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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

MICHAEL L. PERRY and)
LONNIE L. LONG,)

C/A NO. 2023-CP-40-04072

Plaintiffs,)

In Re:
Asbestos Personal Injury Litigation
Coordinated Docket

v.)

AMERICAN INTERNATIONAL)
INDUSTRIES, *et al.*,)

Defendants.)

**ORDER ON DEFENDANT AMERICAN
INTERNATIONAL INDUSTRIES' POST-TRIAL MOTIONS**

In this asbestos case, the jury returned a Plaintiffs' verdict on August 15, 2024 in favor of Michael L. Perry and Lonnie L. Long. Defendant American International Industries ("A-I-I") moves to set aside or vacate the default judgment against it, for judgment notwithstanding the verdict, a new trial absolute, a new trial *nisi remittitur*, for a setoff of Plaintiffs' settlements as to the verdict against it, and for a stay of execution of the judgment. The motions have been fully briefed, and the Court heard oral arguments on September 24, 2024. For the reasons set forth below and on the record during oral arguments, A-I-I's motions to set aside or vacate the default judgment, for JNOV, for a new trial absolute, and to stay the execution of judgment are DENIED. A-I-I's motion for new trial *nisi remittitur* as to actual damages and motion for setoff are GRANTED.

I. MOTION TO SET ASIDE OR VACATE OR VACATE DEFAULT

A-I-I argues that the default judgment against it must be vacated or set aside because it answered amended complaints and because procedural deficiencies require it. A-I-I is incorrect.

A. Factual Background

To address the issues raised by A-I-I's motion, some background is necessary. Plaintiffs filed suit against A-I-I and several other defendants on August 4, 2023. A-I-I was served on August 10, 2023. A-I-I's answer was due on September 11, 2023, but it did not file an answer. On September 26, 2023, Plaintiffs filed a motion for default judgment as to A-I-I. On September 29, 2023, A-I-I filed an answer to the complaint. This Court granted default against A-I-I on October 3, 2023. On October 10, 2023, A-I-I moved to set aside the entry of default, which was denied on November 2, 2023.

After entry of default, on November 9, 2024, Plaintiffs moved to amend the complaint solely "to add an additional Defendant responsible for Mr. Perry's exposures to asbestos in South Carolina." The motion was granted on November 21, 2023, and the first amended complaint was filed on November 30, 2023. A-I-I was not served with the first amended complaint because it was in default. Despite the lack of service, A-I-I answered the first amended complaint on December 8, 2023.

On January 31, 2024, Plaintiffs moved to file a second amended complaint, again solely "to add an additional Defendant responsible for Mr. Perry's exposures to asbestos in South Carolina." The motion was granted on February 1, 2024, and the second amended complaint was filed the same day. As before, A-I-I was not served with the second amended complaint because it was in default. Despite the lack of service, A-I-I answered the second amended complaint on February 16, 2024.

From evidence produced to the Court, I find that Plaintiffs consistently communicated their understanding to A-I-I that it was in default. Plaintiffs' counsel sent numerous emails between March 27, 2024 and May 14, 2024, repeating to A-I-I that it was in default. A-I-I did not seek

relief or clarification from the Court. On May 9, 2024, Plaintiffs filed a motion for protective order to quash A-I-I's subpoena for employee records. A-I-I did not file a response before Plaintiffs filed their motion for protective order to prohibit A-I-I from participating in expert discovery except on the issue of damages. A-I-I responded with the argument it has made here—that responding to the amended complaints cured its default. The Court granted the motion for protective order on May 29, 2024, finding that A-I-I remained in default.

A-I-I filed a petition for writ of certiorari on this issue on June 28, 2024. The petition was denied on August 13, 2024. On July 29, 2024, A-I-I also requested a stay in this Court, which was denied.

B. Legal Standard

“The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge.” *Sundown Operating Co. v. Intedg Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (citing *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)). An appellate court will not disturb the trial court's decision “absent a clear showing of an abuse of that discretion.” *Id.* at 606–607 (citing *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct.App.1988)). A trial court abuses its discretion “when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Id.* at 607 (citing *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997)).

C. A-I-I remained in default despite answering amended complaints.

A-I-I argues that it could cure its default by answering an amended complaint that made the same allegations against it. A-I-I is incorrect. Once it defaulted as to the original complaint,

that default could not be cured absent new allegations against A-I-I. While there is no clear authority on this point in South Carolina, this result is consistent with South Carolina's Rules of Civil Procedure. Pursuant to Rule 5(a), SCRPC, Plaintiffs did not need to serve A-I-I with the amended complaints because they did not change the allegations against A-I-I, to which A-I-I had already defaulted:

No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

Plaintiffs' amended complaints simply added additional defendants to the case. They did not change the claims, substantive or otherwise, against A-I-I in any way. Thus, Plaintiffs were not required to, and did not, serve A-I-I with the amended complaints. A-I-I had no right to service and no right to answer. Nothing about the amended complaints changed the status quo or gave A-I-I the ability to cure its default.

There is authority from other states consistent with the Court's ruling. For example, in Wisconsin, "a defaulting party cannot answer an amended complaint, thereby attempting to cure its default, when the party is already in default at the time the amended complaint is filed, unless the amended complaint relates to a new or additional claim for relief." *Ness v. Digital Dial Commc'ns, Inc.*, 227 Wis. 2d 592, 607–08, 596 N.W.2d 365, 373 (1999). The court "recognize[d] an exception to the basic rule that an amended complaint supersedes an original complaint." *Id.* at 600, 596 N.W.2d at 370. Like this Court, the *Ness* court considered it important that the amended complaint did not need to be served on the defaulting defendants because it did not assert new or additional claims for relief. *Id.* at 601, 596 N.W.2d at 370. Essentially, a defaulting defendant halts the action with regard to it at the time of the original complaint. *See id.* at 602–03, 596 N.W.2d at 371. In *Ness*, as here, the defendants "propose[d] a bright-line rule that whenever a plaintiff files

an amended complaint, regardless of the defendant's timing, the defendant receives a new time period to answer.” *Id.* at 603, 596 N.W.2d at 371. The *Ness* court found the argument unpersuasive and inequitable. *Id.* at 605, 596 N.W.2d at 372 (quoting *Ness v. Digital Dial Commc'ns, Inc.*, 222 Wis. 2d 374, 382–83, 588 N.W.2d 63 (Ct. App. 1998), *aff'd*, 227 Wis. 2d 592, 596 N.W.2d 365 (1999)). The court was also concerned with the “serious conflict for a plaintiff who would be torn between taking a default judgment and correcting the pleadings through amendment,” as well as “inefficient judicial administration” from the defendants’ proposed rule. *Id.* at 606, 596 N.W.2d at 372. These are valid concerns that the Court finds persuasive.¹

The claims against A-I-I were not changed by the amended complaints, and A-I-I, having “previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action,” should not be “fortuitously allowed to ‘restart the clock’ for filing a response.” *Ness*, 227 Wis. 2d at 605, 596 N.W.2d at 372 (citation omitted). The plaintiff should not have to choose between amending the complaint as to other parties and taking a default judgment against the party who “previously disregarded its opportunity for defending itself.” *Id.* at 606, 596 N.W.2d at 372. For the policy reasons stated in *Ness*, the Court’s finds that answering the amended complaints did not relieve A-I-I of its default.

Again, under Rule 60, “the power to set aside a default judgment is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” *Fassett v. Evans*, 364 S.C. 42, 49, 610 S.E.2d 841, 845 (Ct. App. 2005) (citing *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct.App.1988)). “The standard for granting relief from an entry of default is good cause under

¹ Other states take the same position. *See, e.g., Wells Fargo Bank, N.A. v. Dechert*, 12 N.E.3d 262, 267 (Ind. Ct. App. 2014); *Spilke v. Wicklow*, 138 Conn. App. 251, 270, 53 A.3d 245, 256 (2012); *Brown v. Funk*, No. 2023-CA-0576-MR, -- S.W.3d --, 2024 WL 2096892, at *5–6 (Ky. Ct. App. May 10, 2024); *Stack v. Welder*, 3 Cal. 2d 71, 75, 43 P.2d 270, 272 (1935).

Rule 55(c), SCRCPP, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRCPP.” *Richardson v. P.V., Inc.*, 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009) (citing *Sundown*, 681 S.E.2d 885). “Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or ‘other misconduct of an adverse party.’” *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888 (2009). For the same reasons the Court declined to set aside entry of default, the Court finds that A-I-I has failed to meet the heightened standard for relief from the default judgment. A-I-I’s request to set aside the default judgment based on its answers to the amended complaints is DENIED.

