

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA**

MINUTE ORDER

DATE: 12/14/2015

TIME: 08:20:00 AM

DEPT: 43

JUDICIAL OFFICER PRESIDING: Kevin DeNoce

CLERK: Tiffany Froedge

REPORTER/ERM: Diana Solis

CASE NO: **56-2014-00458073-CU-AS-VTA**

CASE TITLE: **Robert Denyer vs AB Electrolux**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Asbestos

EVENT TYPE: Motion for Summary Judgment

MOVING PARTY: Familian Corporation

CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment and/or Adjudication of issues,
10/23/2015

APPEARANCES

Tenny Mirzaya, specially appearing for counsel Stephen M. Fishback, present for Plaintiff(s).

Thomas McNamara, specially appearing for counsel Natalie Ann Garcia, present for Defendant(s).

At 9:56 a.m., court convenes in this matter with all parties present as previously indicated.

Counsel have received and read the court's written tentative ruling.

Matter submitted to the Court with argument.

The Court finds/orders:

The Court's tentative is adopted as the Court's ruling.

Defendant Familian Corporation ("Familian") moves for summary judgment on Plaintiffs Gertrude Denyer's, Edward Lawrence Denyer's, and Elizabeth Denyer Hoggan's 1st Amended Complaint or, alternatively, summary adjudication of three specified Issues. Plaintiffs oppose Defendant Familian's motion.

The court's ruling is as follows:

The court grant's Plaintiffs Gertrude Denyer's, Edward Lawrence Denyer's and Elizabeth Denyer Hoggan's request for judicial notice.

The court sustains Plaintiffs' evidentiary objections to the declaration of Defendant Familian Corporation's ("Familian") counsel Natalie Garcia Lashinsky as to Objections Nos. 6, 7, 9, and 12.

Overrule Plaintiffs' remaining Objections to Lashinsky's declaration.

The court overrules Plaintiffs' evidentiary objections to the declaration of Familian's expert Dr. Gail Stockman.

The court sustains Familian's evidentiary objections as to Objection No. 15. Overrule Familian's remaining Objections.

The court finds, for the purposes of the present motion only, that: (i) Familian's Material Facts Nos. 1-12, 21, 27, 59, 77, and 96 are undisputed and established; (ii) Familian's Material Facts Nos. 15, 17-20, 23, 24, 30-34, 39, 41-50, 54-56, 60, 61, 62, 63, 78, 79, 81, 82, 93, 97, 100-102, and 107 are disputed and established; (iii) Familian's Material Fact No. 14 is disputed and established as to Decedent Robert Denyer not being 100% certain; (iv) Material Fact No. 36 is disputed and established as to Decedent smoking up to 2 packs of cigarettes per day; (v) Familian's Material Facts Nos. 13, 22, 25, 26, 28, 29, 35, 37, 38, 40, 51-53, 57, 58, 64, 94, and 103 are disputed and not established; (vi) the remainder of Familian's Material Facts are mere repetitions of the Material Facts addressed above – except for Material Facts Nos. 68, 71, 86, and 105, which are combinations of those Material Facts, and Material Fact No. 112, which is a part of Material Fact No. 35; (vii) Plaintiffs' Additional Material Facts Nos. 1, 2, 4, 5, 9, 11, 12, 13, and 15 are supported by the cited-to evidence and established; (viii) the remainder of Plaintiffs' Additional Material Facts are not supported and not established, either due to overbroad citations to supporting evidence, the fact that they consist of legal conclusions and/or argument, or, as to Additional Material Fact No. 6, the fact that the cited to evidence does not support the fact as stated.

Defendant Familian's Request for Summary Judgment:

Defendant Familian contends that it is entitled to summary judgment on the grounds that (a) Plaintiffs lack evidence of Decedent Robert Denyer's substantial exposure to asbestos attributable to Familian; and (b) the evidence establishes that Decedent's lung cancer was caused by his history of smoking cigarettes.

There is a triable issue of fact as to exposure:

Familian correctly notes the rule that the plaintiff in an asbestos case bears the burden of proving exposure to the defendant's asbestos-containing product. (See, e.g., *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103.) However, on a motion for summary judgment/adjudication, the initial burden is on Familian as moving party to demonstrate that Plaintiffs cannot establish an element of their case. (See *McGonnell v. Kaiser Gypsum Co.*, supra, 98 Cal. App. 4th at pp. 1102-1103.)

Familian first contends that Plaintiffs only have speculative evidence that Decedent worked with asbestos-containing products supplied by Familian. This contention lacks merit, as Decedent's deposition testimony and Familian's own discovery responses are sufficient to establish that Decedent worked with asbestos-containing Familian pipe.

As to Decedent's deposition testimony, Decedent testified early in his deposition that he worked with asbestos cement pipes called "Transite" or "transite" (see Decl. of Plaintiffs' Counsel Tenny Mirzayan, Exh. A [Excerpts from Decedent's deposition], 49:14-20); that he used asbestos cement pipes manufactured by Johns-Manville and CertainTeed (*id.* at 66:19-67:10); that he used a handsaw to cut the transite pipe, and "it took forever" and there "was stuff flying all over the place, naturally, and your breathing it in, and its on your clothes and under the house and everything's falling on you," and "[y]ou couldn't help but breathe it (*id.* at 72:24-73:14); that he would pick up transite pipe from Familian approximately twice a month because it was cheaper (*id.* at 109:16-110:5, 111:7-11); and that they used the transite pipe "on every job" (*id.* at 111:12-14), and that Familian was their main supplier of transite pipe (*id.* at 1679:24-25.)

