

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. 2025-000065
Civil Action No. 2023-CP-40-04072

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SC Court of Appeals

Michael L. Mr. Perry and Lonnie Long Respondents,

v.

American International Industries et al.

Of whom Johnson & Johnson; LLT Management, LLC
f/k/a LTL Management, LLC; Kenvue, Inc.; and
Johnson & Johnson Holdco (NA), Inc. are the Appellants.

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INTRODUCTION

Plaintiffs are quick to remind the Court that the jury sided with them. But the jury's decision is unsurprising given the trial court's many errors that prevented jurors from hearing the full story. Plaintiffs' self-serving brief—one rife with misdirection, misstatement, and omission—thus fails at the outset. Courts, after all, have no discretion to misapply the law.

Here, the trial court's errors jump from the page. For example, Plaintiffs cannot defend the court's spoliation order. Instead, they say (at 31) that “no spoliation order was entered.” Yet the court itself said “[t]he spoliation order . . . *was made pretrial*,” and the defense cannot “get around *the ruling that I made about spoliation*.” (Trial Tr. (“Tr.”) 1379:5-6, 1755:12-16; R. ___ (emphases added).) The court also showed—again, quoting her words—just how prejudicial that order was: “[I]f you boil it down, [the order] said that if J&J attempt[ed] to introduce evidence of negative testing, the spoliation charge will be read to the jury so that it put the onus on J&J to decide how it wanted to try the case.” (Tr. 1379:7-11; R. ___.) That error alone requires a new trial.

Nor is that error an outlier. Plaintiffs, for example, cannot dispute that Dr. Longo indicated he could not complete a tissue digestion before trial, nor that the J&J Defendants relied on that *sworn* testimony. And even Plaintiffs cannot defend the court's refusal to allow the defense to tell the jury that Dr. Longo indicated he could not do the analysis in the time available to him.

Plaintiffs also have no real defense for the court's refusal to let the jury know that Mr. Perry admitted that he routinely worked in a building “full of asbestos.” (J&J Defs.' Proffer of Evid. Re Library/Hotel Exposures (filed Aug. 6, 2024) [“Library/Hotel Proffer”], Ex. A (Perry Dep. at 130:24); R. ___.) Instead, they claim (at 25) that the “asbestos was next door.” But *Mr. Perry worked in that very building with asbestos even after the ceiling began to collapse*. (*Id.*, Ex. A (Perry Dep. at 131:18-23); R. ___.) Plaintiffs also say (at 13) that “J&J's own experts have found

winchite in JBP,” yet withhold a key fact: None of that winchite has *ever* been found in any mine from which the powder Mr. Perry allegedly used was sourced. (*See* J&J Defs.’ Proffer of Evid. Re Dr. Kuffner’s Excluded Test. Winchite (filed Aug. 13, 2024) [“Winchite Proffer”] at 2; R. ___ (collecting citations).) Plaintiffs also cannot defend keeping from the jury that the FDA concluded “that even when asbestos was present, *the levels were so low that no health hazard existed.*” (J&J Defs.’ Proffer of Evidence Re 1986 FDA Citizen’s Pet. Resp. (filed Aug. 12, 2024) [“Citizen’s Petition Proffer”], Ex. A (July 11, 1986 Ltr. 2); R. ___) (emphasis added). And it would turn due process on its head to allow a court not only to instruct the jury that asbestos in talc products can cause cancer (itself, hotly disputed), but that in fact asbestos in talc products caused the plaintiff’s cancer in particular. Yet that is what the court said here.

These are not the only errors in Plaintiffs’ brief, but they illustrate the point: The trial court’s many errors tainted the jury’s decision and precluded a fair trial. The jury did not hear critical evidence that other courts have admitted, and the trial court’s far-reaching spoliation order prevented the J&J Defendants from meaningfully defending themselves. Reversal is required.

ARGUMENT

I. The Court Erred by Permitting Trial-by-Ambush.

A. Dr. Longo’s belated tissue-digestion analysis was legally flawed.

This case is a classic example of trial by ambush. Three weeks before trial, on July 16, 2024, Dr. Longo indicated that tissue-digestion analysis cannot be done quickly but instead usually takes weeks. (Pre-trial Hr’g Tr. 222:19-20; Tr. 965:9-24; R. ___.) Accordingly, on July 23, 2024, a week after Dr. Longo’s deposition and a week before the pretrial conference, the defense told the court that “the tissue has not yet been divided, let alone delivered to the parties’ respective experts.” (J&J Defs.’ Mot. *in Limine* to Partially Exclude Certain Opinions of Dr. Longo, July 23, 2024, at 1–3; R. ___.) Given how long it takes to do the analysis, that meant “we’re out of time.” (Pretrial

Hr’g Tr. 222:1-18; R. __; *see also* J&J Defs.’ Mot. Reconsider Mot. Exclude Evid. Tissue Testing, Ex. B – Dr. Stanley Geyer Aff.; R. __) The tissue was eventually divided on July 29, and delivered to experts on July 30—less than a week before opening statements.¹ *Id.* Given Dr. Longo’s testimony that it would take weeks to perform the analysis, J&J reasonably understood the case would go to trial without any tissue digestion.

In fact, defense counsel told the court at the pretrial conference: “[W]e can’t get into a situation where there’s a surprise the morning of opening statements about what this tissue allegedly says or doesn’t say.” (Pretrial Hr’g Tr. 222:21-24; R. __.) Yet on August 5, 2024—the morning of opening statements—J&J learned that Dr. Longo surreptitiously had performed a tissue-digest analysis. Even then, however, Plaintiffs did not provide any results until the day trial began. (Tr. 144:21-22; R. __.) Nonetheless, the court not only denied the defense’s request to postpone opening statements, it refused to let the defense ask whether Dr. Longo’s analysis suffered because—by his own sworn account—such analysis could not be done so quickly. (Tr. 145-47, 966:2-10; R. __.)