D. Alleged Procedural Defects Do Not Relieve A-I-I of Default Judgment.

1. A-I-I Had Actual Notice of the Damages Trial.

A-I-I argues that it must be relieved of its default because Plaintiffs did not serve it with notice of the damages hearing by first class mail. Rule 5(a), SCRCPP provides that “notice of any trial or hearing on unliquidated damages shall also be given to parties in default.” Rule 55(b)(2) directs that this notice shall be given by first class mail. However, there is no question that A-I-I had actual notice of the damages trial. On June 28, 2024, A I-I stated in its Petition for a Writ of Certiorari that the trial was scheduled for August 5, 2024. On June 29, 2024, A-I-I moved this Court to stay the trial against it, which it acknowledged at the pre-trial hearing. At the pretrial hearing, A-I-I’s counsel stated that A-I-I would “definitely be here” for trial. It participated in the pretrial hearing and at trial regarding damages. Plaintiffs served A-I-I with a trial subpoena by way of Federal Express sent to A-I-I’s counsel at Fox Rothschild LLP in Greenville, SC. There is no question, and A-I-I does not contest, that it had actual notice of the damages trial months before the date of trial. A-I-I cites no case, and this Court is aware of none, where a default judgment was

vacated for a new damages trial or hearing when the defendant was present at the damages trial or hearing.

Moreover, A-I-I did not raise the issue of inadequate notice at any point before the trial in this case. A-I-I “denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object,” and so it cannot to raise the issue for the first time when cure is no longer possible. *State v. Pauling*, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996). For example, in *State v. Ariail*, the supreme court held that, by proceeding to trial, the defendant waived any objection concerning waiver of arraignment. 311 S.C. 35, 37, 426 S.E.2d 751, 753 (1993). Likewise, by proceeding to trial here, A-I-I waived any objection to notice.

The purpose of the notice rule is to “ensur[e] that notice is properly received by all entitled to it.” *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). In *McCall*, the court underlined that the purpose is that the defaulting defendants “actually receive notice” and not some “arcane or highly technical application of the rules.” *Id.* In this case, where A-I-I had actual notice and appeared and participated at the trial, granting a new damages trial for lack of notice would indeed be “an arcane and highly technical application of the rules.” *Id.* In *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.* also, the court’s concern was whether the defaulting defendant was “given an opportunity to participate in the damages hearing.” 275 S.C. 556, 561, 274 S.E.2d 287, 290 (1981). Again, none of these concerns arise when the defendant actually participates in the damages trial, as A-I-I did.

Even if A-I-I were correct, the purpose of granting a new damages hearing when the defendant did not receive notice is so that the defendant is able to participate. But A-I-I already has participated. There has been no prejudice to A-I-I. Moreover, A-I-I would not be relieved of

its default. If it were correct in its argument, it would be entitled solely to a new damages hearing. *See McCall*, 363 S.C. at 648, 655, 611 S.E.2d at 316, 319.

A-I-I's request to vacate or set aside the default judgment on the basis of lack of notice is DENIED.

2. Plaintiffs Were Not Required to Make a Post-Verdict Request for Default Judgment.

Rule 55 does not provide the means by which the plaintiff must request default judgment. It provides merely that “the party entitled to a judgment by default shall apply to the court therefor.” Rule 55(b)(2), SCRPC. There is no requirement that this request be made after the verdict. Indeed, Rule 55 presumes that the request be made and the court then conduct a damages hearing or trial if necessary. Rule 55(b)(2), SCRPC. At the pretrial hearing, Plaintiffs' counsel reminded the Court that A-I-I was in default. The word default appears 119 times in the trial transcripts. The Court was aware that Plaintiffs sought a default judgment against A-I-I, which was the purpose of the damages trial. The Court was fully apprised that Plaintiffs were seeking default judgment, A-I-I was aware that Plaintiffs were seeking default judgment, and a formal request post-verdict was not required.

A-I-I's motion as to this issue is DENIED.

E. Plaintiffs' Pleadings Support the Default Judgment.

A-I-I also complains that it was barred from challenging the sufficiency of Plaintiffs' complaint. In fact, A-I-I did not *try* to challenge the sufficiency of the complaint until directed verdict—several months after it could have and should have made such a challenge and nearly two months after it took a writ on the validity of the default. For example, A-I-I moved for summary judgment, but it did not argue that the pleadings were insufficient to support claims for fraudulent

misrepresentation or punitive damages. Instead, it simply argued that Plaintiffs did not have evidence to support the pleadings.

“The defendant, by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations, set out in the plaintiff’s declaration or complaint.... Hence the default authorizes the entry of any judgment warranted by the facts alleged.” *State ex rel. Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 489, 334 S.E.2d 528, 530 (Ct. App. 1985) (quoting *Gadsden v. Home Fertilizer & Chemical Co.*, 89 S.C. 483, 487–88, 72 S.E. 15, 17 (1911), quoting *Gillian v. Gillian*, 65 S.C. 129, 132, 43 S.E. 386, 387 (1903)). When A-I-I did file the directed verdict motion challenging the pleadings, the Court found that the facts were well pleaded. TT 8/13/24 at 1818:19-20.

The pleadings support the claim for fraudulent misrepresentation. In the original complaint, Plaintiffs alleged that:

- “...defendants manufactured products composed of talc that were sold and marketed as safe for daily use by consumers on their person....” Complaint at ¶ 148.
- Defendants “made false statements to plaintiff, the general public, news media and government agencies” as part of “intentional efforts to deceive the general public as to the safety of and presence of carcinogens, including asbestos, in talc-containing products.” *Id.* at ¶ 149.
- Plaintiffs alleged that Defendants “have represented to various news media outlets and the public at large that their products are ‘asbestos-free,’ when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods.” *Id.* at ¶ 183.
- Plaintiffs alleged at length Defendants’ knowledge of the risk and the basis for that knowledge. *Id.* at ¶¶ 150-159, 161-165, 174.
- “Plaintiff Michael L. Perry and other exposed persons did not know of the substantial danger of using Defendants’ asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff.” *Id.* at ¶ 115.

- “Plaintiff, directly and/or indirectly relied upon CTFA’s and defendants’ false representations regarding the safety of cosmetic talc.” Id. at ¶ 199.
- “Plaintiff Michael L. Perry act upon the representations by continuing his personal use of, and thereby exposure to, the asbestos-containing talc products.” Id. at ¶ 145.
- “Plaintiff Michael L. Perry was ignorant of the falsity of Defendants’ representations and rightfully relied upon the representations.” Id. at ¶ 145.

These allegations, among others, support Plaintiffs’ claim for fraudulent misrepresentation and punitive damages.

A-I-I has presented no authority for its argument that Plaintiffs cannot make allegations against Defendants collectively, and the allegations gave A-I-I fair notice of the facts supporting the claim against it for fraudulent misrepresentation. *See, e.g., Green v. Indus. Life & Health Ins. Co.*, 199 S.C. 262, 18 S.E.2d 873, 875–76 (1942) (finding allegations adequate to state cause of action when plaintiff alleged conduct of defendants acting together); *McKellar v. Stanton*, 104 S.C. 248, 88 S.E. 527, 527 (1916) (same).

Finally, A-I-I challenges only the fraudulent misrepresentation and punitive damages pleadings. It does not and did not challenge the sufficiency of the pleadings with regard to Plaintiffs’ negligence or strict liability claims. These claims fully support judgment against A-I-I for Plaintiffs’ actual damages. Thus, even if A-I-I were correct that the allegations of fraudulent misrepresentation were insufficient, the judgment would be supported by the negligence and strict liability claims.

A-I-I’s motion as to the sufficiency of the pleadings is DENIED.

F. Because of Its Default, A-I-I Admitted Willful, Wanton, and/or Reckless Conduct.

A-I-I contends that Plaintiffs were required to prove its willful, wanton, and reckless conduct at the damages trial. However, when the defendant has defaulted, “the plaintiff must prove

by competent evidence the amount of his damages, Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.” *Jackson v. Midlands Hum. Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988). Thus, the well-pleaded allegations of the complaint are sufficient to support the defaulting defendant’s liability, and proof is only required to establish the plaintiff’s damages. *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981) (in case involving actual and punitive damages, “[w]hether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof....”).

A-I-I’s argument ignores that it was found in default, resulting in its admitting liability to all the well-pleaded facts. The fact that a case involves punitive damages is no barrier to finding a defendant in default. *See Roche v. Young Bros., of Florence*, 332 S.C. 75, 79, 504 S.E.2d 311, 313 (1998) (not distinguishing between default resulting in actual and punitive damages). In *Lewis* as well, a case involving punitive damages, the supreme court reiterated that “where a defendant has made an appearance but is in default, liability is admitted but the amount of damages is not; the amount must be proved.” 275 S.C. at 561, 274 S.E.2d at 289 (remanding for damages hearing only on actual and punitive damages because award was excessive in light of allegations).

The pleadings in the case support the finding of willful, wanton, or reckless conduct, and the evidence presented supports the amount of punitive damages. In the original complaint, as noted above, Plaintiffs alleged Defendants’ knowledge of the risk of talcum powder products that they marketed as safe for daily use. Original Complaint at ¶ 148. Plaintiffs alleged Defendants’ knowledge of carcinogens, including asbestos, in talc. *Id.* at ¶ 150. Plaintiffs alleged that Defendants “have represented to various news media outlets and the public at large that their

products are ‘asbestos-free,’ when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods.” Id. at ¶ 183. There are nearly 20 pages of allegations concerning Defendants’ knowledge and bad acts with respect to the hazards of asbestos in their products. *See id.* at pp. 67-86. These allegations, among others, support Plaintiffs’ claim for punitive damages.