Familian relies on subsequent deposition testimony by Decedent indicating that his earlier testimony was not correct, because after speaking with his son he was informed that Familian was not even in business during the time period in question. (See Def.'s Index of Exhibits, Exh. 13 [Excerpts from Decedent's deposition], 302:4-18.) However, later Decedent retracted his retraction, indicating that notwithstanding his son's statement that Familian was not in business, he still remembered purchasing transite pipe from Familian. (See Mirzayan Decl., Exh. A [Excerpts from Decedent's deposition], 1171:19-1172-25; 1680:7-18.) Although Decedent testified that he was "not sure" and couldn't say "100 percent positive" about the purchases of transite pipe from Familian (*id.* at 1173:1-9), he still indicated that he thought he did (*id.*), and later testified that he recalled doing so. (*Id.* at 1658:19-1659:6.) And although Decedent subsequently testified that it was "possible" that he did not purchase transite pipe from Familian, he also indicated that he had a specific memory of doing so. (*Id.* at 1677:2-14, 1683:7:, 1683:7-13.)

Taking all of Decedent's deposition testimony about Familian together, Decedent originally testified about his exposure to asbestos cement "transite" pipe purchased from Familian, later retracted this testimony when his son told him that Familian was not in business at the relevant time, but ultimately reaffirmed his original testimony based on his recollection, although he was not 100% certain and it was possible he was wrong. However, neither the fact that Decedent was not 100% certain or the possibility that he was wrong make his testimony about exposure to Familian transite pipe "speculative" or inadmissible: as Decedent himself notes, "[a]nything's possible" (*id.* at 1683:13). The test for admissibility is not 100% certainty, and the possibility of error merely goes to the weight of the evidence.

Moreover, Familian's own discovery responses (in the present action and/or prior actions) indicate that (a) Decedent's son was incorrect when he informed Decedent that Familian was not in business during the relevant period (see Mirzayan Decl., Exh. H [Familian's Responses to Form Interrogatories], Response to No. 3.1 [indicating that Familian was in business under that name from 1926-1998]; and (b) that Familian sold Johns-Manville asbestos cement vent and flue pipe (*id.* at Exh. G [Familian's Responses to Special Interrogatories], Response to No. 3). Accordingly, Familian's discovery responses support Decedent's ultimate decision to stand by his original testimony and withdraw his retraction based on his son's incorrect statements about when Familian was in business.

Familian next contends that even assuming arguendo that Decedent worked with asbestos-containing

products sold by Familian, Plaintiffs' factually-devoid discovery responses indicate that they do not have sufficient evidence regarding the frequency, duration, or proximity of each exposure, which Familian contends is required under *Whitmire v. Ingersoll-Rand Co.* However, Familian overstates the evidence necessary to establish exposure under *Whitmire*:

" 'A threshold issue in asbestos litigation is exposure to the defendant's product. ... If there has been no exposure, there is no causation.' [Citation.] Plaintiffs bear the burden of 'demonstrating that exposure to [Bechtel's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [Whitmire's] risk of developing cancer.' [Citation.] 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [Whitmire].' [Citation.] Therefore, '[plaintiffs] cannot prevail against [Bechtel] without evidence that [Whitmire] was exposed to asbestos-containing materials manufactured or furnished by [Bechtel] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' [Citations.] 'While there are many possible causes of any injury, "[a] possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.' " [Citation.]' [Citation.]
(*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal. App. 4th 1078, 1084.)

Whitmire, at most, requires evidence regarding the frequency, regularity, and proximity of exposure. As indicated above, Decedent testified that he used the asbestos-containing pipe "on every job," that Familian was the "main supplier" of the pipe, and that he was directly exposed to the product when he hand-sawed the pipe and breathed it in and had it falling on him, etc. Nor does *Rutherford v. Owens-Illinois, Inc.*, also cited by Familian in support of this argument, appear to require more. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 975.)

Moreover, Familian is not entitled to rely on Plaintiffs Gertrude Denyer's, Edward Denyer's, and Elisabeth's Denyer's factually devoid discovery responses on the issue of exposure and causation to shift the burden, because there is no evidence that they were percipient witnesses to Decedent's work during the relevant period and – even assuming arguendo that their discovery responses are factually deficient – would not in the usual course of events have personal knowledge of such facts. In short, Plaintiffs' discovery responses do not establish that Plaintiffs cannot establish the necessary facts regarding Decedent's exposure based on Decedent's own testimony and expert testimony. (See, e.g., *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal. 4th 71, 84.)

Furthermore, Familian's attempts to show that the witnesses and documents identified by Plaintiffs in their discovery responses as supporting their claims against Familian do not actually support those claims falls short. For example, Familian's Material Fact No. 22 [the documents identified by Plaintiffs as supporting their claims do not contain information supporting their claims] is based on statements in ¶26 of the original declaration of Familian's counsel Natalie Lashinsky regarding the results of her review of such documents; however, Lashinsky does not clearly indicate that she reviewed all of the identified documents or even which documents she reviewed: instead, she merely states that she reviewed "the documents made available by Plaintiffs or that were equally available." Similarly, the fact that Familian's former PMKs Bernard Shapiro and George Mock have not provided testimony regarding Decedent's

exposure in depositions in previous actions (see Lashinsky Decl., ¶¶37, 38) is not probative of whether they have personal knowledge relevant to such exposure, at least in the absence of any evidence that they were asked questions about Decedent's exposure at those prior depositions.

Finally, Familian cites to the declaration of certified industrial hygienist Kathy Jones for the propositions that (i) Decedent was not substantially exposed to respirable asbestos from any product supplied by Familian (see Moving Separate Statement, Material Fact No. 51); (ii) Decedent's total exposure to asbestos would not have resulted in any meaningful release of airborne levels of friable asbestos (id. at Material Fact No. 52); and (iii) there is no evidence that Decedent was substantially exposed to asbestos from any product supplied by Familian (id. at Material Fact No. 53). However, Ms. Jones' conclusions in ¶22 of her declaration are based on the same overly-restrictive interpretation of Decedent's testimony regarding exposure as being speculative and not establishing exposure (see Jones Decl., ¶¶17-21) that was analyzed and rejected above. Moreover, other than the flawed argument that Decedent's deposition testimony regarding exposure is speculative, Jones fails to provide any reasoned explanation of the basis for her conclusion that Decedent's work would not have resulted in his exposure to meaningful levels of friable asbestos from any product supplied by Familian. (See, e.g., *Casey v. Perini Corp.* (2012) 206 Cal. App. 4th 1222, 1233.) Jones;' reliance on an overly-restrictive view of Decedent's deposition testimony and her lack of a reasoned explanation taints her conclusions regarding exposure. " ' "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." [Citation.]" [Citation.]" (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 612.)

