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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	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
MICHAEL L. PERRY and	)	C/A NO. 2023-CP-40-04072
LONNIE L. LONG,	)	
	)	<i>In Re:</i>
Plaintiffs,	)	Asbestos Personal Injury Litigation
	)	Coordinated Docket
v.	)	
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS JOHNSON & JOHNSON, LLT MANAGEMENT, LLC, JOHNSON & JOHNSON HOLDCO (NA) INC., AND KENVUE, INC.'S MOTIONS FOR JNOV, NEW TRIAL ABSOLUTE BASED ON ERRORS OF LAW, NEW TRIAL ABSOLUTE BASED ON THE THIRTEENTH JUROR DOCTRINE, AND NEW TRIAL NISI REMITTITUR

Plaintiffs Michael Perry and Lonnie Long, by and through the undersigned counsel, oppose the motions for JNOV, New Trial Absolute, or New Trial *nisi remittitur* file by Defendants Johnson & Johnson; LLT Management, LLC; Johnson & Johnson Holdco (NA) Inc., and Kenvue, Inc. (collectively "J&J") and would respectfully show the Court that the motion should be denied, and that the jury's verdict should be upheld as well grounded in the evidentiary record and South Carolina law.

BACKGROUND

At 53-years young, Michael Perry was diagnosed with mesothelioma, a terminal cancer invariably caused by repeated exposure to asbestos. Michael and his husband Lonnie filed suit against multiple defendants, including J&J, alleging that his repeated exposure to the asbestos in their products contributed to the development of his mesothelioma. Three of Plaintiffs' causes of action were placed before the jury: negligence, strict liability, and fraudulent misrepresentation.

After five days of evidence from Plaintiffs and no case-in-chief from J&J, the jury returned a verdict in favor of Michael and Lonnie on their negligence and strict liability claims for a total of \$32,656,250 in compensatory damages. The jury found in favor of J&J on Plaintiffs' fraudulent misrepresentation claims. Simultaneously, the jury found, by clear and convincing evidence, that J&J's conduct was willful, wanton, and reckless; thus, Plaintiffs were entitled to punitive damages.

After hearing statements from counsel, the jury levied punitive damages against J&J in the amount of \$30 million. Once the jury was discharged, this Court permitted Plaintiffs to submit briefing on their successor liability claims related to Johnson & Johnson, Johnson & Johnson Holdco (NA), and Kenvue, Inc. for resolution of that issue by the Court, as requested by J&J. J&J then filed its multitudinous post-trial motion.

ARGUMENT

I. Legal Standards

A. JNOV

In ruling on a JNOV motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987). The court must deny the motion for JNOV when the evidence yields more than one inference, or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). The jury's verdict may not be overturned if *any evidence* sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

B. New Trial

A new trial is warranted only if the trial court determines that the verdict is contrary to the fair preponderance of the evidence. *See Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). Similarly, “[a] circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate.” *Brinkley v. South Carolina Dep’t. of Corrections*, 687 S.E.2d 54 (S.C. 2009) (citations omitted). “The jury’s determination of damages, however, is entitled to substantial deference. The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives.” *Id.* The decision to grant a new trial rests within the discretion of the court. *Id.* The Court of Appeals has stated when reviewing whether the trial court committed error in exercising that discretion, “we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party.” *Id.*; see also, *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). Here, that is Michael Perry and Lonnie Long.

C. The Thirteenth Juror Doctrine

“The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case.” *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). “Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed.” *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993); see also *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under “thirteenth juror doctrine,” the trial court may grant a new trial

if she believes the verdict is unsupported by evidence or if the verdict is inconsistent and reflects jury's confusion).

D. New Trial *Nisi Remittitur*

A new trial nisi remittitur may be granted “when the verdict indicates the jury was unduly liberal in determining damages.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). “A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.” *Id.*

“Compelling reasons must be given to justify invading the jury’s province by granting a new trial *nisi remittitur*.” *Proctor v. Dep’t of Health & Env’tl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). The consideration for a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Id.*

II. J&J is not entitled to JNOV

J&J contends that they are entitled to JNOV for a number of reasons. Each of J&J’s asserted reasons fail. Plaintiffs’ claims against LLT, Holdco, and Kenvue were necessitated because of Johnson & Johnson’s transfer of assets and liabilities amongst multiple shell companies in an attempt to duck, dodge, and evade liability. Because LLT, Holdco, and Kenvue are a part of the Johnson & Johnson enterprise, evidence related to Johnson & Johnson’s liability doubles as evidence regarding Holdco and Kenvue’s liability as they are successors-in-interest to the now non-existent Johnson & Johnson Consumer, Inc. Additionally, Plaintiffs, contrary to argument from J&J, met their burden on their strict liability-design defect claim. South Carolina law does not require Plaintiffs to demonstrate that J&J **intentionally designed Johnson’s Baby Powder to**

contain asbestos. To the contrary, J&J was aware of the danger associated with the use of its powder—given that it repeatedly tested positive for the presence of asbestos—and failed to take reasonable steps to correct it. *See Jolly v. General Electric Company*, 435 S.C. 607, 649, 869 S.E.2d 819, 843 (Ct. App. 2021). Third, as to Plaintiffs’ strict liability-failure to warn claim, J&J seemingly contends that Michael Perry’s own conduct in failing to read the labels on Johnson’s Baby Powder bottles absolves them of liability. It is undisputed, however, that Johnson’s Baby Powder bottles contained no warning labels. It is also undisputed that Michael Perry testified repeatedly at trial that had such warnings been present on the bottles of Johnson’s Baby Powder that he used, he would have read them, heeded such warnings, and not used the product. As such, Michael Perry cannot be at fault for not protecting himself against a danger he did not know about because of J&J’s failure to inform him that the talc used in its powder contained asbestos. Further, Plaintiffs’ evidence demonstrated that Michael Perry’s frequent and repeated use of Johnson’s Baby Powder contributed to the development of his mesothelioma and, because Michael Perry was entitled to recover on his claims against J&J, his husband Lonnie’s loss of consortium claim is likewise meritorious.

As to J&J’s remaining contentions, Plaintiffs presented substantial evidence on the successor liability issue. In the interest of brevity, Plaintiffs incorporate all arguments made in *Plaintiffs’ Trial Brief on Successor Liability of The Johnson & Johnson Defendants* as if fully stated herein.¹ There is no indication that the material evidence on the issue of successor liability would leave this Court with only one conclusion—that being that Kenvue and Holdco are not successors in interest to Johnson & Johnson Consumer Inc. Similarly, Plaintiffs’ evidence

¹ To be clear, J&J’s request that any finding related to successor liability is premature as the Court has not yet ruled on this issue.

supported the jury's finding that J&J acted with willful, wanton, and reckless disregard of Michael Perry's rights.

In short, J&J is not entitled to JNOV on any of the issues they have raised. As such, this motion should be denied in its entirety.

A. Liability of Holdco, LLT, and Kenvue.

In the interest of brevity, Plaintiffs incorporate their *Trial Brief on Successor Liability* as if fully stated herein. Plaintiffs have presented substantial evidence regarding Holdco and Kenvue's status as successors in interest to Johnson & Johnson Consumer Inc., making them liable for Michael Perry's injuries.

B. Plaintiffs met their burden of proof on their design defect claims.

J&J contends that Plaintiffs failed to prove their design defect claim because, they argue, "Johnson's Baby Powder was never designed to contain asbestos." See J&J Motion, at pg. 5. What J&J ignores is Plaintiffs' evidence that Johnson's Baby Powder was designed with talc, which J&J knew contained asbestos. As the Court of Appeals of South Carolina has recently acknowledged:

"A product can be defective because of a flaw in its design." *Madden v. Cox*, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985). "Liability for a design defect may be based on negligence, strict tort, or warranty." *Id.* "In an action based on strict tort or warranty, **plaintiff's case is complete when he has proved the product, as designed, was in a defective condition *unreasonably dangerous to the user when it left the control of the defendant, and the defect caused his injuries.***" *Id.* at 579–80, 328 S.E.2d at 112 (emphasis added). "Liability for negligence requires, in addition to the above, proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." *Id.* at 580, 328 S.E.2d at 112. "This burden may be met by showing that the manufacturer was aware of the danger and failed to take reasonable steps to correct it." *Id.*

Jolly v. General Electric Company, 435 S.C. 607, 648-49, 869 S.E.2d 819, 841-42 (Ct. App. 2021).

In 2010, the South Carolina Supreme Court held that the exclusive test in a products liability design case is the risk-utility test. *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (S.C.

2010). According to the Restatement (Third) of Torts: Products Liability §2(b), adopted by the Supreme Court in *Branham*:

A product ... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Branham, 390 S.C. at 223-24, 701 S.E.2d at 16 (quoting Restatement (Third) of Torts: Products Liability §2 (b) (1998)). J&J cites comment d to §2 which states, in part:

d. Design defects: general considerations. Whereas a manufacturing defect consists of a product unit's failure to meet the manufacturer's design specifications, **a product asserted to have a defective design meets the manufacturer's design specifications but raises the question whether the specifications themselves create unreasonable risks.**

Restatement (Third) of Torts: Products Liability §2, cmt. d (emphasis added). Missing from the case law and the sources on which the case law relied is the requirement that Plaintiff demonstrate that any manufacturer intentionally added asbestos to the product which ultimately harmed him. The focus instead should be, as the case law clarifies, that the specifications themselves create unreasonable risks.

It is undisputed that throughout Michael Perry's use of Johnson's Baby Powder, the specifications for the powder called for talc sourced from different mines. Plaintiffs' expert, Dr. William Longo, testified that he has analyzed talc from all of the sources that Johnson & Johnson used in its baby powder. (**Ex. 3**, TT 8/7/24, at 860:6-9). His test results showed the presence of asbestos in each of the mines utilized by J&J in its baby powder throughout time. When he tested the talc using XRD, 1 of 72 samples was positive for asbestos. (*Id.* at 860:19-21). When he tested the talc using PLM, 30% of the samples were positive for asbestos. (*Id.* at 860:22-24). When he tested the talc using TEM, 75% of the samples were positive for asbestos. (*Id.* at 860:24-25). He

confirmed that he found tremolite and other asbestos fibers over and over in Johnson's Baby Powder. (*Id.* at 862:21-23). Dr. Longo did not just find asbestos in the 1960s - he found it repeatedly in the 1970s, the 1980s, the 1990s, and the 2000s—all years in which Michael Perry was using Johnson's Baby Powder. (*Id.* at 865:3-866:10). He confirmed that he found tremolite asbestos, anthophyllite, richterite, and actinolite in Johnson's Baby Powder. (*Id.* at 867:8-11). And he was not the only scientist to do so. In fact, Battelle Memorial Labs also found tremolite asbestos in Johnson's Baby Powder 153 times. (*Id.* at 867:15-868:1). Even with "poor analytical sensitivity" the FDA's contract lab found asbestos in the talc used in Johnson & Johnson's Baby Powder. (*Id.* at 869:6-12). Johnson & Johnson, through its former corporate representative Dr. John Hopkins, admitted that there has never been a warning about asbestos on any Johnson & Johnson product and certainly by the early 1970s, Johnson & Johnson had numerous supports of the presence of tremolite in its Vermont and Italian talc ore. (**Ex. 2**, TT 8/6/24, at 594:9-595:15).

Dr. Hopkins further testified about several positive tests for asbestos in Johnson's Baby Powder throughout the decades that the talc powder was for sale. Specifically, Dr. Hopkins testified about the following test results on its talc powder:

- October 10, 1967: serpentine, .25 to 1.5 percent
- May 10, 1971: Colorado School of Mines found free nontalc "needles."
- May 14, 1971: Colorado School of Mines said that the nontalc needles were tremolite.
- July 7, 1971: Colorado School of Mines reported less than 1% of tremolite and actinolite in 6 of 7 J&J talc samples.
- July 29, 1971: J&J's Vermont talc has trace amounts of fibrous tremolite and actinolite.
- September 3, 1971: Less than 0.001% asbestos in medicated powder and chrysotile in J&J's Shower to Shower.

- October 27, 1972: McCrone confirms .5% tremolite in one J&J talc sample and .2 to .3% tremolite in a second J&J talc sample.
- July 1975: McCrone confirms four times that there is asbestos in the fines of J&J's cosmetic talc ore.
- November 1975: McCrone confirms six "fibers of asbestos" and calls them amphibole in J&J's cosmetic talc.

(*Id.* at 562:14-565:24).

The jury had this evidence and more in front of them when considering Plaintiffs' strict liability—design defect claim. Plaintiffs were not required to demonstrate that J&J, like brake manufacturers, intentionally added asbestos to their product. J&J's specifications for their Baby Powder—which called for the use of talc from mines which contained asbestos—created an unreasonable risk of harm to Michael Perry and other users of Johnson's Baby Powder. And when they became aware of the harm created by their own specifications, they did nothing; except continue to sell the products for decades more.

This Court should deny J&J's motion for JNOV on Plaintiffs' design defect claim.

C. Plaintiffs met their burden on their failure to warn claim.

J&J contends that Plaintiffs failed to present sufficient evidence on their failure to warn claim because, according to J&J, there was "no evidence that Mr. Perry read the warnings on Johnson's Baby Powder before he used it." J&J Motion, at pg. 8. J&J's argument on this point wholly ignores the testimony presented at trial, is misleading at best, and, contrary to its arguments, they are not entitled to JNOV on Plaintiffs' failure to warn claim.

"A supplier and manufacturer of a product are liable for failing to warn if they know or have reason to know the product is or is likely to be dangerous for its intended use; they have no

reason to believe the user will realize the potential danger; and, they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous. *Livingston v. Noland Corp.*, 293 S.C. 521, 525, 362 S.E.2d 16, 18 (1987). Plaintiffs presented evidence that J&J, after multiple tests of the talc used in their Baby Powder, knew that the talc contained asbestos, had no reason to believe that any of its users, including Michael Perry, would know that the product likely contained asbestos, and still failed to warn of the hazards associated with the foreseeable use of the product.

Michael Perry testified that his earliest memory of using talcum powder on himself was from 1974 when he was four or five years old. (Ex. 5, TT 8/12/24, at 1644:19-21). He also testified that, after he was born in 1969, his mother used Johnson's Baby Powder on him during diaper changes when he was an infant and that his use of the baby powder "didn't just start at the age of five." (*Id.* at 1662:24-1663:2; 1687:20-1688:4). He used Johnson & Johnson Baby Powder the most of any talc body powder. (*Id.* at 1644:24-25). Michael last used Johnson's Baby Powder on himself in 2019. (*Id.* at 1651:2-4). Michael discussed what was written on the bottles of Johnson's Baby Powder, such as the phrases "purest protection", indicating that "pure" was synonymous with "safe", and "clinically proven mildness", indicating once more that "clinically proven" meant scientifically safe. (*Id.* at 1654:18-25; 1656:1-8). Mr. Perry found two bottles of Johnson's Baby Powder in his home and photos were attached to the court record and shown to the jury. (*Id.* at 1654:10-13; 1655:11-25). On the first bottle of Johnson's Baby Powder that Michael found in his sailing bag, ***there is no warning of any kind whatsoever on the bottle:***



(Ex. 10, Trial Ex. 611). On the second bottle, there was a small warning regarding keeping the bottle away from small children to avoid inhalation:



(*Id.*). Neither bottle found in Michael's home had a warning that Johnson's Baby Powder could contain asbestos, and one bottle had no warning about anything at all.

Michael then further testified that if he had seen the word cancer or death on any of the Johnson's Baby Powder bottles he ever used, he "would never have brought them into [his] home." (**Ex. 5**, TT 8/12/24, at 1661:10-14). If he had seen "danger" on the bottle he "would not have even bought the products." (*Id.* at 1661:15-19). If he had seen anything on the Johnson's Baby Powder bottles "that just had a skull and crossbones on it or a poison logo" he "would have absolutely walked away from that." (*Id.* at 1661:20-1662:2).

As mentioned above, Johnson & Johnson has admitted that by the early 1970s, they had numerous reports that tremolite asbestos was being found in the talc they used in the Baby Powder. (**Ex. 2**, TT 8/6/24, at 594:9-595:15). Indeed by 1958 Battelle Memorial, a laboratory hired by J&J to test its Italian talc, told J&J that there was fibrous tremolite in its talc. (*Id.* at 439:4-8). Further, bottles of Johnson's Baby Powder have **never** displayed a warning about asbestos. (*Id.* at 171:11-171:14).

The question then is: what warning was Michael Perry supposed to have read? Not only was there never any warning about asbestos on Johnson's Baby Powder at any time, but there were no warnings on the specific bottles that Michael found in his home. It is clear from his testimony and is undisputed that had he seen any warnings on the Johnson's Baby Powder bottles, he would have heeded those warnings and not purchased or used the product. The jury had every reason to conclude that Michael Perry would have followed an adequate warning if one had been present of the bottles of Johnson's Baby Powder. It is incredible for J&J to contend that Plaintiffs failed to present sufficient evidence as to their failure to warn claim based on Michael Perry's failure to read a warning that was **never** on the bottle. J&J's motion on this issue must be denied.

D. Plaintiffs' evidence shows that J&J's failure to warn was a proximate cause of Michael Perry's mesothelioma.

As their next basis for JNOV, J&J contends that Plaintiffs failed to establish that Johnson's Baby Powder was a proximate cause of Michael Perry's mesothelioma. J&J is mistaken. Specifically, J&J argues that Plaintiffs failed to prove that Michael Perry's exposure to Johnson's Baby Powder was a substantial factor in the development of his mesothelioma.

As the South Carolina Court of Appeals made clear in *Jolly v. General Electric Company*, 435 S.C. 607, 869 S.E.2d 819 (2021), "when there are multiple possible sources of the plaintiff's exposure to a toxin . . . the plaintiff must also show that his exposure to a particular defendant's product was a 'substantial factor' in the development of the plaintiff's disease." *Id.* at 435 S.C. at 625, 869 S.E.2d at 829 (citing David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 52 (2008)). South Carolina adopted the "substantial factor test" in *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007), where the Supreme Court held that a plaintiff in an asbestos case need only present evidence of "actionable exposure" to a defendant's asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). To determine whether exposure is actionable, South Carolina courts apply the "frequency, regularity and proximity" factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, "[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to . . . the plaintiff[.]" *Id.* (quoting *Lohrmann*, 782 F.2d at 1162).

Contrary to argument from J&J, Plaintiffs' evidence demonstrates more than just a casual or minimum contact with Johnson's Baby Powder from which the jury could conclude that

Michael Perry's exposure to Johnson's Baby Powder was a substantial factor in the development of his mesothelioma.

Michael Perry testified that his earliest memory of using talcum powder was from 1974 when he was four or five years old. (**Ex. 5**, TT 8/12/24, at 1644:19-21). He also testified that, after he was born in 1969, his mother used Johnson's Baby Powder on him during diaper changes when he was an infant and that his use of the baby powder "didn't just start at the age of five." (*Id.* at 1662:24-1663:2; 1687:20-1688:4). He used Johnson & Johnson Baby Powder the most. (*Id.* at 1644:24-25). Michael last used Johnson's Baby Powder on himself in 2019. (*Id.* at 1651:2-4). He explained that he was using Johnson's Baby Powder a minimum of two times a day—sometimes three times day, depending on the season, and potentially a fourth time right before going to bed. (*Id.* at 1653:1-9). Prior to getting sick, Michael showered three times a day in the summer. (*Id.* at 1653:10-13). To apply the Johnson's Baby Powder to himself, Michael would

shake it into my hand and fill the palm of my hand full, a heaping full of powder, and then start at my neck and work my way down, just like my mom showed me almost 50 years ago.

(*Id.* at 1653:16-19). Michael testified that he used "[n]o less than" ten bottles a year of Johnson's Baby Powder. (*Id.* at 1643:2-5). As J&J's counsel put it during her cross-examination of Michael, he went from using "four heaping handfuls of talc every day of [his] life for 45 years to just stop cold turkey." (*Id.* at 1670:18-22). Michael used so much Johnson's Baby Powder as part of his daily hygiene routine because he was allergic to deodorant. (**Ex. 5**, at 1659:3-12).

The evidence in this case was that Michael Perry was exposed to visible dust from his use of Johnson's Baby Powder. Plaintiffs' expert Dr. Steven Haber testified that talc is in a powder form. (**Ex. 2**, TT 8/6/24 at 390:8-10). If talc is used in a powder form inside the home the space where it is used in often enclosed spaces, such as a bedroom or bathroom, it is impossible to get

the asbestos from that talc powder out of the home. (*Id.* at 390:11-391:5). Dr. Haber also testified about re-entrainment, explaining that once asbestos settles down to the ground or to a surface anyone walking by it or brushing it can put the asbestos fibers back into the air inside the home. (*Id.* at 391:11-22). He elaborated that even if one were to vacuum or sweep up the talc dust with asbestos in it that is all over the home, that process is simply blowing the asbestos back into the air. (*Id.* at 391:23-392:2). Once it's in the air, it can be breathed in. (*Id.* at 392:3-5). Dr. Haber cited an authoritative, peer-reviewed and published paper by Dr. Hillerdal that studied these very concepts. (*Id.* at 392:6-15). Unlike the visible dust, asbestos fibers within that dust cannot be seen. (*Id.* at 395:19-396:9).

The jury was presented with evidence demonstrating that Johnson's Baby Powder contained asbestos, and J&J knew it. Plaintiffs' expert, Dr. William Longo, testified that he has analyzed talc from all of the sources that Johnson & Johnson used in its baby powder. (**Ex. 3**, TT 8/7/24, at 860:6-9). Each of the talc mine sources used by J&J throughout the years in Johnson's Baby Powder showed the presence of asbestos in Dr. Longo's test results. When he tested the talc using XRD, 1 of 72 samples was positive for asbestos. (*Id.* at 860:19-21). When he tested the talc using PLM, 30% of the samples were positive for asbestos. (*Id.* at 860:22-24). When he tested the talc using TEM, 75% of the samples were positive for asbestos. (*Id.* at 860:24-25). He confirmed that he found tremolite and other asbestos fibers over and over in Johnson's Baby Powder. (*Id.* at 862:21-23). Dr. Longo did not just find asbestos in the powder from the 1960s, he also found it repeatedly in Johnson's Baby Powder from the 1970s, the 1980s, the 1990s, and the 2000s—all years that Michael Perry was using Johnson's Baby Powder. (*Id.* at 865:3-866:10). He confirmed that he found tremolite asbestos, anthophyllite, richterite/winchite, and actinolite in Johnson's Baby Powder. (*Id.* at 867:8-11). And he was not the only scientist to do so. In fact, Battelle

Memorial Labs also found tremolite asbestos in Johnson's Baby Powder 153 times. (*Id.* at 867:15-868:1). Even with "poor analytical sensitivity" the FDA's contract lab found asbestos in the talc used in Johnson & Johnson's Baby Powder. (*Id.* at 869:6-12).

Dr. Madigan, Plaintiffs' statistician and epidemiology expert, testified that he did a dose calculation immediately prior to this trial for someone who applied Johnson's Baby Powder twice a day for 30 years. (**Ex. 3**, TT 8/7/24 at 802:24-803:9). Relying on the Gardner paper, a peer reviewed and published study, Dr. Madigan testified that "there is an estimate of the fibers per cc of asbestos that a person was exposed to by using talc for one minute. And it's 1.9 fibers per cc." (*Id.* at 803:14-17). He further testified that this was the equivalent to .35 fiber years. (*Id.* at 803:22-24). Mr. Perry used even more talc than the person utilized in Dr. Madigan's calculation, and his calculation demonstrated an increased risk.

Dr. Haber additionally testified that OSHA began regulating asbestos exposure in the workplace in the early 1970s and that while the permissible exposure limit eventually was set at .1 fiber/cc time -weighted average, that level was not safe for mesothelioma. (*Id.* at 401:13-25). In fact, according to OSHA, if you exposed people to .1 fibers-per-cc for a year, several people would still develop mesothelioma. (*Id.* at 402:1-10). Thus, OSHA concluded that there is no safe level of exposure to asbestos. (*Id.* at 402:23-403:3). Dr. Haber testified that mesothelioma requires the least amount of asbestos exposure to develop. (*Id.* at 403:14-24). According to Dr. Haber, the length of a person's exposure to asbestos matters because talcum powder users, like Michael Perry, would have a higher dose of exposure as they are being exposed to asbestos "for decades and decades, and decades[.]" (*Id.* at 406:13- 22). Dr. Haber testified that in reaching his conclusions he reviewed the peer-reviewed published literature about the levels of exposure that occur when someone uses Johnson & Johnson's talc. One particular study revealed that when individuals used Johnson &

Johnson's talc for 40 years, the exposure level is between .38 to 5.18 fibers/cc years, which substantially increases the user's risk of developing mesothelioma. (*Id.* at 414:2-6). Dr. Haber opined, to a reasonable degree of medical certainty, that the range of exposures from Johnson's Baby Powder is between .1 to 4 fibers per cc. (*Id.* at 414:12-18). He clarified that 1 fiber per cc meant breathing "10,000 fibers every minute, millions or billions in a year." (*Id.* at 414:20-24).

Given this evidence, the jury could have easily concluded that Michael Perry, who used Johnson's Baby Powder on his body multiple times a day, had frequent, regular, and proximate exposure to asbestos from Johnson's Baby Powder that contained asbestos over the course of many years. This evidence is more than sufficient to support the jury's determination that Michael Perry's mesothelioma was caused by his exposure to asbestos from Johnson's Baby Powder.

E. No precise quantification of the number of asbestos fibers to which Michael Perry was exposed or "threshold exposure" is required.

Interestingly, J&J contends, without citation to any binding precedent, that Plaintiffs were required to show, by direct evidence, a "threshold exposure to asbestos" or that "the Johnson's Baby Powder Mr. Perry *actually used* was contaminated with asbestos." J&J Motion, at pg. 11 (emphasis in original). This argument, too, is without merit. First, Plaintiffs are permitted to prove their case through circumstantial evidence. See *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007). Second, the substantial factor test does not require a precise quantification of the number of asbestos fibers to which Michael Perry was exposed or a "threshold exposure." *Jolly, supra*, 435 S.C. at 633, 869 S.E.2d at 833.

Plaintiffs' evidence permitted the jury to infer that the Johnson's Baby Powder that Michael Perry used contained asbestos. As a preliminary issue, J&J repeatedly makes references throughout its motion to Plaintiffs' lack of testing of Michael's bottles of Johnson's Baby Powder he found in his home. J&J lambasts Plaintiffs over and over again while completely leaving out the fact that

there was a joint stipulation between the parties to not test Mr. Perry's bottles due to the amount of testing that has been done historically on Johnson's Baby Powder products. To leave this out of this record is nothing more than an attempt to intentionally mislead this Court, repeatedly, and should be summarily dismissed and ignored.

Dr. Longo testified that he and his lab have tested over 100 bottles of Johnson & Johnson's Baby Powder. (Ex. 3, TT 8/7/24, at 814:12-14). Of the 100 samples, 75% of the samples tested positive for asbestos. (*Id.* at 833:22-834:3). He explained that the samples he tested are referred to as "historical samples" which came directly from Johnson & Johnson. (*Id.* at 834:7-18). Dr. Longo clarified that the testing samples were of Johnson's Baby Powder itself and not the mines. (*Id.* at 836:15-837:3). He also performed a tissue digestion of Michael Perry's lung tissue. (*Id.* at 814:15-17).

As to detecting asbestos in the products he tested, Dr. Longo explained the counting criteria: that it has "to be at least 5 times longer than it is wide", it has to have the right chemistry, "then you see if it has the right crystalline structure." (*Id.* at 839:14-841:10). According to Dr. Longo, "chemistry" is how he determines which of the six asbestos minerals he is looking at. (*Id.* at 841:15-20). The "chemistry" for tremolite asbestos, according to Dr. Longo, is as follows:

Now we go to the chemistry. It's a little hard to see. But if you start on the left-hand side, that very first peak says that this is a magnesium peak. And the way you get - - and the intensity or how high the magnesium peak has to be at a certain length or height for it to match -- and where we're going with this, this is a chemistry for tremolite.

Then the next peak, that really high one, is silicate. And then going to the next peak is calcium. And the calcium peak is typically lower than the magnesium peak for tremolite. The very last peak is the copper grid because you get static. So that's the chemistry.

So that means the intensity of the X-rays coming off the sample for this, silicate is the most. The second most is magnesium. And the third most is calcium. And if you have that ratio, you know beyond a shadow of a doubt that this is, in fact,

tremolite asbestos because there's no other mineral out there that has that type of chemistry and that type of structure.

(*Id.* at 842:7-843:3). Dr. Longo also explained that even Johnson & Johnson's own internal documents identify "fibrous tremolite" as a form of asbestos and that it was simple to tell the difference between "fibrous talc" and asbestos. (*Id.* at 847:14-848:8). The size of an asbestos fiber allows an entity to "have a ton and . . . say, "Oh, it's only trace amounts." (*Id.* at 856:20-857:25).

Dr. Longo has looked into Mr. Perry's exposures to asbestos from Johnson's Baby Powder. (*Id.* at 869:13-16). He also explained how he performed the tissue digestion on Michael Perry's lungs. (*Id.* at 876:14-877:7). The tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc particles in Michael Perry's lungs. (*Id.* at 877:7-10). He explained that what he found was what he would expect to find for someone who had been exposed to talc. (*Id.* at 877:13-15). According to Dr. Longo, the tremolite in Michael Perry's lungs was consistent with what he has previously and repeatedly found in Johnson's Baby Powder, and it is also consistent with "Johnson & Johnson's own internal documents from decades ago that said when you find tremolite in talc in people's lungs with mesothelioma, it's a fingerprint for exposure to asbestos." (*Id.* at 877:23-878:7). Because Johnson & Johnson attempted to suggest that the winchite that he found in Michael Perry's lungs came from a different product, Dr. Longo explained that J&J's own experts have found winchite in Johnson's Baby Powder, that winchite has been found in the talc sourced from the Italian mine used by J&J, that he has found richterite in Johnson's Baby Powder, and that J&J's own expert refers to "richterite" as "winchite" because the chemistry is so close. (*Id.* at 977:5-979:20). Dr. Longo clarified that he has "never found richterite or winchite in brakes[.]" (*Id.* at 981:18-982:9). This is a critical distinction given J&J's continued insistence that Mr. Perry's exposure to brake work was the sole cause of his mesothelioma.

Dr. Haber testified that mesothelioma requires the least amount of asbestos exposure to develop. (*Id.* at 403:14-24). According to Dr. Haber, the length of a person's exposure to asbestos matters because talcum powder users, like Michael Perry, would have a higher dose of exposure as they are being exposed to asbestos "for decades and decades, and decades[.]" (*Id.* at 406:13-22). Dr. Haber testified that in reaching his conclusions he reviewed the peer-reviewed published literature about the levels of exposure that occur when someone uses Johnson & Johnson's talc. One particular study revealed that when individuals used Johnson & Johnson's talc for 40 years, the exposure level is between .38 to 5.18 fibers/cc years, which substantially increases the user's risk of developing mesothelioma. (*Id.* at 414:2-6). Dr. Haber opined, to a reasonable degree of medical certainty, that the range of exposures from Johnson's Baby Powder is between .1 to 4 fibers per cc. (*Id.* at 414:12-18). He clarified that 1 fiber per cc meant breathing "10,000 fibers every minute, millions or billions in a year." (*Id.* at 414:20-24). According to Dr. Haber, these levels were sufficient for Johnson's Baby Powder to be a substantial contributing factor in the development of Mr. Perry's mesothelioma. (*Id.* at 425:9-13; 426:8-14).

Dr. Haber confirmed that Mr. Perry had some *potential* exposure asbestos-containing brakes in the mid-1980s. (*Id.* at 421:5-16). That exposure "counted and contributed to his cumulative dose of asbestos[.]" (*Id.* at 421:17-21). However, Mr. Perry's first exposure to asbestos was from Johnson's Baby Powder. (*Id.* at 421:22-24). As to frequency, Dr. Haber explained that Mr. Perry was "an above-average user" of Johnson's Baby Powder and he was "not only using it two to four times a day, but he was putting it on his whole body, and . . . at times he was actually putting it on his. . . face." (*Id.* at 421:25-422:10). He also explained that Michael's use of Johnson's Baby Powder was "a repeated use" and, because Michael is "a big guy" that "the amount of talc that he uses . . . is going to be more than . . . a smaller-framed individual." (*Id.* at 423:5-9). Dr.

Haber ultimately opined that Michael Perry's exposures to asbestos from Johnson's Baby Powder were a "substantial contributing factor to" the "development of [his] mesothelioma." (*Id.* at 425:9-13). When explaining his conclusion, Dr. Haber noted:

A. Yeah. So, again, no protective measures, 45-plus years repeated daily, multiple times a day. It's in confined spaces in the home. There's reentrainment. Two grown men using it. It's applied all over the body. And plus, he had exposures in -- in childhood and adolescence, and those are more vulnerable years.

(*Id.* at 426:20-427:1). He also explained that there is no way to medically go through an individual's exposures to say that some exposures counted, and others did not. (*Id.* at 427:16-21). According to Dr. Haber:

It's the cumulative. It doesn't come with a label. And asbestos is asbestos no matter where you're breathing it from. So we talk about the cumulative exposures of an individual that adds to their risk.

(*Id.* at 427:21-25). He clarified that Johnson's Baby Powder used talc from Italy before 1966, talc "mostly" from Vermont from 1966 to 2003, talc from Italy for seven months in 1979, and talc from China from 2003 to 2020. (*Id.* at 428:1-19). Michael Perry was exposed to talc from each of those sources and each of those sources have tested positive for asbestos. (*Id.* at 428:20-429:14).

Contrary to the argument from J&J, there is no question that the evidence placed before the jury could lead to the reasonable conclusion that Michael Perry's mesothelioma was caused, even in part, by his exposure to asbestos in Johnson's Baby Powder. Further, the *Henderson* exposure standard was met and exceeded here. Michael Perry used Johnson's Baby Powder from the time of his birth in 1969 to 2019. He used the product daily for forty-three (43) years all over his body, often in close proximity to his face and certainly within his breathing zone. Throughout that time, J&J sourced its talc from multiple mines—all of which have tested positive for asbestos. While J&J repeatedly contends that "trace amounts" are safe, scientists, such as Plaintiffs' experts, and regulatory organizations across this country have stated that there is no safe level of exposure

to asbestos. Numerous witnesses testified throughout this trial that there is no safe level of exposure to asbestos despite J&J's persistent insistence to the contrary:

- Dr. Haber testified that OSHA has concluded there is no safe level of exposure to asbestos for the disease mesothelioma. (Ex. 2, TT 8/6/24, at 402:23-403:3).
- Dr. Hopkins, a corporate representative of J&J, testified by videotaped deposition that J&J knew there was no safe level of asbestos exposure, especially for children. (*Id.* at 578:2-8).
- Dr. Gibney, Mr. Perry's treating thoracic surgeon expert with a specialty in mesothelioma treatment, testified live at trial that he has never heard of, or learned about, a level of asbestos that is safe for people to breathe and not get sick. (Ex. 3, TT 8/7/24, at 706:22-25).
- Dr. Kuffner, a corporate representative of J&J, testified live at trial that there is no known safe level of asbestos generally. (Ex. 4, TT 8/9/24, at 1205:6-12).

Although not required, Plaintiffs furthermore through their experts, quantified Michael's level of exposure to asbestos from Johnson's Baby Powder was between .1 to 4 fibers per cc each time he used the product. (*Id.* at 414:12-18).

The jury could thus have concluded not only that Michael Perry had frequent, regular, and proximate exposure to asbestos-containing Johnson's Baby Powder, but that these exposures caused his mesothelioma. J&J is not entitled to JNOV on the issue of proximate cause or causation, and their request for such must be denied.

F. J&J is not entitled to JNOV on Lonnie Long's loss of consortium claim.

Plaintiff Lonnie Long is entitled to loss of consortium damages based on the jury's liability and causation findings against J&J, which J&J has failed to show were erroneous or unsupported

by the evidence.

G. J&J is not entitled to JNOV on the issue of successor liability.

J&J seeks JNOV on the issue of successor liability. The parties agreed that because successor liability is an equitable matter, the issue would be decided by this Court after receiving the jury's verdict. As of the date of J&J's motion, this Court has not entered any Order or ruling on the successor liability issues. As such, any argument seeking JNOV on the issues of successor liability is premature.

In the interest of brevity, Plaintiffs adopt & incorporate by reference Plaintiffs' Trial Brief on Successor Liability of the Johnson & Johnson Defendants, filed August 22, 2024, and the exhibits attached thereto. Additionally, Plaintiffs adopt & incorporate by reference *Plaintiffs' Response to Motion to Substitute Pecos River Talc, LLC as a Party Defendant for LLT Management, LLC f/k/a LTL Management, LLC*, filed September 13, 2024, and the exhibits attached thereto.

Plaintiffs have submitted sufficient evidence for this Court to find that Kenvue, Inc. and Johnson & Johnson Holdco (NA), Inc. are the successor-in-interest to now-non-existent Johnson & Johnson Consumer Inc.

During the hearing on J&J's Motion for Directed Verdict, the issue of successor liability, although not ruled on, was discussed. Plaintiffs' counsel expressed the following concern, which was shared by the Court:

So we entered into a stipulation where I think they say -- although what I'm worried about is they're going to wiggle out of this -- that LLT is responsible for everything that JJCI did, so all that baby powder during those decades. What I want to be able to do is have the jury apportion -- or not apportion -- find fault with the Johnson & Johnson defendants who were responsible for that time period. No one will give me a straight answer as to if we get the verdict against whoever we need to get a verdict against, if you find later the successor is these other entities, that we can collect that verdict.

(Ex. 6, TT 8/13/24, at 1763:12-24). J&J stood by its agreement “about LLT being liable and agreeing that it’s liable.” (*Id.* at 1765:8-9). The Court reiterated Plaintiffs’ counsel’s concern:

All I want to know is this, Mitch, all right, the -- if I don't have to get into this right now, I won't get into this right now -- but I want to be assured that whatever the jury does by way of a verdict is going to apply to people that are in position to pay the verdict, whether that's the entities themselves, the insurance companies, or a combination of it. I don't want them to be able to say later -- well, whoop, that's not against the right one. The jury awarded against the wrong one, therefore, we don't have to pay.

(*Id.* at 1765:10-21). J&J again stood on its agreement that “LLT would be liable for a verdict against Johnson & Johnson.” (*Id.* at 1765:22-1766:2).

The jury in this matter returned a verdict against “the Johnson & Johnson entities” on August 19, 2024. On that same day, LLT, the entity that “would be liable for a verdict against Johnson & Johnson” ceased to exist. See *Motion to Substitute Pecos River Talc, LLC as a Party Defendant for LLT Management, LLC f/k/a LTL Management, LLC*. J&J’s further intermingling of the entities under the Johnson & Johnson Enterprise continues and the uncertainty of which entity will be deemed liable is no longer simply a **potential** concern.

H. Plaintiffs’ evidence supports the jury’s finding that the Johnson & Johnson defendants acted with willful, wanton, and reckless disregard of Mr. Perry’s rights.

The jury in this matter assessed punitive damages against J&J in the amount of \$30 million. (Ex. 11, Punitive Damages Verdict Form, 8/19/24). Plaintiffs do not seek to recover punitive damages as it relates to their strict liability claim or loss of consortium claim. However, contrary to J&J’s argument, this jury had sufficient evidence before it to conclude that J&J’s conduct was willful, wanton, or in reckless disregard of Michael Perry’s rights in connection with Plaintiffs’ negligence claim.

Under South Carolina law, punitive damages may be awarded to punish tortfeasors who have acted in a “reckless, willful, or wanton” manner. S.C. Code Ann. § 15-32-520(D); *Duncan v.*

Ford Motor Co., 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009) (citing *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996)); see also *Berberich v. Jack*, 392 S.C. 278, 288, 709 S.E.2d 607, 612 (2011). The South Carolina Court of Appeals recently wrote that “[t]he purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future.” *Portrait Homes-South Carolina, LLC v. Pennsylvania National Mutual Casualty Insurance Company, et al.*, 442 S.C. 515, 587, 900 S.E.2d 245, 284 (Ct. App. 2023) (quoting *Clark v. Cantrell*, 339 S.C. 369, 378-379, 529 S.E.2d 528, 533 (2000)). Additionally, punitive damages “serve to vindicate a private right of the injured party[.]” *Id.* “A tort is characterized as reckless, willful or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff’s rights. A conscious failure to exercise due care constitutes willfulness.” *Taylor*, 324 S.C. at 221, 479 S.E.2d at 46 (citations omitted); see also *Berberich*, 392 S.C. at 288, 709 S.E.2d at 612. When evidence exists that suggest a defendant is aware of a dangerous condition and does not take action to minimize or avoid the danger, sufficient evidence exists to create a jury issue as to whether there is clear and convincing evidence of willfulness and recklessness. *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005) (citing *McGee v. Bruce Hosp., Sys.*, 321 S.C. 340, 346, 468 S.E.2d 633, 637 (1996)). The jury has considerable discretion to determine the amount of damages. See *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 404-05, 714 S.E.2d 904, 915 (Ct. App. 2011) (noting the deference due to the jury on punitive damages).

In *Mishoe v. QHG of Lake City, Inc.*, the South Carolina Court of Appeals affirmed the denial of JNOV on the issue of punitive damages where there was evidence the defendant was provided “actual, written notice” of a dangerous condition on its premises—a hole in the pavement

near the defendant's emergency room exit-and failed to take any action to repair the hole or to warn visitors or patients of the existence of the hole. 366 S.C. 195, 201-02, 621 S.E.2d 363, 366 (Ct. App. 2005). Having neglected to take any corrective action for nearly a year since being notified, the *Mishoe* court specifically found the written notice informing QHG of the hole was sufficient evidence of QHG's willful, wanton, reckless, or malicious conduct to warrant submission of punitive damages to the jury. *Id.*

Similar to the *Mishoe* court, **J&J knew its talc contained asbestos** and took no corrective action. Since the 1800s, geology texts reported asbestos in talc. (**Ex. 2**, TT 8/6/24, at 438:11-13). Since the early 1930s, it has been known that asbestos causes deadly diseases. (*Id.* at 438:14-16). J&J's own documents and sworn testimony reveal that it has known that asbestos causes cancer since the 1930s. (*Id.* at 438:17-23). By the 1940s, it was known that asbestos was a common impurity in cosmetic talc. (*Id.* at 438:24-439:3). By 1958, J&J knew they had fibrous tremolite asbestos in their talc. (*Id.* at 439:4-10). Additionally, beginning in the late 1950s, J&J regularly received test results showing that the talc used to make Johnson's Baby Powder contained tremolite. (**Ex. 12**, Plaintiffs' Trial Exhibit No. 72-Chart-Decades of Evidence of Asbestos in Johnson & Johnson Products). By the 1960s, it was established that mesothelioma was caused by asbestos. (*Id.* at 439:11-14).

Plaintiffs showed that J&J had actual knowledge of asbestos in talc before and during the time Michael Perry was exposed to Johnson's Baby Powder. *First*, from the 1950s, J&J regularly and continuously received test results showing its talc contained asbestos. (**Ex. 12**, Plaintiffs' Exhibit No. 72-Chart-Decades of Evidence of Asbestos in Johnson & Johnson Products). *Second*, in addition to its internal tests, J&J's internal statements reflect an awareness that the talc used to make JBP contained asbestos. (**Ex. 13**, Plaintiffs' Trial Exhibit No. 3; **Ex. 14**, Plaintiffs' Trial

Exhibit No. 62; **Ex. 15**, Plaintiffs' Trial Exhibit No. 106). *Third*, J&J knew not only that its talc contained asbestos, but that its asbestos-contaminated talc was giving women, with no other articulable exposures to asbestos, mesothelioma. (**Ex. 16**, Plaintiffs' Trial Exhibit No. 49).

J&J knew exposure to asbestos causes disease. J&J knew asbestos, including asbestos in talc, can cause fatal diseases (i.e. mesothelioma) based on the internal literature reviewed, the professionals with asbestos-related knowledge it employed, its acknowledgments of the association of asbestos with mesothelioma, its internal cautionary measures for employees, and the many warnings it received about the dangers of exposing consumers to asbestos through talc. (**Ex. 2**, TT 8/6/24, at 553:13-24).

J&J knew JBP was inhaled by users. J&J admitted infants inhale some talc during JBP application. (*Id.* at 558:2-25). By 1969, J&J knew the "needle shape of tremolite" made it especially respirable and capable of entering "pulmonary alveoli." (**Ex. 17**, Plaintiffs' Trial Exhibit No. 7). Plaintiff entered documents into evidence showing the average consumer used significantly more talc than the volume used by MAS (4.05 grams for adult below-the-waist) in its airborne studies. (**Ex. 18**, Plaintiffs' Trial Exhibit No. 136; **Ex. 19**, Plaintiffs' Trial Exhibit No. 193; **Ex. 20**, Plaintiffs' Trial Exhibit No. 194; **Ex. 21**, Plaintiffs' Trial Exhibit No. 196). Plaintiff introduced evidence on the concentration of airborne asbestos from using JBP. (**Ex. 22**, Plaintiffs' Trial Exhibit No. 111; **Ex. 23**, Plaintiffs' Trial Exhibit No. 113; **Ex. 24**, Plaintiffs' Trial Exhibit No. 191).

J&J failed to warn. Johnson & Johnson, through its former corporate representative Dr. John Hopkins, admitted that there has never been a warning about asbestos on any Johnson & Johnson product. Certainly by the early 1970s, Johnson & Johnson had numerous reports showing tremolite in its Vermont and Italian talc ore. (**Ex. 2**, at 570:14-571:8). Instead, J&J sought to

promote the perception of the Baby Powder's purity and capitalize on the mother-child bond using deceptive marketing and advertising. (**Ex. 25**, Plaintiffs' Trial Exhibits Nos. 92-94; **Ex. 26**, Plaintiffs' Trial Exhibits Nos. 117-118; **Ex. 27**, Plaintiffs' Trial Exhibit No. 181; **Ex. 28**, Plaintiffs' Trial Exhibit No. 203; **Ex. 2**, TT 8/6/24, at 572:4-15). From the 1960s to the 2000s, J&J recognized Johnson's Baby Powder as a crucial product in its portfolio, often describing it as their "cornerstone" and "flagship product." (**Ex. 4**, TT 8/9/24, at 1228:19-23; 1233:15-18).

J&J failed to adequately test. J&J failed to test frequently enough with powerful/sensitive transmission electron microscopy ("TEM"). (**Ex. 29**, Plaintiffs' Trial Exhibit No. 10; **Ex. 30**, Plaintiffs' Trial Exhibit No. 90). J&J chose not to adopt heavy liquid density separation techniques for asbestos detection, considering them overly sensitive and potentially harmful to their purity claims. (**Ex. 31**, Plaintiffs' Trial Exhibit No. 55; **Ex. 32**, Plaintiffs' Trial Exhibit No. 61; **Ex. 14**, Plaintiffs' Trial Exhibit No. 62). Their reporting protocols were designed to downplay asbestos findings, marking minimal asbestos fiber detections as non-quantifiable. (**Ex. 2**, at 579:4-580:6).

J&J influenced scientists and suppressed information. Understanding that any revelation of asbestos in baby powder would be catastrophic for their reputation, J&J developed a comprehensive strategy to suppress such information. (**Ex. 2**, at 559:1-6; 577:17-21; **Ex. 5**, at 1416:13-1417:8; 1417:15-1419:18). J&J's documents reveal tactics aimed at defending the safety image of their baby powder, including monitoring and defending against adverse scientific, consumerist, and regulatory trends (**Ex. 4**, TT 8/9/24, at 1178:2-1180:21; 1183:10-1184:17; **Ex. 2**, at 582:1-583:1); generating scientific data, even if insignificant or embarrassing, to leverage in their defense; quelling questions and data about asbestos in talc; and (4) misleading the FDA and promoting weaker regulations by advocating for less sensitive test methods and withholding positive asbestos test results. (**Ex. 2**, at 579:4-580:6).

Safe alternatives were available. J&J knew cornstarch served as a substitute for talc since the late 1800s. (**Ex. 2**, at 557:17-22). J&J was evaluating an alternative to talc throughout the 1960s, 1970s, and 1980s. (*Id.* at 618:17-22). J&J knew that talc “has no medicinal value” and was a foreign body being ingested by infants. (**Ex. 4**, TT 8/9/24, at 1223:10-25; **Ex. 33**, Plaintiffs’ Trial Exhibit No. 5). Yet, it continued to sell talc-based Johnson’s Baby Powder until 2020 in the United States. (**Ex. 4**, at 1281:23-1282:7).

The evidence of J&J’s willfulness and recklessness is damning. The evidence presented to the jury revealed that J&J knew of the association between asbestos and talc well before Michael Perry began using Johnson’s Baby Powder, and over a decade before he was even born. J&J also knew that asbestos was a common impurity in talc at least 30 years before Michael Perry began using Johnson’s Baby Powder. They received multiple tests showing that the talc used to make Johnson’s Baby Powder contained asbestos, and was in fact present even in the final product sold to the American public and Mr. Perry. Additionally, J&J has known since the late 1800s that cornstarch was a reasonable, safe alternative to talc. Despite having all of this knowledge, J&J continued to sell asbestos-containing Johnson’s Baby Powder until 2020 in the United States. J&J never placed a single warning label on its Baby Powder bottles related to asbestos. It never warned its end user that this product, despite its advertisements, was not safe for babies or adults or that the product’s use could cause cancer and/or death.

The jury’s punitive damages award should stand even though, as J&J claims, talc-based Johnson’s Baby Powder is no longer being sold in the United States. J&J’s argument on this point fails because they focus on the product and not the conduct. Punitive damages are designed to punish wrongful **conduct** and deter future **misconduct**. It does not matter that the injury-causing product has allegedly been pulled from the shelves. J&J sold asbestos-containing Baby Powder for

over 100 years, injured and fatally sickened people, and actively suppressed information that would have shown that asbestos was in its baby powder. This is the exact sort of conduct that punitive damages is directed towards deterring.

1. An award of punitive damages would not be unconstitutional based on the failure to apportion fault.

J&J argues that an award of punitive damages against them would be unconstitutional because there has been no apportionment of “fault between and among all responsible persons[.]” J&J Motion, at pg. 27. This argument disregards the directives of the punitive damages statute. S.C. Code Ann. § 15-32-520 does not require apportionment of fault among joint tortfeasors. While “the defendant’s degree of culpability” is one of many factors the jury **may** consider in arriving at the amount of punitive damages to award, its “apportionment of fault” is reflected in the punitive damages award . . . specific to [that] defendant.” See S.C. Code Ann. § 15-32-520(G). Further, “each defendant is liable only for the amount of the award made against that defendant.” *Id.* Thus, there is no danger that J&J would be liable for an unsupported portion of the punitive damages award.

To the extent that J&J’s challenge as to the punitive damages award is the failure to apportion fault amongst other J&J entities, error, if any, was induced and/or invited by J&J’s own conduct. See *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (“a party may not complain . . . or object to a trial procedure which his own conduct has induced.”). Through trial and during argument on its directed verdict motion, J&J was clear that only one Johnson & Johnson entity needed to be on the verdict form. (**Ex. 6**, TT 8/13/24, at 1765:10-1768:10). They cannot now complain that it was error for this Court to do exactly what they asked.

2. Punitive damages are recoverable against successor entities.

To be clear, the jury's assessment of punitive damages was against "Defendant Johnson & Johnson entities[.]" (**Ex. 11**, Punitive Damages Verdict Form, 8/19/24). Therefore, in the event that Kenvue & Holdco are found to be successor-in-interest to Johnson & Johnson Consumers, Inc. ("Old JJCI"), they would also be liable for any portion of punitive damages assessed to Old JJCI. Punitive damages would likewise be recoverable against LLT because, as discussed in *Plaintiffs' Trial Brief on Successor Liability*, it agreed to assume the talc liabilities, debts, and obligations of its predecessor.

Successor liability does not, as J&J implies, allow the successor to pick and choose which of its predecessor's obligations follow it. As the Supreme Court recognized in *Nationwide Mutual Insurance Company v. Eagle Window & Door, Inc.*, 424 S.C. 256, 818 S.E.2d 447 (2018), "a successor corporation is not liable for the obligations of its predecessor" unless one of the recognized exceptions apply. Similarly, Black's Law Dictionary defines "successor corporation" as follows:

The term "successor corporation" means "[a] corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and **duties** of an earlier corporation." Black's Law Dictionary (9th Ed.2009) p. 1569.