A-I-I’s argument that the Court improperly found it defaulted on allegations of willful, wanton, and reckless behavior is DENIED.

II. MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO (JUDGMENT NOTWITHSTANDING THE VERDICT) (“JNOV”)

A. Legal Standard

“In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt.” *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 338, 611 S.E.2d 485, 487 (2005) (quoting *Jinks v. Richmond Cty.*, 355 S.C.341, 345, 585 S.E.2d 281, 283 (2003)). In the context of a default judgment, the complaint constitutes the “evidence” of liability, while the evidence presented to the jury constitutes the evidence of damages. An appellate court will not reverse a trial court’s ruling on a JNOV motion “unless there is no evidence to support the ruling or where the ruling is controlled by an error of law.” *Gause v. Smithers*, 403 S.C. 140, 149, 742 S.E.2d 644, 649 (2013) (citation omitted).

B. The Pleadings Support the Fraudulent Misrepresentation Claim.

The Court has addressed the pleadings supporting Plaintiffs’ claim. For the reasons stated above, the allegations supporting the fraudulent misrepresentation claim are well-pleaded and fully

support the claim. Because A-I-I was in default, the Court found that A-I-I was liable for fraudulent misrepresentation in accordance with the pleadings.

Moreover, A-I-I does not and did not challenge the sufficiency of the pleadings with regard to Plaintiffs' negligence or strict liability claims. These claims fully support judgment against A-I-I for Plaintiffs' actual damages. Even when a general verdict is returned, where any theory supports the verdict, any error is harmless. *See Piedmont Aviation, Inc. v. Quinn*, 294 S.C. 502, 504, 366 S.E.2d 31, 32 (Ct. App. 1988). Thus, even if A-I-I were correct that the allegations of fraudulent misrepresentation were insufficient, the judgment would be supported by the negligence and strict liability claims.

A-I-I's motion for JNOV on this issue is DENIED.

C. A-I-I Is Not Entitled to JNOV on the Award of Punitive Damages.

The Court addressed the allegations supporting the punitive damages claim above and found that they were sufficient to support willful, wanton, and reckless conduct. Because A-I-I was in default, Plaintiffs were not required to prove its willful, wanton, and reckless conduct. *See Lewis*, 275 S.C. at 561, 274 S.E.2d at 289; *Roche*, 332 S.C. at 79, 504 S.E.2d at 313. A-I-I admitted the allegations of the pleadings, which supported a claim for punitive damages. Nothing more was required.

A-I-I contends that federal due process requires that it receive notice of the factual basis for the punitive damages claim against it and an opportunity to defend itself against that claim. In light of A-I-I's default, holding that it had admitted allegations of willful, wanton, and reckless conduct did not violate its due process rights. A-I-I quotes the following language from *BMW of North America, Inc. v. Gore*: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him

to punishment....” 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996). A-I-I received notice of the claims against it and the facts underlying those claims through Plaintiffs’ complaint, and it defaulted. The United States Supreme Court has held that due process requires notice of the claims against a defendant and the opportunity to be heard, but a defendant gives up the right to be heard on liability when it defaults: “This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Thus, A-I-I acquiesced to the allegations of the complaint and declined the opportunity to be heard on liability, including liability for punitive damages. At that point, it had the right to be heard on one matter: the amount of damages.

Branham v. Ford Motor Co., cited by A-I-I, was concerned with two aspects of due process protections relevant to punitive damages. First, the South Carolina Supreme Court noted that harm to others was not a valid basis for punitive damages. 390 S.C. 203, 238, 701 S.E.2d 5, 23–24 (2010) (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 350 (2007)). In this case, the jury heard no evidence of harm to others, and A-I-I has not alleged that Plaintiffs’ counsel argued harm to others as a basis for the punitive damages award or that the complaint included allegations of harm to others. This issue is not implicated in the instant case.

The *Branham* court also was concerned with evidence relevant to the amount of punitive damages, specifically what evidence could be admitted consistent with due process in the jury’s evaluation of the proper amount of punitive damages: “Because the United States Supreme Court has discovered that a state court’s punitive damages award implicates federal substantive due process, this Court is not the final arbiter of determining what financial evidence is proper in assessing punitive damages.” 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010). A-I-I has also not alleged

that any financial or other evidence was improperly presented in the punitive damages phase of the trial.

A-I-I argues that the allegations against it were not sufficient to apprise it of the conduct for which it is being punished because Plaintiffs made the allegations against Defendants' collectively. First, Plaintiffs alleged that Defendants acted collectively in many cases, and Plaintiffs alleged that they acted "individually and collectively." *See, e.g.*, Complaint at ¶¶ 177, 179, 188, 198. As noted above, A-I-I has presented no authority for its argument that Plaintiffs cannot make allegations against Defendants collectively, and the allegations gave A-I-I fair notice of the facts supporting the claim against it for punitive damages. *See, e.g., Green*, 199 S.C. 262, 18 S.E.2d 873, 875–76 (1942); *McKellar*, 104 S.C. 248, 88 S.E. at 527.

A-I-I's motion for JNOV on this issue is DENIED.

D. A-I-I Is Not Entitled to JNOV Because the Initial Complaint Was Operative as to It as a Defaulting Party.

A-I-I argues that it could cure its default by answering an amended complaint that made the exact same allegations against it. In addressing the motion to vacate or set aside the default judgment, the Court has addressed in some detail why this contention is incorrect.

Although the second amended complaint governs the claims against the Johnson & Johnson Defendants ("J&J"), it does not apply to the claims against A-I-I. "The amended complaint ... supersedes the original as to any other party except the defaulting party." *Ness*, 227 Wis. 2d at 602–03, 596 N.W.2d at 371. Thus, A-I-I was not relieved of its default by answering amended complaints, and the original complaint remained operative as to it.²

A-I-I's motion for JNOV on the issue of its default is DENIED.

² Moreover, if A-I-I were correct, the remedy would be a new trial.

III. NEW TRIAL ABSOLUTE

“Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is ‘wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.’” *Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 271, 670 S.E.2d 1, 4 (Ct. App. 2008) (quoting *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 479, 567 S.E.2d 851, 854 (2002); *Folkens v. Hunt*, 300 S.C. 251, 254–55, 387 S.E.2d 265, 267 (1990); *S.C. State Hwy. Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976); *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App.1996); *Sorin Equip. Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 364, 474 S.E.2d 819, 822 (Ct. App.1996)). The appellate court’s “review is limited to consideration of whether evidence exists to support the trial court's order.” *Id.* (quoting *Folkens*, 300 S.C. at 255, 387 S.E.2d at 267; *Vinson*, 324 S.C. at 403, 477 S.E.2d at 722).

A. A-I-I Had Notice of the Damages Trial.

A-I-I again complains that it did not receive proper notice of the damages trial against it. The Court addressed this argument in response to A-I-I’s motion to vacate or set aside the default judgment. A-I-I has demonstrated and admitted that it had actual notice of the damages trial, and it participated in the damages trial. The purposes of Rule 5(a), SCRCP, and Rule 55(b)(2), SCRCP, have been met. Moreover, because it participated in the damages trial, A-I-I was not prejudiced by any technical defect in the notice. The notice rule is intended to provide the defaulting party the opportunity to participate in the damages hearing, and A-I-I exercised that opportunity.

A-I-I’s motion for new trial for alleged lack of notice is DENIED.

B. Trial Against Defendants on the Operative Complaints as to Each Defendant Was Appropriate.

In addition to arguing that the original complaint was not operative as to it, A-I-I also argues that trial against it and J&J on different operative complaints was improper. It was

appropriate to go to trial against Defendants based on different operative complaints. As the Wisconsin Supreme Court noted, “The amended complaint ... supersedes the original as to any other party except the defaulting party.” *Ness v. Digital Dial Commc'ns, Inc.*, 227 Wis. 2d 592, 602–03, 596 N.W.2d 365, 371 (1999) (emphasis added).

Moreover, there was no difference in the substantive allegations against A-I-I in the original complaint or the second amended complaint. Although A-I-I claims the second amended complaint was “more robust,” the allegations in both complaints were identical as to A-I-I. Indeed, this is the reason that A-I-I remained in default after Plaintiffs amended the complaint.

A-I-I also argues that trying the case under different operative complaints was confusing. There was no confusion. Certainly, A-I-I should not have been confused because the Court’s order of May 29, 2024 made clear that the Court considered A-I-I to remain in default for failure to timely answer the original complaint. As noted above, the allegations against A-I-I were identical in the two complaints. Neither could the jury have been confused since they never saw the complaints, which were inadmissible.

A-I-I’s motion for new trial on this issue is DENIED.

C. Based on Its Default, A-I-I Was Deemed to Have Acted Willfully, Wantonly, and Recklessly, and the Jury Was Properly Instructed About that Fact.