Based on the above, there is a triable issue of fact on the issue of exposure.

There is a triable issue of fact as to medical causation:

Familian contends that there is no triable issue of fact as to whether Decedent's lung cancer was caused by exposure to asbestos in Familian's products based on (i) Ms. Jones' declaration statements indicating that Decedent was not substantially exposed to asbestos from any Familian product; and (ii) the declaration of Familian's medical expert Dr. Gail Stockman, in which she states her opinion that Decedent's lung cancer was caused by his cigarette smoking, with no contribution from exposure to asbestos. (See Stockman Decl., ¶27.)

For the reasons stated above, Ms. Jones' statements in (i) above are insufficient to support Familian's contention that Decedent was not substantially exposed to asbestos from Familian's products. Dr. Stockman's opinion in (ii) above is sufficient to shift the burden on medical causation to Plaintiffs. However, Plaintiffs satisfy their shifted burden by submitting the declaration of their own expert, Dr. Robert Fallat, who opines, inter alia, that: "Every exposure to asbestos must be considered a substantial factor in causing lung cancer." (See Fallat Decl., ¶6.)

On a motion for summary judgment/adjudication, a trial court may not weigh the testimony of the parties' experts (see, e.g., *Andrews v. Foster Wheeler LLC* (2006) 138 Cal. App. 4th 96, 113), and determining the credibility of experts is a question for jury. (See *Chavez v. Glock, Inc.* (2012) 207 Cal. App. 4th 1283,

1309.) Given the conclusion above that there is a triable issue of fact as to whether Decedent was substantially exposed to asbestos from Familian's products, and Fallat's opinion (which he contends is the consensus opinion) that every exposure to asbestos is a substantial factor in causing cancer), there is a triable issue of fact as to whether Decedent's exposure to asbestos was a substantial factor in causing his lung cancer.

Based on the above, there are triable issues of fact on the issues of exposure and medical causation, and Familian's request for summary judgment based on these issues is denied.

Defendant Familian's Requests for Summary Adjudication:

In the alternative, Familian requests summary adjudication of three specified Issues: (i) Plaintiffs' third cause of action for false representation; (ii) Plaintiffs' fourth cause of action for intentional tort; and (iii) Plaintiffs' request for punitive damages.

False Representation Claim:

As to the claim for false representation, Familian contends that Plaintiffs have no evidence indicating that (i) Familian made any misrepresentations to Decedent; or (ii) Decedent justifiably relied on any such misrepresentations.

However, neither of these contentions, even if true, are sufficient to entitle Familian to summary adjudication of Plaintiff's false representation claim. First, as to contention (i) above, a misrepresentation directly to Decedent is not an essential element of a claim for false representation. The Restatement Second of Torts, §402B, provides that:

"One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller."

Accordingly, the fact that Familian never made a misrepresentation directly to Decedent is not a complete defense to a false representation claim.

Second, as to contention (ii), this contention is based on Material Facts Nos. 65 through 76 which, collectively, are intended to demonstrate that Plaintiffs have no evidence regarding reliance. However, Material Fact No. 69 is the same as Material Fact No. 26, which is disputed and not established; Material Fact No. 71 is based on a combination of Material Facts Nos. 28 and 29, both of which are disputed and not established; and Material Fact No. 35, which is disputed and not established. Accordingly, Familian fails to demonstrate that Plaintiffs will not be able to submit any evidence showing reliance at trial, and

therefore fails to satisfy its initial burden as to this claim.

Based on the above, Familian's request for summary adjudication of the false representation claim is denied.

Intentional Tort Claim:

Familian contends that it is entitled to summary adjudication of the intentional tort claim on the grounds that (i) Plaintiffs have no evidence that Familian knew that asbestos was hazardous during the relevant time period; and (ii) Familian had no duty to investigate the hazards of asbestos.

As to ground (i), Familian cites to Material Facts Nos. 83-95 which, collectively, are intended to show that Plaintiffs have no evidence that Familian knew about the hazards of asbestos during the relevant time period. However, Material Fact No. 84 is the same as Material Fact No. 22, which is disputed and not established; Material Fact No. 86 is the same as Material Facts Nos. 24 and 25 collectively, the latter of which is disputed and not established; Material Fact No. 94 is disputed and not established; and Material Fact No. 95 is the same as Material Fact No. 35, which is disputed and unestablished. Accordingly, Familian fails to demonstrate that Plaintiffs will not be able to submit any evidence showing Familian's knowledge of this hazard at trial, and therefore fails to satisfy its initial burden as to such knowledge.

As to ground (ii), assuming *arguendo* that Familian is correct that it had no duty to investigate the hazards posed by asbestos, this point is not dispositive due to Familian's failure to establish that Plaintiffs will not be able to show that Familian had actual knowledge of those hazards at the relevant time.

Finally, Familian makes an argument that Plaintiffs have no evidence that Familian intended to harm Decedent. However, Familian cites no authority for the proposition that an "intent to harm" is an element of claim for intentional tort. Instead, Familian cites to authority that one element of a fraud claim is an intent to deceive. As a result, even if Familian were correct that Plaintiffs have no evidence that Familian intended to harm Decedent, Familian fails to show that such intent is an essential element of Plaintiffs' claim.

Based on the above, Familian's request for summary adjudication of the intentional tort claim is denied.

