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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SANDRA FOGLIA, et al., Plaintiffs and Appellants, v. MOORE DRY DOCK COMPANY, Defendant and Respondent.	A142125 (Alameda County Super. Ct. No. RG12624835)

INTRODUCTION

Plaintiffs Sandra Foglia, individually and on behalf of the estate of Ronald Foglia (decedent), Michael Foglia and Annette Rackley appeal the summary judgment entered against them on their wrongful death claim against defendant Moore Dry Dock (MDD), based on the allegation that decedent developed mesothelioma after secondary exposure to asbestos brought home by his father, Felix Foglia (Father) from Father's work at a shipyard operated by MDD.

MDD moved for summary judgment claiming it owed no duty of care to decedent for secondary exposure and that plaintiffs did not have and could not reasonably obtain evidence to show that decedent was exposed to asbestos from the clothing and person of Father as a result of Father's employment at MDD from 1942 to 1945. The trial court granted summary judgment, ruling the evidence was not sufficient to support a reasonable inference that Father was exposed to asbestos at MDD.

Plaintiffs contend the trial court erred in finding MDD made a sufficient showing, based on plaintiffs' factually devoid discovery responses, to shift the burden of proof to them on the issue of the exposure of Father. Specifically, plaintiffs contend MDD did not meet its initial burden on summary judgment where it failed to conduct comprehensive discovery and failed to disclose all the evidence it had already discovered and that plaintiffs' discovery responses were sufficiently detailed to raise a triable issue of fact on exposure. Plaintiffs further assert that even if the burden did shift, their evidence raised triable issues as to Father's exposure to asbestos from his employment at MDD. Finally, plaintiffs contend the court erroneously excluded lay and expert testimony that raised a triable issue as to Father's exposure to asbestos from his employment at MDD. We will affirm.

BACKGROUND

The Lawsuit

In 2012, decedent and his wife filed a complaint for personal injury (asbestos) against multiple defendants, including Moore Securities Company. As relevant here, the complaint alleged that decedent was exposed to asbestos brought home on the clothing of Father, who in the early 1940s worked as an electrician at shipyards including but not limited to, MDD in Oakland, California. After decedent died, his wife and children filed a wrongful death complaint and the two lawsuits were consolidated.

The Summary Judgment Motion

MDD moved for summary judgment, contending it had no duty to decedent, who was not directly exposed to asbestos and that even if it had such a duty, there was no evidence that Father was exposed to asbestos by MDD or did any work with or around asbestos while employed by MDD. MDD did not appear to dispute that Father had worked for it in the early 1940s. The motion argued that decedent, who would have been barely five years old when his father allegedly ceased work at MDD, had been deposed and could provide only a vague recollection that Father worked for MDD. MDD argued

that it had served plaintiffs with "state all facts" special interrogatories and standard asbestos interrogatories and that plaintiffs responded with nothing but allegations as to what they believed "could have" happened. Plaintiffs offered no evidence as to what the asbestos-containing products consisted of, or the manner in which exposure occurred. MDD asserted these responses were factually devoid and supplied prima facie evidence that plaintiffs did not possess and could not reasonably obtain evidence to support their claims.

Specifically, in its Separate Statement of Undisputed Material Facts and Supporting Evidence, MDD pointed to plaintiffs' responses to its Special Interrogatory No. 1 and Alameda County Standard Asbestos Interrogatory No. 32, which responses it set forth in full in exhibits to the motion, and to an excerpt from the deposition of decedent, wherein he acknowledged never having been present at MDD. The relevant interrogatories and complete answers thereto are set forth hereafter.

Special Interrogatory No. 1 requested that plaintiffs "state all facts that support YOUR contention that DECEDENT'S exposure to ASBESTOS-CONTAINING MATERIAL was caused by THIS DEFENDANT." Plaintiffs responded in relevant part: "With regards to Defendant MOORE DRY DOCK COMPANY ('MOORE') it was a ship repair facility and dry dock in Oakland, CA where ships were constructed and repaired. [¶] Plaintiffs contend that decedent Ron Foglia suffered para-occupational exposure to asbestos fibers brought home on the clothing of his father, Felix 'Phil' Foglia, who worked as a lead electrician at Moore Dry Dock from 1942-1945. Felix Foglia was employed by MOORE and headed a team of electricians. He worked on the conversion of passenger ships to troop transports or ships for other military uses during WWII as well as new construction. On occasion he was also sent to work at the Kaiser Shipyards in Richmond, CA while employed by MOORE. [¶] . . . [¶] Plaintiffs contend that Felix 'Phil' Foglia was exposed to a variety of asbestos-containing products, including but not limited to the full range of asbestos-containing thermal insulation

products used on ships, including but not limited to, pipe covering, block, board, cement, cloth, paper, gaskets and Micarta while performing his duties at Moore Dry Dock and at Kaiser Shipyards. Felix 'Phil' Foglia's asbestos-laden clothing and person served to contaminate the family vehicle and home, and were sources of asbestos exposure for Ron Foglia in the course of his normal and routine interactions with his father and his father's work vehicle." In response to Special Interrogatory No. 2, requesting plaintiffs "state all facts" supporting its contention that Felix "Phil" Foglia's exposure to asbestos-containing material was caused by MDD, plaintiffs incorporated by reference their response to Interrogatory No. 1.

Alameda County Standard Interrogatory No. 32, requested plaintiffs provide specific details for each type of asbestos material and/or asbestos containing product to which plaintiffs claimed exposure, as well as the employer, job site and dates of exposure. Plaintiffs responded as to MDD: "From approximately 1941-1945, when decedent was a young child, his father Felix 'Phil' Foglia worked as an electrician at Moore Drydock. Phil Foglia worked on the conversion of ocean liners into troop carriers and was also involved in new construction of ships. Decedent was exposed to asbestos fibers his father brought home from his work with and around asbestos thermal insulation on ships and at the shipyards. Decedent recalled at deposition that Phil Foglia worked at Moore Dry Dock until the war ended. Phil Foglia also worked at Kaiser Shipyard in Richmond, CA in 1940. Decedent recalled at deposition that his father played with him when he came home from work while still wearing his dirty work clothes. The family had one car which Phil Foglia drove to work. Decedent liked to play around and sit in the driver's seat of the car during this time. Investigation and discovery are continuing as to additional shipyards at which he may have worked. [¶] *Please also see Felix 'Phil' Foglia's social security records attached to this document as 'Exhibit C'.*"

Plaintiffs filed their opposition to MDD's summary judgment motion, including their separate statement of disputed material facts, their reply to MDD's separate

statement, and a request for judicial notice of the social security records of Philip L. Foglia, which it contended were those of Father. Plaintiffs asserted MDD had failed to meet its initial burden as it had not produced competent evidence establishing that plaintiffs did not have and could not reasonably expect to establish a prima facie case.