A-I-I argues that the jury was improperly instructed that it was liable for willful, wanton, and reckless conduct. Again, A-I-I ignores the fact that it was in default. Plaintiffs did not have to prove A-I-I’s willful, wanton, or reckless conduct because A-I-I admitted the allegations of such conduct through its default. *See Jackson*, 296 S.C. at 529, 374 S.E.2d at 506. The allegations of the complaint are sufficient to support the defaulting defendant’s liability, and proof is only required to establish the plaintiff’s damages. *Lewis*, 275 S.C. at 561, 274 S.E.2d at 289.

The fact that a case involves punitive damages is no barrier to finding a defendant in default. *See Roche v. Young Bros., of Florence*, 332 S.C. 75, 79, 504 S.E.2d 311, 313 (1998) (not distinguishing between default resulting in actual and punitive damages). In *McEachern v. Poston*, the court stated “that even if respondent is in default, the award of actual and punitive damages must be set aside under our recent decision of *Howard v. Holiday Inns, Inc.*, S.C., 246 S.E.2d 880 (1978), where we held under similar circumstances that a defendant in default was entitled to an opportunity to participate in the hearing to assess damages.” 273 S.C. 122, 126, 254 S.E.2d 796, 798 (1979). In *Lewis* as well, a case involving punitive damages, the supreme court reiterated that “where a defendant has made an appearance but is in default, liability is admitted but the amount of damages is not; the amount must be proved.” 275 S.C. at 561, 274 S.E.2d at 289 (remanding for damages hearing only on actual and punitive damages because award was excessive in light of allegations). South Carolina law supports holding that A-I-I has admitted the allegations of willful, wanton, and reckless conduct, and the jury was rightly directed that A-I-I was deemed to have acted willfully, wantonly, and recklessly.

A-I-I’s motion for new trial on this issue is DENIED.

IV. THE CLAIMS AGAINST A-I-I AND J&J DEFENDANTS WERE PROPERLY TRIED TOGETHER, AND A-I-I SUFFERED NO PREJUDICE AS A RESULT.

Again, A-I-I defaulted, so that liability on the claims against it was established as a matter of law. This determination necessarily includes that A-I-I caused the Plaintiffs’ damages. A-I-I seems to be complaining that J&J was prejudiced by having its liability determined in the presence of a defaulting Defendant. A-I-I then makes the argument that it was prejudiced because, if J&J won on liability, A-I-I would be relieved of its default to avoid an inconsistent verdict. Counsel for A-I-I contends that there should have been a liability phase against J&J and then actual and punitive damages phases against J&J and A-I-I. Counsel for A-I-I proposed this tri-part division

in the middle of trial. TT 8/9/24 at 1369:9-1370:1. The jury had already been instructed on Defendants' status in the case. The suggestion came too late to be feasible even if it were advisable.

In fact, A-I-I cannot show that it was prejudiced by including it in the trial of this matter. First, the Court's instructions made it clear that Defendants were to be considered separately: "You should decide the case against each defendant separately as if it were a separate lawsuit." TT 8/14/24 at 2070:6-8. At the end of the trial, the Court instructed the jury, "Now, while these [liability issues] are issues you must decide against Johnson & Johnson, you are instructed that American International Industries is liable to the plaintiffs in this case." TT 8/14/24 at 2071:7-11. It was clear from this instruction that all of Plaintiffs' claims against J&J would be presented to the jury for resolution. Nothing about the trial Court's instruction to the jury indicated that it should also find J&J liable for Plaintiffs' injuries because of A-I-I. It was equally clear from the instruction that only liability as to A-I-I had been resolved by the trial court. Again, the jury was instructed that these two defendants were to be considered separately. TT 8/14/24 at 2070:6-8.

Moreover, A-I-I would not have escaped liability if J&J had been found not liable. There would be nothing inconsistent about the jury finding that exposure to J&J's product did not cause Mr. Perry's mesothelioma while exposure to Clubman did. These two Defendants did not always use the same talc sources, for example. Clubman talc incorporated Montana and North Carolina talc for certain periods of time, which Johnson's Baby Powder did not. J&J's and A-I-I's liability is not truly joint, and so there would be no reason that a J&J verdict would relieve A-I-I of liability.

The circumstances were entirely different in *Frow v. De La Vega*, 82 U.S. 552 (1872), on which A-I-I relies. In that case, the plaintiff had alleged a joint fraud against the defendants, so that if there was no joint fraud, the defaulting defendants should also be found not liable. A-I-I

suggests that *Frow* would relieve it of liability if J&J won on liability, but in fact, *Frow* is considerably more narrow than that. The Third Circuit has held:

...*Frow* stands for the proposition that if at trial facts are proved that exonerate certain defendants and that as a matter of logic preclude the liability of another defendant, the plaintiff should be collaterally estopped from obtaining a judgment against the latter defendant, even though it failed to participate in the proceeding in which the exculpatory facts were proved.

Farzetta v. Turner & Newall, Ltd., 797 F.2d 151, 154 (3d Cir. 1986). The Eighth Circuit has also limited *Frow* to circumstances of joint liability: “Although [the defendants] share closely related interests, they were not codefendants facing lawsuit on a theory of joint liability, where ‘no one defendant may be liable unless all defendants are liable.’” *McMillian/McMillian, Inc. v. Monticello Ins. Co.*, 116 F.3d 319, 321 (8th Cir. 1997). The District of Columbia Circuit has also found that “a default order that is inconsistent with a judgment on the merits must be set aside only when liability is truly joint—that is, when the theory of recovery requires that all defendants be found liable if any one of them is liable....” *Whelan v. Abell*, 953 F.2d 663, 674–75 (D.C. Cir. 1992). Thus, “when different results as to different parties are not logically inconsistent or contradictory, the rationale for the *Frow* rule is lacking.” *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1257–58 (7th Cir. 1980). Again, here it is entirely possible that J&J might have been found not liable, for example, because its product did not cause Mr. Perry’s mesothelioma while Clubman’s did. There was no error and no prejudice to A-I-I in including it in the trial.

A-I-I’s motion for new trial on this issue is DENIED.

V. THE JURY WAS INFORMED ABOUT THE ECONOMIC DAMAGES AND THE DEFENDANTS’ STIPULATIONS REGARDING ECONOMIC DAMAGES.

A-I-I argues that the Court’s instructions regarding the stipulation regarding medical expenses were in error and prejudiced it, so that the jury awarded an unjustified amount of economic damages. In fact, the jury saw the joint stipulation, which was entered into evidence. It

clearly identified which Defendants stipulated to which amounts. TT 8/12/24 at 1589:1-23. And the stipulation addressed only current economic damages, not future damages.

As to the identity of Defendants who were parties to the economic damages stipulation, the Court told the jury that “AII, which is the other defendant before you, has not stipulated to the amount of Mr. Perry's economic loss; and, therefore, plaintiff is calling an economist to testify as to the economic loss.” TT 8/12/24 at 1590:7-11. The economist testified, consistent with the stipulation between Plaintiffs and J&J Entities, that Mr. Perry’s economic damages, minus medical expenses, were \$2,819,353. TT 8/12/24 at 1611:23-1612:5. A-I-I questioned Plaintiffs’ economist, challenging his assumptions. The jury was later told that Plaintiffs and A-I-I had stipulated that “the reasonable and necessary past medical bills as a result of Michael Perry's mesothelioma diagnosis and treatment are \$510,620.05.” TT 8/14/24 at 1879:3-8.

In closing counsel for A-I-I asked the jury to question his assumptions and presumably to reject his testimony:

We so too talked to Robert Johnson. You remember the plaintiffs' economist. We did that -- we hoped it wasn't a waste of time. The reason we did that is because we had concerns about his underlying assumptions that make up the numbers. And we hope that you will also take that to heart and really look at the numbers and question his assumptions as well.

TT 8/14/24 at 1965:18-25. Thus, A-I-I also made clear that it did not accept the economic damages calculated by Plaintiffs’ economist and stipulated to by the J&J Defendants. Given that the jury was told A-I-I did not stipulate to economic damages other than medical expenses, which A-I-I underscored in closing argument, there was no prejudice to A-I-I in the Court’s instructions.

As to the amount of the stipulations, the Court referred briefly to adding the numbers: “when you saw those two figures added together in argument.” TT 8/14/24 at 2063:23-24. But the

argument on economic damages and in particular medical expenses was clear. Plaintiffs' counsel stated:

And then we had a stipulation read this morning. I know it kind of whizzed by us. I saw somebody trying to write it down. I don't know if you got it all down -- it's in her instruction -- was about \$510,000 more. So 2.8 million plus 510,000, that's how we get the 3.3 number. That's what that means.

It's only the current economic loss. But the number that you have to write down is for the past and the future. And I hate to say it out loud with Michael in here, but there's going to be a lot of medical expenses in Michael's future. A lot. He's already had 510,000, and this has barely started. You heard it came back, and his pleura is twice the size it was. This is going to keep coming back. And it's never going to stop coming back.

And so I think, conservatively, Michael has another half a million dollars of medical expenses in his future. I think the number you should write down is \$3.8 million.

