THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean H. Toal, Circuit Court Judge

---

Appellate Case No. 2024-001550
Civil Action No. 2023-CP-40-04072

RECEIVED
JUL 08 2025
SC Court of Appeals

---

Michael L. Perry and Lonnie Long, Respondents,

v.

American International Industries, Atlas Turner Inc., Avon Products, Inc., Barretts Minerals Inc., Block Drug Company, Inc., Brenntag North America, Inc., Brenntag Specialties, LLC, Bristol-Myers Squibb Company, Buy-Low General Merchandise, Inc., C&S Wholesale Grocers, LLC, Calvin Klein Inc., Chanel Inc., Charles B. Chrystal Company, Inc., Chattem, Inc., Colgate- Palmolive Company, Color Techniques, Inc., Cosmetic Specialties, Inc., Coty Inc., CVS Health Corporation, CVS Pharmacy, Inc., EDC Drug Stores, Inc., Estee Lauder Inc., Estee Lauder International, Inc., The Estee Lauder Companies Inc., Food Lion, LLC, Genuine Parts Company, Glamour Industries Co., Himmel Management Co. LLC, Himmel Media LLC, Honeywell International, Inc., Idelle Labs, Ltd., IMI Fabi (Diana) LLC, IMI Fabi (USA) Inc., IMI Fabi, LLC, Janssen Pharmaceuticals, Inc., Johnson & Johnson, Johnson & Johnson Holdco (NA) Inc., Kenvue Inc.; L'Oreal USA, Inc., L'Oreal USA Products, Inc., LLT Management LLC, Long's Drugstores of South Carolina, Inc., LTL Management LLC, Minerals Technologies Inc., The Neslemur Company, Piggly Wiggly, LLC, Pneumo Abex LLC, Presperse Corporation, The Procter & Gamble Company, PTI Royston, LLC, PTI Union LLC, Ralph Lauren Corporation, Rite Aid of South Carolina, Inc., Shulton, Inc., Specialty Minerals Inc., Sumitomo Corporation of Americas, Union Carbide Corporation, Vi-Jon, LLC; Walgreen Co., Walmart Inc., Defendants,

Of which American Industrial Industries is the Appellant.

## FINAL BRIEF OF RESPONDENTS


Misty A. Farris (Admitted *Pro Hac Vice*)
mfarris@dobslegal.com
DEAN OMAR BRANHAM SHIRLEY, LLP
1801 North Lamar Street, Suite 300
Dallas, Texas 75202
Telephone: 214-722-5990
Facsimile: 214-722-5991
Other email: rgarner@dobslegal.com

Theile B. McVey (SC Bar 16682)
tmcvey@kassellaw.com
John D. Kassel (SC Bar 03286)
jkassel@kassellaw.com
KASSEL MCVEY
ATTORNEYS AT LAW
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina. 29202-476
Telephone: 803-256-4242
Facsimile: 803-256-1952
Other email: emoultrie@kassellaw.com

*Counsel for Respondents*

## TABLE OF CONTENTS


TABLE OF AUTHORITIES ........ iii

STATEMENT OF ISSUES ........ 1

STATEMENT OF THE CASE ........ 1

STANDARD OF REVIEW ........ 4

STATEMENT OF FACTS ........ 6

I. Mr. Perry regularly used Clubman talcum powder over the course of his life. ........ 6

II. A-I-I's Clubman talcum powder contained asbestos. ........ 7

III. Exposure to asbestos in Clubman talcum powder was a substantial factor in causing Mr. Perry's mesothelioma. ........ 8

ARGUMENT ........ 8

I. The trial court did not abuse its discretion in denying A-I-I's motion to set aside default under Rule 55(c) and to set aside default judgment under Rule 60(b), SCRCP. ........ 8

A. The trial court acted within its discretion in denying A-I-I's motion to set aside the entry of default. ........ 8

1. A-I-I was properly served with the original complaint. ........ 8

2. The trial court properly exercised her discretion in denying A-I-I's motion to set aside the entry of default. ........ 11

a. The trial court was within its discretion in finding that A-I-I did not show good cause for its default. ........ 11

b. The trial court was not required to consider the Wham factors because A-I-I provided no satisfactory explanation for its default. ........ 15

B. A-I-I was not relieved of its default when it answered amended complaints that did not change the allegations against it. ........ 16

C. The trial court acted within its discretion in denying A-I-I's request to set aside the default judgment. ........ 23

1. A-I-I waived any complaint of inadequate notice. ........ 24

2. Requiring a new damages hearing when A-I-I participated in the damages trial does not serve the purposes of Rule 55. ........ 24

3. Complaints of inadequate notice do not relieve a defendant of the entry of default ........ 26

4. The trial court properly entered default judgment following the damages trial. ........ 27

II. A-I-I's due process rights were not violated in the imposition of punitive damages. .......... 27

A. The allegations were sufficient to provide A-I-I fair notice of the conduct that subjected it to punitive damages. .......... 27

B. The punitive damages award did not exceed constitutional limits. .......... 30

1. The allegations demonstrate reprehensible conduct. .......... 30

2. The ratio of the compensatory to punitive damages awards raises no constitutional concerns. .......... 33

3. While there is no comparable penalty, larger punitive damages awards have been upheld in similar cases. .......... 34

CONCLUSION .......... 34

## TABLE OF AUTHORITIES

Page(s)

Cases

*BB&T v. Taylor*,
369 S.C. 548, 633 S.E.2d 501 (2006) .......... 9

*Berberich v. Jack*,
392 S.C. 278, 709 S.E.2d 607 (2011) .......... 31

*BMW of N. Am., Inc. v. Gore*,
517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) .......... 28, 33

*Brown v. Carolina Emergency Physicians, P.A.*,
348 S.C. 569, 560 S.E.2d 624 (Ct. App. 2001) .......... 9

*Brown v. Funk*,
697 S.W.3d 739 (Ky. Ct. App. 2024) .......... 20

*Campbell v. City of N. Charleston*,
431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020) .......... 15, 16

*Cartee v. Lesley*,
290 S.C. 333, 337 S.E.2d 388 (1986) .......... 31

*Columbia Pools, Inc. v. Galvin*,
288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986) .......... 12

*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,
532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) .......... 6, 28

*Crowe v. Coleman*,
113 F.3d 1536 (11th Cir. 1997) .......... 29

*DiSorbo v. Hoy*,
343 F.3d 172 (2d Cir. 2003) .......... 28

*Dymon, Inc. v. Hyman*,
305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991) .......... 25, 26

*Fairchild v. S.C. Dep't of Transp.*,
398 S.C. 90, 727 S.E.2d 407 (2012) .......... 31

*Gamble v. Stevenson*,
305 S.C. 104, 406 S.E.2d 350 (1991)....................32, 34

*Green v. Indus. Life & Health Ins. Co.*,
199 S.C. 262, 18 S.E.2d 873 (1942)....................29

*Hagood v. Sommerville*,
362 S.C. 191, 607 S.E.2d 707 (2005)....................5

*Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*,
369 S.C. 540, 633 S.E.2d 497 (2006)....................4, 5

*In re Estate of Weeks*,
329 S.C. 251, 495 S.E.2d 454 (Ct.App.1997)....................5

*I'On, L.L.C. v. Town of Mt. Pleasant*,
338 S.C. 406, 526 S.E.2d 716 (2000)....................5

*Jolly v. Gen. Elec. Co.*,
435 S.C. 607, 869 S.E.2d 819 (Ct. App. 2021)....................10

*Keene v. CNA Holdings, LLC*,
426 S.C. 357, 827 S.E.2d 183 (Ct. App. 2019)....................34

*Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.*,
2008 WL 11476081....................21, 22

*Krinsk v. SunTrust Banks, Inc.*,
654 F.3d 1194 (11th Cir. 2011)....................21

*Ledford v. Pennsylvania Life Ins. Co.*,
267 S.C. 671, 230 S.E.2d 900 (1976)....................13

*Lee v. Edwards*,
101 F.3d 805 (2d Cir. 1996)....................28

*Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*,
275 S.C. 556, 274 S.E.2d 287 (1981)....................25

