STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	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 DEFENDANTS JOHNSON & JOHNSON; LLT MANAGEMENT, LLC; JOHNSON & JOHNSON HOLDCO (NA) INC.; AND KENVUE, INC,'S POST-TRIAL MOTIONS

Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc. (collectively "J&J") move for relief from the jury's August 15, 2024 verdict in favor of Plaintiffs Michael L. Perry and Lonnie L. Long. For the reasons set forth below, J&J's motions for judgment notwithstanding the verdict, new trial absolute based on errors of law, new trial absolute based on the thirteenth juror doctrine is DENIED, and new trial *nisi remittitur* are GRANTED. Separately, J&J's motion for setoff and production of settlement agreements is GRANTED as to setoff, but DENIED as to the production of settlement agreements. Finally, J&J's motion for stay of execution on the judgment is GRANTED, in part.

I. EVIDENCE AT TRIAL

Viewing the record in the light most favorable to Plaintiffs, sufficient evidence supports the jury's finding that Michael Perry's malignant pleural mesothelioma was proximately caused by exposure to asbestos in Johnson's Baby Powder ("JBP"). Mr. Perry and his husband, Lonnie Long, brought this action against multiple defendants, including but not limited to J&J. Evidence

at trial demonstrated that Mr. Perry was exposed to asbestos by using JBP on himself on a daily basis, multiple times a day, from 1974 through 2019. His mother also used JBP on him during diaper changes from the day of his birth on December 20, 1969. Three of Plaintiffs' causes of action were placed before the jury: negligence, strict liability, and fraudulent misrepresentation. J&J did not put on a case-in-chief.

A. Liability and Punitive Damages

1. Mr. Perry testified to his decades-long use of JBP on a daily basis.

Mr. Perry testified that his earliest memory of using talcum powder on himself was from 1974, when he was four or five years old, through 2019. He also testified that, after he was born in 1969, his mother used JBP on him during diaper changes when he was an infant and that his use of the baby powder "didn't just start at the age of five." This is all undisputed. He explained that he was using Johnson's Baby Powder two to four times per day. The jury further heard that Mr. Perry used a minimum of ten bottles of JBP per year. Use of JBP was part of Mr. Perry's daily hygiene routine because he was allergic to deodorant. The jury heard that this also was undisputed.

The jury was shown images of two bottles of JBP Mr. Perry found in his home. There was no warning of any kind on the first bottle. The second bottle had a small warning regarding keeping the bottle away from small children to avoid inhalation. Neither bottle found in his home had a warning that JBP could contain asbestos. Mr. Perry further testified to the jury about what was written on the bottles of JBP found in his home, including the phrases "purest protection", indicating that "pure" was synonymous with "safe," and "clinically proven mildness," indicating once more that "clinically proven" meant scientifically safe.

2. JBP contained asbestos.

It was undisputed that throughout Michael Perry's use of JBP, the specifications for the powder called for talc sourced from different mines including but not limited to mines in Val Chisone, Italy, Vermont, and China. Plaintiffs' expert, Dr. William Longo, testified that he has analyzed talc from each source that J&J used in its baby powder. His test results showed the presence of asbestos in each of the mines utilized by J&J in its baby powder throughout time. He confirmed that he found tremolite and other asbestos fibers, including winchite/richterite, over and over in JBP. Dr. Longo further testified that he found asbestos in JBP throughout each of the decades in which Mr. Perry used JBP – 1960s through the late 2000s. He confirmed that he found tremolite asbestos, anthophyllite, richterite, and actinolite in JBP. Battelle Memorial Labs also found tremolite asbestos in JBP 153 times as early as the 1950s. By the early 1970s, J&J had numerous reports showing the presence of tremolite in its Vermont and Italian talc ore. Additionally, even with "poor analytical sensitivity", the FDA's contract lab found asbestos in the talc used in JBP in 2019. Despite J&J having this knowledge, J&J admitted through its former corporate representative, Dr. John Hopkins, that there has never been a warning about asbestos on JBP or any J&J talc product.

3. Michael Perry was exposed to asbestos from JBP.

The testimony established that Mr. Perry's use of JBP exposed him to visible asbestos-containing dust. Plaintiffs' expert Dr. Steven Haber testified that once talc is used in a powder form inside the home, often in enclosed spaces such as a bedroom or bathroom, it is impossible to get the asbestos from that talc powder out of the home. There was uncontradicted evidence regarding re-entrainment. Dr. Haber explained that once asbestos settles down to the ground or to a surface, anyone walking by it or brushing it can put the asbestos fibers back into the air inside

the home. He elaborated that even if one were to vacuum or sweep up the talc dust with asbestos in it that is all over the home, that process is simply blowing the asbestos back into the air. Once it's in the air, it can be breathed in. Dr. Haber cited an authoritative, peer-reviewed and published paper by Dr. Hillerdal that studied these very concepts.

Dr. Haber additionally testified that OSHA began regulating asbestos exposure in the workplace in the early 1970s and that while the permissible exposure limit eventually was set at .1 fiber per cubic centimeter of air (fiber/cc) time -weighted average, that level was not safe for mesothelioma and people exposed at this level would still develop the disease. Dr. Haber testified about his reliance on the Steffen study, which the jury heard showed that when individuals used JBP for 40 years, their exposure level to asbestos is between .38 to 5.18 fibers/cc years. This exposure level substantially increases the user's risk of developing mesothelioma. Dr. Haber opined, to a reasonable degree of medical certainty, that Mr. Perry's range of exposures from his use of JBP was between .1 to 4 fibers per cc. Epidemiological studies have established that these levels are sufficient to cause mesothelioma, including studies by Gardner, Ferrante, Jiang, LaCourt, Roland, Iwatsubo, and Rodelsperger.

The jury heard testimony from Dr. Madigan, who testified that he did a dose calculation immediately prior to this trial for someone who applied JBP twice a day for 30 years. He testified that "there is an estimate of the fibers per cc of asbestos that a person was exposed to by using talc for one minute. And it's 1.9 fibers per cc." He further testified that this was the equivalent to .35 fiber years. Mr. Perry used even more talc than the hypothetical person utilized in Dr. Madigan's calculation, and his calculation demonstrated an increased risk. Dr. Madigan's dose testimony was undisputed.

The jury also heard testimony from Dr. Haber, who testified that OSHA concluded that there is no safe level of exposure to asbestos and that mesothelioma requires the least amount of asbestos exposure to develop. Dr. Haber testified to the jury about the *Steffen, et al.* peer-reviewed published paper and explained the levels of exposure that occur when someone uses J&J's talc. He explained to the jury that the study showed that individuals who used J&J's talc for 40 years had an exposure level to asbestos between .38 to 5.18 fibers/cc years, which substantially increases the user's risk of developing mesothelioma. Dr. Haber testified that Mr. Perry's range of exposures to asbestos from JBP was between .1 to 4 fibers per cc. He clarified that 1 fiber per cc meant breathing "10,000 fibers every minute, millions or billions in a year."

4. Plaintiffs' experts considered Mr. Perry's frequent use of JBP.

The jury heard testimony from Dr. Haber that Mr. Perry was "an above-average user" of JBP and he was "not only using it two to four times a day, but he was putting it on his whole body, and . . . at times he was actually putting it on his. . . face." He also explained that Mr. Perry's use of JBP was "a repeated use" and, because Mr. Perry is "a big guy" that "the amount of talc that he uses . . . is going to be more than . . . a smaller-framed individual." The testimony established that Mr. Perry's exposures to asbestos from JBP were a "substantial contributing factor to" the "development of [his] mesothelioma." The jury also heard evidence that J&J used talc in JBP from Italy before 1966/1967, talc "mostly" from Vermont from 1966 to 2003, talc from Italy for seven months in 1979, and talc from China from 2003 to 2020 – and each of these mines have tested positive for asbestos. The uncontradicted evidence was that Mr. Perry inhaled talc from JBP from each of these mine sources.

5. Mr. Perry's lung tissue contained amphibole asbestos fibers found in JBP.

Plaintiffs' material scientist expert Dr. Longo performed a tissue digestion on Mr. Perry's tissue. The tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc particles in Mr. Perry's lungs. The jury heard from Dr. Longo that the tremolite in Mr. Perry's lungs was consistent with what he has previously and repeatedly found in his testing of JBP, and it is also consistent with "Johnson & Johnson's own internal documents from decades ago that said when you find tremolite in talc in people's lungs with mesothelioma, it's a fingerprint for exposure to asbestos." Dr. Longo further explained to the jury that J&J's own experts have found winchite in JBP, that winchite has been found in the talc sourced from the Italian mine used by J&J, that he has found richterite in JBP and that J&J's own expert refers to "richterite" as "winchite" as finding the same thing because the chemistry is so close. The jury then heard, uncontradicted, that Dr. Longo has never found tremolite or winchite in any of his testing of brakes.

B. Successor Liability

Prior to the trial of this matter, the parties agreed that the issue of successor liability would not be tried to the jury. Therefore, no evidence was put forth to the jury throughout trial as to the successor liability of any J&J entities, even though J&J continued to make objections on the record regarding certain evidence. Plaintiffs and J&J jointly stipulated that the verdict form submitted to the jury would read "J&J Entities" so that this Court could rule on the successor liability post-trial. As such, the parties have since submitted extensive briefing regarding the successor liability issue to this Court and reserved that issue for the Court's ruling.

C. Jury Trial

A jury trial was held against J&J and a co-defendant, American International Industries, in August, 2024. The jury found that (1) J&J was negligent and that its negligence proximately caused

Mr. Perry's mesothelioma; (2) J&J was strictly liable for selling defective products that were a proximate cause of Mr. Perry's mesothelioma; and (3) J&J was willful, wanton, and reckless in its conduct. The jury returned a verdict of $23,037,500 for Mr. Perry's past and future loss and of $9,618,750 for Lonnie Long on his loss of consortium claim. After a bifurcated trial on punitive damages, the jury found that J&J had acted willfully, wantonly, and recklessly and awarded $30,000,000 in punitive damages against J&J.

J&J now seeks judgment notwithstanding the verdict, a new trial absolute, and a new trial *nisi remittitur*. J&J contends that there was no evidence to support any part of the jury's verdict, and challenges the amounts of the compensatory and punitive damages awards.

II. RULING ON SUCCESSOR LIABILITY

A. Standard of Review

In South Carolina, successor liability arises when: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully defeating creditor claims. *Nationwide Mutual Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451 (2018); *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008); *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924). A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, and shareholders. *Simmons*, at 366 S.C. at 313, 622 S.E.2d at 216. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise

satisfied. *Nationwide Mutual*, 424 S.C. at 269-70, 818 S.E.2d at 454-55. South Carolina recognizes this exception when a predecessor's assets are specifically transferred or moved to place the predecessor's assets out of the reach of creditors and/or third parties. *Nationwide Mutual*, 424 S.C. at 256.

B. Creation of the Successor Defendants

Johnson & Johnson alone made and sold JBP from the 1890s to 1978. From 1979 to 2021, subsidiaries under Johnson & Johnson's direction sold JBP (collectively "Old JJCI").

In October 2021, Johnson & Johnson devised a scheme called "Project Plato" with the stated purpose of avoiding talc liabilities. Defendants admitted they did it to (a) "allocate the talc liabilities," (b) "stop litigation completely" and (c) prevent an "outflow of revenue." On October 12, 2021, through a series of intercompany transactions (called the "Texas Two Step"), Old JJCI ceased to exist, and two new companies were created (a) LTL Management ("LTL") holding all the talc liabilities (per Johnson & Johnson), no productive assets and no ongoing business and (b) Johnson & Johnson Consumer Inc. ("New JJCI"), holding the productive business assets.

Two days after its creation, LTL declared Chapter 11 bankruptcy. LTL requested a bankruptcy stay of litigation to apply not only to LTL, but to Johnson & Johnson, New JJCI and various other parties. In November 2021, the request was granted. In early 2023, the Third Circuit reversed the Bankruptcy Court, holding LTL's bankruptcy was filed in bad faith. On April 4, 2023, the Bankruptcy Court formally dismissed the case. LTL re-filed a second bankruptcy a few hours later on April 4, 2023. Ultimately, the Bankruptcy Court held that LTL filed the second bankruptcy in bad faith. On August 11, 2023, the second bankruptcy attempt was formally dismissed, ending all litigation stays. There is no dispute that Old JJCI is not a viable entity as it ceased to exist in October 2021.

After its creation in October of 2021, New JJCI continued to operate Johnson & Johnson's Consumer Health business in the U.S. without interruption. The manufacturing, marketing and distribution assets that Old JJCI used to make baby powder went to New JJCI. New JJCI maintained and continued (a) Old JJCI's business contracts (manufacturing, licensing, supply, vendor, etc.), (b) the same ownership (Johnson & Johnson as grandparent, Janssen Pharmaceuticals as parent), (c) the same management, (d) the same employees in the same positions, (e) the same operating locations, (f) the same business operations and (g) making the same products, including JBP. New JJCI changed its name to Johnson & Johnson Holdco (NA) Inc. ("New JJCI/Holdco") in December 2022.

In early 2023, Johnson & Johnson spun off its consumer business segment to defendant Kenvue, Inc. ("Kenvue"):

- New JJCI/Holdco formed a subsidiary, Johnson & Johnson Consumer, Inc. ("JJCI 3.") in June 2022
- New JJCI/Holdco transferred New JJCI 3 to Janssen Pharmaceuticals in Feb. 2023.
- Janssen transferred "JJCI 3" to a holding company, JNTL Holdings 2, Inc.
- JNTL Holdings 2, Inc. (parent of JJCI 3), along with other entities, were ultimately transferred to Johnson & Johnson by early April 2023.
- Johnson & Johnson spun off these entities to Kenvue in April 2023.

According to testimony from Kenvue's corporate representatives, Kenvue held itself out as essentially the same company that was operating the Consumer Health Division inside of Johnson & Johnson. Kenvue's SEC filings present itself as the same company that sold JBP for decades. Kenvue maintained the (a) same business contracts, permits, licensing, etc. as Old JJCI and New JJCI/Holdco, (b) same ownership (both before and after an August 2023 "stock swap"), (c) same management, (d) same employees, (e) same operating locations, (f) same business operations and (g) same products, including JBP.