Despite all of that, Plaintiffs say no one was prejudiced by Dr. Longo’s complete about-face. But their support for that incredible claim is that the defense was able to depose Dr. Longo via Zoom at **10:00 p.m.** on August 6, 2024, a day *after* trial began and the night *before* Dr. Longo testified. (Tr. 72:3-6, 144:10-13; R. __.) A deposition this close to cross-examination—conducted by a defense team in the middle of trying a case—cannot cure the prejudice of being required to open to the jury blind. Plaintiffs also say (at 23) the defense “did not seek a continuance.” Not so. The court warned the defense not to try to delay the trial, (Tr. 55:14-17; R. __) and Plaintiffs

¹ Plaintiffs’ claim (at 12) that “it took several days” after the court’s July 10, 2024 order “to divide the tissue” is misleading at best.

threatened “sanctions” if the defense tried, (Pretrial Hr’g Tr. 13:3-7; R. ___.) Even so, the defense asked the court not to hold opening statements until Plaintiffs provided Dr. Longo’s results. (Tr. 147:3-7; R. ___.) The court refused. (Tr. 147:8-18; R. ___.) And Plaintiffs’ suggestion (at 23-24) that “J&J even opened on the issue of the tissue digestion” cites defense counsel’s lament that “I have no idea what this man is going to tell you.” (Tr. 227:18-21; R. ___.)

The idea that none of this prejudiced the defense blinks reality. The court’s restrictions—including a bar on asking Dr. Longo to explain why he had indicated that he did not have time to do such analysis—struck at the heart of the defense. Plaintiffs were permitted to present digestion as a smoking gun, and the defense had no expert to rebut that testimony. By law, all that is required to show prejudice is “a reasonable *probability* [that] the jury’s verdict was *influenced*” by the court’s error. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480 (2005) (emphases added). In a case like this, where causation is the ball game, ambushing the defense with undisclosed expert evidence that Mr. Perry’s lungs contained asbestos is almost the definition of prejudice.

B. The court compounded its error by disregarding possible alternative causes.

Allowing Dr. Longo to offer a tissue-digestion analysis was highly prejudicial. It became even more prejudicial, however, when the court refused to allow the defense to point out possible alternative explanations for Mr. Perry’s illness that Plaintiffs’ experts never considered.

Dr. Longo found winchite—a substance absent from the mines where the talc Mr. Perry was exposed to came from. (*See* Winchite Proffer at 2; R. ___.) By contrast, Mr. Perry admitted he entered a room “maybe more than two times per month” that was “full of asbestos,” where he would stay “a long period of time.” (Library/Hotel Proffer, Ex. A – Perry Dep. at 130:20-24; 278:22-279:23; R. ___.) Mr. Perry conceded he has a “history of asbestos exposure” because of that job. (*Id.* Ex. C – Dr. Haber Report at 7; R. ___.) And Dr. Longo admitted that winchite can be found in such settings. (J&J Defs.’ Post-Trial Mots., Ex E. – Longo Dep. at 93:16-94:2; R. ___.) Although

the jury should have been told where the winchite could have come from, the court refused to admit the evidence. Plaintiffs misstate the record and the law to defend that exclusion.

First, Plaintiffs say (at 25) the asbestos was “*next door*.” That is a red herring. Even after the ceiling began to “cave in,” Mr. Perry spent “long period[s]” in a storage room “full” of it. (Library/Hotel Proffer, Ex. A – Perry Dep. at 130-31, 279:20-23; R. ___.) Plaintiffs cannot pretend away that testimony. The defense offered sworn testimony, treating records, and expert reports tying Mr. Perry’s exposure to the very type of fibers Dr. Longo found.

Second, Plaintiffs (at 26) defend the court’s misapplication of *Henderson v. Allied Signal, Inc.*, 373 S.C. 179 (2007). *Henderson* requires **plaintiffs** to show product-specific exposures to make a *prima facie* case. Unlike plaintiffs who always bear the burden to demonstrate causation, defendants do not bear any such burden and therefore may point out flaws in the plaintiffs’ experts’ analysis. *Henderson* does not impose any burden on defendants rebutting causation—which would upend basic principles of burdens of proof. *See, e.g., Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005); *accord Menne v. Celotex Corp.*, 861 F.2d 1453, 1463 (10th Cir. 1988).

According to Plaintiffs (at 26), pointing out other ways a plaintiff could be exposed is “essentially an empty-chair defense,” for which the defendant has the burden of proof. Yet this defense “merely focuses the jury’s attention upon the **plaintiff’s duty** to prove that defendant’s . . . defective product was a proximate cause of the accident.” *Fabian v. Minster Mach. Co.*, 609 A.2d 487, 495 & n.5 (N.J. Super. Ct. App. Div. 1992) (emphasis added). True, if a defendant wishes to receive **contribution** or a **setoff**, it must prove that the other party’s actions caused the plaintiff’s injury. *See Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 427 (Ct. App. 2022) (following S.C. Code 15-38-15 and *Dawkins v. Sell*, 434 S.C. 572, 590 (Ct. App. 2021)). But the mere “fact that [a defendant] may be entitled to a setoff” because of an affirmative defense “does not preclude

him from offering evidence to show the jury why it should not enter a judgment against him at all.” *Dawkins*, 434 S.C. at 591. After all, “[u]nder a general denial a defendant may always introduce any evidence which tends to disprove that which the plaintiff must prove as a basis for recovery.” *Imperial Die Casting Co. v. Covil Insulation Co.*, 264 S.C. 604, 610 (1975).

Third, the court’s error was anything but harmless. Plaintiffs were permitted to argue in closing that “[t]he winchite proves they did it.” (Tr. 2046:3-6; R. __.) Meanwhile, the defense was barred from presenting testimony, medical records, and expert analysis showing the opposite—that winchite in Mr. Perry’s lungs proved that the J&J Defendants did **not** “d[o] it.” And regardless of whether the hotel exposure caused Mr. Perry’s mesothelioma, at minimum, the evidence of that exposure ***explained the presence of the winchite***. Without that evidence, the jury was left with the false impression that the winchite could only have come from the talc. In fact, the prejudice was especially biting because the court allowed Plaintiffs to introduce an oncologist’s note but redacted the reference to Mr. Perry’s prolonged exposure to an asbestos-filled room with a caved-in roof, creating the misleading impression that talc was the only exposure. Defense counsel objected, arguing that because Plaintiffs used that record to suggest talc was the only occupational exposure noted, fairness requires that the reference to hotel work come in. (Tr. 397:10-399:22; R. __.) Yet the court left the jury with just such a one-sided and inaccurate account.

C. The court also erred regarding Dr. Kuffner.

There is also clear evidence that none of the mines at issue here even have winchite—a fact that alone defeats Plaintiffs’ theory. But the trial court *sua sponte* barred the defense from offering testimony on this point from Dr. Kuffner, J&J’s Chief Medical Officer and corporate representative, who could testify that he had seen no evidence that any of the mines have winchite. For the reasons explained in the J&J Defendants’ initial brief, that was legal error.