Plaintiffs' evidence included the following:

1. Additional excerpts from decedent's deposition stating that Father was a lead electrician and worked on ship conversions at MDD and was employed by MDD, though he might have gone to Kaiser and other places during this time and that Father would come home without changing his clothes and they would play (physical rough-housing, Father would pick decedent up and throw him over Father's shoulder).[1]

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[1] "Q. What did he do for the shipyards?

"A. He was like a lead electrician. He had a crew of electricians that worked on ship conversions.

"Q. Do you know which shipyard he worked at?

"A. I believe it was Moore Dry Dock.

"Q. Other than Moore Dry Dock, do you know if – did he work at any of the other Bay Area shipyards?

"A. My recollection is that he went from one yard to the other, but I think he was employed by Moore, but he might have gone – there was a whole lot of ship building activity in the Bay Area then. So he may have gone to Kaiser and other places also, but mostly it was Moore.

" . . .

"Q. You were a young guy at this time, correct?

"A. Well, I was born in 1940.

" . . .

"Q. You were somewhere between two and five years old at this time, correct?

"A. That's correct."

2. A declaration from Amelia L. Garcia, decedent's aunt and Father's sister, who stated her brother Felix Phil Foglia was decedent's father, that he worked as an electrician on ships at MDD in the early 1940s, and that decedent lived with Father and they would visit her and decedent's grandfather at grandfather's home.[2]

3. Excerpts from previous trial testimony and depositions of James R. Moore, who had been designated in other cases (*Eddie Broussard, Jr., et al. v. Asbestos Defendants, et al.,* SFSC No. 044518 and *Wesley McGee v. Abex Corp.,et al.,* SFSC No. 914077) as MDD's "Person Most Knowledgeable," and who testified therein that outside contractors had installed asbestos-containing insulation aboard MDD's ships, that "[t]here may have been asbestos in some electrical equipment or material" that MDD employees installed. "It's possible that there was asbestos in joiner work." Moore also testified that "[a]t just about any given time during the ship building period," laborers would be dry sweeping up asbestos dust with brooms and dust pans.

4. Excerpts from the deposition of Barry Castleman, and a declaration by Barry R. Horn, proffered experts.

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[2] Garcia declared in pertinent part:

"2. All of the matters stated herein are true and correct and based on my personal knowledge.

"3. I am the aunt of decedent, Ronald Foglia. My brother, Felix Phil Foglia, is Ronald Foglia's father.

"4. Felix Phil Foglia worked as an Electrician on ships at Moore Dry Dock in the early 1940s. During this time, Ronald Foglia was a child living in the house with his father and mother.

"5. My father, Felix John Foglia, who is Ronald Foglia's grandfather, also worked on ships at Moore Dry Dock during WWII, as a Machinist. During this time, I lived at home with my father and mother and Felix Phil Foglia and Ronald Foglia would visit our home."

Plaintiffs stated Castleman was an "expert in 'state of the art' as to what was known or knowable about the hazards of asbestos during various times." He stated it was well understood at the time that asbestos fibers migrate and travel and that the risk of contracting an asbestos disease was not confined to the person actually working with the asbestos product. Therefore, he opined, it was foreseeable that decedent would be exposed to asbestos from the work clothes brought home by *Father as a WW II electrician, absent special measures being taken by the shipyard to provide protection*.

In his declaration, Horn stated he was board certified in pulmonary medicine and internal medicine and had spoken to and treated numerous individuals with asbestos-related diseases stemming directly from exposure to asbestos products at MDD. He had read numerous depositions of those with lung cancer, asbestosis or mesothelioma, including those who worked as electricians and other trades at MDD and that "I am aware that asbestos-containing materials were used on ships at More Dry Dock." Having reviewed decedent's deposition, Horn opined that decedent's "exposure to fibers brought home by his *father from his work around asbestos insulation on ships at Moore Dry Dock*, would have increased his risk of developing mesothelioma." (Italics added.)

MDD filed a reply and response to plaintiffs' separate statement and its objections to plaintiffs' evidence, asserting that it had shifted the burden as to whether decedent was exposed to asbestos for which it could be held liable, by establishing via plaintiffs' factually devoid discovery responses and deposition testimony that plaintiffs had not and could not present evidence of the alleged exposure. In addition to reiterating that it had no duty to decedent for any secondary exposure, MDD challenged the evidence that Father worked for MDD at the shipyard as an electrician on ship conversion that had been introduced through decedent's deposition and Garcia's declaration as inadmissible hearsay, as lacking foundation, and as speculative. MDD supported its objections to decedent's deposition testimony by further excerpts from decedent's deposition, wherein decedent admitted that he had no personal knowledge of any facts relating to Father's

alleged employment with MDD, including the details of his work, but knew only because he had been told so by Father and decedent's aunt, Amelia Garcia.[3]

[3] "Q. How is it that you know that your father worked at Moore Dry Dock?

"A. I asked my aunt.

" . . .

"Q. Other than the information that your Aunt [Mia] gave you saying that your father worked at Moore Dry Docks, do you have any other information on which to base your statement that your father worked at Moore Dry Docks?

"A. My dad told me he did, too.

"Q. Any other information?

"A. No.

" . . .

"Q. Okay. You said that your father was a lead electrician at the shipyards. Is this something that he told you?

"A. Yes.

" . . .

