

STEPHEN LANZO, III AND KENDRA  
LANZO,

Plaintiffs-Respondents

v.

CYPRUS AMAX MINERALS COMPANY,  
INDIVIDUALLY AND AS SUCCESSOR-  
IN-INTEREST TO AMERICAN TALC  
COMPANY, METROPOLITAN TALC  
COMPANY, INC., CHARLES MATHIEU,  
INC., RESOURCE PROCESSORS, INC.  
AND WINDSOR MINERALS, INC.;

Defendants-Appellants

(for continuation of caption  
see cover page 2)

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION DOCKET NO.:  
A-005717-17

On Appeal From:

Superior Court of New Jersey,  
Law Division, Middlesex County

Docket No. MID-L-7385-16 AS

Sat Below:

Hon. Ana C. Viscomi, J.S.C.

---

**BRIEF FOR DEFENDANT-APPELLANT  
JOHNSON & JOHNSON CONSUMER INC.**

---

Robert M. Loeb (*pro hac vice*)  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
1152 15th Street NW  
Washington, DC 20005  
rloeb@orrick.com

John C. Garde (Atty ID 014171986)  
McCARTER & ENGLISH LLP  
100 Mulberry Street  
Newark, New Jersey 07102  
jgarde@mccarter.com

E. Joshua Rosenkranz (*pro hac vice*)  
Naomi J. Scotten (*pro hac vice*)  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
51 West 52nd Street  
New York, NY 10019  
(212) 506-5380  
jrosenkranz@orrick.com  
nscotten@orrick.com

Paul David Meyer (*pro hac vice*)  
Evan M. Rose (*pro hac vice*)  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
405 Howard Street  
San Francisco, CA 94025  
pmeyer@orrick.com  
erose@orrick.com

*Counsel for Defendant-Appellant  
Johnson & Johnson Consumer Inc.*

STEPHEN LANZO, III AND KENDRA  
LANZO,

Plaintiffs-Respondents

v.

CYPRUS MINERAL CO.,  
INDIVIDUALLY AND AS SUCCESSOR-  
IN-INTEREST TO AMERICAN TALC  
COMPANY, METROPOLITAN TALC  
COMPANY, INC., CHARLES  
MATHIEU, INC., RESOURCE  
PROCESSORS, INC. AND WINDSOR  
MINERALS, INC.; IMERYS TALC  
AMERICA, INC., F/K/A LUZENAC  
AMERICA, INC., INDIVIDUALLY  
AND AS SUCCESSOR-IN-INTEREST  
TO WINDSOR MINERALS, INC.;  
JOHNSON & JOHNSON; JOHNSON &  
JOHNSON CONSUMER COMPANIES,  
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.;  
JOHN DOE CORPORATIONS 1-50;  
JOHN DOE CORPORATIONS 51-100,

Defendants-Appellants

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION DOCKET NO.:  
A-005717-17

On Appeal From:

Superior Court of New Jersey,  
Law Division, Middlesex County

Docket No. MID-L-7385-16 AS

Sat Below:

Hon. Ana C. Viscomi, J.S.C.

**TABLE OF CONTENTS**

	Page
TABLE OF JUDGMENTS, ORDERS AND RULINGS.....	iii
TABLE OF AUTHORITIES.....	v
TABLE OF TRANSCRIPT CITATIONS.....	x
PRELIMINARY STATEMENT.....	1
PROCEDURAL HISTORY.....	3
STATEMENT OF FACTS.....	5
The FDA And Independent Scientists Investigate A False Alarm In The Early 1970s.....	5
The Talc Industry Adopts Comprehensive Testing Standards.....	8
J&J Adopts Testing That Far Exceeds Industry Standards....	8
Stephen Lanzo Develops Mesothelioma And Sues J&J.....	12
ARGUMENT.....	16
I.    The Trial Court Erred In Admitting Unreliable Expert Testimony. (48T293-94; 24T155-56; 100T4- 24; Da1067-70, Da1420-23; 9T4-9T12; 55T83-84; Da8-11, Da3005.).....	16
A.    The trial court erred in admitting unreliable expert testimony about what qualifies as asbestos. (24T155-56; 48T293- 94; 100T4-24; Da1067-70, Da1420-23, Da3005.)...	17
1.    The established definition of asbestos distinguishes asbestiform from non- asbestiform minerals. (24T155-56; 48T293-94; 100T4-24; Da1067-70, Da1420- 23, Da3005.).....	19
2.    Plaintiffs' experts did not overcome the overwhelming scientific consensus. (24T155-56; 48T293-94; 100T4-24; Da1067-70, Da1420-23, Da3005.).....	24
3.    Plaintiffs' expert testimony was fatally unreliable. (24T155-56; 48T293-94; 100T4-24; Da1067-70, Da1420- 23, Da3005.).....	28

B.	The trial court erred in admitting expert testimony that drew unsupported conclusions from unreliable samples. (Da8-11, Da3005; 9T4-12; 55T83-84.).....	33
1.	The trial court erred in admitting Dr. Longo's analysis of samples lacking any reliable chain of custody. (Da8-11, Da3005; 100T4-24; 55T83-84.).....	33
2.	The trial court erred in admitting Dr. Longo's baseless extrapolated conclusions. (Da8-11, Da3005; 9T4-12; 55T83-84.).....	40
II.	The Trial Court Undermined J&J's Defense By Refusing To Grant Separate Trials After Instructing The Jury That It Could Infer That Imerys's Talc Was Contaminated With Asbestos. (Da2994-95; 83T149-57; 91T120.).....	43
III.	The Jury Instructions Improperly Constrained The Jury's Consideration Of Evidence Of Potential Alternate Causes Of Mr. Lanzo's Illness. (Da3005; 86T236-42; 91T152.).....	49
IV.	Insufficient Evidence Supported The Jury's Verdict. (100T4-24; Da3005.).....	52
A.	Plaintiffs presented insufficient evidence that Mr. Lanzo was exposed to asbestos from J&J talcum powder. (100T4-24; Da3005.).....	53
B.	Plaintiffs presented insufficient evidence to establish causation. (100T4-24; Da3005.).....	58
C.	Insufficient evidence supports the punitive damages award. (100T4-24; Da3005.).....	62
CONCLUSION.....		65

**TABLE OF JUDGMENTS, ORDERS AND RULINGS**

12/22/2017 Oral ruling denying motion for preclusion of evidence based on lack of authenticity ..... 9T4-12

12/22/2017 Order denying motion for preclusion of evidence based on lack of authenticity ..... Da8-9

12/22/2017 Order denying motion for preclusion of evidence based on lack of authenticity as to Johnson & Johnson, Johnson & Johnson Consumer Inc., and Imerys Talc America, Inc. .... Da10-11

1/25/2018 Oral Ruling denying motion to preclude testimony of Dr. James Webber or, in the alternative, for a Rule 104 hearing ..... 24T155-56

1/25/2018 Order denying motion to preclude testimony of Dr. James Webber or, in the alternative, for a Rule 104 hearing ..... Da1067-68

1/25/2018 Order denying motion to exclude Dr. James Webber or, in the alternative, for a Rule 104 hearing, as to Johnson & Johnson, Johnson & Johnson Consumer Inc., and Imerys Talc America, Inc. .... Da1069-70

2/21/2018 Oral ruling granting in part and denying in part motion to exclude Dr. Jacqueline Moline's expert opinions and testimony, or, in the alternative, for a Rule 104 hearing as to Johnson & Johnson, Johnson & Johnson Consumer Inc., and Imerys Talc America, Inc. .... 48T293-94

2/21/2018 Order granting in part and denying in part motion to exclude Dr. Jacqueline Moline's expert opinions and testimony, or, in the alternative, for a Rule 104 hearing as to Johnson & Johnson, Johnson & Johnson Consumer Inc., and Imerys Talc America, Inc. .... Da1420-21

2/21/2018 Order granting in part and denying in part motion to exclude Dr. Jacqueline Moline's expert opinions and testimony, or, in the alternative, for a Rule 104 hearing as to Johnson & Johnson Consumer Inc. .... Da1422-23

2/28/2018 Oral ruling denying objection to admission of testimony of Dr. William Longo. ....	55T83-84
3/28/2018 Oral ruling granting motion for adverse inference instruction and denying motion to sever and declare a mistrial in light of adverse inference instruction .....	83T149-57
3/29/2018 Oral ruling denying objections to alternative causation instruction .....	86T236-42
3/29/2018 Order granting motion for adverse inference instruction .....	Da2991-93
3/29/2018 Order denying motion to sever and to declare a mistrial in light of adverse inference instruction .....	Da2994-95
4/04/2018 Oral jury instruction on adverse inference.....	91T120
4/04/2018 Oral jury instruction on alternative causation .....	91T152
4/23/2018 Final Judgment Against Defendants Imerys Talc America, Inc. & Johnson & Johnson Consumer Inc. ....	Da3000-03
4/23/2018 Order of disposition.....	Da3004
6/29/2018 Oral ruling denying Defendant Johnson & Johnson Consumer Inc.'s motion for judgment notwithstanding the verdict or in the alternative new trial .....	100T1-24
6/29/2018 Order denying Defendant Johnson & Johnson Consumer Inc.'s motion for judgment notwithstanding the verdict or in the alternative new trial .....	Da3005

**TABLE OF AUTHORITIES**

	Page (s)
<b>Cases</b>	
<u>In re Accutane Litigation,</u> 234 N.J. 340 (2018) .....	16, 29, 30, 31, 34
<u>Alfaro v. Imerys Talc Am. Inc.,</u> No. B277284, 2017 WL 3668610 (Cal. Ct. App. Aug. 25, 2017) .....	36, 37, 42
<u>Alley v. Gubser Dev. Co.,</u> 785 F.2d 849 (10th Cir. 1986) .....	63
<u>Barlow v. ACandS, Inc.,</u> Consolidated No. 24X11000783 (Bal. Cir. Ct. Nov. 13, 2015) .....	35, 37
<u>Clark v. Chrysler Corp.,</u> 436 F.3d 594 (6th Cir. 2006) .....	63
<u>Coleman v. Quaker Oats Co.,</u> 232 F.3d 1271 (9th Cir. 2000) .....	46
<u>Davidson v. Slater,</u> 189 N.J. 166 (2007) .....	51
<u>In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant</u> <u>Prod. Liab. Litig.,</u> 888 F.3d 753 (5th Cir. 2018) .....	34
<u>Dolson v. Anastasia,</u> 55 N.J. 2 (1969) .....	52
<u>Donato v. Fitzgibbons,</u> 172 F.R.D. 75 (S.D.N.Y. 1997) .....	47, 48, 49
<u>Eschle v. E. Freight Ways, Inc.,</u> 128 N.J. Super. 299 (Law Div. 1974) .....	46
<u>In re Estate of Barabin v. AstenJohnson, Inc.,</u> 740 F.3d 457 (9th Cir. 2014) .....	29, 31, 32
<u>Feldman v. Lederle Labs.,</u> 132 N.J. 339 (1993) .....	63

Fishbain v. Colgate-Palmolive Co.,  
Dkt. No. MID-L-5633-13 AS  
(N.J. Super. Ct. Aug. 6, 2015) .....38

Franklin Disc. Co. v. Ford,  
27 N.J. 473 (1958) .....52

Goss v. Am. Cyanamid Co.,  
278 N.J. Super. 227 (App. Div. 1994) .....59

Greene v. ACandS, Inc.,  
Consolidated No. 24X16000314  
(Bal. Cir. Ct. May 16, 2017) .....37

Hughes v. A.W. Chesterton Co.,  
435 N.J. Super. 326 (App. Div. 2014) .....59

Johnesee v. Stop & Shop Cos., Inc.,  
174 N.J. Super. 426 (App. Div. 1980) .....50

Kiczula v. Am. Nat’l Can Co.,  
310 N.J. Super. 293 (App. Div. 1998) .....50

Landrigan v. Celotex Corp.,  
127 N.J. 404 (1992) .....29

Maudsley v. State,  
357 N.J. Super. 560 (App. Div. 2003) .....62

Mitchell v. Gencorp Inc.,  
165 F.3d 778 (10th Cir. 1999) .....30

Nease v. Ford Motor Co.,  
848 F.3d 219 (4th Cir. 2017) .....31

Newmark-Shortino v. Buna,  
427 N.J. Super. 285 (App. Div. 2012) .....52

Pavlova v. Mint Mgmt. Corp.,  
375 N.J. Super. 397 (App. Div. 2005) .....62

Paxton v. Misiuk,  
34 N.J. 453 (1961) .....50, 51

Provini v. Asbestospray Corp.,  
360 N.J. Super. 234 (App. Div. 2003) .....59

Quintanilla v. City of Downey,  
84 F.3d 353 (9th Cir. 1996) .....45

<u>Rendine v. Pantzer,</u> 141 N.J. 292 (1995) .....	45
<u>Richards v. Michelin Tire Corp.,</u> 21 F.3d 1048 (11th Cir. 1994) .....	63
<u>Robertet Flavors, Inc. v. Tri-Form Const., Inc.,</u> 203 N.J. 252 (2010) .....	47
<u>Rosenblit v. Zimmerman,</u> 166 N.J. 391 (2001) .....	47
<u>Rubanick v. Witco Chem. Corp.,</u> 125 N.J. 421 (1991) .....	29
<u>Satcher v. Honda Motor Co.,</u> 52 F.3d 1311 (5th Cir. 1995) .....	63
<u>Sholtis v. Am. Cyanamid Co.,</u> 238 N.J. Super. 8 (App. Div. 1989) .....	17, 40, 59
<u>State v. Bankston,</u> 63 N.J. 263 (1973) .....	32, 42
<u>State v. Boone,</u> 66 N.J. 38 (1974) .....	48
<u>State v. Brown,</u> 99 N.J. Super. 22 (App. Div. 1968) .....	34, 35
<u>State v. Dotro,</u> No. A-2805-15T1, 2017 WL 744693 (N.J. Super. Ct. App. Div. Feb. 27, 2017) .....	34
<u>State v. Mance,</u> 300 N.J. Super. 37 (App. Div. 1997) .....	45
<u>State v. Manney,</u> 26 N.J. 362 (1958) .....	48
<u>State v. Smiley,</u> No. A-3858-09T1, 2012 WL 4328335 (N.J. Super. Ct. App. Div. Sept. 24, 2012) .....	45
<u>State v. Smith,</u> 262 N.J. Super. 487 (App. Div. 1993) .....	50
<u>State v. Van Duyne,</u> 43 N.J. 369 (1964) .....	50

United States v. Boone,  
437 F.3d 829 (8th Cir. 2006) .....45

United States v. Lueth,  
807 F.2d 719 (8th Cir. 1986) .....45

Washington v. Perez,  
219 N.J. 338 (2014) .....49, 51

Weirick v. Brenntag N. Am., Inc., Case No. JCCP 46743  
(Cal. Super. Ct. July 23, 2018) .....36, 42

**Statutes**

Toxic Substances Control Act (TSCA), 15 U.S.C.  
§§ 2601-2629

15 U.S.C. § 2601 .....23

15 U.S.C. § 2642(3) .....23

21 U.S.C. § 393(b)(2)(D) .....6

Clean Air Act, 42 U.S.C. § 7401 et seq.