Punitive Damages:

Familian contends that it is entitled to summary adjudication of Plaintiffs' claim for punitive damages on the ground that Plaintiffs do not have any "clear and convincing evidence" that Familian acted with "malice, oppression, or fraud." Familian cites to Material Facts Nos. 98 through 112 which, collectively, are intended to show that Plaintiffs have no evidence that Familian acted with "malice, oppression, or fraud." However, Material Fact No. 103 is disputed and not established; Material Fact No. 105 is the

same as Material Facts Nos. 24 and 25, the latter of which is disputed and not established; Material Fact No. 106 is the same as Material Fact No. 26, which is disputed and not established; and Material Fact No. 112 is a part of Material Fact No. 35, which is disputed and not established. Accordingly, Familian fails to demonstrate that Plaintiffs will not be able to submit "clear and convincing" evidence showing that Familian acted with "malice, oppression, or fraud" toward Decedent, and therefore fails to satisfy its initial burden on this issue.

Based on the above, Familian's request for summary adjudication of Plaintiffs' request for punitive damages is denied.

Discussion:

Plaintiffs Gertrude Denyer's, Edward Denyer's, and Elisabeth Hoggan's 1st Amended Complaint alleges, generally, as follows:

Each of the approximately 30 named Defendants was the successor/assign/predecessor/parent/subsidiary/owner/member in an entity researching/studying/manufacturing/fabricating/designing/modifying/labeling/assembling/distributing/leasing/buying/offering for sale/supplying/selling/inspecting/servicing/ installing/repairing/ marketing/warranting/packaging/advertising asbestos and products containing asbestos. Defendants are also liable for the acts of their "alternate entities" in that there has been a virtual destruction of Plaintiffs' remedies against such "alternate entities," and because Defendants have acquired the assets or product lines (or a portion thereof) of the alternative entities, have the ability to assume the risk-spreading role of those "alternative entities," and enjoy the goodwill originally attached to those "alternate entities."

Plaintiffs allege that Defendants negligently researched/manufactured/fabricated/designed/modified/tested (or failed to test)/abated (or failed to abate)/warned (or failed to warn)/labeled/assembled/ distributed/ leased/bought/offered for sale/supplied/sold/inspected/serviced/ installed/contracted for installation/repared/marketed/warranted/rebranded/packaged /advertised asbestos and products containing asbestos, and said products caused personal injuries to user/consumers/workers/bystanders/others, including Plaintiffs, while being used in a manner that was reasonable foreseeable, thereby rendering said products unfit for use.

Plaintiffs allege that Defendants knew or should have known and intended that the aforementioned asbestos and products containing asbestos would be transported by truck/rail/ship/common carrier, that in the shipping process the products would break/crumble/be damaged, and/or that the products would be used for insulation/construction/plastering/fireproofing/ soundproofing/other applications resulting in the release of airborne asbestos fibers and that through foreseeable use and/or handling exposed persons, including decedent Robert Denyer ("Decedent") would be in proximity to and exposed to asbestos fibers. Decedent used, handled, or otherwise been exposed to asbestos and asbestos-containing products at various locations as set forth in Exhibit A to the Complaint.

Plaintiffs allege that Defendants and their "alternate entities" breached their duties by, inter alia, (a) failing to warn Plaintiff Robert of the dangers/characteristics/potentialities of their asbestos-containing products when Defendants knew or should have known that exposure to those products would cause disease and injury; (b) failing to warn Plaintiff Robert of the dangers to which he was exposed when Defendants knew or should have known of the dangers; (c) failing to exercise reasonable care to warn Plaintiff Robert of what would constitute safe, sufficient, and proper protective clothing/equipment/appliances when working near or being exposed to Defendants' asbestos or asbestos-containing products; (d) failing to provide safe, sufficient and proper protective clothing/equipment/appliances with their asbestos and asbestos-containing products; (e) failing to test their asbestos or asbestos-containing products in order to ascertain the dangers involved upon exposure to their asbestos and asbestos-containing products; (f) failing to exercise reasonable care in conducting research to ascertain the dangers involved upon exposure to their asbestos and asbestos-containing products; (g) failing to remove the product(s) from the market when Defendants knew or should have known of the hazards of exposure to their asbestos and asbestos-containing products; (h) failing, upon discovery of the dangers/hazards/ potentialities of exposure to asbestos, to adequately warn Plaintiff Robert of said dangers/hazards/ potentialities; (i) failing, upon discovery of the dangers/hazards/ potentialities of exposure to asbestos, to package their asbestos and asbestos-containing products so as to eliminate said dangers/hazards/ potentialities; (j) failing to advise Plaintiff and others that the risks inherent in their asbestos-containing products greatly outweighed any benefits afforded by such products; and (k) generally using unreasonable/careless/negligent conduct in the manufacture/fabrication/supply/ distribution/ sale/installation/use of their asbestos and asbestos-containing products.

As a result of the conduct of Defendants and their "alternate entities," Plaintiffs allege that Decedent's exposure to asbestos and asbestos-containing products caused severe and permanent injury to Decedent as set forth in Exhibit A to the Complaint. Decedent suffered and died from a condition related to exposure to asbestos and asbestos-related products: namely, lung cancer and other asbestos pleural disease. Decedent was not aware at the time that of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease. Plaintiffs did not learn of the causal relationship between Decedent's exposure to asbestos and his death on May 21, 2015, until less than a year before the filing of the 1st Amended Complaint.

Threshold Procedural Issue Concerning "Reply" Evidence:

1. Defendant Familian's "Reply" Evidence

For this first time with its reply papers, Familian submits the supplemental declaration of its counsel Natalie Garcia Lashinsky and Exhibits 28 through 32 thereto. The general rule is that the Court will normally not consider "reply" evidence submitted in support of a motion for summary judgment/adjudication in the absence of exceptional circumstances which might justify consideration of this "reply" evidence. (See *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn.8; *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316; *Nazir v. United Airlines, Inc.*, supra, 178 Cal.App.4th at p. 252.[1])

Here, Familian's counsel Lashinsky's supplemental declaration is essentially non-substantive, and submitted to authenticate the additional exhibits and – as to a few of the exhibits – to indicate why they were not submitted with Familian's moving papers.

