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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

TERESA ELIZABETH LEAVITT et al., Plaintiffs and Respondents, v. JOHNSON & JOHNSON et al., Defendants and Appellants.	A157572 / A159021 (Alameda County Super. Ct. No. RG-17882401)

Teresa Elizabeth Leavitt and her husband, Dean J. McElroy (collectively, plaintiffs), asserted negligence, strict product liability, and fraud claims against Johnson & Johnson and Johnson & Johnson Consumer Inc. (collectively, defendants), alleging that Johnson's Baby Powder was contaminated with asbestos and that Leavitt's long-term use of the product caused her mesothelioma. After a nine-week trial, the jury returned a special verdict in plaintiffs' favor on all claims except for intentional misrepresentation. Defendants appeal, contending that the trial court made evidentiary and instructional errors, and that substantial evidence does not support the jury's causation findings. We conclude defendants have not demonstrated prejudicial error and affirm.

BACKGROUND

A.

A plaintiff seeking to hold a manufacturer liable for asbestos-related latent injuries must satisfy a two-part causation test. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 (*Rutherford*).) Specifically, "the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, *and* must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury." (*Id.* at p. 982, some italics omitted.)

When the plaintiff alleges she developed mesothelioma because of exposure to asbestos-contaminated talc, the plaintiff must satisfy the first prong (exposure) with evidence that supports an inference of probability—that it is more likely than not the talc product was contaminated with asbestos when the plaintiff used it. (*LAOSD Asbestos Cases* (2020) 44 Cal.App.5th 475, 489; *Berg v. Colgate-Palmolive Co.* (2019) 42 Cal.App.5th 630, 635 (*Berg*).) A mere possibility that the plaintiff was exposed to a defendant's asbestos-contaminated product is insufficient. (*Berg, supra,* at p. 635.)

With respect to the second prong, plaintiff need not prove that "fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth." (*Rutherford, supra,* 16 Cal.4th at pp. 976–977, italics omitted.) Rather, a plaintiff can demonstrate legal causation by proving that his or her "exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate

dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*Ibid.*, italics omitted.) In other words, "a particular asbestos-containing product is deemed to be a substantial factor in bringing about the injury if its contribution to the plaintiff or decedent's risk or probability of developing cancer was substantial." (*Id.* at p. 977, italics omitted.) The substantial factor standard is relatively broad, requiring only that the contribution of the exposure be "more than negligible or theoretical." (*Id.* at p. 978.) Factors relevant to that assessment include "the length, frequency, proximity and intensity of [asbestos] exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed." (*Id.* at p. 975.)

B.

Leavitt was born in the Philippines in 1966. When she was an infant, Leavitt's mother and other caretakers applied Johnson's Baby Powder to her after diaper changes and baths. After Leavitt moved to the United States in 1968, she continued to regularly use the product after bathing and then, as a teenager, began applying it to her face, as a powder, and to her hair, as a dry shampoo. She stopped using Johnson's Baby Powder in approximately 1998.

In 2017, at the age of 51, Leavitt was diagnosed with mesothelioma—a rare type of cancer that is primarily caused by exposure to asbestos. The average time between exposure and mesothelioma diagnosis is 30 to 35 years.

Johnson's Baby Powder is made of talc. Talc is a very soft mineral that is mined from the earth and ground up for use in cosmetic products. There are two kinds of talc – "fibrous" talc and "platy" talc.

Fibrous talc is long, thin, and has parallel sides, whereas platy talc is disc-shaped. During the relevant time period, Johnson & Johnson sourced its cosmetic talc sold in the Philippines from talc mines in South Korea. Defendants sourced cosmetic talc sold in the United States from mines in Vermont (except for a very brief period of time when talc was sourced from Italy).

"Asbestos" generally refers to a group of minerals that, when occurring in an "asbestiform habit," are federally regulated: chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite. (See, e.g., 15 U.S.C. § 2642(3) [Asbestos Hazard Emergency Response Act].) Plaintiffs' experts testified that there is also a "public health" definition of asbestos, which focuses on whether a particular substance is harmful because its individual fibers have aerodynamic dimensions that can penetrate the alveoli, deep in the lungs. Although they are not included in the federal government's definition, plaintiffs' experts opined that winchite-richterite and fibrous talc are also asbestiform structures that cause mesothelioma.

C.

Leavitt and her husband filed suit for personal injury and loss of consortium against, among other defendants, Johnson & Johnson and Johnson & Johnson Consumer Inc., each of which manufactured and distributed Johnson's Baby Powder during the time Leavitt used it. Plaintiffs alleged that Leavitt's exposure to asbestos in Johnson's Baby Powder caused her mesothelioma.

The following causes of action were eventually tried and submitted for the jury's consideration on a special verdict form: (1) strict products liability (design defect and failure to warn of risk); (2)

negligence; and (3) fraud (concealment and intentional misrepresentation).

D.

