

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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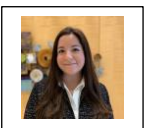
Paul Majkowski and Lauren Russo of Rivkin Radler LLP, report on a recent New Jersey Appellate Division case reiterating the rigorous gatekeeping required for expert testimony in a talc exposure case.

Holding the Gate Against Talc Plaintiffs' Experts: New Jersey Appellate Court Reverses Multi-Hundred- Million Dollar Verdict

ABOUT THE AUTHORS



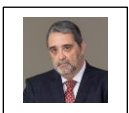
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For the second time in the past couple of years, the trial court's role as gatekeeper for talc-related science was before by the New Jersey Appellate Division, which again found that the gate should not freely swing open. In Barden v. Brenntag North Am., Inc.,¹ the Appellate Division addressed whether the talc plaintiffs' expert testimony regarding a causal link between non-asbestiform cleavage fragments and cancer and extrapolating the extent of plaintiffs' exposure was sufficiently supported by sound methodology and underlying data. The appellate court found the trial court failed to perform its gatekeeping function and erred in allowing the jury to hear the experts' "unsupported" theories. The Appellate Division reversed the jury award of \$37,300,000 in compensatory damages and \$186,500,000 in punitive damages and remanded the matter for a new trial.

In support of plaintiffs' claims that their long-term use of defendants' talcum powder products had caused their mesothelioma, they sought to introduce three expert witnesses at the time of trial: James Webber, Ph.D, Jacqueline M. Moline, M.D., and William E. Longo, Ph.D. Drs. Webber and Moline would testify that "non-asbestiform versions of the six asbestiform minerals, called 'cleavage fragments,' could cause mesothelioma" in an effort to satisfy the plaintiffs' showing of general causation,

while Dr. Longo's testimony would be offered to show specific causation, by extrapolating the plaintiffs' overall exposure and dose from certain evidence regarding their use of defendants' talc products, i.e., number of applications, amount of talc used, concentration of asbestos, etc.

Defendants moved *in limine* to exclude these opinions and requested hearings under New Jersey Rules of Evidence 104²; however, the trial court denied the motions, declining to hold the preliminary hearings, and permitted the jury to hear the testimony of these experts.

On appeal, the defendants argued that the trial court erred in admitting the expert testimony, specifically, that the trial court abused its discretion in denying the N.J.R.E. 104 hearings "because the testimony of Webber, Moline and Longo was "unreliable, not supported by generally accepted methodologies, and unsupported by the facts in the record," and further that the trial court failed to follow the necessary process in failing to "make sufficient findings . . . to justify its decision to admit the expert opinions."³ Relying on the New Jersey Supreme Court's standard in In re Accutane Litigation⁴ and the Appellate Division's prior application of that standard to the asbestos context in Lanzo v. Cyprus Amax Minerals

¹ Nos. A-0047-20 *et seq.*, 2023 N.J. Super. Unpub. LEXIS 1624 (N.J. Super. Ct. App. Div., Oct. 3, 2023). The trial court consolidated four cases for trial.

² Under N.J.R.E 104, "[t]he court shall decide any preliminary question about whether a witness is

qualified, a privilege exists, or evidence is admissible."

³ Barden, op. at 7, 2023 N.J. Super. Unpub. LEXIS 1624 at *5.

⁴ 234 N.J. 340, 388 (2018).

Co.⁵ the Appellate Division agreed with the defendants and found that the trial court's admission of the expert testimony was not harmless error as "the trial court misapplied the well-established judicial gatekeeping procedures."⁶

The Barden court reiterated the contours of the trial court's rigorous gatekeeping role explained by the Supreme Court in Accutane:

Importantly, the Accutane Court touched on an important distinction when a court is charged with determining whether to admit expert testimony: a trial court is tasked with making legal determinations about the reliability of an expert's methodology, which is not to be confused with a credibility determination in the province of the jury. Id. at 388. As a result, the Accutane Court "clarif[ied] and reinforce[d] the proper role for the trial court as the gatekeeper of expert witness testimony." Id. at 389. It instructed the trial courts "to assess both the methodology used by the expert to arrive at an opinion and the underlying data used in the formation of the opinion." Id. at 396-97. This "rigorous" role is critical because the court's gatekeeping function prevents the jury from exposure to unsound science that is labeled expert or scientific. Id. at 390.⁷

In summary, the Appellate Division in Barden, relying on the rationale in Accutane, found that "the proposed expert's testimony should be excluded when it does not satisfy our Court's standards for a sound methodology and the reasonable reliance on the type of data and information used by other experts in the field."⁸ Therefore, "when an expert's opinion lacks the requisite foundation, it is an inadmissible net opinion or a bare opinion that has no support in factual evidence or similar data."⁹ Reiterating Lanzo, the Barden court observed "a trial court's failure to perform its gatekeeping function by allowing experts to testify concerning untested opinions is error clearly capable of producing an unjust result,"¹⁰ and found comparable deficiencies in the expert evidence and the trial court's failure to properly assess it.