TT 8/14/24 at 1928:24-1929:20. Plaintiffs' counsel's explanation was consistent with the stipulation provided to the jury that economic damages, including medical expenses, were \$3.3 million. Future medical expenses are an aspect of economic damages as well, and Plaintiffs' counsel asked for \$3.8 million to include future medical expenses of \$500,000. The jury's award was for past and future economic damages. The fact that the jury awarded \$3.8 million does not definitively show that the jury added current economic damages and past medical expenses in their award. It is more likely that the award for past and future economic damages reflects the damages stipulated by Plaintiffs and J&J Entities and testified to by Plaintiffs' economist, along with the \$500,000 requested in future medical expenses.

Any error in jury instructions supports granting a new trial only if the movant can show prejudice, as A-I-I acknowledges. "An erroneous jury instruction... is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction." *Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) (citing *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961)); see also *Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249, 250 (2009). In addition,

when reviewing a jury charge, the court “must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.” *Id.* (quoting *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). In *Cole v. Raut*, the court determined, “Considering the entire jury charge in light of the evidence and issues presented at trial, we conclude that the erroneous charge ... was not prejudicial to the [plaintiffs].” 378 S.C. at 406, 663 S.E.2d at 34 (emphasis added). In this case, even if the charge was misleading, A-I-I cannot show it was prejudiced. The stipulations were admitted into evidence. The closing argument was also clear about what had been stipulated to and what additional economic damages were requested, and the jury’s verdict appears to accord with that request. A-I-I is not entitled to a new trial based on the jury instructions.

A-I-I’s motion for new trial based on the jury instructions concerning economic damages is DENIED.

VI. The Verdict Form Reflected A-I-I’s Default.

A-I-I contends that the verdict form was incorrect because “it made it a foregone conclusion that asbestos-containing talc was a cause of Mr. Perry’s mesothelioma and that A-I-I’s conduct was willful, wanton, and reckless.” In fact, it was a foregone conclusion because A-I-I was in default. The jury was instructed:

Now, I have found as a matter of law that American International Industries, AII, is liable. So you don’t have to make that liability determination. They are liable.

The Court has already determined that American International Industries, the company responsible for Clubman talc products, is liable to Michael Perry on each of the causes of action pled against them, specifically negligence, strict liability, fraudulent misrepresentation.

The Court has determined that Clubman asbestos-containing talc products was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma.

The Court has determined that American International Industry's conduct was willful, wanton, and reckless, meaning American International Industries acted with a conscious indifference to the rights and safety of others.

Now, while these are issues you must decide against Johnson & Johnson, you are instructed that American International Industries is liable to the plaintiffs in this case. Your task -- your only task as to AII is to determine the total amount of damages that Michael Perry and Lonnie Long have suffered.

TT 8/14/24 at 2070:10-2071:13. It was appropriate for the verdict form to be checked as to A-I-I's liability because it was in default and had admitted the allegations of the complaint. The allegations were sufficient to support A-I-I's liability. As discussed *supra*, there was no need for Plaintiffs to prove A-I-I's willful, wanton, or reckless conduct because A-I-I admitted that conduct when it defaulted.

A-I-I also suggests that finding it liable for willful, wanton, or reckless conduct was improper because "the complaint was neither entered into evidence nor read into the record." There was no reason for the complaint to be entered into evidence or read into the record. It is already part of the Court's record, and it is the Court's province to determine that A-I-I defaulted and thus admitted liability—not the jury's.

A-I-I's motion for new trial on this point is DENIED.

VII. THE JURY WAS PROPERLY INSTRUCTED WITH RESPECT TO PUNITIVE DAMAGES, AND NO LIMITING INSTRUCTION WAS NECESSARY.

A-I-I argues that there was no evidence from which a jury could base an award of punitive damages against it. However, by operation of law, it was established that A-I-I behaved willfully, wantonly, and/or recklessly. This is the basis for punitive damages. As noted above in response to A-I-I's motion for JNOV, there was no due process violation in holding that A-I-I had admitted

the allegations of the complaint and acted willfully, wantonly, and recklessly. In addition, the jury heard by stipulation that A-I-I's net worth was \$76 million. There was evidence by virtue of A-I-I's default to support the award of punitive damages against A-I-I that was entirely separate from the facts proven as to J&J.

At the beginning of deliberations, the Court instructed the jury, "You should decide the case against each defendant separately as if it were a separate lawsuit." TT 8/14/24 at 2070:6-8. Later, the Court went through punitive damages verdict form and pointed out the separate language as to each Defendant, separately noting that the jury could put \$0 in the blank as to J&J or A-I-I. TT 8/15/24 at 2262:20-2263:10. In light of these instructions, there was no need for an additional limiting instruction. In addition, counsel for A-I-I reminded the jury, "Please understand that AII is not associated with Johnson & Johnson, and the evidence that you saw does not apply to us and should not be considered against American International Industries." TT 8/15/24 at 2272:19-24.

A-I-I's motion for new trial on this point is DENIED.

VIII. DR. HABER TESTIFIED ABOUT DAMAGES AND HEALTH CONDITIONS THAT MIGHT HAVE IMPACTED LIFE EXPECTANCY, AND THERE WAS NO PREJUDICE TO A-I-I.

At the end of J&J's cross-examination of Dr. Haber, counsel for A-I-I asked to cross-examine Dr. Haber. Counsel for A-I-I said that she had some additional topics she was ready to proffer. The Court invited her to make her proffer as soon as Plaintiffs' counsel finished redirect examination. TT 8/6/24 at 517:14-518:3. After redirect, Ms. Flynn made an extensive argument about separating the liability evidence regarding J&J from A-I-I.

As to damages, she stated in one sentence, "And in addition to that, he's got a long list of prior medical history that we would have raised to -- just to go to quality of life and/or possible life expectancy issues." TT 8/6/24 at 541:18-22. This comment was buried in A-I-I's argument

about and request for “a limiting instruction so that the jury understands that this is the liability portion of the trial as it relates to Johnson & Johnson on the second amended complaint,” which the Court said would be provided. TT 8/6/24 at 536:2-537:18, 539:1-541:17, 542:14-21.

Again, counsel for A-I-I was invited to make a proffer concerning its proposed questions for Dr. Haber at the end of Dr. Haber’s testimony, which counsel stated she was ready to do. TT 8/6/24 at 517:19-518:3. J&J did make such a proffer. TT 8/6/24 at 642:7-645:20. A-I-I did not. The next morning, A-I-I requested “a proffer of what we could do with the economist,” and the Court asked that it be put in writing for review. TT 8/7/24 at 656:19-23. Also, the day after Dr. Haber’s testimony was over and he could not be feasibly recalled, A-I-I made its proffer concerning his testimony. TT 8/7/24 at 668:5-11.

In fact, Dr. Haber did testify at some length about medical conditions that could have impacted Mr. Perry’s life expectancy. Plaintiffs’ counsel asked him about health and impact on life expectancy:

Q. Did you evaluate Mr. Perry's overall health before he was diagnosed with mesothelioma?

A. I did.

Q. Can you tell us about that?

A. Sure. So the first one, dyslipidemia, that's a fancy medical term for high cholesterol. So he had high cholesterol. He had GERD or acid reflux disease, very common.

AR is allergic rhinitis. That basically is -- you know, when it's seasonal, when you go out and -- pollens and you get watery eyes and runny nose. Very, very common.

And he had diverticulosis. Diverticulosis is where in the -- in the colon there are little outpouchings that can become inflamed sometimes. It can cause swelling in the -- in the abdomen and pain, and he did have diverticulosis. Again, a very, very common condition. But it was not of any limitation.

He had really no significant lung issues, except he did have a little bit of seasonal asthma, which means that -- you know, during certain seasons, when the allergies -- he would get a little congested, a little short of breath and wheezy. But he was on no chronic medications for any lung condition and, really, a quite healthy man.

TT 8/6/24 at 356:2-357:3.

Dr. Haber also testified about Mr. Perry's social history, family history, and genetic issues.

Q. Did you evaluate other --

A. Yeah. So I looked at social history. So he -- he never smoked. This is in the records as well as I talked with him. He had never had any cancer before. And he really had no family history to suggest any sort of a concern.

Q. It says: No family history c/w germline mutation. What does that mean?

A. Consistent with. So there are -- there are certain types of genetic abnormalities. There's a very small number of people in families that they've -- they've been able to find from the past ten years or so across the world.

It's just a handful of -- of these cases. But they can have this genetic defect that causes them to have a number of certain types of rare cancers: cancers of the eye, cancer of the kidney, mesothelioma, certain types of skin cancers. And a lot of people in the family all have -- they'll have multiple cancers, multiple, five, six, seven cancers. And there was nothing his family history that suggested anything like that.

...

Q. And just -- Mr. Perry had no history consistent with having that type of mutation?

A. Correct. And nor did he -- in fact, he -- he absolutely did not, because in the medical record we -- they actually did tests, and he didn't.

TT 8/6/24 at 357:3-358:18. Counsel for J&J also questioned Dr. Haber at length about Mr. Perry's family history of cancer. TT 8/6/24 at 472:5-479:5.