Although there is no dispute that exposure to asbestos causes mesothelioma, plaintiffs' and defense experts disagree about whether that relationship depends on the dose. Plaintiffs' epidemiology expert testified that there is no safe level of exposure to asbestos, whereas defense experts testified that asbestos exposure must exceed a threshold (or be above "background" levels found in ambient air) to cause disease. The jury was also tasked with resolving many other disputed issues— what structures are correctly identified as asbestos, whether it is more likely than not that the Johnson's Baby Powder used by Leavitt contained asbestos, and, if it did, whether Leavitt's use of Johnson's Baby Powder substantially contributed to her risk of developing mesothelioma. (*Rutherford, supra*, 16 Cal.4th at pp. 976-977.)

E.

Plaintiffs presented expert testimony from, among other witnesses, materials scientist William Longo, Ph.D.; two pathologists—Jerrold Abraham, M.D. and Ronald Dodson, Ph.D.; and occupational and preventive medicine physician and epidemiologist David Egilman, M.D.

Plaintiffs sought to establish Leavitt's exposure to asbestos primarily through Dr. Longo, who is a former materials science professor and current consultant. He testified that he found asbestos contamination in multiple samples of Johnson's Baby Powder. Dr. Longo did not obtain any samples from containers Leavitt possessed or

find asbestos in a bottle of Johnson's Baby Powder that came directly from a store shelf in 2016.

However, Dr. Longo found asbestos in Johnson's Baby Powder samples produced by defendants. In six out of seven of such samples that were originally sourced from Korean mines, he detected tremolite-actinolite asbestos. In those six samples, Dr. Longo testified that asbestos levels ranged from below 0.1 up to 0.3 percent by weight, which amounted to between 29,000 and 65,000 asbestos fibers per gram of talc. Dr. Longo also found asbestos, including tremolite asbestos and anthophyllite asbestos, in 25 of the 41 Vermont-sourced cosmetic talc samples produced by defendants. Asbestos concentration levels in these Vermont-sourced samples did not exceed 95,000 asbestos fibers per gram.

Before obtaining the defense-produced samples, Dr. Longo also tested samples from "vintage" Johnson's Baby Powder containers, which were obtained by plaintiffs' lawyers from various "collectors." Samples from these containers, which had been previously opened at some unidentified point between manufacture and testing, showed the highest levels of asbestos contamination.

Based on the results he obtained solely from testing the defense-produced samples as well as his review of discovery and published literature, Dr. Longo opined that Johnson's Baby Powder, sourced from Korean and Vermont mines, and sold between 1966 and 1998, contained asbestos and that Leavitt was exposed to asbestos through her use of such products.

Dr. Dodson and Dr. Abraham examined tissue specimens taken from Leavitt's lymph nodes and lungs, using electron microscopy and x-

ray spectrum analysis. They found chrysotile asbestos, tremolite asbestos, and either anthophyllite or fibrous talc in her lymph node tissue. They found platy talc, winchite-richterite, plus either anthophyllite or fibrous talc in her lung tissue. Plaintiffs' experts opined that the asbestiform structures could not have come from background exposure because anthophyllite and tremolite fibers are not found in commercial asbestos products that might otherwise have been the source.

Both of plaintiffs' expert pathologists, as well as Dr. Egilman, testified that Leavitt's exposure to asbestos and asbestiform fibers in Johnson's Baby Powder was a substantial factor contributing to her risk of developing mesothelioma.

F.

Plaintiffs also presented evidence from defendants' corporate documents and historical laboratory test reports that suggested defendants knew, from at least the 1960's or 1970's, that their cosmetic talc (sourced from both the Korean and Vermont mines) contained trace amounts of asbestos.

Dr. Seymour Lewin and Dr. Arthur Langer reported, in the 1970's, finding possible asbestos in samples of cosmetic talc, including Johnson's Baby Powder. When independent labs conducted follow-up testing, they found no (or extremely limited) contamination. Dr. Lewin then stated publicly that he found no asbestos in nine of 11 samples of Johnson's Baby Powder and that the results from the other two samples were "inconclusive." Dr. Langer publicly stated that only "trace" amounts of asbestos were detected and that he "may have mistaken long talcum fibers for asbestos fibers."

In 1991, Alice Blount, Ph.D., documented, in a peer-reviewed and published paper, the existence of trace levels of tremolite asbestos in a sample of Johnson's Baby Powder, sourced from the Vermont mines.

Plaintiffs also suggested that defendants used methods and protocols for testing their cosmetic talc—primarily x-ray diffraction without use of concentration methods or transmission electron microscopy—that they knew were not sufficiently accurate, to avoid detecting trace levels of asbestos (below 0.1 percent by weight).

G.

The defense offered competing testimony about the validity, significance, and proper interpretation of Dr. Longo's test results, defendants' internal documents, and their historical laboratory reports.

The defense also presented evidence that it lacked notice of any health risk because the Food and Drug Administration concluded, in 1986, that an asbestos warning label was not required on cosmetic talc because "even when asbestos was present, the levels were so low that no health hazard existed."

Defendants offered opinion testimony from their own experts, most notably geologist Matthew Sanchez, Ph.D., pulmonologist David Weill, M.D., epidemiologist Suresh Moolgavkar, Ph.D. & M.B.B.S., and two pathologists, Richard Attanoos, M.B.B.S. and Brooke Mossman, Ph.D.