Thus, the liability of a successor corporation is derivative in nature and the successor may be liable for the conduct of its predecessor to the same extent as the predecessor. Should this Court determine that Kenvue and Holdco are successors-in-interest, they can then be held liable for their predecessors' conduct, including conduct supporting the imposition of punitive damages.

J&J is correct that South Carolina court have yet to address the issue of whether punitive damages are recoverable against a successor corporation. Courts in other jurisdictions have held that punitive damages may be assessed against a successor corporation. *See Aurora Loan Servs.*,

LLC v. Hirsch, 170 Conn. App. 439, 456 (2017) (defendant can be held vicariously liable for punitive damages when it ratified or approved the act); *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 73-75; *Man v. Raymark Indus.*, 728 F.Supp.1461, 1471 (D. Haw. 1989) (imposing successor liability, including punitive damages, and stating acquiring corporation cannot accept the good without the bad, absent an unlikely agreement with the acquired entity, and jettison inchoate liabilities into a never-never land of transcorporate limbo); *Krull v. Celotex Corp.*, 611 F.Supp. 146,148 (N.D. Ill. 1985) (applying Delaware law; the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself).

Contrary to argument from J&J and unlike the defendants in the cases cited by J&J, Kenvue and Holdco stepped into the shoes of Old JJCI and continued to manufacture, sell, market, and distribute the exact same asbestos-containing talc which, in turn, gave Michael Perry cancer. Thus, Holdco, Kenvue, and Old JJCI were “effectively one and the same entity” in the way they sold asbestos containing talc and hid that its baby powder contained asbestos. This Court should find that Kenvue and Holdco are successors-in-interest to Old JJCI and that punitive damages, to the extent of Old JJCI’s liability, should be assessed a portion of the punitive damages.

III. J&J is not entitled to a New Trial Absolute

“A trial court must charge the current and correct law.” *In re Estate of Pallister*, 363 S.C. 437, 451, 611 S.E.2d 250, 258 (2005). “Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence.” *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000). However, jury instructions should be confined to the issues made by the pleadings and supported by the evidence. *Baker v. Weaver*, 279 S.C. 479, 482, 309 S.E.2d 770, 771 (Ct. App. 1983). “A trial court’s refusal to give a properly requested

charge is reversible error only when the requesting party can demonstrate prejudice from the refusal.” *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). “The substance of the law is what must be instructed to the jury, not any particular verbiage.” *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016).

Contrary to arguments from J&J, the Court’s instructions to the jury in this matter were proper statements of the law and the principles of law that apply to this case. J&J is not entitled to a new trial on any of its challenges to the given jury instructions.

A. The Jury Instructions given in this case were proper.

1. The Court properly charged the jury on punitive damages.

J&J contends the Court improperly charged the jury as to punitive damages because the Court permitted the jury to award punitive damages based on third-party harm. This challenge is without merit.

To be clear, J&J objected to any punitive phase in this case, alleging that, during the liability phase of trial, “there has been an abundance of third-party harm asserted in the case, including to people that are not Mr. Perry, such as mothers, babies.” (**Ex. 8**, TT 8/15/24 at 2205:17-2206:2). The trial court, after noting that there had been no previous objection to “what you now call third-party harm evidence” during the liability phase, resolved to cure the issue in the punitive charge. (*Id.* at 2206:14-2207:4). Plaintiffs’ counsel responded that the mention of mothers and babies during the liability phase of trial was due to evidence “that Michael Perry’s mother used it on him when he was a baby” and to address the “knowing and intentional nature of [J&J’s] conduct.” (*Id.* at 2209:9-23).

After a period of discussion between the Court and counsel for the parties, the jury returned as was charged, in part, as follows:

So we will begin with these instructions. As I have told you, if you award actual damages against the defendant, you may also consider and award punitive damages. You've already crossed the first hurdle, which is you have found that the conduct was willful, reckless, and wanton. Punitive damages are intended to punish a defendant for willful, reckless, and wanton misconduct and to prevent the defendant and others from committing similar acts in the future. Punitive damages can only be awarded when the conduct of the defendant has been something more than mere negligence. The evidence must clearly and convincingly establish that the defendant was reckless or willful or wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or reckless disregard for the safety of others.

(*Id.* at 2259:20-2260:14). The Court also read pertinent portions of S.C. Code Ann. § 15-32-520 to the jury. This was proper. As to punitive damages, the trial court may charge the jury regarding the factors which would justify a punitive damages award in the case. A punitive damages award survives constitutional scrutiny if: (1) the trial court's jury instruction explains the nature, purpose and basis for the award; (2) post-trial procedures enable the court to scrutinize the award; and (3) an appellate review process ensures that the award is reasonable and rational. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994).

J&J makes an argument that Plaintiffs' punitive award was the result of Plaintiffs being able to introduce evidence of third-party harm related to ovarian cancer. First, J&J ignores that much of the objective evidence concerning ovarian cancer as another type of disease caused by asbestos exposure from talc comes from J&J's own internal documents that were properly admitted – a fact conceded by J&J as they do not argue that such documents were improperly admitted anywhere in its 90-page brief.

J&J next misleads this Court by neglecting to mention that it was *J&J itself* that first introduced evidence of ovarian cancer in Mr. Perry's family to the jury. During J&J's cross

examination of Dr. Haber, J&J's counsel displayed a side to the jury noting that Mr. Perry's mother had uterine cancer. (**Ex. 2**, TT 8/6/24, at 473:12-17). Further testimony was elicited from Dr. Haber that some of Mr. Perry's medical records noted that his mother had ovarian cancer. (*Id.* at 477:5-12). J&J even tried to admit the *Carr* paper into evidence – minutes from a 1994 FDA meeting repeatedly discussing ovarian cancer. (*Id.* at 492:18-493:16). Counsel for J&J continued, then cross-examining Dr. Haber at length on a peer-reviewed published paper concerning ovarian cancer. (*Id.* at 502:24-504:3).

A review of the transcript therefore, as a whole, reveals that references to ovarian cancer, when not being listed as a type of disease which could be caused by asbestos (**Ex. 2**, TT 8/6/24, at 387:3-21), were introduced overwhelmingly by J&J. Further, it cannot be said that this evidence improperly encouraged the jury to return a punitive damages verdict against J&J. It was made clear repeatedly throughout trial that Michael Perry suffers from mesothelioma and not any other asbestos-related disease.

Next, the punitive charge did not, contrary to arguments from J&J, encourage the jury to award punitive damages against J&J for harm done to others. Throughout Plaintiffs' counsel's closing argument during the punitive phase, J&J objected, and counsel corrected his argument. (**Ex. 8**, TT 8/15/24, at 2265:9-2269:12). Further argument from Plaintiffs' counsel continued to clarify that the punitive phase was for what J&J had done to Michael Perry:

It's late. Everybody wants to go home. Don't let them get away with it, please. This is a big deal. You heard that from AII when they came up. This is a big deal. You know what's a big deal? What Michael Perry is going through. There's a fly (indicating). It's at the worst time. But that is a big deal. This is money. What Michael is going through is a big deal.

(*Id.* at 2281:11-19). The jury clearly understood this when they were told that the money from punitive damages gets paid to Michael Perry. (*Id.* at 2282:24-2283:22). The Court's punitive

damages instruction simply explained the nature, purpose, and basis for the punitive damages award and defined the standard, which, interestingly, is the same definition given to the jury when it was determining whether J&J's conduct was reckless, willful, and wanton to justify moving to the punitive phase. "The substance of the law is what must be instructed to the jury, not any particular verbiage." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016).

A jury charge is correct if, when read as a whole, it contains correct definitions and adequately covers the law. *Keaton ex rel. Foster v. Greenville Hosp. System*, 334 S.C. 488, 514 S.E.2d 570 (1999). J&J's challenge to the punitive damages instruction is simply one in which it disagrees with the verbiage used. For example, the reference to the Court's statement "that has been done" (see J&J's Motion at pg. 35) was taken completely out of context as that statement was made in reference to the jury's previous finding that J&J's conduct was willful, wanton, or reckless.

2. Failure to Explain the Effect of "Question 8" on the Jury form was not improper.

At the end of the liability phase of trial, the trial court instructed the jury, in part, as follows:

In addition, if you find that the defendant's conduct was willful, wanton, or reckless, the plaintiff must also prove that by clear and convincing evidence, that is, that the evidence must clearly and convincingly establish that the defendant was actually reckless or willful and wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or reckless disregard of the rights and safety of others.

* * *

Willful and wanton and reckless conduct. There's one question on the jury form that asks about willful, wanton, or reckless conduct. A defendant's conduct is reckless or willful or wanton if there was a conscious failure to exercise due care or conscious indifference to the rights and safety of others or reckless disregard to the rights and safety of others. This must be established by clear and convincing evidence, which is something more than simple greater weight of the evidence and something less than beyond a reasonable doubt. Clear and convincing proof is proof that leaves you firmly convinced. Clear and convincing proof establishes in your mind not only that a fact is probable but that it is highly probable.

(Ex. 7, TT 8/14/24, at 2092:6-16; 2098:5-21). Prior to charging the jury, the Court and counsel for the parties discussed the verdict form and the propriety of telling the jury the purpose of Question 8 on the verdict from J&J's counsel agreed with the plan to include Question 8 on the verdict from (Ex. 6, TT 8/13/24, at 1783:9-23). Counsel, in fact, indicated her understanding as follows:

MS. PEPKE: Strict liability, yes; negligence no; recklessness, yes. Okay, we don't go to a next phase.

THE COURT: Correct.

(*Id.* at 1784:3-6). It was clear that a punitive damages phase would not be necessary if the jury returned a "no" verdict as to negligence. The verdict form was not defective, it did not prejudice J&J in any fashion, and the trial court gave clear and cogent instructions to the jury regarding completing the form. J&J has failed to demonstrate how the failure to tell the jury that a "yes" as to Question 8 would trigger a second phase trial resulted in prejudice. J&J's motion for a new trial on this issue must be denied.

3. The Court did not err in failing to charge J&J's requested "But-For" Causation charge.

J&J contends it was prejudicial for the Court to refuse to instruct the jury using its causation charge, wherein it stated as follows:

Proximate cause requires proof of both causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's acts. Legal cause is proved by establishing foreseeability. If there is not sufficient evidence to conclude that, but for a defendant's conduct the injury would not have occurred, then you must find in favor of the defendant.

Jury Charges and Verdict Form Modified from *Plant* Case from J&J Defendants, pg. 38, Charge #21 Causation. As mentioned above "[a] trial court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal." *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). Again, "[t]he

substance of the law is what must be instructed to the jury, not any particular verbiage.” *Marin*, 415 S.C. at 482, 783 S.E.2d at 812.

J&J’s instruction sought to have the jury determine causation in this case using a strict but-for causation standard. That is not the proper standard in asbestos cases in South Carolina. This Court, instead, charged the jury as to causation according to *Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 644 S.E.2d 724 (2007). In *Henderson*, the Supreme Court of South Carolina held that in asbestos cases:

In determining whether exposure is actionable, we adopt the “frequency, regularity, and proximity test” set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162[-63] (4th Cir. 1986): “To support a reasonable inference of *substantial causation* from circumstantial evidence, there must be evidence of exposure to a *specific product* on a *regular* basis over some *extended* period of time in *proximity* to where the plaintiff actually worked.”

373 S.C. at 185, 644 S.E.2d at 727 (emphases added). This standard was reaffirmed this year in *Edwards v. Scapa Waycross, Inc.*, 442 S.C. 387, 899 S.E.2d 597 (2024). Notably, in *Edwards*, the Supreme Court explained that “the *Lohrmann* substantial factor test relaxes the ‘but-for’ requirement that applies in traditional tort cases [but] still requires the plaintiff to show “more than a casual or minimum contact with the product.”” 442, S.C. at 391, 899 S.E.2d at 599 (quoting *Lohrmann*, 782 F.2d at 1162)).

J&J’s proposed instruction was an incorrect statement of law. It would have been error to give it. There can be no prejudice from the Court’s proper decision not to misinform the jury about the controlling law.

4. The Court did not err in failing to give J&J’s requested instruction on specific causation.

J&J additionally contends that this Court failed to properly instruct the jury as to “specific causation.” Again, J&J argues that this Court should have accepted its instruction on specific

causation and that Plaintiffs failed to present sufficient evidence of specific causation to the jury. Both of these arguments are without merit.

As South Carolina appellate courts have stated, “specific causation is whether a substance caused particular individual’s injury.” *See Jolly v. General Electric Company*, 435 S.C. 607, 625, 869 S.E.2d 819, 828 (Ct. App. 2021) (quoting *In re Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig.*, 693 F.Supp.2d 515, 518 (D.S.C. 2010)).

The Court instructed the jury as to causation, in part, as follows:

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

(Ex. 7, TT, 8/14/24, at 2087:4-14). Notably, J&J does not argue that the instructions given to the jury were erroneous statements of law. Its argument is simply that its proposed instruction was, in its opinion, a correct statement of the law and better worded than the instructions given to the jury. Unfortunately for J&J, this is not the standard. The instructions given to the jury as to causation were proper statements of the law, simply worded, and free of any unexplained legalese designed to confuse the jury. Additionally, as mentioned above, J&J has not and cannot demonstrate any prejudice to it resulting from the Court’s properly worded instruction. *Pittman v. Stevens*, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). In the absence of prejudice, J&J’s challenge to the instructions given fails. “The substance of the law is what must be instructed to the jury, not any particular verbiage.” *Marin*, 415 S.C. at 482, 783 S.E.2d at 812.

Further, Plaintiffs presented sufficient evidence to satisfy the *Henderson* causation standard. A plaintiff in an asbestos case need only present evidence of “actionable exposure” to a defendant’s asbestos product. *Henderson v. Allied Signal, Inc.*, 373 S.C. at 185, 644 S.E.2d at 727.

To determine whether exposure is actionable, South Carolina courts apply the “frequency, regularity and proximity” factors set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* Therefore, “[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.” *Id.* (quoting *Lohrmann*, 782 F.2d at 1162). All of Plaintiffs’ evidence fully satisfying the substantial contributing factor standards are discussed at length, *supra*.

The evidence in this case was that Michael Perry was exposed to visible dust while applying Johnson’s Baby Powder. Plaintiffs’ experts presented circumstantial evidence from which the jury could have concluded that the Johnson’s Baby Powder that Michael Perry used for over 40 years contained asbestos; especially given that the talc used in the product repeatedly tested positive for asbestos. The jury was also informed of the range of exposure to Michael Perry that he would have experienced while using Johnson’s Baby Powder and told that the exposure level was many orders above background levels.

The jury could thus have easily concluded that Michael Perry had frequent, regular, and proximate exposure to asbestos from his use of Johnson’s Baby Powder over the course of many years. This evidence is more than sufficient to support the jury’s determination that Michael Perry’s mesothelioma was caused by his exposure to asbestos from Johnson’s Baby Powder.

5. The Court properly instructed the jury on substantial factor.

As noted in *Edwards v. Scapa Waycross, Inc.*, 442 S.C. 387, 899 S.E.2d 597 (2024), the “substantial factor” test requires demonstration of frequency, regularity, and proximity. The Court instructed the jury as to substantial factor and defined what that phrase meant. The Court instructed the jury, in part, as follows:

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

(Ex. 7, TT 8/14/24, at 2087:4-14) (emphasis added). In this instruction, the trial court told the jury that substantial factor meant “frequency, regularity, and duration.” Notably, J&J’s proposed Charge #21 on Causation defines “substantial factor” in the same fashion.

Also, the Court’s instructions as to causation corrected the alleged improper statement in Plaintiffs’ counsel’s closing argument. Counsel’s argument, contrary to J&J’s argument here, did not attempt to define “substantial factor.” Even if did, the trial court corrected that statement when it instructed the jury that in order to find J&J liable for Michael Perry’s injuries, they must find that his exposure to asbestos in Johnson’s Baby Powder “was of such a frequency, regularity, and duration that it was a substantial factor in bringing about the disease or injury.” (*Id.*). This argument is without merit and J&J is not entitled to a new trial on this issue.

6. Instruction as to “component parts” was proper.

It was not error for the Court to instruct the jury as to component parts. As to component parts, the jury instructed the jury as follows:

If a reasonable inspection or test would have disclosed a defect, a manufacturer who incorporates a defective component into its finished product and places the finished product into the stream of commerce is liable for the injuries caused by defect in that component part.

But defendant can, however, be liable for an alleged defective product it did not design, recommend, specify, require, manufacture, sell, or place in the stream of commerce. In deciding whether the defendant had a duty to test the product, you should consider the defendant's ability to conduct tests at the time the product was sold.

(Ex. 7, TT 8/14/24, at 2076:16-2077:5). This instruction aligned with J&J's repeated assertion that it did not "intend" for asbestos to be in its talc or that the asbestos in the product was not placed into the product "intentionally." Including the instruction informed the jury that J&J could, nevertheless, be liable for Michael Perry's injuries even though, as it contends, it did not intentionally add asbestos to its product. The instruction also noted that as a manufacturer, once J&J was on notice that its product contained a defective component, *i.e.*, asbestos, and still placed the product into the stream of commerce, it could be held liable for injuries caused by exposure to that defective component. J&J's argument on this issue is without merit and it is not entitled to a new trial based on the Court's instruction regarding component parts.

7. The "Eggshell Plaintiff" instruction was proper.

Similarly, it was not error for the Court to instruct the jury as to "eggshell plaintiff." Like the instruction on "component parts," this instruction was necessary because of J&J's attempt to suggest that Michael Perry's individual susceptibility would have been the reason he developed mesothelioma. J&J took considerable time discussing Michael Perry's family's history of cancer. Part of this argument that J&J injected into the trial was that there were some medical records that mistakenly called Mr. Perry's grandfather's cancer mesothelioma, despite sworn discovery responses from Mr. Perry denying that this was the case. As discussed *supra*, J&J itself brought up the fact that Mr. Perry's mother had ovarian/uterine cancer. Furthermore, J&J cross-examined Mr. Perry's treating thoracic surgeon expert, Dr. Gibney, at length on Mr. Perry's genetic makeup and what kinds of genetic testing were either done, or not done, on Mr. Perry. (Ex. 3, TT 8/7/24, at 723:2-724:13). Because of this, without this instruction, the jury would potentially have been led to believe that J&J could be found not liable for Michael Perry's mesothelioma because of his own individual susceptibility to cancer.

The Court's instruction as to the "eggshell plaintiff" was a proper statement of law. South Carolina, like most jurisdictions, has adopted the "eggshell plaintiff" rule which states a "defendant takes the plaintiff as [she] is found." *See, e.g., Raino v. Goodyear Tire and Rubber Co.*, 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992). "As a general rule, liability for the consequences of one's tortious act is not lessened by reason of the fact that the injuries were aggravated by plaintiff's unhealthy conditions . . ." *Id.*, citing 22 Am.Jur.2d Damages §282 (1988). The jury in this case heard testimony from Plaintiffs' experts, especially through cross-examination by J&J, that people can have the exact same exposure, but both will not develop and asbestos-related disease. (See **Ex. 2**, TT 8/6/24, at 402:12-404:6).

J&J has failed to provide any authority that it was improper for the Court to instruct this jury as to "eggshell plaintiff." J&J sold a product that contained asbestos. It is beyond dispute that asbestos is a carcinogen which causes mesothelioma, a deadly, incurable cancer. Michael Perry did not have a rare, allergic reaction. He developed terminal cancer from a known carcinogen. J&J cannot show a single jurisdiction that has ever held a seller of a deadly carcinogen has no duty to warn of its products' deadly nature. No such jurisdiction exists. Mesothelioma is not an allergy; it is a cancer. South Carolina, like every other jurisdiction in the country, recognizes asbestos is a deadly hazard causing a terminal, incurable cancer, and that there is a duty to protect and warn against such hazards. *See, e.g., Jolly, Glenn, supra.*

8. "Blended" Products Liability Charge

To be clear, Plaintiffs alleged both a design defect and manufacturing defect claim against J&J. (See **Ex. 6**, TT 8/13/24, at 1791:23-1793:5). Contrary to argument from J&J, the "consumer expectations test" has not been rejected in South Carolina as to products liability claims in general. In *Branham v. Ford Motor Co.*, 390 S.C. 203, 220, 701 S.E.2d 5, 14 (2010), which J&J relies on

for this argument, the Supreme Court clearly stated that “the consumer expectations test fits well in manufacturing defect cases” but is “ill-suited in design defect cases.” Because Plaintiffs brought a manufacturing defect claim against J&J, it was then proper for the Court to instruct the jury as to the “consumer expectations” test.

Further, the instruction was not blended. The Court clearly instructed the jury as to “manufacturing defect,” in part, as follows:

When a manufacturing defect is claimed, the test of whether a product is or is not defective is whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend the use of the product.

(Ex. 7, TT 8/14/24, at 2084:5-10). The jury was charged separately as to design defect. (*Id.* at 2082:9-22). Importantly, when instructing the jury as to design defect, the court correctly included language reflecting the risk-utility test (*id.* at 2082:23-2083:19) which, according to *Branham* is the proper test for design defect claims. *Branham, supra*.

9. The Court did not err in failing to charge the jury as to “hindsight opinions”, that more could have been done, or “post distribution” evidence.

There is no authority, and J&J has cited none, which would require this Court to instruct the jury as to what J&J characterizes as “hindsight opinions” or that the jury should consider that “more could have been done.” In fact, when considering Plaintiffs’ design defect claim and the fact that there was a reasonable alternative design, the question of “what could have been done” is inherent. Further, the admission of post-distribution evidence in this case was not prejudicial. First, given that Michael Perry repeatedly purchased and used Johnson’s Baby Powder since he was born in 1969, post-distribution evidence is limited. He used the product until shortly before J&J removed the product from the shelves. Thus, it is a stretch for J&J to assert that evidence dated

after 1974 is improper or evidence after 2013 is improper because he continued to use and be exposed to the asbestos in the product well after those dates.

Second, in *Branham*, the Supreme Court defined “post-distribution” evidence as “evidence of facts neither known nor available at the time of distribution.” See *Branham*, 390 S.C. at 227, 701 S.E.2d at 17. In a footnote, the Court clarified that:

If information on a product is reasonably attainable, then a manufacturer is charged with such knowledge at the time of manufacture. The rule prohibiting the introduction of post-distribution evidence does not permit a manufacturer to turn a blind eye to reasonably available information regarding the safety or danger of its product.

Id. at n. 17. The purpose of the alleged post-distribution evidence in this case was to demonstrate that J&J knew of the presence of asbestos not only in the talc that it put into its powder but also the presence of asbestos in its finished product. Further, this information regarding the presence of asbestos was available to J&J prior to Michael Perry’s initial exposure to asbestos from Johnson’s Baby Powder, and throughout his 50-year usage of the product. J&J’s motion on this issue is without merit and does not entitle J&J to a new trial.

B. None of the alleged structural or evidentiary errors identified by J&J warrant post-trial relief.

1. No error in denying J&J’s motion to sever.

Contrary to argument from J&J, the Court did not err in denying its request to sever a trial from American International Industries (“AII”). Trial judges, in their discretion, are responsible for determining whether trial issues are distinct enough to warrant severability. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). In this case, as acknowledged by J&J, the claims against J&J and AII were largely identical. There is no indication that the issues to be determined by the jury in this matter as to both of these defendants were so distinct as to warrant severability.

By the time of trial, the Court had resolved Plaintiffs' liability claims against AII as a matter of law. Before opening statements, the Court informed the jury as follows:

It has been determined as a matter of law that American International Industries, AII, which is a company responsible for Clubman talc products, is liable to Mr. Michael Perry on each of the causes of action pled against them in this case, specifically negligence, strict liability, fraud, conspiracy and implied warranty of merchantability. It has been determined as a matter of law that Clubman's asbestos-containing talc product was defective and unreasonably dangerous and was a substantial factor in the development of Michael Perry's mesothelioma. It has been determined as a matter of law that American International Industries' conduct was willful, wanton, and reckless, meaning American International Industries acted with conscious indifference to the rights and safety of others.

You are instructed that American International Industries is liable to the plaintiffs in this case. Your only task as to American International Industries are to determine the total amount of damages that Michael Perry and Lonnie Long have suffered.

(Ex. 1, TT 8/5/24, at 156:10-157:9). It was clear from this instruction that all of Plaintiffs' claims against J&J, as far as the jury knew, would be presented to the jury for resolution. Nothing about the trial court's instruction to the jury indicated that it should also find J&J liable for Plaintiffs' injuries because of AII. It was equally clear from the instruction that only claims as to AII, with the exception of damages, had been resolved by the trial court. Injecting superfluous legalese into the instruction given to the jury regarding AII, such as the fact that they were "in default for failing to comply with certain deadlines," as J&J would have had the trial court do, would have undoubtedly raised questions not before the jury for resolution. The jury was clearly instructed that these two defendants were to be considered separately. J&J is therefore not entitled to a new trial based on the trial court's denial of its motion to sever.

2. The trial court did not err in excluding opinions that Michael Perry's mesothelioma was idiopathic or spontaneous.

This Court, in accordance with its "gatekeeping" function, prevented J&J's experts from opining that Michael Perry's mesothelioma was idiopathic and/or spontaneous. J&J's experts were

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

Here, the Court properly excluded opinions from J&J’s experts that Michael Perry’s mesothelioma was “spontaneous.” The Court determined that these anticipated opinions from J&J’s experts Drs. Gregory Diette and David Weill were unsupported and were not valid scientific opinions or diagnoses. This exclusion was proper.

As Plaintiffs argued prior to trial, Dr. Weill is a pulmonologist who has no expertise in cancer generally or mesothelioma specifically. While Dr. Weill purported to have reviewed the reports of the parties’ experts in this matter, he did not review any of the underlying data allowing any expert to reach any opinions and, critically, he had not reviewed any internal testing documents from J&J. He didn’t review any J&J documents at all. Additionally, given Dr. Weill’s lack of

review of data and given that the opinion is unsupported in any recognized scientific community, his conclusions regarding the “cause” of Michael Perry’s mesothelioma would have been unsupported and merely a diagnosis of exclusion. His methodology was not reliable or consistent with recognized scientific principles. *See generally*, **Ex. 9**, Pre-Trial Hearing, 7/30/24, at 133:11-139:5.

Dr. Diette’s opinions suffer similarly in that he has only an expertise in asthma and COPD, and also lacks an adequate foundation to opine that that Michael Perry’s mesothelioma was either spontaneous or “natural occurring.” In fact, Dr. Diette has previously opined that there is no scientific literature to support the conclusion that a mesothelioma can occur spontaneously when there is a history of asbestos exposure.²

To be clear, Drs. Diette and Weill were not excluded completely from testifying. Their only limitation was that they could not use a diagnosis of exclusion and testify that Mr. Perry’s mesothelioma was spontaneous, but J&J did not establish in any way that they were prejudiced by these rulings. In their motion, J&J contends that Dr. Weill would have testified that “the cosmetic talcum powder is free from asbestos[.]” J&J Mot., at pg. 53. While this would have been curious testimony given that he never reviewed any J&J documents concerning the asbestos content of its talc, even with the court’s limitation on the subject matter of Dr. Weill’s testimony, J&J could have chosen to have Dr. Weill testify to such in court. J&J chose not to call Dr. Weill as a witness in its case-in-chief.

In contrast, Dr. Haber testified that asbestos is a major cause of mesothelioma; all types of asbestos causes mesothelioma. (**Ex. 2**, TT 8/6/24, at 382:2-22). Dr. Haber relied on geology, industrial hygiene, testing and other information to assess the amount and type of asbestos likely

² See **Ex. 34**, Deposition of Gregory Diette, 2/3/23, at 80:13-21.

in talc and consider Michael Perry's exposure in relation to his use (duration, frequency and proximity of use) to discuss causation.³ He opined talc containing asbestos fibers is a carcinogen to humans and causes malignant mesothelioma, and cited to specific studies.⁴ Similarly, Dr. Haber testified that Michael Perry has no germline mutations consistent with genetic abnormalities. (Ex. 2, TT 8/6/24, at 357:10-358:2). Dr. Haber testified that, even in people who have high individual susceptibility, exposure to asbestos is still require before even those individuals can develop mesothelioma. (*Id.* at 358:3-12).

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

3. Testimony from Plaintiffs' experts complied with the South Carolina Causation Standard.

J&J contends, as it did before trial, that the causation testimony of Plaintiffs' medical experts, Dr. Arnold Brody and Dr. Steven Haber, is unreliable and insufficient to establish

³ Plaintiffs do not attach Dr. Haber's lengthy testimony on these subjects; however, Dr. Haber's trial testimony, in general, reflects his overall opinions and reliance materials.

⁴ *Id.*

substantial factor causation. In the interest of brevity, Plaintiffs adopt and incorporate by reference *Plaintiffs' Consolidated Response in Opposition to Defendants' Motions in Limine to Exclude or Limit Causation Testimony of Plaintiffs' Expert Witnesses* ("Consolidated Response"), filed July 24, 2024, and the exhibits attached thereto.

J&J once again asks this Court to preclude testimony from Plaintiffs' causation experts that "each and every exposure" caused Michael Perry's mesothelioma. Contrary to J&J's mischaracterization and yet another attempt to re-brand these experts' opinions, Plaintiffs' experts do not hold the opinion that "any exposure" or "every exposure" or "every asbestos fiber" causes mesothelioma generally or caused Michael Perry's mesothelioma. As set forth below, they instead testified that Michael Perry's mesothelioma was caused by his cumulative asbestos exposure, and that given the specific facts of his exposure to visible asbestos dust from Johnson's Baby Powder regularly for many years, these exposures were a substantial factor in causing Michael Perry's disease.

a. Standard of Review

The admissibility of expert testimony is governed by South Carolina Rule of Evidence 702. That rule provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE.

Courts evaluating the admissibility of scientific expert evidence "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508 (S.C. 1999). The reliability of scientific evidence is evaluated based on several factors, including: (1) the publications and peer review of the

technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684 (S.C. 2009) (citing *Council*, 335 S.C. at 19).

“[C]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” are the ordinary means to attack an opposing expert. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Courts should not exercise their gatekeeping responsibility by excluding expert testimony that falls within the range of matters on which reasonable experts can disagree. *See Milward v. Acuity Specialty Prods. Group, Inc.*, 639 F.3d 11, 22 (1st Cir. 2011). While the trial court may look at the reliability of the expert’s methodology, it is for the jury to determine the soundness of the facts underlying the expert’s opinion and the correctness of the expert’s conclusions. *See id.* 22.

b. A JNOV is an improper vehicle for the court to reconsider a *motion in limine*.

J&J offers no authority for the proposition that a JNOV motion is the appropriate vehicle for requesting a Court reconsider its evidentiary rulings. To the contrary, South Carolina Courts have found that a JNOV motion is not the appropriate vehicle to address errors in the admission of evidence. *Johnson v. Hoechst Celanese Corp.* 317 S.C. 415, 420 (1995) (“a motion for judgment notwithstanding the verdict was not the appropriate vehicle to address the alleged error,” in submitting a color-coded map to the jury which the moving parties contended showed their properties in the wrong color classification.).

In ruling on a JNOV, the Court is required to review *all* the evidence and consider it in the light most favorable to the nonmoving party. *Welch, supra*, 342 S.C. at 299. South Carolina law does not contemplate revisiting evidentiary rulings when deciding a JNOV motion. For this initial

reason, J&J's request that this Court belatedly exclude and of Plaintiffs' experts' testimony so that it can grant JNOV is without merit.

c. Plaintiffs' experts have a reliable scientific basis for their opinions.

This Court accepted these same causation opinions at the trial of *Jolly v. General Electric Co.*, No. 2016-CP-42-1592 (S.C. Com. Pl. Dec. 15, 2017) (**Ex. 35**). In *Jolly*, this Court allowed expert testimony that mesothelioma can be caused by brief or low-level cumulative exposures, finding that the plaintiffs' "experts were entitled to rely on this basic medical fact in reaching their opinion in this case." *Id.* at 30. The Court recognized that testimony about this basic medical fact is not the same thing as testimony that "each and every exposure" is a substantial factor in causing disease. *Id.* Dr. Brody's testimony was similarly allowed in the *Howe* trial in March 2018, the *Crawford* trial in July 2018, and the *Glenn* trial in January 2019.

In *Jolly*, the Court found that the plaintiffs' experts had utilized a reliable methodology in that they "relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the manner described by [the plaintiff and his co-worker], and the facts surrounding [the plaintiff's] exposure to visible dust from Defendants' valves." *Id.* at 31. The Court ruled that because the experts' causation opinions were supported by the scientific literature as well as relevant exposure facts, their testimony was admissible, relevant, and helpful to the jury. *Id.* at 32.

The Court of Appeals affirmed this Court's *Jolly* Order. Considering the same arguments raised by Defendants in this matter, it ruled, "[t]o the extent Appellants challenge the admissibility of Respondents' experts' testimony on the ground that it was unreliable, *they have failed to show*

any significant part of the testimony that could be reasonably characterized as espousing the ‘each and every exposure’ theory.” Jolly v. General Electric, 435 S.C. 607, 639; 869 S.E.2d 819, 836 (Ct. App. 2021) (emphasis added).

The Court of Appeals agreed with Mrs. Jolly that her “experts relied on the cumulative dose theory and that their reliance on basic science in reaching their opinions is not the equivalent of testifying that ‘each and every exposure’ was a substantial factor in causing Dale’s mesothelioma.” *Id.* at 634, 869 S.E.2d at 833-34.

The Court of Appeals also noted its disagreement with Defendants’ contention that “the cumulative dose theory conflicts with the *Henderson/Lohrmann* substantial factor standard.” *Id.* at 635, 869 S.E.2d at 834. “Stating that a certain exposure *contributes* to an individual’s cumulative dose does not espouse the view that ‘each and every breath’ of asbestos is ‘substantially’ causative of mesothelioma or imply that one exposure meets the legal requirement for causation.” *Id.* at 635-36, 869 S.E.2d at 834. “We view the testimony concerning cumulative dose as background information essential for the jury’s understanding of medical causation, which must be based on science. We do not interpret this presentation as an attempt to supplant the *Henderson/Lohrmann* test.” *Id.* at 636, 869 S.E.2d at 834-35.

The Court of Appeals ultimately concluded, “the cumulative dose theory on which Respondents’ experts relied *easily meets* the standard for reliability set forth in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).” *Id.* at 639, 869 S.E.2d at 836 (emphasis added). “Respondents’ experts were guided by the facts specific to Dale’s exposure to Appellants’ products in forming their opinions concerning causation.” *Id.* at 637, 869 S.E.2d at 835. Finally, the Court recognized Plaintiff’s experts relied on “numerous peer-reviewed, published epidemiological studies, case series, and case reports,” as well as other scientific criteria impacting causation of

disease, and follows the weight-of-the-evidence methodology used by national and international public health organizations for evaluating the health effects of asbestos.” *Id.* at 640-41, 869 S.E.2d at 837.

South Carolina’s Court of Appeals again rejected Defendants’ attempts to conflate “cumulative dose” testimony with the “each and every exposure” theory in *Edwards v. Scapa Waycross, Inc.*, 437 S.C. 396, 878 S.E.2d 696, (Ct. App. Aug. 3, 2022).

[Defendant] Scapa argues the trial court erred in failing to grant its motion for JNOV because Stewart employed the “each and every exposure” theory of causation at trial. Scapa states that Dr. Frank explained the cumulative dose or “cumulative exposure” theory to the jury and utilized that theory in reaching his opinion as to whether Scapa’s dryer felts were a substantial factor in causing Stewart’s mesothelioma. Scapa conflates these two theories and claims they are inconsistent with the specific causation standard set forth in Henderson. We disagree.

“The ‘each and every exposure’ theory espouses the view that ‘each and every breath’ of asbestos is substantially causative of mesothelioma.” *Jolly*, 435 S.C. at 633, 869 S.E.2d at 833 (quoting *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1044 (2016)); see also *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841, 846 (E.D.N.C. 2015) (“Also referred to as ‘any exposure’ theory, or ‘single fiber’ theory, it represents the viewpoint that, because science has failed to establish that any specific dosage of asbestos causes injury, every exposure to asbestos should be considered a cause of injury.”). This court has recently refused to conflate the cumulative dose theory with the each and every exposure theory, concluding that an expert’s opinion which states “that a certain exposure contributes to an individual’s cumulative dose does not espouse the view that ‘each and every breath’ of asbestos is ‘substantially’ causative of mesothelioma or imply that one exposure meets the legal requirement for causation.” *Jolly*, 435 S.C. at 635–36, 869 S.E.2d at 834. Rather, this court viewed testimony regarding a plaintiff’s cumulative dose as “background information essential for the jury’s understanding of medical causation, which must be based on science.” *Id.* at 636, 869 S.E.2d at 834–35.

Edwards, 437 S.C. at 416-417, 878 S.E.2d at 707. See also, *Glenn v. 3M Company*, 440 S.C. 34, 64-68, 890 S.E.2d 569, 585-587 (Ct. App. 2023).

Similarly, in *Garvin v. Agco Corp.*, Judge Hill rejected a challenge to the admissibility of the testimony of Dr. Brody. **Ex. 36**, No. 2012-CP-40-6675 (S.C. Ct. Comm. Pleas Nov. 14, 2014).

The Court held that the opinions of this expert was reliable and helpful to the trier of fact. *Id.* at 21-25. The Court further determined that the opinions of these experts supported the jury's finding that the plaintiff developed mesothelioma from breathing asbestos fibers from the defendant's asbestos products. *Id.* at 25. He rejected the defendant's contention that Dr. Brody held the opinion that every asbestos exposure contributes to cause disease, noting that "[t]he trial record does not contain any such testimony from any of Plaintiffs' experts." *Id.* at 23.

Contrary to Defendant's assertions, Plaintiffs' experts' opinions regarding the cumulative nature of asbestos diseases and the lack of any safe threshold of exposure are not "unreliable," but are generally accepted medical facts that have been established by a significant body of peer-reviewed medical and scientific literature and have been part of the asbestos litigation since its inception. As in *Jolly* and *Garvin*, the opinions of Plaintiffs' experts are reliable and admissible expert opinion testimony.

d. Dr. Haber has a reliable scientific basis for his opinions.

This court has found causation testimony similar to Dr. Haber's testimony to be reliable and admissible and rejected the same challenges to those opinions that J&J makes here. **Ex. 35**, Order Denying Defendants' Post-Trial Motions, *Jolly v. General Electric Co.*, No. 2016-CP-42-1592, at 31-32 (S.C. Ct. Comm. Pleas Dec. 15, 2017). This Court found that the plaintiff's causation expert had a reliable basis for his specific causation opinion given his reliance on a broad range of scientific evidence as well as the exposure facts proven at trial:

Dr. Frank . . . relied on [his] many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including epidemiology and other scientific literature, the dose-response relationship, the science regarding the low levels of exposure that can cause mesothelioma, the exposure levels documented from working with gaskets and packing in the manner described by Jolly and Taylor, and the facts surrounding Jolly's exposure to visible dust from Defendants' valves.

Jolly Post-Trial Order, at 31.

Contrary to J&J's assertions, Plaintiff's experts' opinions regarding the cumulative nature of asbestos diseases and the lack of any safe threshold of exposure are not "unreliable," but are generally accepted medical facts. The scientific evidence establishing these basic medical facts is set forth in Plaintiff's Consolidated Response. Plaintiffs' experts were entitled to rely on these basic medical facts in reaching their opinion in this case. That does not mean that they concluded that "each and every exposure" that Michael Perry had was a *substantial factor* in causing his disease. This distinction was recently explained by the Pennsylvania Supreme Court in an opinion upholding the admissibility of similar causation opinions. *See Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045-46 (Pa. 2016). The court found his testimony to be entirely compatible with the substantial factor causation standard:

We must agree with the Rosts that Ford has confused or conflated the "irrefutable scientific fact" that every exposure cumulatively contributes to the total dose (which in turn increases the likelihood of disease), with the legal question under Pennsylvania law as to whether particular exposures to asbestos are "substantial factors" in causing the disease. It was certainly not this Court's intention, in either Gregg or Betz, to preclude expert witnesses from informing juries about certain fundamental scientific facts necessary to a clear understanding of the causation process for mesothelioma, even if those facts do not themselves establish legal (substantial factor) causation.

Rost v. Ford Motor Co., 151 A.3d 1032, 1045-46 (Pa. 2016).

The Eleventh Circuit has recently held the same. In *Bobo v. Tennessee Valley Auth.*, 855 F.3d 1294 (11th Cir. Apr. 26, 2017), the court noted that expert testimony that "there is no evidence that there is a threshold level of exposure below which there is zero risk of mesothelioma," and that "all 'significant' exposures to asbestos 'contribute to cause mesothelioma,'" is not the same thing as saying that each and every exposure is causative. *Id.* The

expert's causation opinion was admissible because it was based on the exposure facts in the case and was supported by scientific literature, including the Helsinki Criteria. *Id.*

This Court has previously concluded that plaintiffs' experts who offer opinions similar to the opinions offered here is not an opinion that "each and every exposure" is a substantial factor in causing disease. *Jolly* Post-Trial Order, at 30.

Judge Hill has similarly found Dr. Brody's causation opinions to be reliable and admissible. **Ex. 36**, *Garvin v. Agco Corp.*, No. 2012-CP-40-6675, at 21-25 (S.C. Ct. Comm. Pleas Nov. 14, 2014). In *Garvin*, Dr. Brody's testimony was found to be reliable and helpful to the trier of fact. *Id.* Judge Hill rejected the defendant's contention that Dr. Brody holds the opinion that every asbestos exposure contributes to cause disease, noting that "[t]he trial record does not contain any such testimony from any of Plaintiffs' experts." *Id.* at 23.

Dr. Brody's testimony has likewise been admitted by courts across the country. *See, e.g.*, *Waite v. All Acquisition Corp.*, 194 F. Supp. 3d 1298, 1315 (S.D. Fla. 2016); *Rabovsky v. Air & Liquid Sys. Corp.*, No. CIV.A. 10-3202, 2012 WL 876752, at *3 (E.D. Pa. Mar. 13, 2012); *In re Asbestos Prod. Liab. Litig. (No. VI) (Rabovsky)*, No. 10-CV-03202, 2012 WL 252919, at *1 (E.D. Pa. Jan. 25, 2012); *In re Asbestos Products Liab. Litig. (No. VI) (Larson)*, No. 09-69123, 2010 WL 4676563, at *3-4 (E.D. Penn. Nov. 15, 2010); *Rost v. Ford Motor Co.*, 151 A.3d 1032, 1045 (Pa. 2016); *Startley v. Welco Mfg. Co.*, 78 N.E.3d 639, 647 (Ill. Ct. App. 2017); *Hennegan v. Cooper/T. Smith Stevedoring Co.*, 837 So. 2d 96, 105-06, 110 (La. Ct. App. 2002).

J&J relies on the South Carolina District Court's opinion in *Haskins v. 3M Co.*, No. 2:15-cv-02086, No. 3:15-cv-02123, 2017 WL 3118017 (D.S.C. July 21, 2017). There, Judge Norton excluded the testimony of the plaintiff's expert, Dr. Carlos Bedrossian, on the grounds that it was inconsistent with the substantial factor causation standard. *Id.* at *6. While he did not question the

underlying scientific foundation for the expert's opinions, he held that the opinion was inconsistent with the legal requirements for demonstrating causation because the expert did not determine that the plaintiff's exposure to the defendant's product had a substantial impact on the plaintiff's total cumulative exposure. *Id.* at *7. He concluded that the expert's opinion that every occupational exposure contributes to cause mesothelioma "is sound science [but] is inconsistent with the law." *Id.* at *6.

The serious flaws in the *Haskins* opinion were outlined in a note in the Harvard Law Review. **Ex. 37**, *Tort Law—Expert Testimony in Asbestos Litigation—District of South Carolina Holds the Every Exposure Theory Insufficient to Demonstrate Specific Causation Even if Legal Conclusions Are Scientifically Sound*, 131 Har. L. Rev. 658 (Dec. 2017). The author explained that "although the court wrapped its conclusions in substantial factor language, it applied the but-for causation standard for specific causality" by requiring a showing that exposure to the defendant's product must be quantified and shown either to reach a threshold sufficient to independently cause the disease or to be comparatively significant in the context of the other exposures. *Id.* at 662. In doing so, "[t]he *Haskins* interpretation of 'substantial factor' merely rehashed the traditional tort standard and added potentially insurmountable hurdles in a field where the courts have consistently determined that those standards are inappropriate." *Id.* at 664. Moreover, "[i]n failing to ground his interpretation of the legal standard in the scientific realities of mesothelioma, Judge Norton overly narrowed the amount of admissible scientific evidence that can demonstrate specific causation." *Id.* at 665. "Requiring evidence on the dose threshold or quantification of exposure pushes against the legal community's virtual agreement that asbestos diseases do not respect traditional tort rules." *Id.* The court should have instead used the science

to guide his interpretation of the legal standards, which would respect the appropriate balance between the standard of proof and the limits of science. *Id.*

As recognized by this Court and other courts, which have all admitted causation testimony similar to the causation testimony offered here, it is not proper to evaluate the experts' medical opinions with reference to only one narrow part of the basis for the opinion. *Jolly* Post-Trial Order, at 31. Here, in reaching their causation opinions, Dr. Haber and Dr. Brody relied on their many years of experience in the area of asbestos-related diseases, as well as a broad range of evidence including animal studies, epidemiology, and other scientific literature, the dose-response relationship, and the science regarding the low levels of exposure that can cause mesothelioma. J&J's attack on their opinions as "unreliable" has absolutely no merit.

- e. Dr. Haber's specific causation opinion was based on the exposure evidence in this case.

Dr. Haber's specific causation opinion is firmly grounded in the exposure evidence presented at trial. Dr. Haber was offered and qualified as an expert in internal medicine and pulmonology. (Ex. 2, TT 8/6/24, at 353:8). While J&J had no objection to Dr. Haber being qualified as an expert in internal medicine, they objected "to anything outside of internal medicine and pulmonology; for example, any opinions about asbestos detection in talc; any marketing opinions; any opinions on mineral science, geology or microscopy[.]" (*Id.* at 352:11-18). This objection was partially overruled because Dr. Haber had read and relied on those materials in forming his specific causation opinion about what caused Michael Perry's mesothelioma. (*Id.* at 352:19-353:20).

Dr. Haber testified that Michael Perry was suffering from mesothelioma caused by asbestos. (*Id.* at 355:2-6). According to Dr. Haber, the Johnson's Baby Powder that Michael Perry used for nearly five decades played a role in the development of his mesothelioma. (*Id.* at 355:7-

10). In reaching his conclusions, Dr. Haber reviewed Michael Perry's medical records, including X-rays and scans of his chest, conducted a personal interview with Mr. Perry, reviewed reports of other experts designated in this matter, reviewed the deposition testimony in this case, and "other materials". (*Id.* at 355:11-356:1). Dr. Haber also reviewed and evaluated Mr. Perry's clinical course of care and treatment post-diagnosis. (*Id.* at 359:4-360:6).

Dr. Haber explained that mesothelioma is a "signal tumor" meaning that when someone has mesothelioma, "you think about asbestos exposure," as, according to Dr. Haber, "one signals the other." (*Id.* at 369:2-11). The average life expectancy for epithelioid mesothelioma is 18 months. (*Id.* at 370:11-17). Mr. Perry's medical records referenced his use of talc. (*Id.* at 370:20-371:3). Mr. Perry's cancer was extensive and invasive, including that it had spread into the soft tissues of the chest wall, into the lymph nodes, and the lung. (*Id.* at 375:14-376:14). Dr. Haber then discussed asbestos and how the different asbestos types were used commercially and noncommercially. (*Id.* at 382:2-20). All fiber types, according to Dr. Haber, cause mesothelioma and other cancers. (*Id.* at 383:20-22).

Dr. Haber reviewed Johnson & Johnson's internal records finding tremolite asbestos in its talc and he reviewed published medical and scientific literature on the definition of asbestos. (*Id.* at 384:8-385:11). He also noted that Johnson & Johnson's own internal documents confirm that fibrous tremolite is a cause of mesothelioma. (*Id.* at 385:12-19). He discussed the nine asbestos-related diseases. (*Id.* at 386:23-387:21). He explained that for asbestos to attack the body, "you have to be able to . . . breathe it in." (*Id.* at 388:21-389:1). According to Dr. Haber, [t]he worst is in a powder form, because it's already in a respirable form. . . . So if you have asbestos in a powder form, that's the worst." (*Id.* at 389:13-16).

Dr. Haber explained what he refers to as the “onion properties” when explaining whether asbestos harms a person as soon as it’s breathed in. According to Dr. Haber, asbestos has no “onion properties” in that you cannot smell it, you cannot see it, you cannot taste it, and it doesn’t produce a tangible reaction as soon as it’s breathed. (*Id.* at 395:19-396:9). Additionally, there is no safe level of exposure to asbestos even at the 0.1 fibers-per-cc- level established by OSHA. (*Id.* at 401:13-403:3). Dr. Haber also explained that study after study and organization after organization has concluded that there is no threshold level below which there is no risk of developing an asbestos-related disease. (*Id.* at 404:4-405:4).

Dr. Haber testified that a person’s length of exposure matters when he is considering how dangerous exposures to asbestos are. (*Id.* at 406:13-16). He explained that:

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

(*Id.* at 406:16-22). The U.S. Food and Drug Administration (“FDA”) has previously said that using talc can produce occupational levels of exposure to asbestos. (*Id.* at 407:12-408:2). Johnson & Johnson’s Baby Powder is literally a bottle of talc. (*Id.* at 409:3-13). He further explained that:

And in fact, from the scientific and medical perspective, asbestos-causing mesothelioma is established as a fact. And so there is no need to get a study who was exposed to this particular product or this particular product or this particular product. If it's capable of releasing asbestos into someone's breathing zone or getting into their body and -- it is dangerous, and you don't need a whole nother study. It's been studied for 60 years. We've done plenty of studies in all kinds of scenarios. In every scenario, at lower and lower and lower and lower doses, we still have substantial risk of mesothelioma.

(*Id.* at 410:8-21). Specifically, Dr. Haber reviewed peer-reviewed published literature about the levels of exposure that occur when someone uses J&J’s talc. (*Id.* at 413:21-24). According to that literature, the level of exposure was .38 to 5.18 fiber per cc years. (*Id.* at 414:1-6). Even exposures

at the low-end of the range, substantially increases the risk of developing mesothelioma. (*Id.* at 414:7-11). In addition to studies, Dr. Haber also reviewed case reports which look at an “individual person” or multiple people who had the disease. (*Id.* at 415:6-10). According to Dr. Haber, there are case reports based on certain occupations that work with talc which indicate concerns about the development of mesothelioma and case reports of individuals exposed to cosmetic talc who develop mesothelioma. (*Id.* at 416:2-417:2). At autopsy, talc, anthophyllite, and tremolite have been repeatedly found. (*Id.* at 416:24-417:2). Dr. Haber later noted that background asbestos is mostly composed of small amounts of chrysotile “all very, very tiny, less than 1 micron.” (*Id.* at 424:3-9). Anthophyllite and tremolite are not really found in background asbestos. (*Id.* at 424:9-10).

Based on his review of this literature and others, Dr. Haber formed an opinion, to a reasonable degree of medical certainty, about the fiber per cc levels of exposure from Johnson’s Baby Powder:

So it’s between .1 to 4 fibers per cc. So a cc, I think you have heard, is about the size of -- of a sugar cube. We breathe in 500 ccs, roughly, with every breath, 20 breaths. So if you have 1 fiber per cc, you’re going to breathe in 10,000 fibers every minute, millions or billions in a year.

(*Id.* at 415:18-24).

As to Mr. Perry, Dr. Haber discussed that Mr. Perry had exposures to asbestos other than from talc. According to Dr. Haber, nothing in Mr. Perry’s work exposed him to asbestos given that he did not do “any remodeling of . . . his home or construction work and none of his schools” and he did not live with anyone that was working with or around asbestos. (*Id.* at 420:19-421:4). In the mid-1980s, he had potential exposures to asbestos from brake work that he performed with his father. (*Id.* at 421:5-8). He noted that Mr. Perry performed “little more than a dozen” brake jobs and that some brakes contained chrysotile asbestos. (*Id.* at 421:8-16). Mr. Perry’s exposure to

asbestos, according to Dr. Haber, was “an exposure that counted and contributed to his cumulative dose of asbestos.” (*Id.* at 421:17-21).

As to frequency and quantity, Dr. Haber testified that Mr. Perry was “an above-average user” of Johnson’s Baby Powder, using it “two to four times a day”, “putting it on his whole body” and occasionally “actually putting it on his . . . face.” (*Id.* at 421:25-422:10).