Dr. Haber was asked directly whether anything in Mr. Perry's health condition that would have shortened his life expectancy, and he replied that there was not.

- Q. Was there anything in your review of Mr. Perry's health condition overall before his diagnosis with mesothelioma that would have shortened his normal life expectancy?
- A. No. I mean, he was just a very typical individual. If anything, here, you know, maybe even on the healthier side, but certainly thing that would -- that would make you concerned that he wouldn't just be an average man of his age.

TT 8/6/24 at 358:19-359:3.

“The admissibility of evidence is within the trial court's discretion.” *Haselden v. Davis*, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000), *aff'd*, 353 S.C. 481, 579 S.E.2d 293 (2003). “Generally, there is no abuse of discretion where the excluded testimony is merely cumulative of other evidence proffered to the jury.” *Com. Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct. App. 2001) (citing *Ott v. Pittman*, 320 S.C. 72, 79, 463 S.E.2d 101, 105 (Ct.App.1995)). Further cross-examination on these points would have yielded only cumulative testimony.

Counsel for A-I-I did cross-examine Dr. Gibney, but she did not ask whether she could explore these issues with him. She asked only to cross-examine Dr. Gibney about the relative aggressiveness of Mr. Perry's mesothelioma. TT 8/7/24 at 728:15-25. Moreover, she asked Dr. Gibney if Mr. Perry was a surgical candidate because he was in “relatively good health.” TT 8/7/24 at 732:10-15.

Even if the Court should have permitted the cross-examination, which was cumulative of the testimony already given, “[t]o warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof.” *Turner v. Med. Univ. of S.C.*, 430 S.C. 569, 589, 846 S.E.2d 1, 11 (Ct. App. 2020) (quoting *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct.

App. 2014)). In this case, because the proposed examination was largely duplicative of the examination that had already occurred, there was no prejudice to A-I-I, and for this reason as well, no new trial is warranted.

A-I-I's motion for new trial based on this point is DENIED.

IX. THERE WAS NO CUMULATIVE ERROR THAT DENIED A-I-I A FAIR DAMAGES HEARING.

No cumulative errors justify granting a new trial to A-I-I. First, it is not clear that the cumulative error doctrine applies in civil cases. *See Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 163, 760 S.E.2d 111, 121 (Ct. App. 2014) (“The cumulative error doctrine, if it applies in civil cases, is inapplicable in this case....”). Even if it does apply, to succeed on a cumulative error claim, the movant must show that the errors had “the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial.” *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013), *aff'd*, 415 S.C. 632, 785 S.E.2d 202 (2016) (citing *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)); *see also State v. Daise*, 421 S.C. 442, 467, 807 S.E.2d 710, 722 (Ct. App. 2017) (finding “any errors by the circuit court were not prejudicial and did not combine to affect [the defendant’s] right to a fair trial.”).

As to A-I-I's argument that the jury should have been instructed that the basis of its liability was its default, the trial court has discretion with regard to jury instructions. *See Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citations omitted). “A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied.” *State v. Sanchez*, 435 S.C. 468, 474, 867 S.E.2d 595, 598 (Ct. App. 2021). The instruction simply stated that the Court had determined as a matter of law that A-I-I was liable on the causes of action pleaded against it in the complaint, specifying those claims. TT 8/5/24 at

156:10-157:3. This was an accurate statement of the law, and nothing further needed to be said about it to the jury because there was no decision for the jury to make concerning A-I-I's liability. Nevertheless, counsel for A-I-I violated the Court's directive and shared this information with the jury during her closing argument.

There is no reason the jury should not have been instructed from the beginning of trial and at the end of the actual damages phase that A-I-I had been determined as a matter of law to have behaved willfully, wantonly, and/or recklessly. It was a question for the first phase of the trial, and because A-I-I was in default, it *was* determined as a matter of law. The Court did make clear that there had been no determination as to actual or punitive damages: "the amount of damages has not been determined. Much less has it been determined that any actual or punitive damages should be awarded. That is for the evidence to proceed and determine." TT 8/5/24 at 167:8-12.

A-I-I again complains of the economic damages instruction, but, as noted above, it has not shown prejudice from the Court's instructions. Because there was no prejudice shown, the instructions do not justify a new trial or contribute to a cumulative error analysis.

A-I-I's motion for new trial based on cumulative error is DENIED.

X. RULING ON MOTION FOR SET OFF

A-I-I contends that they are entitled to a full set-off for Plaintiffs' entire settlement amount and Plaintiffs do not object. A-I-I further contends that Plaintiffs should have to produce their settlement agreements with various co-defendants, with which the Court disagrees. Plaintiffs' settlement releases are not discoverable. Rule 408, SCRE. The Court has reviewed Plaintiffs' settlement agreements in camera and finds they are fair and reasonable. *See Glenn v. 3M Co.*, 440 S.C. 34, 86, 890 S.E.2d 569, 596 (Ct. App. 2023). The Court therefore rules that the amount of

\$11,255,000 in Plaintiffs' pre-trial settlements will be set-off from Plaintiffs' compensatory damages award.

XI. A-I-I IS ENTITLED TO A NEW TRIAL *NISI REMITTITUR* AS TO PLAINTIFFS' ACTUAL DAMAGES.

A new trial nisi remittitur may be granted "when the verdict indicates the jury was unduly liberal in determining damages." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). "A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice." *Id.*

When reviewing a request for new trial nisi remittitur, substantial deference must be given to the jury's determination of damages. *Hassell v. City of Columbia*, 430 S.C. 620, 635, 846 S.E.2d 373, 381 (Ct. App. 2020). The consideration of a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). "Compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur*." *Id.*

The jury award against A-I-I, along with J&J, was for \$23,037,500 in actual damages to Michael Perry, \$30 million in punitive damages to Plaintiffs Michael Perry and Lonnie Long, and \$9,618,750 to Lonnie Long in loss of consortium damages.

In support of its request for remittitur, A-I-I argues:

While the jury had nothing more than this Court's statements upon which to base a verdict against A-I-I, the jury had ample evidence of conduct as it relates to the J&J defendants. Indeed. The entirety of the evidence presented at trial by Plaintiffs was directed to J&J's conduct. There can be no question that the actual damages verdict rendered by the jury was largely, if not entirely, based on Plaintiffs' evidence as to J&J. A-I-I was just "along for the ride," making it wholly unfair to saddle A-I-I with damages the jury found to be appropriate as a result of Plaintiffs' characterization of the J&J defendants' acts and omissions.

A-I-I's Post Trial Motions: Judgment Notwithstanding the Verdict, New Trial Absolute and/or New Trial *Nisi Remittitur* at 35.

A. Analysis of other cases.

- *Firth v. Garlock Sealing Technologies, LLC*, Civil Action No. 2008-CP-23-09186 (Greenville Cty. 2009), involved a 72-year-old deceased mesothelioma. The jury awarded \$300,000 for survival and \$400,000 for wrongful death, for a total of \$700,000 in compensatory damages. The jury declined to award damages for loss of consortium.
- *Garvin v. AGCO Corporation, et al.*, Civil Action No. 2012-CP-40-06675 (Richland Cty. 2013), involved a 74-year-old living mesothelioma who worked on pumps and valves as a millwright for thirty years. The jury awarded \$10 million for pain and suffering and \$1 million for loss of consortium, for a total of \$11 million in compensatory damages. The jury also awarded an aggregate of \$27 million in punitive damages against three defendant parties. After a trial defendant challenged the verdict, and the trial court granted a new trial *nisi remittitur* reducing the compensatory damages award from \$11 million to \$1.5 million (a remittitur of slightly more than 85%) and reducing the punitive damages award against the challenging defendant from \$11 million to \$3.5 million, commensurate with the statutory cap on punitive damages.
- *Keene v. CNA Holdings, LLC*, Civil Action No. 2013-CP-42-03915 (Spartanburg Cty. 2015), involved a 70-year-old deceased mesothelioma who worked as a millwright for Daniel Construction at the Celanese Spartanburg facility from 1969 to 1978. The jury awarded \$2 million for pain and suffering, \$5 million for wrongful death, and \$5 million for loss of consortium, for a total of \$12 million in compensatory damages. The jury also awarded \$2 million in punitive damages.
- *Jolly v. General Electric Co., et al.*, Civil Action No. 2016-CP-42-01592 (Spartanburg Cty. 2017), involved a 73-year-old living mesothelioma who worked for Duke Power as a mechanical inspector around other trades engaged in tearing-out asbestos insulation and gaskets from 1980 to 1984. The jury awarded \$200,000 for pain and suffering and \$100,000 for loss of consortium, for a total of \$300,000 in compensatory damages. This Court granted a new trial *nisi additur*, increasing the compensatory damages award to a total of \$1,870,000.
- *Edwards v. Scapa Waycross, Inc.*, Civil Action No. 2013-CP-46-00368 (York Cty. 2018), involved a 60-year-old deceased mesothelioma who worked at Bowater Paper Mill on a paper machine from 1963 to 2002. The jury awarded \$600,000 in survival and \$100,000 in wrongful death damages. This Court granted a new trial *nisi additur*,

increasing the survival award by \$400,000 to \$1 million and sustaining the damages awarded for wrongful death. After additur, the compensatory damages totaled \$1,100,000.