"Q. And other than what your father told you, do you have any independent knowledge that your father was a lead electrician at the shipyards?

"A. No, I don't.

" . . .

"Q. You had also said that your father told you he worked on the conversion of passenger ships to troop carriers. Other than what your father told you, do you have any independent knowledge that he worked on the conversion of passenger ships to troop carriers?

"A. No, I don't.

" . . .

"Q. My question was, do you have any information or knowledge as to whether your father worked with or around any thermal insulation when he was at the shipyards or on ships?

"A. He said he did.

Similarly, MDD challenged the admissibility of the Garcia declaration, objecting that it was hearsay, lacking in personal knowledge and failing to provide a basis for her knowledge regarding Father's employment.

MDD also challenged the Castleman deposition evidence and the opinions proffered by Horn as lacking in foundation and speculative because they were based on an assumed set of facts for which there was no evidence.

The Trial Court Grants Summary Judgment

Following a hearing on the motion, the court rejected MDD's claim it owed no duty to decedent as a matter of law. The court found a duty of care could arise on the part of an employer to protect family members of its employees from exposure to harmful substances encountered by its employees in the course and scope of their employment.

"Q. And did he say that he worked with it or did he say he worked around it or both?

"A. Around it.

"Q. And other than your father stating to you that he worked around thermal insulation, do you have any independent knowledge that he worked around thermal insulation at the shipyards?

"A. No.

"Q. Your interrogatory responses indicate that your father worked with thermal insulation as well as around it. Do you know where the information in the interrogatory responses came from that says that he worked with it?

"A. No, I don't.

"Q. . . . I know you said that he was involved in conversions of ships, but do you have any information or knowledge as to whether your father was ever involved in the new construction of ships?

"A. I don't know that.

"Q. Your interrogatory responses say that your father was involved in the new construction of ships. Do you know where that information came from?

"A. No."

The court next concluded MDD had made a sufficient showing based on plaintiff's factually devoid discovery responses to shift the burden of proof to plaintiffs regarding Father's exposure. The trial court ruled on MDD's objections to plaintiffs' evidence. Although it took judicial notice of the social security records of Phil L. Foglia,[4] the court sustained MDD's evidentiary objections to those portions of decedent's deposition discussing Father's employment, because it failed to show decedent had personal knowledge of Father's employment by MDD or his job duties. The court also sustained MDD's evidentiary objections to the Garcia declaration, ruling, "the declarant does not disclose any source of knowledge about her brother's job duties other than statements made by him." It sustained objections to the portions of the Garcia declaration regarding her father's (decedent's grandfather's) employment as irrelevant to the issues on the motion. As relevant here, the court overruled the bulk of MDD's objections to the Moore (person most knowledgeable) deposition testimony in *Broussard v. Asbestos Defendants* and *McGee v. Abex Corp.*, but sustained objections to his testimony as to whether joining work was done, whether asbestos-containing materials were used in such joining work and whether the work released asbestos fibers into the air on the ground Moore lacked personal knowledge and as irrelevant, as there was no evidence Father performed such work or was around others who were doing so. (Plaintiffs do not contend the court erred in sustaining this objection to Moore's testimony.)

The court also sustained objections to the Castleman deposition for lack of a "sufficient foundation for his opinion that decedent was exposed to asbestos fibers from his father as a result of working around asbestos insulation on ships at [MDD]. There is

[4] In its ruling, the court pointed out that the record did not establish that Philip L. Foglia whose social security records were introduced, was the same person as Father, who was referred to by witnesses as Felix Foglia. Nevertheless, the court assumed that Phil L. Foglia was decedent's father and that Moore Securities Company was the same entity as MDD.

no evidence that decedent's father worked around such insulation work." Similarly, it sustained objections to the Horn declaration as lacking a sufficient foundation.

The court granted summary judgment for MDD. It later denied plaintiffs' new trial motion. Plaintiffs filed this timely appeal from the judgment. They have not challenged the court's denial of their new trial motion.

DISCUSSION

I. *Applicable Legal Standards*

The standards for review of a summary judgment are well-established and were recently reiterated by Division Five of this court in *Johnson v. Arvinmeritor* (2017) 9 Cal.App.5th 234, 239-240:

"Summary judgment is appropriate 'if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' (Code Civ. Proc., § 437c, subd. (c).)[5] '[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . 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.' (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fns. omitted.) In ruling on the motion, the court must draw all reasonable inferences from the evidence in the light most favorable to the opposing party. (*Id*. at p. 843.) An order granting summary judgment is reviewed de novo. (*Id*. at p. 860.)

" 'A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete

[5] Undesignated statutory references are to the Code of Civil Procedure.

defense to the cause of action.' (§ 437c, subd. (p)(2).) To show a cause of action cannot be established, a moving defendant may either conclusively negate an element of the claim, or show 'the plaintiff does not possess, and cannot reasonably obtain, needed evidence.' (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 855.) '[A] defendant moving for summary judgment [must] present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (. . . § 437c, subd. (b).)' (*Aguilar*, at p. 854, fn. omitted.)"

A. *Legal Standards in Asbestos Exposure Cases*

" ' ' "A threshold issue in asbestos litigation is exposure to the defendant's product. . . . If there has been no exposure, there is no causation." (*McGonnell*[*v. Kaiser Gypsum Co., Inc.* (2002)] 98 Cal.App.4th [1098,] 1103.]) Plaintiffs bear the burden of "demonstrating that exposure to . . . asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [the] risk of developing cancer." (*Rutherford v. Owens–Illinois, Inc.* (1997) 16 Cal.4th 953, 957–958.) "Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product. . . ." [Citation.] Therefore, "[plaintiffs] cannot prevail . . . without evidence [of exposure] to asbestos-containing materials manufactured or furnished by [a defendant] 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." ' " ' (*Whitmire v. Ingersoll–Rand Co.* (2010) 184 Cal.App.4th 1078, 1084; see also *Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1438.)" (*Shiffer v. CBS Corporation* (2015) 240 Cal.App.4th 246, 251; see also *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236.)