Dr. Haber testified that Michael Perry’s exposures to asbestos from Johnson & Johnson’s Baby Powder were a substantial contributing factor to the development of his mesothelioma. (*Id.* at 425:9-13). Dr. Haber explained that there was no way to examine an individual’s medical history to say certain exposures counted and other exposures did not count; instead, it is the cumulative dose of asbestos exposure that causes mesothelioma. (*Id.* at 427:16-25).

Dr. Haber’s causation opinions are based on the record of Michael Perry’s repeated exposures to asbestos from Johnson’s Baby Powder, as well as the scientific literature and other evidence mentioned above. In this way, Dr. Haber’s methodology and approach is exactly the same as that approved by this Court in *Jolly* and Judge Hill in *Garvin*. Plaintiffs urge this Court to similarly hold that Dr. Haber’s specific causation testimony is supported by the scientific literature as well as the facts of this case, and that his testimony was relevant and helpful to the jury. Dr. Haber’s causation opinion was expressed to a reasonable degree of scientific and medical certainty, and he identified Mr. Perry’s exposures to asbestos in Johnson’s Baby Powder as a cause of his mesothelioma. There was nothing tenuous or uncertain about his opinion and he expressed the reasons for this opinion in detail. Nothing more is required under South Carolina law.

4. There was no error as to the admission of the tissue digestion evidence.

On July 10, 2024, a little over a month before the beginning of trial, this Court ordered the division of Michael Perry’s lung tissue for digestion. **Ex. 38**, Order Granting Joint Motion

Requesting the Division of Plaintiff Michael L. Perry's Tissue, 7/10/24. At the pre-trial hearing on July 30, 2024, J&J moved to exclude the very tissue testing the parties requested only weeks before. **Ex. 9**, Pre-Trial Hearing Transcript, 7/30/24, at 220:8-10. According to argument made by J&J at the pre-trial hearing, its expert, Dr. Victor Roggli, informed J&J that he could not perform the digestion prior to trial. *Id.* at 221:11-16. However, J&J purportedly found another expert to analyze the tissue – Dr. Stanley Geyer. *Id.* at 221:16-18. Nevertheless, J&J contended that the tissue digestion should be excluded because “we’re out of time.” *Id.* at 222:6-13.

In response, Plaintiffs’ counsel informed the court that Plaintiffs and J&J went back and forth attempting to create an order regarding the tissue digestion that both parties could agree on. *Id.* at 223:6-25. After this Court signed the order, it took several days for MUSC to divide the tissue as instructed by the Court’s Order. Ultimately, on the day before the pre-trial hearing, the tissue was divided and MUSC sent the tissue to the experts designated by the parties. Each tissue division arrived at each of the parties’ respective experts on the very same day. *Id.* at 224:23-225:24. Specifically, the tissue arrived to each of those experts on the morning of the pre-trial hearing prior to 8:30am. *Id.* at 225:24-226:1. Dr. Longo performed the tissue digestion for Plaintiffs and Plaintiffs agreed to make Dr. Longo available for deposition. *Id.* at 226:2-5. The Court agreed to revisit the motion to exclude the tissue digestion if both experts were unable to perform the digestion. *Id.* at 227:12-13.

On the first morning of trial, J&J informed the Court and Plaintiffs’ counsel that its expert could not perform the tissue digestion. (**Ex. 1**, TT 8/5/24, at 71:19-22). Plaintiffs’ counsel, on the other hand, informed the court that Dr. Longo was in the process of concluding the tissue digestion and again offered to make Dr. Longo available for a short deposition on his findings. *Id.* at 72:3-6.

Dr. Longo drafted a report regarding the tissue digestion results and Plaintiffs forwarded that report to counsel for the Johnson & Johnson Defendants on August 5, 2024. On that same day, Plaintiffs offered to make Dr. Longo available for deposition regarding his lung digestion results on August 6, 2024, at 4:00 pm by phone. The Johnson & Johnson Defendants refused this offer and insisted that the deposition be conducted via zoom. Because the Johnson & Johnson Defendant requested a deposition by zoom and given that Dr. Longo was traveling in order to testify live at trial, his deposition could not occur until 10:00 pm on August 6, 2024.⁵

Two days later, Plaintiffs' expert, Dr. Longo, testified that he tested Michael Perry's lung tissue. (**Ex. 3**, TT 8/7/24, at 814:15-17). Dr. Longo, prior to discussing the tissue digestion results, testified that he and his lab had analyzed over 400,000 different individual asbestos samples, including testing human lung tissue, referred to as a "lung burden" to see what if anything is in the lung. *Id.* at 827:6-828:2. Dr. Longo testified that the tissue digestion revealed the presence of tremolite asbestos, winchite asbestos, and talc in Michael Perry's lungs. *Id.* at 877:5-13. According to Dr. Longo, the presence of tremolite asbestos in Michael Perry's lungs was consistent with what he had repeatedly found in his testing of Johnson's Baby Powder. *Id.* at 877:21-878:7. J&J thoroughly cross-examined Dr. Longo regarding his findings of the presence of asbestos in Michael Perry's lungs. *Id.* at 964:16-967:8.

The court prohibited the parties from asking certain questions regarding when Dr. Longo received the lung tissue for testing since it was the Court who had permitted the tissue digestion tissue to be performed. (*Id.* at 965:17-966:1). Further, Plaintiffs' expert received the tissue at the exact same time the Defendants' expert received the tissue. Plaintiffs should not be penalized and/or prevented from presenting admissible evidence solely because J&J's expert could not

⁵ **Ex. 39**, Oral Videoconference Deposition of William E. Longo, PhD, 8/6/24.

perform his own digestion. J&J had every opportunity to cross-examine Dr. Longo on his methodology of performing the tissue digestion. They chose not to.

On the other hand, it is correct, however, that this Court prohibited J&J's corporate representative from discussing the results of the tissue digestion. Dr. Edwin Kuffner was not designated as an expert witness in this case. **Ex. 40**, Johnson & Johnson Defendants' Witness List, 7/20/24. Despite the failure to tender Dr. Kuffner as an expert, J&J attempted to question Dr. Kuffner about Dr. Longo's "finding of winchite asbestos in Mr. Perry's tissue or addressing the history of winchite (or lack thereof) in Johnson's Baby Powder". J&J Mot. at pg. 63. Prohibiting Dr. Kuffner, designated as a fact witness, from testifying about things he had no knowledge, skill, or training, from discussing the results of a tissue digestion study was not error and was certainly not "manifest injustice" as J&J so dramatically proclaims.

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Gooding v. St. Francis Xavier Hospital*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). Dr. Kuffner's testimony revealed that he was not an expert in microscopy or geology. (**Ex. 4**, TT 8/9/24, at 1186:12-1187:5). Further, Dr. Kuffner had already given his testimony that whatever minerals found in Mr. Perry's lungs did not and could not have come from Johnson's Baby Powder. Dr. Kuffner, as a fact witness, properly testified that the winchite and tremolite in Mr. Perry's lungs did not come from Johnson's Baby Powder and he based his statement on his "understanding of the . . . data." (**Ex. 4**, TT 8/9/24, 1207:18-1208:14). If J&J truly intended to have Dr. Kuffner testify further as to the geology, mineralogy, and findings of winchite asbestos, he should have been offered and qualified as an expert witness with the training, skill, and education to do so. Alternatively, J&J

could have called its geologist expert, Dr. Sanchez, to testify at trial. They again chose not to do this and instead tried to launder geology expert opinions through J&J's corporate representative.

As a fact witness, Dr. Kuffner's testimony was properly limited by South Carolina Rule of Evidence 701, which provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

He was not qualified to give the testimony J&J now says he should have been able to provide in front of the jury. It was not error for the trial court to prevent him from doing so.

Moreover, Plaintiffs' counsel statement in closing argument regarding J&J's failure to call an expert witness to rebut Dr. Longo's findings of tremolite and winchite in Michael Perry's lungs was not an improper invocation of the missing witness rule. He simply called attention to the fact that no witness had rebutted Dr. Longo's findings. "The fact that the unfavorable inference may be drawn does not require that the jury draw it." *Baker v. Port City Steel Erectors, Inc.*, 261 S.C. 469, 476, 200 S.E.2d 681, 683–84 (1973).

Even if J&J could make an argument that Plaintiffs' counsel's argument regarding Defendant not bringing any experts to testify in its case in chief somehow was not totally proper, this Court completely rectified that concern. This Court instructed the jury, in the middle of closing, that "Discussion of failure to call an expert is completely permitted, but the assertion they couldn't find any expert is not something is in evidence; and therefore, I'm striking that." (Ex. 7, TT 8/14/24, at 1887:14-21). Therefore, J&J cannot argue that this comment was an improper invocation because the jury was instructed on it and it was stricken from the record, which if anything hurt Plaintiffs more than J&J.

There is no evidence or indication that the jury saw counsel's statement as a directive to either rule in favor of Plaintiffs or concluded that any expert that J&J would have called would have given opinions or testimony unfavorable to J&J. Dr. Kuffner testified that J&J's talcum powder did not contain any form of asbestos whether winchite or tremolite. The jury had sufficient evidence presented to it to determine whether or not that was true.

As J&J cannot demonstrate prejudice from the failure to permit Dr. Kuffner to testify outside of his qualifications as a fact witness/corporate representative, J&J is not entitled to a new trial on this issue.

5. Dr. Haber did not testify outside of his qualifications.

J&J challenged Dr. Haber's testimony prior to the beginning of trial. To the extent relevant, Plaintiffs incorporate their *Responses to Johnson & Johnson Defendants' Motion in Limine to Partially Exclude the Opinions of Dr. Steven Haber*, filed on July 24, 2024, and the exhibits attached thereto, as if fully stated herein.

As mentioned above, Dr. Haber was qualified as an expert by reason of his training, education, and experience, as an expert in the areas of internal medicine and pulmonology. (Ex. 2, TT 8/6/24, 353:7-12). He was also permitted to testify about the information that he relied on in forming his conclusions. (*Id.* at 353:13-16). Dr. Haber repeatedly testified that he had evaluated and reviewed J&J's internal documents on various topics. (*Id.* at 384:16-20; 384:8-13 (indicating that he had reviewed "thousands and thousands" of J&J's internal documents); 385:12-16; 419:3-18; 432:24-433:2; 443:2-7). There was nothing improper about permitting Dr. Haber to testifying about information that he relied on in reaching his conclusions. "Expert testimony may be based partially on information received from other sources if such facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

Lucas v. Sara Lee Corp., 307 S.C. 495, 501, 415 S.E.2d 837, 841 (Ct. App. 1992). J&J is not entitled to a new trial on this issue.

6. Exclusion of the 1986 Letter and H.H. E. document was proper.

The trial court properly excluded what J&J characterizes as “the FDA’s 1986 letter.” Plaintiffs moved to exclude this evidence prior to the beginning of trial. As such, Plaintiffs incorporate and reference *Plaintiffs’ Motion in Limine No. 19 to Exclude the 1986 Letter from H.W. Swanson to Phillippe Douillet*, filed on July 15, 2024, and the exhibits attached thereto, as if fully stated herein.

The exclusion of this evidence was proper. As Plaintiffs argued prior to trial, the evidence J&J sought to present to the jury was that the FDA’s position was that there is “no risk” from asbestos in talc. This document contained false and unreliable expert opinion information which made its probative value substantially outweighed by the risk of confusion to the jury and therefore unfair prejudice as prohibited by South Carolina Rule of Evidence 403. J&J claims, falsely, that the Swanson Letter states the FDA’s position that the level of asbestos in Johnson’s Baby Powder is “not a hazard,” so therefore the FDA did not think that Johnson’s Baby Powder needed a warning about asbestos. J&J attempts to use this misleading argument to defeat Plaintiffs’ failure to warn claims, as well as a signal to the jury that even the FDA did not believe there was enough asbestos in Johnson’s Baby powder to cause mesothelioma.

The statements in the Swanson Letter are not just unreliable, unpublished, lacking quality control, and inconsistent with scientific laws and procedures, they are demonstrably false on several counts. The document therefore had no probative value, and the risk of prejudice was extreme.

First, the statements in the Swanson Letter are based on false information Johnson & Johnson provided to the FDA. For example, in one of the documents that Mr. Swanson relied upon, Donald Kennedy, the then–Commissioner of the FDA, attempts to justify the 0.1% level by relying, in part, on Johnson & Johnson’s “extensive testing for asbestiform particles in cosmetic-grade talc; all results to date have been negative.”⁶ But all results of Johnson & Johnson’s talc had not been negative – far from it. Seven years earlier in 1972, in a report labeled “Do Not Use This Report/Replaced by Another Version,” Dr. Goudie of Johnson and Johnson reports a total tremolite content in two samples of Johnson and Johnson’s Baby Powder of approximately 0.5% for one and 0.2-0.3% for the other, many times higher than the assumed 0.1% impurity level the defense experts refer to as the “worst case scenario.”⁷ Moreover, by 1979, Johnson & Johnson was aware that asbestos minerals had been found in its talc *over 400 times*.⁸ In other words, by 1979 Johnson & Johnson had successfully misled the FDA about both (1) hundreds of positive tests finding asbestos in its baby powder and (2) about the percentage of asbestos in its baby powder. And one employee of the FDA had parroted this disinformation to a concerned citizen in 1979. Thus, the Letter is not just highly unreliable, it is objectively false. South Carolina law prohibits experts from presenting unreliable disinformation to the jury. *State v. White*, 382 S.C. 265, 270 (2009); *Matter of Bilton*, 432 S.C. 157, 166-67 (S.C. App. 2020); SCRE 703.

The statements in the Swanson Letter about the low risk of mesothelioma from the use of asbestos-containing talc are based on only two years of talc use, not the *fifty years* that Mr. Perry was exposed to. “We have used, as our population at risk, infants that may be routinely dusted

⁶ See **Ex. 41**, Letter from Donald Kennedy, Commissioner of Food and Drugs, dated 1/11/1979 at p. 3.

⁷ See **Ex. 42**, Goudie, Examination of Johnson & Johnson’s Baby Powder (10/27/72) at p. 3.

⁸ See **Ex. 43**, Chart of Decades of Evidence of Asbestos Content in Johnson & Johnson Products at pp. 1 – 10.

with talcum powder for an estimated period of 2 years.”⁹ What Johnson & Johnson does with this document is they present it as the FDA’s official position that any and all use of cosmetic talcum powder – no matter how long, how heavy, or how consistent – is without risk and cannot increase a person’s risk of mesothelioma at all.

The Court excluded the letter after argument from J&J that the letter “overlaps with a motion you heard on Dr. Barlow”—one of J&J’s experts who was not excluded from testifying at trial—was the FDA’s position on “the worst-case scenario” and that it was admissible “as far as notice and other issues”. (Ex. 9, PreTrial Hearing Transcript, 7/30/24, at 144:11-146:1). The Court determined that J&J had other proper avenues to present the information or what they purported was the FDA’s position on the asbestos in their talc, which was through their toxicologist expert’s opinions and testimony. (*Id.* at 146:2-5).

Throughout trial, J&J presented evidence regarding the FDA’s position on its talc regardless of whether such testimony was misleading or not. In questioning its corporate representative, Dr. Kuffner testified that it was untrue that J&J hid information from the FDA. (Ex. 4, TT 8/9/24, at 1240:12-20). He also testified that J&J’s testing method was created with consultation from the FDA so that J&J’s testing method became industry standard. (*Id.* at 1254:25-1255:5). Additionally, Dr. Kuffner testified that the FDA conducted studies of Johnson’s Baby Powder in the 1970s and found no asbestos in the powder. (*Id.* at 1262:11-1263:7). J&J asked its corporate representative multiple additional questions about whether the FDA found asbestos in its powder and that as of 1994, the FDA had concluded that “talc has proved to be among the safest of consumer products.” (*Id.* at 1263:22-1268:4).

⁹ Ex. 44, “Swanson Letter” and attachments at p. 26 of 188.

As is evident, the exclusion of the 1986 Letter did not prejudice J&J or prevent it from asking pertinent questions to its corporate representative (or any witness) about the FDA's findings and/or conclusions regarding the safety (or lack thereof) of Johnson's Baby Powder.

Regarding the admission of the 2019 Health Hazard Evaluation of Johnson's Baby Powder ("HHE"), Plaintiffs objected to the admission of the document as it was an expert opinion. (**Ex. 4**, TT 8/9/2024, at 1286:8-15). Dr. Kuffner was not designated as an expert in any respect or on any topic or field of study in this matter, an issue that Plaintiffs flagged and argued at the pretrial hearing on this matter. **Ex. 9**, Pre-Trial Hearing, 7/30/24. The trial court prevented the admission of the document through Dr. Kuffner *only*. In fact, the court noted that J&J "may have some expert" through which the HHE document could be admitted. (*Id.* at 1289:8-1290:14). J&J chose not to call any of its experts, both after the pre-trial hearing when J&J was on notice that this Court would not allow J&J to launder expert testimony through Dr. Kuffner and after the Court's statement that the document could be admitted into evidence through a properly designated expert.

Moreover, the HHE document was improper evidence to receive through a fact witness. Laypersons can provide opinion or inferences so long they (a) are rationally based on the perception of the witness; (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) do not require special knowledge, skill, experience or training. *See* Rule 701 of the South Carolina Rules of Evidence. It is clear from the substance of the HHE document that any opinion given regarding the document or any conclusions drawn from the document would require special knowledge, skill, experience, or training. This fact is evident based upon how J&J's counsel attempted to introduce this document into evidence through Dr. Kuffner:

A. Essentially, you need to understand when you have this finding of asbestos in the product that FDA said that they found with zero, put four zeroes there and 2 percent, and you need to understand if that is in the product, and we assumed it was, you need to understand if somebody's using the product, adults using it or putting it on a baby, how much of the -- the talc would get into the air, how much would somebody breathe in and get in their body, and then is that actually a risk to somebody, and is that enough to actually cause a health problem for somebody.

(Ex. 4, TT 8/9/24, at 1285:7-23). J&J was free to ask Dr. Kuffner about the fact that he was involved in preparing and writing the HHE, which indeed they did. (*Id.* at 1285:1-6). What J&J could not do was seek to have Dr. Kuffner give toxicology testimony based upon this document, which is exactly what J&J was trying to do. This very testimony is evident that Dr. Kuffner was trying to testify to the jury, using his “special knowledge, skill, experience, or training,” what the HHE *meant*, which the Court properly precluded Dr. Kuffner from doing in accordance with South Carolina law. It would have been improper to allow Dr. Kuffner to give opinion testimony about this document as J&J could not launder expert toxicology testimony through its corporate representative, a fact that was made clear to J&J both at the pre-trial hearing and throughout the entire trial.

Further, there was no error in questioning Dr. Kuffner, as J&J’s corporate representative, if he knew of the experts that were going to testify on behalf of J&J. There is no rule or law preventing counsel from asking the corporate representative what he knew or knows about the

case. If anything, it was a preview for the jury that J&J would bring in experts to give the expert testimony impermissible through Kuffner.

J&J is not entitled to a new trial based on the exclusion of the identified documents. Its motion on this issue must be denied.

7. Plaintiffs' counsel's closing argument was not prejudicial such that J&J is entitled to a new trial.

“It has long been settled that closing arguments and objections thereto are left largely to the sound discretion of the trial judge ‘who is on the scene and in much better position than an appellate court to judge as to what is improper argument under the circumstances.’” *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 599, 344 S.E.2d 157, 164 (Ct. App. 1986) (quoting *Lesley v. Am. Sec. Ins. Co.*, 261 S.C. 178, 185, 199 S.E.2d 82, 86 (1973)). “[C]onsiderable latitude is allowed counsel in drawing inferences and deductions from the evidence and in arguing the same to the jury.” *Lesley*, 261 S.C. at 185, 199 S.E.2d at 85. “When [an] objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending counsel to desist from improper remarks.” *McElveen v. Ferre*, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989).

J&J notes that several statements from Plaintiffs' counsel during his closing argument were prejudicial. These arguments are without merit and, in the event that J&J objected, and that objection was sustained, the trial court gave a proper curative instruction, which if it affected either side it is more likely that it affected *Plaintiffs* rather than J&J.

- J&J “couldn’t find an expert” (**Ex. 7**, TT 8/14/24, at 1885:4-7); J&J objected to this statement from Plaintiffs' counsel. The trial court sustained this objection and gave a curative instruction. (*Id.* at 1886:10-1887:21).

- Plaintiffs’ counsel use of the words “unconscionable”, “heinous”, “shameful”, “stole”, “on babies” (**Ex. 7**, TT 8/14/24, at 1937:1-20); J&J objected to these statements and the trial court sustained the objection and gave a curative instruction (*Id.*, at 1937:21-1938:11).
- Use of the term “value” and “how they took it”, “worst carcinogen” (**Ex. 7**, TT 8/14/24, at 1883:22-1884:2; 1932:7-1933); J&J did not object to Plaintiffs’ counsel use of these terms and phrases during closing statement. As such, J&J has waived its argument as to these statements. *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (“It is well settled that an issue may not be raised for the first time in a post-trial motion.”); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 657, 615 S.E.2d 440, 450 (2005) (rejecting argument regarding improper closing argument: “Since there was no contemporaneous objection, this issue is not preserved for appellate review.”); *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994) (“[T]he record indicates no objection to counsel's argument to the jury regarding consent and this issue is not preserved for review”); *State v. Walker*, 366 S.C. 643, 660, 623 S.E.2d 122, 131 (Ct. App. 2005) (“Failure to object to comments made during [closing] argument precludes appellate review of the issue.”).

“[G]reat latitude is accorded counsel in presenting closing arguments to a jury.” *United States v. Johnson*, 587 F.3d 625, 632 (4th Cir. 2009) (citation omitted); *see also id.* at 633 (“[T]o parse through a prosecutor's closing statement for minor infelicities loses sight of the function of our adversary system, which is to engage opposing views in a vigorous manner.”). “Thus, while courts should not hesitate to condemn those prosecutorial comments that truly offend

constitutional norms, neither shall we attach constitutional significance to every verbal fillip, lest we unduly censor the clash of viewpoints that is essential to adversarial proceedings.” *United States v. Runyon*, 707 F.3d 475, 507 (4th Cir. 2013). Argument from Plaintiffs’ counsel was not prejudicial such that J&J is entitled to a new trial. The arguments were neither designed to inflame the jury or encourage the jury to rule in Plaintiffs’ favor on an improper basis. J&J’s motion on this issue must be denied.

8. There was no error in the verdict form submitted to the jury.

J&J contends that it is entitled to a new trial because, while Plaintiffs’ claims against J&J included design defect and manufacturing defect, the verdict form did not include separate questions on those issues. J&J has not only waived this argument, but the argument is also without merit.

J&J did not object to the questions on the verdict form prior to its submission to the jury. See **Ex. 45**, J&J Defendants’ Objections to the Court’s Final Jury Charges and Related Final Court Verdict Form, 8/14/24. All of the parties had an opportunity to review and approve the verdict form before it was submitted to the jury. Because its post-trial motion is the first time that J&J has objected to the questions on the final verdict form, its objection is waived. See *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 757 (1997) (finding appellant waived claim of lack of notice of cause of action by failing to object to having his name included on the verdict form); *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (holding by failing to object to a verdict form until after a liability verdict had been reached, appellant failed to preserve any issue relating to the verdict form). Interestingly, the proposed verdict form that J&J requested that the trial court use asked the following question:

Was Johnson’s Baby Powder in a defective condition, unreasonably dangerous to the consumer, due to its design, manufacture or warning?

Yes _____ No _____

See **Ex. 46**, Johnson & Johnson Defendants Proposed Verdict Form, at pg. 7. Thus, even if the trial court would have chosen J&J's proposed verdict form, it would have suffered just as it now claims the final verdict form suffered as its strict liability question is blended. Consistent between the actual verdict form given and J&J's proposed verdict form is the fact that the jury only needed to find that one of the defects existed, just as the court instructed. (**Ex. 7**, TT 8/14/24, at 2082:5-7).

Additionally, neither the verdict form nor the instructions to the jury created confusion about the jury's role in this case. In the trial court's instructions to the jury, the Court explained that Plaintiffs had alleged that J&J sold a product that was defective in multiple ways: the product had a manufacturing defect, had a design defect, and/or a warning defect. The Court specifically stated:

Plaintiffs' claims in this case are based on several theories: negligence, strict liability, and fraudulent misrepresentation.

(**Ex. 7**, TT 8/14/24, at 2071:24-2072:2). The Court went on to explain the different ways J&J could be found strictly liable in South Carolina. (*Id.* at 2072:3-8; 2081:25-2085:18). Importantly, the jury needed to find only one type of defect existed. (*Id.* at 2082:5-7).

A trial judge has discretion to determine how a case is submitted to the jury and error, if any, in the refusal of using J&J's proposed verdict form would only constitute grounds for a new trial if prejudice resulted from that failure. See *Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 386, 778 S.E.2d 902, 914 (2015); *Steele v. Dillard*, 327 S.C. 340, 343, 486 S.E.2d 278, 280 (Ct. App. 1997) (quoting 5A C.J.S. *Appeal & Error* § 1762(b), at 1136 (1958)). J&J cannot demonstrate any prejudice that it suffered as a result of the trial court refusing to use its proposed

verdict form or in not separating the question regarding strict liability into multiple questions. This issue is without merit and J&J is not entitled to a new trial.

C. No cumulative error justifies a new trial.

Where there has been no error, there cannot be cumulative error. “The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial. *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). “An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground.” *Id.* Here, even if the Court were to find some error during trial, J&J cannot show that it did not receive a fair trial or that cumulative errors affected the outcome for the reasons stated above.

D. J&J is not entitled to a new trial pursuant to the Thirteenth Juror Doctrine.

In South Carolina, the thirteenth juror doctrine is a long-standing means by which a trial court may grant a new trial absolute. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (S.C. 1990). “‘Under the “thirteenth juror doctrine,” a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts.’” *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (S.C. Ct. App. 2000) (quoting *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (S.C. Ct. App. 1996)). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict “is contrary to the fair preponderance of the evidence.” *Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (S.C. 1978); see also *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722 (“Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge’s finding

that justice has not prevailed.”). “[T]he trial Judge is the thirteenth juror, possessing the veto power to the wth degree....” *Worrell v. S.C. Power Co.*, 186 S.C. 306, 195 SE. 638 (S.C. 1938).

“Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view the evidence in the light most favorable to the opposing party.” *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 578 SE.2d 746 (S.C. Ct. App. 2003); see also *Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 452 SE.2d 640 (S.C. Ct. App. 1994) (stating the trial court may take its own view of the evidence). Furthermore, the decision of whether to grant a new trial upon the facts is one addressed to the sound discretion of the trial judge. *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (S.C. 1976).

“South Carolina’s thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds ‘the evidence does not justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’” *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (S.C. 2002) (quoting *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267). By sitting “[a]s the ‘thirteenth juror,’ the trial judge can hang the jury by refusing to agree to the jury’s otherwise unanimous verdict.” *Id.* at 478, 567 S.E.2d at 854. As stated by the South Carolina Supreme Court in *Folkens*,

The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the “thirteenth juror” vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

300 S.C. at 254, 387 S.E.2d at 267.

In the present case, the jury returned a verdict finding that J&J was negligent, and that J&J was liable in strict liability for the injuries suffered by Michael Perry. For all of these reasons stated above, the jury’s verdict was justified by the evidence presented during trial. Plaintiffs presented

evidence that J&J knew that the talc it used in Johnson's Baby Powder contained asbestos. They had access to multiple tests revealing that the talc contained asbestos. J&J knew that exposure to asbestos could cause cancer. Despite this knowledge, J&J nevertheless, used and continued to use asbestos-containing talc in its products, which it promoted as "safe." It did so without warning consumers like Michael Perry about the hazards associated with the use of its asbestos-containing product. Upon weighing the evidence in this case, this Court should decline to act as the thirteenth juror to overturn a supported verdict.

E. J&J is not entitled to a new trial based on the size of the jury's verdict.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530, 431 S.E.2d 557, 558 (1993). Likewise, the circuit court must avoid conflating the constitutionality of a damages award with an award motivated by passion or prejudice. *See e.g., Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 592-96, 686 S.E.2d 176, 187-190 (2009) (finding a \$15 million punitive damages award to be "grossly excessive" such that it rose to the level of a due process violation but finding "no credible evidence anywhere in the record" to support the defendant's contention that the compensatory or punitive damages award resulted from passion, caprice, or prejudice).

Further, the amount of unliquidated damages that "a jury might properly award ... is largely a matter of judgment based upon the facts and circumstances of each case." *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964). "In determining the question, the facts must be viewed in the light most favorable to the plaintiff[,] and[] whe[n] the amount of a verdict bears a reasonable relationship to the character and extent of the injury sustained, it is not

excessive.” *Id.* Moreover, “the jury’s determination of damages is entitled to substantial deference[,]” and the circuit court’s decision on whether to grant a new trial based on the amount of the verdict “will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law.” *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000).

Here, as to the award of compensatory damages, the jury was informed that the parties stipulated to a certain portion of damages: \$3,329,973.05. (**Ex. 47**, Notice of Joint Stipulation, 7/31/24; see also **Ex. 7**, TT 8/14/24, at 2064:13-17.) In addition to this figure, the jury heard testimony from forensic economist Robert W. Johnson, who uses the standard techniques of finance, statistics, and accounting to assist the jury or judge when they go to place dollar values on damages in a case. (**Ex. 7**, TT 8/12/24, at 1598:16-1599:5). Mr. Johnson explained that his task in this case was “to use standard methods of economic analysis used and relied upon by forensic economists to calculate Mr. Perry’s lost earnings capacity, his future lost Social Security income, and the future value of his household services.” (*Id.* at 1603:21-1604:1). Mr. Johnson testified that Michael Perry’s lost income would equal \$2,102,586 (*id.* at 1608:19-23); his lost social security would equal \$365,185 (*id.* at 1609:22-24); loss of household services would equal \$351,582 (*id.* at 1610:7-1611:11). According to Mr. Johnson, Michael Perry’s total economic damages would be \$2,819,353. (*Id.* at 1611:23-1612:5). Notably, Plaintiffs requested \$51.3 million in damages, which equated to approximately \$2 million for every year that J&J stole from Michael Perry. (**Ex. 7**, at 1934:13-17). The jury returned a verdict much lower than Plaintiffs requested. It is clear then that the jury used its best judgment in reaching a reasonable award for Michael Perry.

However, the jury was also charged with awarding an amount for past and future noneconomic loss. The jury heard testimony that Michael Perry’s cancer and the collection of fluid

in his pleura will cause shortness of breath because the fluid will not allow his lungs to expand. (Ex. 2, TT 8/6/24, at 361:21-362:3) He had a pleural catheter to continuously drain the fluid that will keep coming back. (*Id.* at 367:22-368:16). The jury also heard that mesothelioma is incurable with an average life expectancy of 18 months post-diagnosis. (*Id.* at 370:9-17). Mr. Perry's cancer has spread throughout his chest, "along the chest wall", "around the heart", "in the mediastinum", "the lymph nodes", "into the ribs", and "through the chest wall". (*Id.* at 371:20-372:5). The jury heard about the multiple surgeries that Mr. Perry had and the treatments he has undergone for his cancer. (*Id.* at 372:22-375:6). They heard about Mr. Perry's chemotherapy and radiation treatments and some of the side effects of chemo, including pain, anxiety, and depression. (*Id.* at 377:7-378:8). By April of 2024, Mr. Perry's pleura had doubled in size. (*Id.* at 378:9-14). The jury heard that Michael Perry had a poor prognosis, that on average he'd have another six months, but given the treatments and surgeries that he has had, he could live "another year, another two years. But most likely, not beyond that." (*Id.* at 379:6-15). Had Michael Perry not contracted mesothelioma, he would have been expected to live another 26.65 years. (*Id.* at 379:16-380:11).

The jury also heard from Mr. Perry's treating thoracic surgeon – Dr. Gibney - who testified that published scientific data indicates that it is an average of 50% of mesothelioma patients that will survive between 12 to 18 months, and then confirmed that this survival period applies to Mr. Perry. (Ex. 3, TT 8/7/24, at 707:13-22). The jury also heard from Dr. Gibney that people with mesothelioma suffer from extreme chest pain, restrictive air disease that leads to heart problems and extreme shortness of breath that makes the patient feel as though they are drowning. (*Id.* at 708:3-709:1). Dr. Gibney testified that mesothelioma almost always recurs and is aggressive. (*Id.* at 709:2-16). The jury then heard about the 6-8 surgery Dr. Gibney performed on Mr. Perry in great detail, testifying that: (1) he had to cut Michael open from behind his shoulder blade all the

way around to the front of his body to access the chest wall; (2) cut his large back muscle in half to access his chest where the cancer was; and (3) removed one of his ribs. Indeed, Dr. Gibney testified that he had to use his hands to “peel the pleura off the chest wall and then off the lungs. I liken it most to removing the peel off of an orange.” (*Id.* at 712:3-713:17). Dr. Gibney further testified that he had to remove Michael’s entire diaphragm and rebuild it with mesh. (*Id.* at 713:18-714:1). Dr. Gibney told the jury about Mr. Perry’s post-surgical recovery, describing it as significantly painful due to the removal of the pleura where the mesothelioma is. (*Id.* at 715:22-716:8). He testified that Mr. Perry would die from his mesothelioma and described the end of life of a mesothelioma patient as:

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

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

(*Id.* at 717:2-19).

The jury, in setting Michael Perry’s damages, took note of the testimony it heard regarding his pain and suffering, the shortening of life by over two decades, the anxiety and mental anguish he will undoubtedly suffer before he dies, and the fact that his cancer will cause his death.

Additionally, Plaintiffs' evidence demonstrated that J&J knew that asbestos could cause cancer and, despite knowing that the talc it used in Johnson's Baby Powder had repeatedly tested positive for asbestos, continued to use that talc in the powder. Michael Perry used that powder for almost 50 years and his use of that powder has significantly shortened his life. Because these considerations are rational inferences from the evidence presented at trial, it cannot be concluded that the compensatory damages award resulted from passion, caprice, or prejudice. In light of the tragedy suffered and to be suffered by Michael Perry, there is simply no basis to suggest the jury's award was the result of anything but well-reasoned, thoughtful, and reflective deliberation. J&J is not entitled to a new trial based on this issue.

Similarly, the loss of consortium damages award to Lonnie Long should likewise stand. The jury heard testimony from Lonnie that he and Michael met over 20 years ago. (**Ex. 5**, TT 8/12/24, at 1567:7-19). He testified about the life they had together prior to Michael's mesothelioma diagnosis. (*Id.* at 1568:1-1570:7). Lonnie told the jury about sharing the holidays with his husband and how Michael would decorate and do things with the neighborhood kids for the holidays. (*Id.* at 1570:18-1571:13). He talked about their honeymoon in Hawaii and how much they enjoyed traveling together and that their favorite place to vacation is the Dominican Republic. (*Id.* at 1572:8-1573:8). Lonnie described Michael as his "savior" because when they met Lonnie was suffering with low self-esteem and depression and Michael showed him the strength to keep going. (*Id.* at 1573:12-23). He pushes him to overcome his fears. (*Id.* at 1574:17-24). Before Michael got sick, they were making retirement plans and talking about where they wanted to retire to and getting a sailboat. (*Id.* at 1575:18-25). Since Michael's diagnosis, the discussions have changed. The conversations have turned to "how we're going to fight this and how we're going to get through it[.]" (*Id.* at 1576:2-8).

Michael described Lonnie as his “absolute oxygen.” (*Id.* at 1658:18-21). He testified that he woke up every morning “[s]o blessed that [he] met him.” (*Id.* at 1658:22-1659:2). He discussed the things that he and Lonnie would do together prior to his diagnosis, which “always” included “an adventure of either fishing, real estate.” (*Id.* at 1659:13-1660:1). Michael testified that Lonnie takes him to all of his doctors’ appointments and that he has never missed a single appointment. (*Id.* at 1660:21-24). He noted that Lonnie did not stay in the courtroom for his testimony because Lonnie was “very protective”, and he did not want to see Michael “hurt or attacked[.]” (*Id.* at 1660:25-1661:6.)

Just as it did with Michael’s damages, the jury considered the relationship that Michael and Lonnie had experienced for over 20 years, what they lost as a result of Michael’s diagnosis, and what they would lose when Michael inevitably passed away from the cancer. The jury’s loss of consortium award reflects the jury’s deliberation on the life that Michael and Lonnie had together, the loss of that life as a result of Michael’s diagnosis, and the loss that Lonnie has and will suffer as a result of Michael’s inevitable death. The jury’s award of loss of consortium damages was not the result of passion or prejudice and should stand.

1. The jury’s award of punitive damages satisfies Constitutional standards and should not be reduced.

“The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future” as well as “to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party.” *Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000). “At least three important purposes are served by a punitive damages award: (1) punishment of the defendant’s reckless, willful, wanton, or malicious conduct; (2) deterrence of similar future conduct by the defendant or others; and (3) compensation for the reckless or willful invasion of

the plaintiff's private rights." *Mellen v. Lane*, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). "The paramount purpose for awarding punitive damages is not to compensate the plaintiff but to punish and set an example for others." *Id.*

To receive a punitive damages award, "the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). "A tort is characterized as reckless, willful[,] or wanton if it was committed in such a manner or under such circumstances that a person of ordinary reason and prudence would have been conscious of it as an invasion of the plaintiff's rights." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). "A conscious failure to exercise due care constitutes willfulness." *McCourt ex rel. McCourt v. Abernathy*, 318 S.C. 301, 308, 457 S.E.2d 603, 607 (1995).

J&J challenges the size of the jury's punitive damages award here, alleging that it is "grossly excessive and violates Johnson & Johnson's constitutional right to procedural and substantive due process." J&J Mot. at pg. 76. Its argument lacks merit.

"In South Carolina, 'punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.'" *Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) (quoting *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964)). The amount of the punitive damages award is largely within the discretion of the jury, and, like the compensatory award, is entitled to substantial deference. *McCourt By and Through McCourt v. Abernathy*, 318 S.C. 301, 309-10, 457 S.E.2d 603, 608 (1995).

Nevertheless, punitive damages awards should be reviewed for compliance with the Due Process Clause. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 194, 638 S.E.2d 667, 670 (2006).

In *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the South Carolina Supreme Court set forth three guideposts to be applied in conducting a post-judgment review of a punitive damages award: “(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135, 150-151 (2010). These guideposts incorporate the relevant factors set forth in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991) and *BMW of North America v. Gore*, 517 U.S. 559 (1996). See *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

2. Reprehensibility

Reprehensibility is the most important consideration. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. A number of factors are relevant to reprehensibility, including whether: “(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.” *Id.*

Contrary to argument from J&J, its conduct was reprehensible – and the jury agreed. Michael Perry is expected to die a very premature, painful death despite, as the jury was instructed, having a life expectancy—in the absence of mesothelioma—of 25.65 years. Thus, the harm caused to Michael Perry was physical as opposed to solely economic. J&J has been selling baby powder since 1894. (Ex. 4, TT 8/9/24, at 1054:8-12). The serious health risks of inhaling asbestos dust from talc were well-published in the scientific literature, and actually known by J&J decades before Michael Perry was ever born, let alone exposed to asbestos from Johnson’s Baby Powder.

Michael Perry used Johnson's Baby Powder repeatedly and on a daily basis for almost 50 years. Throughout the time that Michael used Johnson's Baby Powder, J&J never warned neither Michael nor any other customer of the potential asbestos exposure from their foreseeable use of Johnson's Baby Powder. (**Ex. 2**, TT 8/6/24, at 594:9-12). The jury concluded that Michael Perry's mesothelioma was caused by J&J's negligence and that J&J engaged in conduct that was willful, wanton, and reckless. The jury's assessment is appropriate considering the devastating physical and emotional losses that Michael Perry and Lonnie Long have suffered and will suffer due to J&J's willful, wanton, and reckless conduct.

3. Ratio

It is certainly true that due process requires consideration of the ratio between the compensatory damages award, which represents the plaintiff's actual or potential harm, and the punitive damages award. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. However, a single-digit ratio is generally thought to comport with due process. *Id.* The South Carolina Supreme Court has upheld verdicts with a 6.82 to 1 ratio, 3.75 to 1 ratio, 2.54 to 1 ratio, 9.96 to 1 ratio, and a 28 to 1 ratio. *Id.* at 593, 686 S.E.2d at 188 (collecting cases). In *Mitchell*, the Court remitted a punitive damages award from \$15 million to \$10 million so that it would be a 9.2 to 1 ratio. *Id.* at 594, 686 S.E.2d at 188.

Here, there is less than a 1 to 1 ratio of compensatory (excluding Lonnie Long's loss of consortium award) to punitive damages. The jury awarded \$23,037,500 million in compensatory damages, and \$30 million (as to J&J) in punitive damages. J&J makes no effort to explained how this ratio is problematic or too high.

4. Comparable Civil Penalties

Plaintiffs also note that the jury's punitive damages award is consistent with such awards

in other cases. The court may properly consider the similarity between the punitive damages awarded by the jury in the case under review as compared to punitive damages awards in other cases. *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186. Relevant points of comparison are “the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant’s conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.” *Id.* at 588-89, 686 S.E.2d at 186.

Mr. Perry’s award is comparable to awards in other talc cases with young plaintiffs. Most recently, in *Lee v. Johnson & Johnson, et al.*, No. 23CV40369, Circuit Court of Multnomah County, Oregon, the jury awarded 50-year-old Kyung Lee, who used Johnson’s Baby Powder for approximately 20 years, \$47.7 million in compensatory damages and \$200 million in punitive damages. (**Ex. 48**, *Lee v. Johnson & Johnson, et al.*, No. 23CV40369, Circuit Court of Multnomah County, Oregon, Special Verdict Form, 6/3/24.)

In the Theresa Garcia case tried earlier this year in Chicago, the jury awarded \$45 million in compensatory damages to her estate (\$33 million for noneconomic damages) and to her children (\$12 million). (**Ex. 49**, *Salcedo v. Avon*, 4/19/24, Cook County, Illinois Circuit Court). Ms. Garcia had a very similar profile to Mr. Perry – she was only 52 years old, she left behind several children, and her primary exposure was to JBP.

In 2018, a jury in New Jersey awarded \$30 million in noneconomic damages to Stephen Lanzo and \$7 million to his wife in a talc case against J&J (pre-bankruptcy) for JBP and \$55 in punitive damages. *Lanzo v. Cyprus Amax Mins. Co.*, 254 A.3d 691, 698 (NJ. App. 2021) (judgement reversed on other grounds on appeal). Mr. Lanzo was only 43 years old.

In another reported decision from 2021, a California jury awarded \$29.491 in compensatory damages to Teresa Leavitt and her husband in their case against J&J, again pre-

bankruptcy. *Leavitt v. Johnson & Johnson*, No. A157572, 2021 WL 3418410, at *2 (Cal. Ct. App. Aug. 5, 2021). Mrs. Leavitt, originally from the Philippines, was exposed to JBP as an infant and adult and was diagnosed with mesothelioma at only 51 years old. *Id.*

There are not a large number of verdicts against J&J because its multiple bankruptcies stayed litigation for almost two years, from November 2021 until August 2023. Talc verdicts against other companies have also been large, though. In 2021, Nedelka Vanklive was awarded \$75 million in noneconomic damages in a talc case in Alameda County California. (**Ex. 50**, *Vanklive*, 12/9/21, Alameda County Superior Court.) The case was started against both J&J and Whitaker, Clark & Daniels but J&J declared bankruptcy in the middle of trial. The verdict is against Whitaker, Clark & Daniels but the jury assigned 60% liability to J&J. (*Id.*) Ms. Vanklive, originally from Mexico, was exposed to JBP as an infant and child and developed mesothelioma at 48 years old.

In a talc trial in California in 2022, the jury awarded \$32 million in noneconomic damages to Rita-Ann Chapman, and \$8 million to her husband, and a total of \$11.3 million in punitive damages in a case involving exposure to body powders made by Avon and J&J. (**Ex. 51**, *Chapman v. Avon Products*, 12/14/22, Los Angeles Superior Court). Mrs. Chapman used both J&J and Avon body powders as a child and adult and was 75 years old at the time of her mesothelioma diagnosis. The case was tried against Avon, but not J&J, because J&J had declared bankruptcy at the time of trial.

In the *Plant* case tried before this Court in 2023, the jury awarded \$20 million in noneconomic damages to Sarah Plant, \$3.5 million in future medical expenses, and \$5 million to her husband, in a trial against talc supplier Whitaker, Clark & Daniels. (**Ex. 52**, *Plant v. Whitaker*,

Clark & Daniels, 3/3/23, South Carolina Court of Common Pleas.) Mrs. Plant was only in her thirties when she developed mesothelioma from talc powders.

These recent talc verdicts against J&J and others demonstrate that the award to Mr. Perry is very consistent with awards in other talc cases across the country. It only makes sense that damages awards are higher for younger people who are losing decades of life. While J&J's explanation for any large verdict is to cry "misconduct," the fact is that these young plaintiffs have devastating damages and juries are valuing them fairly.

Finally, J&J contends that the jury's punitive damages award in this case is either unsupported or unconstitutional because it no longer sells the talc-based version of Johnson's Baby Powder. This argument fails in that it disregards one of the primary purposes of punitive damages—to deter the wrongdoer **and others** from engaging in similar reckless, wanton, willful, or malicious conduct in the future. *See Portrait Homes—South Carolina, LLC v. Pennsylvania National Mutual Insurance Company*, 442 S.C. 215, 900 S.E.2d 245 (Ct. App. 2023). Additionally, J&J wishes to sidestep the punishment theory behind punitive damages. It sold talc-based Johnson's Baby Powder for over 100 years, with no warning of potential asbestos exposure, and, according to J&J, through its corporate representative, the decision to stop selling the powder was not based on safety reasons. (**Ex. 4**, TT 8/9/24, at 1283:17-1284:4).

The jury's punitive damages award in this matter was proper and does not violate any Constitutional bounds.

F. J&J is not entitled to a new trial based on *State v. Wright*.

J&J is not entitled to a new trial based on *State v. Wright*, 271 S.C. 534, 248 S.E.2d 490 (1978) as the trial court neither prevented J&J from presenting a defense to Plaintiffs' claims nor made comments that affected the outcome of the case or the effectiveness of counsel's

presentation. Unlike counsel in Wright, J&J chose the case it presented and chose to attempt to do so through Plaintiffs' case-in-chief. Since the inception of this case, J&J's defense has been that its baby powder does not and has never contained asbestos and, therefore, could not have been a substantial contributing factor in the development of Michael Perry's mesothelioma. While the court slightly limited the opinions that certain experts could offer, none of the experts were prevented completely from testifying at trial. The court did not enter any orders which prevented J&J from calling any witness it chose. It chose not to do so.

1. The Hood-McBrayer Spoliation Order

The *Hood-McBrayer* Spoliation Order was entered on November 5, 2021, in another case involving decades of use of Johnson's Baby Powder. **Ex. 53**, Order, 11/5/21. According to the Order, the McBrayer Plaintiff is entitled to the following adverse inference instruction:

the jury will be instructed that it may presume:

- 1) That when Johnson & Johnson introduces a test result, for tests performed by Johnson & Johnson or commissioned by Johnson & Johnson, that is negative for asbestos, reports "no quantifiable asbestos," or contains similar language, if the evidence shows Johnson & Johnson destroyed or unreasonably failed to preserve underlying data related to the test, the jury may presume that the missing data showed asbestos fibers were present.
- 2) When Johnson & Johnson argues any positive tests for asbestos, for tests performed by Johnson & Johnson or commissioned by Johnson & Johnson, were the result of lab contamination but Johnson & Johnson failed to retain evidence related to the "blanks" used as a control for such contamination, the jury may presume the blanks were free from asbestos.

Id. at pg. 10.

First, while there was discussion during the pre-trial hearing of entering this Order in the Perry matter, no such order was ever signed, and no adverse instructions were given. The trial court's potential entering of the *Hood-McBrayer* Order did not change the outcome of the trial or J&J's defense. J&J has failed to identify any witness that could not be called to testify as a result

of the *Hood-McBrayer* Order. Additionally, the *Hood-McBrayer* Order, ***which was never entered, ordered, or given to the jury in this case***, did not stop J&J from discussing test results in any respect. During cross-examination of Dr. Haber, J&J asked Dr. Haber about studies showing that Johnson's Baby Powder "had no asbestos detected[.]" (**Ex. 2**, TT 8/6/24, at 496:6-497:1).

By the fourth day of trial, the trial court made clear that the Order, which still had not been entered, did not put "a limitations on the plaintiffs' ability or anybody's ability in this trial to put before the jury the contention that Johnson & Johnson concealed and spoliated evidence." (**Ex. 4**, TT 8/9/24, at 1024:16-24). The trial court again noted to J&J's counsel that the court had "not given you free rein to conceal from the jury anything about what J&J did about testing. I have not given you permission to say that no test results from J&J can be put in front of the jury." (*Id.* at 1028:5-10). Even after the trial court made clear that J&J could put on evidence regarding J&J's testing, which it had done despite the potential for the spoliation order that J&J pretends that it was so nervous about, in part through its cross-examination of Dr. Haber, J&J chose not to call any witnesses in its case-in-chief. Interestingly, it was not until this post-trial motion that J&J asserted that orders from the trial court prevented it from calling the witnesses it chose. Throughout trial and right up until closing arguments, J&J asserted that it would be calling its own witnesses to rebut evidence and testimony presented by Plaintiffs.

Contrary to assertions by J&J, the trial court made clear multiple times throughout the trial that J&J could call whatever witnesses it chose. It did so early enough in trial such that J&J was aware that it could call its witnesses. J&J implies that it could not call *any* witnesses because it could not discuss negative testing. What J&J also conveniently leaves out is that the Court, over Plaintiffs' counsel's stringent objection, even afforded J&J the opportunity to call expert witnesses completely at the last minute and with no notice to Plaintiffs' counsel as to which witnesses they

needed to be prepared to cross-examine. (**Ex. 5**, TT 8/12/24, at 1392:6-19). J&J was given every opportunity possible by this Court to put on its case with expert witnesses. J&J also questioned Plaintiffs' experts extensively about tests, from the FDA and others, which did not detect asbestos in either the talc used in Johnson's Baby Powder or the finished product.

2. The trial court's exchanges with Dr. Kuffner

As discussed above, Dr. Kuffner was not offered and/or tendered as an expert witness in this case. Therefore, the trial court did not allow Dr. Kuffner to give opinions that would have been based on his skill, knowledge, training, and education because that testimony is not the testimony of a fact witness. J&J, during its questioning of Dr. Kuffner, made clear that his role of corporate representative was separate from his role as chief medical officer. (**Ex. 4**, TT 8/9/24, at 1241:10-13). He was permitted to testify as to what Johnson & Johnson documents say about the presence of asbestos in their talc and in their finished products and to testify as to what documents were produced in litigation and not destroyed or concealed. (*Id.* at 1247:10-18).

Beyond being able to testify as an expert on issues outside of his role as a fact witness or corporate representative, J&J does not identify any other topic on which the trial court prevented Dr. Kuffner from testifying.

3. Different standard as to J&J

A theme throughout J&J's 90-page post-trial brief seems to be that everything the trial court did or said that it disagreed with is error sufficient to grant it a new trial. It has failed to show it was effectively prevented from putting on a defense to Plaintiffs' claims at trial. This is just simply not the case and when considering a request for a new trial, not the standard.

First, the Court's comments regarding the years that LTL spent in bankruptcy neither reflect a different standard for J&J nor did the comments infect the trial such that J&J is entitled

to a new trial. The trial court's comments reflect a reading and interpretation of the bankruptcy orders. On July 28, 2023, the United States Bankruptcy Court, District of New Jersey, in *In re: LTL Management, LLC*, Case No. 23-12825-MBK, dismissed the LTL bankruptcy as having been "filed in bad faith." The assertion that J&J was being "too generous" to claimants is simply J&J attempting to pat itself on the back. At any rate, nothing that the trial court said during the pre-trial hearing regarding the LTL bankruptcy reflects J&J being held to a different standard. Additionally, none of these comments were made in front of the jury. There is no precedent preventing a trial court judge from disagreeing with the steps taken by a defendant to avoid talc liabilities. See *Plaintiffs' Trial Brief on Successor Liability of The Johnson & Johnson Defendants*, Exs. 7, 8, 9.

Second, the Court's comments regarding the opinions that J&J intended to have its experts offer, including the Matt Sanchez definition of asbestos, were not improper and were certainly not prejudicial to extent that the comments prevented J&J from presenting a defense to Plaintiffs' claims at trial. The comments, instead, were made as part of the Court's gatekeeping function, the trial court, in minding the Rule 702 gate, must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable." *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). A trial court does not abuse its discretion under Rule 702 by excluding the testimony of medical experts whose conclusions were not supported by the data and experiments upon which they relied. *Id.* (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Id.* (quoting *Joiner*, 522 U.S. at 146).