*Limehouse v. Hulsey*,
397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011)....................13

*Limehouse v. Hulsey*,
404 S.C. 93, 744 S.E.2d 566 (2013)....................*Passim*

*McCall v. IKON*,
363 S.C. 646, 611 S.E.2d 315 (Ct. App. 2005) ....................24, 25, 26

*McKellar v. Stanton*,
104 S.C. 248, 88 S.E. 527 (1916) ....................29

*Mitchell, Jr. v. Fortis Ins. Co.*,
385 S.C. 570, 686 S.E.2d 176 (2009) ....................6, 32, 34

*Mull v. Ridgeland Realty, LLC*,
387 S.C. 479, 693 S.E.2d 27 (Ct. App. 2010) ....................10

*Ness v. Digital Dial Commc'ns, Inc.*,
222 Wis. 2d 374, 588 N.W.2d 63 (Ct. App. 1998) ....................18

*Ness v. Digital Dial Commc'ns, Inc.*,
227 Wis. 2d 592, 596 N.W.2d 365 (1999) ....................17, 18, 22

*New Hampshire Ins. Co. v. Bey Corp.*,
312 S.C. 47, 435 S.E.2d 377 (Ct.App.1993) ....................5

*Pac. Mut. Life Ins. Co. v. Haslip*,
499 U.S. 1 (1991) ....................33

*Pioneer Util. Corp. v. Scott–Newcomb, Inc.*,
26 F. Supp. 616 (E.D.N.Y.1939) ....................9

*Pomroy v. Indian Acres Club of Chesapeake Bay, Inc.*,
254 Md. App. 109, 270 A.3d 1014 (2022) ....................20, 21

*Price v. Skylstead*,
69 Mont. 453, 222 P. 1059 (1924) ....................22

*Richardson v. P.V., Inc.*,
383 S.C. 610, 682 S.E.2d 263 (2009) ....................11, 13

*Ricks v. Weinrauch*,
293 S.C. 372, 360 S.E.2d 535 (Ct.App.1987) ....................5

*Roberson v. Southern Finance of South Carolina, Inc.*,
365 S.C. 6, 15 S.E.2d 112 (2005) ....................10

*Roberts v. Peterson*,
292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987) ....................13

*Roche v. Young Bros. of Florence*,
318 S.C. 207, 456 S.E.2d 897 (1995)....................9, 10, 11

*Romanski v. Detroit Ent., L.L.C.*,
428 F.3d 629 (6th Cir. 2005)....................28

*Shepherd v. Grayson Motor Co.*,
200 Ark. 199, 139 S.W.2d 54 (1940)....................22

*Spilke v. Wicklow*,
138 Conn. App. 251, 53 A.3d 245 (2012)....................19

*Sprint Sols., Inc. v. Fils-Amie*,
44 F. Supp. 3d 1224 (S.D. Fla. 2014)....................30

*Stack v. Welder*,
3 Cal. 2d 71, 43 P.2d 270 (1935)....................21, 22

*State Farm Mut. Auto. Ins. Co. v. Campbell*,
538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003)....................28, 33

*State v. Ariail*
311 S.C. 35, 426 S.E.2d 751 (1993)....................24

*State v. Pauling*,
322 S.C. 95, 470 S.E.2d 106 (1996)....................24

*Sundown Operating Co. v. Intedge Indus., Inc.*,
383 S.C. 601, 681 S.E.2d 885 (2009)....................*Passim*

*TXO Prod. Corp. v. All. Res. Corp.*,
509 U.S. 443 (1993)....................33

*Wells Fargo Bank, N.A. v. Dechert*,
12 N.E.3d 262 (Ind. Ct. App. 2014)....................19

*Wham v. Shearson Lehman Bros., Inc.*,
298 S.C. 462, 381 S.E.2d 499 (Ct.App.1989)....................15, 16

*Williams v. Stalnaker*,
312 S.C. 373, 440 S.E.2d 408 (Ct.App.1994)....................5

Rules

Rule 4(d)(3), SCRCP .......... 9, 11

Rule 5(a), SCRCP .......... 16, 23

Rule 55, SCRCP .......... 24, 27

Rule 55(b)(2), SCRCP .......... 23, 27

Rule 55(c), SCRCP .......... *Passim*

Rule 60(b), SCRCP .......... 1, 5, 8

Rule 208, SCACR .......... 30

Other Authorities

49 C.J.S. Judgments § 431 (2008) .......... 22

62B Am. Jur. 2d, Process § 268 (1990) .......... 9

62B Am Jur. 2d Process § 111 (1990) .......... 11

## STATEMENT OF ISSUES

**1.**

Whether the circuit court acted within its discretion in denying A-I-I's motions to set aside default under Rule 55(c) and default judgment under Rule 60(b) of the South Carolina Rules of Civil Procedure where A-I-I gave no reasonable explanation for its default.

**2.**

Whether A-I-I's constitutional rights were violated by holding it in default as to punitive damages based on allegations in the complaint that A-I-I knowingly manufactured asbestos-containing Clubman talc products as safe for personal cosmetic use despite its knowledge of the dangers of asbestos exposure, falsely represented that Clubman products did not contain asbestos, and mislead Plaintiff-Respondent Michael Perry who did not know he was at risk of mesothelioma from his regular use of Clubman products for decades.

## STATEMENT OF THE CASE

The relevant procedural facts underlying A-I-I's appeal are very simple. Plaintiffs-Respondents Michael Perry and Lonnie Long filed suit against A-I-I and several other defendants on August 4, 2023. (R. pp. 0067-0173.) A-I-I was served on August 10, 2023, through service on Executive Vice President Terri Cooper. (R. p. 0178.) A-I-I's answer was due on September 11, 2023, but it did not file an answer. On September 26, 2023, Plaintiffs filed a motion for default judgment as to A-I-I. (R. p. 0174.) On September 29, 2023, A-I-I filed an answer to the complaint. (R. pp. 0179-0222.)

The trial court granted default against A-I-I on October 3, 2023. (R. pp. 0045-0047.) On October 10, 2023, A-I-I moved to set aside the entry of default, which was denied on November 2, 2023. (R. pp. 0223-0267; R. pp. 0268-0292; R. pp. 0048-0052.) A-I-I did not move for reconsideration of that order. (R. pp. 0057 at n.1.)

After entry of default, on November 9, 2024, Plaintiffs moved to amend the complaint solely "to add an additional Defendant responsible for Mr. Perry's exposures to asbestos in South Carolina." (R. pp. 0293.) The motion was granted on November 21, 2023. (R. pp. 0053-0054.) The first amended complaint was filed on November 30, 2023. (R. pp. 0295-0401.) The allegations against A-I-I were identical to those in the original complaint. (R. pp. 0067-0173; R. pp. 00295-0401.) Although it had no right to service[1] and no right to file an answer to the amended complaint, A-I-I answered the first amended complaint on December 8, 2023. (R. pp. 0402-0444.)

On January 31, 2024, Plaintiffs moved to file a second amended complaint, again solely "to add an additional Defendant responsible for Mr. Perry's exposures to asbestos in South Carolina." (R. pp. 0445.) The motion was granted on February 1, 2024, and the second amended complaint was filed the same day. (R. pp. 0055-0056; R. pp. 0447-0578.) Again, the allegations against A-I-I were identical to those in the original complaint and in the first amended complaint. (R. pp. 0067-0173; R. pp. 00295-0401; R. pp. 0447-0578.) Again, without the right to service or to file an answer, A-I-I answered the second amended complaint on February 16, 2024. (R. pp. 0579-

[1] A-I-I insists that, because its attorneys had made an appearance, it was served with the amended complaints through NEF. This evinced no intention on the part of Plaintiffs to serve A-I-I and gave A-I-I no right to service or right to answer the complaint. The fact that A-I-I received the complaints via NEF is inconsequential.

0626.)

It was consistently clear that Plaintiffs understood A-I-I to be in default. Plaintiffs' counsel sent numerous emails between March 27, 2024, and May 14, 2024, repeating to A-I-I that it was in default. (R. pp. 0878-0909.) A-I-I did not seek relief from the trial court, choosing instead to rely on its baseless position that its answers to the amended complaints cured its default.

