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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

JOHN J. DEPREE et al., **Plaintiffs and Appellants,** **v.** **BASF CATALYSTS LLC et al.,** **Defendants and Respondents.**	**A140681** **(Alameda County Super. Ct. No. RG12659674)**

John J. and Rosalinda DePree (plaintiffs) sued a number of defendants, including respondents in this appeal,[1] for injuries arising out of Mr. DePree's alleged exposure to the defendants' asbestos-containing products. With regard to BASF, plaintiffs alleged Mr. DePree had been exposed to talc produced by BASF's corporate predecessor, because the talc was an ingredient of an auto body filler Mr. DePree used to repair dented vehicles. Asbestos was not an intended ingredient in the filler; it was allegedly present as an impurity in the talc.

After discovery, BASF moved for summary judgment, claiming plaintiffs could not establish causation, because they could show no more than a possibility that Mr. DePree had been exposed to an asbestos-containing BASF product. BASF relied on California case law holding that a mere possibility of asbestos exposure is insufficient to

[1] Respondents in this court are BASF Catalysts LLC, Eastern Magnesia Talc Company, and Pita Realty Limited. For the sake of convenience, we refer to them collectively as BASF, save when the context requires that they be identified individually.

support a finding of causation. The trial court agreed with BASF and entered summary judgment in its favor.

Plaintiffs appealed.[2] In this court, Mrs. DePree argues the trial court improperly granted summary judgment because (1) BASF failed to make a prima facie showing sufficient to shift the burden to plaintiffs to demonstrate the existence of a triable issue of fact, and (2) the evidence before the court showed there were triable issues of fact regarding Mr. DePree's exposure to an asbestos-containing BASF product.

We hold BASF's initial showing on summary judgment was sufficient to meet its burden of showing that "one or more elements of [plaintiffs'] cause[s] of action . . . cannot be established[.]" (Code Civ. Proc., § 437c, subd. (p)(2).) The burden thus shifted to plaintiffs "to show that a triable issue of one or more material facts exists" as to their causes of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Viewed in the light most favorable to plaintiffs, the evidence before the trial court showed at most that some of the talc produced by BASF's corporate predecessor in the mid-to-late 1970s contained asbestos. In the absence of evidence that all or even most of the talc was contaminated with asbestos, plaintiffs could show only a possibility of asbestos exposure. Under California law, such a possibility is insufficient to support a finding in plaintiffs' favor on the issue of causation. Accordingly, we will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. DePree was diagnosed with mesothelioma in September 2012. He died on March 27, 2014. He was exposed to a wide variety of asbestos-containing products over the course of his life, but the claims in this case concern only alleged asbestos exposure from his use of a product called Bondo. We explain the nature of this product and Mr. DePree's use of it.

[2] Mr. DePree died after the notice of appeal was filed in this case. On July 17, 2014, we ordered that Mrs. DePree be substituted as party appellant. (See Code Civ. Proc., § 377.31; Cal. Rules of Court, rule 8.36(a).)

Emtal Talc and Bondo Auto Body Filler

In 1967, Engelhard Minerals & Chemicals Corporation acquired Eastern Magnesia Talc Company (Eastern Magnesia), including its talc mine in Johnson, Vermont (the Johnson Mine). From the acquisition in 1967 until 1983, the Johnson Mine was operated by Eastern Magnesia as a subsidiary of Engelhard Minerals & Chemicals Corporation and its successor, Engelhard Corporation (Engelhard). Talc from the mine was marketed and sold by Engelhard/Eastern Magnesia under the brand name "Emtal". In 1983, the Johnson mine closed. BASF states it acquired Engelhard in 2006, renaming it BASF Catalysts LLC.

Talc is a soft, layered, hydrated magnesium silicate mineral. It is not asbestos.[3] Talc was one ingredient used in Bondo, a product used for fixing dents in vehicles. While talc was an intended ingredient of Bondo, asbestos was not. We glean from the record that automobile body patch products such as Bondo generally contained 20 to 40% talc by volume. The principal ingredient in Bondo was polyester resin that was mixed with the talc.

Mr. DePree's Use of Bondo

Mr. DePree used Bondo in the 1970s to repair dents in vehicles he owned. He also used Bondo in the late 1970s when repairing dents in vehicles belonging to his son and his son's friends.

To repair a dent in a vehicle, Mr. DePree would clean the dent with a wire brush or sandpaper and then apply Bondo to it. He would first mix the Bondo with a liquid hardener to form a paste-like substance. After it was mixed, he would apply the Bondo to

[3] According to plaintiffs' expert, "asbestos" is a commercial term that describes a group of specific silicate minerals, which are asbestiform varieties of the magnesian minerals serpentine and amphibole. Asbestiform serpentine is commonly known as chrysotile asbestos. Asbestiform amphiboles include tremolite asbestos and actinolite asbestos. (See McGraw-Hill Dict. of Scientific and Technical Terms (4th ed. 1989) p. 129 [two varieties of asbestos exist, "amphibole asbestos . . . and serpentine asbestos, usually chrysotile"].) As used in this opinion, the terms chrysotile, tremolite, and actinolite refer to varieties of asbestos. (See 15 U.S.C. § 2642(3) [defining asbestos as including chrysotile, tremolite, and actinolite]; Cal. Code Regs., tit. 8, § 5208(b) [same].)

the dent, wait for it to dry and harden, and then sand it smooth with sandpaper or file it down with a file or rasp. Sanding the Bondo "would make a lot of dust," and Mr. DePree breathed the dust. After sanding the Bondo, Mr. DePree would usually blow the Bondo dust off the vehicle with an air hose, which made the air "very dusty."