C. Other issues impacting successor liability.

J&J's business used to consist of three segments: Consumer, Pharmaceutical and Medical Devices. The consumer segment was composed of numerous legal entities, Old JJCI being only one. While over 10,000 employees worked in the consumer segment, allegedly Old JJCI employed about 3,000. Executives testified that they conducted business by segment, sharing employees and resources without regard for the legal entities:

- *Mr. Mongon (President of the consumer segment and then Kenvue)*: They operated business segment, not "through the lens of legal entities;"
- *Mr. Ruh (CFO of the consumer segment and then Kenvue)*: He did not know "what legal entities were under my purview" because it operated by segment;
- *Dr. Kuffner (Medical Officer of the consumer segment)*: They oversaw and monitored products sold across all legal subsidiary entities of the segment;
- *Ms. Goodridge (President of Old JJCI and New JJCI)*: She worked for the consumer segment consisting of multiple legal entities.

The officers and directors of Old JJCI and New JJCI were all employees of Johnson & Johnson. Ms. Goodridge simultaneously held positions as president of (a) a unit of Johnson & Johnson's consumer segment and (b) Old JJCI. She never participated in any board meetings for Old JJCI. Ms. Goodridge explained that the president of Old JJCI was not an "operational role," but instead a "corporate officer role" consisting of signing legal transactions. The consumer health segment of J&J was spun off to the Kenvue enterprise.

Johnson & Johnson dictated the October 2021 "Texas Two Step." The president of the Consumer segment (and then Kenvue) testified that the Legal Department of Johnson & Johnson handled the decisions of "Project Plato" in October 2021. Ms. Goodridge, president of Old JJCI, confirmed that Johnson & Johnson (the parent) controlled the creation of LTL and New JJCI. Ms. Goodridge testified that (a) Johnson & Johnson made her president of the other newly created entities in the transactions and instructed her to sign the instruments, (b) Johnson & Johnson

established the entities, (c) she only spoke with Johnson & Johnson attorneys (and no businessperson) and (d) she cannot identify any business purpose for the transactions.

Similarly, Johnson & Johnson dictated the April 2023 Kenvue spinoff. Both Kenvue's CEO and CFO confirmed that Johnson & Johnson made all decisions; the Kenvue Board had no say. The entire transaction was under the control and direction of Johnson & Johnson.

In the instant case, Plaintiffs deposed Kenvue Inc. first through its corporate representative James Mittenthal. Mr. Mittenthal testified the Vice President of Global Risk Management for Kenvue once worked for Johnson & Johnson. Additionally, according to Kenvue, Teddy Reed, Kenvue's vice president and corporate secretary, also worked for Johnson & Johnson before coming to Kenvue. Further, Mr. Mittenthal, as corporate representative for Kenvue, has no knowledge of the logic behind the "restructuring" transactions and cannot testify that anything substantive occurred in Texas.

Kenvue later designated John Kim as its corporate representative in this case after this Court found the preparation of Kenvue lacking. He was also designated as the corporate representative for Johnson & Johnson Holdco (NA) Inc. Mr. Kim has never worked for Kenvue or Holdco. He was, however, head of product liability litigation at Johnson & Johnson. Mr. Kim confirmed that the 2021 transaction created two entities from Old JJCI—LTL and New JJCI. New JJCI later became Holdco.

Mr. Kim testified that he was personally involved in Project Plato, along with Chris Andrew, who is currently at Kenvue. According to Mr. Kim, there are documents associated with Project Plato which refer to the J&J family or the "J&J enterprise" and he noted that the term is used to denote a company that shares some common ownership with, at the top—basically—generally, they're owned by Johnson & Johnson shareholders, ultimately.

In 2023, Johnson & Johnson initiated "Project Diamond" which concerned the spinoff of the Consumer Health business segment from Johnson & Johnson to the Kenvue enterprise. Kenvue's CEO admitted that (a) Kenvue has held itself out to investors as essentially the same company that was operating the Consumer Health Division inside Johnson & Johnson and (b) Kenvue has held itself out as the former Johnson & Johnson consumer business. Despite forming in February 2022, Kenvue publicly referred to its portfolio of iconic and modern brands that has been built over 135 years, including JBP. In other words, Kenvue held itself out as the same company that made JBP for generations.

Similarly, corporate representatives for the companies admitted that all of the employees were transferred from Johnson & Johnson's consumer segment to Kenvue, unless they were designated as shared employed. The executive officers for Kenvue had previously held the same or substantially similar positions for the Johnson & Johnson consumer segment. The manufacturing facilities remained the same and all of the manufacturing assets were transferred to Kenvue. According to Kenvue's corporate representatives, everything under the consumer health sector was transferred over to Kenvue, including assets, trademarks, people, manufacturing facilities, and brands. Nothing related to the manufacture of JBP was left with Johnson & Johnson's prior consumer health division. Through mid-August 2023, Johnson & Johnson still owned close to 90% of Kenvue. After mid-August 2023, Kenvue continued to have the same ownership because Johnson & Johnson shareholders became Kenvue shareholders through a stock swap. Johnson & Johnson shares were converted to Kenvue shares.

As to the commonality of directors, employees, officers, and/or managers, Kenvue testified during its deposition that currently two members of Kenvue's current Board of Directors previously held positions at Johnson & Johnson. Kenvue made no effort to confirm which of its

current board members held positions with Johnson & Johnson. During Kenvue's deposition in this case, Kenvue confirmed the connections of each current member of Kenvue's executive team to prior Johnson & Johnson and/or Old JJCI:

Name	Kenvue Position	JJCI or J&J Position
Thibaut Mongon	CEO	Executive VP and Worldwide Chairman of Consumer Health
Paul Ruh	CFO	CFO
Luani Alvarado	Chief People Officer	Global Leader of Human Resources
Carlton Lawson	Group President, Europe, Middle East and Africa & Latin America	Group Chairman for Europe, Middle East, and Africa
Charmaine England	Chief Growth Officer	Global Head of Strategy, Consumer Health
Matthew Orlando	General Counsel	General Counsel
Meri Stevens	Chief Operations Officer	Worldwide Vice President, Consumer Health Chain and Delivery
Bernardo Tavaras	Chief Technology & Data Officer	Chief Information Officer
Ellie Bing Xie	Group President, Asia Pacific	Company Group Chairman, Asia Pacific

After their creation, Holdco and Kenvue continued the baby powder line. Talcum-based baby powder was sold internationally after the spinoff of Johnson & Johnson's consumer segment from Holdco to Kenvue.

III. CHOICE OF LAW

As a threshold matter, this Court must decide which state's substantive law will apply to the issue of successor liability. The Successor Defendants contend that Texas substantive law should apply to the issue because the restructuring of companies occurred under Texas law.

Plaintiffs disagree and argue that either South Carolina or New Jersey substantive law should apply to this issue. The Court agrees with Plaintiffs.

Under South Carolina's choice-of-law rules, the analysis necessarily begins with the question of whether a cause of action - in this instance successor liability - sounds in contract or tort. *Lister v. NationsBank of Delaware, N.A.* 329 S.C. 133, 141, 494 S.E.2d 449, 454 (S.C. App. 1997) ("Before determining choice of law, this Court must first decide if the cause of action . . . is an action in contract or in tort.").

If successor liability is properly characterized as a contract-based theory, South Carolina law provides that "contracts are to be governed as to their nature, validity and interpretation by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." *Livingston v. Atlantic Coast Line R.R.*, 176 S.C. 385, 391, 180 S.E. 343, 345 (1935); *see also Albermarle Corp. v. Astrazeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010) (observing that the law gives effect to the parties' choice of law as set forth in the contract if reasonable); S.C. Code Ann. § 36-1-105 (1) (providing that when a transaction bears a reasonable relation to this state and to another state or nation, the parties may agree on the law that governs their rights and duties). On the other hand, if successor liability is properly characterized as a tort-based theory, South Carolina choice-of-law rules look to the law of the state in which the injury occurred. *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994).

Contrary to argument from J&J, South Carolina courts have not clarified whether successor liability claims should be evaluated using the choice-of-law rules governing tort or corporate/contract law and the Successor Defendants' reliance on the Supreme Court of South Carolina's statements in *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640 (2018) is inapposite. *Pertuis* was an action for stockholder oppression. 423 S.C. at 628. This case, unlike *Pertuis*, is

focused on determining which of the many entities organized underneath the Johnson & Johnson Enterprise can or should be held liable for the injuries suffered by Plaintiffs. Plaintiffs' issue regarding successor liability does not seek to "regulate the organization or [the] internal affairs of a foreign corporation[.]" *Pertuis*, at 423 S.C. at 650.

The Successor Defendants presume the Court must abide by their preferences for which entity (and only one entity) bears responsibility for the harm they caused. However, they overlook two distinctions. The import of a choice-of-law provision differs in disputes between (a) parties to the contract or transaction and (b) non-parties to the contract or transaction who are alleging injury in tort (*e.g.*, Plaintiffs here). *See, e.g.*, *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 465 (3d Cir. 2006) (applying an "interest-based analysis" to conclude that contractual choice-of-law provisions do not apply to choice of law in "de facto merger" analyses). Likewise, choice-of-law law analysis differs when analyzing disputes about the standard of care for (a) internal affairs of a corporation and (b) injuries caused by those corporations. While Johnson & Johnson can choose to apply Texas law in disputes between and amongst its own internal subsidiaries, Plaintiffs here are not bound by that choice.

Plaintiffs do not contend that Kenvue or Holdco expressly assumed liability. Similarly, Plaintiffs do not contend that Kenvue or Holdco are successors in interest to LTL/LLT/Pecos River (or any new entity with no ongoing business concerns that expressly assumes liabilities for talc). Rather, Plaintiffs contend Kenvue and Holdco are successors in interest to Johnson & Johnson Consumer Inc. and Johnson & Johnson.

I find that the successor-liability issue in this case is tort-based, as the question to be resolved is not one of contract interpretation or contract validity. Instead, the focus is on which entity in a chain of entities is and/or can be held liable for the injuries suffered by Plaintiffs.

Because this issue is tort-based, the laws of the state where Plaintiffs' injuries occurred—South Carolina—will apply.

IV. SUCCESSOR LIABILITY UNDER SOUTH CAROLINA LAW

In South Carolina, in the absence of a statute, a successor company is not ordinarily liable for the debts of a predecessor company under a theory of successor liability unless: (a) there was an agreement to assume such debts; (b) the circumstances surrounding the transaction indicate a consolidation of the two corporations; (c) the successor company was a mere continuation of the predecessor company; or (d) the transaction was fraudulently entered into for the purpose of wrongfully defeating creditor claims. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 263, 818 S.E.2d 447, 451; *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 305-06, 657 S.E.2d 67, 69 (Ct. App. 2008); *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 312, 622 S.E.2d 213, 215 (2005); *Brown v. American Ry. Express Co.*, 128 S.C. 428, 123 S.E. 97 (1924).

Importantly, a plaintiff may maintain a product liability claim under a successor liability theory against a defendant when there are one or more other viable product liability defendants. *Simmons*, 622 S.E.2d at 97. The status and availability of other potential defendants is irrelevant in determining the issue of a successor corporation's liability in a product liability action. Here, the predecessor entity—Old JJCI—no longer exists and is not a viable defendant. Rather than focus on viability of others a plaintiff must fall within one of the four exceptions set forth in *Brown*. See, *Nationwide*, supra, 424 S.C. at 264, 818 S.E.2d at 451.

A. An agreement to assume the debts

As to the Successor Defendants, Plaintiffs do not contend that the first exception applies. It is undisputed that LLT (now Pecos River Talc) was sued because of an agreement to assume the

debts of Old JJCI. This exception does not apply to the inquiry of whether **Holdco and Kenvue** may be held as successors in interest to Old JJCI.

B. Mere Continuation

A successor corporation is a mere continuation of its predecessor when the predecessor and successor corporations have substantially the same officers, directors, and shareholders. *Simmons*, at 366 S.C. at 313, 622 S.E.2d at 216. The mere continuation test is a strict one, but not completely inflexible. While commonality of ownership is a keystone of the analysis and almost always sufficient to establish mere continuation when paired with common directors and officers, South Carolina court have stressed that control is an essential consideration as well. Typically, ownership and control are found in tandem; however, there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability. Although the mere continuation test is a high burden for a plaintiff to meet, it is intentionally so, as corporate law generally favors the free transfer of assets and disfavors successor liability. However, South Carolina's successor liability doctrine affords protection for plaintiffs in those cases where a corporate sale is driven by a desire to escape the predecessor's liabilities and obligations. Where the changing of corporate hats is tainted by such fraudulent intent, the successor corporation remains liable, even when the test for mere continuation is not otherwise satisfied. *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 269-70, 818 S.E.2d 447, 454-55 (S.C. 2018).

The Court finds that the mere continuation theory, as addressed in *Nationwide,* is satisfied. The business of Old JJCI continued without interruption in New JJCI via Holdco and Kenvue. The shareholders of Old JJCI became the shareholders of Holdco/Kenvue. The companies shared

employees, including members of their leadership teams and boards of directors. The majority of the individuals on Kenvue's current Board of Directors got their start at Johnson & Johnson or Old JJCI. Kenvue has even admitted in official documents that it is the same company as Old JJCI.

This Court finds continuity of enterprise management. Kenvue's representative created a chart of the overlap of leaders as of July 2024. However, each person currently in a leadership position at Kenvue held the same or a similar leadership position at Johnson & Johnson or JJCI prior to Kenvue's creation. Some changes occurred such as changing the title from "human resources" to "People Officer," but Defendants could not identify any substantive changes.

The Court further finds that the creation of these various corporate entitles by J&J was done to escape its predecessor's liabilities and obligations with the intent to defeat creditors, such as Mr. Perry, and evade liability.

C. Holdco and Kenvue are liable as successors under the fraudulent transfer and blurred corporate identifies exceptions to non-liability.

Holdco and Kenvue are also liable as successors based on fraud and the use of the corporate form to escape liability. Here, the entity who had the liability for JBP for decades ceased to exist and assets were transferred to other entities. Additionally, Johnson & Johnson, Holdco, and Kenvue, along with other entities, have intermingled and blurred corporate interests, entities, and activities such that there is no legal distinction between the corporations involved in the consumer products business. *Mid-South Mgt. Co. Inc. v. Sherwood Development Corp.*, 374 S.C. 588, 604-605 (Ct. App. 2007); see also *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986) (finding a sibling company liable for the obligation of another sibling company due to the evidence revealing an "'amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities' where the companies shared officers, shareholders, and location).