42 U.S.C. § 7401 .....23

N.J.R.E. 702 .....29

N.J.S.A. 2A:15-5.10 .....62

N.J.S.A. 2A:15-5.12(a) .....62

N.J.S.A. 2A:15-5.12(b) .....62

Worker and Community Right to Know Act, L. 1983, c.  
315, N.J.S.A. 34:5A-1, et seq.

N.J.S.A. 34:5A-2 .....24

N.J.S.A. 34:5A-34 .....24

Rule 2:10-2 .....32

40 C.F.R. § 61.141 .....23

57 Fed. Reg. 24310 .....23

**Other Authorities**

David G. Owen, Problems in Assessing Punitive Damages  
Against Manufacturers of Defective Products, 49 U.  
Chi. L. Rev. 1 (1982) .....64

Nosse v. ArvinMeritor, Inc.,  
LASC No. BC603354, Motion Hearing Transcript (Cal.  
Super. Ct. Jun. 29, 2016) .....37

Schoeniger v. Colgate-Palmolive Co.,  
Dkt. No. MID-L-5869-16AS, Motion Hearing Transcript  
(N.J. Super. Ct. Oct. 19, 2017) .....37

W. Page Keeton, et al., Prosser and Keeton on the Law  
of Torts § 36 (5th ed.) .....63

**TABLE OF TRANSCRIPT CITATIONS**

<u>Transcript Number</u>	<u>Date</u>
1T	September 29, 2017
2T	October 11, 2017
3T	November 29, 2017
4T	December 6, 2017, Volume I
5T	December 6, 2017, Volume II
6T	December 6, 2017, Volume III
7T	December 8, 2017
8T	December 15, 2017
9T	December 22, 2017
10T	January 3, 2018, Volume I
11T	January 3, 2018, Volume II
12T	January 8, 2018
13T	January 9, 2018
14T	January 10, 2018, Volume I
15T	January 10, 2018, Volume II
16T	January 11, 2018
17T	January 12, 2018, Volume I
18T	January 12, 2018, Volume II
19T	January 16, 2018, Volume I
20T	January 16, 2018, Volume II
21T	January 17, 2018

22T	January 19, 2018
23T	January 22, 2018
24T	January 25, 2018
25T	January 29, 2018
26T	January 30, 2018, Volume I
27T	January 30, 2018, Volume II
28T	January 31, 2018, Volume I
29T	January 31, 2018, Volume II
30T	February 1, 2018, Volume I
31T	February 1, 2018, Volume II
32T	February 5, 2018, Volume I
33T	February 5, 2018, Volume II
34T	February 6, 2018, Volume I
35T	February 6, 2018, Volume II
36T	February 7, 2018
37T	February 8, 2018, Volume I
38T	February 8, 2018, Volume II
39T	February 12, 2018, Volume I
40T	February 12, 2018, Volume II
41T	February 13, 2018, Volume I
42T	February 13, 2018, Volume II
43T	February 14, 2018, Volume I
44T	February 14, 2018, Volume II
45T	February 20, 2018, Volume I

46T	February 20, 2018, Volume II
47T	February 21, 2018, Volume I
48T	February 21, 2018, Volume II
49T	February 22, 2018
50T	February 23, 2018
51T	February 26, 2018, Volume I
52T	February 26, 2018, Volume II
53T	February 27, 2018, Volume I
54T	February 27, 2018, Volume II
55T	February 28, 2018, Volume I
56T	February 28, 2018, Volume II
57T	March 1, 2018, Volume I
58T	March 1, 2018, Volume II
59T	March 5, 2018, Volume I
60T	March 5, 2018, Volume II
61T	March 6, 2018, Volume I
62T	March 6, 2018, Volume II
63T	March 8, 2018, Volume I
64T	March 8, 2018, Volume II
65T	March 9, 2018
66T	March 12, 2018, Volume I
67T	March 12, 2018, Volume II
68T	March 13, 2018, Volume I

69T	March 13, 2018, Volume II
70T	March 14, 2018
71T	March 16, 2018
72T	March 19, 2018, Volume I
73T	March 19, 2018, Volume II
74T	March 20, 2018, Volume I
75T	March 20, 2018, Volume II
76T	March 22, 2018
77T	March 23, 2018, Volume I
78T	March 23, 2018, Volume II
79T	March 26, 2018, Volume I
80T	March 26, 2018, Volume II
81T	March 27, 2018, Volume I
82T	March 27, 2018, Volume II
83T	March 28, 2018, Volume I
84T	March 28, 2018, Volume II
85T	March 29, 2018, Volume I
86T	March 29, 2018, Volume II
87T	March 30, 2018
88T	April 2, 2018
89T	April 3, 2018, Volume I
90T	April 3, 2018, Volume II
91T	April 4, 2018
92T	April 5, 2018

93T	April 9, 2018, Volume I
94T	April 9, 2018, Volume II
95T	April 10, 2018, Volume I
96T	April 10, 2018, Volume II
97T	April 11, 2018
98T	May 23, 2018
99T	June 6, 2018
100T	June 29, 2018

**PRELIMINARY STATEMENT**

Plaintiffs won a \$117 million verdict based on an outlandish allegation that the scientific community and the FDA discredited four decades ago: that Johnson & Johnson talcum powder is contaminated with asbestos. The FDA has repeatedly determined that that assertion is flatly false. In the 1970s, the FDA found that the company's cosmetic talcum powder contains no asbestos. It declared in 1986 that there was no basis to conclude that cosmetic talc presented a health hazard attributable to asbestos, and that the worst-case estimate of asbestos exposure risk from cosmetic talc was less than the risk from environmental background levels of exposure over a lifetime. And it reaffirmed that conclusion in 2010 after again testing talc samples—including Johnson & Johnson talcum powder—and finding no asbestos fibers in any cosmetic talc. The FDA's findings were confirmed by tests of tens of thousands of talc samples conducted by Johnson & Johnson and independent experts since the early 1970s, all of which determined that talc is safe.

In the face of these scientific and regulatory findings, plaintiffs based their case principally on the testimony of experts who flouted the most basic norms of legitimate science. First, plaintiffs' experts expanded the definition of "asbestos" to encompass the benign trace minerals found in the cosmetic talc. But that contradicts the overwhelming consensus in the scientific and regulatory community that these minerals—aptly called "non-

asbestiform"—are not asbestos, and that they have not been shown to cause cancer. The FDA, OSHA, NIOSH, independent scientists, Congress, and the New Jersey Legislature all concur. Plaintiffs' experts simply ignored that consensus.

Next, plaintiffs presented an expert who claimed to have found asbestos fibers in some decades-old bottles of baby powder that various plaintiffs' law firms purchased, many from eBay. Never mind that the bottles had all been opened by the time they got to the expert. Never mind that he had no idea where they had been gathering dust all those decades. Never mind that he was unable to replicate his results with any bottles that were unopened, purchased off the shelf, or had a known chain of custody. And never mind that he could not dispute that his findings—often limited to one or two particles of suspected asbestos in any given sample—contradicted the contemporaneous tests of tens of thousands of samples of Johnson & Johnson talcum powder over more than four decades.

None of this was reliable science. The trial court relinquished its critical role as gatekeeper in allowing a jury to find liability on that basis.

The court then all but ensured a verdict for plaintiffs by instructing the jury that it was free to just assume that Johnson & Johnson talcum powder had asbestos in it, despite all the evidence to the contrary. The instruction came in the form of an

adverse-inference charge that the court provided after it found that the supplier of talc used in Johnson & Johnson Consumer Inc. products, codefendant Imerys Talc America, Inc., had destroyed talc samples. Because Johnson & Johnson Consumer Inc. had nothing to do with the alleged sample destruction, the court told the jury that the adverse inference did not apply to it. But that was untenable: Even the most diligent juror could not conclude that the same talc was both contaminated and uncontaminated. The only solution was to order separate trials. Yet the court improperly denied Johnson & Johnson Consumer Inc.'s motion for severance.

The evidence does not come close to supporting the jury's verdict—particularly once either the unreliable expert testimony or the prejudicial adverse inference is stripped away. This Court should reverse or, at minimum, remand for a fair trial.

#### **PROCEDURAL HISTORY**

Plaintiffs Stephen Lanzo III and his wife, Kendra Lanzo, filed a complaint in the Middlesex County Superior Court against several defendants, including Johnson & Johnson, Johnson & Johnson Consumer Inc.<sup>1</sup>, and Imerys Talc America, Inc. (Imerys). Plaintiffs

---

<sup>1</sup> Johnson's Baby Powder is manufactured by a Johnson & Johnson subsidiary now named Johnson & Johnson Consumer Inc. See 36T153:13-154:16; 66T127:4-16. As discussed below, Johnson & Johnson was removed from this case by directed verdict, while Johnson & Johnson Consumer Inc. remained. For ease of reference, we refer to these defendants collectively as "J&J," even though the companies are separate corporate entities.

asserted statutory and common-law product liability and tort claims, alleging that Mr. Lanzo's use of Johnson's Baby Powder and Shower to Shower talcum powder products (collectively, "J&J talcum powder") caused him to develop mesothelioma.

Before trial, the court granted summary judgment to defendants on plaintiffs' common-law claims but allowed plaintiffs' statutory design-defect and failure-to-warn claims to proceed. Da3409-10. The parties filed numerous motions in limine. Relevant to this appeal, the court denied J&J's motions to exclude the testimony and opinions of Drs. Longo, Webber, and Moline. Da8-12, Da1067-70, Da1420-23.

At trial, the court granted a directed verdict to the defendants that remained in the case—other than J&J and Imerys. After all testimony was presented, the court ruled that Imerys had failed to preserve some talc samples. It therefore instructed the jury that it could infer that those samples would have been helpful to plaintiffs' case against Imerys. 91T120:1-13; Da3364. The court did not find that J&J mishandled any samples. J&J objected to the instruction against Imerys, moved to sever the trials, and sought a mistrial. 83T143:23-144:29. The court denied those motions.

The jury returned a verdict for plaintiffs. The court entered judgment on April 23, 2018. Da3000-03. It subsequently denied

defendants' motions requesting judgment notwithstanding the verdict, new trial, and remittitur. Da3005, Da3450-51. J&J filed a timely notice of appeal. Da3398-08.

#### STATEMENT OF FACTS

##### ***The FDA And Independent Scientists Investigate A False Alarm In The Early 1970s***

The softest mineral on earth, talc has been used for centuries in countless products, including pharmaceuticals and cosmetics. 42T273:18-274:11; Da6163. In the late 19th century, J&J discovered that talcum powder could soothe skin irritation caused by medicated plasters. 25T145:19-146:10. Consumers quickly realized that the powder also helped alleviate diaper rash, see 42T207:14-21, and Johnson's Baby Powder was born, Da6185-88. The product first appeared in 1894 and quickly became a household staple. Da6185.

In 1971, a false alarm sounded throughout the cosmetic talc industry. Newspapers reported that two scientists, Dr. Seymour Lewin and Dr. Arthur Langer, had found possible asbestos in talc samples they tested, including a J&J powder. 30T129:13-24; Da4634, 4870. The sensational story was big news. See Da4634, Da4870. A sustained examination of talc purity ensued.

The nation's top labs and scientists studied talc, in concert with the Food and Drug Administration (FDA), which is charged with ensuring the safety of cosmetic products. See 30T130:3-7; 43T107:20-108:25; Da4870, Da4873, Da4876-90, Da4935-36; 21 U.S.C.