Mr. DePree testified he "had quite a few vehicles" and "used quite a bit of Bondo" over the years. He worked on vehicles on weekends and sometimes during the week. He described this work as a "hobby." In "the 1976 to 1979 timeframe," he testified he "did a lot of work on vehicles and a lot of it involved Bondo taking out dents." Mr. DePree "purchased quite a bit of" auto body filler over the years, and Bondo was the brand of auto body filler he purchased. He bought the auto body filler from Grand Auto, and it came in cans bearing the name "Bondo." Although Mr. DePree testified in general terms about his work involving Bondo, with one exception, he was unable to recall the work he had done on any particular car.

Other Sources of Asbestos Exposure

In addition to the alleged asbestos exposure from his work with Bondo, Mr. DePree's medical records and testimony reflect other sources of exposure. He played with asbestos as a child. From approximately 1969 through 1990, he worked as a maintenance person for a company where one of his job duties was repairing forklift brakes, including the removal of the old asbestos-containing brakes, the removal of asbestos-containing dust from the brake assembly with an air hose, and the installation of new asbestos-containing parts. He also replaced asbestos-containing brakes on his personal vehicles. Mr. DePree was also exposed while doing home renovation and remodeling work, which involved asbestos-containing joint compound and wrapping pipes with asbestos.

The Action Below

After Mr. DePree was diagnosed with mesothelioma in 2012, he and his wife filed an action in Alameda County Superior Court against 11 defendants, including BASF and

Pita Realty Limited (Pita Realty).[4] The complaint included causes of action for negligence, strict liability, false representation, intentional tort/intentional failure to warn, and as to Mrs. DePree, loss of consortium.

In August 2013, BASF, Eastern Magnesia, and Pita Realty moved for summary judgment on all of plaintiffs' causes of action. BASF contended plaintiffs could not satisfy their burden of proving Mr. DePree had been exposed to asbestos-containing Emtal talc. For purposes of its motion for summary judgment, BASF assumed DePree was exposed to Bondo that contained Emtal talc,[5] and it further assumed some tests performed in the 1970s purported to identify chrysotile in the talc. But it argued that even with those assumptions, plaintiffs could not prove causation because they had no evidence Mr. DePree was ever exposed to asbestos-containing Emtal talc.

Plaintiffs filed an opposition to BASF's motion. In it, they relied on the deposition testimony a former Engelhard employee had given in other cases, as well as on internal Engelhard documents regarding the testing of Emtal talc and talc products in the mid-to-late 1970s and on the declaration of their expert geologist, Sean Fitzgerald. Plaintiffs first contended BASF had failed to shift the burden to plaintiffs to show the existence of a triable issue of fact, because BASF had neither conclusively negated an element of their causes of action nor shown plaintiffs did not have and could not obtain the needed evidence of causation. (See Code Civ. Proc., § 437c, subd. (p)(2).) Plaintiffs also argued that even if BASF had met its initial burden, triable issues of fact existed regarding Mr. DePree's exposure to Bondo containing asbestos-contaminated Emtal talc.

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[4] BASF was sued individually and as successor-in-interest to Engelhard. Pita Realty was sued individually and as successor-in-interest to Eastern Magnesia.

[5] We make the same assumption for purposes of this appeal. We therefore have no need to consider the parties' conflicting views of the evidence on this point. Obviously, we express no view on whether Mr. DePree was, in fact, exposed to Bondo containing Emtal talc. Like BASF, we have made this assumption purely for purposes of argument.

BASF also moved for summary judgment on the ground that plaintiffs could not prove sanding Bondo released asbestos fibers. The trial court did not rule on this argument, and it is not at issue in this appeal.

After hearing argument from the parties, on October 11, 2013, the trial court granted BASF's motion for summary judgment. The court described Mr. DePree's testimony about his work with Bondo in the mid-to-late 1970s as "vague." It noted BASF argued the evidence showed "at best, the possibility that the Bondo product used by [Mr.] DePree contained asbestos" and "a mere possibility of exposure to asbestos from a defendant's product is not sufficient to create a triable issue of fact." The trial court found BASF had shifted the burden to plaintiffs "to come forward with evidence establishing a reasonable inference that it was more likely than not that [Mr.] DePree was exposed to asbestos from talc attributable to BASF."

The trial court concluded that although there might be a disputed issue of fact as to the reliability of some tests to show asbestos content and as to whether Emtal talc was the sole source of talc used in Bondo, plaintiffs had failed to meet their burden based on the record as a whole. The court considered the record "speculative" as to "whether the Bondo actually used by [Mr. DePree] was indeed contaminated with asbestos[.]" The court stated that Fitzgerald's declaration "merely establishes that at times Emtal talc contained asbestos during the mid-to-late 1970s" but noted Fitzgerald acknowledged one would not expect asbestos to be present in every sample of talc. According to the trial court, "[t]he most reasonable inference from the testimony of Fitzgerald is that one would also not expect asbestos to be present in every can of Bondo made during the mid-to-late 1970s."[6]

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[6] Shortly after it granted BASF's motion for summary judgment, the trial court granted summary judgment in favor of defendant NMBFil, Inc. NMBFil was the successor to Bondo Corporation, which manufactured Bondo auto body filler from 1967 to 1983. In its order granting summary judgment, the court explained, "There is no evidence that all or nearly all the . . . Emtal talc used in Bondo sold during the relevant time period was contaminated with asbestos," and plaintiffs' expert, Sean Fitzgerald, "does not opine that it [is] more likely than not that Bondo sold during the relevant time period contained asbestos contaminated talc."