Dr. Sanchez testified that most, if not all, of the structures found in samples of Johnson's Baby Powder were nonasbestiform versions of tremolite, anthophyllite, and actinolite, which are considered cleavage fragments and are not harmful.

Dr. Weill conceded that asbestos causes mesothelioma but testified that the disease is dose dependent and that a threshold level of exposure to asbestos fibers is needed. According to Dr. Weill, there is a broad scientific consensus that exposure to background levels of asbestos is insufficient to increase the risk of mesothelioma. Similarly, both Dr. Moolgavkar and Dr. Attanoos agreed that only exposure to asbestos above background levels increases the risk of developing mesothelioma.

Dr. Mossman opined that exposure to talc and cleavage fragments does not cause cancer. Dr. Weill, Dr. Moolgavkar, and Dr. Attanoos also testified that there was no epidemiological evidence linking talc to mesothelioma.

Dr. Attanoos examined samples from Leavitt's lung tissue and opined that Leavitt had not been exposed to asbestos fibers above background levels. He and Dr. Moolgavkar also opined that most cases of mesothelioma in North American women are not attributable to asbestos exposure at all. Most of such cases instead arise "spontaneous[ly]" or because of biological processes such as aging.

H.

The jury found both Johnson defendants liable on plaintiffs' negligence, design defect, failure to warn, and concealment claims. The jury failed to reach a verdict on plaintiffs' intentional misrepresentation cause of action, and plaintiffs dismissed it after a mistrial was declared. The jury awarded plaintiffs $29.491 million in total compensatory damages, apportioning 98 percent of responsibility to the Johnson defendants. The remaining 2 percent of responsibility was allocated to a former owner of the Vermont talc mines, Cyprus

Mines Corporation, with whom plaintiffs later settled. The jury awarded no punitive damages. The trial court entered judgment on the jury's special verdict.

DISCUSSION

A.

Defendants maintain the trial court abused its discretion by allowing Dr. Longo to testify, over defendants' chain of custody and reliability objections, that he found richterite and other asbestos in certain vintage, unsealed bottles of Johnson's Baby Powder obtained from a "collector." Even if they are correct, defendants fail to meet their burden to demonstrate prejudice.

1.

When the issue is beyond the realm of common experience and expert opinion will assist the trier of fact (Evid. Code, § 801, subd. (a)),[1] qualified experts may testify, "with a proper foundation." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) But trial courts are required to act as gatekeepers to exclude speculative or irrelevant expert testimony. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 753 (*Sargon*); § 801.) Before admitting expert testimony, "a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning. 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.' " (*Id.* at p. 771; accord, § 802.)

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[1] Undesignated statutory references are to the Evidence Code.

But courts should not choose between competing expert opinions. (*Sargon, supra*, 55 Cal.4th at p. 772.) "The court must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' [Citation.] The goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion." (*Ibid.*)

Expert testimony regarding a tested specimen or sample may also be excluded on "chain of custody" grounds. (*People v. Catlin* (2001) 26 Cal.4th 81, 134 (*Catlin*); see *Sargon, supra,* 55 Cal.4th at p. 772 ["decisional law . . . may also provide reasons for excluding expert opinion testimony"]; *Geffcken v. D'Andrea* (2006) 137 Cal.App.4th 1298, 1308.) When chain of custody is questioned, the party offering the evidence bears the burden of showing that it is reasonably certain the samples were not altered considering all the circumstances, including the ease or difficulty of alteration. (*Catlin, supra*, 26 Cal.4th at p. 134.) The standard of review is abuse of discretion. (*Catlin, supra*, 26 Cal.4th at p. 134; *Sargon, supra*, 55 Cal.4th at p. 773.)

We may only reverse the judgment if appellants meet their burden to affirmatively demonstrate, with an adequate record, both error and a reasonable probability of a more favorable result absent the error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 (*Soule*);

Ballard v. Uribe (1986) 41 Cal.3d 564, 574 ["a party challenging a judgment has the burden of showing reversible error by an adequate record"]; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*) [judgment challenged on appeal is presumed to be correct and appellant bears burden to affirmatively demonstrate error].) There is no presumption that an evidentiary error is prejudicial. (Code Civ. Proc., § 475; Evid. Code, § 353, subd. (b).)

2.

Dr. Longo tested two sets of samples. First, he tested samples from "vintage" Johnson's Baby Powder containers obtained by plaintiffs' lawyers from various "collectors." Specifically, Dr. Longo received three unsealed containers from plaintiffs' lawyers (M65228-001, M65208-001, and M6205-001), which plaintiffs' lawyers obtained from a "collector" named Steven Berkness. At trial, Dr. Longo testified specifically about one such sample (M65228-001). He tested this sample, using polarized light microscopy and transmission electron microscopy, and found that it contained tremolite asbestos and winchite-richterite. Dr. Longo also testified, on cross-examination, that samples from these Berkness containers, which had been previously opened at some unidentified point between manufacture and testing, showed the highest levels of asbestos contamination (in excess of 95,000 fibers per gram).

