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

Michael L. Perry and Lonnie Long …… Respondents,

v.

American Industrial Industries, Atlas Turner Inc., Avon Products, Inc., Barretts Minerals, Inc., BlockDrug 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 Stroes, Inc., Estee Lauder, Inc., Estee Lauder International, Inc., The Estee Lauder Companies, Inc., Food Lion, LLC, Genuine Parts Company, Glamour Industries Co., Himmell Management Co., LLC, Himmel Media, LLC, Honeywell International, Inc., Idelle Labs, Ltd., IMI Fabi (Diana), LLC, IMI Fabi (USA), Inc., IMI Fabi, LLC, Janssen Pharmaceutical, Inc., Johnson & Johnson, Johnson & Johnson Holdco (NO), 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 Proctor & 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 ViJon, LLC, Walgreen Co., Walmart Inc. ……..Defendants,

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

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

COUNTER-STATEMENT OF ISSUES

1. Did the trial court abuse its discretion in admitting tissue digestion evidence that was properly disclosed to J&J[1] but they chose not to rebut?

2. Did the trial court abuse its discretion in rejecting J&J's false assertion that a spoliation order prevented the presentation of their defense in this case?

3. Did the trial court abuse its discretion in prohibiting J&J's experts from offering testimony and opinions outside their expertise and refusing improper jury instructions on causation?

4. Did the trial court err in finding Holdco and Kenvue were successors-in-interest to Johnson & Johnson Consumer Inc. under South Carolina's successor liability exceptions?

INTRODUCTION

Plaintiffs Michael Perry and Lonnie Long brought personal injury claims against J&J arising from Mr. Perry's diagnosis of mesothelioma caused by his exposure to asbestos from his lifelong use of Johnson's Baby Powder ("JBP"). The jury found J&J negligent and strictly liable for selling deadly asbestos-containing baby products and awarded $32.6 million in compensatory damages and $30 million in punitive damages.

At trial, J&J repeatedly indicated they were going to call a number of witnesses, including experts and their corporate representative, Dr. Edwin Kuffner, but they never did so. (R. at 17752:7-10; R. at 18878:5-18880:2). They rested without presenting a single witness in their case in chief. Instead of offering substantive evidence in support of their theory of the case, J&J adopted a strategy of accusing the circuit court of preventing the presentation of their defense. In truth, J&J was given every opportunity to call a tissue digestion expert, to present testimony about their historic talc testing, to call medical causation experts, to call back Dr. Kuffner after he testified in Plaintiffs' case, and to otherwise make its case to the jury. J&J's complaints against the circuit

[1] "J&J" collectively refers to Defendants Johnson & Johnson, LLT Management, LLC, Kenvue, Inc., and Johnson & Johnson Holdco (NA), Inc.

court are a calculated strategy to have this case decided on the basis of its procedural grievances rather than the merits of Plaintiffs' case as decided by the jury.

As part of its procedural maneuvering, J&J appealed the circuit court's denial of its motion for new trial and then asked for the case to be remanded for the circuit court to hear a motion to reconsider its order. On remand, presiding circuit judge, Jean Hoefer Toal, Chief Justice of the Supreme Court of South Carolina (Retired), explained the unprecedented nature of J&J's bad conduct at trial, concluding that "J&J decided, perhaps even before this trial began, that its primary defense would be aimed at attacking the trial court's rulings rather than presenting a substantive defense case." (R. at 244). Judge Toal clarified that J&J's witnesses were not excluded, and its defense was not inhibited in the ways J&J claimed:

> Two weeks were allotted for the trial of this case, a more than adequate time-frame given that the Johnson & Johnson entities and AII, who was in default, were the only two trial Defendants. Despite these efforts on this Court's part, this trial presented difficulties right off the bat. The Defendants were not cooperative with this Court with their list of witnesses . . . . The Defendants continued to decline to give an outline of their trial witnesses so that this Court could properly allocate time but attempted to blame this Court for their inability to present experts and other witnesses they previously designated. Ultimately, Defendants Johnson & Johnson announced it would not present a substantive defense case but would rest at the end of Plaintiffs' case. J&J contended that this decision was necessitated by the pre-trial rulings of this Court, which they claimed unfairly limited the testimony of their experts. **This Court emphasized that none of their witnesses were excluded, and that they were free to offer any previously identified witnesses.**

(R. at 242-243, emphasis added). Even in the midst of J&J's relentless and unfounded accusations against the circuit court, the court *granted* their requested remittiturs of both the compensatory and punitive damages awards. (R. at 145-152).

The jury's large verdict is not a product of any circuit court bias, but a result of the evidence of J&J's truly outrageous conduct in knowingly selling an asbestos-containing cosmetic product meant for use on babies. Mr. Perry's daily use of JBP, beginning in childhood, caused him to

develop a painful, fatal cancer at the age of 53, which his doctors expect will cut short his life by at least 25 years. After consideration of the factual record, circuit court rulings, and jury findings, this Court should affirm the judgment of the circuit court in all respects.

STATEMENT OF FACTS

I. Evidence Offered at Trial

A. Plaintiffs' causation evidence established Mr. Perry's mesothelioma was caused by JBP.

Michael Perry testified that his earliest memory of using talcum powder on himself was from 1974 when he was four or five years old. (R. at 19168:19-21). He used JBP more than any other body powder. (R. at 19168:24-25). He used JBP a minimum of twice a day, using "(n)o less than" ten bottles a year. (R. at 19177:1-9, 19178:2-5). Mr. Perry last used JBP in 2019. (R. at 19175:2-4).

Plaintiffs' expert Dr. William Longo testified that he and his lab have tested over 100 bottles of JBP. (R. at 18338:12-14). Of the tested samples, 75% tested positive for asbestos. (R. at 18357:22-18358:3). The samples he tested are referred to as "historical samples" which came directly from J&J. (R. at 18358:7-18). His results are consistent with hundreds of historical tests of JBP bottles and source mines finding asbestos in J&J's talc. (R. at 18390:11-18393:12).

Dr. Longo explained the counting criteria for detecting asbestos in the products he tested: that it has "to be at least 5 times longer than it is wide," it has to have the right chemistry, "then you see if it has the right crystalline structure." (R. at 18363:14-18365:10). According to Dr. Longo, "chemistry" is how he determines which of the six asbestos minerals he is looking at. (R. at 18365:15-20). Dr. Longo testified at length about the chemistry for tremolite asbestos. (R. at 18366:7-18367:3). J&J's internal documents identify "fibrous tremolite" as a form of asbestos and that it is simple to tell the difference between "fibrous talc" and asbestos. (R. at 18371:14-18372:8;

R. at 20816-20822; R. at 20823-20824). The size of an asbestos fiber allows an entity to "have a ton and . . . say, 'Oh, it's only trace amounts.'" (R. at 18380:20-18381:25).

Dr. Longo also analyzed talc from the source mines that J&J used in JBP. (R. at 18384:6-9). His test results showed the presence of asbestos in each of the mines used by J&J in its baby powder throughout time. When he tested the talc using J&J's preferred weaker testing method, x-ray diffraction (XRD), 1 of 72 samples was positive for asbestos. (R. at 18384:19-21).[2] When he tested the talc using a polarized light microscope (PLM), 30% of the samples were positive for asbestos. (R. at 18384:22-24). When he tested the talc using a transmission electron microscope (TEM), 75% of the samples were positive for asbestos. (R. at 18384:24-25). He confirmed that he found tremolite and other asbestos fibers over and over in JBP. (R. at 18386:21-23).

Dr. Longo found tremolite asbestos, anthophyllite, richterite, and actinolite in JBP. (R. at 18391:8-11). And he was not the only scientist to do so. Testing performed for J&J by Battelle Memorial Labs found tremolite asbestos in JBP 153 times in the 1960s. (R. at 18391:15-18392:1). Even with "poor analytical sensitivity" the FDA's contract lab found asbestos in the talc used in JBP. (R. at 18393:6-12).

Plaintiffs' medical causation expert Dr. Steven Haber was offered and qualified as an expert in internal medicine and pulmonology. (R. at 17877:7-12). He testified Mr. Perry suffers from mesothelioma caused by asbestos exposure. (R. at 17879:2-6). According to Dr. Haber, the JBP that Mr. Perry used for nearly five decades was a substantial factor in the development of his mesothelioma. (R. at 17879:7-10). In reaching his conclusions, Dr. Haber reviewed Mr. Perry's

[2] J&J understood that only very high levels of asbestos are detectable by XRD: 1 percent for tremolite and 5 percent for chrysotile. (R. at 18832:9-13). One percent asbestos is the equivalent of billions of asbestos fibers. (R. at 18380:6-18381:10). Despite its limitations, this was the testing method J&J used the vast majority of the time. (R. at 18405:1-4).

medical records, including X-rays and scans of his chest, conducted a personal interview with Mr. Perry, reviewed reports of other experts designated in this matter, and reviewed deposition testimony and other materials. (R. at 17879:11-17880:1).

All fiber types cause mesothelioma and other cancers. (R. at 17906:20-22). There is no safe level of exposure to asbestos even at the 0.1 fibers-per-cc-level established by the Occupational Safety and Health Administration (OSHA). (R. at 17925:13-17927:3). Studies and organizations have concluded that there is no threshold level below which there is no risk of developing an asbestos-related disease. (R. at 17928:4-17929:4).

J&J's documents confirm that fibrous tremolite is a cause of mesothelioma. (R. at 17909:12-19; R. at 20825-20829). Dr. Haber explained that for asbestos to attack the body, "you have to be able to . . . breathe it in." (R. at 17912:21-17913:1). According to Dr. Haber, "(t)he worst is in a powder form, because it's already in a respirable form. . . . So if you have asbestos in a powder form, that's the worst." (R. at 17913:13-16).

The FDA has determined that using talc can produce occupational levels of exposure to asbestos. (R. at 17930:12-17931:2). Dr. Haber reviewed peer-reviewed published literature about the levels of exposure that occur when someone uses J&J's talc. (R. at 17937:21-24). According to that literature, the level of exposure was .38 to 5.18 fiber per cc years. (R. at 17938:1-6). Even exposures at the low-end of the range substantially increase the risk of developing mesothelioma. (R. at 17938:7-11).

Dr. Haber reviewed published case reports of individuals with mesothelioma that used cosmetic talc. (R. at 17939:6-17941:2). Talc, anthophyllite, and tremolite have been repeatedly found in the lungs of cosmetic talc users at autopsy. (R. at 17940:24-17941:2). Background

asbestos is mostly composed of small amounts of chrysotile but anthophyllite and tremolite are not really found in background asbestos. (R. at 17948:3-10).

Based on his review of the literature, Dr. Haber has determined that talc users are exposed to asbestos at levels between .1 to 4 fibers per cc. (R. at 17938:18-24). To put this in context, "if you have 1 fiber per cc, you're going to breathe in 10,000 fibers every minute, millions or billions in a year." (R. at 17938:21-24).