Plaintiffs appealed the judgment in favor of NMBFil, but later filed a request to dismiss NMBFil from this appeal. On July 17, 2014, we granted that request and issued a partial remittitur as to respondent NMBFil.

On November 5, 2013, the trial court entered judgment in favor of BASF. Notice of entry of judgment was served on November 7, 2013, and plaintiffs filed a notice of appeal on January 6, 2014.

DISCUSSION

Mrs. DePree first challenges the sufficiency of BASF's initial showing on summary judgment. She then argues that even if BASF's showing was adequate to shift the burden to plaintiffs to controvert BASF's evidence, there were triable issues of fact precluding summary judgment. We address these contentions after setting forth the standards that govern rulings on motions for summary judgment, our standard of appellate review, and the rules regarding causation in asbestos cases.

I. *Summary Judgment Standards, Standard of Appellate Review, and Causation in Asbestos Cases*

"A motion for summary judgment must be granted 'if all the papers submitted show that there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' (Code Civ. Proc., § 437c, subd. (c).)" (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1083 (*Whitmire*).) "A defendant moving for summary judgment has met his or her burden of showing a cause of action has no merit if the defendant can show one or more elements of the plaintiff's cause of action cannot be established." (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1102-1103 (*McGonnell*).)

In such a case, the moving defendant "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The defendant's burden, however, is one of production rather than persuasion. (*Ibid*.) The defendant's showing "must be supported by evidence, such as affidavits, declarations, admissions, interrogatory answers, depositions, and matters of which judicial notice may be taken."

Mrs. DePree has asked that we take judicial notice of the trial court's order denying summary judgment to yet another defendant, E.T. Horn Company. We conclude the order is not relevant to the issues before us, and we therefore deny the request for judicial notice. (Cal. Rules of Court, rule 8.252(a)(2)(A).)

(*Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582, 587 (*Collin*).) A defendant moving for summary judgment may, but need not, conclusively negate an element of the plaintiff's cause of action. (*Ibid*., citing *Aguilar, supra,* 25 Cal.4th at p. 853; see *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 335, fn. 7 [moving defendant may carry its burden of production by presenting evidence "which, unless materially contradicted or rebutted, would establish that each of [the plaintiff's] causes of action lacked merit"].) "Instead, the defendant may show through factually devoid discovery responses that the plaintiff does not possess and cannot reasonably obtain needed evidence." (*Collin, supra*, 228 Cal.App.4th at p. 587; accord, *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 101 (*Andrews*).)

"After the defendant meets its threshold burden, the burden shifts to the plaintiff to present evidence showing that a triable issue of one or more material facts exists as to that cause of action or affirmative defense. [Citations.] The plaintiff may not simply rely on the allegations of its pleadings but, instead, must set forth the specific facts showing the existence of a triable issue of material fact. [Citation.] A triable issue of material fact exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof. [Citation.]

"In ruling on the motion, the trial court views the evidence and inferences therefrom in the light most favorable to the opposing party. [Citations.] If the trial court concludes the evidence or inferences raise a triable issue of material fact, it must deny the defendant's motion. [Citations.] But the trial court must grant the defendant's motion if the papers show there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. [Citation.]" (*Collin, supra,* 228 Cal.App.4th at p. 588.)

"The first step in analyzing any motion for summary judgment is to identify the elements of the challenged cause of action or defense in order to isolate those targeted by the motion." (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 757.) "A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff

bears the burden of proof on this issue." (*McGonnell, supra,* 98 Cal.App.4th at p. 1103.) If there has been no exposure, the plaintiff cannot show the defendant's product was the cause of the decedent's injuries. (*Ibid.*; *Collin, supra,* 228 Cal.App.4th at p. 589.) The plaintiff in an asbestos case therefore bears the burden of "demonstrating that exposure to the defendant's asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [the] risk of developing cancer." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 957-958 (*Rutherford*).)

"The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." (*Rutherford, supra,* 16 Cal.4th at p. 978.) "Plaintiffs may prove causation in an asbestos case by demonstrating that the . . . decedent's exposure to the defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the . . . decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*McGonnell, supra,* 98 Cal.App.4th at p. 1103.) Factors relevant in assessing the medical probability that a particular exposure contributed to the decedent's asbestos disease include "[f]requency of exposure, regularity of exposure, and proximity of the asbestos product" to the decedent, as well as "the type of asbestos product to which [decedent] was exposed, the type of injury suffered by [decedent], and other possible sources of [decedent's] injury." (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1416, 1417.) "While there are many possible causes of any injury, ' "[a] possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury." ' [Citation.]" (*Id.* at p. 1416.)

Our review of summary judgment is de novo, but we must presume the judgment is correct. (*Allen v. Liberman* (2014) 227 Cal.App.4th 46, 53.) " 'On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.]' " (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

II. *BASF Met its Initial Burden of Production*

Mrs. DePree first contends BASF failed to satisfy its initial burden of production on summary judgment, and thus the burden never shifted to plaintiffs to controvert BASF's evidence. (See Code Civ. Proc., § 437c, subd. (p)(2) [once defendant meets initial burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action"].) We examine BASF's showing in light of the applicable legal standards to determine whether it made "a prima facie showing of the nonexistence of any triable issue of material fact[.]" (*Aguilar, supra,* 25 Cal.4th at p. 850.)

