(NOTE: The status of this decision is **Unpublished**.)

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0

STEVEN G. KAENZIG and LINDA KAENZIG,

Plaintiffs-Respondents,

v.

CHARLES B. CHRYSTAL COMPANY,
INC.; R.T. VANDERBILT COMPANY,
INC., individually and as
successor-in-interest to
Gouverneur Talc Company, Inc.,
and International Talc Company;
SHULTON INC., individually and
as successor to the Shulton Group
and Shulton, Inc. (for discovery
purposes only); WYETH HOLDINGS
CORPORATION f/k/a/ American

Cyanamid Company, individually
and as successor-in-interest to
Shulton Inc. (for discovery
purposes only); AMERICAN TALC
CO., individually and as
successor in interest to
Suzorite Mineral Products,
Inc., f/k/a Pioneer Talc Co.,
a wholly owned subsidiary
of Wold Companies; IMERYS TALC
AMERICA, INC., individually and
as successor in interest to Rio
Tinto, a wholly owned subsidiary of
Luzenac Inc., RTZ Corp., Cyprus
Mineral Co. a/k/a Cyprus
Windsor Mineral Co., Windsor
Minerals Inc., Metropolitan
Talc, Co., Inc., Charles
Mathieu, Inc.,

Defendants,

and

WHITTAKER, CLARK & DANIELS, INC.,

Defendant-Appellant.
March 27, 2015

Argued March 4, 2015 – Decided

Before Judge Alvarez, Waugh, and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4873-12.

Richard J. Mirra argued the cause for appellants (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Mr. Mirra, of counsel and on the briefs).

Jeffrey P. Blumstein argued the cause for respondents (Szaferman, Lakind, Blumstein & Blader, P.C. and Levy Konigsberg, LLP, attorneys; Robert E. Lytle and Moishe Maimon, on the brief).

PER CURIAM

In July 2012, plaintiffs Steven G. Kaenzig and Linda Kaenzig filed an asbestos litigation complaint asserting claims of negligence and products liability against several defendants, including Whittaker, Clark & Daniels, Inc. (defendant).[1] Defendant was the primary supplier of raw talc to Shulton, Inc., the company that owned the Mays Landing facility (the facility) where the asbestos-contaminated Old Spice and Desert Flower talcum powder was produced. Plaintiffs alleged that Steven contracted mesothelioma as a result of his exposure to the talc, through contact with his father, who worked at the facility from 1967 to 1975.

Defendant filed several pretrial motions, including a motion to compel plaintiffs to produce testing data and reports prepared by an expert, whom plaintiffs had consulted but did not intend to call at trial, on three "vintage" samples of Old Spice and Desert Flower talcum powder products. The judge denied the motion, but ordered plaintiffs to provide defendant with the samples. The judge also denied defendant's motions to exclude testimony by plaintiffs' experts Sean Fitzgerald, a geologist, and Jacqueline Moline, M.D., but barred Fitzgerald's testimony as to his testing of the "vintage" samples he had received from the non-testifying consulting expert.

Following a trial in October and November 2013, a jury awarded plaintiffs $1.6 million in compensatory damages. On appeal, defendant challenges several pretrial and trial evidentiary rulings, and the denial of its motions for judgment notwithstanding the verdict (JNOV) and a new trial. After reviewing the record in light of the contentions advanced on appeal, we affirm.

I.

To lend context to defendant's arguments, we categorize the pertinent facts and procedural history drawn from the record on appeal.

A. Exposure

From 1967, when Steven was born, until 1975, when Shulton's production facility moved, Wilfred Kaenzig ("Wiz"), Steven's father, worked as a warehouse supervisor and manager at the facility. The facility received a weekly delivery of approximately 40,000 pounds of raw powdered talc, and generally kept 60,000 to 80,000 pounds in stock for use in the manufacturing of cosmetic talcum powder products. According to Wiz, defendant supplied ninety-nine percent of the raw talc used in the facility.

Before leaving work, Wiz attempted to brush the talc dust off his hair and clothes, but some residue always remained. Upon arriving home, and before he changed or showered, Wiz interacted with Steven by picking him up when he was a baby, and by playing and wrestling with him when he was older. When Steven was a child, his mother also laundered Wiz's talc-dust-coated work clothes in close proximity to her son. Wiz indicated that he probably brought talc dust home every working day, from the day Steven was born in 1967, until Shulton moved the talc manufacturing facility to Tennessee in 1975 - a move that was motivated by complaints from purchasers of some of Shulton's "high-priced" products that its product containers were coated with talc dust.

Steven was diagnosed with peritoneal mesothelioma in October 2011. He testified that he could not recall having been exposed to asbestos after 1975, and denied he was exposed to asbestos during his job as a residential fiberglass insulation installer. He explained that when he began installing fiberglass insulation in 1988, the dangers of asbestos were well known and its use in installation had been discontinued. Further, he had always worked exclusively in residential settings, had been trained to recognize asbestos, had never removed insulation from a residence, and would not install fiberglass insulation in an older home until all of the asbestos insulation had been removed.

