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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DELGADINA ALFARO,

Plaintiff and Appellant,

v.

IMERYS TALC AMERICA INC.,  
et al.,

Defendants and Respondents.

B277284

(Los Angeles County  
Super. Ct. No. JCCP4674)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
John J. Kralik, Judge. Affirmed.

The Arkin Law Firm, Sharon J. Arkin; The Lanier Law Firm, Mark  
Asa Linder, for Plaintiff and Appellant.

Quinn Emanuel Urquhart & Sullivan, William B. Adams, Morgan  
Tovey and Adam Abensohn for Defendant and Respondent Colgate-Palmolive  
Company.

Dentons US, Brad DeJardin, Jules S. Zeman and Caren Dawson  
Dombrowski for Defendant and Respondent Imerys Talc America, Inc.

## INTRODUCTION

Elizabeth Alfaro<sup>1</sup> was diagnosed with mesothelioma at age 38. She claimed her disease was a result of exposure to asbestos contained in talcum powder products she used as a child. Her claims for negligence and strict product liability proceeded to trial against defendants Colgate-Palmolive Company (Colgate), the manufacturer of Cashmere Bouquet talcum powder, and Imerys Talc America, Inc. (Imerys), the successor-in-interest to the talc suppliers for Colgate during the relevant time period. The jury found for defendants on the issue of exposure. Alfaro argues on appeal that the trial court prejudicially erred in excluding the testimony of one of her experts regarding testing of talc contained in previously-opened vintage Cashmere Bouquet containers and his exposure opinion based on that testing. We find no abuse of discretion and therefore affirm.

## FACTUAL AND PROCEDURAL HISTORY<sup>2</sup>

### I. *The Parties*

Alfaro filed this action in May 2015, alleging causes of action for negligence and strict product liability against 14 defendants, all of whom were purportedly involved in the manufacture and/or sale of talcum powder products. She alleged that her mesothelioma resulted from exposure to talcum powder contaminated with asbestos. By the time of trial, the case focused on one product, Cashmere Bouquet, and two remaining defendants, Colgate and Imerys.

Alfaro claimed that her mother and grandmother both used Cashmere Bouquet talcum powder and that they regularly applied it to Alfaro when she was a small child. As she grew older, Alfaro used the powder on herself every day after her shower, until she was about 13 years old. Thus, her potential exposure to Cashmere Bouquet ran from her birth in 1977 until about 1990. Alfaro testified at trial that when she applied the talcum powder to her body, it released dust into the air, some of which she would inhale. Her mother

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<sup>1</sup> Alfaro died on March 15, 2017, while this appeal was pending. On July 5, 2017, we granted plaintiff's unopposed motion seeking to substitute her mother, Delgadina Alfaro, as her successor-in-interest in this action.

<sup>2</sup> We relate only the factual background pertinent to the issues raised on appeal.

also testified that the air would become “dusty” during use of the powder. Alfaro was diagnosed with mesothelioma in her lungs and abdomen in 2015, at age 38. Given that 25 years elapsed between her use of Cashmere Bouquet and her diagnosis, Alfaro and her mother had not retained any of the Cashmere Bouquet containers they used.

Colgate manufactured Cashmere Bouquet, a cosmetic talcum powder, between approximately 1871 and 1985. After that, the product was manufactured by a third party, but marketed and sold by Colgate until 1995. Cashmere Bouquet was never formulated to contain asbestos. During the relevant time period, Colgate received its talc from two companies, Charles Mathieu (from 1977 to 1979) and Cyprus Industrial Materials. The talc was sourced from two mines in Montana and one in Italy. Imerys is the successor-in-interest to Cyprus.

## **II. *Talc, Asbestos, and Mesothelioma***

As the parties’ experts explained at trial, talc and asbestos are both naturally-occurring minerals formed through metamorphosis of the same parent minerals. Talc is a soft, layered, hydrated magnesium silicate mineral. The term “asbestos” describes a group of six silicate minerals that have crystallized into a fibrous (or asbestiform) shape. The group includes chrysotile, tremolite, crocidolite, amosite, actinolite, and anthophyllite. Only the fibrous varieties of these minerals are associated with disease, and some are more potent than others. Mined talc has a variety of industrial and commercial uses and grades; talc used for cosmetic products has the most stringent level of purity.

Mesothelioma is a rare form of cancer that targets mesothelial cells, such as those lining the pleural membrane surrounding the lungs and the peritoneal cavity in the abdomen. Asbestos exposure is the primary cause of the disease, although it is possible to develop “spontaneous” mesothelioma with no exposure.<sup>3</sup> When an individual is exposed to asbestos in the environment, microscopic asbestos fibers may be inhaled and travel into the

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<sup>3</sup> Defendants’ experts opined at trial that Alfaro’s mesothelioma originated in her abdomen, rather than her lungs, and given that origination point, as well as her age and gender, her cancer likely arose spontaneously, rather than from asbestos exposure.

lungs. Mesothelioma occurs through genetic alteration and thus can take many decades to develop. According to Alfaro's doctor, the median life expectancy from the time of diagnosis is eight to twelve months.

Alfaro's experts testified at trial that there was no "known safe level" above "background" exposure, which is the level of asbestos generally present in the ambient air. Typically, exposure at background level is insufficient to cause disease. They also testified that while longer asbestos fibers presented more significant danger, "[a]ll fiber sizes participate in the disease process."

### **III. *Plaintiff's Expert Sean Fitzgerald***

#### **A. *Testimony At Trial***

Alfaro designated Sean Fitzgerald as an expert on geology and asbestos testing. Alfaro sought to establish her exposure to asbestos from Cashmere Bouquet talcum powder through Fitzgerald's opinions offered at trial.

Fitzgerald testified regarding the possible contamination of asbestos in the talc mined from the three source mines for Cashmere Bouquet during the relevant time period. Specifically, he detailed his visit to the Willow Creek mine in Montana, where Colgate obtained talc between 1977 and 1979, his recovery of talc from near that mine, his testing of that talc, and his findings that the mine contained several types of asbestos. Based on this investigation, Fitzgerald opined that to a reasonable degree of scientific certainty, the talc mined from Willow Creek was contaminated with asbestos during the period Alfaro was using Cashmere Bouquet.