A. *BASF's Showing*

In support of its motion for summary judgment, BASF submitted the declaration of Drew Van Orden, a registered professional engineer specializing in asbestos. Van Orden opined that "Johnson talc was generally free of asbestos, save for certain samples that purported to detect trace levels of chrysotile in the latter years of the operation." He based this opinion on his "review, analysis and interpretation of decades of study conducted by various geologists and other researchers from the Vermont state and US governments." In addition, Van Orden also reviewed and analyzed available analytical testing data on Johnson talc ore and products. Finally, Van Orden supported his opinion by analyses of five Johnson talc samples originally collected in the 1970s and 1980s. The samples were analyzed using state-of-the-art testing methods, and none was found to contain asbestos.

Specifically, Van Orden's declaration cited to reports of testing data from as early as 1914 that found no asbestos in Johnson talc. He also relied on analyses published in 1951 and 1962 by a geologist for the United States Geological Survey who had examined approximately 100 samples from the Johnson mine "by thin section and polarized light microscopy[.]" No asbestos was observed in any of the samples. Similarly, an epidemiological study conducted in the mid-1970s by the Harvard School of Public Health and the National Institute of Occupational Safety and Health (NIOSH), an arm of the federal Occupational Safety and Health Administration (OSHA), found no asbestos in

bulk samples taken from Vermont talc mines, including the Johnson mine. A draft NIOSH report published in 2009 concluded that "[t]he available evidence indicates that Vermont talc is free of asbestos fibers."

Of particular relevance here, Van Orden reviewed the results of tests performed on Johnson talc between 1971 and 1982, none of which detected asbestos in samples of talc, talc ore, or talc products from the Johnson mine. Beyond tests performed by others, Van Orden described the results of testing performed by his own employer on "two Emtal product samples collected in 1973" and "three Johnson talc ore samples collected . . . between 1976 and 1983." The tests were completed using modern analytical methods, and no asbestos fibers were observed in any of the samples.

Van Orden acknowledged that "several samples analyzed in 1979 purported to identify trace amounts of chrysotile." Nevertheless, Van Orden did not consider any of the results of these tests to be scientifically supportable for two reasons. First, some of the samples were analyzed using a method known as "phase contrast microscopy" (PCM). According to Van Orden, "PCM cannot distinguish talc particles from asbestos particles (if any are present)" and "cannot identify the mineralogy of the 'fibers' observed." Because of these deficiencies, "[i]t is widely accepted in the asbestos analytical field that PCM is scientifically unreliable for determining the mineralogy of given particles." Thus, while certain samples tested reflected findings of fibers using the PCM method, "it would be scientifically unsupportable to opine that those 'fibers' were asbestos because PCM cannot identify the mineral and talc particles can appear in the form of a fiber when observed under PCM."

Second, Van Orden discussed other samples relied on by experts for plaintiffs in other asbestos cases, and he noted they were either blind samples of talc or of other minerals that did not identify the source of the material tested. He therefore concluded "it is not scientifically supportable to assume that because Engelhard requested testing on talc, it must have been from the Johnson, Vermont talc mine."

B. *BASF's Evidence, If Left Uncontradicted, Would Constitute a Preponderance of Evidence that an Essential Element of Plaintiffs' Case Cannot Be Established*

A defendant moving for summary judgment "must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not[.]" (*Aguilar, supra*, 25 Cal.4th at p. 851.) "The import of the 'more likely than not' language in the foregoing quotation is that a moving defendant must present evidence which, *if uncontradicted*, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879 (*Kids' Universe*), italics added.) Here, Van Orden's declaration and the materials upon which he relied were evidence that would require a reasonable trier of fact *not* to find an underlying material fact, *i.e.*, that Emtal talc was contaminated with asbestos. (*Aguilar, supra,* 25 Cal.4th at p. 851.) If left uncontradicted, Van Orden's declaration and the materials on which he relied would constitute a preponderance of evidence that all scientifically supportable analyses of Emtal talc showed it was free of asbestos contamination. (See *Kids' Universe, supra,* 95 Cal.App.4th at p. 879.)

As BASF argues, this evidence would show "plaintiffs have no way (other than through impermissible speculation) to claim that Mr. DePree was exposed to Bondo containing asbestos." BASF therefore presented affirmative evidence to show plaintiffs would be unable to establish the causation element of their causes of action. Without evidence of exposure to an asbestos-contaminated BASF product, there could be no causation. (*McGonnell, supra*, 98 Cal.App.4th at p. 1103.) We conclude BASF satisfied its initial burden to make a prima facie showing. (See *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1336-1337 [expert declaration showing it was only a possibility, not medical probability, that fungus spores came from source plaintiff claimed, sufficient to shift burden to plaintiff on summary judgment]; *Kids' Universe, supra,* 95 Cal.App.4th at p. 882 [defendants' evidence that plaintiffs' business was unprofitable shifted burden to plaintiffs to raise triable issue of fact as to claimed lost

profits].) Thus the burden shifted to plaintiffs to show a triable issue of material fact existed as to causation. (*Aguilar, supra,* 25 Cal.4th at p. 850.)