§ 393(b)(2)(D) (establishing the FDA's duty to ensure that cosmetics are "safe and properly labeled").

J&J immediately investigated as well. It sent Dr. Lewin's samples to the nation's top experts: Colorado School of Mines (the nation's top mining engineering school), McCrone Laboratories (the foremost private testing laboratory for asbestos), a Princeton University professor, and a Cardiff University professor. J&J also performed testing at its own internal research lab. 30T143:25-147:21; Da4613, Da4810-68. Each tested the samples using the most advanced techniques available. See 30T143:25-147:21; Da4810-68. Each independently concluded that there was no contamination and that Dr. Lewin had confused non-asbestos minerals for asbestos. 43T112:16-115:14; Da4810-68.

The company reported those results to the FDA, and the FDA conducted its own investigation. 43T107:20-108:25; Da4812, Da4873, Da4876-90, Da4935-36. That investigation showed no contamination of J&J products. 43T107:20-108:25, 43T118:15-120:15; Da4878-82.

Dr. Lewin later stated that the press had misreported his original findings. 30T147:22-148:11; Da4870. In a letter to the Wall Street Journal, he wrote that he had not found asbestos contamination in "Johnson and Johnson's talcum powder" and that his results were "not seriously at variance with those reported by

investigators retained by [J&J]." Da4870; see also 43T119:6-5-120:3 (describing Dr. Lewin's retesting of samples).

Dr. Langer, meanwhile, denounced reports that he had found the company's products contaminated as "absolutely untrue." Da5578. He stated that initial reports of his testing were incorrect and that, upon further analysis, he had found only trace amounts of asbestos in the samples. Da5578. "Of all the talcs we've looked at," he proclaimed, "Johnson & Johnson is the most pure." Da5578. The preliminary indication of contamination, he explained, was because he had used a technique that did not distinguish asbestos fibers from talc particles of similar shape and size that were not asbestos. Da5578. "[W]hat he thought to be mineral fibers turned out in later research to be talc itself." Da5578; see 68T126:20-127:5 (explaining that "advanced techniques are required to assure talc purity" given the difficulty in distinguishing asbestos particles from non-asbestos particles). Dr. Langer's employer—the Mount Sinai School of Medicine—went even further. It stated that "[t]he most commonly used baby talc has been consistently free of asbestos" and that "[i]t is the opinion of Mount Sinai's Department of Pediatrics that baby talc is a useful and safe product." Da4893; 43T165-67.

***The Talc Industry Adopts Comprehensive Testing Standards***

The initial confusion over testing in the early 1970s led the talc industry and the FDA to be even more vigilant about standardizing asbestos testing. With the FDA's encouragement, the industry developed a comprehensive testing regimen. Da6143-52 (describing the industry method adopted in 1976); see 30T104:23-105:16, 43T99:18-100:15, 68T139:9-140:24, 72T61:8-24. It was called the J4-1 method. Da6143-52. The first step in that method was a test called x-ray diffraction (XRD) to determine whether a sample contained minerals that had the potential to form asbestos. Da6143-44; 60T237:6-239:1; see 61T73:15-24. If the XRD test came back positive, the J4-1 standard used a different test to determine whether the minerals were, in fact, asbestos. 30T26:18-21; Da6143.

As the testing standard itself acknowledged, other methods, like transmission electron microscopy (TEM), were more sensitive than XRD. Da6143. The J4-1 method relied on XRD, however, because only it could quickly process the necessary large volumes of material. Da6143; see 61T73:15-24.

***J&J Adopts Testing That Far Exceeds Industry Standards***

J&J, meanwhile, adopted an unparalleled testing regimen that far exceeded the industry's J4-1 standard. Beginning in the early 1970s, J&J incorporated TEM testing into its regular testing regimen—and it required its suppliers to do the same. 61T71:4-72:5, 61T143:10-15; see, e.g., Da3554-61, Da3731, Da5368-69, Da5370-71,

Da5896-98. Specifically, J&J ensured the purity of the talc it sold in four ways.

First, the company undertook comprehensive surveys of its (and its suppliers') talc mines worldwide to ensure that they did not contain asbestos. 68T122:11-137:25; Da5298-313. The global talc survey, and others like it, used the most sensitive tests, including TEM. 68T128:2-130:11. The surveys included J&J's Vermont mines, from which nearly all the talc at issue in this case originated.<sup>2</sup> See 68T130:12-25; Da4761-62, Da4809; see also Da4869 (study of samples from Italian mine). The conclusion: "None of the source talcs being used were contaminated with asbestos." 68T130:10-11.

Second, J&J required suppliers to produce a Certificate of Analysis with each shipment avowing that the talc had been tested and did not contain asbestos. See, e.g., 34T193:6-197:25; Da3850-73; see also Da5896-98 (J&J's talc supply agreement that required Imerys to rigorously test its talc); Da3731 (describing the daily sampling of source talc for testing). J&J's required testing protocol mandated TEM testing of samples, in combination with other techniques. See Da5897, Da6211-15, Da6216; 61T81:23-84:15;

---

<sup>2</sup> There was a period of just months when J&J had to rely on Italian talc, because of a strike at the Vermont mine; and in 2003, J&J switched its talc supply to China. See 32T77:4-11; 35T207:5-25, 35T220:25-221:12, 35T226:19-228:19; 36T155:1-14, 36T157:8-158:3.

65T264:23-265:24; see also Da3859.<sup>3</sup> It was the same gold-standard method used by the private lab on which J&J principally relied for further testing. See Da4939, Da4941. And it exceeded the industry standards that the FDA had endorsed. See 42T277:18-279:24; 61T71:4-72:5; Da4902-03.

Third, J&J hired independent, third-party laboratories to routinely perform further tests on the source talc. Scientists widely viewed the primary lab J&J used, McCrone, as the best in the business. 30T114:4-8, 30T130:8-131:6. Through the years, McCrone's TEM testing, like the testing conducted by others, consistently found no contamination. Da5922-23; infra n.4.

Fourth, J&J conducted its own internal testing and audits of talc samples. See, e.g., Da3554-61, Da6216; 43T56:17-57:7. Again, internal testing consistently showed no contamination. Infra n.4.

In total, J&J, its suppliers, and independent labs have tested tens of thousands of samples since the early 1970s.<sup>4</sup> As one example

---

<sup>3</sup> For convenience, this brief uses the name "Imerys" for the various entities that owned the mines at issue in this case. A J&J subsidiary owned the Vermont mines until 1989, when it sold them to Cyprus Mines Corporation. 26T7:20-9:7. Cyprus owned them until 1992, when it sold them to Rio Tinto, which operated them under the name Luzenac America. 26T87:21-89:13. In 2011, Imerys purchased the mines. 26T88:20-89:13. The testing documents through the years reflect the names of the mine owner at the time the testing was conducted.

<sup>4</sup> See, e.g., Da3472-73, Da3474, Da3475, Da3476, Da3477-517, Da3518-53, Da3554-61, Da3562, Da3730, Da3732-824, Da3825-27, Da3828-49, Da3850-73, Da3874-93, Da3894-4008, Da4009-12, Da4013-24, Da4025-

of how comprehensive and exhaustive that testing was, J&J talc supplier Imerys took talc samples every few hours at the Vermont mines that supplied J&J. 61T135:8-139:20; Da3731. It aggregated those samples monthly in a composite sample and sent them to private labs for analysis. Da3731. Those tests, using the most advanced and sensitive testing methodologies (including TEM), showed no contamination. 61T139:21-140:19; Da3731.

Further, J&J monitored scientific literature and studies of talc miners in regions where the company sourced its talc. That data is especially valuable because a miner's exposure to talc is orders of magnitude greater than that of a consumer using baby powder. See 81T26:5-20; 55T172:2-173:18. In numerous studies, "not even a single case of mesothelioma has been identified in any [mine worker]," even though "these miners have been exposed to high levels of talc." 81T26:5-27:18; see 56T223:11-224:6; 81T25:3-26:2, 81T50:7-53:11, 81T61:3-13, 81T68:7-69:19.

---

225, Da4226-369, Da4370-425, Da4426-612, Da4624-31, Da4632-33, Da4635-758, Da4759-809, Da4810-68, Da4869, Da4871-72, Da4874, Da4875, Da4876-90, Da4894, Da4895-96, Da4897, Da4898, Da4899-901, Da4904, Da4905-07, Da4908, Da4909-10, Da4911-12, Da4913-14, Da4915, Da4916, Da4917-18, Da4919, Da4920-21, Da4922, Da4923-24, Da4925, Da4926-27, Da4928, Da4929-31, Da4932-33, Da4934, Da4940, Da4941, Da4942, Da4943, Da4944, Da4945, Da4946, Da4947, Da4948, Da4949, Da4950, Da4951, Da4952, Da4953-5060, Da5061-297, Da5298-313, Da5314-67, Da5372-84, Da5385, Da5931, Da5932-34, Da5935-36, Da5937, Da6075-76, Da6113-16, Da6117-26, Da6127, Da6128, Da6206-08, Da6209, Da6210.

Government studies, dating from the early 1970s to the present, also confirmed J&J's and Imerys's conclusion that J&J's talc contained no asbestos. In 1986, for instance, the FDA addressed a citizen petition asking the agency to require companies to include asbestos warning labels on bottles of cosmetic talc. 30T96:19-99:14; Da4935-37. After reviewing more than 15 years of data, the FDA concluded that there was no basis for such a warning. The FDA explained, "the worst-case" risk of asbestos exposure through cosmetic talc was "less than the risk from environmental background levels of exposure . . . over a lifetime." Da4936.

From 2009 to 2010, the FDA again tested talc—including J&J products—and "found no asbestos fibers or structures in any of the samples of cosmetic grade raw material talc or cosmetic products containing talc." 46T228:6-25.

***Stephen Lanzo Develops Mesothelioma And Sues J&J***

In 2016, Stephen Lanzo developed mesothelioma, an extremely rare cancer in the lining of the lungs often linked to asbestos exposure. 49T117:11-119:16; 57T105:20-106:11. Mr. Lanzo grew up at a time when asbestos was ubiquitous. It was used in everything from building insulation to textiles. See Da2851. In the 1970s and 1980s, Mr. Lanzo attended New Jersey public schools that contained asbestos. His school's locker room, for example, had exposed friable asbestos, 48T247:17-250:23; 57T93:14-95:23; Da5386, Da5387, which crumbles into dust when removed, 25T141:21-23.

In 2002, asbestos abatement experts also removed 60 yards of exposed friable asbestos from a pipe in the basement of Mr. Lanzo's childhood home, where he used to spend time. 25T141:8-24; 57T74:4-76:10. Further, like all Americans living in urban areas, Mr. Lanzo had background exposure to asbestos from countless other sources. 57T70:8-71:8. For instance, doctors found a crocidolite fiber embedded in Mr. Lanzo's lymph tissue. 72T149:23-150:16; 72T161:6-162:7. Crocidolite, not found in cosmetic talc, 72T174:21-25, is the "most potent asbestos type in the development of mesothelioma in humans." 76T97:23-98:1.

Mr. Lanzo and his wife sued J&J and Imerys, along with several other defendants who were later dismissed from the case. See Da3296-309, Da3412-15, Da2996-97. The Lanzas alleged that J&J's talcum powder was contaminated with asbestos, that Mr. Lanzo regularly used the powder from 1972 (when he was a baby) through 2003, and that such use caused his mesothelioma. Da3369-70. The claim was part of a wave of cases that the plaintiffs' bar developed across the country, relying mostly on recycled documents from the late 1960s and early 1970s, such as the discredited tests by Dr. Lewin and Dr. Langer. Supra pp. 5-7.

At trial, defendants presented extensive testing records encompassing tens of thousands of samples, confirmed by the FDA's own testing, showing no asbestos contamination in J&J talc. See, e.g., supra p. 10 n.4 (testing records introduced); Da4902-03,

Da4938, Da5368-69, Da5922-24; 30T144:19-147:21; 36T59:10-61:8, 37T28:21-29:13; 42T279:16-281:23; 43T43:21-45:21; 46T245:14-20; 57T47:18-51:1; 61T144:10-148:19; 68T120:4-123:22, 68T160:16-163:19].

Plaintiffs' counsel sought to overcome this overwhelming evidence of non-contamination in several ways—all over defendants' objection. First, they urged the jury to treat so-called *non-asbestiform* minerals as asbestos, even though they are not in fact asbestos. Infra § 1.A. The court allowed plaintiffs' experts to testify to this theory without making any determination as to the theory's reliability.

Second, plaintiffs' expert testified to his analysis of vintage samples of talc. Many of the bottles came from eBay and had already been opened, thus eliminating any reliable chain of custody and raising the significant possibility of post-purchase contamination. Contrary to the thousands of negative tests over four decades, the plaintiffs' expert testified that he found asbestos fibers in 18 of those bottles. Infra § 1.B.

Third, plaintiffs' counsel argued that the jury could discount all *negative* test results amassed by defendants and independent labs over the decades. He told the jury that the repeated findings that talc was safe were irrelevant, because they merely meant that the number of asbestiform fibers was below a prescribed threshold. Infra p. 58. That testing methodology, however, is

standard scientific practice, necessary to distinguish actual asbestos contamination of a product from unavoidable environmental background levels of asbestos—i.e. the levels of asbestos found in testing labs and day-to-day life. Infra p. 58. Plaintiffs also argued that the entire cosmetic talc industry had engaged in a decades-long conspiracy, supposedly in coordination with independent labs, to adopt a testing method designed to overlook asbestos contamination and deceive the FDA and others. Infra pp. 56-57.