On May 9, 2024, Plaintiffs filed a motion for protective order to quash A-I-I's subpoena for employee records. (R. pp. 0639-0640.) A-I-I did not file a response before Plaintiffs filed their motion for protective order to prohibit A-I-I from participating in expert discovery except on the issue of damages. (R. pp. 0641-0644.) A-I-I responded with the argument it has made here—that responding to the amended complaints cured it default. (R. pp. 0648-0654.) The trial court granted the motion for protective order on May 29, 2024, finding that A-I-I was still in default. (R. pp. 0057-0060.)

A-I-I filed a petition for writ of certiorari on June 28, 2024. (R. pp. 0681-0710.) A-I-I acknowledged in its petition that the trial was scheduled for August 5, 2024. (R. p. 0694.) The petition was denied on August 13, 2024. (R. pp. 0061-0062.)

At the pretrial hearing, counsel for A-I-I assured the trial court that A-I-I would be present for trial. (R. p. 950, lines 4-6.) The case went to trial August 5, 2024. A-I-I attended trial. A-I-I's counsel cross-examined Mr. Perry's treating physician and economist concerning damages. (R. p. 1429, line 15 – p. 1432, line 9; p. 2155, line 15 – p. 2177, line 17.) A-I-I's counsel also gave a closing statement concerning Mr. Perry's damages. (R. p. 2334, line 6 – p. 2336, line 25.) The jury awarded a total of $32,656,250 in compensatory damages, $30,000,000 in punitive damages against the

Johnson & Johnson entities, and $760,000 in punitive damages against A-I-I. (R. pp. 0063-0066.)

On August 26, 2024, A-I-I filed its post-trial motions on a variety of issues. (R. pp. 0810-0827; R. pp. 0772-0809.) A-I-I did not argue improper service in its post-trial motions but referred to its previous briefing on that issue. (*See id.*)

The trial court heard argument on those motions on September 24 and 25, 2024. In its Order of December 11, 2024, the trial court granted A-I-I a new trial *nisi remittitur*, reducing the compensatory damages award by $7,000,000, leaving a combined total to Mr. Perry and Mr. Long of $25,656, 250. (R. p. 0037.) The motions were denied in all other respects. (R. pp. 0001-0044.)

After setoffs, the judgment against A-I-I was $14,401,250 in compensatory damages and $760,000 in punitive damages. Despite being ordered by the trial court to post a supersedeas bond in the case of an appeal (R. p. 0043), A-I-I failed to do so.

This appeal followed.

## STANDARD OF REVIEW

### 1.

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (citing *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Sundown*, 383

S.C. at 607, 681 S.E.2d at 888 (citing *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997)).

"The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)." *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888 (citing *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App.1987)). However, "the criteria for obtaining relief from judgment under Rule 60(b)—mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation—are relevant in determining whether good cause has been shown under Rule 55(c), SCRCP." *Id.* at 608, 681 S.E.2d at 889 (citing *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 378–79 (Ct.App.1993)). Again, it is within the trial court's discretion to determine whether these standards have been met. *Id.* at 606, 681 S.E.2d at 888 (citing *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)); *see also id.* at 608, 681 S.E.2d at 888 (citing *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994)).

"In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000)). The only novel issue in this appeal is whether a defaulting defendant can cure its default by answering an amended complaint that does not change any allegations against it.

**2.**

Review of the constitutionality of a punitive damages award is performed de

novo. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) (citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).

## STATEMENT OF FACTS

Michael Perry filed his lawsuit "to tell [his] story, [his] journey that [he's] going to take with, with mesothelioma, and to find closure and hold the individuals that caused this to [him] accountable." (R. p. 2579, lines 2-5.) A-I-I is one of those individuals as the maker of Clubman talcum powder products. (R. p. 0071; p. 0079, ¶ 13; p 0089, ¶ 28) (suing A-I-I individually and as successor-in-interest to Pinaud, Inc., Barbara Alice Inc., Ed. Pinaud, Inc. d/b/a Ed. Pinaud, and Nestle-Le Mur Company, all for the Clubman line of products).)

### I. Mr. Perry regularly used Clubman talcum powder over the course of his life.

Mr. Perry used Clubman talcum powder for many years:

> Q Was there ever any other powder that you used throughout your entire life in addition to Johnson's baby powder?
>
> A Clubman would have been one from my childhood clear up to my adult.

(R. p. 2580, lines 3-7.) Mr. Perry testified that, just like Johnson's Baby Powder, he used Clubman talcum powder throughout his life. (R. p. 2580, p. 39, line 25 – p. 40, line 6.) He remembered using Clubman from 1974 or 1975 until 2019. (R. p. 2580, p. 40, line 9 - p. 41, line 8.)

Mr. Perry testified that he bought 10 or more bottles of Johnson's Baby Powder each year, and about 10 bottles per year of Clubman talcum powder. (R. pp. 2203,

lines 2-11; R. 2580, p. 41, line 14 – p. 2581, p. 43, line 3.) He testified, "Johnson's baby powder and Clubman were always my go-to for so many other reasons. So I was always buying more of that than I was scented powders." (R. p. 2582, p. 46, line 24 – p. 47, line 5.) His husband Lonnie Long loved Clubman, so they always had "plenty of Clubman in the house." (R. p. 2583, p. 93, lines 5-11.)

Mr. Perry had fond memories of the barber brushing Clubman powder over him after haircuts. (R. p. 2583, p. 93, line 16 – R. p. 2584, p. 94, line 11.) He had haircuts every couple of weeks as a child. (R. p. 2583, p. 93, lines 19-23.)

Mr. Perry testified, "I'd use [Clubman powder] all over my body. Shake it three or four shakes. Always up here in this area, down my torso, underneath my armpits. I loved the smell, the fragrance of Clubman." (R. 2584, p. 94, lines 18-25.)

## II. A-I-I's Clubman talcum powder contained asbestos.

A-I-I's Clubman talc was sourced from the Treasure and Regal mines in southwest Montana. (R. pp. 2687-2690.) Numerous studies have found the Montana mines from which Clubman sourced its talc contained asbestos. (R. p. 2624; pp. 2670-2676; pp. 2713-2716.) Testing of all mines from the Montana "Talc Corridor" show evidence of chrysotile and tremolite/actinolite asbestos. (R. pp. 2713-2716.) Tests by Pfizer found asbestos in Montana talc. (R. p. 2715.)

Materials scientist Dr. William Longo has tested a 2006-vintage Clubman talc sample containing Montana talc and found that it contained chrysotile asbestos fibers. (R. pp. 2687-2690.)

Scientific literature confirms asbestos minerals in southwest Montana talc mines, including the Treasure and Regal mines. A published paper examining the

region's geology observed that "tremolite occurs as a replacement of olivine, in a fibrous form in shear zones, and as randomly oriented prisms in the carbonate matrix" and "retrograde serpentine occurs dominantly as pseudomorphs replacing olivine ..." (R. pp. 2644-2659; *see also id.* at p. 2649.) In 1990, the USGS identified "serpentine" among the minerals associated with the talc. (R. p. 2666.) It found that talc formation is accompanied by "siliceous veining of the marble" and "cross-fiber chrysotile" formed in silicate-rich marble. (*Id.*)

### III. Exposure to asbestos in Clubman talcum powder was a substantial factor in causing Mr. Perry's mesothelioma.

At trial, Plaintiffs' pulmonologist Dr. Steven Haber testified that six talc brands Mr. Perry used were significant contributing factors to his mesothelioma, although not equally: Johnson's Baby Powder, Clubman Talc, Gold Bond, Ammens, Equate, and Old Spice. (R. pp. 1223, line 22 – p. 1224, line 13; R. p. 1228, lines 2-8.) He relied, in part, on Mr. Perry's testimony that he used Johnson's Baby Powder and Clubman Talc the most and that he purchased a similar amount of Johnson's Baby Powder and Clubman, about ten bottles each year. (R. p. 1228, lines 18-25.)