B. Plaintiffs' expert witnesses

Fitzgerald, plaintiffs' expert in geology, microscopy, and asbestos analysis, opined that the raw talc defendant sold to Shulton from 1967 to 1975 was contaminated with asbestos. His opinion was based on: (1) geological surveys of the areas where the talc was mined; (2) defendant's testing of the grades of raw talc sold to Shulton; and (3) independent historical testing of Shulton's talcum powder products. He noted that defendant had stipulated that from 1967 to 1975, it sold Shulton three different grades of talc from three different mines located in northwest Italy, Alabama, and North Carolina.

It was undisputed that the geological surveys confirmed the presence of asbestos in all three mines. Tests performed on the raw talc samples from the mine in Italy were also positive for asbestos, and were consistent with the geological survey of that mine. Additionally, tests of samples of the talcum powder products produced at Shulton's facility were positive for asbestos.

Fitzgerald concluded that even the very small percentage quantities of asbestos in the raw talc that defendant sold to Shulton could result in significant exposure. He calculated that a fifty-pound bag of talc contaminated with one percent tremolite would yield a half-pound of asbestos, or trillions of asbestos fibers. Moreover, because talc, unlike other products that contain asbestos such as drywall, is inherently friable, it "very easily releases asbestos" into the air. Thus, low bulk levels of asbestos in talc can yield high levels of airborne asbestos. Further, "the aerodynamic nature of asbestos keeps it suspended in the air column for very long periods."

Moline, plaintiffs' expert in occupational and environmental medicine, specifically asbestos-caused diseases, opined that bystander exposure to asbestos-contaminated talc is a cause of peritoneal mesothelioma, and that Steven's condition developed as a result of his exposure to defendant's asbestos-contaminated talc through contact with his father.

With regard to general causation, Moline explained that asbestos contains microscopic fibers that are easily inhaled deep into the lungs. Exposure to all types of asbestos, including those found in defendant's raw talc, can cause mesothelioma, a rare and fatal cancer. In support of her opinion, Moline cited to a case report from Italy where a young man developed peritoneal mesothelioma from using "significant amounts of cosmetic talc" from age nine to twelve.

Moline testified that there is no safe level of asbestos exposure, and that mesothelioma tends to occur in individuals who have had low levels of exposure. She stated that there are "numerous studies" finding that individuals who were exposed to low levels of asbestos through "take-home" or bystander exposure had developed mesothelioma. She explained that although

"take-home" exposure is usually a "lower level" than direct exposure, the exposure can be for a longer period of time because people spend much more time in their homes.

With regard to specific causation, Moline testified that Steven had "no occupational source of asbestos," and that his "only source of asbestos exposure came through the household contamination from his . . . father's work." In any event, even if Steven had been exposed to asbestos from some other unknown source, it "definitely" would not change her opinion that exposure to defendant's raw talc caused Steven's mesothelioma, as both exposures would be contributing factors to his developing the disease. Moline opined that Steven's diagnosis of mesothelioma in 2011 was entirely consistent with his exposure to defendant's asbestos-contaminated talc approximately forty years earlier, because the average latency period for mesothelioma is thirty to forty years. Moreover, it was not unusual that Wiz, who worked directly with the talc, did not develop mesothelioma, while Steven, who was indirectly exposed, did, because individuals have different susceptibilities to carcinogens. Moline noted that some studies have also shown that children who are exposed to asbestos at a young age are at greater risk of developing mesothelioma than adults.

C. Damages

In May 2011, Steven began experiencing severe abdominal pain. In October 2011, he was diagnosed with malignant peritoneal mesothelioma.

In June 2012, Steven underwent peritoneal debulking surgery, which involved removing his peritoneum (the membrane that lines the abdomen), gallbladder, and part of his colon. The surgeon, Dr. Paul Sugarbaker, also removed tumors from throughout his chest cavity and pelvic area, including nodules from his diaphragm, liver, omentum (the protective tissue shielding the stomach), small intestine, right testicular vessels, rectum, and bladder. Following the surgery, Steven underwent four months of chemotherapy, lost forty pounds, could not eat solid foods for

months, and experienced problems with nausea and liver abnormalities. Although Sugarbaker expressed optimism about Steven's prognosis, Moline noted that mesothelioma tends to "recur," in which event it is very aggressive and usually fatal.

Steven testified that he returned to work in October 2012, even though he had not fully recovered, because as a sole proprietor he earned no income while he was out of work and he needed to support his family. Plaintiffs both testified without objection that they had to borrow $20,000 from Steven's father to pay for a portion of the surgery because they had been "fighting" with the insurance company to cover its cost, and could not wait for months to get through all of the "red tape." They also testified without objection that they had borrowed money from Linda's parents to pay their mounting bills, and had received money from the local fire company that held a fundraiser on their behalf.

Further, Linda testified without objection that their insurance company had recently denied coverage of a PET scan for Steven, because his "disease was too advanced." As a result, they were "trying to get through [the] red tape" because it was "such a long road" for Steven to "get back to somewhat normalcy," and he has "another fight" with the insurance company "on his hands."