C. *The Evidence Mrs. DePree Cites Does Not Make BASF's Showing Inadequate*

In her opening brief, Mrs. DePree disputes the sufficiency of BASF's showing. In her view, BASF was required to "conclusively negate causation." She argues that Van Orden "conceded that asbestos was found in Emtal talc during the exposure period in this case" and that his declaration "was equivocal and gave rise to conflicting inferences." We disagree.

First, plaintiffs appear to misunderstand BASF's burden on summary judgment. To the extent they contend BASF was required to conclusively negate causation, their contention flies in the face of the California Supreme Court's opinion in *Aguilar*. As our high court explained, "summary judgment law in this state any longer requires a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action." (*Aguilar, supra,* 25 Cal.4th at p. 853, fn. omitted.) Indeed, *Aguilar* expressly disapproved language in certain California decisions "purportedly requiring a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action[.]" (*Id*. at p. 853, fn. 19.) Thus, a defendant moving for summary judgment may prevail by either (1) conclusively negating an element of the plaintiff's cause of action or (2) "showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence[.]" (*Id.* at pp. 853, 854.) It is the second of these two options that is at issue here.

Second, Van Orden did not concede asbestos was found in Emtal talc during the relevant time period. Mrs. DePree seizes on Van Orden's statement that "Emtal talc 'was *generally* free of asbestos' " and argues, "implicit in that statement is the recognition that some Emtal talc was *not* 'free of asbestos.' " She also contends Van Orden "expressly conceded that asbestos was found in Emtal talc 'in the latter years of operation' and 'in the late 1970s[.]' " But as we have explained above, what Van Orden actually stated was that all *scientifically supportable* analyses he had reviewed or conducted had found the

talc to be free of asbestos. Far from conceding that asbestos was found in the talc, Van Orden noted only that "certain samples . . . *purported to detect* trace levels of chrysotile in the latter years of the operation." (Italics added.) He then explained why the testing method used on those samples was scientifically unreliable.

Going beyond the declaration itself, Mrs. DePree contends the attached testing records show asbestos was found in Emtal talc prior to the late 1970s. She refers to exhibits O and Q to Van Orden's declaration which, she claims, showed the presence of asbestos in samples of Emtal talc. We disagree with this characterization of the documents. For example, Mrs. DePree tells us exhibit O shows that in March 1977, a testing laboratory found chrysotile asbestos fibers in two respirable dust samples collected at the Emtal talc plant. In fact, while the laboratory's initial PCM tests detected what was thought to be chrysotile asbestos in trace quantities, further microscopic examination determined the fibers were actually glass. Thus, the tests did not demonstrate the presence of asbestos but did support Van Orden's expert opinion that the PCM method is not a reliable way of testing for the presence of asbestos. Indeed, the memorandum attached to this analysis states, "[t]hese results show that the OSHA Phase Contrast procedure is not a suitable test for detecting and counting asbestos fibers."[7]

Likewise, exhibit Q to Van Orden's declaration concerns testing performed on bulk "Emtal 549" talc and on dusting powder used inside balloons produced by the National Latex Products Company (National Latex) and supplied to Hallmark Cards (Hallmark). National Latex was an "Emtal 549 customer," and it used Emtal 549 in its balloon manufacturing process. There were two rounds of tests performed. The first tested dusting powder collected from the inside of sample balloons provided by Hallmark. It detected a very small amount of asbestiform tremolite in the dusting powder. A second round of tests, performed on both bulk Emtal 549 talc *and* the dusting

[7] In another Engelhard memorandum, dated March 25, 1977, the author discussed testing on samples of "Penhorwood talc," and noted "[i]t was suspected that the fiber count reported was due to talc platelets which gave the appearance of fibers when viewed edgewise through a microscope."

powder, detected no asbestos in either product. Thus, the only test conducted on Engelhard's product—the Emtal 549 talc—showed it was free of asbestos.[8]

Van Orden also stated certain test results were not scientifically supportable because the tests were performed using the PCM method. Mrs. DePree takes issue with that statement. She argues Van Orden's assertion is contradicted by the testing records themselves, which identify the presence of asbestos. Merely citing these test results misses the mark, however, because Van Orden's entire point is that the results of those tests cannot be considered scientifically supportable. He explained the PCM method cannot distinguish talc particles from asbestos particles, if any asbestos particles are present. Engelhard employees themselves noted the unreliability of this testing method as far back as 1977. Indeed, Mrs. DePree's own expert geologist, Sean Fitzgerald, testified in another case that PCM detects fibers, but it cannot detect asbestos minerals. Thus, Mrs. DePree's argument simply fails to confront Van Orden's point concerning the limitations of the PCM method.

Mrs. DePree also takes issue with Van Orden's statement that other tests were not scientifically supportable because they were blind samples that do not identify the source of the talc; she argues this was insufficient to satisfy BASF's initial burden. She contends that to satisfy its burden, BASF would have to demonstrate that these were *not* tests of Emtal talc. One of the test reports on which Mrs. Depree relies concerns the samples of balloon dusting powder discussed above. We have already explained why those analyses do not support her claims.[9] Another is a report of test results for "three

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[8] A separate Engelhard memorandum describing these tests noted that "our Emtals do not contain tremolite" and explained that McCrone, the testing laboratory, did not say it had found tremolite in any of Engelhard's talc products. In addition, the memorandum suggested a number of ways fiber particles might have been introduced into the balloons by National Latex's manufacturing process.