The challenged comments presented by J&J were made by the Court in furtherance of its gatekeeping function. The comments were a statement on the unreliability of the substance of

J&J's purported experts' testimony. Not once during trial did J&J state or imply that the Court's actions prevented it from presenting the case it wanted to present. Again, none of these comments were made in front of the jury. This was confirmed, in fact, by J&J's counsel's statements during closing that J&J "didn't need to" bring any witnesses "because the witnesses that were called by plaintiffs demonstrate that they cannot prove their case." (Ex. 7, TT 8/14/24 at 2024:12-15).

At the pretrial hearing, the Court made clear that Dr. Sanchez was permitted to testify but could not offer a causation opinion:

The plaintiffs asked to strike his testimony completely, disqualify him as an expert witness. I wouldn't do that. All I did was say he couldn't give an opinion about whether or not asbestos caused Perry's mesothelioma or whether J&J Baby Powder caused Perry's mesothelioma. It was for certain that he was qualified as a geologist expert, didn't have the expertise to make that statement. But otherwise I allowed him to testify.

(Ex. 5, TT 8/12/24, at 1383:14-22). Put simply, all this Court ordered as it pertains to Dr. Sanchez is that J&J needed to lay a proper foundation for his opinions. Dr. Sanchez was not struck, limited, or prohibited from testifying. If J&J chose not to call him to testify as an expert witness because of this Court's warning that he needed to legally and properly lay a foundation and not go outside the scope of expert experience, that is to J&J's own peril.

To belatedly assert that these rulings and comments from the Court, all made outside of the presence of the jury, prevented J&J from effectively presenting a defense to Plaintiffs' claims is an unsupported position asserted only because J&J thought its defense was sufficiently proven to the jury to ensure a defense verdict. As stated, the court did not exclude any expert that J&J wanted

to have testify at trial. While it is true that the Court disagreed with aspects of Matthew Sanchez's opinion, including his definition of asbestos, and whether or not the substance of his testimony was reliable, the Court did not prevent J&J from presenting Sanchez's testimony. (**Ex. 9**, Pre-Trial Hearing Transcript, 7/30/24, at 132:15-133:9). J&J understood that its experts were not excluded and could testify at trial because, as of Saturday, August 3, J&J intended to call at least 5 witnesses, including Matthew Sanchez, Dr. Diette, and/or Dr. Weill, during its case-in-chief. **Ex. 54**, Email Exchange from Kim Bueno, Re: Perry Trial Schedule, 8/3/24.

If J&J's defense to Plaintiffs' claims was that there was not, and has never been, asbestos in Johnson's Baby Powder, it was free to present that defense. If J&J's defense to Plaintiffs' claims was that even if there was asbestos in Johnson's Baby Powder, it was not present in a sufficient amount to cause mesothelioma, they remained free to present that defense. If J&J's defense to Plaintiffs' claims was that Michael Perry's exposure to asbestos came from brakes, it remained free to present that defense. In fact, a thorough review of the entire trial transcript reveals that J&J extensively examined and cross-examined Plaintiffs' witnesses and Dr. Kuffner on each of these defenses.

Contrary to J&J's implications, it was their conduct which necessitated a deposition shortly after the beginning of this trial. As explained in Plaintiffs' Motion to Compel, which Plaintiffs incorporate here by reference, the depositions were required because of the issue of successor liability and the J&J Defendants' failure to properly prepare their corporate representative on issues in the deposition notice. Information revealed in that deposition was critical to the resolution of the successor liability issue, as well as Plaintiffs' fraud claim. Because the successor liability issue was not being tried to the jury, J&J cannot claim prejudice on having to prepare and produce a corporate representative on the successor liability issue during trial. The deposition was about

more than just financial transactions. Further, the deposition would have been unnecessary had J&J properly prepared the corporate representative for deposition prior to trial.

Next, Plaintiffs have already discussed the circumstances surrounding the tissue digestion protocol and the admission of the tissue digestion results *supra*. Importantly, Plaintiffs informed J&J on the morning of the pretrial hearing that Dr. Longo was performing the tissue digestion, and that Plaintiffs would make Dr. Longo available for deposition on that issue. (**Ex. 9**, Pre-Trial Hearing Transcript, 7/30/24, at 225:13-25). J&J not only received the results of the tissue digestion prior to Dr. Longo's testimony at trial but they also deposed Dr. Longo on his findings the day before his testimony on the issue. The timing of the deposition, *i.e.*, "at night", was J&J's choice as Plaintiffs offered to present Dr. Longo for a phone deposition six hours earlier. Thus, J&J was not surprised that Dr. Longo was going to testify regarding the tissue digestion, at night, and was not surprised at what was found in Michael Perry's lungs. This feigned innocence and manufactured error is unsupported by the record. And importantly, it does not reflect the trial court holding J&J to higher standard and it cannot be said that the Court did anything that affected counsel's effectiveness at trial.

Further, there is no legal basis for this Court to grant a new trial based on a single exchange between counsel outside of the presence of the trial court and outside of the presence of the jury. On Friday, August 9, 2024, Plaintiffs played the videotaped portion of the testimony of Johnson & Johnson's corporate representative, John Hopkins. This portion of the videotaped deposition had been *edited and cut by Johnson & Johnson*. During the re-direct, plaintiff's counsel at the deposition questioned Dr. Hopkins about the 1972 Report from Dr. Hutchinson, finding asbestos in Johnson & Johnson's talc repeatedly. The report is critical evidence because not only did Dr. Hutchinson repeatedly find asbestos in J&J's talc, but he also took pictures of the actual asbestos

fibers he found. During the re-direct, plaintiff's counsel not only discussed the results from Dr. Hutchinson's testing, but he also *displayed the pictures of the asbestos fibers Dr. Hutchinson found on the video*. The video that was cut and played by counsel for J&J *did not show the photographs of the asbestos found in J&J's talc by Dr. Hutchinson to the jury*.

During the break, Plaintiffs' counsel spoke to counsel for J&J and informed counsel that deleting the pictures of asbestos from Dr. Hopkins' video deposition was evidence tampering—a criminal act in South Carolina. See S.C. Code Ann. § 17-28-350. (“A person who willfully and maliciously destroys, alters, conceals, or **tampers** with physical evidence...**is guilty of a misdemeanor** and, upon conviction, must be fined not more than one thousand dollars for a first offense, and not more than five thousand dollars or imprisoned for not more than one year, or both, for each subsequent violation.”) (emphasis added). Such behavior also gives rise to ethical concerns. The entire exchange with J&J's counsel lasted less than a minute and Plaintiffs' counsel did not speak in an intimidating fashion or threatening tone.

J&J's counsel, however, reported a different set of facts to this Court. While Plaintiffs disagree with J&J's recitation of the facts surrounding the incident, the Court admonished Plaintiffs' counsel on the record for his alleged comments made to J&J's counsel - importantly outside of the presence of the court and the jury. (**Ex. 4**, TT 8/9/24, at 1164:14-1170:25). It is likewise untenable that this single incident with Plaintiffs' counsel, even if J&J's recitation of the incident had been true, resulted in such intimidation that J&J's counsel could not effectively represent their clients. Such an argument is not based in any fact and is solely designed to incite a reaction from this Court - and almost certainly the true goal – the appellate court.

Further compounding the situation is that J&J had previously attempted manipulating evidence in a substantially similar fashion in two prior trials, where the issue was once again

critical to issues presented to the jury in this matter. The Johnson & Johnson Defendants attempted the similar trick with videotaped evidence in two previous trials - *Salcedo v. Johnson & Johnson, et al.* (Cook County, Illinois Circuit Court) and *Lee v. Johnson & Johnson* (Multnomah County, Oregon Circuit Court). Even after J&J filed their motions for new trial in this case J&J once again attempted the same trick as in the *Perry* case – this time in the *Plotkin v. Johnson & Johnson, et al.* trial (FBT-CV21-6109520-S) currently underway in the Judicial District of Fairfield at Bridgeport, Connecticut.

Unlike the circumstances in *State v. Wright*, it is ill-conceived that a single incident outside the presence of the jury, for which counsel was reprimanded, rises to any level sufficient to justify a new trial. The record is at odds with J&J's belief that the trial court held it to a different standard or treated it differently from Plaintiffs.

For more than 50 years, it has been well settled that a Court is entitled to ask a witness questions to get to the truth. In *Williams v. South Carolina Farm Bureau Mut. Ins. Co.*, 251 S.C. 464 (1968), our Supreme Court held:

The trial judge, of course, has the right, in [her] discretion, and in a proper manner, to question witnesses during a trial, in order to elicit the truth. This discretion will not be controlled except where it appears that the manner in which the judge exercised the right tended to unduly impress the jury with the importance of the testimony elicited, or would be likely to lead the jury to suppose that the judge was of the opinion that one party rather than the other was correct upon a particular issue of fact.

If a trial judge in the exercise of his discretion feels called upon, in the interest of justice, to question witnesses to elicit the truth, he should be cautious to see that such questions are propounded in a fair and impartial manner, and should not express or indicate to the jury the judge's opinion as to the facts of the case or the weight or sufficiency of the evidence.

Here, while the Court asked Dr Kuffner a question during J&J's questioning, the Court also asked a question during the Plaintiffs' questions of Dr. Kuffner. In fact, before the Plaintiffs started their questioning of Dr. Kuffner the Court admonished the attorneys as follows:

THE COURT: Ladies and gentlemen,
Dr. Kuffner is the corporate representative
of certain entities included in the Johnson

Group as has been outlined by Mr. Adams.
He is the defendant's corporate
representative, and, therefore, he --
Mr. Adams will be given a little leeway,
according to our rules, in how he examines
Mr. Kuffner. He can ask leading questions.

But I have counseled both sides in
this matter, that these leading questions
have begun to resemble a speech where they
get up and look straight at you and not at
the witness and expostulate about a whole
bunch of things and then say, "Don't you
agree?" All right. That's not proper
cross-examination.

So, I have counseled both sides
that -- to ask normal questions, leading
questions if you've got permission to do
it. But don't sit up there and give a
speech to the jury that last ten minutes
and then say, "Don't you agree" or "Don't
you disagree," something like that. So
let's see if they behave as I've asked them
to do.

Mr. Adams, I'm sure you will.
Proceed.

Ex. 4, 1172:23-1174:25). Even when the Court believed that the jury needed clarity on a position taken by Plaintiffs during the questioning of Dr. Kuffner, the Court asked Counsel for clarity and then instructed the jury as follows:

THE COURT: So I'll tell the jury about that.

MR. ADAMS: Okay.

THE COURT: Jurors, there's a document that they've been talking about with

Dr. Kuffner. And it's this one that is about the product recall of that one lot on October the 18th -- October -- excuse me -- October the 18th, 2019. This is the FDA document, and it says on it: Classification, Class 2.

The parties have got some disagreement about whether the FDA is saying that or whether they are taking down what Johnson & Johnson told them. But I'm telling you the FDA document has got that on it.

It also has on it -- just so, on the other hand, Dr. Kuffner understands this, it's got the date of 10/18/2019, which is the date that the recall was initiated, and that's the day after the telephone conversation of October the 17th. The recall was initiated the 18th. Phone call was the 17th.

Okay. Are we straight about this timeline?

MR. ADAMS: Yes, Your Honor.

THE WITNESS: Yes.

THE COURT: All right. Go forward,

(Ex. 4, at 1303:21-1304:25). The Court has treated all parties and their counsel fairly. Throughout this trial, the Court has disagreed with all parties on one issue or another. The Court was evenhanded when it came to ruling on objections. The Court reprimanded counsel when necessary. The disagreement, contrary to J&J's argument, was not just reserved for J&J. Also, J&J has failed to identify any incident which negatively affected its counsel's effectiveness as discussed in *State v. Wright*.

IV. The Court should deny J&J's request for New Trial Nisi Remittitur.

As acknowledged above, when reviewing a request for new trial nisi remittitur, substantial deference must be given to the jury's determination of damages. *Hassell v. City of Columbia*, 430 S.C. 620, 635, 846 S.E.2d 373, 381 (Ct. App. 2020). The consideration of a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Env'tl. Control*, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006). Again, "compelling reasons" must be given to justify the trial court invading the jury's province in this manner. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) (citing *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)).

J&J requests that the Court reduce the jury's loss of consortium award to Lonnie Long. According to J&J, there was "nothing unusual about his loss of services . . . to justify a \$9M loss." This is not a compelling reason and is simply J&J's request to have its characterization and evaluation of the evidence along with its financial evaluation of Michael Perry and Lonnie Long's relationship substituted for the jury's.

Lonnie's loss as a result of Michael's diagnosis is more than just the "loss of services." A claim for loss of consortium includes the loss of companionship, aid, and society. See S.C. Code Ann. §15-75-20. The jury's award reflects its evaluation of both Lonnie's and Michael's testimony

about their relationship. Lonnie testified that Michael's love and presence in his life saved him and gave him the strength to keep going. (Ex. 5, TT 8/12/24, at 1573:12-23). Michael described Lonnie as his "absolute oxygen." (*Id.* at 1658:18-21). After being together for over 20 years and planning for a full life after Michael's retirement, their conversations changed because Michael was diagnosed with a terminal cancer from "when" to "if". (*Id.* at 1575:18-1576:8). It is likely, then, that the jury's loss of consortium award was about more than the "loss of services." The jury recognized that Lonnie has watched and will continue to watch Michael suffer with a disease that will eventually kill him painfully and will undoubtedly continue to feel that loss when Michael is gone. There are no compelling reasons to reduce the jury's loss of consortium award.

The jury's award to Michael is similarly justified. The jury heard testimony from Plaintiffs' experts detailing what his exposure to asbestos in Johnson's Baby Powder has cost and what it will cost him. In addition to medical expenses, Michael has undergone chemotherapy and radiation, experienced and will continue to experience the side effects of that chemotherapy and radiation, including nausea and vomiting. Michael, as a result of his diagnosis, is on medication for anxiety, depression, and pain. Further, at the time of Michael's testimony at trial, his pleura had doubled in size which, as the jury heard, likely means his mesothelioma has recurred and might necessitate additional immunotherapy and radiation treatments and also indicates a possible return of his cancer. Moreover, the jury heard that Michael's prognosis is poor and that at most, Michael had two years left to live. Unlike J&J, the jury obviously saw more of Michael and thought more of Michael than his one good day in court.

Garvin, which J&J points to as a model for its request, is inapposite. While Mr. Garvin suffered from testicular mesothelioma, he was cancer-free and faced a much different prognosis. Mr. Perry is facing a resurgence of his cancer and a fatal prognosis. (Ex. 36, *Order Denying in*

Part and Granting in Part Defendant Crane Co.'s Motion for Post-Trial Relief, Garvin v. AGCO Corporation, No. 2012-CP-40-6675, Richland County Court of Common Pleas of South Carolina, at *18 (Nov. 10, 2014)). Also, Mr. Garvin was twenty years older than Michael Perry at the time trial. *Id.* at *17. Michael Perry's life expectancy (which he is losing as a result of his mesothelioma diagnosis) is twice that of Mr. Garvin's (*id.*) and Michael Perry's exposure to a product regularly sold to everyday consumers lasted at least 5 years longer than Mr. Garvin's exposure to an industrial product. (*Id.*) Additionally, Mr. Gavin suffered from other conditions which might have affected his life span. (*Id.*) There is no similar evidence regarding Mr. Perry.

Consequently, it cannot be said that this jury was unduly liberal in awarding Mr. Perry \$23 million in compensatory damages. Michael Perry was repeatedly exposed to asbestos in Johnson's Baby Powder for almost four decades. That exposure led to the development of a disease that will claim his life. Until his death, he is facing a return of his cancer and, according to testimony from Plaintiffs' expert, the cancer is spreading. His medical records reveal no evidence of any disease which would have cost him his life. Only the mesothelioma. His economic damages are already millions of dollars and living longer will only cost him more. His pain and his suffering and been and will continue to be immense. The jury heard testimony about how he will suffer while he dies, and the suffering will only increase as he gets closer to death. This testimony was undisputed. This Court should not reduce any amount awarded by the jury to Michael Perry.

V. CONCLUSION

For the reasons expressed herein, Plaintiffs respectfully request that this Court deny J&J's motions for JNOV, new trial absolute, and new trial *nisi remittitur*.

Respectfully submitted,

/s/ Charles W. Branham

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ATTORNEYS FOR PLAINTIFF

September 13, 2024

Dallas, TX

EXHIBIT 1

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,	)	
	)	Case No.
vs.	)	2023-CP-40-04072
	)	
AMERICAN INTERNATIONAL	)	
INDUSTRIES, ET AL.,	)	
	)	
Defendants.	)	

TRIAL BEFORE: THE HONORABLE JEAN H. TOAL
DAY 1

DATE TAKEN: Monday, August 5, 2024

TIME BEGAN: 9:00 a.m.

TIME ENDED: 5:39 p.m.

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

REPORTED BY: Cynthia First, RPR, CRR
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P R O C E E D I N G S
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THE COURT: I'll respond. My apologies to all of you. We have got a disaster with our roof and it's going to get worse because the big storm is coming. So I've got people --

MS. MCVEY: Did you have a tree over the weekend?

THE COURT: More complicated.

MS. MCVEY: Oh, I'm sorry. And it's going to rain all week.

THE COURT: Oh, yeah, of course. Naturally.

All right. Let me just say this preliminarily. I am not going to redo the pretrials. To the extent that there are any orders that need to be put on the record of what happened at pretrial, we are going to put them on the record without any argument.

In fact, I would prefer that they put them on the record, as I think Ms. McVey was attempting to do by orders. If there's some dispute about that, I will resolve it very quickly because I want to get this jury picked

1 and get on with this trial. Let me say a few
2 more things so that we can get focused here.

3 I am concerned about two things in terms
4 of what I tell the jury this morning as we
5 begin. There's only one defendant left that
6 does not have default issues, and that is
7 Johnson & Johnson. I want to be clear about
8 what I am to tell the jury. I am not going to
9 place upon the jury the burden of
10 distinguishing between all these versions of
11 Johnson & Johnson to arrive at their verdict.
12 If there's any necessity for distinction, I
13 view it as something that I would make a
14 decision about and not the jury.

15 I, at this moment, without a whole lot of
16 argument about this, view this as an
17 amalgamation situation, and that's how I'm
18 thinking. But I'm open to hearing some further
19 discussion about that.

20 But the various iterations of
21 Johnson & Johnson, since the last time I tried
22 a J&J case, are all wrapped around the axle of
23 this issue about trying to contain liability
24 within newly created corporations for old
25 asbestos cases and mesothelioma cases that have

1 such a long latency period, in my humble
2 opinion.

3 And therefore, I am not going to try to
4 navigate things that have already been
5 navigated by most of the courts that have
6 looked at this and decided that these attempts
7 to isolate responsibility within certain
8 entities and attempts to declare bankruptcy of
9 certain other entities is no longer a bar to
10 trying these cases.

11 And that's all I really need to know about
12 it. I don't need to know the intricacies of
13 Texas two-steps or anything else. To me, this
14 is an amalgamation situation, and I don't think
15 the jury needs to spend a moment about that.
16 So that's one thing.

17 The second thing -- where is Ms. Flynn?
18 Ms. Flynn, I received all your information and
19 particularly about the issues involving the
20 size of the company and the inability to
21 communicate with your clients this weekend
22 because of religious observances, and I respect
23 that.

24 At the same time, I think we disagree
25 profoundly about what default means. Default

1 doesn't give you an opportunity to jump on it
2 again with the second and third amended
3 complaints. You defaulted on the first
4 complaint; therefore, I view you as the AII is
5 in default.

6 So we can talk about that some more, but,
7 again, I don't want to spend a whole lot of
8 time at pretrial. I do want to decide what
9 we're going to tell the jury about this. And
10 to me, the less said, the better. I have
11 wavered back and forth about what I think their
12 role ought to be in the trial. It's certainly
13 not questioning liability, in my view, since
14 you defaulted.

15 You do have some role to play, perhaps, in
16 the damages side, but I can't -- my old default
17 judge mind can't get over the hurdle that when
18 you're in default, if it's liquidated damages,
19 of course, the judge just gets a submission and
20 makes a ruling, and there's no -- big activity
21 does takes place in the court proceeding.

22 If it is liquidated damages -- I have
23 never had a default case where I didn't try the
24 liquidated damages. And this idea that you can
25 be in a default posture for everything and yet

1 have an active role in the trial is something
2 I'm going to have to understand. And it's
3 going to influence what I think the jury should
4 be told.

5 Okay. That's my two hangups.

6 With that, Ms. McVey.

7 MS. MCVEY: Thank you, Your Honor. We
8 sent you an e-mail and everybody an e-mail last
9 night kind of outlining our position.

10 THE COURT: Yes. And I'd love a copy of
11 that, if I could.

12 MS. MCVEY: I'm going to get Ryan Travis
13 to print it out for you. I should have brought
14 one with me.

15 THE COURT: Good. Thanks, Ryan. I might
16 be able to pull it up right here.

17 MS. MCVEY: Okay. I can pull it up.

18 THE COURT: Let me see if I can do that.
19 All right. Power outages big-time. One of the
20 only places we experienced power outages the
21 whole day.

22 All right. Printed. Okay. I got the
23 several issues have been raised over the
24 weekend, mode of trial and all that kind of
25 stuff. And then -- okay. Now I see the

1 outline. All right.

2 MS. MCVEY: Your Honor, so as to the mode
3 of trial, which I think the first time it was
4 even kind of mentioned was at the pretrial.
5 And then on Saturday Johnson & Johnson filed a
6 motion.

7 And essentially what they're saying is
8 that the successor liability issues are for you
9 to decide and the product liability and fraud
10 issues are for the jury to decide. And we
11 don't necessarily disagree with that.

12 THE COURT: Yeah, but it's all going to be
13 done in one trial. I'm not having some
14 separate procedure for that.

15 MS. MCVEY: And that's our position, that
16 what we believe should happen is -- because the
17 evidence is going to overlap. So you talk
18 about the iterations between LTL and NDU and
19 all these other things. The reason why that's
20 relevant for the jury to hear is because it
21 goes to the fraud claim, right? The defendant
22 is trying to avoid responsibility.

23 THE COURT: Yes.

24 MS. MCVEY: So the evidence is going to be
25 the same. Now, what we think can happen is

1 that the jury can decide on the product
2 liability and the fraud claim issue. And after
3 that you can decide --

4 THE COURT: That's how that's going to
5 work in my view.

6 MS. MCVEY: And I think that's important
7 because you'll recall in the Covil case and
8 others, if you decide the mode of trial a week
9 late, a lot of times a defendant can take an
10 appeal of that. And so I don't think it's
11 going to be immediately appealable, but I just
12 don't want to run into that again today.

13 THE COURT: I'm going to ask them about
14 that right now, because I'm not going to have a
15 situation where we go that route.

16 MS. MCVEY: So I think if we tried the
17 product liability fraud case to the jury and
18 then you decide the special liability issue
19 after that, the evidence should be the same.
20 But we will have to walk through all of the
21 things that Johnson & Johnson did to avoid
22 liability goes to the fraud claim.

23 We won't spend a ton of time on it, but it
24 is going to be relevant to the claim. So the
25 evidence will be overlapping, I think, for you.

1 THE COURT: All right.

2 MS. MCVEY: So that's the first thing.

3 THE COURT: Okay. Hold right there.

4 All right. Mr. Bogan --

5 MS. PEPKE: Pepke.

6 THE COURT: Yes, I know Ms. Pepke. I know
7 who you are. I'm talking to Mr. Bogan right
8 now.

9 MR. BOGAN: Sure, Your Honor. Matt Bogan
10 for Johnson & Johnson.

11 THE COURT: Yes, sir. All right. I know,
12 Mr. Bogan, that you are the specialist in South
13 Carolina appellate procedure for this team, and
14 so I want to have some advice right now about
15 whether this mode of trial thing is something
16 that you all are going to attempt to appeal,
17 depending on how I rule, and stop the trial.

18 MR. BOGAN: Your Honor, I think if I heard
19 Ms. McVey correctly, if we're going to impanel
20 this jury and you're going to decide that later
21 when we start, it's not prior to trial, I don't
22 think we have any right to appeal if it happens
23 during trial.

24 So no, ma'am. So I think --

25 THE COURT: Well, that's kind of what I

1 thought.

2 MR. BOGAN: Without conceding anything, I
3 think we're going to have objections possibly
4 to the evidence, but that's for you to decide
5 also. But there is no intent -- I don't
6 think -- I don't hear you ruling, Your Honor,
7 so I don't think --

8 THE COURT: I haven't ruled on anything,
9 and thank you very much. That clarifies a lot
10 of things.

11 And really, Ms. Pepke, you don't need to
12 argue mode of trial right now. I'm very
13 peaceful with the idea. I will protect all of
14 your rights to argue this thing, all of your
15 objections about mode of trial just as
16 Mr. Bogan has outlined. So please understand
17 your position will be protected and you'll get
18 a chance to discuss these matters big-time.

19 But what I don't want to do is interrupt
20 going on and getting the trial started. And I
21 do want to go back and have the second thing
22 talked about, which is how do we deal with this
23 jury about this.

24 MS. PEPKE: And that's the only thing I
25 wanted to address, to speak to.

1 THE COURT: Okay. Then good. Let's just
2 go right to that then. You don't need to worry
3 about mode of trial. We've got that figured
4 out.

5 MS. PEPKE: Mode of the trial figured out,
6 we agree. And Your Honor will decide and --

7 THE COURT: Okay. Let me go back to
8 Ms. McVey and talk about the instruction.

9 MS. MCVEY: You're talking about the
10 instruction as to AII?

11 THE COURT: Well, I want to have you talk
12 about AII, but right now, since we are on J&J,
13 I want to talk about what we say about J&J, if
14 anything, on this amalgamation issue as the
15 case begins.

16 MS. MCVEY: So I think what we want to be
17 able to say, and we're going to walk through
18 it, is Johnson & Johnson -- we have to be able
19 to talk about the entities and the way they
20 have morphed and what Johnson & Johnson tried
21 to do to evade responsibility.

22 THE COURT: Right, right, right. And I
23 take it that you plan to do that as you open?

24 MS. MCVEY: Yes, ma'am.

25 THE COURT: Right. Okay. I got what you

1 want to do.

2 MS. MCVEY: Right.

3 THE COURT: You're not asking me for
4 instruction about that. You are simply saying
5 that's what you want to do in aid of proving
6 the fraud.

7 MS. MCVEY: That's right.

8 THE COURT: All right. Now Ms. Pepke.

9 MS. PEPKE: Thank you, Your Honor. So we
10 obviously disagree with the plaintiffs'
11 position that the evidence overlaps. I think
12 it's clear from her complaint, the plaintiffs'
13 complaint, their fraud claim as to the product
14 liability rests on fraud that they allege
15 occurred over the years starting back in 1960
16 when Mr. Perry --

17 THE COURT: Right, it's hide the ball on
18 whether there was asbestos in the talc.

19 MS. PEPKE: Exactly, Your Honor. So those
20 are the -- the fraudulent evidence relevant to
21 the product liability claim.

22 Now, the fraud that Ms. McVey is referring
23 to that she believes would come in that we
24 would object to is anything related to their
25 exception to the successor liability

1 allegations.

2 They are alleging that the general rule
3 that there is no successor liability, there is
4 an exception based on fraud related to the
5 bankruptcy, the Texas two-step. That goes only
6 to the successor liability issues. That has
7 nothing to do with the product liability fraud
8 issues that the jury needs to decide.

9 THE COURT: So your idea is, as to the
10 fraud which involves successor liability, that
11 should be heard by me outside the presence of
12 the jury?

13 MS. PEPKE: Or submitted on papers.

14 THE COURT: Or submitted on papers. Okay.

15 MS. PEPKE: That is our position.

16 THE COURT: I understand.

17 Ms. McVey.

18 MS. MCVEY: Your Honor, I should also say,
19 it of course goes for reprehensibility. And
20 the jury is going to be asked about
21 Johnson & Johnson's reprehensibility in this
22 first phase. And as Johnson & Johnson conceded
23 during our pretrial, the only thing that is
24 kind of reserved for later on this issue is the
25 net worth information.

1 This is important to walk through to the
2 jury, both on the elements that we have to
3 prove for fraud, the nine elements we have to
4 prove for fraud, and we believe this goes to
5 some of those elements there. It also goes to
6 the reprehensibility of the conduct of the
7 defendants.

8 THE COURT: Okay. Ms. Pepke.

9 MS. PEPKE: Yes, Your Honor. Obviously
10 fraud and the punitives must be by South
11 Carolina law and the Constitution of the United
12 States directed to conduct that affected
13 Mr. Perry.

14 So, again, it's the fraud related to the
15 product liability, the talcum powder that he
16 has alleged to have used from 1972 to 2018,
17 2019, somewhere around that time.

18 All of the successor liability issues are
19 after that. If we get to a punitive damages
20 stage, now the punitive damages the jury would
21 be asked to award would be related to the
22 conduct regarding the Johnson's Baby Powder.
23 Your Honor will be asked to decide whether the
24 successors are liable based on their
25 allegations of fraud --

1 THE COURT: Let me stop you right there.
2 All right. I am not going to award punitive
3 damages, the jury is. At some point, since
4 they claim two kinds of fraud, as you say,
5 fraud in the product and fraud in the
6 successor, that relates to Mr. Perry and that
7 relates to the ability to assign responsibility
8 for punitive damages to the successor
9 corporations. And it also relates to the
10 successor corporations' baseline
11 responsibility.

12 I'll be ruling on whether they can be
13 successor. But if I rule that successors have
14 liability, the jury gets to make an award of
15 actual damages against these successors in
16 interest who bear the responsibility for the
17 products liability's outcome.

18 MS. PEPKE: Your Honor, we would
19 respectfully disagree with that. The
20 product -- the punitive damages, because of
21 their nature, a penalty, must relate to the
22 conduct related to Mr. Perry.

23 THE COURT: Yes, but the conduct related
24 to Mr. Perry is the responsibility of those,
25 their responsibility to Johnson & Johnson. And

1 a successor liability simply means that the
2 successor stands in the shoes of the entity to
3 which it succeeds and bears responsibility for
4 its liability, including punitive damages.

5 MS. PEPKE: And there, Your Honor, we
6 would disagree on the law. We believe the
7 successors can be held liable for compensatory
8 damages, but there is a very clear argument
9 that they cannot be responsible for punitive
10 damages based on the conduct of their
11 predecessors.

12 THE COURT: I am not aware of such
13 authority. Have you briefed that for me?

14 MS. PEPKE: Well, it's currently in
15 briefing that I'm doing right now and is
16 addressed in a draft of the jury charge that
17 I'm working on, but it's based on the
18 product -- the punitive damages statute and the
19 factors and that it has to be related to the
20 conduct that affected the --

21 THE COURT: I understand that argument.
22 All right. And I -- as you see, we have a
23 disagreement between the two of us as to
24 conduct. I say it comes to conduct of the
25 successor. Do you have a case that says that's

1 not so?

2 MS. PEPKE: In South Carolina, no, Your
3 Honor.

4 THE COURT: All right.

5 MS. PEPKE: It's based on statutory
6 interpretation and --

7 THE COURT: In other states or in federal
8 jurisprudence?

9 MS. PEPKE: The South Carolina punitive
10 damages statute, and then similar statutes in
11 other states.

12 THE COURT: I see. I see. I'm not saying
13 that persuasive authority can't be had in other
14 states. So please understand I'm not
15 discounting that. But my memory did not call
16 up a South Carolina case, and it sounds like
17 I'm right about that.

18 MS. PEPKE: You're correct about that,
19 Your Honor. As I stand here today, I believe
20 you're correct.

21 THE COURT: Sure. I am very much inclined
22 to the belief that successors stand in the
23 shoes of the entity for which they stand
24 liable, and that that also includes liable for
25 punitive damages.

1 Mr. Bogan, you maybe want to say
2 something?

3 MR. BOGAN: Just, Your Honor, you're
4 reserving to rule on that later, right? You're
5 not making a determination?

6 THE COURT: Well, I'm trying to figure out
7 what to tell her about what she can say to the
8 jury, because she wants to start talking about
9 successor to the jury.

10 MS. MCVEY: And, your Honor, this is
11 important. Mr. Bogan is asking that question,
12 I think, because if you rule on successor
13 issue, then they're going to appeal.

14 THE COURT: But then that won't interrupt
15 this trial on appeal. Once we get the jury
16 picked, Mr. Bogan has told me they're not going
17 to interrupt the trial and try to appeal.

18 MR. BOGAN: I think you'd want to rule
19 right now, Your Honor, before we impanel the
20 jury. We're hearing argument and you hadn't
21 ruled anything yet, right?

22 THE COURT: That's correct.

23 MR. BOGAN: Okay.

24 MS. MCVEY: If you rule, he's saying he's
25 going to appeal. That's all I'm saying.

1 THE COURT: Right, but he's not going to
2 interrupt this trial to appeal, I would hope.

3 MR. BOGAN: Your Honor, I think if you
4 rule on mode of trial issue prior to trial, it
5 creates an obligation to immediately appeal.
6 And what I'm trying, I think --

7 THE COURT: No, no. Don't run me around
8 the mulberry bush. If I make a ruling during
9 the course of this trial, and not right now,
10 about successor liability, you're going to
11 appall.

12 MR. BOGAN: No, ma'am, we can't, because
13 we wouldn't have the ability to do that at that
14 time because it's not prior to trial.

15 THE COURT: That's correct.

16 MR. BOGAN: We haven't impaneled the jury
17 yet.

18 THE COURT: I'm going to split the baby in
19 this way. Quite often there are situations in
20 which plaintiffs are restricted in their
21 ability to argue to the jury at the beginning
22 of trial about things that are still in dispute
23 in terms of their admissibility. This is one
24 of those things.

25 I am not going to allow plaintiff to argue

1 to the jury in their opening argument about
2 this issue. But I am going to take care of the
3 successor liability issue in sum out of the
4 jury's presence here and probably after a day,
5 and get this thing decided.

6 But I am not going to decide that issue
7 right now before this jury is impaneled. And
8 since I am not going to do that, I am not going
9 to then stop the trial and decide that issue
10 before we begin submitting witnesses.

11 I am going to allow Ms. McVey to make her
12 opening argument, but I am not going to allow
13 her to talk about successor liability, just
14 like I am not going to allow her to talk about
15 punitive damages right now.

16 MS. MCVEY: So, Your Honor, I am not going
17 to talk about successor liability, but what we
18 have to be able to talk about is that
19 Johnson & Johnson is responsible for the baby
20 powder through 1979. And in 1979, they create
21 JJCI, Johnson & Johnson Consumer whatever.

22 THE COURT: Right, right, right. And that
23 has been done in many other Johnson & Johnson
24 trials. No problem.

25 MS. MCVEY: But here's what happens. Then

1 Johnson & Johnson, JJCI, when they start
2 getting hit with verdicts and bad stuff is
3 happening, they decide we're going to divest,
4 JJCI is going to go away, we're putting all the
5 liabilities here, we're putting the assets
6 here, and the bankruptcy stuff starts walking
7 through. That's how you ultimately get to
8 Kenvue, the defendant here.

9 The reason why it has to be talked about
10 in opening is because we've got to walk the
11 jury about how we get to Kenvue. Not because
12 they're a successor, but just to walk through
13 what happened and why. It goes to the
14 reprehensibility; it goes to the fraud element;
15 it goes to causation.

16 THE COURT: I understand, but I am not
17 going to let you do that. I am going to let
18 you talk about Johnson & Johnson and its
19 related corporations. And I'm going to let you
20 talk about it that way, but I'm not going to
21 let you walk through all these details in
22 opening argument.

23 And you're asking for trouble when you're
24 asking me to do that because I'm trying to go
25 on and impanel this jury and get this trial

1 started. And besides successor liability, when
2 I've got the time after the first day, to deal
3 with this.

4 MS. MCVEY: You don't have to decide
5 successor liability, and I don't want you to
6 make a decision until after the trial is over.
7 You don't have to.

8 THE COURT: Yes, but the reason that
9 Kenvue and the one before it, the two-step
10 outfit, are in this case is because of all the
11 activity they engaged in to try to avoid
12 liability.

13 Now, I agree with you that there are two
14 aspects to that. One is simply that they are
15 successor to Johnson & Johnson. It has nothing
16 to do with their badness and their fraud. And
17 that's what I think you're backing up to,
18 saying I want to be able to mention that one
19 that was created in 1979, and then the two-step
20 one, as I call them, and then Kenvue, simply to
21 say that this is a successive -- as we contend,
22 this is a successive group who bear
23 responsibility for the damages.

24 And I might be willing to let you do that,
25 but I don't want to get into the badness, the

1 fraudulent conduct as you see it, the attempt
2 to avoid responsibility. I simply want them to
3 know that you have included other corporations
4 because you view them as successors.

5 MS. MCVEY: And you have previously ruled
6 in pretrial that we could walk through some of
7 the bankruptcies.

8 THE COURT: I'm not going to do that. I'm
9 not going to do that right now, because that --
10 the bankruptcy pertains totally to this fraud
11 thing because the bankruptcy, they tried to do
12 it and it ended up they couldn't do it. And it
13 was some badness there, and I lived with that
14 badness and the wreck it made of my docket for
15 several years. I'm very much aware of that.

16 MS. MCVEY: Yes, ma'am.

17 THE COURT: How it plays into fraud versus
18 basic responsibility is something we need to
19 have some arguments about. I want to be
20 included on that.

21 MS. MCVEY: So what you're ruling for
22 right now is not in opening. I hear you.

23 THE COURT: All I'm going to say is this.
24 In your opening argument, since you have got
25 these four defendants, you may say you have

1 these four defendants and you have them because
2 Johnson & Johnson was by itself, then another
3 corporation was created, and at a certain point
4 another, and then another.

5 MS. MCVEY: Yes, ma'am.

6 THE COURT: And those four, you say, bear
7 the responsibility for what you are asking from
8 the jury for Mr. Perry.

9 MS. MCVEY: Fair enough.

10 THE COURT: And for his husband.

11 MS. MCVEY: Thank you.

12 THE COURT: Okay? I know you don't agree
13 with that, Ms. Pepke, so I want you to know
14 that I note your exception and disagreement on
15 the record. But that is how I'm going to do it
16 in a way that preserves our ability to sort
17 more distinctly into what these
18 responsibilities are and whether any of these
19 corporations bear actual and/or punitive
20 damages responsibilities in connection with the
21 separate frauds alleged in connection with
22 their creation of the bankruptcy.

23 MS. PEPKE: I understand your ruling.

24 Thank you, Your Honor.

25 THE COURT: So we understand where we're

1 going. Okay.

2 All right. Ms. McVey, that's the one that
3 deals with instructions as to J&J.

4 The instruction as to AII. Ms. Flynn,
5 please be prepared to come up here. Y'all let
6 Ms. Flynn up here in the counsel spot so she
7 can talk about this.

8 MS. MCVEY: Your Honor, I'm going to hand
9 you two proposed instructions, one as to AII
10 and one as to Johnson & Johnson spoliation
11 issue.

12 THE COURT: All right.

13 MS. MCVEY: And...

14 THE COURT: Okay. The one I'm looking at
15 right now is the one as to AII. And,
16 Ms. Flynn, you have that one that the plaintiff
17 asked me to charge.

18 MS. FLYNN: Yes, Your Honor.

19 THE COURT: It's the charge as to AII. It
20 has been determined as a matter of law that
21 American International, defendant responsible
22 for Clubman talc products, is liable for
23 Mr. Perry on each of the causes, et cetera.

24 You're familiar with that charge?

25 MS. FLYNN: Correct, Your Honor.

1 THE COURT: Very good.

2 MS. FLYNN: Your Honor, would you like
3 copies of the competing charges?

4 THE COURT: Certainly. Thank you so much.

5 MS. PEPKE: I believe this is AII's that
6 they sent (handing).

7 THE COURT: Gotcha.

8 MS. PEPKE: And this is
9 Johnson & Johnson's.

10 THE COURT: On the spoliation thing?

11 MS. PEPKE: This is on the default
12 instruction.

13 THE COURT: Oh, you don't want one on
14 default. I don't know what I'm going to do
15 about that, but anyway.

16 Okay. All right. Ms. McVey.

17 MS. MCVEY: Your Honor, this is we --
18 based on some of the comments from
19 Johnson & Johnson and AII, we did, in fact,
20 modify our instructions.

21 THE COURT: Right. The one I'm looking at
22 is your modified.

23 MS. MCVEY: That's right. And, Your
24 Honor, our instruction is accurate, right? I
25 mean, it's been decided -- it's been determined

1 as a matter of law that their product --

2 THE COURT: It's completely accurate and
3 I'm not going to get into all this business
4 about you can't say it's determined as a matter
5 of law and you can't say "I hold" and all this
6 kind of thing. That's how I have charged
7 default matters in many, many cases. So if I'm
8 wrong about that, I'm sure the Supreme Court
9 will take a look at it.

10 MS. MCVEY: Thank you, Your Honor.
11 Because our concern is we have to be able to
12 explain why AII is here.

13 THE COURT: That's right. They've been
14 determined, as a matter of law, liable for the
15 causes of action, and been determined they are
16 willful and wanton and, you know, nothing else
17 is said.

18 Now, AII says default means they did not
19 respond -- the jury doesn't need to make any
20 determination about that. I made that
21 determination. All they need to know is, as a
22 matter of law, they are liable.

23 And the only thing I can take out of that
24 is that a defaulting defendant does not concede
25 the amount of plaintiffs' damages, and that

1 will be for you to determine.

2 MS. MCVEY: And, Your Honor, at the bottom
3 of our charge we state that, that they could
4 determine the amount of damages, too. If you
5 want to tweak that, we can.

6 THE COURT: Well, you've got, "While these
7 issues you must decide against
8 Johnson & Johnson and Kenvue are instructed --
9 you are instructed that" -- oh, I see what
10 you've got. Okay. I'm going to put a little
11 box around that clearing your throat thing
12 about deciding these issues as to "you're
13 instructed that it's liable and the only
14 task" -- my instruction as to AII would be your
15 first paragraph, and then "you are instructed
16 that American International is liable. The
17 only task is to determine total amount of
18 damages," and that is all I'm going to say. I
19 am not going to say anything about punitive
20 damages. I always leave that for the punitive
21 part of trial when we get there.

22 So all I would say, Ms. Flynn, is I would
23 say that first paragraph she's got, and then I
24 would say, "You are instructed that your only
25 task as to AII is to determine total amount of

1 damages that Michael Perry and Lonnie Long have
2 suffered." That's it.

3 All right. Now, talk to me.

4 MS. FLYNN: I understand, Your Honor. And
5 that does take care of at least the third point
6 that we made in our briefing before the Court.
7 We do obviously take exception with -- with the
8 plaintiffs' first paragraph, as well, as you
9 know. And before I get into that, as you know,
10 AII does not concede that a statement is
11 appropriate in the first place because we don't
12 believe we are in default.

13 THE COURT: I understand. Your position
14 is completely protected on that. You take the
15 position that because they served you with the
16 second and third amended complaints and
17 committed to amend the complaint by my order,
18 that it somehow vitiated the default that I had
19 held them in to begin with. And I say the
20 default law does not work that way; and
21 therefore I will overrule that objection and
22 you are protected.

23 MS. MCVEY: And just for clarity. I'm
24 sorry to interrupt, but we did not serve them
25 with the second or third amended complaint

1 because they were already --

2 THE COURT: They attempted to answer.

3 MS. MCVEY: That's right.

4 THE COURT: Yeah, let me make the record
5 clear about that.

6 All right. You served them with the first
7 amended complaint. They defaulted. Then you
8 served the second and a third amended complaint
9 against Johnson & Johnson and all the other
10 defendants.

11 MS. MCVEY: And we added new defendants.

12 THE COURT: And added new defendants. All
13 right. They submitted an answer.

14 MS. MCVEY: That's right.

15 THE COURT: But you contend that's not
16 their -- they have no ability to submit further
17 pleadings because they're in default.

18 MS. MCVEY: That's right.

19 THE COURT: Does that clarify it?

20 MS. FLYNN: I understand.

21 THE COURT: Ms. Flynn says yes, they do,
22 because even though they weren't served, you
23 vitiated that first complaint by amending.

24 MS. FLYNN: Correct. The operative
25 complaint is the second amended complaint. We

1 made an appearance in the case related to the
2 complaint and --

3 THE COURT: I understand. I understand.
4 You are protected on that. I will overrule
5 that objection.

6 MS. FLYNN: Yes, Your Honor.

7 THE COURT: Now, let's go back to this.
8 You say, "If you find the non-faulting
9 defendant is liable to Michael Perry and Lonnie
10 Long, your only task is to American
11 International's determined total amount of
12 plaintiffs' damages."

13 This thing about plaintiffs have the
14 burden of proof and all that kind of thing, I
15 do that in another charge. So I'm not going to
16 charge that in your charge.

17 MS. FLYNN: I understand, Your Honor. My
18 only other point to make on that is that if
19 Johnson & Johnson gets a defense verdict, that
20 verdict inures to the benefit of AII as well,
21 because we're jointly -- alleged to be jointly
22 and severally liable --

23 THE COURT: We'll cross that bridge when
24 we come to it. I don't think the law works
25 that way. I don't think you get the benefit of

1 that joint and several liability contention
2 because you're in default. And I think that we
3 have some cases -- South Carolina has some
4 cases on that, but we don't need to decide that
5 right now.

6 MS. FLYNN: We've set our argument forth
7 in the brief on that issue, Your Honor.

8 THE COURT: Good.

9 MS. FLYNN: And we're happy to rely on
10 that.

11 THE COURT: Certainly. You may, and
12 we'll -- but I'm sure we'll talk about it
13 further.

14 MS. FLYNN: Understood, Your Honor.

15 THE COURT: All right. Okay. So we now
16 understand that as between the AII and J&J, I'm
17 going to charge -- I mean, the plaintiff, I'm
18 going to charge plaintiffs' first paragraph,
19 they accept to that and Ms. Flynn is protected
20 on that.

21 Then I'm going to say the second paragraph
22 is going to be the one "if you find that
23 non-defaulting is liable, you determine total
24 amount of plaintiffs' damages" thing. I'm
25 going to charge that off of her thing.

1 MS. MCVEY: Okay.

2 THE COURT: And I'm not going to charge
3 punitive damages at this time.

4 MS. MCVEY: Are you charging any of our
5 second paragraph?

6 THE COURT: Yes, ma'am.

7 MS. MCVEY: That's fine. I just want to
8 make sure we're getting it right.

9 THE COURT: I'm talking about her second
10 paragraph, "If you find," that first little
11 thing. I'm going to charge what she asks
12 there. I'm not going to say, "While these are
13 the issues you must decide against J&J and
14 Kenvue, you are instructed that AII is liable."
15 Right now I'm thinking I won't do that, but
16 I'll pray on that a little bit more, but I'm
17 not going to mention punitive.

18 All right. J&J?

19 MS. FLYNN: Thank you, Your Honor. We
20 have very grave concerns about the impact of
21 any order that implies there has been some kind
22 of merit finding on the allegations in the
23 complaint because of the cross --

24 THE COURT: Come on, now. You all have
25 been in defaults in many, many trials all over

1 the country where somebody is in default. Tell
2 me -- you can be concerned about all that as
3 much as you want, but how does that affect what
4 I'm going to tell the jury?

5 MS. PEPKE: Your Honor, the Lanzo case.
6 The Lanzo case in New Jersey, a very similar
7 thing happened with the trial court instructed
8 on an adverse inference that impacted
9 allegations that went against two defendants,
10 and the court of appeals reversed because the
11 adverse instruction spilled over into the
12 co-defendant. And that's what's happening
13 here.

14 THE COURT: I disagree totally. And I
15 think that case has to do with an evidentiary
16 situation, not a default situation; and
17 therefore I disagree with your logic about
18 that, and I'm not going to file it and you are
19 protected. I will overrule your objection.

20 MS. PEPKE: Thank you, Your Honor.

21 THE COURT: Okay. Now, we understand
22 where we all are. This instruction to the jury
23 will be given to the jury before argument
24 begins.

25 MS. MCVEY: Thank you, Your Honor.

1 THE COURT: All right. Now, spoliation.
2 Let's go there.

3 MS. PEPKE: Your Honor, for the record, I
4 just want to call to your attention, when we
5 filed our motion on this default instruction,
6 in the alternative, we did move to sever. If
7 you did not grant our proposed instructions,
8 because of the concern about spillover, we
9 moved to sever AII's claims from ours.

10 THE COURT: Very good. And I overruled
11 that request to sever. You are totally
12 protected with that.

13 MS. BUENO: Good morning, Your Honor. Kim
14 Bueno for defendants. I want to address the
15 spoliation. I think I can short-circuit this
16 for Your Honor.

17 THE COURT: Yes, ma'am. I'm looking at
18 it.

19 MS. BUENO: As Your Honor understands and
20 is aware, in 2021 there was substantial
21 briefing and argument in a case before you
22 called McBrayer.

23 THE COURT: I know McBrayer. I remember
24 that you all stopped the whole doggone thing.
25 Yeah, I remember that case very well.

1 MS. BUENO: On Tuesday, during pretrial
2 argument, plaintiffs filed a motion in limine
3 to apply the McBrayer order here. You granted
4 that motion. Plaintiffs have given you what
5 they intend to be the J&J spoliation
6 instruction you will give. That's before Your
7 Honor right now.

8 We have reviewed this and we see no
9 problem with it, but there is a catch. I want
10 to let the Court know that Johnson & Johnson
11 has made a strategic decision, in light of the
12 evidentiary ruling that you've offered in this
13 case, we are not going to be offering any
14 evidence in this trial in front of this jury
15 that would trigger a spoliation instruction.

16 So here is what I ask Your Honor to do. I
17 ask Your Honor not to charge this, to wait for
18 the evidence. And to the extent Your Honor
19 thinks that we've done something to trigger it,
20 then we can have that discussion and argument.
21 But I'm telling you right now that we do not
22 intend to offer any evidence that would trigger
23 this for the jury.

24 And that, again, is a decision we've made
25 only because of Your Honor's adverse ruling in

1 this case that we believe prejudices us.

2 THE COURT: Okay. Well, fine. You can
3 make it for any reason you want to. I'm just
4 dealing with the law as it applies to
5 spoliation.

6 What I am inclined, Ms. McVey, to do is to
7 wait on spoliation until we get into the trial,
8 but I can tell you I don't think I'm going to
9 change my mind about charging the jury on
10 spoliation because I cannot imagine, as this
11 trial proceeds, the evidence as what they're
12 offering and what you're offering, I cannot
13 imagine that they're not going to offer some
14 evidence that brings this issue into
15 contention.

16 MS. BUENO: Your Honor, plaintiffs cannot
17 trigger a spoliation instruction for us based
18 on Johnson & Johnson testing. We are not going
19 to offer any evidence to trigger this. And we
20 have agreement with plaintiffs' counsel that
21 the one corporate representative, Dr. Hopkins,
22 that comes by video, we have an agreement
23 already that his clips that are agreed to will
24 not trigger this.

25 THE COURT: Well, that's fine. But I

1 don't know how this trial is going to proceed.
2 And therefore I got what you're saying, but I'm
3 not going to read the spoliation charge to
4 begin with. I'm going to hold that off.

5 But I'm not making any promises as to
6 whether I agree with you that you could kind of
7 make an agreement with them on the front end
8 that only you can trigger spoliation and you
9 decide you're not going to offer any evidence.
10 I haven't put my brain around whether all that
11 is actually correct or not. So I'm not going
12 to rule on it.

13 MS. BUENO: Understood, Your Honor. Thank
14 you for not reading it now. And we'll cross
15 that bridge when we come to it.

16 THE COURT: We'll come to that later. I'm
17 sure there'll be plenty of time before that
18 becomes something we need to talk to the jury
19 about.

20 MS. BUENO: Thank you, Your Honor.

21 THE COURT: All right. Now, how about
22 pre-admit? I don't like that there's been so
23 much disagreement about this. And I've got
24 stacks of boxes in my office I cannot believe.
25 So, y'all, I'm not going through all those

1 boxes.

2 MR. COWAN: I think I can short-circuit
3 this, as well.

4 THE COURT: Okay. Mr. Cowan.

5 MR. COWAN: I stayed up late last night.

6 THE COURT: Good. I know you did.

7 MR. COWAN: Your Honor, I really did, and
8 I put it all in buckets for you. And I think
9 you're going to love the first bucket because
10 it's called objection withdrawn.