The second set of samples were produced by defendants. When he tested these samples, Dr. Longo testified, he found asbestos contamination in a majority of them. In the defense-produced samples, asbestos concentration levels did not exceed 95,000 asbestos fibers per gram.

Before trial, defendants filed motions in limine that argued Dr. Longo should be precluded from offering opinions based on results obtained from testing both the "collector" talc samples and certain of the subsequently obtained defense-produced samples. They raised both chain of custody and *Sargon*/reliability objections.

Defendants argued that the absence of a chain of custody was particularly problematic with the Berkness samples because Dr. Longo's test results—especially his finding of richterite—"suggest that the talcum powder may have been contaminated after it was sold." Defendants also argued that Dr. Longo should be precluded from opining, based on these test results, that the Johnson's Baby Powder Leavitt used was contaminated with asbestos. In the alternative, defendants asked the court to hold a section 402 hearing to determine the reliability of Dr. Longo's testimony under *Sargon*.

In opposing the defense motions in limine, plaintiffs admitted the unsealed, vintage samples from collectors lacked chains of custody before Dr. Longo received them. However, plaintiffs pointed to affidavits and deposition testimony wherein Dr. Longo opined, based on the appearance of interior caps that cannot be removed by hand and would show visible evidence of tampering, that the tested samples are authentic Johnson's Baby Powder. In further support, plaintiffs pointed to Dr. Longo's testimony that the interior cap's small holes cannot be used to refill the bottle. However, plaintiffs and Dr. Longo also admit that a simple technique exists, and is shown in a YouTube video, for refilling such a container through those same small holes.

The trial court denied the defense motions on the basis that plaintiffs had sufficiently shown "authenticity," citing Dr. Longo's

testimony regarding the condition of the bottles, the evidence "that it would be extremely difficult, if not impossible, to put material in through the little holes," and Dr. Longo's finding that particle size was consistent in the samples without chains of custody and in a control bottle of Johnson's Baby Powder purchased directly off the shelf. The court did not address the technique shown in the YouTube video.

At trial, Dr. Longo opined that Johnson's Baby Powder, sourced from Korean and Vermont mines, and sold between 1966 and 1998, contained asbestos and that Leavitt was exposed to asbestos through her use of such products.

Dr. Longo also testified that he performed an exposure study, wherein a consumer's use of Johnson's Baby Powder was simulated, and airborne asbestos exposure levels were measured. Relying on the results of this study, among other things, Dr. Longo opined, over defendants' objection, that Leavitt was significantly exposed to asbestos by using Johnson's Baby Powder. Finally, Dr. Longo also opined, offering little in the way of explanation, that Leavitt's "range of exposures . . . range from approximately 0.1 regulated asbestos fibers per cc to 1.0 regulated asbestos fibers per cc."

3.

We assume, without deciding, that defendants preserved their chain of custody and *Sargon* objections to Dr. Longo's testimony regarding the Berkness sample testing results.[2] We also assume that

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[2] Defendants have abandoned their argument (raised below) that some subset of the defense-produced samples were also an unreliable basis for Dr. Longo's opinions. (See *Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1294 [disregarding "loose and disparate arguments that are not clearly set out in a heading and supported by reasoned legal argument"].)

defendants are right—that the trial court abused its discretion in admitting this evidence because, without reasonable certainty that the Berkness samples were unaltered samples of Johnson's Baby Powder, the Berkness test results could not offer any reliable support for Dr. Longo's opinion that Leavitt used Johnson's Baby Powder contaminated with asbestos. Nonetheless, defendants fail to meet their burden to establish prejudice.

In addition to the "collector" talc samples, Dr. Longo tested numerous other Johnson's Baby Powder samples, including those that were produced directly by defendants and to which defendants have not preserved any evidentiary challenge on appeal. Some of those defense-produced samples were determined to contain no detectable asbestos, but Dr. Longo detected asbestos in a majority of them (both Korean-sourced and Vermont-sourced samples). It was *these* results alone (from the *defense-produced* samples) on which Dr. Longo relied to opine that the Korean-sourced and Vermont-sourced Johnson's Baby Powder contained asbestos at the relevant time.

Furthermore, this evidence was corroborated by Dr. Blount's peer-reviewed research documenting, in the 1990's, trace asbestos contamination of Johnson's Baby Powder. Dr. Webber also opined, based on his review of historical test results, that Johnson's Baby Powder, sourced from Vermont during the relevant time, was contaminated with asbestos. Accordingly, we cannot conclude, without more, that it is reasonably probable the jury would have reached a different result in the absence of Dr. Longo's challenged testimony. (See *Soule, supra,* 8 Cal.4th at p. 574.)

4.

Defendants also contend that another opinion by Dr. Longo—that Leavitt was significantly exposed to asbestos through her use of asbestos-contaminated Johnson's Baby Powder—should also have been excluded on chain of custody and reliability grounds. The record does not support defendants' assertions that the trial court abused its discretion or that any error was prejudicial.

