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

v.

American International Industries et al.

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

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I certify that this Designation does not contain any matters which are irrelevant to this appeal.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO. 2023-CP-40-04072
	)	
MICHAEL L. PERRY AND LONNIE L. LONG,	)	<i>In Re: Asbestos Personal Injury Litigation</i>
	)	Coordinated Docket
	)	
Plaintiffs,	)	
	)	
vs.	)	<u>J&J DEFENDANTS' PROPOSED JURY</u>
	)	<u>CHARGES AND VERDICT FORM</u>
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	
	)	

The J&J Defendants hereby submit that the attached jury charges and verdict form listed as “COMPREHENSIVE JURY CHARGES” and “PHASE 1.VERDICT FORM REQUESTED BY J&J DEFENDANTS” are consistent with the law of South Carolina and should be thus be used during Phase 1, and hereby object to any charges, instructions, or verdict forms used that are inconsistent herewith, and which are inconsistent with the J&J Defendants’ filings, also being filed contemporaneously herewith, on: (1) the proper application of *Smith v. Tiffany*; (2) the proper application of the legal requirements for specific causation in a toxic tort case in South Carolina under *Edwards v. Scapa*; (3) the proper application of the law regarding negligence *per se* in South Carolina and its interaction with South Carolina’s strict liability statute; and (4) successor liability.

As the Court has made clear, it intends to charge the jury and use a verdict form consistent with the law it charged in the *Plant* case, and thus, the J&J Defendants are submitting a modified version of a separate set of charges entitled “JURY CHARGES MODIFIED FROM *PLANT* CASE FROM J&J DEFENDANTS,” to be used during Phase 1, while reserving all objections, requests, and rights, and waiving no positions.

On the submitted verdict form, only “Johnson and Johnson” is listed for the jury’s consideration. The J&J Defendants have maintained throughout that Plaintiffs’ successor liability claims are equitable and for the court, and not for the jury, and that it is error to inject successor liability issues into the products liability claims of Mr. Perry before the jury. Further, there is no evidence that LLT, Holdco, or Kenvue have sold, distributed or made talc that Mr. Perry could possibly have used.¹ The Court thus should instruct the jury that on its verdict form, while different J&J related entities have been sued, it should consider a verdict only as to Johnson and Johnson, and should not concern itself with the other entities.

Additionally, the J&J Defendants understand that the Court disagrees with their interpretation of *Smith v. Tiffany* and *Machin v. Carus*. Without waiving any positions and reserving all rights, the J&J Defendants submit that apportionment should be required with respect to all party defendants sued, whether settled or not, and failing that, for all party Defendants sued, whether settled or not, for whom there was evidence presented as to causation of Plaintiffs’ injuries/ damages. The Court has indicated that only parties still in the case who have not settled or been dismissed as of this time should be on the verdict form for apportionment. The J&J Defendants disagree with this interpretation of the law, but understanding this, and without waiving and fully reserving all objections, rights and positions, the J&J Defendants request at minimum apportionment for all party defendants currently in the case. That would include Atlas Turner and Himmel Media, which are in default but have not been dismissed. The J&J Defendants

¹ Further, in opening statements, Plaintiffs’ counsel stated that “there’s a myriad of Johnson and Johnson companies, but for this trial, the only ones you need to worry about are Johnson and Johnson and Kenvue.” To include LTL and Holdco a verdict form would create confusion and undue prejudice for the jury. There is no evidence sufficient to include Kenvue on the jury verdict form.

also reserve all rights afforded to it by statute, including but not limited to the causation in fact “empty chair” defense.

Additionally, the J&J Defendants hereby submit that the attached jury charges and verdict form listed as “PHASE 2 JURY CHARGES” and “PHASE 2.VERDICT FORM REQUESTED BY J&J DEFENDANTS” are consistent with the law of South Carolina and should be thus be used during Phase 2, and hereby object to any charges, instructions, or verdict forms used that are inconsistent herewith, and which are inconsistent with the J&J Defendants’ filings, also being filed contemporaneously herewith

(Signature Page Follows)

Respectfully submitted,

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Columbia, South Carolina

August 11, 2024

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF
COMMON PLEAS
FOR THE FIFTH
JUDICIAL CIRCUIT

- - -

MICHAEL L. PERRY AND LONNIE)
L. LONG,)

Plaintiffs,)

vs.)

AMERICAN INTERNATIONAL)
INDUSTRIES, ET AL.,)

Defendants.)

Case No.
2023-CP-40-04072

TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
DAY 3

DATE TAKEN: Wednesday, August 7, 2024

TIME BEGAN: 9:06 a.m.

TIME ENDED: 5:02 p.m.

LOCATION: Richland County Judicial Center
1701 Main Street
Courtroom 3B
Columbia, South Carolina

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P R O C E E D I N G S

* * *

THE COURT: I know that we've got the net worth situation, and I want to just address that right now.

The first thing we're addressing is the dispute between the plaintiff and American International Industries about what kind of material may be introduced in aid of net worth.

I am very disappointed in the situation in which we find ourselves now. Ms. Flynn, you have known since before the trial began that they were wanting net worth stuff. And you sent a brief at the very last moment that talks about your small client and they've had holidays, religious holidays and all that kind of business, and that's all I've ever heard from you about them.

You haven't responded to anything about net worth. You know that you've got to provide me some information about net worth because you're going to be facing punitive damages if the jury decides in the

1 actual damage phase that it's willful,
2 wanton and reckless conduct; and,
3 therefore, they are entitled to this, and
4 they are entitled to the time to let their
5 economist evaluate it. So I don't
6 understand why I've gotten nothing.

7 One of the things you say is overbroad
8 is that they asked for too much stuff and
9 you are a little teeny company. Frankly, I
10 and my cousins ran a small business for 30
11 years, and this would all have been
12 digitized and able to be captured even in
13 my small little sand mine business.

14 I don't understand how a business that
15 deals with international suppliers that you
16 don't have some financial information about
17 the sales and the net worth of the company.

18 I will cut this down from ten years to
19 five years. But other than that, I'm
20 prepared to sign the motion -- the order
21 compelling immediate production of this
22 material.

23 MS. FLYNN: Your Honor, if I may -- if
24 I might say, I agree with you that they
25 would be -- that that information would be

1 relative to the punitive damages phase.
2 We're not there yet. It's premature.

3 THE COURT: I've told you already that
4 I am not going to wait until the eve of
5 that. I don't ever do that. I always
6 require that net worth information be
7 submitted beforehand.

8 MS. FLYNN: And as I understand
9 the Court's prior rulings, all the Court
10 has ever ordered in the past, in past
11 trials, has been two years of net worth
12 information, which we think would be
13 sufficient.

14 If we have to turn it over at all,
15 please -- please know this would be over
16 our objection. But in the past,
17 the Court's only ever ordered two years.
18 We think that that's much more reasonable
19 under Branham and under --

20 THE COURT: Why wasn't this
21 explanation that you've given me now given
22 earlier?

23 MS. FLYNN: This was -- this is all
24 outlined, Your Honor, in our -- in our
25 response and opposition to the motion. In

1 trial -- obviously, right before trial is
2 the first time they've asked for it to be
3 produced immediately. We did bring our --
4 Brian Dror was here on Monday to have
5 responded to financial questions. It
6 didn't come up at that time, you know --

7 THE COURT: Did you produce that --
8 you didn't tell them about it, but you're
9 going to let them interview the person or
10 put them under oath or take their
11 deposition so we could have straightened
12 this out?

13 MS. FLYNN: I believe they -- I
14 believe --

15 MS. McVEY: I had no idea who that
16 was.

17 MS. FLYNN: Okay.

18 MS. McVEY: I had no idea he was a
19 financial guy. I had no idea.

20 THE COURT: Ms. Flynn.

21 MS. FLYNN: He's not our financial
22 guy. He's --

23 THE COURT: Well, does he have
24 financial information about the company?

25 MS. FLYNN: He could have responded

1 and explained to you the hardships that
2 this request causes in the -- in the manner
3 that it was requested.

4 THE COURT: I'm not talking about
5 hardship now. I'm talking about the -- the
6 hard figures.

7 MS. FLYNN: The hard figures? I think
8 that there is another person who is our
9 financial person who would be the person to
10 testify.

11 THE COURT: I'm not talking about
12 testimony. I want you to give a report of
13 the things they have compelled -- asked me
14 to compel you to produce. I'm not talking
15 about putting them on the stand right now.
16 I'm talking about getting information to
17 them so they can submit it to their
18 economist.

19 MS. FLYNN: Your Honor, I would just
20 respectfully request that if we could limit
21 it to the orders that the Court has put in
22 place in past trials for the two years of
23 net worth under a order of strict
24 confidentiality that's only for the
25 attorneys' eyes and will be destroyed after

1 this trial as --

2 THE COURT: That's always done. But
3 here's the good piece of heartburn about
4 this: All those other defendant --
5 defendants with a two-year period, their
6 background and information was very known
7 to the plaintiff because they weren't in
8 default, but rather, they had been deposed
9 and a bunch of information gotten. Not the
10 case here. They don't know anything about
11 y'all except that Clubman is the product.

12 MS. FLYNN: Your Honor, if I may.
13 They have deposed AII in the past. AII is
14 actually in trial in Connecticut as we
15 speak. They have -- they know this
16 information. They know our history. They
17 know our --

18 THE COURT: In Connecticut, are you
19 going to be asked to give net worth
20 information?

21 MS. FLYNN: I don't -- I'm not -- I'm
22 not involved in that. My understanding
23 right now is they're -- they're in jury
24 selection, so I don't know the stage and
25 how that works in Connecticut.

1 THE COURT: Say that again. No, wait
2 a minute. No. Wait a minute, Ms. McVey.
3 Let me ask you this: Obviously, if you're
4 in trial in various places, they've got
5 commercial general liability insurance.
6 Has this claim been tendered?

7 MS. FLYNN: I believe -- no.

8 THE COURT: No?

9 MS. FLYNN: I don't think so.

10 THE COURT: It hasn't even been
11 tendered? I mean, it would be one thing to
12 have you disclose to them who the insurance
13 company is and what the amount of insurance
14 is.

15 MS. FLYNN: I don't believe so. Okay.
16 No insurance.

17 MS. McVEY: Your Honor, just briefly,
18 you know, lots of defendants -- for
19 example, Johnson & Johnson -- are publicly
20 traded, and so we have lots of financial
21 information that's available to us. This
22 company is not.

23 We would ask -- because of the delay,
24 they didn't -- they didn't -- when we filed
25 the motion and we drafted this order, no

1 one said to us, "Hey, we'll give you two
2 years. Is that enough?" When their person
3 was here, no one said to us, "Hey, do you
4 want to talk to him about the financial
5 information?"

6 Please -- I mean, we want ten years.
7 We're happy to take your five years that
8 you're ordering to cut it down, but this
9 needs to be produced.

10 Whether or not it all comes in later
11 under Branham, we can talk about. But
12 this -- it's certainly discoverable, and we
13 can give our expert some time to look at
14 it. He's not -- he's not seen anything
15 on --

16 THE COURT: And I -- I am going to
17 require that five years be produced. I
18 want you to redraft the order to do that.

19 MS. McVEY: Yes, ma'am.

20 THE COURT: I want the order to also
21 indicate that the production shall be made
22 by beginning of business tomorrow. Include
23 the usual confidentiality material that I
24 always include in these matters.

25 And do you-all know anything about the

1 coverage in this case?

2 MS. McVEY: I don't.

3 THE COURT: All right. Was a snafu
4 made -- do you know how the snafu was made,
5 whether it was a default because they
6 dropped the ball -- because the insurance
7 company dropped the ball after tender?

8 MS. McVEY: You know, Your Honor, what
9 I know is that they never gave an
10 explanation for why the default happened.
11 And so --

12 THE COURT: Why did the default
13 happen, Ms. Flynn?

14 MS. FLYNN: Your Honor, I believe that
15 the -- the claim was tendered to an
16 insurance carrier that the carrier did not
17 retain counsel timely for that.

18 THE COURT: Well, well, well. So you
19 got coverage. It's the insurance company
20 who's dropped the ball. There's coverage
21 for this matter.

22 So, you know, that is all the more
23 reason why -- and you are in trial in other
24 states. Five years to get it to us as
25 immediately as can be done.

1 Now, I want to say one more thing with
2 respect to your participation in the actual
3 damage issues in this case. I'm assuming
4 that the real reason that you want some
5 participation in the actual damage portion
6 of this trial is to show who AII is.
7 Otherwise, I would be assured that
8 Johnson & Johnson will explore everything
9 about the -- the economic damages have been
10 stipulated. You apparently won't stipulate
11 to the actual damages. I would ask you to
12 reconsider that.

13 MS. FLYNN: We are going to stipulate
14 that. I was walking over to talk to Theile
15 this morning, and I just didn't have a
16 chance to do that. We are going to
17 stipulate --

18 THE COURT: Okay. That's great.

19 MS. FLYNN: -- to the medical.

20 THE COURT: That --

21 MS. McVEY: Oh, wait, this is
22 important.

23 MS. FLYNN: The medical.

24 MS. McVEY: But not the --

25 THE COURT: No, ma'am. No, ma'am.

1 That's not stipulation to actual damages.
2 They stipulated to actual damages,
3 including the medical. So that's not a
4 stipulation to actual damages.

5 MS. FLYNN: Your Honor, we -- we would
6 request the opportunity to cross the --
7 their economist.

8 THE COURT: Yes. I --

9 MS. McVEY: And just -- I -- I asked
10 Ms. Flynn this the other day, and they
11 didn't give any explanation.

12 THE COURT: I have to pull this out
13 like pulling the teeth. And then suddenly
14 when the teeth are pulled, oh, well, we've
15 agreed -- oh, but I've got some other
16 things I want to do.

17 Ms. Flynn, y'all are not cooperating
18 with me at all in this in this matter.

19 MS. FLYNN: I -- I really promise,
20 Your Honor, I'm very much trying to
21 cooperate and to -- to be forthcoming about
22 this and to get up here.

23 I do have some streamline objections
24 that I wanted to put on the record this
25 morning just to get it out of the way so I

1 can sit down and shut up and not be
2 involved, and I very much want to do that.

3 MS. McVEY: I'd love for you to do
4 that, too, but I need to respond about the
5 economist real quick because Ms. Gross just
6 reminded me that we put our economist up
7 for deposition. AII attended the
8 deposition. Ms. Gross said on the record,
9 "Ask your questions if you have questions.
10 Ask your questions to AII." They didn't.

11 And so now they want to -- when
12 everybody else is stipulating to this -- to
13 say there's nothing controversial about
14 this number. They want us to bring our
15 economist to -- from California here in the
16 case in chief and then make us bring him
17 back for the punitive phase.

18 THE COURT: I'm not going to allow
19 that and particularly now that you tell me
20 they've been in deposition.

21 MS. McVEY: I'm sorry. They asked a
22 couple of questions. I lied --

23 THE COURT: Well --

24 MS. McVEY: I didn't lie.

25 THE COURT: -- I -- but -- but whether

1 they asked questions or not, they attended
2 the deposition of the economist and know
3 exactly what their economist is going to
4 say about these figures.

5 MS. FLYNN: That doesn't preclude us
6 from -- from presenting that to the jury
7 and presenting the cross-exam. Maybe we
8 could ask -- we -- we asked a few
9 questions, but maybe we didn't ask the rest
10 of the questions because they were covered.

11 THE COURT: Well, I am going to be
12 very disinclined to allow you to do that
13 because I suspect that it is not anything
14 to do with getting a complete look at the
15 economists and the background of these
16 damages. I have every confidence that
17 Johnson & Johnson will fully explore those
18 things if they needed to be explored.

19 You are wanting to put a face on AII,
20 and that is not something that is permitted
21 in the actual damages part of this case.

22 MS. FLYNN: Understood.

23 THE COURT: And that, I am going to
24 resist strongly. They forfeited their
25 right to do that when they didn't -- when

1 the insurance company dropped the ball on
2 filing an answer in this thing -- or
3 engaging counsel. It's not your fault.
4 It's the counsel who is not here.

5 But it very much is something that AII
6 is stuck with. And what they have going
7 with their insurer may be a way to deal
8 with that. But I'm not going to have this
9 trial be the vehicle for AII to try to
10 present itself with respect to this jury or
11 its insurer. So that's where I am.

12 MS. FLYNN: I -- I understand your
13 position, Your Honor.

14 THE COURT: I -- with respect to these
15 other line objections, please submit them
16 to me, and I will look at them and see if I
17 will incorporate them into the record.

18 MS. FLYNN: And another thing,
19 Your Honor. We would -- we would request a
20 proffer of what we would do with the
21 economist.

22 THE COURT: Well, put that in writing,
23 and I'll take a look at it.

24 MS. FLYNN: We appreciate that,
25 Your Honor. And -- and for -- for just a

1 preview for today, what my -- what my
2 thoughts were, just to try to streamline
3 and get this out once and for all -- get to
4 my notes here. As I understand the
5 schedule today, it's going to be Dr. Gibney
6 first, followed by the continuation of the
7 Hopkins deposition, followed by Madigan and
8 Longo.

9 THE COURT: Yeah. These are all
10 liability witnesses. They are not damages
11 witnesses, as I understand.

12 MS. FLYNN: Dr. Gibney --

13 MS. McVEY: Dr. Gibney will talk
14 about -- I -- now, Dr. Gibney will talk
15 about the surgery and the pain and
16 suffering and what --

17 THE COURT: Okay.

18 MS. McVEY: -- his life may look like.

19 THE COURT: Right.

20 MS. McVEY: They also attended his
21 deposition and put a sad statement on the
22 thing about how they weren't able to ask
23 any questions. And we told them to ask
24 questions in Dr. Gibney's deposition.

25 What I think Ms. Flynn -- not

1 Ms. Flynn -- AII wants to do -- there's a
2 crazy medical record out there talking
3 about testicular cancer. It's clearly not
4 Mr. Perry. I noticed Johnson & Johnson
5 didn't even use it yesterday. And I think
6 that's where they want to go with
7 Dr. Gibney. I -- I would like for her to
8 show you the article -- the record if she's
9 going to use that today.

10 THE COURT: Very good. Show it to me
11 if you're even thinking about using it.
12 And then I will rule on your examination of
13 Gibney on damages. But I am not inclined
14 to do that.

15 MS. FLYNN: I'm not planning on using
16 that, Your Honor. And I was going to wait
17 for J&J's cross-examination to see what
18 they -- what they brought up with
19 Dr. Gibney to determine.

20 And essentially, what I would do, if
21 anything, would just be to point out that
22 his cancer is indolent, meaning it's not
23 as -- in the aggressive form as you might
24 see most of the mesotheliomas, things of
25 that -- along that line. That would be my

1 only real point that I would make with
2 Dr. Gibney --

3 THE COURT: All right. Well, we'll
4 cross that bridge when we come to it.

5 MS. FLYNN: The only other things I
6 did, we filed this morning a proffer for
7 Dr. Haber based on the conversations
8 yesterday. I just wanted to let the Court
9 know that that proffer --

10 THE COURT: All right. I'll take a
11 look at it.

12 MS. FLYNN: Then -- let's see. We've
13 got Dr. Madigan and Dr. Longo today. And
14 you are correct, I do not expect them to
15 have testimony directed to damages as we
16 understand the Court's limitations on that
17 being the numbers --

18 THE COURT: Right.

19 MS. FLYNN: -- and being pain and
20 suffering. But for the default, we would
21 have had a full cross-examination, as
22 the -- as the Court very well knows. We
23 will have a proffer for Dr. Longo, at a
24 minimum, that we can do at the end of his
25 testimony, or we can just file that --

1 THE COURT: And, again, this is a
2 proffer to cross-examine on liability.

3 MS. FLYNN: Correct.

4 THE COURT: And, again, as you
5 understand, that's why I'm even hesitant to
6 receive a proffer on it because you are not
7 entitled to dispute liability of AII at
8 all.

9 MS. FLYNN: I completely understand,
10 Your Honor. We just wanted to preserve our
11 position for the record, let the Court know
12 what we would have asked had we had the
13 opportunity to ask.

14 THE COURT: Now you have it.

15 MS. FLYNN: We think some of this
16 testimony last night would have been
17 important to us on the liability
18 perspective. We won't get to present that
19 otherwise, at least, so we want to proffer
20 that to the Court.

21 THE COURT: All right.

22 MS. FLYNN: And with that, I hope that
23 I will sit there --

24 THE COURT: Yes, ma'am. All right.

25 MS. FLYNN: -- most of the day and

1 don't have to bother you again.

2 THE COURT: I understand. And I'm not
3 fussing with you. It's your client and the
4 directions you're receiving from the client
5 and, perhaps, the insurance company that's
6 got me unhappy.

7 MS. FLYNN: I understand, Your Honor.

8 THE COURT: You're a lawyer with
9 first-class, top-tier professional
10 abilities, and I respect that totally.

11 MS. FLYNN: Thank you, Your Honor.

12 THE COURT: All right.

13 MS. McVEY: Your Honor, I think the
14 only other issue that we were going to try
15 to resolve this morning if we had time is
16 the motion to compel against Kenvue and
17 Holdco.

18 THE COURT: Yes.

19 MS. McVEY: And I can address that now
20 or --

21 THE COURT: You can address that very
22 briefly now. Of course, I've read the
23 materials, and then I'll go to Ms. Bueno.

24 MS. McVEY: Thank you, Your Honor.

25 I just want to just briefly remind you

1 of how we got here with this motion to
2 compel with Kenvue and Holdco.

3 They initially filed a motion to
4 dismiss all the claims and refused to
5 participate in discovery until you ruled on
6 that, but they never really asked you to
7 rule.

8 We finally asked you to rule on that
9 and to do a motion to compel. You denied
10 their motion to dismiss and ordered them to
11 have a fully prepared corporate
12 representative at the very beginning of
13 July.

14 They did not give us a date until kind
15 of last -- I think it was last week, maybe
16 the week before.

17 And it took several days to kind of
18 complete this deposition, so we're kind of
19 jammed in, in my view, due to their refusal
20 to participate.

21 The defendants do not dispute in this
22 corporate representative deposition that he
23 had no personal knowledge and he failed --

24 THE COURT: He was a retired lawyer
25 that had never been with Kenvue or anything

1 to do with them.

2 MS. McVEY: And this is really
3 interesting. Because sometimes you have
4 30(b)(6) witnesses who you have to totally
5 educate, right?

6 THE COURT: 75 minutes of preparation,
7 as I remember.

8 MS. McVEY: That's right.

9 And sometimes you have corporate
10 representatives, like for Johnson &
11 Johnson, a company that's 150-plus years
12 old, whatever it is, and you have to start
13 fresh.

14 These companies that we're talking
15 about, Kenvue and Holdco, they're 2021 --
16 2020, 2021, 2022. The people who were
17 involved in the whos, whens and whys of
18 these companies are still employed.
19 They're there.

20 And the point of this whole thing is
21 to figure out: Why did they do this? What
22 was the purpose?

23 And it's not just -- it's for our
24 underlying fraud claim. It's for the
25 successor claim that you're going to decide

1 later. But it's all relevant to this case.

2 And what they did is they
3 unilaterally -- they never moved for
4 protection under your order.

5 They unilaterally said, "Hey, we're
6 only going to look at when Kenvue actually
7 started, 2022," despite the fact that all
8 these people who are employed by Kenvue
9 were also employed by the Johnson & Johnson
10 entities who were part of the whys: Why
11 did they do that? Was there a legitimate
12 business interest other than to, to be
13 blunt, defraud people like Mr. Perry?

14 And so this is important, and we've
15 gone through all the different reasons why.

16 What they want to say is -- and let me
17 say this. Sometimes we've done plenty of
18 corporate representative depositions of
19 defendants. Certainly, we have.

20 Here, this is the first time that
21 these two companies have been deposed in a
22 talc case as a corporate representative.

23 Now, there are a couple of fact
24 witnesses that have testified before. And
25 they said, "Look, we gave the corporate

1 representative these guys' depositions.
2 What do you want us to do?"

3 But those guys weren't 30(b)(6)
4 depositions. They weren't deposed on all
5 the notices that we have here.

6 And so they unilaterally limited what
7 was done. They never sought protection
8 from this Court.

9 And so, for example, one of the things
10 we have to prove for successor liability is
11 the continuation piece, right? We believe
12 fraud gets us there anyway under successor
13 liability under the law in our state. But
14 we need to prove that.

15 So Topic 11 said whether Kenvue
16 continued under the same board of directors
17 and executive management and leadership as
18 JJCI -- that's the secondary entity --
19 after the Kenvue split-off.

20 So this corporate representative
21 talked to one employee to inform himself of
22 the current directors.

23 Well, that's not exactly relevant.
24 What we need is at that time, right? And
25 it's important, and they know that. So

1 they unilaterally limited what we could ask
2 and what he knew.

3 They did not research any of the
4 events that occurred before Kenvue was
5 formed in 2022.

6 And I won't go through everything, but
7 this is important because Project Plato,
8 which is where they divide all these
9 things, where the grand scheme occurred,
10 occurred in 2021. So we need to know
11 before that.

12 And though Kenvue started in 2022, the
13 plan for Kenvue and what was known and
14 knowable to them was certainly around then.
15 And they unilaterally limited us to that.

16 The last thing, we sought -- we sought
17 specific information as to companies
18 involved with Project Plato, not just
19 Kenvue and Holdco.

20 But those companies were Chenango
21 Zero, Chenango One, Chenango Two, Currahee
22 Holding Company, LLT, LTL, JJCI. And
23 Michelle Goodridge, who we mentioned in our
24 papers to you, was the president of a lot
25 of those companies.

1 This corporate representative never
2 talked to her, never got the information
3 about all of that. It was clearly noticed
4 in our deposition.

5 Now, they say, "This was 65 topics.
6 It was super late. What did you want us to
7 do?"

8 They had this deposition notice since
9 February. They just didn't do anything
10 until you ordered them to do it. That's
11 improper, in our view.

12 So what we're asking for, Judge, is
13 for you to order them to produce fully
14 prepared witnesses for both Kenvue and
15 Holdco.

16 And that should be done within
17 72 hours. I think it's going to have to be
18 this weekend sometime. And we've asked you
19 to order them to be fully prepared and give
20 us a secondary deposition.

21 I'm going to reserve my request for
22 any financial sanctions depending on what
23 they do after this.

24 THE COURT: All right. Ms. Bueno.

25 MS. BUENO: Ms. Pepke will address

1 this, Your Honor.

2 THE COURT: All right. Ms. Pepke.

3 MS. PEPKE: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MS. PEPKE: I took this off

6 Ms. Bueno's list because this is

7 important -- it's an important motion.

8 So I stayed up till 4 a.m., and I read
9 through four days of testimony to make sure
10 that I could answer Your Honor's questions
11 because I wasn't directly involved in that.

12 And what I can tell you from that
13 review is that what you are hearing is not
14 the complete picture.

15 For example, Mr. Mittenthal, who they
16 want to portray as an empty vessel, has
17 served as corporate representative for
18 Holdco in the past, for LLT and for JJCI.

19 Now, why is that important? JJCI is
20 the successor. That is the entity -- no,
21 that is the predecessor that, you know,
22 they're trying to flow down from.

23 So that is information he had already
24 done, not an empty vessel.

25 But they only focused on: So what did

1 you do in addition to that?

2 He made that clear in his deposition
3 why -- you know: I'm not an empty vessel.
4 I have been doing this for five years.

5 One of the reasons is that Holdco is a
6 holding company. There are no employees.
7 Zero. There is no one they can bring up
8 and say, "I'm there on a daily" -- you
9 know. There are no daily operations.
10 There are no day-to-day management. They
11 do not keep financial statements.