Fitzgerald also discussed mines in the Val Chisone and Val Germanasca region of Italy, where Colgate obtained talc during the entire period at issue. Fitzgerald testified regarding his review of the report prepared by defendants' expert, Dr. Matthew Sanchez, discussing samples Sanchez had taken from the Italian mines. While Sanchez reported finding mineral fragments, rather than countable asbestos fibers, Fitzgerald testified he would have counted those structures as asbestos. Based on this report, as well as other testing and the geological information from the area, Fitzgerald opined that the talc from these mines was contaminated with asbestos during the relevant time period. Finally, Fitzgerald testified regarding the Beaverhead mine in Montana, where Colgate obtained talc from 1979 through the 1990s. He stated he reviewed testing from the mine that found

asbestos fibers, but he could not say “to a reasonable degree of scientific certainty that all of the Beaverhead talc would have been contaminated” with asbestos.

Fitzgerald also testified about his review of historical asbestos testing from the 1970s. He reviewed several studies performed by scientists testing cosmetic talcum powders, including Cashmere Bouquet, for the presence of asbestos. As Fitzgerald described them, these studies found asbestos in the tested products.<sup>4</sup>

In addition, Fitzgerald discussed quality-control testing of talc by Colgate and Cyprus in the 1970s and 1980s, the results of which he opined confirmed the presence of asbestos in the product. Beginning in approximately 1971, Colgate began an internal testing program to detect the presence of asbestos in its talc. The process involved initial screening of talc samples using x-ray diffraction (XRD) and, for any samples in which possible asbestos was detected, further screening using optical microscopy. At trial, Fitzgerald opined that these techniques were not sufficiently sensitive to detect all asbestos fibers in a talc sample. He also reviewed test results from McCrone Laboratory, an outside laboratory used by Colgate starting in the mid-1970s to conduct talc analysis as part of its quality-control program. Fitzgerald testified that McCrone’s testing found asbestos in several samples of Cashmere Bouquet. In the intervening decades, Colgate discarded its records of McCrone’s testing for the relevant time period in the ordinary course of business.

Fitzgerald explained his parameters for above-background exposure: “[W]hen we disturb something [that may contain asbestos] we’re looking to see if there’s anything above that. So anything detectable on an air sample in a room where we had taken air samples the day before and found nothing would be significant and above background.” Over objection by defense counsel, Fitzgerald then opined that “if someone uses an asbestos-containing product and it releases asbestos into the air, that would be above background.”

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<sup>4</sup> References to “historical testing” herein refer to testing for asbestos contamination, performed by researchers in the 1970s and 1980s.

Ultimately, Fitzgerald opined it was more likely than not that Cashmere Bouquet was contaminated with asbestos during the time period Alfaro was using the product. Defendants challenged Fitzgerald's opinions during extensive cross-examination. Defendants' experts also criticized Fitzgerald's methods and findings, including the classification and level of countable asbestos fibers, and the validity of the historical testing upon which Fitzgerald relied.

**B. *Testimony Excluded***

Prior to trial, defendants moved to exclude all of Fitzgerald's testimony and opinions. After extensive argument and an Evidence Code section 402<sup>5</sup> hearing, the court allowed the testimony detailed above, but excluded two aspects of Fitzgerald's proposed testimony: (1) his recent testing of talc from vintage Cashmere Bouquet containers,<sup>6</sup> as well as an article authored by Fitzgerald and two others based on this testing; and (2) his ultimate conclusion that Alfaro was exposed to "substantial" asbestos from her use of Cashmere Bouquet. We discuss further details of these proceedings in the relevant portions of our analysis below.

**IV. *Additional Witnesses At Trial***

Alfaro presented five experts at trial: Fitzgerald; Dr. Arnold Brody, who testified regarding the epidemiology of asbestos exposure and related disease; an economist who testified to Alfaro's potential damages; Dr. Barry Castleman, an environmental consultant on toxic substances, who testified regarding the history of asbestos as a public health hazard and concerns with asbestos contamination in talc; and Dr. Jerrold Abraham, a pathologist, who testified regarding asbestos-related disease, his study of asbestos-containing products, and opined that, assuming some of the Cashmere Bouquet Alfaro used was contaminated with asbestos, her use of that product was a

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<sup>5</sup> All further code citations are to the Evidence Code unless otherwise indicated.

<sup>6</sup> The testing of "vintage containers," as described herein, refers to testing beginning in 2008 by experts as part of talc-related litigation. This testing was performed on samples of talcum powder taken from vintage Cashmere Bouquet containers primarily dating from the 1950s through the 1970s. This recent testing on vintage containers is distinct from the historical testing, which we previously have discussed.

substantial contributing factor to her disease. In addition to herself, her mother, and her treating physician, Alfaro also proffered the testimony of a handful of current and former employees for Colgate, Imerys, and Cyprus. These witnesses testified, among other topics, about Colgate's manufacture of Cashmere Bouquet, its testing programs analyzing raw talc material and finished Cashmere Bouquet for asbestos, and defendants' purported knowledge of the presence of asbestos in Cashmere Bouquet. Several witnesses testified by video playback of prior testimony.

Defendants presented five experts. As noted above, Dr. Sanchez, a geologist, rebutted Fitzgerald's testimony regarding the geology of the talc mines and the historical testing and testified regarding his own field samples taken from the Italian mine. Jennifer Sahmel, an industrial hygienist, testified regarding exposure potential for consumer use of talc as well as the regulations on exposure limits, and opined that Alfaro's potential exposure likely would not exceed background levels. Defendants also presented several medical experts who opined that Alfaro's disease originated in her peritoneum and likely was not caused by any asbestos exposure.

## **V. *Verdict***

After three weeks of trial and several days of deliberations, the jury voted nine to three on the first question of the special verdict form, finding that Alfaro was not exposed to asbestos from Cashmere Bouquet. Accordingly, the court entered judgment for defendants. Alfaro timely appealed.

## **DISCUSSION**

Alfaro contends the trial court erred in excluding two aspects of Fitzgerald's proposed testimony: (1) his reliance on recent testing of vintage Cashmere Bouquet samples obtained from various sources; and (2) his ultimate opinion that Alfaro was likely exposed to "significant" asbestos levels through her use of Cashmere Bouquet. Defendants argue the trial court was within its discretion to find that these portions of Fitzgerald's opinions were inadmissible as unreliable. We agree with defendants and affirm.

