fibers[7] could not distinguish between whether a fiber was asbestiform or non-asbestiform. As a result, the implication is that all fibers could cause mesothelioma if either asbestiform fiber particles or fiber-shaped non-asbestiform cleavage fragments can cause cancer. Thus, the jury heard unsupported theories that cleavage fragments could cause cancer and we are satisfied this error was "clearly capable of producing an unjust result." Velazquez, 447 N.J. Super. at 232. As a result, the jury verdict must be overturned and a new trial held.

C. DEFENDANTS' CHALLENGE TO MOLINE'S TESTIMONY

***8** Defendants also allege that the trial court should have precluded or stricken Moline's expert testimony. Specifically, defendants contend that the court erred when it allowed Moline to testify that non-asbestiform cleavage fragments and asbestiform fibers have the same health effects and, also, that defendants' products caused plaintiffs' mesothelioma.

i. Moline's testimony at trial

After hearing oral argument, the trial court denied defendants' motion seeking an N.J.R.E. 104 hearing and to exclude Moline's testimony regarding cleavage fragments. It held that Moline's testimony was not cumulative and confined her testimony to the parameters of her expert report regarding cleavage fragments. The court noted that Moline had "apparently cited to literature and different agencies" with regard to her opinions on cleavage fragments. Moreover, without further analysis, the court stated generally that there "are geological definitions that defendants point to and they have their experts in that regard, and there is a body of agencies and opinions relative ... toward the discussion of what does it all mean, in terms of medicine and ... the effect on the body."

At the outset of her testimony, Moline explained that asbestos is a fiber and that there are six regulated types of asbestos. She stated that she relied on a 2019 article from the Finnish Institute of Occupational Health entitled "Asbestos risk management guidelines for mines" (the 2019 Finnish article). She generally explained that the article supported her definition of asbestos as being any particle that has a minimum "length-to-thickness ratio" of 3:1. Moreover, she claimed without specificity that from an occupational medicine and public health point of view, fibers that are longer than they are wide are hazardous, cause cancer, and lead to pulmonary diseases.

Moline stated that she relied on a 2014 article by "Gordon, Fitzgerald, and Millette" entitled "Asbestos in commercial cosmetic talcum powder as a cause of mesothelioma in woman" (the 2014 Gordon article) to support her conclusion that exposure to talc, including defendants' talc, can cause mesothelioma. However, she did not discuss the details of the study, the data, or the results.

Later in her testimony, Moline again relied generally on the 2019 Finnish article when she concluded that all types of asbestos could cause mesothelioma. Without explaining the scientific basis for her theory, she stated that asbestos fibers that meet the size criteria pose a health risk regardless of how they are characterized by a geologist or mineralogist.

When discussing whether defendants' products caused plaintiffs' mesothelioma, Moline stated that she had reviewed "papers" showing that asbestos can become airborne when using talcum powders. She again briefly referred to the 2014 Gordon article, an untitled paper by "Rohl," and an unnamed study by "Mattenklott." At no point in Moline's testimony did she explain the details or specifics of the Rohl and Mattenklott studies. Rather, she would generally refer to these three papers throughout her testimony without describing the specific parameters of the studies to support her conclusion that billions of particles of asbestos can become airborne when small amounts of talcum powder were used.

On cross-examination, Moline admitted that she had never concluded that talcum powder caused mesothelioma prior to being hired by plaintiffs' attorneys. Moreover, she admitted that she issued her opinion that defendants' products caused plaintiffs' mesothelioma prior to interviewing or examining Barden and Etheridge and, also, without interviewing or examining McNeill-George and Ronning.

ii. The Lanzo court's analysis of Moline's prior trial testimony

***9** In Lanzo, we concluded that Moline's expert testimony that non-asbestiform minerals can cause mesothelioma suffered from similar defects as Webber's opinions at trial. Lanzo, 467 N.J. Super at 511-12. We held that the trial court failed to assess Moline's methodology and the underlying data that she used to form her opinions. Id. at 513. Accordingly, we reversed and remanded for a new trial because the court failed to perform its gatekeeping function. Ibid.

For example, Moline relied on the 2006 EPA Region 9 Response when she concluded that there was no difference between asbestiform fibers and non-asbestiform cleavage fragments with the same dimensions and chemical compositions in terms of their ability to cause disease. Id. at 512. Moline failed to

support her claims that there had been published literature and, also, studies to form the basis for her conclusions that non-asbestiform amphiboles cause mesothelioma. Ibid. Moreover, although she claimed that she reviewed additional studies and found information to support her statement that non-asbestiform minerals were carcinogenic, she failed to identify these studies. Id. at 512-13.