Defendants maintain that the trial court's admission of this evidence, over defendants' objection, was an abuse of discretion because Dr. Longo's significant exposure opinion relied on his exposure study, which in turn used an "outlier" Berkness sample (M65205-001) to test asbestos exposure levels after a simulated application. Dr. Longo admitted at trial that he identified asbestiform structures in that sample in a *far* higher concentration than in any other sample.

However, defendants cannot show an abuse of discretion. Dr. Longo's "significant exposure" opinion was not based solely on his exposure study, and, indeed, the record does not indicate that the opinion turns on the Berkness sample (M65205-001). In addition to his exposure study and unspecified "test results," Dr. Longo testified that he based his quantification opinions on exposure estimates from Johnson & Johnson and others, Leavitt's and her mother's testimony about the frequency of Leavitt's Baby Powder use, Dr. Abraham's examination of Leavitt's tissue, and the "published literature." Defendants did not ask Dr. Longo, on cross-examination, to specify the sample used in his exposure study. Nor do the exposure quantification numbers that Dr. Longo provided at trial match the exposure levels Dr. Longo reported in the exposure study that defendants cite to us.

In short, defendants cite nothing in the record to support their contention that Dr. Longo based his quantification opinions solely on results from the Berkness sample or that his opinion would have been different had he been precluded from relying on that outlier sample. Without a link between the purportedly unreliable basis and Dr. Longo's "significant exposure" opinion, we cannot say that the trial court abused its discretion in admitting it.

In any event, any error was harmless. The defense presented testimony from their own exposure assessment expert. This defense expert's "worst case" cumulative exposure estimates were based on assumed exposure levels that appear to be *higher* than those estimated by Dr. Longo at trial. Dr. Longo also testified that hypothetical use of cosmetic talc products with asbestos concentration levels lower than the outlier Berkness sample and—consistent with those found in the defense-produced Baby Powder samples, *not* the Berkness sample—would result in substantial exposure to asbestos. Defendants have failed to carry their burden to establish that any assumed evidentiary error was prejudicial.

B.

Defendants also contend that the trial court abused its discretion by admitting a purportedly unsupported opinion from Dr. Egilman—that fibrous talc itself causes mesothelioma—without testing its reliability. Defendants forfeited this argument and fail to demonstrate an abuse of discretion.

1.

In a motion in limine addressing many aspects of Dr. Egilman's anticipated testimony, defendants made a conclusory argument that

one of his opinions—that fibrous talc causes mesothelioma—should be excluded because it lacked scientific support. In support, defendants' motion appears to have attached excerpts from various deposition transcripts as well as other exhibits, but the exhibits themselves are not included in the appellate record. The trial court provisionally denied the motion, making clear that its ruling did not preclude further objection or a motion to strike.

After plaintiffs' opening statement, defendants filed a motion for mistrial, arguing that the defense lacked notice of the plaintiffs' theory—that fibrous talc causes mesothelioma—because it was not pled. In denying that motion, the trial court referenced defendants' earlier motion in limine, which showed that the defendants were on notice. Defendants suggested a section 402 hearing was required. The trial court denied that request—because plaintiffs' case in chief was already underway—but indicated that defendants could file a motion to strike if cross-examination demonstrated that any opinion lacked support.

Dr. Dodson testified that "abestiform talc" is found in Johnson's Baby Powder, that he knows of no other place Leavitt would have been exposed to the causative entity for mesothelioma, and that exposure to Johnson's Baby Powder caused Leavitt's mesothelioma. Defense counsel unsuccessfully objected and moved to strike this testimony, but only on the ground that it was beyond the scope of Dr. Dodson's expertise.

During a break in Dr. Dodson's testimony, defense counsel stated, "with respect to the issue we raised in the mistrial motion, I just want to make sure that we have it preserved because . . . the Court's

ruling was we're going to wait and see what the witness says. There's been no foundation laid for his opinion that asbestiform talc . . . cause[s] mesothelioma." The trial court said "your objection . . . is preserved" but, pointing out that no questions were pending, asked if counsel was making a motion. Defense counsel did not make a motion to strike.

Defense counsel asked Dr. Dodson, on cross-examination, about his prior deposition testimony—wherein Dr. Dodson conceded that fibrous talc had not been studied as a cause of mesothelioma. But, again, defense counsel made no motion to strike. Without objection from the Johnson defendants, Dr. Abraham also testified that "asbestiform talc" causes cancer. When Dr. Egilman testified that fibrous talc is itself carcinogenic and can cause mesothelioma, the Johnson defendants objected only on section 352 and "cumulative" grounds.

In support of his opinion, Dr. Egilman stated the International Agency for Research on Cancer (part of the World Health Organization) "considers [fibrous talc] a carcinogen." He briefly explained that fibrous talc's shape allows it to enter the deep lungs where it can persist for decades and induce the release of cytokines, and he alluded to published articles by "Churg and Roggli" indicating that "fibrous talc is a cause of mesothelioma."

2.

We agree with plaintiffs that defendants forfeited the argument they now raise on appeal.

Defendants' motion in limine did not preserve a *Sargon* challenge because it was conclusory and not directed to identifiable evidence.