As to frequency and quantity, Dr. Haber testified that Mr. Perry was "an above-average user" of JBP, using it "two to four times a day," "putting it on his whole body," and occasionally "actually putting it on his . . . face." (R. at 17945:25-17946:10). Mr. Perry's exposure history, JBP documents, and scientific literature support Dr. Haber's opinion that Mr. Perry's exposures to asbestos from JBP were a substantial contributing factor to the development of his mesothelioma. (R. at 17949:9-13).

Regarding Mr. Perry's other sources of asbestos exposure, Dr. Haber noted that in the mid-1980s, he had potential exposures to asbestos from brake jobs he performed with his father. (R. at 17945:5-8). Mr. Perry performed "little more than a dozen" brake jobs and some brakes contained chrysotile asbestos. (R. at 17945:8-16). On the other hand, nothing in Mr. Perry's work history exposed him to asbestos given that he did not do "any remodeling of . . . his home or construction work and none of his schools" and he did not live with anyone that was working with or around asbestos. (R. at 17944:19-17945:4).

Dr. Haber also reviewed and evaluated Mr. Perry's clinical course of care and treatment post-diagnosis. (R. at 17883:4-17884:6). Mr. Perry's cancer is extensive and invasive, spreading into the soft tissues of the chest wall, into the lymph nodes, and the lung. (R. at 17899:14-17900:14). As a result of Mr. Perry's cancer, his life expectancy has been shortened approximately

26 years. (R. at 17903:16-17904:11).

Dr. Barry Gibney, Mr. Perry's treating physician, is a general thoracic surgeon and the section chief of thoracic surgery at the Medical University of South Carolina (MUSC). (R. at 18220:17-18221:1). Dr. Gibney treated Mr. Perry for malignant pleural mesothelioma, a cancer of the lining of the chest wall and the lungs. (R. at 18222:22-18223:3). Dr. Gibney testified that malignant pleural mesothelioma is the result of chronic exposure to asbestos or asbestos-containing compounds. (R. at 18229:22-18230:2). He was not aware of any other cause. (R. at 18230:3-6). Similarly, Dr. Gibney was unfamiliar with "spontaneous mesothelioma," a safe level of exposure to asbestos, or any genetic mutations which caused mesothelioma. (R. at 18230:10-18231:7).

Mesothelioma is incurable and terminal. (R. at 18231:8-12). According to the published data, the median survival rate for a person with mesothelioma, including Mr. Perry, is between 12 and 18 months. (R. at 18231:13-22).

Dr. Gibney described mesothelioma as a restrictive disease, meaning it restricts the lung's ability to expand, causing the lung to become less functional and leading to shortness of breath. (R. at 18232:5-20). A decrease in lung function leads to a decrease in heart function and produces a sensation of drowning. (R. at 18232:20-18233:1). Mesothelioma is an aggressive disease. (R. at 18233:15-16). Mr. Perry's mesothelioma is located around his heart. (R. at 18235:4-11). Dr. Gibney performed a posterolateral thoracotomy on Mr. Perry which involved peeling the pleura off the chest wall and the lungs. (R. at 18235:14-18236:20). Because of the progression of Mr. Perry's mesothelioma, they had to remove a portion of his diaphragm as well. (R. at 18237:4-6). The surgery took six to eight hours and was followed by a painful, three-week recovery. (R. at 18238:2-4; 18238:21-18239:21). Despite surgical efforts, Mr. Perry will ultimately die from his

mesothelioma. (R. at 18241:2-4).

B. Testimony from J&J's corporate representatives establish J&J's knowledge about asbestos in JBP.

Plaintiffs presented testimony from two of J&J's corporate representatives, Dr. John Hopkins and Dr. Edwin Kuffner. (R. at 20023). Dr. Hopkins confirmed that the main source of talc used in JBP from the 1970s until 2003 was Johnson & Johnson-owned Vermont mines. (R. at 18073:22-18074:5). Beginning in 2003, Johnson & Johnson sourced talc from the Guangxi Zhou mine in China. (R. at 18074:6-10). Dr. Hopkins also confirmed that documents from J&J's marketing group refer to its baby powder as the cornerstone of the company's baby products franchise. (R. at 18078:25-18079:9).

It has always been J&J's policy, according to Dr. Hopkins, to have zero asbestos in its talc. (R. at 18102:15-20). J&J has always told the public that there has never been a single fiber of asbestos in any of its baby powder products. (R. at 18096:4-11). J&J also told doctors and nurses that there was no asbestos in its baby powder. (R. at 18096:12-15). Yet from the 1950s to the 2000s, J&J was in possession of over 200 positive test reports on the talc used in its body powders. (R. at 18083:7-18085:9). Dr. Hopkins testified about several positive tests for asbestos in JBP throughout the decades that the talc powder was for sale. (R. at 18086:14-18089:24).

J&J knew that asbestos in its talc could make people sick and that there is no known safe level of asbestos exposure. (R. at 18101:22-18102:5). Dr. Hopkins admitted there has never been a warning about asbestos on any J&J product even though by the early 1970s, J&J knew there was tremolite in its Vermont and Italian talc ore. (R. at 18118:9-18119:15).

Dr. Kuffner, J&J's chief medical officer, testified in Plaintiffs' case-in-chief with the understanding that he would return during J&J's case-in-chief. (R. at 18566:19-24). When questioned by J&J, Dr. Kuffner testified that JBP did not contain asbestos and did not cause Mr.

Perry's mesothelioma. (R. at 18732:15-23). While J&J understood there was "tremolite in the talc . . . used in baby powder," Dr. Kuffner maintained it was not tremolite asbestos. (R. at 18698:20-18699:18; 18705:3-7; 18732:24-18733:1). Even though he is not a geologist, Dr. Kuffner was permitted to testify there is a difference between tremolite and tremolite asbestos, insisting that "the company clearly knew the difference." (R. at 18769:8-22). Dr. Kuffner maintained that JBP never contained asbestos. (R. at 18708:8-9).

Dr. Kuffner claimed J&J's concern with tremolite was related to skin irritation. (R. at 18829:13-25). He admitted, however, that J&J's files note that fibrous tremolite is asbestos. (R. at 18830:1-14; R. at 20816-20824). When presented with a test from 1958 that found fibrous tremolite in its talc, Dr. Kuffner argued that "just because something says it's fibrous doesn't mean it's asbestos." (R. at 18831:19-23). He confirmed that J&J and its testing labs repeatedly found fibrous tremolite in the Italian and Vermont talc used to make its baby powder but again contended "that did not mean it's asbestos." (R. at 18831:7-12).

Dr. Kuffner acknowledged the finding of tremolite, winchite, and talc in Mr. Perry's lung tissue. (R. at 18710:12-19). He could not say the tremolite in Mr. Perry's lungs resembled the tremolite found in JBP because he is a medical doctor and a toxicologist and not a microscopist. (R. at 18710:25-18711:12). Despite his lack of expertise, Dr. Kuffner testified that winchite does not "come from the Italian mine that we used," "the Vermont mine that we used," or "the Chinese mine that we used" but can come from "other sources." (R. at 18817:5-13).

Dr. Kuffner testified that J&J tested its baby powder thousands of times for asbestos. (R. at 18736:22-18737:1). Although many of J&J's tests showed no asbestos, he admitted that at one point, J&J's testing protocols required a finding of at least five asbestos fibers of one type before the sample would be reported to contain asbestos. (R. at 18740:4-22). He agreed that 16 asbestos

fibers could be found in a microscopic sample of talc and J&J would report that as a finding that asbestos was undetectable. (R. at 18742:3-11; R. at 20849-20854).

Dr. Kuffner admitted people trusted J&J to make a "high-quality product" and, according to Dr. Kuffner, it did. (R. at 18744:14-18745:1). JBP was an important part of the company's baby franchise. (R. at 18745:8-18746:12). Dr. Kuffner confirmed that the advertising for JBP made people believe the product was safe and would not hurt them. (R. at 18759:9-15).

On September 7, 2019, the FDA reported finding chrysotile asbestos in JBP. (R. at 18795:8-19). Dr. Kuffner claimed that within two or three days of learning of the FDA's finding, the company initiated a voluntary Class 2 recall. (R. at 18796:8-25; 18802:1-5). A Class 2 recall is proper when "there's potentially . . . some temporary or transient adverse health effects." (R. at 18800:21-23). The FDA defines a Class 2 recall as a "[s]ituation in which use of, or exposure to, a violative product may cause temporary or medical reversible adverse health consequences or where the probability of serious adverse health consequences is remote." (R. at 18805:10-22). J&J recalled the lot used to make the baby powder which tested positive for asbestos but did not stop selling talc-based JBP altogether. (R. at 18805:23-18806:3). The company decided in the following year to stop selling talc-based baby powder, but the decision was not "made based upon safety." (R. at 18806:4-12).

After the FDA found chrysotile in JBP, the company conducted a health hazard evaluation. (R. at 18810:2-7). The court prevented J&J from admitting a copy of the health hazard evaluation through Dr. Kuffner because he was not disclosed as an expert and the health hazard evaluation was an expert report regarding the Class 2 recall. (R. at 18810:11-18815:22). J&J tabled the admission of the health hazard evaluation until its case in chief the following week. (R. at 18815:24-18816:1).

II. Pre-Trial Rulings

A. Johnson & Johnson's Experts

During the pre-trial hearing, Judge Toal was clear that J&J's experts could discuss OSHA levels of exposure and standards of exposure (R. at 16146:20-23), alternative exposure to asbestos via brakes (R. at 16151:7-11), the presence of asbestos markers (R. at 16152:11-17384:9), "worst case scenario or no-observed adverse effects level" (R. at 16159:17-16160:7), the geology of asbestos and talc (R. at 16162:5-16181:9), and lab contamination (R. at 16161:19-16162:2). As to J&J's experts Drs. Weill and Diette, the court limited their testimony in only one aspect: they were prohibited from opining "that Mr. Perry's mesothelioma is spontaneous or idiopathic." (R. at 16181:19-22). While the experts use "spontaneous" and "idiopathic" interchangeably, they are not the same and neither is a cause of mesothelioma. As the trial court noted, "[i]diopathic simply means we don't know what caused it." (R. at 16102:20-21). On the other hand, "spontaneous" means that the mesothelioma was "naturally occurring . . . resulting from intrinsic factors[.]" (R. at 20780:7-13; 21-24). Drs. Weill and Diette reached their conclusions regarding the "cause" of Mr. Perry's mesothelioma without reviewing evidence about the asbestos content of JBP, assuming an improper impurity rate not based on peer-reviewed literature, and without reviewing specifics related to Mr. Perry such as his documented exposure history and the absence of any germline mutation. (R. 20780:15-20; 20780:25-20781:3; 20801:15-20; 20808:14-25; 20809:17-23; R. at 02669-02670; R. at 02709; R. at 02929 (19:9-20:2)). Additionally, Dr. Diette has admitted in past litigation that there is no scientific literature to support the conclusion that a mesothelioma can be caused "spontaneously" when there is a history of asbestos exposure. (R. at 2765 (80:13-21)).