B. *Secondary Exposure Claim*

Much of the focus below and in the parties' briefs on appeal has been on MDD's argument that it had no duty to decedent to protect from secondary exposure from asbestos plaintiffs' claim was brought home on Father's work clothing. During the pendency of this appeal, the Supreme Court, like the trial court below, concluded that such duty exists. In *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, our Supreme Court held, "[T]he duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and on clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission." (*Id.* at p. 1140; followed by *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 275-276.) The court limited the duty to "members of a worker's household, i.e., persons who live with the worker." (*Kesner,* at pp. 1154-1155.)

Consequently, we need not address this issue.

II. *Burden Shifting*

Plaintiffs contend the trial court erred in shifting the burden to plaintiffs to provide admissible evidence that Father was exposed to asbestos from working at MDD. They argue that the burden could not shift to them where MDD failed to conduct comprehensive discovery and failed to disclose discovered evidence.

In *Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 98 (*Andrews*), we held that the plaintiff's nonresponsive answers to comprehensive discovery were sufficient to meet the defendant's burden of production where discovery propounded by the defendant was sufficiently comprehensive and the responses to it so devoid of facts, "as to lead to the inference that plaintiffs could not prove causation upon a stringent review of the direct, circumstantial and inferential evidence contained in their interrogatory answers and deposition testimony." (*Id.* at p. 107.) "When defendants conduct comprehensive

discovery, plaintiffs cannot play 'hide the ball.' " (*Id.* at p. 106.) If the plaintiffs respond "to comprehensive interrogatories seeking all known facts with boilerplate answers that restate their allegations, or simply provide laundry lists of people and/or documents, the burden of production will almost certainly be shifted to [the plaintiffs] once defendants move for summary judgment and properly present plaintiffs' factually devoid discovery responses." (*Id.* at p. 107, fn. omitted.)

Plaintiffs rely upon *Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64 (*Scheiding), Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433 (*Weber*), and *Ganoe v. Metalclad Insulation Corp.* (2014) 227 Cal.App.4th 1577 in opposition.

In *Scheiding, supra*, 69 Cal.App.4th 64, we concluded that summary judgment was improperly granted when the only support for the motion was a declaration from counsel that the plaintiffs did not mention the contractor defendant in discovery. (*Id.* at p. 67.) The husband and wife plaintiffs had brought an action against hundreds of defendants, and one defendant moved for summary judgment based on the plaintiffs' inability to prove causation. (*Ibid*.) However, no defendant had asked the plaintiff husband during his deposition whether he had worked at any jobsite where the general contractor was present. (*Ibid.*) We concluded that "it would be unreasonable to infer from this record that [husband and wife] can produce no other evidence to link [the defendant] to [the husband's] illness." (*Id*. at p. 81.) We held that we could not infer anything when questions were neither asked nor answered. (*Ibid.*)

In *Weber*, Division One of this court held that evidence of the plaintiff's deposition testimony that "he did not recall the defendant's name and did not recall whether he worked with any product bearing the defendant's name," without more, did not meet "the defendant's initial burden of producing evidence that the plaintiff does not possess, and cannot reasonably obtain, evidence the defendant was a cause of the plaintiff's injuries, so that the burden shifts to the plaintiff to show a triable issue of fact

exists as to causation." (*Weber, supra*, 143 Cal.App.4th at p. 1435.) "That Weber was unable to recall whether he worked around [defendant's] product over 40 years ago suggests only that plaintiffs will not be able to prove their case with Weber's deposition testimony." (*Id.* at p. 1439.) The defendant did not provide evidence that the plaintiffs had "failed to provide meaningful responses to comprehensive interrogatories designed to elicit all the evidence plaintiffs had to support their contention of liability." (*Id.* at p. 1442.)

Here, unlike *Scheiding* and *Weber*, and like *Andrews*, defendants did propound comprehensive interrogatories, including specially-prepared interrogatories, requesting that plaintiffs "state all facts" supporting their contention that decedent and Father's alleged exposure to asbestos-containing material was caused by MDD. (See *Scheiding, supra,* 69 Cal.App.4th at p. 81; *Weber, supra,* 143 Cal.App.4th at p. 1441; *Andrews, supra,* 138 Cal.App.4th at pp. 104-106.) Further, at his deposition, decedent was asked about the basis for his testimony as to the circumstances of his father's alleged employment at MDD and responded that his father and his aunt had told him so and acknowledged he had no other basis for such knowledge.

Plaintiffs rely upon *Ganoe v. Metalclad Insulation Corp., supra*, 227 Cal.App.4th 1577, in support of their contention that their responses did not consist of "boilerplate answers" and " 'general allegations,' " but contained " 'specific facts' " on exposure, and so were not factually devoid responses that shifted the burden. (*Id.* at p. 1584.) However, in *Ganoe,* two years into the litigation, but before the summary judgment motion was determined, defendant Metalclad produced a document showing it had performed insulation work on steam piping at the Goodyear plant in 1974. Ganoe had alleged he was exposed during his work as a utility man in department 132 at Goodyear from 1968 until 1979. (*Id.* at p. 1579.) The plaintiffs filed an amended discovery response to Metalclad's "all facts" interrogatories that "contained 'specific facts' showing that Metalclad had exposed Ganoe to asbestos in 1974 by removing asbestos-containing

insulation in Department 132 of the Goodyear plant while he was present." (*Id.* at p. 1584.) No comparable evidence was presented in this case and no amended discovery responses contained specific facts supporting an inference of exposure by Father.

Plaintiffs further contend MDD did not shift the burden because it failed to depose decedent's aunt, who was identified in plaintiffs' discovery responses as a person having more information about Father's exposure and because it failed to ask decedent at his deposition how he knew his father was an electrician and then used that failure to claim a reasonable inference that plaintiffs could not produce further evidence on the point. They further contend MDD did not disclose all evidence it had discovered when it did not include in its initial motion decedent's testimony about Father's work at MDD, but only an excerpt stating decedent had never visited the shipyard and where it failed to include alleged admissions made by MDD in other cases.