[9] Mrs. DePree asserts this test specifically identified the talc tested as "Emtal 549." While this is true, she fails to note the test found the Emtal 549 free of asbestos. Indeed, the memorandum to which she refers states, "there is no evidence or suspicion arising from this matter to suggest that any Emtal product contains tremolite or other fibrous matter."

bulk mineral samples." The report does not say that the samples were talc or that they were from the Johnson mine. A third report concerns testing on 10 samples of talc, but the source of the talc is not named. The same is true of the fourth report Mrs. DePree cites, which describes the results of tests performed on two unidentified talc samples. As Van Orden explained, Engelhard would routinely sample competitors' talc products. It was his expert opinion that "it is not proper to rely on testing where it is unclear if the product in question was the product tested. Therefore, it is not scientifically supportable to assume that because Engelhard requested testing on talc, it must have been from the Johnson, Vermont talc mine." Van Orden's opinion addresses whether it is appropriate, as a matter of scientific practice, to rely on test results from samples the source of which is not clearly identified.[10] Here again, Mrs. DePree's argument fails to come to grips with the problem Van Orden discussed.

We therefore reject Mrs. DePree's arguments regarding the sufficiency of BASF's initial showing. As we have concluded BASF successfully shifted the burden to plaintiffs to show a triable issue of material fact as to causation, we now turn to that question.

III. *Plaintiffs Failed to Show a Triable Issue of Fact on the Essential Element of Causation*

Mrs. DePree argues that even if BASF shifted the burden to plaintiffs to controvert BASF's showing, summary judgment should have been denied because the evidence before the trial court showed Mr. DePree had been exposed to asbestos-containing Emtal talc in Bondo. The trial court's order granting summary judgment explained, "whether the Bondo actually used by [Mr. DePree] was indeed contaminated with asbestos on this record is speculative." The court noted that Fitzgerald's declaration established that at times Emtal talc contained asbestos in the mid-to-late 1970s, but Fitzgerald acknowledged one would not expect asbestos to be present in every sample of talc tested. The trial court concluded that "[t]he most reasonable inference" from Fitzgerald's

[10] Consistent with his view of proper practice, Van Orden provided complete chain of custody information for the samples tested by his employer.

testimony is that "one would also not expect asbestos to be present in every can of Bondo made during the mid-to-late 1970s."

Mrs. DePree cites us to matters in the record which, in her view, demonstrate the existence of a triable issue of material fact. Our review this evidence fails to persuade us the trial court erred in granting summary judgment. We examine the three categories of evidence upon which she relies.

A. *Testimony of Dr. Glen Hemstock*

Mrs. DePree contends plaintiffs presented substantial evidence the Emtal talc in the Bondo used by her late husband contained asbestos. She relies heavily on the deposition testimony of Dr. Glen Hemstock, who served as Engelhard's vice-president of research and development from 1974 to 1983.[11] She points to his responses to questions about whether certain tests conducted in the 1970s detected the presence of asbestos in Emtal talc products.[12] Mrs. DePree contends Hemstock testified that "based on the testing conducted by his department, it became apparent and Engelhard concluded that *all* Emtal talc products contained asbestos *or asbestiform particles* in the range of two percent by weight and that some of these particles were chrysotile asbestos." (Second italics added.) But as Hemstock explained, he had testified there were "traces of asbestiform minerals, and asbestiform to me says only particle shape and size." Asked for his views on whether there was asbestos in Emtal talc, Hemstock responded, "I think

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[11] Hemstock's deposition testimony was given in a number of prior actions alleging asbestos injury. It was offered pursuant to Evidence Code section 1292, which makes admissible former testimony offered in civil actions if the declarant is unavailable as a witness.

[12] In some instances, Hemstock's testimony is significantly more guarded than it is portrayed in Mrs. DePree's brief. For example, in one instance, Hemstock was asked about an August 18, 1972 letter regarding an analysis of dust samples that had found fibers present. Hemstock noted the samples could have been from parts of the mine that were not being mined. Thus, Hemstock questioned whether these test results could be connected to the areas of the Johnson mine that were actually producing talc. In another instance, when asked whether four independent scientists had "concluded asbestos was in Emtal," Hemstock explained that because the samples at issue were "grab samples," "we really don't know . . . whether you find it day in and day out . . . ."

there's pretty strong evidence that at least some of the asbestiform particles are chrysotile. We've seen chrysotile in enough samples in enough different documents to probably conclude that at least in some cases there really is chrysotile there, but in small amounts. . . . [¶] I'm talking about trace amounts, probably two percent or less." In deposition testimony in a later case, Hemstock confirmed that "we saw fibers, but we found out very quickly that all fibers were not asbestos fibers." He emphasized he was talking about "asbestiform particles" as opposed to asbestos.[13] Plaintiffs' expert, Sean Fitzgerald, agreed that asbestiform does not mean asbestos.

Hemstock also explained that Engelhard "looked at multiple samples from the same source, and some of them would show fibrous materials, trace amounts of fibrous material and others would not[.]" In the 1970s "some of the samples would show traces [of chrysotile], but most of them did not." He testified that in 1979, Engelhard was dealing with "trace amounts in some samples," and he clarified that although tests might detect what appeared to be fibers, some of these were actually "platy" talc. Besides these "apparent fibers," other fibers detected were cellulose that might have come from bags.

Thus, as BASF notes, when considered in its entirety, Hemstock's deposition testimony states only that some tests done on Emtal talc in the 1970s showed the presence of asbestos. Others, perhaps most, did not.

