# *McElroy v. Colgate Palmolive Co.*

United States District Court for the Eastern District of North Carolina, Western Division

September 14, 2023, Filed

NO. 5:21-CV-179-FL

**Reporter**
2023 U.S. Dist. LEXIS 198250 *

PATRICIA MCELROY and STEPHEN MCELROY, Plaintiffs, v. COLGATE PALMOLIVE COMPANY; JOHNSON & JOHNSON; and JOHNSON Consumer, INC., f/k/a Johnson & Johnson Companies, Inc., Defendants.



## Core Terms

asbestos, talc, exposure, tested, talcum powder, mesothelioma, contaminated, summary judgment, amphibole, causation, tremolite, products, containers, minerals, samples, expert testimony, plaintiffs', pumps, reliability, chrysotile, cosmetic, detailing, proffered, reporting, Consumer, detected, genuine, defense motion, small amount, speculation

## Opinion

**[*1]** ORDER

This matter1 is before the court on defendant Colgate-Palmolive Company's motions to

exclude expert testimony by William M. Ewing ("Ewing) pursuant to Federal Rules of Evidence

702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), (DE 108)*, and for

summary judgment, (DE 110), based upon inadequate exposure and causation evidence.2 The

issues have been briefed fully and in this posture are ripe for ruling. For the following reasons, defendant's motions are granted.

1 The court constructively amends the case caption to reflect dismissal of formerly named defendants. Claims against defendants Johnson & Johnson and Johnson & Johnson Consumer, Inc., are stayed pending bankruptcy proceedings, as explained in more detail herein. For purposes of this order, all references to "defendant" without qualification are to defendant Colgate-Palmolive Company, and all references to "stayed defendants" are to Johnson & Johnson and Johnson & Johnson Consumer, Inc.

2 Also pending is defendant's motion to exclude expert testimony by William Longo ("Longo"), (see DE 118), which motion the court does not reach as Longo's testimony does not create a material issue of fact as to exposure or causation.

**STATEMENT OF THE CASE**

Plaintiffs Patricia McElroy and her husband, **[*2]** Stephen McElroy, commenced this action April 20, 2021, after Patricia McElroy was diagnosed with mesothelioma March 12, 2021. In the operative amended complaint, filed July 7, 2021, plaintiffs allege Patricia McElroy's mesothelioma developed because of her wrongful exposure to asbestos through asbestos-containing products, which products include telephone wires, cables, soldering pads, and beauty products, particularly talcum powder of varying brands. Relevant to the instant motions, plaintiffs allege defendant developed, manufactured, marketed, and distributed Cashmere Bouquet talcum powder products, Patricia McElroy's daily use of which over the course of a decade caused her to inhale mesothelioma-causing asbestos fibers. Plaintiffs assert causes of action based upon negligence; product liability issues including inadequate design, formulation, and manufacture; breach of implied warranty; willful and wanton conduct; and failure to warn. Plaintiffs seek compensatory and punitive damages.

In July and August of 2021, plaintiffs stipulated to dismissal of defendants AT&T Corporation, Brenntag North America, Inc., and Nokia of America Corporation.3 On October 18, 2021, stayed defendants **[*3]** noticed the court that LTL Management, LLC ("LTL"), with whom they share an identity of interest, filed a voluntary Chapter 11 bankruptcy proceeding, and the automatic stay provision of *11 U.S.C. § 362* applied. In supplement to their notice, stayed defendants explained United States Bankruptcy Court for the Western District of North Carolina, Charlotte Division, granted LTL's motion to preliminarily enjoin all talc-related claims against LTL and certain non-debtor affiliates, including stayed defendants. Following transfer of the bankruptcy proceeding, United States Bankruptcy Court for the District of New Jersey extended that

3 Plaintiffs' filing of their amended complaint on July 7, 2021, also resulted in termination of formerly-named defendant Johnson Consumer, Inc. f/k/a Johnson & Johnson Companies, Inc.



injunction. A stay of claims against Johnson & Johnson and Johnson & Johnson Consumer, Inc. remains in effect, with their last status report jointly filed March 2, 2022.

On July 22, 2022, the court granted joint motions to dismiss without prejudice plaintiffs' claims against defendants Pfizer Inc., Specialty Minerals, Inc., and Whittaker Clark & Daniels, Inc. The court granted the same with respect **[*4]** to plaintiff's claims against defendant Estee Lauder, Inc. November 23, 2022. Approximately two months later, plaintiffs noticed the court of voluntary dismissal of defendant Brenntag Specialties, Inc.