12 THE COURT: Ms. Pepke, the fact that
13 they're a holding company does not --
14 somebody is in charge of why they were
15 created and what they are doing at the
16 present time. That's what they want to
17 know about. And your corporate
18 representative was not prepared on that.

19 The -- the woman that they mentioned
20 is probably the key to this whole thing in
21 terms of really getting the information
22 about why it was put together as well as
23 how it all worked because she was the --
24 chief officer of most of these created
25 corporations.

1 He never even talked to her. So
2 that's the thing that's giving me
3 heartburn.

4 MS. PEPKE: Let me address that.

5 THE COURT: They serve -- they serve a
6 30(b)(6) notice with all the things they
7 want in February, and now we are here in
8 trial. Y'all have arbitrarily limited what
9 he was prepared to talk about in the
10 30(b)(6) that they conducted.

11 I've looked at that deposition. There
12 are a lot of things that he simply doesn't
13 know or hadn't checked on or didn't get
14 into it.

15 That's -- the fact that he may have
16 served as a corporate rep for other things
17 just increases the heartburn I've got about
18 why somebody wasn't prepared to answer
19 their questions. They're entitled to ask
20 those questions of somebody that is
21 prepared to answer.

22 MS. PEPKE: Let me address that in two
23 buckets as to Holdco and Kenvue because
24 these are two different entities. So I
25 want to make sure to distinguish that.

1 So as to Holdco, the only issue they
2 raised in their motion to compel is the
3 fact that he didn't come with a net worth
4 number. Now, what he explained and what
5 is -- there is no documents to dispute
6 this, is that Holdco doesn't keep a net
7 worth number. They don't have balance
8 statements. It simply doesn't exist.

9 So what they're complaining about is
10 that we didn't go create information that
11 doesn't exist. They simply --

12 THE COURT: It is not believable to me
13 that a big company like that that has a
14 place in the range of companies were
15 created when J&J tried to create this a
16 different way of handling their affairs and
17 isolate the liability in one company, it
18 doesn't make any sense to me that there is
19 nothing anywhere that indicates what
20 Holdco's assets are.

21 MS. PEPKE: Let me --

22 THE COURT: And so -- don't --
23 don't --

24 MS. PEPKE: That's what they did. So
25 there isn't a, quote, "net worth number,"

1 which was what the ask was.

2 So after the deposition, they created
3 a asset -- I'm going to say it wrong --
4 stock -- a share valuation or a stock
5 valuation. I'm going to get the exact
6 wording wrong. This is not information
7 that existed prior to this litigation. It
8 was created for the litigation to try to
9 give some kind of value.

10 THE COURT: It was amalgamated. Let's
11 please don't argue that way. But their
12 assets were their assets.

13 MS. PEPKE: Well they --

14 THE COURT: Whether they chose to
15 record them in a particular form that says
16 net worth on it is maybe one thing, but
17 what they're asking for is a picture of
18 their assets and net worth and --

19 MS. PEPKE: And we -- we provided
20 that --

21 THE COURT: -- anybody with half
22 common sense would know that.

23 MS. PEPKE: After -- after the
24 deposition, they provided the information
25 via proposed stipulation. And, Your Honor,

1 as I stand here, with all due respect to
2 the Court, I think it is fair that they
3 should be able to find out about the backup
4 for that information.

5 But that has been provided, a
6 valuation of Holdco created here. I just
7 want to be clear: It wasn't existing
8 knowledge that they --

9 THE COURT: Don't -- don't -- I know
10 what your position is about that.

11 MS. PEPKE: Okay. I've made --

12 THE COURT: I say all that was very
13 much in existence as assets. They chose a
14 way of keeping their books that allowed
15 them to say we have no simple piece of
16 paper that has that on it. I -- I -- that
17 makes little difference to my opinion.

18 MS. PEPKE: The number has been
19 provided --

20 THE COURT: Right.

21 MS. PEPKE: -- to plaintiffs.

22 THE COURT: So let's -- let's move on
23 from that.

24 MS. PEPKE: And so that's that piece.
25 I'm going to set aside -- you don't

1 want to hear it -- about how I don't think
2 it's -- we don't think -- actually think
3 it's relevant. We're not going to talk
4 about that.

5 THE COURT: Right. That's not a part
6 of --

7 MS. PEPKE: So as to Kenvue, I want to
8 be clear that Mr. Mittenthal interviewed
9 the vice president and corporate secretary
10 of Kenvue. And why is that important?
11 Because that gentleman was the corporate
12 secretary of JJCI for seven years.

13 So this notion that they -- that they
14 just limited it to Kenvue, they didn't
15 reach out over here, they did. He was
16 there at JJCI. That's who he went to talk
17 to. He went and -- he read all of the
18 depositions of anyone who has been deposed.
19 I've had --

20 THE COURT: Okay. I understand your
21 position on that.

22 MS. PEPKE: And I want to be clear:
23 They've also got the depositions of the CFO
24 and CEO. And what it comes down to,
25 Your Honor, is they don't like the answer

1 they've gotten. But it is the answer. And
2 I've got four pages up here of the answer
3 why Kenvue was created. And this is
4 information they used in the Garcia trial.

5 THE COURT: All right.

6 MS. PEPKE: And it explains that --
7 why Kenvue was created. It is not some
8 kind of, as they implied, a shelter entity.
9 Kenvue is a publicly traded corporation.
10 It was spun off to hold consumer products
11 because that's the direction the market is
12 going. To break off your consumer products
13 from your pharmaceutical --

14 THE COURT: It is your -- is it
15 y'all's position that it's not -- you're
16 not going to provide anybody nor are they
17 able to ask anybody what their liability in
18 these talc cases -- how that would impact
19 whether that was a reason for creating
20 these companies?

21 That -- that certainly is, from a
22 commonsense point of view, accounts that I
23 have read of the litigation that involves
24 this and the setting aside of the
25 bankruptcy.

1 It seems pretty clear to me that there
2 has been a finding that the bankruptcies
3 and some of the other corporate entities
4 that were created were created in aid of a
5 plan to isolate the liability claims to a
6 company that had nothing -- no other
7 assets. And that's what they're asking
8 about, and I think they are entitled to ask
9 about that.

10 MS. PEPKE: And, Your Honor, the
11 Rocket -- the Ruff and Mangan depositions
12 thoroughly cover that. And I want to break
13 these two apart again.

14 So there's Project Plato that had to
15 do with what you were just talking about.
16 That is the creation of LL -- LTL, now LLT,
17 and --

18 THE COURT: I got this trial that's
19 starting --

20 MS. PEPKE: I know.

21 THE COURT: -- so I'm concerned now
22 that we're going to get into a very long
23 description.

24 MS. PEPKE: No.

25 THE COURT: Your position is that

1 they've already got this information from
2 the people they've already interviewed, the
3 CFO and the CEO, right?

4 MS. PEPKE: That is correct. And
5 Mr. Mittenthal read those depositions. He
6 was asked if -- and reviewed -- did 90
7 other hours of preparation, read all the
8 discovery responses, read all of the
9 depositions of anyone who had been deposed
10 for this and said there's nothing
11 inconsistent.

12 What Mangan and Ruff -- Mr. Mangan and
13 Mr. Ruff told you about those transactions,
14 why LLT and LTL were created and then why,
15 in a separate project, Diamond, why Kenvue
16 was spun off. That is accurate. That is
17 what Kenvue understands.

18 Now, Kenvue -- it's a bit like asking
19 a child why his parents decided to create
20 him, right? So Kenvue didn't make the
21 decision --

22 THE COURT: Well, that -- that -- I
23 don't see it that way at all. This is part
24 of the old J&J as a successor. And I'm not
25 saying that because that's just my opinion.

1 That opinion now has been said by other
2 people that have looked at this whole chain
3 of events to decide whether they're part of
4 an entire course of activity that was
5 geared towards trying to isolate out the
6 liability for these talc cases.

7 So I understand that that's the
8 position they take, but they are entitled
9 to have somebody respond.

10 And this is not some child that sits
11 there by themselves and doesn't know why
12 their parents created them. These same
13 people were involved in those other
14 companies that created this. It's
15 just that's not the line that your
16 corporate representative took and did not
17 educate himself enough to have to take any
18 other position.

19 MS. PEPKE: Your Honor, he did review
20 Mr. McGraw's testimony, which, actually,
21 has a very detailed -- and it was
22 provided -- organization, flowchart of when
23 they were created.

24 THE COURT: What's the problem with
25 just going on and taking this other

1 deposition like they've asked this weekend
2 and saving all this hoopla about it?

3 They're entitled to have somebody to
4 sit down and talk about what they're asking
5 about, and that wasn't provided when the
6 corporate rep's deposition was taken. A
7 few things were provided after. See, that
8 just means that you've got everything you
9 need.

10 They were entitled to have a corporate
11 rep who could talk in detail about the
12 history of this thing, who all was involved
13 in the big company, how these others got
14 formed, why, and so forth. They didn't get
15 that.

16 MS. PEPKE: Your Honor, with due
17 respect, four days of deposition, they got
18 a lot of information about that.

19 THE COURT: Well, they say they didn't
20 get anybody that was detailed on what they
21 wanted to ask about.

22 And I'm going to let them ask about
23 it. That's the bottom line of that.

24 MS. PEPKE: Thank you, Your Honor.
25 I want to clarify one other thing.

1 There's been a reference that LLT -- LLT
2 and LTL was created without assets. That
3 is completely contradicting the Third
4 Circuit's findings twice.

5 The opinion that the Third Circuit
6 issued last week found that LTL and LLT
7 were adequately funded by anyone's
8 estimations, Plaintiffs' experts and
9 Defendants' experts. It is adequately
10 funded for talc liabilities. That is the
11 reason the Third Circuit found that the
12 bankruptcy could not go forward is because
13 they were too well funded.

14 So the notion that LLT was created
15 with no assets and no assets to pay
16 anything has been found to be incorrect by
17 the Third Circuit. I want to be very clear
18 on that.

19 THE COURT: Well, I understand that's
20 your position.

21 MS. PEPKE: Thank you.

22 THE COURT: I am going to allow these
23 depositions to go forward this weekend.

24 Get me an order, Ms. McVey, sharing
25 with the other side the details of that.

1 MS. McVEY: Your Honor, thank you so
2 much.

3 And just one clarification on Holdco.
4 While they did offer a stipulation as to
5 net worth, we said we can't take a
6 stipulation but we'll take an affidavit.

7 So far, we have not gotten an
8 affidavit. So, with your permission, I
9 would like to request a new order that --

10 THE COURT: I'm sure they can provide
11 a sworn statement --

12 MS. PEPKE: That process was being
13 negotiated --

14 THE COURT: Yes. They'll -- you'll
15 get what you need.

16 MS. PEPKE: And outside of my scope of
17 knowledge.

18 THE COURT: Absolutely.

19 MS. McVEY: Thank you so much. And
20 I'll draft an order.

21 For Dr. Gibney, I think we have to use
22 a Zoom link instead of Webex just for some
23 other reasons right now.

24 Does that suit The Court okay?

25 THE COURT: Well, it's -- our court

1 reporter is going to have to be able to
2 have this in a reportable form.

3 So you don't need my computer to set
4 this up?

5 MS. McVEY: I think we can -- well,
6 let me -- this is Ryan Travis.

7 THE COURT: Yeah. I don't want to
8 violate any of our courtroom if that thing
9 needs to be on Webex. So you tell me.

10 MR. TRAVIS: As far as to be able to
11 record, for that you need a separate
12 recording file?

13 MS. McVEY: Or can you just transcribe
14 it?

15 She can transcribe it.

16 THE COURT: Can you transcribe it,
17 Court Reporter?

18 THE REPORTER: Yes.

19 THE COURT: Very good.

20 All right. Well, then set it up and
21 let's go. Is it for the -- it's not for
22 this first witness, is it?

23 MS. McVEY: It is.

24 THE COURT: It is? All right. Well,
25 get to it. How long is it going to take

1 you?

2 MS. McVEY: We just need about a
3 ten-minute just test to make sure the sound
4 is working. And then we're good to go.

5 THE COURT: Okay. Let's do it.

6 The Court will be in recess.

7 MS. McVEY: Thank you so much.

8 * * *

9 (Whereupon, there was a recess in the
10 proceedings from 9:41 a.m. to 9:51 a.m.)

11 * * *

12 THE BAILIFF: All rise. Court come to
13 order.

14 THE COURT: Y-all, we got another
15 little snafu going on here.

16 One of the jurors had a car breakdown.
17 But she's not hurt or anything, but the car
18 is broke down and she's on the side of the
19 road, and so forth and so on.

20 I asked our court personnel to try to
21 get her. She had called in to the jury
22 assembly room. And we haven't been able to
23 reestablish contact with her to see what
24 the situation is.

25 So what I am prepared to do is to

1 dismiss her as a juror and pick the first
2 alternate.

3 The juror -- the applicable juror is
4 Juror Number 75. That is Stephanie Davis.
5 And the first alternate is Juror Number 166
6 Lakeisha Jenkins.

7 And what I am prepared to do is
8 dismiss the juror that we can't get ahold
9 of.

10 So I turn to the plaintiff. Y'all got
11 anything to say about that?

12 MR. ADAMS: No, Your Honor. We defer
13 to the Court.

14 THE COURT: All right.

15 I turn to the defense. Do you have
16 anything to say?

17 MS. BUENO: No. That's fine,
18 Your Honor.

19 THE COURT: All right. I'm
20 apologetic, and I kind of held off on this
21 because we heard it a little while ago.
22 But I just -- if we are ready to go, which
23 it looks like we are, I just think we don't
24 know.

25 MS. BUENO: Yes.

1 THE COURT: You know? Okay. Not her
2 fault.

3 All right. Please, number one, tell
4 the bailiffs to bring me the jury.

5 THE BAILIFF: Yes, ma'am.

6 THE COURT: And I will advise them
7 when they get here.

8 So just bring me the jury as it's
9 currently constituted, and I will then tell
10 them what's going on.

11 THE BAILIFF: Yes, Your Honor.

12 THE COURT: All right. Be at ease.

13 MS. McVEY: Thank you, Your Honor.

14 (Off-the-record conference.)

15 (The jury enters the courtroom at
16 9:55 a.m.)

17 THE BAILIFF: The jury is seated,
18 Your Honor.

19 THE COURT: Thank you.

20 Ladies and gentlemen of the jury, I am
21 so sorry that one of our jurors has
22 apparently had a car breakdown and is -- we
23 have not been able to communicate back with
24 her to see how things are progressing.

25 And we've got this trial that probably

1 needs to go on forward, so what I am going
2 to do is to replace her.

3 And the first alternate juror is Juror
4 Number 166, Lakeisha Jenkins.

5 So, Ms. Jenkins, you are now a regular
6 juror. Very good.

7 Now, please be seated, Counsel.

8 All right. This is the continuation
9 of the plaintiffs' case. And the next
10 witness to be presented will be presented
11 by video?

12 MS. GROSS: Yes, Your Honor.

13 THE COURT: And so, Ms. Gross, are you
14 presenting the witness?

15 MS. GROSS: Yes, ma'am, I am.

16 THE COURT: All right. You may
17 proceed.

18 MS. GROSS: Dr. Gibney, can you hear
19 us.

20 THE COURT: What's that?

21 MS. GROSS: I'm trying to see. Oh.
22 There it is.

23 Just for the record, the next witness
24 Plaintiffs call is Dr. Barry Gibney.

25 THE COURT: Barry Gibney, Dr. Gibney,

1 members of the jury.

2 Dr. Gibney, can you hear me? This is
3 Jean Toal, the judge.

4 THE WITNESS: Yes, Your Honor. I can
5 hear you.

6 THE COURT: Very good.

7 This is another expert witness. His
8 qualifications will be presented, and then
9 he'll be qualified in certain areas and you
10 may hear opinions from him in accordance
11 with the rules for expert witnesses.

12 You may proceed, Ms. Gross.

13 MS. GROSS: Thank you, Your Honor.

14 * * *

15 DIRECT EXAMINATION

16 BY MS. GROSS:

17 Q. Good morning, Dr. Gibney.

18 A. Good morning, ma'am.

19 Q. Good morning. Can you go ahead and
20 introduce yourself to the jury this morning?

21 A. I am Dr. Barry Gibney. I am a general
22 thoracic surgeon, the --

23 THE COURT: Oh.

24 THE WITNESS: -- section chief of
25 thoracic surgery at the Medical University

1 of South Carolina.

2 THE COURT: Dr. Gibney, I'm sorry to
3 interrupt one more time. Would you listen
4 up for the administration of the oath?

5 THE WITNESS: Oh. Sorry.

6 THE CLERK: Dr. Gibney, can you please
7 raise your right hand?

8 Do you swear or affirm the testimony
9 you are about to receive to be the truth,
10 the whole truth, and nothing but the truth
11 so help you God?

12 THE WITNESS: I do.

13 THE CLERK: Thank you.

14 THE COURT: Now, pardon the
15 interruption. Ms. Gross, you may proceed.

16 MS. GROSS: It's a pretty important
17 interruption.

18 * * *

19 BARRY C. GIBNEY, D.O.,
20 having been first duly sworn, was examined and
21 testified as follows:

22 BY MS. GROSS:

23 Q. Just so everything is on the straight
24 and narrow, Dr. Gibney, can you go ahead and
25 introduce yourself one more time to the jury this

1 morning, please.

2 A. Yes, ma'am.

3 I am Dr. Barry Gibney. I'm a general
4 thoracic surgeon and the section chief of thoracic
5 surgery at the Medical University of South
6 Carolina in Charleston.

7 Q. Do you know Michael Perry?

8 A. I do, yes.

9 Q. How do you know him?

10 A. I was his surgeon.

11 Q. How long, about, has Michael been one
12 of your patients?

13 A. For approximately one year now.

14 Q. I'll represent to you, Dr. Gibney,
15 that the jury has met a couple of expert witnesses
16 that spent time testifying in court. Is that you?

17 A. Am I a expert witness? I believe so,
18 yes.

19 Q. Are you the kind of physician who
20 testifies in court repeatedly?

21 A. No, ma'am.

22 Q. Okay. What disease have you been
23 treating Mr. Perry for?

24 A. Malignant pleural mesothelioma.

25 Q. What is malignant pleural

1 mesothelioma?

2 A. It is a cancer of the pleura, which is
3 the lining of the chest wall and of the lungs.

4 Q. Let's talk just for a few minutes
5 briefly this morning about you and who you are.

6 You said you are a thoracic surgeon,
7 correct?

8 A. Yes, ma'am.

9 Q. Could you tell the jury a little bit
10 about what a thoracic surgeon is?

11 A. So as a thoracic surgeon, more
12 specifically, a general thoracic surgeon, is
13 someone who specializes in the treatment of lung,
14 pleura, esophageal and other chest wall
15 malignancies, primarily.

16 We occasionally will do
17 transplantation as well. And we are distinctly
18 different from our cardiac surgeon colleagues who
19 operate on the heart and the great vessels.

20 Q. Where do you -- you said you work in
21 Charleston, correct?

22 A. Yes, ma'am.

23 Q. Is that where you're calling in from
24 today?

25 A. Yes, ma'am.

1 Q. Can you give us a general overview of
2 your educational background?

3 A. Yes, ma'am. I went to the University
4 of Fordham for my undergraduate degree. I went to
5 Nova Southeastern for my medical degree, and then
6 went to Penn State for my general surgery
7 training.

8 During my time at Penn State, I did a
9 postdoctoral fellowship at Brigham and Women's
10 Hospital. I completed three years of basic
11 science and translational research before
12 returning to Brigham for my thoracic surgery
13 fellowship under the guidance of Raphael Bueno.

14 Q. Are you board-certified?

15 A. Yes, ma'am.

16 Q. In what?

17 A. General -- cardiac and thoracic
18 surgery as well as general surgery.

19 Q. Can you explain to us briefly what it
20 means to be board-certified?

21 A. So after completing an accredited
22 training program -- and that's a program that has
23 oversight from a governing body called the
24 "ACGME" -- and satisfied certain case
25 requirements, you sit for a written examination,

1 which is typically about 300 questions, that you
2 must pass at a certain threshold to then be
3 admitted to an oral examination, where you then go
4 and do an examination that's administered by
5 experts in the field. And on passing that, you
6 become board-certified.

7 And once you are board-certified,
8 there are criteria that are met -- that must be
9 met to maintain certification, such as continuing
10 medical education.

11 Q. You mentioned Brigham and Women's
12 Hospital. Where is that?

13 A. In Boston, Massachusetts.

14 Q. Is it associated with any medical
15 schools in Massachusetts?

16 A. Harvard Medical School.

17 Q. And then you also said that you
18 studied under a doctor named Dr. Bueno at
19 Brigham and Women's. Could you tell us briefly a
20 little bit about who Dr. Bueno is and what his
21 specialty is?

22 A. So he is also a general thoracic
23 surgeon. He is the chief of thoracic surgery at
24 the Brigham and Women's Hospital and has made a
25 career out of the treatment and study of malignant

1 pleural mesothelioma.

2 Q. Is he well-known in the medical
3 community for his treatment of patients with
4 mesothelioma?

5 A. Yes, ma'am.

6 Q. When you trained and studied with
7 Dr. Bueno, did you see and treat mesothelioma
8 patients with him?

9 A. Yes, ma'am.

10 Q. How many mesothelioma patients,
11 approximately, have you seen and treated
12 throughout your entire medical career?

13 A. I would say at least 100.

14 Q. What is the NIH?

15 A. It's the National Institutes of
16 Health.

17 Q. They give grants out to physicians to
18 do research, correct?

19 A. Yes, ma'am.

20 Q. Is it competitive to get an NIH grant?

21 A. Yes, ma'am.

22 Q. Have you received any?

23 A. I have, yes.

24 Q. How many?

25 A. One.

1 Q. Could you tell us a little bit about
2 that work?

3 A. So it's a K12, which is a mentored
4 research grant designed around building clinical
5 trials was the particular grant that I received.

6 Q. You've also received funding from the
7 American Cancer Society, correct?

8 A. Yes, ma'am.

9 Q. You are the program director for the
10 integrated thoracic surgery residency at MUSC,
11 correct?

12 A. Yes, ma'am.

13 Q. You are also the surgical director for
14 the transplant program at MUSC, correct?

15 A. With the lung transplant program, yes,
16 ma'am.

17 Q. Is part of your job, Dr. Gibney,
18 mentoring and training medical students?

19 A. Yes, ma'am.

20 Q. Is that something you have done
21 throughout your entire medical career?

22 A. Yes, ma'am.

23 Q. The jury has heard about what it means
24 to be published in the peer-reviewed literature.
25 Have you been published in the peer-reviewed

1 literature?

2 A. Yes, ma'am.

3 Q. How many times?

4 A. I believe I have 45 or so
5 publications.

6 Q. And are any of those 45 or so
7 publications related to mesothelioma?

8 A. Yes, ma'am.

9 Q. Are these, what I've shown to the jury
10 on the screen -- can you see that, by the way?

11 A. I can. Yes, ma'am.

12 Q. Okay. So what I've shown to the jury
13 on the screen, are these three of your
14 publications that have been published in the
15 peer-reviewed literature about mesothelioma?

16 A. Yes.

17 Q. The jury will get a copy of your
18 resume, which, for the record, has been marked and
19 admitted as 626.

20 MS. GROSS: Do you have an objection?

21 MS. BUENO: I do not have an
22 objection, no.

23 THE COURT: Very good.

24 (PLAINTIFF'S EXHIBIT 626, Curriculum
25 Vitae of Barry C. Gibney, D.O., was

1 admitted into evidence.)

2 MS. GROSS: So, at this time,
3 Your Honor, we would tender Dr. Gibney as
4 an expert in thoracic surgery with a focus
5 on thoracic oncology and mesothelioma
6 surgery.

7 THE COURT: Thoracic surgery?

8 MS. GROSS: Yes, ma'am, with a focus
9 on thoracic oncology and mesothelioma
10 surgery.

11 THE COURT: All right. By reason
12 of --

13 MS. BUENO: And I'll say no objection.

14 THE COURT: Thank you very much,
15 Ms. Bueno.

16 By reason of Dr. Gibney's training,
17 education and experience, he is qualified
18 as an expert in thoracic surgery, focus on
19 thoracic oncology and mesothelioma surgery.

20 MS. GROSS: Thank you, Your Honor.

21 BY MS. GROSS:

22 Q. Let's talk a little bit more about
23 malignant pleural mesothelioma. What is the cause
24 of malignant mesothelioma?

25 A. To the best of our knowledge, it

1 indicates it is a result of chronic exposure to
2 asbestos or asbestos-containing compounds.

3 Q. Is there any other cause that you know
4 of that -- any other cause of mesothelioma that
5 you know of other than exposure to asbestos?

6 A. None that I'm aware of.

7 Q. Is there any dispute in the medical or
8 scientific community about that fact?

9 A. Not that I'm aware of.

10 Q. In the 100 or so patients that you've
11 seen and treated with mesothelioma throughout your
12 career, have you ever diagnosed someone with a
13 spontaneous mesothelioma?

14 A. I'm unfamiliar with the term
15 "spontaneous mesothelioma."

16 Q. So then I take it -- I think I know
17 what the answer to my next question is, but just
18 in case: Did you learn anything in medical school
19 about what causes mesothelioma?

20 A. We learned that asbestos exposure is
21 the cause of mesothelioma.

22 Q. Have you ever heard of or learned
23 about a level of asbestos that is safe for a
24 person to breathe and not get sick?

25 A. I have not.

1 Q. Does having prior cancers in your
2 family give you mesothelioma?

3 A. I am not aware of any genetic or
4 familial link.

5 Q. Do any genetic mutations just give you
6 mesothelioma?

7 A. I am unaware of any.

8 Q. Is mesothelioma a curable or incurable
9 cancer?

10 A. As best as we know, it is incurable.

11 Q. So it's terminal, correct?

12 A. Yes, ma'am.

13 Q. In your opinion, Doctor, what is the
14 survival rate of someone who has been diagnosed
15 with mesothelioma?

16 A. The published data indicate a median
17 survival or a time in which we would expect
18 50 percent of patients to be alive is somewhere
19 between 12 and 18 months.

20 Q. Does that 12- to 18-month survival
21 period apply to Mr. Perry?

22 A. Yes, ma'am.

23 Q. One of the things, Doctor, that the
24 jury will eventually be asked to consider in this
25 case is Mr. Perry's pain and suffering. Do you

1 understand that?

2 A. I believe I do, ma'am.

3 Q. Do people with mesothelioma suffer?

4 A. Yes, ma'am.

5 Q. Can you tell us a little bit more
6 about that?

7 A. Well, the pleura is like the lining of
8 the chest wall. It's where the nerve endings from
9 the chest wall go into the chest. So it causes
10 quite significant chest pain for the majority of
11 our patients, and the worse their pain is
12 typically indicates a greater degree of
13 involvement within the chest wall.

14 And then, second, it is a restrictive
15 disease. And what I mean by that is it restricts
16 the lung's ability to expand -- the chest's
17 ability to expand.

18 So what that causes is for that lung
19 to become much less functional, leading to
20 shortness of breath. And eventually that lack of
21 function or restriction leads to the heart
22 functioning in a decreased manner, leading to more
23 shortness of breath. Which leads to more heart
24 problems, which leads to more shortness of breath.
25 And, ultimately, there is a sense of the patient

1 drowning that most of these patients experience.

2 Q. Does mesothelioma -- if you treat
3 somebody with mesothelioma, does it ever reoccur
4 and come back?

5 A. Almost uniformly.

6 Q. What happens when it reoccurs and
7 comes back, typically?

8 A. It essentially causes what was just
9 described.

10 The recurrence tends to be local,
11 meaning in the area that we removed the malignancy
12 from. And it just grows along those spaces,
13 causing chest pain and then the restrictive lung
14 physiology as I described.