- *Glenn v. 3M Co., et al.*, Civil Action No. 2015-CP-04-01607 (Anderson Cty. 2019), involved a 69-year-old deceased mesothelioma who worked for Duke Power as an instrumentation worker around trades tearing-out asbestos insulation and gaskets from 1970 through 1996. The jury awarded \$1 million for pain and suffering, \$1 million for wrongful death, and \$1 million for loss of consortium, for a total of \$3 million in compensatory damages. The jury also awarded \$2,125,000 in punitive damages.
- *Weist v. Kraft Heinz Company, et al.*, Civil Action No. 2020-CP-40-01597 (Richland Cty. 2021), involved the death of Kathy Weist. The jury awarded \$11 million for Kathy Weist's survival damages, \$10 million for the wrongful death damages and \$1 million for the loss of consortium damages. The jury also awarded \$10 million in punitive damages.
- *Plant v. Whittaker Clarke & Daniel et al*, Civil Action No. 2022-CP-40-01265 (Richland Cty. 2023), involved a 35 year old living mesothelioma who was exposed to talcum powder and cosmetic products. The jury awarded \$871,356 in past medical expenses, \$3,368,336 in future medical expenses, \$20 million in other damages, and \$5 million in loss of consortium.

1. *Garvin v. Crane Co.*

This Court points to now-Justice Hill's prior order in the *Garvin v. Crane Co.* case. *Order Denying in Part and Granting in Part Defendant Crane Co.'s Motion for Post-Trial Relief, Garvin v. AGCO Corporation*, No. 2012-CP-40-6675, Richland County Court of Common Pleas of South Carolina (Nov. 10, 2014)). After Mr. Garvin's trial, Justice Hill remitted the jury finding from \$10,000,000 in compensatory damages to \$1,500,000. The reasons for this remittitur were that Mr. Garvin was 74 years old, had testicular mesothelioma, and had several other serious medical conditions unrelated to his testicular mesothelioma. Additionally, Mr. Garvin was cancer-free and only had economic damages in the amount of \$149,000. Justice Hill noted that based on Mr. Garvin's pecuniary damages, the nature of his injury (testicular mesothelioma), his treatments, his age, and his life expectancy, there were compelling reasons to remit Mr. Garvin's verdict.

2. *Seay v. CNA Holdings, LLC*

Justice Hill also evaluated a request for new trial nisi remittitur in the *Seay v. CNA Holdings, LLC* case. *Order Denying Defendant CNA Holding, LLC's Motion for Post-Trial Relief, Angie Keene, Individually and as Personal Representative of the Estate of Dennis Seay, Decased, and Linda Seay v. CNA Holdings, LLC*, No. 2013-CP-42-03915, Richland County Court of Common Pleas of South Carolina (Jan. 8, 2016)). Celanese requested that Justice Hill remit the jury's compensatory verdict from \$2,000,000 to \$1,500,000, which Justice Hill declined to do. *Id.* at *31. In support of his ruling, Justice Hill noted that Mr. Seay had pleural mesothelioma and suffered with chest and lung pain before his diagnosis. He noted all of Mr. Seay's pain and suffering, including all of his medical treatments and surgeries to try and prolong his life. He noted that before his pleural mesothelioma diagnosis, Mr. Seay was "strong and in very good physical shape," Justice Hill noted that Mr. Seay suffered from excruciating pain and mental distress, and that he found no compelling reason to reduce the compensatory verdict. Justice Hill further noted that the compensatory verdict was similar to other jury awards for someone with pleural mesothelioma.

Justice Hill further elaborated in his *Seay* post-trial order that:

As Celanese points out, in Garvin, this Court did remit the pain and suffering awarded to Mr. Garvin from \$10 million to \$1.5 million. But the cases are very different. Mr. Garvin was alive and cancer free at the time of his trial, whereas Mr. Seay suffered unrelenting pain until his mesothelioma killed him. Mr. Garvin was four years older at the time of trial than Mr. Seay was at his death, and Mr. Garvin's life expectancy was a number of years shorter. Mr. Garvin suffered from a testicular form of mesothelioma, while Mr. Seay suffered from pleural mesothelioma that caused his death by suffocation.

Id. at *35.

Justice Hill also affirmed the jury's award of \$5,000,000 for loss of consortium damages to Mr. Seay's widow because she "suffered extreme hardship and loss" because of her husband's

mesothelioma. *Id.* at *36. Justice Hill noted how much time Mr. and Mrs. Seay spent together and the fact that Mrs. Seay took care of her husband when he was sick because he “always wanted her right beside him.” *Id.* at *36. Justice Hill noted that the loss of consortium award was supported by the trial evidence and was not unduly liberal. *Id.* at *37. Justice Hill acknowledged that, same as in *Garvin*, there was no compelling reason to disturb the loss of consortium verdict.

Justice Hill also affirmed the award of \$5,000,000 to the wrongful death claim noting that Mr. Seay would have had a life expectancy of 13 years had he not developed mesothelioma.

Finally, Justice Hill declined to remit the jury’s punitive verdict, finding of \$2,000,000 in total, or in the alternative to \$50,000. *Id.* at *43. Justice Hill walked through all of the evidence that had been presented to the jury about how long Celanese had known about asbestos causing disease, how long Celanese had known that the asbestos on its premise exposed people to high enough levels of asbestos to cause disease, and that Celanese had knowingly and consciously disregarded the rights and safety of Mr. Seay and other workers on its premise and never warned anyone of asbestos hazards. Justice Hill wrote that:

...evidence included Celanese’s decision to continue using asbestos products when there were available alternatives, and deliberately concealing the nature of the danger from contract workers like Mr. Seay. This was not isolated conduct, but continued for almost a decade...

Id. at *45.

3. Michael Perry and Lonnie Long

The evidence shows that Mr. Perry’s injuries are very different from Mr. Garvin’s. Mr. Perry was 53 years old at the time of his diagnosis in 2023, more than 20 years younger than Mr. Garvin at the time of his trial. Mr. Perry has pleural mesothelioma and, as the jury heard from Dr. Haber, is facing a resurgence of his disease. He has no other severe medical conditions aside from his pleural mesothelioma and was in good physical health before his cancer diagnosis.

Mr. Perry is more similar to Mr. Seay. Mr. Perry, like Mr. Seay, has pleural mesothelioma. He has suffered extreme chest and lung pain. He has had extensive medical treatments, including but not limited to chemotherapy, radiation, and a six-to-eight surgery during which his back muscle was cut in half, his cancer-ridden lung lining was peeled off like an orange rind, his rib was removed, and his diaphragm was removed and reconstructed with mesh. The jury heard from Dr. Gibney that Mr. Perry's mesothelioma will recur, will be aggressive, and that when that happens Mr. Perry will suffocate to death with a sensation of "drowning."

Relevant to both *Garvin* and *Seay* prior orders, Mr. Perry's loss of life expectancy was approximately 26 years. Mr. Perry had \$510,620.05 in medical bills, an amount that was stipulated to as fair and reasonable by J&J. The record also shows that Mr. Perry had an economic loss of \$2,819,353, an amount also stipulated to by J&J as fair and reasonable. Therefore, Mr. Perry had a total economic loss of \$3,329,973.05, an amount that J&J stipulated to which was then presented to the jury. This is contrasted with Mr. Garvin's economic loss of \$149,000.

Evidence supports the fact that Mr. Long has felt the loss of his husband, and will continue to feel it long after Mr. Perry dies. The jury heard evidence that his husband gives him strength, and his entire life revolves around his relationship with Mr. Perry. The jury heard that Mr. Long takes Mr. Perry to every single doctor's appointment without fail, and loves his husband so much he could not even watch him testify at trial because it would be too painful to watch Mr. Perry be cross-examined.

As Justice Hill noted in his prior post-trial order in *Garvin*, "While the jury did decide on a large award, the Court has no reason to conclude it was the result of any improper motive or outside consideration. Placing a value on pain and suffering is inherently subjective." *Order*

Denying in Part and Granting in Part Defendant Crane Co. 's Motion for Post-Trial Relief, Garvin v. AGCO Corporation, at *32 (Nov. 10, 2014)).

However, the Court does find the verdict should be reduced because it is “merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). The verdict to Mr. Perry of \$23,037,500 shall be reduced by \$4,000,000 thereby leaving a verdict of \$19,037,500.

The Court finds the loss of consortium award shall be reduced because it is “merely excessive although not motivated by considerations such as passion, caprice or prejudice.” *Id.* The verdict to Mr. Long of \$9,618,750 shall be reduced by \$3,000,000 thereby leaving a verdict of \$6,618,750.