## I. *Applicable Legal Standards*

“A threshold issue in asbestos litigation is exposure to the defendant’s product. . . . If there has been no exposure, there is no causation.’ [Citation.]” (*Whitmire v. Ingersoll–Rand Co.* (2010) 184 Cal.App.4th 1078, 1084.) It is plaintiff’s burden to establish some threshold exposure to asbestos through defendants’ products. (*Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236 (*Casey*).)<sup>7</sup>

Section 801 provides: “If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is . . . [¶] . . . [¶] (b) Based on matter . . . perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.” In other words, “the matter relied on must provide a reasonable basis for the particular opinion offered, and [ ] an expert opinion based on speculation or conjecture is inadmissible.” (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564; see also *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 (*Sargon*).) “Thus, under Evidence Code section 801, the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion. As we recently explained, ‘[T]he expert’s opinion may not be based “on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors. . . . [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?” [Citation.]’ [Citations.]” (*Sargon, supra*, at p. 770.)

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<sup>7</sup> To ultimately prevail in her underlying claims, plaintiff also would need to establish that this exposure was to a reasonable medical probability a substantial factor in contributing to any asbestos-related disease she suffered. (See *Rutherford v. Owens–Illinois, Inc.* (1997) 16 Cal.4th 953, 974–977.) However, because the jury returned a verdict in favor of defendants on the question of exposure, it did not reach the causation issue.



A trial court enjoys broad discretion in ruling on foundational matters on which expert testimony is to be based. (§§ 801, subd. (b); *Board of Trustees v. Porini* (1968) 263 Cal.App.2d 784, 792-794.) We review the trial court's decision to exclude expert testimony for abuse of that discretion. (*In re Lockheed Litigation Cases*, *supra*, 115 Cal.App.4th at p. 563; see also *Sargon*, *supra*, 55 Cal.4th at p. 773.) "A ruling that constitutes an abuse of discretion has been described as one that is 'so irrational or arbitrary that no reasonable person could agree with it.' [Citation.] But the court's discretion is not unlimited, especially when, as here, its exercise implicates a party's ability to present its case. Rather, it must be exercised within the confines of the applicable legal principles." (*Sargon*, *supra*, 55 Cal.4th at p. 773.)

"It is prejudicial error to exclude relevant and material expert evidence where a proper foundation for it has been laid, and the proffered testimony is within the proper scope of expert opinion. [Citation.] Conversely, the courts have the obligation to contain expert testimony within the area of the professed expertise, and to require adequate foundation for the opinion." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523 (*Korsak*).)

## **II. *Exclusion of Vintage Cashmere Bouquet Products***

Alfaro contends the trial court erred in excluding Fitzgerald's proposed testimony regarding his analysis of recently-obtained vintage samples of Cashmere Bouquet based on concerns with the chain of custody of the samples. We conclude the trial court did not abuse its discretion in finding these samples presented an unreliable basis for Fitzgerald's opinions, and excluding Fitzgerald's proffered testimony on that basis.

### **A. *Underlying Proceedings***

#### **1. *Vintage samples***

Fitzgerald sought to testify regarding findings of asbestos contamination in 46 talc samples, the majority of which were contained in previously-opened vintage Cashmere Bouquet containers dating from the 1960s and 1970s. Fitzgerald only tested a handful of these samples himself, but also relied upon the testing of additional samples by two other experts.<sup>8</sup>

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<sup>8</sup> Those experts, Dr. Ronald Gordon and Dr. James Millette, had served as plaintiffs' experts in other asbestos litigation, but did not testify in this case.

The facts surrounding the collection and retention of these samples are largely undisputed.

The samples generally fall into four categories. First, 19 samples came from vintage Cashmere Bouquet containers with estimated dates of manufacture largely in the 1950s through the 1970s, with a few as early as the 1930s and as late as the early 1990s. These containers were purchased by several plaintiffs' law firms from the eBay website and from antique shops, beginning in 2008. Fitzgerald admitted that the samples he tested had been opened before he received them, he did not know who the original purchasers were, and only knew of their recent purchase history by the law firms. Nor could Alfaro provide any information as to where or how these samples were maintained prior to their recent purchase.

Second, 23 samples came from vintage Cashmere Bouquet containers produced by Colgate in discovery from display cases of "memorabilia" at several facilities. According to Colgate, these items had "trickle[d] in" to its corporate communications department over the years, often originating from current and former employees who collected containers from flea markets, garage sales, and antique stores and previously had displayed or stored them in their own residences. Colgate retrieved some of these samples from its display cases and some from boxes in storage. Dr. Marie Capdevielle, Colgate's corporate representative, testified at her deposition in another case that "we may know somebody who gave them to Colgate or that somebody found them at a flea market but we really don't know the history of any of these samples, where they originated from, where they have been. We don't have details on even if what is in some of these tins is what was the original Cashmere Bouquet." She further stated it was her understanding that "everything had been opened."

Third, three samples were obtained by researchers at the Mount Sinai School of Medicine (Mt. Sinai) in the late 1970s. This included two Cashmere Bouquet containers obtained from a cosmetics company in 1977, and one container of raw talc labeled "AGI 1615," which purportedly originated from an Italian talc mine. According to Dr. Arthur Langer, one of the researchers, the Mt. Sinai laboratory obtained the three containers in connection with research into asbestos and related products. He did not recall purchasing the

samples himself, and admitted that the samples were stored in unlocked drawers at the lab, accessible to multiple researchers and students, and “were stored in the same drawer as samples of raw asbestos and asbestos-containing products.” The samples were maintained in their original packaging, but were used for testing while at Mt. Sinai. When Langer transferred to Brooklyn College in 1989, he oversaw the relocation of the samples, where they were kept under similar conditions. The samples were then transferred to a commercial storage space in New Jersey in 1996 and remained there until 2013, when they were retrieved by Langer’s colleague.