15 Q. Is mesothelioma aggressive?

16 A. Yes, ma'am.

17 Q. Let's spend some time now talking
18 about Mr. Perry specifically, okay?

19 A. Yes, ma'am.

20 Q. What was Mr. Perry's health like
21 before he ended up as one of your patients with
22 mesothelioma?

23 A. As best as I could tell, he was very
24 healthy.

25 Q. Did you get to know Michael as a

1 person at all when he first began to see you?

2 A. Briefly, yes. He came with his
3 partner and struck me as being a very kind and
4 generous group.

5 And then, parenthetically, one of my
6 good friends also knows Mr. Perry and speaks very
7 highly of him.

8 Q. The jury saw this slide yesterday.
9 Can you tell us what we're looking at here?

10 A. Well, these are individual slices from
11 a PET-CT scan.

12 THE WITNESS: I don't know if the jury
13 or if the -- Your Honor would like me to
14 describe what a PET scan is.

15 But essentially what we are seeing are
16 areas of lividity that line the pleura in
17 the areas of cardiothoracic inlet on the
18 top left photo, down by the arch of the
19 aorta in the bottom left photo, with some
20 potential involvement of lymph nodes that
21 are present along the arch of the aorta.

22 And then farther down from arch of
23 aorta and in the esophagus on the two
24 bottom right photos with potential
25 involvement with another lymph node that's

1 in the -- below airway space on the very
2 far right picture.

3 BY MS. GROSS:

4 Q. Okay. I just want to make sure I'm
5 even on the same page about this.

6 So Mr. Perry's mesothelioma was --
7 has -- was it in his heart or around his heart?

8 A. Around his heart. So the right -- the
9 picture on the right indicates that it's involving
10 the pleura that surrounds the pericardium, which
11 is the sac that holds the heart.

12 Q. Was it also in his diaphragm?

13 A. Yes, ma'am.

14 Q. The jury heard yesterday from one of
15 our experts, Dr. Haber, about a surgical procedure
16 called a -- I'm going to say this right --
17 pleurectomy and decortication?

18 A. Yes. That is --

19 Q. Did I say that right?

20 A. Yes, ma'am.

21 Q. Great. Is that the name of the
22 surgery you performed on Mr. Perry?

23 A. Yes. I performed an extended
24 pleurectomy and decortication.

25 Q. Can you tell us -- since you're the

1 guy who did it, can you tell us a little bit about
2 the surgery that you performed on Mr. Perry?

3 A. Certainly. So it's an operation where
4 we create what's called a "posterolateral
5 thoracotomy." So it's an incision that goes from
6 behind the shoulder blade all the way on the side
7 of the patient around towards their front.

8 Because we have to be able to see and
9 get our hands into the entire chest to remove the
10 cancer, we divide the latissimus muscle, which is
11 the large back muscle that allows you to do
12 pull-ups, and then we remove one of the ribs to
13 give us adequate exposure to the chest.
14 Classically, it's the sixth rib, which is the rib
15 that I removed in Mr. Perry.

16 Once we have that, the surgery itself
17 is rather inelegant. We essentially just use our
18 hands to peel the pleura off of the chest wall and
19 then off the lungs. I liken it most to removing
20 the peel off of an orange.

21 And oftentimes it's very similar to
22 that where the tumor itself involves portions of
23 the chest wall and portions of the lung, and we
24 have to kind of scrape it out to take it out.

25 And then after we remove it from the

1 chest wall, we work on removing it off of the
2 diaphragm. In some cases, we're able to keep the
3 diaphragm intact.

4 In Mr. Perry's case, it was too deep
5 within the diaphragmatic muscle, so we removed a
6 good portion of his diaphragm.

7 And then the goal of the operation is
8 to remove all visible disease, called a
9 "macroscopic complete resection." So we take out
10 all areas that we see of the disease.

11 Once this is completed, we then
12 perform -- some people, and my training was to
13 perform adjunctive procedures, where we go in and
14 try to remove any nonvisible areas of the disease
15 with cautery and then, oftentimes, chemicals,
16 either chemotherapy agents or other antiviral --
17 other agents that reduce fibrotic cells.

18 Q. Did you have to reconstruct
19 Mr. Perry's diaphragm?

20 A. When the diaphragm is removed, yes,
21 you have to reconstruct it.

22 Q. How did you do that?

23 A. Usually, I use a piece of a thick
24 mesh, either GORE-TEX or a biologic-type mesh. I
25 believe I used a biologic mesh in Mr. Perry's

1 case.

2 Q. How long is this surgery, typically?

3 A. It's typically about six to eight
4 hours.

5 Q. In terms of surgery length, where does
6 this six to eight hours fall on that scale?

7 A. In terms of what I do, it's routinely
8 one of the longer operations that I would perform.

9 Q. When I asked you earlier and we
10 started talking about asbestos and mesothelioma,
11 you said in your opinion what causes mesothelioma
12 is exposure to asbestos in a chronic fashion,
13 right?

14 A. Yes, ma'am.

15 Q. What does "in a chronic fashion" mean?

16 A. So as best as I can understand it, a
17 single exposure to asbestos does not necessarily
18 put you at extreme high risk for mesothelioma. It
19 is repeated exposure over time. So it's just
20 repeated exposure over time would be chronic.

21 Q. What is the postsurgical recovery of
22 the procedure you performed, the pleurectomy and
23 the decortication and like for our patient?

24 A. So I tell most of my patients to
25 anticipate approximately three weeks in the

1 hospital, and it's usually about one week in the
2 intensive care unit. We keep them on a ventilator
3 for the first night after the surgery to help with
4 both pain control as well as to help reexpand the
5 lung that we decorticated.

6 And then once they leave the ICU, it's
7 a matter of time for things to heal up from the
8 operation.

9 So I routinely leave four drainage
10 tubes behind, and that's what keeps people in the
11 hospital is the presence of the drainage tubes as
12 we remove the drainage tubes.

13 Sequentially, once they are out is
14 when we are able to discharge these patients. And
15 that process, like I said, typically takes
16 somewhere around three weeks for the majority of
17 them.

18 Q. In your experience, is the
19 postsurgical recovery phase of this procedure you
20 perform painful for patients?

21 A. Yes, ma'am.

22 Q. Did Mr. Perry have issues with pain
23 after this procedure?

24 A. Oh, he did, yes.

25 Q. Tell us why you think that.

1 A. Well, it's a very large operation. We
2 know that stretching the chest open causes
3 significant pain that can be long-standing.
4 The -- and then just the removal of the pleura is,
5 in itself, a painful aspect of the operation.

6 So it's both a long operation with a
7 lot of stretching and then a lot of nerve injury
8 that happens just by doing the operation.

9 Q. Do pain medications have any of their
10 own side effects?

11 A. Yes, ma'am.

12 Q. Such as?

13 A. Well, it depends on the pain
14 medication, but strong nonsteroidal medications
15 can cause bleeding and kidney problems. And then
16 opioids, which are frequently used for this
17 operation, can cause respiratory depression and
18 addiction.

19 Q. What does "respiratory depression"
20 mean?

21 A. Breathing less frequently.

22 Q. Was Michael on any pain medication
23 after your surgery?

24 A. Yes, ma'am.

25 Q. Do you remember which kind?

1 A. I believe oxycodone.

2 Q. In your opinion, Dr. Gibney, will
3 Michael ultimately die from his mesothelioma?

4 A. Unfortunately, yes.

5 Q. When someone with mesothelioma gets to
6 the end of their life, in your experience, what
7 does that typically look like?

8 A. The patients have an ashen appearance.
9 They typically lose their appetites, so they lose
10 weight. They become deconditioned, so they're not
11 up and moving as much as they were previously.
12 Oftentimes we see them in wheelchairs when they
13 come into the offices.

14 And they experience shortness of
15 breath, chest discomfort. And then the previous
16 cycle that was described earlier on of continued
17 shortness of breath, chest pain, more shortness of
18 breath and chest pain until, ultimately, they
19 pass.

20 Q. Let's shift gears here for a couple
21 minutes.

22 Are you an expert in asbestos
23 products?

24 A. No, ma'am.

25 Q. Are you an expert in what products had

1 asbestos in them and when?

2 A. No, ma'am.

3 Q. If there is a powder that has asbestos
4 in it that someone is using in their home every
5 day, multiple times a day, over five decades, is
6 that chronic use of an asbestos product?

7 A. I believe so, yes.

8 Q. If Johnson's Baby Powder has asbestos
9 in it and Michael used it every day, multiple
10 times a day, for almost five decades, would that
11 use be a substantial contributing factor in the
12 development of his mesothelioma?

13 A. I would imagine so, yes.

14 Q. Have all of the opinions you've given
15 to me today so far been to a reasonable degree of
16 medical certainty?

17 A. I believe so, yes.

18 Q. I think I'm done with you for now. I
19 may have more questions for you later.

20 MS. GROSS: But pass the witness for
21 now, Your Honor.

22 THE COURT: Cross-examination on the
23 part of Johnson & Johnson. Ms. Bueno.

24 MS. BUENO: Thank you, Your Honor.

25 May I begin, Your Honor?

1 THE COURT: All right.

2 MS. BUENO: Thank you.

3 Good morning, ladies and gentlemen.

4 * * *

5 CROSS-EXAMINATION

6 BY MS. BUENO:

7 Q. Good morning, Doctor. How are you?

8 A. I'm well.

9 Q. Are you able to see me?

10 A. Yes, ma'am.

11 Q. My name is Kim Bueno, and you and I
12 have not met before. I represent Johnson &
13 Johnson and the defendants in this case. Do you
14 understand that?

15 A. I do, ma'am.

16 Q. And my last -- last name is "Bueno,"
17 who is the same name as your mentor, the dear
18 Dr. Raphael Bueno, but I don't think there's any
19 relation.

20 A. Okay.

21 Q. I think that -- I'll have to ask my
22 husband, but it sounds like Raphael Bueno is a
23 great man and one that you admire very much; is
24 that correct?

25 A. He is a great man and one I admire

1 very much, yes.

2 Q. Now, you are, Doctor, a very
3 successful cardiothoracic surgeon at MUSC, the
4 Medical University of South Carolina, correct?

5 A. That is correct.

6 Q. And you told the jury this morning
7 that one of your specialties and areas of study is
8 a cancer called "mesothelioma," true?

9 A. Yes, ma'am.

10 Q. You don't have any sort of opinion
11 that talc use causes mesothelioma. Is that fair?

12 A. That is correct.

13 Q. You have never seen any published
14 studies that say cosmetic talc contains asbestos,
15 true?

16 A. Correct.

17 Q. And you've never heard any of your
18 colleagues opine that cosmetic talc has asbestos
19 in it, correct?

20 A. That is correct, ma'am.

21 Q. And it is not your practice to
22 routinely ask your mesothelioma patients whether
23 or not they used cosmetic talc, right?

24 A. That is correct.

25 Q. And you are not here to tell this jury

1 that Mr. Perry's mesothelioma was caused by
2 Johnson's Baby Powder or any other cosmetic talc,
3 correct?

4 A. I do not believe so. No.

5 Q. Now, when Mr. Perry came to see you
6 for the first time on July 11th of 2023, he had
7 already been diagnosed with mesothelioma, correct?

8 A. Yes, ma'am.

9 Q. And you did not ask him about whether
10 or not he used talcum powder. He offered that
11 information to you; is that correct?

12 A. I do not recall, unfortunately.

13 Q. Do you have your records with you,
14 Dr. Gibney, for Mr. Perry?

15 A. I do not. I can pull them up easily,
16 though.

17 Q. Well, let me -- let me put, actually,
18 a slide up so the jury can see it, and I'll ask
19 you about it. And I think we should be able to
20 share.

21 MS. BUENO: So now -- I'm going to go
22 to the ELMO, please. Now I went too far.

23 BY MS. BUENO:

24 Q. Okay. Dr. Gibney, are you able to see
25 that?

1 A. I am, yes, ma'am.

2 Q. And is that your record from when you
3 saw Mr. Perry on July the 11th of 2023?

4 A. That is, yes, ma'am.

5 Q. And I'll share with you that the jury
6 saw this yesterday. This was actually on a slide
7 that was put up that Dr. Haber showed.

8 And I'll draw your attention to the
9 very last line of this record where you wrote:
10 Mr. Perry denies any direct asbestos exposure.
11 However, he did use a lot of talc throughout his
12 life as a swimmer.

13 Do you see that note?

14 A. I do, yes.

15 Q. And that was information that
16 Mr. Perry offered to you during your discussion,
17 correct?

18 A. Yes, ma'am.

19 Q. And it's fair to say that all you
20 recall was this statement about talc use
21 throughout his life as a swimmer, true?

22 A. That is correct, ma'am.

23 Q. You don't recall him talking about any
24 other type of talc use or any specifics about how
25 much he used it; is that correct?

1 A. That is correct.

2 Q. Now, am I correct that you are aware
3 that Mr. Perry's tumor was tested for something
4 called BAP1; is that correct?

5 A. Yes. I did send it for BAP1 testing.

6 Q. And that testing showed what, related
7 to BAP1?

8 A. I believe he did not have the
9 mutation.

10 Q. And to be clear, that BAP1 testing was
11 done on his actual tumor, not germline testing on
12 his body, correct?

13 A. Correct.

14 Q. And there is a difference between
15 doing a genetic test on the tumor that's removed
16 from a patient and on the patients for germline
17 mutations; is that true?

18 A. Yes, ma'am.

19 Q. And you did not conduct any germline
20 testing or genetic testing of Mr. Perry; is that
21 correct?

22 A. That is correct.

23 Q. And germline testing can test for any
24 number of potential mutations, correct?

25 A. I'm not an expert in germline testing,

1 but I believe so.

2 Q. And to your knowledge, Mr. Perry has
3 not been tested for any other potential mutation
4 aside from the BAP1, true?

5 A. In his tumor, I do not believe we
6 tested anything further.

7 Q. And you're not aware of any germline
8 testing either, correct?

9 A. For Mr. Perry, I am not.

10 Q. And you have never personally
11 researched the potential genetic mutations that
12 can cause mesothelioma, true?

13 A. That is correct.

14 Q. And you performed surgery on Mr. Perry
15 almost exactly one year ago, correct?

16 A. It seems, yes.

17 Q. And the last time you saw him, based
18 on the records, was September the 29th of 2023; is
19 that correct?

20 A. That sounds correct.

21 Q. Okay. And I'm going to offer into
22 evidence the two records that we just discussed,
23 the first one from July 11th when you first saw
24 him, and the second one from September 29th of
25 2023.

1 And to make the record clear, the
2 first one -- the first one I'm offering has been
3 marked for the record as DX12000.397 to 400. That
4 is the July 11th visit, yes, and the one that we
5 see on the screen.

6 And then I will also mark for the
7 record the September 29th, which is DX12000.88 to
8 91.

9 MS. BUENO: Your Honor, these two
10 exhibits have not been offered into
11 evidence, and I seek to do so now.

12 THE COURT: Yes. Any objections?

13 MS. GROSS: No objection, Your Honor.

14 THE COURT: No objection. Admitted.
15 They have previously marked. That will be
16 the exhibit numbers.

17 MS. BUENO: Thank you, Your Honor.

18 (DEFENDANT'S EXHIBIT DX12000.397-400,
19 MUSC Health record dated 7/11/23, was
20 admitted into evidence.)

21 (DEFENDANT'S EXHIBIT DX12000.88-91,
22 MUSC Health record dated 9/29/23, was
23 admitted into evidence.)

24 BY MS. BUENO:

25 Q. Now, when you saw Mr. Perry last on

1 September 29th of 2023, he was just starting his
2 cycles of chemotherapy; is that correct?

3 A. Yes, ma'am.

4 Q. And you don't have any information
5 about Mr. Perry or his current condition over the
6 last ten months since that last visit, true?

7 A. That is correct.

8 Q. Now, plaintiff lawyers reached out to
9 you and met with you a few times before you were
10 deposed in this matter; is that true?

11 A. They met with me once before the
12 deposition, yes.

13 Q. And they actually came to your office
14 and spent some time with you; is that correct?

15 A. They spent approximately 30 minutes
16 with me, yes.

17 Q. Okay. And during that time at your
18 office, they didn't tell you anything about any
19 other alleged exposures to asbestos for Mr. Perry;
20 is that correct?

21 A. I do not recall any discussion about
22 that, correct.

23 Q. And so you are not aware, as you sit
24 here, about allegations in this lawsuit related to
25 asbestos exposure from anything else other than

1 Johnson's Baby Powder; is that correct?

2 A. Yes.

3 Q. And they did tell you that they sued
4 Johnson & Johnson, correct?

5 A. I don't recall them giving the company
6 name at that time.

7 Q. Now, you have never researched the
8 causes of mesothelioma aside from asbestos; is
9 that true?

10 A. That is correct.

11 Q. And so it could be that mesothelioma
12 can exist without asbestos exposure. You just
13 haven't researched that specifically, right,
14 Dr. Gibney?

15 A. I am unaware of any other causes of
16 mesothelioma.

17 Q. And just to be crystal clear, last
18 question for you, Dr. Gibney: You did not tell
19 Mr. Perry that his cosmetic talc caused his
20 mesothelioma; is that true?

21 A. Yes, ma'am.

22 MS. BUENO: Okay. I thank you for
23 your time. That's all the questions I
24 have. Thank you.

25 THE COURT: Redirect, Ms. Gross?

1 MS. FLYNN: Your Honor, I don't know
2 if this is an appropriate time now to ask
3 about any cross-examination for AII.

4 THE COURT: I thought we decided this
5 earlier. Approach.

6 He said that he doesn't know anything
7 about what caused it, that he just treated
8 it. So what is it you propose to ask him?

9 MS. FLYNN: I'm asking for damages --
10 ask regarding damages. I'm going to join
11 in the cross-examination J&J has already
12 done, so I'm not going to --

13 THE REPORTER: I can't hear you.

14 MS. FLYNN: I'm so sorry.

15 The only thing that I would ask about
16 would be the cancer being indolent, meaning
17 that it's just --

18 THE COURT: He's already said that he
19 doesn't know anything about indolent or
20 spontaneous or anything of that nature.

21 MS. FLYNN: Oh, indolent is a
22 different thing.

23 THE COURT: What is that?

24 MS. FLYNN: "Indolent" just means it's
25 not as aggressive.

1 MS. McVEY: They just want to ask
2 these questions --

3 THE COURT: I am -- I am very
4 irritated by this because I've already told
5 you what I think about AII's ability to ask
6 questions. But you want to introduce
7 yourself, start getting AII into the
8 picture. I don't want that.

9 MS. FLYNN: Your Honor, I'm happy
10 to -- I'm happy to proffer what we would
11 have asked because it's very, very short,
12 and then we can just move on with --

13 THE COURT: Let's do that.

14 MS. McVEY: You don't want them to ask
15 questions?

16 THE COURT: Huh?

17 MS. McVEY: You don't want them to ask
18 questions? I just don't --

19 THE COURT: You and your reversible
20 record. I tell you, that's why I have
21 these things before trial. I don't like
22 doing it like this.

23 MS. McVEY: I agree.

24 THE COURT: All right. I will let you
25 ask one -- the questions about indolent.

1 And let me instruct the jury as to
2 what that is. All right. I've already
3 instructed the jury about that.

4 MS. GROSS: Yes.

5 THE COURT: All right.

6 Ladies and gentlemen of the jury, if I
7 could have your attention for a minute.

8 As you know, I try not to interrupt
9 our proceedings here with matters --
10 technical matters. I try to get all that
11 stuff outside of your presence so it
12 doesn't interrupt the trial.

13 Ms. Stephanie Flynn -- Attorney
14 Stephanie Flynn represents AII, American
15 International Industries.

16 I gave you an instruction at the
17 beginning that this particular entity is in
18 default in this matter and therefore not
19 otherwise allowed to participate in
20 questioning witnesses with respect to their
21 liability because their liability, that is,
22 responsibility, has already been determined
23 as a matter of law.

24 She has a question that she feels
25 relates to damages suffered by Mr. Perry

1 rather than liability.

2 She can't deny that AII is liable.
3 They are liable as a matter of law.

4 But she has a question about what
5 he -- what damages he suffered, and I'm
6 going to ask -- allow her to briefly
7 explore that with --

8 Where's Dr. Gibney? Is he still with
9 us?

10 -- with Dr. Gibney.

11 Make sense? All right. Thank you.

12 All right. Ms. Flynn, as soon as we
13 get Dr. Gibney back up, you may proceed.

14 * * *

15 CROSS-EXAMINATION

16 BY MS. FLYNN:

17 Q. Good morning, Dr. Gibney.

18 A. Good morning.

19 Q. My name is Stephanie Flynn. I
20 represent a company called "American International
21 Industries."

22 THE COURT: Ms. Flynn, you and
23 Dr. Gibney both speak very quickly. If you
24 would slow down just a little bit, the
25 court reporter can hear you better as well

1 as myself and the jury. Thank you so much.

2 MS. FLYNN: Yes, Your Honor. I
3 apologize for that.

4 BY MS. FLYNN:

5 Q. And I apologize we haven't had the
6 chance to meet earlier.

7 I do just wanted to take a brief
8 moment of your time this morning just to ask a few
9 quick questions.

10 I understand that, by virtue of
11 Mr. Perry being a surgical candidate, that that
12 means he was in -- he was in relatively good
13 health at the time that you saw him; is that
14 correct?

15 A. Yes, ma'am.

16 Q. Meaning he didn't have metastatic
17 disease?

18 A. That is correct, ma'am.

19 Q. And you wouldn't have been able to do
20 the surgery if the cancer was appearing to have
21 spread throughout the chest cavity or beyond to
22 other parts of the body?

23 A. We do not operate on metastatic
24 mesothelioma, correct.

25 Q. And I understand that that surgery

1 went well for Mr. Perry; is that correct?

2 A. I believe it did, yes.

3 Q. He didn't appear with the nerve pain
4 that you might normally see with -- with other
5 people who have the same sorts of surgery and the
6 opening of the chest cavity wall?

7 A. Can you repeat your question?

8 Q. Sure. Mr. Perry did not appear to
9 have the nerve pain that sometimes accompanies --
10 I'm not suggesting he didn't have pain, but didn't
11 have the nerve type of pain that sometimes
12 accompanies opening the chest cavity wall?

13 A. I would say his pain was fairly
14 typical for most of my patients that have this
15 operation.

16 Q. And I believe you described the tumor
17 as "indolent." Is that correct?

18 A. I don't recall describing it as
19 "indolent."

20 Q. All right. And what I mean by that is
21 it -- the type of mesothelioma that Mr. Perry has
22 is -- is a slower one to develop or progress than
23 you might see in your average mesothelioma?

24 A. So he had epithelial mesothelioma.
25 There are three subtypes of mesothelioma. It is

1 the best-behaved of a bad disease.

2 MS. FLYNN: Dr. Gibney, I really
3 appreciate your time and the opportunity to
4 ask you some questions this morning. Thank
5 you very much.

6 THE COURT: Thank you, Ms. Flynn.

7 All right. Redirect examination.

8 Ms. Gross.

9 MS. GROSS: Yes, Your Honor.

10 * * *

11 REDIRECT EXAMINATION

12 BY MS. GROSS:

13 Q. All right. Dr. Gibney, you're back
14 with me real quick.

15 You had several years of training with
16 Dr. Bueno at Brigham and Women's, right?

17 A. Yes, ma'am.

18 Q. Dr. Bueno, once again, is one of the
19 foremost mesothelioma surgeons in the country,
20 right?

21 A. Yes, ma'am.

22 Q. When you were training with Dr. Bueno,
23 did he ever diagnose a patient with some sort of
24 genetically caused mesothelioma?

25 A. To my knowledge, I do not know.

1 Q. You've treated about -- at least a
2 hundred patients over your career, right?

3 A. Yes, ma'am.

4 Q. Have you yourself ever diagnosed
5 somebody with a spontaneous mesothelioma?

6 A. I am unfamiliar with the term
7 "spontaneous mesothelioma."

8 Q. And so do you remember when the lawyer
9 for Johnson & Johnson asked you all those
10 questions about how, well, you didn't do germline
11 testing on Mr. Perry, right?

12 A. Yes, ma'am.

13 Q. And then you were asked questions
14 about, well, you didn't research genetic
15 mutations. So isn't it possible that there is
16 some link between genetic mutations and
17 mesothelioma?

18 Do you remember those?

19 A. Yes, ma'am.

20 Q. Throughout your career, both when you
21 were studying with Dr. Bueno, one of the foremost
22 mesothelioma surgeons in the country, and your
23 hundred-or-so patients that you've seen with
24 mesothelioma, if spontaneous mesothelioma was a
25 thing, do you think would you have heard of it?

1 A. I think so, yes.

2 Q. Okay. You've also peer-reviewed and
3 published several times on mesothelioma, right?

4 A. Yes, ma'am.

5 Q. You are one of a small handful of
6 surgeons in the country who does the mesothelioma
7 surgery you performed on Mr. Perry, right?

8 A. I believe so, yes.

9 Q. How many -- well, just so we're -- I
10 think we got a little garbled. What was your
11 answer?

12 A. I believe so, yes.

13 Q. How many surgeons in the country,
14 approximately, do the kind of procedure you did on
15 Mr. Perry?

16 A. I would guess it's fewer than 50 to
17 100 of us.

18 Q. Have you ever heard from any of those
19 other surgeons who performed this pleurectomy and
20 decortication procedure on mesothelioma patients
21 that spontaneous mesotheliomas are a thing?

22 A. I've never heard this term.

23 Q. I will represent to you -- I was
24 hoping to show it to you. But I will represent to
25 you that there is a document in evidence the jury

1 will see. It's Exhibit 297. They've heard about
2 it already.

3 I will tell you that in 1976, Johnson
4 & Johnson hired a consulting company to give some
5 information to doctors and hospitals.

6 Are you with me so far?

7 A. Yes, ma'am.

8 Q. Okay. And in that document that they
9 gave to doctors and hospitals, Johnson & Johnson
10 told hospitals that their baby powder doesn't have
11 asbestos in it.

12 Are you with me?

13 A. I am, yes, ma'am.

14 Q. Okay. In your opinion as a medical
15 doctor, is it appropriate for a company to hide a
16 carcinogen in its products from doctors and
17 hospitals?

18 A. If a company has a known carcinogen
19 and they hide it, yes, it is inappropriate.

20 Q. Why do you say that?

21 A. I think it is unethical. It goes
22 against at least two of the four principles of
23 bioethics. It removes the autonomy, meaning it
24 removes one's ability to determine whether they
25 want to expose themselves to said carcinogen. And

1 then it also goes against nonmaleficence, meaning
2 "do no harm," that we have a known carcinogen that
3 does cause harm.

4 So I would say it's unethical.

5 Q. And so there's another document that's
6 in evidence. The jury will see it, too. It's
7 Exhibit 125?

8 MS. BUENO: Objection, Your Honor.

9 This is not only beyond the scope, but this
10 witness has not seen any company documents
11 before. This is inappropriate.

12 THE COURT: Overruled.

13 MS. GROSS: Thank you, Your Honor.

14 BY MS. GROSS:

15 Q. There is an exhibit in evidence, like
16 I said, Dr. Gibney -- it's Exhibit 125 -- where it
17 shows that Johnson & Johnson knew its talc had
18 asbestos in it and that that talc was used in the
19 baby powder, and then they turned around and told
20 doctors and hospitals that their powder doesn't
21 have asbestos in it.