## ARGUMENT

### I. The trial court did not abuse its discretion in denying A-I-I's motion to set aside default under Rule 55(c) and to set aside default judgment under Rule 60(b), SCRCP.

#### A. The trial court acted within its discretion in denying A-I-I's motion to set aside the entry of default.

1. A-I-I was properly served with the original complaint.

A corporation or partnership may be served "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other

agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires." Rule 4(d)(3), SCRCP. "Exacting compliance with the rules is not required to effect service of process." *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (citing *Roche v. Young Bros. of Florence*, 318 S.C. 207, 209–10, 456 S.E.2d 897, 899 (1995)).

Rather, [the Court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id.* (quoting *Roche*, 318 S.C. at 210, 456 S.E.2d at 899). The trial court's findings of fact regarding whether service was proper "are binding on the appellate court unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law." *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001).

"The rule allowing service on an officer of a corporation or partnership 'presupposes that an officer ... will know what to do with the papers served and will see that the corporation takes steps to defend the action.'" *Roche*, 318 S.C. at 210, 456 S.E.2d at 899 (quoting 62B Am. Jur. 2d, Process § 268 (1990)). Upon service on an officer, the corporation or partnership "then has actual notice of the action." *Id.* (citing *Pioneer Util. Corp. v. Scott–Newcomb, Inc.*, 26 F. Supp. 616 (E.D.N.Y.1939)). There is a presumption of proper service "when the rules governing service are followed." *Taylor*, 369 S.C. at 552, 633 S.E.2d at 503 (citing *Roche*, 318 S.C. at 211, 456 S.E.2d at 900).

A-I-I admits that Terri Cooper is an executive vice president of A-I-I. (Br. at 10; R. p. 923, lines 1-6.) There is no dispute that Plaintiffs-Respondents served Terri

Cooper. There is no dispute that Ms. Cooper did know what to do with the papers and no dispute that A-I-I had actual knowledge of the suit. There is no dispute that the papers were forwarded to A-I-I's insurance company. "When Terri Cooper received the initial complaint, A-I-I forwarded it to its insurer with instructions to obtain local counsel...." (Br. at 9.) "The principal object of service of process is to give notice to the defendant corporation of the proceedings against it." *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 680, 869 S.E.2d 819, 858 (Ct. App. 2021), *aff'd sub nom. Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 905 S.E.2d 380 (2024) (quoting *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010)). This objective was undisputably accomplished.

"When the civil rules on service are followed, there is a presumption of proper service." *Roche*, 318 S.C. at 211, 456 S.E.2d at 900 (quoting 62B Am Jur. 2d Process § 111 (1990)). A-I-I's argument is that its executive vice president did not have authority to accept service, but A-I-I must establish that Ms. Cooper was unauthorized *despite* her title. It has not done so. The affidavit of Brian Dror, which A-I-I says proves Ms. Cooper was unauthorized, merely addresses express authority. It does not prove Ms. Cooper had no apparent authority.

As A-I-I acknowledges, a person's authority to accept service may be express or implied. (Br. at 19 (quoting *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 15 S.E.2d 112 (2005)).) A person may have "apparent authority which the principal by his or her conduct is precluded from denying." (*Id.* (quoting *Roberson*, 365 S.C. 6, 15 S.E.2d 112).) "[A]pparent authority is when the principal knowingly permits the agent to exercise authority, or the principal *holds the agent out as*

*possessing such authority.*" *Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009) (emphasis added). In *Richardson*, the court found that a hotel employee had apparent authority to receive service when she was the only employee present and so appeared to be in charge. *Id.* Terri Cooper certainly appeared to be an officer of A-I-I.

Even if A-I-I did not expressly authorize Ms. Cooper to accept service, by virtue of her title, A-I-I extended her apparent authority to receive service as an officer of A-I-I. It is undisputed that A-I-I held Terri Cooper out to the world as an executive vice president.[2] (Br. at 10.) Whether or not this designation meant anything internally is irrelevant when A-I-I held Ms. Cooper out as an officer of the partnership. The trial court found that Ms. Cooper was an officer of A-I-I. (R. p. 0049.) In *Roche*, a vice president was deemed an officer and so authorized to receive service under Rule 4(d)(3), SCRCP. 318 S.C. at 210, 456 S.E.2d at 899. A-I-I has not shown that the outcome should be different here. The trial court was well within its discretion in finding that service on Terri Cooper was proper under Rule 4(d)(3), SCRCP.

2. The trial court properly exercised her discretion in denying A-I-I's motion to set aside the entry of default.

*a. The trial court was within its discretion in finding that A-I-I did not show good cause for its default.*

A-I-I argues there was good cause for its failure to timely answer the

[2] In an affidavit A-I-I attached to its Motion to Set Aside Entry of Default Before Default Judgement Hearing, Charles Loveless described at length information he claims to have in his "capacity as Executive Vice President" of A-I-I, again demonstrating that executive vice presidents are officers of A-I-I. (R. pp. 0247-0256)

complaint, suggesting that its failure was a "mere technicality." (Br. at 18.) In fact, this was not a technicality. A-I-I was not confused about the deadline. *Cf. Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 60, 339 S.E.2d 524, 524–25 (Ct. App. 1986) (finding that trial court should have considered "mistake" as a reason to set aside default judgment where defendant answered one day late because he was misinformed by his client concerning the date of service). A-I-I knew the deadline but did nothing until after receiving the motion for default. It did not follow up on its insurer's conflicts-of-interest investigation (to the extent one happened), even when the deadline to answer was passing. It answered 18 days late (and only when prompted by Plaintiffs' action) while Plaintiff Michael Perry suffered from a terminal cancer. But when it did decide to answer, it was able to do so the same day.

In its Motion to Lift Default, A-I-I acknowledged the following:

> A-I-I emailed a copy of the Complaint to A-I-I's "national counsel" (who represents A-I-I in California, where A-I-I is located, but not in South Carolina). Acting swiftly, on August 11, A-I-I's national counsel recommended retention of local counsel in South Carolina to A-I-I's insurer. On August 24, A-I-I's insurer acknowledged the Complaint and noted the need for conflicts check with the South Carolina firm.

(R. p. 0269) (internal citations omitted).) A-I-I provided no further explanation than that the insurer had apparently not completed conflicts checks: "A-I-I presumed that its insurer was doing just that and was trying to secure local counsel who could clear conflicts, understanding that the process could take time with the number of defendants and potential for conflicts as a result." (*Id.*) A-I-I stated, "At this time [when its answer was due], A-I-I had still not been notified by its insurer that conflicts had been cleared for any local counsel in South Carolina." (*Id.*) A-I-I's counsel

admitted in an email, "It looks like we were trying to get local counsel to take that out in SC but it didn't happen. (R. p. 0265.) A-I-I actually blamed Plaintiffs' counsel for not reminding it to answer the Complaint.[3] (R. p. 0269; R. p. 0259, ¶ 9.)

A-I-I wants to place the blame for the failure to act on its insurer, but "[i]n South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default."[4] *Limehouse v. Hulsey*, 397 S.C. 49, 71, 723 S.E.2d 211, 223 (Ct. App. 2011), *rev'd on other grounds*, 404 S.C. 93, 744 S.E.2d 566 (2013) (citation omitted). Thus, "even assuming that the insurance company was at fault for not answering the complaint, Appellants failed to show good cause. Negligence of an insurance company is imputed to a defaulting litigant and *cannot constitute good cause* to relieve Appellants from the entry of default." *Richardson v. P.V., Inc.*, 383 S.C. 610, 618–19, 682 S.E.2d 263, 267 (2009) (emphasis added).

In fact, if the insurer is responsible for the failure to answer, it is the insurer's conduct that must be considered. *See Ledford v. Pennsylvania Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976) (finding that the conduct of the person responsible for the failure to answer mut be weighed in the context of reviewing a

---

[3] A-I-I also points out that Plaintiffs did not agree to an extension of time for it to answer where they did agree for other defendants. (Br. at 24.) However, A-I-I fails to point out that the other defendants requested extensions before defaulting. A-I-I inexplicably failed to request an extension of time to answer until it was already more than two weeks past its answer deadline.