(See *People v. Morris* (1991) 53 Cal.3d 152, 189 (*Morris*) [ruling on motion in limine preserves argument for appeal if specific, "directed to an identifiable body of evidence" and "advanced at a time when the trial judge could give fair consideration to the admissibility of the evidence in its context"], disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn.1; *People v. Whalen* (2013) 56 Cal.4th 1, 85 [appellant's failure to provide an adequate record requires resolution against her].)

Furthermore, the trial court denied defendants' motion in limine *without prejudice*. It also made clear it intended to address any *Sargon* issue only when the evidence was presented and it had sufficient context to properly consider the issue. (See *Morris, supra*, 53 Cal.3d at p. 189.) And it specifically invited defendants to develop the issue on cross examination and make a motion to strike. Thus, to preserve their *Sargon* challenge for appeal, it was necessary for defendants to object to (or to move to strike) plaintiffs' experts' opinions and press for a ruling at the evidentiary phase of trial. (See *id*. at pp. 189-190; *People v. Holloway* (2004) 33 Cal.4th 96, 133.) Having failed to do so on the same grounds they press on appeal, defendants' argument was forfeited. (§ 353, subd. (a); *Holloway, supra,* at pp. 132-133; *Morris, supra*, 53 Cal.3d at pp. 190-191.)

Even if their argument was not forfeited, defendants fail to meet their burden on appeal. (*Denham, supra,* 2 Cal.3d at p. 564.) They argue the trial court abdicated its gatekeeping role (*Sargon, supra*, 55 Cal.4th at p. 753), pointing to their own experts' testimony, as well as Dr. Dodson's and Dr. Abraham's admissions on cross-examination, that they were unaware of any studies showing fibrous talc causes

mesothelioma on its own. They also contend the monograph by the International Agency for Research on Cancer does not support Dr. Egilman's opinion because it merely classifies " 'talc containing asbestos or other asbestiform fibres' " as a carcinogen without any discussion of the underlying evidence for that statement, and it does not state that inhaled fibrous talc causes the type of cancer at issue here, mesothelioma.

In their opening brief, however, defendants wholly fail to acknowledge, much less address, Dr. Egilman's reliance on published articles from "Churg and Roggli"—articles that purportedly indicate "fibrous talc" is a cause of mesothelioma. We cannot presume—as defendants ask us to do for the first time in their reply brief—that any research by Churg and Roggli does *not* support Dr. Egilman's stated opinion. (See *People v. Whalen, supra,* 56 Cal.4th at p. 85 [appellant's failure to provide an adequate record requires resolution against her]; *Denham, supra,* 2 Cal.3d at p. 564 [judgment challenged on appeal is presumed correct].) The unnamed articles are not before us.

We thus have an incomplete record that shows a mere conflict among the experts. Accordingly, defendants cannot demonstrate that the trial court abused its discretion. (See *Sargon, supra*, 55 Cal.4th at p. 772 ["court does not resolve scientific controversies"]; *Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 492 ["[i]f [expert] opinion is based on materials on which the expert may reasonably rely in forming the opinion, and flows in a reasoned chain of logic from those materials rather than from speculation or conjecture, the opinion may pass, even though the trial court or other experts disagree with its conclusion"].)

C.

Defendants insist judgment should be entered in their favor because the jury's causation findings are not supported by substantial evidence. We disagree.

1.

As we explained previously, a plaintiff seeking to hold a manufacturer liable for asbestos-related latent injuries must (1) "establish some threshold exposure to the defendant's defective asbestos-containing products," and (2) "further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury." (*Rutherford, supra,* 16 Cal.4th at pp. 982–983, italics omitted.)

On the second prong inquiry, "*Rutherford* does not require a 'dose level estimation.' Instead, it requires a determination, to a reasonable medical probability, that the plaintiff's . . . exposure to the defendant's asbestos-containing product was a substantial factor in contributing to the risk of developing mesothelioma." (*Davis v. Honeywell Internat. Inc., supra*, 245 Cal.App.4th at p. 492.)

2.

Viewing the record most favorably to plaintiffs, the jury's implicit first-prong exposure finding—that it is more likely than not that Johnson's Baby Powder was contaminated with asbestos when Leavitt used it—is supported by substantial evidence. (*LAOSD Asbestos Cases, supra,* 44 Cal.App.5th at p. 489; *Berg, supra,* 42 Cal.App.5th at p. 635.) In addition to Dr. Longo's testimony, the plaintiffs also presented Dr. Webber's contamination opinion based on historical test results, and

evidence regarding Blount's testing in the 1990's—all of which corroborated Dr. Longo's opinion that Johnson's Baby Powder sourced from the Vermont and Korean mines in the relevant period was contaminated with asbestos.