Fourth, plaintiffs pointed to a handful of tests purporting to find traces of contamination. Infra pp. 55-56. Plaintiffs asserted that the tests were evidence that Mr. Lanzo must have been exposed to significant amounts of asbestos through use of the company's products, and that such exposure must have caused his disease. Infra pp. 55-56, 60-61.

At trial, the court found that Imerys (but not J&J) failed to preserve some of its talc samples. At the close of the case, as a sanction *against Imerys*, the court issued an adverse-inference instruction. It instructed the jury that it could "*infer that the missing evidence may have been helpful to the plaintiffs' case to the detriment of defendant Imerys.*" 91T120:1-8 (emphasis added). In other words, it could assume that the talc Imerys provided to J&J contained asbestos. The court then cautioned the jury that

the instruction applied only to Imerys, and not J&J. 91T120:10-13.

J&J vigorously contested that instruction, explaining that it was not realistic to allow the jury to infer that the talc Imerys provided to J&J was contaminated with asbestos, while at the same time reserving judgment as to whether the same talc was uncontaminated when J&J received it. 83T142:22-144:2. J&J therefore moved to sever, and also sought a mistrial. 83T143:23-144:2. The court denied J&J's motion. 83T157:9-11; Da2994-95.

The jury issued a verdict for plaintiffs on their design-defect and failure-to-warn claims. Da3394-96. It awarded compensatory damages of \$37 million, allocating 70% to J&J and 30% to Imerys. Da3396. The jury then awarded punitive damages of \$55 million against J&J, and \$25 million against Imerys. Da3397.

#### ARGUMENT

**I. The Trial Court Erred In Admitting Unreliable Expert Testimony. (48T293-94; 24T155-56; 100T4-24; Da1067-70, Da1420-23; 9T4-9T12; 55T83-84; Da8-11, Da3005.)**

Plaintiffs offered three expert witnesses who drew unsupported conclusions from unreliable sources—or no sources at all. Without the benefit of the Supreme Court's recent emphasis that the trial court's "gatekeeping role must be rigorous," In re Accutane Litigation, 234 N.J. 340, 390 (2018), the trial court admitted this testimony, mostly without any analysis. The testi-

mony fell into two categories—both directed at overcoming defendants’ powerful showing that routine tests of tens of thousands of talc samples over decades had confirmed that J&J talcum products did not contain asbestos. First, one pair of experts testified—in defiance of the overwhelming scientific and regulatory consensus—that minerals that are not asbestos have the same carcinogenic effect as asbestos. Second, another expert urged the jury to reject the decades of exhaustive testing in favor of his finding that there was asbestos in several vintage bottles of Johnson’s Baby Powder that plaintiffs’ law firms purchased, unsealed, from unknown sources, many from eBay. These errors, both individually and together, require reversal or, at minimum, a new trial.<sup>5</sup>

**A. The trial court erred in admitting unreliable expert testimony about what qualifies as asbestos. (24T155-56; 48T293-94; 100T4-24; Da1067-70, Da1420-23, Da3005.)**

Plaintiffs’ case hinged on proving both that Mr. Lanzo “was exposed to asbestos” through his use of J&J talc products and that the claimed exposure proximately caused his mesothelioma. Da3375, Da3379, Da3383; see Sholtis v. Am. Cyanamid Co., 238 N.J. Super.

---

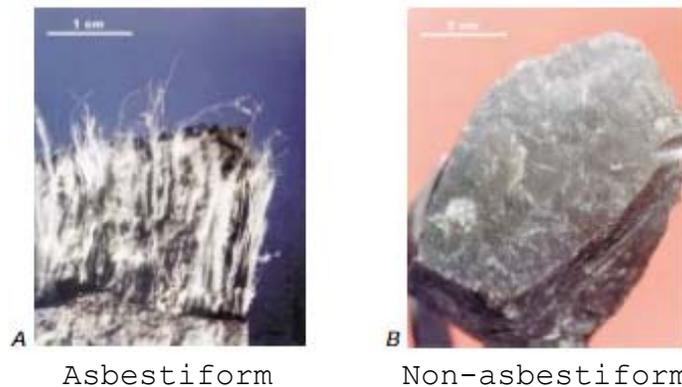
<sup>5</sup> In its appeal from the same verdict (Case No. A-004994-15T3), Imerys emphasizes both of these grounds as a basis for overturning the verdict. Because the cases are not consolidated, but the parties are respondents in one another’s appeals, J&J joins in those arguments and also separately develops them here.

8, 30-31 (App. Div. 1989). To overcome decades of tests showing that J&J talcum powder was not contaminated with asbestos, plaintiffs adopted a radical strategy: expand the definition of asbestos to encompass material that the scientific community considers to be very different from asbestos, and which has not been demonstrated to cause cancer. Over defendants' objection, plaintiffs presented two experts who told the jury that tiny particles of non-asbestiform minerals—mostly tremolite—found in small quantities in the talc were just as dangerous as carcinogenic asbestos. Da1082-83, Da1531-32. As plaintiffs' counsel put it, "our experts will tell you it doesn't matter what you call something." 25T79:1-81:23. That testimony contradicted more than 25 years of overwhelming scientific and regulatory consensus, including agreement by the FDA, OSHA, NIOSH, independent scientists, Congress, and the New Jersey Legislature. Infra pp. 22-24.

The trial court erroneously admitted that testimony without even holding a hearing to assess its reliability. In doing so, the court failed to fulfill its role as gatekeeper and misapplied the robust legal standard recently articulated in Accutane.

**1. The established definition of asbestos distinguishes asbestiform from non-asbestiform minerals. (24T155-56; 48T293-94; 100T4-24; Da1067-70, Da1420-23, Da3005.)**

We start where the trial court and plaintiffs' experts should have started—basic, incontrovertible science. Only a few minerals can become asbestos. When they do, they are "asbestiform." When they do not, they are "nonasbestiform," 39T87:1-91:11; 61T76:10-77:20; 66T171:10-19; Da2849-50, Da2874-77, Da2883-87, Da2893, which is the ordinary form of all those minerals, 39T88:17-21; 66T173:10-176:15; Da2883-99. The mineral tremolite, for example, can be asbestiform or non-asbestiform. Though they have the same chemical composition, the two forms look very different because of the different geological conditions in which they were formed:



Da2849. When tremolite is asbestiform, it looks like brushed cotton, with populations of puffy fibers that are remarkably flexible and durable. Da1364-66; 60T224:12-225:17. Those rare prop-

erties—scientists call them “tensile strength” and “biodegradability”—help make asbestos fibers deadly. When asbestos fibers enter the lung’s mesothelial tissue, the lung has trouble breaking them down and flushing them out. 76T150:10-151:18. They become lodged. When stuck in the lung tissue in sufficient quantities, the crystalline structure and surface chemistry of the asbestos fibers trigger proteins that control cell survival and replication. 76T74:16-76:21, 76T103:4-19, 76T121:10-122:3, 76T129:14-130:8, 76T42:9-20, 76T153:1-154:20. The surrounding cells replicate uncontrollably, causing tumors. 76T87:5-88:13.

When tremolite is non-asbestiform, it is like an ordinary rock, no matter what you do with it. 60T224:12-225:17. Crush it, pulverize it, cleave it; non-asbestiform fragments cannot be transformed into asbestos fibers. 47T79:5-9; 66T178:23-180:9. Regardless of their size, the particles—sometimes called “cleavage fragments”—will simply not have crystallized in the unique way that gives tendrils of asbestos their fibrous form and their dangerous biodegradability and surface chemistry. 76T150:10-151:20, 76T153:1-154:20; 77T18:8-22; see 67T220:16-18 (explaining that a “cleavage fragment” is “used to denote something that is not asbestos”). Even when broken into long, thin particles, they do not have the tensile strength or biodegradability that makes asbestos fibers so dangerous in our lungs. 30T191:5-16; 76T153:1-155:21;

Da1364-70 (“the Agency now finds that differences in biologic effect between asbestos and its nonasbestiform analogues are likely related to the distinctions which define the two groups as separate mineral entities”).

In this way, the difference between an asbestiform and non-asbestiform mineral is like the difference between diamond and graphite. Both are made of the same element (carbon), and both can be ground or cleaved to the same shape and size. But you can’t cut glass with graphite. See 60T223:25-225:17.

Based on over 25 years of study, the medical and regulatory communities have embraced the distinction between asbestiform and non-asbestiform minerals. In 1992, the Occupational Safety and Health Administration (OSHA)—responsible along with the Mine Safety and Health Administration (MSHA) for regulating miners’ and millers’ exposure to talc—undertook a comprehensive study of scientific data and opinions to determine whether *nonasbestiform* minerals should be regulated as asbestos. Da1364-65, Da2953-74. The agency reviewed decades of testing and literature. OSHA determined that “[s]ubstantial evidence is lacking to conclude that non-asbestiform [minerals] present the same type or magnitude of health effect as asbestos.” Da2953; 30T180:11-16; see also Da1369-70. Specifically, the agency found no credible link between exposure to non-asbestiform minerals and cancer. Da2954; Da1369-70; 34T182:9-21. OSHA therefore decided to *exclude* non-asbestiform

minerals from regulations governing asbestos exposure for workers who are often exposed to exponentially more talc than consumers. See Da2953, Da1369-70.

MSHA, which currently regulates talc mines and mills, has adopted the same position. The agency's definition explicitly "*does not include nonfibrous or nonasbestiform minerals.*" Da2591 (emphasis added). And as MSHA has explained, that "definition of asbestos is consistent with the regulatory provisions of several Federal agencies including EPA, OSHA, and CPSC, among others." Da2591.

Other agencies that regulate asbestos for health purposes have uniformly excluded non-asbestiform minerals from the definition of asbestos.

- **NIOSH**, OSHA's scientific and research arm, has declared "that . . . nonasbestiform minerals are not 'asbestos' or 'asbestos minerals.'" Da1287; see 39T112:9-12, 39T115:1-116:4. NIOSH explained that only "exposure to fibers from the asbestos minerals" is credibly linked to mesothelioma in epidemiological studies. Da1287; 39T116:5-117:23.
- The **FDA** has similarly defined asbestos for health purposes as "asbestiform" minerals. See Da4935-36. For instance, in evaluating the adequacy of talc testing, the FDA has looked

to whether manufacturers “analyze their talc for asbestiform minerals as part of their quality control programs.” Da4936.

- The **EPA**’s national testing standards limit what can be considered harmful asbestos to “the *asbestiform* varieties of six different minerals.” 65T116:2-14 (emphasis added); see 39T106:19-111:1; 63T76:22-77:23.
- The **United States Geological Survey** (USGS) explains that, “when it comes to health risk,” it “matter[s] whether an amphibole is asbestiform,” and that “available evidence supports a conclusion that exposure to nonasbestiform cleavage fragments is not likely to produce a significant risk of developing asbestos-related disease.” Da2850 (quoting 57 Fed. Reg. 24310).

Not a single regulatory agency believes that non-asbestiform minerals cause cancer.

Congress, too, has embraced this fundamental distinction between asbestos and non-asbestiform minerals. For example, the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 et seq., authorizes federal regulation of toxic substances that pose health hazards. It limits the definition of asbestos to “asbestiform varieties” of specific minerals. 15 U.S.C. § 2642(3). The regulations implementing the Clean Air Act, 42 U.S.C. § 7401 et seq., adopt the same distinction. 40 C.F.R. § 61.141. There is not a

single federal statute or regulation that equates the two forms or treats them the same.

The New Jersey Legislature concurs. The Worker and Community Right to Know Act regulates "hazardous substances in the environment" that pose public health threats. N.J.S.A. 34:5A-2. Like federal law, the Act limits "asbestos" to certain "asbestiform" minerals. Id. 34:5A-34.

This regulatory and legislative consensus is based on numerous scientific studies, conducted over decades, confirming that non-asbestiform fragments behave differently from asbestiform ones. For instance, scientists have injected both forms of minerals into animals, and conducted animal inhalation studies, to examine the different cellular reactions. See 76T79:10-80:25, 76T142:9-20; Da1345-46. They have done the same with human cells. 76T98:20-103:19, 76T121:8-122:3; Da1345-46. Those studies have shown that non-asbestiform minerals do not cause the cellular responses that asbestiform ones do. See 76T98:15-103:19, 76T121:8-122:3, 76T142:9-20; Da1345-46. That holds no matter the size of the non-asbestiform particle or fiber. 76T128:6-130:8.

**2. Plaintiffs' experts did not overcome the overwhelming scientific consensus. (24T155-56; 48T293-94; 100T4-24; Da1067-70, Da1420-23, Da3005.)**

One of plaintiffs' experts admitted that "if you take the non-asbestiform version of, say, tremolite and you crush it up,

that doesn't transform it into pieces of asbestos." 47T79:5-9. Yet, two experts attempted to counter the overwhelming scientific consensus using a discredited theory: If you reduce a particle of a non-asbestiform mineral to roughly the same size as an asbestiform particle with the same chemical formula, they will behave the same way in the lungs. That is like positing that two carats of graphite will behave the same as diamond on an engagement ring so long as you cut it just right. Those experts provided no proof supporting this fallacy—much less proof sufficient to overcome the overwhelming medical and regulatory consensus to the contrary.

