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 International Industries et al.

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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the J&J Defendants are entitled to a new trial where the court allowed Plaintiffs to submit undisclosed evidence about tissue digestion after openings, altering the course of trial; prevented the J&J Defendants from obtaining their own tissue digestion expert opinions; and prevented the J&J Defendants from rebutting the Plaintiffs' tissue digestion evidence through fact or expert testimony?

2. Whether the J&J Defendants are entitled to a new trial where the court granted a spoliation order pre-trial that prejudiced the J&J Defendants' defense that their talc products do not contain asbestos?

3. Whether the J&J Defendants are entitled to a new trial where the court limited the J&J Defendants' causation defense by permitting improper expert testimony for Plaintiffs, restricting the evidence offered by the J&J Defendants, declining charges requested by the J&J Defendants, and where Plaintiffs' counsel argued improper law respecting causation to the jury and made other improper arguments?

4. Whether the court erred by imposing successor liability on Holdco and Kenvue where neither defendant manufactured Johnson's Baby Powder used by Plaintiff, each is a separate entity from Johnson & Johnson, and Plaintiffs have an adequate remedy against the other J&J Defendants?

INTRODUCTION

This trial started on an uneven playing field with Plaintiffs ambushing the J&J Defendants with surprise expert testing. And by the end of trial that playing field was tilted entirely in Plaintiffs' direction.

Plaintiffs claim that the J&J Defendants' talc products are inadvertently contaminated with ultra trace amounts of asbestos and contributed to Plaintiff Michael Perry's development of mesothelioma. Sometimes, but not always, these talc cases involve "tissue digestions." These are analyses of tissue samples from the plaintiff that might or might not show the presence of asbestos. So when they are available, they can be critical pieces of evidence. Plaintiffs' lead testing expert, Dr. William Longo, testified at his deposition three weeks before trial that he would not be able to complete any tissue digestion analysis by the time of trial.

So the J&J Defendants understandably prepared their trial strategy with the expectation that this case would not have a tissue digestion. The J&J Defendants arrived at court to give opening statements and—surprise!—Plaintiffs informed the court that Dr. Longo had in fact completed the tissue digestion analysis he had just testified he couldn't do. What were the results of that analysis? The J&J Defendants weren't told. They were forced to begin opening with no understanding whatsoever about this critical expert opinion. In fact, defense counsel had to tell the jury in opening: "I have no idea what this man [Dr. Longo] is going to tell you." That is how the trial began on an uneven playing field.

The court then prohibited defendants from offering evidence that Mr. Perry was exposed to asbestos from his work at a hotel where the asbestos would have been the very types of Dr. Longo claimed to find in Mr. Perry's tissue samples. The court also prohibited Johnson & Johnson's Chief Medical Officer from testifying that the J&J Defendants had never found one of the types of asbestos found in Mr. Perry's tissue in any of their source mines. So the jury was left with only one possible conclusion: the asbestos in Mr. Perry's tissue came from talc.

The J&J Defendants had two main defenses: that its products did not contain asbestos, and that the extremely low levels of asbestos Plaintiffs claim are present are insufficient to cause mesothelioma. The court's rulings initially chipped away at the first defense until it became impossible to maintain. Despite the fact that the J&J Defendants maintained hundreds of thousands of pages of historic documents and dozens upon dozens of actual bottles of talc, the court found that the J&J Defendants improperly spoliated evidence. Other courts around the country have disagreed. The court stated that if the J&J Defendants discussed internal J&J testing or testing commissioned by J&J, that would open the door to an adverse inference that evidence would have

shown asbestos present in the talc. When the J&J Defendants began trying their case under those parameters, the contours of what would trigger the adverse inference changed.

Limited in their ability to explain to the jury that their products did not contain asbestos, the J&J Defendants were left with only one defense: low dose. But then court rulings limited that defense at every turn. A co-defendant in this case is American International Industries ("A-I-I"). They manufactured another brand of talc. The court entered default judgment against A-I-I based on the timing of their answer. But rather than severing A-I-I, the court instructed the jury at the outset of the case that "A-I-I's asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma." (Trial Tr. 156:10-22; R. 17680.) This completely undercut the defense that the levels of asbestos allegedly found in talc are too ***low*** to cause mesothelioma.

The court also permitted Plaintiffs' specific causation expert to offer the opinion that ***any*** exposure to asbestos contributes to a plaintiff's cumulative exposure and therefore is causative. That invalid opinion has been rejected by courts across the country. But at the same time, the court ***prohibited*** the J&J Defendants from introducing FDA's conclusion in 1986 that levels of asbestos allegedly found in talc are too low to be hazardous on the grounds that the document was a "letter between two people." (Pretrial Hrg. Tr. 145:12-14; R. 17424.) The court ***also*** excluded Defendants' experts from offering the opinion that Mr. Perry's cumulative exposure to asbestos was too low to cause his mesothelioma and that it occurred—as many cancers do—through errors in cell division and not from any external source. Plaintiff's own expert agrees mesotheliomas can occur that way. The court precluded that opinion based on a prior ruling it made in another case regarding what materials the experts reviewed even though the experts reviewed those very materials to account for the court's prior criticisms.

Hearing such a one-sided view of the evidence, the jury returned a $62 million verdict, which after remittitur and setoffs, resulted in a final judgment of $39.4 million. This Court should reverse the judgment for the reasons set forth herein and order a new trial.

STATEMENT OF THE CASE

This is an appeal of a verdict in favor of Plaintiffs against Appellants Johnson & Johnson, Inc. and LLT Management, LLC, f/k/a LTL Management, LLC, and of the court's subsequent order imposing successor liability on Kenvue, Inc., and Johnson & Johnson Holdco (NA), Inc. One of the original defendants in the lawsuit was American International Industries ("A-I-I"), the company that manufactured a brand of talcum powder called Clubman. At the outset of the case, A-I-I went into default and the court denied its motion to set aside the entry of default. (*See* Oct. 3, 2023 Order; Nov. 2, 2023 Order; R. 1-8.) The parties proceeded with discovery and the case was set for trial on August 5, 2024. Prior to trial, all defendants other than A-I-I and the J&J Defendants settled or were dismissed.

At the pretrial hearing, the court stated that A-I-I would be included in the trial for purposes of damages only. (Pretrial Hrg. Tr. 8:17-19; R. 17287.) Before trial, Plaintiffs proposed a jury instruction, accepted by the court, that "the court has determined that Clubman's asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma." (*See* J&J Defs. Objection, Ex. 1 – Email; R. 9630-36.) The J&J Defendants objected and proposed a different instruction, and moved in the alternative to sever, which were denied. (J&J Defs. Obj. p.2; Trial Tr. ("Tr.") 38:3-12; R. 9627, 17562.)

The court also stated, after the jury was sworn, that if the J&J Defendants attempted to present evidence of internal talc tests showing no asbestos contamination, the court would charge

the jury that due to alleged spoliation, it could assume that the J&J Defendants' talc products contained asbestos.[1] (*See* J&J Defs. Resp. to Pltfs.' MIL #22, Ex. B – *Hood-McBrayer* Order; Trial Tr. 40:2-41:12; R. 8917-28, 17564-65.)

Following a two-week trial, the jury returned a verdict against the J&J Defendants on Plaintiffs' claims for negligence and strict liability and for the J&J Defendants on Plaintiffs' fraudulent misrepresentation claim. The jury awarded Plaintiffs a total of $32,656,250 in actual damages assessed against the J&J Defendants and A-I-I. The jury also found that the J&J Defendants' conduct was willful, wanton, or reckless. The case proceeded to the punitive damages phase, and the jury returned a verdict of $30,000,000 in punitive damages against the J&J Defendants and $760,000 against A-I-I.

The court permitted Plaintiffs to make further filings and submit additional evidence regarding successor liability claims post-trial. The J&J Defendants and A-I-I then timely filed their post-trial motions, renewed their directed verdict motion, and opposed successor liability. The Court issued an Order on December 11, 2024: (1) denying the J&J Defendants' motions for JNOV, new trial absolute, and new trial based on the thirteenth juror doctrine; (2) granting their motion for a new trial nisi remittitur; (3) granting, in part, their motion for setoff, but denying production of settlement agreements; (4) granting, in part, their motion to stay execution on the judgment; and (5) finding Johnson & Johnson Holdco (NA), Inc. ("Holdco") and Kenvue, Inc. liable under a successor liability theory. (Dec. 11, 2024 Order on J&J Defs. Motions p. 1; R. 68.)

After the remittitur, the compensatory damages to Plaintiff Perry were reduced by $4,000,000 to $19,037,500; the loss of consortium award was reduced by $3,000,000 to $6,618,750; and the punitive damages award was reduced by $5,000,000 to $25,000,000. (*Id.* p.

[1] The existence of negative testing reports spanning decades was a central pillar of the J&J Defendants' anticipated defense. Evidence and testimony concerning these reports has routinely been allowed by trial courts across the country.

85; R. 152.) After accounting for setoffs of $11,255,000, the total compensatory judgment was $14,401,250 and the total punitive judgment remained $25,000,000. Thus, the total judgment against the J&J Defendants was **$39,401,250**. (*Id.*) A judgment was also entered against A-I-I.

On December 23, 2024, the J&J Defendants timely filed a motion to reconsider pursuant to Rule 59(e).[2] The court issued its ruling denying the motion to reconsider on March 2, 2025, and entered an amended order on the J&J Defendants' post-trial motions that same day, making a change to a factual finding. (Order on Rule 59(e) Mot.; Amended Order on J&J Defs. Motions; R. 154-258.) The J&J Defendants then timely appealed these additional Orders.

STATEMENT OF THE FACTS

Michael Perry alleged exposure to asbestos based on: (1) his and his mother's use of various cosmetic and consumer talc products which Plaintiffs allege were contaminated with trace amounts of asbestos, and (2) dozens of brake jobs utilizing asbestos-containing brake pads. Regarding talc, Mr. Perry alleged that he was exposed to asbestos through his mother's use of talc products produced by Avon, Cashmere Bouquet, Chanel, Estee Lauder, and Johnson's Baby Powder and Shower to Shower, (Tr. 462:12-24; R. 17986), and through his personal use of various talc brands, including Clubman, Drakkar Noir, Gold Bond, Ralph Lauren, Ammens, Calvin Klein, Equate, and Johnson's Baby Powder. (Tr. 1664:2-67:3; R. 19188-91.)

Mr. Perry contended that he was exposed to asbestos from changing the brakes on family vehicles when he was between 15 and 18 years old. (Tr. 1677:17-78:2; R. 19191.) He installed six

[2] Because the Court had not acted on this motion within 30 days of the December 11 Order, the J&J Defendants proceeded to file a notice of appeal and moved for a limited remand to allow the court to rule on the motion to reconsider, which this Court granted.

dozen brakes[3] on these vehicles over a three-year period and testified the process would take several hours and release visible dust that he breathed. (Tr. 1678:15-82:7; R. 19202-06.)

I. The Court Permits Dr. Longo's Tissue Digestion Results To Be Disclosed After Opening Statements, Then Prohibited Related Defenses.

A "tissue digestion" is an analysis of someone's tissue, which can be relevant to exposure because it can show the presence or absence of particular types of asbestos and the levels of those asbestos in a plaintiff's tissue. Prior to trial, the J&J Defendants contacted Plaintiffs to request assistance in obtaining Mr. Perry's tissue from the hospital to conduct a tissue digestion. (*See* J&J Defs. Mot. to Exclude Tissue Digestion; R. 5689-24.) For over a month, there were exchanges of correspondence on how to split samples until the J&J Defendants were forced to get a court order to split the samples. Plaintiffs' testing expert, Dr. William Longo, testified at his deposition before trial that he would not be able to complete any tissue digestion analysis in time for trial. So the J&J Defendants proceeded to trial expecting that no tissue digestion would be part of the case.