Defendants suggest Leavitt could not establish exposure to asbestos without test results from samples sourced directly from bottles *she actually* used. But we are not aware of any such burden. (See *Lyons v. Colgate-Palmolive Co*. (2017) 16 Cal.App.5th 463, 468 ["[t]he absence of the packaging and testing of the very container that plaintiff used is hardly sufficient reason to reject the testimony identifying the product that she used, combined with the expert testimony that all of that product contained 'significant concentrations of airborne asbestos' "].) Here, if the jury believed that Dr. Longo correctly identified asbestos in most of the samples from the same talc mines that produced the talc Leavitt used for decades, they could reasonably infer that Leavitt more likely than not used baby powder that was similarly contaminated. (See *id*. at p. 469.)

The jury's implicit causation finding is also supported by substantial evidence. Leavitt, her mother, and Leavitt's college roommate testified that Leavitt used Johnson's Baby Powder almost daily for over 30 years. Dr. Longo testified that a hypothetical normal user of cosmetic talc products, containing trace asbestos concentration levels like those found in the defense-produced samples, would be substantially exposed to asbestos. Dr. Egilman testified that there is *no* safe level of exposure to asbestos. Dr. Abraham testified that Leavitt's cumulative exposure to asbestos throughout her life caused her mesothelioma. Dr. Abraham and Dr. Egilman also opined that the

length and type of fibers found in Leavitt's tissues were "fingerprint[s]" that she had been exposed to asbestos from using Johnson's Baby Powder and that exposure was a substantial factor contributing to her mesothelioma. Dr. Dodson reached the same conclusion.

Substantial evidence supports the jury's implicit finding that Leavitt's exposure to Johnson's Baby Powder was more than a negligible or theoretical contribution to her injury. (See *Rutherford, supra*, 16 Cal.4th at p. 978; *Lyons v. Colgate-Palmolive Co., supra,* 16 Cal.App.5th at p. 469.)

D.

Defendants next contend the trial court was required to grant a mistrial after Dr. Egilman testified that Johnson's Baby Powder had been shown to asphyxiate infants. The trial court did not abuse its discretion in denying defendants' motion. (See *People v. Williams* (1997) 16 Cal.4th 153, 210 [standard of review].)

1.

A trial court has discretion to declare a mistrial "when 'an error too serious to be corrected has occurred.' " (*Velasquez v. Centrome, Inc.* (2015) 233 Cal.App.4th 1191, 1214.) However, a curative instruction to disregard improper testimony is generally sufficient to cure prejudice. (*People v. Navarrete* (2010) 181 Cal.App.4th 828, 834, 836.) "The trial court, 'present on the scene, is obviously the best judge of whether any error was so prejudicial to one of the parties as to warrant scrapping the proceedings up to that point.' [Citation.] A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged." (*Velasquez, supra*, at p. 1214.)

2.

During his direct examination, Dr. Egilman testified, on two separate occasions, that studies showed Johnson's Baby Powder caused infant deaths through asphyxiation. Defense counsel repeatedly objected and moved to strike the testimony, arguing it was irrelevant or more prejudicial than probative (§ 352). The trial court initially overruled defendants' objections and then reserved a ruling on defendants' motion to strike while it obtained briefing. Twelve days later, the trial court struck the testimony and instructed the jury it could not consider Dr. Egilman's testimony regarding asphyxiation studies.

The trial court denied defendants' motion for a mistrial, explaining, "There were two comments in a lengthy examination. This is a highly intelligent and very focused jury that I think will take my instructions seriously. [¶] [T]here was not a motion in limine on this specific issue. [Dr. Egilman] . . . did specifically disclose at his deposition that the asphyxiation issue . . . was an issue that he had opinions about. [¶] And the fact there wasn't a pretrial motion . . . makes me very reluctant to disrupt the trial without a clearer showing of prejudice and I don't find any such showing at this point."

3.

A mistrial was not required in this case because defendants' chance of receiving a fair trial was not irreparably damaged.

Defendants point only to the delay between Dr. Egilman's testimony and the court's curative instruction. Here, in contrast to the cases defendants cite (*Velasquez v. Centrome, Inc., supra,* 233 Cal.App.4th at p. 1196; *People v. Navarrete, supra,* 181 Cal.App.4th at

p. 831), defendants failed to file a pretrial motion in limine, despite being on notice of Dr. Egilman's proposed testimony. Given the trial court had no advance warning that the asphyxiation studies would be an issue, we cannot fault it for requesting mid-trial briefing before ruling on the motion to strike.

Defendants do not persuade us that this is an exceptional case where the trial court's instruction failed to cure any harm done by Dr. Egilman's stricken testimony. (See *People v. Wharton* (1991) 53 Cal.3d 522, 566 [rejecting, as speculative, argument that delay between testimony and curative admonition would lead jury to disregard court's instruction]; *People v. Navarrete, supra,* 181 Cal.App.4th at pp. 834, 836 [juries presumed to obey curative instructions].)

E.

Defendants insist the evidence was insufficient to support the trial court's instruction that the jury could draw an adverse inference if it found defendants intentionally concealed or destroyed evidence. We assume error, but, again, defendants do not show prejudice.

1.