In *Schmoll v. AcandS, Inc.*, Raymark Industries transferred its assets to Raytech—a company owned by Raymark Industries' shareholders—through asset transfers and corporate restructurings. 703 F. Supp. 868, 872-73 (D. Or. 1988). As a result of the transfers and corporate restructurings, Raymark Industries was left with "staggering asbestos liabilities, unprofitable operations, unsecured notes, and stock which could not be sold in large blocks without a deep discount." *Id.* at 873. Meanwhile, Raytech received Raymark Industries valuable assets. *Id.* This left present and future asbestos tort claimants with little chance of compensation. *Id.* Based on this context and statements made by those involved, the court concluded, "the elaborate transfer of assets was designed to escape liability[,]" and held Raytech liable as a successor of Raymark Industries. *Id.*

Like *Schmoll*, Johnson & Johnson, Kenvue, and Holdco have engaged in an elaborate corporate fiction to avoid liabilities associated with and from asbestos-containing Johnson's Baby Powder. Johnson & Johnson has been "transparent" about using the bankruptcy process as a vehicle "to address the company's growing talc-related liability exposures and costs in defending the tens of thousands of pending ovarian cancer claims and hundreds of mesothelioma cases, as well as future claims." *In re LTL Management, LLC*, 637 B.R. 396, 407 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738, *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023). The corporate restructure was "designed to allow 'New JJCI to continue to operate Johnson & Johnson's Consumer Health business in the United States without interruption[.]'" *Id.* Despite being amply solvent, Johnson & Johnson sought to use the bankruptcy system to limit and redefine the rights of the people its products harmed. While it sought refuge in the bankruptcy system for talc-based liabilities, Kenvue and Holdco continued to make, sell, and profit from Johnson & Johnson's talc-based product line for some time and in some locations. Here, even more so than the defendants

in *Schmoll*, Johnson & Johnson's, Kenvue's, and Holdco's conduct, both before the Texas Two Step and after, shows that these entities were created to avoid and eliminate liability.

Additionally, like the companies in *Kincaid v. Landing Development Corporation*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986) here too, J&J and these defendants have common shareholders, common officers and directors, and a blurred corporate distinction amongst the entities involved in the consumer products business.[1]

D. Amalgamation

J&J argues that the Plaintiffs did not plead an amalgamation theory in their complaint. The Court agrees that the amalgamation theory was not plead in the complaint, and therefore, the Court does not address this issue.

V. SUCCESSOR LIABILITY AND PUNITIVE DAMAGES

Plaintiffs and J&J jointly stipulated to have the verdict form submitted to the jury to read "J&J Entities". Because of this, the jury's finding of punitive damages was against J&J Entities. Because the Successor Defendants are successors-in-interest to Old JJCI, they are also liable for any portion of punitive damages assessed to Old JJCI. Punitive damages are likewise recoverable against LLT because it agreed to assume the talc liabilities, debts, and obligations of its predecessor.

Successor liability does not allow the successor to pick and choose which of its predecessor's obligations follow it. Successor Defendants argue that South Carolina courts have yet to address the issue of whether punitive damages are recoverable against a successor corporation. Courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 456 (2017)

[1] Because the Court has concluded that South Carolina law will apply to the successor-liability issue, the Court declines to address Plaintiffs' alternatively contention that the issue be resolved pursuant to New Jersey law.

(defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.*, 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo); *Krull v. Celotex Corp.*, 611 F.Supp. 146,148 (N.D. Ill. 1985) (applying Delaware law; the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself).

The Successor Defendants cite a litany of cases from other jurisdictions that have found that punitive damages are not recoverable against a corporate successor. *See e.g., In re Related Asbestos Cases*, 566 F. Supp. 818 (N.D. Cal. 1983) (reasoning that, because the successor was doing nothing to perpetuate the alleged malicious conduct of the predecessor, no award of punitive was warranted); *Catasauqua Area School District v. Raymark Industries*, 662 F. Supp. 64 (E.D. Penn. 1987) (holding that punitive damages were not allowed against successor entities where the plaintiff failed to present evidence that asbestos products manufactured by a successor entity were actually used); *Drayton v. Jiffee Chemical Corp.*, 395 F. Supp. 1081 (N.D. Ohio 1975), *modified*, 591 F.2d 352 (6th Cir. 1978) (refusing to award exemplary damages when the successor company improved the injury-causing product).

The Court finds the cases cited by the Successor Defendants inapposite because, based on the evidence presented. Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc products once manufactured and/or distributed by Old JJCI. Kenvue and Holdco continued these sales with the

same knowledge that its' JBP contained asbestos as Old JJCI. Thus, Holdco, Kenvue, and Old JJCI were "effectively one and the same entity" in the way they sold asbestos containing talc and hid that its baby powder contained asbestos.

Therefore, Successor Defendants' request that punitive damages not be assessed against them is DENIED.

VI. RULING ON JUDGMENT NON OBSTANTE VEREDICTO (NOT WITHSTANDING THE VERDICT) ("JNOV")

A. Standard of Review

In ruling on a JNOV motion, 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 non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference, or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any evidence* sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. *See Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). Similarly, "[a] circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate." *Brinkley v. South Carolina Dep't. of Corrections*, 687 S.E.2d 54 (S.C. 2009) (citations omitted). "The jury's determination of damages, however, is entitled to substantial deference. The circuit court should grant a new trial absolute on the excessiveness of the verdict

only if the amount is so grossly inadequate or excessive so as to shock the conscious of the court and clearly indicates that the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives." *Id.*

"The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case." *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). "Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed." *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993); *see also Johnson v. Hoechst Celanese Corp*., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under "thirteenth juror doctrine," the trial court may grant a new trial if she believes the verdict is unsupported by evidence or if the verdict is inconsistent and reflects jury's confusion).

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.*

"Compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur*." *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). The consideration for 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. *Id.*

B. J&J is not entitled to JNOV as to Plaintiffs' design defect claims.

The record supports the jury's finding that JBP was designed to contain talc, which J&J knew contained asbestos. As the Court of Appeals of South Carolina has recently acknowledged:

> "A product can be defective because of a flaw in its design." *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). "Liability for a design defect may be based on negligence, strict tort, or warranty." *Id.* "In an action based on strict tort or warranty, **plaintiff's case is complete when he has proved the product, as designed, was in a defective condition *unreasonably dangerous* to the user when it left the control of the defendant, and the defect caused his injuries.**" *Id.* at 579–80, 328 S.E.2d at 112 (emphasis added). "Liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." *Id.* at 580, 328 S.E.2d at 112. "This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it." *Id.*

Jolly v. General Electric Company, 435 S.C. 607, 648-49, 869 S.E.2d 819, 841-42 (Ct. App. 2021). In 2010, the South Carolina Supreme Court held that the exclusive test in a products liability design case is the risk-utility test. *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (S.C. 2010). According to the Restatement (Third) of Torts: Products Liability §2(b), adopted by the Supreme Court in *Branham*:

> A product ... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Branham, 390 S.C. at 223-24, 701 S.E.2d at 16 (quoting Restatement (Third) of Torts: Products Liability §2 (b) (1998).

The evidence presented at trial demonstrated that throughout the time period of Mr. Perry's use of JBP, from 1969 through 2019, the specifications for JBP called for talc sourced from mines in Italy, Vermont, and China. Plaintiffs' expert, Dr. William Longo, testified that he has analyzed talc from all of the sources that J&J used in its baby powder and that his test results showed the

presence of asbestos in each of the mines utilized by J&J in its baby powder throughout time. Dr. Longo testified to the jury that he found tremolite and other asbestos fibers repeatedly in JBP throughout each decade in which Mr. Perry used JBP.

The jury also heard at trial that other scientists found asbestos in the talc used to manufacture JBP. Battelle Memorial Labs found tremolite asbestos in Johnson's Baby Powder 153 times as early as the 1950s. Even with "poor analytical sensitivity" the FDA's contract lab found asbestos in the talc used in JBP in 2019. The jury heard Dr. Hopkins' testimony that there was never a warning about asbestos on any Johnson & Johnson product, despite knowing that by the early 1970s there were numerous reports of tremolite in J&J's Vermont and Italian talc ore. Dr. Hopkins further testified to the jury about several positive tests for asbestos in JBP throughout the decades that the talc powder was for sale.

The jury had this evidence and more in front of them when considering Plaintiffs' strict liability—design defect claim. Contrary to argument from J&J, Plaintiffs were not required to demonstrate that J&J intentionally added asbestos to their product. J&J's specifications for JBP—which called for the use of talc from mines which contained asbestos—created an unreasonable risk of harm to Mr. Perry.

J&J's motion for JNOV on Plaintiffs' design defect claim is DENIED.

C. J&J is not entitled to JNOV as to Plaintiffs' failure to warn claim.

"A supplier and manufacturer of a product are liable for failing to warn if they know or have reason to know the product is or is likely to be dangerous for its intended use; they have no reason to believe the user will realize the potential danger; and, they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous. *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987). Plaintiffs presented

evidence that J&J, after multiple tests of the talc used in JBP, knew that the talc contained asbestos. J&J presented no evidence to the jury that there was reason to believe that any of its JBP users, including Mr. Perry, would know that the product likely contained asbestos and still failed to warn of the hazards associated with the foreseeable use of the product.

In 1958, J&J knew its talc contained tremolite asbestos. By the early 1970s, J&J had received numerous additional reports that tremolite asbestos was found in the talc used in JBP. Despite this knowledge, the jury heard that bottles of JBP never displayed a warning about asbestos.

The jury also saw photos of two different bottles of JBP Mr. Perry found in his home. One of Mr. Perry's bottles had no warning on it about anything. The second of Mr. Perry's bottles had a small warning about infant's inhaling JBP generally. It was undisputed that neither of Mr. Perry's bottles of JBP had a warning about asbestos, and it is undisputed that one of Mr. Perry's JBP bottles had no warning at all.

J&J's motion as to this issue is DENIED.

D. J&J is not entitled to JNOV as to proximate cause.

J&J contends that Plaintiffs failed to establish that JBP was a proximate cause of Mr. Perry's mesothelioma. The evidence presented at trial, however, was sufficient for the jury to conclude that Mr. Perry's exposure to JBP was a substantial factor in the development of his mesothelioma.

As the South Carolina Court of Appeals affirmed in *Jolly v. General Electric Company*, 435 S.C. 607, 869 S.E.2d 819 (2021)[2], "when there are multiple possible sources of the plaintiff's

[2] The South Carolina Supreme Court granted certiorari only on the issue of additur and set off. It affirmed the trial court and the Ct. of App on additur and set off. Thus, the Court of Appeal's analysis on all other issues stands as though it was reviewed by the Supreme Court. Jolly v. General Electric Co., __S.C.__, 905 S.E.2d 380 (2024).

exposure to a toxin . . . the plaintiff must also show that his exposure to a particular defendants' product was a 'substantial factor' in the development of the plaintiff's disease." *Id.* at 435 S.C. at 625, 869 S.E.2d at 829 (citing David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 52 (2008)). South Carolina adopted the "substantial factor test" in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007), where the Supreme Court held that a plaintiff in an asbestos case need only present evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp*., 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "'[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to . . .the plaintiff[.]'" *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

Plaintiffs' extensive causation evidence includes testimony from Mr. Perry regarding his lifelong daily use of JBP; testing of JBP establishing that the talc ore and finished product contained asbestos during the years Mr. Perry used JBP; Dr. Haber's testimony regarding talc exposure studies indicating that Mr. Perry's range of exposures to asbestos from JBP was between .1 to 4 fibers/cc, resulting in cumulative exposures over 40 years of .38 to 5.18 fiber-cc years; Dr. Madigan's similar testimony that Mr. Perry's dose of asbestos from JBP was .35 fiber years; Dr. Madigan's testimony that this exposure level is within the range found to cause mesothelioma in numerous epidemiological studies; and Dr. Haber's opinion that Mr. Perry's exposure to JBP was a substantial factor in causing his disease.

The record supports the jury's finding that Mr. Perry had frequent, regular, and proximate exposure to asbestos from JBP that contained asbestos over the course of many years. Evidence at trial demonstrated more than just a casual or minimum contact with JBP from which the jury could conclude that Mr. Perry's exposure to JBP was a substantial factor in the development of his mesothelioma.

J&J's request for JNOV on this issue is DENIED.

E. J&J is not entitled to JNOV on Lonnie Long's loss of consortium claim.

J&J's request for JNOV as to Lonnie Long's loss of consortium claim is based on, and derivative of, the jury's liability and causation findings for Mr. Perry's mesothelioma, which the Court has denied.

Therefore, this request is DENIED.

F. J&J is not entitled to JNOV as to punitive damages.

The jury in this matter assessed punitive damages against J&J in the amount of $30 million. J&J argues that this amount was grossly excessive and that there was no evidence of J&J's reprehensible conduct in the record. The Court disagrees. The record supports the jury's finding that J&J's conduct was willful, wanton, or in reckless disregard of Mr. Perry's rights in connection with Plaintiffs' negligence claim.

Under South Carolina law, punitive damages may be awarded to punish tortfeasors who have acted in a "reckless, willful, or wanton" manner. S.C. Code Ann. § 15-32-520(D); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009) (citing *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996)); *see also Berberich v. Jack*, 392 S.C. 278, 288, 709 S.E.2d 607, 612 (2011). The South Carolina Court of Appeals recently wrote that "[t]he purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others

from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Portrait Homes-South Carolina, LLC v. Pennsylvania National Mutual Casualty Insurance Company, et al.*, 442 S.C. 515, 587, 900 S.E.2d 245, 284 (Ct. App. 2023) (*quoting Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000)). Additionally, punitive damages "serve to vindicate a private right of the injured party[.]" *Id.* "A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights. A conscious failure to exercise due care constitutes willfulness." *Taylor*, 324 S.C. at 221, 479 S.E.2d at 46 (citations omitted); *see also Berberich*, 392 S.C. at 288, 709 S.E.2d at 612. When evidence exists that suggest a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness and recklessness. *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) (citing *McGee v. Bruce Hosp., Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). The jury has considerable discretion to determine the amount of damages. *See Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404-05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages).

The evidence at trial showed that J&J knew asbestos, including asbestos in talc, could cause fatal disease. The jury heard that since the 1800s geology texts have reported asbestos in talc. Since the early 1930s, it has been known that asbestos causes deadly diseases. J&J's own documents as well as J&J's corporate representative, Dr. Hopkins' testimony to the jury revealed that J&J has known that asbestos causes cancer since the 1930s. It was even further established by the 1960s that mesothelioma was caused by asbestos exposure.

The evidence at trial showed that J&J knew its talc contained asbestos and took no corrective action. By the 1940s, it was known that asbestos was a common impurity in cosmetic talc. By 1958, J&J knew they had fibrous tremolite asbestos in their talc. The jury heard from Dr. Hopkins about all of the testings done on J&J's talc throughout the 1970s that were positive for asbestos done by multiple scientists. The jury also heard about the 2019 FDA finding in which asbestos was, once again, found in JBP.