Defendant moves to exclude testimony by Ewing with reliance upon the following: 1) Ewing's expert reports, 2) Ewing's testimony in the instant and in other lawsuits, 3) an article detailing findings of asbestos in commercial cosmetic talcum powder, 4) testimony by two authors of that article, and 5) Patricia McElroy's March 25, 2021, health record. Plaintiffs responded in opposition, also relying upon Ewing's testimony and his July 21, 2022, expert report, in addition to summary of the materials Ewing consulted to produce that report, his curriculum vitae, and testimony by Patricia McElroy.

Defendant also moves to exclude testimony by Longo, relying upon: 1) Longo's expert report; 2) his declaration and testimony in the instant and in earlier lawsuits; 3) Longo's reports detailing his tests of Cashmere Bouquet for asbestos; 4) a report prepared by the Colorado School of Mines ("CSM") describing a process for separating talcum powder from chrysotile asbestos using a process called heavy **[*5]** liquid separation; 5) materials by the International Organization for Standardization specifying procedures for collection of samples and qualitative analysis of commercial bulk materials for the presence of asbestos, upon which Longo relied; 6) the Occupational Safety and Health Administration's amendment to its standard for regulating



occupational exposure to asbestos; 7) materials regarding methods for asbestos detection; and 8) transcripts of hearings and decisions by other courts on motions to exclude Longo's testimony.

Plaintiffs responded in opposition, with reliance upon some of the same materials, in addition to: 1) Patricia McElroy's deposition, 2) Longo's curriculum vitae, 3) reports detailing methods for detection of asbestos, 4) reports detailing findings of asbestos, 5) articles regarding asbestos and its effects, 6) chain of custody documentation, 7) reports to Johnson & Johnson, and 8) a press release on health risks of carcinogens in consumer products.

Defendant also moves for summary judgment. Both sides rely upon multiple categories of evidence in support of their respective positions, comprising in relevant part: 1) expert reports and testimony; 2) testimony by Patricia **[*6]** McElroy and defendant's representative, as well as testimony by defendant's representatives in prior lawsuits; 3) interrogatories produced in prior lawsuits; 4) reports on the composition of talc generally and Cashmere Bouquet specifically, discussed in detail in the court's analysis herein; 5) articles concerning mesothelioma and its relation to talcum powder; 6) geological studies, particularly of the talc deposits in Italian mines; 7) communications between Walter C. McCrone Associates ("McCrone"), an external testing company, and defendant; 8) lab entries by defendant concerning internal testing of Cashmere Bouquet; 9) progress reports drafted for Johnson & Johnson regarding talc mines; and 10) studies of the mortality rates of talc miners and millers.4

**STATEMENT OF UNDISPUTED FACTS**

4 Defendant also moved for partial summary judgment

on plaintiffs' claims for punitive damages, which was resolved by consent motion to dismiss those claims against defendant with prejudice.

4

The undisputed facts may be summarized as follows.5 Patricia McElroy was diagnosed with mesothelioma on or about March 12, 2021, which she alleges was caused by exposure to asbestos containing products, including **[*7]** Cashmere Bouquet. (Def. Stmt. (DE 112) ¶¶ 1-2). Cashmere Bouquet is a talcum-based body powder. (See id. ¶¶ 4-5, 16). Patricia McElroy transitioned to Cashmere Bouquet from Johnson & Johnson baby powder at age ten or eleven in 1956 or 1957, and used it regularly until her first wedding anniversary, approximately a decade later. (Id. ¶¶ 4-5, 9). Thereafter she recalls using other body powders including by Estee Lauder, Avon, and Gold Bond. (Id. ¶¶ 9, 11).

Patricia McElroy did not purchase Cashmere Bouquet herself, but rather received it from her mother on an "as needed basis." (Pl. Dep. (DE 128-1) 228:7-10, 231:3-6). She does not recall how long she would use a single container of Cashmere Bouquet before it would become empty. (Def. Stmt. (DE 112) ¶ 15). Patricia McElroy does not have any Cashmere Bouquet talcum powder that she used still in her possession, and she does not know if any of it contained asbestos. (Id. ¶¶ 16-17).