Moline's expert report stated, without support, that the EPA, Centers for Disease Control (CDC), and American Thoracic Society rejected the notion that there is biological significance to labeling anthophyllite or tremolite as either non-asbestiform or cleavage fragments. Id. at 512. She also failed to cite her sources for her claim that miners and millers of talc in New York had mesothelioma caused by talc containing approximately 50% non-asbestiform anthophyllite and tremolite. Ibid.

iii. In the present case, the trial court erred by admitting Moline's expert testimony and the admission of this testimony was not harmless error

Again, as in Lanzo, the trial court failed to perform its gatekeeping role in assessing the underlying reasonableness of Moline's methodology and underlying data in forming her opinion. Moline failed to identify the data she used to develop her opinion, did not discuss how the authorities she relied upon provided comparable data from other experts in the same field, and in some instances failed to adequately identify her sources. For example, she repeatedly cited to studies by Rohl and Mattenklott which may have had the effect of bolstering her statements to the jury as being more reliable despite Moline failing to discuss any details of such studies.

Further, Moline failed to explain her methodology or data as it related to her use of the 2019 Finnish article to support her claim that from a public health point of view, fibers that are longer than they are wide are hazardous, cause cancer, and lead to pulmonary diseases. Similarly, she failed to explain the link between her theories about the causes of mesothelioma and the 2014 Gordon article because she did not explain the article including the data relied upon and the analysis.

As to the trial court's gatekeeping function, it again failed to hold an N.J.R.E. 104 hearing and made no legal determinations of reliability about Moline's methodology. The court also permitted the jury to make credibility determinations as to the quality of the expert testimony instead of first determining whether Moline's opinion was based on sound and adequately founded scientific methodology.

For the same reasons stated above regarding the admission of Webber's testimony, the trial court's failure to adequately perform its gatekeeping function was harmful error because it was "so wide off the mark that a manifest denial of justice resulted." Green, 160 N.J. at 492. Moline theorized that cleavage fragments could cause mesothelioma, but did not opine that cleavage fragments were in JBP or STS. However, her testimony bolstered plaintiffs' claims that they could have been exposed to substances that caused their mesothelioma. What is more, the jury could associate Moline's statements with Longo's testimony to conclude that all fibers could cause mesothelioma if either asbestiform fiber particles or fiber-shaped non-asbestiform cleavage fragments can cause cancer. Thus, via Moline's testimony, the jury heard unsupported theories that cleavage fragments could cause cancer. Because this error was "clearly capable of producing an unjust result," Velazquez, 447 N.J. Super. at 232, we reverse and remand for a new trial.

D. DEFENDANTS' CHALLENGE TO LONGO'S EXTRAPOLATION TESTIMONY

***10** Defendants also raise several arguments concerning the trial court's admission of Longo's expert testimony. We will address defendants' contentions concerning Longo's extrapolation testimony because that testimony represents another occasion where the court failed to discharge its gatekeeping function as required by Accutane.

i. The trial court's decision

After hearing oral argument, the trial court denied defendants' motion to hold an N.J.R.E. 104 hearing and exclude Longo's trial testimony concerning his "exposure calculations" where he extrapolated the number of ten-ounce containers of defendants' products that each plaintiff used in their lifetime. As to Longo's extrapolation testimony, the court merely stated that it was "something that Dr. Longo has done in this courtroom during the course of trials, where he takes the testimony ... of the plaintiff and he does an extrapolation." The court stated that it had seen Longo use data on "some" J&J documents previously. On the basis of those

statements, the court concluded that there would be no prejudice in allowing Longo to testify as to extrapolation because "he's done it on other trials." Instead of analyzing the matter further in accordance with the Accutane mandates, the court stated that any issues with Longo's testimony on this subject could be resolved on cross-examination.

ii. Longo's testimony regarding extrapolation

Longo explained that he reviewed the deposition testimony of McNeill-George, Etheridge, Barden, and Ronning. He believed that their description of how they used J&J's products was fair because based on J&J's own studies, most users of J&J's products used them after showering as plaintiffs had. Based on J&J's own studies, people used about eight grams per application.

Based upon that ambiguous data, Longo estimated that McNeill-George would have had 13,578 exposures to JBP and STS made with talc from the Vermont and Chinese mines and those exposures would have been substantial. He opined that Etheridge would have had approximately 8,180 applications of JBP, was exposed to substantial amounts of asbestos, and would have been exposed to the Vermont and Chinese talc.

According to Longo's analysis, Barden used JBP for approximately 23,449 applications, was exposed to substantial amounts of asbestos by virtue of his use of JBP, and that the talc came from the Italian and Vermont mines based on the timing of his usage. Finally, Longo told the jury that Ronning had approximately 6,787 applications of JBP with talc from the Vermont and Chinese mines, which would have represented a substantial exposure.