Yet Plaintiffs launched a surprise on the eve of trial. Just before opening statements began, Plaintiffs disclosed that— contrary to his deposition testimony—Dr. Longo had in fact completed the tissue digestion he previously said under oath he could not complete in time for trial. The J&J Defendants requested either that the tissue findings be excluded or that trial be continued for their own expert to conduct a tissue analysis, which would take three weeks. (*See* Tr. 72:12-20, 147:3-22; R. 17596, 17621.) The court denied both requests. (Tr. 147:8-48:18; R. 17671-72.)

The J&J Defendants requested either that the tissue findings be excluded or that trial be continued for their own expert to conduct a tissue analysis, which would take three weeks. (Tr. 72:12-20, 147:3-22; R. 17596, 17671.) The court denied both requests. The court stated that, even

[3] He recalled using the following asbestos containing brake parts: Bendix brake drum linings, NAPA drum brake linings, Rayloc drum brake linings, and NAPA asbestos auto gasket kit preformed gaskets. (Tr. 481:2-11; R. 18005.)

though the J&J Defendants knew nothing about Dr. Longo's findings, that they would not come as a surprise to the defense. (Tr. 147:14-22; R. 17671.)

Critically, what Plaintiffs "disclosed" prior to trial was simply the ***fact*** that Dr. Longo had done a tissue digestion. They did not disclose what Dr. Longo's actual ***findings*** were. Over the J&J Defendants' objection, the court permitted the case to proceed to opening statements with the J&J Defendants completely in the dark about a critical piece of evidence.

In fact, defense counsel was forced to tell the jury in openings: "And I'm standing here as the counsel for Johnson & Johnson defendants, and I have no idea what this man [Dr. Longo] is going to tell you. We'll have an opportunity to cross-examine him. And who knows what he'll say about this tissue in Mr. Perry's body. We'll have to find out." (Tr. 227:18-25; R. 17750.)

Those findings ***did***, in fact, contain a major surprise. Dr. Longo identified winchite asbestos in Mr. Perry's lungs, in addition to tremolite. (Tr. 877:5-15, 966:14; R. 18401, 18490.) However, the court prohibited the J&J Defendants from introducing evidence that Mr. Perry had been exposed repeatedly to asbestos throughout his hotel employment in an old library storage building and prohibited questions of experts that such most probably contained winchite. (*See* J&J Defs.' Post-trial Motions, Ex E. Longo Dep. at 93:16-94:2; R. 13409-10.) The court then also prohibited Johnson & Johnson's Chief Medical Officer from testifying about his personal knowledge that the winchite purportedly found in Mr. Perry's lung tissue could not have originated from the J&J Defendants' products. (Tr. at 1293:15-1294:2; R. 18817-18.) The Court also prohibited the J&J Defendants from fulsome cross-examination of Dr. Longo about the reliability of his rushed testing given his prior testimony that such testing could not be completed before trial. (Tr. 964:19-66:12; R. 18488-90.)

After the J&J Defendants were forced to address the surprise tissue digestion findings both after opening statement and at a time where Defendants could not conduct their own testing—and with Defendants prevented from explaining how the winchite finding actually helped the defense—Plaintiffs' lawyer took advantage in closing. He told the jury: "you can buy almost anything," "pay people to eat bugs on TV or marry someone they've never met," and "pay experts to come into court and say smoking doesn't cause lung cancer, arsenic in the water doesn't cause leukemia" but "[o]nce we realized what was in Michael Perry's lungs, they couldn't find an expert on earth to come into this court and tell you they didn't do it." (Tr. 1884:22-1885:7; R. 19408-09.) The Court permitted Plaintiffs to argue that the jury could take negative inferences from the fact that J&J Defendants chose not to call their retained expert but struck the portion of the statements that the J&J Defendants "couldn't find" an expert. (Tr. 1887:14-21; R. 19411.)

II. The Court Issues A Shifting Spoilation Order Prejudicing The J&J Defendants' Defense that Asbestos Is Not Present In Their Talc Products.

The J&J Defendants have produced over 500,000 historic documents in the talc litigation going back decades. Indeed, Plaintiffs' center their case on the J&J Defendants' own historic documents which they maintained for decades. The J&J Defendants also kept dozens upon dozens of actual bottles of its talc products spanning multiple decades that anyone is able to test. In fact, Plaintiff's testing expert, Dr. William Longo's, opinion is based predominantly on his testing of those very bottles, which the J&J Defendants provided in discovery.

Nevertheless, in a prior case known as *Hood-McBrayer*, the court found that the J&J Defendants spoliated evidence. Specifically, any reliance on the results of testing the J&J Defendants either conducted themselves or commissioned where the test results showed the absence of asbestos where underlying backup data was not present would trigger an instruction

that the missing data showed asbestos fibers were in fact present (contrary to what the analyst reported as the results):

> That when Johnson & Johnson introduces a test result, for tests performed by Johnson & Johnson or commissioned by Johnson & Johnson, that is negative for asbestos, reports "no quantifiable asbestos," or contains similar language, if the evidence shows Johnson & Johnson destroyed or unreasonably failed to preserve underlying data related to the test, the jury may presume that the missing data showed asbestos fibers were present.

(*See* J&J Defs. Resp. to Pltfs.' MIL #22, Ex. B – *Hood-McBrayer* Order; Trial Tr. 40:2-41:12; R. 8917-28, 17564-65.) The court then adopted that ruling here. (Pretrial Hrg. Tr. 149:22-156:10; R. 17428-35.)

This order drastically changed the type of evidence the J&J Defendants could present at trial, and the J&J Defendants structed their entire strategy around the contours of the order. Defense counsel said as much publicly, telling the court and the plaintiffs on the first day of trial: "I'm telling you right now that we do not intend to offer any evidence that would trigger this for the jury. And that, again, is a decision we've made only because of Your Honor's adverse ruling in this case that we believe prejudices us." (Tr. 39:21-40:1; R. 17563-64.)

But the contours of this order mutated during trial. Mid-trial, the court said that if the J&J Defendants merely "projected the notion of no asbestos," that would trigger the adverse inference instruction as well—even if the J&J Defendants did not "introduce[] a test result" as originally required by the order (Tr. 1025:22-1026:4; R. 18549-50.)

Because the J&J Defendants did not present the critical evidence for their defense of the testing showing the absence of asbestos in their products in order to avoid triggering the adverse inference instruction, the court ultimately did not give that instruction.

III. The Court Limits Defendants' Remaining Low Dose Causation Defense.

A. Low dose becomes the only remaining defense.

With the J&J Defendants unable to present their desired evidence that testing showed their talc products did not contain asbestos, the defense centered around dose: that even the asbestos exposures Plaintiffs alleged occurred from talc would be at too low levels to cause mesothelioma. Just because someone is exposed to asbestos does not mean that asbestos caused their mesothelioma. The levels of exposure can be too low to give rise to cancer. Even Plaintiffs' own expert agreed. Plaintiffs' expert Dr. Arnold Brody testified that the "background level" of asbestos in the ambient air is 0.006 fibers per cc, which leads to billions of asbestos fibers in everyone's lungs. (Tr. 292:2-93:10; R. 17816-17.) Dr. Brody agreed that breathing that background level of asbestos every minute of every day presents ***no increased risk of mesothelioma***. (Tr. 294:6-25; R. 17818-19.)

Dr. Longo has tested dozens of bottles of the J&J Defendants' products and claims to find asbestos. While the J&J Defendants of course disagree with Dr. Longo's findings, he at most purports to find only "ultra-trace" levels of asbestos in the J&J Defendants' products. (Tr. 912:17-22, 913:19-24; R. 18436-37.) Indeed, Dr. Longo testified that using an average-concentration bottle from the J&J archive would lead to airborne concentrations of only 0.004 fibers per cc. (Tr. 925:5-14, 931:1-18; R. 18449, 18455.) Those are ***lower*** levels of asbestos in the air under Dr. Longo's own testing that someone would be exposed to for only a few minutes of using talc than the ***background*** levels in the air people breathe in 24 hours a day. Dr. Longo conceded on cross examination that based on his 0.004 f/cc number, a person could apply Johnson's Baby Powder eight hours a day for 40 years and still not reach the OSHA permissible exposure limit. (Tr. 938:16-39:13; R. 18462-63.)

As a point of comparison, under Dr. Longo's own testing, exposure from changing brakes would be 24 to 36 fibers per cc. (Tr. 963:10-64:7; R. 18487-88.) This is 6,000 to 9,000 times higher than Dr. Longo's alleged finding of .004 fibers per cc in Johnson's Baby Powder. Mr. Perry's exposure to asbestos in brakes amounted to quadrillions of asbestos fibers. (Tr. 957:6-17; R. 18481.) Plaintiffs' pulmonology and specific causation expert, Dr. Steven Haber, conceded that the brake dust exposure was a substantial factor in causing Mr. Perry's mesothelioma. In fact, Dr. Haber admitted that if Mr. Perry had never used talcum powder, he would have attributed Mr. Perry's mesothelioma to his exposure to asbestos from brake dust. (Tr. 484:2-87:7; R. 18008-11.)

B. The court issues numerous rulings limiting the lose dose defense.

The Court limited the ability to present a low dose causation defense in numerous ways both before and during trial.

A-I-I Instruction. Right from the outset of trial, the court informed the jury that, as a result of default, it had "determined" that A-I-I's cosmetic talc product contained asbestos, was defective and unreasonably dangerous, and was a substantial factor in the development of Michael Perry's mesothelioma. (Tr. 156:10-22; R. 17860.) Notably, a critical component of the J&J Defendants' defense was that there is no reliable scientific evidence that cosmetic talc, regardless of manufacturer, can or does increase the risk of mesothelioma. (*Id.* at 1267:19-68:18; R. 18791-92.) Plaintiffs' proposed instruction, adopted by the court over J&J Defendants' objection, completely undercut that defense. The Court also denied the J&J Defendants' request to sever A-I-I. Trial. (*Id.* at 38:3-12; R. 17562.)

Any Exposure Theory. Dr. Haber was permitted to testify over J&J Defendants' objections that every exposure to asbestos contributes to a person's cumulative exposure that the ***cumulative*** exposure caused Mr. Perry to develop mesothelioma. (*Id.* at 427:15-25, 446:3-12; R. 17951,

17970.) This theory—often called an "any exposure" opinion—permits an expert to claim an asbestos exposure "caused" a plaintiff's mesothelioma ***no matter how infinitesimal*** that exposure is. For that reason, courts across the country have precluded experts from offering it.

1986 FDA Response. The J&J Defendants sought to present to the jury the FDA's 1986 letter response denying a citizen's petition to require a warning label on talc ("1986 FDA Response"). In that 1986 FDA Response, the FDA concluded that, based on talc testing that occurred in the 1970s, "even when asbestos was present, the levels were so low that no health hazard existed." (J&J Defs. Proffer re: Citizen's Petition, Ex. A – 1986 FDA Response p. 2; R. 11050.) That statement was based on the results of the FDA's analysis that "risk from a worst-case estimate of exposure to asbestos from cosmetic talc would be less than the than the risk from environmental background levels of exposure to asbestos (non-occupational exposure) over a lifetime." (*Id.*) But the court prohibited J&J Defendants from discussing this document.

Spontaneous Mesothelioma. Defendants retained two experts—Dr. David Weill and Dr. Gregory Diette—who would tell the jury that mesothelioma can occur without exposure to asbestos or any outside substance. (Pretrial Hrg. Tr. 136:12-40:7; R. 17660-61.) This is a well-established science. Indeed, an article in the prestigious journal *Science* concluded that over one-third of mesotheliomas develop this way. (J&J Defs. Opp'n to Pltfs. MIL # 17, Ex. A – Diette Report p. 44; R. 7993.) It was their opinion that exposure to asbestos from both the brakes and any alleged exposure from talc was too low to cause Mr. Perry's mesothelioma. But the court precluded this opinion from being offered to the jury.