Fourth, one opened container of Cashmere Bouquet dating from the 1970s was purportedly discovered by Kristi Lescalleet, a plaintiff in another case, in her basement in 2012. She previously testified during her deposition that she did not possess any containers of Cashmere Bouquet and had stopped using the product in 1975. Lescalleet contended she later discovered the sample in a box, along with a different brand of talcum powder and “other stuff.” She discarded the other items and the box, but turned the Cashmere Bouquet over to her attorney. She also admitted that the sample was open and “less than half full” when she found it, and she did not know how it had gotten to her current residence.

## *2. Fitzgerald’s testing and analysis*

Fitzgerald tested six of the vintage samples in two different ways. In September 2014, he received two of the vintage 1960s samples purchased from eBay. Fitzgerald tested the talcum powder using “bulk analysis by PLM [Polarized Light Microscopy] and TEM [Transmission Electron Microscopy],” and reported that both samples contained “fibrous talc, asbestiform tremolite, and asbestiform anthophyllite.”

Fitzgerald also performed “glovebox releasability tests” on three vintage Cashmere Bouquet products in 2012 and 2013. He described this methodology as a “controlled study” where he “simulated” a consumer’s use of the powder “in a controlled environment” by shaking the powder onto gloved hands inside an enclosed box. He then took air samples from inside the box to test for airborne asbestos. The three tested samples were two vintage containers purchased from eBay and the container recovered by Lescalleet. Over several rounds of testing, Fitzgerald varied some of his parameters and

methods, including using less powder in the second round of testing to “determine if the initial finding of asbestos released from the talc could be repeated using less product.” Each time, he took samples of the dust released into the glovebox. These tests produced a total of 19 samples. According to Fitzgerald, “[a]ll 19 samples were found to contain quantifiable asbestos.”

Fitzgerald also tested the raw talc from the AGI 1615 sample originally obtained by Mt. Sinai. In approximately 2013, he received the sample from a plaintiffs’ law firm and performed “bulk analysis for asbestos content, as well as glovebox testing for asbestos releasability.” According to his report, these tests “confirmed that that talc contains releasable fibers of anthophyllite and tremolite asbestos.”

### 3. *The article*

Fitzgerald reported the results of his glovebox testing in an article entitled *Asbestos in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women*, 20 Int’l J. Occup. & Env’tl. Health 318 (2014) (the article), co-authored by Drs. Millette and Gordon and published in a peer-reviewed journal.<sup>9</sup> The stated purpose of the article was to “investigate one historic brand of cosmetic talcum powder associated with mesothelioma in women.” The brand was not identified in the article, but Fitzgerald represented it to be Cashmere Bouquet. The article combines and details testing on the vintage samples conducted by the three authors: Dr. Gordon analyzed 50 samples “using transmission electron microscope (TEM) methods,” Fitzgerald “assessed asbestos releasability” of three samples using his glovebox method, and Dr. Millette tested nine samples and also conducted “air testing” in a simulated bathroom. The authors reported that each of them “confirmed in multiple tests the presence of asbestiform anthophyllite and asbestiform tremolite in the talcum powder products.” Based on these results, the article concluded that the tested brand “contained asbestos and the application of talcum powder released inhalable asbestos fibers.”

### 4. *Additional analyses and opinion*

Fitzgerald also reanalyzed vintage samples tested by Dr. Sanchez at RJ Lee Group, Inc. (RJLG), the laboratory retained by Colgate. Fitzgerald

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<sup>9</sup> The parties disagree as to whether the article itself was subject to a scientific peer-review process.

conducted his analysis during two visits to the RJLG facility in 2013. According to Fitzgerald, RJLG tested 20 samples and found no asbestos. Fitzgerald criticized the testing and findings, and reported that his reanalysis found asbestiform fibers in nearly all of the samples. These results were reported in the article, with RJLG identified only as “Laboratory D.”

Based at least in part on the vintage sample testing, Fitzgerald’s proposed testimony included the opinion that the Cashmere Bouquet products used by Alfaro “included asbestos.” Moreover, he opined, “to a reasonable degree of scientific certainty, that Ms. Alfaro was repeatedly exposed throughout her childhood, by use of Colgate Cashmere Bouquet talcum powders, to significant airborne asbestos.”

##### 5. *Motions in limine*

Defendants moved in limine to preclude Fitzgerald’s opinions relying on testing or analysis of the vintage samples, as well as any reliance on the article, as it was based on the same testing. Defendants argued that the vintage samples were unreliable because of the significant gaps in the chain of custody between their original sale and their collection and testing by Alfaro’s experts decades later. As such, Fitzgerald could not reasonably rely on the samples as representative of Cashmere Bouquet used by Alfaro during her youth. Moreover, defendants suggested that the gaps in the chain of custody, and potential for contamination of the samples *after* manufacture, were particularly problematic where all of the samples were open and partially used, the amount of potential asbestos contaminating the talcum powder was admittedly very small, and plaintiff’s own experts admitted that asbestos is “everywhere” at a background level. Plaintiff argued that the type of testing conducted by Fitzgerald and the other experts was the type that could be reasonably relied upon, and hence was a sufficient basis to allow Fitzgerald to rely on that testing in forming his opinions.

Defendants also noted that four other trial courts had excluded the same samples in other cases around the country. During the hearing on the motions in limine, the court acknowledged those rulings but stated it would give “relatively low weight” to decisions of other trial courts. The court then found that the vintage samples were unreliable based on the chain of custody

issues, reasoning that the samples did not “have a reliable history as being the material that [Alfaro] might have been exposed to.” Accordingly, the court excluded Fitzgerald’s testimony regarding any testing of the vintage samples and the article.