The court found the opinion that Mr. Perry's mesothelioma was spontaneous and/or idiopathic lacked a scientific foundation. (R. at 16186:9-16187:5). The court also noted that neither

Drs. Diette nor Weill "examined Mr. Perry" or "details about his lungs, or anything like that." (R. at 16188:8-17). Therefore, Drs. Diette and Weill were not permitted "to opine on the cause of the mesothelioma of Mr. Perry." (R. at 16182:9-12).

B. Tissue Digestion

On July 10, 2024, more than a month before trial, the trial court ordered the division of Mr. Perry's lung tissue for digestion. (R. at 00013-00016). After the trial court signed the order, it took several days for MUSC to divide the tissue as instructed. On the day before the pre-trial hearing, the tissue was divided and MUSC sent the tissue to the experts designated by the parties. The tissue was delivered to each of the parties' respective experts on the morning of the pre-trial hearing prior to 8:30am. (R. at 16272:23-16274:1).

At the pre-trial hearing, J&J moved to exclude the tissue testing the parties requested only weeks before. (R. at 16268:8-10). J&J argued their initial expert could not perform the digestion prior to trial. (R. at 16269: 11-16). J&J, however, purportedly found another expert to analyze the tissue. (R. at 16269:16-18). Nevertheless, they contended that the tissue digestion should be excluded because "we're out of time." (R. at 16270:6-13).

The Court agreed to revisit the motion to exclude the tissue digestion if *both* experts were unable to perform the digestion. (R. at 16275:12-13).

On the first morning of trial, J&J informed the court and Plaintiffs that its expert could not perform the tissue digestion. (R. at 17595:19-22). Because Dr. Longo was in the process of concluding the tissue digestion, Plaintiffs offered to make Dr. Longo available for a deposition. (R. at 17596:3-6). Plaintiffs did not open on the issue of the tissue digestion to give J&J more time to depose Dr. Longo.

Dr. Longo drafted a report revealing the tissue digestion results and Plaintiffs forwarded that report to J&J on August 5, 2024. On that same day, Plaintiffs offered to make Dr. Longo

available for deposition regarding his lung digestion results on August 6, 2024, at 4:00 pm by phone. J&J refused this offer and requested the deposition be conducted via zoom. Because J&J requested a deposition by zoom and given that Dr. Longo was traveling in order to testify live at trial, his deposition could not occur until 10:00 pm on August 6, 2024. (R. at 20429-20437). Because both parties received the tissue at the same time, the court found that Dr. Longo would be permitted to testify about his tissue digestion. (R. at 00013-00016).

Two days later, Dr. Longo, testified at trial that he tested Mr. Perry's lung tissue. (R. at 18338:15-17). Dr. Longo, prior to discussing the tissue digestion results, testified he and his lab had analyzed over 400,000 different individual asbestos samples, including testing human lung tissue, referred to as a "lung burden" to see what, if anything, is in the lung. (R. at 18351:6-18352:2). The tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc particles in Mr. Perry's lungs. (R. at 18401:7-10). According to Dr. Longo, the tremolite in Mr. Perry's lungs was consistent with what he has previously and repeatedly found in JBP, and it is also consistent with "Johnson & Johnson's own internal documents from decades ago that said when you find tremolite in talc in people's lungs with mesothelioma, it's a fingerprint for exposure to asbestos." (R. at 18401:23-18402:7). Because J&J attempted to suggest that the winchite found in Mr. Perry's lungs came from a different product, Dr. Longo explained that J&J's own experts have found winchite in JBP, that winchite has been found in the talc sourced from the Italian mine used by J&J, that he has found richterite in JBP, and that J&J's own expert refers to "richterite" as "winchite" because the chemistry is so close. (R. at 18501:5-18503:20). Dr. Longo clarified that he has "never found richterite or winchite in brakes[.]" (R. at 18505:18-18506:9).

J&J cross-examined Dr. Longo regarding his findings of asbestos in Mr. Perry's lungs. (R. at 18488:16-18491:8). While he has never identified winchite in a J&J talc product, Dr. Longo has

found richterite in J&J's talc products. (R. at 18498:10-16). J&J's expert, Matt Sanchez, has found winchite in J&J's baby powder. (R. at 18501:5-14).

J&J also questioned Dr. Longo about asbestos-containing brakes, including the brand of brakes that Mr. Perry worked with. (R. at 18492:20-25). Dr. Longo confirmed that Bendix brakes contained chrysotile and tremolite asbestos. (R. at 18493:1-4). In his testing of brakes, he has never found winchite and richterite. (R. at 18496:20-24).

The court prohibited the parties from asking certain questions regarding when Dr. Longo received the lung tissue for testing since the court had permitted the tissue digestion to be performed. (R. at 18489:17-18490:1).

C. No Spoliation Order

The *Hood-McBrayer* Spoliation Order was entered on November 5, 2021, in another case involving decades of use of JBP. (R. at 16927-16938). According to the order, the *McBrayer* plaintiffs were entitled to an adverse instruction regarding J&J's arguments concerning positive and negative test results in the absence of underlying data. (R. at 16936). While there was discussion during the pre-trial hearing of entering this order in the instant case, no such order was ever signed. (R. at 17428:22-17434:15). On the first day of trial, the trial court informed the parties that the spoliation order would not be entered, and no adverse inference instruction would be given. (R. at 17564:2-15; 17564:25-17565:12).

III. Jury Verdict and Post-Trial

On August 15, 2024, the jury returned a verdict in favor of Plaintiffs on their negligence, strict liability, and punitive damages claims. (R. at 00259-00261). The jury returned a verdict in favor of J&J on Plaintiffs' fraudulent misrepresentation claim. (R. at 00260). The jury awarded Plaintiffs $32,656,250 in compensatory damages. Because the jury found "by clear and convincing evidence that the conduct of (Johnson & Johnson) was willful, wanton, or reckless" the trial court

proceeded with Phase II of the trial to determine punitive damages. (R. at 19712:15-24; 19716:7-19717:1). After hearing argument from counsel for the parties, the jury levied punitive damages against J&J of $30 million. (R. at 19813:10-19814:15).

On September 24-25, 2024, the circuit court held a hearing on J&J's post-trial motions. (R. at 19823-20020). After argument, the trial court found that 1) South Carolina's substantive law would apply to the issue of successor liability; 2) Holdco and Kenvue were successors in interest to Old JJCI under the mere continuation, fraudulent transfer, and blurred corporate identities exceptions to non-liability; 3) J&J was not entitled to a Judgment Notwithstanding the Verdict; 4) J&J was not entitled to a new trial pursuant to the Thirteenth Juror Doctrine; and 5) J&J was not entitled to a new trial. (R. at 00068-00153; 19984:13-20002:11). The trial court, however, granted J&J's request for remittitur and reduced Mr. Perry's award of actual damages to $19,037,500; Mr. Long's loss of consortium award to $6,618,750; and the punitive damages award to $25,000,000. (R. at 00152). The total judgment entered against J&J, after setoff, was $39,401,250. (R. at 00152).

IV. Post-Trial Successor Liability Proceedings

Successor liability was decided by the circuit court as an equitable issue after trial. (R. at 09622-09624; R. at 17534:2-11, 17546:25-17547:15; R. at 12217-12241; R. at 11294-11306; R. at 9713-9721).

As background, it is undisputed that Johnson & Johnson alone made and sold JBP from the 1890s to 1978. (R. at 12261; 12266-12267). From 1979 to 2021, subsidiaries under J&J's direction sold JBP (collectively "Old JJCI"). (R. at 12244; 12261; 12266-12268).

A. Johnson & Johnson twice attempted to avoid liability through bankruptcy.

In October 2021, Johnson & Johnson devised a scheme called "Project Plato" with the stated purpose of avoiding talc liabilities by (a) allocating talc liabilities, (b) ending talc litigation completely, and (c) preventing an outflow of revenue. (R. at 12317-12328; R. at 12329-12330; R.

at 12351:8-9 (312:8-9)). On October 12, 2021, through a series of intercompany transactions (called the "Texas Two Step"), Old JJCI ceased to exist, and two new companies were created: (a) LTL Management ("LTL") holding all the talc liabilities (per Johnson & Johnson) but with no productive assets and no ongoing business, and (b) Johnson & Johnson Consumer Inc. ("New JJCI"), holding the productive business assets. (*In re LTL Management, LLC*, 64 F.4th 84, 95-96 (3d Cir. 2023); R. at 01522:21-01523:2; R. at 12476-12477; R. at 12483, ¶4).

Two days after its creation, LTL declared Chapter 11 bankruptcy. (R. at 12473-12474, ¶ 6; R. at 12477, ¶ 25; R. at 12478, ¶ 61). LTL requested a bankruptcy stay of litigation to apply not only to LTL, but to Johnson & Johnson, New JJCI, and various other parties. (*In re LTL Management, LLC*, 64 F.4th 84, 97 (3d Cir. 2023); R. at 12478, ¶ 61). In November 2021, the request was granted. (R. at 12478, ¶ 62). In early 2023, the Third Circuit reversed the Bankruptcy Court, holding LTL's bankruptcy was filed in bad faith. (*Id*.; R. at _). On April 4, 2023, the Bankruptcy Court formally dismissed the case. (*In re LTL Management, LLC*, 64 F.4th 84, 111 (3d Cir. 2023). LTL filed a second bankruptcy hours later. (*In re LTL Management, LLC*, 652 B.R. 433, 439 (Bankr. D.N.J. 2023)). Ultimately, the Bankruptcy Court held that LTL filed the second bankruptcy in bad faith. (*In re LTL Management, LLC*, 652 B.R. 433, 437 (Bankr. D.N.J. 2023)). On August 11, 2023, the second bankruptcy attempt was formally dismissed, ending all litigation stays. (R. at 12508-12518).

B. After the October 2021 "Texas Two Step," New JJCI/Holdco continued the exact same business as Old JJCI.

After the 2021 bankruptcy attempt, New JJCI "continue(d) to operate Johnson & Johnson's Consumer Health business" in the U.S. "without interruption." (R. at 12318, 12320; R. at 12389 (121:15-24); R. at 12477, ¶ 26; R. at 12562; R. at 12353 (325:9-21)). The "manufacturing, marketing and distribution assets that Old JJCI used to make baby powder went to New JJCI." (R.

at 12363 (18:7-12), R. at 12369 (44:22-45:13)). New JJCI maintained and continued (a) Old JJCI's business contracts (manufacturing, licensing, supply, vendor, etc.), (b) the same ownership (Johnson & Johnson as grandparent, Janssen Pharmaceuticals as parent), (c) the same management, (d) the same employees in the same positions, (e) the same operating locations, (f) the same business operations and (g) making the same products, including JBP. (R. at 12320, 12324-12328; R. at 12562; R. at 12570; R. at 12572; R. at 12433:15-17, 12440:10-12; R. at 12580:20-12581:10, 12584:15-12585:2, R. at 12589:11-21, 12590:10-18; R. at 12387 (116:25-117:19)). New JJCI changed its name to Johnson & Johnson Holdco (NA) Inc. ("New JJCI/Holdco") in December 2022. (R. at 12706).