D. Defendant's expert witnesses

Michael Graham, M.D., defendant's expert in forensic and environmental pathology, and Kenneth Mundt, defendant's expert epidemiologist, opined that Steven's mesothelioma was not caused by his exposure to defendant's talc and that forty percent of peritoneal mesothelioma cases in men are idiopathic. They explained that the absence of any reported cases of mesothelioma in any of the workers at the three mines supported a conclusion that the workers had not been exposed to asbestos. Further, they opined that even if the raw talc had contained some low levels of asbestos, as a bystander, Steven was not exposed to levels sufficient to

develop peritoneal mesothelioma. According to Graham, there was no evidence of mesothelioma in Steven's lungs, which indicated that Steven had developed the disease from an unknown cause and not by inhaling asbestos dust.

E. Verdict

The jury returned a verdict in plaintiffs' favor, awarding Steven $1.4 million for pain and suffering, and Linda $200,000 for loss of consortium. On December 20, 2013, the court denied defendant's motion for a new trial or JNOV, and on January 2, 2014, issued a final judgment.

On appeal, defendant presents the following points for our consideration:

> I. DR. MILLETTE'S DATA SHOULD HAVE BEEN GIVEN TO THE DEFENDANT BECAUSE IT IS THE ONLY INFORMATION SHOWING THE STATE OF THE TALC AS IT EXISTED WHEN HE RECEIVED THE SHULTON PRODUCT SAMPLES.
>
> II. DR. MOLINE'S TESTIMONY WAS INADMISSIBLE "NET OPINION" AND SHOULD NOT HAVE BEEN PRESENTED TO THE JURY.
>
> III. DR. MOLINE'S REMARKS REGARDING ANOTHER SHULTON EMPLOYEE WITH MESOTHELIOMA WERE IMPROPER AND PREJUDICIAL.
>
> IV. THE TRIAL COURT ERRED IN PRECLUDING DEFENDANT'S CORPORATE REPRESENTATIVE FROM TESTIFYING AT TRIAL.
>
> V. PLAINTIFF FAILED TO PROVE THAT A FAILURE TO WARN CAUSED

THE PLAINTIFF'S EXPOSURE TO ASBESTOS IN THE DEFENDANT'S TALC AND THAT EXPOSURE TO ASBESTOS IN THE DEFENDANT'S TALC WAS THE MEDICAL CAUSE OF HIS MESOTHELIOMA.

VI. PLAINTIFFS' TESTIMONY WITH RESPECT TO LACK OF INSURANCE AND FINANCIAL HARDSHIP WAS IMPROPER AND PREJUDICIAL.

VII. PLAINTIFFS' CLOSING ARGUMENT UNFAIRLY PREJUDICED DEFENDANT BY SUGGESTING THAT DEFENDANT FAILED TO PROVE ELEMENTS THAT WERE NOT DEFENDANT'S BURDEN TO PROVE.

VIII. THE JURY VERDICT MUST BE SET ASIDE AS THE PRODUCT OF IMPROPER COMPROMISE BASED UPON SYMPATHY RATHER THAN THE FACTS.

We address these arguments in turn.

II.

A.

Defendant argues in its first point that the judge erred in denying its motion to compel plaintiffs to produce "raw data" and reports concerning testing allegedly performed by James Millette, Ph.D., a non-testifying consulting expert, on three "vintage" samples of Old Spice and Desert Flower talcum powder. We disagree.

Plaintiffs had initially retained the law firm of Early, Lucarelli, Sweeney & Meisenkothen, LLC ("the Early firm") to represent them in this matter. In April 2012, a paralegal at the firm purchased, from an unnamed seller on eBay, three "vintage" talcum products that had been

produced at the facility in the 1960's and mid-1970's. The Early firm retained Millette "for pre-suit review and consultation," not as a litigation expert. After conducting its pre-suit investigation, the Early firm referred the case to Levy, Phillips & Konigsberg LLP ("the Levy firm").

In February 2013, the Levy firm obtained the "vintage" samples from Millette and sent them to their litigation expert, Fitzgerald, for testing. In his August 2013 deposition, Fitzgerald stated that he knew from reviewing the chain of custody that the "vintage" samples had been sent to Millette, but he did not know what kind of testing, if any, Millette had done on the samples, nor had he reviewed or relied on those results in forming his opinion.

In September 2013, defendant sought Millette's "raw testing data" and any written reports and analyses of such data. The judge denied the application, finding that defendant had "not demonstrated exceptional circumstances" as required by Rule 4:10-2(d)(3), because it had the "ability to test the samples." However, the judge ordered plaintiffs to provide defendant with the samples tested by Millette. Plaintiffs complied with the order.

Thereafter, the judge barred Fitzgerald from testifying at trial as to the results of his testing of the "vintage" samples. The judge found that plaintiffs could not establish a chain of custody during the forty years from the time the products were manufactured at the Shulton facility in the 1960's to the mid-1970's, to the time they were purchased on eBay in 2012.

Under our court rules, a civil litigant is entitled to "broad discovery of the expert witnesses whom an adversary expects to call to testify at trial." Washington v. Perez, 219 N.J. 338, 361 (2014). However, discovery of the opinions of an expert who is not expected to testify at trial, such as Millette, is only permitted upon a showing of "exceptional circumstances," as set forth in Rule 4:10-2(d)(3) as follows:

> A party may discover facts known or opinions held by an expert (other than an expert who has conducted an examination pursuant to R. 4:19) who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The "exceptional circumstances" test is strictly applied and rarely satisfied. Graham v. Gielchinsky, 126 N.J. 361, 374 (1991). "Permitting a party to use non-discoverable expert testimony obtained by an adversary does not advance the efficient administration of trials and the fair balance of the parties' interests in the absence of exceptional circumstances." Id. at 371 (citations and internal quotation marks omitted).