However, the court rejected defendants’ attempt to exclude Fitzgerald’s testimony regarding historical testing conducted by other researchers in the 1970s. Defendants argued that the testing was “40 year old hearsay” and had been acknowledged as unreliable by several governmental health agencies. The court refused to exclude this testing, noting that the tests were not unreliable “just because they’re old.” Instead, the court drew a distinction between the historical testing, which it allowed, and the recent testing on vintage samples, which it excluded: “I do think there’s a difference between . . . relying on materials that are historical materials, even if they’re unreliable tests [ ] because, over the course of that 30 years, Colgate-Palmolive had the opportunity to put in other tests. And so that’s all been part of the scientific debate, but this material is just created for litigation.” The court also found that “once something is opened, I do think in a case and in a context like our asbestos litigation where even [a] very minor amount of asbestos could be sufficient to create an exposure from it, [the] sample would have to be airtight, at least, to the testing facility.” The court recognized there could be similar concerns with the historical samples, but “there’s a whole history of very fervid research that resulted on both sides from that. And so I think that the jury can hear that. But as to . . . these new samples and this article, I . . . believe it’s too much a part of the adversary process to be admitted as [ ] scientific.”<sup>10</sup>

#### B. *Analysis*

In *Sargon*, *supra*, 55 Cal.4th 747, the Supreme Court analyzed the trial court’s gatekeeping function under section 801: “The trial court’s preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The court must not weigh an opinion’s probative value or substitute its own opinion for the expert’s opinion. Rather,

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<sup>10</sup> In light of this ruling, Colgate’s expert, Dr. Sanchez, did not present the RJLG test results of the same samples at trial, which he claimed showed no asbestos.

the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a ‘circumscribed inquiry’ to ‘determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert’s general theory or technique is valid.’ [Citation.] The goal of trial court gatekeeping is simply to exclude ‘clearly invalid and unreliable’ expert opinion. [Citation.] In short, the gatekeeper’s role ‘is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.’ [Citation.]” (*Id.* at p. 772.)

Alfaro asserts that the trial court improperly focused on the defects in the chain of custody for the vintage samples, rather than their relative reliability as a basis for Fitzgerald’s opinions regarding asbestos contamination in Cashmere Bouquet. Alfaro argues that because she was not seeking to admit the samples themselves or the testing of their contents as evidence, a perfect chain of custody was not required. Instead, Fitzgerald should have been allowed to use this information as a basis for his opinions as long as the samples and testing were “of a type that may reasonably be relied upon.” (§ 801, subd. (b).)

We agree that the proper question before the trial court was the reliability of the evidence as the basis for an expert’s opinion, rather than the issue of the admissibility of the evidence itself. However, we disagree with Alfaro’s suggestion that the issue of chain of custody is irrelevant to the question of reliability, or that the trial court misapplied the standard.

“The question of what is ‘reasonable’ for an expert to rely upon in forming an opinion under the terms of [ ] section 801, subdivision (b), is a foundational issue. It affects the credibility and the authority of the expert’s opinion.” (*Mosesian v. Pennwalt Corp.* (1987) 191 Cal.App.3d 851, 861 (*Mosesian*)), disapproved on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15; see also *Sargon, supra*, 55 Cal.4th at p. 771 “[A] court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert’s reasoning. ‘A court

may conclude that there is simply too great an analytical gap between the data and the opinion proffered.’ [Citation.]”.)

While analysis under section 801 may not necessitate proof of a chain of custody with the level of detail required for admission of the evidence, a court may nevertheless evaluate this issue as a measure of the reasonableness of an expert’s reliance on that evidence. At bottom, chain of custody requirements strike at the same concern—that the evidence is what the offering party says it is. In a chain of custody claim, “[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.” [Citations.]” (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

Here, it is clear from the record that the trial court determined the vintage samples could not be reasonably relied upon by Fitzgerald as authentic, unaltered samples of Cashmere Bouquet due to the substantial gaps in the chain of custody. Fitzgerald could reasonably rely on the vintage samples only if he had a logical basis to conclude that those samples were what they purported to be. But all of the samples had been opened and used prior to their recent testing. Moreover, Fitzgerald admitted he could not account for the whereabouts of the majority of the samples for several decades, including the manner in which they were stored or how many hands they had passed through. Notably, most of the samples had been displayed or sold on the secondary market as vintage items; there was no evidence that any had been maintained with the intent of properly preserving their contents.

Of the few samples with more complete custodial documentation, the Mt. Sinai and Lescalleet samples, the former were admittedly stored together



with other asbestos materials and accessible to numerous individuals, while the latter was of questionable reliability for additional reasons, including the timing and inconsistencies surrounding Lescalleet's purported discovery of the Cashmere Bouquet container. Further, the trial court found that these authentication concerns were exacerbated because the amount of asbestos allegedly present in the talcum powder was very small, plaintiff's experts contended that minimal amounts of asbestos above background levels were sufficient to cause disease, and both sides agreed that asbestos was omnipresent, including "everywhere" at background levels.

Alfaro argues that any questions regarding the foundation for Fitzgerald's reliance on the vintage samples go to the weight and not the admissibility of his opinion. However, section 801 sets a limit beyond which the underlying evidence lacks reliability to a degree that an expert cannot reasonably rely upon it. (See, e.g., § 801, subd. (b); *Buckwalter v. Airline Training Center* (1982) 134 Cal.App.3d 547, 553-554 ["The reasonableness of an expert's opinion [ ] is 'a question of degree, and may well vary with the circumstances.'"].) The chain of custody issues before the court did not require plaintiff to meet a technical procedural requirement; rather, the court concluded they invalidated the very basis for Fitzgerald's opinion. We are not convinced, given the significant foundational issues raised, that the trial court abused its discretion in determining the vintage samples fell below the limit of reliability.

Alfaro claims the trial court erred in concluding the samples were not sufficiently reliable because other evidence bolsters the conclusion that the contents of the vintage containers were unaltered after initial production. For example, she notes that the Cashmere Bouquet packaging was authentic, the powder in the containers was consistent with the formula cards produced by Colgate for Cashmere Bouquet, and, according to Fitzgerald, both the historical testing of talc and the testing of the vintage samples found the same types of asbestos materials—tremolite, anthophyllite, and chrysotile. In response, defendants note that authentic packaging and confirmation of the contents as talcum powder do not demonstrate that the powder was Cashmere Bouquet, much less a product unaltered over decades of potential use, storage, testing, display, or other unknown possibilities. Moreover,

because the type and concentration of asbestos Fitzgerald reported varied widely across samples, his suggestion that the historical testing matched the vintage testing is less compelling.