11 THE COURT: Okay. I love that one.

12 MR. COWAN: Can I approach?

13 THE COURT: Of course.

14 MR. COWAN: (Handing.) So I have handed
15 Your Honor a list. These are buckets. Most of
16 them can be dealt with just as a bucket. I am
17 happy to read into the record or we can simply
18 mark that as a court exhibit.

19 THE COURT: I mark this as Court's
20 Exhibit 1.

21 - - -

22 (Plaintiffs' Motion to Pre-Admit
23 marked Court Exhibit Number 1 received
24 into evidence.)

25 - - -

1 THE COURT: It's Plaintiffs' Motion to
2 Pre-Admit proposal by Defendant.

3 MR. COWAN: And so the first bucket --

4 THE COURT: Hand that up to her and let
5 her mark that.

6 MR. COWAN: I'm sorry.

7 THE COURT: Do you have an extra copy of
8 that?

9 MR. COWAN: I do. I have another one.

10 THE COURT: Just let her hold on to that
11 as Court's Exhibit 1.

12 Thank you, ma'am.

13 MR. COWAN: Just roughly --

14 THE COURT: Let her mark it.

15 Thank you, Cindy.

16 All right. Yes, sir.

17 MR. COWAN: Yes, Your Honor. The first
18 bucket is roughly 15 that we've decided to pull
19 the objection.

20 THE COURT: All right. That's good.

21 MR. COWAN: So those can be preadmitted.
22 The second bucket there on Court Exhibit 1 says
23 "Motion in Limine." That just means that, you
24 know, we have the correspondence over the
25 weekend about motion in limine and whether that

1 preserves anything.

2 So I just want it on the record, with
3 regard to the motion in limine that you denied
4 in favor of plaintiffs, that would be -- these
5 would be exhibits that would be covered under
6 those. So the only objection would be what we
7 already spelled out in the motion in limine
8 that was denied.

9 THE COURT: All right. So with regard to
10 the item that's labeled in this Court's
11 Exhibit 1 motion in limine, I made rulings
12 pretrial on all these motions in limine of the
13 defendants. And these are numbers of motions
14 in limine of defendant, and I made rulings with
15 which the defendant disagrees.

16 I hereby reaffirm those rulings. If you
17 want me to do it after the jury is impaneled, I
18 can do that. I think Mr. Bogan would like
19 that. So I'm going to mark this. When jury is
20 impaneled and outside the presence of the jury,
21 I will confirm on the record all of my rulings
22 on motions in limine and you will be protected.

23 MR. COWAN: And just so we're clear, the
24 numbers here are actually exhibit numbers, and
25 these exhibit numbers are related to motion in

1 limine that you have denied against the
2 defendants.

3 THE COURT: Right. So let me go back and
4 say, about Court's Exhibit 1, motions to
5 pre-admit. All the numbers on this motion to
6 pre-admit are exhibit numbers.

7 MR. COWAN: Yes, ma'am.

8 THE COURT: And they are now contained in
9 exhibits that will be made a part of the record
10 in this case and moved into evidence at the
11 appropriate time after the jury is impaneled.

12 MR. COWAN: Thank you, Your Honor.

13 THE COURT: All right.

14 MR. COWAN: The next one is the only
15 objection on the exhibits that are listed under
16 hearsay within hearsay are that these are J&J
17 documents that have hearsay within that
18 hearsay.

19 Obviously the initial hearsay is covered
20 by the stipulation. Our objection is that the
21 hearsay within that is not. However, I heard
22 Your Honor quite clearly on Monday, so I'm
23 just -- I'm making the objection. I'm putting
24 them in a bucket for you, and you can deny or
25 grant the objection.

1 THE COURT: Great. And that will all be
2 confirmed on the record.

3 MR. COWAN: Thank you, Your Honor.

4 THE COURT: I'll just make a note to
5 confirm it on the record at the appropriate
6 time.

7 Yes, sir.

8 MR. COWAN: The next --

9 THE COURT: Wait a minute. Ben, you don't
10 need to be arguing this right now.

11 MS. MCVEY: He was just saying -- he knows
12 the documents better than I do, so he's just --

13 THE COURT: Okay. Good. You just stay on
14 call.

15 MR. ADAMS: Yes, Your Honor.

16 THE COURT: The decades chart. I know you
17 all hate those.

18 MR. COWAN: Yes, we do. So, Your Honor,
19 this is something that I think deserves some
20 argument, so we can skip over this for a moment
21 if you'd like.

22 THE COURT: Argument requested on record
23 is what I'm going to put by this. And then
24 when we get the jury impaneled, we'll decide
25 what to do about that.

1 MR. COWAN: I did not see any decade of
2 evidence on the --

3 THE COURT: If she wants to use the
4 decades in open argument or not?

5 MR. ADAMS: No, Your Honor.

6 MS. MCVEY: No. Didn't we argue that in a
7 motion in limine?

8 MR. COWAN: No, because I didn't know
9 which chart.

10 THE COURT: This is the decades chart.

11 MR. COWAN: There's actually three charts.
12 One is the decades, and then there's two
13 others.

14 THE COURT: Two other ones, right.

15 MR. COWAN: One of which is less
16 objectionable than the other two.

17 THE COURT: I'm familiar. And we'll get
18 that on the record, and I will accept some
19 discussion about that at the appropriate time.
20 We'll get them all and get them marked and talk
21 about them.

22 MR. COWAN: Thank you, Your Honor.

23 THE COURT: But you have exhibit numbers
24 of these already marked?

25 MR. COWAN: That's what these are.

1 THE COURT: And that's what these numbers
2 are. Very good.

3 Okay. Branham.

4 MR. COWAN: Branham. So I'm going to pass
5 this one off to Ms. Pepke if she wants to make
6 this argument. But all of these exhibit
7 numbers, the objection is based on Branham.

8 THE COURT: Branham versus Ford Motor
9 Company?

10 MR. COWAN: Yes, ma'am.

11 THE COURT: All right.

12 MS. PEPKE: Your Honor, I understand that
13 you're very familiar with Branham.

14 THE COURT: I'm very familiar with
15 Branham.

16 MS. PEPKE: Just for the record, I'll
17 restate that the evidence of conduct after the
18 date of manufacture improperly shifts the focus
19 from the premanufacturing decision and has the
20 potential to taint any finding of liability;
21 therefore, post-distribution evidence to
22 evaluate the product design should not -- is
23 improper.

24 So in this case, Your Honor, Mr. Perry was
25 diagnosed with mesothelioma in 2023. Their

1 expert, in on that opening slide, they are
2 representing that there's a 10-year latency
3 period. That means that the last exposure that
4 could have caused mesothelioma would have been
5 in 2013.

6 Our position is the documents after 2013
7 should not be admitted under Branham. And at
8 the very latest, the date would be 2019, which
9 is when Mr. Perry testified that he stopped
10 using Johnson's Baby Powder.

11 THE COURT: I got you.

12 All right. Ms. McVey.

13 MS. MCVEY: Your Honor, I'm not looking at
14 Branham right now, but I've argued this motion
15 many times, and I believe it's footnote 17
16 which talks about all the reasons where
17 post-distribution evidence can come in. And in
18 this case this post-distribution evidence is
19 entirely relevant.

20 This argument that 10 years' latency means
21 you can't get in this evidence for other
22 reasons is a silly argument, in my view. And
23 everything that you'll see on their Branham
24 list is directly relevant as to this case and
25 it shouldn't be banned by the Branham

1 post-distribution because it falls under that
2 footnote 17. If I had it up, I would quote it
3 to you.

4 THE COURT: I'm looking at it.

5 MS. MCVEY: Okay. And I think we're
6 covered under Branham.

7 THE COURT: All right. Ben.

8 MR. ADAMS: Just to supplement, Your
9 Honor, the first exhibit, 156, that they
10 reference under Branham. Exhibit 156.

11 THE COURT: Yes.

12 MR. ADAMS: That's when the FDA found
13 asbestos in Johnson's Baby Powder in 2019 and
14 they sent it to their go-to lab, R.J. Lee.
15 R.J. Lee found the exact same thing in the
16 exact same sample. So it goes to
17 asbestos-content causation and all these
18 critical issues in the case.

19 THE COURT: Right.

20 MR. ADAMS: And it doesn't matter that it
21 happened after -- or it doesn't matter that it
22 happened the year Michael Perry stopped.

23 MS. PEPKE: It would be our position, Your
24 Honor, that the Branham exception in
25 footnote 17 -- and I'm looking at it as well --

1 would not apply to 2019, which was on a very
2 specific lot of baby powder. It was not found
3 in other lots. It was not a lot that Mr. Perry
4 could have used because he said he stopped
5 using baby powder in 2019.

6 THE COURT: Well, I understand that's the
7 way you want to construe that piece of
8 evidence. They construe it as a long -- as the
9 latest in a long line of hide the ball of
10 whatever you could have as a non-pejorative
11 term.

12 But their contention is that J&J has known
13 for years and years and years that they had
14 asbestos. They defined asbestos in some ways
15 that made this not asbestos and argued, well,
16 if it's not asbestos, therefore you don't have
17 to disclose it.

18 They had internal documents that said,
19 hey, if they ever find out that there's
20 needle-like tremolites in here, it's going to
21 be bad for us.

22 This is a continuation of their contention
23 that their testers told them the truth, but
24 they didn't tell the public the truth. And I'm
25 going to let that kind of evidence in. I think

1 that is at the heart and soul of what Branham
2 says can be let in, and therefore we just have
3 a disagreement about Branham. But your
4 position is protected on that. I will admit
5 the so-called Branham-type evidence.

6 MS. MCVEY: Thank you, Your Honor.

7 MS. PEPKE: Your Honor, out of curiosity,
8 how would you prefer us to handle this?
9 Obviously, that argument is a little
10 evidence-specific, right? I understand your
11 ruling on the 2019 lot. There may be other
12 lots then that we believe don't fall under
13 Branham.

14 THE COURT: Well, that's fine. If it
15 comes to that, let me know, but I don't want to
16 have to send the jury out and get screened. So
17 it's going to have to be something that you
18 specify to me before that time. I don't think
19 this needs to be done at this moment when I'm
20 trying to get a jury called up.

21 MS. PEPKE: I agree with you. I think
22 it's going to have to be when we see how
23 they're offering the evidence.

24 MS. MCVEY: I would like to do it
25 differently than that. I'm happy to not do it

1 right this second, if we could do it maybe
2 after court today or first thing in the morning
3 tomorrow, but I think we need to argue this
4 outside the jury so we're not stopping.

5 THE COURT: I'm not going to stop the
6 jury, and I definitely think you all ought to
7 plan on doing some stuff after court today.

8 MS. MCVEY: I'm happy to do that.

9 THE COURT: All right. You know what my
10 feeling is with respect to 156, that Ben's just
11 mentioned, I would absolutely agree with
12 plaintiffs' argument about that. We will go
13 through these others at the appropriate time.
14 But just know that's going to be done rather
15 quickly so that Mr. Cowan can get straight
16 about knowing which exhibits are in and which
17 ones are not.

18 MS. PEPKE: Thank you, Your Honor.

19 THE COURT: Okay. Miscellaneous.

20 MR. COWAN: You're going to hate this one.
21 No, I'm kidding. Look, these have been
22 briefed, right, because our objections have
23 been filed with the Court. Here's what I would
24 suggest, because they can't be decided in
25 bucket form. Either, one, Your Honor looks at

1 the objections as --

2 THE COURT: How many of these are there?

3 MR. COWAN: I believe I counted them as
4 47.

5 THE COURT: 47 things that I'm going to
6 have to look at briefing for and make a
7 decision.

8 MR. COWAN: It's not really briefing.
9 It's short paragraph objections that are
10 attached to --

11 THE COURT: How many of these things are
12 material to your ability to present your
13 opening argument in the beginning of your case,
14 Ms. McVey?

15 MS. MCVEY: I don't know looking at the
16 bucket like this. We can look at it quickly.

17 What I have for you, if it's helpful --
18 and I don't want to stop the opening of the
19 jury. This is our exhibit number, a
20 description of it, why we think it's relevant,
21 and their objection. I don't think you're
22 going to have time to do that right now. And
23 Rachel is going to look and see if any of these
24 need to be used in the opening.

25 THE COURT: Well, how about do this. Let

1 me have that notebook. You've got one for
2 yourself now?

3 MS. MCVEY: Yes, ma'am. And I'm just
4 going to show you how it works because it's a
5 little -- this column is going to have the
6 exhibit number, and then it kind of walks
7 across. The objections are right there, so as
8 you walk through them.

9 THE COURT: All right. We're going to
10 have a little time before opening argument, so
11 I am going to reserve on this for a moment and
12 see whether there are ones that need some
13 specific address before you make your opening
14 argument, because I am not going to stop and
15 get into that after we impanel the jury. We're
16 going to go into opening argument and get on
17 with it.

18 MR. COWAN: I understand.

19 THE COURT: Understood?

20 MR. COWAN: Yes, Your Honor.

21 THE COURT: I've got to figure out a
22 rational way to do this, and we'll give you a
23 chance to weigh in, either on paper or by some
24 further argument. Okay?

25 MR. COWAN: Yes, Your Honor.

1 THE COURT: All right. Anything else
2 preliminarily?

3 Witnesses for August the 5th? Any problem
4 about that? I think y'all have got that worked
5 out.

6 MS. MCVEY: I think so.

7 THE COURT: You agree, everybody agree to
8 use the as-played video of Dr. Hopkins?

9 MS. MCVEY: Yes.

10 THE COURT: That was used in the Lee case?

11 MS. MCVEY: Yes, we just have to make a
12 few modifications.

13 THE COURT: And then therefore they're not
14 going to have to recut or anything like that.

15 All right. Time limits for each witness.

16 MS. MCVEY: Hold on one second.

17 Dr. Brody's coming today or is supposed to.

18 THE COURT: Yeah, yeah.

19 MS. MCVEY: His flight was cancelled last
20 night. His flight was delayed this morning.
21 We're hoping he's still coming, but if not,
22 we'll start with Hopkins.

23 THE COURT: Okay. And take Brody when he
24 gets here. That's fine.

25 MS. BUENO: And we have not received any

1 disclosures from Dr. Brody of demonstratives or
2 exhibits, which we -- you know, to the extent
3 we need to raise anything with Your Honor
4 before his testimony, we'd like a chance to do
5 so.

6 MS. MCVEY: It's the same Brody stuff.

7 THE COURT: It's the same Brody stuff. If
8 you all don't know Brody now, you don't need to
9 be trying these cases. I've heard that stuff
10 so many times, it's not funny. I've ruled on
11 it so many times, it's not funny.

12 MS. BUENO: Well, we haven't seen it in
13 this case. We don't know what he's planning to
14 do. So we --

15 THE COURT: Well, you won't be surprised.
16 Let's just put it that way.

17 MS. BUENO: Well, we've asked them to
18 disclose to us what he's going to use so we
19 have a chance to look at it.

20 THE COURT: Ms. McVey, are you going to
21 give them something?

22 MS. MCVEY: Yes.

23 THE COURT: Okay. Very good.

24 All right. Time limit on each witness.

25 MS. MCVEY: So you'll see in my e-mail,

1 we've gone back and forth nicely, I think. And
2 where it's in black, there's agreement. Where
3 there's red, it's Johnson & Johnson's proposal.
4 Where it's blue, it's kind of our proposal.

5 I understood that the plaintiffs are going
6 to get an hour for opening. They say we should
7 only get 45 minutes. Your Honor, we would ask
8 for an hour.

9 THE COURT: I'll give you an hour each
10 side.

11 MS. MCVEY: Thank you.

12 THE COURT: All right. Longo. Do we have
13 to get into Longo right now?

14 MS. MCVEY: No, we don't.

15 THE COURT: Okay. Brody, you agreed on,
16 so I don't have to do anything with the rest of
17 these?

18 MS. MCVEY: And the only issue is
19 Johnson & Johnson e-mailed earlier this weekend
20 or last week and said we need to bring
21 Dr. Sanchez in your case --

22 MS. BUENO: Dr. Barlow.

23 MS. MCVEY: No, you said Dr. Sanchez.

24 MS. BUENO: No.

25 MS. MCVEY: Yes, you did.

1 MS. BUENO: We never said Dr. Sanchez.

2 THE COURT: Well, we got something about
3 some witness that was supposed to be offered at
4 the end of the week and this kind of thing.
5 Have y'all resolved that?

6 MS. MCVEY: I understood it was to be
7 Dr. Sanchez. My apologies if that's not true.

8 THE COURT: Is he a doctor now?

9 MS. BUENO: Your Honor, we have --

10 THE COURT: He's Mr. Sanchez. He's not a
11 doctor.

12 MS. BUENO: He is a doctor. He's a Ph.D.

13 THE COURT: Oh, a Ph.D. Okay.

14 MS. BUENO: So, Your Honor, we never said
15 Dr. Sanchez is coming Friday. We had one
16 witness, Dr. Christy Barlow, who needs to come
17 on Friday. She's not --

18 THE COURT: No, she can't come on Friday
19 because they've still got their case going on.

20 MS. BUENO: Well, but here's what we're
21 going to do. We need to bring her on Friday.
22 We do not have an option to call her Monday and
23 Tuesday. And we understand, Your Honor, that
24 we're going to close on Wednesday.

25 So we've been giving this some thought.

1 And if Your Honor's ruling is that we cannot
2 bring her on Friday, we're going to rearrange
3 some of the plan.

4 So here's what I think we can do to make
5 this work. Dr. Hopkins, who is by video,
6 you'll see that the plaintiffs have two hours
7 and we have one hour and 12 minutes. Normally
8 we would play our Hopkins affirmatives together
9 at the same time, but in order to accommodate
10 Dr. Barlow, we will take that hour and put it
11 in our case next week instead. So that gives
12 us an hour.

13 And then also, Dr. Kuffner, you'll see,
14 who is our corporate representative, you'll see
15 that he has been scheduled for one hour and 30
16 minutes per side. Plaintiffs have asked for 20
17 minutes on recross. And we had asked for
18 redirect.

19 And the plan here was, Your Honor, that we
20 were going to call Dr. Kuffner -- they're
21 calling him Thursday adversely in their case --
22 and that we had agreement that we would do our
23 direct of Dr. Kuffner at the same time.

24 But in order to accommodate Dr. Barlow and
25 give us more time on Friday afternoon to bring

1 her, what we propose is that we will play
2 Dr. Hopkins' clip in our case next week and we
3 will bring Dr. Kuffner back to do our direct
4 next week in our case. That way we can trim
5 down what plaintiffs require by a perfect
6 amount of time for Dr. Barlow to appear on
7 Friday afternoon. And that seems to make sense
8 for the schedule.

9 THE COURT: Well, it sounds like I don't
10 need to figure that out right now.

11 MS. MCVEY: Well, you might not be able
12 to, but I do object to them dictating what's
13 happening in our case. I mean, we offered to
14 move -- we asked to call Madigan out of turn.
15 They said we can't call Madigan out of turn.
16 So we need to go forward. If we rest our case
17 Friday afternoon and they have time, certainly
18 they can call Dr. Barlow. But I don't know
19 that we're going to be finished. And so that's
20 the concern.

21 THE COURT: Well, I'm not going to decide
22 that right now.

23 MS. BUENO: Okay. May I state for the
24 record, since there was a representation, we
25 never said they couldn't bring Dr. Madigan out

1 of turn. The proposal by plaintiffs was to
2 bring Dr. Madigan on Wednesday, the 14th.
3 That's the day we're closing. Our case will
4 already be over by then. And so what we said
5 is that's not going to work because we can't
6 bring him after we rest. We offered to let
7 Dr. Madigan --

8 THE COURT: Look, I'm not going to decide
9 these issues right now.

10 MS. BUENO: The only issue we would ask is
11 that at some point today we have this
12 discussion, because whether or not Dr. Barlow
13 can come on Friday is going to dictate our
14 schedule. I know plaintiffs are eager for us
15 to tell them who we're calling and we need that
16 information.

17 THE COURT: I'm not going to decide that
18 right now.

19 MS. BUENO: Understood.

20 THE COURT: That's going to be decided
21 sometime either later today or -- we'll have an
22 understanding before we leave the courthouse
23 today about this issue.

24 MS. BUENO: Thank you.

25 THE COURT: I understand you need to know

1 that for your purposes. So we'll decide that.
2 I'm just not going to decide that right now.

3 MS. BUENO: Thank you.

4 THE COURT: What I need to know is, what's
5 happening with our jury? Do we know anything
6 about that?

7 MS. MCVEY: I haven't heard. I don't know
8 if they started qualification. Are you
9 qualifying?

10 THE COURT: I'm qualifying. That's why
11 I'm anxious to get this piece of it over with.

12 MS. MCVEY: I think we're almost done.
13 I've got two more issues just to raise -- one
14 more issue. We can bring up anything on a
15 stipulation. I thought we had an agreement on
16 economic stipulation about the medicals and the
17 economist number.

18 THE COURT: By the way, I'm not going to
19 put up with having some big battle about that.
20 The stipulation about the damages, the economic
21 damages, ought to be pretty routine.

22 MS. BUENO: We've already agreed, Your
23 Honor.

24 THE COURT: Okay. Then what have we got
25 is a problem about it?

1 MS. MCVEY: I didn't know they agreed. I
2 thought it was conditioned on them bringing --

3 THE COURT: Okay. Good. If they've
4 agreed, done.

5 MS. MCVEY: Wonderful.

6 Last thing, Dr. Haber is coming tomorrow
7 morning. Would it be possible to start court
8 at 9:00?

9 THE COURT: That's hard on the jury.

10 MS. MCVEY: I know. It's okay if we
11 can't. I'm just trying to, like, jam as much
12 in as we can.

13 THE COURT: Let me see what happens today
14 and how long they go today. I might give them
15 a trade-off.

16 MS. MCVEY: And the last thing is they
17 have two pulmonologists listed, Diette and
18 Weill. I think they're only bringing one. We
19 would love to know who they're bringing.

20 THE COURT: Yes, I'm going to make them do
21 that before we get farther down the road here.

22 MS. MCVEY: Thank you, Your Honor. That's
23 all the issues that I have.

24 THE COURT: All right. Then what I need
25 to do is find out what's going on with our

1 jury.

2 THE BAILIFF: Your Honor, Ms. Jackie was
3 just here. She said do you want her to go
4 ahead and do the roll call?

5 THE COURT: So we're still cool with her?

6 THE BAILIFF: No.

7 THE COURT: Is she doing the roll call
8 now?

9 THE BAILIFF: No. She wants to know. She
10 didn't want to --

11 THE COURT: Go on and do the roll call.
12 I'm prepared to qualify. And where are you
13 going to qualify, downstairs?

14 THE BAILIFF: In Courtroom 2A.

15 THE COURT: 2A. Okay. All right. Y'all,
16 be advised that you need to go down to 2A and
17 we'll have jury qualifications just as soon as
18 we can.

19 Go on and do the roll call and I'll be
20 down.

21 MS. BUENO: Your Honor, just to be clear,
22 when would be the appropriate opportunity to
23 raise any questions about the proposed voir
24 dire that has been submitted by both sides?

25 MS. MCVEY: And I can hand them up, too,

1 if that's helpful.

2 THE COURT: I thought I decided all that.

3 MS. BUENO: No, Your Honor. Both sides
4 have submitted proposed voir dire.

5 THE COURT: Okay. Well, wait a minute.
6 Let me have yours.

7 MS. FLYNN: Your Honor, I obviously
8 thought with voir dire, I understood the
9 Court's rulings on that.

10 THE COURT: You know, I just don't do all
11 this stuff that y'all want me to do about voir
12 dire. I believe voir dire is pretty simple.

13 MS. MCVEY: A hundred percent. You'll see
14 we asked more than we normally do. One concern
15 that we have, because it kind of came up in
16 pretrial, is that Mr. Perry is married to his
17 husband, Lonnie.

18 THE COURT: Right.

19 MS. MCVEY: And so I just want to make
20 sure that we don't have anybody who totally
21 objects to --

22 THE COURT: Let me look at this for a
23 minute.

24 MS. MCVEY: Okay.

25 THE COURT: All right. So send yours up

1 to me, Ms. Pepke.

2 Okay. With respect to the plaintiffs'
3 voir dire, I will charge 1, 2, 3, 4, 5, 6 -- I
4 will not charge 7 -- I mean, I will not ask 7.
5 I will not ask 8. I will ask 9. I will not
6 ask 10. I will not ask 11. I will not ask 12.
7 I will not ask 13. I will ask 14. I will not
8 ask 15. I will ask 16 kind of in the way I've
9 modified.

10 What I ask for all of these things about
11 the plaintiffs' claim is, "One of the questions
12 you may be asked," is what I'll say, "is
13 whether plaintiffs are entitled to recover
14 punitive damages from defendants."

15 I am not going to say "intended to punish
16 the company."

17 "Does anyone believe they're unable to
18 award money damages of punishment against a
19 company regardless of what the evidence might
20 demonstrate?" I will ask that.

21 Then 17, I will say, "Has any member of
22 your immediate family -- husband, wife,
23 children, mother, father -- ever worked around
24 asbestos-containing material?"

25 18, I am not going to ask that. 19, I

1 will ask something about the use of baby -- of
2 cosmetic talc, but it's not going to be exactly
3 what 19 is. And same for 20, I'll ask
4 something like that and, again, defining
5 members of your family as I have suggested.
6 All right.

7 On 21, I'll say "of immediate family."

8 MS. MCVEY: Thank you, Your Honor.

9 THE COURT: All right. Now, with respect
10 to defendants, I will ask, number 1, whether
11 they've read anything. I don't know how much
12 I'm going to get into what they've read. My
13 bet is they'll say no to that and solve my
14 problem.

15 2 -- I've asked this many times and never
16 had anybody say they've read anything about the
17 cases I tried. And then I'll ask about the
18 attorneys. So, 2, yes, I'll ask.

19 I hope that B is the same thing as their
20 witness list. I think it is.

21 MS. MCVEY: I think it is, Your Honor.

22 THE COURT: Yeah, so I'll ask about
23 witnesses. I will not ask about 3. I will ask
24 about immediate family working around asbestos
25 or been exposed to asbestos. I will not ask B

1 and C. Well, I may ask "whether you filed
2 anything related to asbestos," but I'm not
3 going to get concerned for your loved ones and
4 all that.

5 Number 5, I'm not going to ask. Number 6,
6 I will ask. 7 does not make sense, but I'm
7 going to say, "Do you use some talc" -- that
8 "or" doesn't make any sense. I think that's a
9 typo.

10 8, I will not ask. 9, I will not ask.
11 10, I will ask. 11, I will not ask. I will
12 ask some form of 12. I think it's in my normal
13 questions. I'm not going to ask 13. I've got
14 a question mark about 14. I'll give them to
15 you on that.

16 So that's what I'm going to ask and not
17 ask. And let me just say this to you. I don't
18 allow the -- as you know, we do not have
19 lawyer-directed voir dire in South Carolina. I
20 do not try to stake out the jury's position and
21 stake them out on positions when they try the
22 case. I try to ask them some basic questions
23 about their situation and the facts in the
24 case, but I don't get into their opinions about
25 things and so forth and so on. So that's just

1 the way I do it, and you can accept through the
2 course.

3 Ms. Flynn?

4 MS. FLYNN: Yes, Your Honor. I just
5 wanted to make sure that the Court is not going
6 to entertain any of the proffered voir dire
7 that AII submitted.

8 THE COURT: I don't even know what it is,
9 but I don't think you get to voir dire the --
10 well, I don't know. Let me see what you've
11 got, Ms. Flynn. Is it so different from all of
12 the rest of this?

13 MS. FLYNN: It's probably not, Your Honor.

14 THE COURT: Okay. Let me just look at it.

15 All right. On AII, I won't ask these
16 things just like they're written, but I'll ask
17 whether they know the plaintiff, obviously, and
18 his husband. And I'm going to do all the list
19 of names as to -- 3 is fine. Vi-Jon is out. 4
20 is no longer needed. 5, yes, I'll ask about
21 the attorneys. 6, yes, I'll ask about AII's
22 attorneys. 7, I will not ask that. 8, I will
23 ask that, just whether they're familiar, yes or
24 no.

25 I will not ask whether they are familiar

1 with the Clubman brand or Clubman talc. I will
2 not ask 11 or 12. I will not ask 13, 14, 15,
3 16, 17, 18, 19, 20, 21. I will ask something
4 about 22 without asking about the details of
5 the lawsuit. I will not ask 23, 24, 25, 26,
6 27, 28, 29. And I always have something about
7 being fair and impartial, which is 30.

8 So that's what I'm going to do with that.
9 All right. Are we clear?

10 MS. BUENO: We are, Your Honor. This does
11 not involve jury selection, but there's one
12 outstanding motion. We have renewed our motion
13 to exclude tissue testing. You recall that we
14 had a motion in limine on this that Your Honor
15 denied, but you said we will revisit it if the
16 experts are not capable of performing the
17 tissue testing in advance of trial.

18 THE COURT: Yeah.

19 MS. BUENO: We filed a motion, attaching
20 an affidavit from our expert saying he cannot
21 and does not have time. He talked through the
22 whole process that it takes --

23 THE COURT: All right. Just send that up
24 to me and let me look at it. I'm not inclined
25 to give you any ruling on that, as I said

1 before, but send it up to me and we'll revisit
2 it sometime later today.

3 MS. MCVEY: And, Your Honor, Dr. Longo has
4 concluded the tissue digestion and is in the
5 process, I think, today. And we'll be able to
6 put him up for a, you know, short deposition.

7 THE COURT: Well, Longo is not going
8 today, is he?

9 MS. MCVEY: No.

10 THE COURT: Well, then we can figure this
11 out before that.

12 MS. BUENO: Yes, but, Your Honor, we
13 cannot have an opening statement before we know
14 what Dr. Longo says he found in this tissue.
15 This is unbelievable that we now have tissue
16 testing coming in after we're going to start
17 trial, where Dr. Longo is going to say he found
18 something that we haven't even been able to
19 discover yet. This has to be excluded, Your
20 Honor.

21 THE COURT: I hear.

22 MS. MCVEY: Your Honor, we discussed this
23 at length, of course, and I'll let Mr. Adams
24 speak to the digestion.

25 THE COURT: I'm not going to talk about

1 digestion in any detail.

2 MS. MCVEY: Perfect. That works.

3 THE COURT: You know, we will visit this
4 at a later time. I don't see what it has to do
5 with what's being said in opening statement.

6 MS. MCVEY: Thank you, Your Honor.

7 THE COURT: All right.

8 MS. MCVEY: Last things, these are just
9 orders that we sent around this weekend. I can
10 just hand them up. They don't need to be
11 addressed right now, but it's the motions in
12 limine, that kind of stuff that -- the AII
13 financials that we e-mailed to you and copied
14 to everyone else. We don't have to deal with
15 them right now. I just want to hand them up.

16 THE COURT: Yeah.

17 MS. MCVEY: Okay (handing).

18 THE COURT: All right. Thank you.

19 MS. MCVEY: Thank you, Your Honor.

20 MS. BUENO: May I pass up the binder on
21 the tissue testing motion?

22 THE COURT: What's that?

23 MS. BUENO: The tissue testing (handing).

24 THE COURT: Tissue sample. Okay. All
25 right.

1 MS. FLYNN: Stephanie Flynn on behalf of
2 AII. We just want to be sure we've got an
3 opportunity to be heard on financial motions
4 before any order is signed. I understand you
5 don't want to do that now.

6 THE COURT: Ms. Flynn, we just said we're
7 going to do that a little bit later on.

8 MS. FLYNN: I understand. I just wanted
9 to make sure.

10 THE COURT: Okay. All right. Anything
11 else? All right. I'm going to reassemble down
12 there where the jury is and see what's going
13 on.

14 THE CLERK: Excuse me, Your Honor.
15 They're not doing anything until the attorneys
16 get down there for the roll call.

17 (Whereupon there was a recess in the
18 proceedings from 10:14 a.m. to 10:27 a.m.)

19 THE COURT: Is that the roll call?

20 THE CLERK: Yes, Your Honor.

21 THE COURT: All right. Have you
22 administered the oath?

23 THE CLERK: No, Your Honor.

24 THE COURT: Very good. Administer the
25 oath, please.

1 THE CLERK: Yes, Your Honor.

2 - - -

3 (The prospective jurors were
4 administered the oath.)

5 - - -

6 JURY VOIR DIRE

7 - - -

8 THE COURT: Ladies and gentlemen, I will
9 try to speak so that all may hear, but if you
10 have any problems hearing what I'm saying,
11 please raise your hand.

12 Good morning, ladies and gentlemen. My
13 name is Jean Toal. I am the retired Chief
14 Justice of South Carolina, and in retirement I
15 have served as a senior active judge. This
16 week I am serving, and next week I am serving
17 as a circuit court judge for Richland County.

18 This term of court is for two weeks.
19 Therefore, your service as jurors would be this
20 week and would end next Friday, not this
21 Friday. If there is a potential for any
22 service beyond, I would advise you upfront, but
23 quite frankly, I'm pushing these lawyers very
24 hard and I'm pushing them to have this case
25 ready to submit to you by midway next week. So

1 that is the current plan, and I generally get
2 it accomplished within that kind of time frame.

3 We understand the inconvenience of jury
4 service and what it causes with your personal
5 life. And we all thank you, and particularly
6 me, as your judge, for being here. We will do
7 our best to minimize the inconvenience, and
8 hopefully this will be an enjoyable and
9 educational two weeks for you.

10 Our purpose this morning is to determine
11 your qualifications and eligibility to serve as
12 jurors. Jury qualification is done in several
13 stages. The first stage you just completed,
14 the roll call. As a part of the -- I now have
15 certain questions in the next stage to ask you
16 to determine your qualifications as jurors in
17 court. These questions determine your general
18 eligibility to serve.

19 State law requires that I ask these
20 questions. And quite frankly, some of these
21 questions are very personal and you may not
22 want to stand and disclose this information
23 openly in the presence of your fellow jurors.
24 After each question, if any juror feels the
25 need to respond, I'll ask you to stand. And if

1 you don't want to stand, that's fine. At the
2 end of this process, I will give you a chance
3 to come forward and speak privately with me and
4 with the court reporter and the clerk. We
5 don't want any of you to suffer any
6 embarrassment. So if you do not want to stand
7 as a question is asked, you need to make a
8 mental note and remember to come forward at the
9 end when I ask you to.

10 It's absolutely essential that we have
11 accurate information so that we can pick a
12 qualified jury. These are the questions that I
13 am asking that bear on your qualification to
14 serve as jurors.

15 Is any member of the jury panel not a
16 citizen of the United States? If so, please
17 stand.

18 Is any member of the jury panel not a
19 resident and citizen of Richland County, South
20 Carolina? If so, please stand.

21 Is any member of the jury panel unable to
22 read, write, speak, or understand the English
23 language? If so, please stand.

24 Does any member of the jury panel have
25 less than a sixth grade education or its

1 equivalent? If so, please stand.

2 Is any member of the jury panel unable
3 because of mental or physical infirmities to
4 render efficient jury service? For example,
5 does any member of the jury panel have any
6 medical condition that would prevent you from
7 serving on a jury for this week and next week?

8 Let me explain how I conduct court. And
9 this may give you the opportunity to fully
10 evaluate your ability to participate. I begin
11 court at 9:30 unless there is some particular
12 need to begin earlier. But in no case have I
13 ever begun court more than at 9:00. So that is
14 generally the beginning.

15 I try to close proceedings at 5:00 or
16 close to it as possible. In no case do I run
17 past 5:30 unless we are in the active
18 deliberation of a verdict on the case.

19 I take a break about midmorning for folks
20 to refresh themselves, stretch, and relax. I
21 try to have lunch for an hour and 15 minutes,
22 an hour and a half, depending on how the trial
23 is progressing. And that generally takes place
24 sometime between 12:00, 12:15, and 1:00, and
25 then goes for an hour, an hour and a half. And

1 I take a similar break midafternoon for folks
2 to refresh themselves.

3 But we will have a foreperson of the jury,
4 and I allow members of the jury to communicate
5 if there's some need for a break that's outside
6 the normal parameters of time. That is
7 basically the schedule that I follow.

8 So, all right, with that in mind, is any
9 member of the jury panel unable because of
10 mental or physical infirmities to render
11 efficient jury service? If so, please stand.

12 Yes, ma'am. Would you care to tell me or
13 come forward?

14 PROSPECTIVE JUROR: I just have bad
15 anxiety.

16 THE COURT: You have anxiety?

17 PROSPECTIVE JUROR: Uh-huh.

18 THE COURT: Are you concerned that your
19 anxiety condition will prevent you from serving
20 for two weeks?

21 PROSPECTIVE JUROR: It's bothering me now.

22 THE COURT: Ma'am?

23 PROSPECTIVE JUROR: It's bothering me
24 right now.

25 THE COURT: I understand. All right. I

1 will excuse you.

2 THE CLERK: What's your juror number?

3 PROSPECTIVE JUROR: 24.

4 THE COURT: 24. You are excused to come
5 to the clerk and make arrangements to see what
6 else needs to be done.

7 Yes, ma'am. Juror number?

8 PROSPECTIVE JUROR: 149.

9 THE COURT: Yes, ma'am.

10 PROSPECTIVE JUROR: I have arthritis and
11 it is very difficult for me to walk from the
12 parking today. I am under a doctor's care for
13 my arthritis.

14 THE COURT: And how old are you?

15 PROSPECTIVE JUROR: I'll be 74.

16 THE COURT: Let me tell you. If you're
17 above 65, you're going to have an exemption if
18 you want to claim it anyway. So you ought to
19 claim your age 65 exemption from service.

20 PROSPECTIVE JUROR: Yes.

21 THE COURT: And I'll tell you, those of
22 you who are 65 and above, you can serve if you
23 care to, but you also can claim your exemption.
24 You are exempt from juror service, number?

25 PROSPECTIVE JUROR: 149.

1 THE COURT: 149. Very good.

2 Yes, ma'am. Number?

3 PROSPECTIVE JUROR: 163. Being here is
4 causing me some trauma and emotional feelings.
5 Last July, right next door --

6 THE COURT: Yes, ma'am.

7 PROSPECTIVE JUROR: -- I was involved in a
8 murder trial of my brother.

9 THE COURT: You need to say no more. If
10 you are still concerned about your feelings
11 about that, you will be excused. You may come
12 to the clerk and make arrangements. Number
13 again?

14 PROSPECTIVE JUROR: 163. Eisha James.

15 THE COURT: Very good.

16 PROSPECTIVE JUROR: Thank you.

17 THE COURT: All right. Yes, ma'am?

18 PROSPECTIVE JUROR: Juror Number 47. I
19 think I can do it. I have -- I'm a diabetic.
20 I do need to have my -- I need to have a bottle
21 of water and a snack with me. Other than that,
22 I think I can do it.

23 THE COURT: We will accommodate every
24 need. If you serve on this jury, please know
25 that we will accommodate you completely with

1 everything related to both water and any other
2 needs that you have related to your diabetic
3 condition, absolutely.

4 PROSPECTIVE JUROR: Thank you.

5 THE COURT: Yes, sir.

6 PROSPECTIVE JUROR: I suffer from
7 depression from -- my mother died a year ago
8 and I have a hard time being in places like
9 this. I wake up in the morning, and the doctor
10 do have me on --

11 THE COURT: Actually, you need to say no
12 more. Your number is?

13 PROSPECTIVE JUROR: 364.

14 THE COURT: All right. You'll be excused.
15 Yes, sir.

16 PROSPECTIVE JUROR: I moved in October and
17 I believe I currently live in Lexington County.

18 THE COURT: Say your number again.

19 PROSPECTIVE JUROR: 362.

20 THE COURT: Say again.

21 PROSPECTIVE JUROR: I moved in October. I
22 got served at my old house, but I currently
23 believe I live in Lexington County right now,
24 I'm just finding out.

25 THE COURT: If you live in Lexington

1 County, come down here. You are exempt. I
2 will excuse you. You've got to come down here
3 and tell the clerk, this lady that's standing
4 back here.

5 Whoa, silence.

6 THE BAILIFF: Quiet, please.

7 THE COURT: Quiet, please.

8 Ma'am, come forward a little bit so I can
9 hear you and the clerk can hear you. A little
10 bit closer. Thank you, ma'am.

11 PROSPECTIVE JUROR: I'm Juror 152. My
12 name is Tiffany Hudgens. I have MS, which I
13 can't sit down long, can't stand up too long.
14 Frequent, you know, going back and forth to the
15 restroom.

16 THE COURT: Yes, ma'am. You don't need to
17 discuss it further. You're excused.

18 PROSPECTIVE JUROR: Thank you, sir.

19 THE COURT: It's ma'am. Old, cancer hair,
20 but grandmother, mother, wife of 56 years.

21 Yes, ma'am. Come down where we can hear
22 you just a little bit better.

23 PROSPECTIVE JUROR: I've got COVID.

24 THE COURT: Oh, you have COVID. You're
25 excused. Get her number. She's excused. What

1 number?

2 THE CLERK: 324.

3 THE COURT: 324. Excused.

4 Yes, sir.

5 PROSPECTIVE JUROR: Jeffrey Coles, Juror

6 61. I'm a retired veteran, suffer from PTSD.

7 I'm currently taking meds. Right now I have
8 bad anxiety.

9 THE COURT: I understand. All right.
10 You're excused.

11 THE CLERK: What's his number?

12 PROSPECTIVE JUROR: 61.

13 THE COURT: All right. Has any member of
14 the jury panel been convicted by a guilty plea
15 or a trial in state or federal court of record
16 of a crime punishable by imprisonment for more
17 than one year and your civil rights have not
18 been restored by pardon or amnesty?

19 Punishable by more than one year means you
20 could have received a sentence of more than one
21 year regardless of what sentence you may have
22 actually received. If this applies to you,
23 please stand.

24 Is any member of the jury panel --

25 PROSPECTIVE JUROR: I don't know if it a

1 hundred percent applies, but when I was 21, I
2 had a misdemeanor DUI in New Jersey.

3 THE COURT: First offense?

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: All right. And what was
6 your -- what was your sentence?

7 PROSPECTIVE JUROR: Suspended license for
8 seven months.

9 THE COURT: Yeah, I don't know that we
10 have mandatory one year for DUI there or here,
11 so you're qualified. You're able to serve, and
12 thank you for drawing that to my attention.

13 All right. Is any member of the jury
14 panel a clerk or deputy clerk of court, a
15 constable, sheriff, or other commissioned law
16 enforcement officer, probate judge, county
17 commissioner, magistrate, or other county
18 officer, or employed within the walls of any
19 courthouse? If so, please stand.

20 Yes, sir.

21 PROSPECTIVE JUROR: I'm a retired
22 constable.

23 THE COURT: Retired constable.

24 PROSPECTIVE JUROR: Retired law
25 enforcement officer. I'm a current Class 2

1 constable.

2 THE COURT: And you have a current
3 classification as Class 2 constable?

4 PROSPECTIVE JUROR: Yes, ma'am.

5 THE COURT: You're excused.

6 THE CLERK: What's your number, sir?

7 PROSPECTIVE JUROR: 99.

8 THE CLERK: Thank you.

9 THE COURT: Is there any member of the
10 jury panel who has not -- excuse me. Let me
11 restate that. Is there any member of the jury
12 panel who has previously served on jury duty in
13 circuit court, not city court, magistrate's
14 court or federal court, during this calendar
15 year? If so, please stand.

16 Has any member of the jury panel served as
17 a member of the Richland County grand jury
18 during the past several years? If so, please
19 stand.

20 PROSPECTIVE JUROR: Your Honor?

21 THE COURT: Yes.

22 PROSPECTIVE JUROR: I was at the one on
23 Decker a few years ago. I'm not sure if that
24 counts or not.

25 THE COURT: That's a magistrate court and

1 it wouldn't count.

2 PROSPECTIVE JUROR: All right.

3 THE COURT: All right. We now move to
4 jury exemptions. State law provides for
5 several exemptions to jury service. An
6 exemption does not mean you're not qualified to
7 serve. It simply means that if you want, you
8 have the right to say "I choose not to serve."

9 First exemption. Those of you who are 65
10 years of age or older may be exempted from jury
11 service. Those of you who are 65 years of age
12 or older represent a pool of tremendous talent
13 for jury service, and we urge you to serve this
14 week if you are inclined to do so. But if you
15 wish to be exempted, you may certainly do so.

16 Is there any member of the jury panel who
17 is 65 years of age or older and who wishes to
18 be exempted from jury service this week and
19 next week? If so, please stand.

20 Another exemption concerns prior jury
21 service. No person is required to serve as a
22 juror more than once every three calendar
23 years. Therefore, if any member of the jury
24 panel has served on jury duty during the last
25 two calendar years, you may be exempt from

1 service this week and next week if you choose
2 to be exempted.

3 Please note this exemption does not apply
4 if your jury service was in a magistrate's
5 court, a city court, or a federal court. If
6 this exemption, which is the last three years
7 circuit court jury service, and you wish to
8 claim the exemption, please stand.

9 All right. Next exemption. Persons who
10 have served as grand jurors in the last five
11 calendar years may also be exempt. So if
12 anyone has served on a grand jury in the last
13 five years, you may be exempted for claim. If
14 so, please stand.

15 Next exemption deals with those of you who
16 have small children. Please listen very
17 carefully to this exemption. It has several
18 parts, all of which must apply for you to be
19 exempted on this basis.

20 You may be exempted from jury service if
21 you have a small child or small children under
22 the age of seven years; you have legal custody
23 of your child or children; you have the
24 principal care, custody, and control of your
25 child or children; and you are unable to make

1 arrangements for the adequate care of your
2 child or children while performing jury duty.

3 If all of these requirements apply to you,
4 then you may be exempted on this basis. If
5 this exemption applies to you, and you wish to
6 be exempted, please stand at this time.

7 All right. I'll ask each of you juror
8 number and tell me that juror number.

9 PROSPECTIVE JUROR: 280.

10 THE COURT: Yes, ma'am.

11 PROSPECTIVE JUROR: I have two small
12 children in elementary school. They're not in
13 after-school care. I work from home.

14 THE COURT: Very good. All right. You
15 can claim your exemption. Come to the clerk
16 and you'll be excused.

17 Yes, ma'am, in the back there.

18 PROSPECTIVE JUROR: 297. I have two small
19 children at home with me.

20 THE COURT: And you don't have any ability
21 to have alternate care for them?

22 PROSPECTIVE JUROR: No, ma'am.

23 THE COURT: Very good. You may claim your
24 exemption. Come down to the clerk.

25 Yes, ma'am, in the back there.

1 Would you all mind coming down? I'm going
2 to come to the front. You two in the back,
3 would you mind coming a little closer.

4 Yes, ma'am, you at the rail there. Ma'am,
5 you.

6 PROSPECTIVE JUROR: I'm 346. And I have
7 two small kids, and their day care closes at
8 6:00. And there's two nights during the week
9 when my husband works till 7:00, so I don't
10 have anyone else to pick them up.

11 THE COURT: All right. You can claim your
12 exemption. Please come to the clerk.

13 Yes, ma'am.

14 PROSPECTIVE JUROR: I'm 153. I have a
15 three-month old, and I don't really have the
16 care situation set up right now; so I won't be
17 able to.

18 THE COURT: Yes, ma'am. You may claim
19 your exemption.

20 Yes, sir.

21 PROSPECTIVE JUROR: How you doing? 287.
22 I have two small children. And, unfortunately,
23 my fiancée is recovering from a delivery.

24 THE COURT: Understood. You may claim
25 your exemption.

1 All right. The next exemption involves --
2 you got the -- oh, yes, ma'am?

3 PROSPECTIVE JUROR: I have two at home --

4 THE COURT: You've got to come down a
5 little closer here.

6 PROSPECTIVE JUROR: My --

7 THE COURT: Come down to the rail here so
8 I can hear you and so we can get your number.
9 Your number first.

10 PROSPECTIVE JUROR: 227.

11 THE COURT: All right.

12 PROSPECTIVE JUROR: I have a daughter at
13 home by myself.

14 THE COURT: Okay. You may claim your
15 exemption. Come down to the clerk now.

16 The next exemption involves those of you
17 who may be attending school at this -- who may
18 be attending school at this time or working in
19 some capacity with a school.

20 If this exemption applies to you and you
21 wish to be exempted, we will transfer your
22 service to another term of court at a time
23 which will not conflict with your school
24 responsibility.

25 Is there any member of the jury panel who

1 is a full-time student, school teacher, school
2 crossing guard, school bus driver, or who
3 serves in any other school-related function who
4 is unable to serve on jury duty this week and
5 next as a result of that school involvement?
6 If so, please stand.

7 On the rail there, yes, ma'am.

8 PROSPECTIVE JUROR: I'm Juror 337. I move
9 back to college on Saturday, so I wouldn't be
10 able to do it next week.

11 THE COURT: Understood. You may claim
12 your exemption. Come down to the front, and
13 you'll be transferred to another term of court.

14 Yes, ma'am.

15 PROSPECTIVE JUROR: 179. I'm a school
16 psychologist.

17 THE COURT: All right. And you're on
18 active duty at this time as a school
19 psychologist? You may claim your exemption and
20 will be transferred to another term. Come down
21 to the front.

22 Yes, ma'am.

23 PROSPECTIVE JUROR: 223. I work with
24 special needs kids, and I start work tomorrow.

25 THE COURT: You what now?

1 PROSPECTIVE JUROR: I work with special
2 needs kids.

3 THE COURT: Oh, okay. Got you. You may
4 claim your exemption.

5 Yes, sir.

6 PROSPECTIVE JUROR: Juror 256. I am chief
7 of operations for a school district that starts
8 school on Wednesday.

9 THE COURT: Yes, sir. You may claim your
10 exemption. Come down to the front.

11 Yes, ma'am.

12 PROSPECTIVE JUROR: 199. I am a school
13 teacher.

14 THE COURT: Good. We need more school
15 teachers. My daughter is a teacher. Come down
16 and claim your exemption.

17 Is there any member -- do we have anybody
18 else? Yes, ma'am. I didn't see you. Sorry.

19 PROSPECTIVE JUROR: I'm Juror 236. I
20 attend school early next week, so I won't be
21 able to.

22 THE COURT: I understand. You may claim
23 your exemption and be transferred to another
24 term.

25 All right. Is there any member of the

1 jury panel who is employed with the Department
2 of Corrections at a penitentiary? If so, and
3 you would like to be exempted, please stand.

4 Is there any juror who performs services
5 for a business, commercial, or agricultural
6 enterprise which are so essential -- meaning
7 your services are so essential to the operation
8 of the enterprise that if you were required to
9 perform jury duty, the enterprise would have to
10 close or stop functioning? If so, and you wish
11 to be exempted, please stand.

12 Yes, ma'am.

13 PROSPECTIVE JUROR: Juror Number 53. I
14 work for my family's business, and I'm the only
15 one in the office. I do payroll.

16 THE COURT: All right. You may claim your
17 exemption.

18 Yes, sir.

19 PROSPECTIVE JUROR: Your Honor, Juror
20 Number 286. I'm a managing partner of a real
21 estate busy law firm. I have nine offices and
22 I'm running three of them, one in the Village
23 at Sandhill. If I miss this week and next
24 week, it's going to cost the law firm over
25 \$50,000. It's going to be a pretty substantial

1 hardship. We have to move everything. We also
2 have depositions on Thursday we'd have to move.

3 THE COURT: Well, I don't understand why
4 one person is so essential to that operation,
5 to be honest with you. I practiced law for
6 many years.

7 PROSPECTIVE JUROR: Yes, Your Honor. We
8 lost two attorneys in the last few months, and
9 we've got two attorneys right now running nine
10 offices.

11 THE COURT: I understand. Okay. I will
12 allow you to claim your exemption.

13 Yes, sir.

14 PROSPECTIVE JUROR: I'm 244. I'm on
15 patient trauma call at Richland Hospital and
16 oral surgery call at Midlands Oral Surgery, and
17 I have a full schedule of patients this week.

18 THE COURT: I understand. I tell you what
19 I'm going to do. I'm going to allow you to
20 claim your exemption. I was going to transfer
21 you to another term. I'm not going to do that.
22 I'll allow you to claim your exemption.

23 Yes, sir, in the back there.

24 PROSPECTIVE JUROR: Juror 124. I own a
25 floor-cleaning business. It's me and my son.

1 Our largest account was scheduled for this week
2 and I rescheduled it for next week.

3 THE COURT: I understand. I will allow
4 you to claim your exemption.

5 Yes, ma'am.

6 PROSPECTIVE JUROR: Juror 130. I run a
7 department --

8 THE COURT: Wait a minute. I can't hear
9 you.

10 PROSPECTIVE JUROR: I run a department and
11 am scheduled to be out of office -- I'm
12 sorry -- on-site with my whole office in
13 Virginia next week, Wednesday through Friday,
14 to run departmental operations for an off-site
15 meeting. I'm the one leading.