Defendant manufactured and sold Cashmere Bouquet talcum powder beginning in the 1870s and until 1995 when Colgate sold its rights to the product line. (Id. ¶ 18). Cashmere Bouquet was formulated to contain talcum powder, small amounts of perfume, and anti-caking **[*8]** and anti-bacterial agents. (Id. ¶ 20). During the time Patricia McElroy used Cashmere Bouquet, its talc was sourced from talc deposits in Val Charonian Germanesca, Italy. (Id. ¶ 22).

Talc is not asbestos. (Id. ¶ 21). It can, however, be contaminated with asbestos. (See,e.g., Capdeville Testimony (DE 128-5) at 656:14-657:11). Beginning in the 1970s, there existed

5 Pursuant to Local Rule 56.1(a)(2), the court cites to paragraphs in the parties' statements of facts, or portions of such paragraphs, where not "specifically controverted by a correspondingly numbered paragraph in the opposing statement."

5

reports raising "concerns about the potential for asbestos contamination in some cosmetic talcum powder." (Def. Stmt. (DE 112) ¶ 23). Defendant then began testing "the talc used in Cashmere Bouquet for the presence of amphibole or serpentine minerals, which are the minerals capable of forming asbestos," by x-ray diffraction. (Id. ¶ 28). No later than 1974, defendant hired McCrone to perform testing by transmission electron microscopy. (Id. ¶ 33). Several of the tests McCrone performed were "positive" for the presence of asbestos. (Id. ¶ 35).

**COURT'S DISCUSSION**

A. Motion to Exclude

1. Standard of Review

Federal Rule of Evidence 702 governs the **[*9]** admissibility of expert opinion testimony. Under Rule 702, expert testimony is appropriate when "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." *Fed. R. Evid. 702*. A witness qualified as an expert may be permitted to testify where "(b) the testimony is based upon sufficient facts or data, (c) the testimony is the product of reliable principles and methods, and (d) the expert has reliably applied the principles and methods to the facts of the case." Id.

Federal Rule of Evidence 702 imposes a "basic gatekeeping obligation" upon a trial judge to "ensure that any and all scientific testimony is not only relevant, but reliable." *Kumho Tire Co.v. Carmichael, 526 U.S. 137, 147 (1999)*; *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993)*.6 "The proponent of the testimony must establish its admissibility by a preponderance of proof." *Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001)*.

6 Internal citations and quotation marks are omitted from all citations unless otherwise specified.

6

"[R]elevance - or what has been called 'fit' - is a precondition for the admissibility of expert testimony, in that the rules of evidence require expert opinions to assist the 'the trier of fact to understand the evidence or to determine a fact in issue.'" *United States v. Ancient CoinCollectors Guild, 899 F.3d 295, 318 (4th Cir. 2018)*. A key "aspect of relevancy . . . is whether expert **[*10]** testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a

factual dispute." *Daubert, 509 U.S. at 591* (internal quotations omitted).

The reliability inquiry is a "flexible one focusing on the principles and methodology employed by the expert, not on the conclusions reached." *Westberry v. Gislaved Gummi AB, 178 F.3d 257, 261 (4th Cir. 1999)*. One factor pertinent to reliability is the proposed expert's qualifications. See *Thomas J. Kline, Inc. v. Lorillard, Inc., 878 F.2d 791, 799 (4th Cir. 1989)*. A witness may qualify to render expert opinions in any one of the five ways listed in Rule 702: knowledge, skill, experience, training, or education. *Kumho Tire, 526 U.S. at 147*. When an expert's qualifications are challenged, "'the test for exclusion is a strict one, and the purported expert must have neither satisfactory knowledge, skill, experience, training nor education on the issue for which the opinion is proffered.'" Kopf v. Skyrm, 993 F.2d 374, 377 (4th Cir. 1993).

In assessing whether expert testimony is "reliable," the court considers additional factors besides the expert's qualifications. These include:

(1) whether a theory or technique can be (and has been) tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards **[*11]** controlling the techniques' operation; and (5) whether the technique has received general acceptance within the relevant scientific or expert community.

*United States v. Crisp, 324 F.3d 261, 266 (4th Cir. 2003)*. These factors are "neither definitive, nor exhaustive," and "particular factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Cooper, 259 F.3d at 199-200*. "[T]he court has broad latitude to consider whatever 7

factors bearing on validity that the court finds to be useful[,] . . . depend[ing] upon the unique circumstances of the expert testimony involved." *Westberry, 178 F.3d at 261*.