The evidence at trial showed that J&J had actual knowledge of asbestos in its talc before, and during, the time Mr. Perry was exposed to JBP. The jury saw an internal document from J&J in 1997 in which J&J was analyzing the tissue of women who had mesothelioma and finding tremolite and talc fibers. The jury saw that J&J wrote that both tremolite and anthophyllite are known contaminants of talc, and that the cases of mesothelioma among women with no other identifiable exposures to asbestos could be related to cosmetic talc exposure. The jury also saw an internal document from 1973 in which J&J notes that its "clean mine approach to asbestos is over."

The evidence at trial showed that J&J knew infants inhale talc during JBP application. By 1969, J&J knew the "needle shape of tremolite" made it especially respirable and capable of entering "pulmonary alveoli."

The evidence at trial showed that J&J failed to adequately test by transmission electron microscopy ("TEM"), which it knew was the most sensitive method for identifying asbestos in talc. The jury heard testimony and saw evidence that J&J chose not to adopt heavy liquid density separation techniques for asbestos detection because the method was too sensitive. The jury also heard about, and saw documents about, J&J's TM7024 testing method, which J&J intentionally designed in such a manner that 16 various kinds of asbestos fibers could be found in a small sample from a bottle of JBP and still be reported as non-detect.

The jury also heard from Dr. Hopkins that J&J knew there would be negative consequences for its business if people found out there was asbestos in JBP. Evidence at trial showed J&J's tactics aimed at defending the safety image of JBP, including (1) monitoring and defending against adverse scientific, consumerist, and regulatory trends; (2) quelling questions and data about asbestos in talc; (3) promoting less sensitive FDA regulations by advocating for less sensitive test methods and (4) withholding positive asbestos test results. The jury saw J&J documents in which J&J touted the safety of asbestos in talc, such as the 1974 document in which J&J told the FDA that a substantial amount of asbestos could be safely allowed in baby powder. The jury then saw evidence that, despite this, J&J continued to advertise JBP throughout the decades by seeking to capitalize on the mother-infant bond and promote JBP as a safe product that mothers should use on their babies to show love.

The evidence at trial further showed that J&J knew cornstarch was an available substitute for talc since the late 1800s. J&J was evaluating an alternative to talc throughout the 1960s, 1970s, and 1980s.

The evidence at trial supported the jury's finding that J&J was willful, wanton, or reckless. J&J knew there were multiple tests showing that the talc used to make JBP contained asbestos, and was present even in the final product sold to the American public. Dr. Hopkins then testified that J&J never put any warning about asbestos on JBP despite this knowledge. Regardless of this information, J&J continued to sell asbestos-containing JBP until 2020 in the United States.

Therefore, J&J's request for JNOV on Plaintiffs' punitive damages award is DENIED.

G. J&J is not entitled to a JNOV on punitive damages as to successor entities because punitive damages are recoverable against successor entities.

Plaintiffs and J&J jointly stipulated to have the verdict form submitted to the jury to read J&J Entities. The determination of successor liability was reserved for determination by the Court

post-trial. Because of this, the jury's finding of punitive damages was against J&J Entities. Because Kenvue and Holdco are successors-in-interest to Old JJCI, they are also liable for any portion of punitive damages assessed to Old JJCI. Punitive damages are likewise recoverable against LLT because it agreed to assume the talc liabilities, debts, and obligations of its predecessor. The J&J Defendants have requested that newly-formed Pecos River Talc, LLC ("Pecos River") be substituted as a party defendant for LLT. Plaintiffs have objected to this substitution. The Court DENIES J&J's request for substitution, but will permit Pecos River to be added as an additional party defendant.

Successor liability does not allow the successor to pick and choose which of its predecessor's obligations follow it. J&J argues that South Carolina court have yet to address the issue of whether punitive damages are recoverable against a successor corporation. Courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 456 (2017) (defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.,* 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo); *Krull v. Celotex Corp.,* 611 F.Supp. 146,148 (N.D. Ill. 1985) (applying Delaware law; the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself).

This Court finds that Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc products which in turn gave Mr. Perry cancer. Thus, Holdco, Kenvue, and Old JJCI were "effectively one and the same entity" in the way they sold asbestos containing talc and hid that its baby powder contained asbestos.

Therefore, J&J's request that it have, in effect, a JNOV as to the award of punitive damages against its successor entities is DENIED.

VII. RULING ON MOTION FOR NEW TRIAL

J&J contends that a new trial is warranted because the jury instructions given to the jury were improper and that the Court improperly limited J&J's evidence such that J&J had an unfair trial due to prejudicial error. The Court disagrees.

A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. *See Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). Similarly, "[a] circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate." *Brinkley v. South Carolina Dep't. of Corrections*, 687 S.E.2d 54 (S.C. 2009) (citations omitted). "The jury's determination of damages, however, is entitled to substantial deference. The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives." *Id.* The decision to grant a new trial rests within the discretion of the court. *Id.* The Court of Appeals has stated when reviewing whether the trial court committed error in exercising that discretion, "we must consider the testimony and reasonable interferences to be drawn therefrom in the light most favorable to the nonmoving party." *Id.*; *see*

also, Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

A. The jury instructions given in this case were proper.

1. The jury instructions on punitive damages correctly stated the law.

J&J contends the Court improperly charged the jury as to punitive damages because the Court permitted the jury to award punitive damages based on third-party harm. A jury charge is correct if, when read as a whole, it contains correct definitions and adequately covers the law. *Keaton ex rel. Foster v. Greenville Hosp. System*, 334 S.C. 488, 514 S.E.2d 570 (1999).

As to punitive damages, the jury was charged, in part, as follows:

> So we will begin with these instructions. As I have told you, if you award actual damages against the defendant, you may also consider and award punitive damages. You've already crossed the first hurdle, which is you have found that the conduct was willful, reckless, and wanton. Punitive damages are intended to punish a defendant for willful, reckless, and wanton misconduct and to prevent the defendant and others from committing similar acts in the future. Punitive damages can only be awarded when the conduct of the defendant has been something more than mere negligence. The evidence must clearly and convincingly establish that the defendant was reckless or willful or wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or reckless disregard for the safety of others.

The Court also read pertinent portions of S.C. Code Ann. § 15-32-520 to the jury. The trial court may charge the jury regarding the factors which would justify a punitive damages award in the case. A punitive damages award survives constitutional scrutiny if: (1) the trial court's jury instruction explains the nature, purpose and basis for the award; (2) post-trial procedures enable the court to scrutinize the award; and (3) an appellate review process ensures that the award is reasonable and rational. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994).

J&J argues that Plaintiffs' punitive award was the result of Plaintiffs being able to introduce evidence of third-party harm related to ovarian cancer. The Court disagrees. It was made clear repeatedly throughout trial that Mr. Perry suffers from mesothelioma and not any other asbestos-related disease. Additionally, there is no evidence that the jury was encouraged to award punitive damages against J&J for harm done to others. Plaintiffs' told the jury that the punitive phase was for what J&J had done to Mr Perry, emphasizing that punitive damages are for "[w]hat Michael Perry is going through."

The punitive damages instruction explained the nature, purpose, and basis for the punitive damages award. The instruction was the same as the instruction given to the jury when it was to determine whether J&J's conduct was reckless, willful, and wanton. The record shows that the jury understood that punitive damages are paid to Mr. Perry.

2. There was no error regarding the effect of "Question 8" on the jury form.

At the end of the liability phase of trial, the Court instructed the jury, in part, as follows:

> In addition, if you find that the defendant's conduct was willful, wanton, or reckless, the plaintiff must also prove that by clear and convincing evidence, that is, that the evidence must clearly and convincingly establish that the defendant was actually reckless or willful and wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or reckless disregard of the rights and safety of others.
>
> * * *
>
> Willful and wanton and reckless conduct. There's one question on the jury form that asks about willful, wanton, or reckless conduct. A defendant's conduct is reckless or willful or wanton if there was a conscious failure to exercise due care or conscious indifference to the rights and safety of others or reckless disregard to the rights and safety of others. This must be established by clear and convincing evidence, which is something more than simple greater weight of the evidence and something less than beyond a reasonable doubt. Clear and convincing proof is proof that leaves you firmly convinced. Clear and convincing proof establishes in your mind not only that a fact is probable but that it is highly probable.

Prior to charging the jury, the Court and counsel for the parties discussed the verdict form and the propriety of telling the jury the purpose of Question 8. J&J agreed to include Question 8 on the verdict form.

The record shows that a punitive damages phase would not be necessary if the jury returned a "no" verdict as to negligence. The verdict form was not defective, it did not prejudice J&J, and the Court gave clear instructions to the jury regarding completing the form. J&J has failed to demonstrate how the failure to tell the jury that a "yes" as to Question 8 would trigger a punitive damages phase trial resulted in prejudice. Quite to the contrary, the South Carolina General Assembly, by statute[3], now mandates a bifurcated trial for punitive damages in cases of this kind. The jury must make the predicate finding that the Defendant's conduct was willful, wanton and reckless. This does not dictate that a jury must find punitive damages. The Court's decision not to discuss punitive damages until after the jury made its decision as to the character of the conduct is completely consistent with the provisions of the statute governing this matter. Finally, the Court's preliminary instructions in the punitive phase made it clear that it was up to the jury whether to award any amount of punitive damages after a finding of willful, wanton and reckless conduct.

J&J's motion for a new trial on this issue is DENIED.

3. There was no error in declining to charge J&J's requested "But-For" Causation instruction.

J&J contends it was prejudicial for the Court to refuse to instruct the jury using its suggested causation charge, wherein it stated as follows:

> Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's acts. Legal cause is proved by establishing foreseeability. If there is not

[3] See S.C. Code Ann §15-32-520

> sufficient evidence to conclude that, but for a defendant's conduct the injury would not have occurred, then you must find in favor of the defendant.

"[A] trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). "[T]he substance of the law is what must be instructed to the jury, not any particular verbiage." *Marin*, 415 S.C. at 482, 783 S.E.2d at 812.

J&J's instruction sought to have the jury determine causation in this case using a strict but-for causation standard. That is not the proper standard in asbestos cases in South Carolina. This Court, instead, charged the jury as to causation according to *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007). In *Henderson*, the Supreme Court of South Carolina held that in asbestos cases:

> In determining whether exposure is actionable, we adopt the "frequency, regularity, and proximity test" set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162[-63] (4th Cir. 1986): "To support a reasonable inference of *substantial causation* from circumstantial evidence, there must be evidence of exposure to a *specific product* on a *regular* basis over some *extended* period of time in *proximity* to where the plaintiff actually worked."

373 S.C. at 185, 644 S.E.2d at 727 (emphases added). The Supreme Court reaffirmed this standard in *Edwards v. Scapa Waycross, Inc.*, 442 S.C. 387, 899 S.E.2d 597 (2024). Notably, in *Edwards*, the Supreme Court explained that "the *Lohrmann* substantial factor test relaxes the 'but-for' requirement that applies in traditional tort cases [but] still requires the plaintiff to show "more than a casual or minimum contact with the product.'" 442, S.C. at 391, 899 S.E.2d at 599 (quoting *Lohrmann*, 782 F.2d at 1162)).

J&J's proposed instruction was an incorrect statement of law. There can be no prejudice from the Court's proper decision not to misinform the jury about the controlling law.

J&J's motion for a new trial on this issue is DENIED.

4. There was no error in declining to give J&J's requested instruction on specific causation.

J&J contends this Court failed to properly instruct the jury as to "specific causation" and argued that this Court should have accepted its instruction on specific causation. J&J also contends that Plaintiffs failed to present sufficient evidence of specific causation to the jury. The Court disagrees.

"Specific causation is whether a substance caused particular individual's injury." *Jolly*, 435 S.C. at 625, 869 S.E.2d at 828 (*quoting In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, 693 F. Supp. 2d 515, 518 (D.S.C. 2010)).

The Court instructed the jury as to causation, in part, as follows:

> Plaintiff must prove that the defendant -- that the plaintiffs' exposure to asbestos in the defendant's product was of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury. The mere fact that an injury or accident occurred standing alone does not permit you to draw the conclusion that the injury or accident was caused by anyone's negligence or breach of warranty of strict liability.

The Court finds that the instructions given to the jury as to causation were proper statements of the law. J&J has not and cannot demonstrate any prejudice to it resulting from the Court's properly worded instruction. *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005).

The evidence satisfied the *Henderson* causation standard. A plaintiff in an asbestos case need only present evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. at 185, 644 S.E.2d at 727. To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp*., 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "'[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must

be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.'" *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

Plaintiffs' presented sufficient evidence to support the jury's causation finding. The evidence in this case was that Mr. Perry was exposed to visible dust while applying JBP on a daily basis for 50 years. Plaintiffs' experts presented circumstantial evidence from which the jury could have concluded that the JBP that Michael Perry used for 50 years contained asbestos. The jury also heard testimony about the range of exposure to asbestos that Mr. Perry had while using JBP, and was further told that Mr. Perry's asbestos exposure level was many orders above background levels.

The jury could thus have easily concluded that Mr. Perry had frequent, regular, and proximate exposure to asbestos from his use of JBP over the course of many decades. This evidence is more than sufficient to support the jury's determination that Mr. Perry's mesothelioma was caused by his exposure to asbestos from Johnson's Baby Powder.

J&J's motion on this issue is DENIED.

5. The Court properly instructed the jury on substantial factor causation.

As noted in *Edwards,* the "substantial factor" test requires demonstration of frequency, regularity, and proximity. 442 S.C. at 391, 899 S.E.2d at 599. The Court instructed the jury as to substantial factor. The Court instructed the jury, in part, as follows:

> Plaintiff must prove that the defendant -- that the **plaintiffs' exposure to asbestos in the defendant's product was of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury.** The mere fact that an injury or accident occurred standing alone does not permit you to draw the conclusion that the injury or accident was caused by anyone's negligence or breach of warranty of strict liability.

In this instruction, the Court told the jury that substantial factor meant "frequency, regularity, and duration." This was a correct statement of law.

J&J's request for a new trial on this issue is DENIED.

6. The jury instruction as to "component parts" was proper.

It was not error for the Court to instruct the jury as to component parts. As to component parts, the Court instructed the jury that:

> If a reasonable inspection or test would have disclosed a defect, a manufacturer who incorporates a defective component into its finished product and places the finished product into the stream of commerce is liable for the injuries caused by defect in that component part.
>
> But defendant can, however, be liable for an alleged defective product it did not design, recommend, specify, require, manufacture, sell, or place in the stream of commerce. In deciding whether the defendant had a duty to test the product, you should consider the defendant's ability to conduct tests at the time the product was sold.