As to the exhibits themselves, they consist of (i) a certified copy of Plaintiff Edward Denyer's deposition transcript (Exh. 28); Familian submitted a rough transcript with its moving papers; (ii) excerpts from the transcript of the telephonic deposition of Plaintiffs' expert John Templin taken on December 2, 2015 (Exh. 29); (iii) excerpts from the transcript of the telephonic deposition of Plaintiffs' expert Dr. Robert Fallat, taken on November 25, 2015 (Exh. 30); (iv) excerpts from the transcript of the telephonic deposition of Plaintiffs' expert Dr. Barry Levy taken on December 3, 2015 (Exh. 31); (v) copies of Plaintiff Gertrude Denyer's verifications of certain discovery responses (Exhs 32, 33).

The evidence in (i), (iv), and (v) above is merely curative in nature (i.e., it cures technical defects in evidence already submitted, and Lashinsky states facts that these documents were not available at the time Familian filed its moving papers. Accordingly, the Court will consider "reply" Exhibits 28, 32, and 33.

As to the partial deposition transcripts in (ii), (iii) and (iv) above, these depositions were taken after Familian filed its original moving papers. Moreover, these deposition transcripts do not contain "new matter" so much as attempt to put the declaration statements of Plaintiffs' experts in context, and therefore are merely supplemental in nature. As such, the court will consider Exhibits 29 through 31 as well.

Based on the above, the Court will consider all of Familian's "reply" evidence, but give Plaintiffs an opportunity to respond to this evidence at the hearing if a sufficient offer of proof is given which justifies a continuance.

2. Plaintiffs' Late Evidence

On December 9, 2015, the same day Familian filed its reply papers, Plaintiffs filed a supplemental declaration of their counsel Tenny Mirzayan and attached Exhibit A. The sole purpose of Mirzayan's supplemental declaration and Exhibit A is submit Dr. Fallat's Curriculum Vitae, which document was inadvertently omitted from his declaration filed with Plaintiffs' original opposition papers. Because this evidence is merely curative in nature, the court will consider it.

General Rules Applicable to Motions for Summary Judgment/Adjudication

Summary adjudication is granted where a moving party establishes a right to adjudication of an issue in its favor as a matter of law. (See Code of Civil Procedure §437c(c).) The purpose of a motion for summary judgment/ adjudication is to penetrate evasive language and adept pleading to ascertain the existence or absence of triable issues of material fact. (*Chern v. Bank of America* (1976) 15 Cal.3d 866, 873.) The material issues on the motion are framed by the pleadings, and the motion can neither be granted nor denied on a ground not properly raised therein. (*Tsemetzin v. Coast Fed. Sav. & Loan Ass'n* (1997) 57 Cal.App.4th 1334, 1343; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381-382.)

On a defendant's motion for summary judgment/adjudication, the defendant as moving party bears the initial burden of persuasion[2] that there is no triable material fact as to one or more elements of that claim, or as to a complete defense thereto. (Code of Civil Procedure §437c(p)(2); see also, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) The burden of persuasion is perhaps more accurately as a burden of production: namely, the burden of producing evidence sufficient to make a prima facie showing of the nonexistence of any material fact. (*Id.*) If the moving party satisfies its or her initial burden, then and only then the burden shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (*Id.*)

In determining whether a triable issue of material fact exists, the moving party's evidence is construed strictly and the opposing party's evidence liberally. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.) Moreover, the trial court cannot assess the credibility of the parties on a motion for summary judgment/adjudication. (Code of Civil Procedure §437c(e); *AARTS Productions, Inc. v. Aetna Life Ins. Co.* (1986) 179 Cal.App.3d 1061, 1064.)

In ruling on a motion for summary judgment/adjudication, the trial court must consider not only the evidence submitted but the reasonable inferences deducible from such evidence. (*Binder v. Aetna Life Ins. Co.*, *supra*, 75 Cal.App.4th at p.840.) Conflicting reasonable inferences must be resolved in favor of the party opposing the motion. (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1397, n.4.)

Request for Judicial Notice

Plaintiffs request that judicial notice be taken of 20 U.S.C.A. §3601. The court grants Plaintiffs' request for judicial notice pursuant to Evidence Code §451(a).

Evidentiary Objections

Plaintiffs have submitted written objections to portions of the original declaration of Familian's counsel Natalie Garcia Lashinsky and the expert declaration of Dr. Gail Stockman filed in support of Familian's motion.

Familian has submitted written objections to portions of the declaration of Plaintiffs' counsel Tenny Mirzayan, the declarations of Plaintiffs' experts Dr. Barry Levy and Robert Fallat, and various exhibits.

The court sustains Plaintiffs' evidentiary objections to the declaration of Defendant Familian Corporation's ("Familian") counsel Natalie Garcia Lashinsky as to Objections Nos. 6, 7, 9, and 12. Overrule Plaintiffs' remaining Objections to Lashinsky's declaration.

The court overrules Plaintiffs' evidentiary objections to the declaration of Familian's expert Dr. Gail Stockman.

The court sustains Familian's evidentiary objections as to Objection No. 15. Overrule Familian's remaining Objections.