B. *Internal Engelhard Records*

Mrs. DePree also relies on certain Engelhard records that she claims show that asbestos was repeatedly found in Emtal talc in the 1970s. Some of the cited documents describe testing that found asbestos present. Other documents show no asbestos was

[13] Mrs. DePree seeks support in a portion of Hemstock's testimony in which he stated, "I said that there were traces of asbestiform minerals, and asbestiform to me says only particle shape and size. It doesn't say there's a whole family of asbestos-related minerals and it doesn't identify whether it's chrysotile or amosite or crocidolite or whatever the other asbestos minerals might be." On its face, however, this testimony distinguishes between *asbestos-related* minerals and asbestos minerals.

found.[14] Still others are ambiguous. Thus, Mrs. DePree relies on a May 17, 1979 document entitled "Legal/Environmental Presentation Outline" which states, "Asbestos fiber is present." Mrs. DePree argues, "Engelhard did not state in this memorandum that asbestos was present in only some or in limited quantities of the talc." But this document does not state that asbestos was present in all or even most Emtal talc; it simply raises questions about what Engelhard might be required to do and says the "Legal/Environmental position is not yet defined."

C. *Declaration of Sean Fitzgerald*

Mrs. DePree relies on the declaration of her expert, Sean Fitzgerald, a licensed professional geologist. Fitzgerald stated it was his professional opinion "to a reasonable degree of scientific certainty, that there was chrysotile asbestos in the Johnson Mine and that Emtal talc produced in the mid-to-late 1970s contained chrysotile asbestos." Fitzgerald based his opinion on his review of the results of tests conducted between 1976 and 1979. He also relied on his review of Hemstock's deposition testimony. Fitzgerald conceded there were tests during this time period that did not detect the presence of asbestos but opined that "one would not expect every test to be positive."

When testifying in another case, however, Fitzgerald admitted there were many tests of Emtal talc that did not show the presence of asbestos, and he stated he was not going to question the results of any particular test. He also testified the occurrence of chrysotile at the mine would have been "sporadic and occasional[.]" Fitzgerald conceded he did not know whether every bag or any particular bag of Emtal talc contained chrysotile, and he could not opine on what percentage of the talc from the Johnson mine

[14] For example, among the documents cited are the March 1977 test results that were attached as exhibit O to Van Orden's declaration. As we explained above, the fibers detected in those samples proved to be glass and not asbestos. Another document is an August 26, 1976 letter discussing the results of testing samples for "fiber determinations." The author explains that testing found elongated particles meeting the definition of fiber, but most of these particles were actually talc. Several particles were identified as antigorite, and two samples (of 28 tested) showed single chrysotile fibers. The author concludes by saying he is "very encouraged by . . . *the lack of asbestos fibers* in either the bulk or airborne materials." (Italics added.)

contained chrysotile. Although BASF's motion for summary judgment referred specifically to Fitzgerald's testimony that asbestos contamination at the Emtal talc mine would have been sporadic and occasional, Fitzgerald's declaration did not state that all or even most Emtal talc would have contained asbestos during the mid-to-late 1970s. (Cf. *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1226 [plaintiffs submitted expert declaration opining that all surfacing materials from relevant period contained asbestos]; *McGonnell, supra*, 98 Cal.App.4th at p. 1106 [expert opined it was "more likely than not" plaintiff was exposed to asbestos at worksite].) Moreover, Fitzgerald's declaration did not state that all Bondo using Emtal talc would have been contaminated with asbestos, much less state that the Bondo with which Mr. DePree worked would have been contaminated. (*Ibid*. [expert declaration opining that plaintiff was exposed to asbestos could not create triable issue of fact where it did not tie defendants to the airborne asbestos at plaintiff's job site]; see *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 203 ["the testimony from numerous experts that Medina *could* have been exposed to asbestos at ASARCO is not sufficient to demonstrate exposure"].)

D. *Mr. DePree's Testimony*

Mrs. DePree also argues that based on the numerous times her late husband worked with Bondo between 1976 and 1979, "[t]his evidence, combined with the evidence that Bondo was manufactured with Emtal talc and that Emtal talc consistently tested positive for asbestos during that period, was sufficient to support an inference that, even if some Emtal talc did not contain asbestos, it is more likely than not that Mr. DePree was exposed to some Emtal talc that did contain asbestos[.]" But the only Bondo work Mr. DePree specifically identified from the 1976 to 1979 time period was the work he did on cars belonging to his sons and sons' friends. Mr. DePree could not recall how many times in the 1976 to 1979 timeframe auto body work was done at his home. He testified it was done close to every weekend and a lot of the work involved using Bondo to remove dents. He could not recall how long he worked on each vehicle or how much time was devoted to sanding Bondo.

Fundamentally, however, the frequency of Mr. DePree's use of Bondo is irrelevant in the absence of evidence showing it is more likely than not that the Bondo to which he was exposed actually contained asbestos-contaminated Emtal talc. While evidence of frequent use might be relevant to whether Mr. DePree's exposure was sufficiently substantial to prove it was "more than [a] negligible or theoretical" cause of his injuries (*Rutherford, supra,* 16 Cal.4th at p. 978), it cannot supply the missing proof of exposure to an asbestos-containing BASF product.

