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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JOHN WITTMAN,

Plaintiff and Appellant,

v.

COTY, INC.,

Defendant and Respondent.

B286135
(Los Angeles County
Super. Ct. No. BC646439)

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

Weitz & Luxenberg, Benno Ashrafi and Josiah Parker for Plaintiffs and Appellants.

Arnold & Porter Kaye Scholer and Rhonda R. Trotter; Quinn Emanuel Urquhart & Sullivan, Daniel H. Bromberg and Kirk Goza; Tucker Ellis, James P. Cunningham and Justin E. Garratt for Defendant and Respondent.

Barbara and John Wittman asserted claims for negligence, strict liability, breach of warranty, and loss of consortium against respondent Coty, Inc. (Coty), alleging that Barbara's exposure to asbestos in Coty's talcum powder resulted in her mesothelioma. The trial court granted summary judgment in Coty's favor on appellants' claims, concluding that the Wittmans lacked evidence that Barbara was exposed to asbestos fibers through her use of Coty's product. Appellant John Wittman challenges the grant of summary judgment.[1] We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In January 2017, the Wittmans commenced the underlying action, alleging that Barbara developed mesothelioma due to her exposure to asbestos fibers in products she used. Their first amended complaint, filed March 30, 2017, asserted claims against Coty and other defendants for negligence, strict liability, breach of warranty, and loss of consortium. Accompanying the claims was a request for punitive damages.

In June 2017, Coty sought summary judgment or adjudication on the Wittmans' claims, contending the Wittmans' discovery responses and deposition testimony

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[1] During the pendency of this appeal, Barbara Wittman died. For purposes of the appeal, John Wittman has been designated her successor in interest. As the Wittmans shared a surname, we refer to them by their first names.

demonstrated their inability to prove the claims. Coty requested summary judgment on the ground that the Wittmans could not show that Barbara was exposed to asbestos through the particular Coty product she had used, namely, a specific face powder. In the alternative, Coty sought summary adjudication on the request for punitive damages on the ground that the Wittmans could not show oppression, fraud, or malice.

The Wittmans opposed summary judgment and summary adjudication, contending that Coty did not carry its initial burden regarding their purported inability to show Barbara's exposure to asbestos from Coty's product and the existence of oppression, fraud, or malice. They further maintained that there were triable issues regarding the requisite asbestos exposure, relying on a declaration from expert John Harris, who stated that he found asbestos fibers in some face powder provided to him.

In granting summary judgment, the trial court concluded that Coty had carried its initial burden regarding whether the Wittmans lacked needed evidence of Barbara's exposure to asbestos. The court further ruled that Harris's declaration was inadmissible to raise a triable issue regarding Barbara's exposure, concluding that the Wittmans established no "chain of custody" for the face powder provided to Harris. On September 6, 2017, judgment was entered in favor of Coty and against the Wittmans.

DISCUSSION

The Appellant challenges the grant of summary judgment. For the reasons discussed below, we reject his contentions.

A. *Standard of Review*

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action -- for example, that the plaintiff cannot prove element X." (*Id.* at p. 853, fn. omitted.)

Although we independently assess the grant of summary judgment, our inquiry is subject to certain constraints. Under the summary judgment statute, we examine the evidence submitted in connection with the summary judgment motion, with the exception of evidence

to which objections have been appropriately sustained.[2] (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 711; Code Civ. Proc., § 437c, subd. (c).) Furthermore, our review is limited to contentions adequately raised in the Wittmans' briefs. (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125-126.)

B. *Governing Principles*

The Appellant contends the trial court erred in ruling that Coty carried its initial burden on summary judgment and in excluding Harris's declaration due to an inadequate "chain of custody." We begin by examining the principles applicable to those contentions.