B. Punitive Damages

A-I-I also argues that the punitive damages award of \$760,000 against it should be reduced. Again A-I-I ignores that, as a matter of law, its conduct was found to be willful, wanton, and/or reckless, which is the predicate for punitive damages. The jury was instructed about this fact. The jury awarded \$760,000 in punitive damages against A-I-I. Defendant A-I-I, as a matter of law, admitted the allegations of the complaint, which fully support the imposition of punitive damages.

In *Gamble v. Stevenson*, the South Carolina Supreme Court directed:

[T]o ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, “other factors” deemed appropriate.

Gamble v. Stevenson, 305 S.C. 104, 111–12, 406 S.E.2d 350, 354 (1991). However, in *Mitchell, Jr. v. Fortis Insurance Co.*, the supreme court held “that *Gamble* remains relevant to the post-

judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts.” 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009). Thus, in *Mitchell*, the court considered reprehensibility, ratio, and comparative penalty awards.

1. Reprehensibility

A number of the *Gamble* factors are relevant to reprehensibility and will be addressed below. While the jury did not see the allegations in the complaint, they are available and relevant to the Court’s review. As noted above, Plaintiffs alleged Defendants’ knowledge of the risk of talcum powder products that they marketed as safe for daily use. Original Complaint at ¶ 148. Plaintiffs alleged Defendants’ knowledge of carcinogens, including asbestos, in talc. *Id.* at ¶ 150. Plaintiffs alleged that Defendants “have represented to various news media outlets and the public at large that their products are ‘asbestos-free,’ when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods.” *Id.* at ¶ 183. Again, there are nearly 20 pages of allegations concerning Defendants’ knowledge and bad acts with respect to the hazards of asbestos in their products. *See id.* at pp. 67-86. A-I-I’s conduct, as admitted by its default, demonstrates a high degree of culpability.

A-I-I’s conduct, as alleged in the complaint, went on for decades. Plaintiffs alleged that “For decades, defendants manufactured products composed of talc that were sold and marketed as safe for daily use by consumers on their person....” Complaint at ¶ 148. Plaintiffs also alleged that “Defendants and CTFA, for decades before Plaintiff Michael L. Perry was born, possessed medical and scientific data that raised concerns regarding the presence of carcinogens, including asbestos, in talc and that demonstrated the existence of health hazards to those exposed to asbestos-containing talcum powder products.” *Id.* at ¶ 150. Plaintiffs alleged that “Defendants ... have long

known that the deposits in the earth that are associated with talc are also associated with the formation of asbestos.” *Id.* at ¶ 152.

The crux of the conduct alleged, as shown above, is that Defendants, including A-I-I, knew of the dangers of their products but did not warn, instead marketing their products as safe and trying to conceal the hazards. The alleged awareness and concealment of the danger, which A-I-I admitted through its default, demonstrates the reprehensibility of A-I-I’s conduct.

Plaintiffs alleged that Defendants engaged in the same conduct with awareness of the risks for decades before Michael Perry was born, showing that they engaged in similar past conduct as well. Complaint at ¶¶ 148, 150, 152. Because these allegations support the finding of willful, wanton, and reckless conduct, they support the punitive damages award in this case.

2. Ratio

“The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (citing *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 459 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)). The punitive damages award must bear a “reasonable relationship” to the compensatory damages award. *Id.* “Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.” *Id.* at 580–81. “In *Haslip*, [the Supreme Court] concluded that even though a punitive damages award of ‘more than 4 times the amount of compensatory damages’ might be ‘close to the line,’ it did not ‘cross the line into the area of constitutional impropriety.’” *Gore*, 517 U.S. at 581 (quoting *Haslip*, 499 U.S. at 23–24). In *Campbell*, the Supreme Court returned to the 4:1 ratio as instructive:

Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore*. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 or, in this case, of 145 to 1.

538 U.S. at 425. Here, where the jury awarded punitive damages of little more than 2% of the actual damages, the ratio tends to show that the punitive damages award is not excessive.

3. Comparative penalty awards

As to comparative penalty awards, the South Carolina Supreme Court has directed:

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying “comparable cases” a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant’s conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

Mitchell, 385 S.C. at 588–89, 686 S.E.2d at 186.

There appear to be no civil penalties that clearly apply to the facts of this case. In a case against cigarette manufacturer Phillip Morris, the Oregon Supreme Court noted that, rather than a civil penalty, Philip Morris’s conduct in hiding the cancer risks of its product and misleading the public “would constitute at least second-degree manslaughter, a Class B felony.” *Williams v. Philip Morris Inc.*, 340 Or. 35, 59, 127 P.3d 1165, 1179 (2006), *vacated on other grounds sub nom. Philip Morris USA v. Williams*, 549 U.S. 346 (2007), *and adhered to on reconsideration*, 344 Or. 45, 176 P.3d 1255 (2008). In South Carolina involuntary manslaughter involves “criminal negligence,”

which is “the reckless disregard of the safety of others.” S.C. Code § 16-3-60. It is punishable by up to five years in prison, however, and not by fine. *Id.*

In *Mitchell*, the court also could not find examples of civil penalties in equivalent circumstances but looked to punitive damage awards that had previously been upheld in similar circumstances. 385 S.C. at 592–93, 686 S.E.2d at 187–88. Certainly, larger punitive damages awards have been upheld in asbestos cases where, like here, the plaintiff alleged that the manufacturer knew and did not warn of the hazard of its product. *See, e.g., Keene v. CNA Holdings, LLC*, 426 S.C. 357, 384–85, 827 S.E.2d 183, 198 (Ct. App. 2019), *aff’d*, 436 S.C. 1, 870 S.E.2d 156 (2021) (upholding awards of \$12 million in compensatory damages and \$2 million in punitive damages against premises owner in asbestos exposure case).

Consequently, this Court will not invade the province of the jury in determining damages, and the jury’s awards to Michael Perry and Lonnie Long will stand.

A-I-I’s request for *nisi remittitur* as to Plaintiffs’ compensatory awards is GRANTED and A-I-I’s request for *nisi remittitur* as to the punitive damages award is DENIED.

XII. A-I-I’s ADOPTED ARGUMENTS ARE ALSO DENIED

A-I-I adopts certain arguments made by J&J:³

- Section IV.B.1.: This Court Erred By Denying J&J Defendants’ Motion to Sever and Compelling J&J Defendants to Try Their Case Along With American International Industries (A-I-I) Without a Proper Limiting Instruction.
- Section IV.C.: J&J Defendants Are Entitled to a New Trial Because Of The Cumulative Impact Of This Court’s Errors.
- Section IV.D.: The Court Should Grant A New Trial Absolute Under The “Thirteenth Juror” Doctrine Because The Evidence Did Not Justify The Verdict.
- Section IV.E.: A New Trial Must be Ordered Because the Verdict Shocks The Conscience and Because the Punitive Damages Award is Unconstitutional and Shockingly Excessive.

³ These are arguments made in J&J’s post trial motions and briefings.

- Section V.: Failing All of the Above, The Court Should Grant a New Trial *Nisi Remittitur*.

To the extent J&J Defendants' motions apply to A-I-I, they are DENIED for the same reasons put forth in the Court's Order on Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc.; and Kenvue, Inc.'s Motions for JNOV, New Trial Absolute Based on Errors of Law, and New Trial Absolute Based on the Thirteenth Juror Doctrine, excepting that

I GRANT J&J's motion for New Trial *Nisi Remittitur*, which grant of such motion directed to Plaintiffs' actual damages also applies to A-I-I by virtue of joint and several liability for an indivisible injury.

Plaintiffs' verdict of \$19,037,500 for Mr. Perry's past and future total loss, \$6,618,750 for Mr. Long's loss of consortium shall be set off by the fair and reasonable setoff of \$11,255,000, resulting in a compensatory judgment of \$14,401,250. The total punitive judgment is \$760,000. Therefore, the total judgment to be entered against A-I-I is \$15,161,250.

XIII. RULING ON STAY OF EXECUTION FOR JUDGMENT AND BOND

A-I-I requests a stay of judgment pursuant to Rule 62, SCRPC. The Court agrees that A-I-I is entitled to a ten-day automatic stay of judgment pursuant to Rule 62(a).

There is no automatic stay of execution of a money judgment during the pendency of appeal. S.C. Code § 18-9-130(A)(1); *see also* Rule 241(b)(1), SCACR (providing that money judgments are an exception to the general rule that service of a notice of appeal automatically stays matters decided in the judgment). Rather, a stay of execution is within the trial court's discretion: "A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution." S.C. Code § 18-9-130(A)(1). Rule 62(d) provides that a stay of execution of judgment is predicated on posting a supersedeas bond.

The Court exercises its discretion to deny A-I-I's request for a stay order without the requirement of an appeal bond. In the event of an appeal, the Court orders that A-I-I post a supersedeas bond in the full amount of the judgment, pursuant to SCRCP 62(d).

IT IS SO ORDERED.

[JUDGE'S ELECTRONIC SIGNATURE PAGE TO FOLLOW]



Richland Common Pleas

Case Caption: Michael L Perry , plaintiff, et al vs American International Industries ,
defendant, et al

Case Number: 2023CP4004072

Type: Order/Other

So Ordered

Jean H. Toal

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