Alfaro also points to “the fact that some of the tested samples demonstrated an asbestos concentration of over 200 million asbestos fibers per gram of powder” as a further indication of reliability. We are not persuaded. Alfaro asked the trial court to assume as fact that there were potentially disease-causing levels of asbestiform asbestos present in the vintage samples to buttress her argument that the samples were reliable. However, the levels of asbestos in the vintage samples were disputed by defendants. The trial court’s role as gatekeeper was to determine whether the materials Fitzgerald relied on could provide a reasonable basis for his opinion; that analysis does not include “choosing between competing expert opinions” on asbestos levels as a basis for a finding of reliability. (*Sargon, supra*, 55 Cal.4th at p. 772.) Therefore, the court could not assume the truth of the results claimed by plaintiff as a basis upon which to show that the tests were reliable.

As such, these factors are insufficient to compel a finding that the trial court abused its discretion when it determined that the foundational problems were insurmountable. As the *Sargon* court put it, quoting from the dissenting opinion by Justice Johnson in the Court of Appeal, “a trial court must be permitted to draw the line in the sand, either letting the evidence in,” as meeting a threshold of reliability, “or excluding it as below that threshold. The placement of that threshold is left to the trial court so long as it is within the bounds of the law,” to be determined “in the context of its evidentiary rulings after an evaluation of all of the facts, evidence, and arguments.” (*Sargon, supra*, 55 Cal.4th at p. 768.) Here, it is clear the court carefully considered the competing factors, as it rejected defendants’ challenges to Fitzgerald’s reliance on the historical testing and on his own testing methodologies, recognizing that there was a sufficient basis to allow presentation of both sides of those issues to the jury. Nor is there any indication that the trial court improperly focused on the relative persuasiveness of Fitzgerald’s opinion or substituted its own opinion for Fitzgerald’s. On this record, we conclude the trial court did not abuse its

discretion in concluding that the vintage samples were not sufficiently reliable to support Fitzgerald's opinions.<sup>11</sup>

Alfaro next suggests that any reliability concerns were outweighed by the necessity of the evidence. In other words, even assuming the vintage samples were of questionable reliability, the court should have found Fitzgerald's reliance on them to be reasonable because there was little to no available direct evidence of the finished Cashmere Bouquet product dating from the relevant time period. Alfaro points to the facts that neither Colgate, McCrone, nor Alfaro retained any intact product samples from the period of her use, Colgate screened the majority of its talc samples for asbestos using XRD, which would not detect the low levels Fitzgerald claimed to find in the vintage samples, and Colgate did not retain the records of its more sensitive microscopy testing.<sup>12</sup> She cites *Mosesian*, *supra*, 191 Cal.App.3d 851 and *Korsak*, *supra*, 2 Cal.App.4th 1516 in support of this premise. In both cases, the issue before the appellate court was whether the trial court erred in *permitting* certain expert testimony. In *Mosesian*, the court found it was within the trial court's "considerable latitude in qualifying experts" to allow an expert to rely on hearsay from other experts. (*Mosesian*, *supra*, 191 Cal.App.3d at p. 862.) In *Korsak*, on the other hand, the jury returned a verdict for the plaintiff, who was injured when the shower head in his hotel room detached from the water pipe. (*Korsak*, *supra*, 2 Cal.App.4th at p. 1519.) As plaintiff's only evidence of proper hotel shower maintenance practices, the trial court allowed plaintiff's expert to testify to "incompetent hearsay evidence of an informal survey the expert conducted about hotel maintenance practices," consisting of information from unknown sources at other hotels. (*Id.* at p. 1525.) After noting the general principle providing

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<sup>11</sup> We also note that the majority of the bulk testing for asbestos content performed by plaintiff's experts was not performed by Fitzgerald, who tested only two vintage samples dating from the 1960s (at least a decade before Alfaro was exposed), the AGI 1615 sample, and the sample discovered by Lescalleet. The remainder of Fitzgerald's testing was focused on releasability.

<sup>12</sup> There is no evidence that Colgate engaged in spoliation; instead, the record suggests Colgate destroyed these records in the regular course of its business, prior to any litigation regarding asbestos contamination in its talc.

experts “considerable leeway as to the material on which they may rely,” the court of appeal nevertheless reversed, finding that the “authenticity, reliability, or the representative nature of the responses [to the survey] are totally undeterminable based upon [the expert’s] testimony.” (*Id.* at p. 1524, 1526.)

At most, these cases suggest that a trial court may, within its discretion, consider the necessity of a piece of evidence as a balancing factor along with reliability. (See *id.* at p. 1524 [noting “[s]everal factors that a trial court should take into account in ruling upon the propriety of particular foundational matters in expert testimony,” including “necessity, reliability, and speculation or conjecture”]; *Mosesian, supra*, 191 Cal.App.3d at p. 862 [“Sometimes evidence of questionable reliability may be used to form an opinion.”].) They do not compel a court to value necessity above all else, particularly where there are substantial concerns as to the reliability and foundation of the proposed evidence.

*Buckwalter v. Airline Training Center* (1982) 134 Cal.App.3d 547, the case relied upon by both the *Mosesian* and *Korsak* courts, is also inapplicable here. *Buckwalter* involved competing negligence claims brought by the estates of three pilots killed in a midair collision of two airplanes. (*Id.* at pp. 549-550.) Because there were “no eyewitnesses and very little radio communication data,” at trial the parties relied heavily on accident reconstruction experts to attempt to recreate the routes flown by the planes and determine respective fault. (*Id.* at pp. 550-551.) The plaintiff’s expert sought to rely on the training records of the two pilots in the other plane, which showed “instances of past confusion on the part of both [of the pilots] during landing approaches,” in support of the conclusion that the latter pilots became confused during their landing and caused the crash. (*Id.* at p. 552-554.) The trial court excluded this evidence. (*Ibid.*)

The appellate court reversed, holding that “the paucity of evidence available in this case would allow” the plaintiff’s expert to “reasonably rely on the ATC training records in forming his opinion and to explain that reliance to the jury.” (*Buckwalter, supra*, 134 Cal.App.3d at p. 553.) The court reasoned, “[t]he reasonableness of an expert’s reliance is a question of degree, and may well vary with the circumstances. Where, as here, there is little or

no direct evidence upon which the expert can base an opinion, the expert may have to turn to forms of circumstantial evidence on which he might not otherwise rely. In such circumstances, the necessity for the information dictates that courts accord to experts somewhat greater latitude in sources of information than might otherwise be the case. (See generally Jefferson, California Evidence Benchbook (1972) § 29.4, p. 509.) [¶] The circumstances of the instant case demonstrate the need for such latitude. . . . Since the ATC training records indicated instances of past confusion on the part of [two of the pilots] during landing approaches, they provided the experts with at least one possible reason why one of the planes might have been out of position.” (*Id.* at pp. 553-554.) Thus, although the court found the training records were insufficient to constitute admissible “habit” evidence (see § 1105), they were reliable enough, particularly given the lack of other evidence, to permit inclusion as the basis for the expert’s opinion. (*Id.* at p. 553.)