IV. The Jury Returns Its Over $60 Million Verdict.

The jury returned a verdict against the J&J Defendants on Plaintiffs' claims for negligence and strict liability. The jury awarded Plaintiffs a total of $32,656,250 in actual damages assessed

against the J&J Defendants and A-I-I. The jury also found that the J&J Defendants' conduct was willful, wanton, or reckless and, in the punitive damages phase, the jury returned a verdict of $30,000,000 in punitive damages against the J&J Defendants and $760,000 against A-I-I.

LEGAL STANDARD

Admission or exclusion of evidence is based on an abuse of discretion standard, as is whether to grant a motion for mistrial based on improper argument of counsel. *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017); *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 202, 621 S.E.2d 363, 366 (Ct. App. 2005). The trial court is required to charge the proper controlling law, and failure to do so is error if prejudicial. *Clark v. Cantrell*, 339 S.C. 369, 389-390, 529 S.E.2d 528, 539 (2000). A claim of successor liability is an equitable claim subject to de novo review. *See Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011).

ARGUMENT

I. The Court Erred by Permitting Trial-By-Ambush With Dr. Longo's Late Disclosed Tissue Digestion Findings.

A. The surprise introduction of Dr. Longo's tissue digestion analysis unfairly prejudiced the J&J Defendants.

"Disclosure of information between the parties before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing." *Reed v. Clark*, 277 S.C. 310, 316, 286 S.E.2d 384 (1982). When it comes to experts, Rule 26(b)(4)(A), SCRCP provides that "[d]iscovery of facts known and opinions held by experts . . . may be obtained by any discovery method." Rule 403 also prohibits even relevant evidence its probative value is "substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE.

This case presents a circumstance with precisely the unfair prejudice these rules exist to prevent. At Dr. Longo's deposition—when Defendants are entitled to discover an expert's opinion before trial—Dr. Longo testified that he could not complete the tissue digestion in time for trial.[4] So the J&J Defendants then understandably came to trial with the expectation that no expert opinion regarding results of tissue testing would be part of this case.

Informing the defense that tissue testing had been completed on ***the day of openings*** was a surprise ambush that should never be permitted. Plaintiffs did not even actually disclose Dr. Longo's ***opinions*** at that time because Plaintiffs did not disclose the ***results*** of his testing. Both parties coming to trial with the same information and time to actually evaluate the evidence in the case is critical to a fair trial.

The court's response to the J&J Defendants' request for disallowance of the tissue digestion evidence or, in the alternative, a continuance, was that the J&J Defendants should "pretty well be able to guess" what Dr. Longo found. (Tr. 147:25-148:2; R. 17671-72.) Defendants had no possible way to "guess" that Dr. Longo would identify winchite—an unexpected finding—in Mr. Perry's tissue. More importantly, no defendant should have to ***guess*** what the opposing party's critical expert will testify about. While the court should have excluded this testing, the court refused other simple ways that could have also ameliorated the prejudice to defendants such as a short continuation of trial to ensure a defense expert could conduct his own testing. At a bare minimum, Plaintiffs should have been required to disclose the ***results*** of their ambush testing before trial so the defense did not have to go into opening statements blind to a critical piece of evidence.

Most egregious, defense counsel was forced to tell the jury in opening that she "had no idea" what Dr. Longo would testify about. (Tr. 227:18-25; R. 17751.) That is a perversion of the

[4] The master discovery to Plaintiffs also sought "test results, or other records of any type which relate to each plaintiff's medical history and/or current medical condition."

rules of pre-trial disclosure, the rules preventing unfair prejudice, and the fundamental principle of fairness that the parties should be equipped with the same information. Plaintiffs would be hard pressed to find any other example of an opening statement in South Carolina where an attorney had to tell the jury that he or she was completely unaware of a critical expert's opinion. That's because the rules are designed to prevent this injustice.

The J&J Defendants entered trial without any knowledge of this critical piece of evidence that the Plaintiffs knew about and therefore could not properly prepare their case. Then, as is discussed below, when the J&J Defendants wanted to discuss reasons why the J&J testing results supported the *defense,* the court precluded that evidence.

B. The court improperly precluded Defendants from offering evidence of the likely source of the winchite and tremolite.

There was no dispute that the brakes Mr. Perry changed would not have contained the winchite Dr. Longo claimed to find in his tissue. So where did it come from? Defendants sought to explain to the jury the winchite likely came from his repeated exposure to asbestos through his employment at a hotel during which he went into an old storage building he himself reported was "full of asbestos." (*See* J&J Defs. Proffer re: Library Evidence & Exhibits; R. 9674-712.)

Mr. Perry worked at an Embassy Suites hotel during the 2000s. (*See id.* at Ex. A – Dep. of Michael Perry at 130:1-2; R. 9680.) The Embassy Suites used an adjacent library as a storage facility, which Mr. Perry himself acknowledged was later condemned by the county for being "full of asbestos." (*Id.* at 279:25-280:9, 849:1-20; R. 9686-87, 9690.) In the library, workers were "constantly" moving furniture around and hitting the ceilings, causing the ceilings to start caving in. (*Id.* at 130:18-32:20; R. 9680.) Mr. Perry testified that he physically went into the library on a semi-regular basis, "maybe more than two times per month." (*Id.* at 278:20-279:8; R. 9686-87.) Once inside the library, Mr. Perry would remain for "a long period of time." (*Id.* at 279:10-23; R.

9687.) In fact, outside of litigation and several months prior to his deposition, Mr. Perry informed his physicians that he "used to work at embassy suites adjacent to the old county library which apparently had a lot of asbestos in the walls." (*See* J&J Defs' Proffer re: Library, Ex. B. – 7/11/23 Office Visit Record; R. 9694.) Plaintiff expert Dr. Haber's own report acknowledged Mr. Perry's physician noted a "history of asbestos exposure from 'working at the old library/Hotel Bennett downtown.'" (*See id.* at Ex. C. – Dr. Haber Report at 7; R. 9704.)

Most importantly, Dr. Longo has testified that ***winchite and tremolite asbestos*** can be found in building materials such as insulation, building fireproofing, and plasters, (*see* J&J Defs.' Post-trial Motions, Ex E. – Longo Dep. at 93:16-94:2; R. 13409-10.) The hotel exposure, therefore, provided a direct link to the dust at the library and the fibers found in Mr. Perry's tissue. Yet the court refused to admit evidence of this critical potential exposure. The court reasoned that "you haven't got any expert that ties any of that to any of his mesothelioma." (Pretrial Hrg. Tr. 101:12-15; R. 17380.)

That rationale is wrong for three independent reasons. ***First***, to the extent the court meant that the defense experts did not conclude by a preponderance of the evidence that the hotel exposure caused Mr. Perry's mesothelioma, defendants do not bear that burden. Plaintiffs do.

Second, regardless of whether the storage room exposures ***caused*** Mr. Perry's mesothelioma, that exposure could still explain the ***presence*** of winchite (and tremolite) in Dr. Longo's analysis of Mr. Perry's lung tissue. The jury was left with only the explanation that those fibers came from talc.

Finally, the court's ruling permitted Plaintiffs to present a completely one-sided and skewed picture to the jury. For example, when Plaintiffs presented their expert Dr. Haber on direct examination, Plaintiff showed the jury a medical record that discussed Mr. Perry's talc use, which

came from reports from Mr. Perry. But the ***very next sentence*** in that same record stated that "he also used to work at Embassy Suites adjacent to the old county library, which apparently have a lot of asbestos in the walls." (Tr. 397:4-25; R. 17921.) This report from Mr. Perry was not allowed to be discussed.

The J&J Defendants asked the judge for permission to cross examine Dr. Haber on that very statement in light of Plaintiffs' presentation, but the court refused, saying "I don't think that opens the door." (Tr. 399:2-3; R. 17939.) This ruling disregards the rule of completeness in Rule 106, SCRE. The jury was improperly given the view that the Mr. Perry's medical record and his self-reported exposures did not include the storage building exposure.

The J&J Defendants should have been allowed to fully present evidence on the issue of Mr. Perry's exposures that would have provided an explanation for the tremolite and winchite Dr. Longo reported in Mr. Perry's tissue.

C. The court improperly excluded Dr. Kuffner's testimony that the J&J Defendants had never found winchite in the relevant talc mines.

The J&J Defendants also wanted to have Dr. Kuffner, Chief Medical Officer for Johnson & Johnson, tell the jury that the J&J Defendants never found winchite in the mines from where they sourced their talc during the relevant time periods.

The court, *sua sponte*, prohibited "any" defense testimony "about . . . winchite or whether it . . . occurs in various mines" from Dr. Kuffner, stating only that "[h]e's not being offered for this." (Tr. at 1293:15-1294:2; R. 18817-18.) When defense counsel attempted to clarify the question as asking solely about Dr. Kuffner's firsthand, nonspecialized knowledge of what he observed (or didn't observe) in J&J's records, the Court admonished her—before the jury—stating, "I am not going to allow you to get around a ruling by saying 'as a corporate representative are you aware[.]'" (Tr. 1294:11-13; R. 18818.)

That ruling was incorrect and further prejudiced the J&J Defendants. The contour between expert and lay witness testimony is "special knowledge, skill, experience, or training." Rules 701(c) & 702, SCRE. So long as a witness does not speak about issues of scientific, technical, or specialized knowledge, a witness should be allowed to testify to any opinion "rationally based on the perception of the witness" and personal knowledge that is "helpful to a clear . . . determination of a fact in issue." Rules 602 & 701, SCRE. Perception is merely "things the witness observed firsthand in the factual underpinnings of the case [and] not the general or background experience of the case." *State v. Gibbs*, 438 S.C. 542, 548-49, 885 S.E.2d 378 (2023).

Dr. Kuffner is the Chief Medical Officer for Johnson & Johnson and oversaw the safety of Johnson's Baby Powder. Through his decades of work, he has personal and direct knowledge of whether the J&J Defendants ever found winchite in their mines.

The mines Johnson & Johnson used, and whether winchite asbestos had ever been found in Johnson's Baby Powder or the mines were facts known to Dr. Kuffner. Dr. Kuffner would have explained that winchite is a form of asbestos associated with isolated mines in the United States—but not the mines the J&J Defendants used to source Johnson's Baby Powder during the relevant period. (*See* J&J Defs.' Proffer of Evidence Regarding Dr. Kuffner & Exs.; R. 11399-12164.) He is ***exactly*** who should be telling the jury about whether the J&J Defendants ever found winchite in the relevant mines at issue. That is a factual issue. The court's improper striking of Dr. Kuffner's admissible lay witness testimony constitutes reversible error because it improperly applied the Rules of Evidence and prevented the J&J Defendants from properly rebutting the same scientific findings permitted by the court days earlier.

D. The rulings above permitted counsel to exploit the situation in closing arguments.

The prejudice from the rulings above is plain, but the closing arguments only make the prejudice more apparent. After blindsiding the J&J Defendants with the tissue digestion analysis at trial and fighting to exclude any defenses based on the testing throughout trial, Plaintiffs' counsel then emphasized the tissue digestion findings as the smoking gun.

Plaintiffs' counsel told the jury: "You've heard they hired seven separate expert witnesses to come into court to swear under oath and to tell you they didn't do it. But then something very -- and those expert witnesses, you heard, wrote long reports. And they gave depositions. And they were ready to come into court and defend this company. But then something very interesting happened. We looked at Michael Perry's body, and we found the exact talc and the exact asbestos that was in Johnson's Baby Powder that he breathed for 50 years. And then not a single expert witness came into court to look you in the eye and defend this company. Not one. Please don't set aside your common sense." (Tr. 1884:6-21; R. 19408.)

But the J&J Defendants reasonably expected at the outset of trial from their discovery efforts that no tissue digestion evidence would even be in the case. The rulings above independently and collectively prejudiced the J&J Defendants and warrant a new trial.

II. The Court's Spoliation Ruling Improperly Prevented The J&J Defendants From Contending Their Products Did Not Contain Asbestos.