Of course, the admission of expert testimony must be considered within the context of the other rules of evidence. In particular, Rule 403 provides that the court must ensure that the probative value of any proffered evidence is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Fed. R. Evid. 403*. As this court has noted, "[d]espite the court's ability to exercise broad discretion and flexibility when determining the admissibility of expert testimony, the **[*12]** court must balance this discretion with the concerns of Rule 403 to ensure that the probative value of the proffered testimony is not 'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Bouygues Telecom, S.A. v. Tekelec, 472 F. Supp. 2d 722, 725 (E.D.N.C. 2007)* (quoting *Fed. R. Evid. 403*).

2. Analysis

Ewing is a certified industrial hygienist. (Ewing Report (DE 109-2) at 2). "Industrial hygiene is the field of identification, evaluation and control of occupational and environmental health hazards." (Id.). Ewing has practiced in the field for 43 years, "with the emphasis on asbestos exposures in facilities." (Id.). In the instant action, Ewing intends to testify as to the occurrence of asbestos contaminated talc generally, as well as regarding Patricia McElroy's "airborne exposures resulting from application of cosmetic talc contaminated with anthophyllite asbestos and tremolite asbestos." (Id. at 4-5).

Defendant does not challenge Ewing's qualifications. Indeed, though its motion is stylized as one to exclude Ewing entirely, defendant only asserts arguments objecting to the latter part of

8

Ewing's proffered testimony, contending it is premised upon unsupported speculation and conjecture. So construed, the court agrees.

Ewing's **[*13]** opinion regarding Patricia McElroy's actual exposure to airborne asbestos through use of defendant's product is based upon an article by Ronald E. Gordon, Sean Fitzgerald, and James Millett titled "Asbestos in Commercial Cosmetic Talcum Powder as a Cause of Mesothelioma in Women," (hereinafter, "Gordon article"). (See id. at 6 n.13 (citing Gordon article); see Gordon article (DE 109-4)). The Gordon article reports testing approximately 50 containers of "one historic brand of cosmetic talcum powder," where the containers were produced over a 50-year time span. (Gordon article (DE 109-4) at 1-2). It concludes that the brand tested "contained asbestos and the application of talcum powder released inhalable asbestos fibers,"

which exposure is in turn a "causative factor in the development of ovarian carcinomas, gynecological tumors, and mesothelioma." (Id.).

In the instant action, Ewing proffers testimony that "[a]ssuming the amphibole asbestos content in the talcum powder used by [Patricia] McElroy had a similar amphibole asbestos content as the talcum powder used in the [Gordon article], it may reasonably be concluded that [Patricia] McElroy had similar exposures when she applied the **[*14]** talcum powder to her body." (Ewing Report (DE 109-2) at 2). Said differently, Ewing intends to extrapolate from the findings in the article the fact of exposure and causation, providing that if the Cashmere Bouquet Patricia McElroy used over the course of ten years had similar levels of contamination as that found in the 50 containers tested in the Gordon report, Patricia McElroy was exposed to asbestos on comparable levels. (See Ewing Dep. (DE 109-3) at 80:7-13, 87:14-25, 88:1-24, 89:7-13).

The findings of the Gordon article are thus essential to Ewing's testimony regarding exposure and causation. Ewing, however, was unable to testify regarding the origin of the

9

containers tested by the authors of the Gordon article, (Ewing Dep. (DE 109-3) at 94:25, 95:1-7); did not know the time of manufacture of any of the containers, (id. at 109:16-23); could not comment on whether and how the article was peer reviewed, (id. at 99:9-13); and was unaware of the methodology employed by its authors, (id. at 106:7-12). Tellingly, even when questioned how he knew that the product studied by the authors, identified in the article only as "one historic brand of cosmetic talcum powder," was in fact Cashmere **[*15]** Bouquet, Ewing reported "that's what [he] was told." (Id. at 94:4-13).

Where the Gordon article serves as the foundation of Ewing's exposure and causation testimony, these information gaps are determinative of the reliability inquiry. *Kumho Tire Co., 526 U.S. at 147*. Plaintiffs have failed to establish the reliability of Ewing's testimony regarding Patricia McElroy's "airborne exposures resulting from application of cosmetic talc contaminated with anthophyllite asbestos and tremolite asbestos." (Id. at 4-5). Ewing's testimony so delineated is accordingly excluded under Rule 702. *Fed. R. Evid. 702*. In addition, and in the alternative, the court excludes it as substantially more prejudicial than probative under Rule 403. *Fed. R. Evid. 403*.