The Substantive Merits of Defendant Familian's Request for Summary Judgment or Summary Adjudication

Defendant Familian contends that it is entitled to summary judgment on the grounds that (a) Plaintiffs lack evidence of Decedent Robert Denyer's substantial exposure to asbestos attributable to Familian; and (b) the evidence establishes that Decedent's lung cancer was caused by his history of smoking cigarettes.

a. There Is a Triable Issue of Fact as to Exposure

Familian correctly notes the rule that the plaintiff in an asbestos case bears the burden of proving exposure to the defendant's asbestos-containing product. (See, e.g., *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103.[3]) However, on a motion for summary judgment/adjudication, the initial burden is on Familian as moving party to demonstrate that Plaintiffs cannot establish an element of their case. (See *McGonnell v. Kaiser Gypsum Co.*, supra, 98 Cal. App. 4th at pp. 1102-1103.[4])

Familian first contends that Plaintiffs only have speculative evidence that Decedent worked with asbestos-containing products supplied by Familian. This contention lacks merit, as Decedent's deposition testimony and Familian's own discover responses are sufficient to establish that Decedent worked with asbestos-containing Familian pipe. As to Decedent's deposition testimony, Decedent testified early in his deposition that he worked with asbestos cement pipes called "Transite" or "transite" (see Decl. of Plaintiffs' Counsel Tenny Mirzayan, Exh. A [Excerpts from Decedent's deposition], 49:14-20); that he used asbestos cement pipes manufactured by Johns-Manville and CertainTeed (*id.* at 66:19-67:10); that he used a handsaw to cut the transite pipe, and "it took forever" and there "was stuff flying all over the place, naturally, and your breathing it in, and its on your clothes and under the house and everything's falling on you," and "[y]ou couldn't help but breathe it (*id.* at 72:24-73:14); that he would pick up transite pipe from Familian approximately twice a month because it was cheaper (*id.* at 109:16-110:5, 111:7-11); and that they used the transite pipe "on every job" (*id.* at 111:12-14), and that Familian was their main supplier of transite pipe (*id.* at 1679:24-25.)

Familian relies on subsequent deposition testimony by Decedent indicating that his earlier testimony was not correct, because after speaking with his son he was informed that Familian was not even in business during the time period in question. (See Def.'s Index of Exhibits, Exh. 13 [Excerpts from Decedent's deposition], 302:4-18[.]) However, later Decedent later retracted his retraction, indicating that notwithstanding his son's statement that Familian was not in business, he still remembered purchasing transite pipe from Familian. (See Mirzayan Decl., Exh. A [Excerpts from Decedent's deposition], 1171:19-1172-25; 1680:7-18.) Although Decedent testified that he was "not sure" and couldn't say "100

percent positive" about the purchases of transite pipe from Familian (*id.* at 1173:1-9), he still indicated that he thought he did (*id.*), and later testified that he recalled doing so. (*id.* at 1658:19-1659:6.) And although Decedent subsequently testified that it was "possible" that he did not purchase transite pipe from Familian, he also indicated that he had a specific memory of doing so. (*id.* at 1677:2-14, 1683:7:, 1683:7-13.)

Taking all of Decedent's deposition testimony about Familian together, Decedent originally testified about his exposure to asbestos cement "transite" pipe purchased from Familian, later retracted this testimony when his son told him that Familian was not in business at the relevant time, but ultimately reaffirmed his original testimony based on his recollection, although he was not 100% certain and it was possible he was wrong. However, neither the fact that Decedent was not 100% certain or the possibility that he was wrong make his testimony about exposure to Familian transite pipe "speculative" or inadmissible: as Decedent himself notes, "[a]nything's possible." (*id.* at 1683:13.) The test for admissibility is not 100% certain, and the possibility of error merely goes to the weight of the evidence.

Moreover, Familian's own discovery responses (in the present action and/or prior actions[5]) indicate that (a) Decedent's son was incorrect when he informed Decedent that Familian was not in business during the relevant period (see Mirzayan Decl., Exh. H [Familian's Responses to Form Interrogatories], Response to No. 3.1 [indicating that Familian was in business under that name from 1926-1998]; and (b) that Familian sold Johns-Manville asbestos cement vent and flue pipe (*id.* at Exh. G [Familian's Responses to Special Interrogatories], Response to No. 3). Accordingly, Familian's discovery responses support Decedent's ultimate decision to stand by his original testimony and withdraw his retraction based on his son's incorrect statements about when Familian was in business.

Familian next contends that even assuming *arguendo* that Decedent worked with asbestos-containing products sold by Familian, Plaintiffs' factually-devoid discovery responses indicate that they do not have evidence regarding the frequency, duration, or proximity of each exposure, which Familian contends is required under *Whitmore v. Ingersoll-Rand Co.* However, Familian overstates the evidence necessary to establish exposure under *Whitmore*:

" 'A threshold issue in asbestos litigation is exposure to the defendant's product. ... If there has been no exposure, there is no causation.' [Citation.] Plaintiffs bear the burden of 'demonstrating that exposure to [Bechtel's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [Whitmire's] risk of developing cancer.' [Citation.] 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [Whitmire].' [Citation.] Therefore, '[plaintiffs] cannot prevail against [Bechtel] without evidence that [Whitmire] was exposed to asbestos-containing materials manufactured or furnished by [Bechtel] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' [Citations.] 'While there are many possible causes of any injury, "[a] possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.' "[Citation.]' (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal. App. 4th 1078, 1084.)

Whitmore, at most, requires evidence regarding the frequency, regularity, and proximity of exposure. As indicated above, Decedent testified that he used the asbestos-containing pipe "on every job," that Familian was the "main supplier" of the pipe, and that he was directly exposed to the product when he hand-sawed the pipe and breathed it in and had it falling on him, etc. Nor does *Rutherford v. Owens-Illinois, Inc.*, also cited by Familian in support of this argument, appear to require more. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 975.[6]) Moreover, Familian is not entitled to rely on Plaintiffs Gertrude Denyer's, Edward Denyer's, and Elisabeth's Denyer's factually devoid discovery responses on the issue of exposure and causation to shift the burden, because there is no evidence that they were percipient witnesses to Decedent's work during the relevant period and – even assuming *arguendo* that their discovery responses are factually deficient – would not in the usual course of events have personal knowledge of such facts. In short, Plaintiffs' discovery responses do not establish that Plaintiffs cannot establish the necessary facts regarding Decedent's exposure based on Decedent's own testimony and expert testimony. (See, e.g., *Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal. 4th 71, 84.[7])

Furthermore, Familian's attempts to show that the witnesses and documents identified by Plaintiffs in their discovery responses as supporting their claims against Familian do not support those claims falls short. For example, Familian's Material Fact No. 22 [the documents identified by Plaintiffs as supporting their claims do not contain information supporting their claims] is based on statements in ¶26 of the original declaration of Familian's counsel Natalie Lashinsky regarding the results of her review of such documents; however, Lashinsky does not clearly indicate that she reviewed all of the identified documents or even which documents she reviewed: instead, she merely states that she reviewed "the documents made available by Plaintiffs or that were equally available." Similarly, the fact that Familian's former PMKs Bernard Shapiro and George Mock have not provided testimony regarding Decedent's exposure in depositions in previous actions (see Lashinsky Decl., ¶¶37, 38) is not probative of whether they have personal knowledge relevant to such exposure in the absence of any evidence that they were asked questions about Decedent's exposure at those prior depositions.