C. After the April 2023 spinoff, Kenvue continued the same business.

In early 2023, Johnson & Johnson spun off its consumer business segment (through a series transactions designed to avoid tax liability) to Kenvue, Inc. (R. at 12483, ¶ 5; 12484, ¶7-12485, ¶8; 12486, ¶11; R. at 12708-12790). Kenvue held "itself out" as "essentially the same company that was operating the Consumer Health Division inside of Johnson & Johnson." (R. at 12371 (51:22-52:1); R. at 12418 (61:7-18, 61:22-23)). Kenvue's SEC filings present itself as the same company that sold JBP for decades. (R. at 12799, 12802). Kenvue maintained the (a) same business contracts, permits, licensing, etc. as Old JJCI and New JJCI/Holdco, (b) same ownership, (c) same management, (d) same employees, (e) same operating locations, (f) same business operations and (g) same products, including JBP. (R. at 12796-12817; R. at 12418-12419 (60:20-62:7), 12419-12420 (65:18-66:13), 12422 (74:14-75:5), 12422-12423 (77:11-78:9); R. at 12369-12370, 12377, 12398-12399 (161:11-162:25); R. at 12819-12823; R. at 12862-12864; R. at 12871).

D. Other issues impacting successor liability.

1. The legal entities (including Old JJCI) within Johnson & Johnson's Consumer Health segment intermingled resources and employees.

J&J's business once consisted of three segments: Consumer, Pharmaceutical and Medical Devices. (R. at 12873-12882). The consumer segment was composed of numerous legal entities, Old JJCI being only one. (R. at 12366 (30:1-24)). While over 10,000 employees worked in the consumer segment, allegedly Old JJCI employed about 3,000. (R. at 12320; R. at 12862; R. at 12617 (75:10-76:10)). Executives testified they conducted business by segment, sharing employees and resources without regard for the legal entities. (R. at 12366 (30:17-24); R. at 12406, 12414, 12416; R. at 12301-12303, 12307; R. at 12349, 12355; R. at 12462:14-12463:2)). The officers and directors of Old JJCI and New JJCI were "all employees of Johnson & Johnson." (R. at 12348). The consumer health segment of the J&J was spun off to the Kenvue enterprise. (R. at 12633-12634). Kenvue could not identify a person working for this subsidiary, outside of the president, who was not involved with the Johnson Baby line. (R .at 12655).

2. Johnson & Johnson controlled Project Plato and the Kenvue spinoff.

Johnson & Johnson dictated the October 2021 "Texas Two Step." The president of the Consumer segment (and then Kenvue) testified that "the Law Department of Johnson & Johnson" handled the decisions of "Project Plato" in October 2021. (R. at 12364). Michelle Goodridge, president of Old JJCI, confirmed that Johnson & Johnson (the parent) controlled the creation of LTL and New JJCI. She testified that Johnson & Johnson made her president of the other newly created entities in the transactions and instructed her to sign the instruments. Johnson & Johnson established the entities, and she only spoke with Johnson & Johnson's attorneys (and no businessperson). She cannot identify any business purpose for the transactions. (R. at 12436:21-

12437:2, 12439, 12440-12443, 12446, 12449:23-12450:9, 12451:9-13, 12452:9-20; R. at 12792-12794; R. at 12338-12339, 12341-12342, 12343, 12345).

Similarly, Johnson & Johnson dictated the April 2023 Kenvue spinoff. Both Kenvue's CEO and CFO confirmed that Johnson & Johnson made all decisions; the Kenvue Board had no say. (R. at 12370; R. at 12414-12415, 12419). The "entire transaction was under the control and direction of Johnson & Johnson." (R. at 12419).

Kenvue's corporate representative, James Mittenthal, has testified the Vice President of Global Risk Management for Kenvue once worked for Johnson & Johnson. (R. at 12893). Additionally, according to Kenvue, Teddy Reed, Kenvue's vice president and corporate secretary, also worked for Johnson & Johnson before coming to Kenvue. (R. at 12893). Further, Mr. Mittenthal has no knowledge of the logic behind the "restructuring" transactions and cannot testify that anything substantive occurred in Texas. (R. at 12901-12902).

Kenvue later designated attorney John Kim as its corporate representative. He was also designated as the corporate representative for New JJCI/ Holdco. (R. at 12599). Mr. Kim acknowledged that documents associated with Project Plato refer to the J&J family" or the "J&J enterprise" and he noted that the term is "used to denote a company that shares some common ownership . . . at the top—basically—generally, they're owned by Johnson & Johnson shareholders, ultimately." (R. at 12614).

3. Project Diamond (early 2023)

"Project Diamond" concerned the spinoff of the Consumer Health business segment from Johnson & Johnson to the Kenvue enterprise. (R. at 12366, 12368). Kenvue's CEO admitted that (a) Kenvue "has held itself out to investors as essentially the same company that was operating the Consumer Health Division inside Johnson & Johnson," and (b) Kenvue has held itself out as the former Johnson & Johnson consumer business. (R. at 12371, 12378). Despite forming in February

2022, Kenvue publicly referred to its "portfolio of iconic and modern brands that has been built over 135 years," including "Johnson's" brand. (R. at 12802, 12808). Plaintiffs presented several documents detailing admissions regarding the continuity of personnel, the continuity of management, the continuity of physical location, the continuity of assets, the continuity of general business operations, continuity of ownership, and the assumption of business contracts. (R. at 12414, 12418-12423; R. at 12796-12817; R. at 12821-12823; R. at 12912-12913; R. at 12572; R. at 01730; R. at 12867-12871; R. at 12819-12823; R. at 12368 -12370, 12377-12378, 12398-12399). Kenvue confirmed that the Johnson's baby brand is part of the Kenvue portfolio. (R. at 12903). Kenvue also confirmed that all of the employees and manufacturing assets that were formally part of Johnson & Johnson's consumer segment became Kenvue employees and assets unless they were shared. (R. at 12904-12905). Everything associated with JBP was transferred to Kenvue. (R. at 12905).

As to the commonality of directors, employees, officers, and/or managers, Kenvue understood that, according to Kenvue's "articles of incorporation and conversion" "many of the executive leadership of Kenvue had come from Johnson & Johnson-related positions," Kenvue initially could not confirm which of its current board members held positions with Johnson & Johnson either concurrently or prior to Kenvue's creation. (R. at 12905-12906). Kenvue later confirmed that several members of its executive team had prior Johnson & Johnson and/or Old JJCI connections prior to joining Kenvue's executive team. (R. at 12907-12908). J&J continued to sell talc-based body powders internationally after the spinoff from Holdco to Kenvue. (R. at 12867-12871).

STANDARD OF REVIEW

Decisions regarding the admissibility of evidence and the denial of a new trial rest within the sound discretion of the trial court, and that decision will not be disturbed absent an abuse of

discretion. *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *Carlyle v. Tuomey Hosp*., 305 S.C. 187, 193, 407 S.E. 2d 630, 633 (1991). The standard of review for the grant or denial of a motion for a new trial extends substantial deference to the trial court, and the trial court's decision will not be disturbed on appeal unless the ruling is wholly unsupported by the evidence or based on an error of law. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49, 691 S.E.2d 135, 149 (2010); *Limehouse v. Hulsey,* 397 S.C. 49, 72, 723 S.E.2d 211, 223 (Ct. App. 2011) (citing *Stevens v. Allen,* 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999)) *rev'd on other grounds* by *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (S.C. 2013).

Similarly, when reviewing a jury charge for alleged error, an appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). The trial court's decision regarding jury instructions will not be reversed unless the trial court committed an abuse of discretion. *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008).

As to jury instructions, "[i]t is not error for the trial judge to refuse a specific request to charge when the substance of the request is included in the general instructions." *Burroughs v. Worsham*, 352 S.C. 382, 391–92, 574 S.E.2d 215, 220 (Ct. App. 2002). "To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial." *Fairchild v. South Carolina Dept. of Transp.,* 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012).

The successor liability issue was presented to the trial court as an action in equity. As such, this Court's standard of review is de novo. *Fountain v. Fred's, Inc*., 436 S.C. 40, 47, 871 S.E.2d 166, 170 (2022). The South Carolina Supreme Court has stated that it has "jurisdiction in appeals

in equity to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of verdict by jury." *Id*. at 47, 871 S.E.2d at 170 (quoting *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 184, 64 S.E.2d 524, 528 (1951)); *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290-91 (2000).

ARGUMENT

I. The circuit court did not permit trial-by-ambush and did not abuse its discretion in admitting the tissue digestion findings.

J&J's allegations of trial by ambush are wholly disputed by the record. The trial court did not abuse its discretion in admitting tissue digestion evidence, excluding testimony regarding alleged exposure to asbestos from Mr. Perry's work in hotels, or prohibiting improper expert testimony from Dr. Kuffner. Accordingly, this Court should affirm the trial court's rulings on these issues.

A. The tissue digestion results were not a surprise to J&J.

The parties jointly requested the division of Mr. Perry's lung tissue a month before the beginning of trial. Through no fault of the parties, the tissue division did not occur until the day before the pre-trial hearing. At the pre-trial hearing, while moving to have the tissue digestion results excluded, J&J simultaneously informed the court that it had retained an expert to analyze Mr. Perry's lung tissue. The court agreed to revisit the issue if *both* experts were unable to perform the digestion. At this time, J&J was aware that Dr. Longo was performing the digestion. Once complete, Dr. Longo issued a report on his findings and that report was forwarded to J&J. Dr. Longo was also made available for deposition on August 6, 2024.

J&J claimed it was "surprised" by the tissue digestion results because they were completed the same day as opening statements but did not seek a continuance. J&J, in fact, knew the digestion was happening, knew which expert was performing the digestion, received the results of the

digestion, and was given an opportunity to depose Dr. Longo regarding those results prior to his testimony at trial. An opportunity which J&J took. J&J even opened on the issue of the tissue digestion. (R. at 17751:1-17752:6).[3] There was no surprise about the admission of evidence J&J expected and previewed for the jury.