22 Is that unethical?

23 MR. BUENO: Objection, Your Honor.

24 That not only misstates the evidence, but
25 this is improper.

1 If there's a document that
2 Your Honor's going to let her ask about,
3 the witness should be shown it. At least
4 should be allowed to --

5 THE COURT: That's a double-barrel
6 objection.

7 The first objection is to the content
8 of the question. I overrule that
9 objection.

10 With respect to the document,
11 Ms. Gross, do you have a document where
12 you're able to show it to the doctor?

13 MS. GROSS: I can. The tech is --
14 yes, I can. Give me one second.

15 THE COURT: I remember the document.
16 I think she's reciting correctly what it
17 says.

18 MS. GROSS: Yes, Your Honor.

19 THE COURT: All right.

20 MS. BUENO: Your Honor, I also object
21 because this is outside Dr. Gibney's
22 qualifications. He was not offered as an
23 expert in anything other than
24 cardiothoracic surgery.

25 THE COURT: Overruled. Just first

1 cousins with the objection you just made,
2 and I overrule the objection.

3 BY MS. GROSS:

4 Q. So here is the document. Can you see
5 this, Dr. Gibney?

6 A. I see a document, yes.

7 Q. So this is in evidence. This is
8 Exhibit 125. Do you see where it says confirmed
9 asbestos on the document?

10 A. I see a blown-up portion that says
11 confirmed asbestos, yes, ma'am.

12 Q. Perfect.

13 Do you see where, on top of it, it
14 says talc samples?

15 A. Yes, there's a blown-up screen of talc
16 samples on top of the document.

17 Q. And then we see over and over again
18 the words "low," "low," "medium" and then "low"
19 four more times. Do you see that?

20 A. Yes, ma'am.

21 Q. And so would you agree with me that
22 the document you're looking at shows that these
23 talc samples had confirmed asbestos in them
24 repeatedly?

25 MS. BUENO: Objection, Your Honor.

1 THE COURT: Overruled.

2 THE WITNESS: I believe this is what
3 you're trying to show me with this
4 document, yes.

5 BY MS. GROSS:

6 Q. Perfect.

7 And so the question I asked you
8 before: If a few months after this Johnson &
9 Johnson went and told doctors and hospitals that
10 their baby powder with talc in it didn't have
11 asbestos in it, would that be truthful?

12 A. No, ma'am.

13 MS. GROSS: I don't have any further
14 questions for you, Dr. Gibney. I
15 appreciate your time so far today.

16 MS. BUENO: Your Honor, may I please
17 ask about this document?

18 THE COURT: You know, we don't have
19 competing back-and-forth questions, and we
20 don't have -- and we do have open redirect.

21 That said, I'm not going to spend all
22 morning long on this, Ms. Bueno. If you've
23 got one or two focused questions, you can
24 ask about them.

25 MS. BUENO: Thank you, Your Honor.

1 This will be very fast.

2 * * *

3 RE CROSS-EXAMINATION

4 BY MS. BUENO:

5 Q. Dr. Gibney, the document that you just
6 were shown by plaintiffs' counsel, you had not
7 seen that before; is that correct?

8 A. No, I have never seen that before.

9 Q. And you haven't read the document
10 aside from those cut-and-paste job that was put on
11 that slide in front of you, correct? You don't
12 know what it says in its entirety?

13 A. That is correct, ma'am.

14 Q. And if that Windsor Minerals document
15 did not have anything to do with asbestos in
16 cosmetic talc and if it had to do with asbestos --

17 THE COURT: Wait a minute. Wait a
18 minute. That's not a proper question. You
19 are testifying about what you believe is in
20 the testing, Ms. Bueno. I will let you ask
21 him about this document, all right --

22 MS. BUENO: Okay.

23 THE COURT: -- but I'm not going to
24 allow you to get into presentation to the
25 jury your opinion about what the document

1 says.

2 He says that he hadn't seen it before
3 and that he's seen the blown-up segments of
4 it, and he's testified about those.

5 MS. BUENO: Last question.

6 THE COURT: I'm not going to let you
7 go far astray from that. Yes, ma'am.

8 BY MS. BUENO:

9 Q. Dr. Gibney, you have no idea if that
10 document related to industrial talc or cosmetic
11 talc; is that correct?

12 A. That is correct.

13 Q. And you have no idea if the talc
14 that's referenced in that document had anything to
15 do with Johnson's Baby Powder; is that true?

16 A. That is correct.

17 MS. BUENO: That's all, Your Honor.

18 THE COURT: All right. Dr. Gibney,
19 thank you so much for taking time out of
20 your schedule to present testimony to
21 this Court today and to these jurors. We
22 appreciate it very much, and you are
23 excused.

24 THE WITNESS: All right. Thank you,
25 Your Honor. I appreciate you accommodating

1 this by virtual platform.

2 THE COURT: Yes, sir.

3 All right.

4 MS. McVEY: Your Honor, we have
5 another remote witness to kind of situate.
6 We might want to take a few-minute break.

7 THE COURT: Very good. All right.
8 About how long is it going to take to set
9 up? About ten minutes?

10 MS. GROSS: Ten minutes.

11 THE COURT: All right. Well, then I'm
12 going to let the jury go to the jury room
13 for a minute and stretch there rather than
14 just in place.

15 Jurors, you may go to your jury room.
16 We'll probably call you pretty quickly as
17 soon as this is set up.

18 Please stand for the departure of the
19 jury.

20 (The jury exits the courtroom at
21 10:51 a.m.)

22 THE COURT: All right. Be at ease.

23 MS. McVEY: Thank you, Your Honor.

24 * * *

25 (Whereupon, there was a recess in the

1 proceedings from 10:51 a.m. to 11:05 a.m.)

2 * * *

3 THE BAILIFF: All rise.

4 THE COURT: Please be seated.

5 All right. Bring out the jury.

6 THE BAILIFF: Yes, ma'am.

7 (The jury enters the courtroom at
8 11:07 a.m.)

9 THE BAILIFF: The jury is seated,
10 Your Honor.

11 THE COURT: Very well. The direct
12 examination of Dr. Madigan.

13 MS. GROSS: Yes, Your Honor.

14 THE COURT: All right. Ms. Gross, you
15 may proceed. All right. If you'll call
16 Dr. Madigan, I'll have him sworn.

17 MS. GROSS: Oh, my gosh. Okay.
18 Plaintiffs next call Dr. David Madigan to
19 the stand.

20 THE COURT: Dr. Madigan, can you hear
21 me?

22 THE WITNESS: I can hear you. Not --
23 not very well, but I can hear you.

24 THE COURT: All right, sir. The clerk
25 of court will administer the witness oath

1 to you at this time.

2 THE CLERK: Please raise your right
3 hand, sir. Do you swear or affirm that the
4 testimony you are about to give in this
5 case will be the truth, the whole truth and
6 nothing but the truth so help you God?

7 THE WITNESS: I do.

8 * * *

9 DAVID MADIGAN, Ph.D.,
10 having been first duly sworn, was examined and
11 testified as follows:

12 THE CLERK: Thank you, sir. Please
13 state your full name for the record.

14 THE WITNESS: David Madigan.

15 * * *

16 DIRECT EXAMINATION

17 BY MS. GROSS:

18 Q. Hey, Dr. Madigan. Can you hear me?

19 A. Yes, I can. Good morning.

20 Q. Good morning. I know you just did
21 it sort of unofficially, but can you go ahead and
22 introduce yourself to the jury, please.

23 A. Sure. I'm David Madigan.

24 Q. What kind of doctor are you,
25 Dr. Madigan?

1 A. I have a Ph.D. in statistics from
2 Trinity College of Dublin.

3 Q. We asked you here today to talk to the
4 jury about statistics and epidemiology, right?

5 A. Correct.

6 Q. The jury has heard quite a bit at this
7 point about what it means to be published in the
8 peer-reviewed literature. You yourself have
9 written over 190 peer-reviewed publications; is
10 that right?

11 A. That's right.

12 Q. Where do you currently work,
13 Dr. Madigan?

14 A. I work at Northeastern University,
15 which is -- the main campus is in -- in Boston.
16 So I'm a professor at Northeastern. And I'm also
17 the provost at Northeastern, which is basically
18 the chief academic officer of the university.

19 Q. Can you tell us a little bit where
20 else you have worked besides your current position
21 at Northeastern?

22 A. So I -- I grew up in Ireland. I got
23 my Ph.D. in Ireland. Came to the United States in
24 my late 20s. So I was first a professor at the
25 University of Washington in Seattle. And I was

1 also appointed at the Fred Hutchinson Cancer
2 Research Center.

3 And after that, I spent a period at
4 Rutgers University in New Jersey as a professor
5 and ultimately a dean.

6 I spent a lengthy period at Columbia
7 University in New York City where I was chair of
8 the statistics department. I was also the dean of
9 arts and sciences at -- at Columbia.

10 And then about four years ago or so, I
11 moved to Northeastern University, as I said, where
12 I'm a professor and I'm the provost.

13 Q. Okay. You -- you also have 30 to 40
14 epidemiological publications as well; is that
15 correct?

16 A. Yeah. So my area of research over the
17 last 30-plus years have been at the intersection
18 of statistics and epidemiology, so issues to do
19 with the application of statistics and
20 epidemiology to healthcare data.

21 Q. You said earlier that you actually
22 teach epidemiology; is that correct?

23 A. I have over the years. In particular,
24 I've taught -- I've taught many, many courses in
25 statistics, biostatistics and statistics applied

1 to health care.

2 But it was -- specifically in
3 epidemiology, I taught a lot of courses -- short
4 courses, like, day-long or -- or two-day-long
5 courses at companies, pharmaceutical companies,
6 mostly, and also at epidemiological conferences
7 over the years.

8 I've also taught -- as part of my
9 regular teaching, I think there are aspects of
10 epidemiology that come up as well.

11 Q. Can you tell us a little bit about the
12 work you have done with Harvard?

13 A. So, specifically right now, I am one
14 of the associate editors of a journal called the
15 Harvard Data Science Review, which I've been --
16 that journal was founded, I don't know, four or
17 five years ago, so I'm one of the founding
18 associate editors.

19 So that's my primary involvement with
20 folks at Harvard right now is -- involves that
21 journal. It's a peer-reviewed scholarly journal.

22 Q. Can you tell us a little bit about the
23 work that -- here, I see this logo on the left
24 side of the FDA. Can you tell us a little bit
25 about the work you did with the FDA?

1 A. Sure. So, you know, by nature of the
2 research that I do, you know, it intersects a lot
3 with issues of importance to the Food and Drug
4 Administration. So I -- I've had all kinds of
5 interactions with the FDA over the years.

6 At one point, I served a term on one
7 of their advisory committees. So they maintain a
8 set of advisory committees that advises them on
9 regulatory decisions that have to do with drugs.
10 And other things, but drugs in my context.

11 I was also the -- a co-PI, a public --
12 I was a co-principal investigator on a significant
13 public-private partnership between the FDA and the
14 pharmaceutical industry called "OMOP," the
15 Observational Medical Outcomes Partnership, and so
16 that ran for five or six years. I finished about
17 ten years ago. And that, that, I was working very
18 closely during that period with folks at the -- at
19 the FDA.

20 Q. So the jury will get a copy of your
21 resume, Dr. Madigan. It's been marked and entered
22 into evidence as Exhibit 625.

23 MS. GROSS: And, Your Honor, at this
24 time, in the interest of time, Plaintiffs
25 tender Dr. Madigan as an expert in

1 statistics and epidemiology.

2 MS. BUENO: Your Honor, we renew our
3 objections to Dr. Madigan that were filed
4 prior to trial and object to any causation
5 opinions on the basis of qualifications.

6 I don't hear counsel saying they're
7 going to offer that, but those were our
8 objections.

9 THE COURT: Well, I rule that -- I
10 don't recall carving in on causation, but
11 he's --

12 He is qualified -- ladies and
13 gentlemen, by reason of Dr. Madigan's
14 education, training and experience, he is
15 qualified in the field of statistics and
16 epidemiology.

17 And that's the kind of fancy word that
18 they will explain to you, I hope, in time
19 as to what it means.

20 But I don't understand any foundation
21 for objection -- for objection to causation
22 evidence. That's typically very much the
23 center of what statisticians and
24 epidemiologists testify to. So I overrule
25 the objection.

1 MS. BUENO: Thank you, Your Honor.

2 MS. GROSS: All right.

3 THE COURT: And why don't you start
4 off by having either Dr. Madigan or is some
5 way explaining to the jury what
6 epidemiology is.

7 MS. GROSS: I actually have a slide
8 with just the word "epidemiology" on it, so
9 I'll just ask him now.

10 BY MS. GROSS:

11 Q. Dr. Madigan, can you explain to us and
12 the jury what epidemiology is, please?

13 A. Sure. So epidemiology is a discipline
14 that focuses on disease: the spread of disease,
15 prevalence of disease, instances of disease,
16 causes of disease, et cetera. So it's a broad
17 field.

18 As I said earlier, it intersects a lot
19 with statistics because a lot of the issues that
20 arise in conducting epidemiological studies are
21 very statistical in nature. There's a lot of
22 overlap between those two things.

23 Q. So up on the screen here, do you see
24 this in front of you right now?

25 A. I sure do.

1 Q. Okay. Wonderful.

2 So the first question I asked you to
3 come talk to everybody about today was to examine
4 the publicly available data concerning cosmetic
5 talc production, asbestos consumption, and male
6 and female mesothelioma rates, right?

7 A. Right.

8 Q. Do we have some charts to help the
9 jury understand this and what this all means?

10 A. Yes. I prepared some charts that
11 address this question.

12 Q. All right. Can you tell us what we're
13 looking at here in this first chart?

14 A. Sure. So I'm -- unfortunately, I
15 can't see the jury. But I -- I am -- what I'm
16 showing you here is -- I'm going to show a series
17 of pictures that look like this.

18 This particular -- so this particular
19 one is showing asbestos consumption in the United
20 States over time.

21 So on the horizontal axis is time, so
22 from 1900s up to close to the present day. And
23 then the vertical axis is a measure of asbestos
24 consumption in the United States. And these --
25 these -- this is government data. So I got this

1 directly from the U.S. Geological Survey.

2 And so what it shows -- and probably
3 not surprising to anyone. But what it shows is
4 that, you know, asbestos consumption in the United
5 States rose sharply through the early part of the
6 last century, peaking sometime in the 1960s or
7 thereabouts, and then, happily, has been declining
8 since then to -- to much lower levels.

9 What I'm showing you here is kind of a
10 smooth version of the data. The actual data kind
11 of bounce around from year to year.

12 And what I'm showing here is kind of
13 the overall trend in asbestos consumption, you
14 know, has been -- rose to a peak sometime about
15 60 years ago and has been -- you know, has been
16 declining since then.

17 Q. Now, this next slide adds a second
18 line. What are we looking at here?

19 A. So what I've -- and I'm also going to
20 end up with four curves on this picture. And so
21 what I'm interested is in kind of the shape how
22 these things have evolved and changed over time.

23 So the black is asbestos consumption
24 that we just talked about. And the blue one is
25 the male mesothelioma rate.

1 And again, this is government data.
2 This particular one comes from the National Cancer
3 Institute from a set of registries that they
4 maintain around the country, and so it's an
5 estimate of the mesothelioma rate in terms of
6 number of cases per hundred thousand persons.

7 And what you see is it follows in some
8 ways -- again, this is smooth, where the actual
9 data are more irregular.

10 What it shows is the overall trend
11 here is that, you know, asbestos -- the asbestos
12 rate rose over a period of time, peaked sometime
13 in the, say, 1990s or thereabouts, and, happily,
14 has been declining since then.

15 And the -- you know, there's nothing
16 terribly surprising about the juxtaposition of
17 these two pictures.

18 So, you know, the peak in asbestos
19 consumption predates the peak in the meso -- the
20 male, in this case, mesothelioma rate by, you
21 know, 30 or 40 years.

22 And it's well-known that mesothelioma
23 has -- you know, takes a long time to develop
24 after exposure to asbestos. And so the fact that
25 these two are in concert with each other like this

1 is to be expected.

2 Q. So for these first two charts you
3 showed us, the rates for men and women are not
4 constant, correct?

5 A. Well, I haven't shown women yet. But
6 for --

7 Q. Oh.

8 A. -- the male rate, that, for sure, is
9 not constant, you know. It rose for a period of
10 time; peaked, you know, whenever it was, 1990s or
11 thereabouts; and then has fallen.

12 So this plot shows the corresponding
13 female mesothelioma rate. And the -- all right.

14 So the first thing to notice is it's
15 on -- it's on a different scale. So the scale on
16 that side is the mesothelioma scale on this plot.

17 So the female, as you can see, peaked,
18 you know, somewhere about .4 cases per hundred
19 thousand.

20 And, actually, Ms. Gross, if you could
21 go back one slide.

22 Q. I can.

23 A. You see the male rate peaks at around
24 two cases per hundred thousand.

25 Go forward again, please.

1 So the male rate, you know, in
2 general, round numbers, is about 5 times higher
3 than the female rate. And that, again, is not
4 surprising, you know. It's well-known.

5 But I want to focus on this -- in this
6 particular plot is, I think, the shape, the
7 general trend in female mesothelioma.

8 And it's not so different from the
9 male trend, which is to say it rose for a number
10 of years, and then the female mesothelioma rate
11 peaked at some point in the 1990s or thereabouts
12 and has been falling since then.

13 Again, kind of -- you know, sort of
14 a -- sort of reflecting the asbestos consumption
15 trend, but with this lag of 30 or 40 years, you
16 know, accounting for this, you know, the way that
17 mesothelioma develops sometimes often decades
18 after exposure to asbestos.

19 So I think the next picture -- yes.
20 Thank you.

21 Q. Yes.

22 A. And so a curious thing that -- that
23 emerges when we plot these data -- again, it's all
24 government data. Anyone can reproduce this
25 picture.

1 A curious thing that's happening which
2 is that the female rate is falling -- typically is
3 falling more slowly than the male rate.

4 In fact, the -- the male rate, that
5 drop-off in the blue curve there, is statistically
6 significant, whereas the drop-off in the green one
7 is not. And you can see that on the cancer
8 institute website.

9 And so there's some -- you know,
10 something's going on there. There's some reason
11 why the female rate is not -- is not falling as
12 quickly as -- as the male rate. So, you know,
13 I'm -- you know.

14 If you can go one -- forward one more
15 picture.

16 Q. Yeah. I was just going to ask you.
17 What does this next slide tell us?

18 A. So the next slide adds one last curve
19 to this picture, and now, there are four different
20 axes on the left-hand side.

21 So this is -- this one, the red one,
22 is the one I've added. And it is a measure of
23 cosmetic talc production in the United States.
24 And, again, this comes directly from the
25 U.S. Geological Survey, and it's sort of in

1 between.

2 So the talc production in the United
3 States peaked, you know, sometime after the
4 asbestos peaked, sometime before the mesothelioma
5 peaks.

6 And -- but it's curious that the peak
7 in talc production does predate that slower fall
8 in the female rate by 30 or 40 years. So that's
9 the -- the -- you know, that is a possible
10 explanation for why the female rate has fallen
11 slowly.

12 Q. The next question I asked you to
13 address, Dr. Madigan, is: For male and female
14 mesothelioma rates in the U.S., have the rates
15 remained constant over time?

16 So what does this next chart tell us
17 about that?

18 A. Right. So, first of all, to answer
19 your question, neither the female rate nor the
20 male rate is constant over time. Both cases, they
21 rose to a peak some years ago and have fallen
22 since then. So neither of them are constant.

23 And there's a picture which you're
24 looking at here. This is directly from the
25 National Cancer Institute website. You can choose

1 to plot the males and the females on one graph,
2 which I did that, too.

3 But what's -- what's confusing or
4 deceiving about this particular picture is, it's
5 plotting the male and the female rate on the same
6 scale. And the problem with that is, the female
7 rate is way lower -- right? -- 5 times lower than
8 the male rate.

9 So it's very visually obvious that the
10 male rate is -- so it's not constant. It rose --
11 it rose over time -- it's the same data that I was
12 using -- rose to some peak and then has been
13 falling since the peak.

14 But it's very hard -- if you squint,
15 you can see it. What's hard to see is what's
16 known as the female rate, what are they doing,
17 because it's squished into that tiny little band
18 near the bottom of the graph.

19 So it said -- you know, if you just
20 look at the female rate on its own -- on its own
21 scale, and do you that just by unchecking the male
22 box on the -- on the website, that's what the
23 female rate looks like.

24 And, you know, when you zoom in, so to
25 speak, and you look at the female rate on its own

1 scale, you can see quite clearly that it's not
2 constant. It rose for some number of years,
3 reached a peak and then has been falling, but
4 indeed has been falling more slowly than the male
5 rate, but nonetheless has been -- has been
6 falling.

7 Q. There is a paper, Dr. Madigan, that
8 claims the rate of female mesotheliomas have
9 stayed the same despite all of this data. Are you
10 familiar with that?

11 A. Right. So there's been a suggestion
12 in the literature of this paper that the female
13 rate is -- you know, is not changing or is
14 constant over time. But what I've just showed you
15 is it's not -- it's not true.

16 The female rate is changing over time.
17 You can't see it on -- if you put them on -- if
18 you put the females on the male scale. But it's
19 very clear if you just plot the females by
20 themselves, you can see that the rate is not
21 constant.

22 Q. Have you looked further into this
23 paper to see who funded it?

24 A. Yeah. So there's -- actually, go back
25 one, please, for a second.

1 Q. Sure.

2 A. So there's an acknowledgment in the
3 paper that -- actually, I don't know if the jury
4 has heard about this or not. But it's very much
5 part of the modern scientific practice in the
6 scientific literature to clearly acknowledge any
7 potential conflicts of interest.

8 And, you know, in this case, this is
9 the relevant statement in the paper, you know,
10 that it was funded by Price Associates. The first
11 author is Bertram Price.

12 But -- but what that doesn't tell you
13 is, you know, if you go to that -- to the website
14 for Price Associates, you know who their clients
15 are -- are -- you know, of -- of that company.
16 And, you know, indeed, they do. For example, they
17 represent manufacturers' counsel as well as a
18 number of defense law firms.

19 So that's -- that's less than clear
20 from the paper. But -- but, you know, these
21 potential conflicts of interest exist.

22 Q. We talked about epidemiology already.
23 What is "power" as it pertains to an
24 epidemiological study?

25 A. Sure. So we're -- I think we're about

1 to talk about some epidemiological studies.

2 Q. We are.

3 A. So there's -- you know, when you
4 construct an epidemiological study, which is
5 trying to assess, for example, cause and effect,
6 does a particular agent cause a particular outcome
7 or exposure of -- does smoking cause lung cancer,
8 for instance, is very -- you know, classical area
9 for epidemiologists in the last century.

10 And so there's a -- there's a notion
11 in epidemiology, when you're designing a study to
12 address a question like that, you have to think
13 about the size of the study, how many individuals
14 and how long are you going to follow them for.

15 And -- and the reason for that -- I
16 think it's fairly intuitive. Like, think of the
17 smoking example. So suppose you try to address
18 the question "Does smoking cause lung cancer?"
19 That has been settled years ago.

20 And -- but if you're trying to address
21 that de novo, and if you did a study with let's
22 say five smokers and five nonsmokers, I think --
23 and you follow them for some period of time, I
24 think it's intuitively obvious that that --
25 that -- a study that small is highly unlikely to

1 sort out the issue.

2 Because, you know, let's say, for
3 example, amongst the five smokers, you know, one
4 of them developed lung cancer; and among the five
5 nonsmokers, let's say, none of them developed lung
6 cancer.

7 Well, you couldn't -- I think it true
8 that you couldn't rule out the play of chance
9 there, right? You know, maybe it was just a
10 fluke, that the lung cancer could just as well
11 have been amongst the nonsmokers.

12 So there's a statistical
13 epidemiological concept called "power," which
14 is -- is -- it's a calculation between the two.
15 You can do it before you do a study, when you're
16 designing it. You can also do it after the fact
17 to say whether or not how much power did the study
18 have.

19 But that's the basic idea is that it's
20 what's the probability that a study on a given
21 size and duration, what's the probability that
22 that study would have found a statistically
23 significant effect that -- if, indeed, one exists,
24 right?

25 So -- so you would say, for instance,

1 on the smoking front -- and imagine you're back
2 in, you know, the 1950s and you don't know the
3 answer to the question.

4 What you would do is you'd say, you
5 know, "How big a study would I need so that the
6 probability that I will detect an event" --
7 right? It's basically (snaps fingers) -- "is,
8 let's say, 80 or 90 percent? It's high."

9 Plus: "How do I design a study so
10 that the probability is high that I really will
11 find an effect of smoking, if one exists, of a
12 certain size?"

13 So, you know, let's say, smoking
14 doubles your risk of lung cancer, let's say. So
15 then you'd like to design a study that has a very
16 high probability of detecting this as an effect of
17 smoking if, indeed, it does increase the risk of
18 lung cancer.

19 So that -- that's the nature of a --
20 of a power calculation. It is a centrally
21 important concept needed in epidemiology.

22 Q. So on this slide we have in front of
23 us, Dr. Madigan, at the top it's titled "Studies
24 of Occupational Exposures in Talc Mines and
25 Mills."

1 And on the left side, we see the
2 authors and the list of references, the studies
3 that we're talking about.

4 Do you see all that?

5 A. Yes.

6 Q. Okay. Have you reviewed these
7 studies?

8 A. Not all of them. But several of them,
9 yes.

10 Q. Right. Exactly.

11 So, to be fair, I did not ask you to
12 look at the studies relating to Georgia, France,
13 Austria, Texas, North Carolina, or Montana because
14 they're not at issue in this case, right?

15 A. Right.

16 Q. Okay. So you have looked at the
17 studies for Italy, though, right?

18 A. Yes. So there's an Italian study that
19 was first published in 1976, and it's been updated
20 a bunch of times since then.

21 And it's an epidemiological study
22 that -- that focuses on a -- a set of workers,
23 individuals that worked in a talc mine and mill,
24 but they're miners and millers of talc.

25 And, you know, this is of interest

1 because, you know, the notion would be that they
2 were living -- living with a lot -- work -- this
3 wasn't living. They were working in an
4 environment with a lot of talc.

5 And so it's of interest to see do --
6 do individuals in that cohort -- so it's 1750
7 people -- you know, do they have increased risk of
8 mesothelioma. So that's -- that's the question of
9 interest.

10 So it -- it sounds like so 1750
11 workers followed for decades by now. So, you
12 know, it sounds like a reasonable number of
13 people.

14 But the problem is that, you know,
15 that study does not have a whole lot of
16 statistical power.

17 And the reason for that is, you know,
18 kind of -- mesothelioma is quite rare. And, you
19 know, you -- you -- in a cohort of that size, you
20 just don't expect to find very many mesothelioma
21 cases, even if the risk is doubled or quadrupled
22 over the background. You just don't expect to see
23 very many cases.

24 So it's unlikely that that study, the
25 Rubino study and its successors -- it is possible.

1 It can happen. But unlikely that that -- that
2 study design, that study, would ever find an
3 increased risk of mesothelioma.

4 And it actually doesn't. There
5 haven't been documented cases for mesothelioma --
6 mesothelioma in that study.

7 That doesn't -- it's kind of an
8 absence of evidence. It doesn't really settle the
9 issue one way or the other.

10 You know, we -- we didn't really
11 expect to find anything because it's too small,
12 and then we didn't find anything. So it's -- it
13 doesn't -- doesn't really help very much to
14 advance the science.

15 Q. Have I also asked you to look at this
16 Vermont study that's listed here?

17 A. Right. So that's very similar in
18 nature but much smaller. It's just a -- 400 or so
19 workers in -- in -- working in the talc industry
20 in Vermont.

21 And so by -- by definition, if the
22 Italian study is underpowered, then the Vermont
23 study is even more grossly underpowered. It's a
24 much -- you know, it's a lot smaller than the
25 Italian cohort.