Finally, Familian cites to the declaration of certified industrial hygienist Kathy Jones for the propositions that (i) Decedent was not substantially exposed to respirable asbestos from any product supplied by Familian (see Moving Separate Statement, Material Fact No. 51); (ii) Decedent's total exposure to asbestos would not have resulted in any meaningful release of airborne levels of friable asbestos (*id.* at Material Fact No. 52); and (iii) there is no evidence that Decedent was substantially exposed to asbestos from any product supplied by Familian (*id.* at Material Fact No. 53). However, Ms. Jones' conclusions in ¶22 of her declaration are based on the same overly-restrictive interpretation of Decedent's testimony regarding exposure as being speculative and not establishing exposure (see Jones Decl., ¶¶17-21) that was analyzed and rejected above. Moreover, other than the flawed argument that Decedent's deposition testimony regarding exposure is speculative, Jones also fails to provide any reasoned explanation of the basis for her conclusion that Decedent's work would not have resulted in his exposure to meaningful levels of friable asbestos from any product supplied by Familian. (See, e.g., *Casey v. Perini Corp.* (2012) 206 Cal. App. 4th 1222, 1233.[8]) Jones;' reliance on an over-restrictive view of Decedent's deposition testimony and lack of a reasoned explanation for her conclusions taints her conclusions regarding exposure. " ' "Like a house built on sand, the expert's opinion is no better than

the facts on which it is based." [Citation.] [Citation.]" (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 612.)

Based on the above, there is a triable issue of fact on the issue of exposure.

b. There Is a Triable Issue of Fact as to Medical Causation

Familian contends that there is no triable issue of fact as to whether Decedent's lung cancer was caused by exposure to asbestos in Familian's products based on (i) Ms. Jones' declaration statements indicating that Decedent was not substantially exposed to asbestos from any Familian product; and (ii) the declaration of Familian's medical expert Dr. Gail Stockman's expert opinion that Decedent's lung cancer was caused by his cigarette smoking, with no contribution from exposure to asbestos. (See Stockman Decl., ¶27.) Ms. Jones' statements in (i) above are insufficient to support Familian's contention that Decedent was not substantially exposed to asbestos from Familian's products for the reasons stated above. Dr. Stockman's opinion in (ii) above is sufficient to shift the burden on medical causation to Plaintiffs. However, Plaintiffs satisfy their shifted burden by submitting the declaration of their own expert, Dr. Robert Fallat, who opines, *inter alia*, that: "Every exposure to asbestos must be considered a substantial factor in causing lung cancer." (See Fallat Decl., ¶6.)

On a motion for summary judgment/adjudication, a trial court may not weigh the testimony of the parties' experts (see, e.g., *Andrews v. Foster Wheeler LLC* (2006) 138 Cal. App. 4th 96, 113[9]), and determining the credibility of experts is a question for jury. (See *Chavez v. Glock, Inc.* (2012) 207 Cal. App. 4th 1283, 1309.[10]) Given the conclusion above that there is a triable issue of fact as to whether Decedent was substantially exposed to asbestos from Familian's products, and Fallat's opinion (which he contends is the consensus opinion) that every exposure to asbestos is a substantial factor in causing cancer), there is a triable issue of fact as to whether Decedent's exposure to asbestos was a substantial factor in causing his lung cancer.

Based on the above, there are triable issues of fact on the issues of exposure and medical causation, and Familian's request for summary judgment based on these issues is denied.

Defendant Familian's Requests for Summary Adjudication

In the alternative, Familian requests summary adjudication of three specified Issues: (i) Plaintiffs' third cause of action for false representation; (ii) Plaintiffs' fourth cause of action for intentional tort; and (iii) Plaintiffs' request for punitive damages.

a. False Representation Claim

As to the claim for false representation, Familian contends that Plaintiffs have no evidence indicating that (i) Familian made any misrepresentations to Decedent; or (ii) Decedent justifiably relied on any such misrepresentations. However, neither of these contentions, even if true, are sufficient to entitle Familian to summary adjudication of Plaintiff's false representation claim. First, as to contention (i) above, a

misrepresentation directly to Decedent is not an essential element of a claim for false representation. The Restatement Second of Torts, §402B, provides that:

"One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller."

Accordingly, the fact that Familian never made a misrepresentation to Decedent is not a complete defense to a false representation claim.

Second, as to contention (ii), this contention is based on Material Facts Nos. 65 through 76 which, collectively, are intended to demonstrate that Plaintiffs have no evidence regarding reliance. However, Material Fact No. 69 is the same as Material Fact No. 26, which is disputed and not established; Material Fact No. 71 is based on a combination of Material Facts Nos. 28 and 29, both of which are disputed and not established; and Material Fact No. 35, which is disputed and not established. Accordingly, Familian fails to demonstrate that Plaintiffs will not be able to submit any evidence showing reliance at trial, and therefore fails to satisfy its initial burden as to this claim.