B. Defendant's Motion for Summary Judgment

1. Standard of Review

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)*.

10

Once the moving party has met its burden, **[*16]** the non-moving party must then "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co.Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)*. Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)* (holding that a factual dispute is "material" only if it might affect the outcome of the suit and "genuine" only if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party).

"[A]t the summary judgment stage the [court's] function is not [itself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id. at 249*. In determining whether there is a genuine issue for trial, "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [non-movant's] favor." *Id. at 255*; see *United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)* ("On summary judgment the inferences to be drawn from the underlying facts contained in [affidavits, attached exhibits, and depositions] must be viewed in the light most favorable to the party opposing the motion.").

Nevertheless, "permissible inferences must still be within the range of reasonable probability, . . . and it is the duty of the **[*17]** court to withdraw the case from the [factfinder] when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." *Lovelacev. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982)*. Thus, judgment as a matter of law is warranted where "the verdict in favor of the non-moving

party would necessarily be based on speculation and conjecture." *Myrick v. Prime Ins. Syndicate, Inc., 395 F.3d 485, 489 (4th Cir. 2005)*. By contrast, when "the evidence as a whole is susceptible of more than one reasonable

11

inference, a [triable] issue is created," and judgment as a matter of law should be denied. *Id. at 489-90*.

2. Analysis

Defendant challenges plaintiffs' evidence of exposure and causation as to all causes of

action.

To establish liability for asbestos exposure, a plaintiff in a common law products liability case must demonstrate that she was in fact exposed to defendant's product containing asbestos. Wilder v. Amatex Corp., 314 N.C. 550, 553-54 (N.C. 1985).7 The evidence also must establish exposure "on a regular basis over some extended period of time in proximity to [plaintiff]," (hereinafter, "the *Lohrman* test"). *Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-63 (4th Cir. 1986)* (applying Maryland law); see *Jones v. Owens-Corning Fiberglas Corp. &Amchem Prods., Inc., 69 F.3d 712, 716 n.2 (4th Cir. 1995)* (applying *Lohrmann* where North Carolina law governed); Haislip v. Owens-Corning Fiberglas Corp., No. 95-1687, 1996 WL 273686 (4th Cir. May 23, 1996) (same). To meet this evidentiary burden "proof of causation must be such as to suggest probability rather than mere possibility," **[*18]** so as to "guard against raw speculation by the fact finder." *Sakaria v. Trans World Airlines, 8 F.3d 164, 172-73 (4th Cir. 1993)*.

The parties proffer voluminous evidence in support of their competing positions regarding the presence of asbestos in talc and talc mines, generally; asbestos in talc mines harvested for the

7 A district court exercising diversity jurisdiction must apply the choice-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg . Co., 313 U.S. 487, 496-97 (1941)*. "In tort actions, North Carolina courts adhere to the rule of lex loci and apply the substantive laws of the state in which the injuries were sustained." *Johnson v.Holiday Inn of Am., Inc., 895 F. Supp. 97, 98 (M.D.N.C. 1995)*; Boudreau v. Baughman, 322 N.C. 331, 335 (N.C. 1988) ("This Court has consistently adhered to the lex loci rule in tort actions."). Patricia McElroy's mesothelioma diagnosis occurred in North Carolina and the parties agree that North Carolina law applies. Accordingly, the court will apply North Carolina's substantive law.

12

talc used in Cashmere Bouquet, specifically; and tests regarding specific samples of packaged Cashmere Bouquet. To survive summary judgment, however, plaintiffs must present evidence that Patricia McElroy was in proximity to Cashmere Bouquet contaminated with asbestos and was so exposed "on a regular basis over some extended period of time." *Lohrmann, 782 F.2d at 1162-63*. Defendant **[*19]** in its motion for summary judgment contends plaintiffs have not done so. The court agrees.