**Dr. Webber.** The first expert was Dr. James Webber, a retired associate professor and former New York public health official. Dr. Webber's report merely asserted, with no support, that non-asbestiform particles and asbestiform fibers should be considered to present the same cancer risks. Da1082-83. He explained that "[w]hen amphibole rocks are crushed, some cleavage fragments may have dimensions that overlap those of asbestos fibers." Da1082-83. He then announced, without citation, the unsubstantiated conclusion that once "in the lungs, cleavage fragments almost certainly present the same risk as asbestos fibers of the same dimension because of their identical chemical composition and their biodurability." Da1082-83.

Dr. Webber's report cited not a single study or authority that supports this conclusion. See Da1082-83. Nor did he address

the critical physical differences between asbestiform and non-asbestiform minerals that the scientific community has identified as a prime reason for asbestiform minerals' dangerousness.

At trial, Dr. Webber conceded he knew of not one "epidemiological article[]" linking non-asbestiform cleavage fragments to asbestos-related disease. 39T75:12-17, 39T95:14-18, 39T98:5-99:3. That is important, because plaintiffs have never disputed that epidemiological studies are the "gold standard for establishing causation between a potential exposure and a disease." 81T9:15-19; 55T168:12-169:19. Dr. Webber further testified that he had never personally "examined whether non-asbestiform cleavage fragments are harmful to people." 39T75:4-7. In fact, just 16 months earlier in a different case, he had conceded "that cleavage fragments [of non-asbestiform minerals] are not considered hazardous"—the exact opposite of his opinion in this case. 30T176:14-21.

**Dr. Moline.** Plaintiffs' second expert was Dr. Jacqueline Moline, their specific-causation expert. Dr. Moline is a physician, with no expertise on the health effects of asbestiform versus non-asbestiform minerals. See Da1512-13. Yet, she too opined that non-asbestiform minerals can have the same effect in the lungs if cut to the same dimensions as asbestiform fibers. Da1531-32.

Unlike Dr. Webber, Dr. Moline's report at least purported to invoke authorities that she claimed supported her opinion. See

Da1532. But what she cited could not come close to overcoming the scientific consensus against her conclusion. Dr. Moline relied mainly on a 2006 EPA regional report assessing data from one specific site, "the El Dorado Hills Asbestos Evaluation Project." Da1531-32, DA1583-96. That regional report suggested that "cleavage fragments" of non-asbestiform minerals should be included in an analysis of asbestos. Da1584-85, Da1592-93. Notably, the regional office did not cite evidence that non-asbestiform minerals present a safety risk. See Da1532, Da1593-94. It said something very different: that it was including the non-asbestiform fragments because of what it deemed a lack of evidence demonstrating that non-asbestiform cleavage fragments are harmless. Da1584-85 ("No well-designed animal or epidemiological studies have adequately tested the hypothesis that cleavage fragments with the same dimensions as a fiber are benign.").

One regional office's belief that there is some uncertainty as to whether non-asbestiform fragments are wholly harmless—a belief not adopted by the agency as a whole—does not overcome the established consensus that there is no credible evidence that such fragments present any risk of cancer. More to the point, a report stating that there is no evidence either way does not help establish the reliability of the opinion that the dangers are the same—especially in the face of unrefuted science pointing to significant differences in biodurability and surface chemistry.

Dr. Moline also stated, without citation, that other entities, like the American Thoracic Society, believed that non-asbestiform and asbestiform minerals should be treated the same. That statement appears to rely on comments presented to OSHA during the 1992 rulemaking discussed above (p. 21). See Da2954 (noting the American Thoracic Society's opinion at that time that it would be "prudent" to treat non-asbestiform tremolite as capable of causing disease). But OSHA exhaustively reviewed and roundly rejected those comments as not supported by science. See supra pp. 21-22.

Dr. Moline's trial testimony further underscored her opinion's unreliability. She conceded there were no studies supporting her view that non-asbestiform varieties of minerals are carcinogenic. 49T194:19-195:6; see Da1468-69 (deposition testimony). She never conducted such a study. See Da1512. Like Dr. Webber, she had previously testified, *just months earlier*, that she did not have enough information to opine on whether non-asbestiform minerals could be carcinogenic. 49T191:4-192:6. And perhaps most important, she stated that she could not testify that non-asbestiform minerals caused Mr. Lanzo's mesothelioma. 49T3516:7-11.

**3. Plaintiffs' expert testimony was fatally unreliable. (24T155-56; 48T293-94; 100T4-24; Da1067-70, Da1420-23, Da3005.)**

a. In allowing plaintiffs' experts to testify to these opinions, the trial court abdicated its critical gatekeeping role.

The court simply said that the question of what constitutes asbestos was “highly contested” and a “central issue[]” in talc cases. 24T155:16-20; 48T293:13-294:15; Da1067-70, Da1420-23. The court therefore concluded that the jury could consider plaintiffs’ experts’ opinions. 48T294:4-9; 24T156:20-22.

That was a plain misapplication of New Jersey law—and far from the “rigorous” “gatekeeping role” the Supreme Court prescribed in Accutane. 234 N.J. at 390. “[T]he gatekeeper’s ‘critical determination is whether comparable experts accept the soundness of the methodology, including the reasonableness of relying on [the] type of underlying data and information.’” Id. (quoting Rubanick v. Witco Chem. Corp., 125 N.J. 421, 451 (1991)). The court must therefore determine whether an expert uses reliable, “scientifically sound reasoning” to “prevent[] the jury’s exposure to unsound science through the compelling voice of an expert.” Id. at 389-90; see N.J.R.E. 702; In re Estate of Barabin v. Asten-Johnson, Inc., 740 F.3d 457, 464-65 (9th Cir. 2014) (en banc) (a court may not “delegate[] . . . to the jury” its role in determining reliability of expert opinions). To facilitate that determination, experts must “identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and methodology are scientifically reliable.” Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992).

The trial court never reached this question before allowing Drs. Webber and Moline to testify, as Accutane requires. Had it conducted the requisite analysis, it would have been compelled to find that plaintiffs' experts fell far short of these standards.

First, merely pointing out that non-asbestos particles can sometimes have similar shape and size as asbestos fibers does not prove that they are dangerous. The experts' failure to address how any "similarities cause the human body to respond" in the same way to the different mineral forms renders their opinions fatally unreliable. Mitchell v. Gencorp Inc., 165 F.3d 778, 782 (10th Cir. 1999). Their reports did not even offer a hypothesis as to why that would happen.

Second, the reports of Drs. Webber and Moline did not so much as acknowledge the contrary opinions of scientists and government agencies. Ignoring overwhelming evidence as if it did not exist is simply not valid science. See Accutane, 234 N.J. at 392 (upholding the exclusion of expert opinions in which the experts "employed a methodology whereby they disregarded eight of nine epidemiological studies"). Experts are certainly allowed to buck a prevailing view, but an admissible opinion is required to explain why the prevailing view is wrong or why the data have been misinterpreted, based on a reliable foundation.

Third, evidentiary support matters to scientists, and Drs. Webber and Moline provided almost none in their reports. Dr.

Webber's conclusion without a single citation of support is the opposite of proper scientific methodology. And Dr. Moline did not do much better by presenting as support authorities that contradict her conclusions, and by relying upon the purported *absence* of evidence regarding the toxicity of non-asbestiform minerals. See Da1468-69 (Dr. Moline's deposition testimony in which she describes the lack of scholarship on the health effects of non-asbestiform minerals).

Fourth, the experts presented no evidence that their "scientific theory has been subjected to peer review and publication," much less "a general acceptance in the scientific community about the scientific theory." Accutane, 234 N.J. at 398; see Barabin, 740 F.3d at 464 (explaining, in an asbestos case, that "[b]efore allowing the jury to hear . . . expert testimony" about a cause of mesothelioma, the trial court should "first determine[] that the expert meets the threshold" requirement of reliability (internal quotation marks omitted)).

In short, the opinions were simply inadequate as a matter of law. The trial court did exactly what the Fourth Circuit recently held to be an abuse of discretion: It "simply dismissed every argument . . . as going to the weight, not admissibility," without "us[ing] Daubert's guideposts" or "mak[ing] any reliability findings." Nease v. Ford Motor Co., 848 F.3d 219, 230 (4th Cir. 2017)

(brackets and internal quotation marks omitted), cert. denied, 137 S. Ct. 2250 (2017); see Barabin, 740 F.3d at 464 (similar).

b. The court's error in allowing plaintiffs to present these discredited speculations as expert testimony was highly prejudicial. Rule 2:10-2; see State v. Bankston, 63 N.J. 263, 273 (1973) (evidence is prejudicial where there is a "reasonable doubt" as to whether the admission of the expert opinions affected the trial outcome). These opinions allowed the jury to find asbestos contamination where there was none. Notably, plaintiffs' counsel repeatedly urged the jury to do just that. Counsel encouraged the jury to disregard whether a talc sample contained asbestiform or non-asbestiform minerals on the ground that "our experts will tell you it doesn't matter what you call something." 25T79:1-81:25.<sup>6</sup> Counsel stated that the "distinction between non-asbestiform and asbestiform" was one "without having any science" to support it. 32T117:8-12. And in closing, plaintiffs' counsel once again directly attacked the position that the jury could only find asbestos contamination if it concluded that the talc contained asbestiform minerals. "That's a game," he told the jury. "That's a trick. That's a word game." 89T134:7-8.

---

<sup>6</sup> There is direct evidence that the jury took that instruction to heart. At the end of one witness's testimony, a juror submitted a question to the court asking whether "J&J [sought] to remove all forms of tremolite from its talc or just the asbestos variety?" 44T257:17-19. The court declined to ask the witness to clarify. 44T263:23-264:2.

B. The trial court erred in admitting expert testimony that drew unsupportable conclusions from unreliable samples. (Da8-11, Da3005; 9T4-12; 55T83-84.)

1. The trial court erred in admitting Dr. Longo's analysis of samples lacking any reliable chain of custody. (Da8-11, Da3005; 100T4-24; 55T83-84.)

Despite decades of tests establishing that J&J talcum powder was not contaminated with asbestos, Dr. Longo claimed he found asbestos fibers in 18 (of 32) bottles he tested—often only one or two particles per bottle. 45T93:16-94:1; 47T182:19-183:3; Da42-43. They were largely vintage bottles, which various plaintiffs' lawyers obtained, many from eBay.<sup>7</sup> See 6T11:8-11, 21:2-22:19. Here is what the bottles looked like when Dr. Longo received them:



Da20. Dr. Longo did not "know who all had possession of those samples between the time they were manufactured and they came to the plaintiff's law firms," what state they were purchased in, or how or where they were stored. 6T11:12-13:11, 6T16:21-25, 6T17:22-

---

<sup>7</sup> In his report, Dr. Longo purported to find asbestos in 17 of 30 bottles. Da25. By trial, Dr. Longo testified he had tested two more and found asbestos in one. 45T93:19-94:1; 47T101:11-14.

19:5, 6T30:17-25. All of the purportedly contaminated bottles had been opened before Dr. Longo received them. 6T13:12-16, 6T17:15-21. Most were decades old. E.g. 6T30:5-9; 47T168:24-170:13. And most were purchased by the Lanier Law Firm, 6T11:8-11, 6T20:24-22:19—the same firm that the Fifth Circuit recently found to be “unequivocally deceptive” in “misle[ading] the jury” with respect to expert testimony, In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig., 888 F.3d 753, 791-92 (5th Cir. 2018).

The trial court erred in admitting Dr. Longo’s testimony without a reliable chain of possession of the samples he tested. Accutane emphasized that an expert’s testimony must rest on a “reliable foundation.” 234 N.J. at 384. But this testimony came nowhere close to meeting that standard, because plaintiffs failed to establish by even a reasonable probability that the talc was what it purported to be. Without an “uninterrupted chain of possession,” plaintiffs had no credible proof that the bottles were contaminated upon release from J&J—rather than at some later point in the bottles’ often decades-long journey into Dr. Longo’s hands. State v. Brown, 99 N.J. Super. 22, 27 (App. Div. 1968); see State v. Dotro, No. A-2805-15T1, 2017 WL 744693, at \*2, \*4 (N.J. Super. Ct. App. Div. Feb. 27, 2017) (approving of trial court’s strict conditions for maintaining integrity of real evidence through expert examination and remanding for consideration of additional conditions) (Da6369-75). Specifically, they failed to establish

by a "reasonable probability that no tampering has occurred" since the time of production. Brown, 99 N.J. Super. at 28.

That sort of validation was critically important here for several reasons. First, there is "a significant market for vintage talcum powder containers." Barlow v. Colgate-Palmolive Co., Consolidated No. 24X11000783, at 16 (Bal. Cir. Ct. Nov. 13, 2015) (Da6322-49). Those who buy and resell in the collectible market could refill talc bottles with powder from other sources. 6T35:21-36:25.

Second, the results Dr. Longo reported were wildly inconsistent with the testing results of the FDA, independent experts, J&J, and Imerys when they examined Johnson's Baby Powder verifiably secured from the source. Supra pp. 9-12. Similarly, all sealed bottles that Dr. Longo himself purchased off the shelf tested negative for asbestos. 6T56:12-19.