The Court was wrong to rule the J&J Defendants spoliated evidence. The J&J Defendants had no duty for large-scale preservation of documents unless and until mass tort litigation became reasonably foreseeable. Plaintiffs failed to establish the requisite culpability of willfulness or bad faith. Nor could Plaintiffs establish that they are prejudiced by the loss of the evidence. But the spoliation order that created a to-be-triggered adverse inference instruction greatly prejudiced the

J&J Defendants. The court should not have imposed a requirement that for testing conducted in the 1970s—over 50 years ago—the J&J Defendants needed to keep underlying lab notebooks, count sheets and the like rather than the actual results reported by the scientist.

A. The J&J Defendants had no duty to preserve the documents and materials at issue.

The court should not have issued its spoliation ruling because Plaintiffs could not show that J&J "had a duty to preserve" the evidence in question. *Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013). It is well- recognized—and plaintiff does not dispute—that "[a] party seeking sanctions based on the spoliation of evidence must establish" first and foremost "that the alleged spoliator had a duty to preserve [the] material evidence [at issue]." *Id.*

Importantly, "a party is not required to preserve ***all*** its documents but rather only documents that the party knew or should have known were, or could be, relevant to the parties' dispute." *Blue Sky Travel & Tours, LLC v. Al Tayyar*, 606 F. App'x 689, 698 (4th Cir. 2015) (emphasis added). Thus, a party's duty to preserve "does not require the preservation of all potential evidence or '***every single scrap of paper***' in a business." *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 247 F.R.D. 567, 570-71 (D. Minn. 2007) (emphasis added) (citation omitted). The J&J Defendants had no duty to preserve the documents at issue.

First, the initial case alleging mesothelioma based on the use of Johnson's Baby Powder—the *Howard* action[5]—was not filed until ***1996***. Plaintiffs below pointed to J&J and Old JJCI's alleged awareness in 1981 of the *Westfall* case pending in Rhode Island. But the plaintiff in that case alleged that he developed mesothelioma from inhaling ***industrial- grade*** talc while involved in the manufacture of rubber and rubberized products. (*See id.* ¶ 15; R. 8717-18.) Industrial talc

[5] *Howard* was filed in Michigan state court and alleged mesothelioma based on ***both*** occupational and other exposures. (*See* J&J Defs. Resp. to Pltfs. MIL #22, Ex. A – *Hood-McBrayer* Resp., Ex. 8 – Aff. of Gene Williams ¶ 7 n.2.; R. 8715.) The only J&J entity involved in the case was dismissed less than a year later. (*See id.*)

can be as low as 35% talc. Industrial talc is "different from the cosmetic talc" used in Johnson's Baby Powder in a number of ways, "including that industrial talc was a different grade of talc" and was "processed and handled" in a different manner. (*Id.* ¶ 9; R. 8716.)

Multiple courts overseeing talc cases have expressly rejected the argument that the existence of these historical talc cases created a duty to preserve materials related to testing of cosmetic talc for asbestos. In the *Rimondi* case, a New Jersey state court held that J&J and Old JJCI did not have a duty to retain documents related to talc testing until recently—*i.e.*, when the steady increase of cosmetic talc litigation involving mesothelioma and ovarian cancer allegations indicated that J&J and Old JJCI should reasonably anticipate substantial product-liability litigation involving their cosmetic talc products. (J&J Defs. Resp. to Pltfs. MIL #22, Ex. A – *Hood-McBrayer* Resp., Ex. 1 – *Rimondi* Hrg. Tr. 18:12-20:8; R. 8354.) As that court explained, the *Westfall* case, and the handful of other 1980s talc lawsuits cited by plaintiff here, did not trigger any general duty to preserve because they involved "alleged exposures to industrial" talc and/or claims of talcosis "not at issue" in cosmetic talc litigation. (*Id.*)

Similarly, in *Hayes*, another talc case, a Kentucky state court rejected the argument that J&J and Old JJCI had a duty to preserve evidence prior to the recent groundswell of litigation alleging that cosmetic talc products cause asbestos-related illnesses. (J&J Defs. Resp. to Pltfs. MIL #22, Ex. A – *Hood-McBrayer* Resp., Ex. 2 – *Hayes* Order; R. 8367-409.) In so holding, the court noted that "the 1970s and 1980s talc cases . . . involved either industrial talc or talcosis, and did not involve cosmetic talc or mesothelioma." (*Id.* at 37; R. 8404.)

A California court in *Doomey* recently also concluded that "Defendants' alleged failure to retain underlying data for certain historical talc tests is baseless, as any such materials were discarded in the ordinary course of business by third-parties long before Defendants had any duty

to retain evidence in connection with Cosmetic talc cases." *Doomey v. Albertsons Companies, Inc.*, No. 21STCV47286, 2025 WL 1520911, at *2 (Cal. Super. Mar. 14, 2025).

The Court's reliance on a single document taken out of context did not establish any duty.

Second, even the filing of a few isolated cases alleging mesothelioma from the use of Johnson's Baby Powder in the late 1990s—which were followed by a handful of similar actions over the next two decades—could not have created a broad duty on the part of J&J or Old JJCI to retain all documents and materials that might theoretically have some tangential relevance to future consumer talc litigation. As courts across the country have recognized, the existence of a limited number of "isolated product liability" cases is not "good cause to implement ongoing, large scale document preservation measures" applicable to all future cases that may arise. *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 513, 517 (S.D. W. Va. 2014); *see also Brigham Young Univ. v. Pfizer, Inc.*, 282 F.R.D. 566, 572 (D. Utah 2012). Hence, it was not until 2016, when mesothelioma litigation concerning consumer talc products became widespread, that ***any*** duty to preserve documents or materials related to this case could possibly have been triggered.

Third, any duty to retain the historical talc samples or backup data Plaintiffs claimed were spoliated were spoliated would not have been triggered, if at all, until 2017-2018, when talc plaintiffs began seeking talc samples in connection with litigation. None of the legal holds instituted by the J&J Defendants in connection with isolated asbestos-related consumer cases filed in the late 1990s and 2000s required the preservation of all historic samples that were tested—much less every sample that existed—because there was no reasonable expectation that such information would be sought by plaintiffs in litigation. Indeed, it was not until 2017-2018 that requests for all talc samples and related materials were first made. (*See* Williams Aff. ¶ 14; R. 8717.)

In sum, J&J did not have a duty to preserve any of the materials that plaintiff claims were spoliated. For this reason alone, the decision below was wrong.

B. Plaintiffs did not establish that the J&J Defendants engaged in intentional or bad faith loss of evidence.

Even if the J&J Defendants had engaged in spoliation, Plaintiffs' request for any sanctions would still fail because the J&J Defendants did not willfully or intentionally destroy any evidence. Where the "effect" of the proposed discovery sanction would "be the same as granting judgment by default or dismissal," there ***must*** be "some showing of willful disobedience or gross indifference to the rights of the adverse party." *Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (citation omitted). At a bare minimum, as the court recognized, "willfulness" is a factor to consider when determining whether an adverse inference is warranted. (*See McBrayer* Order p. 10; R. 8926.)

Plaintiffs cannot possibly show that the J&J Defendants destroyed any evidence willfully or in bad faith. Plaintiffs rely heavily on testing documents maintained by the J&J Defendants for decades. Indeed, they have a chart of over 204 documents dating back to 1948—largely from the J&J Defendants' own files produced in discovery—with testing results that Plaintiffs claim show asbestos in the J&J Defendants' talc products. (*See* J&J Defs. MIL #5 re: Summary Charts, Ex. A – Decades of Evid. Chart; R. 4997-5013.) The J&J Defendants, of course, disagree with Plaintiffs interpretation of these documents, but there is no dispute they were retained by the J&J Defendants, produced in discovery, and Plaintiffs argue they support Plaintiffs' case.

Moreover, Defendants retained the absolute best evidence of whether their talc products had asbestos in it: the actual ***bottles*** of talc across decades. The J&J Defendants produced in discovery for testing bottles of talc from their museum dating from the 1960s, 70s, 80s, 90s and 2000s. (Tr. 906:7-19; R. 18430.) Dr. Longo tested samples from ***over 50*** of these bottles. (Tr.

907:14-908:2; *see also* Tr. 834:14-18; R. 18358, 18431-32.) If the J&J Defendants were trying to destroy evidence of asbestos in talc, why would they keep the actual bottles of talc along with hundreds of thousands of internal documents on the topic? That makes no sense.

Moreover, Plaintiffs did not even argue below that the J&J Defendants were in possession of allegedly discarded historic talc tasting samples or "bench sheets" (*i.e.* the testing backup data). Rather, Plaintiffs recognized that such materials were created by (and/or in the possession of) third-party testing facilities, such as McCrone, that were hired by the J&J Defendants to do the testing. Even assuming that the loss of this evidence could be imputed to the J&J Defendants, the documents Plaintiffs themselves rely on make clear that the materials were discarded in the ordinary course of business pursuant to written retention policies. (*See* Pltfs. MIL #22 re: Spoliation, Ex. 60 – McCrone Letter; R. 3805-08.)

C. Plaintiffs were not prejudiced by any loss of evidence.

It is axiomatic that under South Carolina law, a party seeking an adverse inference instruction "must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009) (citation omitted). Thus, South Carolina courts have held that where a party is "not prejudiced by [a defendant]'s" discovery violation, sanctions are not appropriate. *See, e.g., Baughman v. Am. Tel. & Tel. Co.*, 298 S.C. 127, 130, 378 S.E.2d 599, 601 (1989) (considering sanction "too severe" where "[party] was not prejudiced by" the discovery violation).

Moreover, South Carolina courts have made clear that spoliation sanctions should not be awarded where it is clear that "the [spoliated evidence] in question would not have provided any ***additional information***" for plaintiff to make her claims—*i.e.*, where the spoliated evidence is

cumulative. *Pringle*, 382 S.C. at 405, 675 S.E.2d at 787 (emphasis added); *see also Baughman*, 298 S.C. at 130, 378 S.E.2d at 601 (party "[c]learly[] . . . was not prejudiced" by the opposing parties' failure to answer interrogatories where party was still able to take "lengthy depositions" of opposing parties). Plaintiffs did not demonstrate such prejudice.

As discussed above, Defendants retained numerous historic talc samples for Plaintiffs to test. The *Rimondi* court denied issuing an adverse inference because plaintiffs "nonetheless ha[d] an availability of samples that span decades of usage of the product as alleged by Mr. Rimondi." (*See Rimondi* Hrg. Tr. 22:2-7; R. 8355.) In addition, "the court f[ou]nd[] persuasive the testimony of Dr. [William] Longo"—a frequent talc plaintiffs' expert—"wherein . . . he basically says . . . the mines really don't change over a long period of time." (*Id.* at 22:7-10.) Accordingly, as the *Rimondi* court found, there is no reason to believe that *these* specific missing samples would be any different from the *plethora* of other samples plaintiff has access to. Plaintiffs also were provided hundreds of historic testing results they rely on for their claims.

D. The spoliation order prejudiced the J&J Defendants.

The J&J Defendants dramatically altered their trial strategy because of the court's erroneous ruling to avoid the adverse inference instruction. The J&J Defendants could not introduce the results of testing it conducted internally or it commissioned by third party labs. That the trial strategy was drastically curtailed is not some post-hoc revisionist history. The J&J Defendants told the court the same thing doing before trial started: "I'm telling you right now that we do not intend to offer any evidence that would trigger this for the jury. And that, again, is a decision we've made only because of Your Honor's adverse ruling in this case that we believe prejudices us." (Tr. 39:21-40:1; R. 17563-64.)

As just one example, the J&J Defendants could not 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." (J&J Defs. Resp. to Pltfs. MIL #22, Ex. A – *Hood-McBrayer* Resp., Ex. 7 – McCrone Letter; R. 8604-05.)

The fact that the court ultimately chose not to give a spoliation adverse inference charge to the jury did not cure the prejudice to J&J Defendants. The court's pretrial, along with the statements expanding that ruling during trial, precluded J&J Defendants from presenting their key defense. The court's prejudicial spoliation decision warrants a new trial.