[4] In *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987), cited by A-I-I, the court found that the negligence of the school district employer in failing to pass the summons and complaint on to its attorney or insurer would not be imputed to the teacher defendant because, unlike insurers, the school district's business was education, not litigation.

default judgment). A-I-I offered no testimony or other evidence from the insurer to explain what it was doing during the period between August 24, 2023, when "A-I-I's insurer acknowledged the Complaint and noted the need for a conflicts check with the South Carolina firm," and September 11, 2023, when A-I-I's answer was due.

A-I-I and its insurer let the deadline to answer pass without requesting an extension. It let well over two weeks pass after the deadline without contacting Plaintiffs' counsel or filing an answer. When A-I-I realized it was in default and that Plaintiffs' counsel would not agree to a post-default extension of time to answer, it found counsel and filed an answer *the same day*—showing that it could have answered the Complaint at any time. (Br. at 8; R. p. 0270 (citing R. p. 0259, ¶11).)

A-I-I continues to assert that it was unable to answer sooner because conflicts checks had not been completed, suggesting some sort of impossibility issue. A-I-I simply *presumed* that conflicts checks were proceeding. (R. p. 0269.) It was only *after* receiving the motion for default that A-I-I sought South Carolina counsel. (R. p. 0289.) In any event, it was far from impossible for A-I-I to answer. Indeed, the fact that A-I-I was able to file an answer *in one day* without finding South Carolina counsel first completely undermines its claim that it was unable to answer because of ongoing conflicts checks.

In light of the above, the trial court found that A-I-I gave "no reason, much less a satisfactory explanation for the default." (R. p. 0050.) This conclusion was proper under the law and in full accordance with the facts. The trial court did not abuse its discretion in finding A-I-I gave no satisfactory explanation for its default.

*b. The trial court was not required to consider the Wham factors because A-I-I provided no satisfactory explanation for its default.*

The "good cause" standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." It is *only after* "a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607–08, 681 S.E.2d 885, 888 (2009) (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct.App.1989)); *see also Campbell v. City of N. Charleston*, 431 S.C. 454, 462 n.5, 848 S.E.2d 788, 793 n.5 (Ct. App. 2020) ("Because the City has failed to put forward a satisfactory explanation, we need not address the *Wham* factors."). Thus, if A-I-I provided no satisfactory explanation for the default, the *Wham* factors did not apply.

Summarizing A-I-I's explanation, the trial court stated:

> Here, AII has not put forth a satisfactory explanation for the default. Terri Cooper was an officer of the company and therefore was an appropriate person to serve under SCRCP 4(d)(3). AII admits that the Complaint was given to its national counsel the day after service. AII further admits that the Complaint was then passed on to the Insurer.

(R. pp. 0050-0051.) Although A-I-I continues to assert that its failure to answer was due to the delay in finding South Carolina counsel, it never sought an extension of time to answer pre-default. It did nothing as the deadline passed, and that is not explained by its search for South Carolina counsel. Given that A-I-I gave "no reason,

much less a satisfactory explanation for the default," and in accord with *Sundown*, 383 S.C. at 607–08, 681 S.E.2d at 888 and *Campbell*, 431 S.C. at 462 n.5, 848 S.E.2d at 793 n.5, the circuit court did "not need to reach the *Wham* factors." (*Id.* at 4.) A-I-I did not move for reconsideration to ask that the Court apply the *Wham* factors. Considering the circumstances and A-I-I's failure to provide a satisfactory explanation for its default, the trial court appropriately addressed A-I-I's arguments and was not required to consider the *Wham* factors.

### B. A-I-I was not relieved of its default when it answered amended complaints that did not change the allegations against it.

A-I-I argues that it could cure its default by answering an amended complaint that made the exact same allegations against it. A-I-I is incorrect. As A-I-I admits, there is no appellate authority on this point in South Carolina. (Br. at 32.) However, whether A-I-I received automatic notice of the amended complaints or not, pursuant to Rule 5(a), SCRCP, A-I-I was not *entitled* to service of the amended complaints because they did not change the allegations against A-I-I, to which A-I-I had already defaulted:

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

Rule 5(a), SCRCP. As the Court recognized, "Plaintiffs' amended complaint simply added additional defendants to the case. It did not change the claims, substantive or otherwise, against A-I-I in any way." (R. p. 0058.) The trial court further stated,

> Importantly, the substantive claims against Defendant have never been amended since Plaintiffs' Original Complaint—the one for which it is in

> default. In fact, Plaintiffs' complaint has only been amended to add new defendants. The claims against Defendant remain the same since the very inception of this lawsuit.

(R. p. 0059.) Thus, Plaintiffs were not required to serve A-I-I with the amended complaints. A-I-I had no right to service and no right to answer. Nothing about the amended complaints changed the status quo or gave A-I-I the ability to cure its default.

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

> Since a defaulting party has through inaction lost its right to notice of further pleadings, a plaintiff ... is not required to serve the defaulting party with an amended complaint. Similarly, *a defaulting party loses the right to answer the amended complaint and revive its defense.* Essentially, in those circumstances, the defaulting party halts the action at the point in time of the original complaint. *The amended complaint therefore supersedes the original as to any other party except the defaulting party.* Because the amended complaint does not supersede the original complaint with regard to the defaulting party, the

> defaulting party does not receive a new window in which to file an answer to the amended complaint.

*Id.* at 602–03, 596 N.W.2d at 371 (internal citation omitted; emphasis added).

In *Ness,* as here, the defendants "propose[d] a bright-line rule that whenever a plaintiff files an amended complaint, ... the defendant receives a new time period to answer." *Id.* at 603, 596 N.W.2d at 371. The court found the argument unpersuasive. In addition, the court found that the proposed rule would be inequitable: "such a rule would mean that '[t]he defaulting party [who] has previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action ... is fortuitously allowed to 'restart the clock' for filing a response.'" *Id.* at 605, 596 N.W.2d at 372 (quoting *Ness v. Digital Dial Commc'ns, Inc.*, 222 Wis. 2d 374, 382–83, 588 N.W.2d 63 (Ct. App. 1998), *aff'd,* 227 Wis. 2d 592, 596 N.W.2d 365 (1999)). The court was also concerned with the "serious conflict for a plaintiff who would be torn between taking a default judgment and correcting the pleadings through amendment," as well as "inefficient judicial administration" from the defendants' proposed rule. *Id.* at 606, 596 N.W.2d at 372.

A-I-I complains that the policy concerns of Wisconsin are too different from South Carolina's to find the decision persuasive. However, South Carolina is also concerned that a defaulting defendant bear the consequences of that default, shown by limiting the defaulting defendant's participation in the damages hearing: "If our courts were to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence of default." *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 578–79 (2013). The preference for deciding cases on

the merits is not enough to justify relieving a defaulting defendant from the consequences of its default when it has failed to show good cause for that default.

Other states take the same position. In Indiana, a defendant argued, as A-I-I does here, the rule that an amended complaint supersedes the prior complaint means the defaulting defendant is relieved of the prior default. The Indiana court of appeals disagreed, holding:

> [N]one of the amended pleadings undermined any basis upon which the default judgments against Wells Fargo were issued. Wells Fargo advances no other basis upon which we are to conclude that the "general rule" concerning the effect of amended pleadings operates absolutely to estop [plaintiffs] from enforcing their judgments against Wells Fargo.

*Wells Fargo Bank, N.A. v. Dechert*, 12 N.E.3d 262, 267 (Ind. Ct. App. 2014) (internal citation omitted).