This instruction was given in order to address J&J's argument at trial that it did not intend for asbestos to be in its talc. This instruction informed the jury that J&J could still be found liable for Mr. Perry's mesothelioma even though it did not intentionally add asbestos to its product. The instruction also noted that once J&J was on notice that its product contained a defective component (asbestos) and still placed the product into the stream of commerce, J&J could be held liable for injuries caused by exposure to that defective component.

J&J's request for a new trial on this issue is DENIED.

7. The "eggshell plaintiff" instruction was proper.

J&J contends that the Court committed error when it instructed the jury on the "eggshell plaintiff." The Court disagrees. This instruction was necessary because of J&J's suggestion that Mr. Perry's individual susceptibility would have been the reason he developed mesothelioma. J&J put on evidence at trial about Mr. Perry's family history of cancer. The jury heard from J&J that Mr. Perry's mother had ovarian/uterine cancer. J&J cross-examined Mr. Perry's treating thoracic

surgeon expert, Dr. Barry Gibney, at length on Mr. Perry's genetic makeup and what kinds of genetic testing were either done, or not done, on Mr. Perry.

South Carolina has adopted the "eggshell plaintiff" rule which states a "defendant takes the plaintiff as [she] is found." *Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992). "As a general rule, liability for the consequences of one's tortious act is not lessened by reason of the fact that the injuries were aggravated by plaintiff's unhealthy conditions . . ." *Id.*, *citing* 22 Am.Jur.2d Damages §282 (1988).

J&J's request for a new trial on this issue is DENIED.

8. The jury was not given a "blended" products liability charge.

J&J contends that the Court committed error by providing a "blended" products liability charge to the jury. This Court disagrees.

Plaintiffs alleged both a design defect and manufacturing defect claim against J&J and was given the proper test for each. In *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010), the Supreme Court clearly stated that "the consumer expectations test fits well in manufacturing defect cases" but is "ill-suited in design defect cases."

The instruction was not blended. The jury was instructed as to "manufacturing defect," in part, as follows:

> When a manufacturing defect is claimed, the test of whether a product is or is not defective is whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend the use of the product.

The jury was charged separately as to design defect. When instructing the jury as to design defect, the Court included language reflecting the risk-utility test, which is the proper test for design defect claims. *Branham*, 390 S.C. at 220, 701 S.E.2d at 14.

J&J's request for a new trial on this issue is DENIED.

9. There was no error in declining to charge the jury as to "hindsight opinions," that more could have been done, or "post distribution" evidence.

J&J contends that the Court committed error by failing to charge the jury as to "hindsight opinions." The Court disagrees. J&J has cited no authority which would require this Court to instruct the jury as to "hindsight opinions," or that the jury should have considered that "more could have been done."

The admission of post-distribution evidence in this case was not prejudicial. Mr. Perry used JBP until shortly before J&J removed the product from the shelves. South Carolina's Supreme Court defined "post-distribution" evidence as "evidence of facts neither known nor available at the time of distribution." *See Branham*, 390 S.C. at 227, 701 S.E.2d at 17. In a footnote, the Court clarified that:

> If information on a product is reasonably attainable, then a manufacturer is charged with such knowledge at the time of manufacture. The rule prohibiting the introduction of post-distribution evidence does not permit a manufacturer to turn a blind eye to reasonably available information regarding the safety or danger of its product.

Id. at n. 17. The evidence supports a finding that J&J knew of the presence of asbestos not only in the talc that it put into its powder but also the presence of asbestos in its finished product. The information regarding the presence of asbestos in JBP was available to J&J prior to Mr. Perry's initial exposure.

J&J's request for a new trial on this issue is DENIED.

B. None of the alleged structural, evidentiary, or expert witness errors identified by J&J warrant post-trial relief.

1. J&J was not entitled to severance.

J&J contends that the Court committed error by denying its request to sever trial from co-defendant American International Industries ("AII"). The Court disagrees. Trial judges, in their

discretion, are responsible for determining whether trial issues are distinct enough to warrant severability. *Flagstar Corp. v. Royal Surplus Line*s, 341 S.C. 68, 533 S.E.2d 331 (2000). In this case, the claims against J&J and AII were largely identical. The issues to be determined by the jury in this matter as to both of these defendants were not so distinct as to warrant severability.

By the time of trial, the Court had resolved Plaintiffs' liability claims against AII as a matter of law as a result of AII being in default. Before opening statements, the Court informed the jury as follows:

> It has been determined as a matter of law that American International Industries, AII, which is a company responsible for Clubman talc products, is liable to Mr. Michael Perry on each of the causes of action pled against them in this case, specifically negligence, strict liability, fraud, conspiracy and implied warranty of merchantability. It has been determined as a matter of law that Clubman's asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma. It has been determined as a matter of law that American International Industries' conduct was willful, wanton, and reckless, meaning American International Industries acted with conscious indifference to the rights and safety of others.
>
> You are instructed that American International Industries is liable to the plaintiffs in this case. Your only task as to American International Industries are to determine the total amount of damages that Michael Perry and Lonnie Long have suffered.

It was clear from this instruction that the jury understood that all of Plaintiffs' claims against J&J were to be decided by the jury. Nothing about the Court's instruction to the jury indicated that it should also find J&J liable for Plaintiffs' injuries because of AII. The jury was instructed that these two defendants were to be considered separately.

J&J's request for a new trial on this issue is DENIED.

2. Defendants' experts did not have a proper scientific foundation for their opinions that Mr. Perry's mesothelioma was idiopathic or spontaneous.

In accordance with its "gatekeeping" function, the Court prevented J&J's experts from opining that Mr. Perry's mesothelioma was idiopathic and/or spontaneous. J&J's experts were

permitted, however, to testify at trial about spontaneous mesotheliomas generally.

The trial court must act as a gatekeeper over scientific evidence and make three preliminary findings before expert testimony may be admitted. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). The Court must find "that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable." *Id.* at 446-47, 699 S.E.2d at 175. "In South Carolina, a trial court minding the Rule 702 gate must assess not only (1) whether the expert's method is reliable (i.e., valid), but also (2) whether the substance of the expert's testimony is reliable." *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). A trial court does not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). '"A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."' *Id.* (quoting *Joiner*, 522 U.S. at 146).

Dr. Weill is a pulmonologist who J&J intended to have testify that Mr. Perry's mesothelioma was spontaneous because he saw no exposure to asbestos that Mr. Perry would have had, including any exposure to talc. While Dr. Weill reviewed the reports of the parties' experts, he did not review any internal testing documents from J&J. He didn't review any J&J documents at all. The Court finds that Dr. Weill's opinion regarding spontaneous mesothelioma is unsupported in any recognized scientific community, and that his conclusions regarding the "cause" of Mr. Perry's mesothelioma would have been unsupported and merely a diagnosis of exclusion. His methodology was not reliable or consistent with recognized scientific principles. Additionally, Dr. Weill's anticipated testimony that Mr. Perry had no exposure to asbestos

throughout his life is unreliable given that he has not reviewed any J&J documents, including J&J's internal testing documents – some of which found asbestos in J&J's talc that Mr. Perry used.

Dr. Diette's opinions also lack an adequate foundation to opine that that Mr. Perry's mesothelioma was either spontaneous or "naturally occurring." The Court finds that Dr. Diette's opinion regarding spontaneous mesothelioma is unsupported in any recognized scientific community, and that his conclusions regarding the "cause" of Mr. Perry's mesothelioma would have been unsupported and merely a diagnosis of exclusion. His methodology was not reliable or consistent with recognized scientific principles. Additionally, Dr. Diette's anticipated testimony that Mr. Perry had no exposure to asbestos throughout his life is unreliable given that he has not reviewed any J&J documents, including J&J's internal testing documents – some of which found asbestos in J&J's talc that Mr. Perry used. In fact, Dr. Diette has previously opined that there is no scientific literature to support the conclusion that a mesothelioma can occur spontaneously when there is a history of asbestos exposure.

Drs. Diette and Weill were not excluded completely from testifying. Their only limitation was that they could not use a diagnosis of exclusion and testify that Mr. Perry's mesothelioma was spontaneous. J&J has not provided any explanation as to how it was prejudiced by these rulings. J&J chose not to call Dr. Weill and Dr. Diette as witnesses in its case-in-chief.

South Carolina precedent makes clear that "it is not sufficient for the doctors to say simply that the ailment in question 'possibly' or 'might have' resulted from the accident, but the medical experts must go further and testify at least that in their professional opinions the result in question 'most probably' came from the alleged cause." *Windham v. City of Florence*, 221 S.C. 350, 358, 70 S.E.2d 553, 556 (1952). The Court finds that any opinions from J&J's experts that Mr. Perry's

mesothelioma was "spontaneous" were scientifically unsupported, lacking in factual foundation, and unreliable.

J&J's request for a new trial on this issue is DENIED.

3. Testimony from Plaintiffs' experts complied with the South Carolina causation standard.

J&J contends that the causation testimony of Plaintiffs' medical experts Dr. Arnold Brody and Dr. Steven Haber is unreliable and insufficient to establish substantial factor causation. The Court disagrees. Plaintiffs' experts do not hold the opinion that "any exposure" or "every exposure" or "every asbestos fiber" causes mesothelioma generally or caused Mr. Perry's mesothelioma. They testified that Mr. Perry's mesothelioma was caused by his cumulative asbestos exposure, and that given the specific facts of his exposure to visible asbestos dust from JBP regularly over the course of several decades, these exposures were a substantial factor in causing Mr. Perry's disease.

a. Standard of Review

The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE.

Courts evaluating the admissibility of scientific expert evidence "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the

quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

"[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. *See Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert's methodology, it is for the jury to determine the soundness of the facts underlying the expert's opinion and the correctness of the expert's conclusions. *See id.* 22.

b. JNOV is an improper vehicle for the court to reconsider a *motion in limine*.

J&J offers no authority for the proposition that a JNOV motion is the appropriate vehicle for requesting a Court reconsider its evidentiary rulings. To the contrary, South Carolina Courts have found that a JNOV motion is not the appropriate vehicle to address errors in the admission of evidence. *Johnson v. Hoechst Celanese Corp*. 317 S.C. 415, 420 (1995) ("a motion for judgment notwithstanding the verdict was not the appropriate vehicle to address the alleged error," in submitting a color-coded map to the jury which the moving parties contended showed their properties in the wrong color classification.).

In ruling on a JNOV, the Court is required to review *all* the evidence and consider it in the light most favorable to the nonmoving party. *Welch*, 342 S.C. at 299. South Carolina law does not contemplate revisiting evidentiary rulings when deciding a JNOV motion.

For this initial reasons, J&J's request that this Court belatedly exclude Plaintiffs' experts' testimony is DENIED.

c. Plaintiffs' experts had a reliable scientific basis for their opinions.

Plaintiffs' experts provided identical and/or similar causation opinions to the jury as at the trial of *Jolly v. General Electric Co.*, 435 S.C. 607, 869 S.E.2d 819 (S.C. Ct. App 2021), aff'd *Jolly v. General Electric Co.*, ___S.C. ___, 905 S.E.2d 380 (2024). In *Jolly,* this Court allowed expert testimony that mesothelioma can be caused by brief or low-level cumulative exposures, finding that the plaintiffs' "experts were entitled to rely on this basic medical fact in reaching their opinion in this case." *Id.* at 30. The Court recognized that testimony about this basic medical fact is not the same thing as testimony that "each and every exposure" is a substantial factor in causing disease. *Id.* Dr. Brody's testimony was similarly allowed in the *Howe* trial 2015-CP-46-03456 in March 2018, the *Crawford* trial 2017-CP-42-04429 in July 2018, the *Glenn* 440 S.C. 34, 890 S.E.2d 560 (Ct. App 2023), trial in January 2019, and the *Plant* trial 2022-CP-40-01265 in 2023.

In *Jolly*, the Court found that the plaintiffs' experts had utilized a reliable methodology in that they "relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the manner described by [the plaintiff and his co-worker], and the facts surrounding [the plaintiff's] exposure to visible dust from Defendants' valves." *Id.* at 31. The Court ruled that because the experts' causation opinions were supported by the scientific literature as well as relevant exposure facts, their testimony was admissible, relevant, and helpful to the jury. *Id.* at 32.

The Court of Appeals affirmed this Court's *Jolly* Order. Considering the same arguments raised by Defendants in this matter, it ruled, "[t]o the extent Appellants challenge the admissibility of Respondents' experts' testimony on the ground that it was unreliable, *they have failed to show any significant part of the testimony that could be reasonably characterized as espousing the 'each and every exposure' theory*." *Jolly v. General Electric*, 435 S.C. 607, 639; 869 S.E.2d 819, 836 (Ct. App. 2021) (emphasis added).[4]

The Court of Appeals agreed with Mrs. Jolly that her "experts relied on the cumulative dose theory and that their reliance on basic science in reaching their opinions is not the equivalent of testifying that 'each and every exposure' was a substantial factor in causing Dale's mesothelioma." *Id.* at 634, 869 S.E.2d at 833-34.

The Court of Appeals also noted its disagreement with Defendants' contention that "the cumulative dose theory conflicts with the *Henderson/Lohrmann* substantial factor standard." *Id.* at 635, 869 S.E.2d at 834. "Stating that a certain exposure *contributes* to an individual's cumulative dose does not espouse the view that 'each and every breath' of asbestos is 'substantially' causative of mesothelioma or imply that one exposure meets the legal requirement for causation." *Id.* at 635-36, 869 S.E.2d at 834. "We view the testimony concerning cumulative dose as background information essential for the jury's understanding of medical causation, which must be based on science. We do not interpret this presentation as an attempt to supplant the *Henderson/Lohrmann* test." *Id.* at 636, 869 S.E.2d at 834-35.

The Court of Appeals ultimately concluded, "the cumulative dose theory on which Respondents' experts relied *easily meets* the standard for reliability set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)." *Id.* at 639, 869 S.E.2d at 836 (emphasis added).

[4] The Supreme Court granted review on other grounds and affirmed. *Jolly v. General Electric,* ___S.C.___, 905 S.E.2d 380 (2024).

"Respondents' experts were guided by the facts specific to Dale's exposure to Appellants' products in forming their opinions concerning causation." *Id.* at 637, 869 S.E.2d at 835. Finally, the Court recognized Plaintiff's experts relied on "numerous peer-reviewed, published epidemiological studies, case series, and case reports," as well as other scientific criteria impacting causation of disease, and follows the weight-of-the-evidence methodology used by national and international public health organizations for evaluating the health effects of asbestos." *Id.* at 640-41, 869 S.E.2d at 837.