Typically, the exceptional circumstances test "is met in such cases where evidence, after examination by one party's expert, is no longer extant or available to the other party for examination." Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:10-2(d)(3) (2015).[2] For example, exceptional circumstances can be shown where the evidence was destroyed during testing or examination. We apply an abuse of discretion standard to decisions made by trial courts as to whether a party satisfied the "exceptional circumstances" test. Moore, supra, 312 N.J. Super. at 377-78.

Contrary to defendant's argument, Rule 4:10-2(d)(3) is not limited to the discovery of reports, but rather includes both "facts known" and "opinions" of a non-testifying expert. Raw test data is a "fact known," and is not, as argued by defendant, "analogous to a treating physician's observations of fact" in a Rule 4:19 report.

In the present case, the trial judge correctly found that defendant failed to establish "exceptional circumstances" because the samples remained available for testing. The judge ordered plaintiffs to produce the samples, and they complied. Defendant was afforded the opportunity to have its experts test the samples, but chose not to do so. Defendant also failed to demonstrate why it could not procure its own "vintage" samples for testing, just as plaintiffs did. Further, the record is devoid of evidence to support defendant's argument that the samples were no longer available because they had been "mishandled, tampered with or altered," presumably by the Early firm, the Levy firm, or Fitzgerald. Accordingly, the judge did not abuse his discretion in denying defendant's motion to compel the production of Millette's test results.

B.

Prior to trial, defendant moved to bar Moline's expert testimony as an inadmissible "net opinion." Specifically, defendant contended that Moline relied exclusively on Fitzgerald's misguided opinion in determining that defendant's talc contained asbestos, and thus she lacked a proper foundation for her conclusion that Steven's exposure to the talc caused him to develop mesothelioma. Defendant renews its challenge to Moline's testimony on appeal.

We apply a "deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard." Pomerantz Paper Corp. v. New Comm. Corp., 207 N.J. 344, 371 (2011). "[A] court must ensure that the proffered expert does not offer a mere net opinion." Id. at 372. A net opinion is "an expert's bare opinion that has no support in factual evidence or similar data . . . ." Ibid. An expert witness's opinions that are not reasonably supported by the factual record and an explanatory analysis from the expert may be excluded as net opinion. Creanga v. Jardal, 185 N.J. 345, 360 (2005); accord Greenberg v. Pryszlak, 426 N.J. Super. 591, 607 (App. Div. 2012). In general, an expert should provide the "whys and wherefores" supporting his or her analysis. Beadling v. William Bowman Assocs., 355 N.J. Super. 70, 87 (App. Div. 2002). As we have explained, "'[e]xpert testimony should not be

received if it appears the witness is not in possession of such facts as will enable him [or her] to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.'" Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 323 (App. Div.) (alteration in original) (quoting Vuocolo v. Diamond Shamrock Chem., 240 N.J. Super. 289, 299 (App. Div.), certif. denied, 122 N.J. 333, (1990)), certif. denied, 146 N.J. 569 (1996).

Initially, we note that the judge denied defendant's motion without prejudice to renew it at trial. Defendant did not renew the motion or object to Moline's testimony at trial. Moreover, on appeal, defendant does not challenge the denial of its motion to bar Fitzgerald from testifying.

Nor does defendant object to Moline's qualifications to render an expert opinion. The record establishes that she is a board-certified physician, specializing in occupational and environmental medicine. She has directed and reviewed training programs for the National Institute for Occupational Safety and Health (NIOSH), conducted research in asbestos-related diseases, performed epidemiological studies on asbestos exposure, treated thousands of patients with asbestos-related diseases in her clinical practice, and published approximately fifty scientific articles, many of which concern exposure to asbestos.

In rendering her opinion on causation, Moline reviewed Fitzgerald's report, Steven's and Wiz's deposition testimony, and Steven's medical records. Her opinion that Steven was exposed to asbestos-contaminated talc through contact with his father was not a net opinion because she relied not only on that information but also on the test results referenced in Fitzgerald's report indicating asbestos contamination in both the raw talc and the talcum products. See Scully v. Fitzgerald, 179 N.J. 114, 129 (2004) (fire investigator's opinion as to the cause of a fire not a net opinion when supported by facts contained in reports prepared by other experts). Moline further cited to a case report from Italy involving a young man who developed peritoneal mesothelioma from using "significant amounts of cosmetic talc."

Moline's opinion that low-level bystander exposure caused Steven to develop mesothelioma was also not a net opinion. In forming that opinion, she relied on her extensive knowledge about asbestos, including the fact that asbestos causes mesothelioma, that there is no safe level of asbestos exposure, and that mesothelioma tends to occur in people with low levels of exposure. She relied on Wiz's deposition testimony describing the extent of the talc dust at the plant and on his clothes, and Steven's lack of exposure to asbestos as an insulator. She testified that there were "numerous studies" showing that individuals were exposed to low levels of asbestos as bystanders. Accordingly, the judge did not abuse his discretion in denying defendant's motion to bar Moline's testimony.