Plaintiffs' attempt to defend that error fails. Dr. Kuffner, for example, was not required to be an expert to testify about what J&J's *records* show—namely, that none of the relevant mines have winchite. While a trial court may exclude undisclosed expert opinions, it may not bar a corporate representative from testifying about company records. *See, e.g., FV-I, Inc. v. Dolan*, 2017 WL 157139, at *2 (S.C. Ct. App. Jan. 11, 2017) (corporate witness may testify about company records even if he “did not personally participate in creating” them).

In fact, although Plaintiffs say (at 28) that Dr. Kuffner should not be able to testify about “whether or not he had seen reference to winchite in Johnson & Johnson’s records,” they offer no argument why that would be so, beyond that (i) he “was, in fact, allowed to give that testimony,” and (ii) “there is nothing improper about the exclusion of testimony from a fact witness” requiring “specialized skill” or the like. As to (i), Plaintiffs’ record citations (at 27) do not support their contention that Dr. Kuffner was able to testify as to the source of “any asbestos minerals found in Mr. Perry’s lungs.” Instead, Dr. Kuffner, on direct, testified only that he “wouldn’t say that [JBP] caused [Mr. Perry’s] mesothelioma.” (Tr. 1208:12-14; R. __.) When asked by defense counsel whether he had seen records of winchite detection in J&J’s source mines, the court *struck* Dr. Kuffner’s testimony, excluding “an[y] attempt to discuss the presence of that mineral in these mines.” (Tr. 1293:16-1294:20; R. __.) Plaintiffs elsewhere concede (at 27) that “the trial court stopped the line of questioning.” And as to (ii), Plaintiffs’ argument is a *non sequitur*. No specialized skill or knowledge is required to testify about what information is found in the J&J Defendants’ records.

Plaintiffs thus retreat (at 28-29) to arguing that there was no prejudice because the defense could “rebut[] evidence of testimony presented by Plaintiffs” or call an “expert witness.” That misses the point. The fact that nothing in decades’ worth of records supports Plaintiffs’ theory

dooms punitive damages (at least) by confirming that the company had no reason to believe JBP contained winchite. Nor could any expert provide relevant evidence of the J&J Defendants' *subjective* knowledge. The consequence of the court's error thus was to leave Dr. Longo's digestion results un rebutted. Plaintiffs even told the jury those fibers allegedly revealed "the exact talc and the exact asbestos that was in Johnson's Baby Powder." (Tr. 2234:16-20; R. ___.) The witness best positioned to disagree was silenced.

D. Plaintiffs fundamentally misconstrue the defense's argument regarding closing statements.

As the initial brief explains, Plaintiffs' counsel tainted jury deliberations by falsely stating that the J&J Defendants "couldn't find an expert." Yet even a glance at the initial brief confirms the J&J Defendants have never contended on appeal that Plaintiffs' counsel's remark constituted independent attorney misconduct or that the missing-witness rule is implicated. Instead, this episode underscores the prejudice resulting from the trial court's evidentiary rulings. Plaintiffs were permitted to tell the jury no expert would "look [them] in the eye" and defend J&J, even though the defense was ambushed by Dr. Longo's last-minute tissue-digestion results and the court prohibited Defendants from referencing the absence of winchite in their source mines. That one-two punch magnified the prejudice of Plaintiffs' counsel's improper statement.

Plaintiffs' response does not address that argument. Instead, they devote pages (at 29-31) to defending counsel's closing and to asserting that the missing-witness rule does not apply. The J&J Defendants, however, did not advance a missing-witness argument. The argument is, and remains, that this episode illustrates how the trial's evidentiary rulings wrongly left the jury with the sole impression that only JBP could have caused Mr. Perry's illness, a misimpression the defense was not permitted to dispel. To this argument, Plaintiffs offer no response.

Regardless, Plaintiffs are wrong even on their own terms. For example, they accuse (at 29) the defense of “chang[ing] its argument on appeal.” That is false. The defense objected to Plaintiffs’ improper argument below. (*See* Tr. 1885:4-15; R. ___). Plaintiffs suggestion (at 30) that counsel was just “comment[ing] on J&J’s failed promise to present testimony” also ignores the critical difference between not calling an expert and being unable to call one. And contrary to their claim (at 30), this was no “insubstantial error[.]”—it was a deliberate misstatement. In a case that turned on expert testimony, such bad-faith insinuation went to the heart of the dispute.

II. The Court’s Unlawful Spoliation Order Gutted the Defense.

Although the trial court committed many errors, its flawed spoliation order may be the most straightforward basis for reversal. After all, Plaintiffs do not defend the court’s analysis, but instead claim (at 31, in an argument spanning just two pages) that “[t]here was no spoliation order entered in this case.” That claim is false. Plaintiffs’ fallback arguments are equally wrong.

A. The court issued a spoliation order.

For decades, the J&J Defendants have tested their talc and found no asbestos. In fact, an external lab concluded after “over 15 years of closely exampl[ing] this product” that there was none. (*See* J&J Defs.’ Resp. to Pltfs. MIL #22, Ex. A – *Hood-McBrayer* Resp., Ex. 7 – McCrone Ltr.; R. ___.) This evidence is doubly relevant. Not only does it support the theory that the J&J Defendants did not cause Mr. Perry’s illness, but it destroys punitive damages. Unfortunately, the trial court entered a spoliation order that blocked the defense from discussing those results.

The distinction between the spoliation order and the adverse-inference instruction is critical. The *Hood-McBrayer* order that the court adopted in this case made a threshold finding that the J&J Defendants had spoliated testing evidence. That ruling barred the defense from introducing decades of negative asbestos tests by warning them that doing so would trigger an adverse-inference instruction to the jury. In other words, there were two steps: *If* the defense

attempted to present such evidence, *then* the court would issue an adverse-inference instruction telling the jury to presume the missing testing materials contained asbestos. The spoliation order thus imposed immediate and ongoing restrictions on the defense throughout trial, while the threatened jury instruction was the coercive measure constantly hanging over their heads.

The J&J Defendants' initial brief explains why that spoliation order violates black-letter law—a point courts around the country confirm. (*See, e.g.*, App. Br. at 21-23.) As those courts have explained, it is “baseless” to accuse the J&J Defendants of failing to retain data decades before litigation. *Domey v. Albertsons Cos., Inc.*, 2025 WL 1520911, at *2 (Cal. Super. Mar. 14, 2025). The spoliation order runs headlong into that body of law.