III. The Court Made Several Incorrect Rulings That Handcuffed and Prejudiced The Remaining Low Dose Defense Respecting Causation.

The Court issued several rulings improperly limiting the J&J Defendants low dose argument that independently and cumulatively constitute reversable error.

A. The court's refusal to sever A-I-I undercut the J&J Defendants' case.

At the outset of trial, the court committed reversible error by informing the jury that, as a result of A-I-I's default, it had been determined as a matter of law "that Clubman's asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma." (Trial Tr. 156:17-22; R. 17680.) As a threshold matter, default judgment should never have been entered for all the reasons in A-I-I's own brief.

Moreover, this instruction improperly failed to explain to the jury that the default was for ***procedural*** reasons (missing deadlines) and that this resulted in a determination by the court of ***liability on the merits*** as to A-I-I. This prejudiced the J&J Defendants (who vigorously denied the claim that their cosmetic talc, or any cosmetic talc, contained asbestos) because the jury was told

by the court that another defendant's talc was ***admitted to contain asbestos and to have caused Plaintiff's disease*** without proper context.

To address this prejudice, the J&J Defendants requested that the Court clarify it had found that A-I-I admitted the allegations of the Complaint by operation of law due to its failure to comply with certain deadlines, but this finding had no impact on the remaining, non-defaulting defendants. (*See* J&J Defs. Obj. to Proposed Instruction; R. 9626-36.) Alternatively, the J&J Defendants argued that the court should sever A-I-I pursuant to Rules 21 and 42(b), SCRCP. The court should have granted one of these requests, but instead denied both despite the J&J Defendants' citation of *Lanzo v. Cyprus Amax Mins. Co.*, 467 N.J. Super. 476, 530, 254 A.3d 691, 722 (App. Div. 2021).[6]

Many of Plaintiffs' allegations and evidence were made against both A-I-I and the J&J Defendants, and the implication that there had been a finding of liability by the court against A-I-I greatly prejudiced the J&J Defendants. (*See, e.g.*, Compl. ¶13 (alleging all defendants' "talc powder products" exposed Plaintiff to asbestos through daily use); *id.* ¶6 (describing both J&J Defendants and A-I-I as "Product Defendants" who "are legally responsible, were engaged in the manufacture, sale and distribution of asbestos-containing products, raw asbestos, raw asbestos talc, and/or asbestos-containing talc materials."); R. 693-94.) This Court should reverse for a new trial.

B. Dr. Haber offered an invalid "any exposure" opinion.

With the defense centered around dose, Plaintiffs deployed the testimony of their specific causation expert, Dr. Haber, to get around the fact that their own testing expert (Dr. Longo) only even ***claims*** to find "ultra-trace" levels of asbestos in the J&J Defendants' talc products.

[6] The *Lanzo* court vacated a jury verdict where adverse inference instruction against one defendant undermined co-defendant's defense and trial court refused a motion to sever, because an "adverse inference instruction [against co-defendant Imerys] allowed the jury to infer the talc that Imerys supplied was contaminated with asbestos" and "the jury could conclude that [Johnson & Johnson Consumer Inc's] talc products were similarly contaminated." *Id.*

Dr. Haber testified over multiple objections that every exposure contributes to a person's cumulative exposure that causes him to develop mesothelioma and that every single exposure to asbestos was a cause of Mr. Perry's mesothelioma. (Tr. 427:15-25, 446:3-12; R. 17951, 17970.) In other words, Dr. Haber was permitted to tell the jury that ***any exposure***—no matter how small—was a cause of Mr. Haber's mesothelioma. That opinion is not reliable or valid and should not have been permitted, as courts across the country have held.

The admissibility of expert testimony is generally governed by Rule 702 of the South Carolina Rules of Evidence, which provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." In determining whether to admit expert testimony under Rule 702, the court must make three inquiries: (1) whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury; (2) whether the expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter; and (3) whether the substance of the testimony is reliable. *See Graves v. CAS Medical Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175-76 (2010). Dr. Haber's "every exposure" causation opinion failed to meet the reliability requirement of Rule 702.

If an expert's testimony is scientific in nature, then the trial court must determine its reliability under the factors set forth in *State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999); *Graves*, 401 S.C. at 74, 735 S.E.2d at 655. There can be little doubt that testimony that there is no safe level of exposure to asbestos or that "every exposure" to asbestos causes mesothelioma is scientific in nature; therefore, the court must look to the following factors:

(1) the publications and peer view of the technique;
(2) prior application of the method to the type of evidence involved in the case;
(3) the quality control procedures used to ensure reliability; and
(4) the consistency of the method with recognized scientific laws and procedures.

Council, 335 S.C. at 19, 515 S.E.2d at 517.

Dr. Haber's "every exposure" opinion did not satisfy any of the *Council* factors because (1) it is neither published nor peer reviewed; (2) it has been rejected by other courts when plaintiffs have attempted to apply it to the type of evidence involved here; (3) there are no quality control procedures or other methods used to ensure reliability; and (4) the method is wholly inconsistent with recognized scientific laws and procedures. *See Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) (rejecting the "each and every exposure" theory as unreliable because it "cannot be tested, has not been published in peer-reviewed works, and has no known error rate"). In fact, this theory is not a "method" at all, but an end run around Plaintiffs' burden of proof.

This opinion is seductive in its simplicity, as evidenced by Plaintiffs' counsel's comments in closing-- "Do y'all understand that the only way they [the J&J Defendants] win is if they played zero role?" (Tr. 2048:7-8; R. 19572.) Once the jury heard it, the jury was unlikely to engage in any critical assessment of the exposure and medical evidence adduced to assess causation, as it was required to do under South Carolina law. Rather, the jury likely accepted Dr. Haber's invitations and short-circuited any meaningful deliberations as to specific causation. *See Yates*, 113 F. Supp. 3d at 850 (excluding opinions similar to Dr. Haber's and explaining "given the potential persuasiveness of expert testimony, proffered evidence that has a greater potential to mislead than to enlighten should be excluded").

Thus, the court should have stricken this opinion testimony and should have instructed the jury to give this testimony no weight in its causation analysis, in line with the numerous courts across the country who have considered and rejected this opinion in differing forms.[7]

In one recent federal case, *Smith v. Ford Motor Co.*, the court held that even if a plaintiff's expert's "no safe level/every exposure" theory were deemed admissible under Rule 702, it would exclude the testimony under Rule 403 because "the probative value of such unsupported speculation by [the expert] is substantially outweighed by the danger of unfair prejudice, as well as being confusing, and presenting a danger of misleading the jury." No. 2:08-CV-630, 2013 WL 214378, at *2 (D. Utah Jan. 18, 2013). In reaching this conclusion, the court noted its agreement with "the growing number of published opinions from other courts that have reached a similar result: that the every exposure theory as offered as a basis for legal liability is inadmissible speculation that is devoid of responsible *scientific* support." *Id.* Similarly, in *Rockman v. Union*

[7] *See, e.g.*, *Vedros v. Northrop Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556, 560 n.2 (E.D. La. 2015) (rejecting this theory and noting that "[t]he theory that Defendants refer to [as the 'Every Exposure theory'] has other names, including 'No Safe Level of Exposure,' 'Each and Every Exposure,' 'Any Exposure,' and 'Single Fiber.' All theories have as their basis the principle that all exposures to asbestos should be included as a cause of mesothelioma because there is no way to know which exposures caused it and which ones did not."); *Bell v. Foster Wheeler Energy, Corp.*, No. 15-6394, 2016 U.S. Dist. LEXIS 138817, at *11 (E.D. La. Oct. 5, 2016) ("The Court sees no material difference between the 'every exposure' theory and the 'every significant exposure' theory.") (citing *Vedros*); *Krik v. Crane Co.*, 76 F. Supp. 3d 747, 750-51 (N.D. Ill. 2014) ("Any Exposure," "Each and Every Exposure," "Single Fiber," and "no safe level of exposure" are all different "monikers" for the same theory); *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217, 1225 (D. Utah 2013) ("[A] growing number of courts have determined that the ["no safe level/every exposure"] theory is not proper under Daubert and Rule 702."); *Smith*, 2013 WL 214378, at *2 (concluding that the "no safe level/every exposure" theory does not hold up under careful examination, noting that "[i]t is questionable whether it can even properly be called a theory, inasmuch as a theory is commonly described as a coherent collection of general propositions used to describe a conclusion, and while there are some general propositions used by [plaintiff's expert], they fall far short of supporting the legal liability he attempts to reach with them."); *Suoja v. Owens-Illinois, Inc.*, 211 F. Supp. 3d 1196 (W.D. Wis. 2016) (rejecting the "cumulative exposure" theory, also described as the "no safe level" theory or "every exposure contributes" theory, and concluding the opinion was "no different from the 'any exposure' theory" or from the impermissible conclusion that "if there is exposure, then there is causation"); *Comardelle v. Pa. Gen. Ins.*, 76 F. Supp. 3d 628, 634 (E.D. La. 2015) ("Although there may be no known safe level of asbestos exposure, this does not support [plaintiff's expert's] leap to the conclusion that therefore every exposure Comardelle had to asbestos must have been a substantial contributing cause of his mesothelioma. The Court agrees that this 'is not an acceptable approach for a causation expert to take.'"); *Sclafani v. Air & Liquid Sys Corp.*, 14 F. Supp. 3d 1351, 1356 (C.D. Cal. 2014) (noting that the "'every exposure' theory could not be tested and had not been published in any peer-reviewed literature [and] therefore failed to satisfy at least two of the four *Daubert* criteria").

Carbide Corp., No. RDB-16-1169, at 8-22 (D. Md. July 17, 2017), a Maryland federal district court excluded the "each and every exposure" and "cumulative exposure" opinions of two experts and granted summary judgment for the defendants on the ground that the plaintiffs failed to establish causation.

In line with this notion, Judge Norton excluded expert opinions almost identical to the Plaintiffs' expert opinions in this case. *See Haskins v. 3M Co.*, No. 2:15-CV-02086-DCN, 2017 WL 3118017, at *9 (D.S.C. July 21, 2017).[18] In *Haskins*, an expert espoused the "cumulative exposure" theory: "each of the defendants' products which contained asbestos added to the total cumulative dose of Chesher's asbestos exposure." *Id.* at *2. The *Haskins* expert's opinions, as described by the court, closely mirrors Plaintiffs' experts' opinions here. *Id.* at *6-7.

Judge Norton found the issue of Dr. Carlos Bedrossian's opinions "requires very little analysis" because "Bedrossian's opinions evaluate causation in a manner that is inconsistent with the appropriate legal standard." *Id.* at *6. Therefore, the court found the opinions were "essentially irrelevant, and any probative value they may have is easily outweighed by their tendency to confuse or mislead the jury" under rule 403. *Id.* The court further explained that:

> [F]or Bedrossian's opinion to have any legal significance, the court must accept the proposition that each exposure can be considered a "substantial cause" of mesothelioma if it could have independently caused the disease. But this approach would be problematic from both a factual and legal perspective. Every exposure to asbestos could cause mesothelioma, but lower levels of exposure carry lower risk. Therefore, Bedrossian's logic quickly devolves into the sort of "every exposure" liability that was specifically rejected in *Lindstrom* [*v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005)], and leads to the bizarre conclusion that any exposure that carries any chance of causing mesothelioma—however miniscule—constitutes a "substantial cause," regardless of the other exposures that may have contributed to the total cumulative exposure. The court further emphasized that Bedrossian "showed very little knowledge of, or interest in, [the plaintiffs'] actual exposures to defendants' products.

Id. at *7.

Like Bedrossian's opinions in *Haskins*, Dr. Haber's opinions here were not based on any analysis of causation specific to Plaintiff. Instead, they relied solely on the idea that any minuscule exposure to asbestos associated with J&J's products contributed to the cumulative result of Plaintiff contracting mesothelioma and, therefore, the exposure was a cause of Plaintiffs' injury. These opinions deviated from the appropriate legal standard and were useless to the jury. Instead, they served merely to confuse or mislead the jury as to the standard it was required to apply to Plaintiffs' claims. Accordingly, the opinions did not comport with Rule 403 and should have been excluded and/or stricken from the record.