C.

Defendant argues in its point III that it was deprived of a fair trial by Moline's improper references to a mesothelioma claim by another worker at the facility. Defendant further contends that the trial judge's inadequate curative instruction did not remedy the inherent prejudice resulting from Moline's comments.

During cross-examination, defense counsel asked Wiz about the occurrence of mesothelioma cases among workers at the facility as follows:

> Q. [D]o you recall saying [during depositions in 2012] that basically you were not aware of anyone at Old Spice or Shulton ever making a claim for an asbestos-related disease?
>
> A. At that time, yes, I said that.
>
> Q. Okay.

A. After the fact, after the deposition, Steve's lawyer I believe told me there was one other person.

Q. But –

A. I don't . . . recall his name.

Q. [B]ut you don't [sic] know of anyone when you were there . . . or anybody up to that point in time, correct?

A. Correct.

Defense counsel did not move to strike Wiz's comment.

At issue here, Moline subsequently testified in response to a jury question as follows:

Q. [The Court] This next question, I'm just going to phrase it a little bit differently than it was written. In the medical literature have there been any documented cases of other children of Shulton workers getting [a] mesothelioma diagnosis?

A. I'm unaware of any other Shulton worker[s'] children. I'm aware of a Shulton employee who has mesothelioma in addition to Mr. Kaenzig, who's the --

Q. [The Court] Yeah, but that wasn't the question.

A. Okay.

. . . .

[Defense Counsel]: Your Honor, I'm going to move to strike Dr. Moline's last comments.

The Court: Yeah, the jury will disregard those last comments going into another worker at Shulton, and by that I mean that [it] should not enter into your discussions or your deliberations in a jury room. They say you can't unring a bell once it's been rung, so you've already heard it, but to the best that you can you should put it out of your mind and it should not be anything that should be discussed within your deliberations, okay?

Defendant did not object to the instruction.

In response to another jury question, Moline testified:

Q. [The Court] . . . I'm just going to ask the first part [of this question] and not ask the second one for legal reasons. Drawing attention to a subject's exposure to aerosolized talc-containing asbestos fibers . . . and it's [sic] relationship to the development of mesothelioma in those subjects, could you please why [sic] in a factory full of employees with high levels of exposure to fibers there have been little or no reported mesothelioma cases, but yet in the plaintiff's case he did not have a high exposure and he developed the cancer?

A. Well, I don't know if I can respond to -- in the same way that -- there has been another case among --

[Defense Counsel]: Your honor --

Q. [The Court] Well, no, we're not going into other cases, okay?

A. But so -- but that's -- but that's asking me a question where I know that there's --

Q. [The Court] Well, we discussed that at sidebar.

A. I think that --

[The Court]: Then if you can't answer the question, we'll go on to the next set, okay?

A. Oh, okay.

Defense counsel did not move to strike Moline's comment, or move for a new trial on this basis. During closing argument, defense counsel stated that no asbestos-related disease had been reported by workers in defendant's mines, and that Wiz had testified that there was no "disease at Shulton."

The judge sustained defendant's objection to Moline's very brief statement about another unnamed mesothelioma case at the facility. The judge then gave the jury a prompt instruction, cautioning them not to consider that information in their deliberations. The jurors are presumed to have followed those cautionary instructions. See State v. Montgomery, 427 N.J. Super. 403, 410 (App. Div. 2012), certif. denied, 213 N.J. 387 (2013). Further, defendant did not object to the adequacy of the judge's curative instruction, nor move for a mistrial, thereby suggesting that counsel perceived no error in the instruction. See Bradford v. Kupper Assocs., 283 N.J. Super. 556, 573-74 (App. Div. 1995), certif. denied, 144 N.J. 586 (1996).

In any event, defendant has failed to establish that it suffered prejudice sufficient to warrant a new trial as a result of Moline's statement. This is so because defendant itself elicited testimony from Wiz that Wiz also had become aware of another mesothelioma case at the Shulton facility. Defense counsel then proceeded to comment on Wiz's testimony during closing argument.

D.

Defendant argues in its point IV that the trial judge erred in barring its corporate representative, Theodore Hubbard, from testifying that no employee had filed a workers' compensation claim for death or disability from mesothelioma caused by exposure to asbestos-contaminated raw talc at defendant's South Plainfield facility.

The court held a N.J.R.E. 104 hearing on plaintiffs' objection to Hubbard's proposed testimony. Hubbard, who began working for defendant in 1978 as a product manager, testified that from 1991, when he was promoted to executive vice president, to 2004, he was personally made aware of all workers' compensation claims filed against the company and coordinated those claims with the insurance companies. Prior to trial, he directed the company's human resources employees to search the workers' compensation records, and they reported that no

claims for asbestos-related diseases had been filed by workers at defendant's South Plainfield facility. At the conclusion of the hearing, the trial judge overruled plaintiffs' objection to Hubbard's testimony that there were no asbestos-related workers' compensation claims filed between 1991 and 2004, but barred Hubbard from testifying as to claims filed before 1991 or after 2004.