1 Q. What else did they find in the -- even
2 in that small population in the Boundy paper?

3 A. So, as it happens, this are two
4 documented mesothelioma cases in that cohort. So,
5 you know, small and all as the cohort is, they did
6 actually find, you know, remarkably, that there
7 have been a couple documented mesothelioma cases
8 in that study.

9 Q. Is there a better way to look at
10 exposures to talc?

11 A. Sure. So you -- you -- what you could
12 do is instead of having, you know, 1750 workers
13 in -- in an epidemiological study, if you could do
14 a study with 17,000 workers or 50,000 workers, you
15 know, or 100,000 workers, then you -- you might --
16 I haven't done this calculation. But you
17 presumably would have enough statistical power.
18 But, you know, no such study exists.

19 So an alternative approach that --
20 that I've looked at and others have is to -- you
21 know, to assess the question from different
22 perspectives.

23 So in epidemiology, there is a set of
24 criteria called the "Hill" criteria, which came
25 from the 1960s, which are basically a set of

1 lenses to look at -- at studies and data from
2 different perspectives to address a causal
3 question. They're referred to as "causal
4 considerations."

5 So there are a number of them. I've
6 explored these in some depth. But one particular
7 dimension of this is -- is there was a scientific
8 association.

9 So the issue here is -- is that the --
10 is that it's the -- the presence of asbestos in
11 the talc that is due to the cause of the
12 mesothelioma in the talc users.

13 And so, therefore, if that's the
14 case -- I believe that's -- there's asbestos
15 presence in the talc -- it is totally relevant and
16 makes scientific sense to look at what's the
17 strength of association between asbestos and
18 mesothelioma.

19 And that -- you know, that's
20 well-trodden territory. So there are -- there are
21 many studies in the literature, epidemiological
22 studies, that characterize the association between
23 lifetime exposure to asbestos at a certain level
24 and the consequent risk, elevated, in this case,
25 elevated risk of mesothelioma.

1 So, you know, for example, just let's
2 look at the one at the bottom, the Ferrante study.
3 So it's an epidemiological study that looked --
4 that follows -- it's occupational exposure to
5 asbestos. And it looks at different levels of
6 lifetime exposure to -- to asbestos.

7 So the -- the lowest range, let's say
8 the Ferrante study, that -- they considered a
9 number of different ranges. But the lowest range
10 they've considered above zero is fibers per
11 milliliter year. So that's a measure of lifetime
12 exposure to asbestos.

13 Fibers per milliliter year are in the
14 range of .1 to 1, from .1 to just less than 1. So
15 in that range, as compared with no exposure, the
16 increased risk of mesothelioma in -- in those
17 patients is fourfold, 4.4. That is the estimated
18 increased risk. So exposure to asbestos in that
19 range quadruples your risk of mesothelioma.

20 And there's also a 95 percent
21 confidence level associated with that, which is --
22 that gives you a sense of kind of how certain we
23 are as to what that increased risk is.

24 So, you know, it's -- with 95 percent
25 confidence, the increased risk is -- you know,

1 it's somewhere between 1.7 and 11.3. So roughly
2 between a doubling and a tenfold increase is what
3 we're fairly sure, you know, exists in light of
4 this -- of this study.

5 Q. Does talc use ever get you into these
6 ranges that we're looking at right here?

7 A. Right. So that's -- you know, that --
8 that's the question is how does this relate to --
9 to talc.

10 So -- and there are -- there are a
11 number of studies in the literature that are
12 relevant to this question, but one I'm going to
13 highlight, which is on the next slide.

14 This is the so-called Gardner study.
15 I'm not sure if the jury has seen this before.

16 But, basically, in this study what the
17 authors did was they took -- they exposed
18 individuals to talc. They had people use a talc
19 container on their bodies for a minute.

20 And then they -- they had a --
21 filters, and they measured the number --
22 basically, the amount of asbestos that the person
23 was exposed to pursuant to their use of the talc
24 that they -- of using talc on their bodies.

25 So if you, you know -- so then they

1 estimated approximately close to within one minute
2 of use.

3 So if you then extrapolate that to
4 then say, "Okay, imagine you've got somebody -- a
5 person who uses, let's say, two applications a day
6 for 30 years."

7 That, I'm just -- it's just a scenario
8 that seems somewhat realistic for a talc -- you
9 know, a talc user. Imagine somebody uses talc
10 for, yeah, two applications a day, each one
11 lasting a minute, let's say, for 30 years.

12 Then, using what's in that -- the
13 Gardner Paper, this paper in front of us here,
14 then that would suggest that their -- their
15 lifetime -- their lifetime exposure in fiber years
16 would be .35 fibers per milliliter years, .35.

17 So if you go back -- go back here --
18 thank you.

19 So, the, you know, point, if you look
20 at -- just look at the Ferrante study at the
21 bottom again just to zero in on one of them.

22 So .35 for lifetime exposure would put
23 you smack in the middle of that range, you know,
24 in which there's an increased risk of -- fourfold
25 increased risk.

1 Or look at the Jiang paper or Lacourt
2 paper. It would put you above the lowest range in
3 the Rolland paper and the Rodelsperger paper and
4 put you in the range of the Iwatsubo paper.

5 So the point is is the kinds of fiber
6 years that you would be exposed to through the use
7 of talc per the experiment, you know, do put you
8 in the ranges that are associated with an
9 increased risk of mesothelioma.

10 Q. So the next question I asked you to
11 talk to us about is: What is the probability
12 Mr. Perry was exposed to asbestos from his use of
13 talc? And then that sort of parlays into how many
14 contaminated containers was he likely exposed to.

15 Are you ready to talk to us about
16 that?

17 A. Sure. Sure.

18 Q. First question: Can you tell us what
19 a binomial distribution is?

20 A. Sure. And, actually, if you don't
21 mind, just go back a slide --

22 Q. Yes.

23 A. -- for a second.

24 So on the basis of testing of
25 containers of talc, I've done some probability

1 calculations that address two questions here
2 on the -- on the slide, which is: Through the use
3 of these containers, what's the probability that
4 Mr. Perry was exposed to asbestos?

5 And then a second was, you know: Of
6 all the containers he used over the years -- and,
7 as I understand it, he used, you know, something
8 like about ten containers a year for many decades.
9 And of those containers that he used, many of them
10 likely contained asbestos.

11 So these are -- these are somewhat
12 elementary probability calculations just to give
13 you a sense of what underlies these calculations.
14 And I'll show you the results in a second.

15 So the core -- the slide again. Thank
16 you.

17 Q. Oh.

18 A. The core kind of -- back one. There
19 it is. Thank you.

20 So the underlying mathematics of these
21 calculations to compute these probabilities, the
22 underlying mathematics relies at its core on
23 something called "binomial distribution," which is
24 a -- you know, a concept in -- if any of you have
25 had a statistics class in high school or in

1 college, you for sure will have encountered the
2 binomial distribution.

3 And it's been around since the 1700s,
4 and it's been very well understood. But it's at
5 the heart of the matter here.

6 If -- I asked Ms. Gross to bring along
7 a jar of Tic Tacs that I could --

8 Q. I do have them. I'm afraid I'm going
9 to spill them, but I have them.

10 A. So I use this in my teaching routinely
11 to get across the basic idea of binomial
12 distribution.

13 So what I have there is -- I can't see
14 it, but I take it on trust -- so is a jar of
15 Tic Tacs.

16 What colors are they?

17 Q. They are orange and -- I think orange
18 and yellow today. Or orange and white. God.

19 A. Orange and white. Okay.

20 So here's what I want you to imagine.
21 So imagine that jar contains -- each Tic Tac in
22 there is -- is -- that jar contains all of the
23 talc containers that were ever produced. They're
24 all the J&J talc containers that were ever
25 produced.

1 And let's imagine that half of them
2 are contaminated, contain asbestos, and half of
3 them don't. Okay?

4 So let's imagine that the orange ones
5 are contaminated containers, so they're -- they've
6 got asbestos in them, and the white ones do not,
7 let's say.

8 Now, I'm doing 50/50 here because it's
9 a little easier to think about it. The testing
10 that I'm relying on would suggest that it's higher
11 than 50 percent, but never mind that.

12 So that jar -- so in your head, or in
13 our heads, that jar is every talc container that
14 was ever been produced. And the orange ones have
15 asbestos in them and the white ones do not.

16 So, now, here's the point. If -- if
17 you go to the store, and Mr. Perry had gone to the
18 store, and purchased a single talc container,
19 then --

20 If you could -- Ms. Gross, if you
21 could just reach in without looking, reach in and
22 just pick one out as close to just, like, random
23 as you can. Put it on the table and tell me what
24 color it is.

25 Q. It's an orange one.

1 A. An orange one. So just intuitively
2 reasonable, yeah? You could -- if you -- if you
3 just buy one, you know, any one at random, pick
4 one at random, it might well be -- have asbestos
5 in it.

6 Do it again. Just pick out one.

7 Q. It's orange again.

8 A. Okay. Do one more.

9 Q. Okay. White.

10 A. White. And so on. We don't need to
11 keep doing it.

12 So I think it's intuitively obvious.
13 It's like coin flipping. You know, you've got a
14 50/50 chance of getting an orange every time you
15 go take one.

16 So -- so you might get a contaminated
17 one or you might not get a contaminated one
18 with -- actually, with probability precisely .5,
19 50/50 chance.

20 Now, here's -- here's the rub. So
21 Mr. Perry used hundreds of containers. So he
22 didn't just do one and it might or might not
23 contain asbestos.

24 So what I'm going to ask Ms. Gross to
25 do is to reach in and grab a bunch of containers.

1 And this is -- this is the analogy here is this
2 Mr. Perry grabbing all the containers he used.

3 So grab a bunch and put them on the
4 table. And I guarantee you -- and I haven't even
5 see this. But I guarantee you there'll be some
6 oranges and some white in here.

7 Q. There are orange and white, yes.

8 A. Yes. It's fairly intuitive.

9 And if she were to do that again and
10 again and again -- you don't need to do it.

11 If you were to do that again and
12 again, every time, guaranteed, pretty much, that
13 there will be some oranges and there will be some
14 whites.

15 That's what the binomial distribution
16 does. It actually tells you with a mathematical
17 formula if you pick ten, what's the probably that
18 there are five oranges; what's the probability
19 there are six oranges; what's the probability
20 there are three oranges, et cetera.

21 That's the binomial distribution.
22 It's a law of nature, essentially. It's been
23 understood and written down since -- you know,
24 since the 1700s.

25 So that -- that's the binomial

1 distribution. That's at the heart of this.

2 So based on testing of containers that
3 was performed by a laboratory called MAS, based on
4 what -- their testing results, you can use
5 something based on the binomial distribution to
6 calculate, for example, for Mr. Perry, it's my
7 understanding that he used somewhere in the order
8 of 400 containers, perhaps as many as 500
9 containers. Let's say 400 containers.

10 You can compute the probability, using
11 binomial and based -- the formulas based on that,
12 what's the probability that he never got an
13 orange, right? What's the probability that he
14 grabbed 400 out of there and there were no oranges
15 in it. He got lucky and never hit a contaminated
16 container.

17 The answer to that question is 7.2
18 times 10 to the minus 91.

19 So that's -- if you're not used to
20 this notation, that's .000000, dot, dot, dot,
21 dot -- 90 zeroes followed by a 7.

22 It is astronomically small. It's way
23 smaller, for example, than the probability of
24 winning the lottery twice. It's a very small
25 probability.

1 Next slide.

2 You can also compute using similar
3 kinds of mathematics, the -- of those 400, how
4 many of them likely were oranges.

5 And, I think, in this case, somewhere
6 between 279 of them and 348 of them were, with
7 95 percent probability, likely contained asbestos.

8 So you can codify, you know, of the
9 400, how many of them were likely to be orange.
10 And the answer is: a lot. More than half,
11 certainly. And, you know, in all likelihood,
12 between 279 and 348 of them were
13 asbestos-containing.

14 Q. Dr. Madigan, I am nearly out of time.

15 So, for now, have all of the opinions
16 you have told us about today been to a reasonable
17 degree of scientific certainty?

18 A. Yes.

19 Q. Thank you so much.

20 THE COURT: Cross-examination of
21 Dr. Madigan.

22 Ms. Bueno.

23 MS. BUENO: Yes, ma'am.

24 * * *

25 CROSS-EXAMINATION

1 BY MS. BUENO:

2 Q. Dr. Madigan, hello. I'm Kim Bueno.

3 How are you?

4 A. I'm very well, thank you. Hi.

5 Q. Good. I met you briefly when I took
6 your deposition, also by Zoom, a couple weeks ago.

7 I'm not sure if you remember.

8 A. I do, indeed.

9 Q. Okay. Great.

10 A. Nice to see you. I can't see you, but
11 I can hear you.

12 Q. Okay. You are able to see me?

13 A. No, I'm not.

14 Q. Oh, okay.

15 MS. BUENO: Oh. They don't see us.

16 BY MS. BUENO:

17 Q. Okay. I'm sorry. I thought you were
18 able to.

19 All right. Well, we can see you, so
20 thank you for being here.

21 Dr. Madigan, you are a statistician;
22 is that correct?

23 A. Yes.

24 Q. And so, in layman's terms, that means
25 you analyze data and numbers. Fair to say?

1 A. That's a part of it, yes. I also do
2 design studies and interpretation of studies.

3 But, yeah. That's part of it.

4 Q. And you didn't crunch any numbers
5 specifically related to the dose of asbestos that
6 Mr. Perry got, correct?

7 A. I did not other than the number of
8 containers.

9 Q. Right. And you've never met or spoken
10 to Mr. Perry, correct?

11 A. Right.

12 Q. You did not determine a lifetime
13 asbestos level for Mr. Perry, correct?

14 A. I did not.

15 Q. And you don't have any information
16 about what level of asbestos exposure Mr. Perry
17 had, true?

18 A. Well, I -- what I'm told is that he
19 used ten -- you know, he purchased around ten
20 containers a year for many decades.

21 Q. And that's the extent of your
22 information, true?

23 A. Sure. Yeah. You can -- you could do
24 a Gardner-like calculation. I have not done that.

25 Q. And are you aware that, in addition to

1 Johnson's Baby Powder, the allegations in this
2 case are that Mr. Perry used a lot of other
3 brands?

4 Did you know that?

5 A. No. I don't know about that.

6 Q. So you're not here to offer any
7 probability opinions about Clubman or Ammens or
8 Equate or -- the list goes on and on, other -- of
9 other talcs, true?

10 A. That's correct.

11 Q. The only thing that the plaintiff
12 lawyers asked you to do was give opinions about
13 Johnson & Johnson, right?

14 A. Well, the probability calculations
15 that I described at the end, they're specific to
16 J&J. The rest of my opinions are not specific to
17 J&J.

18 Q. And you -- you were not provided any
19 information to do any probability calculations
20 about other cosmetic talc or any other type of
21 asbestos exposure that Mr. Perry might have had,
22 true?

23 A. That is generally true. Those
24 calculations I did were specific to J&J's.

25 Q. Right. And you don't have an opinion

1 about what particular exposures of Mr. Perry
2 caused or contributed to his disease, correct?

3 A. Correct.

4 Q. All right. Now, I want to make sure
5 we're using the same terminology, so I'm going to
6 grab that board.

7 MS. BUENO: Would you grab that for
8 me?

9 And do we have that slide for that
10 board that we can show Dr. Madigan?

11 And I don't need the easel. I'll
12 just --

13 MR. LOEBBAKA: Okay.

14 MS. BUENO: -- grab it. Thank you.

15 If we don't have the slide,
16 Mr. Loebbaka, I can tell Dr. Madigan what
17 it is while you're pulling it up.

18 BY MS. BUENO:

19 Q. So Dr. Madigan, so the jury has seen a
20 board that I have in the courtroom that's very,
21 very simple.

22 It has three parts. On the left,
23 there is a bottle. In the middle, there's a box
24 that says "air." And on the right, there's a box
25 that says "body."

1 And we have been talking in this trial
2 about terminology.

3 A. Okay.

4 Q. So do you see that up there that says
5 "bottle"?

6 A. Yeah.

7 MS. BUENO: Do we have the full one,
8 TJ, that has all three? If not, that's
9 okay. We'll talk it through.

10 THE WITNESS: It has -- it has all
11 three.

12 BY MS. BUENO:

13 Q. It has all three. Okay.

14 So Dr. Brody and Dr. Haber talked
15 about the amount in the air, and they called that
16 "exposure." And I'm going to write that on the
17 board here.

18 A. I can't see what you're writing, but
19 I'm -- I'm writing myself here.

20 Q. Okay. Well, it's going to be simple,
21 and I hope that the jury can see this.

22 But what I'm writing under "air,"
23 which is the second thing, I'm writing "exposure."
24 Exposure.

25 And then under "body," I wrote "dose."

1 Because we have talked in this
2 courtroom about "exposure" being what is in the
3 air and "dose" being what gets in the body.

4 Are you with me, Dr. Madigan?

5 A. Sure.

6 Q. And you don't have an opinion about
7 the background level of asbestos that does not
8 cause mesothelioma, correct? That's outside of
9 what you're telling the jury about?

10 A. That's right. I -- that's not my area
11 of expertise.

12 Q. And you're not offering an opinion
13 about dose, about how much asbestos would actually
14 get in the body, correct?

15 A. Not specific. But I did just testify
16 to the, you know, once a day -- or two
17 applications a day for 30 years, what that would
18 result in in terms of fiber years. I did just
19 testify to that.

20 Q. Right. Just so we're clear, when
21 you're talking about that, you're talking about
22 exposure, which means what is in the air, true?

23 A. I'm talking about fibers as measured
24 in a filter attached to a -- to someone's head.

25 Q. Perfect. So to the extent the jury's

1 heard from a -- medical doctors about the body's
2 natural defense mechanisms that -- that have --
3 that mean less -- less asbestos gets in the body
4 than what's in the air, you're not here to talk
5 about that, correct?

6 A. No. That's not my area of expertise.

7 Q. And when you say "exposed" when you're
8 talking about the containers, you are talking
9 about what is in the bottle, true?

10 MS. BUENO: You can take that down,
11 Mr. Loebbaka. That's fine.

12 THE WITNESS: So you mean something I
13 referred to the probability calculation
14 that I showed at the end?

15 BY MS. BUENO:

16 Q. Yes.

17 A. Yeah. So I'm -- you know, the -- the
18 analysis there sees the bottle as a binary object.
19 Either it contains asbestos or it doesn't.

20 And my calculations pertain to, you
21 know, all of the containers that a person used,
22 Mr. Perry. You know, how many of them contained
23 asbestos.

24 Q. Right. And so that was what I was
25 trying to do here is make clear that when you were

1 using the word "exposed," you're just saying
2 whether or not there was asbestos in the container
3 that somebody used, correct?

4 A. Sure. You're just -- again, it is
5 precisely what I'm saying is, you know, of all the
6 containers used, how many of them contained -- in
7 all likelihood, how many of them contained
8 asbestos.

9 Q. And so just to get it clear, in your
10 mind, they either had it or they didn't. It's
11 either asbestos or not, correct?

12 A. It's not "in my mind." It's just --
13 it's the nature of those particular calculations.

14 Q. Right.

15 A. The container either -- either it has
16 orange or white. It either contains asbestos or
17 it doesn't.

18 Q. Right. So just to be clear, you're
19 not giving the jury any information about the
20 quantity or the amount of asbestos in those
21 bottles, correct?

22 A. Not in those calculations, no. It's
23 either present or absent.

24 Q. So if, for example, I was to say that
25 I want you to have pink Tic Tacs for when there's

1 just a tiny bit of asbestos or a sub-ultra-trace
2 amount, that's not an analysis you did. It's just
3 yes, no; asbestos, not asbestos. Right?

4 A. Sure. It's the nature of those
5 calculations that I did.

6 Q. Okay. And so whether or not there is
7 a significant amount of asbestos or just 1 fiber,
8 in your calculations, that's an orange Tic Tac.
9 That means there is asbestos, correct?

10 A. I don't know anything about the word
11 "significant." But it's -- it's "any asbestos"
12 means there's asbestos present. And if there's no
13 asbestos, then there's no asbestos.

14 Q. All right. And so you mentioned that
15 you rely on some testing to get information about
16 whether or not there's asbestos or not. And all
17 of your data comes from Dr. William Longo,
18 correct?

19 A. So the testing results of those
20 calculations are based on -- are based on testing
21 from -- from the lab that he is the president of,
22 MAS.

23 Q. Okay. And he's going to be here I
24 think this afternoon. So is it fair to say that
25 if Dr. Longo says the bottle contains asbestos,

1 you accept that as true?

2 A. Yeah. That's basically -- that -- I'm
3 relying on the testing that was performed by his
4 lab. That's the inputs to my calculations.

5 Q. All right. And other than Dr. Longo,
6 you haven't gone and looked at any expert reports
7 or data from experts for the defendants in this
8 case, correct?

9 A. I have not seen any such reports, no.

10 Q. All right. So I'm going to start with
11 the epi studies, I think, the epidemiological
12 studies. You talked to the jury about those.

13 And it's fair to say you do not have a
14 degree in epidemiology, right, sir?

15 A. I do not.

16 Q. You do not have any formal training in
17 epidemiology, correct?

18 A. I don't. But I've taught a lot of
19 epidemiology.

20 Q. And you mentioned that -- that you
21 taught at some conferences or one- or two-day
22 courses on epidemiology, correct?

23 A. Yes. For years, yes.

24 Q. And not all statisticians are
25 epidemiologists, true?

1 A. No. It's -- there are certainly
2 statisticians who don't focus on disease and
3 modeling and so on of disease data. Many do.

4 Q. And you can't point this jury to a
5 single epidemiological study that links cosmetic
6 talc use to mesothelioma, correct?

7 A. I -- yeah. I don't know of any such
8 study in the literature.

9 Q. You are not aware of any peer-reviewed
10 published epidemiological study that has ever
11 concluded that Johnson & Johnson's talc causes
12 mesothelioma, true?

13 A. Yeah. Yeah. I'm not aware of any
14 such study.

15 Q. Okay. You talked about talc miners
16 and millers, and so I want to mention that to the
17 jury briefly.

18 MS. BUENO: And I'll ask for the ELMO,
19 if I can, Mr. Loebbaka.

20 And we'll take -- I don't -- oh, I'm
21 sorry. I have this paper on here, don't I?
22 Here we go.

23 BY MS. BUENO:

24 Q. This was the slide that you showed. I
25 don't have it on a slide, but I have it here on

1 paper.

2 Are you able to see that?

3 A. Yes.

4 Q. And that's the slide you just showed
5 the jury where you talked about the two Rubino
6 studies from Italy and Boundy from Vermont,
7 correct?

8 A. Right.

9 Q. And the Boundy study from Vermont
10 actually has a connection to you because it was
11 done by researchers at Harvard; is that true?

12 A. I have no idea.

13 Q. Oh. I thought you've reviewed this
14 study?

15 A. I have reviewed this study, but I
16 don't remember where the -- the affiliations of
17 the authors.

18 Q. Okay. Well, let's take a look at it.
19 I've got it up here for you. I've marked it as
20 8079.

21 And if you took -- look at the very
22 first page. This is the article that you
23 referenced in the slide by Dr. Boundy, and it
24 indicates it comes from Harvard School of Public
25 Health; is that correct?

1 A. Yeah.

2 Q. All right. And if I go to the second
3 page, it tells us exactly what you said in your
4 slide, that this is Vermont USA from 1975 to 1976.

5 And that is verified by what it says
6 here, and the jury is able to see this as well.

7 Three major Vermont talc companies
8 were surveyed in the summer of 1975 and the winter
9 of 1976.

10 Is that correct? Do you see that?

11 A. I see that, yes.

12 Q. And if you go down to the bottom,
13 where it's talking about what they sampled in
14 that -- sorry. I'm trying to maneuver this.
15 There we go.

16 -- it indicates that bulk samples from
17 the mines and mineral mixtures or products from
18 the mills were obtained from each company.

19 Do you see that?

20 A. I see that.

21 Q. And at the bottom, it says: Further
22 analysis by NIOSH -- and that's the National
23 Institute of Occupational Safety and Health,
24 right?

25 A. Yes.

1 Q. -- which included petrographic
2 microscope analysis, transmission electron
3 microscopy, and X-ray diffraction with
4 step-scanning, revealed no asbestos in these
5 samples.

6 That's what the Boundy article says,
7 correct?

8 A. So it seems, yeah.

9 Q. So when you showed the jury this slide
10 about talc miners and millers, the Vermont mine
11 that you pointed out to the jury as part of that
12 study had no asbestos in it, according to the
13 Harvard researcher that you cited, true?

14 A. No. So what they say in the article
15 is they -- they did some testing of samples at a
16 particular point in time, and they tested in a
17 particular way and didn't find any asbestos.
18 That's what it says.

19 Q. And what it --

20 A. And it needs -- it needs something of
21 a testing expert to understand, you know, how well
22 they did that.

23 Q. Okay. Okay. Fine. But -- but what
24 you're telling the jury is that there was
25 significant mesothelioma found in the Boundy

1 study. And you are not a testing expert and have
2 no information that there was any asbestos in that
3 mine, right?

4 A. I don't. But I -- all I know is there
5 are two mesothelioma cases in that cohort. That's
6 what I testified to.

7 Q. And you don't have any opinion about
8 whether or not mesothelioma can develop outside of
9 asbestos exposure because you're not a medical
10 doctor, correct?

11 A. That's fair enough, yeah. That's
12 outside my area of expertise.

13 Q. And you criticized the miner and
14 millers data as saying that they're not powered
15 enough. But you know the International Agency of
16 Research on Cancer at the World Health
17 Organization disagrees with you, don't you?

18 A. I do not know that.

19 MS. BUENO: Can you please pull up
20 Slide 3?

21 This is DX8079, which I'm going to
22 seek to offer into evidence.

23 Oh, I'm sorry. This is -- this one is
24 DX9178.2, which is the IARC monograph.

25 I seek to offer this into evidence.

1 Is that already in?

2 MS. GROSS: I think we -- we object to
3 this. I thought this was withdrawn.

4 MS. BUENO: We can --

5 THE COURT: Are we going to have to
6 put all that paper in just to have one
7 little observation in the front?

8 MS. BUENO: I'm just giving that to
9 counsel so she has the whole document,
10 Your Honor.

11 THE COURT: I see.

12 BY MS. BUENO:

13 Q. Okay. So, Dr. Madigan, are you --

14 THE COURT: Well, wait a minute.

15 MS. GROSS: So, Your Honor, we
16 objected. This was withdrawn by IARC, the
17 2010 version.

18 MS. BUENO: It was not, Your Honor.
19 But that's --

20 THE COURT: Well, now, wait a minute.
21 Wait one minute. We are not going to sit
22 up here and have you argue back and forth
23 about a fact that can easily be identified.

24 So if you-all are disagreeing about
25 whether it was withdrawn or not, then

1 something's got to be done about that.

2 That's factual information.

3 MS. BUENO: It absolutely is,
4 Your Honor, and we'll seek to offer it with
5 another witness.

6 THE COURT: Very good.

7 BY MS. BUENO:

8 Q. So my question for you, Dr. Madigan,
9 is: Are you aware that the World Health
10 Organization's International Agency for Research
11 on Cancer has written that the studies of talc
12 miners and millers are considered to be the best
13 source of evidence?

14 Is that something you're aware of?

15 A. Yes. I've seen this before.

16 Q. You have seen this before?

17 A. Uh-huh. Yeah.

18 It's nothing to do with power.
19 There's no -- there's no -- the word "power" isn't
20 here. There's nothing inconsistent with my -- my
21 calculations and my opinions and this statement.