Third, Dr. Longo found impurities in some of the bottles that were simply not associated with Johnson's Baby Powder, indicating contamination from external sources. For example, several of the open bottles contained richterite and chesterite. 47T174:3-179:5, 5T28:13-18. Plaintiffs introduced no evidence that either mineral has been found near mines at issue here. Richterite is, however,

common in Libby, Montana, and frequently found in household insulation. 6T48:12-49:2.<sup>8</sup>

Fourth, the results across samples were internally inconsistent. On one extreme, Dr. Longo found that samples from 14 bottles had no trace of asbestos. 45T93:15-94:1. On the other extreme, samples from two of the bottles purportedly had 74 and 101 asbestos particles, respectively. Da35, Da40.

Especially under these circumstances, the chain of possession was a "measure of the reasonableness of an expert's reliance" on the evidence. Alfaro v. Imerys Talc Am. Inc., No. B277284, 2017 WL 3668610, at \*8 (Cal. Ct. App. Aug. 25, 2017) (Da6306). A California court recently excluded Dr. Longo's testimony about the identical talc samples for the same chain-of-custody problems. The court explained, "[g]iven the low levels of asbestos to which the Plaintiffs' experts are referring, the samples must have a chain of custody that prevents contamination." Weirick v. Brenntag N. Am., Inc., Case No. JCCP 4674, Ex. B at 27-33 (Cal. Super. Ct. July 23, 2018) (Da6376). This ruling is consistent with a long

---

<sup>8</sup> Dr. Longo's testimony about the chesterite was particularly telling. He agreed that one of the asbestos fibers was "ferro anthophyllite," also known as "chesterite." 47T173:14-175:8. The name chesterite "comes from a mine in Chester, Vermont." 47T175:5-8. But Dr. Longo backtracked when asked whether he knew that J&J baby products "were not sourced from the Chester mine": "Wait a minute. I'm not sure it came from Chester. This is just Chester, right. But if that's the case, then how did it get in there?" 47T175:9-14.

line of cases excluding very similar analyses of talc contamination when vintage talc samples lack chains of possession. See Alfaro, 2017 WL 3668610, at \*9 (affirming exclusion of expert testimony regarding vintage talc samples due to “substantial gaps in the chain of custody”) (Da6313); Barlow v. ACandS, Inc., Consolidated No. 24X11000783, at 16-17 (Bal. Cir. Ct. Nov. 13, 2015) (“[I]t is indeed possible that the eBay samples have been subjected to tampering or altered in some fashion.”) (Da6322); Greene v. ACandS, Inc., Consolidated No. 24X16000314, (Bal. Cir. Ct. May 16, 2017) (granting motion in limine to preclude testimony and evidence regarding expert testing of talc for lack of authenticity and lack of relevance) (Da6366); Nosse v. ArvinMeritor, Inc., LASC No. BC603354, Motion Hearing Transcript at 41:16-24 (Cal. Super. Ct. Jun. 29, 2016) (“[I]t’s unreasonable for an expert to rely on the test that was done in a product that cannot be traced back to the product at issue and draw conclusions . . . that what he tested was indeed the product in issue.”) (Da792).

In fact, in other cases, Judge Viscomi herself excluded expert testimony about vintage talc samples under similar circumstances, holding that “chain of custody . . . has not been met and the samples . . . cannot be deemed to be that which they purport to be.” Schoeniger v. Colgate-Palmolive Co., Dkt. No. MID-L-5869-16AS, Mot. Hr’g Tr. (N.J. Super. Ct. Oct. 19, 2017) (Da771); see

Fishbain v. Colgate-Palmolive Co., Dkt. No. MID-L-5633-13 AS, Ruling at 7 (N.J. Super. Ct. Aug. 6, 2015) (Da6350) (excluding testing where plaintiffs did not make a “*prima facie* showing of chain of custody as to the[] purported . . . ‘vintage’ samples”).

The trial court’s decision to diverge from its prior opinions was based on a non sequitur. The court credited Dr. Longo’s testimony that the sizes of talc particles in the vintage bottles were consistent with each other, and consistent with Johnson’s Baby Powder. 9T10:4-15; see 5T39:4-40:20. The most that could show—and all Dr. Longo used it to show—was that the talc had not been replaced with talc from some other source. 5T38:8-23.

But it did not even establish that. Dr. Longo assumed that the size of talc particles in baby powder varied by manufacturer. 5T39:15-40:20; 6T52:2-13; Da868-69. But he lacked any basis for that assumption—he failed to test the size of the talc particles in baby powder produced by other manufacturers.<sup>9</sup> Further, the only article he cited for that proposition contradicted his assumption that different talc brands would have different-sized particles. The article Dr. Longo cited said that the particle size of

---

<sup>9</sup> There was one notable exception. Dr. Longo tested three Valeant-manufactured “Shower to Shower” bottles, 47T111:19-22, a brand which J&J sold to Valeant in 2012, 47T171:9-172:9:2. Each of those bottles was purchased after the transfer in ownership—two in 2013 and one in 2017. Da26, Da706:13-25. Longo claimed the talc in each “Shower to Shower” bottle had the *same* particle size distribution as J&J talc. Da868-69.

*different* products—"solid, semi-solid, or liquid"—varies by product type and by manufacturer. Da1037. But baby powder is different—it is a "loose matrix product." Da1037, Da1039. And as to baby powder, the article establishes that "a 200-mesh (74- $\mu$ m) talc is used almost *exclusively*." Da1039 (emphasis added). Thus, even Dr. Longo's limited use of the particle size to show the talc must be from J&J holds no water, and this theory never should have gone to the jury.

Further, the particle size distribution analysis that Dr. Longo performed did not even purport to establish when any asserted contamination was introduced into the bottle. The court made no finding whatsoever as to the risk of post-sale contamination.

And Dr. Longo's reasons for assuming no such contamination made no sense and were unsupported. He relied in part on the fact that the asbestos was distributed homogenously throughout each bottle, rather than collected at the top. See 5T29:10-18. But Dr. Longo testified that he shook each sample before testing "to be sure that [he] had a homogeneous mixture inside the bottles." 6T51:11-52:1. His shaking of the bottles wholly undermined his rationale and his findings regarding post-sale contamination.

**2. The trial court erred in admitting Dr. Longo's baseless extrapolated conclusions. (Da8-11, Da3005; 9T4-12; 55T83-84.)**

Dr. Longo's testimony that he found some asbestos in some vintage bottles of Johnson's Baby Powder could not have satisfied plaintiffs' burden of proving that asbestos-contaminated J&J talcum powder caused Mr. Lanzo's mesothelioma. Meeting that burden required proof that Mr. Lanzo was exposed sufficiently "frequently and on a regular basis" to asbestos through the talc. See Sholtis, 238 N.J. Super. at 31. Because the historical testing failed to establish this, supra pp. 9-12, the only remaining testimony was Dr. Longo's statement that exposure was "substantial" because "if you could measure this, you would have concentration levels typically 10 to 20 times at least over background levels." 55T84:15-21.

Dr. Longo provided absolutely no support for this statement: He offered no statistical analysis whatsoever. There was simply no explanation for how Dr. Longo came to that conclusion—not in his trial testimony and not in his expert report, which did not even state the conclusion. That opinion could never survive Accutane's rigorous requirements.

Plaintiffs provided a post hoc rationalization for Dr. Longo's assertion in their post-trial motion: They claimed it was based on Dr. Longo's trial testimony that one asbestos fiber discovered in a milligram of talc meant that there were 100,000 fibers

in a four-ounce bottle; likewise, four found fibers in a smaller sample of talc meant 57 million fibers in the bottle. But Dr. Longo's calculations regarding the amount of asbestos in any single bottle say nothing about the frequency of Mr. Lanzo's exposure over a lifetime, or how it compared to background levels.

Without analyzing a randomly selected, statistically significant number of bottles of baby powder from the relevant time periods and the relevant mines—or some reliable meta-analysis of the historical testing—Dr. Longo could not come anywhere close to supporting the estimation he offered. He did not claim to do any of this. Indeed, of the 18 purportedly positive samples, 11 predated this case substantially and came from a mine from which J&J sourced talc for the products at issue for only a few months. Infra p. 56. Two were manufactured by other companies. Supra p. 38 n.9, Da26a, 10a. Further, the fiber counts in the 32 samples varied widely—from 14 samples containing no asbestos, to eight purportedly containing one to two particles, to a sample in which Dr. Longo claimed to find 101. Supra p. 36. There is absolutely no record evidence supporting the idea that this translated into “10 to 20 times at least over background” exposure for anyone—let alone Mr. Lanzo.

As the California court recently explained in Weirick in excluding Dr. Longo's testimony that the plaintiff was “more likely than not” exposed to asbestos, Dr. Longo “reached this opinion by

detecting asbestos in 17 of 30 containers. Plaintiffs fail to show how these results provide a reliable means to extrapolate a likelihood of asbestos contamination and exposures above background levels.” Weirick, Case No. JCCP 4674, Ex. B at 34-35 (Da6435-36); see Alfaro, 2017 WL 3668610 at \*9-11 (affirming exclusion of exposure opinion, based on exclusion of underlying vintage talc samples) (Da6313-15). The same is true here. The trial court should have excluded Dr. Longo’s net opinion about Mr. Lanzo’s total exposure levels.

The court’s failure to exclude this testimony was highly prejudicial. Allowing Dr. Longo to tell the jury that Mr. Lanzo was exposed to quantified levels of asbestos bolstered Dr. Longo’s testimony that Mr. Lanzo’s exposure was substantial. His unsupported calculations propped up an opinion that lacked any basis whatsoever in the record.”

\* \* \*

If there is one lesson the Supreme Court emphasized in Accutane, it is that juries are prone to reaching unjust decisions when trial courts fail to perform an adequate gatekeeping function. That is what happened here. Without this improperly admitted expert testimony, there is, at the very least, a “reasonable doubt” as to whether the jury would have reached the same conclusion. Bankston, 63 N.J. at 273. Indeed, as we demonstrate below (at § IV), the evidence was legally insufficient even considering the

unreliable expert testimony. The Court should therefore reverse or, at minimum, grant a new trial.

**II. The Trial Court Undermined J&J's Defense By Refusing To Grant Separate Trials After Instructing The Jury That It Could Infer That Imerys's Talc Was Contaminated With Asbestos. (Da2994-95; 83T149-57; 91T120.)**

In a case replete with powerful evidence that defendants' talc was not contaminated with asbestos, infra § IV, one of the worst blows a court could strike against the defense is to instruct the jury that they could simply assume the talc was, in fact, contaminated. That was the effect of the trial court's adverse inference instruction. J&J joins Imerys's argument that the adverse inference was unwarranted. But even if it were justified as to Imerys, the trial court abused its discretion in denying J&J's motions for severance and a mistrial.

1. The trial court intended to grant an adverse inference against Imerys only. It instructed the jury that Imerys "wrongfully . . . destroyed or discarded" talc samples. 91T120:1-5. Thus, the jury could "infer that the missing evidence may have been helpful to the plaintiffs' case to the detriment of defendant Imerys." 91T120:6-8. But the court cautioned the jury that the instruction did not apply to J&J. 91T120:9-13. In other words, the jury could hold Imerys liable on the assumption that the talc it had provided to J&J was laden with asbestos, but the jury was

expected not to make that same assumption as to the same exact talc in considering the claims against J&J.

The court initially recognized a juror's mind simply could not compartmentalize like that. At first, the court *refused* to grant any such instruction. It correctly observed that there was "no way of creating" an adverse inference "in any way that would not somehow implicate Johnson & Johnson," 82T244:18-24, because the jury could not reasonably be expected to draw an inference as to Imerys and then "forget what [it] just heard as to Johnson & Johnson," 83T142:22-143:1. The court therefore chose to strike Imerys's answer and suppress its defenses, leaving J&J unaffected. 82T245:8-10. J&J did not object to that approach.

Later, however, the court changed course. Concerned that its initial sanction against Imerys may have been too harsh, the court decided to issue an adverse-inference instruction instead. 83T145:5-25; 91T120:1-13. J&J immediately moved for severance or a mistrial, explaining that this instruction would hamstring its principal defense: that the Imerys talc J&J used in its products *did not* contain asbestos. 83T143:23-144:2.

The court denied the motion, concluding that the jury could, in fact, do what it had previously announced there was "no way" it could do. Observing that the jury was not *required* to draw the inference, but merely *could* do so, the court concluded that it would be possible for the jury to draw the inference against Imerys

without it affecting the jury's view of the claims against J&J. 83T149:7-150:21, 83T157:9-24.

2. The court was right the first time around. Refusing J&J's request for severance was a manifest abuse of discretion. A court abuses its discretion in failing to grant a motion for separate trials when joinder unduly prejudices the moving party. See Rendine v. Pantzer, 141 N.J. 292, 310 (1995); State v. Smiley, No. A-3858-09T1, 2012 WL 4328335, at \*2 (N.J. Super. Ct. App. Div. Sept. 24, 2012) (affirming severance) (Da6373-75). Undue prejudice occurs when the jury "cannot be expected to compartmentalize the evidence with respect to different defendants due to a 'prejudicial spillover effect' between the cases against them." United States v. Boone, 437 F.3d 829, 837 (8th Cir. 2006) (quoting United States v. Lueth, 807 F.2d 719, 731 (8th Cir. 1986)). For example, severance is required "where a significant portion of the evidence to be adduced at trial is admissible only as to one defendant thereby causing prejudice to other defendants." State v. Mance, 300 N.J. Super. 37, 53 (App. Div. 1997).