The judge re-opened the N.J.R.E. 104 hearing the following trial day at defense counsel's request. Hubbard testified that over the weekend he had personally reviewed the one-page summaries of the annual workers' compensation claims that were archived in boxes at the warehouse and found no claims of asbestos-related disease. He also recalled that, beginning in 1989 when he was vice president of operations, the employees in the South Plainfield facility reported their workers' compensation claims directly to him. Plaintiffs' counsel objected to the introduction of this "additional testimony" because the records were never produced in discovery, and on the basis that Hubbard's testimony was inadmissible hearsay.

In sustaining plaintiffs' objection, the trial judge cited to N.J.R.E. 803(c)(7), and noted that "[t]he Rule is not satisfied by stating merely that no record was found after an examination of the files which 'would have been maintained in the normal course of business.'" Biunno, Weissbard & Zegas, Current N.J. Rules of Evid., comment to N.J.R.E. 803(c)(7) (2015) (quoting Berkeley v. Berkeley Shore Water Co., 213 N.J. Super. 524, 531 n.1 (App. Div. 1986)). The record is unclear whether the judge reversed his prior ruling that Hubbard could testify that there were no asbestos-related workers' compensation claims filed between 1991 and 2004. In any event, after sustaining plaintiffs' objection, the judge asked if there was any other testimony that defendant sought to introduce from Hubbard. Defendant responded that there was "no other probative evidence" that Hubbard could offer, and rested its case.

Our standard of review for evidential rulings is abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 10 (2008); Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif.

denied, 163 N.J. 79 (2000). We will not reverse a trial court's evidentiary decisions unless they are "so wide of the mark that [they result] in a manifest denial of justice." Bitsko v. Main Pharmacy, Inc., 289 N.J. Super. 267, 284 (App. Div. 1996).

N.J.R.E. 803(c)(7) provides, as an exception to the hearsay rule, for the admission of

> [e]vidence that a matter is not included in a writing or other record kept in accordance with the provisions of Rule 803(c)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a writing or other record was regularly made and preserved, unless the sources of information or other circumstances indicate that the inference of nonoccurrence or nonexistence is not trustworthy.

Although, for purposes of this rule, it is not necessary to produce in court the records that were searched to try to locate the absent entry, State v. Antiere, 186 N.J. Super. 20, 24 (App. Div.), certif. denied, 91 N.J. 546 (1982), it is necessary that the records be kept in accordance with the provisions of Rule 803(c)(6), Berkeley, supra, 213 N.J. Super. at 531 n.1, and that a witness with personal knowledge of those files testifies. State v. Martini, 131 N.J. 176, 319-20 (1993). N.J.R.E. 803(c)(6), provides that:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or

circumstances of preparation
indicate that it is not trustworthy.

Here, defendant failed to establish that the one-page summaries of the workers' compensation claims stored in boxes in a warehouse were prepared in conformity with N.J.R.E. 803(c)(6) because there was no evidence as to who prepared them, when they were prepared, or why they were prepared.

Further, even had defendant made the requisite showing under N.J.R.E. 803(c)(6), the exclusion of this testimony was not so prejudicial as to warrant a new trial. First, it appears that Hubbard was not barred from testifying that there were no asbestos-related workers' compensation claims filed between 1991 and 2004, when he had personal knowledge of the claims and when latent cases of mesothelioma might have developed. Moreover, Hubbard admitted that the talc received by defendant's South Plainfield employees was already bagged, and thus, unlike the Shulton employees, the South Plainfield workers were not required to handle loose, raw talc. See, e.g., Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1161 (4th Cir. 1986) ("state of the art as it relates to the health of persons exposed to asbestos products differs considerably for asbestos plant workers dealing with raw asbestos and for persons working in the vicinity of asbestos products"). Therefore this testimony would have had very little probative value.

Accordingly, we conclude that the judge did not abuse his discretion in barring Hubbard from testifying about the nonoccurrence of asbestos-related workers' compensation claims.

E.

Defendant next argues in its point V that the judge erred in denying its motions for judgment. Defendant contends that plaintiffs failed to prove that a failure to warn caused Steven's exposure to the asbestos-contaminated product and that exposure to the contaminated talc was a cause of Steven's mesothelioma.

In denying defendant's motion for judgment at the close of plaintiffs' evidence, the trial judge found that a reasonable jury could find that defendant's raw talc contained asbestos and that Steven was exposed to the asbestos-contaminated cosmetic talcum powder, which contained ninety percent raw talc, through contact with his father, who worked at the Shulton facility. The judge initially reserved decision on defendant's motion for judgment at the close of all the evidence, and subsequently denied defendant's motion for a JNOV.

A motion for judgment may be made at the close of plaintiff's case, Rule 4:37-2(b), at the close of all the evidence, Rule 4:40-1, and after the verdict, Rule 4:40-2(b). All three motions are governed by the same evidential standard: "'[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. . . .'" Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (alteration in original) (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000) (citations omitted)). See ADS Assoc. Grp., Inc. v. Oritani Sav. Bank, 219 N.J. 496, 511 (2014). We apply the same standard on appeal. Estate of Roach, supra, 164 N.J. at 612.