1. *Initial Burden on Summary Judgment*

The defendant, in seeking summary judgment, need not "conclusively negate" the essential elements of the plaintiff's claims. (*Aguilar*, *supra*, 25 Cal.4th at pp. 853-

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[2] As discussed further below (see pts. C.2. & C.4. of the Discussion, *post*), during the proceedings, the Wittmans asserted a single written evidentiary objection that they withdrew prior to the ruling on the summary judgment motion. Although Coty asserted two written evidentiary objections, the trial court expressly ruled on only one, as it sustained a "chain of custody" claim relating to Harris's declaration (see pt. E. of the Discussion, *post*). Due to the absence of a ruling on the other objection, we presume it was overruled. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534 (*Reid*).)

854.) It is sufficient that the defendant demonstrate "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence" regarding one or more elements of the claims. (*Id.* at p. 854.) On summary judgment, the defendant bears the initial burden regarding this issue. (*Zoran Corp. v. Chen* (2010) 185 Cal.App.4th 799, 805.) "If the defendant fails to meet this initial burden, it is unnecessary to examine the plaintiff's opposing evidence." (*Ibid.*)

Here, Coty sought to show that the Wittmans did not possess, and could not reasonably obtain, evidence sufficient to establish an aspect of causation crucial to their claims, namely, exposure to asbestos. In asbestos cases, "the plaintiff must first establish some threshold exposure to . . . asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a substantial factor in bringing about the injury." (*Rutherford v. Owen-Illinois, Inc.* (1997) 16 Cal.4th 953, 982, italics & fn. omitted.) Thus, "[a] threshold issue in asbestos litigation is exposure to the relevant asbestos product. [Citations.] 'If there has been no exposure, there is no causation.' [Citation.]" (*Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1246, quoting *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103 (*McGonnell).*)

In attempting to show that the plaintiff does not possess, and cannot reasonably obtain, needed evidence, the defendant may satisfy its initial burden on summary

judgment through "admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing" (*Aguilar, supra*, 25 Cal.4th at p. 855), or through discovery responses that are factually devoid (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 590). As the defendant must do more than "simply point out" the purported deficiency (*Aguilar*, *supra*, at pp. 853-854), the burden on summary judgment does not shift to the plaintiff unless a "stringent review of the direct, circumstantial and inferential evidence" shows that the plaintiff inherently lacks the needed evidence (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 83 (*Scheiding*)).

Generally, the responses upon which the defendant relies must be to discovery sufficiently comprehensive, or sufficiently focused on key elements of the plaintiff's claims, to support the reasonable inference that the plaintiff cannot marshal needed evidence. Thus, in *McGonnell*, which involved an asbestos-based personal injury action, the appellate court concluded that the defendant carried its initial burden on summary judgment by showing that when deposed, the plaintiff admitted he was familiar with the defendant's products and could not recall seeing them at his jobsites. (*McGonnell*, *supra*, 98 Cal.App.4th at pp. 1104-1105.)

In contrast, when the pertinent discovery is insufficiently comprehensive or focused, summary judgment is not properly ordered in the defendant's favor. In *Scheiding*, a worker asserted asbestos-related personal

injury claims against numerous defendants, including a general contractor. (*Scheiding*, *supra*, 69 Cal.App.4th at pp. 67-68.) The general contractor successfully sought summary judgment on the ground that the worker, testifying in deposition and responding to form interrogatories, did not specifically name the general contractor as active at any jobsite where the worker encountered asbestos. (*Ibid.*) Reversing, the appellate court concluded that the general contractor failed to carry its initial burden, as the general contractor directed no questions to the worker during his deposition, and propounded no discovery specifically designed to elicit whether the worker possessed evidence regarding the general contractor. (*Id.* at pp. 67, 83-84.)

2. *Chain of Custody Claims*

Generally, qualified experts "may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common experience that the expert's opinion will assist the trier of fact to assess the issue of causation." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) Nonetheless, an expert "does not possess a carte blanche to express any opinion within the area of expertise." (*Id.* at p. 1117.) Subdivision (b) of Evidence Code section 801 provides that expert opinion must be "[b]ased on matter . . . 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 . . . ." Under that provision, the court acts as a "gatekeeper," and "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." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771, italics omitted.) Where this showing is lacking, "'there is simply too great an analytical gap between the data and the opinion proffered.'" (*Ibid.*, quoting *General Electric Co. v. Joiner* (1997) 522 U.S. 136, 146.)