In addition to J&J not being surprised by the tissue digestion, J&J was also not unfairly prejudiced by the admission and/or presentation of the evidence. "The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). Determining whether prejudice exists "depends on the circumstances" and "the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *State v. Taylor*, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998) (quoting *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). Prejudice in this context means "there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

Missing from J&J's analysis is the prejudice they suffered from the admission of the tissue digestion results and how this evidence, relevant to the issues before the jury, wrongly influenced the jury's verdict. The tissue digestion results only demonstrated that Mr. Perry had asbestos and talc in his lung tissue. The source of those materials remained subject to dispute, and J&J remained free to rebut the tissue digestion results through testimony and evidence from its experts.

[3] Out of an abundance of caution, Plaintiffs did not mention tissue digestion until after Dr. Longo's deposition.

Contrary to their contention, J&J was not *forced* to tell the jury during opening statements that they "had no idea" what Dr. Longo would testify regarding the results of the tissue digestion. Opening statements serve to inform the jury of the *general* nature of the action and defenses involved in a case so the jury will be better prepared to understand the evidence presented. *State v. Brown*, 277 S.C. 203, 204, 284 S.E.2d 777, 778 (1981). It is irrelevant that J&J allegedly could not discuss the specifics of the tissue digestion, especially when its defense to Plaintiffs' claims was that JBP did not contain asbestos. Even without mention of the tissue digestion results, J&J's opening statement covered the general nature of the case. There was no prejudice to J&J.

B. The circuit court did not abuse its discretion in prohibiting speculative testimony about Michael Perry's exposures to asbestos.

In an effort to deflect from the alleged exposures to JBP, J&J sought to point to alternative exposures. J&J was permitted to do so when properly disclosed and evidenced. For instance, J&J presented evidence suggesting that the tremolite in Mr. Perry's lungs came from his brake work. (R. at 18003:15-18011:7; R. at 18468:4-18472:24, 18473:23-18488:9). However, undisclosed and/or speculative theories of potential exposures were properly disallowed.

Specifically, the trial court properly excluded speculative testimony regarding Mr. Perry's alleged exposure to asbestos while working in the hotel industry. (R. at 17377:2-17381:3). In deposition testimony, Mr. Perry stated he worked at an Embassy Suites in approximately 2000 (R. at 20567:1-17). Based on a newspaper article, Mr. Perry thought the library next to the Embassy Suites had asbestos in it. (R. at 20678). He was never in the library while work was being done. (R. at 20677). The belief that asbestos was *next door* to the building he worked was the only concern about asbestos related to his work in the hotel industry. Unsurprisingly, there was no expert designated in this case who found any exposure—much less substantial exposure—to asbestos stemming from Mr. Perry's work in and around hotels.

Although J&J proffered testimony regarding Mr. Perry's work in hotels, it did not provide the missing causal link that would have made this testimony relevant. The proffer did not, as required by *Henderson v. Allied Signal, Inc*., 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007), provide evidence of "exposure to a specific product on a regular basis over any extended period of time in proximity to where the plaintiff actually worked." Additionally, although J&J pointed to a reference in Dr. Haber's report regarding alleged exposure to asbestos while working at hotels, the reference is to a summary of a summary from a doctor not called as a witness at trial, (R. at 17922:1-17923:18; R. at 09674-09676), and was not otherwise substantiated. Moreover, J&J failed to identify a single expert witness that opined or would opine that 1) Mr. Perry was exposed to the rumored asbestos in the library next to the hotel where he worked, and 2) that exposure was a substantial factor in the development of Mr. Perry's mesothelioma. Consequently, the evidence/testimony remained speculative and was properly excluded.

Contrary to J&J's argument, it was J&J's burden to demonstrate that the alleged asbestos exposure from Mr. Perry's work at hotels caused and/or contributed to his mesothelioma. This was essentially an empty-chair defense. As recently noted in *Edwards v. Scapa Waycross, Inc.*, "(i)n seeking to establish an empty-chair defense, a defendant must assign fault for the plaintiff's injury to another party by providing evidence to the fact-finder that is sufficient for it to determine whether the party's 'actions were the cause of the plaintiff's injuries.'" 437 S.C. 396, 427, 878 S.E.2d 696, 713 (Ct. App. 2022) (quoting *Machin v. Carus Corp.*, 419 S.C. 527, 542-43, 799 S.E.2d 468, 476 (2017)). J&J provided no evidence Mr. Perry was exposed to asbestos during his work in hotels much less that the exposure caused his mesothelioma. Moreover, it is entirely within the trial court's discretion to exclude such attenuated testimony under Rule 403 to exclude discussion of potential and remote possibilities as undue consumption of time.

Finally, Plaintiffs' counsel's use of a medical record from Mr. Perry's treating thoracic oncologist with a mention of Mr. Perry's work in hotels redacted did not "open the door" for J&J to question any witness regarding this alleged exposure to asbestos while Mr. Perry worked in the hotel industry. Plaintiffs' counsel's direct examination of Dr. Haber only addressed Mr. Perry's exposure to talc. Counsel's redaction of documents so as not to violate previous in limine rulings was not improper and did not open the door to previously excluded testimony. Notably, when Mr. Perry's thoracic oncologist testified, J&J made no effort to ask the trial court to revisit its ruling regarding alleged hotel exposure. (R. at 18243:6-18251:24). Exclusion of this testimony was proper, and J&J is not entitled to a new trial.

C. The circuit court properly prevented Dr. Kuffner from further testifying regarding winchite.

Dr. Kuffner was not designated as an expert witness in this case. Additionally, during his testimony, he clearly testified that he was not a microscopist or geologist. (R. at 18711:2-12; 18769:11-12). Even without relevant expertise, however, he was permitted to testify that any asbestos minerals found in Mr. Perry's lungs did not and could not have come from JBP. (R. at 18731:18-18732:23). He further testified that in his review of company documents, he had never seen a finding of winchite in JBP. (R. at 18816:9-18817:4). Moreover, he gave opinions about geology despite his lack of expertise in that field, testifying both that he was familiar with where winchite comes from and that it did not come from any of the mines used as a talc source for JBP. (R. at 18817:5-13). When J&J sought to have Dr. Kuffner testify further about the sources of winchite, the trial court stopped the line of questioning. (R. at 18817: 5-18818:20).

The trial court's ruling was consistent with the court's pretrial order that Dr. Kuffner, a fact witness, could not be the conduit for expert opinions. (R. at 17384:10-17388:4). The trial court

also noted that Dr. Kuffner was "not there to offer opinions. He is there to testify about the records of Johnson & Johnson." (R. at 17388:14-17).

The trial court did not abuse its discretion in prohibiting Dr. Kuffner—a fact witness and non-geologist—from testifying about the sources of winchite, especially when J&J designated an expert geologist. As a fact witness, Dr. Kuffner's testimony was bound by South Carolina Rules of Evidence 701, which limits lay opinion testimony to topics about which the witness has personal knowledge and topics that do not require special knowledge, skill, experience, or training. Opinions regarding the presence or absence of winchite in J&J's mine sources requires special knowledge in the field of geology and would be governed by South Carolina Rules of Evidence 702 and 703. Given Dr. Kuffner's testimony that he was not a geologist and had no special training in that area, and that J&J did not disclose Dr. Kuffner as an expert witness on any subject, it was not error for the trial court to prohibit Dr. Kuffner from offering expert opinion testimony on the subject.

Further, attempting to couch the question as "whether or not he had seen reference to winchite in Johnson & Johnson records" (R. at 18817:5-18818:20) does not save Dr. Kuffner's attempt to testify outside the scope of his designation as a corporate representative. Dr. Kuffner was, in fact, allowed to give that testimony. Further, there is nothing improper about the exclusion of testimony from a fact witness which clearly required specialized skill, knowledge, training, and experience.

The exclusion of Dr. Kuffner's speculative testimony about winchite did not prevent J&J from rebutting evidence or testimony presented by Plaintiffs on that point. As of August 9, 2024—the day that Dr. Kuffner testified—J&J had not begun to put on its case in chief and was still expected to present testimony from its properly designated expert witnesses. (R. at 20410-20428;

R. at 18878:5-18880:2). J&J's choice not to do so was a matter of trial strategy. Prohibiting this testimony through an improper conduit was not an abuse of discretion.

D. Plaintiffs' counsel's closing argument was proper.

"A trial court is allowed broad discretion in dealing with the range and propriety of closing argument." *O'Leary-Payne v. R.R. Hilton Head, II, Inc*., 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct. App. 2006). Here, the trial court sustained an objection to Plaintiffs' counsel's argument that J&J could not *find* an expert (and gave a curative instruction) while recognizing counsel could comment on J&J's choice not to *call* any experts at trial. (R. at 19409:4-15, 19410:15-21). J&J, in fact, agreed that counsel could "comment on the fact we didn't bring experts." (R. at 19410:10-13).

J&J now changes its argument on appeal, suggesting it was improper to comment on the failure to call an expert. This argument has been waived. "A party may not argue one ground at trial and an alternate ground on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Consequently, J&J's claim regarding the impropriety of counsel's argument is procedurally barred from appellate review because J&J argues a different basis on appeal than was argued at trial. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 60, 777 S.E.2d 176, 190 (2015).

Further, in the event this Court finds that this issue has been properly preserved for appellate review, there was no reversible error. "Generally, the missing witness rule is applied when the uncalled witness is an agent, employee, relation, or associate of the party failing to call him, or within some degree of control of said party." *Davis v. Sparks*, 235 S.C. 326, 333, 111 S.E.2d 545, 549 (1959). As acknowledged by the Supreme Court, "the better practice is that use of the missing witness rule should be limited to counsel's argument, and a jury instruction on the matter should not be given." *In re Gonzalez*, 409 S.C. 621, 635, 763 S.E. 2d 210, 217 (2014).

Plaintiffs' counsel's statement during closing argument regarding the absence of J&J's expert witnesses was simply a comment on J&J's failed promise to present testimony "from experts who are paid by defendants," (R. at 17752:8-9), and from "doctors to talk through the studies showing that . . . individuals that by far had more talc exposure than anybody would with a baby powder" had no increased risk of mesothelioma. (R. at 17765:24-17766:5). The comment was made during closing arguments, as permitted by *Gonzalez*.

J&J was not prevented from rebutting any unfavorable inference, and they did so during closing statements, insisting that they did not need to "bring any other experts" because Plaintiffs' "expert told my story and proved my defense for Johnson & Johnson." (R. at 19493:1-19494:7). Any error resulting from an alleged improper invocation of the missing witness rule could not have reasonably affected the outcome of trial. *See, e.g., Way,* 410 S.C. at 385, 764 S.E.2d at 706 (quoting *Dansbury v. State*, 193 Md.App. 718, 1 A.3d 507, 522 (2010) ("Where a party raises the missing witness rule during closing argument, its use is just that—an argument.... Furthermore, the opposing side also has an opportunity to refute the argument and counter with reasons why the inference is inappropriate."). "Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result." *Judy v. Judy,* 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) (citing *State v. Sherard,* 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)).