22 MS. BUENO: You can take that down and
23 I'll go back to the ELMO, please.

24 BY MS. BUENO:

25 Q. Now, Dr. Madigan, I was very surprised

1 to see you talking about the trend data that you
2 showed the jury.

3 Because when we talked a couple of
4 weeks ago, you testified that data about female
5 mesothelioma trends would be irrelevant to this
6 trial and irrelevant to Mr. Perry; is that right?

7 A. I -- yes. I think I said -- you and I
8 spoke about that. But at that time, it wasn't
9 obvious to me why it would be relevant.

10 Q. And, in fact, you said it's hard to
11 imagine why female mesothelioma data would be
12 relevant or important for a jury to hear in a case
13 involving a male plaintiff, right? That's what
14 you said?

15 A. But it could be that I have imagined
16 it since then.

17 Q. And you're not telling this jury that
18 mothers powder their baby girls more than they
19 powder their baby boys, right? You're not saying
20 that?

21 A. Nope.

22 Q. I'm sorry?

23 A. No.

24 Q. Okay.

25 A. I'm not.

1 Q. And you are not giving the opinion --
2 despite what you told the jury, you are not giving
3 the opinion to a reasonable degree of scientific
4 certainty that changes in the amount of cosmetic
5 talc uses in the U.S. has caused changes in the
6 amount of female mesotheliomas, true?

7 A. I'm not saying that. You said
8 contrary to what I said to the jury. I did not
9 say that to the jury.

10 Q. Let me restate the question. You are
11 not giving the opinion to a reasonable degree of
12 scientific certainty that changes in the amount of
13 cosmetic talc use have caused changes in the
14 amount of female mesothelioma, right?

15 A. Right. I'm not.

16 Q. Okay. So you cannot say there is
17 causation between the two things, cosmetic talc
18 use and female mesothelioma? That's not an
19 opinion you're offering?

20 A. No. I -- I don't know. I don't have
21 an opinion.

22 Q. Now, you did offer an opinion about
23 causation, and you -- just to be clear, you are
24 not a medical doctor, correct?

25 A. Correct.

1 Q. And you started testifying in --
2 related to asbestos about 2018, correct?

3 A. That sounds right, yeah.

4 Q. And you admit that back then and even
5 now, your understanding of asbestos is what you
6 have called "very limited," true?

7 A. Sure. I'm not an expert on -- I'm not
8 a mineral scientist.

9 Q. Okay.

10 MS. BUENO: One more thing,
11 Your Honor. I hear my time is up.

12 THE COURT: Yes. Well, if it's up,
13 then resume your seat.

14 MS. BUENO: Do I have one more minute?

15 MS. McVEY: You're out, but I
16 thought -- one more minute is fine.

17 THE COURT: All right.

18 BY MS. BUENO:

19 Q. The last thing. This is the -- the
20 information that you provided about asbestos
21 consumption.

22 And you would agree with me that
23 Mr. Perry, if he was born in 1969, would have been
24 born at the height of asbestos consumption in the
25 United States?

1 A. More or less, yes.

2 MS. BUENO: Thank you.

3 And thank you for giving me a few
4 extra minutes.

5 THE COURT: All right.

6 MS. BUENO: Dr. Madigan, thank you for
7 your time. I regret we don't have more of
8 it together.

9 THE WITNESS: Thank you, Ms. Bueno.

10 THE COURT: Ms. Gross, redirect.

11 MS. GROSS: Thank you. Give me one
12 more second.

13 * * *

14 REDIRECT EXAMINATION

15 BY MS. GROSS:

16 Q. Can you still hear me? Can you still
17 hear me, Dr. Madigan?

18 THE COURT: Put it in the box.

19 BY MS. GROSS:

20 Q. All right. Dr. Madigan, can you hear
21 me now?

22 A. Yes. Can you hear me?

23 Q. Yes, I can.

24 So the lawyer for Johnson & Johnson
25 was asking you all these questions about you

1 didn't do a dose, you didn't do a calculation, you
2 didn't do all this stuff.

3 Do you remember those questions?

4 A. Sure.

5 Q. And do you remember that you answered
6 her and you said, "I actually just did a
7 calculation for someone who applied powder twice a
8 day for 30 years"?

9 A. Right.

10 Q. Could you tell us a little bit about
11 that?

12 A. Sure. I mean, it's -- it's just
13 arithmetic.

14 So in the Gardner Paper, there's an
15 estimate of the fibers per cc of asbestos that a
16 person was exposed to by using talc for one
17 minute. And it's 1.9 fibers per cc.

18 So, just arithmetic, you can then take
19 that one minute and say, "Well, if only that one
20 minute was repeated twice a day for 30 years, what
21 exposure would that result in?"

22 And the answer in that case
23 is .35 fiber years. That's what I testified to
24 earlier.

25 Q. You were also asked some questions

1 about the graphs that we looked at earlier, the
2 charts about the male versus female rates, about
3 asbestos consumption.

4 And the lawyer from Johnson & Johnson
5 said, "Well, isn't the data about women
6 irrelevant?"

7 And you said, "Well, I don't think
8 so," right?

9 A. Yes.

10 Q. If asbestos-containing talc gives
11 women mesothelioma, what does it do to men?

12 MS. BUENO: Objection, Your Honor.

13 He's not a medical --

14 THE COURT: Overruled. You opened the
15 door to that.

16 THE WITNESS: So if -- if it causes it
17 in women, I believe it causes it in men.
18 Is that what you're asking?

19 BY MS. GROSS:

20 Q. Yes. That is exactly what I'm asking.
21 Thank you, Doctor.

22 Final question. You were shown the
23 Boundy study on the -- I don't know, the projector
24 thing.

25 Have you ever been shown any documents

1 by a Johnson & Johnson lawyer related to that
2 Boundy study?

3 A. Not that I recall.

4 Q. Have you ever seen the Johnson &
5 Johnson documents where they discussed that they
6 deleted the reference to asbestos from the Boundy
7 study?

8 A. I don't recall.

9 Q. Okay.

10 MS. GROSS: I don't have any further
11 questions, Your Honor.

12 Thank you, Dr. Madigan. Very much
13 appreciate it.

14 THE COURT: Dr. Madigan, this is Jean
15 Toal. I'm the judge in this matter.

16 Thank so much for your testimony and
17 for your participation in this trial. You
18 are excused.

19 THE WITNESS: Thank you, Your Honor.

20 THE COURT: Yes, sir.

21 All right. All right. Now, remind me
22 where we in the lineup, Ms. McVey.

23 We've now got Dr. Longo, and he's
24 going to be our next expert witness. So
25 we'll be starting him after lunch?

1 MS. McVEY: If possible, that would be
2 great.

3 THE COURT: Yeah. I think that makes
4 sense.

5 MS. BUENO: And then we have the rest
6 of the video, too.

7 THE COURT: Yes.

8 Just for a preview then, members of
9 the jury, one of the plaintiffs' principal
10 witnesses is appearing live here, and he'll
11 be lengthy. So my thinking is we'll take
12 our lunch break now.

13 And after that testimony is complete,
14 there are some designations of Dr. Hopkins'
15 video material that the defendant wants to
16 put in, and we will play those after that.

17 And that kind of is a preview of what
18 the day will be like.

19 In terms of weather, we will get some
20 heavier rain tomorrow, but it doesn't look
21 like anything that would get into the
22 ballpark of what we've already experienced.

23 So, so far, so good. But I'll get
24 some more complete information about that
25 before I release you today so that you'll

1 know exactly where we stand.

2 Again, your safety is the biggest
3 thing. And I intend to protect that no
4 matter what happens about the trial, so...
5 All right?

6 Very well. You are -- it's 12:15.
7 Please try to be back here by 1:40 and
8 ready to go.

9 All right. Please rise for the return
10 of the jury.

11 (The jury exits the courtroom at
12 12:16 p.m.)

13 THE COURT: All right. Ladies and
14 gentlemen, we'll break at this time.
15 Anything before we do?

16 MS. PEPKE: Your Honor, if I can,
17 while we still have the court reporter.

18 I just -- we were off the record
19 yesterday when I made sure that we had the
20 right to raise our DV. Even though the
21 plaintiffs will receive a copy this
22 afternoon, that we all agree that we can
23 hold the DV and --

24 THE COURT: Absolutely. Thank you
25 very much for checking.

1 Now, anything else by way of
2 designations, Ms. Flynn, that you wanted to
3 put on?

4 MS. FLYNN: I don't believe so other
5 than we would have cross-examined had we
6 not been in default. But aside from that,
7 I don't have any --

8 THE COURT: All right. But -- okay.
9 I think your -- I just want to be sure your
10 position is protected.

11 MS. FLYNN: I appreciate that,
12 Your Honor.

13 THE COURT: Very good. All right.
14 The court will be in recess.

15 * * *

16 (Whereupon, there was a lunch recess
17 in the proceedings from 12:17 p.m. to
18 1:42 p.m.)

19 * * *

20 THE BAILIFF: All rise. Court will
21 come to order, please.

22 THE COURT: Okay.

23 MR. ADAMS: Your Honor.

24 THE COURT: Please be seated.

25 Yes, sir.

1 MR. ADAMS: We're three minutes away
2 from the tech being ready.

3 THE COURT: That's fine. I've got a
4 couple little things.

5 Ms. Flynn, I received your document
6 called "Objection" and asked for a limited
7 instruction on Steven Haber with a
8 100-and-something-pages-long medical
9 report. It's all about a different --
10 different point of view about causation.

11 The averments of the complaint include
12 averments about causation and everything
13 else, and that is improper to be offered
14 even as a proffer.

15 I'm going to -- I did a little speed
16 reading, but I haven't digested the whole
17 thing. But that's far beyond anything I
18 would ever have allowed anybody to ask
19 Dr. Haber by taking some medical report
20 you-all got from somebody that isn't
21 even -- never been in this case and start
22 talking about the cause of his
23 mesothelioma, so offering a theory about
24 what caused it.

25 So I'll just let you know that that is

1 in the wind, and we'll try to put something
2 on the record about it before we get out of
3 here today.

4 MS. FLYNN: I understand. We did not
5 offer it for that purpose. We offered it
6 for the -- the exhibit had some elements
7 of --

8 THE COURT: The whole purpose -- the
9 whole thrust of that medical report given
10 to somebody at Nelson, Mullins, is the way
11 I read it, is an alternate medical opinion
12 about Perry, about somebody who has never
13 examined him and then quotes extensively
14 about his medical records and gets some of
15 it wrong in the balance. So that's the way
16 I'm reading it.

17 MS. FLYNN: It was about past medical
18 history, which was what we wanted to talk
19 about.

20 THE COURT: Well...

21 All right. Now, let me say something
22 else. Apparently, the style now in all
23 these trial academies you people go
24 through, not available when I tried cases,
25 is that cross-examination is no longer

1 simply the ability to lead the witness.
2 Cross-examination is to be able to testify
3 to the jury.

4 Ms. Bueno, this business of turning
5 your back on the witness, looking up
6 straight and getting in the space of the
7 jury and then formulating this big
8 question, which is nothing but testimony
9 about your theory about things rather than
10 simply not a direct question but a leading
11 question, it's got all this information in
12 it that's not anything that's been said and
13 then what you want to say, you -- "You're
14 not saying that," or "You don't know
15 anything about that," that's not proper
16 cross-examination.

17 In my day, that was called "testifying
18 cross-examination." And some of the finest
19 judges who are pictured around here would
20 have kicked me out of the courtroom if I
21 had had the temerity to ask questions like
22 that.

23 So I want you to be mindful of that
24 and as I do all of you lawyers. I'm not
25 going to permit that kind of questioning.

1 That's just contrary to everything I know
2 about what a leading question allows and
3 what it doesn't allow.

4 And I do just the slightest little
5 dive into one of my old trial handbooks to
6 look at what kinds of testimony on
7 cross-examination -- that's what I'm not
8 going to allow. So word to the wise. I
9 hope it's sufficient.

10 All right. Now, Mr. Adams, ready to
11 go?

12 MR. ADAMS: All set. Yes, Your Honor.

13 THE COURT: Madam Bailiff, yes, ma'am,
14 bring me the jury.

15 (The jury enters the courtroom at
16 1:48 p.m.)

17 THE BAILIFF: The jury is seated,
18 Your Honor.

19 THE COURT: All right. Thank you,
20 ma'am.

21 Ladies and gentlemen of the jury, we
22 continue with the presentation of the
23 plaintiffs' case, and Dr. Longo is the next
24 witness for the plaintiff.

25 So, Mr. Adams, you may proceed.

1 MR. ADAMS: Thank you, Your Honor.

2 Plaintiff calls the next witness,

3 Dr. William Longo.

4 THE COURT: Come right around,

5 Dr. Longo, and be sworn.

6 THE WITNESS: Thank you, Your Honor.

7 THE BAILIFF: Turn to the clerk.

8 Raise your right hand, please.

9 THE CLERK: Do you swear or affirm
10 that the testimony you are about to give in
11 this case will be the truth, the whole
12 truth and nothing but the truth, so help
13 you God?

14 THE WITNESS: Yes, I do.

15 THE CLERK: Thank you, sir. Please
16 have a seat in the witness stand and state
17 your full name for the record.

18 THE WITNESS: William Edward Longo,
19 L-O-N-G-O.

20 * * *

21 WILLIAM E. LONGO, Ph.D.,
22 having been first duly sworn, was examined and
23 testified as follows:

24 * * *

25 DIRECT EXAMINATION

1 BY MR. ADAMS:

2 Q. Good afternoon, Dr. Longo.

3 A. Good afternoon.

4 Q. How are you?

5 A. I'm doing okay.

6 Q. I'm going to get into what kind of
7 doctor you are, your background, your training and
8 expertise and all of that, but I just want to give
9 the jury a heads-up about where we're going, if
10 that's okay.

11 A. That's fine with me.

12 Q. Have you tested over 100 bottles of
13 Johnson & Johnson's Baby Powder?

14 A. We have.

15 Q. Have you tested the tissue -- the lung
16 tissue of Michael Perry, his own lung tissue?

17 A. We have.

18 Q. And are you going to, when we get to
19 your opinions, tell the jury whether the asbestos
20 in the bottles of Johnson's Baby Powder matches
21 Mr. Perry's -- what's in Mr. Perry's lung tissue?

22 A. Yes, I will.

23 Q. Okay. You've got a Ph.D. What kind
24 of doctor are you?

25 A. I'm not a medical doctor. But I have

1 a doctorate or Ph.D. in a field called "material
2 science and engineering," sort of -- and -- and
3 "biomaterials."

4 Q. What is material science? What does
5 that mean?

6 A. You know, it's, quite simply, just the
7 study of materials. And the materials are broken
8 down in approximately five groups. They're
9 metals -- we call it "metallurgy" -- polymers or
10 plastics; ceramics; minerals, which asbestos would
11 fall under; things where they will mix different
12 types of materials, put a metal into the polymer
13 to make it stronger or carbon fiber that's put
14 into the polymer to make it very strong; and
15 biomaterials. And that's the area I work in a
16 lot.

17 And these would be materials going
18 into the body, like a hip prosthesis. You know,
19 what is the best metal? What is the strength,
20 et cetera. Will it cause the body to try to
21 reject it? You know, so you've got to make --
22 you've got to do it so that the immune system
23 doesn't go after it, you know.

24 Intraocular lenses, say, if --
25 typically, if you get old enough, you'll start

1 forming cataracts at some point. Mine have just
2 started.

3 And at some point, they get bad enough
4 they will take out -- try to take out the lens and
5 stick in a polymeric artificial lens in there, you
6 know, to get your sight back. There's a lot of
7 development on that. Is it the right materials?
8 Can it last as long as it should? Et cetera.

9 And the last area is what I do a lot
10 of, is: Why did something go wrong? Why did it
11 break? Why was asbestos put in products? What
12 kind -- what kind of -- advantages of using it and
13 not using it. How is it released? Et cetera. So
14 that's what I've been doing for the last 36 years.

15 Q. Is one of the things that you have
16 done over your career is test various types of
17 asbestos-containing products to see what's in
18 them?

19 A. Yes.

20 Q. And we'll get into that a little more
21 in a bit. Have you testified in front of Congress
22 on the specific topics you're going to talk to the
23 jury about today?

24 A. I have.

25 Q. Can you tell us about that?

1 A. Well, I got an email one day, and they
2 asked me if I would come to Congress and testify
3 what was the best analytical method for testing
4 cosmetic talcs for asbestos, what was my thoughts
5 on that.

6 It's sort of like -- when somebody
7 says a method or -- it's sort of like a recipe.
8 You start off at the first ingredient, and you go
9 all the way down to the last ingredient. And if
10 you put all the ingredients in right, you get a
11 cake.

12 But what we want is that when -- when
13 labs test something in different labs, we want
14 them all to use the same recipe, so that when I
15 look at their cake, it can match up with my cake
16 where I look at their results and our results. So
17 Congress was in the process of evaluating that.

18 I do a lot of public speaking. That's
19 about as afraid as I've ever been, those five
20 minutes. It was pretty daunting. I lost -- I
21 don't think I slept for two days before I got to
22 Washington and did that.

23 Q. It says carcinogens in consumer
24 projects. What -- what carcinogens and what
25 consumer projects?

1 A. The consumer products, essentially,
2 was talcum powder. And the carcinogens were the
3 asbestos that's in that talcum powder.

4 And what they wanted to know is what
5 our lab was doing to get enough sensitivity so
6 that we could get a good detection limit. And
7 we'll talk about that later.

8 And so that -- I'm not sure how they
9 got my name. But it was pretty -- I thought it
10 was a joke at first, when I got the email, and my
11 friends were pranking me.

12 Q. And you talk about detection limits.
13 The jury sort of heard these TEM, XRD, PLM names
14 floating around. Are you going to help us
15 understand what that actually means?

16 A. I'll try.

17 Q. Okay. And we've got this big picture
18 over here, and we're going to -- we're going to
19 learn about microscopes a little bit.

20 Can you give us your educational
21 background, tell us a little bit about that.

22 A. Yes. I went to the University of
23 Florida and received a bachelor's in microbiology
24 and virology. From there, I was -- I was going to
25 go to veterinary school. It just never occurred

1 to me that I wouldn't get in.

2 So I was a burden on society, and I
3 had to get a job. And I got a job in the material
4 science department as a lab tech. And three
5 months later, the professor, who I never saw like
6 twice because I was just a lowly lab tech, called
7 me into his office.

8 I was sure he was going to fire me. I
9 didn't know what I had done. And he said he'd
10 like me to go to graduate school.

11 And I said, "Well, I have two
12 problems."

13 He says, "What's the first problem?"

14 I said, "I'm reapplying to veterinary
15 school in the fall because that's all I wanted to
16 ever do since I was, you know, old enough to think
17 about it. And when I get accepted, I'll have to
18 leave here."

19 And he said, "Well, that's --
20 that's -- you know, life goes on, and, you know,
21 we'll miss you."

22 And he said, "You know what? If I was
23 sitting on the board of the veterinary school,"
24 whenever they use to say yes or no to your
25 application, "I would probably be more impressed

1 that you're in an engineering field and graduate
2 school than taking a couple of courses per
3 semester."

4 I said, "Man, that's a great idea.
5 Okay."

6 He says, "What's the -- what's your --
7 what's your other concern?"

8 I said, "This is graduate school and
9 engineering. I have two quarters of calculus.
10 How the hell am I going to survive over there?"

11 He said, "Well, you're friends with
12 John Sheets, who is a graduate student. He --
13 he's got a degree in zoology, and Richard Cherry
14 has got a degree in -- in biology. They were
15 doing fine."

16 Well, he didn't tell me that their IQs
17 are probably 50 times higher than mine. So,
18 anyway, long story short, I was glad I did that
19 because I really enjoy this kind of work, and I
20 never thought about veterinary school again.

21 Q. You ended up getting your master's and
22 your Ph.D. in material science?

23 A. Yes, sir.

24 Q. Okay. And engineering?

25 A. Correct.

1 Q. And tell us just a little bit about
2 your memberships in societies that have to do with
3 your field.

4 A. I mean, I'm a member in the
5 Environmental Information Association. I'm a
6 member of the American Industrial Hygiene
7 Association.

8 I'm not a member of EPA because they
9 don't really have memberships. But I was chosen
10 some years ago, myself and four -- three other
11 scientists, to go to the headquarters of EPA every
12 year -- every six months to look at their research
13 in asbestos.

14 They wanted us to critique what they
15 were doing. Also look at the analysis they're
16 doing, to peer-review it, and to give them our
17 thoughts on where the research ought to go. And I
18 did that for a number of years until their funding
19 ran out.

20 I'm a member of the American Society
21 of Testing Materials, ASTM. It is a -- it's not a
22 government agency, but it is one of the largest
23 method development agencies in the world. Again,
24 developing recipes.

25 And so they developed testing methods

1 from -- everything from how many times a cabinet
2 door ought to open and close before the hinge
3 breaks; a mask to -- a mask that you can put on
4 that would reduce the amount of contaminants
5 you're breathing, and they test what gets through
6 and what does not; a lot of, you know, concrete.

7 You're putting up a new building, and
8 typically the concrete they want you to use in
9 that structure will have an ASTM number on it or,
10 you know, what the ingredients ought to be,
11 et cetera.

12 And it takes a long time to get these
13 methods through. 40,000 members across -- across
14 the world are in ASTM. I made the mistake of
15 volunteering to do one of these methods. It took
16 five years of rebuilding and rebuilding it.

17 It's easier to try to herd 125 cats
18 into one area than get 125 scientists in your
19 committee to agree on anything. I haven't done
20 another one since.

21 Q. Despite the difficulty in reaching
22 sort of a consensus within these organizations,
23 have some of these organizations, ASTM, EPA, come
24 up with specific protocols when you're using a
25 microscope and you're -- and you're determining

1 whether there's asbestos in a substance?

2 A. Yes.

3 Q. Okay. And we'll get into that in a
4 little bit more. But do you follow those
5 protocols when evaluating, for example, Johnson's
6 Baby Powder?

7 A. Yes, you have to initially, because a
8 lot of these organizations will audit you, and you
9 better be following the protocols that are
10 specific to a certain type of testing. If you
11 diverge from those, you can flunk that area. And
12 if you flunk enough of them, they'll pull your --
13 they'll pull your certification.

14 Q. What is MAS?

15 A. That's the short version of
16 "Materials Analytical Services," and -- God, I
17 look so much younger there. That's me, only a few
18 years ago, and sitting in one of our scanning
19 electron microscopes, which at that point, some
20 three, four years ago, was a state-of-the-art one.

21 And we use that -- when you say
22 "scanning electron microscope," instead of like an
23 optical microscope where you're using light, you
24 know, to illuminate what you're looking at, like
25 biology, these use electrons.

1 And the electrons are generated at the
2 top of a column. And then having a different type
3 of -- like a negative or a positive will pull them
4 down into the column. But since they are
5 electrons, they can't go through anything.

6 So these columns -- and we'll see some
7 here -- have these electromagnetic magnets. They
8 will push the electrons into a small beam.

9 Because it's scanning, it ratchets
10 across the sample really fast, sort of like a TV
11 where you can't see it, but it's -- it's going at
12 a high speed. And when an electron hits, say -- I
13 never put my finger in a scanning electron
14 microscope because it would be like sticking your
15 finger in outer space, you wouldn't have a finger
16 anymore.

17 But it scans it. And so the electrons
18 that get hit at the top is going to be the most.
19 So that generates other electrons, kicks them out
20 of the sample. You don't have room for them all.
21 And then the computer system measures the
22 intensity of those electrons and builds an image.
23 We'll see some later that will make it a little
24 easier.

25 Q. What --

1 A. We use this for -- if you want to see
2 real fine surface features.

3 Q. What's your connection to MAS, that
4 lab?

5 A. Oh, I'm the CEO.

6 Q. How long have you been the CEO and/or
7 president and owned that lab?

8 A. Well, I was president up to about two
9 years ago, and I promoted a person to be the
10 president. So I had to have a title of some sort.
11 So I made myself CEO. Well, we had a vote.

12 Q. How long have you had MAS?

13 A. I opened the doors in February of
14 1988.

15 Q. Is your lab, MAS, accredited?

16 A. Yes.

17 Q. Can you tell us about that?

18 A. We're a registered -- start off with
19 an FDA lab. So we do a lot of work on
20 pharmaceuticals.

21 So you don't get an accreditation.
22 They give you a number. You're registered.
23 However, they do have the most intense audits of
24 any -- any group you've ever had.

25 Q. This is the FDA?

1 A. The FDA. Because if you're doing FDA
2 work, they're going to -- they're going to come
3 audit you. But they do not tell you when they're
4 going to show up. You'll know you're having an
5 audit when your receptionist tells you there's two
6 FDA agents sitting in the lobby waiting for you to
7 get to work.

8 Also certified by the American
9 Industrial Hygiene Association. And we have a
10 number of certifications from the International
11 Standards Organization for different types of
12 methods. And that would -- and their standards go
13 through the American Association of Laboratory
14 Accreditation, do the work for the International
15 Standards Organization.

16 And this is all about following the
17 methods properly so that you're getting the right
18 results. It's also about the quality control, how
19 you make sure that it's right, and keep checks of
20 the training.

21 And FDA even has -- they want you to
22 keep a insect log. Anytime a bug gets into the
23 lab, you've got to write it down and then tell how
24 you got rid of it. So it's fairly intense for
25 labs to maintain that type -- these types of

1 accreditations.

2 Q. You mentioned product testing earlier.
3 Give us a sense of how many asbestos-containing
4 products you have tested and some of the folks
5 you've consulted for.

6 A. You know, I've estimated now that we
7 have analyzed well over 400,000 different
8 individual asbestos samples of just about every
9 type you can think of.

10 These would be what we call "bulk
11 samples," meaning, it's like -- I know this
12 courthouse does not have asbestos in the plaster
13 up there. But if somebody wanted to know in a
14 building, they would take, essentially, a piece
15 of -- piece of the ceiling.

16 And the size of the sample you take --
17 and I know they don't have these anymore. You
18 youngsters probably don't know what they are. But
19 these would be 35-millimeter film canisters.
20 That's a perfect fit for one of those samples.
21 It's hard to find them now.

22 Air samples. Take an air sample in
23 here to see if there's any fibrous material with
24 asbestos. Water samples. Human lung tissue
25 samples to see if there's asbestos -- we call them

1 a "lung burden" -- in the lungs. And not only
2 asbestos, it's what else is in there.

3 And I think that covers the majority
4 of all the different samples.

5 Q. Tell us about some of the government
6 organizations and businesses that have hired you
7 and your lab.

8 A. We've done a lot of work over the
9 years for the Environmental Protection Agency
10 and -- EPA -- the -- the Environmental Protection
11 Agency does not do a lot of their own research
12 testing. They'll come up with what -- some --
13 what they want done, and then you can bid on it.
14 And we've gotten a few of those contracts.

15 The U.S. Department of the Treasury,
16 we were asked to help evaluate some of the new
17 printing processes when the new -- I think they
18 started with the \$20 bill, 50s and all the -- and
19 what they wanted from us was -- is to tell them
20 how far the ink went into the new paper that they
21 used.

22 So we did that work. They sent us the
23 money to look at it. It just came in a box in the
24 mail, and I was feeling it and going, "Must be
25 \$15,000 in here." It probably was, but it was all

1 shredded.

2 The U.S. Air Force was some work that
3 we did for them that had to do with some computer
4 chips. And I can't talk about what the project
5 was. But it was interesting because they would
6 come every day in a jet with MPs and a guy holding
7 a briefcase like in the movies with the chips in
8 there, and they never let those chips out of their
9 sight. And at the end of the day, they'd pack it
10 all up and fly back out. They did that for a few
11 months. It was very interesting.

12 BMW is -- some of the car companies
13 we've done work for to solve some sort of problem
14 in the manufacturing or QC.