In a products liability, failure-to-warn case, a plaintiff must prove that: (1) the product was defective; (2) the defect existed when the product left the defendant's control; and (3) the defect caused injury to a reasonably foreseeable user. James v. Bessemer Processing Co., 155 N.J. 279, 296 (1998) (citation and internal quotation marks omitted); Coffman v. Keene Corp., 133 N.J. 581, 593 (1993).[3] The defect, as alleged in this case, "is the absence of a warning to unsuspecting users that the product can potentially cause injury." Coffman, supra, 133 N.J. at 593-94. In an asbestos failure-to-warn case, the plaintiff must also prove two types of causation: product-defect causation and medical causation. Becker v. Baron Bros., 138 N.J. 145, 152 (1994); Coffman, supra, 133 N.J. at 594; Hughes v. A.W. Chesterton Co., 435 N.J. Super. 326, 337 (App. Div.), certif. denied, 220 N.J. 41 (2014).

(i) Product-defect causation

Product-defect causation means that the absence of a warning proximately caused the plaintiff's injury. Becker, supra, 138 N.J. at 152. In a failure-to-warn case, the plaintiff must prove that the absence of a warning caused injury to a reasonably foreseeable user. Coffman, supra, 133 N.J. at 594.

Initially, to prove product-defect causation, plaintiffs must establish that defendant had a duty to warn. James, supra, 155 N.J. at 297. "To establish such a duty, the plaintiff must satisfy 'a very low threshold of proof in order to impute to a manufacturer sufficient knowledge to trigger the duty to provide a warning of the harmful effects of its product.'" Id. at 297-98 (quoting Coffman, supra, 133 N.J. at 599). "[T]he nature of the product is an important factor in assessing the reasonableness of defendant's conduct in failing to provide a warning." Hughes, supra, 435 N.J. Super. at 339.

Here, plaintiffs met their burden of proving a duty to warn because there was evidence, presented through Fitzgerald, that defendant knew, through its own testing and through independent testing of the products produced by Shulton, that the raw talc it supplied Shulton from 1967 to 1975 contained asbestos. There was also evidence that this asbestos-contaminated product was dangerous and thus the absence of a warning rendered it defective. See Becker, supra, 138 N.J. at 165 (defendants will rarely, if ever, be able to produce any evidence demonstrating that a dangerous asbestos product marketed without a warning is not defective). For example, Fitzgerald testified that raw talc can easily release high levels of asbestos into the air, and that the "aerodynamic nature" of asbestos keeps it suspended in the air for long periods. He estimated that a fifty-pound bag of raw talc containing one-percent asbestiform tremolite would yield a half pound of asbestos, or trillions of asbestos fibers. Moline also testified that there are no safe levels of asbestos exposure, that mesothelioma tends to occur in individuals who have had low levels of exposure, and that there are documented cases in the medical

literature of individuals who contracted mesothelioma as a result of exposure to asbestos-contaminated talc.

Moreover, it was undisputed that Wiz was a foreseeable user of the product, and plaintiffs presented evidence that Steven was exposed to the asbestos-contaminated product through exposure to his father, who brought the talc dust home on his clothing every day for the first eight years of Steven's life. See Coffman, supra, 133 N.J. at 606 (manufacturer of product used by employees must "take reasonable steps to ensure that its warning reaches those employees").

(ii) Medical causation

"[M]edical causation means that exposure to the defendant's asbestos proximately caused the injury." Becker, supra, 138 N.J. at 152 (alteration in original). To prove medical causation, a plaintiff must show that the exposure to the defendant's asbestos products was a "substantial factor" in causing the injured party's disease. James, supra, 155 N.J. at 299. New Jersey courts, as well as courts in a majority of other jurisdictions, look to the "frequency, regularity, and proximity" as pronounced in Sholtis v. American Cyanamid Co., 238 N.J. Super. 8, 28-30 (App. Div. 1989), in order to determine whether the party's exposure to the defendant's asbestos-containing product was a "substantial factor" in causing the alleged injury. James, supra, 155 N.J. at 302-04; Hughes, supra, 435 N.J. Super. at 337; Provini v. Asbestospray Corp., 360 N.J. Super. 234, 239 (App. Div. 2003).

The frequency, regularity, and proximity test "'is not a rigid test with an absolute threshold level necessary to support a jury verdict.'" James, supra, 155 N.J. at 302 (quoting Tragarz v. Keene Corp., 980 F.2d 411, 420 (7th Cir. 1992)). "[T]he phraseology should not supply 'catch words[]' [and] the underlying concept should not be lost." Sholtis, supra, 238 N.J. Super. at 29. However, "liability should not be imposed on mere guesswork," and the

"'[i]ndustry should not be saddled with . . . open-ended exposure based upon a casual or minimum contact.'" Hughes, supra, 435 N.J. Super. at 345 (quoting Sholtis, supra, 238 N.J. Super. at 29 (citation and internal quotation marks omitted)).