Based on the above, Familian's request for summary adjudication of the false representation claim is denied.

b. Intentional Tort Claim

Familian contends that it is entitled to summary adjudication of the intentional tort claim on the grounds that (i) Plaintiffs have no evidence that Familian knew that asbestos was hazardous during the relevant time period; and (ii) Familian had no duty to investigate the hazards of asbestos. As to ground (i), Familian cites to Material Facts Nos. 83-95 which, collectively, are intended to show that Plaintiffs have no evidence that Familian knew about the hazards of asbestos during the relevant time period. However, Material Fact No. 84 is the same as Material Fact No. 22, which is disputed and not established; Material Fact No. 86 is the same as Material Facts Nos. 24 and 25 collectively, the latter of which is disputed and not established; Material Fact No. 94 is disputed and not established; and Material Fact No. 95 is the same as Material Fact No. 35, which is disputed and unestablished. Accordingly, Familian fails to demonstrate that Plaintiffs will not be able to submit any evidence showing Familian's knowledge of this hazard at trial, and therefore fails to satisfy its initial burden as to such knowledge. As to ground (ii), above, assuming *arguendo* that Familian is correct that it had no duty to investigate the hazards posed by asbestos, this point is not dispositive due to Familian's failure to establish that Plaintiffs will not be able to show that Familian had actual knowledge of those hazards at the relevant time.

Finally, Familian makes an argument that Plaintiffs have no evidence that Familian intended to harm Decedent. However, Familian cites no authority for the proposition that an "intent to harm" is an element of claim for intentional tort. Instead, Familian cites to authority that one element of a **fraud** claim is an intent to deceive. As a result, even if Familian were correct that Plaintiffs have no evidence that Familian intended to harm Decedent, Familian fails to show that such intent is an essential element of Plaintiffs' claim.

Based on the above, Familian's request for summary adjudication of the intentional tort claim is denied.

c. Punitive Damages Claim

Familian contends that it is entitled to summary adjudication of Plaintiffs' claim for punitive damages on the ground that Plaintiffs do not have any "clear and convincing evidence" that Familian acted with "malice, oppression, or fraud." Familian cites to Material Facts Nos. 98 through 112 which, collectively, are intended to show that Plaintiffs have no evidence that Familian acted with "malice, oppression, or fraud." However, Material Fact No. 103 is disputed and not established; Material Fact No. 105 is the same as Material Facts Nos. 24 and 25, the latter of which is disputed and not established; Material Fact No. 106 is the same as Material Fact No. 26, which is disputed and not established; and Material Fact No. 112 is a part of Material Fact No. 35, which is disputed and not established. Accordingly, Familian fails to demonstrate that Plaintiffs will not be able to submit "clear and convincing" evidence showing that Familian acted with "malice, oppression, or fraud" toward Decedent, and therefore fails to satisfy its initial burden on this issue.

Based on the above, Familian's request for summary adjudication of Plaintiffs' request for punitive damages is denied.

/n
[1] Stating that:

"The reply also included 153 pages of 'Exhibits and Evidence in Support of Reply.' No such evidence is generally allowed. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 [125 Cal. Rptr. 2d 499].)"

7 "[O]n summary judgment, the moving party's burden is more properly one of persuasion rather than of proof, since he must persuade the court that there is no material fact for a reasonable trier of fact to find, and not prove any such fact to the satisfaction of the court itself as though it were sitting as the trier of fact." (*Aguilar v. Sup. Ct.* (2001) 25 Cal.4th 826, 850, fn.11.)

[3] Stating that:

"A threshold issue in asbestos litigation is exposure to the defendant's product. The plaintiff bears the burden of proof on this issue. [Citations.] If there has been no exposure, there is no causation. [Citation.] Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or

decendent's exposure to the defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer. [Citation.]"

[4] Stating that:

"A defendant moving for summary judgment has met his or her burden of showing a cause of action has no merit if the defendant can show one or more elements of the plaintiff's cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (o)(2).) In such a case, the defendant bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. [Citation.] If the defendant carries the burden of production, the burden shifts to the plaintiff to make his or her own prima facie showing of the existence of a triable issue of fact. [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [Fn. omitted.]' [Citation.]"

[5] Familian's discovery responses in other actions constitute hearsay, but fall within the "party admission" exception.

[6] Stating that:

"Finally, at a level of abstraction somewhere between the historical question of exposure and the unknown biology of carcinogenesis, the question arises whether the risk of cancer created by a plaintiff's exposure to a particular asbestos-containing product was significant enough to be considered a legal cause of the disease. Taking into account the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed (e.g., other asbestos products, cigarette smoking), and perhaps other factors affecting the assessment of comparative risk, should inhalation of fibers from the particular product be deemed a 'substantial factor' in causing the cancer? [Citations.]"

[7] Stating that:

"Plaintiff's admissions may be read only to acknowledge that he did not personally know the precise mechanism that caused his cancer and that he did not personally know the identity of those who would know. As his counsel explains in his brief to this court, plaintiff was a physicist, 'not a medical toxicologist, and therefore lacked personal knowledge how [defendants'] chemical products caused his cancer.' 'That [he] lacked [this] personal knowledge . . . in no way constituted an admission that expert medical testimony could not be provided to establish causation at trial.' In sum, the answers are irrelevant with regard to the objective mechanisms that allegedly caused his illness, and invoking them against the complaint cannot succeed."

[8] Stating that:

"... [A]n expert's opinion, ' "may not be based on assumptions of fact that are without evidentiary support or based on factors that are speculative or conjectural, for then the opinion has no evidentiary value and does not assist the trier of fact. [Citation.] Moreover, an expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based. [Citations.]' [Citation.]' [Citation.]"

[9] Stating that:

"The record also does not support plaintiffs' contention that the trial court improperly weighed their expert evidence against Foster Wheeler's, submitted in its reply. It is established law that on a summary judgment motion, 'the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact.' [Citation.]"

[10] Stating that: "Determining the credibility of expert witnesses and deciding whether Kapelsohn's risk-benefit opinion is entitled to greater weight than Lord's are questions for the jury."

Parties waive notice.