By failing to offer *any* contrary argument, Plaintiffs essentially concede error. Instead, they assert (at 31) that the court did not enter a spoliation order at all. That assertion is wrong. During the pretrial hearing, the court granted Plaintiffs' motion *in limine* requesting the same framework from the *Hood-McBrayer* case. The court thus stated that “[t]he spoliation order taken from *Hood McBrayer* was one such determination [] made pretrial.” (Tr. 1379:5-6; R. __.) Nor was this the only time the court confirmed that the spoliation order was in effect. The court referred to “the ruling that [it] made about spoliation, which . . . wouldn't be triggered unless . . . J&J offer[ed] information about its testing.” (Tr. 1755:10-16; R. __.) The court also explained that her spoliation order did not prevent Plaintiffs from suggesting that J&J had concealed information, adding: “And we're not going to, under the guise of something I said in a spoliation order, preclude the jury from hearing that evidence.” (Tr. 1023:11-1024:5; R. __.) The court further warned that testimony about negative testing “certainly triggers—that's a risk you take if you want to go there. I am reading the spoliation charge to the jury.” (Tr. 1379:25-1380:4; R. __.) The court stressed that the defense could “open the door” not only by “affirmatively presenting some kind of evidence,” but also

through cross-examination. (Tr. 1395:7-1396:3; R. __.) And the court acknowledged its “heartburn” over whether “the spoliation situation ha[d] been triggered” by Dr. Hopkins’s testimony. (Tr. 1718:14-19; R. __.)

These statements confirm that the spoliation order was in effect. And that is how Plaintiffs understood the ruling as well. Indeed, mid-trial, they argued that questioning that implied negative asbestos tests existed had “opened the door” to the spoliation charge. (Tr. 1020-24; R. __; *see also* Tr. 1163-64, 1395-96; R. __.) Plaintiffs now try to run away from what they said below, but the record speaks for itself. Just as the trial court intended, moreover, the J&J Defendants were forced to try their case without presenting decades of negative asbestos testing to avoid the threatened adverse inference jury instruction. Plaintiffs do not cite a single case—from any court—suggesting that obeying an unlawful order means the order’s legality cannot be challenged on appeal. *Accord MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) (party can challenge a purported legal duty without violating that duty). If Plaintiffs’ rule were the law, no one could challenge a granted motion *in limine* without disobeying it. That is not the law anywhere.

B. The spoliation order was highly prejudicial.

Shifting gears, Plaintiffs argue (at 31) that the “potential entering” of an adverse-inference instruction—as punishment—was not prejudicial. But the court explained that “if J&J attempts to introduce evidence of negative testing, the spoliation charge will be read to the jury so that it put the onus on J&J to decide how it wanted to try the case.” (Tr. 1379:5-11; R. __.) In other words, the pretrial ruling on Plaintiffs’ motion *in limine* expressly limited what evidence the defense could present. Worse still, the contours of that order shifted during trial, with the court expanding it to cover even “project[ing] the notion of no asbestos.” (Tr. 1025:22–1026:4; R. __.) The result was a moving target that left the defense unable to know what evidence could be safely presented without risking a devastating sanction. It is hard to imagine greater prejudice.

Plaintiffs' effort to minimize that prejudice cannot withstand scrutiny. As a threshold matter, Plaintiffs do not (and cannot) contest that the court's ruling regarding what triggered the adverse-inference instruction changed mid-trial. They instead argue (at 31) that no prejudice exists where "J&J failed to identify any witness that could not be called to testify as a result of the order." Yet Plaintiffs cannot deny that, because of the unlawful spoliation order, the defense could not present significant amounts of testing it has shared with juries in other jurisdictions.

Plaintiffs thus fall back on the claim (at 31) that the defense "was not prevented from discussing negative test results." Again, however, Plaintiffs have no answer for the many negative results of talc samples that the defense could not introduce. (Pretrial Hr'g Tr. 152:4-155:15; R. __.) Plaintiffs cite the cross-examination of Dr. Haber, which reveals that the defense was only able to introduce the FDA's negative testing—not the decades of negative testing performed by third parties on JBP. (*Compare* Tr. 496:6-497:1 *with* J&J Defs.' Reply MIL #5, Ex. B – Defs.' Mar. 2021 Supp. Resps. Pltfs. First Set of Interrogatories and Requests for Production of Documents; R. __.) Plaintiffs' other cites similarly miss the mark. (*See* Tr. 604:7-606:3 (J&J's funding of certain testing), 1052:3-23 (testing process), 1060:4-1064:10 (testing process and funding); R. __.) And the mere fact that some studies may have been mentioned does not remotely suggest that defense counsel—who did all they could to avoid violating the court's spoliation order—were able to make full *use* of this key evidence. Suffice it to say, the trial court has never suggested that the spoliation order did not work as intended by putting "the onus on J&J to decide how it wanted to try the case." (Tr. 1379:7-11; R. __.)

As a last-ditch effort, Plaintiffs (at 32) fault defense counsel for not announcing until after Plaintiffs rested that there would be no defense case-in-chief. But that gets causation backwards. The court's bar on key evidence helps explain why the defense did not present an affirmative case.

In all events, nothing requires tipping off a plaintiff that the defense is going to rest.

III. The Court Repeatedly Erred Regarding Causation.

A. Plaintiffs cannot defend the court's treatment of A-I-I.

The court not only refused to sever A-I-I, but also told jurors that asbestos in a talc product “was a substantial factor in the development of Michael Perry’s mesothelioma,” thus rejecting that his illness was spontaneous. (Tr. 156:17-22; R. __.) Yet over one-third of mesotheliomas develop spontaneously. (J&J Defs. Resp. to Pltfs. MIL #17, Ex. A - Diette Report at 44 [“Diette Report”]; R. __.) It also refused to tell the jury that its finding against A-I-I was procedural. None of this was consistent with *Lanzo v. Cyprus Amax Mins. Co.*, 254 A.3d 691 (N.J. Super. Ct. App. Div. 2021).

Nonetheless, Plaintiffs now claim (at 33) that the court’s instruction did not “encourage[] the jury to find J&J talc products caused and/or contributed” to his disease. That defies common sense. Plaintiffs’ theory was that JBP contained asbestos and any amount of asbestos in cosmetic talc can cause mesothelioma. Plaintiffs’ counsel even solicited testimony from Mr. Perry’s doctor that no “level of asbestos . . . is safe for a person to breathe and not get sick.” (Tr. 706:22-25; R. __.) What rational juror could hear *from the court* that a talc product caused Mr. Perry’s mesothelioma but conclude that JBR—alleged to contain the same substance—did not?