Plaintiffs cite to progress reports, written to another defendant in this case, Johnson & Johnson, regarding talc mines, with emphasis on Italian talc mines, which region also was harvested for the talc used in Cashmere Bouquet. As an initial matter, plaintiffs do not point to specific portions of these lengthy reports that support plaintiffs' claims of exposure to asbestos from Cashmere Bouquet. See *Albrechtsen v. Bd. of Regents of Univ. of Wis. Sys., 309 F.3d 433, 436 (7th Cir. 2002)* ("[A]n invitation to search without guidance is no more useful than a litigant's request to a district court at the summary judgment stage to paw through the assembled discovery material."). Having nevertheless reviewed the reports, however, the court determines that they include identification of "contaminants" in the talc, including trace or small amounts of asbestos, such as tremolite. (See, e.g., Exhibit 24 (128-27) at 12, 15, 19; Exhibit 25 (DE 128-28) at 10, 11, 19, 21, 30; Exhibit 27 (DE 128-30) at 15; Exhibit 29 (DE 128-32) at 28, 31, 33, 34; Exhibit 30 (DE 128-33) at 19; Exhibit 31 (DE 123-34) at 3).

For instance, a report titled "Progress Report on Further Studies on the Measurement and **[*20]** Correlation of the Physical Properties of Talc to Johnson and Johnson" dated May 9, 1958, provides:

The Italian No. 1 talc contains from less than 1 per cent to about 3 per cent of contaminants. The contamination is natural and consists mostly of carbonate with minor amphibole and rare accessory minerals. The carbonate component has been identified petrographically as primarily dolomite [] plus a minor amount of

13

probable magnesite []. No calcite [] was identified. The amphibole component has been established to be the variety tremolite[.]

(Exhibit 25 (DE 128-28) at 9) (emphasis added).8 Plaintiffs also cite various letters, such as one dated December 8, 1972, detailing findings from "X-Ray diffraction" and "TEM work," including that tremolite was detected in trace amounts. (Exhibit 41 (DE 128-44) (a letter to a Mr. J. E. Clements from Mr. H.D. Stanley titled "Asbestos in Talc")).

Viewing this evidence in the light most favorable to plaintiff, it establishes that some talc from the Italian talc mines was contaminated with small amounts of asbestos. Namely, though "[t]he Italian talc contain[ed] from about 97 to more than 99 per cent pure mineral talc," the remaining percentage was comprised **[*21]** of "contaminants." (Exhibit 23 (DE 128-26) at 10). "Among other contaminants, present in trace amounts," was amphibole asbestos. (Id.; see also Exhibit 43 (DE 128-46) at 4 ("It appears that in practically all good cosmetic talc powders the level of amphibole asbestos contamination is negligible.") (emphasis added)).

With respect to independent product testing, plaintiff's evidence includes the following:

a. A laboratory notebook belonging to defendant dated March 11, 1976, reporting positive identification of asbestos, (Exhibit 16 (DE 128-19) at 2), and another dated March 25, 1976, reporting the asbestos was "slightly indicate[d]," and further "confirmation" was needed, (Exhibit 7 (DE 128-8) at 2);

b. Testimony by defendant's representative in prior trial proceedings regarding documents and letters reporting positive tests for asbestos by defendant's external testing company, McCrone, including the following:

i. Test results from 1974 reporting asbestos in a sample from a mine Colgate used, and indication that McCrone also found asbestos in a finished Cashmere Bouquet talcum product that same year (Exhibit 4 (DE 128-5) 696:12-697:24);

8 Amphibole minerals are minerals capable of forming **[*22]** asbestos. (Def. Stmt. (DE 112) ¶ 28). Tremolite is a type of amphibole asbestos. (See id. ¶ 26).

14

ii. Detection of asbestos in all samples "designated 516, Cashmere Bouquet, at N.C. Regal" in a letter dated February 5, 1974, (Exhibit 8 (128-9) at 122:1-124:22);

iii. Correspondence with a defendant employee dated December 10, 1974, reporting that McCrone had analyzed three samples of Talc and one sample "contained two fibers of amphibole, which we believe to be tremolite," (id. at 125:14-131:19);

iv. Reporting that a sample of talc designated 4915, a "finished product," and dated November 1, 1976, had "one fiber of tremolite," but providing that upon further examination of the sample "no other tremolite" was found and the fiber found "may well just be stray contamination," (Exhibit 4 (DE 128-5) 868:1-869:12);

v. A letter dated November 16, 1977, providing a sample designated "Talc 1615" contained a "small amount of tremolite," (Exhibit 8 (128-9) at 134:24-135:25);

vi. Notification of a talc sample from a mine used by defendant testing positive for "less than .1 percent by weight" of chrysotile asbestos on March 16, 1981, (id. at 146:1-20);

vii. A letter dated July 26, 1983, reporting that **[*23]** a sample of talc sent by defendant "was found to contain a very low level of chrysotile asbestos," (id. at 148:8-149:20);