In Connecticut, where the amendments do not result in a substantial change in the cause of action against the defaulting defendant, the default on the original complaint is not extinguished by the amendments:

> The problem with the defendants' argument is that the plaintiff, in the previously mentioned substituted complaint, makes it abundantly clear that the substitution relates only to the former defendants Joseph Wicklow III and Walsh, Lasala, Wicklow and Velardi, LLC, and that it does not seek to be a substitute for the original counts against the defendants Kenneth Spilke and Jennifer Ballard. In light of the foregoing, the default against Kenneth Spilke and Jennifer Ballard still stands,

*Spilke v. Wicklow*, 138 Conn. App. 251, 267, 53 A.3d 245, 254 (2012). The court made clear that "if the amendment interjects material new issues, the adversary is entitled to reasonable opportunity to meet them by pleading and proof." *Id.* at 270, 53 A.3d at 256. But a court does not abuse its discretion when it refuses to relieve a defendant

of its default based on its answer to an amended complaint that makes no substantial change to the action. *Id.*

And in Kentucky, while an amended pleading may give the defaulting defendant an opportunity to cure the default, this is not true if, as here, the amended petition merely reiterates the allegations against the defaulting party. *See Brown v. Funk*, 697 S.W.3d 739, 745–46 (Ky. Ct. App. 2024), *rev. denied* (Oct. 16, 2024). A-I-I characterizes *Brown* as consistent with its position, (Br. at 38), but actually the case supports Plaintiffs' position. Under *Brown*, if the plaintiff "incorporate[s] by reference or expressly reiterate[s] the allegations of the original complaint," the defaulting defendant *cannot* cure its default by answering the amended complaint. *Id.* at 746. Plaintiffs *did* reiterate the allegations of the original complaint in each of the amended complaints, which would prevent a defendant from curing the default by answering an amended complaint.

A-I-I also misconstrues the holding of *Pomroy v. Indian Acres Club of Chesapeake Bay, Inc.*, 254 Md. App. 109, 270 A.3d 1014 (2022). There, the court determined that "*where the plaintiff files an amended complaint with new or additional substantive allegations*, a court may not enter a default judgment on account of the defendants' failure to file a timely response to the original complaint." *Id.* at 114, 270 A.3d at 1017 (emphasis added). However, the plaintiff had filed a complaint with new allegations as to the defaulting party and had not obtained an order of default on that complaint. *Id.* at 123, 270 A.3d at 1022. Thus, no default judgment could be entered without giving the defendant an opportunity to answer the new allegations: "In the circumstances of this case, where the amended complaint

asserts a new or additional claim for relief, we hold that the court may not enter a default judgment on the amended complaint before the plaintiff has moved for an order of default on the amended complaint and the court has declined to vacate that order of default." *Id.* at 125, 270 A.3d at 1023–24. Again, where the complaint makes no new allegations against the defaulting defendants, *Pomroy* supports Plaintiffs' position that the original default remains in effect despite the amended complaint.

In California too, the controlling issue is whether the amendment changed the substantive claims against the defaulting party:

> [I]t is a settled rule that where, after the default of a defendant has been entered, a complaint is amended in matters of substance as distinguished from mere matters of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default.

*Stack v. Welder*, 3 Cal. 2d 71, 75, 43 P.2d 270, 272 (1935) (citations omitted). The California Supreme Court recognized that "[t]he bringing in of a new party by amendment may or may not be a matter of substance, depending on whether the defaulting parties are affected thereby." *Id.* Here, A-I-I's rights were not affected by the amendments adding additional defendants.

There are also federal cases that are consistent. In *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011), the Eleventh Circuit recognized that an amended complaint does not automatically revive a defaulting defendant's rights when the amended complaint does not change the theory or scope of the case. For example, in that case, an amended complaint did not give the defaulting defendant a new opportunity to compel arbitration. *Id.*

In *Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.*, the federal district court

held that the default as to the original complaint was not cured by the defendant's answer to the amended complaint. No. 205CV01532RLHGWF, 2008 WL 11476081, at *4.

> As a general rule, an amendment of the complaint after a default has been taken, which introduces a new cause of action, or goes to the substance of the pleading, operates to open the default, but *an amendment in matters of form rather than substance does not operate to open the default* [or default judgment].

*Id.* at *3 (quoting 49 C.J.S. Judgments § 431 (2008)) (emphasis added). The federal district court looked to earlier state court decisions: *Shepherd v. Grayson Motor Co.*, 200 Ark. 199, 139 S.W.2d 54, 55 (1940); *Stack v. Welder*, 43 P.2d 270 (1935); *Price v. Skylstead*, 69 Mont. 453, 222 P. 1059, 1061 (1924). As the Montana Supreme Court recognized more than 100 years ago, "It is the general rule that an amendment of the complaint made after default operates to open the default, provided it introduces a new cause of action or goes to the substance of the pleading, otherwise it does not." *Price*, 69 Mont. 453, 222 P. at 1061 (internal citations omitted).

The Court's order follows the reasoning and rule set out in these cases. The claims against A-I-I were not changed by the amended complaints, and A-I-I, having "previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action," should not be "fortuitously allowed to 'restart the clock' for filing a response.'" *Ness*, 227 Wis. 2d at 605, 596 N.W.2d at 372 (citation omitted). The plaintiff should not have to choose between amending the complaint as to other parties and taking a default judgment against the party who "previously disregarded its opportunity for defending itself." *Id.* at 606, 596 N.W.2d at 372. This Court's ruling was well reasoned and consistent with South Carolina law.

Because A-I-I remained in default, it was a matter of the Court's discretion whether to set aside the entry of default. *Sundown*, 383 S.C. at 606, 681 S.E.2d at 888). Under Rule 55(c), SCRCP, the defaulting defendant must show "good cause" to be relieved of an entry of default. *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. Again, A-I-I did not even file a motion for relief after it answered the amended complaint. A-I-I has not shown good cause, and the Court was well within its discretion in not setting aside the entry of default.

### C. The trial court acted within its discretion in denying A-I-I's request to set aside the default judgment.

A-I-I contends it should have been relieved of the default judgment for the same reasons it contends it should have been relieved of the entry of default. (Br. at 40.) It also argues that the default judgment must be set aside because it did not get required notice of the damages hearing. *Id.* Because A-I-I had actual notice of the damages trial and participated in the damages trial, its argument should be rejected.

Rule 5(a), SCRCP provides that "notice of any trial or hearing on unliquidated damages shall also be given to parties in default." Rule 55(b)(2) directs that this notice be given by first class mail. Plaintiffs did not use first class mail. However, there is no question that A-I-I had *actual* notice of the damages trial more than three days before. On June 28, 2024, A-I-I acknowledged in its Petition for a Writ of Certiorari that trial was scheduled for August 5, 2024. (R. p. 0694.) On June 29, 2024, A-I-I moved the trial court to stay the damages trial against it. (R. p. 0949, lines 13-23.) At the pretrial hearing, A-I-I's counsel stated A-I-I would "definitely be here" for trial. (R. p. 0950, lines 2-6.) A-I-I participated in the pretrial hearing and at trial regarding

damages. In fact, Plaintiffs served A-I-I with a trial subpoena by Federal Express. (R. p. 0912.) A-I-I cites no case, and Plaintiffs have found none, where a default judgment was vacated for a new damages trial or hearing when the defendant was present and participated in the damages trial or hearing.

1. A-I-I waived any complaint of inadequate notice.

A-I-I did not raise the issue of inadequate notice at any time before the trial in this case. A-I-I "denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object," and so it waived the opportunity to raise the issue of inadequate notice post-trial and on appeal. *State v. Pauling*, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996). For example, in *State v. Ariail*, the supreme court held that, by proceeding to trial, the criminal defendant waived objection concerning waiver of arraignment. 311 S.C. 35, 37, 426 S.E.2d 751, 753 (1993). A-I-I proceeded to participate in the trial while saying nothing about lack of notice. Thus, A-I-I waived any objection to notice.

2. Requiring a new damages hearing when A-I-I participated in the damages trial does not serve the purposes of Rule 55.

As A-I-I acknowledges, the purpose of the rule is to "ensur[e] that notice is properly received by all entitled to it." (Br. at 40 (quoting *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005)).) In *McCall*, where the defendants *did not appear* for the damages hearing, the court found that sending a single letter to two defendants was inadequate notice of the damages hearing because one defendant would be required to pass the letter on to the second defendant before actual notice was achieved:

> The need to properly serve each party individually does not arise from an arcane or highly technical application of the rules. Rather, this requirement serves an essential function—ensuring that notice is properly received by all entitled to it. Addressing a single notice to two distinct parties as McCall did in the present case, sharply diminishes the likelihood that both will actually receive notice, as such a method necessarily depends upon one of the parties "passing along" the notification to the other. The rules of service are designed to eliminate the need for such contingencies.