15 The Center for Disease Control were
16 two projects when the initial -- when the Ebola
17 virus -- virus outbreak happened -- I don't
18 know -- 15, 20 years ago. We had better scanning
19 electron microscopes than they did. They wanted
20 to come over and image the virus.

21 Q. You said Ebola?

22 A. Ebola.

23 Q. Ebola.

24 A. It was dead when it got to our lab.

25 And Kimberly-Clark Corporation was to do some work

1 on looking at some of their paper production, and
2 they wanted to see some of the defects that are in
3 it. Gulfstream was, again, looking at some parts
4 that they needed some evaluation on.

5 Q. And I don't want to go through
6 every -- every single one, but have you served as
7 an official referee lab and also worked for
8 various cities and states around the country?

9 A. Yes. We were retained as an expert in
10 all those cases, starting from the top down to the
11 City of Baltimore. They wanted us to do reverse
12 engineering on asbestos-containing products that
13 were in their buildings that they had to spend a
14 lot of money on now to take care of it.

15 So we were able to figure out how to
16 reverse-engineer the samples. We did a lot of
17 that.

18 When I got the State of Hawaii
19 contract, I was very excited, but they never took
20 me to Hawaii.

21 And as a referee with W.R. Grace,
22 property damage, asbestos manufacturing claims.
23 So in these bankruptcies, if you wanted to get
24 money to remove W.R. Grace thermal insulation from
25 your building, you had to prove to them that it

1 was a W.R. Grace product. So we would get those
2 and say yea or nay when we analyze them and -- and
3 the same for the others.

4 Q. Have you also published in the
5 peer-reviewed scientific literature?

6 A. Yes, sir, I have.

7 Q. Can you tell us briefly about that.

8 A. Publications in the peer-reviewed
9 process is where if you have something unique and
10 it's new research and new results or -- something
11 that -- that pushes along the knowledge of a
12 particular area.

13 And there's got to be hundreds of
14 individual journals, and finding one that is in
15 your area, send a manuscript. The editor will
16 look at it and say, "Yes, this is worthwhile."
17 Then they'll send it out to peer-review people,
18 people that are in your area.

19 So they're not -- no names or anything
20 are on it. So you're supposed to stay in the --
21 in the dark about whose paper it is. And then
22 they'll either say, yes, this can be published or
23 needs some more work. And usually, with mine,
24 they would say, "Need to clean the English up."
25 And I'm not kidding about that. I wish I had

1 studied that more in college.

2 And once it gets published, then you
3 have a peer-reviewed process. And so we -- I have
4 peer-reviewed papers from all the way back to
5 graduate school on -- when I was working on my
6 Ph.D. to the property damage areas and other
7 things.

8 And the most recent one is -- had to
9 do with exposure to individuals from Johnson's
10 Baby Powder and the tissue analysis we had done on
11 some of these individuals to show how it matched
12 back to the product itself.

13 MR. ADAMS: Your Honor, we'd offer
14 Dr. Longo as an expert witness on the
15 issues of material science, industrial
16 hygiene, asbestos testing and tissue
17 digestion.

18 MR. COWAN: Your Honor --

19 THE COURT: Just a second. Let me --

20 MR. COWAN: Sure.

21 THE COURT: Yes, sir?

22 MR. COWAN: Just for your -- we didn't
23 have an evidentiary ruling on that with
24 regard to Longo -- Dr. Longo, so no
25 objection.

1 THE COURT: Thank you.

2 All right. Ladies and gentlemen of
3 the jury, by reason of his training,
4 education and experience, Dr. William Longo
5 is qualified to testify about material
6 science, industrial hygiene, asbestos
7 testing and tissue digestion and may
8 express opinions to you about those
9 matters. The credibility of this evidence,
10 as usual, is within your purview.

11 You may proceed, Mr. Adams.

12 MR. ADAMS: Thank you, Your Honor.

13 BY MR. ADAMS:

14 Q. I've got three questions up here,
15 Dr. Longo. I want to start with Number 1. Did
16 Johnson's Baby Powder contain asbestos?

17 That's something you've evaluated?

18 A. Yes.

19 Q. Is that something that you are
20 prepared to answer today?

21 A. Yes, sir.

22 Q. Okay. Just -- we'll get into the
23 details. But have you repeatedly found asbestos
24 in Johnson's Baby Powder?

25 A. Yes, we have. Over the 100 samples,

1 different product samples that we've analyzed, the
2 percentage of positive samples is approximately
3 75 percent.

4 Q. We've got some reports here that we've
5 marked as Exhibit 2338, 4070, 4071, 4072, 4073 and
6 4074. What are these?

7 A. These are reports for analysis of
8 Johnson's Baby Powder as well as a few Shower to
9 Shower. And these go through different decades,
10 starting in about 2000. And then the final report
11 at the very end, I threw it all together. So I
12 think it goes from approximately 1950 through
13 2000.

14 And these would be samples that
15 Johnson & Johnson provided, what they call the
16 "historical samples" where they're museums. So
17 that came from them, so we know that for sure this
18 is their product.

19 MR. ADAMS: Your Honor, we discussed
20 these reports and just admitting the images
21 found in them. So at this time, we would
22 seek to admit the images from these reports
23 as 2338, 4070, 4071, 4072, 4073 and 4074.

24 THE COURT: All right.

25 MR. COWAN: Your Honor, we don't have

1 an issue with the images. I'd just like to
2 be able to check the images before they
3 actually go back to make sure there's no
4 writing. Sometimes --

5 THE COURT: That's fine.

6 MR. ADAMS: We'll provide a copy.

7 Thank you.

8 BY MR. ADAMS:

9 Q. What are we looking at here?

10 A. These are what we call "micrographs."
11 They're photographs taken by the transmission
12 electron microscope.

13 And here, we have various samples
14 showing the asbestos structures that were found in
15 with the talc. So the structures that are -- look
16 like they're very thin, that's known as a fibril,
17 you know, just one asbestos structure.

18 You get the ones that say -- you look
19 at one, two from the right-hand side, the third
20 row down that -- over one, that's a bundle. If
21 you look at the very top of that structure, you
22 can see that it has multiple fibrils sticking out
23 of it. We call that a "bundle."

24 Now, what you're looking at is --
25 would be absolutely invisible to the naked eye.

1 These -- these structures and fibers are measured
2 in what we call "microns" or "micrometers."
3 Anybody go into that yet?

4 Q. We've had some of that with Dr. Brody.

5 A. Okay. He stole that from me. I swear
6 he did. No, only kidding.

7 And -- and you can see some of those
8 at a higher magnification. They're on filters
9 that we call "polycarbonates," which they are.
10 And you can see, like, almost a round hole in it.
11 Those round holes are 2/10 of a micron in width.
12 So they're all microscopic, and for us to see
13 these type of structures, we have to have one of
14 those transmission electron microscopes.

15 Q. And I think it was clear, but I just
16 want to make sure. Are these all asbestos
17 structures that you found in Johnson's Baby Powder
18 or Johnson & Johnson's talc?

19 A. Well, it's in their talc. It's not
20 their talc. They buy the talc. But it's in their
21 products. These were from the products
22 themselves, not from the mines themselves. We
23 have done those analyses, but these are all from
24 the products themselves.

25 Q. And when you say "product themselves,"

1 are you referring to bottles of Johnson's Baby
2 Powder or Shower to Shower?

3 A. Yes, that's what I'm referring to.

4 Q. Okay. I want to just cover this
5 quickly, and I know it's a little tedious. But we
6 talked about these specific protocols that are to
7 be followed when you're analyzing talc for
8 asbestos.

9 Can you tell us what -- what this
10 slide is, and then we'll go through the protocol
11 quickly, if you can.

12 A. Well, the left-hand side, that's
13 the -- that's the International Standards
14 Organization, which provides protocols for various
15 types of things. And it's the -- and essentially,
16 when it says International Standard, it's for
17 scientists from different countries around the
18 world.

19 The middle one is the Environmental
20 Protection Agency, EPA. And then on the far side,
21 the American Society of Testing Materials. Now,
22 all three of these different organizations have a
23 protocol or methodology for analyzing a myriad of
24 things by transmission electron microscopy for
25 asbestos. And the International Standards

1 Organization actually has a protocol specifically
2 for cosmetic talc.

3 Q. Okay. I want to go through that
4 protocol. I've got some real time limits. So I'm
5 going to try to pick it up a little bit.

6 A. Okay.

7 Q. What is this three-step process we
8 have here?

9 A. That's -- Step 1, Step 2, Step 3, if
10 it meets the criteria for asbestos for all three
11 steps, you have to call it asbestos.

12 Step 1 means 5:1 aspect ratio or
13 greater. So it means that the length has to be,
14 at a minimum, 5 times the width, the top of it.
15 Chemistry. And we will see that later in some
16 examples. You've got to have the right chemistry
17 for asbestos. And selected area electron
18 diffraction is a very fancy word for saying it has
19 to have the right crystalline formation or
20 structure.

21 Once it meets all three criteria,
22 every one of those methods -- and they're all the
23 same even though they're three different
24 organizations -- you have to call it asbestos.

25 Q. Is that some method that you made up

1 and you're kind of doing your own thing, or did
2 you get that specifically from these
3 organizations?

4 A. No, sir, that's not my method or there
5 would have been just "Longo" up there.

6 No, it's -- this is a method that we
7 follow because it's -- pretty much, it's accepted
8 worldwide for a specific type of way to determine
9 if you have asbestos in there or some other type
10 of fiber or something else.

11 Q. Is this EPA method, AHERA, the same --
12 have the same criteria as what you follow?

13 A. Yes.

14 Q. And did AHERA explain in the Federal
15 Register EPA why they use these counting criteria?

16 A. When they put this together and --
17 initially starting in 19 -- 1980 -- 1987, they
18 pulled in all the -- what they would consider the
19 expert electron microscopists around the country,
20 got them together and then put the method
21 together.

22 So there would be a couple of people
23 there that wanted 10:1, but the overwhelming
24 majority of the scientists decided that the 5:1
25 was what was needed as the -- we call it the more

1 volatile. The thing has to be at least 5 times
2 longer than it is wide.

3 Q. Okay. And what was the reason that --
4 that these organizations came down on 5:1 aspect
5 ratio?

6 A. Because you'll hear things like
7 "cleavage fragments," "nonasbestos structures."
8 The majority of all those nonasbestos structures
9 and cleavage fragments, et cetera, are down in the
10 1:1/1:2 aspect ratio.

11 They felt going to 10:1 was going to
12 eliminate actual asbestos fibers in bundles that
13 met all the criteria. So that's why they did
14 that. They felt the 10:1 was going to -- what we
15 call "false negatives." Oh, it's negative for
16 asbestos, but it's false.

17 Q. And you said 10:1. Did you mean 5:1?

18 A. Well, they initially wanted 10:1.
19 That's why they went to 5:1 --

20 Q. I got it.

21 A. -- or stayed with 5:1 because most of
22 all these fragments were less than 5:1.

23 Q. Got it.

24 So if you have one of these asbestos
25 minerals and it's 5:1 or greater, it's asbestos?

1 A. 5:1 or greater. Has to have
2 significantly parallel sides. It can't be like,
3 you know, going out in a triangle. It has to have
4 the right chemistry.

5 So once 5:1 or greater, it also has to
6 be at least a half a micron long or longer. So
7 that's number one. You get by number one, then
8 you go and see if it meets number two. If it
9 meets number two, which is the chemistry, then you
10 see if it has the right crystalline structure.

11 Q. Is this counting criteria also in
12 peer-reviewed published scientific literature?

13 A. Yes. I have some published literature
14 myself that has the same criteria in it.

15 Q. And then you mentioned the second and
16 third steps. And I just want to go to Step 2 for
17 a second. It says chemistry. Is that how you
18 determine whether it's one of these six asbestos
19 minerals?

20 A. Yes.

21 Q. What are these images that we're
22 looking at here?

23 A. Well, you go -- this is the three
24 steps. Step 1, you have a bundle there. And does
25 it have parallel sides? It doesn't have to be

1 perfect parallel sides. Significantly parallel.

2 And the answer is yes.

3 Is the length at least 5 times greater
4 than the width? Yes. Is it greater than a half a
5 micron in length? No. Same -- at least a half a
6 micron? Yes.

7 Now we go to the chemistry. It's a
8 little hard to see. But if you start on the
9 left-hand side, that very first peak says that
10 this is a magnesium peak. And the way you get --
11 and the intensity or how high the magnesium peak
12 has to be at a certain length or height for it to
13 match -- and where we're going with this, this is
14 a chemistry for tremolite.

15 Then the next peak, that really high
16 one, is silicate. And then going to the next peak
17 is calcium. And the calcium peak is typically
18 lower than the magnesium peak for tremolite. The
19 very last peak is the copper grid because you get
20 static. So that's the chemistry.

21 So that means the intensity of the
22 X-rays coming off the sample for this, silicate is
23 the most. The secondmost is magnesium. And the
24 thirdmost is calcium. And if you have that ratio,
25 you know beyond a shadow of a doubt that this is,

1 in fact, tremolite asbestos because there's no
2 other mineral out there that has that type of
3 chemistry and that type of structure.

4 Q. Do they have situations where you can
5 get literal bottles of asbestos fiber from -- from
6 this organization to compare to the fibers that
7 you're testing?

8 A. Yes. We -- we purchase those. And to
9 have accreditation for doing this work, you have
10 to have these standards in them.

11 So the standard means that you can
12 make a sample with that, put it in the electron
13 microscope, transmission electron microscope. And
14 because it is standard of the National Institutes
15 of Standards and Technology, you can look at it as
16 we keep those for new electron microscopes -- Not
17 microscopes. They don't know what they're doing
18 unless you run it -- microscopists to train them
19 on what it should look like, what the chemistry
20 should look like.

21 And then we have those -- then we have
22 those, what -- the "Spectras," we call them, the
23 EDXA, up in the different TEM rooms so they can
24 see it. Then we have that for every -- all the
25 important -- all -- all the asbestos types that we

1 run into.

2 Q. Okay. These are some images that we
3 have marked as Exhibit 3324. Are these images you
4 took, and what are they?

5 A. These were from that NIST standard
6 that we have, and what I wanted to do is -- that
7 is known as asbestos, asbestiform. So it
8 shouldn't be any argument that these are asbestos.

9 So this is taken with the scanning
10 electron microscope. And you can see a
11 difference, that we get a lot of nice surface
12 features with this. Because this is just scanning
13 the surface and while the transmission electron
14 microscope is sort of like how an X-ray works.

15 Electrons come down, go through the
16 sample. Some electrons are stopped. Some are
17 allowed to pass through. So that gives you the
18 contrast. This only looks at the surface feature.
19 So -- so it's two different types. And you can
20 see how well the surfaces are, so every one of
21 these is asbestos.

22 Q. And these came out of that NIST
23 standard container, and you took these
24 photographs?

25 A. I did.

1 Q. Okay. Are these tremolite asbestos?
2 What kind of asbestos are these?

3 A. I think these are all tremolite.

4 Q. Have you also reviewed and relied on
5 peer-reviewed published literature using
6 transmission electron microscopy, TEM microscopes,
7 to look at asbestos in talc?

8 A. Yeah. This is a 1975 paper that --
9 probably one of the first publications out that
10 showed that cosmetic talcs had asbestos in them.

11 Q. I think we've covered this.

12 Just very quickly, if we can, what is
13 a count sheet, and what does that have to do with
14 testing for asbestos?

15 A. Well, this is a count sheet for the
16 transmission electron microscope, and as -- if you
17 look over to the left, these are the sample grids.
18 This is what goes into -- the sample goes on, and
19 then it goes into the electron microscope.

20 Now, the electron microscopes probably
21 weigh five to as high as 7,000 pounds, anywhere
22 from 9 feet, 8 feet tall. The biggest sample you
23 can put in there is a copper disc that's only
24 3 millimeters in diameter.

25 And in that 3 millimeters, they etch

1 out 100 openings. And if you look kind of close,
2 you can see that on the right-hand -- on the
3 vertical sides, we have 1 through 10. And then on
4 the parallel sides, we have A through J, I think
5 it is. So when we find a structure, we can
6 pinpoint it on the grid.

7 Say we got -- you know, A2 has a
8 tremolite fiber in it. So when we do QC or we
9 want to go back and look at it, we can easily find
10 it.

11 Q. What is this big picture over here of?
12 What is that?

13 A. That is a transmission electron
14 microscope. That's not one of ours. That's a
15 Philips. That's one of Mark Bailey's. And that's
16 the instrument that takes that little grid thing.

17 Q. These are some of the standards and
18 the protocol -- counting protocols for asbestos.
19 When you look at asbestos in talc, do you follow
20 every single one of these, some of them? Tell us
21 about that.

22 A. Well, some of them. And the top one,
23 EPA, AHERA. That's one. The ISO 10312 is an
24 ambient air one, but it has the exact same
25 requirement as EPA.

1 Q. Yeah.

2 A. ASTM 5755, the surface dust fiber
3 count method, that's the one I shepherd through.
4 That has the exact same counting rules and so on.

5 Down at the bottom, we don't follow
6 the J&J one. And the soil method one, again, the
7 same counting rules. And the settled dust one,
8 the same counting rules.

9 Q. I asked a bad question. I know you
10 don't follow all these, but when you find a fiber
11 that you identify as asbestos, does it qualify as
12 asbestos under every single one of these?

13 A. Yes.

14 Q. Have you seen Johnson & Johnson's own
15 internal definition of asbestos?

16 A. I have.

17 Q. Okay. And is fibrous tremolite a form
18 of asbestos?

19 A. Yes, it is.

20 Q. Is it easy to tell the difference
21 between fibrous talc and asbestos using these
22 diffraction patterns?

23 A. Yes. Fibrous talc, anthophyllite
24 asbestos has the exact same chemistry. And it
25 looks pretty close in the morphology. But the

1 crystalline structure for the fibrous talc is this
2 little pentagon-type -- see the dots? That's --
3 and those dots are from the diffraction of the
4 electron beams going through the crystal.

5 Then over here in anthophyllite, you
6 see that it's completely different from the
7 fibrous talc. That's how we tell the difference
8 between them.

9 Q. We've got XRD, PLM and TEM. Can you
10 briefly -- and, again, I've got limited time --
11 tell us the difference between these as far as
12 sensitivity?

13 A. The one on the far left, X-ray
14 diffraction, XRD, uses X-rays to determine what
15 kind of mineral you have. It has a very poor
16 detection limit. It can't tell you if it's
17 fibrous or not.

18 It's not a microscope. We don't use
19 it. We don't even have it in our lab. It's -- to
20 me, it's a waste of time. Because if you find
21 that it's positive for, say, tremolite, you still
22 have to go and do the next steps. And the
23 polarized light microscope.

24 The polarized light microscope, when I
25 first got involved in this, I thought that was

1 useless because it didn't have the resolution.
2 However, after -- after doing this for years
3 and -- you know, scientists, if you're a good
4 scientist, I think, you go, "You know what? I was
5 wrong about that."

6 And then -- so it's an important part
7 of -- and it used polarized light, like polarized
8 sunglasses makes light go in a particular
9 direction that's refracted on a crystal, and you
10 can see different colors. And then, of course, we
11 have the transmission electron microscope.

12 Q. How -- can you give us a sense of,
13 like -- people know the microscope they have in
14 high school, sort of tabletop, looks kind of like
15 the one in the middle but less sophisticated.

16 A. It's a -- it's a little bit more
17 sophisticated.

18 Q. How much more powerful is a TEM
19 microscope than that little microscope we're used
20 to from high school?

21 A. The highest magnification you can get
22 on a polarized light microscope and still use is
23 about 600 times, meaning -- you know; where TEM,
24 we use it, typically, at its lowest magnification
25 for -- for asbestos, which is about 20,000 times.

1 So if you were to take a basketball and magnify it
2 by 20,000 times, your basketball would be 5 miles
3 in diameter.

4 The reason that the transmission
5 electron microscope is much more powerful in
6 magnification is because what you're using to
7 image is electrons. I can have 10 million
8 electrons sitting on my thumb, you can never see
9 it.

10 Light, on the other hand, is a
11 wavelength where it's just one wave of, you know,
12 electromagnetic radiation or whatever you'd like
13 to call it.

14 So if I have -- if this is my asbestos
15 fiber, and my wavelength is this big, I can't see
16 it in the polarized light microscope.

17 Now, if my wavelength was only this
18 big -- say, this was a lot bigger -- then, yes, I
19 can see it. The transmission electron microscope,
20 because you have infinitely small electrons, we --
21 when we had our Raleigh lab, we had one there that
22 you can increase the magnification to 6 million
23 times to use for semiconductors. You could
24 actually see the atom lattices with it, because
25 the electrons are infinitely small. The -- the

1 smaller -- what you're using to look at something,
2 the better -- you call it "resolution."

3 Q. Is there also something called
4 "concentration method" or the "heavy liquid
5 separation method"?

6 A. Yes.

7 Q. What is that?

8 A. This is sample preparation. You can
9 have the most expensive transmission electron
10 microscope in the world that does everything. If
11 you don't prepare the sample right, you cannot get
12 good results. It's sort of the old saying with
13 computers when they first came out: Junk in/junk
14 out. So it's all about sample preparation.

15 Heavy liquid separation allows us to
16 take a sample and concentrate what we don't want
17 to see. So -- and this is a method that's been
18 around for hundreds of years. You go back to the
19 California gold rush, and they're doing the pan to
20 find the gold. Well, whenever you watch them,
21 they've got water in, and they're doing it real
22 soft. And then they pour it, put some more water
23 in it, because the dirt and soil in there, it's
24 easily resuspended in the water because it has a
25 low density.

1 The gold, on the other hand, has a
2 density, I think it's 14.8 grams for a little
3 cube, where the soil is like 2.6.

4 So you're getting the soil out. You
5 get the soil out, and you keep doing that. And
6 then you look in there and you're going to have
7 small pebbles, and hopefully you've got some that
8 are gold. That's heavy liquid density separation.

9 Another example would be, you know, I
10 want to -- I want to find the needles in the
11 haystack. That old saying, "like looking for
12 needles in a haystack."

13 Well, if you take that haystack and
14 put it in a big old thing of water and shake it
15 up, the hay has less density than the water for a
16 while and it'll all float to the top. All the
17 needles go to the bottom. And if you have a way
18 to sample the bottom, you can get the needles.

19 We do that with the talc. We use a
20 heavy liquid density material that'll cause the
21 talc to float and the asbestos bundles and stuff
22 to go to the bottom.

23 Q. Do we have some slides to sort of walk
24 us through that procedure?

25 A. Yes. So, here's a test tube. You're

1 putting in the heavy liquid density liquid. And
2 this liquid -- typically water has a density of
3 about 1.2 grams for a cube. This material that
4 we're putting in there is the liquid. It has a
5 density of 2.81. The talc has a density of 2.6 --
6 2.65 to 2.7. So it's going to float, just like
7 the hay, because it has a less density.

8 The asbestos we're looking for here --
9 tremolite, actinolite, anthophyllite -- has
10 densities of 3.0 to 3.3. They're all going to go
11 to the bottom.

12 Now, if we were to do all this and
13 shake it up and sit it out on the counter for
14 about a week, it slowly will all separate. Or you
15 put it in a centrifuge and get it out a couple
16 hours later. Because the force of that will push
17 the stuff that is heavier to the bottom and the
18 things that float to the top.

19 So here we have the -- say the blue is
20 the -- the -- the amphibole asbestos, and we'll
21 just say it is tremolite, and all at the top.

22 Now, we take that -- take that
23 container and we stick the bottom in liquid
24 nitrogen, which is at a temperature of minus
25 260 degrees Fahrenheit, I believe. It

1 flash-freezes that tip.

2 We cut that off with this
3 guillotine-like apparatus, and that's what we then
4 prepare for the sampling. So -- and it increases
5 our detection limit tremendously.

6 Q. The jury has heard a little bit about
7 Dr. Alice Blount. Was -- was the heavy liquid
8 density separation method something -- something
9 she published on in 1991?

10 A. She worked on that and used it exactly
11 what we just talked about, used it to show that
12 you could separate out tremolite from cosmetic
13 talcs using that protocol, which we use now.

14 Q. Have you also reviewed Johnson &
15 Johnson for internal documents going back to the
16 '70s about this concentration method?

17 A. Yes. I have all those documents. And
18 when I saw them, I saw that it was possible to
19 even -- chrysotile.

20 Johnson & Johnson hired the Colorado
21 School of Mines to develop a method called -- they
22 called it the -- you know? The presence of --
23 "preconcentration," they called it.

24 So it took them a year from start to
25 finish, and they basically developed what Alice

1 Blount published and what we were using and had it
2 all signed off, 1973. And they had a method to do
3 exactly what we'd been doing and what Alice Blount
4 published.

5 Q. Have you also reviewed Johnson &
6 Johnson documents in which they hired Dartmouth
7 University to use concentration techniques?

8 A. Well, it's actually Windsor Mineral
9 hired them. But -- so, yeah. But they're all
10 connected.

11 Yes. They did the exact same thing.
12 They developed -- in 1974 they developed this
13 method.

14 Q. Windsor Minerals is the division of
15 Johnson & Johnson that owned the talc mine in
16 Vermont. Do I have that right?

17 A. You have that right.

18 Q. Okay. And these are documents that
19 you've reviewed in preparation to testify. Fair?

20 A. Yeah. Dr. Reynolds of Dartmouth is
21 the scientist who developed it for them. And you
22 can see a lot of the similarity, except we didn't
23 use a rubber plug. That's not so easy.

24 And the heavy minerals, again, bottom;
25 talc at the top. And then they analyzed it and

1 showed that they could concentrate the asbestos in
2 the Vermont talc. I think it was Argonaut, maybe.

3 And here's a photograph from 1974
4 showing anthophyllite asbestos, the talc, and --
5 so they were successful in developing that method.

6 Q. I want to just briefly touch on this
7 concept with the jury. Because they already heard
8 a little bit about -- about how you can kind of
9 have a low weight percentage of asbestos in a talc
10 product and still have millions or billions of
11 asbestos fibers in the bottle.

12 Can you explain that to the jury
13 briefly --

14 A. Sure.

15 Q. -- in a way that we can understand?

16 A. I have -- I always have trouble with
17 "briefly."

18 Q. I know. I'm running out of time.

19 A. I know. I know.

20 The weight of a single asbestos fiber,
21 and even a good-sized one, is measured in
22 picograms. Milligram -- micrograms is a millionth
23 of a gram. The next step up is nanograms. That's
24 a billionth of a gram. 1 fiber, a billionth of a
25 gram. A picogram is another thousand times up.

1 That's a trillionth of a gram.

2 So how many fibers do you think you
3 can have in your hand and hardly weigh anything?
4 And that's the whole fundamental problem because
5 they're so small.

6 You could have a hundred fibers per cc
7 in this air, which is an extraordinary amount of
8 asbestos fibers, anywhere. You hardly ever see
9 things that high. You could never see it.
10 They're so small.

11 If they were big, we wouldn't have
12 this issue. That's why you can have a ton and
13 even say, "Oh, it's only trace amounts."

14 Well, you know, what's an ant weigh?
15 How many ants could you have in a -- you know, in
16 a couple grams? You know, a couple hundred?

17 Well, that -- you know, they -- if you
18 measure all the sand that they pile around, the
19 ants would be -- and what that would weigh, it's
20 the ants would be at trace levels. So, you know,
21 there's a few thousand in there. So that's the
22 same thing.

23 That's why you can have so many in --
24 in a -- in cosmetic talc but still be called
25 "trace."

1 Q. What is this -- what is this
2 calculation here?

3 A. Well, this was a calculation where we
4 found 63,800 asbestos structures in 1 gram --
5 1 gram of the talcum powder.