In response to MDD's interrogatory that plaintiffs identify each person who has information relating to Father's alleged exposure by "name, current or last known address, and current or last known telephone number," plaintiffs identified decedent via his deposition testimony, Moore as MDD's person most knowledgeable, unnamed employees of MDD, and decedent's aunt "Mia Garcia," without the contact information requested. MDD was not required to depose Garcia; nor was it required to ask decedent every possible question, where it was satisfied that neither decedent nor Garcia had any independent knowledge that Father worked as a lead electrician on ships or in the shipyard.

It may be that, considered in a vacuum, MDD's separate statement of material facts relying upon portions of plaintiffs' interrogatory answers and a single paragraph of decedent's deposition stating he had never been to MDD shipyards, would have been insufficient to shift the burden so as to allow the court to infer that plaintiffs had no

evidence to prove their causes of action and could not obtain such evidence.[6] However, the trial court properly considered the entirety of the admissible evidence provided by the parties in support of and in opposition to the summary judgment motion when it found MDD had shifted the burden and that plaintiffs' evidence was insufficient to raise a triable issue of material fact. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 749-750.)

As a leading treatise warns: "**Caution—gaps in moving papers may be 'cured' by opposition evidence:** Declarations and exhibits presented by plaintiff in opposition to the motion may 'cure' evidentiary gaps in the moving papers. The court is entitled to consider 'all of the evidence set forth in the papers.' [Citations.]" (Weil and Brown, Civil Procedure Before Trial, *supra*, ¶¶ 10:251, 10:271.1, citing *Villa v. McFerren, supra,* 35 Cal.App.4th at pp. 751.) Here, plaintiffs' opposition papers included portions of defendant's deposition testimony, which when coupled with defendant's other evidence, was sufficient to satisfy defendant's burden and to shift the burden of proof to plaintiffs. (See *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289.)

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[6] "If the moving party contends there is no evidence to support an element of the opponent's case, the moving party must set forth all the material evidence on a point. Thus, the statement of 'undisputed facts' must include the opponent's discovery responses even if their content is inadmissible (e.g., hearsay, or for lack of foundation). Including the opponent's responses does not waive the evidentiary objection. The proper method is to include the inadmissible discovery responses and state why they may not be considered by the court." (Weil and Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶ 10:95.10, citing *Rio Linda Unified School Dist. v. Superior Court* (1997) 52 Cal.App.4th 732, 740-741.) It appears MDD did not do so. While this failure may have given the court "an 'easy way out,' " the judge need not take that path and, where dispositive evidence is obvious to the court and the parties, it may be an abuse of discretion for the court to disregard it. (Weil and Brown, *supra*, at ¶ 10:98, citing *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316.)

This reasoning is consistent with the rule that the court must grant summary judgment "if all the papers submitted show that there is no triable issue as to any material fact . . . ." (§ 437c, subd. (c).)

III. *Trial Court's Exclusion of Evidence*

The trial court sustained several of the objections made by MDD to plaintiffs' proffered evidence. Plaintiffs contend the court erroneously excluded evidence from decedent and Garcia that Father worked as an electrician on ships at MDD, as well as from plaintiffs' experts on the key issue of exposure.

In our review of a summary judgment, "we consider all the evidence set forth in the moving and opposition papers except that to which objections have been made and *properly* sustained." (*Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451-1452.)

Although opposition declarations are liberally construed, while the moving party's declarations are strictly scrutinized (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768) the party opposing summary judgment must produce *admissible* evidence raising a triable issue of fact. The opposing party's burden is not satisfied by liberally construed declarations containing inadmissible evidence (hearsay or conclusions). (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761 ["Only *admissible evidence* is liberally construed in deciding whether there is a triable issue."]; see Weil and Brown, *supra*, at ¶¶ 10:253.1, 10:205.1.) "[A] lack of evidence exists where the opposing party's discovery responses consist of inadmissible hearsay and the moving party timely objects thereto." (Weil and Brown, *supra*, at ¶ 10:245.27, citing *Rio Linda Unified School Dist. v. Superior Court, supra*, 52 Cal.App.4th 732, 741.)

Plaintiffs argue we should review the court's evidentiary rulings de novo. Although the weight of authority supports an abuse of discretion standard of review (Eisenberg, et al., Civil Appeals and Writs (The Rutter Group 2017) ¶ 8:168, citing *Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 52; *Miranda v. Bomel Construction Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335; *DiCola v. White Bros.*

Performance Products, Inc. (2008) 158 Cal.App.4th 666, 679; *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852), at least one recent case has held such review is de novo. (*Pipitone v. Williams, supra,* 244 Cal.App.4th at p. 1451.) The Supreme Court has acknowledged this is an issue for debate (see *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535), but held in light of the facts presented, "we need not decide generally whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo.) We noted this issue ourselves in *Turley v. Familian Corporation* (2017) 18 Cal.App.5th 969, 978 and *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255 & footnote 4. We need not resolve the debate here, as even under the more rigorous de novo standard of review, we conclude the trial court did not err in the challenged evidentiary rulings.

A. *Decedent's Deposition Testimony*

The trial court excluded decedent's testimony that Father was a lead electrician for the shipyards, supervising a crew of men working on ship conversions and that he believed Father worked at MDD and was employed by MDD. Decedent was less than five years old at the time and acknowledged he had no personal knowledge of Father's employment and that his knowledge was based on what Father and decedent's aunt had told him. Decedent admittedly lacked personal knowledge as to this testimony, which was entirely based on hearsay statements made to him. That a family member is testifying as to what other family members told him does not make this testimony admissible.[7]

[7] Evidence Code sections 1312 and 1313 contain hearsay exceptions for certain types of entries in family records and the like and for reputation among family members when offered to prove the "birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family . . . ." These exceptions are clearly inapplicable here.