16 THE COURT: Okay. I understand. I will
17 allow you to claim your exemption.

18 Yes, ma'am.

19 PROSPECTIVE JUROR: Thank you, Judge. I'm
20 361, and I'm the broker in charge for a small
21 real estate company. It's just me and my
22 girls.

23 THE COURT: On the edge, but I'll allow
24 you to claim your exemption.

25 Yes, ma'am.

1 PROSPECTIVE JUROR: So my juror number is
2 209, and I have my own store and I have no one
3 to work there.

4 THE COURT: I understand. You may claim
5 your exemption. All right.

6 Yes, sir.

7 PROSPECTIVE JUROR: Juror Number 13. I'm
8 a first responder for a restoration company and
9 we're expecting Debby to be real bad down in
10 Charleston. So we're all supposed to go to
11 Charleston.

12 THE COURT: I'm going to tell you, that
13 really gives me some heartburn, but I will
14 excuse you.

15 All right. That concludes the statutory
16 list of qualifications and exemptions for jury
17 service. It may be you're qualified and no
18 exemption applies to you, but jury service this
19 week would constitute an extreme hardship on
20 you for a particular reason.

21 I cannot permanently excuse or qualify a
22 juror from jury service, but under extreme and
23 compelling circumstances I may excuse a juror
24 from this term of court and transfer the juror
25 to another term of court, particularly if you

1 have not been previously transferred.

2 Please understand that general
3 inconvenience is not a sufficient reason to
4 transfer you to another term of court. To
5 justify transfer to another term of court, it
6 must be an extreme hardship, like an hourly
7 worker who will not be paid and is the family's
8 only source of income.

9 Okay. That's the -- oh, I see people
10 lining up. Ladies and gentlemen, this is now a
11 chance for those of you who did not respond
12 earlier to any questions that I asked, those of
13 you who have a compelling reason to request a
14 transfer, to come forward. If you believe you
15 are disqualified or exempt from jury service or
16 you have any questions about whether you are
17 disqualified or exempt and want to be
18 transferred to another term, then come forward
19 now.

20 All right. Now, the way this works, I've
21 got to --

22 THE BAILIFF: Do it quietly, please.
23 Quiet.

24 THE COURT: Yeah, I'm going to tell you,
25 the more people start lining up here, the more

1 I'm going to be inclined to say I'm not going
2 to be very liberal about these transfers. It's
3 an extreme hardship for me to take two weeks as
4 a retired judge.

5 All right. Quiet, please. Thank you so
6 much.

7 Now, let's don't send everybody on your
8 team up here.

9 THE BAILIFF: For the last time, quiet,
10 please. The judge has got to hear.

11 THE COURT: Appreciate your patience with
12 this process and the fact that this is a
13 soundproof nightmare in this courtroom, so it's
14 hard for us to hear. And we don't mean to be
15 hollering at you all the time; so please accept
16 my apologies for that, but we've got a process
17 we have to follow.

18 All right. First juror.

19 THE BAILIFF: Juror Number 164.
20 Juror 164.

21 THE COURT: Come right up here, please.

22 THE CLERK: Ms. Jamison.

23 THE COURT: Yes, ma'am.

24 PROSPECTIVE JUROR: I suffer from anxiety
25 and I thought I was going -- I'm having an

1 attack now.

2 THE COURT: All right. I'm excusing you.

3 PROSPECTIVE JUROR: Thank you.

4 THE COURT: Go around here to the clerk.

5 Yes, sir.

6 THE BAILIFF: Juror Number 232. 232.

7 Juror Number 232.

8 PROSPECTIVE JUROR: I don't know if it
9 disqualifies me. My primary address is still
10 Richland County. I live in Georgetown. I
11 don't mind being here. I have the time off
12 from work.

13 THE COURT: Where do you vote?

14 PROSPECTIVE JUROR: Richland County.

15 THE COURT: Then you're qualified.

16 PROSPECTIVE JUROR: I just wanted to make
17 sure.

18 THE BAILIFF: Juror Number 293. 293.

19 Juror Number 293.

20 THE COURT: Please come forward. Yes,
21 ma'am.

22 PROSPECTIVE JUROR: I'm the only caretaker
23 of my elderly mother. I'm the only caretaker
24 of my elderly mother.

25 THE COURT: I gotcha. By the way, how old

1 is she?

2 PROSPECTIVE JUROR: 86.

3 THE COURT: Well, tell her I'm trying to
4 join her. 81 times around the sun next Sunday.

5 PROSPECTIVE JUROR: Bless your heart.

6 THE COURT: Thank you. You're excused.

7 PROSPECTIVE JUROR: 293.

8 THE COURT: 293, excused.

9 THE BAILIFF: Juror Number 251, 251.

10 THE COURT: Yes, sir. Come forward.

11 Only reason I'm standing back here -- by
12 the way, y'all, the court reporter has to get
13 this down, so this is a compromise in this very
14 unhospitable courtroom environment here to try
15 to get it on the record.

16 Yes, sir.

17 PROSPECTIVE JUROR: Judge, I didn't
18 realize it was going to be two weeks.

19 THE COURT: I told you two weeks upfront.

20 PROSPECTIVE JUROR: No, no. I have a
21 business trip next week I have to go to.

22 THE COURT: Where?

23 PROSPECTIVE JUROR: Pittsburgh. I'm a
24 contract manager. I do meetings.

25 THE COURT: Okay. We'll transfer you to

1 another term.

2 PROSPECTIVE JUROR: Sounds good.

3 THE BAILIFF: Juror Number 299, 299.

4 THE COURT: Yes, ma'am.

5 THE BAILIFF: Juror 299.

6 PROSPECTIVE JUROR: Hi, Your Honor. I
7 don't know if it's an exemption. I have MS.
8 It's difficult for me to sit for long periods.
9 I need frequent bathroom breaks.

10 THE COURT: I will excuse you. Excused.

11 PROSPECTIVE JUROR: Thank you.

12 THE CLERK: 299.

13 THE BAILIFF: Juror Number 208, 208.

14 Juror Number 208.

15 PROSPECTIVE JUROR: Hey, how are you
16 doing? I work overnight and I don't get off
17 until 7:30 in the morning time. And I'm a
18 single parent.

19 THE COURT: Oh, my, my. That's all you've
20 got to say. Single parent, and it's an
21 overnight work situation.

22 PROSPECTIVE JUROR: Yes, ma'am.

23 THE COURT: You're excused.

24 PROSPECTIVE JUROR: Thank you.

25 THE BAILIFF: Juror Number 217, 217. 217.

1 PROSPECTIVE JUROR: I have kids. My
2 three-year-old nephew has autism, and I work my
3 schedule and my sister's schedule. She had to
4 call out this week. I'm his caregiver while
5 she's at work and --

6 THE COURT: I'll excuse you.

7 PROSPECTIVE JUROR: Thank you.

8 THE BAILIFF: Juror Number 340, 340. 340.

9 PROSPECTIVE JUROR: This would put me in a
10 financial hardship. I currently work at Sam's
11 Club Battery and I'm part-time (inaudible).

12 THE COURT: Okay. That's all you need to
13 say. You're excused.

14 THE BAILIFF: Juror Number 203, 203.
15 Juror Number 203.

16 PROSPECTIVE JUROR: I'm a CDL truck
17 driver, owner-operator, so I'm basically my own
18 business. And I have a family reunion coming
19 up this weekend.

20 THE COURT: Sure. Okay. You're excused.

21 PROSPECTIVE JUROR: Thank you.

22 THE BAILIFF: Juror Number 147, 147.
23 Juror Number 147.

24 PROSPECTIVE JUROR: I'm a business owner
25 and I'm the only employee. I work for myself.

1 THE COURT: Okay.

2 PROSPECTIVE JUROR: I wouldn't have
3 income.

4 THE COURT: You're excused.

5 PROSPECTIVE JUROR: I appreciate it.
6 Thank you.

7 THE BAILIFF: Juror Number 27, 27. Juror
8 Number 27.

9 PROSPECTIVE JUROR: Sir.

10 THE COURT: Ma'am.

11 PROSPECTIVE JUROR: Ma'am, sorry. My
12 apologies. I'm a contract consultant right
13 now. I bring about 90 percent of my household
14 income. If I don't work, I don't get paid.

15 THE COURT: Okay. You're excused.

16 PROSPECTIVE JUROR: Thank you so much.

17 THE BAILIFF: Juror Number 354, 354.
18 Juror Number 354.

19 PROSPECTIVE JUROR: I don't get paid to be
20 here for jury duty with my job, and we're also
21 limited staffing right now in my department.

22 THE COURT: Well, they're not supposed to
23 do that. What's the company?

24 PROSPECTIVE JUROR: It's DDI Technology.
25 I'm a title specialist.

1 THE COURT: Well, they're not supposed to
2 do that. They can't do that by law and it puts
3 you in a bind. I get that.

4 PROSPECTIVE JUROR: Yes.

5 THE COURT: Well, I'll excuse you, but
6 tell them that's not legal.

7 PROSPECTIVE JUROR: Okay. Thank you.

8 THE BAILIFF: Juror Number 142. 142.
9 Juror Number 142.

10 THE COURT: Yes, ma'am.

11 PROSPECTIVE JUROR: Judge, I was the
12 caregiver for my dad. He passed suddenly. I'm
13 emotionally and --

14 THE COURT: I understand.

15 PROSPECTIVE JUROR: And my mother-in-law
16 broke her hip. She's in rehab now, and now
17 she's coming to stay with us next week.

18 THE COURT: I understand.

19 PROSPECTIVE JUROR: It's a lot.

20 THE COURT: It's a lot. You're excused.

21 PROSPECTIVE JUROR: Thank you.

22 THE BAILIFF: Juror Number 69, 69. Juror
23 Number 69.

24 THE COURT: Yes, ma'am.

25 PROSPECTIVE JUROR: I actually have a

1 therapy -- I have -- I have therapy twice a
2 week, so I have various mental illnesses going
3 on. So I have a hard time focusing, as well,
4 and I don't --

5 THE COURT: You don't need to say more.
6 You're excused.

7 PROSPECTIVE JUROR: Thank you.

8 THE BAILIFF: Juror Number 318, 318.
9 Juror Number 318.

10 PROSPECTIVE JUROR: I have a small
11 one-year-old and I'm a full-time mom. It's
12 just me. I don't have any babysitter.

13 THE COURT: You just didn't feel like
14 standing up when I asked that before?

15 PROSPECTIVE JUROR: Because I really
16 wanted to try to do it.

17 THE COURT: You're excused.

18 PROSPECTIVE JUROR: Thank you, sir.

19 THE COURT: Ma'am. This old short cancer
20 hair is getting me in more trouble, after being
21 a mom and a beloved wife, I hope.

22 THE BAILIFF: Juror Number 338. 338.
23 Juror Number 338.

24 PROSPECTIVE JUROR: Ma'am, I don't have a
25 lot of employees now.

1 THE COURT: What is your business?

2 PROSPECTIVE JUROR: Heating and
3 air-conditioning and supplies.

4 THE COURT: So it's a private business?

5 PROSPECTIVE JUROR: Yes, ma'am.

6 THE COURT: You're excused.

7 PROSPECTIVE JUROR: Thank you.

8 THE BAILIFF: Juror Number 331. 331.
9 Juror Number 331.

10 THE COURT: Yes, ma'am. Now, you be calm.
11 You be calm. You be relaxed. Tell me what's
12 going on.

13 PROSPECTIVE JUROR: I'm in a domestic
14 situation with my husband, and I'm not sure if
15 we're going to leave, me and my daughter.

16 THE COURT: You're excused. Don't you
17 worry about it.

18 PROSPECTIVE JUROR: Thank you.

19 THE BAILIFF: Juror Number 109. 109.
20 Juror Number 109.

21 THE COURT: Good morning.

22 PROSPECTIVE JUROR: Good morning.

23 THE COURT: Come up here where we can hear
24 you. Yes, sir.

25 PROSPECTIVE JUROR: Can I transfer to

1 another court date?

2 THE COURT: What's the reason?

3 PROSPECTIVE JUROR: I'm very sick right
4 now.

5 THE COURT: Okay. Yeah, that's all you
6 need to say. You're excused.

7 Transfer this gentleman. He's ill right
8 now.

9 THE BAILIFF: Juror Number 235. 235.
10 Juror Number 235.

11 THE COURT: Yes, sir.

12 PROSPECTIVE JUROR: I don't need to be
13 excused, but I was wondering who I would have
14 to go to to get a written form sent in to be
15 two weeks instead of one week. Because I've
16 got an auto waive for one week out of school.

17 THE COURT: If you're cool with that,
18 we'll get you all the necessary paperwork. You
19 just be sure to deal with this -- he's got a
20 one-week excuse, thinking that was going to be
21 it. He needs a two-week excuse. Y'all work
22 with him on that. No problem.

23 THE BAILIFF: Juror Number 58. 58.

24 THE COURT: Yes, sir.

25 PROSPECTIVE JUROR: Good morning, Judge.

1 I'm not sure if this counts, but my wife is 34
2 weeks pregnant and it's considered a high-risk
3 pregnancy. I'm not sure --

4 THE COURT: I'm going to let you go.

5 PROSPECTIVE JUROR: Thank you, Judge.

6 THE COURT: All right. That's it.

7 All right. Ladies and gentlemen of the
8 jury, the jury panel is now qualified. All
9 right. How much time are you all going to need
10 to produce the list?

11 THE CLERK: Maybe about 15 minutes.

12 THE COURT: All right. Ladies and
13 gentlemen of the jury, here is what happens
14 now. It used to be that they had a child that
15 would come and draw the names out of a big jury
16 box and that's how you picked the venire from
17 which the jury was struck. But now we have
18 automation, thank goodness, so the process
19 won't take that long.

20 But there will be a random process using
21 an algorithm and it will produce a list of
22 potential members of the jury. Then the
23 lawyers will have a time to check out the jury
24 and see that -- see who they want to strike and
25 so forth. And so we're close to end of the

1 process.

2 Now, one thing I want to ask before I let
3 you go is whether any of you know the lawyers
4 involved. Was that asked?

5 MS. MCVEY: Your Honor, I don't think we
6 asked the individual voir dire questions that
7 we discussed.

8 THE COURT: We got the individual voir
9 dire, but I generally don't voir dire them
10 until I qualify them.

11 MS. MCVEY: However you want to do it. I
12 just want to know in case some of that may
13 produce people leaving. Up to you.

14 THE COURT: All right. We can do the voir
15 dire now if that's what you all prefer. Hang
16 on. I've got a notebook for that.

17 You know, I'm not going to do that now.
18 Voir dire questions, let me tell you -- that's
19 a fancy Latin word that means questions will be
20 asked you about whether you know anything about
21 the particular case and things of that nature.
22 But that won't be asked until we get a
23 qualified set, because you don't get knocked
24 out of jury service because of that. They just
25 have to know that to decide whether they want

1 to strike you from the potential jury or not.
2 But that comes after you're qualified.

3 So the jury is now qualified. And so,
4 clerks, get us a jury venire from which we can
5 strike.

6 THE CLERK: Yes, Your Honor.

7 THE COURT: We'll take about 15 minutes.
8 So in this 15 minutes, if you want to move
9 around and be at your ease. Be back here -- it
10 is now 10 minutes after 11:00. Be back here at
11 25 after 11:00.

12 (The following proceedings were held
13 outside the presence of the jury:)

14 THE COURT: What I'm going to do after I
15 get voir dire selection made, I'm going to let
16 them go to lunch and let you all begin the
17 opening arguments after lunch.

18 MS. MCVEY: So we'll strike before lunch?

19 THE COURT: Get them settled, strike, the
20 jury will be selected and we let them go to
21 lunch and have mercy on the court reporter.

22 MS. MCVEY: And you'll give us a little
23 bit of time to figure out who we're striking?

24 THE COURT: Oh, yeah. As usual, I give
25 you about 15 minutes or so to decide who you're

1 striking. We're going to be after midday
2 before we even get the jury selected. So I
3 think y'all need to and she needs to have a
4 little break before we go forward.

5 MS. MCVEY: Thank you, Your Honor.

6 MS. BUENO: Thank you, Your Honor.

7 MR. ADAMS: Thank you, Your Honor.

8 (Whereupon there was a recess in the
9 proceedings from 11:26 a.m. to 11:34 a.m.)

10 THE COURT: My bailiffs, are all the
11 jurors present? Are we good?

12 All right. Ladies and gentlemen, let me
13 explain what happens now. There's a fancy
14 Latin word, "voir dire," but it simply means
15 these are questions that the parties on each
16 side have asked that I ask the jury.

17 These aren't things that disqualify you or
18 anything else that I know about. We'll see
19 what happens. But they are questions I ask
20 you. Just like before, I ask you to please
21 stand or acknowledge in some way, depending on
22 whether this question applies to you or not.
23 So that's what I'm going to do now. I will ask
24 those questions.

25 Yes, sir?

1 THE BAILIFF: There's one missing.

2 THE COURT: There's one missing?

3 THE BAILIFF: Yes, ma'am.

4 THE COURT: Didn't see anybody down there?

5 THE BAILIFF: Yes. I'm going to get her.

6 She's eating.

7 THE COURT: Okay. Sorry. Be patient for
8 a minute.

9 Ms. McVey, Mr. Bogan, come up here for a
10 second.

11 The descriptors we had about the case and
12 so forth, I propose to read those before you
13 make your opening arguments. The summary I
14 have here is just who is the parties in the
15 case.

16 MS. MCVEY: I didn't know if you wanted
17 to --

18 THE COURT: I think it's better when we
19 have the panel here to make those things. So
20 I'll do those before you open.

21 MS. MCVEY: We don't have Jamie's name on
22 the sheet. We can introduce ourselves or you
23 can do it.

24 THE COURT: I'm going to turn to each
25 side.

1 All right. All present. Ladies and
2 gentlemen of the jury, we will proceed to
3 these, as I explained, voir dire questions that
4 will be asked.

5 Before we do that, we have the plaintiff
6 and defendants' attorneys assembled at these
7 two tables. And I'm going to begin with the
8 plaintiffs' counsel and ask Ms. Theile McVey,
9 who heads the plaintiffs' team, to introduce
10 herself and have each of her members of her
11 team introduce themselves to you.

12 MS. MCVEY: Good morning. Theile McVey
13 from the law firm of Kassel McVey here in
14 Columbia.

15 MR. ADAMS: Good morning. Ben Adams. I
16 represent Michael Perry and Lonnie Long. Thank
17 you for being here.

18 MS. GROSS: Good morning. I also
19 represent Michael Perry and Lonnie Long. My
20 name is Rachel Gross.

21 MS. RUTKOSKI: Jamie Rutkoski, also from
22 Kassel McVey.

23 MR. GEORGE: Jonathan George, also with
24 Dean Omar.

25 THE COURT: All right. And on behalf of

1 the defendants, please introduce yourselves to
2 the jury.

3 MS. BUENO: Good morning. Kim Bueno is my
4 name. I work for a law firm called Butler
5 Snow, and I'm here on behalf of the defendants
6 with my partners.

7 MS. PEPKE: Good morning. Amy Pepke, and
8 I'm also with Butler Snow.

9 MR. COWAN: Good morning. Chris Cowan.
10 I'm also with Butler Snow.

11 MR. BOGAN: Good morning. My name is Matt
12 Bogan. I work for Nelson Mullins here in
13 Columbia, South Carolina.

14 MS. FLYNN: This is Stephanie Flynn. I'm
15 with Fox Rothschild. I represent American
16 International Industries.

17 MR. CHERRY: Nick Cherry, also with Fox
18 Rothschild for American International
19 Industries.

20 THE COURT: All right. Ladies and
21 gentlemen, this is the case of Michael L. Perry
22 and Lonnie L. Long versus Johnson & Johnson;
23 LTL Management, LLC; Johnson & Johnson Holdco,
24 Inc., and Kenvue, Inc., the Johnson & Johnson
25 defendants; and American International

1 Industries.

2 This case arises out of Mr. Perry's
3 alleged exposure to asbestos-containing talcum
4 powders. The plaintiffs are Michael Perry and
5 his husband, Lonnie Long.

6 The plaintiffs claim that Mr. Perry's
7 cancer, mesothelioma, was caused by his
8 exposure to asbestos found in defendants' talc
9 products. The defendants in this case are
10 Johnson & Johnson entities and AII.

11 Here are the questions for you as the
12 panel. Do you know or are you related either
13 by blood or marriage to Michael Perry or Lonnie
14 Long? If so, please stand.

15 Is there any juror who knows, currently
16 works for, or in the past has worked for or has
17 a business interest in Johnson & Johnson; LTL
18 Management, LLC; Johnson & Johnson Holdco,
19 Inc., and Kenvue, Inc., the Johnson & Johnson
20 defendants; and American International
21 Industries? If so, please stand.

22 Is there any juror who has been
23 represented by the law firm of Kassel McVey or
24 by Theile McVey of Kassel McVey, Jamie Rutkoski
25 of Kassel McVey, or the law firm of Dean Omar

1 Branham and Rachel Gross or Ben Adams or --

2 MR. GEORGE: Jonathan George.

3 THE COURT: If any juror has been
4 represented by any of those members of the
5 plaintiffs' team, please stand.

6 Is there any juror who has been
7 represented by the firm of Nelson Mullins or
8 Blake Williams, Mitch Brown, Yasmeen Ebbini, or
9 Matt Bogan? If so, please stand.

10 Has any juror been represented by the law
11 firm of Butler Snow or Kimberly Bueno,
12 Christopher Cowan, or Amy Pepke? If so, please
13 stand.

14 Has any juror been represented by the law
15 firm of Fox Rothschild or Stephanie Flynn or
16 Nick Cherry? If so, please stand.

17 Is there any juror who knows any of the
18 following potential witnesses: Michael Perry,
19 Lonnie Long, Dr. Barry Gibney, Dr. David Zhang,
20 Dr. Arnold Brody, Mark Bailey, Dr. Steven
21 Haber, Dr. William Longo, Dr. David Madigan,
22 Robert Johnson, Dr. Steven Mann, Paul Root,
23 Thibo Mongon, Dr. Edwin Kuffner, Dr. Dominik
24 Alexander, Dr. Christy Barlow, Dr. Gregory
25 Diette, Dr. Stanley Geyer, Dr. Victor Roggli,

1 Dr. Matthew Sanchez, Dr. David Weill, Dr. John
2 Hopkins, Dr. Alice Blount, Timothy McCarthy?
3 If so, please stand.

4 Has anyone --

5 PROSPECTIVE JUROR: Your Honor, I need to
6 go back just a second. I was represented by, I
7 believe, an attorney at Nelson Mullins. Her
8 name's Erin Black.

9 THE COURT: How long ago was it?

10 PROSPECTIVE JUROR: Two years ago.

11 THE COURT: All right.

12 MR. BOGAN: I think she works at Nexsen
13 Pruet.

14 PROSPECTIVE JUROR: Thank you. I wasn't
15 sure, and didn't --

16 THE COURT: So not connected with this
17 case at all. Thank you for being sure about
18 that.

19 Has anyone personally or has any member of
20 your immediate family -- which is your husband,
21 your wife, your children, your father, your
22 mother -- ever been a plaintiff or a defendant
23 in a lawsuit? If so, please stand.

24 Yes, sir.

25 PROSPECTIVE JUROR: Seven years ago I was

1 a plaintiff. My son died in a tree accident.

2 THE COURT: In a what?

3 PROSPECTIVE JUROR: Tree accident.

4 THE COURT: All right. Very good.

5 MS. PEPKE: Juror number?

6 PROSPECTIVE JUROR: 182.

7 THE COURT: 182. Thank you, sir. You may
8 be seated.

9 Is there anyone here who would not award
10 money to a husband for a loss of consortium of
11 his male spouse? If so, please stand.

12 Does anyone here believe that they are
13 unable under any circumstances to award money
14 damages for someone's pain and suffering or
15 emotional distress? If so, please stand.

16 PROSPECTIVE JUROR: Excuse me. I think
17 there's --

18 THE BAILIFF: Stand up, please.

19 THE COURT: You've got to stand.

20 PROSPECTIVE JUROR: I think there's some
21 concern about the previous question. I think
22 some folks, the jurors --

23 THE COURT: Hang on. The previous
24 question is, is there anyone here who would not
25 award money to a husband for loss of consortium

1 of his male spouse? All right.

2 And the question I just asked that we kind
3 of -- I didn't see any stand, but does anyone
4 believe they are unable under any circumstance
5 to award money or damages for someone's pain
6 and suffering or emotional distress? If so,
7 please stand.

8 One question you may be asked during the
9 course of the trial is whether plaintiffs are
10 entitled to recover punitive damages from the
11 defendants. Does anyone believe they are
12 unable to award money damages, punitive
13 damages? If so, please stand.

14 Has anyone or any member of your immediate
15 family -- husband, wife, children, mother,
16 father -- ever worked with or around
17 asbestos-containing material that you know
18 about? If so, please stand.

19 Yes, ma'am.

20 PROSPECTIVE JUROR: Juror 94. My husband
21 is a painting contractor, so he does have to
22 sometimes, you know, get testing for asbestos.

23 THE COURT: All right. Would the fact
24 that your husband is a painting contractor
25 interfere with your ability to render a fair

1 and impartial verdict in this matter?

2 PROSPECTIVE JUROR: No, ma'am.

3 THE COURT: Let me go back to the
4 gentleman on the front row. Forgot to ask you
5 that question. You were involved in a tree
6 matter as a plaintiff.

7 PROSPECTIVE JUROR: Yes, ma'am.

8 THE COURT: Would the fact that you were
9 involved in that matter seven years ago
10 interfere with your ability to render a fair
11 and impartial verdict in this matter? If so,
12 tell me now.

13 PROSPECTIVE JUROR: No, Your Honor.

14 THE COURT: All right. Has anyone or any
15 member of your family, immediate family --
16 husband, wife, children, mother, father -- ever
17 worked or are currently working for a company
18 that made products using talcum powder? If so,
19 please stand.

20 Has any member of the jury panel had an
21 immediate family member -- husband, wife,
22 children, mother, father -- who had
23 mesothelioma or any asbestos-related disease?
24 If so, please stand.

25 Has anyone read or heard anything about

1 this case before today? If so, please stand.

2 All right. That completes the voir dire
3 questions. Now, here's what's going to happen.
4 The lawyers have something that is called a
5 strike sheet. It has names on it. And from
6 that they will make their strikes. And then we
7 will read out the names of the jurors who have
8 been selected.

9 It will be a different number that's used
10 for the strike, so you won't be able to tell
11 who's being struck from the number because it
12 won't be the same number as your juror number.
13 But when we assemble the whole jury, we'll call
14 that out so that you'll understand who has been
15 selected for service on this jury and who has
16 not.

17 These lawyers need about 15 minutes to
18 complete this. And they will then come back
19 and we'll strike the jury. And then here's
20 what's going to happen. I will dismiss you for
21 lunch. Those who are not, you have completed
22 your jury service. Those who are picked, I
23 will dismiss you for lunch. I will settle on a
24 time when you have to be back, and then we will
25 come back and begin the case.

1 And the case will begin by opening
2 arguments by each side of the case. And then
3 we'll move forward to the first witness.

4 I'll have a little something to say about
5 the nature of the case before we get started
6 and kind of how you function as jurors.

7 I think I've told you everything I need
8 to. So be at ease for about 15 minutes. Don't
9 stray too far. And these jurors -- I mean
10 these lawyers will sit here and work on their
11 strikes. And then it's 10 minutes of. Come
12 back at 5 after 12:00. All right. Court will
13 be at ease.

14 (Whereupon there was a recess in the
15 proceedings at 11:52 a.m.)

16 (The following proceedings were held
17 outside the presence of the jury:)

18 THE COURT: Yes?

19 PROSPECTIVE JUROR: I know Matt Bogan. We
20 go to church together.

21 THE COURT: Would the fact that you know
22 him have any effect on your ability to be a
23 fair juror?

24 PROSPECTIVE JUROR: I don't believe it
25 will.

1 THE COURT: Here is what's going to
2 happen. When we assemble again, I'm going to
3 ask that question in open court so we can put
4 that on the record. Thank you so much for that
5 disclosure.

6 PROSPECTIVE JUROR: **Absolutely. Do I need**
7 **to say I know Matt Bogan?**

8 THE COURT: Yes. I'm going to have you
9 stand up and tell me just what you told me and
10 we'll put it on the record. Thank you so much
11 for that.

12 PROSPECTIVE JUROR: **Okay.**

13 - - -

14 (Whereupon proceedings resumed at
15 12:07 p.m.)

16 - - -

17 (The following proceedings were held
18 in the presence of the prospective
19 jurors:)

20 THE COURT: Are we prepared to strike the
21 jury?

22 MS. MCVEY: Yes, ma'am.

23 MS. BUENO: Yes, Your Honor.

24 THE COURT: Very good. One thing that I'd
25 like to draw to your attention before we begin.

1 Juror 263?

2 PROSPECTIVE JUROR: 363.

3 THE COURT: Please stand. Say the number
4 again.

5 PROSPECTIVE JUROR: 363.

6 THE COURT: 363. Right. Juror 363 goes
7 to the same church as Mr. Bogan does. All
8 right. And so she knows him.

9 Would the fact that you know Mr. Bogan
10 through being in the same church with him have
11 any effect on your ability to render a fair and
12 impartial verdict in this matter?

13 PROSPECTIVE JUROR: No, Your Honor.

14 THE COURT: Very good. You may be seated.

15 PROSPECTIVE JUROR: Thank you.

16 PROSPECTIVE JUROR: Your Honor?

17 THE COURT: Yes.

18 PROSPECTIVE JUROR: Juror 50. I called my
19 company to find out and Johnson & Johnson is a
20 customer of ours and we supply them raw
21 materials.

22 THE COURT: Say again. Come down here
23 where I can...

24 PROSPECTIVE JUROR: Juror Number 50.
25 Johnson & Johnson is a customer of the company

1 that I work for and we supply them with two raw
2 material. I just wanted to be honest with
3 that.

4 THE COURT: What kind of raw materials?

5 PROSPECTIVE JUROR: Two powders.

6 THE COURT: Okay. Very good. Thank you,
7 ma'am. I appreciate that. Would the fact that
8 your company supplies Johnson & Johnson with
9 these two powder products have any effect on
10 your ability to render a fair and impartial
11 verdict in this matter?

12 PROSPECTIVE JUROR: No, sir.

13 THE COURT: All right. Ma'am. I swear I
14 shouldn't have gone to the beauty parlor and
15 gotten this haircut. Grandmother, mother,
16 daughter, beloved wife, I hope.

17 PROSPECTIVE JUROR: I'm sorry.

18 THE COURT: That's all right. Okay.

19 Let's begin the striking of the jury. And
20 I may say that in striking the jury, we will
21 pick four alternates.

22 Very good. All right. Ms. McVey, are you
23 speaking for the plaintiff?

24 MS. MCVEY: Yes, Your Honor. Just one
25 second. I apologize.

1 We're ready, Your Honor. I understand
2 we're striking the first four from 1 through 20
3 on the left-hand side?

4 THE COURT: That's correct.

5 MS. MCVEY: Your Honor, the plaintiffs
6 excuse Juror Number 3.

7 THE CLERK: Plaintiffs excuse Juror
8 Number 3.

9 MS. BUENO: And to be clear, are you
10 talking about the juror number or the one on
11 the left?

12 MS. MCVEY: Left.

13 THE COURT: The one on the left. Just
14 like I told y'all that's the one we'd be using.
15 Okay?

16 MS. BUENO: I just wanted to make sure.

17 THE COURT: All right. Defense?

18 MS. BUENO: Yes, Your Honor. We strike
19 Juror Number 7.

20 THE CLERK: Defense strikes 7.

21 MS. MCVEY: Your Honor, the plaintiffs
22 excuse Juror Number 1.

23 THE CLERK: Plaintiff strikes 1.

24 MS. BUENO: Defendants would strike Juror
25 Number 12, please.

1 THE CLERK: Defense strikes 12.

2 MS. MCVEY: Your Honor, the plaintiffs
3 strike Juror Number 9.

4 THE CLERK: Plaintiff strikes Number 9.

5 MS. BUENO: Defendants strike Juror
6 Number 16.

7 THE CLERK: Defense strikes Number 16.

8 MS. MCVEY: And the plaintiffs would
9 strike Juror Number 13.

10 THE CLERK: Plaintiff strikes Juror
11 Number 13.

12 MS. BUENO: And defendants strike Juror
13 Number 20.

14 THE CLERK: Defendant strikes Juror
15 Number 20.

16 THE COURT: All right. Alternates?

17 MS. MCVEY: Your Honor, the next three in
18 order, for the first alternate, the plaintiffs
19 strike Juror Number 23.

20 THE CLERK: Plaintiff strikes Juror Number
21 23.

22 THE COURT: 23 or 22, Ms. McVey?

23 MS. MCVEY: 23.

24 THE COURT: 23. All right.

25 MS. BUENO: Defendants strike Number 21.

1 THE CLERK: Defense strikes Number 21.

2 THE COURT: All right. That's the first
3 alternate.

4 MS. MCVEY: For the second alternate, the
5 plaintiffs would strike Juror Number 26.

6 THE CLERK: Plaintiff strikes Juror 26.

7 MS. BUENO: Defendants strike Juror
8 Number 24.

9 THE COURT: All right.

10 THE CLERK: Defendants strike Number 24.

11 THE COURT: Third alternate?

12 MS. MCVEY: Plaintiffs strike Juror
13 Number 27.

14 THE CLERK: Plaintiff strikes 27.

15 MS. BUENO: Defendants strike Juror
16 Number 28.

17 THE CLERK: Defense strikes Number 28.

18 THE COURT: Fourth alternate?

19 MS. MCVEY: I'm sorry, Your Honor. Your
20 Honor, the plaintiffs would strike Juror
21 Number 30.

22 THE CLERK: Plaintiff strikes 30.

23 THE COURT: Defendant?

24 MS. BUENO: Defendant would strike Juror
25 Number 32, please.

1 THE CLERK: Defendant strikes Number 32.

2 THE COURT: All right. Mr. Clerk, please
3 repeat the strikes.

4 THE CLERK: Yes, Your Honor.

5 Plaintiff strikes numbers 3, 1, 9, and 13
6 and alternates 23, 26, 27 and 30. Is this
7 correct?

8 MS. MCVEY: Yes.

9 THE CLERK: Defense strikes numbers 7, 12,
10 16, 20, and alternates 21, 24, 28, and 32. Is
11 this correct?

12 MS. BUENO: Yes, it is.

13 THE COURT: Very good. All right.
14 Mr. Clerk, call the names and seat the jury.

15 THE CLERK: Yes, Your Honor.

16 Ladies and gentlemen of the jury panel, as
17 I call your name, please come to the jury box
18 bringing your personal belongings.

19 Juror Number 37, Brandy Brown.

20 Juror Number 40, Fatima Bucheli.

21 Juror 31, Caroline Bond.

22 Juror 253, Donna Quirk.

23 Juror 51, Matthew Carswell.

24 Juror 78, Veronica Deas.

25 Juror 235, Austin Parrish.

1 Juror 75, Stephanie Davis.

2 Juror 360, Kayla Queener.

3 Juror 191, Aleksey Lyashevich.

4 Juror 296, Frantzetter Stone.

5 Juror 50, Ms. Carson.

6 Juror 166, Lakeisha Jenkins.

7 Juror 138, Kenneth Haynesworth.

8 Juror 355, Mary Gillespie.

9 And Juror 124, Gloria Green.

10 The jury's been seated, Your Honor.

11 THE COURT: Thank you. All right.

12 Clerk's office, check me on this, 3B.

13 THE CLERK: Yes, Your Honor.

14 THE COURT: Very good. Ladies and
15 gentlemen of the jury, the first thing we will
16 do is swear you. So let's go on and swear the
17 jury now.

18 THE CLERK: Yes, Your Honor.

19 THE COURT: Very good. All right.

20 THE CLERK: Ladies and gentlemen of the
21 jury, please stand and raise your right hand to
22 be sworn. After I give this oath, please
23 affirm with an "I do."

24 - - -

25 (Jury was administered the oath.)

— — —

THE COURT: Ladies and gentlemen of the jury, the first thing to tell you is where you will be when you come back. Instead of being here in the second floor, you'll go up to the third floor and you will be in Courtroom 3B. So as you approach those doors, B is on your right, but you'll be in Courtroom 3B. That's where we're going to try the case.

We'll also make sure as time goes by that we pronounce such names as have been incorrectly pronounced, pronounce correctly. So we'll take care of that.

My maiden name was H-O-E-F-E-R, and I got
Hoofer, Heifer, Hoffer, Hoefer, and everything
else, but it was pronounced "Hoefer." So we'll
take care of that.

I want you to refresh yourself and have lunch. And what's going to happen after you come and are seated is that I will give you the opening charge of the judge. That will describe to you what the case is in just a slight bit more detail than what you've so far heard and will describe your duties and mine.

And then the lawyers will give you their

1 opening statement. Each statement will take
2 about an hour, and they'll fully outline what
3 they intend to show on behalf of the client.

4 And then we will proceed to at least one
5 witness today. I'm going to try to keep it as
6 close to 5:00 as I am able to do. You will, of
7 course, have a midafternoon break, but if
8 there's any concern other than at that
9 particular time, you let me know.

10 What I will do is this. Some judges pick
11 the foreperson of the jury. I generally let
12 the jury do that themselves. But you need to
13 have just a little bit of a chance to know who
14 you are. So what I will do is have you
15 assemble. You'll hear the opening statements,
16 you'll take a break, go to the jury room. And
17 after that, if you feel you are ready, I'll ask
18 you while you're on your break to pick your
19 foreperson, and you'll do that and let me know
20 who that person is.

21 That foreperson doesn't have any more of a
22 voice than anybody else does. It is just the
23 person that is kind of our point of contact
24 with you, the members of the jury, about needs,
25 concerns, and ultimately the verdict itself.

1 But everybody's on the very same footing and
2 has the same influence as anybody else.

3 Of course, you can't talk about the case
4 ever until it's submitted to you for an actual
5 verdict. And that means while you're on your
6 break for lunch today.

7 I think that's probably all I need to
8 preliminarily charge you. I'll talk to you a
9 little bit in my charge about not looking
10 elsewhere for information other than what comes
11 out of this jury box or what comes, as far as
12 the law is concerned, from me. In other words,
13 don't -- resist that temptation to take those
14 wonderful electronic devices that we now live
15 by and do research about the case. You're not
16 supposed to do that. You can only hear what is
17 produced to you in this courtroom, and that
18 includes taking time for lunch right now. So
19 "Hmm, let me look up something." Don't do
20 that.

21 Your cell phones, I don't know exactly how
22 to do it here, about I imagine they secure the
23 cell phones and give them to you as you leave
24 to go about your business. And that's fine.

25 So it's 12:30, for all intents and

1 purposes. Come back to the 3B and be able
2 to -- ready to go at 2:00. Very well.

3 All rise as the jury retires. And the way
4 I'm going to let them retire -- have you got
5 all your belongings, members of the jury? Then
6 you follow the bailiff and he will show you how
7 you get out of this rabbit warren and where you
8 go to come back.

9 THE BAILIFF: Follow me.

10 THE COURT: Please be seated for just a
11 moment longer for members of the jury venire.

12 This may be a source of great relief to
13 you that you don't have to be with me and these
14 lawyers the next two weeks and try this case.
15 But this definitely counts as jury service, as
16 far as I'm concerned.

17 I thank you very much for your attention
18 to this matter, for all the pushes and pulls
19 that go with what seems to be endless delay and
20 everything else before trials proceed. Thank
21 you for your patience more than I can say.

22 And you are dismissed and not subject to
23 recall at any time during this two weeks. So
24 you may retire from the courtroom at this time.

25 Please stand for the jury venire.

1 UNIDENTIFIED PROSPECTIVE JUROR: Your
2 Honor, thank you for your years of service.
3 They're so appreciated.

4 THE COURT: Oh, aren't you kind. Thank
5 you so much. It's still fun or I wouldn't be
6 doing it. My husband says he has embraced
7 retirement and Jean has flunked retirement.

8 - - -

9 (The prospective jurors exited the
10 courtroom at this time.)

11 - - -

12 THE COURT: The courtroom door is closed.
13 Okay. Now, let's talk about what we need to
14 talk about. All right. Do we want a break,
15 have lunch, and come back here in an hour?
16 Would that be -- or thereabouts? Would that be
17 sufficient to take up whatever else we need to
18 take up?

19 MS. BUENO: That would be perfect.

20 THE COURT: Very good. And at that time I
21 will put on the record -- now that we have an
22 impaneled and sworn jury, I will put on the
23 record something that Matt Bogan was kind
24 enough to supply me with, which is putting on
25 the record the rulings made on the in limine

1 portion of this case.

2 Before I let y'all go, court personnel, we
3 can't print anything on our printer. Can you
4 figure out some way to get it so we can do
5 that? On my printer upstairs in my office, I
6 typed up Matt Bogan's little statement and some
7 other things that I wanted to print.

8 THE CLERK: I'll give you my e-mail
9 address and I'll print it up from mine.

10 THE COURT: Well, I don't like that.

11 THE CLERK: You don't?

12 THE COURT: No. I mean you're very kind,
13 and give me the e-mail address, but also tell
14 those folks to get something done about our
15 printer. This is a recurring problem. Tell IT
16 please help me out on this.

17 THE CLERK: Yes, ma'am.

18 THE COURT: Thank you.

19 MS. BUENO: Will we be in 3B?

20 THE COURT: 3B, exactly. If you want to
21 take things there now and secure things in any
22 way, you will be fine to do that.

23 Members of the bailiff staff, will they be
24 able to get in the courtroom?

25 THE BAILIFF: Yes.

1 THE COURT: You will be able to get in the
2 courtroom. If you want to put things in there,
3 that's fine.

4 MS. BUENO: Thank you.

5 (Whereupon there was a recess in the
6 proceedings from 12:33 p.m. to 1:51 p.m.)

7 - - -

8 THE COURT: My thinking is to put the
9 motion in limine statement, preserving it for
10 the record, on the record right now. And then
11 what else do I need to do?

12 MS. MCVEY: I think we can wait for
13 exhibits until at the end of the day.

14 THE COURT: Yes, I agree.

15 MS. MCVEY: There is one slide in the
16 opening that I think Johnson & Johnson --

17 THE COURT: All right. And then you've
18 got this tissue digestion matter. Well, why
19 don't I put the motion in limine on the record
20 right now, and then we'll go to these two
21 things we've got.

22 MS. BUENO: And we have two other things,
23 too. I have a total of four just quick things
24 before --

25 THE COURT: We'll get to them right now.

1 That's why I didn't even put my robe on. This
2 is Court's Exhibit Number 2.

3 - - -

4 (Chief Justice Toal's Ruling
5 Regarding Motions in Limine marked Court
6 Exhibit Number 2 received into evidence.)

7 - - -

8 THE COURT: This is a copy for each side
9 (handing).

10 All right. I'd like to place on the
11 record my ruling with respect to motions in
12 limine rulings that affect trial, but also
13 specifically affect possible evidentiary
14 matters and other matters. I have conducted
15 extensive pretrials and we have talked about
16 these motions in limine that deal with
17 witnesses, that deal with elements and other
18 things.

19 I have made rulings on these matters, but
20 there is concern that since those rulings were
21 made pretrial, there's a concern that
22 objections to these rulings are not adequately
23 preserved. And I intend to do everything
24 within my power to be absolutely sure that the
25 rulings are a matter of this record. As it now

1 stands, the jury hasn't even been impaneled, so
2 as to protect the objections of the objecting
3 parties with respect to my rulings.

4 I have reread all the rulings on the
5 motions in limine. I am familiar with the
6 requirements of State versus Forester. But I
7 hereby rule under Rule 43(i) of South Carolina
8 Rules of Civil Procedure, now that the jury is
9 impaneled, there will be no further arguments
10 regarding the elements that was the subject of
11 the motions in limine. Proffers in summary
12 form by any party can be made as needed at the
13 next break after any contested evidence is
14 introduced.

15 And in contenance with the discussion in
16 State v. Forester, which I authored, I have in
17 effect refused to receive further arguments
18 about it, shut down further arguments. And on
19 that basis, the position of the objecting
20 parties, both sides, has been preserved.

21 All right. Now, these little things.

22 MS. BUENO: Your Honor, the first item is
23 just one slide in plaintiffs' deck. May I
24 approach and pass it out?

25 THE COURT: Certainly. I know you all

1 will provide me with the decks when you get
2 ready.

3 MS. BUENO: This is slide number 142,
4 which is the bottom left of the page I just
5 gave you.

6 THE COURT: Yes, I see it.

7 MS. BUENO: This relates to our discussion
8 earlier about successor liability.

9 THE COURT: Yes.

10 MS. BUENO: Plaintiffs wish to put up this
11 slide, which I understand will be animated to
12 start with all of these entities, and then take
13 certain entities away until it's left with
14 Kenvue and Johnson & Johnson Holdco. And I
15 object to this slide because there are entities
16 on here who are not defendants.

17 And the suggestion will be that
18 Johnson & Johnson created all of these
19 entities, but the only ones you need to worry
20 about are Kenvue and Johnson & Johnson Holdco.
21 That goes beyond Your Honor's ruling about what
22 they can do on successor liability in opening,
23 and I ask for this slide to be -- I object to
24 the slide and ask for it to be struck.

25 THE COURT: Very good. Ms. McVey.

1 MS. MCVEY: Thank you, Your Honor. This
2 is not to talk about successor liability. It's
3 simply to show, because you're going to see it
4 in documents and hear from witness, that these
5 are various entities. It's going to flash up
6 there. All these will go away and the only
7 thing -- the only point being made is that it's
8 just Johnson & Johnson and Kenvue. That's who
9 you're left with. That's who is important.

10 It's not talking about all the different
11 iterations and when they happened and all that
12 kind of stuff. It's going to be a quick move
13 through. But it's important to at least
14 introduce it because they're going to see it.
15 It's coming in in other stuff.

16 THE COURT: What you're saying, as I
17 understand it, by this slide is there are
18 myriad past and present Johnson & Johnson
19 entities.

20 MS. MCVEY: Right.

21 THE COURT: Amongst that myriad group of
22 entities, there are entities about which we are
23 concerned.

24 MS. MCVEY: That's right.

25 THE COURT: Yes, ma'am.

1 MS. BUENO: Your Honor, I object to
2 Chenango 1, Chenango 2. Some of the entities
3 on here are directly related to bankruptcy
4 issues. They have no bearings. They are not
5 defendants in this case and they have nothing
6 to do with Kenvue.

7 THE COURT: I understand. I overrule your
8 objection.

9 MS. MCVEY: Thank you, Your Honor.

10 MS. BUENO: Your Honor, another question
11 about opening. May I say in opening about
12 default against the AII defendant is procedural
13 and does not affect the proof regarding J&J?

14 MS. MCVEY: No.

15 THE COURT: I don't think you get to
16 interpret my ruling about another defendant. I
17 would -- I would deny your ability to do that.

18 MS. BUENO: Your Honor, the next item
19 let's talk about is Dr. Longo and the tissue
20 testing.

21 THE COURT: Yes.

22 MS. BUENO: As Your Honor knows, you told
23 us on Tuesday that you denied our motion in
24 limine. We understand that's a final ruling,
25 but you invited us to revisit it with you if

1 the experts were unable to do the tissue
2 testing before trial.

3 THE COURT: And what we have here is one
4 not able, yours; one able, theirs.

5 MS. BUENO: That's not true. We have two
6 that were unable to get the tissue testing done
7 before trial.

8 THE COURT: Two of yours unable, one of
9 theirs able.

10 MS. BUENO: No. Plaintiffs' experts did
11 not get the testing done in order for us to do
12 a discovery deposition before trial. We do not
13 know --

14 THE COURT: Okay. There are two questions
15 here. One is: Was the tissue digestion able
16 to be done? That's the first and really the
17 most important thing that I'm concerned about.
18 Tissue digestion was able to be done by
19 plaintiffs' expert. Was it able to be done by
20 your expert?

21 MS. BUENO: It was not, and we have no
22 idea what those results were.

23 THE COURT: That's the second question.
24 First of all, why -- if their experts could do
25 the tissue digestion, why were your experts not

1 able? You got it both at the same time.

2 MS. BUENO: Your Honor, if you read
3 Exhibit A to our motion, the most recent one
4 that we filed, we have an affidavit from
5 Dr. Geyer, our expert, who explained in
6 detail --

7 THE COURT: Oh, I've read his affidavit.
8 That's what you're relying on.

9 MS. BUENO: Dr. Longo testified --

10 THE COURT: Let's not get into Longo just
11 yet. I'm trying to find out -- we have a
12 discrete test to be run of tissue digestion.
13 It's always a big issue in these cases. These
14 tissues, you have to have a neutral that is
15 trustworthy to both sides to divide the tissue.
16 Then you have to get it to the parties'
17 experts, and then they have to do the digestion
18 which takes a little while to do. One side --
19 you both got it at the same time. Your experts
20 did.

21 MS. BUENO: Yes, ma'am.

22 THE COURT: That's part of the protocol.
23 They were able to complete theirs. Your
24 experts go into all kind of different things
25 about how they disagree with how theirs is done

1 and this, that, and the other and so forth, and
2 suggest that it was too short a period of time
3 to do it.

4 I've already had all that before me. That
5 has not changed. That does not persuade me to
6 exclude their tissue digestion. I don't
7 understand why it took so long. Part of it was
8 MUSC's fault, as I understand it. But in the
9 end you all both got it at the same time. You
10 all don't have one tissue digestion expert,
11 you've got two. I do not understand why at
12 least one of them was not able to do it.

13 Now, the second thing is you were not able
14 to have this big discovery thing and so forth.
15 Sometimes you don't get that. Discovery is not
16 a precursor to every piece of evidence that
17 comes in. I know about discovery disputes.
18 I've monitored them in this case. That makes
19 no difference to me in terms if a late piece of
20 evidence before it is to be presented to the
21 jury before the jury is to hear the first
22 opening argument.

23 There is now produced information about
24 the digestion. The fact that you can't perform
25 the kind of discovery you'd like is not the

1 issue to me. The issue is whether it's
2 admissible. I find it is admissible.

3 MS. BUENO: Your Honor, we cannot start
4 this trial and provide an opening statement
5 without understanding what testimony Dr. Longo
6 is going to come into this courtroom and talk
7 to the jury about.

8 THE COURT: Well, I disagree with that.
9 You can certainly say what you want to say
10 about tissue digestion, but I'm not going to
11 stop the trial and say they can't mention it
12 simply because they were able to perform it and
13 you were not.

14 In terms of knowing what Dr. Longo says,
15 my bet is, just a bet, that as experienced as
16 you lawyers are in this little particular slice
17 of evidence, that what Dr. Longo says is going
18 to come as no surprise to you.

19 MS. BUENO: It will come as a surprise to
20 me, Your Honor, because he said less than three
21 weeks ago that he was not able to get this
22 done.

23 THE COURT: That has no bearing on the
24 admissibility of it. Able to get done is not
25 something. What he found is the something.

1 And you're going to, I think, pretty well be
2 able to guess what he found.

3 MS. BUENO: I am not able to guess.

4 THE COURT: Well, then, I'm sorry for
5 that, but I am not going to do anything about
6 not admitting this evidence and I'm not doing
7 anything about excluding the mention of this
8 evidence in opening statement.

9 MS. BUENO: When can we get this evidence,
10 Your Honor?

11 THE COURT: I don't know, but I'm not
12 debating that with you right now. I'm going to
13 rule on these things and bring this jury in.
14 And it's past time to bring them in as it
15 stands. I've made my ruling.

16 MS. MCVEY: Your Honor, just to be
17 clear --

18 THE COURT: I have made my ruling.

19 MS. MCVEY: I was going to agree with you.

20 THE COURT: There's a rule that says when
21 the judge makes a ruling, you move on. I have
22 ruled.

23 MS. BUENO: Final issue, Your Honor.

24 THE COURT: Yes, ma'am.

25 MS. BUENO: Dr. Barlow, we mentioned her

1 earlier today. I understand from my
2 colleagues, perhaps I wasn't clear. Dr. Barlow
3 is our inhalation toxicologist. I would like a
4 ruling on this before opening because I intend
5 to open on it.

6 THE COURT: I'm not going to let you
7 interrupt their trial to have Dr. Barlow. They
8 proposed a proposal that would allow them to
9 keep on track and have Dr. Barlow come whenever
10 you put her in. But I am not going to grant
11 the motion to have her come early or anything.
12 They're going to finish their case and you're
13 going to do your case.