viii. An October 27, 1983, letter stating, "three of the samples were tested by transmission electron microscopy" and "chrysotile asbestos was detected in all three samples," (id. at 156:1-20);

ix. April 27, 1984, report that asbestos was detected in three of six samples sent by defendant, some of which included "finished products," (id. at 164:6-167:1);

c. "[A]nalytical results on the mineral compositions of 102 examples of standard, commercial products containing talc" by Seymour Lewin ("Lewin"), a professor at New York University, showing "59 of the products have no detectable amounts of any of the asbestiform minerals (by the technique employed, proportions by weight of 1-2% or less could escape detection), 20 had small but definite percentages of tremolite, 7 had small percentages of chrysotile, 9 had small percentages of both tremolite and chrysotile, and 7 had substantial percentages of one or both of these asbestiform minerals," (Exhibit 11 (DE 128-12) at 2);

15

d. Sample 81 of those 102 samples, which plaintiffs

allege was Cashmere Bouquet, contained 2% chrysotile **[*24]** asbestos, (id. at 6);

e. A March 1, 1976, memorandum detailing a call wherein Arthur Langer ("Langer") described results of an examination of "single grab samples" of "twenty brands of talcum powder" and reported the sample of Cashmere Bouquet was comprised of 20% asbestos, (Exhibit 15 (DE 128-18) at 2);

f. A deposition of Johns Hopkins in which a memorandum from March 30, 1976, detailing a phone call by Fred Pooley ("Pooley") is discussed, providing Pooley believed the sample of Cashmere Bouquet Body Powder Langer tested in fact had "4% amphibole," and Langer agreed with that revised percentage (Exhibit 17 (DE 128-20) at 1299:1-1300:4);

g. Results by Longo, who tested 38 containers of Cashmere Bouquet covering the time period from 1930 through 1975, and identified amphibole asbestos in 31 of the containers, (Exhibit 19 (DE 128-22) ¶¶ 39-43).9

In sum, "believ[ing]" plaintiffs' evidence, and drawing "all justifiable inferences" in plaintiffs' favor, it establishes that some containers of Cashmere Bouquet from 1930 through the 1970s contained low levels of asbestos. *Anderson, 477 U.S. at 255*.

However, showing that discrete, often individual, samples during the years in which Patricia McElroy used Cashmere Bouquet **[*25]** contained small amounts of asbestos does not create a triable issue of fact of exposure. In this regard, the court finds *Pace v. Air & Liquid Sys. Corp., 642 F. App'x 244 (4th Cir. 2016)* persuasive. There, plaintiff's husband, William L. Pace ("Pace"), was diagnosed with mesothelioma, which the plaintiff alleged was a result of "asbestos dust" Pace inhaled while working on "pumps, motors, and valves." *Id. at 246*. Plaintiff "introduced evidence showing that Pace worked in Shop 38 assembling pumps, and that some of the pumps in the shipyard contained asbestos." *Id. at 248*. Plaintiff also relied upon testimony that Pace worked

9 Longo additionally includes in his report opinions regarding the presence of chrysotile asbestos in Cashmere Bouquet based upon a novel methodology. Plaintiffs in opposition to defendant's motion to exclude testimony by Longo provide that they would include as evidence Longo's testimony and findings of chrysotile asbestos at trial, and accordingly that part of Longo's opinion is not here considered. (See Pls. Resp. (DE 125) at 1 n.3).

16

frequently on one brand of pumps in the shipyard, Crane Co. pumps, and introduced into the record "advertisements for Crane Co. products containing asbestos." *Id. at 249*. Applying the *Lohrman* test, under South Carolina law, **[*26]** the Fourth Circuit reasoned the record was clear "both asbestos-containing and non-asbestos-containing gaskets, packing, and insulation were used in connection with pumps in the shipyard." Id. With respect to Crane Co. pumps specifically, "the record establish[ed] that the company sold varieties of certain products with asbestos and varieties without." Id. (emphasis in original). The court reasoned that plaintiff accordingly had not shown "pumps that Pace might have worked on or near contained asbestos," and thus "failed to provide evidence supporting a reasonable inference that [pump] products were a substantial cause of Pace's mesothelioma." *Id. at 248-49*.