A witness must have personal knowledge of a subject for the testimony about it to be admissible, unless the witness is testifying as an expert. (Evid. Code, § 702, subd. (a).) "Personal knowledge means a present recollection of an impression derived from the exercise of the witness's own senses. [Citation.] A witness cannot competently testify to facts of which he or she has no personal knowledge. [Citation.]" (*Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 731 (*Alvarez*), overruled on other grounds in *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 74, fn. 3; Evid. Code, § 702.)[8]

Plaintiffs rely upon *Alvarez, supra*, 79 Cal.App.4th 720, 731. In *Alvarez*, the court affirmed summary judgment in favor of the State on a design immunity defense. The trial court had allowed the project engineer who prepared the plans and the defendant's expert witness to testify that the plans received the requisite discretionary approval, although they did not themselves approve the plans and were not present when the plans were signed and did not subsequently talk to the person who signed the plans. (*Id.* at pp. 731-732.) The Court of Appeal first held that the trial court reasonably could infer from

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[8] Evidence Code section 702 provides:

"(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

"(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony."

The Law Revision Commission Comments to Evidence Code section 702 explains: "Section 702 states the general requirement that a witness must have personal knowledge of the facts to which he testifies. 'Personal knowledge' means a present recollection of an impression derived from the exercise of the witness' own senses. [Citation.] . . . [¶] Except to the extent that experts may give opinion testimony not based on personal knowledge (see Evid. Code § 801), the requirement of Section 702 is applicable to all witnesses, whether expert or not. . . ." (Cal. Law Revision Com. Com., 29B, pt. 2 West's Ann Evid. Code (1995 ed.) foll. § 702, p. 300.)

the face of the project designer's declaration that he had personal knowledge as to whether his superiors approved his plan. (*Id.* at p. 732.) The court also observed that the project designer's statement that his superior reviewed and approved the project plans he had drawn was based on the project designer's knowledge of the design review process and the reasonable inference he drew from the fact the plans were not returned to him for redesign. The project designer described the approval process, which involved several layers of review, and testified that had his superiors rejected the design plans, they would have refused to sign them, requiring him to redesign the project plans to meet what his superiors believed was the correct design. (*Id*. at pp. 729-730.)

The expert civil engineer testified about his extensive knowledge of the State design review and approval process, the process itself, his personal familiarity with the four state officials who approved and signed the project plans, and their discretionary authority to approve the project plans. The officials' signatures showed they had in fact exercised their discretionary authority and approved the plans. (*Alvarez, supra,* 79 Cal.App.4th at pp 729-730.) The court held the civil engineer had the requisite expertise to testify as to the State's discretionary approval custom and practice, and to explain the discretionary approval process as indicated by the plans. As an expert, he could competently interpret and explain the project plans, identify the officials involved and explain their role in the discretionary approval process, even though he was not involved at the time. (*Id.* at p. 732.)

Alvarez is clearly distinguishable. Neither decedent nor Garcia were expert witnesses. More to the point, neither decedent's deposition testimony nor Garcia's declaration disclosed the type of factual foundation or explanation, from which an inference of personal knowledge or expertise could be drawn. The court did not err in excluding decedent's testimony about his father's alleged work at MDD.

B. *Garcia's Declaration*

The trial court sustained MDD's objections to those portions of Garcia's declaration that her brother worked as an electrician at MDD in the early 1940s, ruling Garcia did "not disclose any source of knowledge about her brother's job duties other than statements made by him." Garcia declared the matters stated therein were based upon her "personal knowledge." But that recitation carries no weight. (6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 225, p. 666 ["The affidavit or declaration supporting or opposing summary judgment must be made on personal knowledge and must show affirmatively that the affiant or declarant is competent to testify to the matters stated. ([§] 437c(d).) These elements must be shown by facts set forth in the affidavit or declaration and not merely by conclusory statements to that effect. The bare statement that the facts are within the affiant's or declarant's knowledge does not fulfill the requirement where the facts set forth do not show this. [Citations.]"]; Weil and Brown, Civil Procedure Before Trial, *supra*, ¶ 10:110.)

Plaintiffs argue that the court could reasonably infer that Garcia had personal knowledge of her brother's occupation from her statement that she lived at home with her mother and father at the time and saw decedent and Father when they would visit.

People v. Cortez (2016) 63 Cal.4th 101, 123, arguably supports plaintiff. There, the trial court determined a witness had sufficient personal knowledge to testify and the Court of Appeal reversed. The Supreme Court first acknowledged that "[t]he Evidence Code declares that 'the testimony of a witness [at trial] concerning a particular matter is inadmissible unless [the witness] has personal knowledge of the matter.' (Evid. Code § 702, subd. (a).)" The Supreme Court reversed the Court of Appeal, observing: "When a witness's personal knowledge is in question, the trial court must make a preliminary determination of whether 'there is evidence sufficient to sustain a finding' that the witness has the requisite knowledge. (Evid. Code, § 403, subd. (a)(2).) 'Direct proof of perception, or proof that forecloses all speculation is not required.' [Citation.] The trial

court may exclude testimony for lack of personal knowledge ' "*only if no jury could reasonably find* that [the witness] has such knowledge." ' [Citation.] Thus, '[a] witness challenged for lack of personal knowledge must . . . be allowed to testify *if there is evidence from which a rational trier of fact could find* that the witness accurately perceived and recollected the testimonial events. Once that threshold is passed, it is for the jury to decide whether the witness's perceptions and recollections are credible. [Citation.]' [Citation.]" (*People v. Cortez, supra*, 63 Cal.4th at p. 124.)

Unlike the trial court in *People v. Cortez, supra*, 63 Cal.4th 101, which had found the witness possessed sufficient personal knowledge to testify, the trial court here determined the evidence in Garcia's declaration was not sufficient to sustain a finding that Garcia had personal knowledge that Father worked as an electrician on ships at MDD in the early 1940s. Garcia's statement that she lived at home with her parents and saw Father and decedent does not provide a foundation of personal knowledge regarding father's alleged employment as an electrician working on ships at MDD.

Plaintiffs further contend that Garcia's statement as to Father's employment was not hearsay, as there was no sentence in the declaration that was "an out of court statement offered to prove the truth of the matter stated." (See *Alvarez, supra*, 79 Cal.App.4th at pp. 732-733.) In the absence of any foundation indicating personal knowledge in the declaration, the court did not err in concluding the only source of Garcia's knowledge was inadmissible hearsay from Father or her parents.