On cross-examination, Longo explained that he counted the number of applications, counted the amount of talcum powder used per person, and provided a potential range of exposure when he concluded that it was more likely than not that each plaintiff had substantial exposure to asbestos from defendants' products. He based his extrapolation data on a sample from a bottle of defendants' product that had been obtained on eBay. This bottle had the highest concentration of asbestos of any of the sample bottles Longo examined. Longo testified he used this unique sample bottle because the concentration of asbestos in it was similar to a published paper that had an analogous amount of asbestos and he wanted to compare the two.

***11** During cross-examination, defense counsel asked how Longo determined whether someone experienced "substantial exposure" to asbestos and alleged his testimony contradicted his expert testimony in other matters. In particular, in a prior case, Longo testified about an individual's use of crocidolite filters used in "Kent Micronite" brand cigarettes and, also, that same individual's possible asbestos exposure from mixing cement with asbestos. At the time of that case, Longo did not believe that the asbestos in the cement would cause significant asbestos exposure. He admitted that the asbestos in the mixing cement was in excess of the asbestos found in JBP, but explained that the exposure to the asbestos in JBP was higher because it was being used as a hygiene product.

iii. The trial court erred by admitting Longo's extrapolation testimony and the admission of this testimony was not harmless error

As set forth above, Longo estimated the number of exposures McNeill-George, Etheridge, Barden, and Ronning each had to defendants' products based upon: their deposition testimony about the number of times they used defendants' products per day; J&J's own studies about the amount of talcum powder a person used per application; and the length of time each plaintiff used defendants' products as presented in their respective deposition testimony. In permitting this testimony without first conducting an N.J.R.E. 104 hearing and subjecting Longo's claims to the standards set forth in Accutane and Daubert, the trial court clearly erred in its judicial gatekeeping and abused its discretion.

There is insufficient evidence in the record to conclude that Longo's extrapolation methodology was based on a sound, adequately founded scientific methodology involving data reasonably relied upon by experts in the scientific field. Further, it is unclear if Longo's extrapolation method had been tested, subjected to peer review or publication, subjected to standards for controlling the technique, or accepted in the scientific community.

Tellingly, the trial court's analysis of the extrapolation method only consisted of recognizing that Longo had presented similar data in prior cases and had used J&J's documents in his analysis. This meager "finding" plainly did not comply with the strictures of Accutane and Daubert.

The trial court's admission of Longo's extrapolation testimony was harmful because it lent significant weight

to plaintiffs' assertions that defendants' products were a substantial factor in causing plaintiffs' mesothelioma. This error was clearly capable of producing an unjust result. Therefore, the matter must be reversed and remanded for a new trial.

E. CONCLUSION

In sum, the trial court erred when it admitted Webber's and Moline's testimony about cleavage fragments, and Longo's extrapolation testimony. These errors, taken singularly or collectively, were harmful and require the reversal of the jury verdict. See Lanzo, 467 N.J. Super. at 517-18 (holding that trial court's failure to perform its gatekeeping function by allowing experts to testify concerning untested opinions is error clearly capable of producing unjust result). Therefore, we reverse the July 24, 2020, orders of final judgment and remand the matter for new trials.

In view of our decision, we need not address the other issues that defendants have raised on appeal, including their contentions that the trial court erred by: striking their closing argument; consolidating the four matters for trial; committing other evidentiary and trial errors; empaneling a new jury for the punitive damages phase of the trial; denying their motion for a new trial on punitive damages; and failing to conduct an appropriate post-trial review of the punitive damages awards.

Reversed and remanded to the trial court for further proceedings in accordance with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in Atl. Rptr., 2023 WL 6430088

Footnotes

1 The four primary plaintiffs were D'Angela M. McNeill George, David Charles Etheridge, Douglas Barden, and William Ronning. Etheridge, Barden, and Ronning passed away during the course of the proceedings and their estates were substituted as plaintiffs.

2 Etheridge's, Barden's and Ronning's respective spouses also filed claims for loss of consortium.

3 The parties did not include the transcripts of the trial court's jury voir dire. As a result, the total number of trial days is unclear from the record on appeal.

4 The trial court later calculated prejudgment interest, which was added to each award.

5 The punitive damages phase of the trial lasted approximately sixteen non-consecutive days. Again, the total number of trial days is unclear from the appellate record.

6 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-95 (1993). Recently, in State v. Olenowski, 253 N.J. 133, 151-52 (2023), our Court adopted the Daubert principles in criminal cases.

[7] Longo testified he used a transmission electron microscope (TEM) to conduct his analysis.