South Carolina's Court of Appeals again rejected Defendants' attempts to conflate "cumulative dose" testimony with the "each and every exposure" theory in *Edwards v. Scapa Waycross, Inc*.:

> [Defendant] Scapa argues the trial court erred in failing to grant its motion for JNOV because Stewart employed the "each and every exposure" theory of causation at trial. Scapa states that Dr. Frank explained the cumulative dose or "cumulative exposure" theory to the jury and utilized that theory in reaching his opinion as to whether Scapa's dryer felts were a substantial factor in causing Stewart's mesothelioma. Scapa conflates these two theories and claims they are inconsistent with the specific causation standard set forth in Henderson. We disagree.
>
> "The 'each and every exposure' theory espouses the view that 'each and every breath' of asbestos is substantially causative of mesothelioma.'" *Jolly*, 435 S.C. at 633, 869 S.E.2d at 833 (quoting *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 (2016)); see also *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) ("Also referred to as 'any exposure' theory, or 'single fiber' theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury."). This court has recently refused to conflate the cumulative dose theory with the each and every exposure theory, concluding that an expert's opinion which states "that a certain exposure contributes to an individual's cumulative dose does not espouse the view that 'each and every breath' of asbestos is 'substantially' causative of mesothelioma or imply that one exposure meets the legal requirement for causation." *Jolly*, 435 S.C. at 635–36, 869 S.E.2d at 834. Rather, this court viewed testimony regarding a plaintiff's cumulative dose as "background information essential for the jury's understanding of medical causation, which must be based on science." *Id.* at 636, 869 S.E.2d at 834–35.

437 S.C. 396, 416-17, 878 S.E.2d 696, 707 (Ct. App. Aug. 3, 2022), *aff'd,* 442 S.C. 387, 899 S.E.2d 5976 (2024); see also, *Glenn v. 3M Company*, 440 S.C. 34, 64-68, 890 S.E.2d 569, 585-587 (Ct. App. 2023).

Consistent with years of South Carolina law, Plaintiffs' experts' opinions regarding the cumulative nature of asbestos diseases and the lack of any safe threshold of exposure are not "unreliable," but are generally accepted medical facts that have long been established by a significant body of peer-reviewed medical and scientific literature. In addition, Dr. Haber and Dr. Brody relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including animal studies, epidemiology, and other scientific literature, the dose-response relationship, and the science regarding the low levels of exposure that can cause mesothelioma. As in *Jolly*, *Edwards*, and *Glenn*, the opinions of Plaintiffs' experts are reliable and admissible expert opinion testimony.

J&J's request that this Court find Plaintiffs' experts' unreliable and inadmissible is DENIED.

d. Dr. Haber's specific causation opinion was based on the exposure evidence in this case.

Dr. Haber's specific causation opinion is firmly grounded in the exposure evidence presented at trial. Dr. Haber was offered and qualified as an expert in internal medicine and pulmonology. J&J objected to anything outside of internal medicine and pulmonology. This objection was partially overruled because Dr. Haber had read and relied on those materials in forming his specific causation opinion about what caused Mr. Perry's mesothelioma.

Dr. Haber testified that Mr. Perry was suffering from mesothelioma caused by asbestos. Dr. Haber testified to the jury that the JBP that Mr. Perry used for five decades played a role in the development of his mesothelioma. In reaching his conclusions, Dr. Haber reviewed Mr. Perry's

medical records, including X-rays and scans of his chest, conducted a personal interview with Mr. Perry, reviewed reports of other experts designated in this matter, reviewed the deposition testimony in this case, and "other materials." Dr. Haber also reviewed and evaluated Mr. Perry's clinical course of care and treatment post-diagnosis.

Dr. Haber explained that mesothelioma is a "signal tumor" for asbestos exposure. The average life expectancy for epithelioid mesothelioma is 18 months. Dr. Haber told the jury that Mr. Perry's cancer was extensive and invasive and that it had spread into the soft tissues of the chest wall, including into his lymph node and lung. Dr. Haber also testified that Mr. Perry's pleura had doubled in size as of April, which likely meant a recurrence of his mesothelioma. Dr. Haber then discussed asbestos and how the different asbestos types were used commercially and noncommercially. He testified that all fiber types cause mesothelioma.

Dr. Haber also testified to the jury that he reviewed J&J's internal records finding tremolite asbestos in its talc and he reviewed published medical and scientific literature on the definition of asbestos. He also noted that J&J's own internal documents confirm that exposure to fibrous tremolite is a cause of mesothelioma because it is asbestos. He explained that for asbestos to attack the body the asbestos fibers had to be in respirable form and, if there is asbestos in talc powder the asbestos is by its nature already in a respirable form.

Dr. Haber explained what he refers to as the "onion properties" when explaining whether asbestos harms a person as soon as it's breathed in. He also testified that there is no safe level of exposure to asbestos even at the 0.1 fibers-per-cc- level established by OSHA. Dr. Haber also explained that multiple studies and multiple health organizations have concluded that there is no threshold level below which there is no risk of developing an asbestos-related disease.

Dr. Haber also reviewed and testified about case reports which look at people who had mesothelioma. He told the jury that there are case reports based on certain occupations that work with talc which indicate concerns about the development of mesothelioma and case reports of individuals exposed to cosmetic talc who develop mesothelioma. During autopsies of people who died of mesothelioma, Dr. Haber testified that talc, anthophyllite, and tremolite have been repeatedly found. Dr. Haber later noted that background asbestos is mostly composed of small amounts of chrysotile and that anthophyllite and tremolite are not found in background levels.

Dr. Haber also considered whether Mr. Perry had exposures to asbestos from sources other than talc. He concluded that Mr. Perry had some exposure to chrysotile asbestos from brake work and that this contributed to cause his disease.

In Dr. Haber's opinion, JBP was Mr. Perry's first and primary exposure to asbestos. As to frequency and quantity, Dr. Haber testified that Mr. Perry was "an above-average user" of JBP, using it "two to four times a day", "putting it on his whole body" and occasionally "actually putting it on his . . . face." Dr. Haber concluded that Mr. Perry's exposure to asbestos from JBP was a substantial contributing factor to the development of his mesothelioma.

Dr. Haber's causation opinion was expressed the jury to a reasonable degree of scientific and medical certainty. His causation opinions are based on the record of Mr. Perry's repeated exposures to asbestos from JBP, as well as the scientific literature and other evidence presented to the jury. Dr. Haber's methodology therefore is identical to the methodology affirmed in *Jolly*, *Edwards*, and *Glenn*.

J&J's request for a new trial on this issue is DENIED.

4. The Court did not commit error by admitting Plaintiffs' tissue digestion.

On July 10, 2024, this Court ordered the division of Mr. Perry's lung tissue for digestion. At the pre-trial hearing on July 30, 2024, J&J moved to exclude the tissue digestion. J&J argued that its expert, Dr. Victor Roggli, could not perform the digestion prior to trial. J&J then claimed to have found a second expert, Dr. Stanley Geyer, who could perform the digestion prior to trial.

After this Court signed the order permitting the tissue split to occur, it took several days for Medical University of South Carolina ("MUSC") to divide the tissue as instructed by the Court's order. On the day before the pre-trial hearing, the tissue was divided and MUSC sent the tissue to the experts designated by the parties in this Court's order. Each tissue division arrived at each of the parties' respective experts on the same day at the same time – the morning of the pre-trial hearing in this case. J&J argued that the tissue digestion should not be allowed because the parties were out of time to perform the testing. This Court overruled J&J's objection, and ordered that the tissue digestion could proceed.

On the first morning of trial, J&J informed the Court that its expert could not perform the tissue digestion. Plaintiffs' informed the court that its expert who was performing the tissue digestion, Dr. Longo, was in the process of concluding the tissue digestion and offered to make Dr. Longo available for a deposition on his findings before he testified so that there was no surprise.

Dr. Longo's report on his tissue digestion findings was produced to J&J on August 5, 2024. Plaintiffs tendered Dr. Longo for deposition on August 6, 2024, at 4:00 pm by phone as he was traveling to testify in trial that evening. Dr. Longo's deposition was conducted via zoom at 10:00 pm on August 6, 2024, at J&J's request.

Dr. Longo testified to the jury that he tested Mr. Perry's lung tissue. He told the jury that he and his lab had analyzed over 400,000 different individual asbestos samples, including testing human lung tissue referred to as a "lung burden" to see what, if anything, is in the lung. Dr. Longo testified that the tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc in Mr. Perry's lungs. The evidence supported Dr. Longo's testimony that the presence of tremolite asbestos in Mr. Perry's lungs was consistent with what had repeatedly found in Dr. Longo's historical testing of JBP. J&J cross-examined Dr. Longo regarding his findings of the presence of asbestos in Mr. Perry's lungs.

The Court prohibited J&J from asking questions regarding when Dr. Longo received the lung tissue for testing. J&J had two experts at its disposal that could have performed the tissue digestion yet did not make the time. J&J had every opportunity to cross-examine Dr. Longo on his methodology of performing the tissue digestion. They chose not to and this Court does not find compelling reasons to allow J&J to challenge Dr. Longo's findings in a post-trial motion.

The Court prohibited J&J, through its corporate representative Dr. Edwin Kuffner, from discussing the results of the tissue digestion. Dr. Kuffner was not designated as an expert witness in this case. J&J contends that the Court improperly prohibited Dr. Kuffner from testifying about Dr. Longo's winchite finding in Mr. Perry's lungs to the jury, and that this prohibition was error. The Court disagrees.

Dr. Kuffner was designated as the corporate representative and was a fact witness. J&J did not list him as an expert nor did it seek to qualify him as an expert. As he was not designated or qualified as an expert, this Court ruled that Dr. Kuffner could not testify about topics of which he had no special knowledge, skill, or training to discuss with the jury. The Court did allow Dr. Kuffner to testify about what he had seen in J&J documents regarding winchite asbestos in JBP,

but the Court ruled that J&J could not use Dr. Kuffner to testify about geological concepts to the jury, as J&J sought to have Dr. Kuffner testify to the jury what Dr. Longo's finding of winchite meant.

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Gooding v. St. Francis Xavier Hospital*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). As a fact witness, Dr. Kuffner's testimony was properly limited by South Carolina Rule of Evidence 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Dr. Kuffner's was not an expert in microscopy or geology and was not tendered as an expert. Dr. Kuffner had already been permitted to explain to the jury that the minerals found in Mr. Perry's lungs did not come from JBP based upon his review of J&J documents. If J&J intended to have Dr. Kuffner testify as to the geology, mineralogy, and findings of winchite asbestos, he should have been offered and qualified as an expert witness with the training, skill, and education to do so. Alternatively, J&J could have called its geologist expert, Dr. Sanchez, to testify at trial. J&J chose not to do either.

J&J further argues that Plaintiffs' counsel statement in closing argument regarding J&J's failure to call an expert witness to rebut Dr. Longo's in Mr. Perry's lungs was an improper invocation of the missing witness rule. The jury was instructed that a comment on the failure to call an expert is permitted, but that Plaintiffs' assertion that J&J could not find an expert was

stricken. This instruction cured any potential prejudice to J&J. As such, the Court finds that J&J has failed to demonstrate any prejudice from admitting Plaintiffs' tissue digestion.

J&J's request for a new trial on this issue is DENIED.

5. **Dr. Haber did not testify outside of his qualifications.**

Dr. Haber was qualified as an expert by reason of his training, education, and experience, as an expert in the areas of internal medicine and pulmonology. He was also permitted to testify about the information that he relied on in forming his conclusions. Dr. Haber repeatedly testified that he had evaluated and reviewed thousands of J&J's internal documents on various topics. "Expert testimony may be based partially on information received from other sources if such facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Lucas v. Sara Lee Corp.*, 307 S.C. 495, 501, 415 S.E.2d 837, 841 (Ct. App. 1992).

J&J's request for a new trial on this issue is DENIED.

6. **The Court's exclusion of the 1986 Citizens Petition and J&J 2019 Health Hazard Evaluation was proper.**

J&J contends that this Court improperly excluded the 1986 Citizens Petition and the 2019 Health Hazard Evaluation ("HHE") and that these exclusions were error warranting a new trial. The Court disagrees.

J&J sought to present to the jury that the FDA's position was that there is "no risk" from asbestos in talc by admitting the 1986 document into evidence. The Court found the 1986 Citizens Petition contains inaccurate and unreliable expert opinion information which made its probative value substantially outweighed by the risk of confusion to the jury, and therefore unfair prejudicial under South Carolina Rule of Evidence 403.

The Court finds that the statements in the 1986 document are based on false information that J&J provided to the FDA. For example, in one of the documents Donald Kennedy, the then–Commissioner of the FDA, attempts to justify the 0.1% level by relying in part on J&J's "extensive testing for asbestiform particles in cosmetic-grade talc; all results to date have been negative." But all results of J&J's talc had not been negative. The evidence showed that by 1979, J&J was aware that asbestos minerals had been found in its talc over 400 times.

J&J offered this document as the FDA's official position and use it support its argument that any and all use of cosmetic talcum powder – no matter how long, how heavy, or how consistent – is without risk and cannot increase a person's risk of mesothelioma at all. The document was not admitted because it contained false and unreliable expert opinion information which the risk of confusion to the jury substantially outweighed by any probative value. J&J had other avenues to present their position regarding the FDA's position on asbestos in their talc, including through Dr. Barlow, J&J's toxicologist.

Despite this Court striking the 1986 document, J&J still was able to present evidence to the jury regarding its theory as to the FDA's position on the safety of talc. Dr. Kuffner testified that it was untrue that J&J hid information from the FDA. He also testified that J&J's testing method was created with consultation from the FDA, so J&J's testing method was the industry standard. Additionally, Dr. Kuffner testified that the FDA conducted studies of JBP in the 1970s and found no asbestos. Dr. Kuffner also testified that as of 1994, the FDA had concluded that "talc has proved to be among the safest of consumer products."

This Court finds no prejudice from the exclusion of the 1986 Citizens Petition.

With regard to the 2019 HHE, the Court's ruling was limited to Dr. Kuffner, a lay witness. Laypersons can provide opinion or inferences only if they (a) are rationally based on the

perception of the witness; (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) do not require special knowledge, skill, experience or training. Rule 701, SCRE. Any opinions or conclusions about the HHE would require special knowledge, skill, experience, or training.