Courts regularly sever claims when that is the only way to protect a defendant from the spillover effect of prejudicial evidence. A common example is cases involving claims against cities and their individual employees, where evidence demonstrating the city's pattern or practice of unlawful conduct would prejudice the employees. See, e.g., Quintanilla v. City of Downey, 84 F.3d 353,

356 (9th Cir. 1996). Separate trials are also necessary in cases involving both liability and insurance, because the risk is too great that a jury's ruling on liability will be "colored by the presence or absence of insurance." Eschle v. E. Freight Ways, Inc., 128 N.J. Super. 299, 306 (Law Div. 1974). And separate trials are often required in multi-plaintiff cases against a single defendant, where all the evidence would be admissible in each respective case, but where the sheer volume of claims is itself prejudicial. See, e.g., Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir. 2000) (finding that "even the strongest jury instructions could not have dulled the impact of a parade of witnesses" (citation omitted)). That does not mean that separate trials are *always* necessary when evidence—even prejudicial evidence—is admissible as to one defendant but not another. But severance *is* required where it is unreasonable to expect the jury to consider the evidence as to only a single party.

3. This was one of those circumstances. It was unreasonable for the court to tell the jury it could infer that talc supplied to J&J was contaminated, but then expect that the jury would not reach the same conclusion with respect to that very same talc that J&J bottled and sold. Imerys supplied the raw material that comprised more than 99% of the J&J products at issue. See 42T268:14-23. Thus, any inference that Imerys's talc was contaminated inherently carried with it an inference that J&J's talc was likewise

contaminated. As the trial court acknowledged here before changing course, the jury could hardly infer one thing with respect to Imerys and then "forget" that inference as to J&J. 83T142:22-143:1.

Severance is particularly critical in a case involving multiple defendants, where only one of them engaged in spoliation. A central tenet of spoliation law is that only the spoliator is subject to the adverse inference. "[C]ourts faced with spoliation claims should strive to impose a remedy that will serve the ends of justice by . . . ensuring that the consequence of the lost evidence falls on the spoliator rather than on an innocent party." Robertet Flavors, Inc. v. Tri-Form Const., Inc., 203 N.J. 252, 284 (2010). The goal should be to "even[] the playing field" by punishing the spoliator while protecting innocent parties from the consequences of the spoliator's misconduct. Id. at 273 (quoting Rosenblit v. Zimmerman, 166 N.J. 391, 401 (2001)). But it is impossible to "even[] the playing field" in a manner that protects the innocent party when the court issues an adverse-inference instruction that guts the innocent party's core defense. "[I]t is not reasonable to expect a jury to find a fact one way as to [one party], and to find that same fact another way as to [another]." Donato v. Fitzgibbons, 172 F.R.D. 75, 85 (S.D.N.Y. 1997).

Donato is instructive. There, the court issued an adverse-inference instruction against a municipality, but not against the

municipality's police officer, based on the municipality's spoliation of evidence. Id. at 84. The court initially chose not to sever the officer's case from the municipality's, in the interest of judicial economy. Id. at 84-85. However, it sua sponte reconsidered and severed the parties. Without separate trials, it explained, the innocent party would "bear the burden of the adverse inference, although he [wa]s not properly the focus of [the court's] ruling in that regard." Id. at 85.

4. Here, just as in Donato, the court could not cure the prejudice with an instruction that any adverse inference did not apply to J&J. 91T120:14-16. Although courts ordinarily presume juries follow instructions, "[t]here are undoubtedly situations in which notwithstanding the most exemplary charge, a juror will find it impossible to disregard . . . a prejudicial statement." State v. Boone, 66 N.J. 38, 48 (1974); see State v. Manney, 26 N.J. 362, 368 (1958) (recognizing that severance should be granted where "a jury is likely to be unable to comply with the trial court's instructions"). Here, the jury was being asked to suspend logic.

Thus, as in Donato, "there [wa]s no instruction to the jury that could avoid the possibility that the adverse inference against [one party] would 'contaminate' the mind of the fact finder in its consideration of [the second party's] claims." Donato, 172 F.R.D. at 85. And "[a]ny instruction which may [have] suggest[ed] such

a possibility would [have] be[en] unduly confusing for the jury.”  
Id.

The court therefore erred in denying J&J’s motion for severance or a mistrial. And that error was not merely prejudicial, it was outcome-determinative: “when not warranted,” an adverse-inference instruction “can have a decisive impact upon a jury’s determination.” Washington v. Perez, 219 N.J. 338, 357 (2014) (internal quotation marks omitted). The Court should, at the very least, vacate the judgment and remand for a new trial.

**III. The Jury Instructions Improperly Constrained The Jury’s Consideration Of Evidence Of Potential Alternate Causes Of Mr. Lanzo’s Illness. (Da3005; 86T236-42; 91T152.)**

One of defendants’ most important defenses was that Mr. Lanzo, over the course of a lifetime, had been exposed to other sources of asbestos that could have caused his mesothelioma. Supra pp. 12-13. The trial court severely restricted the jury’s consideration of the evidence that was presented at trial with an erroneous jury instruction on alternative causation.<sup>10</sup>

The trial court told the jury that, in considering defendants’ alternate causation evidence, any “[s]uch potential causes must be probabilities as distinguished from possibilities.” 91T152:6-10.

---

<sup>10</sup> Imerys has addressed this argument in its separate appeal (Case No. A-004994-15T3). Because the cases are not consolidated, but the parties are respondents in one another’s appeals, J&J joins in Imerys’ argument and also separately develops it here.

While the court also noted that “[i]t is not Defendant’s burden to prove what caused Mr. Lanzo’s illness,” 91T152:19-20, its instruction required exactly that.

The court appeared to be relying on a rule that applies to plaintiffs, rather than defendants. The party bearing the burden of proof must establish medical causation by a *probability*. See, e.g., Kiczula v. Am. Nat’l Can Co., 310 N.J. Super. 293, 303 (App. Div. 1998) (preponderance of the evidence standard requires litigant to establish causal link was more probable than not); Johnesee v. Stop & Shop Cos., Inc., 174 N.J. Super. 426, 431 (App. Div. 1980) (per curiam) (“It is . . . plaintiff’s burden” “to prove [causation] by a reasonable medical probability.”). Thus, that party’s expert testifying to “some ultimate issue of causation” must usually offer testimony “couched in terms of reasonable medical certainty or probability.” State v. Smith, 262 N.J. Super. 487, 519 (App. Div. 1993).

But that is not the rule that applies to the party *challenging* evidence of medical causation. In those circumstances, the rule is reversed: When considering evidence of an alternate cause of a plaintiff’s injury, the question is “one of possibility rather than probability.” Paxton v. Misiuk, 34 N.J. 453, 461 (1961). A defendant “should be able to rebut any such proof by medical evidence negating the claimed cause.” Id.; see State v. Van Duyne, 43 N.J. 369, 380 (1964) (defendant could introduce evidence of

possible other causes to “weaken the probative force of” the state’s causation evidence); Davidson v. Slater, 189 N.J. 166, 187 (2007) (“[E]very defendant . . . possesses the right of demonstrating by competent evidence that the injury *could* have been caused, wholly or partly . . . by a pre-existing condition.” (emphasis added) (internal quotation marks omitted)).

In keeping with these ground rules, the Supreme Court has decisively rejected the argument that a jury may consider evidence of a possible alternate cause of the plaintiff’s injury only if the injury “[p]robably resulted from” that alternate cause. Paxton, 34 N.J. at 461. The Court recognized that a defendant has the right to present evidence “as to matters . . . which *might* have caused, or contributed to cause, the suffering of which [the plaintiff] complain[s].” Id. (emphasis added) (internal quotation marks omitted).

Here, by telling the jury that J&J’s alternative causation evidence should be held to the same standard as plaintiffs’ causation evidence, the court impermissibly shifted the burden of proof to J&J and thereby thwarted a key element of its defense. “[H]ad the jury been instructed correctly,” “the outcome might have been different.” Washington, 219 N.J. at 351. The judgment must be reversed.

**IV. Insufficient Evidence Supported The Jury's Verdict.  
(100T4-24; Da3005.)**

When the unreliable expert testimony and spillover effect of the adverse inference are stripped away, all that remains is grossly insufficient evidence to uphold the jury's verdict. That said, even if the trial court properly admitted the fatally unreliable expert testimony in this case, the trial record is bereft of evidence that Mr. Lanzo was exposed to asbestos in J&J talcum powder—let alone that any such contamination caused his disease. Instead, the record reveals 40 years of J&J's comprehensive testing, encompassing tens of thousands of samples tested. Supra pp. 9-12. The results of those tests, confirmed by government agencies and independent scientists, conclusively established the product's safety. Supra pp. 9-12. The judgment here should be reversed on sufficiency grounds, see Newmark-Shortino v. Buna, 427 N.J. Super. 285, 313 (App. Div. 2012), or, at a minimum, vacated, as "against the weight" of the evidence, see Franklin Disc. Co. v. Ford, 27 N.J. 473, 490 (1958); Dolson v. Anastasia, 55 N.J. 2, 5-7 (1969).

If this Court finds the evidence minimally adequate to support liability, it should reverse the \$55 million in punitive damages because there was no "clear and convincing evidence" that J&J acted with malice or wanton disregard. The evidence was undisputed that J&J exceeded industry testing standards and that the FDA and other regulatory agencies repeatedly reviewed and approved its approach.

**A. Plaintiffs presented insufficient evidence that Mr. Lanzo was exposed to asbestos from J&J talcum powder. (100T4-24; Da3005.)**

1. Plaintiffs provided insufficient evidence that Mr. Lanzo was exposed to asbestos from J&J talcum powder. The following is undisputed:

First, J&J and Imerys routinely tested source talc and cosmetic powder for the entire period in question, using both internal and external labs. As plaintiffs repeatedly alluded to at trial, 28T135:18-136:5, 30T18:20-23; 45T9:8-12, those tests consistently found no asbestos contamination, supra p. 10 n.4.

Second, the outside lab J&J used for much of the testing was the best in the business. As even *plaintiffs'* expert acknowledged: "[I]f you are going to hire someone . . . Johnson & Johnson hired the right company." 30T130:14-19; see 30T114:4-8, 30T142:16-19. That lab, McCrone, concluded, based on its years of "closely examining" the talc used in J&J products, that those "products have been, and continue to be free of asbestos." Da5922.

Third, in the rare instances when a test showed trace amounts of suspicious minerals, the samples underwent further testing and analysis to determine whether they showed asbestos contamination. Da4938, Da5923; 61T140:1-19, 61T147:11-148:19; 68T78:9-79:2, 68T140:8-142:13. Those tests unvaryingly came back negative. See, e.g., 61T140:2-19, 61T147:11-148:1; Da4938.

Fourth, the FDA has repeatedly confirmed that cosmetic talc is safe. In the 1970s, the FDA found “no health hazard” after a comprehensive review of talc testing that included J&J products. Da4936; see 43T108:14-25; 72T56:12-58:13. In 1986, after another review, it found “no need to require a warning label on cosmetic talc.” Da4936. There was “no basis” to conclude there was a “health hazard attributable to asbestos in cosmetic talc,” because the “worst-case” risk was “less than the risk from environmental background levels of exposure . . . over a lifetime.” Da4936. From 2009 to 2010, the FDA again tested talc—including J&J products—and “found no asbestos fibers or structures in any of the samples of cosmetic-grade raw material talc or cosmetic products containing talc.” 46T228:18-25.

*Fifth*, other agencies have independently agreed. The EPA reviewed testing data in 1975 and concluded that the samples were not contaminated with asbestos. 36T65:3-22, 43T180:14-182:19; Da5922-23, Da5576-77. The USGS also examined talc samples and concluded that none contained asbestos. See, e.g., 72T51:13-52:24; Da4919. No federal or state agency has concluded that cosmetic talcum powder presents a health risk due to potential asbestos contamination.

2. In the face of this overwhelming evidence that J&J’s talc is not contaminated with asbestos, plaintiffs seized on language describing *negative*, *inconclusive*, or *innocuous* test results as

proof positive of contamination. For instance, they pointed to an opinion that J&J talc contained "less than 1%, *if any*, asbestos," Da6303 (emphasis added), a report *from 1960* that an Italian mine had tremolite (not asbestos), and the testing by Dr. Langer that he later disavowed. Da5984, Da5996, Da6232; 38T220:19-221:18; 41T133:1-135:17; supra p. 7. Of course, that evidence could not establish contamination, much less permit a reasonable inference that Mr. Lanzo was exposed to any contaminated talc.

The other evidence plaintiffs cited was likewise insufficient to establish that Mr. Lanzo was exposed to asbestos from J&J talc. For instance, plaintiffs cited a 1991 article reporting that a single sample of what plaintiffs assert was Johnson's Baby Powder tested positive for asbestos. See 28T154:7-28T157:15; Da6007-13. But the author later concluded that baby powder had at most "trace amounts of asbestos which are well below those specified by OSHA." Da6014. And even if the single sample showed asbestos, it plainly "st[ood] alone" "in context of the whole testing record" that spanned four decades, 68T185:17-20, and was thus insufficient to establish that Mr. Lanzo was personally exposed.