" 'Spoliation' is ' "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." ' " (*Reeves v. MV Transportation, Inc*. (2010) 186 Cal.App.4th 666, 681.) One remedy for spoliation is an adverse evidentiary inference—allowing the jury to infer that evidence which one party has willfully destroyed or rendered unavailable was unfavorable to that party. (§ 413; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11; CACI No. 204.) Such an instruction may be given only "if there is evidence of

willful suppression, that is, evidence that a party destroyed evidence with the intention of preventing its use in litigation." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1434.)

2.

The trial court determined there was sufficient evidence to support an adverse inference instruction in this case. Accordingly, the jury was instructed: "You may consider whether Johnson & Johnson and Johnson & Johnson Consumer, Inc. intentionally concealed or destroyed evidence. If you decide that [they] did so, you may decide that the evidence would have been unfavorable to that party."

3.

If the trial court erred in giving the instruction, defendants have not shown that it is reasonably probable the instructional error affected the jury's verdict. (See *Soule, supra*, 8 Cal.4th at pp. 574, 580.)

In assessing prejudice, the reviewing court should consider the nature of an instructional error, " 'including its natural and probable effect on a party's ability to place his full case before the jury,' " as well as the likelihood of actual prejudice considering " '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Rutherford, supra,* 16 Cal.4th at p. 983.)

Here, the instruction did not inform the jury that defendants had intentionally concealed or destroyed evidence. It merely permitted the jury to consider whether defendants had done so and, *if* it so found, that it may (but did not have to) decide that the evidence would have been unfavorable to defendants.

Plaintiffs did refer to the instruction in their closing argument. They argued that the jury could infer defendants' products contained asbestos from the intentional destruction of one document containing a code that revealed which particular products were linked to positive results in blind asbestos testing. The only inference the jury could have drawn—that Johnson's Baby Powder contained asbestos—is not prejudicial. As we have already outlined, abundant evidence supports such a finding. Without the challenged instruction, it is not reasonably probable that the jury would have found otherwise.

F.

Finally, defendants contend, in a conclusory manner, that the trial court abused its discretion by limiting their direct examination of a former employee—John Hopkins—who was deposed by plaintiffs as defendants' corporate representative. (Code Civ. Proc., § 2025.230 [requiring corporation to designate person most qualified to testify on its behalf at deposition].) At the end of the first day of his deposition, the parties stipulated that, rather than continue Hopkins's deposition before trial, plaintiffs would continue his deposition, in a corporate representative capacity, in their case-in-chief. Defendants forfeit their challenge to the trial court's evidentiary rulings and, in any event, show no error.

To preserve an appellate challenge to an evidentiary ruling, the appealing party must identify the specific ruling and objection at issue (through citation to the record), provide legal argument explaining why the trial court's ruling was in error, and support that argument with citation to pertinent legal authority. (*Salas v. Department of*

Transportation (2011) 198 Cal.App.4th 1058, 1074.) Defendants fail to meet that burden here.

In their opening brief on appeal, defendants fail to identify any challenged ruling and focus instead on preliminary comments the trial court made in response to plaintiffs' motion, which sought to limit defendants' questioning of Hopkins to matters within his personal knowledge. Without knowing the specific testimony and context in which defendants would offer it at trial, the trial court declined to issue a preliminary ruling and made clear it would rule on a question-by-question basis. The court also stated that it did "not think that the same rules for a corporate representative necessarily apply across the board to both sides" and that the defense would have to limit itself to questions calling for information within Hopkins's personal knowledge. In the final few sentences of their argument on this issue in their opening brief, defendants cite to two pages of testimony and vaguely assert that the court erred by barring them from eliciting testimony from Hopkins regarding defendants' historical testing policies and practices.[3] This argument does not meet defendants' burden on appeal.

In any event, defendants fail to demonstrate error in evidentiary rulings requiring Hopkins to testify from his personal knowledge unless a hearsay exception applies. (See §§ 702, subd. (a) [lay witness may only testify about matters within personal knowledge], 1200, subd. (b) ["[e]xcept as provided by law, hearsay evidence is inadmissible"].)

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[3] The cited pages indicate the trial court sustained plaintiffs' hearsay objections when defense counsel asked Hopkins whether Johnson & Johnson was aware of medical risks raised by use of its Baby Powder and then again when Hopkins was asked about Johnson & Johnson's knowledge regarding asbestos contained in its products.

Although there is no California authority on this issue, the federal courts have concluded that only an adverse party can use, at trial, a corporate representative's deposition testimony as to matters within a corporation's knowledge. (*Union Pump Co. v. Centrifugal Tech., Inc.* (5th Cir. 2010) 404 Fed.Appx. 899, 907-908; accord, *Brazos River Authority v. GE Ionics, Inc.* (5th Cir. 2006) 469 F.3d 416, 433-435.) "[A] corporate representative may not [otherwise] testify to matters outside his own personal knowledge 'to the extent that information [is] hearsay not falling within one of the authorized exceptions.' " (*Union Pump Co., supra*, at pp. 907-908.) Defendants do not persuade us that the trial court abused its discretion.

DISPOSITION

The judgment is affirmed. Plaintiffs are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

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BURNS, J.

We concur:

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SIMONS, ACTING P.J.

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NEEDHAM, J.

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