Turning to the substance of the expert testimony at issue, first, Dr. James Webber opined that non-asbestiform cleavage fragments cause cancer.¹¹ Such theory would have the effect of expanding a causal link to mesothelioma to types of fibers other than just asbestos. The question is whether this theory is supported by science.

Dr. Webber cited a "limited number of publications," but failed to identify the pertinent data and explain how they supported his theory. For example, Dr.

⁵ 467 N.J. Super. 476, 504-18 (App. Div. 2021).

⁶ Barden, op. at 8, 2023 N.J. Super. Unpub. LEXIS 1624 at *5.

⁷ Id. at 9-10, 2023 N.J. Super. Unpub. LEXIS 1624 at *7.

⁸ Id. at 12, 2023 N.J. Super. Unpub. LEXIS 1624 at *9.

⁹ Id.

¹⁰ Id. at 8, 2023 N.J. Super. Unpub. LEXIS 1624 at *6 (citing Lanzo, 467 N.J. Super. at 517-18).

¹¹ Id. at 12-17, 2023 N.J. Super. Unpub. LEXIS 1624 at *10-15.

Webber generally relied on an article, “Surface Charge Measurements of Amphibole Cleavage Fragments and Fibers,” published by the Bureau of Mines in 1980, but he “did not discuss the details of the publication, the parameters of the study, or any of the scientific analysis.”¹² Dr. Webber’s next resource was a United States Geological Survey entitled “Mineralogy and Morphology of Amphiboles Observed in Soils and Rocks in El Dorado Hills, California” from 2006. He drew the conclusion, without discussing the details of the publication or studies, that “when a person is trying to define asbestos in environmental terms, an analysis must look at the aspects of fibers that are pertinent to human health.”¹³ Dr. Webber also relied upon a United States Environmental Protection Agency (EPA) Region 9 report from 2006 when forming his conclusion that the EPA made no distinction between fibers and cleavage fragments of comparable chemical composition, size, and shape, but merely selected a few sentences from the report without detailed analysis.¹⁴ Another article relied upon was not peer-reviewed.

Overall, the Appellate Division observed, “When citing to a limited number of publications, Webber failed to identify the data he used to form his opinion and did not discuss how the authorities he relied upon provided comparable data from other

experts in the same field. Rather he only generally stated, without explanation or discussion, that the sources he relied upon were similarly relied upon by other unspecified experts.”¹⁵

Thus, “the trial court failed to perform its gatekeeping role in “assessing the underlying reasonableness of Webber’s methodology and underlying data in forming his opinion.”¹⁶ The Appellate Division criticized the trial court for failing to make a legal determination about the reliability of Dr. Webber’s methodology – that methodology seeming to consist of cherry-picking statements from a handful of references – and thereby allowing the jury to hear “unsound science labeled as expert and scientific.”¹⁷ As the Appellate Division reinforced, the matter of sound scientific methodology should not simply be deferred as a determination of credibility or weight of the evidence.

Plaintiffs’ second expert, Dr. Jacqueline Moline, similarly testified that non-asbestiform cleavage fragments and asbestiform fibers have the same health effects and defendants’ products caused plaintiffs’ mesothelioma.

Dr. Moline relied on a 2019 article from the Finnish Institute of Occupational Health to support her definition of asbestos as being

¹² *Id.* at 14-15, 2023 N.J. Super. Unpub. LEXIS 1624 at *12.

¹³ *Id.* at 15, 2023 N.J. Super. Unpub. LEXIS 1624 at *12-13.

¹⁴ *Id.* at 16, 2023 N.J. Super. Unpub. LEXIS 1624 at *13-14.

¹⁵ *Id.* at 20, 2023 N.J. Super. Unpub. LEXIS 1624 at *18

¹⁶ *Id.*

¹⁷ *Id.* at 21, 2023 N.J. Super. Unpub. LEXIS 1624 at *20.