*Id.* (emphasis added). The concern in *McCall* was that the parties entitled to it "actually receive notice." *Id.* A-I-I *did* "actually receive notice," a fact that it cannot deny. In this case, requiring a new damages hearing because A-I-I received notice of the trial/hearing by electronic service and Federal Express rather than first class mail *when A-I-I actually appeared and participated at the trial* would indeed be "an arcane and highly technical application of the rules." *Id.*

A-I-I points to language from *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*, 275 S.C. 556, 274 S.E.2d 287 (1981), where the court stated, "Participation by the defending party will give to the judge and/or jury a broader understanding of the amount which should be awarded and will tend to insure a [fairer] verdict and judgment." (Br. at 40 (quoting *Lewis*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981)).) *Lewis* was concerned when situations in which "the defaulting party is not given an opportunity to participate in the damages hearing." *Id.* at 561, 274 S.E.2d at 290. Again, these concerns do not arise when the defendant actually participates in the damages trial, as A-I-I did.

Neither does *Dymon, Inc. v. Hyman*, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991), support A-I-I's argument. In that case, although the defendant had appeared by filing a late answer, he was completely unaware of the application for a judgment

of default against him. In fact, he was unaware default judgment had been entered until several months later. *Id.* at 171, 406 S.E.2d at 389. Although Dymon had entered an appearance, he was not aware of and did not participate in the case or have the opportunity to challenge the plaintiffs application for default judgment. A-I-I's situation is very different.

Even if A-I-I were correct, it is unclear what the proper relief would be. Plaintiffs' damages have been determined in an adversarial trial in which Johnson & Johnson Entities *and* A-I-I participated. The purpose of granting a new damages hearing when the defendant did not receive notice is so that the defendant is able to participate. But A-I-I already has participated. Johnson & Johnson also participated and had exactly the same interest in minimizing damages. Granting A-I-I a new damages trial would risk inconsistent verdicts and offer A-I-I only the same opportunity it already had at the trial.

3. Complaints of inadequate notice do not relieve a defendant of the entry of default.

It would not be proper to relieve A-I-I of its default based on inadequate notice of the damages trial. In *McCall,* the court remanded the case for a new damages hearing because neither defendant appeared and there was no evidence the second defendant received actual notice of the damages hearing. 363 S.C. at 648, 650, 654–55, 611 S.E.2d at 316, 317, 319. The lack of notice had no impact on the entry of default, and neither should it here. A-I-I acknowledges as much in its brief, offering lack of notice by mail only as a reason to set aside the default judgment.

4. The trial court properly entered default judgment following the damages trial.

A-I-I includes two sentences in its argument about notice that the circuit court independently entered default judgment when Plaintiffs did not apply for it. (Br. at 41-42.) As the trial court noted in the post-trial order, Rule 55 does not provide the method by which a plaintiff must request default judgment. It simply provides that "the party entitled to a judgment by default shall apply to the court therefor." Rule 55(b)(2), SCRCP. Plaintiffs had moved for entry of default. At the pretrial hearing, Plaintiffs' counsel reminded the trial court that A-I-I was in default. The court and the parties discussed at length how to conduct the damages trial. The word default appears 119 times in the trial transcripts. The trial court was aware Plaintiffs sought default judgment, as was A-I-I. A formal request post-verdict was not required.

## II. A-I-I's due process rights were not violated in the imposition of punitive damages.

### A. The allegations were sufficient to provide A-I-I fair notice of the conduct that subjected it to punitive damages.

A-I-I quite reasonably does not contend that it could not be held in default as to punitive damages. *See Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013) (recognizing that defendant can default on punitive damages). Rather, A-I-I argues that the allegations in the complaint were insufficient because they did not provide A-I-I with "fair notice of the conduct that will subject him to punishment." (Br. at 46.)

In *Gore*, the Supreme Court noted that a defendant must "receive fair notice

… of the conduct that will subject him to punishment."[5] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598, 134 L. Ed. 2d 809 (1996). The South Carolina Supreme Court has noted that due process safeguards apply in default cases involving punitive damages, in that "the relief granted in a default judgment is limited to that supported by the allegations in the Complaint…." *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013).

In fact, the pleadings did give A-I-I sufficient notice and support the finding of willful, wanton, or reckless conduct:

- "…defendants manufactured products composed of talc that were sold and marketed as safe for daily use by consumers on their person…." (R. p. 0137 at ¶ 148.)

- Defendants "made false statements to plaintiff, the general public, news media and government agencies" as part of "intentional efforts to deceive the general public as to the safety of and presence of carcinogens, including asbestos, in talc-containing products." (R. p. 0138 at ¶ 149.)

- Plaintiffs alleged that Defendants "have represented to various news media outlets and the public at large that their products are 'asbestos-free,' when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods." (R. p. 0150 at ¶ 183.)

---

[5] At least one federal court of appeals has distinguished between the notice to be given of possible penalties vs. notice of unlawfulness of the conduct: "Notice of possible penalties is not to be confused with notice of the unlawfulness of the underlying conduct; the latter is irrelevant to the constitutionality of a punitive damages award." *Romanski v. Detroit Ent., L.L.C.*, 428 F.3d 629, 648 (6th Cir. 2005) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580, 116 S. Ct. 1589, 1601, 134 L. Ed. 2d 809 (1996); *DiSorbo v. Hoy*, 343 F.3d 172, 186 (2d Cir. 2003); *Lee v. Edwards*, 101 F.3d 805, 809 (2d Cir. 1996)). Indeed, constitutional review of punitive damages cases generally addresses alleged excessiveness of those awards. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426, 123 S. Ct. 1513, 1524, 155 L. Ed. 2d 585 (2003) ("courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered"); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434, 121 S. Ct. 1678, 1684, 149 L. Ed. 2d 674 (2001) ("the constitutional violations were predicated on judicial determinations that the punishments were 'grossly disproportional to the gravity of … defendant[s'] offense[s]'"); *Gore*, 517 U.S. at 580.

- Plaintiffs alleged at length Defendants' knowledge of the risk and the basis for that knowledge. (R. pp. 0138-0143 at ¶¶ 150-159, 161-165; R. p. 0147 at ¶ 174.)
- "Plaintiff Michael L. Perry and other exposed persons did not know of the substantial danger of using Defendants' asbestos, asbestos-containing talc products, and products manufactured for foreseeable personal use by individuals like Plaintiff." (R. p. 0129 at ¶ 115.)

In the original complaint, as noted above, Plaintiffs alleged that Defendants knew their products contained asbestos and still marketed them as safe. Plaintiffs alleged that Defendants represented to the public that their products are "asbestos-free," when they knew this to be untrue. These allegations, among others, support Plaintiffs' claim for punitive damages.

A-I-I argues, however, that these pleadings were insufficient because they did not specify conduct *individually* as to A-I-I, but rather pleaded *collectively* the knowledge and bad conduct of Defendants. (Br. at 45.) A-I-I presents no authority for its argument that Plaintiffs cannot make allegations against Defendants collectively, and in fact, there is authority to the contrary. *See, e.g., Green v. Indus. Life & Health Ins. Co.*, 199 S.C. 262, 18 S.E.2d 873, 875–76 (1942) (finding allegations adequate to state cause of action when plaintiff alleged conduct of defendants acting together); *McKellar v. Stanton*, 104 S.C. 248, 88 S.E. 527, 527 (1916) (same).

In federal courts as well, plaintiffs are permitted to plead collectively the conduct of multiple defendants: "When multiple defendants are named in a complaint, the allegations can be and usually are to be read in such a way that each defendant is having the allegation made about him individually." *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997). "The practice only runs afoul of the applicable

pleading standard where it results in a complaint that fails to give each defendant notice of the claims against it." *Sprint Sols., Inc. v. Fils-Amie*, 44 F. Supp. 3d 1224, 1227 (S.D. Fla. 2014) (citation omitted). The allegations gave A-I-I fair notice of the facts supporting the punitive damages claim against it.