Here, by contrast, while Alfaro contends Fitzgerald’s testimony on the vintage sample testing would have been the strongest support for her claims, she had other evidence of potential asbestos contamination in Cashmere Bouquet. Notably, the trial court allowed Fitzgerald to testify, over defendants’ objections, about the historical testing and his own investigation of the talc mines. Moreover, unlike in *Buckwalter*, the underlying evidence at issue here presented serious authentication issues. As previously discussed, the trial court expressed substantial and pervasive concerns with the foundational premise that the vintage samples were what they purported to be—Cashmere Bouquet talcum powder containing the same type and amount of asbestos at the time of testing as it had when it was manufactured decades before. Under those circumstances, we cannot find it was an abuse of the trial court’s considerable latitude to conclude the unreliability of these samples required their exclusion, even considering the hardship Alfaro faced in mustering other evidence to support her exposure claim. The trial court was in the best position to assess reliability, and Alfaro has not provided sufficient basis to disturb that conclusion on appeal.

Finally, we reject Alfaro’s contention that Colgate previously stipulated to the authenticity of the vintage samples in a prior litigation and must therefore be bound by that stipulation. Alfaro seeks to apply section 1414,

which allows a party to authenticate a writing with evidence that the “party against whom it is offered has at any time admitted its authenticity.” Putting aside the question of whether the vintage samples qualify as a “writing” under the statute, which Colgate disputes, Alfaro has failed to establish that Colgate previously admitted the authenticity of the samples. Rather, the evidence in the record shows that in unrelated New York proceedings, Colgate agreed to stipulate “limited to these cases only” that it would not challenge the authenticity of the vintage samples, “notwithstanding claimed chain of custody concerns.” Alfaro provides no authority to support the application of section 1414 to such a stipulation, and we decline to do so.

As such, we find no error in the trial court’s exclusion of the vintage samples and all testimony flowing therefrom.

### **III. *Exclusion of Opinions Regarding Releasability and “Significant” Exposure***

Alfaro also contends the court erred in excluding Fitzgerald’s releasability testing conducted on the vintage Cashmere Bouquet samples, and his ultimate opinion that Alfaro was likely exposed “to significant airborne asbestos.” We disagree. Fitzgerald’s testimony in this area was principally based on the excluded vintage samples. Thus, it was well within the court’s discretion to exclude this portion of Fitzgerald’s opinion.

#### **A. *Underlying Proceedings***

As part of their motions in limine to exclude Fitzgerald’s testimony, defendants sought to exclude the glovebox testing performed by Fitzgerald, arguing that the testing method was unreliable and was performed using the excluded vintage samples. Defendants also moved to exclude Fitzgerald’s opinion that Alfaro was more likely than not exposed to significant amounts of asbestos from her use of Cashmere Bouquet, arguing that Fitzgerald had no basis for that opinion without the vintage test results and no basis to offer any quantitative opinion regarding the degree of exposure.

During the hearing on the motions in limine, plaintiff’s counsel suggested that the glovebox testing was “just a releasability study” about how much asbestos could be released into the air during use of cosmetic talcum powder, and therefore could be relied upon by Fitzgerald regardless of the

ruling on the vintage samples. The court asked counsel to clarify whether Alfaro was “offering that testimony to prove that whatever is in a powder such as Cashmere Bouquet is capable of being inhaled; or . . . are you offering it to prove that some asbestos was inhaled?” Alfaro’s counsel responded that the testimony was being offered for both purposes.

Defense counsel also argued that Fitzgerald should be precluded from offering an ultimate opinion regarding exposure, due to an “analytical gap . . . between whatever evidence in the historical record Mr. Fitzgerald believes shows the presence of asbestos and an opinion . . . that there was, in the particular bottles of Cashmere Bouquet purchased by the Alfaros, more likely than not contamination; or, that such contamination in any Cashmere Bouquet was regular or frequent.” Counsel pointed to deposition testimony from Fitzgerald admitting that he could not, for example, take positive testing from a mine for one year and conclude that there was asbestos in the same mine several years later.

The trial court conducted a lengthy hearing under section 402 to allow Alfaro to attempt to show that, absent the results from the testing of the vintage samples, Fitzgerald had sufficient evidence on which to base an opinion as to Alfaro’s exposure to asbestos. Alfaro sought to include Fitzgerald’s releasability testing on other talc samples that were not Cashmere Bouquet, but defense counsel objected that they had not been provided any notice or background information on such testing. During the section 402 hearing, Fitzgerald testified (over defendants’ reserved objection) that he performed glovebox testing on ten other unnamed talc brands, which he claimed also contained talc sourced from mines in Italy and/or Montana. He found asbestos in all ten air samples, in a “wide range of concentrations,” but all were above background. He then stated that, in looking at the asbestos concentrations of this “similar” cosmetic talc, all of which were “significant,” “that tells me, to a reasonable degree of scientific certainty, that when someone uses cosmetic talcs that were sourced from these same materials, that asbestos is significantly released and can be detected by industry standard protocol as above background.”

At the conclusion of the hearing, the court again reiterated that Fitzgerald’s recent testing —the bulk testing and glovebox testing of vintage

Cashmere Bouquet starting in 2012, his reanalysis of RJLG’s testing of these vintage samples, and his discussion of all of this testing in the article—all “remain excluded,” because the samples on which the testing relied do not “have a sufficient chain of custody of reliability between them and the commercial product of Cashmere Bouquet.” The court also excluded the glovebox testing of the unnamed talc products, finding that “we don’t have enough information about what those materials were and their chain of custody to inject them into this litigation.”