Under these principles, expert testimony regarding the features of an examined or tested item may be excluded on the basis of a so-called "'chain of custody'" claim. (*People v. Catlin* (2001) 26 Cal.4th 81, 134.) The crux of such a claim is that the expert testimony relies on tests of a sample not adequately shown to reflect or represent the item in question. (*Dobson v. Industrial Acc. Com.* (1952) 114 Cal.App.2d 782, 783 (*Dobson*); *American Mut. etc. Co. v. Ind. Acc. Com.* (1947) 78 Cal.App.2d 493, 496-497 (*American*); see *County of Sonoma v. Graham* (1986) 187 Cal.App.3d 1439, 1448-1449.) "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, supra*, at p. 134.) In the context of a summary judgment motion, we review the trial court's ruling on a chain of custody claim for an abuse of discretion. (*Public Utilities Com. v. Superior Court* (2010) 181 Cal.App.4th 364, 376, fn. 9.)[3]

C. *Underlying Proceedings*

1. *Coty's Showing*

Coty sought summary judgment and summary adjudication on the ground that the Wittmans' discovery responses were factually devoid with respect to their claims and request for punitive damages. In support of the motion for summary judgment, Coty contended the Wittmans' discovery responses demonstrated their lack of evidence to

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[3] We recognize that among the appellate courts, there is an unresolved division of opinion regarding the standard of review for the trial court's evidentiary rulings on summary judgment (see *Reid*, *supra*, 50 Cal.4th at p. 535). We follow the weight of authority and apply the abuse-of-discretion standard. (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 8.168, p. 8-148.)

establish Barbara's specific alleged exposure to asbestos from Coty's products. When deposed, Barbara stated that she had used Coty's "Airspun Translucent" face powder from the late 1970's to 2015. Coty maintained that the Wittmans' discovery responses showed they had no evidence that the Coty product contained asbestos. Coty submitted their responses to three sets of interrogatories, one set of requests for admissions, and one set of requests for production of documents, as well as excerpts from their depositions disclosing that they had no personal knowledge whether the Coty product in question contained asbestos.[4]

Coty placed special emphasis on the Wittmans' responses to certain interrogatories, document requests, and requests for admission which, when taken together, purported to identify "all" facts, documents, and witnesses that would be offered to show the alleged asbestos exposure. Coty contended that insofar as the responses identified particular documents and witnesses, those sources of evidence either suggested that Coty's products contained no asbestos or were irrelevant. Cody further contended that insofar as the responses purported to identify facts supporting the alleged asbestos exposure, the responses referred to the documents and witnesses noted above, and otherwise contained only inspecific "boilerplate."

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[4] Additionally, Coty offered evidence that as a child, Barbara lived near a coke fuel and coal gas manufacturing plant that made use of asbestos insulation.

2. *The Wittmans' Opposition*

In opposing summary judgment, the Wittmans contended Coty failed to carry its initial burden, arguing that the discovery responses upon which Coty relied were inadmissible because they were unverified.[5] The Wittmans further maintained that even had Coty shifted the burden on summary judgment, they possessed evidence sufficient to raise a triable issue whether the Coty product Barbara had used contained asbestos. They submitted a declaration from asbestos analysis expert John Harris, who stated that he tested a container of Coty Airspun Translucent powder he received from the Wittmans' counsel. According to Harris, he had been informed that Barbara bought the powder in 2015 or 2016. Upon testing the powder in the container, Harris found two asbestos fibers. Harris estimated that "[b]ased on the two asbestos fibers, . . . a concentration of 15,700,000 fibers per gram of material, and a concentration of 1.263 structures[,] . . . were detected." Harris opined that Barbara would have been exposed to respirable asbestos fibers above the ambient level had she "used [the] product[] in a manner that created respirable dust . . . ."