E. *On this Record, the Trier of Fact Would Be Required to Speculate That Mr. DePree Was Exposed to Asbestos-Containing Emtal Talc*

The most that can be said of the foregoing evidence is that some tests performed on Emtal talc and/or talc products in the mid-to-late 1970s showed the presence of asbestos. There were others showing the talc and talc products were free of asbestos. Certainly, numerous tests detected asbestiform materials, but Hemstock and Fitzgerald agreed this is not the same thing as detecting asbestos. Although Mr. DePree's testimony would support a finding he had worked frequently with Bondo, there is no evidence any particular batch or shipment of talc supplied to the makers of Bondo contained asbestos. And there is no evidence any particular can of Bondo Mr. DePree may have used contained asbestos.

We conclude this evidence is insufficient to show a triable issue of material fact as to Mr. DePree's exposure to an asbestos-containing BASF product. The question before us is not whether plaintiffs produced evidence from which a jury could conclude Mr. DePree was exposed to Bondo containing Emtal talc. Instead, the question is whether plaintiffs produced evidence from which a jury could conclude—without speculating—that Mr. DePree was exposed to Bondo containing *asbestos-contaminated* Emtal talc. (See *Collin, supra*, 228 Cal.App.4th at p. 595 ["the pertinent question is not whether Loren was exposed to Kaiser Gypsum joint compound. The pertinent question is whether Loren encountered an asbestos-containing Kaiser Gypsum joint compound."].) It is undisputed that asbestos was not an ingredient in Bondo. Many tests of Emtal talc in the relevant period showed it to be free of asbestos, and even plaintiffs' expert was unwilling

to opine that all, or even most, Emtal talc contained asbestos during that period. Thus, unlike the cases upon which Mrs. DePree relies, it cannot be assumed that exposure to Bondo would necessarily have resulted result in exposure to asbestos.[15] Thus, the issue is whether plaintiffs produced evidence from which the trier of fact could reasonably infer it was more likely than not Mr. DePree was exposed to asbestos attributable to Engelhard, BASF's corporate predecessor. (*Collin, supra*, 228 Cal.App.4th at p. 596.)

We think not. At best, the evidence before the trial court would permit an inference that *some* Emtal talc contained asbestos in the mid-to-late 1970s, and thus it is *possible* that during that period Mr. DePree might have been exposed to a can or cans of Bondo containing asbestos-contaminated Emtal talc. But "[t]he mere 'possibility' of exposure does not create a triable issue of fact." (*Andrews, supra,* 138 Cal.App.4th at p. 108.) "Even under the most lenient causation standards, . . . plaintiff[s] must present evidence that would allow a reasonable trier of fact to find more likely than not that [Mr. DePree] encountered an asbestos-containing [BASF] product." (*Collin, supra,* 228 Cal.App.4th at p. 595.) Thus, even assuming the validity of the tests showing the presence of asbestos in some samples of Emtal talc in the mid-to-late 1970s, there is no proof the Bondo with which Mr. DePree worked contained asbestos-contaminated Emtal talc. Since the evidence shows no more than the *possibility* that Mr. DePree might have been exposed to an asbestos-containing BASF product, it cannot create a triable issue of fact on summary judgment. (See *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 971 [where Union Carbide was one of plant's multiple asbestos suppliers, jury could not infer without speculating that plaintiff was exposed to Union Carbide's joint compound as opposed to joint compound from other manufacturers, despite proof that Union Carbide joint compound was present at plant]; *Collin, supra,* 228 Cal.App.4th at

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[15] In the cases Mrs. DePree cites, the products at issue were known to contain asbestos, and thus exposure to dust or fibers released from those products would almost certainly result in exposure to asbestos fibers. (See, e.g., *Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 665 [defendant marketed gun plastic cement containing asbestos]; *Greathouse v. Amcord, Inc.* (1995) 35 Cal.App.4th 831, 835 [same; cement contained two percent asbestos by volume].)

pp. 595-596 [where plaintiff could not identify when he encountered defendant's joint compound, jury could not reasonably infer it was more likely than not plaintiff was exposed to asbestos attributable to defendant, despite fact that defendant manufactured asbestos-containing joint compound for 16 years and manufactured asbestos-free joint compound for only three years]; *Casey, supra,* 206 Cal.App.4th at p. 1239 [plaintiff's limited circumstantial evidence of exposure insufficient to create triable issue of fact where it showed "only that given the relevant time period . . . at some point Casey might have worked at jobsites where asbestos-containing products might have been used"]; *Whitmire, supra*, 184 Cal.App.4th at p. 1093 [plaintiff's evidence insufficient to create triable issue of fact it showed, at most, that asbestos would likely have been found in some insulation in two buildings where plaintiff worked].)

As Division Four of this court has explained, "[i]t is not enough to produce just some evidence. The evidence must be of sufficient quality to allow the trier of fact to find the underlying fact in favor of the party opposing the motion for summary judgment." (*McGonnell*, *supra*, 98 Cal.App.4th at p. 1105.) Here, on the issue of exposure (and thus causation) the evidence "creates only 'a dwindling stream of probabilities that narrow into conjecture.' " (*Ibid*., quoting *Lineaweaver v. Plant Insulation Co*., *supra*, 31 Cal.App.4th at p. 1421.) As the California Supreme Court has explained, " '[a] mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to direct a verdict for the defendant*.' [Citation.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 775-776; see also *Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [where inference of plaintiff's exposure to asbestos "would be 'only as likely . . . or even less likely' then the contrary inference" court must grant defendant's motion for summary judgment, because reasonable trier of fact could not find for plaintiff..)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.