6 Now, you don't get talcum powder
7 samples in 1 gram. Usually, it's anywhere from
8 1.5 ounces to 9 ounces. And then you get the
9 larger containers. I'm dealing with J&J ones,
10 15 ounces and then they had a 22-ounce.

11 Every ounce has 28.35 grams in it. So
12 if you have a 9-ounce bottle times 28.35, that'll
13 give you all the grams in there.

14 And if you then multiply how many
15 grams in an ounce, you'll get 16,278,000. But
16 just round it off to 16 million asbestos
17 structures in one 9-ounce container of Johnson
18 Baby Powder. If you find at least 63,800. We've
19 found that much. We have found right at our
20 detection limit of seven to 8,000 to 10,000.

21 And we have found as high as -- I
22 think our highest one is approximately 15 million
23 asbestos structures per gram, now. Not in the
24 whole container.

25 Q. What if you -- and I don't know if you

1 can do this calculation sort of off the top of
2 your head.

3 But what if you find, I don't know, 5,
4 8, 16 -- well, let me just ask you.

5 You're aware of the TM724 method that
6 Johnson & Johnson had where they could find
7 16 asbestos fibers in a microscopic sample of the
8 talc and report that it wasn't there?

9 A. I've seen that, yes.

10 Q. Help us understand how many asbestos
11 fibers there is in a bottle if you find just a
12 handful in a microscopic sample, whatever unit you
13 want to use.

14 A. Well, 63 million would be
15 approximately 7 -- 5 to 7 asbestos fibers that
16 we'd find in a little, microscopic amount of the
17 sample. We're only looking at a very small amount
18 of the entire sample.

19 Q. Okay.

20 A. You know? And so it's -- in order to
21 get up into the millions per sample, it's still a
22 really tiny amount that we're looking at.

23 Q. Let's look at some of your reports on
24 Johnson's Baby Powder.

25 Is this one of your reports on a

1 sample from 1978?

2 A. That's one of the historic -- that's
3 one of the samples that we, yeah, got in 1978,
4 Johnson & Johnson. In 1978, that was with their
5 Vermont mine. So that's one we analyzed.

6 Q. Have you analyzed talc from all of the
7 sources that Johnson & Johnson used in its baby
8 powder that it sold in this country?

9 A. Yes.

10 Q. Okay. Have you analyzed Johnson's
11 Baby Powder with XRD, PLM, and TEM and TEM with
12 the concentration method?

13 A. We did run an analysis of XRD. Now, I
14 said it was useless. But when we did the
15 analysis, I wanted to compare it to the different
16 methods to see which ones were the worst and which
17 ones were the best, and that's the only time we've
18 used it.

19 And the detection limit, the XRD, we
20 think it was 72 samples. The XRD showed that only
21 1 of those 72 had -- was positive for asbestos.

22 The PLM analysis is when we started
23 using it approximately showed that 30 or -- 20 or
24 30 percent were positive for asbestos. And the
25 TEM showed that there was 75 percent positive.

1 So we only use PLM and TEM now, and
2 I've never used XRD again.

3 Q. This is one of your reports from
4 Johnson & Johnson's Baby Powder from the 1960s?

5 A. Yes.

6 Q. I just want to walk through some of
7 the images so the jury can see what you're
8 finding. We don't have to talk long about --
9 well, I can just kind of scroll through them and
10 you -- why don't you just tell us what we're
11 looking at?

12 A. Well, this is a -- a tremolite, I
13 believe, bundle.

14 Q. Okay.

15 A. Here's another one. Again, a bundle,
16 tremolite.

17 This one is a, I believe, bundle
18 of .5 microns. It could be a single fiber. What
19 I -- you really need to be on the microscope when
20 you're doing this.

21 Q. Right.

22 A. Because somebody will look it up and,
23 go, "No. You're wrong."

24 Here's a definite bundle, another
25 tremolite. And you can see on the left-hand side

1 that there really is multiple fibril structures
2 there. So you have to have at least two of them
3 touching each other in order to be classified as a
4 bundle.

5 This one's pretty close to being a
6 single fiber again. And you can see that it has
7 substantially parallel sides. And these other
8 things you're seeing in there is talc --
9 typically, talc flakes.

10 Q. Okay. There are some other ones that
11 are sort of lower-aspect ratio. What are we
12 looking at here?

13 A. This, again, is tremolite and, again,
14 tremolite. This has a pretty large aspect ratio.
15 This one is actually 20:1, and it's a bundle.

16 Q. I think this one says anthophyllite.

17 A. Is it? I've got to get my glasses.

18 Q. Okay.

19 A. Thank you for correcting that.

20 Q. No worries.

21 Have you found tremolite and other
22 asbestos fibers over and over --

23 A. Yes.

24 Q. -- in Johnson's Baby Powder?

25 A. Now, this -- if you go back to this

1 previous one here, this one is a bundle that you
2 can see some of the individual really well, some
3 of the individual fibrils in there.

4 But the problem in TEM, if you have
5 thick bundles like this, the electrons can't get
6 through it all. So you get an image of it. It
7 would be like taking an X-ray of your hand, but
8 people piled up about ten hands on top of your one
9 hand, then tried to take an X-ray of it. You're
10 not going to see anything.

11 That's what happens with these, and
12 that's why they developed the counting rules like
13 they did that had to be at least 5:1. So they
14 don't allow you to measure -- try to measure
15 individual fibers. You have to measure the whole
16 length and the whole width.

17 Q. Have you also analyzed Johnson &
18 Johnson's talc from the 1970s?

19 A. Yes, sir.

20 Q. Okay. What are we looking at here?
21 Why does this look different from some of the
22 other images?

23 A. This is a polarized light microscope
24 analysis in which we now have light coming through
25 from the bottom up. And the light going through

1 there, because it's scattered, will make it
2 through.

3 This is called -- we're looking at
4 what the speed of the light is through there. And
5 the way you do that is on the geometry of it,
6 and it's -- so one -- one of the angles coming
7 through there is slower than the other.

8 If we go on to the next one, another
9 TEM from that time, again, we're seeing the same
10 stuff over and over when the sample is positive.
11 So go back to that one. No, no, no. One more.

12 Now, this is actinolite, tremolite,
13 because the light comes up through the bottom of
14 the crystal and then goes in two directions, you
15 can actually see individual fibrils from -- from
16 the -- you know, like the lines go there. Those
17 are individual structures.

18 So to get the aspect ratio of this
19 type of analysis, you do measure the individual
20 fibers, both length and width, and that's going to
21 be over 20:1, 30:1, 40:1. What you can't do is
22 use this type of criteria for the TEM.

23 Q. Okay. I'm just going to scroll
24 through these because I'm going to run out of time
25 unless I start going faster.

1 So can you just kind of narrate on --
2 well, let me ask you a question.

3 Have you found tremolite over and over
4 and over in both the bottles and the ore of
5 Johnson's Baby Powder from the 1970s?

6 A. Yes. The three types of asbestos we
7 see is anthophyllite asbestos; tremolite; and from
8 time to time, we see what we -- we call it
9 "solid solution series of tremolite." It's
10 actinolite, and then we go off and see, you know,
11 richterite and winchite, where all the -- if the
12 tremolite is the main mineral, then these are all
13 the families of tremolite.

14 Because when they were formed hundreds
15 of millions of years ago -- it's like cooking.
16 And tremolite has its recipe, but you have a
17 couple of other elements in there. Like, a little
18 iron ore or a little potassium ore or whatever
19 gets incorporate in, and then we call it
20 richterite and winchite just to differentiate
21 them.

22 Q. Now, we've got your 1980s report on
23 Johnson's Baby Powder. Are you still finding
24 actinolite, tremolites repeatedly, including
25 anthophyllite in the 1980s samples?

1 A. Yes. Again, with all the samples that
2 we have analyzed, approximately 75 percent we have
3 found asbestos in them.

4 Q. 1990s, do you continue finding the
5 same thing, tremolite, anthophyllite and other --
6 and asbestos minerals in Johnson's Baby Powder?

7 A. Yes.

8 Q. And what about for the 2000s,
9 tremolite --

10 A. The same thing.

11 Q. Okay. Have -- we've got a chart here.
12 I know it's not all of the containers of Johnson's
13 Baby Powder that you've tested, and it makes me
14 dizzy, but I just want to scroll through so people
15 can get a sense. What are we looking at here?

16 A. We're looking at not every container,
17 but most of the containers of Johnson's Baby
18 Powder and Shower to Shower, both from samples
19 that we acquired and samples that were given to us
20 by Johnson & Johnson from the three mines that
21 cover the United States.

22 Then the mines were, say,
23 South America, which is the Brazilian mine; the
24 Korean one that was in play for a while for
25 Southeast Asia; the two mines in India that

1 service that part of the country; and Australia.

2 Q. What does this total U.S. containers
3 and then all total containers percentage tell us
4 at the end? I don't know if you can read it.

5 A. All total containers. I think that's
6 a hundred -- 146, actually. And out of that 146,
7 79 percent were positive for asbestos.

8 Q. Have you found tremolite over and over
9 and over and over in Johnson's Baby Powder?

10 A. Tremolite, anthophyllite, richterite
11 we have, and actinolite.

12 Q. Are you familiar with the Battelle
13 lab?

14 A. Yes.

15 Q. Have -- have you looked at the
16 historical talc testing that Battelle did for
17 Johnson & Johnson on its talc?

18 A. Yes.

19 Q. What does say it here, and have you
20 confirmed that that's accurate?

21 A. 153 tests where they found tremolite
22 in 1968.

23 Q. What are we looking at here?

24 A. So this is their testing, Battelle
25 Memorial Labs, and you can see the big red arrow

1 showing tremolite. And these were the results.

2 Q. Have you also compared the asbestos
3 that you find in Johnson's Baby Powder to
4 traditional asbestos-added products?

5 A. Yes. But specifically, did the
6 asbestos-added products, like chrysotile, did they
7 have an accessory mineral that we're seeing in the
8 talc? And we are, and it does. And it shows the
9 same -- the same everything.

10 Q. I've got a couple examples here.
11 We've got brake linings. What is wall mud?

12 A. Bondex. Uh-huh.

13 Q. The joint compound that goes on walls?

14 A. That's a joint -- that's a joint
15 compound. Bendix are brake shoes, brake linings.
16 And then we have the Johnson's Baby Powder.

17 Q. Have you -- have other labs checked,
18 confirmed your findings of asbestos in Johnson's
19 Baby Powder?

20 A. Yes.

21 Q. What are we looking at here?

22 A. J3 Labs, which is another lab with
23 that -- they ran a series of samples. And then we
24 ran the same samples, and we got within 90 percent
25 of each other.

1 Q. Are these just some images from
2 J3 Labs running the same samples on Johnson's Baby
3 Powder as you -- your lab and finding the same
4 thing?

5 A. Yes.

6 Q. Have other labs found asbestos in
7 Johnson & Johnson's talc?

8 A. Yes. Every one of those. FDA --
9 because they sent it out to a contract lab, but
10 they did find asbestos in some of the samples,
11 even with the poor analytical sensitivity they
12 were using.

13 Q. Okay. Have you looked into what
14 Mr. Perry's exposures to asbestos from Johnson's
15 Baby Powder have been?

16 A. Yes.

17 Q. Is that something you've studied where
18 you performed more practice studies with Johnson's
19 Baby Powder?

20 A. Yes.

21 Q. What are we looking at here?

22 A. Well, what we're looking at on the far
23 side is what we call "background." It's how much
24 asbestos fibers are floating around in the air.
25 You may hear that, "Oh, asbestos is everywhere,

1 and we're always breathing some, but it doesn't
2 hurt you." Well, that's just foolish. Asbestos
3 is heavier than air. It does not describe the law
4 of gravity.

5 Now, you could have it go a long
6 distance, depending on the wind currents,
7 et cetera, like a volcano that puts the ash up in
8 the air, say, in South America, but it's showing
9 up in the United States. Well, after a while,
10 there's no more ash going up from the volcano.
11 That ash falls on the ground. That's what happens
12 with asbestos.

13 But in order to say what a background
14 is that we can compare something to, we use a
15 number of .00005 fibers per cc, and that comes
16 from the ATSDR, the Agency for Toxic Substances
17 Disease -- what's that last one?

18 Q. Registry.

19 A. Thank you. Too many acronyms.

20 So we go across. Anderson did a
21 study, a published study, in which they -- their
22 little number was 0.004 fibers per cc. Now, it
23 was published, but there's been a lot of criticism
24 on that report for, in my opinion and others',
25 making it so that they have the lowest

1 concentration.

2 And then we have -- Johnson & Johnson
3 has a -- did a calculation, an estimate, of what
4 an exposure would be, say, for a person diapering.
5 And they came up with a concentration of -- and
6 this was a mathematical -- 4.5 fibers per cc.

7 And then they had an estimate of what
8 the concentration would be on the baby itself.
9 Because if you're using talcum powder that has
10 asbestos in it and you put it on a baby, that baby
11 is going to inhale that talcum powder. You
12 can't -- because it gets up in the air so easy.
13 They came up with 0.18 fibers per cc.

14 And then Gordon -- Dr. Gordon and
15 others published a paper in 2014 where they did a
16 work practice study, and they showed an average
17 concentration of 1.9 fibers per cc.

18 Q. You mentioned that Anderson 2016,
19 the .004 fibers per cc level, had been criticized.
20 Very quickly, can you tell us why?

21 A. Well, when they took the air samples,
22 they added what they call an "impinger" on top of
23 the air samples. It's a -- well, they call it a
24 "cyclone." It's a device that -- and here's the
25 cassettes. And the top is not taking off on them.

1 They put a device up there that remove
2 particles before it got into the -- into the
3 canister. And that's not in the protocols.
4 Nobody has ever suggested doing that with the air
5 samples. So you don't know what you really got
6 because you're removing stuff.

7 And they also put pressure on the
8 laboratory they were using to change their opinion
9 that it was asbestos to predetermines.

10 Q. And so --

11 A. Even with that, it's still 0.004.

12 Q. Given your -- your -- understanding
13 you have some concerns with Anderson, are these
14 some of the general levels that we can expect or
15 at least the best data we have on the levels that
16 Mr. Perry would have been exposed to at times
17 during his 40-plus years of daily use of Johnson's
18 Baby Powder?

19 A. Yes. You're going to have sometimes
20 in that range if you were measuring it. Sometimes
21 it'll be higher than what you're seeing, depending
22 on what's in the container. And sometimes, if you
23 were taking an air sample, you might -- the
24 concentration is such that you can't detect it
25 even though the person is still being exposed.

1 And -- and the reason why is we have
2 not been able to develop an air sampling system
3 that's as efficient as the human lungs are in
4 filtering out things.

5 Those air cassettes are about this
6 big. And you've got a surface area about this big
7 that can collect the particles and stuff.

8 Now, if you take the human's lungs and
9 opened it up and spread out the surface area of
10 what's in this -- each side, the inside area that
11 does the filtering and where things come in, et
12 cetera, would be the size of a tennis court versus
13 something this big.

14 So I know at certain concentrations we
15 would be very fortunate to find something because
16 we have yet to come up with how do we duplicate
17 that type of filtering system. The human lungs
18 are incredibly good filtering systems.

19 Q. One of your areas of expertise is
20 tissue digestion. Have you published on that in
21 the peer-reviewed scientific literature?

22 A. Yes. This was a paper that was
23 published two or three years ago. It has our
24 initial work in it from the heavy liquid density
25 separation showing the tremolite and also the

1 tissue analysis from these individuals that had
2 ovarian cancer.

3 And we were able to see the same
4 ingredients that were in the Johnson's Baby
5 Powder: talc, asbestos fibers, and sometimes
6 aluminum silicates.

7 So -- and they had absolutely no other
8 exposure to anything. I mean, they're -- the --
9 you know, they didn't work on cars. They didn't
10 work in factories and everything. So their only
11 exposure to asbestos was from the cosmetic
12 Johnson's Baby Powder.

13 Q. The left-hand column, is that this
14 NIST standard for tremolite asbestos? I know it's
15 hard to see, but...

16 A. Yes. It is.

17 Q. Okay. And then the middle column is
18 tremolite asbestos found in Johnson's Baby Powder?

19 A. That is correct.

20 Q. And then what's the right-hand column?

21 A. That is tremolite found in tissue
22 samples. And you can see they all look the same.

23 Q. What are we looking at here?

24 A. These are known as "tissue blocks" --
25 this is Michael's tissue -- where they do biopsies

1 to see what's gone wrong.

2 So they take it out and then they fix
3 it in formaldehyde, and then they put it in a hot
4 liquid wax block. So the wax will penetrate into
5 the tissue blocks, and when it hardens, that gives
6 it support so that you can slice it. Otherwise --
7 it's almost like putting something in a clamp and
8 you're going to file it and it doesn't move
9 around.

10 Because when they take pathology
11 slides, meaning they cut the tissue and put it on
12 a glass slide, that tissue thickness is about
13 5 microns.

14 So we received these, and you can see
15 two different colors up there. You can see the
16 pink, which is lung tissue that does not have
17 tumor. And if you go to the ones that have real
18 dark areas, that's the mesothelioma tumor in
19 there.

20 And you don't want to analyze tumor
21 from lungs for asbestos. Obviously, you want to
22 analyze it if you're a pathologist so you can tell
23 what kind it is.

24 But tumor tissue is new tissue, and
25 this is new tissue that has formed when a person

1 is no longer -- usually no longer is being exposed
2 to talcum powder. You want the tissue that's been
3 there for a while.

4 So what we do is we took half of the
5 pink areas across the top, and then one of -- one
6 of the -- one, two, three, four -- the fifth one,
7 you can see on the right side there is some pink
8 tissue. That's what we cut out to analyze.

9 And then -- and the last one is what
10 in the middle is pink. So we just wanted
11 parenchyma, or lung tissue, with no tumor in it.

12 Q. Okay. I got a 15-minute warning, so I
13 got to go fast.

14 Can you tell us how you do this
15 procedure? And just walk us through it.

16 A. The first thing we do is take the
17 pieces, and we put them through a type of xylene
18 or another chemical to wash out all the talc --
19 excuse me -- washout all the -- all the wax.

20 Have to do that five or six times.
21 After we do that, we let it dry. We weigh it.
22 And then we put it into a -- essentially, a bleach
23 material, but a lot more -- a lot more high-power
24 than what you put in, you know, with the whites.

25 Once we do that, we dissolve all the

1 tissue out as much as we can. We centrifuge it
2 and try to get what fibers and whatnot in the
3 bottom, put it on a filter, and put it in the
4 microscope, one of these grid things.

5 Q. What are we looking at here?

6 A. This is the analysis of 12 particles
7 in the sample. What we found in here was
8 tremolite, asbestos and winchite asbestos, which
9 is a form of tremolite. And then we found all
10 these talc particles.

11 Q. Is this from Michael's body?

12 A. This is his lung tissue, about a
13 tenth -- less than a gram of the lung tissue. So
14 we found what we would expect in -- in there for
15 somebody who had been exposed to talc.

16 Q. This is one of those images from the
17 NIST tremolite asbestos standard that we looked at
18 before. This is one of the images from tremolite
19 in Johnson's Baby Powder that we looked at before.

20 A. In his lung.

21 Q. And that's his lung, right?

22 A. Right.

23 Q. Can you tell us whether or not the
24 tremolite in Michael Perry's lung is consistent
25 with what you found in Johnson's Baby Powder?

1 A. It is.

2 Q. Is it also consistent with Johnson &
3 Johnson's own internal documents from decades ago
4 that said when you find tremolite in talc in
5 people's lungs with mesothelioma, it's a
6 fingerprint for exposure to asbestos?

7 A. Yes.

8 MR. ADAMS: I think we have five
9 minutes, give or take? Six or seven.

10 Okay.

11 BY MR. ADAMS:

12 Q. Are you familiar with Johnson &
13 Johnson's stack of testing that says "nondetect"?

14 A. Yes.

15 Q. Why -- give me a summary, in case I
16 run out of time. Why are there so many
17 nondetects?

18 A. Because of the method they were using.

19 Q. Well, let me ask the first question.

20 Have you seen a chart detailing over
21 1,000 examples of samples of Johnson's Baby Powder
22 indicating asbestos in talc?

23 A. I've seen that many showing no
24 asbestos.

25 Q. Have you also -- I want to get to the

1 no asbestos in a second.

2 But there's a chart -- Decades of
3 Evidence chart that we put together from documents
4 showing over 1,000 samples evidencing asbestos in
5 Johnson's Baby Powder.

6 A. Yes. I've seen it.

7 Q. So it's not like there's just a bunch
8 of nondetects. There's a bunch of detects, too.
9 That's what I -- okay. All right.

10 Well, let's talk about the nondetects
11 for a second. Why are there so many nondetects?

12 A. Because their detection limit was so
13 poor. Meaning that in order for this -- in order
14 for them to find it, the sample would have to have
15 at least, in some cases, the minimum would be
16 5 million tremolite samples -- tremolite fibers in
17 bundles in 1 gram of the talcum powder.

18 But usually it's as high as
19 15 million. And out of the 135 samples that we
20 get -- or 45 samples, we have two that would meet
21 that criteria.

22 Q. What is the J4-1 method that we're
23 looking at and why is it inadequate to test to
24 find asbestos in talc?

25 A. Because they use X-ray diffraction

1 initially, and X-ray diffraction has a very poor
2 detection limit. The concentration of asbestos in
3 there, depending on the type, even the
4 state-of-the-art ones, for tremolite, it has to
5 have at least .1 percent. For anthophyllite, it's
6 between .2 and .4. For chrysotile, you're up into
7 half a percent that has to be there.

8 And the thing is, if it's positive,
9 then you have to do polarized light microscopy
10 analysis to verify its fibers. So if it's
11 negative, you just quit.

12 Q. So Johnson & Johnson with its J4-1
13 method used the weakest test there is. And if
14 they didn't see it, they stopped. Do I have that
15 right?

16 A. That's correct. You would say there's
17 no asbestos in there.

18 Now, nobody can ever say there's no
19 asbestos in there. Alls you can say is, "I have a
20 detection limit of this, and I didn't find it."

21 Because you can never say it's not in
22 there because unless you have a detection limit of
23 1, and so far there is no analytical instruments
24 in this world that has been able to achieve
25 something like that.

1 Q. Is it accurate that the vast majority
2 of nondetects in Johnson & Johnson's files are
3 where they used XRD and nothing else?

4 A. Correct.

5 Q. Have -- are you familiar with a White
6 Paper?

7 A. I am.

8 Q. Have scientists in the White Paper
9 criticized the XRD method for finding asbestos in
10 talcs?

11 A. Yes, they have.

12 Q. Did --

13 A. They didn't realize -- you know, they
14 didn't realize for a while that the XRD method was
15 very poor.

16 Q. Do they specifically mention Johnson &
17 Johnson's J4-1 method as -- in their criticisms?

18 A. Yes, they did.

19 Q. Did Johnson & Johnson's own internal
20 documents criticize XRD -- or let me withdraw
21 that.

22 Did Johnson & Johnson's own internal
23 documents have examples where they find asbestos
24 with TEM and don't with XRD?

25 A. Yes.

1 Q. What are we looking at here?

2 A. This was the -- this was the J4
3 method, where they sent spiked samples out to a
4 number of labs to see how they correlated with
5 each other. And only 1 out of 7 found the
6 tremolite in the spiked sample.

7 Q. And a spiked sample is where they
8 literally put asbestos into the talc, send it to
9 these labs, use J4-01, and only 1 of the 7 found
10 it?

11 A. Yeah, all the same concentration.

12 Q. TEM we've covered.

13 Have you seen internal Johnson &
14 Johnson documents from the 1970s where they were
15 concerned that the industry standard was going to
16 become TEM testing of talc?

17 A. Yeah. They didn't like it.

18 Q. What did they say?

19 A. Grave concern was expressed by the
20 meeting with the inclusion of TEM.

21 Q. So we covered the J4-1 XRD method,
22 right?

23 A. Yes.

24 Q. The Johnson & Johnson -- we already --
25 and we discussed this: Johnson & Johnson also had

1 a TEM protocol for the big microscope, right?

2 A. Correct.

3 Q. Okay. Why wasn't -- why wasn't
4 Johnson & Johnson's protocol for the big
5 microscope, the powerful one, adequate?

6 A. Because, one, their detection limit
7 was so poor. You know, their sample size that
8 they're putting on the grid is 9-millionths of a
9 gram. What we put on it -- what we start with
10 because we have heavy liquid density is
11 30 milligrams. So, you know, we have thousand --
12 it's many thousands of times better detection
13 limits.

14 If they have to have 15 million in a
15 gram to detect 1 fiber, we only have to have
16 between 7,000 of the 10,000 in a gram to detect
17 1 fiber. That's why we have so many positives and
18 they have so many negatives.

19 Q. Did they also require the detection of
20 five or more asbestos minerals of one variety;
21 otherwise, they could report it wasn't there?

22 A. Yeah. That -- they called it
23 "unquantifiable." Now, you had to have five.
24 Protocol is -- you know, if you go to ISO
25 protocol, they say detection limit is one; you

1 have to find one, but you had to have five of the
2 same thing.

3 If you found four tremolite, four
4 actinolite, four winchite, four chrysotile, and
5 they were all four, they would say, "That's
6 unquantifiable. You're just fine. You didn't
7 find five."

8 There's no -- absolutely zero reason
9 you have to find five other than -- well, you
10 know, my cynical side says, "other than to say
11 it's negative."

12 Q. Did Johnson & Johnson also limit the
13 time its analysts could look under the big
14 microscope?

15 A. One hour.

16 Q. Why is that a problem?

17 A. Because you're dealing with high
18 magnifications, and you have to -- you know, you
19 see a fiber, you have to then: Okay. What kind
20 of fiber is it? You know, is it talc? Is it
21 asbestos?

22 One hour for us would be looking at a
23 negative sample that didn't have much in it, just
24 to go through and make sure. That sample that --
25 on the analysis on the talc in those two, that

1 took many hours.

2 Q. In Johnson & Johnson's stack of
3 nondetects did they ever use the concentration
4 method even once?

5 A. No.

6 Q. Did they write down why?

7 A. No.

8 Q. Did Johnson & Johnson write down why
9 they didn't want to use the concentration method?

10 A. Oh, yes. It was too sensitive. It
11 puts it in words right there: We deliberately
12 have not included a concentration technique as we
13 felt it would not be in the worldwide company
14 interests to do this.

15 You can't sell it if you show asbestos
16 in it, I guess.

17 MR. ADAMS: Thank you for bearing with
18 me and answering my questions.

19 Pass the witness, Your Honor.

20 THE WITNESS: No problem.

21 THE COURT: All right. Before we go
22 to cross-examination, we'll take our
23 midafternoon break.

24 Ladies and gentlemen of the jury,
25 let's take our midafternoon break. Be back

1 at 3:30 or thereabouts. Everyone needs to
2 be refreshed.

3 (The jury exits the courtroom at
4 3:17 p.m.)

5 THE COURT: Okay. Ladies and
6 gentlemen, I have sad news to give you.
7 The courthouse will be closed tomorrow.
8 Richland County School District wants
9 schools to be closed tomorrow.

10 There is a flood warning, and there's
11 specific information about flood warning as
12 to the Congaree and other bodies of water
13 and rivers which are right around Columbia.

14 And so the Richland County Government
15 has closed the courthouse tomorrow. It
16 will open on Friday. That's what's going
17 to happen. And y'all try to take -- I want
18 to give you that at the break so you can
19 kind of plan out what you want to suggest
20 about how you proceed.

21 MS. BUENO: Thank you, Your Honor.

22 MS. McVEY: Thank you, Judge.

23 THE COURT: All right. Be at ease.

24 * * *

25 (Whereupon, there was a recess in the