In opposing summary adjudication on the request for punitive damages, the Wittmans again maintained that the

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[5] Generally, the discovery statutes require responses to interrogatories, requests for the production of documents, and requests for admissions to be verified under oath by the responding party. (Code Civ. Proc., §§ 2030.250, subd. (a), 2031. 250, subd. (a), 2033.210, subd. (a)).

pertinent discovery responses were inadmissible because they were unverified. They further argued that the responses, if admissible, were not "'factually devoid'" with respect to the Wittmans' allegation that Coty had "[e]ngaged in [m]alice that [h]armed [Barbara]."

3. *Coty's Reply*

Coty contended its showing established the Wittmans' lack of needed evidence. Coty maintained that the Wittmans were estopped from objecting to the admission of the unverified discovery responses, arguing that prior to the filing of the summary judgment motion, the Wittmans' counsel assured Coty that no such objection would be asserted in opposition to the motion. Coty further objected to Harris's declaration on the ground that the Wittmans failed to show that "the contents of the container [provided to Harris] were not altered after it left Coty's factory."

4. *Trial Court's Rulings*

At the hearing on the motion for summary judgment or adjudication, the Wittmans' counsel withdrew the objection to their unverified discovery responses submitted by Coty. Following the hearing, the trial court concluded that Coty had shifted the burden on summary judgment to the Wittmans, who raised no triable issues of fact. In determining that Coty carried its initial burden, the court found that the Wittmans "waived" any contention that the discovery responses were not factually devoid by failing to

address that issue in their opposition. The court further ruled that Harris's declaration was inadmissible to raise a triable issue because the Wittmans established no chain of custody for the powder Harris tested. In view of the ruling on the motion for summary judgment, the court concluded that the motion for summary adjudication was moot.

D. *Coty's Initial Burden on Summary Judgment*

The appellant challenges the trial court's determination that Coty carried its initial burden on summary judgment. He contends the court's basis for that determination -- namely, the finding of a forfeiture predicated on the Wittmans' failure to argue that their discovery responses were not factually devoid -- was unsound. In support of the contention, he maintains (1) that their opposition contained such an argument, and (2) that regardless of whether it did so, the trial court was required to examine whether the discovery responses were factually devoid. The appellant further contends Coty's showing was insufficient to carry its initial burden, arguing that the Wittmans' discovery responses were not factually devoid.

It is unnecessary to address appellant's challenge to the forfeiture-based ruling because the discovery responses in question are, in fact, factually devoid with respect to Barbara's alleged exposure to asbestos from Coty's product. Generally, we may affirm summary judgment on a ground not relied upon by the trial court, provided the parties have had an adequate opportunity to address that ground. (*Bains*

v. Moores (2009) 172 Cal.App.4th 445, 471, fn. 39; Code Civ. Proc., § 437c, subd. (m)(2).) That requirement is satisfied here, as the parties's briefs on appeal have presented their views regarding whether the discovery responses are factually devoid.

We find guidance regarding whether Coty carried its initial burden from *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96 (*Andrews*) and *Collin v. Calportland Co.* (2014) 228 Cal.App.4th 582 (*Collin*). In *Andrews*, the plaintiff asserted personal injury claims against a manufacturer of asbestos-containing products, alleging that he was exposed to asbestos from those products while working in and near naval vessels. (*Andrews*, *supra*, at p. 96.) The manufacturer successfully sought summary judgment, contending the plaintiff's evasive responses to broad discovery requests showed he could not establish exposure to asbestos from the manufacturer's products. Affirming, the appellate court determined that the manufacturer carried its initial burden, as the discovery responses contained only general allegations of exposure against the manufacturer -- rather than "specific facts showing that [the plaintiff] was actually exposed to asbestos-containing material from [the manufacturer's] products" -- and a list of witnesses, none of whom were described as capable of providing specific facts relating to the plaintiff's alleged asbestos exposure. (*Id.* at pp. 104, 106-107.)