Any potential prejudice caused by Plaintiffs' counsel's statement was cured by the trial court striking the statement and issuing a curative instruction. *State v. Cooper*, 334 S.C. 540, 554, 514 S.E.2d 584, 591 (1999). J&J did not object to the trial court's curative instruction and did not move for a mistrial as a result of Plaintiffs' counsel's alleged improper invocation of the missing witness rule. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003); *McElveen v. Ferre*, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989).

II. There was no spoliation order entered in this case.

The *Hood-McBrayer* spoliation order was entered in another case involving J&J. While there was discussion during the pre-trial hearing of having the *Hood-McBrayer* Order apply to this case, no spoliation order was entered, and no spoliation instruction was given. Additionally, and contrary to J&J's argument, the potential entry of this order did not prevent J&J from presenting a case to rebut Plaintiffs' claims.

J&J's argument on this issue regards the merits of the order itself. However, because this order was never entered in this case, it is improper for J&J to request that this Court assign error—in any fashion—to that order. Essentially, J&J is asking this Court to enter an advisory opinion regarding the merits of the *Hood-McBrayer* Order. *See, e.g., Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006). Because entry of the order was only contemplated but never entered, there is no justiciable controversy, and this Court should refuse to render an advisory opinion regarding the merits of the order.

Further, the trial court's potential entering of the *Hood-McBrayer* Order did not change the outcome of the trial or prejudice J&J's opportunity to present its defense. Not only has J&J failed to identify any witness that could not be called to testify as a result of the order, it also was not prevented from discussing negative test results. In fact, during J&J's cross-examination of Dr. Haber, J&J questioned him about studies showing that JBP "had no asbestos detected[.]" (R. at 18020:6-18021:1). Additionally, Dr. Hopkins, J&J's former corporate representative, testified via videotaped deposition about J&J's negative test results. (R. at 18083:19-18089:24). Testimony also included discussion of testing and studies funded and/or initiated by J&J. (R. at 18128:7-18130:3; R. at 18576:3-23, 18584:4-18588:10). As such, testimony regarding negative test results was placed in front of the jury, the trial court never entered a spoliation order, and J&J was afforded the opportunity to call any witnesses they chose to call. (R. at 18916:12-18917:14).

Interestingly, J&J contends that the potential of the trial court's entry of the *Hood-McBrayer* Order "dramatically altered" their trial strategy. They made the same statement at trial but insisted that the strategy was to not offer "any evidence . . . in front of this jury that would trigger a spoliation instruction" and went on to request that the trial court "wait for the evidence." (R. at 17563:9-18). Even after this exchange, J&J led the trial court and Plaintiffs to believe they were calling witnesses and presenting a case-in-chief to the jury. (R. at 18878:5-18880:2).

J&J claims it was unable to "present evidence that the world renown testing lab they hired concluded that their talc products were 'free of asbestos' which was 'based on over 15 years of closely examining this product.'" (App. Brief, at pg. 27). This is untrue. The specific letter from McCrone Associates, Inc., dated May 21, 1987, was repeatedly referenced during trial. The very exhibit that J&J contends it could not discuss was discussed in the video deposition of Dr. Hopkins, as designated by J&J, and played for the jury during trial. (R. at 18569:21-25; 18621:12-20).

Any prejudice experienced by J&J's failure to present witnesses is prejudice of their own creation and not the result of any ruling from the trial court regarding spoliation. J&J is not entitled to a new trial on this issue.

III. The circuit court made no errors that would entitle J&J to a new trial.

A. The circuit court properly refused to sever Plaintiffs' claims against A-I-I.[4]

The civil rules permit a court to conduct separate trials on any issue or claim "in furtherance of convenience or to avoid prejudice" or where separate trials improve the efficiency of the court. Rule 42(b), SCRCP. "A trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice." *Creighton v. Coligny Plaza Ltd. P'ship*, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998). The decision to sever claims and order separate trials

[4] A-I-I has filed a separate appeal.

is a matter of discretion for the trial court. *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 77, 533 S.E.2d 575, 577 (2000).

The trial court did not err in denying J&J's request to sever A-I-I. There is no indication the issues to be determined by the jury as to A-I-I were so distinct as to warrant severance.

The jury instruction regarding A-I-I did not prejudice J&J. The instruction made clear that only Plaintiffs' claims against A-I-I as to Clubman talc products had been judicially resolved. (R. at 17680:10-17681:9). Nothing about the instruction encouraged the jury to find J&J talc products caused and/or contributed to the development of Mr. Perry's mesothelioma. The *Lanzo* case is inapposite. In *Lanzo*, two defendants remained at trial—one of which (Imerys) sold talc to the other defendant (JJCI) for use in its talc products. *Lanzo v. Cyprus Amax Minerals Company*, 467 N.J. Super. 476, 490-93, 254 A.3d 691, 699-701 (App. Div. 2021). The *Lanzo* instruction directed the jury to infer that Imerys' talc was contaminated. This talc was later provided to JJCI for use in its products. Consequently, the jury, based on the instruction, could likewise infer that JJCI's products were contaminated with talc.

That was not the nature of instruction given to this jury regarding A-I-I. First, as opposed to being a talc supplier and a manufacturer of products, this case involved two manufacturers. The instruction said nothing about the supply of talc to A-I-I. There was no discussion during trial about the supply of talc to A-I-I and whether the suppliers of talc to A-I-I and J&J were the same. It was clear from the instruction that only claims as to A-I-I, with the exception of damages, had been resolved by the trial court. Injecting superfluous legalese into the instruction given to the jury regarding A-I-I, such as the fact that they were "in default for failing to comply with certain deadlines," as J&J would have had the trial court do, would have undoubtedly raised questions not before the jury for resolution. The jury was clearly instructed that these two defendants were to be

considered separately and that Plaintiffs were required to prove their case against J&J. (R. at 17679:20-17681:9; R. at 19594:6-9). J&J is therefore not entitled to a new trial based on the trial court's denial of its motion to sever.

B. Dr. Haber's testimony complied with South Carolina's causation standard.

Contrary to J&J's mischaracterization and yet another attempt to re-brand these experts' opinions, Plaintiffs' experts did not opine that "any exposure" or "every exposure" or "every asbestos fiber" caused Mr. Perry's mesothelioma. Instead, Dr. Haber testified that Mr. Perry's mesothelioma was caused by his cumulative asbestos exposure and given the specific facts of his exposure to visible asbestos dust from JBP for decades, these exposures were a substantial factor in causing Mr. Perry's disease.

J&J's argument is foreclosed by controlling law. This Court has repeatedly held it is permissible for experts to express the opinion that documented exposure to the defendant's asbestos product was sufficient to contribute to the cumulative dose that caused the plaintiff's mesothelioma. *See Glenn v. 3M Co.*, 440 S.C. 34, 64-68, 890 S.E.2d 569, 585-587 (Ct. App. 2023); *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 416-17, 878 S.E.2d 696, 707 (Ct. App. 2022; *Jolly v. General Electri*c, 435 S.C. 607, 634, 869 S.E.2d 819, 833-34 (Ct. App. 2021). In fact, "the cumulative dose theory on which [the plaintiff's] experts relied easily meets the legal standard for reliability." *Glenn*, 440 S.C. at 65, 890 S.E.2d at 585; *see also Jolly*, 440 S.C. at 639, 869 S.E.2d at 836 (same). This Court has rejected attempts to conflate "cumulative dose" testimony with the "each and every exposure" theory. *Edwards*, 437 S.C. at 416-417, 878 S.E.2d at 707. *Edwards* was affirmed by the Supreme Court, which held "[t]he trial court properly allowed [the plaintiff's expert] to explain to the jury that as the amount of asbestos accumulates in the body, the likelihood of developing mesothelioma increases" and to testify that the plaintiff's exposure to the defendant's asbestos product "was a substantial factor in causing his mesothelioma." *Edwards v.*

Scapa Waycross, Inc., 442 S.C. 387, 392, 899 S.E.2d 597, 600 (2024). J&J improperly failed to cite this controlling law expressed in *Jolly*, *Edwards*, and *Glenn*.

This Court has also disagreed with J&J's contention that "the cumulative dose theory conflicts with the *Henderson/Lohrmann* substantial factor standard." *Jolly,* 435 S.C. at 635, 869 S.E.2d at 834. "Stating that a certain exposure *contributes* to an individual's cumulative dose does not espouse the view that 'each and every breath' of asbestos is 'substantially' causative of mesothelioma or imply that one exposure meets the legal requirement for causation." *Id.* at 635-36, 869 S.E.2d at 834. "We view the testimony concerning cumulative dose as background information essential for the jury's understanding of medical causation, which must be based on science. We do not interpret this presentation as an attempt to supplant the *Henderson/Lohrmann* test." *Id.* at 636, 869 S.E.2d at 834-35; *see also Edwards*, 442 S.C. at 392–93, 899 S.E.2d at 600 (holding the same expert testimony expressed in this case "satisfied the requirements of *Henderson* and *Lohrmann*").

Contrary to J&J's assertions, Dr. Haber's opinions regarding the cumulative nature of asbestos diseases and the lack of any safe threshold of exposure are not "unreliable," but are generally accepted medical facts that have been established by a significant body of peer-reviewed medical and scientific literature and have been part of the asbestos litigation since its inception.

Dr. Haber does not believe *all* exposures contribute but considers a person's length of exposure when evaluating whether an exposure is dangerous to health. (R. at 17930:13-16). He explained:

> yes, you can have brief exposures, but the more -- the longer you have it -- so if you're -- if you're using it for your entire life from the time you were born, you know, for decades and decades and decades, that's – that's the worst because you're going to have a higher dose.

(R. at 17930:16-22). He also considers other exposure factors such as regularity and intensity, noting that Mr. Perry was "an above-average user" of JBP, using it "two to four times a day," "putting it on his whole body," and occasionally "actually putting it on his . . . face." (R. at 17945:25- 17946:10).

Dr. Haber concluded that Mr. Perry's exposures to asbestos from JBP were a substantial contributing factor to the development of his mesothelioma. (R. at 17949:9-13). He also explained there was no way to examine an individual's medical history to say certain exposures counted and other exposures did not count; instead, it is the cumulative dose of asbestos exposure that causes mesothelioma. (R. at 17951:16-25).

Dr. Haber's causation opinions are based on the record of Mr. Perry's repeated exposures to asbestos from JBP, as well as the scientific literature and other evidence mentioned above. In this way, Dr. Haber's methodology and approach is exactly the same as that approved by this Court in *Jolly, Edwards*, and *Glenn.* J&J is not entitled to a new trial on this issue.