The prejudice was further compounded when the court refused to clarify that A-I-I’s default was a procedural matter rather than a substantive finding. Far from “[i]njecting superfluous legalese”—Plaintiffs’ words (at 34)—such a clarification would have ensured that the jury understood that the default was unrelated to the merits. It insults jurors’ intelligence to suggest that only a lawyer can grasp the difference between a judge punishing a defendant for missing deadlines (what happened) versus concluding that asbestos in a talc product caused Mr. Perry’s illness (what the jury reasonably believed happened). Plaintiffs have no answer for this basic point.

Plaintiffs' attempt to cabin *Lanzo* also misses the mark. The prejudice there did not turn only on a supplier-manufacturer relationship, but additionally on the risk that jurors would impute one defendant's procedural sanction to another. In fact, this case is easier than *Lanzo*; there, at least, the court did not tell the jury that asbestos caused the plaintiff's cancer—thus preventing other defendants from arguing that the illness had nothing to do with asbestos. Here, by contrast, the court was obligated “to avoid prejudice,” S.C. R. Civ. P. 42(b), but instead *invited* prejudice by outright instructing that asbestos caused Mr. Perry's illness.

B. Plaintiffs cannot defend Dr. Haber's impermissible “any exposure” opinion.

Plaintiffs also insist (at 34) that Dr. Haber merely offered a “cumulative dose” opinion, even though he told the jury that “a brief exposure, a minimal exposure, a seemingly inconsequential exposure, is still capable of causing mesothelioma.” (Tr. 405:2-4; R. __.) He further testified that “there is no known safe level,” (Tr. 578:5; R. __), and even “*one day's* worth of exposure” can cause the disease. (Tr. 402:23-403:13; R. __ (emphasis added).) These are not abstract statements about how asbestos accumulates over time; they are affirmative claims that any exposure—no matter how fleeting—can cause mesothelioma. That is the very “any exposure” theory courts reject and which Plaintiffs do not (and cannot) defend.

Tellingly, Plaintiffs' own cases underscore the difference. In *Jolly*, *Edwards*, and *Glenn*, the courts admitted testimony that cumulative exposures over years of work at industrial sites added to disease risk, but only because the experts did not equate each trivial encounter with asbestos as independently causative. *See, e.g., Edwards v. Scapa Waycross, Inc.*, 442 S.C. 387, 392, (2024) (approving testimony that “as the amount of asbestos accumulates in the body, the likelihood of developing mesothelioma increases”); *Glenn v. 3M Co.*, 440 S.C. 34, 64 (Ct. App. 2023) (emphasizing experts did not “testify[] that ‘each and every exposure’ was a substantial factor”); *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 634 (Ct. App. 2021) (stressing that a plaintiff cannot

testify that “every exposure rises to the level of a *substantial factor*” (emphasis in original)). Here, by contrast, Dr. Haber testified that even “*a seemingly inconsequential exposure*” may suffice. (Tr. 405:2-4; R. ___ (emphasis added).) Such testimony is flatly contrary to law.

C. Excluding the FDA Response also was reversible error.

It is not just the J&J Defendants’ opinion, moreover, that asbestos allegedly in their products cannot cause cancer: the FDA reached the same decision decades ago, concluding under the process set forth in 21 C.F.R. § 10.30 that “even when asbestos was present, the levels were so low that no health hazard existed.” (Citizen’s Pet. Proffer, Ex. A – 1986 FDA Resp. at 2; R. ___.) Unsurprisingly, courts routinely admit this evidence. (See Citizen’s Pet. Proffer, Ex. C – *Boyd-Bostic* TT Excerpts at 1276:3–1277:14; Citizen’s Pet. Proffer, Ex. D – *Lee* TT Excerpts at 2665:20-2666:21; Citizen’s Pet. Proffer, Ex. E – *Garcia* TT Excerpts at 127:7–16; R. ___.)

Plaintiffs do not defend the trial court’s rationale that the FDA’s determination was just “a letter between two people” (Pre-trial Hr’g Tr. 145:12-14; R. ___), nor do they say it is hearsay. Instead, they argue (at 37) that the FDA’s analysis was “false,” “unreliable,” and unnecessary. That is wrong and not a basis for excluding the FDA’s conclusion for at least four reasons.

First, that assertion is untrue. Plaintiffs allege (at 37) that J&J Defendants misled the FDA by failing to include a 1972 report by Dr. Goudie that reported tremolite in two samples. Plaintiffs, however, ignore that reports of tremolite levels could not be substantiated. (See J&J Defs.’ Resp. to Pltfs. MIL #19, Ex. C – Nov. 15, 1972 Ltr. to Dr. Goudie; R. ___.) And Plaintiffs’ claim (at 37) that “J&J was aware that asbestos minerals had been found in its talc” hundreds of times conflates tremolite with asbestos—two different substances. (Tr. 1245:8-24; R. ___.) Three courts have excluded the report Plaintiffs cite for that assertion. See *Doomey*, 2025 WL 1520911, at *16; *Lovell v. Johnson & Johnson*, No. 21-2086 (Mass. Sup. Ct. July 2, 2025); *Paluzzi v. Johnson & Johnson*, No. 21-2019 (Mass. Sup. Ct. May 22, 2025). No wonder the FDA has never found that the studies

it relied on to prepare its Response were falsified, nor has it claimed that the J&J Defendants committed fraud on the FDA.

Second, the FDA does not make health determinations based on any company's say-so. It conducts independent analysis. Here, for example, the FDA Response was based on decades of data and tests conducted by independent entities—including *the FDA itself*. (Tr. 1259:25-1271:21; R. __; see also Citizen's Pet. Proffer, Ex. A – 1986 FDA Resp. at 4–191) (describing decades of FDA analysis); R. __.) Courts provide a “high level of deference” to FDA determinations precisely like this one that “rest[] on the ‘agency’s evaluations of scientific data within its area of expertise.’” *Serono Lab’ys, Inc. v. Shalala*, 158 F.3d 1313, 1320 (D.C. Cir. 1998). In fact, any suggestion that the FDA erred is rebutted by Dr. Longo himself, who admitted that in all his testing of J&J products from the J&J archive, the lowest asbestos concentration he ever reported was .0000033% in a single sample, while the highest was 0.0092%, (Tr. 910:19–911:1-6; R. __)—well below the FDA’s 0.1 percent “worst-case” assumption, (Pltfs. Trial Ex. 4274; R. __).