Dr. Kuffner testified that he was involved in preparing and writing the HHE, but as a lay witness he could not give toxicology testimony based upon this document as J&J sought to do. J&J could not use Dr. Kuffner to provide toxicology expert testimony to the jury. J&J could have called a properly qualified expert, including its toxicologist Dr. Barlow, but chose not to do so.

J&J has not shown that exclusion of the 1986 Citizens Petition and the 2019 HHE were so prejudicial that a new trial is warranted. J&J's request for a new trial on this issue is DENIED.

7. Plaintiffs' counsel's closing argument was not prejudicial such that J&J is entitled to a new trial.

"It has long been settled that closing arguments and objections thereto are left largely to the sound discretion of the trial judge 'who is on the scene and in much better position than an appellate court to judge as to what is improper argument under the circumstances.'" *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 599, 344 S.E.2d 157, 164 (Ct. App. 1986) (quoting *Lesley v. Am. Sec. Ins. Co.*, 261 S.C. 178, 185, 199 S.E.2d 82, 86 (1973)). "[C]onsiderable latitude is allowed counsel in drawing inferences and deductions from the evidence and in arguing the same to the jury." *Lesley*, 261 S.C. at 185, 199 S.E.2d at 85. "When [an] objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks." *McElveen v. Ferre*, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989).

J&J contends that several statements from Plaintiffs' counsel during his closing argument were prejudicial. To the extent that J&J did not object during Plaintiffs' closing argument when

certain terms were used, J&J has waived its argument as to these statements. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (rejecting argument regarding improper closing argument: "Since there was no contemporaneous objection, this issue is not preserved for appellate review."); *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2dd 498, 500 (1994) ("[T]he record indicates no objection to counsel's argument to the jury regarding consent and this issue is not preserved for review"); *State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 131 (Ct. App. 2005) ("Failure to object to comments made during [closing] argument precludes appellate review of the issue.").

"[G]reat latitude is accorded counsel in presenting closing arguments to a jury." *United States v. Johnson*, 587 F.3d 625, 632 (4th Cir. 2009) (citation omitted); *see also id.* at 633 ("[T]o parse through a prosecutor's closing statement for minor infelicities loses sight of the function of our adversary system, which is to engage opposing views in a vigorous manner."). "Thus, while courts should not hesitate to condemn those prosecutorial comments that truly offend constitutional norms, neither shall we attach constitutional significance to every verbal fillip, lest we unduly censor the clash of viewpoints that is essential to adversarial proceedings." *United States v. Runyon*, 707 F.3d 475, 507 (4th Cir. 2013).

J&J has failed to demonstrate that Plaintiffs' closing argument was designed to inflame the jury or encourage the jury to rule in Plaintiffs' favor on an improper basis. This Court gave proper curative instructions when it found they were warranted.

J&J's request for a new trial on this issue is DENIED.

8. There was no error in the verdict form submitted to the jury.

J&J contends that it is entitled to a new trial because, while Plaintiffs' claims against J&J included design defect and manufacturing defect theories, the verdict form did not include separate questions on those issues. The Court disagrees.

J&J did not object to the questions on the verdict form, after being given an opportunity to object, prior to its submission to the jury. Because its post-trial motion is the first time that J&J objected to questions on the final verdict form, its objection is waived. *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 757 (1997) (finding appellant waived claim of lack of notice of cause of action by failing to object to having his name included on the verdict form); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding by failing to object to a verdict form until after a liability verdict had been reached, appellant failed to preserve any issue relating to the verdict form).

The Court finds that neither the verdict form nor the instructions to the jury created confusion about the jury's role in this case. The jury was instructed regarding Plaintiffs' claims that J&J sold a product that was defective in multiple ways: the product had a manufacturing defect, had a design defect, and/or a warning defect. The instructions specifically stated:

> Plaintiffs' claims in this case are based on several theories: negligence, strict liability, and fraudulent misrepresentation.

The instructions went on to explain the different ways J&J could be found strictly liable in South Carolina.

A trial judge has discretion to determine how a case is submitted to the jury and error, if any, in the refusal of using J&J's proposed verdict form would only constitute grounds for a new trial if prejudice resulted from that failure. *See Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 386, 778 S.E.2d 902, 914 (2015); *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 280 (Ct.

App. 1997) (quoting 5A C.J.S. *Appeal & Error* § 1762(b), at 1136 (1958)). The Court finds that J&J has not demonstrated any prejudice that it suffered as a result of this Court not separating the question on the verdict form regarding strict liability into multiple questions.

J&J's request for a new trial on this issue is DENIED.

VIII. RULING ON NEW TRIAL BASED ON CUMULATIVE ERROR

Where there has been no error, there cannot be cumulative error. "The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has 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). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Id.* The Court finds J&J has not shown that it did not receive a fair trial or that cumulative errors affected the outcome.

J&J's request for a new trial on this issue is DENIED.

IX. RULING ON NEW TRIAL PURSUANT TO THE THIRTEENTH JUROR DOCTRINE

In South Carolina, the thirteenth juror doctrine is a long-standing means by which a trial court may grant a new trial absolute. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (S.C. 1990). "'Under the "thirteenth juror doctrine," a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts.'" *Haselden v. Davis*. 341 S.C. 486, 534 S.E.2d 295 (S.C. Ct. App. 2000) (quoting *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (S.C. Ct. App. 1996)). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict "is contrary to the fair preponderance of the evidence." *Dent v. Redd*, 270 S.C. 585, 243

S.E.2d 460 (S.C. 1978); see also *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722 ("Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed.")."[T]he trial Judge is the thirteenth juror, possessing the veto power to the nth degree...." *Worrell v. S.C. Power Co.*, 186 S.C. 306, 195 SE. 638 (S.C. 1938).

"Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view the evidence in the light most favorable to the opposing party." *McEntire v. Mooregard Exterminating Servs., Inc.,* 353 S.C. 629, 578 SE.2d 746 (S.C. Ct. App. 2003); see also *Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 452 SE.2d 640 (S.C. Ct. App. 1994) (stating the trial court may take its own view of the evidence). Furthermore, the decision of whether to grant a new trial upon the facts is one addressed to the sound discretion of the trial judge. *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (S.C. 1976).

"South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts." *Norton v. Norfolk S. Ry. Co*., 350 S.C. 473, 567 S.E.2d 851 (S.C. 2002) (quoting *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267). By sitting "[a]s the 'thirteenth juror,' the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Id*. at 478, 567 S.E.2d at 854. As stated by the South Carolina Supreme Court in *Folkens,*

> The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

300 S.C. at 254, 387 S.E.2d at 267.

The jury returned a verdict finding that J&J was negligent, and that J&J was strictly liable for Mr. Perry's mesothelioma. The Court finds that the evidence at trial supported the jury's verdict. The Court declines to use the thirteenth juror to interfere with the decision made by the jury.

J&J's request for a new trial on this issue is DENIED.

X. RULING ON MOTION FOR SETOFF

J&J contends that it is entitled to a full set-off for Plaintiffs' entire settlement amount and Plaintiffs do not object. J&J 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. RULING ON STAY OF EXECUTION OF JUDGMENT AND BOND

J&J requests a stay of judgment pursuant to Rule 62, SCRCP. The Court agrees that J&J 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 J&J's request for a stay order without the requirement of an appeal bond. In the event of an appeal, the Court orders that J&J post a supersedeas bond in the full amount of the judgment, pursuant to SCRCP 62(d).

XII. RULING ON A NEW TRIAL BASED ON VERDICT SIZE

A. Actual Damages

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). Likewise, the circuit court must avoid conflating the constitutionality of a damages award with an award motivated by passion or prejudice. *See e.g., Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 592-96, 686 S.E.2d 176, 187-190 (2009) (finding a $15 million punitive damages award to be "grossly excessive" such that it rose to the level of a due process violation but finding "no credible evidence anywhere in the record" to support the defendant's contention that the compensatory or punitive damages award resulted from passion, caprice, or prejudice).

Further, the amount of unliquidated damages that "a jury might properly award ... is largely a matter of judgment based upon the facts and circumstances of each case." *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). "In determining the question, the facts must be viewed in the light most favorable to the plaintiff[,] and[ ] whe[n] the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not excessive." *Id.* Moreover, "the jury's determination of damages is entitled to substantial

deference[,]" and the circuit court's decision on whether to grant a new trial based on the amount of the verdict "will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000).

Here, as to the award of compensatory damages, the jury was informed that Plaintiffs and J&J stipulated to $3,329,973.05 in economic loss, which including Mr. Perry's economic loss and costs of his medical treatment. After this stipulation, Plaintiffs requested $2 million for every year of his life that Mr. Perry will lose pursuant to the South Carolina life expectancy tables, which this Court finds to be slightly less than 27 years and reasonable. The jury returned a verdict lower than Plaintiffs' request.

The jury heard testimony about Mr. Perry's pain and suffering extensively. The jury heard from Mr. Perry's treating thoracic surgeon, Dr. Gibney, who testified that published scientific data indicates that it is an average of 50% of mesothelioma patients that will survive between 12 to 18 months, and then confirmed that this survival period applies to Mr. Perry. Dr. Gibney testified that people with mesothelioma suffer from extreme chest pain, restrictive air disease that leads to heart problems and extreme shortness of breath that makes the patient feel as though they are drowning. Dr. Gibney testified that mesothelioma almost always recurs and is aggressive. The jury then heard about the 6-8 surgeries Dr. Gibney performed on Mr. Perry in great detail, testifying that: (1) he had to cut Michael open from behind his shoulder blade all the way around to the front of his body to access the chest wall; (2) cut his large back muscle in half to access his chest where the cancer was; and (3) removed one of his ribs. Indeed, Dr. Gibney testified that he had to use his hands to "peel the pleura off the chest wall and then off the lungs. I liken it most to removing the peel off of an orange." Dr. Gibney further testified that he had to remove Mr. Perry's entire diaphragm and

rebuild it with mesh. Dr. Gibney told the jury about Mr. Perry's post-surgical recovery, describing it as significantly painful due to the removal of the pleura where the mesothelioma is. He also testified that Mr. Perry would die from his mesothelioma and that he would experience shortness of breath and chest pain until he died.

Evidence was also presented to the jury showing Mr. Perry's loss of life expectancy by over two decades, the anxiety and mental anguish he will suffer before he dies, and the fact that his mesothelioma will cause his death. Evidence demonstrated that J&J knew that asbestos caused cancer and despite knowing that the talc it used in JBP had repeatedly tested positive for asbestos, J&J continued to use that talc in JBP. Mr. Perry used JBP for 50 years and his use of that powder has significantly shortened his life. Thus, the Court finds that the jury's award was not the result of passion or prejudice.

The jury also heard testimony from Lonnie Long relevant to his loss of consortium claim. Mr. Long testified that he and Mr. Perry met over 20 years ago and talked about the life they had together prior to Mr. Perry's mesothelioma diagnosis. Mr. Long told the jury about sharing the holidays with Mr. Perry, and how Mr. Perry would decorate and do things with the neighborhood kids for the holidays. He talked about their honeymoon in Hawaii and how much they enjoyed traveling together. Lonnie described Mr. Perry as his "savior" because when they met Mr. Long was suffering with low self-esteem and depression and Mr. Perry showed him the strength to keep going. The jury heard that their conversations since Mr. Perry got mesothelioma have turned to "how we're going to fight this and how we're going to get through it." Mr. Perry then testified that Mr. Long takes him to all of his doctors' appointments and that he has never missed a single appointment. He noted that his husband did not stay in the courtroom for his testimony because he was "very protective."

The jury then considered the relationship that Mr. Perry and Mr. Long had experienced for over 20 years, what they lost as a result of Mr. Perry's mesothelioma, and what they would lose when Mr. Perry inevitably died. The jury's loss of consortium award reflects the jury's deliberation on that life, the loss of that life, and the loss that Mr. Long has suffered, and will suffer, as a result of Mr. Perry's inevitable death. The jury's award of loss of consortium damages was not the result of passion or prejudice.

B. The jury's award of punitive damages satisfies Constitutional standards.

J&J contends that the size of the jury's punitive damages award is grossly excessive and violated J&J's constitutional right to procedural and substantive due process. The Court disagrees.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future" as well as "to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000). "At least three important purposes are served by a punitive damages award: (1) punishment of the defendant's reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of the plaintiff's private rights." *Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). "The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others." *Id.*

To receive a punitive damages award, "the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). "A tort is characterized as reckless, willful[,] or wanton if it was committed in such a manner or

under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "A conscious failure to exercise due care constitutes willfulness." *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995).

"In South Carolina, 'punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.'" *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)). The amount of the punitive damages award is largely within the discretion of the jury, and, like the compensatory award, is entitled to substantial deference. *McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 309-10, 457 S.E.2d 603, 608 (1995).

Punitive damages awards should be reviewed for compliance with the Due Process Clause. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006). In *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth three guideposts to be applied in conducting a post-judgment review of a punitive damages award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 150-151 (2010). These guideposts incorporate the relevant factors set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996). *See Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

Reprehensibility is the most important consideration. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. A number of factors are relevant to reprehensibility, including whether: "(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." *Id.*

The evidence supports the jury's finding that J&J's conduct was reprehensible. Evidence showed to the jury showed that Mr. Perry is expected to die a very premature and painful death despite having a life expectancy—in the absence of mesothelioma—of about 26 years. Thus, the harm caused to Mr. Perry was physical as opposed to solely economic.

J&J has been selling baby powder since 1894. The serious health risks of inhaling asbestos dust from talc were well-published in the scientific literature, and actually known by J&J decades before Mr. Perry was ever born, let alone exposed to asbestos from JBP. The jury saw advertisement by J&J in which it advocated that JBP was safe and pure, and used both language and images to capitalize on the mother-baby bond in order to make J&J money off the reputation of JBP. Mr. Perry was first exposed to JBP through his mother's use and then continued using JBP repeatedly and on a daily basis for almost 50 years. Throughout the time that he used JBP, J&J never warned Mr. Perry, nor any other customer, of the potential asbestos exposure from the foreseeable use of JBP. The jury also saw documents and heard testimony that J&J misled the FDA as to the asbestos content of JBP, including telling the FDA that a substantial amount of asbestos can be allowed safely in a baby powder.

The jury found J&J negligent, and that it engaged in conduct that was willful, wanton, and reckless related to its negligence finding. This Court finds that the jury's assessment is appropriate

considering the devastating physical and emotional losses that Mr. Perry and Mr. Long have suffered and will continue to suffer due to J&J's willful, wanton, and reckless conduct.