C. Exclusion of the Swanson Letter was not an abuse of discretion.

The trial court did not abuse its discretion in excluding the Swanson Letter, which J&J characterizes as "the 1986 FDA Response." (R. at 05187-05338; R. at 17423:11-17425:5). J&J sought to use this letter to tell the jury that FDA's position is that there is "no risk" from asbestos in talc. The document contained false and unreliable expert opinion information, making it inadmissible under South Carolina Rules of Evidence 403. J&J incorrectly contends that the Swanson Letter states the FDA's position that the level of asbestos in JBP is "not a hazard," so therefore the FDA did not think that JBP needed a warning about asbestos.

The statements in the Swanson Letter are not just unreliable, unpublished, lacking quality control, and inconsistent with scientific laws and procedures, they are demonstrably false on

several counts. The document therefore had no probative value, and the risk of prejudice was extreme.

First, the statements in the Swanson Letter are based on false information J&J provided to the FDA. For example, in one of the documents that Mr. Swanson relied upon, Donald Kennedy, the then–Commissioner of the FDA, attempts to justify the 0.1% asbestos level by relying, in part, on J&J's "extensive testing for asbestiform particles in cosmetic-grade talc; all results to date have been negative." But all results of J&J's talc have not been negative – far from it. Seven years earlier, in 1972, in a report labeled "Do Not Use This Report/Replaced by Another Version," Dr. Goudie of J&J reported a total tremolite content in two samples of JBP of approximately 0.5% for one and 0.2-0.3% for the other, many times higher than the assumed 0.1% impurity level the defense experts refer to as the "worst case scenario." (R. at 16646-16648; R. at 20846-20848). Moreover, by 1979, J&J was aware that asbestos minerals had been found in its talc *over 400 times.* (R. at 20830-20839). In other words, by 1979 J&J had successfully misled the FDA about both (1) hundreds of positive tests finding asbestos in its baby powder and (2) about the percentage of asbestos in its baby powder. And one employee of the FDA had parroted this disinformation to a concerned citizen in 1979. Thus, the Swanson Letter is not just highly unreliable, it is objectively false. South Carolina law prohibits experts from presenting unreliable disinformation to the jury. *State v. White*, 382 S.C. 265, 270 (2009); *Matter of Bilton*, 432 S.C. 157, 166-67 (S.C. App. 2020); SCRE 703.

The statements in the Swanson Letter about the low risk of mesothelioma from the use of asbestos-containing talc are based on only two years of talc use, not the *fifty years* that Mr. Perry was exposed to. "We have used, as our population at risk, infants that may be routinely dusted with talcum powder for an estimated period of 2 years." (R. at 05187-05338). J&J wanted to use

this document as the FDA's official position that any and all use of cosmetic talcum powder – no matter how long, how heavy, or how consistent – is without risk and cannot increase a person's risk of mesothelioma at all.

J&J argued that while the information in the letter overlapped with anticipated testimony from J&J's expert Dr. Barlow—who was not excluded from testifying at trial—the information would nevertheless be admissible "as far as notice and other issues." (R. at 17423:11-17425:1). The trial court disagreed and determined that J&J could present information regarding the FDA's position on asbestos in J&J's talc through their toxicologist's opinions and testimony. (R. at 17425:2-5).

Further, J&J suffered no prejudice from the exclusion of the Swanson Letter. Throughout trial, J&J presented evidence regarding the FDA's position on its talc regardless of whether such testimony was misleading or not. In questioning its corporate representative, Dr. Kuffner testified that it was untrue that J&J hid information from the FDA. (R. at 18764:12-20). He also testified that J&J's testing method was created with consultation from the FDA so that J&J's testing method became industry standard. (R. at 18778:25-18779:5). Additionally, Dr. Kuffner testified that the FDA conducted studies of JBP in the 1970s and found no asbestos in the powder. (R. at 18786:11-18787:7). J&J asked its corporate representative multiple additional questions about whether the FDA found asbestos in its powder and that as of 1994, the FDA had concluded that "talc has proved to be among the safest of consumer products." (R. at 18787:22-18792:4).

Therefore, the exclusion of the Swanson Letter did not prejudice J&J or prevent it from asking pertinent questions to its corporate representative (or any witness) about the FDA's findings and/or conclusions regarding the safety of JBP.

D. The circuit court did not abuse its discretion in excluding opinions that Mr. Perry's mesothelioma was idiopathic or spontaneous.

The trial court, in accordance with its "gatekeeping" function, prevented two of J&J's experts from opining that Mr. Perry's mesothelioma was "idiopathic" and/or "spontaneous." (R. at 17412:11-17421:14). The experts were still free to testify at trial about spontaneous mesotheliomas generally, however. (R. at 17420:5-17). The trial court acts as a gatekeeper over scientific evidence and must make three preliminary findings before expert testimony may be admitted. *Watson v. Ford Motor Co*., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). The Court must find "that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable." *Id.* at 446-47, 699 S.E.2d at 175. "In South Carolina, a trial court minding the Rule 702 gate must assess not only (1) whether the expert's method is reliable (i.e., valid), but also (2) whether the substance of the expert's testimony is reliable." *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). A trial court does not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). '"A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *Id.* (quoting *Joiner*, 522 U.S. at 146).

The circuit court properly excluded opinions from J&J's experts that Mr. Perry's mesothelioma was "spontaneous." As discussed above, Drs. Diette and Weill's opinions that Mr. Perry's mesothelioma was either spontaneous or idiopathic were not based on a reliable method and were not supported by reliable date. First, the experts used the terms interchangeably when they are not synonymous. Additionally, neither, based on properly considered peer-reviewed literature, is a "cause" of mesothelioma. Fatally, neither Dr. Diette nor Dr. Weill, prior to

concluding that Mr. Perry's mesothelioma was either spontaneous or idiopathic, reviewed evidence about the asbestos content of JBP or peer-reviewed literature regarding the presence of asbestos in talc. Neither considered Mr. Perry's exposure history or his medical records which reveal the absence of any genetic mutation. There is no scientific literature to support the conclusion that a mesothelioma can be caused "spontaneously" when there is a history of asbestos exposure. Ultimately, the court determined that these anticipated opinions from experts Drs. Gregory Diette and David Weill were unsupported and were not valid scientific opinions or diagnoses. (R. at 17419:19-21). This exclusion was proper.

Dr. Weill is a pulmonologist who has no expertise in cancer generally or mesothelioma specifically. While Dr. Weill purported to have reviewed the reports of the parties' experts in this matter, he did not review any of the underlying data allowing any expert to reach any opinions and, critically, he had not reviewed any internal testing documents from J&J. He did not review any J&J documents at all. (R. at 20808:14-25, 20809:17-23; R. at 17416:21-17418:5). Additionally, given Dr. Weill's lack of review of data and given that the opinion is unsupported in any recognized scientific community, his conclusions regarding the "cause" of Mr. Perry's mesothelioma were unsupported and merely a diagnosis of exclusion. His methodology was not reliable or consistent with recognized scientific principles. (R. at 17412:11-17418:5).

Dr. Diette's opinions suffer similar flaws in that he has only an expertise in asthma and COPD and lacks an adequate foundation to opine that that Mr. Perry's mesothelioma was either spontaneous or "natural occurring." In fact, Dr. Diette has previously opined that there is no scientific literature to support the conclusion that a mesothelioma can occur spontaneously when there is a history of asbestos exposure. (R. at 16487). This opinion is critical given Dr. Diette's failure to consider evidence revealing asbestos in talc. (R. at 02669-02670).

Importantly, Drs. Diette and Weill were not completely excluded from testifying. Their only limitation was that they could not use a diagnosis of exclusion and testify that Mr. Perry's mesothelioma was spontaneous. J&J does not establish any prejudice from these rulings. J&J contends the experts' testimony would have assisted the jury in concluding cosmetic talcum powder is free from asbestos. (Appellants' Br. at p. 35). While this would have been curious testimony given that the experts have admittedly never reviewed any J&J documents concerning the asbestos content of its talc, even with the court's limitation on the subject matter of the experts' testimony, J&J could have chosen to have their experts testify to such in court.

The trial court was under no obligation to permit an expert to guess or surmise as to a possible cause for an injury based on facts not established. In fact, the trial court's gatekeeping function requires that such conjectural testimony be excluded. According to South Carolina precedent, "it is not sufficient for the doctors to say simply that the ailment in question 'possibly' or 'might have' resulted from the accident, but the medical experts must go further and testify at least that in their professional opinions the result in question 'most probably' came from the alleged cause." *Windham v. City of Florence*, 221 S.C. 350, 358, 70 S.E.2d 553, 556 (1952). In short, any opinions from J&J's experts that Mr. Perry's mesothelioma was "spontaneous" were scientifically unsupported, lacking in factual foundation, and unreliable. Exclusion of this testimony was appropriate, and J&J is not entitled to a new trial as a result of the trial court limiting such unreliable expert opinion testimony.

E. The circuit court properly instructed the jury on substantial factor, and counsel's closing argument does not entitle J&J to a new trial.

The circuit court's instruction as to substantial factor was neither erroneous nor prejudicial. "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016). As noted in *Edwards, supra,* the

"substantial factor" test requires demonstration of frequency, regularity, and proximity. The trial court instructed the jury as follows regarding substantial factor and defined what that phrase meant:

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

(R. at 19611:4-14) (emphasis added). This instruction told the jury that substantial factor meant "frequency, regularity, and duration." Notably, J&J's proposed Charge #21 on Causation defines "substantial factor" in the same fashion. (R. at 20068-20069).

Plaintiffs' closing argument did not misstate the causation standard. Counsel's argument was that J&J's contribution to Mr. Perry's dose of asbestos did not need to be the largest dose to be considered a substantial factor. (R. at 19572:15-19573:1). This argument came after testimony from J&J that it played "zero role" in the development of Mr. Perry's cancer. (R. at 18732:15-18733:4). When considered in the context of testimony and evidence preceding closing statements, counsel's statement was a reference back to J&J's testimony at trial. *See, e.g., State v. Busse*, 439 S.C. 104, 114, 886 S.E.2d 208, 213 (2023). Counsel is allowed during close argument to "state his . . . own version of the testimony and to comment on the weight it should be given." *Lesley v. American Sec. Ins. Co.*, 261 S.C. 178, 199 S.E.2d 82 (1973); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991).