Third, in all events, Plaintiffs’ objections go to the weight of the evidence—not its admissibility. The FDA made its own decision after reviewing the data. If Plaintiffs want to argue to a jury that the FDA got it wrong and the J&J Defendants did not subjectively rely on the FDA’s conclusion, they are free to do so. What is improper, however, is preventing the jury from hearing the evidence at all and making its own determination. Plaintiffs also contend (at 38) that the FDA’s analysis was limited to “only two years” of exposure and so should be treated as irrelevant given Mr. Perry’s much longer alleged exposure. Yet Dr. Haber told the jury that even “a seemingly inconsequential exposure[] is still capable of causing mesothelioma.” (Tr. 405:2-4; R. __.) In any event, the FDA considered studies of asbestos exposure that went well beyond two years. (*See*

Citizen’s Pet. Proffer, Ex. A – 1986 FDA Resp. at 40, 48; R. ___.) And the FDA’s conclusion was categorical: “there is no need to require a warning label on cosmetic talc.” That conclusion did not turn on exposure length. Once more, Plaintiffs can argue to the jury that the FDA got it wrong, but the court committed legal error by keeping the FDA’s view from the jury.

Finally, Plaintiffs protest (at 38-39) that the defense did not need the FDA Response and could have made the point just as well in other ways. Yet their suggestion that the defense should have relied on “J&J’s expert Dr. Barlow” withholds a critical fact: The trial court effectively excluded her testimony by refusing to modify the trial schedule to allow her to testify. (Tr. 1358:1-6; R. ___.) Setting that aside, there is a night-and-day difference between a paid defense expert and an official government document. The same flaw afflicts Plaintiffs’ assertion (at 38-39) that testimony from a paid J&J employee—uncorroborated by official documentation—is just as good as an official statement from the FDA that no health hazard existed.

D. Drs. Weill and Diette conducted the very review the court demanded.

Even if the FDA Response were properly withheld from the jury, there is no basis to exclude Drs. Weill and Diette, who were prepared to testify that Mr. Perry’s cumulative exposure was too low to cause his illness and the much more probable explanation is natural mesothelioma. Plaintiffs’ response simply parrots the trial court’s reasoning without addressing the initial brief’s explanation why that reasoning is wrong. For example, without any citation, Plaintiffs state at (40) that “neither Dr. Diette nor Dr. Weill, prior to concluding that Mr. Perry’s mesothelioma was either spontaneous or idiopathic, reviewed evidence about the [alleged] asbestos content of JBP or peer-reviewed literature regarding the presence of asbestos in talc.” But as J&J discussed in its initial brief, Dr. Diette and Dr. Weill addressed exactly that. (*See* Initial Brief at 37-38 (citing Diette Report at 54-59; J&J Defs’ Opp. to MIL # 21, Ex. B – Weill Report at 3-4, 130-131 [“Weill Report”]; *id.* at Ex. D – Weill Dep. at 44:3-7 [“Weill Dep.”]).)

Plaintiffs then contend (at 40) that Drs. Weill and Diette did not use “a reliable method” or “reliable dat[a].” Both, however, reviewed testing results, fiber types, and exposure data, and incorporated epidemiological studies showing no elevated risk among heavily exposed talc miners and millers. To dismiss these experts’ opinions as “unreliable” simply because they concluded Mr. Perry’s cancer occurred naturally disregards not only the scientific literature but also Plaintiffs’ own expert, Dr. Brody, who has conceded that cancers—including mesothelioma—arise spontaneously. (See J&J Defs. Motions for JNOV and New Trial, Ex. C – Garcia Tr., 210:18-20; *id.*, Ex. D – Brody *Hirshberg* Dep., 28:10-13; *see also* Weill Dep. at 15:7-13, 17:1-18:3, 18:23-19:9, 20:16-21; R. __.) In fact, Dr. Weill cited the Tomasetti *Nature* study, which concluded nearly one-third of mesotheliomas occur this way. (See Weill Report at 118; R. __.) That is mainstream science, not speculation.

Plaintiffs further criticize (at 40) these experts for using the terms “spontaneous” and “idiopathic” interchangeably. But one definition of “idiopathic” is “arising spontaneously.” <https://www.merriam-webster.com/dictionary/idiopathic>. In any event, Dr. Weill and Dr. Diette both made their opinions regarding the cause of Mr. Perry’s mesothelioma very clear. Dr. Weill stated that it arose “due to internal replication errors and without an external cause.” (Weill Report at 118; *see also id.* at 1-4, 130-31; R. __.) Dr. Diette reached a similar conclusion. (Diette Report at 63-64; R. __.) Plaintiffs’ criticism amounts to no more than a semantic quibble regarding what to *call* that form of causation. That is no basis to exclude either’s causation opinion.

Plaintiffs additionally say (at 40) that neither “considered Mr. Perry’s exposure history or his medical records which reveal the absence of any genetic mutation.” Not so. Dr. Weill *did* consider the facts of this case, including Mr. Perry’s exposure history and medical records. (See Weill Report at 5-21; R. __.) As the initial brief explains, moreover, Dr. Weill reviewed dozens of

expert reports about J&J products and the levels of asbestos Mr. Perry was supposedly exposed to. Contrary to Plaintiffs' claim (at 40-41), those reports amply cover "testing documents from J&J." And Plaintiffs' theory that there is an "absence of any genetic mutation" goes nowhere. Mesothelioma *is* a genetic mutation—that's what cancer *is*. *E.g.*, Gene Changes and Cancer, Am. Cancer Soc., <https://www.cancer.org/cancer/understanding-cancer/genes-and-cancer/gene-changes.html>.² In other words, there is a genetic mutation here by definition. Plaintiffs' theory thus appears to be that some preexisting mutation is a prerequisite for the natural development of mesothelioma. Despite bearing the burden of proof, however, Plaintiffs cite *nothing* in support of such a preexisting "mutation" theory.

Furthermore, Plaintiffs' refrain (*e.g.*, at 40) that "[t]here is no scientific literature to support the conclusion that a mesothelioma can be caused 'spontaneously' when there is a history of asbestos exposure" is bewildering. There is zero basis in science that exposure to asbestos creates an *immunity* against naturally occurring mesothelioma, the upshot of Plaintiffs' position. Because Plaintiffs' expert concedes (as he must) that mesothelioma can occur spontaneously, logic demands an explanation why that fact of nature would no longer apply after someone has been exposed to a known carcinogen. Plaintiffs never attempt to square the circle.