The court below further concluded that even if it had admitted decedent's deposition testimony and Garcia's declaration, "there would still be an absence of admissible evidence that Felix Foglia worked with asbestos-containing materials, or that his work with asbestos-containing materials would have released asbestos fibers into the air as a result of MDD activities." It appears the court was correct in this regard, as even placing Father as an electrician working at MDD during the early 1940s does not provide evidence he was exposed to asbestos. As the trial court explained: "Plaintiffs suggest

that because there was insulation work being performed at MDD during the relevant period of time, decedent's father must have been exposed to asbestos from that work. However, there is no evidence in the record of the amount of asbestos work that was being conducted at MDD, what the levels of asbestos would have been at the shipyard or on any ship, or that Felix Foglia was in the vicinity of asbestos work while it was being performed. Even if the declaration of Amelia Garcia and the deposition testimony of decedent were admitted, the evidence is not sufficient to support a reasonable inference of decedent[']s exposure resulting from [MDD] activities. (See *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1420-1421.]"

C. *Expert Declarations of Castleman and Horn*

The trial court sustained MDD's objections to the Castleman deposition testimony and the Horn declaration, ruling the experts had not provided a sufficient foundation for their opinions that decedent was exposed to asbestos fibers from Father as a result of Father's work on ships at MDD, where there was no evidence that decedent's father worked around such asbestos insulation.

"The trial court may strike or dismiss an expert declaration filed in connection with a summary judgment motion when the declaration states expert opinions that are speculative, lack foundation, or are stated without sufficient certainty. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 123.) . . . An 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.]" ' " (*Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1115-1116.)

Plaintiffs challenge the court's exclusion of the Castleman and Horn testimony, claiming there was ample foundation for the assumption that Father was "somewhere in the shipyard," citing to decedent's deposition testimony. The trial court did not exclude this testimony on the ground that there was no evidence that Father worked for MDD or

even at a shipyard. It excluded the testimony because there was no admissible evidence that Father worked with or around asbestos insulation on ships at MDD. We have already concluded that decedent's testimony as to Father's employment as an engineer working on ships was properly excluded. There was no foundation for the opinions that Father brought home asbestos fibers on his clothes from work at MDD or that Father worked with or around asbestos.

Relying upon *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 766, plaintiffs contend that expert witnesses are permitted to rely on "facts not personally known" to them and that are "necessarily *hypothetical*," such that the opinions assumed their existence. But plaintiffs quote language from *Cole* out of context. *Cole* does not stand for the proposition that an expert opinion is admissible where based on assumptions of fact without evidentiary support or where based on facts that are speculative or conjectural. Indeed, in *Cole* the plaintiff presented evidence to support her theory of a dangerous condition of public property involving a road configuration and a gravel parking area. This evidence included declarations and testimony by neighbors and others as to their observations of the behavior of drivers on the road.

" 'An expert's speculations do not rise to the status of contradictory evidence, and a court is not bound by expert opinion that is speculative or conjectural. . . . [Parties] cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning.' (*McGonnell v. Kaiser Gypsum Co., supra,* 98 Cal.App.4th 1098, 1106, citations omitted.)" (*Bozzi v. Nordstrom, Inc., supra,* 186 Cal.App.4th at pp. 763-764.)

"An expert's opinion is only as good as the facts on which it is built. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 [expert opinion ' "may not be based 'on assumptions of fact without evidentiary support' " ']; *Casey v. Perini Corp., supra,* 206 Cal.App.4th 1222, 1235 [asbestos expert's opinion based on assumed facts not admissible]; cf. *Howard v. Owens Corning* (1999) 72

Cal.App.4th 621, 633 [‘the opinion of any expert witness “is only as good as the facts and reasons on which it is based” ’ and a fact finder ought not credit expert testimony mischaracterizing level of asbestos exposure].)” (*Shiffer v. CBS Corporation, supra,* 240 Cal.App.4th at pp. 253-254; see also, *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 130 [expert declarations in opposition to summary judgment are liberally construed, but still must be based on facts in the record].)

The Castleman deposition was focused on the issues of what MDD would have known about asbestos fiber transportability in the early 1940s and the question of secondary asbestos exposure. Castleman’s opinion as to *Father’s* exposure is based on decedent’s testimony that father worked at as an electrician at MDD during World War II and would come home in his dusty work clothing without changing. Such testimony is clearly without foundation, absent other admissible evidence that Father worked as an electrician in MDD shipyards during this period, worked with or around asbestos, and would have been exposed to asbestos due to his work. Further, Castleman’s testimony did not tend to prove or disprove any facts relating to Father’s exposure to asbestos and was therefore irrelevant to that issue.

In his declaration, Horn testified he had “spoken to and treated numerous individuals with mesothelioma, including those who worked as electricians and other trades at Bay Area shipyards, specifically those whose asbestos-related diseases stemmed directly from exposure to asbestos products at Moore Dry Dock.” He had “read numerous depositions of those with lung cancer, asbestosis or mesothelioma, including those who worked as electricians and other trades at Moore Dry Dock. I am aware that asbestos-containing materials were used on ships at Moore Dry Dock,” Horn had read the deposition of the decedent “who had testified that his father, Felix Phil Foglia, worked as a lead electrician on board ships at [MDD] shipyard in the 1940’s while [decedent] was a child growing up.” Based upon this information, Horn opined that “[decedent’s] exposure to fibers brought home by his father from his work around asbestos insulation

on ships at Moore Dry Dock, would have increased his risk of developing mesothelioma."

As the trial court observed, Horn's declaration assumes that Father worked on a ship at MDD, and there was no evidence supporting that assumption.[9] Horn's testimony is without foundation where there was no admissible evidence that Father worked on ships or in the shipyards around asbestos insulation or other sources of asbestos at MDD

IV. *No Triable Issue of Fact as to Father's Exposure to Asbestos*

The question, then, is whether the admissible evidence before the court supports its grant of summary judgment. We are convinced it does.