Respondents do not contest A-I-I was entitled to fair notice of the conduct that subjected it to punitive damages. Such notice is important to support the default judgment. *See Limehouse*, 404 S.C. at 116, 744 S.E.2d at 579. A-I-I received that notice through the pleadings in this case. Any fair reading of the pleadings would inform A-I-I that it was alleged to have engaged in willful, wanton, and reckless conduct when it sold a product it knew contained asbestos without providing warnings and, in fact, misled the public about the safety of its product. A-I-I received the necessary notice.

**B. The punitive damages award did not exceed constitutional limits.**

A-I-I did not include in its statement of issues any contention that the punitive damages award was unconstitutional large. "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208, SCACR. Thus, Respondents contend that A-I-I has waived any challenge to the size of the punitive damages award. However, in its argument, A-I-I applies factors that go to the constitutionality of the size of the punitive damages award. For that reason, in an abundance of caution, Respondents address those factors as well.

1. <u>The allegations demonstrate reprehensible conduct.</u>

A-I-I contends "there was absolutely no consideration by the jury or the circuit

court as to the reprehensibility of A-I-I's conduct." (Br. at 47.) This is demonstrably untrue. (R. pp. 0038-0039.) The jury was informed at the beginning and at the end of trial that A-I-I had been found to behave willfully, wantonly, and recklessly:

> 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.

(R. p. 0975, line 22 – p. 0976, line 3; R. p. 2433, lines 1-6.) The jury was also instructed on the meaning of willful, wanton, and reckless conduct: "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." (R. p. 2454, lines 12-16.) This is reprehensible conduct. The trial court pointed out, "A-I-I ignores that, as a matter of law, its conduct was found to be willful, wanton, and/or reckless, which is the predicate for punitive damages. The jury was instructed about this fact." (R. p. 0037.)

The South Carolina Supreme Court has stated, "Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 412 (2012) (citing *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011)). "Willful" and "wanton" conduct have been called synonymous with "reckless" conduct and also support punitive damages. *Id.* (citing *Berberich*, 392 S.C. at 287, 709 S.E.2d at 612). "Ordinarily, the test is whether the tort has been committed in such a manner or under circumstances that a person of ordinary reason or prudence would have been conscious of it as an

invasion of the plaintiff's rights." *Id.* (quoting *Cartee v. Lesley*, 290 S.C. 333, 337 S.E.2d 388, 390 (1986)).

The trial court considered all relevant factors in reviewing the punitive damages aware: reprehensibility of the harm, ratio, and comparative penalty awards. (Post-Trial Order at 37-38 (citing *Mitchell, Jr. v. Fortis Insurance Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009); *Gamble v. Stevenson*, 305 S.C. 104, 111–12, 406 S.E.2d 350, 354 (1991))). Specifically, the trial court carefully reviewed the reprehensibility of A-I-I's conduct as alleged in the complaint:

> Plaintiffs alleged Defendants' knowledge of the risk of talcum powder products that they marketed as safe for daily use. Original Complaint at ¶ 148. Plaintiffs alleged Defendants' knowledge of carcinogens, including asbestos, in talc. Id. at ¶ 150. Plaintiffs alleged that Defendants "have represented to various news media outlets and the public at large that their products are 'asbestos-free,' when, in fact, their products did test positive for asbestos and those that did not were merely the result of inadequate and imprecise testing methods." Id. at ¶ 183. Again, there are nearly 20 pages of allegations concerning Defendants' knowledge and bad acts with respect to the hazards of asbestos in their products. See id. at pp. 67-86. A-I-I's conduct, as admitted by its default, demonstrates a high degree of culpability.
>
> A-I-I's conduct, as alleged in the complaint, went on for decades. Plaintiffs alleged that "For decades, defendants manufactured products composed of talc that were sold and marketed as safe for daily use by consumers on their person…." Complaint at ¶ 148. Plaintiffs also alleged that "Defendants and CTFA, for decades before Plaintiff Michael L. Perry was born, possessed medical and scientific data that raised concerns regarding the presence of carcinogens, including asbestos, in talc and that demonstrated the existence of health hazards to those exposed to asbestos-containing talcum powder products." Id. at ¶ 150. Plaintiffs alleged that "Defendants … have long known that the deposits in the earth that are associated with talc are also associated with the formation of asbestos." Id. at ¶ 152.
>
> The crux of the conduct alleged, as shown above, is that Defendants, including A-I-I, knew of the dangers of their products but did not warn, instead marketing their products as safe and trying to conceal the

> hazards. ... Plaintiffs alleged that Defendants engaged in the same conduct with awareness of the risks for decades before Michael Perry was born, showing that they engaged in similar past conduct as well.

(R. p. 0137 at ¶ 148, R. p. 0138 at ¶¶ 150, 152.)

After review, the trial court found that "[t]he alleged awareness and concealment of the danger, which A-I-I admitted through its default, demonstrates the reprehensibility of A-I-I's conduct." (R. p. 0039.) The trial court concluded, "Because these allegations support the finding of willful, wanton, and reckless conduct, they support the punitive damages award in this case." (*Id.*)

2. The ratio of the compensatory to punitive damages awards raises no constitutional concerns.

A-I-I does not mention the other factors to be considered in reviewing the constitutionality of a punitive damages award, but the trial court also considered the ratio between the compensatory damages and the punitive damages awards and considered comparable penalty awards. "The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996) (citing *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 459 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)). The U.S. Supreme Court has indicated that a 4:1 punitive damages to compensatory damages ratio is likely to fall within the limits of due process. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Gore*, 517 U.S. at 581; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991). In this case, the punitive damages award against A-I-I was a bit over 2% of the jury's compensatory damages award. (R. p. 0040; pp. 0063-0066.)

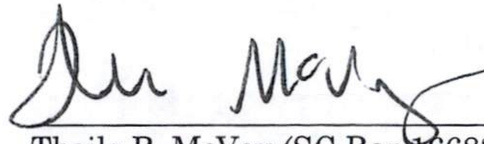
3. While there is no comparable penalty, larger punitive damages awards have been upheld in similar cases.

As to comparative penalty awards, the trial court could not identify comparable conduct that results in fines, but—as exemplified by *Mitchell*—the trial court looked to punitive damages awards that had been affirmed in similar cases. (R. p. 0041) (citing *Mitchell*, 385 S.C. at 592–93, 686 S.E.2d at 187–88.) The trial court noted that "larger punitive damages awards have been upheld in asbestos cases where, like here, the plaintiff alleged that the manufacturer knew and did not warn of the hazard of its product." (*Id.* (citing *Keene v. CNA Holdings, LLC*, 426 S.C. 357, 384–85, 827 S.E.2d 183, 198 (Ct. App. 2019), *aff'd*, 436 S.C. 1, 870 S.E.2d 156 (2021), which upheld $12 million compensatory damages and $2 million punitive damages). The punitive damages award against A-I-I is actually modest.

Each of the relevant *Mitchell/Gamble* factors supports the jury's award of punitive damages. There was no constitutional violation in the imposition of $760,000 in punitive damages against A-I-I.

## CONCLUSION

For all these reasons, Respondents Michael Perry and Lonnie Long respectfully as the Court to deny Appellant American International Industries' appeal. The circuit court acted within her discretion in declining to set aside A-I-I's default and the default judgment against it, and the pleadings adequately supported the punitive damages award against A-I-I. There is no basis for reversal.



Theile B. McVey (SC Bar 16682)
tmcvey@kassellaw.com
John D. Kassel (SC Bar 03286)
jkassel@kassellaw.com
KASSEL MCVEY
ATTORNEYS AT LAW
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina. 29202-476
Telephone: 803-256-4242
Facsimile: 803-256-1952
Other email: emoultrie@kassellaw.com

Misty A. Farris
(Admitted *Pro Hac Vice*)
mfarris@dobslegal.com
DEAN OMAR BRANHAM SHIRLEY, LLP
1801 North Lamar Street, Suite 300
Dallas, Texas 75202
Telephone: 214-722-5990
Facsimile: 214-722-5991
Other email: rgarner@dobslegal.com

July 8, 2025

Columbia, South Carolina.