Equally unfounded are Plaintiffs' attacks on qualifications. Plaintiffs again parrot the trial court to say, without any citation (at 41), that Dr. Diette's expertise is "only" in asthma and COPD. Yet Plaintiffs do not attempt to address Dr. Diette's qualifications outlined in J&J's initial brief (at 38). He is a Professor of Pulmonary and Critical Care Medicine, Epidemiology, and Environmental Health at Johns Hopkins, with a degree in epidemiology and extensive experience regarding

² This Court may "take judicial notice of . . . facts in the field of any particular science which are capable of demonstration by resort to readily accessible sources of indisputable accuracy . . ." *In re Harry C.*, 280 S.C. 308, 309-10, (1984) (quotation marks omitted).

environmental causes of human disease. (Defs.’ Expert & Fact Witness Disclosure at 10-11.) Dr. Weill is a pulmonologist with decades of clinical experience treating asbestos-related conditions. (*Id.* at 75-77.) Notably, Plaintiffs’ own specific causation expert is a pulmonologist. (J&J Defs.’ MIL to Partially Exclude Dr. Haber at 3-4; R. __.)

Finally, Plaintiffs rejoin (at 41) that “Drs. Diette and Weill were not completely excluded from testifying.” The point of their testimony, however, was to help prove that Mr. Perry’s having mesothelioma does not mean asbestos caused it, much less (nonexistent) asbestos in J&J’s products. Their analysis did just that. Forbidding them from discussing scientific facts that Plaintiffs’ own expert, Dr. Brody, admits are true, is tantamount to excluding them altogether.

E. The court also misapplied South Carolina law in other respects.

After preventing the defense from introducing critical evidence that courts elsewhere allow, the court misstated causation while allowing Plaintiffs’ counsel to grievously mischaracterize that law and inflame the jury. As a matter of law, a defendant’s actions cannot be a “substantial factor” in any case where “other actors’ conduct is the predominant factor in bringing the harm at issue.” *Glenn*, 440 S.C. at 59. Plaintiffs’ counsel, moreover, was flatly wrong to tell the jury that “the only way” J&J could prevail was “if they played zero role,” (Tr. 2048:7-8; R. __)—a standard that reads “substantial” out of the law. And allowing Plaintiffs to accuse the J&J Defendants of abusing babies and selling poison to children is indefensible.

Plaintiffs, however, claim (at 42) that the court “properly instructed” the jury because the instruction referenced frequency, regularity, and duration. But that does not answer the relevant question. The court never defined what makes a cause “substantial,” leaving jurors to guess how to distinguish a legally sufficient cause from a trivial one. Courts have recognized that “substantial contributing factor” language, when left undefined, is inherently confusing. *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 733 (Va. 2013). Without a definition, jurors could not apply the standard

consistently or correctly. And allowing Plaintiffs to say that the J&J Defendants had to play “zero role”—which is not the standard—made the confusion even worse.

Plaintiffs retort (at 42-43) that “J&J’s proposed Charge . . . defines ‘substantial factor’ in the same fashion.” This is yet another argument with a material omission. The J&J Defendants submitted a separate set of instructions and argued against Plaintiffs’ proposed language. (Defs.’ Objection to Proposed Instruction on Parties in Default and Conditional Motion to Sever 1-2, Aug. 3, 2024.) *After* the court rejected Defendants’ proposal, they submitted other language. (Tr. 1775:14-20; R. __.) And no amount of “context”—Plaintiffs’ word (at 43)—changes the fact that Plaintiffs’ counsel told the jury that any “role” greater than “zero” means that J&J Defendants can’t “win.” *Accord Simmons v. State*, 331 S.C. 333, 338 (1998) (requiring new trial where “solicitor misstated the law in his closing argument”).

Plaintiffs similarly shrug off (at 43-45) their disgraceful closing argument. Yet they concede that the defense objected to their attempts to inflame the jury. Their claim (at 44) that there is a meaningful difference between doing “the most heinous acts” possible to “babies” (objected to at Tr. 1946:9-12; R. __) and phrases like “worst carcinogen” (not separately objected to) goes nowhere. What matters is the defense made its objections clear. Regardless, Plaintiffs are wrong (at 44-45) that accusing a defendant of harming babies can be excused as a “minor infelicit[y]” or “verbal fillip.” Instead, such inflammatory language requires a mistrial. *See, e.g., State v. Northcutt*, 372 S.C. 207, 222-23 (2007) (use of the phrase “open season on babies” requires a new trial). Courts have repeatedly recognized the seriousness of such misconduct, including in other cases involving Plaintiffs’ counsel. *See Hernandezcueva v. E.F. Brady Co., Inc.*, No. BC475956, at 6 (Cal. Super. Dec. 21, 2023) (setting aside \$107 million verdict after finding, *inter alia*, “[p]ervasive misconduct by plaintiffs’ counsel”).

IV. The Court Erred Regarding Successor Liability

The court should not have found any of the J&J Defendants liable. But at a minimum, it should not have concluded that Holdco and Kenvue are successors-in-interest to Old JJCI. The fundamental problem with Plaintiffs' theory is that there is no basis to fear an uncollectible judgment because J&J continues to exist. Plaintiffs' efforts to escape that point fail.

A. Texas law applies.

Plaintiffs offer no good reason why Texas law—which would exclude Holdco and Kenvue—does not control. Instead, they conflate the law underlying their products-liability claims with the choice of law analysis for successor liability. These issues are wholly separate.

Plaintiffs, for example, argue (at 46) that South Carolina law should govern successor liability because their claims “sound in tort.” But the nature of Plaintiffs' claims is distinct from the question of which entity is legally responsible for payment. Successor liability is not a tort—it is a corporate law doctrine that determines whether liabilities follow a restructuring. Neither Holdco nor Kenvue committed any alleged tort against Mr. Perry; they are newly created entities. Imposing liability on them would expand tort law beyond its limits and ignore that Texas law, which governed the restructuring, controls the *allocation* of liabilities. See *E-Quest Mgmt., LLC v. Shaw*, 433 S.W.3d 18, 23 (Tex. Ct. App. 2013). Expanding tort law to encompass newly created entities defies the logic of both corporate law and foundational choice-of-law principles.