14 MS. BUENO: And we will adjust our
15 witnesses in their case accordingly so
16 Dr. Barlow can be here on Friday. We need to
17 do that.

18 THE COURT: You're not going to be able to
19 present Dr. Barlow on Friday. They have
20 already indicated that they have a full day on
21 Friday before they can close their case. So
22 you're not going to be able to present
23 Dr. Barlow on Friday.

24 MS. BUENO: Here is the concern and I
25 don't think I was clear. Dr. Barlow, due to

1 family commitments, is unable to be here Monday
2 and Tuesday. Your Honor has had a seven-day
3 trial. We're closing on Wednesday, the 14th,
4 which gives defendants two days, the 12th and
5 13th. Our expert cannot come. We're just
6 asking for grace from the court that we can
7 bring our expert on Friday. And we will -- we
8 will take --

9 THE COURT: Enough. You have asked now
10 about five times, just in this argument, for me
11 to do something I've already told you I'm not
12 going to do. I know why you want Dr. Barlow to
13 come on Friday.

14 Ms. McVey.

15 MS. MCVEY: Your Honor, the only thing I
16 want to say is that Dr. Brody has got to get
17 off the stand by 5:30 today.

18 THE COURT: Correct. I'm not going to
19 spend all this time with this. If y'all can
20 work out something, that's fine, but I'm not
21 going to grant your motion to interrupt their
22 trial with Dr. Barlow. That's it. Have I made
23 all the rulings I need to make?

24 MS. MCVEY: Yes, Your Honor. And I didn't
25 get the slide that you have.

1 MS. FLYNN: Your Honor, Stephanie Flynn on
2 behalf of AII. I have one --

3 THE COURT: Wait a minute, Ms. Flynn. Let
4 me recognize you first. I am not going to do
5 anything else about this matter. I'm going to
6 bring this jury in. I'm going to get these
7 opening arguments made, and then I'm going to
8 hear from Dr. Brody.

9 MS. FLYNN: I understand, Your Honor. I
10 just wanted to clarify whether AII would be
11 permitted to make an opening statement.

12 THE COURT: No.

13 MS. MCVEY: Your Honor, the only thing we
14 need to do when the jury comes in, as I recall,
15 is the Clubman charge. The AII charge on --
16 the liability's been determined before
17 openings.

18 THE COURT: Yeah, I just don't have it
19 right here.

20 MS. MCVEY: I'll get it for you.

21 THE COURT: I mean, I've got a whole list
22 of charges I'm going to have to give this jury
23 before we get started, as I think you well
24 know.

25 No, it's not up here. Do you know what

1 I'm talking about? Okay. Let me go get my
2 robe and this charge.

3 Okay. What I've got for things other than
4 my opening, I'm going to make my opening charge
5 to the jury, and then I'm going to tell them
6 about this case.

7 And I've got a -- that's what I haven't
8 got, is the general charge of the case.
9 Theile, do you got --

10 MS. MCVEY: Can we put on the --

11 THE COURT: Yes, yes. What I've got is
12 the AII default claim, and the spoliation
13 thing.

14 MS. BUENO: And you're not going to read
15 the spoliation thing, right, Your Honor?

16 THE COURT: Just let me get through what
17 I'm up here doing first and don't jump up
18 immediately, Ms. Bueno, and start trying to
19 make an argument before I figure out what I've
20 got up here. I've got the spoliation charge.
21 And then I've got --

22 MS. MCVEY: That's the case, the chunk
23 about the case.

24 THE COURT: I've already read them this
25 much. So all I've got to do is this, but I'm

1 going to kind of remind them on this first.

2 MS. MCVEY: That's fine.

3 THE COURT: What I'm going to do is just
4 remind them this is the case, as we said, Perry
5 and Long against the Johnson defendants, and
6 what it is. We've already read that to the
7 jury before.

8 And then I'm going to read the AII
9 material, which is, as I think I have
10 indicated, is the one that -- not the one that
11 AII did. I'm going to read the one that says,
12 "It's been determined as a matter of law,"
13 et cetera, et cetera. That's the one I'm going
14 to read as to AII.

15 And then I'm going to read the part
16 that -- of hers, of AII's, that says, "You find
17 if the non-default defendant is liable, your
18 only task as to American International is to
19 determine the amount" -- wrong. I'm going to
20 read the rest of the Theile thing, which is if
21 they're liable -- after I read about what
22 Johnson & Johnson is, I'm going to say you're
23 instructed if they are liable -- that they are
24 liable, and your only task is to determine the
25 total amount of damages.

1 MS. MCVEY: Yes, ma'am.

2 THE COURT: So that's what I'm reading.

3 All right. Ms. Flynn, is that -- does
4 that clarify for you what's going to be done?
5 I'm not going to have any more argument about
6 this. So listen carefully to what I have to
7 say. You've already objected to it. It's on
8 the record.

9 MS. FLYNN: I understand, Your Honor. We
10 maintain our objection. I just wanted to make
11 sure there was nothing going to be read about
12 willful, wanton conduct.

13 THE COURT: No. I charge that if punitive
14 damages become necessary to be charged. The
15 only thing I said so far about punitive damages
16 is whether they would be willing in the proper
17 case to award them. I'm not going to say
18 anything else about that until the second half
19 of the case when it comes, if it does come.

20 All right. Bring me the jury.

21 Is this something they're trying to set up
22 so other people can listen to this thing? Is
23 that what this Webex thing is? We don't have
24 to worry about it now because the next witness
25 is going to be live, Brody.

1 _ _ _

4 - - -

7 THE COURT: Thank you very much.

14 Lawyers, you be seated.

20 This is the case of Michael Perry and
21 Lonnie Long versus Johnson & Johnson, LTL
22 Management, LLC, Johnson & Johnson Holdco,
23 Inc., and Kenvue, Inc., for Johnson & Johnson
24 defendants and American International
25 Industries. This case arises out of

1 Mr. Perry's alleged exposure to
2 asbestos-containing talcum powders.

3 The plaintiffs are Michael Perry and his
4 husband, Lonnie Long. The plaintiffs claim
5 that Mr. Perry's cancer, mesothelioma, was
6 caused by his exposure to asbestos found in
7 defendants' talc products. The defendants in
8 this case are Johnson & Johnson entities and
9 AII.

10 It has been determined as a matter of law
11 that American International Industries, AII,
12 which is a company responsible for Clubman talc
13 products, is liable to Mr. Michael Perry on
14 each of the causes of action pled against them
15 in this case, specifically negligence, strict
16 liability, fraud, conspiracy and implied
17 warranty of merchantability. It has been
18 determined as a matter of law that Clubman's
19 asbestos-containing talc product was defective
20 and unreasonably dangerous and was a
21 substantial factor in the development of
22 Michael Perry's mesothelioma. It has been
23 determined as a matter of law that American
24 International Industries' conduct was willful,
25 wanton, and reckless, meaning American

1 International Industries acted with conscious
2 indifference to the rights and safety of
3 others.

4 You are instructed that American
5 International Industries is liable to the
6 plaintiffs in this case. Your only task as to
7 American International Industries are to
8 determine the total amount of damages that
9 Michael Perry and Lonnie Long have suffered.

10 MS. FLYNN: Your Honor, may I approach?
11 Your Honor?

12 THE COURT: All right. Just one moment.

13 MS. FLYNN: May I approach?

14 THE COURT: No, ma'am, Ms. Flynn. You may
15 not approach. I have fully discussed what I
16 continue to do with regard to AII, and I've
17 done that. And I do not intend to revisit
18 that.

19 MS. FLYNN: There was a piece included
20 that was not intended to be included in the
21 instruction.

22 THE COURT: Well, all right. I can't do
23 anything about that right now, Ms. Flynn. I've
24 done the best I could.

25 MS. FLYNN: Yes, Your Honor. Please just

1 note our objection for the record.

2 THE COURT: All right.

3 Now, I've been passed a note about note
4 taking. And be assured that I will cover that
5 in the instruction I'm giving about how you
6 operate as a jury. But the short answer is
7 this: Many judges do not allow note taking. I
8 do allow note taking. And at your next break,
9 you will be supplied with tablets and writing
10 equipment so that you may take notes. And I
11 will explain to you in the process of this
12 charge how that operates and how you use those
13 notes.

14 Before we begin this trial, I want to tell
15 you this trial probably will be different from
16 what you might expect. Many people do not have
17 a chance to attend actual court sessions as you
18 are doing now, and may think from watching
19 television or reading books that trials are
20 always full of high drama, intense action and
21 rivetting circumstances.

22 While all of these things may be true at
23 times, this trial is not entertainment. It is
24 a fundamental part of our democracy, a search
25 for the truth and effort to make sure that

1 justice is done between the parties before the
2 court. Searching for the truth and making sure
3 that justice is done is often slow, deliberate,
4 repetitive, the opposite of what you may have
5 seen on television or in movies or may have
6 read in books. This courtroom is a place of
7 honor, dedicated to the protection and
8 preservation of citizens' rights through what
9 many have called the greatest justice system
10 ever.

11 The attorneys appearing before you are
12 advocates for the parties they represent, but
13 first and foremost, they are officers of the
14 court, sworn to uphold the integrity and
15 fairness of our judicial system and to help you
16 search for the truth. You should expect them
17 to be professional, competent, and ethical in
18 the representation of their clients' interest.
19 And remember that you have taken an oath to try
20 this case and reach a fair and just verdict.
21 So you will also be expected to be
22 professional, reasonable, and ethical.

23 I know something about your background
24 from the jury questionnaires, and I am
25 confident this jury is able to do that. Thank

1 you for accepting this important responsibility
2 of jury service and for your contribution today
3 to our justice system.

4 The first thing that will occur is that
5 one of the attorneys for the plaintiff -- and
6 the plaintiffs are the two people who brought
7 this action -- will make an opening statement
8 which will be followed by similar opening
9 statement on the part of the defendants. These
10 opening statements are not arguments. Those
11 arguments will come at the conclusion of the
12 entire case. Opening statements are not
13 evidence. The purpose of an opening statement
14 is for each party to outline to you his or her
15 claims and the elements which he or she intends
16 to present in support of these claims.

17 Following the opening statements, each
18 side will present its evidence with plaintiffs,
19 once again, going first. Evidence may take
20 many forms. It may be testimony, documents,
21 models, photographs or the like. You should
22 pay close attention to all evidence which is
23 presented by each party. You, the jury, are
24 the sole finders of the facts and no one else
25 will be permitted to weigh the evidence or

1 render a verdict except you.

2 After all the evidence has been presented,
3 the attorneys will make their closing
4 arguments. Unlike the opening statements, the
5 final remarks will be true arguments. That is,
6 each side will emphasize certain portions of
7 the evidence and try to persuade you to agree
8 with their version.

9 Keep in mind the opening statements, as
10 well as the closing arguments of the attorneys,
11 do not represent evidence in the case. Give
12 the attorneys your undivided attention, but
13 keep in mind that what they say is not
14 evidence.

15 After the arguments are finished, I will
16 explain to you what the law is applicable to
17 this case. That is called the charge to the
18 jury. I follow the practice of giving you the
19 charge as I must by reading it to you. But I
20 give each juror a copy of the charge. Maybe
21 you don't need to look at it or want to look at
22 it, but you'll have that in the jury room with
23 you, along with all the exhibits, and your best
24 understanding of the evidence as you decide the
25 case.

1 And once you have considered the facts in
2 the law, you will return a verdict in favor of
3 one side or the other. During the course of
4 the trial, the plaintiff has the burden of
5 proving his claims and the plaintiff must meet
6 this burden by proving his claims, their
7 claims, by the greater weight of the
8 preponderance of the evidence. And what we
9 mean by the greater weight of the evidence can
10 be illustrated by imagining a traditional set
11 of scales. When the case begins, those scales
12 are exactly even. After all the evidence has
13 been presented, if the scales remain perfectly,
14 evenly balanced or if they should tip slightly
15 so in favor of the defendant, then the
16 plaintiff will have failed to meet their burden
17 of proof and your verdict will be for the
18 defendant. But if, on the other hand, the
19 scales shall tip even slightly in favor of the
20 plaintiff, then they will have met the burden
21 of proof and your verdict would be for the
22 plaintiff.

23 I'd like to make a few additional comments
24 before the case begins. First, as I mentioned
25 earlier, although I am the only person who can

1 tell you the law, you are the only ones that
2 can determine the facts. I do not have the
3 right to indicate in any way how I might feel
4 about the evidence that is presented. And
5 throughout this trial, my intention will be to
6 act impartially towards each party.

7 Second, from time to time, an attorney
8 will object to some bit of evidence or -- which
9 the other side has presented. And as in sports
10 or business or any other structured activity,
11 there are certain rules that both sides must
12 follow in presenting the evidence. And these
13 rules have a definite purpose. They ensure
14 that the information you receive is the most
15 trustworthy and reliable evidence available.
16 An objection is a procedure that is used for an
17 attorney to call to the attention of the judge
18 a possible violation of the rules.

19 For this reason, don't hold it against the
20 attorneys if they make objections. Nor should
21 you conclude from my ruling that I favor one
22 side against the other. And sometimes I make a
23 ruling that I may change in the light of
24 something that goes on. Ms. Flynn just made an
25 objection. We don't hold that against AII.

1 She's going to look one more time at how I
2 explain their posture as a defendant in the
3 case. If I think there's something I said
4 incorrectly, and I may need to correct it, I'll
5 do so to you. But don't think that I -- I
6 deliberately try to stay as far away from
7 favoring one side as I possibly can, because I
8 don't have any interest in anything other than
9 in the fair trial of this case.

10 And, finally, I'd like to talk for a
11 minute about cell phones and just tell you, as
12 I said briefly this morning before you went to
13 lunch, you're not permitted to use those
14 devices either here in the jury room or when
15 you go back home at night to look up anything.
16 Nor are you allowed to do anything that
17 involves research on your own about the case.

18 Now, I know each of you has curious minds.
19 I certainly do. So that's very tempting to
20 look and see, "hey, let me check this out and
21 see what I think of that." But that goes
22 totally contrary to the way this trial
23 operates. You must only consider evidence
24 which comes from the witness box or from the
25 exhibits and so forth that are presented to

1 you. And you must only consider the law as I
2 give it to you and I charge it to you. And
3 that is the fundamental framework of this
4 endeavor. So we must all work very hard, you
5 and I, as these lawyers will, to be sure we
6 follow that framework as this case unfolds
7 before you.

8 Now, I would ask you to pay close
9 attention to all the evidence presented to you
10 because you will determine the facts and the
11 result you will have to evaluate the
12 credibility, which means the believability of
13 each witness who testifies in this matter.
14 There's going to be a lot of technical evidence
15 in this case. And frankly, when I first
16 started trying these asbestos cases and saw
17 these terms, like mesothelioma, and
18 epidemiology, and some of these other technical
19 matters that are brought to your attention, I
20 thought, oh, my, will I ever figure this out
21 enough to be able to render the service I need
22 to as a judge in this case.

23 My friends, you use your common sense as
24 you evaluate this material. It will be
25 presented to you in a way that you can

1 understand it. And before this trial is over,
2 mesothelioma and epidemiology and all the rest
3 of the terms will be rolling off your mouth
4 like you went to medical school. So your one
5 piece of concern, "I don't know if I can
6 understand this," you'll understand it. It's
7 the job of the lawyers and the evidence they
8 present to help you understand the technical
9 matters in this case. And you will understand.

10 You're participating in a time-tested
11 system and it's extremely important that you
12 listen carefully to all the evidence. Now, you
13 may take notes during the trial of this case.
14 I permit that. And just remember that these
15 notes are for your own individual purposes.
16 They shouldn't be discussed with anybody. Of
17 course, you can't discuss the case even with
18 each other until you've had a finding given for
19 your consideration at the end of the whole
20 case. And I should also warn you that you must
21 not allow this taking of notes to keep you from
22 listening and observing the witnesses. I'm
23 sure that each of you will perform your duties
24 accordingly. And we will now begin this trial.

25 Now, one more time, I am going to look at

1 what Ms. Flynn was concerned about, about the
2 way I introduced AII. So give me just a moment
3 to do that.

4 I think I charged what I need to about
5 AII, but let me just simply again emphasize to
6 you the liability has been determined. The
7 facts, with respect to Clubman talc, have been
8 determined. But the amount of damages has not
9 been determined. Much less has it been
10 determined that any actual or punitive damages
11 should be awarded. That is for the evidence to
12 proceed and determine. And although AII cannot
13 contest the fact of liability, they can
14 certainly participate in the discussion of
15 damages and will, and will make the appropriate
16 presentations on actual damages, and if the
17 case went to another level on any other kind of
18 damages that might be sought properly from the
19 jury. All right.

20 Ms. Flynn, I know that's not exactly what
21 you wanted, but I hope that cures any possible
22 inadvertence on my part. You don't need to
23 agree with me or disagree with me, but I've
24 done that in the hopes that I have clarified
25 the situation for all defendants in the matter.

1 MS. FLYNN: I understand, Your Honor. And
2 we appreciate it. And our prior objections I
3 made stand.

4 THE COURT: As I looked over it again I
5 realized that you were correct about that, so
6 that's why I tried to modify it in the way I
7 have done. Thank you very much for calling
8 that to my attention.

9 All right. We now come to opening
10 arguments. The plaintiff may proceed.

11 MS. GROSS: Hi, everyone.

12 THE COURT: Ms. Gross, on behalf of the
13 plaintiffs.

14 MS. GROSS: Yes.

15 Hi, everybody. I'm sure this is not what
16 you all pictured your day to be like when you
17 woke up this morning, but we just want to thank
18 you guys for being here today.

19 THE COURT: Ms. Gross?

20 MS. GROSS: Yes.

21 THE COURT: Get that microphone and get it
22 up where you can be heard.

23 MS. GROSS: In my face. All right.

24 THE COURT: Now speak one more time before
25 you begin your opening argument.

1 MS. GROSS: Is this better?

2 THE COURT: I don't think it's quite as
3 broadcast as it could be.

4 MS. GROSS: It's really going to be in my
5 face. Is this better?

6 THE COURT: Yes. The closer it gets to
7 you, the better. Keep your voice up. You may
8 proceed.

9 - - -

10 PLAINTIFFS' OPENING STATEMENT

11 - - -

12 MS. GROSS: So I get to tell you all why
13 you're here today, and that story begins in
14 1886 -- there we go. It begins in 1886 when
15 Johnson & Johnson first came into existence.
16 And shortly thereafter, Johnson & Johnson
17 started selling its very first product, which
18 was baby powder.

19 Johnson & Johnson has a credo. They call
20 it their moral code. And it's what they
21 project out into the world about what they
22 think is important. And what Johnson & Johnson
23 tells the world in their credo is that their
24 first responsibility is to the patients, and
25 then it's to mothers and fathers.

1 A few short years after Johnson & Johnson
2 started selling its baby powder, you could go
3 down to the library and see what was being
4 written down in mineralogy textbooks that talc
5 frequently contains asbestos. So now I think
6 is probably a good time for us to stop in our
7 story and talk about what on earth asbestos is
8 and what it's got to do with talc.

9 So this photo right here is an asbestos
10 mine. Asbestos at its core and its simplest is
11 a rock. If you leave it in the ground, you
12 don't mess with it, it's fine. But what
13 happens is -- what happened a long time ago is
14 companies decided that it was really useful.
15 They actually used to call it magic mineral.
16 It was acid-resistant; it was heat-resistant.
17 It was resistant -- indestructible. So what
18 would happen would be they would mine it out
19 and intentionally add it into products. And it
20 was also really cheap. They actually used to
21 call it the magic mineral because of how useful
22 it was and how inexpensive it was.

23 But the real problem with asbestos is that
24 it kills you. When you breathe asbestos, it
25 gives you a super-rare form of cancer called

1 mesothelioma. And mesothelioma is not one of
2 those cancers that we all may have heard of
3 that you can slow down with chemotherapy, you
4 can really treat it. It is a cancer that
5 essentially crushes your lung from the outside
6 in. It is incurable and it is always fatal.

7 There's six types of asbestos. Three
8 commercial types of asbestos, which means you
9 can buy it and intentionally add it into a
10 product. Three noncommercial, which means they
11 grow naturally. The four you have to worry
12 about for the length of this trial are the
13 three types of noncommercial, which are
14 tremolite, anthophyllite, actinolite, and
15 chrysotile as well. I can barely spell
16 anthophyllite; so I see some faces. I promise
17 you guys will feel better about this as we get
18 going.

19 You guys are going to learn as well a
20 whole bunch of things that makes asbestos
21 really dangerous and very scary. The first
22 thing is that you get this mesothelioma when
23 you inhale it, when you inhale these asbestos
24 fibers that have become respirable. These
25 photos up here are actually photos of asbestos

1 fibers that have been taken from talc, from a
2 talc product.

3 And the second thing you all are going to
4 learn is asbestos is really small. It's
5 microscopic. You can't see it. It's
6 completely aerodynamic. I show you this
7 semi-cheesy photo just to show you that point.
8 On the left side where we have the bigger
9 circle, you see two to three grains of rice.
10 In the bottom you see five or six human hairs
11 draped across a penny. But in that tiny little
12 circle, there's actually more than 20,000
13 asbestos fibers, and it's because it is so
14 microscopic that you can't see the fibers.

15 The next thing you guys are going to learn
16 about what makes asbestos so dangerous is it
17 has -- does not have what we call onion
18 properties. And what that means is, when y'all
19 are cutting or cooking and cut onions and it
20 makes your eyes water, or you're in a building
21 or a house and there's a gas leak and you can
22 smell it, asbestos has no natural warning signs
23 to let your body know that you're breathing it.
24 There's some people that actually call it
25 throughout history the silent stalker, because

1 you have no way that you're breathing these
2 tiny, microscopic, aerodynamic particles.

3 The other thing, next thing you're going
4 to learn about asbestos is this concept called
5 the latency period. And the way that I sort of
6 started wrapping my head around it when I
7 started doing this is when you're in a crowded
8 elevator or out in public and someone sneezes
9 or coughs around you and they don't cover their
10 mouth, and you think, "I'm going to get sick in
11 a couple of days," the couple of days in
12 between is the latency period. You don't get
13 sick right away. With mesothelioma, from the
14 time you start breathing asbestos until your
15 lung looks like that, the difference is it's
16 decades. It's anywhere from 10 to 80 years
17 from the first time you start breathing
18 asbestos is when your lung is going to look
19 like that.

20 The next concept you guys are going to
21 learn about is something called individual
22 susceptibility. And why it's important is
23 because it actually doesn't take that much
24 asbestos to give people cancer, to give people
25 mesothelioma. And what this means is I could

1 breathe the same amount of asbestos as
2 Mr. Adams or Ms. McVey, and I could get sick
3 and they could be fine. You just have no way
4 of knowing that I may be more individually
5 susceptible to getting the mesothelioma after
6 breathing asbestos.

7 And the other thing about it is once you
8 get asbestos into your home, like in a powder
9 product, it's virtually impossible to get it
10 out. It gets in your carpet. It gets in your
11 furniture. You try to vacuum it up, and
12 because the fibers are so small, it kind of
13 floats in the air and settles and it's the
14 cycle over and over again.

15 On the left is a healthy human lung. That
16 sort of shiny layer that you all see is called
17 the pleura. That is where the mesothelioma
18 cancer is. It's not in the lung, it's the
19 lining around the lung. The purpose of the
20 pleura is when we breathe, our lungs expand,
21 they expand out into your ribcage, and that
22 moist pleura lining is what protects your lung
23 from rubbing up against your ribcage.

24 And what happens when you get mesothelioma
25 is that shiny pleura, the layer, that's where

1 the tumor starts and it forms -- if you all see
2 on the left side, it looks like an orange rind.
3 It's hard. You can't really expand your lungs
4 fully to catch your breath because it's that
5 orange rind that's pushing in, crushing your
6 lung from the outside in. And if you can catch
7 your breath, it's just this hard rind rubbing
8 up against all the nerves in your chest cavity
9 and your ribcage. Some people who have
10 mesothelioma actually have a procedure to dull
11 the nerves because of how painful it is.

12 Now is probably the time where some of you
13 all are wondering what's this got to do with
14 talc. Talc, just like asbestos, is a rock. So
15 this is a talc mine. And what happens is talc
16 occurs naturally in the ground just like a
17 rock. There's all kinds of other minerals that
18 can be in it, but it's like a rock. It grows
19 along asbestos. What happens is they blast it
20 out of the ground. And then these big rocks
21 get soft and it gets pulverized down into a
22 powder that then ends up in cosmetic products
23 that we use in our house.

24 And because they are rocks -- I'm just
25 showing all this so you can see they look the

1 same unless you look in the middle. If you see
2 the fiber-looking things on the right side,
3 that's the asbestos.

4 And the way -- the best way to think about
5 this is when you have a steak and you have a
6 vein of fat that run through the steak, and you
7 can never really get the vein of fat out of the
8 steak. It's the same concept with asbestos and
9 talc, except the asbestos is the veins of fat
10 that you can't get it out. So you get the
11 talc; it's blasted out of the ground; it's
12 ground down and pulverized into this very fine
13 powder to go into cosmetic products.

14 Because asbestos and talc grow next to one
15 another hand in hand, the asbestos just gets
16 ground down into the talc and you can never
17 really get it out.

18 And so the next natural question is
19 probably, well, what did they know? Right?
20 Did Johnson & Johnson know this? Did they know
21 that there can be asbestos in talc? Did they
22 know asbestos makes people sick? Did they know
23 that there was asbestos in their talc? And the
24 answer is unequivocally, by 1958, you all will
25 learn, they did. The answer to all those

1 questions is yes. And we know this because
2 they started writing it down. And I'll just
3 tell you guys, when you see quotes like this,
4 that means it comes from a document that was
5 given to us by Johnson & Johnson. They gave us
6 these documents.

7 So in 1958, Johnson & Johnson in their own
8 internal documents starts writing down the
9 medical department has knowledge that asbestos
10 was associated with cancer. And in that same
11 year, Johnson & Johnson goes and hires this
12 lab, Battelle Memorial. And what Battelle
13 Memorial does is they test Johnson & Johnson's
14 Italian talc. So the talc that went into
15 Johnson & Johnson's baby powder and other
16 products in 1957 came from Italy.

17 So Battelle goes and tests the Italian
18 talc and tells Johnson & Johnson there's
19 fibrous amphibole established in tremolite.
20 Tremolite is one of those type asbestos that we
21 just talked about. And then here is the
22 definition of what asbestos is to make it
23 simple for you all. "Asbestos is defined to be
24 the fibrous serpentine, chrysotile and the
25 fibrous forms of the amphibole group as

1 represented by amosite, anthophyllite,
2 crocidolite, tremolite and actinolite."

3 For anybody that is wondering where I got
4 this, did I just Google it, some whacky
5 definition off the Internet, this is actually
6 Johnson & Johnson's definition. They wrote it
7 down. You'll see it. This is how
8 Johnson & Johnson defines what asbestos is.

9 After Battelle finds fibrous tremolite in
10 their Italian talc in 1958, Johnson & Johnson
11 keeps selling their baby powder year after year
12 until we get to 1966. And what happens in 1966
13 is there is an employee of Johnson & Johnson, a
14 doctor who started asking some questions. Why
15 are we selling this baby powder with talc in
16 it? It has no medicinal value. It's a foreign
17 body. There's been at least three deaths of
18 infants who have asphyxiated. They actually
19 choked on it from inhaling the baby powder.
20 What Johnson & Johnson writes down in response
21 is "Baby powder represents the cornerstone of
22 our baby products franchise." Our entire
23 reputation is built on baby powder and also "we
24 have a large investment in a talc mine."

25 And so in 1967, as they're continuing to

1 sell their baby powder, Johnson switches their
2 talc from Italian to Vermont, which is where
3 they bought a talc mine, in Vermont, and they
4 immediately test the Vermont talc. And they
5 find tremolite twice. They just keep selling
6 it.

7 In 1969, they write down "medical
8 literature has made reference to potential
9 hazards of talcs containing tremolite. Severe
10 objections to that mineral in talcum powders."
11 And then just a month or so later, they write
12 down again, "we've received inquiries
13 expressing concern over the possibility of
14 adverse effects on the lungs of babies or
15 mothers who inhale our talc." Mothers reaching
16 out to Johnson & Johnson worried about their
17 babies breathing this talc in the baby powder.
18 They continue that there would be "a furor -- a
19 furor is a public outrage or outcry -- there
20 would be a furor if it became known that our
21 talc contained any significant amount of
22 tremolite. The law department should be
23 consulted." Not health and safety. The law
24 department should be consulted. And then they
25 keep selling it.

1 In 1971, you all will see the director of
2 science information for Johnson & Johnson is
3 doing a lot of research internally, a lot of
4 it. And he's looking into things like
5 "asbestos and lungs, talc, mesothelioma and
6 asbestos exposure, relation between exposure to
7 asbestos and mesothelioma, mortality among talc
8 miners and millers, malignant pleural
9 mesothelioma and asbestos exposure." This is
10 all what their director of science information
11 is researching and circulating within the
12 company in 1971.

13 And in the same year their ads to the
14 public look like this. Johnson & Johnson is
15 advertising to the public that very same year
16 that its baby powder is so pure, it feels like
17 love. Later that year they hire another --
18 another lab, Colorado School of Mines, to test
19 their baby powder. Colorado School of Mines
20 writes down and tells Johnson & Johnson you've
21 got needles of tremolite in your baby powder.

22 That same year Dr. Langer, a doctor from
23 Mount Sinai, goes and buys a bottle of baby
24 powder off the shelf to test it. He writes
25 down, there's chrysotile fibers in Johnson's

1 Baby Powder.

2 Again, in 1971, Johnson & Johnson itself
3 writes down in their own documents "the talc in
4 Johnson's Baby Powder is from Vermont where the
5 ore consists of platy talc with fibrous
6 tremolite and actinolite." Just to sum it up,
7 because that's been a lot already, by 1971 you
8 have Battelle who found the fibrous tremolite
9 in 1958. You have Dr. Langer who bought the
10 bottle off the shelf and tested it and found
11 chrysotile asbestos. Colorado School of Mines
12 wrote down there's "needles of tremolite" in
13 your baby powder. And then Johnson & Johnson
14 wrote down there's "fibrous tremolite and
15 actinolite" in your talc.

16 And so what Johnson & Johnson does that
17 same year in 1971, they go to the FDA. They
18 tell the FDA, Johnson's Baby Powder contains no
19 asbestos minerals.

20 You guys will hear a lot about Dr. Pooley,
21 I'm sure, through this trial. But even
22 Dr. Pooley tests its talc, tests Johnson &
23 Johnson's talc in 1971. Dr. Pooley found one
24 small chrysotile fiber. And I'm showing you
25 guys this ad to tell you that at the same time

1 Johnson & Johnson sold baby powder, it sold
2 another talc product called Shower to Shower.
3 What you all need to know about it is it
4 contained the same talc that was inside the
5 baby powder, the Vermont talc. That's really
6 what you guys need to know about that.

7 Johnson & Johnson that same year, still in
8 1971, the testing continues, goes and hires
9 McCrone, another lab, to test its Shower to
10 Shower with its same Vermont talc. And McCrone
11 in a report to Johnson and Johnson says, in
12 your Shower to Shower there's chrysotile.

13 In 1972, the next year, the FDA goes and
14 hires Dr. Lewin from NYU to test Shower to
15 Shower. Dr. Lewin finds chrysotile. After
16 that Johnson & Johnson hires another lab,
17 Sperry Rand. And Sperry Rand double-checked
18 the sample that Dr. Lewin had just tested and
19 found chrysotile. Sperry Rand said there are
20 asbestos fibers. They're chrysotile.

21 So again, just to sum it up, there's a lot
22 of testing we are talking about. In 1972,
23 Dr. Langer, the year prior, found chrysotile
24 asbestos in the baby powder. Dr. Pooley found
25 small chrysotile fiber; McCrone, chrysotile

1 asbestos; Dr. Lewin, chrysotile asbestos; and
2 Sperry Rand, when they double-checked
3 Dr. Lewin, chrysotile asbestos.

4 And what happens is Johnson & Johnson goes
5 to the FDA and talks about Sperry Rand, just
6 Sperry Rand that same year, and tells the
7 FDA -- they convince the FDA that Sperry Rand's
8 testing results are completely at variance from
9 the information we have despite all that.

10 All the while Johnson & Johnson reaches
11 out to a doctor in Minnesota called
12 Dr. Hutchinson. They send him two samples of
13 Shower to Shower. They send him more of the
14 Dr. Lewin sample. They sent them to
15 Dr. Hutchinson. He tests them. He says the
16 original Lewin material had tested, he found
17 chrysotile asbestos eight times. It's
18 unmistakable. And then he takes photos of the
19 asbestos that he found in the talc powder. And
20 then continues and writes down "chrysotile
21 asbestos does exist in the specimens of Shower
22 to Shower and Lewin supplied to this
23 laboratory."

24 So then again Johnson & Johnson goes back
25 to the FDA and they tell the FDA -- they don't

1 just bury Dr. Hutchinson's results, they go
2 back to the FDA and tell the FDA, the Lewin
3 sample Dr. Hutchinson tested, there's no
4 chrysotile there, no chrysotile was detected,
5 even though he took those photos.

6 So another summary slide. All of these
7 doctors, all of these labs at this point in
8 time, by 1972, have found chrysotile asbestos
9 in Johnson & Johnson's talc over and over
10 again. But what Johnson & Johnson does is they
11 take Dr. Lewin's testing, the guy that kind of
12 started all this in 1972, and then they
13 convince the FDA it's not reliable; what
14 Dr. Lewin found should not be trusted; it's not
15 reliable. I don't expect that he will allow
16 the release of Dr. Lewin's report.

17 And then they beg the FDA, please don't
18 release it. Don't tell anybody. Hold
19 Dr. Lewin's findings in strict confidence.

20 All the while Johnson & Johnson is
21 advertising not just to even mothers with
22 babies, they're advertising actually to men, as
23 well. I had to Google who this was, but it
24 turns out he was a pretty famous baseball
25 player that hit a lot of home runs. And

1 they're using him to advertise their baby
2 powder. "Mama taught me it takes more than a
3 towel to really get dry."

4 Later that same year, Johnson & Johnson
5 hires Dr. Ian Stewart to do some testing on its
6 baby powder and the Lewin samples again.
7 Dr. Stewart writes down, "both samples contain
8 tremolite, tremolite content approximately
9 0.5 percent and 0.2 to 0.3 percent," which I
10 know looks like a small number, but because of
11 how microscopically small the asbestos fibers
12 are, what you guys are going to learn is that
13 represents millions upon millions of asbestos
14 fibers.

15 And then Dr. Stewart continues. He writes
16 down "a few tremolite rods as well at a level
17 less than 0.5 percent, definitely significant
18 quantities of tremolite." And then what
19 Johnson & Johnson does -- you all will see the
20 document -- they delete this last sentence.
21 And then they write across the front in big
22 letters, "Do not use this report." And then
23 they bury it.

24 Again, later that same year, 1972 -- it's
25 a busy year -- Johnson & Johnson writes this

1 document that they call "Antagonistic
2 Personalities in the Talc Story in the USA."
3 What it is is a list of people who are talking
4 about asbestos being in talc. They write down
5 Dr. Selikoff, who we will learn, as well, was
6 sort of the forefather of asbestos disease
7 research. They write down Dr. Selikoff is an
8 antagonistic personality because he showed
9 people suffering from cancer related to
10 asbestos.

11 They also write down Dr. Langer, who
12 identified chrysotile in 1971. They write down
13 Dr. Lewin because he insists on claiming
14 there's asbestos in the talc. They also just
15 write the FDA. FDA is an antagonistic
16 personality in 1972.

17 The next year, 1973, Johnson & Johnson
18 writes down itself in its own documents, "Our
19 baby powder contains tremolite or actinolite,
20 and these might be classified as asbestos." So
21 the next year, in 1974, the FDA decides we're
22 going to test this. So the FDA tests again the
23 Dr. Lewin sample. They say, hey,
24 Johnson & Johnson, we found 107 fibers of
25 tremolite and actinolite per milligram. And so

1 Johnson & Johnson's response is something I
2 truly hope that long after this trial you all
3 remember, if there's anything. They convince
4 the FDA substantial asbestos can be allowed
5 safely in a baby powder.

6 Later that same year they hire McCrone
7 once again to test their Vermont talc. McCrone
8 finds chrysotile asbestos 15 times, fibrous
9 tremolite four times. Again that same year
10 they hire Dartmouth to test their Vermont talc.
11 Dartmouth says there's "fibrous anthophyllite,
12 extremely low chrysotile levels present."

13 And you guys might be wondering, why
14 didn't they just use something else? If talc
15 was so bad, was there something else they could
16 have used in their powder? And there was.
17 You'll see in Johnson & Johnson's own
18 documents, they knew "people were selling
19 cornstarch for baby powder throughout the
20 entire 1900s." Why wouldn't they just use
21 that? They tell us why. "We should avoid
22 changes to the product that would increase our
23 vulnerability to criticism or suspicion." They
24 were afraid they'd get caught.

25 So the next year, in 1975, the testing

1 continues. Johnson & Johnson once again hires
2 McCrone to test its Vermont talc. And McCrone
3 tells them "29 talc samples from your ore body
4 confirmed asbestos 14 times."

5 Six months later, in November of that same
6 year, Johnson & Johnson again hires McCrone to
7 test its Vermont talc. The samples we have,
8 there's fibers of asbestos rather high. So a
9 few months later, in early 1976,
10 Johnson & Johnson hires a consulting company to
11 write a 50-page or so monograph to give to
12 hospitals due to the concern in the public eye
13 about asbestos being in talc. And this
14 document is called "Talc, Professional
15 Information for Physicians and Nurses." And
16 what Johnson & Johnson tells hospitals, doctors
17 and nurses in 1976, just a few months after
18 McCrone found fibrous tremolite in their talc
19 again, "Johnson's Baby Powder contains no
20 detectable asbestos."

21 The following year, Johnson & Johnson
22 hires a new lab in 1977. This time it's EMV
23 Associates. EMV tests their talc, tells
24 Johnson & Johnson in nine talc samples,
25 "fibrous tremolite found, anthophyllite,

1 possible fibrous shown."

2 And so what does Johnson & Johnson do?
3 Nothing except they keep selling it year after
4 year after year, all the way through the rest
5 of the '70s, all of the 1980s, until we get to
6 1991.

7 They're still selling it, but what happens
8 in 1991 is they go to one of their consultants,
9 Dr. Blount, who worked for Johnson & Johnson at
10 the time, and she does a study on a bunch of
11 talc samples. And you'll see through documents
12 she tests sample I and finds tremolite
13 asbestos. And when you piece it together,
14 sample I is Johnson & Johnson's Vermont talc.
15 And they keep selling it year after year.

16 And in 1997, something interesting
17 happens. Johnson & Johnson writes down they're
18 starting to look at the bodies of women who
19 have mesothelioma, this super-rare cancer. And
20 they say in several mesothelioma patients, both
21 talc fibers and tremolite were detected. The
22 majority of asbestos bodies from women have
23 tremolite or anthophyllite, the kind of
24 asbestos you can't buy. These are known
25 contaminants of talc.

1 They go on to say "This data suggests that
2 rare cases of mesothelioma among women with no
3 other identifiable exposure might be related to
4 cosmetic talc." So these women with
5 mesothelioma that have these noncommercially
6 available asbestos in their bodies have no
7 other asbestos exposure except to cosmetic
8 talc, and they wrote it down in 1997.

9 All that while that same year they are
10 training their people about the image
11 Johnson & Johnson has and they're explaining to
12 them how important this mother-infant bond is.
13 The key competitive advantage is the
14 mother-baby company. That's what we portray to
15 the world. Their ads are consistent with that.
16 This is the one we looked at earlier, "So pure
17 it's love." The one on the left is actually
18 from 1958, the year that Battelle found
19 tremolite and wrote it down. And you'll see
20 when you get your hands on the ad, it's talking
21 about how fragile babies are.

22 They also advertise to fathers and sons,
23 the whole family, like son like father. 1998,
24 Johnson & Johnson goes back to Dr. Blount who
25 is no longer working for them at the time.

1 Tries to get her to do some work for them, and
2 she says, "I guess, but your Vermont talc has
3 asbestos in it." And they keep selling it well
4 into the 2000s.

5 In 2003, Johnson & Johnson switches from
6 using the talc from its Vermont mine to one
7 from China. In 2004, this news station in
8 Sacramento, California, went and bought a
9 bottle of Johnson's Baby Powder off the shelf
10 and had a lab test it. The lab finds asbestos.
11 You guys will see, they tell Johnson & Johnson,
12 "Hey, we bought a bottle of your baby powder
13 off the shelf and found asbestos in it." And
14 Johnson & Johnson buries it and tells no one.
15 They keep selling it.

16 Again, 2004, again, more internal
17 documents educating their employees. Baby
18 powder, Johnson & Johnson's baby powder is the
19 primary link to the positive Johnson & Johnson
20 name and whole line. They use words to
21 describe how important baby powder is to their
22 image as a company. They use words like
23 sacred, sacred cow, golden egg, our equity, our
24 flagship, our foundation, the cornerstone of
25 our company is this baby powder, and they keep

1 selling it.

2 In 2013, Johnson & Johnson is writing a
3 draft press release article for their website,
4 and you guys will see "Our talc-based consumer
5 products have always been asbestos-free."
6 Someone goes in, they cross out "have always
7 been" and Johnson & Johnson writes, "We cannot
8 say 'always.' We cannot say that our
9 talc-based consumer products have always been
10 asbestos-free." And they keep selling it year
11 after year.

12 In 2016, Johnson & Johnson again hires a
13 new lab. This time it's R.J. Lee, who you guys
14 will learn sort of becomes their go-to lab.
15 They have R.J. Lee test their talc. R.J. Lee
16 finds multiple chrysotile particles observed.
17 Johnson & Johnson says, "Test it again."

18 They test it again. A re-prepared sample
19 is analyzed. This time R.J. Lee finds no
20 chrysotile, no asbestos. And Johnson & Johnson
21 doesn't tell anybody about the first time they
22 found all the chrysotile, and they keep selling
23 it.

24 2017 is a big year. You guys will hear a
25 lot about this. There is a massive explosion

1 of information in the public because 2017 is
2 the first year that Johnson & Johnson was
3 forced to turn over all these documents that I
4 just talked to you all about that you will see
5 throughout this trial. No one had seen them
6 before, before 2017. They keep selling it.

7 And after this explosion of information,
8 the FDA decides we're going to test this baby
9 powder again. They go and buy a bottle of
10 Johnson's Baby Powder. They test it. They
11 find chrysotile over and over again. They take
12 photos of the asbestos, and then they call it
13 poisonous.

14 And so what Johnson & Johnson does next is
15 they take this bottle of baby powder that the
16 FDA has said is poison and they fly it on a
17 private plane to R.J. Lee, their go-to lab.
18 And R.J. Lee tests it, the same bottle. They
19 find chrysotile asbestos. They take photos of
20 it. They find it 27 times.

21 And then that same year Johnson & Johnson
22 turns around and tells the American public
23 asbestos was not present in the bottle the
24 FDA's contracted lab tested. And they keep
25 selling baby powder for another year, through

1 2020, in the United States and Canada.

2 And what happens in 2021, there's a myriad
3 of Johnson & Johnson companies, but for
4 purposes of this trial, the only ones you all
5 need to worry about are Johnson & Johnson and
6 Kenvue. They keep selling the baby powder,
7 their talc, worldwide for another few years
8 until we get to 2023. And then they decide "we
9 should stop." And so we brought this case to
10 you guys for three reasons because of that.

11 The first is Johnson & Johnson knew,
12 right? They knew there was asbestos in their
13 talc, and they sold it anyway; that the talc
14 that had asbestos in it was an unreasonably
15 dangerous product to sell, and that it hurt
16 somebody. And that somebody is named Michael
17 Perry.

18 In 1969, when Johnson & Johnson is writing
19 down there would be a furor, a public outcry if
20 it became known that our talc formulations
21 contained any significant amount of tremolite.
22 Michael is born on December 20th, 1969.

23 In 1974, when Johnson & Johnson tells the
24 FDA that a substantial amount of asbestos can
25 be allowed safely in a baby powder, Michael is

1 having his first memory. He is about five.
2 He's having his first memory of life ever. And
3 one of those memories is using Johnson's Baby
4 Powder all over his body because he's allergic
5 to deodorant.

6 In 1980, when Johnson & Johnson is
7 advertising to the public, targeting men, like
8 son like father, you'll learn that Michael was
9 playing hockey and he would take bottles of
10 Johnson's Baby Powder and dump it in his hockey
11 gear to keep it from smelling really bad.

12 And so like Judge Toal instructed you,
13 after me, the lawyers for Johnson & Johnson are
14 going to come talk to you all. I think they
15 are going to talk to you about a few things
16 most probably what -- I will spend a few
17 moments addressing them now.

18 The first thing is they're going to tell
19 you it was not there; there was no asbestos in
20 our baby powder. But for that to be correct,
21 all these doctors and labs have to have gotten
22 it wrong. All except R.J. Lee. And what you
23 all will learn about R.J. Lee,
24 Johnson & Johnson's go-to lab, is that R.J. Lee
25 is not a stranger to talc litigation. They

1 were first hired by a company named
2 R.T. Vanderbilt who owned a talc mine in
3 upstate New York. And what they did with this
4 Vanderbilt talc mine is R.J. Lee would go in
5 and they would say, this tremolite isn't really
6 asbestos. The anthophyllite isn't really
7 asbestos.

8 All those documents that the plaintiffs'
9 lawyers showed you, they're not saying what
10 they really say. They're about something else.
11 And it's exactly what they're going to do here
12 today.

13 The problem for R.J. Lee is that multiple
14 people, over a dozen, died of mesothelioma in
15 that R.T. Vanderbilt talc mine, and a couple
16 people actually died in Johnson & Johnson's
17 talc mine, too.

18 The next thing you're going to hear from
19 them is, "Well, we tested. We tested our
20 product. We tested our talc." Well, this is
21 the best photo I could think of to illustrate
22 this point. We obviously know there's billions
23 of people who live on earth. We can't see
24 them. We can't see them looking at this photo,
25 but we know they're there. The tool that

1 Johnson & Johnson would use for a period of
2 time is called XRD, x-ray diffraction. And it
3 was not -- you couldn't see it. You couldn't
4 see the asbestos that was there.

5 And then you might hear from them, we used
6 a strong tool. We used this big, giant
7 microscope. You guys will see it at some
8 point. To use that microscope, it's called
9 TEM, and it can zoom in close enough to
10 literally look for a needle in a haystack,
11 which is finding the asbestos in the talc.
12 When you use the TEM and zoom in that close,
13 the talc kind of looks like this. It's platy.
14 It's thin and literally they look like plates.
15 And to look for the asbestos needles, it takes
16 time. It's a time-consuming process. It's
17 work looking for it. But that's the only way
18 to truly find the needle in the haystack as it
19 were.

20 And then Johnson & Johnson is going to
21 tell you, not only did we use the TEM, but we
22 designed our own testing method for it. Their
23 testing method is called TM7024. And I want to
24 talk to y'all about what this testing method
25 actually means. So what TM74 says is the

1 detection of five or more asbestiform minerals
2 of one variety constitutes a quantifiable level
3 of detection.

4 In English that means this: I can find
5 four fibers of chrysotile asbestos in a bottle
6 of baby powder and say it's not there. It
7 means I can find four fibers of chrysotile
8 asbestos and four fibers of tremolite in one
9 bottle of baby powder and say it's not there,
10 because it's not five or more of one kind.

11 What it means is I could find all of this,
12 I could find four fibers of chrysotile, four
13 fibers of tremolite, four fibers of
14 anthophyllite and four fibers of actinolite, 16
15 fibers of asbestos in one bottle of baby powder
16 and I could say it's not there. That's what
17 TM7024 allows for.

18 And the thing with using TEM is you take
19 photos. These are photos that you take when
20 you look under that microscope of the talc for
21 the asbestos needles. And it's pretty hard to
22 rig a test if you take photos because it's
23 proof. And what you all will learn is in over
24 90 -- 99 percent of the photos with the TEM
25 that Johnson took over time with all the

1 testing they did, the photos are gone with no
2 explanation, no trace. They're just gone.

3 But it actually gets worse because there's
4 this testing method called the concentration
5 method that's been around for decades. You'll
6 see Johnson & Johnson has known about it since
7 1971. And the way the concentration method
8 works is asbestos and talc weigh different
9 amounts. And so you take the talc sample you
10 want to look at and you put it in one of these
11 test tube things, and you put it in the
12 centrifuge like you have at the doctor's office
13 when you get your blood checked, and they spin
14 it around really fast. Once it spins around,
15 the heavier asbestos needles sink and
16 everything else floats. Then you take the TEM
17 and you look at what is at the bottom.

18 So why wouldn't Johnson & Johnson just use
19 that method? They've known about it since
20 1971. Why wouldn't they use that method to
21 find a needle in the haystack? They tell us
22 why. "We deliberately have not included a
23 concentration technique as we felt it would not
24 be in worldwide company interests to do this."

25 And then I think the next thing you're

1 going to hear from the Johnson & Johnson
2 lawyers is the justification or defense of it
3 wasn't fair. There was no asbestos in our
4 powder is going to sort of morph into something
5 else, more of a defense, more of an excuse.
6 And what it's going to become is "it was there,
7 but."

8 And what that means is a couple of things.
9 The first is this: You guys will see document
10 after document talking about the millions of
11 dollars Johnson & Johnson spent trying to get
12 the asbestos out of their talc. They tried to
13 wash the asbestos out of the talc. That didn't
14 work. They tried to burn the asbestos out of
15 the talc. That didn't work. They tried to
16 float it out of the talc. That didn't work
17 either. And so they knew that they couldn't
18 get asbestos out of their talc. They wrote it
19 down: Asbestiform particles cannot be
20 processed out of the talc.

21 And then the next thing they're going to
22 tell you about, okay, "There's lab
23 contamination. It's the lab that did it." But
24 what they won't tell you is that professional
25 labs, professional scientific labs actually

1 have failsafe procedures to keep this from
2 happening. And the way they work is this: So
3 you take the talc sample you want to look at.
4 You put it in the samples petri dish, like we
5 did in high school, and you put it under this
6 hood. This one looks like a cooking hood, but
7 in real life it's completely enclosed. And the
8 hood sucks all of the air out, negative air, so
9 there's no air in there. And then these labs,
10 they take a blank and they put it on either
11 side, an empty dish on either side of the talc
12 sample that you all are looking at. The reason
13 is if there's asbestos floating around in the
14 lab and it somehow makes its way past this
15 negative air pressure hood into the petri
16 dishes, if you find it in the sample and the
17 two blanks, then it might have been lab
18 contamination. But if you find it in just the
19 sample, you find asbestos in just the sample,
20 you know the lab is not contaminated because
21 there's no way the asbestos would know to just
22 float into the sample dish.

23 So why would Johnson & Johnson tell you
24 all that there's lab contamination in some of
25 their tests? You guys are going to learn that

1 they actually kept it, a few, some samples,
2 some results of the test they did, and the
3 blanks are blank. There's nothing there. But
4 y'all will also learn that a lot of the tests
5 that they did, the blanks data is gone just
6 like the photos, without a trace or
7 explanation.

8 Then you guys are going to hear Michael
9 had a lot of other exposures to asbestos. He
10 did. We know he used Clubman talc sitting here
11 today. He did about 70 or so brake changes
12 with his father in the early 1980s. But
13 something else you all will learn throughout
14 this trial is mesothelioma is actually a
15 cumulative disease. The expert that we're
16 going to bring and you will meet as soon as we
17 are both done talking to you all is a doctor
18 named Dr. Brody. He's published at least over
19 100 papers on this, on asbestos and disease.
20 And what he's going to explain to you guys is
21 that mesothelioma is a dose-responsive disease.
22 And what that means is every exposure to
23 asbestos counts. You can't parse out one
24 exposure to asbestos and say that's what did
25 it, that's what gave them cancer, any more than

1 y'all could parse out the cigarette that gave
2 someone lung cancer. It's the same concept.

3 But what you guys are going to hear is by
4 far and away Michael's biggest exposure to
5 asbestos was to Johnson & Johnson's baby
6 powder. He used it every day, multiple times a
7 day for about five decades because he was
8 allergic to deodorant.

9 And then the final thing you guys are
10 going to hear from the defendants, I think, is
11 this idea of, well, where is the epidemic? If
12 this baby powder had asbestos in it, where is
13 all the sick people? Where is all the people
14 with mesothelioma? There already has been one.
15 So for six to seven -- for about 50 or so
16 years, 6- to 700 women have died of
17 mesothelioma. And even though it's a really
18 rare cancer, you're going to hear that
19 Johnson & Johnson's doctors could not find any
20 relationship to asbestos exposure.