Just as the plaintiff in *Pace* introduced evidence that some of the pumps in the shipyard in which Pace worked contained asbestos, plaintiffs here have introduced evidence that some of the Cashmere Bouquets in circulation while Patricia McElroy used the product contained small amounts of asbestos. It does not follow, however, that Patricia McElroy was exposed to Cashmere Bouquet product containing asbestos. See Wilder, 314 N.C. at 553-54. And it certainly does not follow that she was exposed "on a regular basis over some extended period of time." **[*27]** *Lohrmann, 782 F.2d at 1162-63*. Rather, plaintiffs' evidence suggests only the possibility of exposure. *Sakaria, 8 F.3d at 172* ("[P]roof of causation must be such as to suggest probability rather than mere possibility."). To find liability, a jury would have to reason: (1) Cashmere Bouquet sometimes contains asbestos; (2) Patricia McElroy used Cashmere Bouquet; (3) asbestos causes mesothelioma; (4) Patricia McElroy contracted mesothelioma; and (5) therefore, Cashmere Bouquet caused Patricia McElroy's mesothelioma. The court cannot allow a finding of liability based upon such speculation. Id.; see *Slaughter v. S. Talc Co., 949 F.2d 167 (5th Cir. 1991)*

17

(reasoning that a study by Longo based upon small samples of talc from the factory in question did not create a triable issue of fact because "asbestos does not appear uniformly in talc and may not be present at all").10

Plaintiffs in opposition contend that the "extended period

of time" component of the *Lohrman* test is not applicable here as *Lohrman* considered causation with respect to asbestosis, as opposed to mesothelioma, and "epidemiological studies have found that even a[t] the lowest levels of asbestos exposure, there have been increases in the incidences of mesotheliomas." (Pl. Resp. (DE 126) at 23). First, the court concludes plaintiffs have failed **[*28]** to show actual exposure, see Wilder, 314 N.C. at 553-54, in addition to failing to show exposure on a regular basis and over an extended period of time, see *Lohrmann, 782 F.2d at 1162-63*. Additionally, "federal courts in North Carolina have routinely applied *Lohrmann*'s 'frequency, regularity, and proximity' test to evaluate proximate causation in asbestos cases, including those involving mesothelioma, arising under North Carolina law." *Connor v. Norfolk S. Ry. Co., No. 1:17CV127, 2018 WL 6514842, at *3 (M.D.N.C. Dec. 11, 2018)*, aff'd sub nom. *Connor v. Covil Corp., 996 F.3d 143 (4th Cir. 2021)* (collecting cases); see also *Pace, 642 F. App'x at 247-48* (applying the *Lohrmann* test in a mesothelioma case under South Carolina tort law).

In sum, plaintiffs' evidence is insufficient to create a genuine issue of fact as to actual exposure, thus precluding all of plaintiff's common law products liability claims under North Carolina law.11

10 Assuming, without deciding, that the Gordon article upon which Ewing relied, (DE 109-4), is separately admissible as evidence, and so assuming positive identification of asbestos in 50 vintage containers of Cashmere Bouquet Talcum Powder dating from the 1930s through the 1990s, plaintiffs still have not established Patricia McElroy's exposure, particularly where it is unclear how many, if any, of the containers tested were from the relevant time period, from 1956 until **[*29]** 1966. (See Ewing Dep. (DE 109-3) at 109:16-23).

11 Other district courts presented with comparable record, including evidence suggesting that some Cashmere Bouquet product contained asbestos, have concluded the same on summary judgment. See, e.g., Hanson v. Colgate-Palmolive Co., No. CV 216-034, 2018 WL 4686438, at *7 (S.D. Ga. Sept. 28, 2018) ("Finding that Ms. Hanson was

18

**CONCLUSION**

Based on the foregoing, defendant's motion to exclude expert testimony by Ewing, (DE 108), is GRANTED. Its motion for summary judgment, (DE 118), is ALLOWED based upon inadequate exposure and causation evidence. Where Longo's testimony does not create a material issue of fact as to causation or exposure, defendant's motion to exclude his testimony, (DE 118), is TERMINATED AS MOOT.

Plaintiffs' claims against Johnson & Johnson and Johnson & Johnson Consumer, Inc. remain stayed pending outcome of bankruptcy proceedings as set forth herein. Plaintiffs, Johnson & Johnson, and Johnson & Johnson Consumer, Inc. are DIRECTED to file jointly a report indicating the status of the bankruptcy proceeding within 30 days of the date of this order, and every 180 days thereafter, or upon its conclusion, whichever is sooner.

exposed to Cashmere speculation 005887, asbestos, contained Bouquet

End of Document