Shiffer v. CBS Corporation, supra, 240 Cal.App.4th 246 is instructive here. There, the Court of Appeal affirmed the trial court's grant of summary judgment, concluding the plaintiffs had failed to show Shiffer had been exposed to asbestos for which the defendant was responsible. Plaintiffs had alleged Shiffer developed mesothelioma from exposure to Westinghouse asbestos at a power plant in 1969. (*Id.* at p. 248.) Defendant conceded that insulation for the turbine generator and certain related piping, installed at the plant in 1969, contained Westinghouse asbestos. (*Id.* at p. 249.) In his deposition, Shiffer admitted that, when he arrived at the power plant in 1969, construction was in its last stages and the main turbine insulation had already been installed. He observed some drains and smaller auxiliary lines being insulated, but his workstation was in another building. (*Ibid.*) In a declaration opposing summary judgment, Shiffer was less specific about what work was already completed or still in progress upon his arrival, stating he had observed construction, including the insulation

[9] Although the trial court refers to the Horn declaration as assuming "decedent" worked on a ship at MDD, the court was clearly referring to Horn's unsupported factual assumption that decedent's father worked on ships at MDD.

of piping in the turbine building, and had spent time daily in this area while educating himself and conducting training. (*Id.* at p. 250.)

Shiffer's experts opined that Shiffer was exposed to hazardous levels of respiratory asbestos during work on the turbines and that this exposure was a substantial factor contributing to his total aggregate exposure to asbestos. (*Shiffer v. CBS Corporation, supra*, 240 Cal.App.4th at p. 250.) However, the experts had failed to review Shiffer's deposition testimony and the trial court excluded or did not consider the expert opinions because they lacked foundation and were speculative. (*Ibid.*) The Court of Appeal affirmed, finding it inappropriate to infer that Shiffer was present during the installation of the asbestos-containing components. According to the court: "plaintiffs did not establish the nature of Shiffer's observation of the insulation work. In his abbreviated declaration he stated he 'observed construction . . . including insulators insulating piping in the turbine building.' Although he also declared he was frequently *in the turbine room* for training, he did not say whether or on how many occasions he observed the insulation process, itself, or whether he merely saw the results of the process after being off-site for some time. Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure. (*Andrews v. Foster Wheeler LLC*[, *supra,*] 138 Cal.App.4th 96, 112.) [¶] Additionally, Shiffer failed to raise a triable issue that whatever piping insulation work he did observe involved asbestos-containing, Westinghouse-supplied material." (*Shiffer v. CBS Corporation, supra*, 240 Cal.App.4th at pp. 251-252.)

At the summary judgment hearing in the matter before us, plaintiffs' counsel admitted plaintiffs could not put decedent's father on a particular ship or show Father was exposed to particular asbestos-containing products. Counsel also conceded he would never be able to establish exactly what decedent's father did at MDD. The court rejected plaintiffs' argument that Father would inevitably have been exposed to asbestos simply by being present at the shipyard. The court observed that to accept such theory would

mean all 37,000 employees would have been exposed, regardless of their job duties. Neither expert so testified, and no such evidence was before the court when it granted summary judgment. Here, plaintiffs failed to produce admissible evidence supporting counsel's assertion.

That courts in other cases with different evidence may have reached different conclusions did not require the trial court here to do so, where there was no evidence of "inevitable exposure" from mere presence at the shipyards. (Cf., *Davis v. Honeywell International Inc.* (2016) 245 Cal.App.4th 477, 493 [Expert "was presented with a hypothetical based on the facts surrounding Davis' exposure to dust from his work on Bendix brake linings, and testified as to estimates of the amount of asbestos fibers contained in visible dust. Therefore, his conclusion that Davis' exposure to [that dust] was a substantial factor in contributing to the risk of mesothelioma was not based simply on 'any exposure' to asbestos, but instead related to an estimate of actual exposure."]; *Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 168 [Evidence showed Overly was exposed to asbestos from his work in engine rooms aboard ships and alongside insulation workers, plaintiffs presented evidence that there is no safe level of exposure to asbestos, an extremely low exposure can cause mesothelioma, the risk of contracting this disease grows in proportion to the amount of asbestos to which the individual is exposed, and plaintiffs' expert testified that Overly's " 'most intense' asbestos exposure occurred in the engine rooms of ships"].)

On the record before the court, admissible evidence connecting Father with MDD was thin at best.[10] In any event MDD did not appear to dispute in its motion for summary

[10] As the court observed in granting summary judgment, the social security records introduced by plaintiffs show that one Phil L. Foglia worked for Moore Securities Company from the end of 1941 to the third quarter of 1944. Plaintiffs' counsel represented to the court that the person was decedent's father, called Felix Foglia, that he had changed his name, and that Moore Securities Company and MDD were the same entity. No evidence was submitted supporting those facts.

judgment or in its separate statement that Father worked for MDD. Moreover, for purposes of the summary judgment motion the court *assumed* the records showed Moore Securities Company and MDD were the same entity and that Father worked at MDD.

Even so, the court accurately concluded that the records "do not show where decedent's father was employed or his job duties. There is no admissible evidence that decedent's father worked as an electrician, that he worked at the shipyard or on ships at MDD, that he worked with or in proximity to asbestos-containing materials, or that he worked with or in proximity to asbestos-containing materials [that] would have released asbestos fibers into the air to which he was exposed. Plaintiffs suggest that because there was substantial insulation work being performed at MDD during the relevant period of time, or other asbestos products on ships, decedent's father would inevitably have been exposed to asbestos simply by being present on ships or at the shipyard. Plaintiffs concede that there is no evidence on this record of the amount of asbestos work that was being conducted at MDD or what the levels of asbestos would have been at the shipyard or on any ship and that there is no evidence that decedent's father was in the vicinity of insulation work while it was being performed or work involving any other asbestos containing product." Consequently, the court concluded there was no evidence of the time, locations, or actual circumstances of the alleged exposure and the record establishes that no such evidence exists.

CONCLUSION

The trial court properly granted summary judgment in this case. Therefore, the judgment is affirmed. MDD is awarded its costs on appeal.

_____
Miller, J.

We concur:

_____
Richman, Acting P.J.

_____
Stewart, J.

A142125, *Foglia v. Moore Dry Dock Co.*