The trial court's instructions as to causation corrected any alleged improper statement in Plaintiffs' counsel's closing argument regarding the causation standard and what was required to find J&J liable for Plaintiffs' injuries. Further, Plaintiffs' counsel's closing argument was not prejudicial such that J&J is entitled to a new trial. "It has long been settled that closing arguments and objections thereto are left largely to the sound discretion of the trial judge 'who is on the scene

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

J&J contends that several statements from Plaintiffs' counsel during his closing argument were prejudicial. These arguments are without merit and, in the event that J&J objected, and that objection was sustained, the trial court gave a proper curative instruction. As to Plaintiffs' counsel use of the words "unconscionable," "heinous," "shameful," "stole," "on babies," (R. at 19461:1-20), J&J objected to these statements and the trial court sustained the objection and gave a curative instruction (R. at 19461:21-19462:11). However, as to use of the terms "value" and "how they took it," and "worst carcinogen," (R. at 19407:22-19408:2, 19456:7-19457:7), J&J did not object to counsel's use of these terms and phrases during closing statement. As such, J&J waived its argument as to these statements. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("It is well settled that an issue may not be raised for the first time in a post-trial motion."); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (rejecting argument regarding improper closing argument: "Since there was no contemporaneous objection, this issue is not preserved for appellate review."); *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994) ("(T)he record indicates no objection to counsel's argument to the jury regarding consent and this issue is not preserved for

review"); *State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 131 (Ct. App. 2005) ("Failure to object to comments made during (closing) argument precludes appellate review of the issue.").

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

IV. The circuit court did not err in finding that Holdco and Kenvue are successors-in-interest to Old JJCI.

The preponderance of the evidence in the record reveals the trial court properly applied South Carolina substantive law to the issue of successor liability, properly found that both Holdco and Kenvue were successors-in-interest to Old JJCI, and properly determined that Holdco and Kenvue are liable for punitive damages. J&J is not entitled to a new trial on this issue.

A. The trial court properly applied South Carolina substantive law.

As a threshold matter, the status and availability of other potential defendants is irrelevant in determining the issue of a successor corporation's liability in a product liability action. In 2005, the South Carolina Supreme Court held that a plaintiff may maintain a product liability claim under

a successor liability theory against a defendant when there are one or more other viable product liability defendants. *Simmons v. Mark Lift Indus.*, 366 S.C. 308, 313, 622 S.E.2d 213, 215 (2005). Consequently, J&J's argument that other currently solvent entities—Johnson & Johnson and Pecos River Talc, LLC—exist in order to ensure a collectible judgment did not prohibit the trial court from finding that Holdco and Kenvue are successors-in-interest to Old JJCI.

Additionally, a preponderance of the evidence demonstrates Texas law does not apply to successor liability. South Carolina courts have not clarified whether successor liability claims should be analyzed using choice of law rules governing tort or contract. The difference is critical. If successor liability claims are properly characterized as contract-based, South Carolina would require those contracts to be "governed as to their nature, validity and interpretations by the law of the place where they are made, unless the contracting parties clearly appear to have had some other place in view." *Livingston v. Atlantic Coast Line R.R.,* 176 S.C. 385, 391, 180 S.E. 343, 345 (1935)*; see also Albermarle Corp. v. Astrazeneca UK Ltd.,* 628 F.3d 643 (4th Cir. 2010) (observing that the law gives effect to the parties' choice of law as set forth in the contract if reasonable); S.C. Code Ann. § 36-1-105 (1) (providing that when a transaction bears a reasonable relation to this state and to another state or nation, the parties may agree on the law that governs their rights and duties). However, if successor liability is properly characterized as a tort-based theory, South Carolina choice-of-law rules look to the law of the state where the injury occurred. *Bannister v. Hertz Corp.,* 316 S.C. 513, 450 S.E.2d 629 (Ct. App. 1994).

J&J contends that Texas law should apply because—although directed and controlled by a New Jersey based entity—the restructuring of other related entities occurred in Texas. The other entities, however, were two pass-through entities that had no meaningful existence, are not and never were parties to this suit, and served only to initiate the sequence of corporate restructuring

designated "Project Plato." The court, therefore, must look at the corporate restructuring as a whole, with emphasis on the surviving entities against whom judgment was entered.

As the trial court properly found, Plaintiffs' claims against J&J sound in tort as opposed to contract. (R. at 00082). Resolution of Plaintiffs' claims against J&J has no bearing on the internal affairs of the corporations and reference to the shared employees, directors, and/or shareholders between the corporations does not automatically transform a question of tort into a question of contract or one of internal affairs. The Third Circuit Court of Appeals has recognized that while the ordinary rule of successor liability – that the purchaser of assets from another firm does not assume the liabilities of the seller – is a matter of corporate law – the exceptions to that rule are variably considered matters of tort, contract, or corporate law. *Berg Chilling Sys., Inc. v. Hull Corp.*, 435 F.3d 455, 464 (3d Cir. 2006). *See also, Ruiz v. Blentech Corp.*, 89 F.3d 320, 326 (7th Cir. 1996) ("As a matter of corporate law, the issue of successor liability pertains to different significant contacts than does the tort law issue of liability for (plaintiff's) injury.").

"Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, that law of the state in which the injury occurred." *Boone v. Boone*, 345 S.C. 8, 13, 546 S.E.2d 191, 193 (2001). Mr. Perry was undoubtedly and indisputably injured by J&J's talc products in South Carolina. Consequently, successor liability was properly resolved pursuant to South Carolina's substantive law.

B. Holdco and Kenvue are successors-in-interest to Old JJCI.

Plaintiffs presented overwhelming evidence to demonstrate that Holdco and Kenvue are successors-in-interest to Old JJCI pursuant to the mere continuation and fraudulent transfer & blurred corporate identities exceptions.

Contrary to argument from J&J, the record is replete with evidence of the continuity of management, personnel, and general business operations and the exertion of control. Plaintiffs

presented evidence that Holdco and Kenvue held themselves out as the same company (Old JJCI) that previously manufactured and sold JBP (R. at 12378), that Holdco and Kenvue continued to manufacturer JBP using the same general business operations as Old JJCI, and that the successors' executive teams (officers, directors, and shareholder) were prior members of their predecessors' executive teams. (R. at 12904-12905).

Without any citation to binding precedent, J&J contends that there must be evidence of the successors' control over the predecessors. This is incorrect. The Supreme Court has written that "there may be instances where directors or officers—lacking ownership—exert such control and influence over a corporation that their continued presence after a corporate acquisition is sufficient to establish successor liability." *Nationwide,* 424 S.C. at 269; 818 S.E.2d at 454. Plaintiffs need not demonstrate that Kenvue or Holdco exercised any level of control over their predecessors. However, Plaintiffs not only presented evidence of the continuity of personnel, directors, officers, and shareholders, but also of Johnson & Johnson's (the parent entity) continued control, including controlling Old JJCI, making all health and safety decisions regarding JBP despite the creation of other entities, and controlling the creation of all subsequent, passthrough, and/or successor entities and the boards of those entities. (R. at 12655-12656; R. at 12281).

Plaintiffs also presented sufficient evidence for the trial court to find that Holdco and Kenvue were successors-in-interest pursuant to the fraudulent transfer and blurred corporate identities exceptions. South Carolina recognizes these exceptions when a predecessor's assets are specifically transferred or moved to place the predecessor's assets out of the reach of creditors and/or third parties. *Nationwide*, 424 S.C. at 256. Here, Plaintiffs presented evidence to show that J&J has intermingled and blurred corporate interests, entities, and activities such that there is no legal distinction between the corporations involved in the consumer products business. *Mid-South*

Mgt. Co. Inc. v. Sherwood Development Corp., 374 S.C. 588, 604-05, 649 S.E.2d 135, 144-45 (Ct. App. 2007). Also, the trial court had evidence that J&J (parent entity) used the bankruptcy process as a vehicle "to address the company's growing talc-related liability exposures and costs in defending the tens of thousands of pending ovarian cancer claims and hundreds of mesothelioma cases, as well as future claims." *In re LTL Management, LLC*, 637 B.R. 396, 407 (Bankr. D.N.J. 2022), *rev'd and remanded*, 58 F.4th 738, *rev'd and remanded*, 64 F.4th 84 (3d Cir. 2023). The corporate restructure was "designed to allow 'New JJCI to continue to operate Johnson & Johnson's Consumer Health business in the United States without interruption(.)'" *Id.* Despite being solvent, J&J sought to use the bankruptcy system to limit and redefine the rights of the people its products harmed. *In re LTL Management, LLC*, 64 F.4th at 111; *In re LTL Management, LLC*, 652 B.R. 433, 437 (Bankr. D.N.J. 2023).

Given the evidence presented to the trial court, the court correctly found that that Holdco and Kenvue are successors in interest to Old JJCI.

C. Holdco and Kenvue are liable for punitive damages.

Having properly found Kenvue and Holdco to be successors in interest to Old JJCI, the circuit court found Kenvue and Holdco are liable for any portion of punitive damages assessed to Old JJCI. (R. at 00087). In doing so, the circuit court noted that this state's courts have not addressed the issue of whether punitive damages are recoverable against a successor corporation but courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs., LLC v. Hirsch*, 170 Conn. App. 439, 456 (2017) (defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.,* 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely

agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo).

Here, as the circuit court found, the evidence shows that Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc which gave Mr. Perry cancer. (R. at 00088-00089). Holdco, Kenvue, and Old JJCI were effectively the same entity. They manufactured and sold the same product using the same formulas, equipment, and employees, amongst other things, and were controlled by the same entity. The trial court correctly found that Kenvue and Holdco are successors-in-interest to Old JJCI and that they should be assessed punitive damages to the extent of Old JJCI's liability.

CONCLUSION

J&J has failed to demonstrate any grounds for reversal of the trial court's order denying J&J's motions for judgment notwithstanding the verdict or new trial absolute. The court did not abuse its discretion in admitting tissue digestion evidence, in denying the request for a new trial based on the *Hood-McBrayer* Spoliation Order, or in prohibiting the J&J's experts from offering testimony and opinions outside of their expertise and refusing improper jury instructions on causation. Additionally, a de novo review of the record reveals no error in finding Kenvue and Holdco to be successors-in-interest to Old JJCI under South Carolina's successor liability exceptions. Accordingly, the circuit court judgment in favor of Mr. Perry and Mr. Long should be affirmed by this Court.

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November 21, 2025

Columbia, South Carolina.

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

Michael L. Perry and Lonnie Long..... Respondents,

v.

American Industrial Industries, Atlas Turner Inc., Avon Products, Inc., Barretts Minerals, Inc., BlockDrug 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 Stroes, Inc., Estee Lauder, Inc., Estee Lauder International, Inc., The Estee Lauder Companies, Inc., Food Lion, LLC, Genuine Parts Company, Glamour Industries Co., Himmell Management Co., LLC, Himmel Media, LLC, Honeywell International, Inc., Idelle Labs, Ltd., IMI Fabi (Diana), LLC, IMI Fabi (USA), Inc., IMI Fabi, LLC, Janssen Pharmaceutical, Inc., Johnson & Johnson, Johnson & Johnson Holdco (NO), 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 Proctor & 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 ViJon, LLC, Walgreen Co., Walmart Inc.....Defendants,

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

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I, Elizabeth Moultrie, of Kassel McVey, hereby certify that the **FINAL BRIEF OF RESPONDENTS** was served on all parties to this appeal on November 21, 2025, via email to their counsel of record:

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