“any particle that has a minimum ‘length to thickness ratio’ of 3:1” and broadly posited that from an occupational medicine and public health point of view, fibers that are longer than they are wide are hazardous, cause cancer, and lead to pulmonary diseases.¹⁸ Dr. Moline also relied on an article entitled “Asbestos in commercial cosmetic talcum powder as a cause of mesothelioma in women” from 2014 to support her conclusion that exposure to talc, including defendants’ talc, can cause mesothelioma; however, she did not provide the details of the study or its underlying data.¹⁹ Dr. Moline further testified she reviewed “papers” which indicate that asbestos can become airborne when using talcum powders, but she likewise failed to explain the details or specifics of these studies, offering only general references to the papers without describing the specific parameters of the studies to support her conclusion that “billions of particles of asbestos can become airborne when small amounts of talcum powder were used.”²⁰

The appellate court found that the trial court failed to assess Dr. Moline’s methodology and underlying data used to form her opinions, and in doing so, failed to perform its gatekeeping function.²¹ In citing to

examples, the Appellate Division pointed out that Dr. Moline failed to support her claims that there had been published literature and studies to form the basis for her conclusions that non-asbestiform amphiboles cause mesothelioma. Furthermore, the Appellate Division found that Dr. Moline’s unsupported theory about cleavage fragments could unfairly bolster plaintiffs’ claims when considered with Dr. Longo’s extrapolation of plaintiffs’ talc exposure by making it appear that the source load calculated by Dr. Longo was comprised entirely of cancer-causing fibers, though a proper foundation was not established for such a presumption.²²

Shifting to plaintiffs’ burden to show specific causation, a third expert witness, Dr. William E. Longo, provided testimony regarding exposure calculations, which purported to extrapolate lifetime exposure from the number of ten-ounce containers of defendants’ products that each plaintiff used in their lifetime.²³ In reaching his calculations, he reviewed plaintiffs’ deposition testimony about their use of the Johnson & Johnson products, the number of times they used the product each day, and the length of time the products were used. He relied upon Johnson & Johnson’s studies

¹⁸ *Id.* at 24, 2023 N.J. Super. Unpub. LEXIS 1624 at *22-23.

¹⁹ *Id.* at 24-25, 2023 N.J. Super. Unpub. LEXIS 1624 at *23.

²⁰ *Id.* at 25, 2023 N.J. Super. Unpub. LEXIS 1624 at *23-24.

²¹ *Id.* at 27, 2023 N.J. Super. Unpub. LEXIS 1624 at *26.

²² *Id.* at 29, 2023 N.J. Super. Unpub. LEXIS 1624 at *28-29 (“[H]er testimony bolstered plaintiffs’ claims

that they could have been exposed to substances that caused their mesothelioma. What is more, the jury could associate Moline’s statements with Longo’s testimony to conclude that all fibers could cause mesothelioma if either asbestiform fiber particles or fiber-shaped non-asbestiform cleavage fragments can cause cancer.”).

²³ *Id.* at 30-32, 2023 N.J. Super. Unpub. LEXIS 1624 at *29-31.

that each person used about eight grams per application. After arriving at the number of times the plaintiff used the product, Dr. Longo used certain presumptions that the talc used came from certain mines and presumed a concentration of asbestos from a sample of defendants' product purchased from eBay to conclude that each plaintiff had "substantial" exposure to asbestos from defendants' products.

While such attempt to "quantify" exposure and dose is ostensibly proper – the dose makes the poison – any extrapolation requires careful scrutiny of the methodology employed. Not long ago, the New York Court of Appeals, in Nemeth v. Brenntag North Am., Inc., reinforced that exposure and dose needed to be quantified and rejected the plaintiff's attempted simulation of asbestos exposure dues to "flaws" in the test, noting that "[t]he requirement that plaintiff establish, using expert testimony based on *generally accepted methodologies*, sufficient exposure to a toxin to cause the claimed illness."²⁴

In Barden, the Appellate Division found that it was an error to permit Dr. Longo's extrapolation testimony without holding a N.J.R.E. 104 hearing and applying the standards of Accutane and Daubert to conclude that Longo's methods were "based

on "a sound, scientific methodology involving data reasonably relied upon by experts in the scientific field . . . had been tested, subjected to peer review or publication, subjected to standards for controlling the technique, or accepted in the scientific community."²⁵

Thus, the admission of the expert testimony on the critical causation issues via the trial court's failure to satisfy its gatekeeping role required reversal.

While we can expect to see plaintiffs' counsel continue to rely upon the "scientific opinions" of these purported experts given how persuasive the testimony can be to a jury – and the wide latitude they have been given to testify in the past, it is positive to see the New Jersey state court make it harder to swing open the gate, as the New York State courts have suggested and the soon-to-be-effective Rule 702 amendments would likewise be contemplated to do.

²⁴ Nemeth v. Brenntag North Am., Inc., 38 N.Y.3d 336, 347 (2022) (emphasis added). As a subsequent decision explained, Nemeth did not reject the notion of exposure modeling, but reiterated it must employ appropriate, accepted methodology. See Dyer v. Amchem Prods. Inc., 207 A.D.3d 412 (1st Dep't 2022) ("[E]xposure simulation studies must account for the

amount of respirable asbestos fibers released from the toxic product . . . Simply quantifying the magnitude of asbestos fibers released into the environment is insufficient.").

²⁵ Barden, op. at 32-33, 2023 N.J. Super. Unpub. LEXIS 1624 at *32.

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