The cases Plaintiffs cite do not hold otherwise. *Bannister v. Hertz Corp.*, 316 S.C. 513 (Ct. App. 1994), applied *lex loci delicti* to determine substantive tort standards governing a car accident, not to decide whether a corporate successor had assumed liabilities. Likewise, *Boone v. Boone*, 345 S.C. 8 (2001), stands for the uncontroversial proposition that tort claims are governed by the law of the place of injury, but it did not involve the distinct question of whether one entity is legally responsible for another's obligations.

B. Even if South Carolina law applied, Plaintiffs are wrong.

Plaintiffs do not dispute that South Carolina “favors the free transfer of assets and disfavors successor liability.” *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 269 (2018). Instead, they jump (at 47) to exceptions for “mere continuation,” “fraudulent transfer,” and “blurred corporate identities.” The record does not support these exceptions.

First, Plaintiffs’ conclusion (at 47) that the record is “replete” with evidence of continuity between Holdco or Kenvue *and Old JJCI* defies reality. For instance, in trying to argue (at 47) that “Holdco and Kenvue held themselves out as the same company (Old JJCI),” Plaintiffs make no distinction between Johnson & Johnson, the parent corporation, and Old JJCI, the subsidiary that sold JBP and which Plaintiffs argue is continued via Holdco and Kenvue. Johnson & Johnson and Old JJCI are *distinct* legal entities. Indeed, the deposition that Plaintiffs cite from Mr. Mittenthal, a corporate representative of Kenvue, specifically refers to projects and employees that transferred from *Johnson & Johnson* to Kenvue—not *Old JJCI*. (See Pltfs.’ Trial Br. on Successor Liability, Ex. 34 – Kenvue Depo. (Mittenthal), Vol. II, 7/30/24, 345:14-346:6; R. __.)

Plaintiffs’ effort to blur corporate lines goes beyond confusing Old JJCI with its parent. They claim that Johnson & Johnson exercises control over Holdco and Kenvue. Yet what is missing is evidence that *Old JJCI owned or controlled Holdco or Kenvue*. Such evidence is nowhere to be found because Plaintiffs’ theory is chronologically impossible. Old JJCI ceased to exist before Holdco and Kenvue were formed. Holdco (formally New JJCI) was created in the corporate restructuring where Old JJCI ended and LTL and New JJCI began. Kenvue was not created until after that. (Kenvue, Inc., Initial Registration (Form S-1) Jan. 4, 2023; R. __.) Plaintiffs also admit (at 48) that absent ownership, there must at least be control. Yet Holdco has no day-to-day operations at all (Post-trial Hr’g Tr. Vol. I at 28:5-8; R. __), and Kenvue is a separately incorporated public company with its own board and investors, and a distinct portfolio of brands,

operations, and employees (*id.* at 28:18-25). Thus, by their own standard, Plaintiffs' theory fails.

Second, Plaintiffs cannot invoke exceptions for fraudulent transfer. Their insinuation (at 48-49), for example, that the J&J Defendants "transferred or moved to place the predecessor's assets out of reach of creditors" or "sought to use the bankruptcy system" to evade liability is backwards. To the contrary, the restructuring *overfunded* Pecos River to ensure payment of claims. In fact, the Third Circuit emphasized that the bankruptcy filing was dismissed because Johnson & Johnson offered too *much* of a "backstop," not too *little*. *In re LTL Mgmt.*, 64 F.4th 84, 111 (3d Cir. 2023); *see also id.* at 110-11 (noting the "irony" that efforts to ensure payment "weakened [the] case to be in bankruptcy"). Notably, Plaintiffs do not attempt to defend the trial court's invocation of *Schmoll v. ACandS, Inc.*, 703 F. Supp. 868, 871 (D. Or. 1988). That is because this case and that one are opposites; rather than evading liability through asset transfers, Johnson & Johnson (and Pecos River) have gone out of their way to ensure payment of any liability.

Nor does the record support their "blurred corporate identities" theory. At the post-trial hearings, defense counsel explained that Holdco is a holding company with no day-to-day operations, and that Kenvue is a separately incorporated, publicly traded company with its own board, its own investors, and a separate portfolio of brands, operations, and employees. That is the opposite of "blurring." The court itself recognized it could not "make the leap on the basis of conventional motions of successor liability." (Post-trial Hr'g Tr. Vol. II 162:22-24; R. ___.) In short, Plaintiffs offer rhetoric about "intermingling" but no evidence that Old JJCI's assets were stripped to hinder creditors or that Holdco and Kenvue failed to maintain corporate separateness.

C. Plaintiffs' punitive-damages theory also fails.

Finally, at a minimum, there is no basis to impose punitive damages on Holdco and Kenvue. Plaintiffs say nothing about the relevant statutes. "Punitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the

defendant's willful, wanton, or reckless conduct,” and “a punitive damages award *must be specific to each defendant.*” S.C. Code. Ann. § 15-32-520(D), (G) (emphases added). As Plaintiffs implicitly concede (at 50), neither Holdco nor Kenvue was involved in any (alleged) activities respecting Mr. Perry. Because “[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent,” courts have “no right to impose any other meaning.” *S.C. Prop. & Cas. Ins. Guar. Ass’n v. Brock*, 410 S.C. 361, 367 (2014) (quotation omitted).

Rather than addressing the statute, Plaintiffs (at 49) point to cases from other jurisdictions—while ignoring opinions cited in the initial brief. Yet *Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439 (2017), is irrelevant. That case—which *rejected* punitive damages—recognized that the acts of an agent sometimes can be imputed to a principal for purposes of assessing punitive damages. *Id.* at 456. It says nothing about successor liability. In *Bankhead v. ArvinMeritor, Inc.*, 205 Cal. App. 4th 68 (Cal. Dist. Ct. App. 2012), the court did not examine the circumstances in which successor liability can apply because the issue was not contested. *Id.* at 73 n.2. And in *Man v. Raymark Industries*, a federal court made an *Erie* guess. 728 F. Supp. 1461 (D. Haw. 1989). In doing so, the court emphasized that imposing punitive damages on a party that “expressly assumed *all* liabilities” of its predecessor could prevent defendants from engaging in corporate transactions to avoid anyone paying punitive damages. *Id.* at 1469–71 & n.10. The court thus had no occasion to decide whether punitive damages would be appropriate in a case like this one, where Holdco and Kenvue did not assume any relevant liabilities, and no one faces a risk of reduced recovery. By any measure, punitive damages against them are improper.

CONCLUSION

The Court should reverse and order the trial court to enter judgment notwithstanding the verdict, or, in the alternative, to order a new trial.

Respectfully submitted,

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