As to ratio, due process requires consideration of the ratio between the compensatory damages award and the punitive damages award. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. A single-digit ratio is generally thought to comport with due process. *Id.* The South Carolina Supreme Court has upheld verdicts with a 6.82 to 1 ratio, 3.75 to 1 ratio, 2.54 to 1 ratio, 9.96 to 1 ratio, and a 28 to 1 ratio. *Id.* at 593, 686 S.E.2d at 188 (collecting cases). In *Mitchell*, the Court remitted a punitive damages award from $15 million to $10 million so that it would be a 9.2 to 1 ratio. *Id.* at 594, 686 S.E.2d at 188.

The Court finds the ratio between the jury's compensatory and punitive award is well within the acceptable ratio as defined by South Carolina law. The Court also finds that the jury's award of punitive damages is well within the legislative cap of three times the compensatory award pursuant to S.C. Code Ann. §15-32-530.

The final *Gamble* factor is an evaluation of like awards in similar cases. The Court may properly consider the similarity between the punitive damages awarded by the jury in the case under review as compared to punitive damages awards in other cases. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186. Relevant points of comparison are "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." *Id.* at 588-89, 686 S.E.2d at 186.

Mr. Perry's award is comparable to awards in other talc cases with young plaintiffs.

In the Theresa Garcia case tried earlier this year in Chicago, the jury awarded $45 million in compensatory damages to her estate ($33 million for noneconomic damages) and to her children

($12 million). Ms. Garcia had a very similar profile to Mr. Perry – she was only 52 years old and her primary exposure was to JBP.

In another reported decision from 2021, a California jury awarded $29,490,000 in compensatory damages to Teresa Leavitt and her husband in their case against J&J, again pre-bankruptcy. *Leavitt v. Johnson & Johnson*, No. A157572, 2021 WL 3418410, at *2 (Cal. Ct. App. Aug. 5, 2021). Mrs. Leavitt was exposed to Johnson's Baby Powder as an infant and adult and was diagnosed with mesothelioma at only 51 years old. *Id.*

There are not a large number of verdicts against J&J because its multiple bankruptcies stayed litigation for almost two years. Talc verdicts against other companies have been substantially similar to the verdict reached in this case. In 2021, Nedelka Vanklive was awarded $75 million in noneconomic damages in a talc case in Alameda County California. The case was started against both J&J and Whitaker, Clark & Daniels but J&J declared bankruptcy in the middle of trial. The verdict is against Whitaker, Clark & Daniels but the jury assigned 60% liability to J&J. Ms. Vanklive was exposed to JBP as an infant and child and developed mesothelioma at 48 years old.

In a talc trial in California in 2022, the jury awarded $32 million in noneconomic damages to Rita-Ann Chapman, and $8 million to her husband, and a total of $11.3 million in punitive damages in a case involving exposure to body powders made by Avon and J&J. Mrs. Chapman used both J&J and Avon body powders as a child and adult and was 75 years old at the time of her mesothelioma diagnosis.

In the *Plant* case tried before this Court in 2023, the jury awarded $20 million in noneconomic damages to Sarah Plant, $3.5 million in future medical expenses, and $5 million to

her husband, in a trial against talc supplier Whitaker, Clark & Daniels. Mrs. Plant was only in her thirties when she developed mesothelioma from her use of asbestos-containing talc powders.

These recent talc verdicts against J&J and others establish that the award to Mr. Perry is consistent with verdicts in other talc cases across the country.

Finally, J&J contends that the jury's punitive damages award in this case is either unsupported or unconstitutional because it no longer sells the talc-based version of JBP. The Court disagrees as this argument fails to account for one of the purposes of punitive damages pursuant to South Carolina law —to deter the wrongdoer **and others** from engaging in similar reckless, wanton, willful, or malicious conduct in the future. *See Portrait Homes—South Carolina, LLC v. Pennsylvania National Mutual Insurance Company*, 442 S.C. 215, 900 S.E.2d 245 (Ct. App. 2023).

The evidence was that J&J sold talc-based JBP for over 100 years, with no warning of potential asbestos exposure, despite actual knowledge that both its talc ore and its finished JBP product had asbestos in it. Additionally, according to J&J, the decision to stop selling JBP was not based on safety reasons. The Court finds that the jury's punitive damages award was proper and does not violate any Constitutional bounds.

J&J's request to eliminate the jury's verdict as to punitive damages is DENIED. However, the Court will reduce the amount of the punitive damages award from $30,000,000 to $25,000,000.

XIII. J&J IS NOT ENTITLED TO A NEW TRIAL BASED ON *STATE V. WRIGHT*.

J&J contends that this Court prevented it from being able to present a defense at trial and thus is entitled to a new trial pursuant to *State v. Wright*, 271 S.C. 534, 248 S.E.2d 490 (1978). The Court disagrees.

J&J was not prevented from presenting a defense, nor did the Court make comments that affected the outcome of the case or the effectiveness of counsel's presentation. Unlike counsel in *Wright*, J&J chose to not put on its case and instead try this case solely through Plaintiffs' case-in-chief. J&J's defense was that JBP does not have enough asbestos in it to have been a substantial contributing factor in the development of Mr. Perry's mesothelioma. J&J's additional defense was that JBP does not have asbestos in it. This Court did not strike any of J&J's experts and they were all free to testify at trial. The only limitation was that Dr. Weill and Dr. Diette could not testify that Mr. Perry's mesothelioma was spontaneous. J&J chose not to call any of its experts.

J&J further argues that it could not try its case because of the potential for a spoliation order and the Court's exchanges with Dr. Kuffner. The Court disagrees on both counts.

A. The *Hood-McBrayer* Spoliation Order

The *Hood-McBrayer* Spoliation Order was entered on November 5, 2021, in another case involving decades of use of JBP. While there was discussion during the pre-trial hearing of this Order, it was never entered. No such order was ever signed in this trial, and no adverse instructions were given in this trial. The Court's potential consideration of entering the *Hood-McBrayer* Order did not change the outcome of Mr. Perry's trial or J&J's defense. J&J has failed to identify any witness that could not be called to testify as a result of the *Hood-McBrayer* Order. Critically, the potential for this order did not stop J&J from discussing negative test results with the jury in Mr. Perry's trial. J&J questioned Dr. Haber about tests, from the FDA and others, which did not detect asbestos in either the talc used in JBP or the finished product. The record also shows that Dr. Hopkins testified to the jury, through videotaped deposition, about. J&J's negative testing results that it now argues the potential for this Order kept it from doing.

The Court made clear multiple times throughout this trial that J&J could call whatever witnesses it chose. J&J contends that it could not call *any* witnesses because it could not discuss negative testing. This is incorrect. The Court afforded J&J the opportunity to call expert witnesses with no notice to Plaintiffs' counsel, which J&J chose not to do. J&J was given every opportunity by this Court to put on its case with expert witnesses.

B. The Court's exchanges with Dr. Kuffner.

Dr. Kuffner was not an expert witness in this case. Because of this, the Court did not allow Dr. Kuffner to give opinions that would have been based on his skill, knowledge, training, and education because that testimony is not the testimony of a fact witness. J&J, during its questioning of Dr. Kuffner, made clear that his role of corporate representative was separate from his role as chief medical officer. He was permitted to testify as to what J&J documents say about the presence of asbestos in its talc and in the finished talc products. He also testified as to what documents were produced in litigation and not destroyed or concealed.

Beyond being able to testify as an expert on issues outside of his role as a fact witness or corporate representative, J&J does not identify any other topic on which the trial court prevented Dr. Kuffner from testifying to justify its request for a new trial.

C. Different standard as to J&J

J&J contends the Court treated J&J so differently from Plaintiffs, and applied a different standard of law, that it affected the verdict in Mr. Perry's case and J&J is entitled to a new trial. The Court disagrees.

First, the Court's comments regarding the years that LTL spent in bankruptcy neither reflect a different standard for J&J nor did the comments infect the trial such that J&J is entitled to a new trial. The record reflects the uncontradicted fact that any such discussion did not happen

in the presence of the jury at any point in time. There is no precedent preventing this Court from disagreeing with the steps taken by a defendant to avoid talc liabilities, and J&J has provided none.

Second, the Court's comments regarding the opinions that J&J intended to have its experts offer, including Dr. Sanchez's definition of asbestos, were not improper or prejudicial. The Court does not agree that the comments prevented J&J from presenting a defense to Plaintiffs' claims at trial and they were not made in the presence of the jury. This Court's discussion of Dr. Sanchez's anticipated testimony was made as part of this Court's gatekeeping function. the Court, in minding the Rule 702 gate, must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable." *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). A trial court does not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). '"A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *Id*. (quoting *Joiner*, 522 U.S. at 146).

J&J knew that this Court did not prohibit any of its experts testifying to the jury because as of Saturday, August 3, 2024, J&J intended to call at least 5 witnesses, including Dr. Sanchez, Dr. Diette, and/or Dr. Weill, during its case-in-chief.

For more than 50 years, it has been well settled that a Court is entitled to ask a witness questions to get to the truth. In *Williams v. South Carolina Farm Bureau Mut. Ins. Co.*, 251 S.C. 464 (1968), our Supreme Court held:

> The trial judge, of course, has the right, in [her] discretion, and in a proper manner, to question witnesses during a trial, in order to elicit the truth. This discretion will not be controlled except where it appears that the manner in which the judge exercised the right tended to unduly impress the jury with the importance of the

> testimony elicited, or would be likely to lead the jury to suppose that the judge was of the opinion that one party rather than the other was correct upon a particular issue of fact.
>
> If a trial judge in the exercise of his discretion feels called upon, in the interest of justice, to question witnesses to elicit the truth, he should be cautious to see that such questions are propounded in a fair and impartial manner, and should not express or indicate to the jury the judge's opinion as to the facts of the case or the weight or sufficiency of the evidence.

The Court questioned Dr. Kuffner during both direct and cross. When the Court believed the jury needed clarity on a position taken by Plaintiffs during the questioning of Dr. Kuffner, the record shows that the Court asked counsel for clarity and then instructed the jury.

None of the discussions that J&J takes issue with occurred in front of the jury. J&J's counsel even stated during its closing argument that J&J did not need to present any witnesses because it had proven its case through Plaintiffs' own witnesses. J&J chose not to call its expert witnesses.

D. Exchanges between attorneys for Plaintiffs and J&J

This Court finds that there is no authority or compelling evidence to grant a new trial based on a single exchange between counsel outside of the presence of the Court and outside of the presence of the jury. On Friday, August 9, 2024, Plaintiffs played the videotaped portion of the testimony of J&J's corporate representative, John Hopkins. This portion of the videotaped deposition had been edited and cut by J&J. During the re-direct, plaintiff's counsel at the deposition questioned Dr. Hopkins about the 1972 Report from Dr. Hutchinson, finding asbestos in J&J's talc repeatedly. Dr. Hutchinson took pictures of the actual asbestos fibers he found in J&J's talc. During the re-direct, plaintiff's counsel on the video not only discussed the results from Dr. Hutchinson's testing, but also displayed the pictures of the asbestos fibers Dr. Hutchinson found on the video. The video that was cut and played by counsel for J&J, however, omitted the

photographs of the asbestos found in J&J's talc by Dr. Hutchinson to the jury. During the break, Plaintiffs' counsel and counsel for J&J spoke about Plaintiffs' concerns regarding the way in which J&J presented evidence to the jury. The entire exchange with J&J's counsel lasted less than a minute.

The Court does not find that this single incident with Plaintiffs' counsel resulted in such intimidation that J&J's counsel could not effectively represent their clients. J&J has provided no such evidence justifying its request for a new trial based on *State v. Wright*. Unlike the circumstances in *State v. Wright*, this Court does not find that a single incident outside the presence of the jury, for which counsel was reprimanded, rises to any level sufficient to justify a new trial.

The Court has treated all parties and their counsel fairly. Throughout this trial, the Court disagreed with all parties on various issues. The Court was evenhanded when it came to ruling on objections. The Court reprimanded counsel on both sides when necessary. J&J has therefore failed to identify any incident which negatively affected its counsel's effectiveness as discussed in *State v. Wright.*

J&J's request for a new trial pursuant to *State v. Wright* is DENIED.

XIV. RULING ON NEW TRIAL *NISI REMITTITUR*

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 J&J, along with AII, was for $23,037,500 in actual damages to Mr. Perry, $9,618,750 to Mr. Long in loss of consortium damages, and $30,000,000 in punitive damages against J&J. This Court also recognizes Plaintiffs' settlement setoff in the amount of $11,255,000 to be fair and reasonable.

As reasons to remit this jury award of actual damages to Mr. Perry and Mr. Long, J&J argued the following:

> For example, the evidence simply does not support the massive loss of consortium award to Mr. Long. Nothing unusual about his loss of services of explained to in detail to justify a $9M loss. Again, there is no attempt here to deny that he has suffered loss. But the jury's award is grossly excessive or, failing that, overly liberal. The award to Mr. Perry is also shockingly excessive and, failing that, overly liberal. Mr. Perry's disease has, fortunately, been treated at least temporarily by his treating doctors and he appeared for most of the two-week trial in court in Richland County. While without question he suffers from a terrible disease, he is ambulatory and self-sufficient, and was physically well-composed and able to testify during the trial, demonstrating his current state of health.

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.

B. *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.

C. *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, Deceased, 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.

D. Mr. Perry

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.

Similar to the *Seay* order, the jury heard evidence that J&J continued to sell JBP knowing that it had asbestos in it and knowing that there was an alternative available in cornstarch the entire time JBP was sold. The jury also heard evidence that J&J deliberately misled the FDA as to the asbestos in its talc and deliberately designed, and advocated for the use of, underpowered testing methods so that the asbestos in its talc either would not be found or could be designated as "non-detect." The jury also heard evidence that J&J hid the fact that it had asbestos in its talc powder from the American public, including Mr. Perry. Finally, the jury heard evidence that J&J persisted in this conduct for decades – long after it first learned in the 1950s that its talc had tremolite asbestos in it.

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.

Finally, the Court finds that the jury's punitive damages award is reasonable given the evidence at trial and that it is within the 3:1 ratio pursuant to S.C. Code Ann. §15-32-530. However, the Court finds that the punitive verdict against the Defendant shall be reduced by $5,000,000, thereby leaving a punitive damage verdict of $25,000,000. Against J&J.

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, after reduction is $25,000,000. Therefore, the total judgment to be entered against the J & J entities is $39,401,250.

J&J's request for nisi remittitur as to Plaintiffs' compensatory awards and the punitive damages award is GRANTED.

[JUDGE'S 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