C. The court improperly excluded the 1986 FDA Response.

The 1986 FDA Response was also another important component of the J&J Defendants' low dose defense. The FDA—the agency responsible for regulating cosmetics—concluded "that even when asbestos was present, the levels were so low that no health hazard existed." (J&J Defs. Proffer re: Citizen's Petition, Ex. A – 1986 FDA Response p. 2; R. 11050.) The J&J Defendants wanted to explain to the jury that a neutral federal agency found that asbestos exposures can be too low to be a health hazard and that that is the case with talc even if asbestos is hypothetically present. That directly contradicts Dr. Haber's opinion. The document also goes directly to the failure to warn claim because the FDA concluded no warning is necessary.

The document is plainly not hearsay. It is over 35 years old, fitting within the ancient document exception to the hearsay rule. Rule 803(16), SCRE. It is also a public record under Rule 803(16). And it is a legitimate subject of expert cross examination. The 1986 FDA Response is routinely discussed at talc trials and featured in opening statements and closing arguments. The J&J Defendants are not aware of any other talc trial in which this critical document has been excluded.

The court precluded any discussion of the 1986 FDA Response reasoning: "This isn't FDA. This is a letter between two people." (Pretrial Hrg. Tr. 145:12-14; R. 17424.) That ruling was error. Any individual may petition the FDA requesting that it to take some action or refrain from taking some action. 21 C.F.R. § 10.30(b)(3). The FDA is ***required*** to respond to those petitions. 21 C.F.R. § 10.30(e)(2). While of course an agency can only speak through its authorized representatives, the 1986 FDA Response itself makes clear it is speaking on behalf of the FDA:

- "FDA recognizes that asbestos inhalation over extended periods is hazardous…"
- "FDA became concerned about…"
- "FDA considered all analytical results to be of questionable reliably"
- "FDA decided that the most appropriate actions…"
- "FDA should also point out that…"

(*See generally* 1986 FDA Response; R. 11049-50.) The letter even critically states: "Without evidence of such a hazard, ***the agency concludes*** that there is no need to require a warning label on cosmetic talc." (*Id.* p. 2 (emphasis added)).[8] There can simply be no dispute that the 1986 FDA Response reflected the FDA's own conclusions. The court's rationale for excluding the 1986 FDA Response that it does not represent statements from the FDA is simply wrong.[9]

The court also stated that the 1986 FDA Response "contains false and unreliable expert opinion that they just kind of throw in there. It's not their opinion. It's some other expert." (Pretrial Hrg. Tr. 145:18-23; R. 17424.) There was no evidence how the FDA's own opinion could be "false," which is an area within the jury's province in any event. The FDA's conclusion in its response stems from multiple analyses by FDA scientists and committees. (*See* 1986 FDA Resp;

[8] Dr. Kuffner, if permitted would have testified that the document reprinted that "FDA essentially said we deny your petition." (J&J Defs. Proffer re: Citizen's Petition, Ex. D – *Lee* Tr.; R. 11246.) That makes sense as the 1986 FDA Response provided the reasons to the petitioner that "your petition [wa]s denied" by the FDA.

[9] Moreover, even if the 1986 FDA Response represented a "letter between two people," that is not a ground for inadmissibility. Plaintiffs themselves relied extensively on similar documents. Indeed, letters are frequent sources of evidence.

R. 11053-283.) Yes, the FDA's conclusion was expressed by one signatory on the letter. But that is not any basis for excluding the entire letter and allowing the jury to weigh it for themselves.

In other words, the court permitted Dr. Haber to say that ***any exposure*** to asbestos causes mesothelioma while at the same time ***prohibiting*** evidence that the FDA reached the opposite conclusion. This one-two punch both permitted flawed, inadmissible opinion posing as "science" while at the same time usurped the role of the jury to evaluate that flawed opinion based on the conclusions of the very agency that regulated cosmetics.

D. The court erred by prohibiting the J&J Defendants' experts from opining Mr. Perry's mesothelioma was naturally occurring.

As discussed above, Dr. Haber offered the opinion that Mr. Perry's ***cumulative*** exposure to asbestos from all sources caused his mesothelioma. The defense experts Dr. Weill and Dr. Diette disagreed. They formed the opinion Mr. Perry's cumulative exposure levels were too low to cause mesothelioma. Rather, they believed it developed like many cancers through errors in cell mutation without any external cause. (J&J Defs' Opp. to Pltfs. MIL # 21, Ex – B, Weill Rep. p. 130; *id.* at Ex. D Weill Dep. 15:7-18:17; J&J Defs' Opp. To Pltfs. MIL # 17 – Ex. C, Diette's *Perry* Supp. Ex. Rep., July 2, 2024, Pg. 4; R. 9563, 9582-83, 8058.)

There is no dispute that mesothelioma can develop this way. Plaintiffs acknowledge that there is scientific literature supporting Dr Weill and Dr. Diette's opinion that there are cases of mesothelioma which cannot be attributed to asbestos exposure. (*See* Pl.'s MIL # 17 pp. 2, 5-7; R. 2594, 2597-98.) Plaintiffs' own expert, Dr. Arnold Brody, has testified many times that any form of cancer, including mesothelioma, can occur naturally in this way. (J&J Defs. Post-trial Motions, Ex. C – *Garcia* Trial Tr., 210:18-20; J&J Defs. Post-trial Motions, Ex. D – Brody *Hirshberg* Dep., 28:10-13; *see also* Weill Dep. at 15:7-13, 17:1-18:2, 18:23-19:9, 20:16-21; R. 9582-83, 13400, 13405.)

For example, Dr. Weill would have explained that cancer occurs after the accumulation of mutations to the DNA in cells. It is initiated by driver gene mutations, which are caused by: (1) heritable mutations; (2) environmental exposures; and (3) replication errors. It is well-established in the medical literature that all cancers, including mesothelioma, can arise naturally through internal replication errors and without an external cause like asbestos exposure. He was prepared to offer the case-specific opinion that, because of the absent evidence of objective markers of above-background asbestos exposure and absent a finding of an external risk, to a reasonable degree of medical certainty, Mr. Perry's mesothelioma was a naturally occurring cancer.

The court below historically permitted defendants' experts to offer this opinion. *See, e.g.*, *Boyd-Bostic v. 3M Company, et al.*, No. 2017-CP-16-0400 (S.C. Ct. Comm. Pl. 2017). But recently, the court changed its views. In the cases *Payne* and *Plant*, the court below excluded Dr. Diette and Dr. Weill from offering the specific causation opinion that the plaintiff's cancer was caused through replication errors and not through an external source. (*See* J&J Defs. Resp. in Opp'n to MIL #17, Ex. B – *Payne/Plant* Order; R. 8048-53.) The court reasoned:

> (1) these doctors have not made an attempt to determine the products at issue contained asbestos at all.
>
> (2) They did not make an attempt to determine the fiber type of asbestos potentially associated with any talc product at issue in this case.
>
> (3) these doctors have not reviewed any studies relating to the products at issue in this case either purporting to demonstrate the presence or lack of presence of asbestos in the products or for purposes of determining the amount of asbestos released from the normal and expected use of these products.

(*Id.* at pp. 3-4.)

While the J&J Defendants disagree with that reasoning, in this case they ensured their experts would not be subject to the same criticisms. The J&J Defendants' experts took great care

to avail themselves of additional information and data they had not reviewed in *Payne* and *Plant* that covers each of those three issues noted by the court.

Dr. Diette reviewed dozens of reports from both the defendants' and plaintiffs' experts' reports showing the results of testing the J&J Defendants' products for asbestos—that discuss whether the products at issue contained asbestos and the fiber types potentially at issue. (J&J Defs. Opp'n to Pltfs. MIL # 17, Ex. A – Diette Report pp. 54-59; R. 8003-08.) He also reviewed plaintiffs' experts' reports regarding their opinions of the supposed levels of asbestos in the air that result from using he J&J Defendants' products. (*Id.* at 58.) That covers the court's final criticism from *Payne*/*Plant* regarding a claimed lack of information regarding the supposed amount of asbestos released from the normal and expected use of the products. For good measure, Dr. Diette also reviewed, among other items, epidemiology studies showing no increased risk of mesothelioma among the miners and millers of the talc sources the J&J Defendants used—individuals with extremely high exposures to talc from working with it day in and day out. (*Id.*)

Dr. Weill also reviewed case materials, including Dr. Longo's testing of various Johnson & Johnson products produced from all three source mines for Johnson & Johnson consumer talc products sold in the United States. (*See* J&J Defs' Opp. to MIL # 21, Ex. B – Weill Rep. pp. 3-4, 130-131; *id.* at Ex. D – Weill Dep. 44:3-7; R. 9436-37, 9563-64, 9585.) Dr. Weill was prepared to offer the opinion that the talcum powder at issue was free from asbestos and the hypothetical exposure experienced by Mr. Perry did not contribute to elevating the risk for his development of mesothelioma.

The court excluded Dr. Diette and Dr. Weill based on its prior rulings without considering that they reviewed more material to address the court's criticisms: "I've limited him in the Plant case and said that he could not give a specific causation opinion about the plaintiff's mesothelioma;

that it was spontaneous. And I did that with respect to Dr. Diette, Dr. Weill, and Dr. Feingold. And I'm going to make those same rulings today." (Pretrial Hrg. Tr. 134:2-8; R. 17413.)

The court also stated in the course of its ruling: "With respect to Diette, he is a pulmonologist. I don't think he has got enough -- he is a COPD man and an asthma man. He doesn't have any background in mesothelioma, as I understand it." (*Id.* at 133:23-134:2; R. 17412-13.) If the court meant that it believed Dr. Diette lacked qualifications to offer a specific causation opinion, nothing could be further from the truth (and the court made no statement regarding Dr. Weill's qualifications).

To have sufficient qualifications, "the expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter,' although he 'need not be a specialist in the particular branch of the field.'" *Graves v. CAS Med. Sys. Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). Dr. Diette far exceeds that standard. There is absolutely no evidence in the record that his experience is limited to asthma and COPD.

Dr. Diette is an attending physician at the Johns Hopkins Hospital and the Johns Hopkins Bayview Medical Center which includes outpatient and inpatient care. (*See* Diette Report p. 2; R. 7051.) He is Professor in the Division of Pulmonary & Critical Care Medicine at The Johns Hopkins University School of Medicine and a Professor of Epidemiology and Environmental Health and Engineering at the Bloomberg School of Public Health at Johns Hopkins. (*Id.*) Dr. Diette has focused his research on environmental causes of human disease. (*Id.*) In addition to his medical degree, Dr. Diette has a master's degree in epidemiology from Johns Hopkins University. (*Id.*) The Court's rationale that Dr. Diette was not qualified to offer a specific causation opinion because he is a pulmonologist is particularly inconsistent because Plaintiffs' specific causation expert is ***also*** a pulmonologist. (Tr. 345:3-347:1; R. 17869-871.)

In short, the court had no basis to exclude these opinions that Mr. Perry's mesothelioma was naturally occurring and not due to exposure to asbestos. It severely prejudiced the J&J Defendants' case that the jury was not permitted to hear this completely valid scientific opinion.

E. The court prejudicially erred by failing to define the substantial factor test in the charge and by failing to cure Plaintiffs' counsel's misstatements of law and related arguments.