Plaintiffs also cited a 2004 test of a sample of Johnson's Baby Powder conducted at the behest of a local Sacramento television station. See 28T151:8-152:22; 37T32:21-33:13. Plaintiffs introduced no evidence of any chain of possession of the sample and the test was, at most, an outlier that failed to demonstrate

that Mr. Lanzo was personally exposed to asbestos with any frequency or regularity. See infra § IV.B.

Finally, plaintiffs relied on Dr. Longo. That testimony does not count if, as demonstrated above (at § I.B.), it was inadmissible. But even if it was admissible, it lacked probative value. Of the 18 samples that Dr. Longo claimed showed "asbestos," 11 contained boric acid (not used after 1953) and/or were in metal tins whose use ended in the 1960s. 45T93:4-94:1; 47T165:2-170:21. They thus predated Mr. Lanzo's birth by years—sometimes decades—and were sourced from an Italian mine that J&J used for only a few months during the three decades at issue in this case. 36T186:24-187:5; 55T73:9-12; supra p. 9 n.2. Of the seven that remained, two were non-J&J products, 47T171:9-172:9, two contained richterite and chesterite, neither of which plaintiffs provided any evidence of having ever been found in the mines at issue here, 47T174:16-175:23, and each of the remaining three had only one fiber, which Dr. Longo could not properly identify as asbestiform, 46T264:5-17; 47T183:19-189:20.<sup>11</sup> That evidence simply could not overcome the 40 years of testing showing that talcum powder is not

---

<sup>11</sup> At trial, Dr. Longo asserted that two of the three contained "bundles" of asbestos fibers—purportedly identifying them as asbestiform—in conflict with his earlier testimony that they contained single fibers. 47T183:21-187:2, 47T189:19-193:23.

contaminated, or show that Mr. Lanzo was somehow personally exposed to asbestos through J&J products.

3. Plaintiffs' wild conspiracy theory did not fill the evidentiary gap. They alleged that the Cosmetic Toiletry & Fragrance Association (CTFA), which includes companies in the cosmetic talc industry, acted with J&J to hide evidence of contamination by adopting inadequate testing protocols. See 89T142:5-143:4. That would have meant that these actors conspired for decades with independent scientists at highly respected labs to institute improper testing standards and mislead the FDA, EPA, MSHA, and OSHA, among others.

The evidence fell far short of establishing any such conspiracy. Plaintiffs argued that the industry deliberately prevented detection of asbestos in talc by adopting a testing method—the J4-1 standard described above (at pp. 8-9)—that was not sufficiently sensitive. See, e.g., 30T30:11-17, 30T56:7-22; 32T32:6-23, 32T112:3-114:7. The FDA, however, accepted J4-1 as sound, including the XRD testing on which it is based. See 43T126:8-127:15; 67T203:2-67T206:13, 67T210:10-24 (describing the value of the XRD test used in the J4-1 method); 68T139:9-13; 72T61:8-62:7; Da4936. In any case, it is uncontested that J&J (and Imerys) exceeded the CTFA standard by using the most advanced and sensitive tests available—including TEM—to detect asbestos-forming minerals, in combination with other advanced techniques. 30T110:17-

112:25; 35T224:7-15; 42T277:8-278:8; 61T71:4-72:5, 61T145:16-46:13; 67T210:4-24, 67T263:16-264:20; Da6222-30, Da4902-03, Da5922.

Still more tenuously, plaintiffs criticized J&J's testing methodology because of its "detection limit" that specified how many asbestos fibers a test had to find to be considered positive. See, e.g., 28T179:24-180:9; 45T61:8-22. Such detection limits are consistently recognized as essential to ensuring both that the material detected is above environmental background levels and that it is not the product of lab contamination. 47T39:2-54:11; 61T98:19-100:18; 67T240:12-242:13, 67T275:1-277:1; 68T94:16-20; 68T177:2-22. And experts have embraced J&J's specific detection limit (five fibers), or one very similar. 39T29:7-19; 47T48:6-47T54:8; 61T100:3-101:7; 68T177:8-18. So have New York State's environmental labs, 47T38:13-39:8, NIOSH, 47T40:7-24, and the American Society for Testing and Materials, an international standards organization, 47T42:10-44:16.

In short, J&J was at the vanguard of industry testing practices, and plaintiffs' evidence was insufficient to allow the jury to infer the presence of asbestos in the talc Mr. Lanzo used.

**B. Plaintiffs presented insufficient evidence to establish causation. (100T4-24; Da3005.)**

Even if plaintiffs' evidence somehow established that Mr. Lanzo was exposed to rare trace amounts of asbestos from J&J talc,

there was nothing to show that such exposure caused Mr. Lanzo's mesothelioma. Plaintiffs' evidence of exposure to *non-asbestiform* particles cannot satisfy this burden.

To establish proximate causation, plaintiffs had to provide "actual proof linking" Mr. Lanzo's asbestos exposure to a J&J product. Goss v. Am. Cyanamid Co., 278 N.J. Super. 227, 236 (App. Div. 1994). Any such exposure must have been sufficiently "frequent[] and on a regular basis." Sholtis, 238 N.J. Super. at 31. It "must be sufficiently significant so that a reasonable jury could determine that the product was a substantial factor in bringing about the plaintiff's injury." Id. at 21. "[M]ere guesswork" does not suffice. Hughes v. A.W. Chesterton Co., 435 N.J. Super. 326, 345 (App. Div. 2014); see Provini v. Asbestospray Corp., 360 N.J. Super. 234, 238 (App. Div. 2003) (affirming grant of summary judgment where plaintiff asked court "to *assume* that he was exposed to the product because the product was used" by his employer during his brief period of employment).

1. Plaintiffs produced no evidence from which a jury could rationally infer that Mr. Lanzo was exposed to asbestos from J&J talcum powder with sufficient frequency to cause his illness. Plaintiffs' theory contravenes the decades of independent scientific consensus that, as stated by the FDA, the "worst-case" risk "of exposure to asbestos from cosmetic talc" is "less than the risk from environmental background levels of exposure . . . over

a lifetime.” Da4936. In opposition, plaintiffs offered Dr. Longo’s purely speculative opinion that exposure was “substantial” because “if you could measure this, you would have concentration levels typically 10 to 20 times at least over background levels.” 55T84:15-21. That net opinion, which did not even purport to discuss health effects, 45T175:19-24, was plainly inadmissible and entitled to no weight whatsoever. Supra § I.B.2.<sup>12</sup>

Plaintiffs offered no evidence establishing how extensive any asbestos contamination of J&J talc purportedly was—and thus whether there was sufficiently frequent contact or not. Even if they had, however, they provided no testimony demonstrating what that would have meant for Mr. Lanzo’s personal risk of exposure, and no scientific analysis comparing any such risk to exposure from environmental background levels of asbestos for all individuals. See 61T99:11-20; 67T276:12-277:18; supra p. 13.

If plaintiffs’ theory were true, and the talc was contaminated with carcinogens, then one would expect to see heightened rates of mesothelioma among the miners and millers who worked in the regions at issue in this case. But the opposite was true. See 55T172:12-

---

<sup>12</sup> Dr. Moline’s opinion that exposure was a “substantial contributing factor to his mesothelioma” (49T64:6-12) fares no better, principally because it was based on Dr. Longo’s invalid testing and the historical documents which, discussed extensively throughout this section, could not establish that the talc was contaminated—let alone that Mr. Lanzo was frequently exposed to asbestos with sufficient frequency through his use of J&J products.

173:8; 56T223:11-16; 81T25:3-26:2, 81T52:4-19, 81T61:17-62:6. Those workers have been studied, and "not even a single case of mesothelioma has been identified in any one," even though "we know that these miners have been exposed to high levels of talc." 81T26:5-27:18. There is simply "no epidemiologic evidence that exposure to cosmetic talc, even at very high exposure levels, increases the risk of mesothelioma." 81T61:17-62:2.

2. Nor could plaintiffs establish causation through proof of exposure to non-asbestiform minerals, such as tremolite. As discussed, these rock-like minerals are very different than their toxic asbestiform cousins; they lack the biodurability and unique surface chemistry that cause asbestos fibers to lodge in the lung and cause uncontrolled cell replication. Supra pp. 19-21.

In any case, plaintiffs' only specific-causation expert, Dr. Moline, stated that she could not "give an opinion . . . that Mr. Lanzo's mesothelioma was caused by non-asbestiform varieties of asbestos minerals in cosmetic talc." 49T195:7-11. Thus, even if Dr. Moline's testimony was properly admitted, it still could not establish causation on this basis.

Plaintiffs' theory was not just against the weight of the evidence. There was no credible evidence supporting it at all. This Court should reverse the verdict or, at a minimum, vacate the judgment and remand for a new trial.

**C. Insufficient evidence supports the punitive damages award. (100T4-24; Da3005.)**

Even if the evidence was minimally adequate to support the jury's liability finding, it was grossly insufficient to satisfy the heightened standard of proof necessary for awarding punitive damages. Punitive damages are inappropriate unless plaintiffs proved "by clear and convincing evidence" that J&J acted with "actual malice or . . . wanton and willful disregard of persons who foreseeably might be harmed by [the defendant's] acts." N.J.S.A. 2A:15-5.12(a). That standard requires proof of "intentional wrongdoing," or "knowledge of a high degree of probability of harm to another and reckless indifference to the consequences of such act." N.J.S.A. 2A:15-5.10.

To determine whether to award punitive damages, the jury must consider the likelihood of harm, defendants' knowledge or recklessness, defendants' conduct upon learning of the risk, and the conduct's duration. N.J.S.A. 2A:15-5.12(b). This standard is "restrictive," Pavlova v. Mint Mgmt. Corp., 375 N.J. Super. 397, 403 (App. Div. 2005), and punitive awards are "reserved for special circumstances," to punish "particularly egregious conduct," Maudsley v. State, 357 N.J. Super. 560, 590-91 (App. Div. 2003).

There is no record support—and certainly no clear and convincing support—for any finding that J&J knew of a risk of harm or even recklessly disregarded one. As a starting point, the

company's testing—which far exceeded the industry standards the FDA embraced—consistently showed no contamination. Supra pp. 8-11; 42T277:4-278:8; 43T126:4-128:16; Da4902-03. That should have foreclosed punitive damages on all claims. See, e.g., Satcher v. Honda Motor Co., 52 F.3d 1311, 1316-17 (5th Cir. 1995) (vacating award of punitive damages in part because the defendant's conduct was consistent with industry and government safety standards); Alley v. Gubser Dev. Co., 785 F.2d 849, 856 (10th Cir. 1986) (holding punitive damages inappropriate where defendant's conduct was consistent with industry practice); cf. Feldman v. Lederle Labs., 132 N.J. 339, 347(1993) (explaining that a company's "attempt to comply with existing FDA regulations . . . bears on the reasonableness of its conduct"); W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 36, at 233 n.41 (5th ed.) ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages.").

Further, the FDA has rejected the contention that the cosmetic talc industry should be required to include an asbestos warning for consumers, finding no evidence that cosmetic talc contains asbestos or is harmful. Supra p. 12. Conduct simply "cannot be seen as wanton" and meriting punitive damages where the relevant government agency has declined to require warnings. Richards v. Michelin Tire Corp., 21 F.3d 1048, 1058 n.20 (11th Cir. 1994); see Clark v. Chrysler Corp., 436 F.3d 594, 603 (6th Cir. 2006) (failure

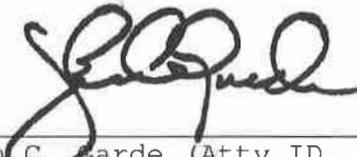
to use a test that "was neither required by the government nor used by other manufacturers" does not indicate "a level of indifference to or reckless disregard for the safety of others").

Here, too, Plaintiffs retreated to their theory of a massive, decades-long conspiracy. They alleged the entire talc industry conspired to adopt a deficient testing standard and mislead the FDA, OSHA, EPA, and experts into believing that the testing was sufficient and talc was safe. Supra p. 15. As previously discussed, however, insufficient evidence supports that theory even in the liability context. Supra pp. 57-58. So plaintiffs come nowhere close to establishing it by clear and convincing evidence for punitive damages. See David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 40-41 (1982) ("Rarely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm.").

**CONCLUSION**

For the foregoing reasons, this Court should reverse the judgment or, at minimum, vacate the judgment and remand for a new trial.

Respectfully submitted,



Robert M. Loeb (*pro hac vice*)  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
1152 15th Street NW  
Washington, DC 20005

John C. Garde (Atty ID  
014171986)  
McCARTER & ENGLISH LLP  
100 Mulberry Street  
Newark, New Jersey 07102

Paul David Meyer (*pro hac vice*)  
Evan M. Rose (*pro hac vice*)  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
405 Howard Street  
San Francisco, CA 94025

E. Joshua Rosenkranz (*pro hac*  
*vice*)  
Naomi J. Scotten (*pro hac vice*)  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
51 West 52nd Street  
New York, NY 10019  
(212) 506-5380

*Counsel for Defendant-Appellant*

December 7, 2018