

## NJ Appeals Court Reverses \$117M Talc Verdict, Faulting Admission of Two Plaintiffs' Experts

By Amanda Bronstad

**A**New Jersey appeals court has reversed a \$117 million talcum powder verdict after finding the trial judge should not have allowed two plaintiffs' experts to testify at trial.

Wednesday's ruling comes nine months after another New Jersey appeals court reversed a trial judge's summary judgment ruling tossing two plaintiffs' experts in a different talcum powder case. Both decisions cited a 2018 landmark ruling by the New Jersey Supreme Court establishing the standard of scientific evidence to be admitted at trial.

In Wednesday's case, taking up Johnson & Johnson's appeal of the denial of its motions to toss two plaintiffs' experts, "we agree the trial court mistakenly exercised its discretion by denying their motions and this error was not harmless under the circumstances presented in this case," wrote Presiding Judge



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Joseph Yannotti in Wednesday's unanimous ruling.

"The court also did not assess the methodology, or the underlying data used by the two experts to form their opinions," he wrote. Neither Johnson & Johnson's New York attorney, E. Joshua Rosenkranz, co-head of the Supreme Court and appellate litigation practice at Orrick, Herrington & Sutcliffe, or plaintiffs attorney Denyse Clancy of Kazan, McClain, Satterley & Greenwood in Oakland, California, responded to requests for comment.

The ruling comes in a case bought by Stephen Lanzo, who

alleged his use of Johnson & Johnson's baby powder caused him to get mesothelioma. The case was the second trial involving talcum powder's link to mesothelioma and the first near Johnson & Johnson's headquarters, which is in New Brunswick. Johnson & Johnson has since won defense verdicts in New Jersey.

In 2018, a jury awarded Lanzo and his wife, Kendra, \$37 million in compensatory damages. Months later, the jury awarded \$80 million in punitive damages, granting a total verdict of \$117 million.

Later that same year, in a win for business groups, the New Jersey Supreme Court adopted the standard set by the U.S. Supreme Court's 1993 decision, *Daubert v. Merrell Dow Pharmaceuticals*, for the use of experts in products liability cases. That decision, in a mass tort case alleging Hoffmann-La Roche's anti-acne drug Accutane led to the development of Crohn's disease, reversed an appellate decision and reinstated Atlantic County Superior Court Judge Nelson Johnson's exclusion of the plaintiffs' experts' testimony.

Wednesday's decision found that Middlesex County Superior Court Judge Ana Viscomi did not sufficiently scrutinize the methodologies of two plaintiffs' experts, as required under *Accutane*, which applied retroactively.

The plaintiffs' experts were Jacqueline Moline, of the Feinstein Institute of Medical Research at Northwell Health, and James Webber, an environmental health consultant, both of whom testified that "non-asbestiform cleavage fragments"

of certain minerals could cause mesothelioma. Both experts, the appeals court held, did not cite adequate studies or research affirming their opinions.

"In *Accutane*, the court stressed the importance of the trial court's gatekeeping role in assessing the reasonableness of the methodology and underlying data used in forming an expert's opinion," Yannotti wrote.

On Aug. 5, a different New Jersey appeals court cited the *Accutane* decision in reversing a ruling by Johnson, now retired, that tossed two other plaintiffs' experts on summary judgment. Johnson & Johnson cited that 2016 decision in other talc cases. The appellate decision lifted a stay on 800 cases alleging Johnson & Johnson's baby powder caused ovarian cancer.

The appeals court in the Lanzo case had additional reasons to reverse the verdict, which also applied to another defendant, Imerys Talc America, a supplier of raw talc, which filed for Chapter 11 bankruptcy in 2019. The jury in Ranzo's trial concluded that Imerys was 30% liable in the compensatory damages

and \$25 million of the punitive damages.

As to the punitive damages verdict, the appeals court concluded that Viscomi's "adverse inference instruction" to the jury that Imerys had destroyed and withheld talc samples, which were sought in discovery, was appropriate. But, addressing Viscomi's decision not to sever the defendants for trial, the appeals court found that the instruction was "unduly prejudicial" to Johnson & Johnson's subsidiary at trial, Johnson & Johnson Consumer Inc.

"The adverse inference instruction allowed the jury to infer the talc that Imerys supplied was contaminated with asbestos," the appeals court wrote. "If that were the case, the jury could conclude that JJCI's talc products were similarly contaminated."

Imerys, represented by Roman Martinez, a Washington, D.C., partner at Latham & Watkins, said in an emailed statement: "Imerys Talc America is very pleased by the appellate court's decision to reverse the verdict in the case. Imerys Talc America stands by the integrity and safety of its products." ■