In *Collin*, the plaintiff asserted asbestos-based personal injury claims against a manufacturer of plastic cement. (*Collin*, *supra*, 228 Cal.App.4th at pp. 585-586.) The manufacturer secured summary judgment on the ground the plaintiff lacked evidence that he was exposed to asbestos from a specific cement product, which was the only asbestos-containing cement the manufacturer made. (*Id*. at p. 586.) Although the plaintiff's discovery responses showed that he had worked with, and near, some of the manufacturer's cement products, the responses disclosed no specific facts that he encountered the asbestos-containing product. (*Id*. at pp. 588-593.) Affirming the grant of summary judgment, the appellate court concluded that the manufacturer's showing sufficed to carry its initial burden. (*Id*. at p. 594.)

Here, our focus is on the Wittmans' responses to Special Interrogatory Nos. 1, 2, and 5, which they contend on appeal identify their evidence that the Coty product in question contained asbestos. Those interrogatories sought "all facts" and "all documents" supporting the Wittmans' claims, including the specific Coty product they alleged to contain asbestos. To establish Coty's manufacturing operations, the responses referred to deposition testimony from three witnesses in other actions, Ralph Macchio, Noel Genco, and George Dippold, who appeared as corporate representatives for Coty, Pfizer, and Whittaker, Clark and Daniels (WCD). Taken together, the responses set forth specific facts showing that for a lengthy period, Barbara

used Coty Airspun Translucent face powder in a manner likely to create respirable dust. However, as explained below, they offered no specific facts showing that the product contained asbestos.

According to the responses, Coty was founded in 1904, became a division of Pfizer in 1963, and reconstituted itself as an independent business in 1992. Coty bought talcum for its products from Pfizer and WCD. Pfizer owned talc mines in California and Montana, and from 1963 to 1987, sold talc to many industries, including the cosmetics industry. WCD also was a prominent talc supplier.

To establish Coty's awareness of the hazard posed by asbestos, the responses pointed to a 1976 memorandum prepared by a trade advocacy group to which Coty belonged, which stated: "On March 11, 1976, . . . the . . . Talc Subcommittee met to discuss the current status of talc. It was recognized that a need exists to bring to your attention a profile of the analyses for asbestos form materials in talc used in the United States production of cosmetics and toiletry products. The attached letters demonstrate responsibility of industry in monitoring its talc. We are *certain* that the summary will give you *assurance as to the freedom from contamination by asbestos form minerals in cosmetic talc products*." (Italics added.)

The responses further stated although Coty did not test its products for asbestos until 1992, it claimed never to have detected asbestos contamination. According to the responses, the claim was founded on Coty's belief that its

suppliers tested for asbestos contamination. The responses described that belief as "unreasonable," noting that WCD informed Coty that the batches of talc it sold to Coty may not have been "'individually tested.'" The responses further asserted that Coty did not want to know whether its talcum powder contained asbestos.

The responses identify no specific witness possessing evidence that the Coty product that Barbara used contained asbestos. Rather, they state: "[The Wittmans'] experts in similar cases have provided depositions, declarations and trial testimony that, more likely than not, the products . . . utilized in [Barbara's] immediate presence and vicinity contained asbestos. . . . [The Wittmans] expect that their experts, *when designated* . . . , will testify in accordance with their past testimony. Defendant and defendant's counsel are well aware of this testimony." (Italics added.)

The responses also identify no specific document constituting evidence that the Coty product used by Barbara contained asbestos. In addition to the memorandum noted above, the responses refer in particular only to certain scientific documents regarding the hazards of asbestos, state and federal regulations regarding asbestos, an FDA (U.S. Food & Drug Admin.) memorandum establishing WCD's importance as a talc supplier, and an appellate court decision regarding the imposition of punitive damages. The responses otherwise contain only nonspecific references to other documents, including discovery responses and deposition testimony in the underlying action, evidence from

other actions, Barbara's medical records, and Coty's records, without stating how those documents showed that the Coty product in question contained asbestos.