The J&J Defendants proposed Charge #21 provided a thorough—and accurate—statement of South Carolina law on causation in a toxic tort case. (*See* J&J Defs. Jury Charges Modified from *Plant* Case; R. 11380-81.) The court did not give the proposed instruction. Although the court did instruct the jury that to hold the J&J Defendants liable for negligence and strict liability, it was required to find that they were a "substantial factor" in causing plaintiffs' injuries, (Tr. 2087:22-89:5; R. 19611-13), it never defined what "substantial factor" means. This is a specific legal term developed over years of case law and, standing alone, had little meaning to a jury without an additional definition. Further, the court should have informed the jury that "if ***other actors'*** conduct is the ***predominant factor*** in bringing the harm at issue, then a defendant's action is not a 'substantial factor' in causing the harm, and thus it is not the legal cause of the harm." *Glenn v. 3M Co.*, 440 S.C. 34, 59, 890 S.E.2d 569, 582 (Ct. App. 2023) (emphasis added). This was particularly significant here given that the evidence at trial showed that the levels of asbestos in the air from changing breaks would be 6,000 to 9,000 times higher than the airborne levels of asbestos Plaintiffs' expert claimed would result from using the J&J Defendants' talc products.

Deprived of this clarifying definition of "substantial factor," the jury was left to guess at its meaning, which Plaintiffs' counsel exploited by misstating the law, telling the jury "Do y'all understand that the only way they [the J&J Defendants] win is if they played zero role?" (Tr. 2048:7-8; R. 19572.) This statement was an erroneous projection that, under the law, ***any*** amount

of exposure or causation more than zero would mean the J&J Defendants' products were a "substantial factor" cause of Plaintiff's disease. Counsel for J&J Defendants objected. (*Id.* at 2048:5-49:9; R. 19572-73.) At sidebar to discuss J&J Defendants' objection, Plaintiffs' counsel argued the objection should be overruled because the court "was going to instruct the jury on what 'substantial factor' means." (*Id.* at 2048:21-22; R. 19572.) The court overruled the objection but never gave any further instruction about the definition of "substantial factor." Under Plaintiffs' arguments, the phrase "substantial factor" is converted to simply the word "factor." By overruling J&J Defendants' objection, the jury was left with the distinct impression that the court found no error in Plaintiffs' counsel's incorrect statement of the law. This error was extremely prejudicial to the J&J Defendants' causation defense and requires a new trial. *See Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164, 167 (1998) (where solicitor misstated the law in his closing argument, and trial judge's instructions to the jury did not sufficiently correct the misstatements, solicitor's improper argument prevented the jury from fairly considering the evidence).

Lastly, not only was the J&J Defendants' causation defense prejudiced as set forth, but Plaintiffs' counsel went on to assert that their conduct was reckless and justified punitive damages. Plaintiffs' counsel accused J&J Defendants of "unconscionable" and "shameful" action, performing "***the most heinous acts you can do to a human being***" and "***on babies***." (Tr. 1883:22-25, 1937:1-5; R. 19407, 19461 (emphasis added).) Plaintiffs' counsel also told the jury: "You have to put a value on not just what they took ***but how they took it, right***?" and that the J&J Defendants "told these dying people under oath the powder never contained [asbestos]. It tells you everything you need to know," asserting that "they stole [Mr. Perry's] life." (Tr. 1933:3-7-17; R. 19457 (emphasis added).) Plaintiffs' counsel also invited the jury to punish J&J Defendants for "***selling the worst carcinogen in human history to children.***" (Tr. 2266:25-67:2; R. 19780-81 (emphasis

added). The court declined to order a mistrial and denied the J&J Defendants' motion for new trial regarding these claims of misconduct, including claims of harm to third parties, which ran afoul of the South Carolina Supreme Court's admonitions in *Branham v. Ford Motor Co.*, 390 S.C. 203, 238-39, 701 S.E.2d 5, 23-24 (2010) (improper to punish a defendant for harming others beyond the plaintiff). These arguments were calculated to create a verdict based on passion rather than on evidence the J&J Defendants' products legally caused Plaintiffs harm. A new trial must be ordered.

IV. The Court Erred by Imposing Successor Liability on Holdco and Kenvue, which also Warrants Reversal.

If the original entity continues to exist after the corporate reformation, then there is no successor liability. *See, e.g., White v. Cone–Blanchard Corp.*, 217 F. Supp. 2d 767, 772 (E.D. Texas 2002) ("[I]t is axiomatic that to establish corporate successor liability there must in fact be a corporate successor.").[10] This is so because "[i]f a remedy against the original manufacturer [i]s available [then] the consumer has not been obliged to bear the risk ***and the justification for imposing successor liability evaporates***." *Conway v. White Trucks, A Div. of White Motor Corp.*, 885 F.2d 90, 95 (3d Cir. 1989) (emphasis added).[11]

Further, a plaintiff with a valid judgment is entitled to be made whole, but he is not entitled to rulings on corporate liabilities regarding which he has no valid interest. The purpose of successor liability is to ensure that a particular plaintiff will be able to recover for his loss in the same or like manner as he would have prior to the transfer of assets or corporate reformation. But, as noted by the *Restatement (Third) of Torts*, successor liability is not available to ***increase*** a plaintiff's chances of satisfying a judgment beyond the availability he would have had pre-transfer or beyond any need to do. *Restatement (Third) of Torts: Product Liability*, § 12 cmt. B.

[10] Prior briefing collected numerous cases on this issue. (*See* J&J Defs. Obj. to Proposed Order pp. 8-9; R. 17066-67.)
[11] By analogy, supplemental proceedings are unnecessary when a judgment can be satisfied by an existing judgment debtor. *See Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167, 459 S.E.2d 900, 902 (Ct. App. 1995).

Additionally, "[t]he purpose of corporate successor liability is to prevent corporations from evading their liabilities through changes of ownership." *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (8th Cir. 1992); *see also Restatement (Third) of Torts: Product Liability*, § 12 cmt. b (1988) (discussing how the rule is designed to protect judgment creditors from being left with an uncollectible judgment). Because it is equitable, this Court can and should view the facts respecting successor liability *de novo. See S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 653, 667 S.E.2d 7, 12 (Ct. App. 2008).

Here, Respondents will not be left holding an uncollectible judgment and thus there was no basis for a finding of successor liability. If the judgment is upheld, Respondents will be able to collect their judgment from two entities: Johnson & Johnson and Pecos River Talc, LLC (f/k/a LLT Management, LLC). Counsel acknowledged that because there is a judgment against Johnson & Johnson, the judgment can be executed against it at the appropriate time (assuming the verdict stands). (Post Trial Tr. 23:8-12 ("Plaintiffs have a verdict against Johnson & Johnson. . . . They are going to have their judgment fulfilled if it holds up. There is simply no question about that."); *id.* at 40:16-23; R. 19845, 19862.) Further, counsel has consistently acknowledged that LLT—now Pecos River—has expressly assumed all talc-related liability involving mesothelioma diagnoses and is more than adequately funded to pay any settlements or judgments.[12] Lastly, the J&J Defendants have posted a supersedeas bond in accordance with S.C. Code Ann. § 18-9-130 and in adherence to the court's Order for the full judgment amount. Thus, Respondents are guaranteed to recover their judgment, to the extent it survives this appeal.

[12] The court's statement to the contrary in its Order is not supported by the record. (*See* Order on Rule 59(e) Mot. p. 8; R. 247.) The only record evidence is that LLT was adequately funded to satisfy talc claims and also had a revenue stream from licensing, which was a productive business asset (again, contrary to what the Court's order found).

Despite all of this, Plaintiffs argued for, and the court found, that Holdco and Kenvue are also liable for the judgment awarded to Plaintiffs. Thus, Kenvue and Holdco had this judgment entered against them and had to join in the procuring of an appeal bond. This must be reversed. [13]

Johnson & Johnson, a New Jersey company incorporated in 1887, first began selling Johnson's Baby Powder in 1894. (Pltfs. Trial Br., Ex. 13 – Decl. of John Kim ¶ 14; R. 12474.) This entity still exists.[14] It is true that Johnson & Johnson subsidiaries/affiliates engaged in a series of corporate restructurings and placed liability for alleged talc liabilities into other corporate entities in an effort to resolve all alleged talc liabilities via divisional merger and through the bankruptcy laws. Those efforts were denied by the bankruptcy court; however, there was no finding of wrongful conduct for those efforts.[15]

One entity that came to exist was "new JJCI" (Johnson & Johnson Consumer, Inc.), which, as a result of restructuring, held no liabilities for alleged talc products, instead manufacturing and selling other consumer products. (Pltfs Trial Br., Ex. 13 – Decl. of John Kim ¶ 26; R. 12477.) In December 2022, New JJCI changed its name to Johnson & Johnson Holdco (NA), Inc. ("Holdco"), a New Jersey corporation. (*Id.* at ¶¶ 25, 61; R. 12477-78.) In early 2023, Holdco transferred its consumer business to its parent entity. (*Id.* at ¶ 26; R. 12477.) As a result, Holdco became a stock holding company, conducting no operations. (*See* Pltfs. Trial Brief, Ex. 21 – Dep. of John Kim

[13] Contrary to the court's statement in its Order on the J&J Defendants' Rule 59(e) motion, the J&J Defendants consistently objected to argument and evidence before the jury on the successor liability issue. Their position was (correctly) that the jury should not be exposed to these equitable issues. Thus, the court also erred by permitting Respondents to introduce evidence and make arguments before the jury relating to these issues. (Tr. 140:22-43:8, 194:2-10, 1190:6-94:11; R. 17664-67, 17716, 18714-18.) Because further evidence was also introduced on these issues after the jury verdict, the J&J Defendants renewed their directed verdict motion, which should have been granted. Failing that, a new trial should have been ordered.

[14] Here, because of what year Mr. Perry allegedly began using talc-based Johnson Baby Powder, Johnson & Johnson has stated it is liable for the judgment if it stands. *See Grand Labs., Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1281 n.5 (8th Cir. 1994) ("Most jurisdictions hold that a prerequisite to the imposition of liability against a corporation under any of the four exceptions to the nonliability of successors is a transfer or sale of all, or substantially all, the assets of the predecessor to the successor.").

[15] *See In re Red River Talc LLC*, No. 24-90505, 2025 WL 1029302, at *5 (Bankr. S.D. Tex. Mar. 31, 2025) for a discussion of the proceedings and efforts in detail.

347:3-14; R. 12685.) Holdco ***should not*** be deemed a successor with liability for plaintiffs' judgment.

In November 2021, J&J announced its intention to separate its global consumer health business, creating a new publicly traded company. (Pltfs. Trial Brief, Ex. 14 - Decl. of Donald McGraw ¶ 5; R. 12483-84.) To accomplish this, through a series of hundreds of individual steps (the "Kenvue Transactions") over the following 18 months, J&J consolidated its global consumer health business in a new publicly traded company, Kenvue Inc. (*Id.* at ¶¶ 5-8.) As corporate representative John Kim described it, when Kenvue was formed, there was essentially a corporate "basket" passed around to a number of domestic and international J&J companies, and each company put its consumer products business into the basket. (*See* Pltfs. Trial Brief, Ex. 21 – Dep. of John Kim 140:22-42:3; R. 12633.) Once the basket had collected all of the consumer product lines from these various companies, it was all passed back to Kenvue. (*Id.*; *see also id.* at 363:14-19; R. 12689.) The project had the "ultimate goal of spinning out the consumer companies from the J&J companies" into the new entity: Kenvue. (*Id.*) This project had nothing "to do with cosmetic talc litigation regarding liabilities." (*Id.*)

LLT (now Pecos River) will accept such liability, regardless of whether it was the entity that manufactured, marketed or sold the product(s) at issue, and without waiver of J&J Defendants' position that each Johnson & Johnson subsidiary and affiliate is a separate and distinct entity.[16]

[16] LLT itself, post-trial, underwent a corporate restructuring. Through a divisional merger under Texas law, LLT no longer exists. What ultimately emerged were two new entities: Pecos River Talc LLC ("Pecos River") and Red River Talc LLC ("Red River"). Pecos River was allocated, among other things, all liabilities for any direct talc personal injury claim that alleges that the relevant injured or deceased individual developed mesothelioma or lung cancer. Red River was allocated all liabilities not assigned to Pecos River, largely consisting of claims related to ovarian cancer and gynecological cancer. Respondents' counsel has opposed substitution of Pecos River for LLT in cases across the country and the court agreed with Respondent that Pecos River should not be substituted here. (Order on Rule 59(e) Mot. pp. 10-11; R. 249-50.) There was no basis for denying substitution, and this Court should reverse.