Here, it was undisputed that from 1967 to 1975, defendant supplied ninety-nine percent of the raw talc used at the facility, and during that time, Wiz regularly worked directly with the injury-producing element (the contaminated friable dust) of that product. See Hughes, supra, 435 N.J. Super. at 345 ("We have required that plaintiffs present proof the injured party has had such exposure to specific products manufactured or sold by the defendant."). It was also undisputed that from birth to age eight, Steven was exposed to defendant's asbestos-contaminated talc on a regular and frequent basis through contact with his father. His mother also laundered Wiz's talc-dust-coated work clothes in close proximity to her son. Further, Moline testified that such low-level bystander exposure can cause mesothelioma.

Viewed in its totality, we conclude that plaintiffs presented sufficient evidence to establish Steven's bystander exposure to defendant's asbestos-contaminated raw talc under the frequency, regularity, and proximity test as established in Sholtis, supra, 238 N.J. Super. at 29. Consequently, we find no error in the trial court's denial of defendant's motions for judgment.

F.

Defendant argues in its point VI that the trial judge committed plain error in allowing plaintiffs to testify about their financial circumstances and their disputes with their insurance carrier, because the testimony invited the jury to consider issues that were not part of the case and to render a verdict based on sympathy. In the context in which this testimony was introduced, we discern no plain error.

Steven testified without objection that he returned to work before he had fully recovered because, as a sole proprietor of a business, he did not get paid while he was not working and he

had to "pay the bills." He also testified, without objection, that he borrowed $20,000 from his father to pay for his surgery because plaintiffs were "fighting with the insurance company" over coverage, and he borrowed money from his in-laws to pay the bills while he was not working. In response to a jury question, Steven testified, again without objection, that their insurance had paid for between twenty and thirty percent of the cost of his surgery.

Similarly, Linda testified, without objection, that their insurance company would not pay for a PET scan because Steven's disease was "too advanced," and that Steven had "another fight on his hands" to get the insurance company to cover his treatment. As to this testimony, the trial judge sua sponte raised the issue of a limiting instruction, and instructed the jury, in accord with defendant's draft limiting instruction, that:

> [A]s you may recall, the plaintiff, Linda . . . testified regarding . . . an insurance denial letter. I'm instructing you that this letter is solely admitted . . . into evidence to show why Steven . . . has not undergone any further treatment for his condition.
>
> This [] letter is not to be considered as proof of the potential terminal nature of his illness or for the purposes of medical expenses.

Relevant evidence is defined as evidence "having a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Unless otherwise provided by rule or law, "all relevant evidence is admissible." N.J.R.E. 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the risk of "undue prejudice." N.J.R.E. 403. Trial courts are granted broad discretion in determining the relevance

of evidence and whether its probative value is substantially outweighed by its prejudicial nature. Verdicchio, supra, 179 N.J. at 34.

Because defendant did not object to the admission of this testimony, it must show plain error, which is error "of such a nature as to have been clearly capable of producing an unjust result[.]" R. 2:10-2. Moreover, defense counsel's failure to object suggests he did not perceive the information to be prejudicial and deprived the judge of an opportunity to weigh the evidence under N.J.R.E. 403. Bradford, supra, 283 N.J. Super. at 573.

Here, the evidence of plaintiffs' financial circumstances was relevant, and therefore admissible under N.J.R.E. 402, as to their damages claim because it explained why Steven returned to work just four months after his surgery and before he had fully recovered. Without this evidence, the jury might have inferred that Steven had fully recovered at that time, and discounted his damages accordingly. The judge also correctly instructed the jury as to the basis for awarding compensatory damages, and specifically instructed that "sympathy must play no role or part in your thinking."

N.J.R.E. 411 provides that "[e]vidence that a person was or was not insured against liability is not admissible on the issue of that person's negligence or other wrongful conduct." However, the exclusionary aspect of N.J.R.E. 411 is limited, and the rule "does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, control, bias, or prejudice of a witness."

In the present case, the evidence as to the problems plaintiffs experienced in obtaining coverage from their insurance carrier was relevant as to why Steven had not undergone any further treatment, as the judge properly charged. Moreover, any prejudice to defendant was cured by the trial judge's cautionary instruction regarding coverage of the PET scan.

Additionally, the judge specifically instructed the jury that plaintiffs' claim "does not include any claims for medical expenses or for lost wages. Therefore, in determining the reasonable amount of damages due to the plaintiff, you shall not speculate about medical expenses or lost wages that the plaintiff may have had." Hence, on these facts, and given the court's cautionary instruction, the trial court did not commit plain error in allowing plaintiffs to testify about their financial circumstances and their disputes with their insurance carrier over coverage.

To the extent that we do not specifically address defendant's remaining points, we conclude that they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

[1] We have been advised that plaintiffs' claims against all other defendants have been settled or dismissed.

2 Another method of showing "exceptional circumstances," which is not applicable here, is to establish "there are no other available experts, other than the adversary's, in the same field or subject area." Moore v. Kantha, 312 N.J. Super. 365, 376 (App. Div. 1998). There is also no indication that Millette performed his consulting functions in a manner that would remove the protection afforded by Rule 4:10-2(d)(3). See In re Long Branch Manufactured Gas Plant, 388 N.J. Super. 254, 269 (Law Div. 2005) (consulting expert performed a public relations role).

3 The asbestos claims asserted in this case fall within the "environment tort" exception to the Product Liability Act (PLA), N.J.S.A. 2A:58C-1 to -11.