We conclude that the responses are factually devoid with respect to Barbara's alleged exposure to asbestos from Coty's product. As in *Andrews*, the responses contain only general allegations against Coty, rather than "specific facts showing that [Barbara] was actually exposed to asbestos-containing material from [Coty's] products." (*Andrews*, *supra*, 138 Cal.App.4th at p. 104.) Furthermore, as in *Collin*, the responses suggest that in the 1970's, some talc-based products were contaminated with asbestos, but offer no specific facts showing that Barbara encountered such a product in using the Coty face powder. (*Collin*, *supra*, 228 Cal.App.4th at pp. 589-591.) The key assertion in the responses is the following: "[The Wittmans'] experts in similar cases have provided depositions, declarations and trial testimony that, more likely than not, the products . . . utilized in [Barbara's] immediate presence and vicinity contained asbestos." That sentence refers only to unnamed witnesses and does not state that "the products" they addressed included Coty's product. In contrast, to the extent the responses identify specific evidence, that evidence does not establish the pertinent allegation. As noted above, the 1976 memorandum contains an assurance that "cosmetic talc products" were *free* from contamination by asbestos.

Gaggero v. Yura (2003) 108 Cal.App.4th 884, upon which appellant relies, is distinguishable. There, the

plaintiff asserted an action for specific performance of a real estate purchase agreement. (*Id*. at p. 888.) The defendant successfully sought summary judgment on the ground that the plaintiff lacked evidence of his financial ability to buy the property, relying solely on the fact that the plaintiff, when deposed, refused to answer questions regarding his financial resources. (*Id*. at p. 890.) Reversing, the appellate court concluded that the defendant failed to show that the plaintiff necessarily lacked the requisite evidence, as the record disclosed only that the plaintiff's refusal to answer was due to ill considered privacy objections by the plaintiff's counsel. (*Id*. at pp. 891-892.) Here, in contrast, the Wittmans' factually devoid responses answered comprehensive discovery requests seeking to identify "all" facts, documents, and witnesses that would be offered to show Barbara's alleged asbestos exposure. In sum, Coty's showing sufficed to shift the burden on summary judgment to the Wittmans.

E. *Exclusion of Expert's Declaration*

Appellant contends the trial court erred in excluding Harris's declaration, which the Wittmans offered to show that they possessed admissible evidence regarding Barbara's exposure to asbestos through her use of the Coty face powder. He argues that the Wittmans demonstrated an adequate chain of custody for the powder that Harris tested. As explained below, we disagree.

In *Dobson, supra,* 114 Cal.App.2d at p. 783, a worker filed a claim for insurance benefits with the Industrial Accident Commission (Commission). At the hearing on the claim, the insurer contended that the worker's injury was due to intoxication. The insurer's sole witness was a toxicologist, who testified that he found alcohol in a specimen of blood, which he had received by registered mail, and which bore a label stating the blood had been drawn from the worker by a doctor in the presence of a witness. (*Id*. at p. 784.) According to the toxicologist, the district attorney provided bottles for blood sampling purposes, accompanied with instructions for their use, to hospitals and police officers, and those bottles were ultimately directed to the toxicologist. (*Id*. at p. 784.) Over an objection of lack of foundation, the Commission admitted the toxicologist's testimony and denied the worker's claim. (*Id*. at pp, 783-784.)

Reversing, the appellate court concluded that the toxicologist's testimony "constituted no proof whatever that [the worker] was intoxicated" because "there was no proof the blood sample the doctor analyzed was [the worker's] blood," and no evidence regarding how the sample had been taken. (*Dobson*, *supra*, 114 Cal.App.2d at pp. 784, 785.) The court stated: "No witness testified that a sample of [the worker's blood] had been taken and . . . there was no testimony as to the way it had been taken nor as to whether or not the instructions for taking such samples had been followed." (*Id*. at p. 784.)