A. Texas law applies and neither Holdco nor Kenvue is liable under Texas law.

The choice-of-law rules applicable to successor liability claims is a novel issue in South Carolina appellate courts. The court rightly concluded that actions in contract are governed by the substantive law of the place where the contract was made, and actions in tort are governed by the substantive law of the place where the injury occurred. (Order on J&J Defs. Post-trial Motions p. 14; R. 167 (citing cases).) But the court was wrong to conclude that the successor-liability issue here sounds in tort and therefore erred in failing to apply the internal affairs doctrine.

The "choice of law rule generally applied to corporate law issues is the internal affairs doctrine, which provides that the internal matters of corporate governance are ***governed by the law of the state of incorporation***." *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 649, 817 S.E.2d 273, 277-78 (2018) (emphasis added). The "'internal affairs' of a corporation consist of 'the relations inter se of the corporation, its shareholders, directors, officers or agents.'" *Id.* at 649-50, 817 S.E.2d at 278. Notably, one of Respondents' successor-liability theories was that the J&J successors are a "mere continuation" of their predecessors, with substantially similar officers, directors, and shareholders. This theory necessarily implicates the internal affairs of the J&J Defendants. *See, e.g.*, *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-0302 MRP, 2011 WL 1765509, at *4 (C.D. Cal. Apr. 20, 2011) ("Mergers, reorganizations, and matters that may affect the interests of the corporation's creditors all fall within the scope of [*Restatement*] Section 302, which prescribes the law of the state of incorporation.").

Other jurisdictions have found that "the question of successor liability involves [companies]' internal affairs" and the law of the state of incorporation therefore applies. *Action Nissan, Inc. v. Hyundai Motor Am.*, No. 6:18-cv-380-Orl-78EJK, 2020 WL 7419669, at *6 (M.D. Fla. Nov. 5, 2020); *Cortes-Castillo v. One Time Constr. Texas LLC*, No. 3:21-CV-2093-BH, 2023

WL 4566257, at *20 (N.D. Tex. July 17, 2023) ("Because the issue of successor liability implicates the internal affairs of OTTX, the issue is considered under Texas law.").[17]

Under this approach, the law of Texas—where the divisional merger occurred—should apply here. Under Texas law, all relevant talc-related liabilities were allocated to LLT, and not to Holdco. As a matter of Texas law, therefore, Holdco came into existence with no talc-related liabilities and cannot be liable for Respondents' damages. Moreover, Kenvue was the subject of a very public separation as a new corporation and an initial public offering, and its business is various consumer products, but not talc. It is run via its own board and officers.

"Texas strongly embraces a nonliability rule for corporate successors." *E-Quest Mgmt., LLC v. Shaw*, 433 S.W.3d 18, 23 (Tex. App. 2013) (cleaned up). Indeed, "Texas law authorizes a successor to acquire the assets of a corporation without incurring any of the grantor corporation's liabilities *unless the successor expressly assumes those liabilities*." *Id.* Texas courts have expressly rejected "the mere continuation doctrine as a means of imposing successor liability," *id.* (citing cases) as well as the product-line successor liability rule. *Ford, Bacon & Davis, L.L.C. v. Travelers Ins. Co.*, 635 F.3d 734, 735 (5th Cir. 2011). The 2021 Corporate Restructuring relied "principally on a merger under Texas law." *In re LTL Mgmt., LLC*, 64 F.4th 84, 95 (3d Cir. 2023). "Counterintuitively, this type of merger involves 'the division of a [Texas] entity into two or more new . . . entities.'" *Id.* (quoting Tex. Bus. Orgs. Code § 1.002(55)(A)). "When the original entity does not survive the merger, it allocates its property, liabilities, and obligations among the entities according to a plan of merger and, on implementation, its separate existence ends." *Id.* "In simplified terms, the merger splits a legal entity into two, divides its assets and liabilities between the two new entities, and terminates the original entity." *Id.* at 95-96.

[17] The J&J Defendants cited numerous other authorities holding the same in their Successor Liability Brief. (*See* Renewed Mot. for Directed Verdict and Mem. Regarding Successor Liability pp. 4-5; R. 16960-61.)

Here, "the merger allocated [LLT] responsibility for essentially all liabilities of Old [JJCI] tied to talc-related claims." *In re LTL Mgmt., LLC*, 64 F.4th at 96. "This meant, among other things, it would take the place of Old [JJCI] [] in current and future talc lawsuits and be responsible for their defense." *Id.* New JJCI, now called Holdco, inherited "none of [Old JJCI's] talc-related liabilities." *Id.* at 97. Thus, contrary to Respondents' claim, Holdco at no point had any talc-related liabilities it could pass along. Indeed, courts across the country have reached that conclusion in other matters involving these Defendants. (*See* Renewed Mot. for Directed Verdict and Mem. Regarding Successor Liability, Exs. A, B, & C (*LaSalle*, *Yandell*, and *Egli* orders); R. 16973-999.) Holdco and Kenvue thus do not have successor liability under the applicable Texas law, and the court thus erred.

B. Even if South Carolina law applied, Holdco and Kenvue are not liable.

In South Carolina, "corporate law generally favors the free transfer of assets and disfavors successor liability." *Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc.*, 424 S.C. 256, 269, 818 S.E.2d 447, 454 (2018). South Carolina recognizes only four instances where the general rule of successor corporate nonliability does not apply: (1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a de facto merger or consolidation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations. *See id.* at 263. Respondents and the court only relied on the "mere continuation" and "fraudulent purpose of escaping liability" exceptions. Neither apply here.

Under the mere continuation exception, there must exist "commonality of officers, directors, ***and*** shareholders" between the predecessor and successor. *See id.* at 269, 818 S.E.2d at 454 (emphasis added). The mere continuation test is "strict" and presents an intentionally high burden for a plaintiff to meet. *See id*. In addition to commonality of ownership, there must be

commonality of control. *Id.* Respondents failed to meet their burden and produce sufficient evidence to show that this exception applies to Holdco and Kenvue because they did not demonstrate that there is: (1) a continuity of management, personnel, and general business operations; or (2) an exertion of the necessary control and influence by the successors over their predecessor companies. Indeed, Respondents' evidence failed on both factors.

Regarding Holdco, Respondents presented no evidence that it ever sold, manufactured, or benefited, in any way, from talc-based Johnson's Baby Powder. As for Kenvue, this entity has its own board, own set of investors, and a separate portfolio of brands, operations, capabilities, and employees. (*See* Pltfs. Trial Br., Ex. 10 - Mongon Dep. at 79:17-20, 79:24-80:7; R. 12378.) That Johnson & Johnson directed the transaction is not sufficient to establish the requisite dominion and control for a "mere continuation" finding. *See, e.g.*, *In re Exactech Polyethylene Orthopedic Prod. Liab. Litig.*, No. 22-MD-3044 (NGG) (MMH), 2024 WL 991210, at *10 (E.D.N.Y. Mar. 7, 2024) (noting large influence over a subsidiary's business strategies not enough to prove necessary dominion and control).

Respondents also presented no evidence to satisfy the fraudulent transfer exception. That exception provides for successor liability where "the transaction was entered into ***fraudulently for the purpose of wrongfully defeating creditors' claims***." *Nationwide*, 424 S.C. at 263, 818 S.E.2d at 451 (emphasis added); *see also* S.C. Code Ann. § 27-23-10 (codifying this principle).

The reorganization and corporate restructurings were not fraudulently undertaken, were very openly done, and were designed to either create a new company with a different business (consumer products) from other companies (medical devices, pharmaceuticals), or done for the purpose of effectuating the ability of claimants to recover in speedy and equitable fashion via bankruptcy as opposed to within fifty states' torts systems. Further, the restructuring was permitted

by law, and LLT (now Pecos River) was adequately funded with the ability to satisfy any talc-related claims. There can be no application of the fraudulent transfer exception here.[18]

Respondents misconstrue the Third Circuit's bankruptcy decisions. That court did not conclude that any J&J Defendants acted in bad faith as would usually be understood in the law—as a type of wrongful act or purpose. Instead, bad faith (and its opposite, "good faith") in the bankruptcy context has a particular legal meaning: "Good faith is somewhat of a misnomer: 'subjective intent' is not determinative; a key question is whether a case serves a 'valid bankruptcy purpose[.]'" *In re LTL Mgmt. LLC*, No. 23-2971, 2024 WL 3540467, at *2 (3d Cir. July 25, 2024). Further, "[i]t ***is not bad faith*** to seek to gain an advantage from declaring bankruptcy—why else would one declare it?" *In re LTL Mgmt., LLC*, 64 F.4th 84, 110 (3d Cir. 2023) (emphasis added).

Further, to the extent that the bankruptcy court and the Third Circuit found "bad faith" or lack of "good faith," that finding was not based on any attempt to "avoid liability," but instead on the fact that LTL was ***over***-funded and not in financial distress. *Id.* at 93. Indeed, the Third Circuit highlighted the J&J Defendants' "[g]ood intentions." *Id.*

C. Holdco and Kenvue are not liable for punitive damages.

Finally, even if Holdco and Kenvue could be liable for actual damages under a successor liability theory (they cannot), they are not liable for punitive damages. In order for a plaintiff to recover punitive damages, the plaintiff must prove that ***the defendant's*** conduct was "reckless, willful, or wanton." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 99-100, 727 S.E.2d 407, 411-

[18] The court improperly relied on *Schmoll v. ACandS, Inc.*, to support that the fraudulent-purposes exception applied. 703 F. Supp. 868, 871 (D. Or. 1988), *aff'd,* 977 F.2d 499 (9th Cir. 1992). In that case, Raymark Industries—a company beset by asbestos claims exceeding $33 billion—conveyed "valuable assets" to Raytech, a company owned by Raymark Industries' former shareholders. *Id.* at 873. This left Raymark Industries "with staggering asbestos liabilities, unprofitable operations, unsecured notes, and stock which could not be sold in large blocks without a deep discount," and left asbestos' claimants with little chance of recovering against Raymark Industries. *Id.* The court concluded that the context of the corporate restructuring "show that the elaborate transfer of assets was designed to escape liability." *Id. Schmoll* is plainly inapposite here.

12 (2012); S.C. Code Ann. § 15-32-520(D). Reckless and wanton conduct "is the doing of a negligent act ***knowingly***; it is a ***conscious failure*** to exercise due care." *Id.* (emphasis added). Punitive damages must be proven by clear and convincing evidence S.C. Code Ann. § 15-33-135. Where, as here, there are multiple defendants, "a punitive damages award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant." S.C. Code Ann. § 15-32-520(G).

South Carolina appellate courts have not addressed the question, but other courts have held that punitive damages may not be assessed against a defendant on a successor liability theory. *See, e.g.*, *Lefever v. K.P. Hovnanian Enters., Inc.*, 160 N.J. 307, 326 n. 4, 734 A.2d 290, 301 n. 4 (1999); *In re Related Asbestos Cases*, 566 F. Supp. 818, 822 (N.D. Cal. 1983); *Bowen v. W.R. Grace & Co.--Conn.*, 781 F. Supp. 682, 683 (D. Mont. 1991) ("[S]uccessor liability applies only to compensatory damages"); *Brown v. Overhead Door Corp.*, No. 06 C 50107, 2008 WL 5539388, at *4 (N.D. Ill. Dec. 11, 2008). This Court should thus at minimum reverse the punitive damages as to Holdco and Kenvue.

CONCLUSION

The J&J Defendants respectfully ask this Court to reverse and order the trial court to enter judgment notwithstanding the verdict, or, in the alternative, to order a new trial absolute, in the particulars set forth herein.

Respectfully submitted,

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November 24, 2025

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SC Court of Appeals

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. Mr. Perry and Lonnie Long..... Respondents,

v.

American International Industries et al.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's final briefs comply with Rule 211(b), SCACR.

SIGNATURE PAGE ATTACHED

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