With respect to Fitzgerald’s ultimate exposure opinion, the court parsed the language used by Fitzgerald in his declaration, first noting that the evidence of “repeated” exposure would come from testimony by Alfaro herself regarding her use of the product. With respect to the conclusion that exposure was “significant,” the court found Fitzgerald’s opinion was based on the excluded testing, and therefore was also inadmissible. However, the court found Fitzgerald could give the general opinion that the product was “friable...that when dispersed it can be inhaled. . . . But whether she actually inhaled a significant amount of airborne asbestos I think requires a logical scientific leap which . . . from what I’m seeing, there isn’t enough science in his work . . . for him to make that leap.”

B. *Analysis*

1. *Releasability Testing*

The trial court excluded evidence of Fitzgerald’s glovebox testing because the tests were conducted using the vintage Cashmere Bouquet samples. Because those samples were found to be an unreliable measure of the historical presence of asbestos in Cashmere Bouquet, the court found Fitzgerald could not testify as to the amount of asbestos released from those samples during his glovebox testing. The trial court was well within its discretion in reaching this conclusion.

Alfaro suggests that, even excluding the vintage samples, Fitzgerald should have been allowed to testify as to releasability. In essence, Alfaro posits a two-part showing on exposure: first, she had to show that it was more likely than not that the Cashmere Bouquet products she used were contaminated with asbestos. If so, then she had to show that her use of the talcum powder “would cause a release of respirable asbestos.” She contends



that by excluding Fitzgerald’s testimony regarding his releasability testing, the court impermissibly prevented her from making the latter showing. She suggests Fitzgerald could have testified as to the results of his glovebox testing—specifically, “whether the typical use of the powder released asbestos into the air and, if so, to what extent”—without discussing the excluded vintage testing, such as by using some assumed level of contamination.

We disagree. Alfaro failed to offer any valid basis upon which Fitzgerald could offer an opinion on releasability related to Alfaro’s use of Cashmere Bouquet. Once the trial court excluded the testing based on the vintage samples, Alfaro attempted to salvage Fitzgerald’s glovebox testing during the section 402 hearing by offering test results he had achieved using other brands of talcum powder that were purportedly “similar” to Cashmere Bouquet. The court allowed extensive examination on this testing, over objection by defendants that Fitzgerald had not previously relied on testing any other brands in this case and had not provided any background materials or even the names of the brands. Ultimately, the court excluded Fitzgerald’s testimony based on this testing because the unnamed brand test samples suffered from similar authentication problems as had the vintage Cashmere Bouquet samples.

Alfaro does not challenge the exclusion of Fitzgerald’s testing of the unnamed brands. Instead, she suggests that Fitzgerald should have been able to testify as to potential releasability based on an assumption that the product Alfaro actually used contained similar asbestos levels as the product (regardless of brand) that Fitzgerald tested. But there was no admissible evidence upon which Fitzgerald could have based such an assumption. (See, e.g., *Sargon*, *supra*, 55 Cal.4th at p. 770 [expert opinion “may not be based “on assumptions of fact without evidentiary support””]; *Casey*, *supra*, 206 Cal.App.4th at p. 1235 [asbestos expert’s opinion inadmissible for lack of sufficient factual basis]; *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117 “[A]n expert’s opinion that something *could* be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not

provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities.”).<sup>13</sup>

Moreover, the court permitted Fitzgerald to give the generic opinions regarding releasability about which Alfaro now complains. Indeed, Fitzgerald testified that any asbestos detected from air samples above background would be “significant,” and that “if someone uses an asbestos-containing product and it releases asbestos into the air, that would be above background.” He also testified generally regarding the minimal size and weight of asbestos fibers and the potential that use or disturbance of an asbestos-containing product would release respirable fibers into the air.

## 2. *Exposure opinion*

The trial court also concluded that Fitzgerald primarily relied on the vintage test results as the basis for his opinion that Alfaro was exposed to asbestos from Cashmere Bouquet. Thus, absent evidence of those test results, Fitzgerald had an insufficient basis to connect his analysis showing that historically *some* Cashmere Bouquet products were likely contaminated with asbestos to his conclusion that the products Alfaro used were contaminated. Alfaro fails to explain how this was error. (See *Sargon, supra*, 55 Cal.4th at p. 771 [court may exclude evidence based on “analytical gap between the data and the opinion proffered.”] [Citation.]”).

Instead, she asserts that the court improperly based its ruling on the fact that Fitzgerald’s testing was performed for the purposes of litigation.

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<sup>13</sup> Alfaro thus argues that Fitzgerald could have made an assumption regarding the level of asbestos contamination in talcum powder without relying on his testing of the vintage Cashmere Bouquet samples or the unnamed brand samples (all of which the trial court excluded), and then testified about potential releasability based upon that assumed contamination level. But neither Alfaro nor Fitzgerald proposed any other evidentiary basis for an assumed level of asbestos contamination, once the trial court had excluded the testing of unnamed brands during the section 402 hearing. By contrast, defendants’ expert, Sahmel, testified as to her opinion that, assuming Alfaro used Cashmere Bouquet as alleged, her likely exposure would have been no greater than background levels. As the basis for her assumption regarding the level of asbestos, Sahmel relied on an earlier study of cosmetic talc by the FDA.

The court did note, in rejecting Fitzgerald’s proffered testimony regarding his glovebox testing of other brands of talcum powder, a concern that the testing was “very bound into the litigation process.” However, the court was very clear that its main focus was determining whether, absent the vintage sample testing, Fitzgerald could bridge the gap to supply a sufficient basis for his opinion regarding Alfaro’s exposure. That analysis was a proper application of the court’s gatekeeping function for expert testimony.<sup>14</sup> After extensive briefing, argument, and questioning of Fitzgerald, the court ultimately concluded he could not do so. This determination was well within the bounds of the court’s discretion.

We therefore conclude that the trial court did not abuse its discretion in excluding the challenged portions of Fitzgerald’s opinions.<sup>15</sup>

### **DISPOSITION**

Affirmed. Respondents are awarded their costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

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<sup>14</sup> By contrast, the court expressly acknowledged that the issues of the validity of various testing methodologies and “what those tests mean” were subjects of scientific debate, and therefore properly left to the jury to weigh.

<sup>15</sup> Accordingly, we need not reach plaintiff’s claim that the asserted errors were prejudicial, or that the court erred in granting nonsuit for defendants on punitive damages.