In *American*, the appellate court reached a similar conclusion on similar facts. (*American*, *supra*, 78 Cal.App.2d at pp. 494-495.) There, an insurer filed a petition with the Commission to annul an insurance award in favor of a worker, who had died when the car he was driving was involved in an accident. (*Ibid*.) Before the Commission, the insurer contended the accident was due to the worker's intoxication, relying on a report from an analyst who stated he had received a blood specimen labeled with the worker's name and found it to contain a high level of alcohol. (*Id*. at p. 495.) In opposition to the petition, the worker's family offered a death certificate issued by a doctor stating he found no symptoms of intoxication. (*Id*. at p. 496.)

When the Commission denied the petition, the insurer appealed, arguing that the ruling was contrary to the evidence. (*American*, *supra*, 78 Cal.App.2d at p. 496.) The appellate court disagreed, stating: "[T]he petitioner's case relies entirely upon the analysis of the blood sample made by the chemist . . . . It may be assumed that the fluid analyzed by Happel was blood, although there is no evidence to show from what manner of body it came . . . . But, assuming that it was [human blood], there is a complete lack of identification of it as the blood of [the worker]. The only indication that it might be [the worker's] blood is a label with his name on it put on the bottle by somebody, but no one knows who. Even assuming it to be [the worker's] blood, there is no showing that it was in the same condition when

[the chemist] received it as it was when the sample was taken . . . ." (*Ibid*.)

The circumstances here closely resemble those of *Dobson* and *American*. In seeking to raise a triable issue regarding Barbara's exposure to asbestos through her use of the Coty product, the Wittmans relied exclusively on Harris's declaration. Harris stated: "I have been asked to provide my opinion as to whether . . . Coty Airspun Translucent Powder [is] asbestos containing. [The] product was provided to me by [the Wittmans' counsel]. . . . I am informed that [Barbara] purchased . . . the Coty Airspun Translucent Powder approximately sometime between 2015 and 2016, and has used [the] product[] that my laboratory tested." According to the report attached to the declaration, Harris received a "sealed container[]" of talcum powder in a gallon-sized ziplock bag from the Wittmans' counsel. Also "[w]ithin the container" were instructions requesting testing.

Coty's reply to the Wittmans' opposition objected to Harris's declaration on the ground that the Wittmans failed to show that "the contents of the container [provided to Harris] were not altered after it left Coty's factory." Coty also submitted evidence that when deposed, Barbara testified that she found an opened container of Coty's product in a bedroom drawer, alongside products not made by Coty that the Wittmans had alleged were asbestos-laden, including Chanel No. 5 bath powder.

In ruling on Coty's objection, the trial court considered Coty's initial showing, the statements in Harris's declaration and report, a declaration from the Wittmans' counsel accompanying their opposition, and the excerpts from Barbara's deposition submitted with Coty's reply. The court concluded that viewed collectively, the evidence showed only that Barbara found an opened container of Coty's product and supplied it to her husband for delivery to their counsel, who offered no evidence regarding "what, if anything, was delivered [to them], how it was stored, whether and how it was repackaged, how it was labelled, how it was sealed, and how it was delivered to . . . Harris." The court thus sustained Coty's chain of custody objection, stating: "[The Wittmans] clearly have not established a chain of custody. Not only is there no assurance that there has been no alteration or contamination; the evidence does not establish that what was tested by . . . Harris is the Coty product [Barbara] found."

We see no error in the trial court's ruling. In addition to the evidence showing that the Coty product Barbara found might have been contaminated, there is a critical gap in the evidence concerning a key link in the chain of custody, that is, the link between the product Barbara found and the sample Harris tested. The Wittmans' effort to close that evidentiary gap relies on Harris's statement that he "[was] informed" that the sample originated with the Wittmans. In view of *Dobson* and *American*, the trial court did not abuse its discretion in concluding that Harris's hearsay reference

to an unspecified source of information was insufficient to establish the chain of custody. Accordingly, as the Wittmans offered no other evidence in order to raise a triable issue, summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.