21 But there's actually two different kinds
22 of mesothelioma you can get. You can get it in
23 your pleura, pleural mesothelioma, when you
24 inhale it, but you can also get it in your
25 stomach lining. It's called peritoneal

1 mesothelioma. And the thing about it when you
2 get it in your stomach is you typically have to
3 have a heavier exposure to asbestos.

4 And so a lot of these women happen to be
5 getting peritoneal, the kind in your stomach.
6 And Johnson & Johnson doctors will come in,
7 they will look and they will try to figure out,
8 was she exposed to asbestos from her husband,
9 from her son, from a brother; did she somehow
10 indirectly or directly work with asbestos that
11 exposed her to it that would explain the
12 stomach cancer?

13 And there just wasn't an explanation. So
14 what happens is the doctors come in and they
15 say, "Things happen. Bodies just failed them.
16 Oh, well."

17 And so we started asking questions like,
18 well, okay. What's the difference between men
19 and women? Right? Are our bodies somehow
20 immune to asbestos in a different way than men?
21 Do our bodies truly just fail us? What's going
22 on? What's the biological difference between
23 men and women that would explain this? The
24 answer really is there, isn't it?

25 But here is what we do know: Remember the

1 slide, the 2017 slide, the massive explosion of
2 information in public where for the first time
3 Johnson & Johnson was forced to turn over all
4 these documents. And then for the first time
5 everybody saw that this exposure to asbestos
6 that women typically have more because we use
7 the cosmetic products more that have talc in
8 them. And we realized there is a biological
9 difference, because women don't just breathe
10 it. They don't just breathe the asbestos.
11 They don't just breathe the talc. They use it
12 in their underwear. And so there is a direct
13 pathway from vaginal dusting into your stomach
14 lining, particularly if you don't have your
15 tubes tied.

16 And so then we had an explanation for the
17 first time of why all of these women with no
18 identifiable asbestos exposure were getting
19 this incredibly rare cancer that required this
20 higher exposure to asbestos for decades. And
21 it's all directly linked with the documents
22 that nobody knew existed, nobody knew to ask,
23 were you a talc user?

24 And the thing is it doesn't discriminate.
25 If you use the talc in that exact same way, if

1 you use it all over your body for decades,
2 multiple times a day, you're going to get the
3 same disease just like Michael.

4 A few things about Michael before I sit
5 down. You guys will hear from him and the
6 person who loves him most in the world, his
7 husband Lonnie. And I really do want you guys
8 to hear their story directly from them. But
9 here is what I will tell you about him in the
10 meantime. Michael is the kind of person who --
11 I always feel kind of cheesy saying it, but
12 he's that kind of person that lives life to the
13 fullest. He makes it happen. His dream in
14 high school was to chase sunsets for a living
15 in the Keys. He graduated from high school.
16 He made it happen. He moved to the Florida
17 Keys and he worked there on his boat for a
18 couple years chasing sunsets. Michael is the
19 kind of guy who loves to laugh and is happiest
20 when he's making those around him happy.
21 Michael is the kind of guy who met the love of
22 his life and, instead of getting scared, ran
23 straight towards it.

24 And then you guys are going to also learn
25 that in January of 2023, Michael got COVID. He

1 had a little bit of cough. The COVID went
2 away, but the cough remained, except the cough
3 got a little bit worse week after week. And
4 then after a few weeks, he started having
5 pretty bad night sweats. And so his husband at
6 a certain point in time said, "Enough. We're
7 going to the doctor."

8 So Michael went to the doctor, had some
9 labs done. The doctor tells him "You've got to
10 get some more testing done right away."

11 And so what you all will hear and learn is
12 that after a battery of tests, Michael, at the
13 age of 53, was told that he had mesothelioma,
14 the kind of cancer that crushes your lung from
15 the outside in.

16 And so when we're all done here, we don't
17 have to hear from any lawyers anymore. And you
18 all have heard all the evidence, got your hands
19 on the documents. The judge has instructed you
20 on what the law is. We're going to ask you to
21 hold this company to their word, their word,
22 their public credo, "Our first responsibility
23 is to the patients, mothers and fathers,"
24 because the thing about asbestos is we talked a
25 lot today about how it's horrible and it's

1 always fatal and it's dangerous and how toxic
2 it is and all these things, but the truly most
3 important thing about it is this cancer, this
4 mesothelioma, is entirely preventible. You
5 just don't expose people to asbestos.

6 Thank you all for listening to me so far.
7 I appreciate it.

8 THE COURT: Thank you, Ms. Gross.

9 Ms. Bueno for the defendant.

10 MS. BUENO: Thank you, Your Honor. Just
11 give me a quick second to set up, if I can.

12 THE COURT: Ladies and gentlemen, let's
13 stand up and stretch for a minute.

14 Sorry, Ms. Bueno. It's not your fault.
15 This is the jankiest sound system known to man.
16 You tell me when you're ready, Ms. Bueno.

17 MS. BUENO: I'm ready if you are, Your
18 Honor. Is that too loud? Can we turn it down?

19 THE COURT: There you go. Perfect.

20 MS. BUENO: I feel like that might be a
21 little bit too loud. Is that okay?

22 THE COURT: Ms. Bueno, you need to go down
23 a little bit. Rachel talked softly, but too
24 fast.

25 MS. BUENO: So I need to talk softly and a

1 little -- if I'm too loud, you all please let
2 me know. I don't want to blow out the speaker
3 here. Are you all able to see the screen and
4 this board here?

5 Your Honor, is this okay with you here?

6 THE COURT: Certainly. Absolutely.

7 MS. BUENO: May I begin, Your Honor?

8 THE COURT: Yes, you may. Ms. Bueno for
9 the defendant.

10 - - -

11 DEFENDANTS' OPENING STATEMENT

12 - - -

13 MS. BUENO: You just heard some very
14 serious allegations, some disturbing
15 allegations. And I could spend my entire time
16 with you today doing nothing but going over
17 that presentation and going through each slide
18 and telling you why it's flat wrong and it's
19 untrue. But the evidence that you need to
20 answer the questions at the end of this trial
21 is not contained in that presentation, because
22 at the end of this trial, you are not going to
23 be asked the question about whether or not
24 there was ever a fiber of asbestos in a bottle
25 of Johnson's Baby Powder somewhere in the

1 world. That is not a question you will be
2 asked.

3 What you are here to decide in your job as
4 jurors is to determine if Johnson's Baby Powder
5 caused Mr. Perry's cancer. And the answer to
6 that is no. There is no science to support
7 these allegations. There are no facts to
8 support these claims. This is not true, and
9 Johnson's Baby Powder did not cause Mr. Perry's
10 cancer, and that's why we're here defending
11 ourselves as Johnson & Johnson and our family
12 of companies.

13 So what I'm going to do today is give you
14 a roadmap of the evidence that will actually
15 help you answer the question at the end of
16 trial and to determine whether or not
17 Johnson & Johnson was responsible with our
18 talcum powder for Mr. Perry's cancer.

19 And so as I was thinking about trying to
20 figure out a way to distill all of this and
21 give you the information, and I was watching
22 the Olympics at the time and watching the
23 swimmers in the swimming pool, and I thought to
24 myself, these amazing athletes have been in
25 that pool days in, days out, years and years.

1 Think of how much time they spent swimming in
2 those pools.

3 And, you know, those pools have very small
4 amounts of chlorine in them, don't they?
5 That's safe for them. That's not a health
6 hazard. But yet we know that chlorine is a
7 dangerous chemical, don't we? And if those
8 same swimmers got into a pool that had really
9 high levels of chlorine, what would happen to
10 them? They would burn their skin. They would
11 probably get sick.

12 And last week when it was so darn hot and
13 I was drinking a lot of bottles of water, that
14 was fine. I can drink water all day and my
15 body is able to flush that out. But if I sat
16 in one place and drank 10 gallons of water in
17 one sitting, what would happen? It would be
18 dangerous and maybe deadly.

19 So both of these examples demonstrate a
20 key concept in this trial that I ask you to
21 keep in mind and that we will continue to
22 discuss, and that is this: Dose matters. The
23 dose, the amount, the level matters. And why
24 do I start my valuable time with you with this?
25 Why do I start with dose? Well, it's important

1 because plaintiffs want you to believe that
2 when you hear asbestos and cancer, there is
3 immediately and always a relationship between
4 the two. And nobody is going to dispute that
5 if you have a high level of asbestos, cancer
6 can happen. Nobody who comes into the
7 courtroom and sits on that witness stand, and
8 it's right there, nobody's going to tell you
9 otherwise. But dose matters even for asbestos.

10 And let me give you a type of perspective
11 here. Counsel mentioned Dr. Brody. Thank you.
12 This is Dr. Brody. He's going to be here this
13 afternoon, if he's not here already. And
14 Dr. Brody is going to explain to you that there
15 are billions of asbestos fibers in our lungs.
16 We all have them. And why do we have them?
17 He's going to explain that it's something
18 called a background level. That means day in
19 and day out, just in our general, natural
20 lives, we are breathing in small levels of
21 asbestos in a background level.

22 Now, you may be surprised by that and
23 wonder, well, how in the world did that happen?
24 Why is there asbestos? And the answer to that
25 is pretty simple. You see back in the '50s and

1 '60s and '70s, even into the '80s and '90s,
2 there was a lot of products that had asbestos
3 in them. You heard a little bit about what
4 asbestos is. And these products, everything
5 from construction material to brakes to
6 insulation, they used asbestos because it had
7 great properties, like being a fire retardant.
8 And so of course we wanted to have things in
9 our schools, on the ceilings, in the boiler
10 rooms, in our Navy ships. We wanted to have
11 asbestos to stop fires and keep things safe.

12 And we were using it a lot at that period
13 of time. And as a result of that the fibers
14 from all of that asbestos, it got in our air,
15 it got in our soil, and it got in our water.
16 And that is why we have what is called a
17 background level.

18 Now, as you might imagine, back in the
19 '60s and '70s, that background level was
20 higher, wasn't it? Because there was more
21 asbestos around. But even today there's a
22 background level. And the evidence will show,
23 and Dr. Brody will tell you that the background
24 level of asbestos is safe. What does that
25 mean? That means that there is a level of

1 asbestos that we are all breathing in and
2 breathing out and not getting sick. And that's
3 true today and it was true in the '60s and '70s
4 when the level was even higher.

5 And the evidence is going to show that the
6 level of asbestos in Johnson's Baby Powder that
7 the plaintiffs are claiming in this trial is
8 lower than the background level, lower than the
9 background level. It is not a health hazard,
10 and it is safe.

11 Now, let me stop there and explain to you
12 that Johnson & Johnson's talc is not at issue
13 here. Plaintiffs are not claiming that the
14 talc itself was dangerous. They're claiming
15 that these trace amounts of asbestos in the
16 talc caused the problem. And I think that's an
17 important distinction. And I want to say right
18 now so there's no confusion, that
19 Johnson & Johnson is not conceding that there
20 is asbestos in our talc. So if anybody comes
21 up here and says that I said or anyone on my
22 team said that there's asbestos in Johnson's
23 Baby Powder, they're flat wrong.

24 But what I'm telling you and what the
25 evidence is going to show in this case is

1 that -- the question is whether or not
2 Johnson's Baby Powder caused Mr. Perry's
3 mesothelioma. And we know the answer is no.
4 And we know that because even if you believe
5 what they are saying, even if you believe what
6 plaintiffs' witnesses tell you, the level of
7 asbestos we're talking about is so low that it
8 does not and cannot cause mesothelioma. That's
9 the point. That's why dose matters.

10 And the reason I have this board up here,
11 and I think it's going to be instructive and
12 helpful for us in this trial, is we need to
13 keep straight when the witnesses are here about
14 what are they talking about. Because in order
15 to prove their case, the plaintiffs have to
16 prove that the amount of asbestos that they say
17 is in the bottle got into the air when
18 Mr. Perry used it, when he put the talc on
19 himself. And then what is in the air, he
20 breathed in and it became a dose in his body
21 that his body did not flush out; and that it
22 ultimately was enough asbestos to cause his
23 mesothelioma. And they cannot prove that. The
24 evidence will not prove that.

25 So that's what I'm going to do right now.

1 I'm going to go through what plaintiffs say is
2 in the bottle, what they say is in the air, and
3 what they say got into Mr. Perry's body. And
4 I'm going to explain what the evidence in this
5 case will not prove, that Johnson's Baby Powder
6 caused Mr. Perry's cancer.

7 Then, when we're done with this, I want to
8 talk about Johnson & Johnson and some of the
9 attacks you heard. And I'm going to give you
10 more evidence that you'll hear at this trial
11 that plaintiffs' lawyer didn't tell you about.
12 When she did that chronology starting in 1898
13 and going all the way up until today, there was
14 a whole lot that was left out of there and
15 misrepresented. And I'm going to set the
16 record straight, and we're going to do that
17 throughout this trial. Okay.

18 So let's start with, what is in the
19 bottle? This is Dr. William Longo. He will be
20 here this week to testify to you. He is the
21 testing expert for the plaintiffs. Now,
22 Dr. Longo has been around a long time. He's
23 been testifying in courtrooms like this for
24 decades. And he started testifying against
25 those companies that I showed you that made all

1 those different asbestos materials. He's
2 testified against companies that made brakes
3 and companies that made insulation and
4 construction material. And he's made, like,
5 \$33 million testifying in asbestos litigation.

6 And now he's turned his sights on talc
7 manufacturers like Johnson & Johnson. So
8 that's his business now. And back when he was
9 testifying for those other asbestos -- or
10 plaintiffs suing other asbestos defendants, do
11 you know what he said about cosmetic talc? He
12 said this idea that cosmetic talc has asbestos
13 in it is just an urban legend, just an urban
14 legend. That's what he said.

15 Then he started getting paid by plaintiffs
16 to testify against Johnson & Johnson, and now
17 all of a sudden he's finding asbestos in
18 bottles. That's Dr. Longo.

19 And so Dr. Longo has done testing of our
20 product. So the very first time, what he calls
21 round 1 testing, he went and got a lot of
22 bottles and tested them. And, my goodness, he
23 found a lot of asbestos in Johnson's Baby
24 Powder. People started to say, "Where did you
25 get those bottles, Dr. Longo?"

1 "Well, I got them on eBay. I got them
2 from a plaintiff lawyer. I got them opened
3 from somewhere. I don't know who gave them to
4 me, but I found asbestos in it." Well, that's
5 a sketchy question.

6 Then he did round 2 testing, another round
7 of Johnson's Baby Powder testing. And this
8 time we gave him the bottles. The bottles came
9 from the Johnson & Johnson archives. So we
10 know where they were and we knew that they were
11 actually bottles that we sold. And you're
12 going to hear about that round 2 testing, we
13 call it, the second time he did it. And what
14 did it show? I see it up here.

15 First of all, a lot of those bottles he
16 tested had no asbestos in it. He'll tell you
17 that. Then he had the highest and lowest
18 amounts. The lowest amount of asbestos he
19 found in the bottle of Johnson's Baby Powder
20 was .0000033, five zeros, percent. That's the
21 weight of percent. Now, the bottle that he
22 tested where he says he found asbestos that had
23 the most in it was from Shower to Shower, which
24 was a different product. And that one he said
25 was .0092 percent asbestos. We're talking

1 about very, very small levels.

2 And Dr. Longo testified that he'll call
3 something trace if it's less than 1 percent,
4 and ultra trace if it's less than .1 percent.
5 So what are these? I guess we'll ask him.
6 Ultra, ultra, ultra trace? Very, very low
7 percentages. So keep that in mind as we go
8 through this trial. Even their own testing
9 expert is saying that the amount of asbestos
10 they're claiming in the bottle is really,
11 really low.

12 So now let's talk about what plaintiffs
13 claim is in the air when you use Johnson's Baby
14 Powder. So what we're talking about here, so
15 we're all clear, is if we believe plaintiffs
16 that there's these ultra, ultra trace levels of
17 asbestos, if we believe that, and there's a
18 bottle of Johnson's Baby Powder, how much is
19 going to get in the air when you shake that on
20 yourself? That's the question. When we talk
21 about air, we talk about exposure. So if you
22 hear the word "exposure," that's what we're
23 talking about in this trial, what's in the air.

24 And you're going to hear that there are
25 government organizations and agencies who set

1 standards. And one of them you'll learn about
2 is OSHA. And if you haven't heard about that
3 already in your life, it's the Occupational
4 Safety and Health Administration. So it's for
5 job sites and employers. And they set what are
6 called PELs, permissible exposure limit, which
7 basically means they figure out how much of a
8 contaminant or asbestos, or anything else in
9 the air, a worker can breathe in over an
10 eight-hour workday, day in and day out, for
11 their whole life of working, 40-plus years.
12 And OSHA sets a limit, a permissible exposure
13 limit for workplaces. And you're going to hear
14 what that is.

15 And you're going to hear from Dr. Longo,
16 who tests what's in the bottle, that he did
17 calculations to figure out what would be in the
18 air. And Dr. Longo will explain to you that if
19 you took a bottle of Johnson's Baby Powder with
20 the average amount of asbestos that he found in
21 those round two bottles, and you took that
22 bottle and you shook it on yourself and you
23 patted it on yourself, and you did that every
24 day all day for 40 years, you will never reach
25 the level of the OSHA-permissible exposure

1 level. You'll never reach it. That's the
2 minute amount that we're talking about that is
3 in the air, even if you believe what plaintiffs
4 say.

5 And their own expert, Dr. Brody, who will
6 be here, he will give us a background level.
7 He's testified about it before, and I will ask
8 him about it hopefully today. And he will give
9 me that number. And we will compare it to the
10 number that Dr. Longo says is in the air. And
11 you will learn, not from our own witnesses, but
12 by plaintiffs' own witnesses will have to admit
13 that the amount of asbestos that gets in the
14 air, even assuming their data is right, it is
15 less than the background level which we know is
16 safe.

17 So now we go to what is in the body.
18 Okay. So stick with me. Assuming what
19 plaintiffs said is in the bottle, you shake it
20 on your body, it gets in the air, you breathe
21 it in. Now, how much gets into the body? Now,
22 we talked about air is exposure, body is dose.
23 When we talk about the dose, we -- that means
24 how much actually is retained in the body. And
25 you're going to learn that our body has these

1 amazing defense mechanisms. We've got hairs in
2 our nose so when we breathe in, it catches
3 things, doesn't it? We've got mucus in our
4 throats so if we breathe something in and
5 swallow it, our body rids it of it. If
6 something actually gets in our lungs, we have
7 cells and macrophages to clean it all out. And
8 most of everything we inhale in our body is
9 cleaned out. And that is the concept of a
10 background level.

11 Now, I bet you're thinking, like I did
12 when I first got involved in this case, if you
13 have a background level and then you have
14 additional asbestos exposure, doesn't it just
15 add on to each other? And I think you heard
16 counsel say that asbestos is cumulative. But
17 respectfully, that is not what the evidence is
18 going to show in this case. The best way for
19 me to think about it is like this, so bear with
20 me.

21 Plaintiffs want you to believe our body is
22 a bowl. Okay? And if we're talking about a
23 bowl of water, and we take a background level
24 and we pour the water in the bowl, right, it's
25 just sitting there, the background. And every

1 day, all day, we're breathing in more, and the
2 bowl fills. And plaintiffs want you to believe
3 that if you are exposed to any kind of other
4 type of asbestos, then you have additional
5 drops of water into the bowl. And eventually
6 what happens to the bowl? It runs over and can
7 cause disease. That is plaintiffs' story in
8 theory. And this is what they want you to
9 believe.

10 But what the evidence will show, and the
11 experts will explain to you, is that our bodies
12 are more like this, like a colander. Do you
13 all call this a colander? I do. I told my
14 husband I was bringing the colander to court.
15 He said, "What are you talking about?" He said
16 it was a strainer. Colander, strainer.

17 But this is what the experts will explain.
18 It's almost like you put the colander in your
19 sink and you turn on the background level.
20 There's a little drip. The background level
21 drips in. It doesn't pool like plaintiffs want
22 you to think. Your body is able to release
23 that and clear that out. And that is why, if
24 you have another exposure that is below the
25 background level, it doesn't get in your body

1 and stay there and cause disease.

2 So when you hear about background level
3 and you hear about things being below
4 background level, it's that slow drip that is
5 slow enough for your body to expel. And I hope
6 that makes sense. We'll talk about that more
7 during trial.

8 But that's why we know that the dose, even
9 if you believe what plaintiffs are claiming,
10 even if you believe there's the ultra, ultra
11 trace amounts in the bottle and the low amount
12 in the air, we know that the dose, that even
13 using their own numbers, is not enough to cause
14 mesothelioma. So what is the dose? What is
15 the dose?

16 Chief Justice Toal mentioned it earlier,
17 and you'll hear at the end of the trial that
18 it's plaintiffs' burden to prove this case,
19 which means they need to bring evidence to you
20 on each of these different parts to prove that
21 Mr. Perry's cancer was caused by Johnson's Baby
22 Powder. But this fundamental question of what
23 is the dose, they will not answer for you.
24 There is not one witness that they are going to
25 bring to that stand, and to do the math, to

1 tell you how much asbestos Mr. Perry allegedly
2 got in his lungs, not one, not one.

3 What are they going to say? They're going
4 to say it was substantial, it was significant,
5 but they're not going to do the math. And the
6 math matters. They're not going to even bring
7 you a statistician to give you this
8 information, but they are bringing a
9 statistician. His name is Dr. Madigan. He's
10 the guy that does numbers all day long. He'll
11 give you a bunch of numbers, but he will not
12 give you the number that matters in this case:
13 How much asbestos from Johnson's Baby Powder
14 did Mr. Perry get?

15 And what plaintiffs are relying on is that
16 you will hear about the phenomenal amount of
17 talcum powder use that Mr. Perry had, and just
18 agree with, oh, significant, oh, substantial,
19 that dose doesn't matter. And I'll tell you
20 right now, Mr. Perry used a lot of talcum
21 powder. On the left-hand side you see the
22 products that Mr. Perry will testify he used
23 over and over again in his lifetime. Johnson's
24 Baby Powder is just one of them. There are
25 nine other talcum powder products that

1 Mr. Perry will tell you he used: Equate,
2 Ammens, Gold Bond, Clubman, Drakkar, Ralph
3 Lauren Polo, Obsession, Stetson. He will tell
4 you that he used some of them, like Johnson's
5 Baby Powder, as a base layer, and then put
6 scented talc on top of it. He will tell you
7 that he used four or five tablespoons at a
8 time, three or four times a day for 40 years.
9 His experts will allege that there's asbestos
10 in every single one of those, not just
11 Johnson & Johnson mind you, all of them.

12 And he alleges exposure not just from his
13 personal use talc. He also alleges that he was
14 in the bathroom with his mother and was exposed
15 to asbestos when she used the talc on the right
16 side, 10 additional types of talc. Or I guess
17 I should say nine, Johnson & Johnson, Johnson's
18 Baby Powder, and nine others that she used in
19 her lifetime that Mr. Perry is claiming also
20 exposed him to asbestos.

21 Significant, substantial -- see, that's
22 what their experts will say because of this
23 use. But they're not going to answer the most
24 important question, which is dose. They're not
25 going to answer that question.

1 Now, before I move on, I need to tell you
2 one more thing about Dr. Longo. He's the guy I
3 told you about that tested what's in the
4 bottle. He's going to be here. We learned
5 today that Dr. Longo has done an examination,
6 an analysis of Mr. Perry's tissue. And that
7 was surprising because when we talked to him a
8 few weeks ago under oath, we asked him if he
9 was going to do this before trial, and he
10 indicated that it would take him too long. It
11 would take him two or three weeks to do this
12 analysis, and it would be very hard, if not
13 impossible, to get it done. He testified that
14 the analysis is so complicated and requires so
15 much thought that he couldn't do a rush job.

16 But lo and behold, he's going to come up
17 to the stand and tell you something about the
18 tissue he analyzed. And I'm standing here as
19 the counsel for Johnson & Johnson defendants,
20 and I have no idea what this man is going to
21 tell you. We'll have an opportunity to
22 cross-examine him. And who knows what he'll
23 say about this tissue in Mr. Perry's body.
24 We'll have to find out. But too little, too
25 late.

1 When we had a chance to depose him a
2 couple weeks ago, he hadn't done that analysis.
3 So now he's going to come to trial and try to
4 tell you something that was in Mr. Perry's
5 body. We'll see what he says. We'll see what
6 he says.

7 Now, you heard about experts who are paid
8 by plaintiffs. You're going to hear from
9 experts who are paid by defendants. It's going
10 to be experts on both sides. But there's going
11 to be one doctor who comes into this room that
12 you're going to want to pay attention to. And
13 this is his name: Dr. Barry Gibney. He's at
14 MUSC. He is Mr. Perry's treating physician.
15 He is a very well-known and respected
16 cardiothoracic surgeon. What that means is he
17 actually opens people up and operates with
18 terrible disease like mesothelioma, and he did
19 the surgery for Mr. Perry. And he'll be here
20 to talk to you.

21 And the thing about Dr. Gibney is he
22 specializes in this disease, mesothelioma.
23 This is what he does. He goes to conferences;
24 he talks to doctors; he reads medical
25 literature. And Dr. Gibney will not come into

1 this room and blame Mr. Perry's mesothelioma on
2 talc. He won't do it. In fact, when we asked
3 him recently under oath about these claims, he
4 had no idea what we were talking about, that
5 talcum powder caused mesothelioma. He had
6 never talked to his colleagues about these kind
7 of allegations. How strong is the science that
8 you're going to hear in this courtroom if a
9 well-known surgeon in this community who
10 specializes in this disease does not believe
11 these claims and will not come in here and tell
12 you that talcum powder is to blame? How strong
13 is the science? I submit to you there is no
14 science. The science tells otherwise. I'm
15 going to talk to you about the science in a
16 minute, but let me first deal with this.

17 I can guarantee you that one of the things
18 you're going to hear, because you already did,
19 is that 2017 was this watershed year where all
20 of a sudden the skies parted and all of the
21 information came down because
22 Johnson & Johnson, in a lawsuit, had to produce
23 a bunch of documents. You just heard that a
24 couple times. Nothing could be further from
25 the truth. The evidence is going to show that

1 this information about talcum powder and
2 concerns about asbestos have been around for a
3 long time. It's been in medical literature.
4 It's been discussed. The FDA's looked into it.
5 I'm about to tell you all about that. There is
6 absolutely nothing to suggest that just because
7 Johnson & Johnson produced millions of
8 documents in 2017, that somehow that changed
9 the game. Not at all. And Her Honor told us
10 to use common sense. That is your job.

11 When was 2017, folks? That was seven
12 years ago. Seven years ago. And if what
13 plaintiffs claim is true that all of a sudden
14 now everybody knows everything since 2017,
15 Dr. Gibney, the treating surgeon, he doesn't
16 know. There is not a warning on cosmetic talc
17 for asbestos even today. And do you know what
18 Johnson & Johnson's done? Now, the Court told
19 you not to go do any research, so I'm not
20 asking you to do it, but I will give you this
21 information which will be evidence. We took
22 all of the documents that you're going to see
23 in this trial and we put them on a website for
24 the whole world to see, the whole world. The
25 FDA can look at them. Doctors can look at

1 them. The public can look at them.
2 FactsAboutTalc.com. There's nothing to hide.
3 Nothing to hide. There's not one document
4 you'll see that's not publicly available.
5 Nothing's changed. There's still not a warning
6 label on cosmetic talc for asbestos, and
7 there's a good reason for that.

8 Let me tell you a little bit about what
9 you didn't hear about the story about
10 Johnson & Johnson. You heard that we sold
11 cosmetic talc starting in 1894. Absolutely
12 right. Sometimes it was used for diapering.
13 In this case, as you heard, Mr. Perry claims he
14 used it for personal use starting at age five.
15 And he said he stopped using it in 2019.
16 That's the time frame we're looking at. And
17 you're going to hear that Johnson & Johnson
18 always has tested our product for asbestos, as
19 well as other contaminants. And that is
20 because asbestos and talc both grow in the
21 ground, as you heard. That is why we do
22 testing. That is why we have done testing.

23 And the evidence will show that over the
24 years Johnson & Johnson tested talc in a
25 variety of different ways. First, we selected

1 high-quality mines. We didn't just go to any
2 talc mine. You'll hear that we did searches
3 not just in the U.S., but around the world, to
4 find the best, purest, and most pure talc
5 mines. And when we did that, we found some in
6 Italy initially. Then we found some in
7 Vermont, and more recently in China.

8 You'll hear about other mines that we went
9 and looked at and thought, that talc is not
10 good enough. We don't want to use it. We want
11 to look and find one that's better. And once
12 we found the mines, we did what's called
13 selective mining, which means we didn't just
14 take the talc from any old place in the mine.
15 We took core samples of specific places in the
16 mine and tested it and tried to figure out
17 whether the talc in that area of the mine was
18 pure enough.

19 And then we tested it again when it got to
20 the mill, processing at the mill, to make sure
21 that the talc that we had taken selectively
22 from the mine was indeed pure and free of
23 contaminants. And then we tested the final
24 product.

25 And you'll hear that for some period of

1 time, Johnson & Johnson, we owned our own mine
2 so we had third-party testers. But then when
3 we sold the mine, we had other suppliers that
4 would sell the talc to us and they tested. So
5 there was testing along the way. And there was
6 a suggestion to you that our testing somehow
7 wasn't good enough.

8 Well, the evidence is going to show
9 otherwise. What I have in the middle of the
10 slide are three different types of microscope
11 going from the top being the least sensitive --
12 that was what was criticized by counsel, XRD,
13 to the bottom being the most sensitive. And on
14 the left-hand side, those blue checkmarks are
15 the J4-1 industry standard. So all of the
16 industry got together and figured out how do we
17 best test talc? And they said we need to use
18 the top microscope and the middle microscope,
19 the XRD and the PLM. And Johnson & Johnson did
20 that. But we took it a step further. The
21 evidence will show that we used the TEM, the
22 highest type of microscope, to test, as well.

23 Now, why was all this testing being done
24 and how was this being developed? You're going
25 to learn that in the early '70s, there was a

1 concern, there was kind of a scare, actually,
2 because some scientists said they found
3 asbestos in cosmetic talc. I saw some of you
4 get a little disturbed when you saw those
5 slides that were put up. I saw that, but I'll
6 tell you that what happened in the early '70s
7 with that cosmetic talc scare, and the
8 headlines, and the problems was a lot because
9 of the technology not being developed at that
10 time.

11 And you know what? I'm going to show you
12 just one example of why you can't believe what
13 you just heard and why throughout trial you
14 have to ask yourself some questions.

15 I'm going to -- can I turn to the ELMO,
16 please? If I can figure out how to work it.

17 TECHNICIAN: Would you like some
18 assistance?

19 MS. BUENO: I would. Yes, please. I
20 should have done this before, shouldn't I have,
21 Mr. Loebbaka? This is a great time for me to
22 introduce Mr. Loebbaka who is our tech
23 extraordinaire and who is going to help us
24 figure all of this out. Thank you. I
25 appreciate that very much.

1 This is one of the slides that you saw.
2 And this was something that counsel showed to
3 you and said, Dr. Langer from Mount Sinai, in
4 1971, observed, dot, dot, dot, dot, dot, dot,
5 chrysotile fibers, dot, dot, dot, dot, dot,
6 dot, in Johnson's Baby Powder. I don't know if
7 you've noticed throughout the presentation from
8 counsel how many dot, dot, dot, ellipses there
9 were. And we know that when you see dot, dot,
10 dot, that means some words are removed.

11 And I'll tell you that I think that this
12 is what's going to happen throughout this
13 trial. Plaintiffs' lawyers are going to throw
14 up these documents where these little snippets
15 and words are taken out of context, trying to
16 paint a story that's just not true, all in an
17 attempt to make Johnson & Johnson look like we
18 had some kind of cover-up or conspiracy or that
19 somehow we thought there was a problem. And
20 boy, I saw your faces. I know that it is a
21 powerful message, but it is not true. Because
22 what the story is going to show is that this
23 Dr. Langer at Mount Sinai, he retracted his
24 findings. It determined that it wasn't true.
25 Dr. Lewin, who they told you about, also

1 retracted his findings and said, upon further
2 review, what I found wasn't asbestos at all.

3 And in fact, there's a statement that you
4 weren't shown that wasn't part of the
5 chronology that was from Mount Sinai Hospital,
6 the president of Mount Sinai Hospital. And
7 this was a memo and a statement. And I'm going
8 to show you all of this during trial. I'm not
9 going to spend all the time on it now, but I
10 think it's important to point it out. This was
11 a statement that you'll see in its entirety
12 from the president of Mount Sinai that says,
13 "Recently data from research carried out in the
14 Mount Sinai Medical Center for the last four
15 years on the asbestos content of some talcum
16 powders was cited in the press before it had
17 been published in the scientific journal."

18 And he goes on to say, importantly,
19 "Although the news media specifically
20 emphasized the dangers of talcum powders
21 advertised for babies, the only baby powder
22 tested that was reported to show asbestos
23 represents less than 1 percent of the market."

24 Now, I'll tell you right now,
25 Johnson & Johnson's powder was never less than

1 1 percent of the talcum powder market. And it
2 goes on to say, "The most commonly used baby
3 talc has been consistently free of asbestos."

4 Folks, Johnson's Baby Powder there. So
5 the letter from Mount Sinai's president sets
6 the record straight on Dr. Langer. This is
7 just one example. I can't do this all day. I
8 cannot go through and demonstrate why all of
9 the dot, dot, dots are leaving out the full
10 story, but there is more to the story. There
11 is more to the story.

12 And what you also didn't hear is the FDA's
13 role monitoring cosmetic talc. You'll hear
14 that in 1976, right after all of that hubbub
15 that you saw from plaintiffs' counsel about
16 alleged asbestos findings, the FDA said, "We
17 better test this out ourselves." And they
18 tested Johnson's Baby Powder and they found no
19 asbestos. ND, not detected. And they didn't
20 stop there.

21 In 1994, you'll hear that the FDA gathered
22 folks together for a talc symposium. They
23 co-sponsored this big meeting, 100 people, with
24 the FDA and toxicology groups to just have a
25 candid conversation about cosmetic talc. And

1 they concluded that cosmetic talc was among the
2 safest of consumer products. And they
3 concluded the probability of human risk is
4 likely nonexistent.

5 Ask yourself why you didn't hear this.
6 Ask yourself why you didn't hear that in 2009
7 and 2010, the FDA went and took some Johnson's
8 Baby Powder off a shelf in Washington D.C.,
9 just walked into the store, bought the bottles,
10 had people test it. No asbestos detected in
11 Johnson's Baby Powder.

12 In 2019, in April, no asbestos detected.
13 Again, the FDA doing its routine monitoring.
14 Same thing in early September of 2019. Now,
15 here's the part you heard. Lo and behold, that
16 same lot that in 2019, in September, the FDA
17 found sub ultra trace amounts of asbestos, of
18 chrysotile. And you better believe this was a
19 surprise to Johnson & Johnson.

20 This was the first time in all of the FDA
21 testing that they had ever found asbestos in
22 our talc. And we're going to bring you the
23 chief medical officer from Johnson & Johnson
24 who will come in and tell you where he was and
25 what happened when he heard this news. He was

1 overseas at a meeting. He got in a plane as
2 soon as he could, flew back to deal with this.
3 And you're going to hear that although
4 Johnson & Johnson determined that the amount of
5 chrysotile allegedly found in this lot was not
6 a health hazard, within two days that lot, that
7 certain group, was immediately recalled, a
8 voluntary recall, and that we worked with the
9 FDA to do what's called a Class II recall where
10 the FDA identifies Class II as the probability
11 of serious adverse events is remote.

12 So even though the amount found in that
13 one bottle in that one lot was so low and
14 insignificant, Johnson & Johnson immediately
15 recalled that. That's what the evidence is
16 going to show, and that's what you would want a
17 company to do.

18 And then you're going to hear a year later
19 there was a decision to stop selling talcum
20 powder in the United States, in 2020. So as of
21 today, Johnson & Johnson doesn't sell
22 talc-based cosmetic talcum powder. We continue
23 to sell Johnson's Baby Powder, the cornstarch
24 variety, but we stopped in 2020.

25 And Dr. Kuffner, the chief medical

1 officer, is going to come in here and explain
2 to you that that was a surprise to him when he
3 learned the news. That was a business decision
4 that had nothing to do with his medical
5 department, and he wasn't even consulted before
6 the business folks decided to make this
7 decision.

8 Now, you might wonder how a company like
9 Johnson & Johnson can come in here and tell you
10 that a trace amount of asbestos in a bottle is
11 not a health hazard. And the answer is
12 science. I told you I would get back to
13 science. This is it, science. Chief Justice
14 Toal told you you're going to learn the word
15 "epidemiology," and I'm glad you did that.
16 That was a good intro for this. Epidemiology,
17 it's a type of science. It's a specialty. It
18 deals with epidemics. Epidemiology, that's
19 what it means. And what it is is a study of
20 cause and effect, of what is it that causes
21 human disease. It's specifically for humans,
22 not talking about animals, but humans,
23 epidemiology. It's when you take large human
24 groups and you figure out what causes different
25 disease.

1 And I will tell you right now there is no
2 epidemiological study concluding that cosmetic
3 talc causes mesothelioma. None, zero.
4 Plaintiffs will not bring any expert that can
5 point to one study, epidemiological human
6 causation study that says this product causes
7 this disease, not one. But there have been
8 studies showing the opposite.

9 So common sense, again, the Court told us
10 to use it. If you wanted to do a study and
11 figure out, okay, does this talc thing cause
12 mesothelioma, what would be the way to do it?
13 You would go to the group of people who have
14 the most talc exposure, wouldn't you? And who
15 would those people be? It would be the people
16 in the mines, in the mills, right? It would be
17 the people that are blowing up the mills and --
18 blowing up the mines to get out the talc, in
19 the dust and the sweat covering themselves for
20 eight hours a day, breathing in all of the
21 talc. And it would be the people in the mills
22 that were churning up the talc into powder and
23 breathing it in all day.

24 And those studies have been done. We will
25 bring you doctors to talk through the studies

1 showing that talc miners and millers had no
2 increased risk of mesothelioma, individuals
3 that by far had more talc exposure than anybody
4 would with a baby powder, no matter how much
5 they use. Common sense. Common sense.
6 There's no epidemiological study and the talc
7 miners and millers have no increased risk.

8 But common sense doesn't stop there.
9 Hundreds of millions of people have used
10 Johnson's Baby Powder. I want you to think
11 about that for a minute. A lot of people have
12 used this product. And counsel knew I was
13 going to say it. There is not an epidemic of
14 mesothelioma. This is an extremely rare
15 disease, thank goodness. But it just doesn't
16 add up for all of the people who have used this
17 who do not have any sickness. That tells us
18 something. That tells us something.

19 Now, mesothelioma is a rare disease, but
20 we know some things about it. We know that
21 there are some people who get mesothelioma who
22 have never been exposed to asbestos. Just like
23 some people get lung cancer and they've never
24 had a smoke in their life, right? It happens.
25 It's rare, but it happens. But you're going to

1 hear that the vast majority of people who get
2 this disease do have asbestos exposure. And
3 you're going to hear that Mr. Perry was exposed
4 to asbestos. And that's not me saying it.
5 That's not my witnesses saying it. It's
6 plaintiffs' own witnesses will explain to you,
7 and Mr. Perry himself, that when he was a
8 teenager, in his home garage with his father,
9 he did a lot of brake jobs, brakes using
10 asbestos. And the thing you have to understand
11 about asbestos brakes, there's like 30 to
12 40 percent asbestos in these brakes. I mean,
13 we're not talking about .00000. We're talking
14 30 to 40 percent asbestos in brakes. And he
15 did six dozen brake jobs in about a three-year
16 period.

17 Plaintiffs' own medical expert will tell
18 you that that exposure to asbestos was enough
19 to cause his cancer. Their own expert will
20 tell you that if he had never used cosmetic
21 talc in his whole life, he would blame this
22 mesothelioma just on the brakes. He'd blame it
23 just on the brakes. But they're not just
24 blaming the brakes, right? They're blaming all
25 of the different asbestos cosmetic talc

1 products.

2 But who are they really blaming?

3 Johnson & Johnson, right? We're the ones.

4 We're the ones that have the spotlight. We're

5 the ones they singled out here for this trial.

6 I think we know why. I think we know why.

7 At the end of the day this is just a great
8 justice system. I hope you -- I hope you get
9 something out of this that is very valuable to
10 you because I'm always just amazed about how
11 awesome and phenomenal the system is. In our
12 society, any individual can sue somebody,
13 whether it be a neighbor or a boss or a big
14 company like Johnson & Johnson. And that's an
15 awesome, awesome power that we have.

16 But along with that privilege, along with
17 that privilege is a requirement, a task to
18 prove the case, to prove the case. And in this
19 case, in order to prove it, in order to
20 prevail, Mr. Perry is going to have to prove
21 not that there was just some fiber of asbestos
22 in some bottle of Johnson's Baby Powder
23 somewhere, but that it was in the bottles he
24 used. And he's going to have to prove that
25 that amount in that bottle, that sub-ultra

1 trace amount, was enough that when he used it
2 on his body, it got into the air and his body
3 didn't fight it off and that it caused his
4 mesothelioma. And I submit to you that
5 Mr. Perry will not be able to prove that case.
6 The science doesn't support it. The facts do
7 not support it.

8 And I know that there's documents you'll
9 see. I know that there's this tail of
10 corporate woe. I know that they probably spent
11 50 minutes of a 60-minute discussion with you
12 doing nothing but talking about
13 Johnson & Johnson and trying to paint us and
14 our family of companies in a bad light. I
15 guarantee that's going to happen throughout
16 this trial.

17 But the question you're going to be asked
18 is: Was Mr. Perry's cancer caused by Johnson's
19 Baby Powder? The answer to that is going to be
20 no. And that's what the evidence is going to
21 show.

22 So I'm going to stand in the same spot
23 probably next Wednesday, or whenever we can get
24 this case wrapped up and get you out of here.
25 But when I do, the last thing I'm going to do

1 is ask you for a verdict in favor of
2 Johnson & Johnson.

3 And we don't fault Mr. Perry for wanting
4 answers. We don't fault him, because when
5 somebody gets cancer, it makes sense and it's
6 natural to want to hold somebody accountable to
7 find a reason to point the finger. And
8 Johnson & Johnson is maybe a good place to
9 point the finger, but in this case, Johnson's
10 Baby Powder did not cause Mr. Perry's
11 mesothelioma.

12 Thank you for your time.

13 THE COURT: All right. That concludes the
14 opening argument for the defense. And you
15 previously heard the opening argument for the
16 plaintiff. Let's take a 15-minute break. Be
17 back here a little bit after -- well, as close
18 to 4:30 you can make it. Let's be in our seats
19 by that time and be ready to proceed.

20 Please rise while the jury departs for its
21 break.

22 - - -

23 (The jury exited the courtroom at
24 this time.)

25 - - -

1 THE COURT: Court will be in recess.

2 - - -

3 (Whereupon there was a recess in the
4 proceedings from 4:13 p.m. to 4:30 p.m.)

5 - - -

6 THE COURT: Everybody present. Dr. Brody,
7 good to see you again, sir.

8 DR. BRODY: Pleasure, Your Honor.

9 THE COURT: Madam Bailiff, check and see
10 if they're all refreshed. If they are, bring
11 me the jury. Be seated until they bring them
12 in.

13 - - -

14 (The jury entered the courtroom at
15 this time.)

16 - - -

17 THE BAILIFF: The jurors are seated, Your
18 Honor.

19 THE COURT: Very good. Please be seated.

20 Ladies and gentlemen of the jury, I would
21 be remiss before we start this if I don't
22 introduce my law clerk. This is Tasha
23 Bridenback. Judges have law clerks and we're
24 very blessed by that. That wasn't always true
25 in my time in practice as long as I've been a

1 lawyer. But we now have employed by the
2 judicial department young lawyers. Most of
3 them have just finished law school or maybe out
4 a couple years who clerk for judges. They
5 clerk for trial court judges. That's what I'm
6 operating as now. And of course they clerk for
7 appellate court judges, and I had a series of
8 law clerks when I served for my very lengthy
9 service on the South Carolina Supreme Court.
10 They're all like my children to me. They're
11 wonderful young people. They go on to have
12 great and successful careers, as I'm sure Tasha
13 will. As a matter of fact, in this trial we're
14 in right now, each side of this endeavor has in
15 its trial counsel group one of my beloved law
16 clerks. On the plaintiffs' side, Jamie
17 Rutkoski. Where are you, Jamie? Did you send
18 her out on errands?

19 MS. MCVEY: She had to do real work and
20 had to go.

21 THE COURT: Jamie is one of the law clerks
22 I have had since I have been a trial judge, and
23 she is on the plaintiffs' team.

24 On the defense team is my very beloved
25 long-time clerk, Matt Bogan. Matt was one of

1 my law clerks when I was on the Supreme Court.
2 So you can see he's got a few more miles on him
3 than Jamie does, but these lawyers have
4 uniformly turned in great service to the firms
5 or outfits with whom they've become associated,
6 and they're a very important part of this
7 endeavor, particularly for their research and
8 writing skills. And I could not do without
9 Tasha, that's for sure.

10 All right. Plaintiffs' case will begin.

11 MR. ADAMS: Thank you, Your Honor.

12 Plaintiffs call as their first witness
13 Dr. Arnold Brody.

14 THE COURT: Dr. Brody, please come around
15 and please be sworn.

16 THE BAILIFF: Stand here and face the
17 clerk.

18 - - -

19 ARNOLD R. BRODY, Ph.D., being first
20 duly sworn, was examined and testified as
21 follows:

22 THE CLERK: Thank you, sir. Please have a
23 seat on the witness stand and state your full
24 name for the record.

25 THE WITNESS: My name is Arnold R. Brody,

1 B-R-O-D-Y.

2 THE COURT: Ladies and gentlemen of the
3 jury, Dr. Brody is going to be offered as an
4 expert witness in this case. And expert
5 witnesses, if I so qualify them, are qualified
6 by means of their education, training, and
7 experience to actually offer an opinion about
8 the evidence. They are the only type of
9 witness you'll hear from that, in addition to
10 talking about the factual matters they know
11 about, can actually offer an opinion.

12 The plaintiffs' counsel will examine
13 Dr. Brody about his qualifications and then
14 offer him as an expert witness. And if I
15 agree, which I certainly would be surprised if
16 I did not -- I've heard Dr. Brody testify many
17 times -- then I qualify him on certain
18 technical fields.

19 That means that you are permitted to
20 receive his opinion. But please remember this
21 about an expert witness, just like any other
22 witness you hear from, you are the sole judges
23 of the credibility of anyone who sits in the
24 witness box, is sworn, and gives you testimony.
25 You may believe all of the witness' testimony;

1 you may believe part of the witness' testimony.
2 It's up to you to measure credibility. I can't
3 do that. That's up to you. I can simply
4 decide whether the witness is permitted to give
5 expert testimony. And that's what we are about
6 to do right now.

7 MR. ADAMS: Thank you, Your Honor.

8 - - -

9 DIRECT EXAMINATION ON VOIR DIRE

10 - - -

11 BY MR. ADAMS:

12 Q Good afternoon, Dr. Brody.

13 A Good afternoon.

14 Q Thank you for being here.

15 Have I asked you to come and explain to
16 the jury how asbestos causes disease?

17 A Exactly.

18 Q Is that the general --

19 THE COURT: Well, Mr. Adams, you're not
20 going to qualify him or are they agreeing to
21 his qualifications? And if they are, I would
22 like to know on what he's being offered for.

23 MR. ADAMS: I'm absolutely going to
24 qualify him, Your Honor. I just want the jury
25 to know why he's here.

1 THE COURT: Oh, okay. You just got to
2 have a little throat-clearing exercise. That's
3 all right. Go right ahead.

4 BY MR. ADAMS:

5 Q You're going to help the jury understand
6 how asbestos causes disease?

7 A Yes.

8 Q Okay. Can you tell the jury what kind of
9 doctor you are?

10 A Yeah. As you can see, I'm a Ph.D. I have
11 a doctorate in what's called cell biology. Every
12 living thing is made of cells. We need to
13 understand how cells develop, how they're involved
14 in disease. And that's what I've been doing for --
15 focusing on lung cells, most recently. The last few
16 decades, I should say.

17 Q It also says "experimental pathologist."
18 What does that mean?

19 A So pathology is the study of disease. And
20 as an experimental pathologist, I study by use of
21 experiments and animal models and human cells to
22 understand how that disease develops.

23 Q Is one of the things you've done in your
24 career spent a lot of time looking at cells and
25 asbestos with microscopes?

1 A Yeah, definitely have from a long time
2 ago, but yes, that's right.

3 Q Can you give the jury a sense of your
4 educational background and how you became a cell
5 biologist?

6 A Right. So after high school in New
7 Hampshire, I went out to Colorado to do a Bachelor
8 of Science degree in zoology, which is the study of
9 animals. I then went to the University of Illinois
10 where I received a Master of Science degree in
11 anatomy. That was human anatomy, animal anatomy.
12 That's when we learned all of our parts put together
13 and function.

14 Then I went back to Colorado to do a
15 doctorate. That's a Ph.D. And then I did three
16 years of postdoctoral study at Ohio State
17 University, and then started my first academic
18 position.

19 Q What was your first academic position?

20 A That was at the University of Vermont.
21 And that's where this picture actually was taken, in
22 the laboratory of the University of Vermont, the
23 medical school, in the pathology department. That's
24 where I started my interest in asbestos disease.

25 Q And did your interest in asbestos disease

1 include studying animal models?

2 A Yeah, animal models to help us understand
3 human disease, sure. And they're not just models
4 because I say so. These are models that we have to
5 prove to our peers, other scientists, that actually
6 teach us about human disease.

7 Q The things that you're going to be
8 teaching the jury about today -- and we're going to
9 move pretty quickly -- have you taught those exact
10 same subjects at universities?

11 A Yeah, to medical students every year, to
12 graduate students, and biology students, sure.

13 Q You mentioned your work at University of
14 Vermont. And you said you were there for six years?

15 A That's right.

16 Q What was your job title there?

17 A I was an assistant professor.

18 Q And then what did you do after the
19 University of Vermont?

20 A I went to the National Institutes of
21 Health, the National Institute of Environmental
22 Health Sciences, where I was the head of the lung
23 pathology research laboratory there. I was there
24 for 15 years, started my basic science research on
25 asbestos and how it causes disease, and started

1 publishing in that field.

2 As I say, I was there for 15 years. And
3 then I went to Tulane University. I was offered a
4 position as a full tenured professor in the medical
5 school at Tulane, and I actually became the vice
6 chairman of the pathology department in the medical
7 school. And I retired in 2011. Carrying on, I
8 wrote this paper in my retirement, so I tried not to
9 disappear.

10 Q You mentioned publishing. Can you just
11 give the jury very quickly an understanding of what
12 it means to be published in a peer-reviewed
13 scientific literature?

14 A Right, so that's what scientists try to do
15 as often as possible, and that's publish their work.
16 It's been reviewed by other scientists, by their
17 peers.

18 So I do a series of experiments, send --
19 write up the paper that describes the methods, the
20 materials, the results that I found, discussion
21 about what we're trying to do in the work, send that
22 paper to a journal, to a journal like this one,
23 Current Respiratory Medicine Reviews, that we did in
24 2018, or the American Journal of Pathology, Journal
25 of Respiratory Cell Molecular Biology. There are a

1 whole series of different journals that publish and
2 have published my work.

3 And that paper then is reviewed
4 anonymously by a series of scientists. I don't know
5 who's looking at my work. They each send a report
6 back to the editor. And then I have the option to
7 revise the paper based on what the reviewers think.
8 Sometimes they agree with me; many times they don't.
9 And so when the reviewers are satisfied and I'm
10 satisfied, then it can appear as a paper in the open
11 medical literature called a peer-reviewed paper.

12 Q You mentioned you had published in the
13 peer-reviewed literature. It looks like it was
14 about asbestos and cancer. Do I have that right?

15 A That's what it says.

16 Q In 2018?

17 A Yes.

18 Q When did you first start publishing in the
19 peer-reviewed scientific literature?

20 A My first paper in -- my first published
21 paper was in 1969, but my first paper in asbestos
22 disease was in 1981.

23 Q And so for the past 50 years, have you
24 fairly routinely published in the peer-reviewed
25 scientific literature?

1 A Well, that's the only way really to remain
2 current and to be able to do your job, so to speak.
3 I mean, that's the requirement of a successful
4 professor in a medical school.

5 MR. ADAMS: Can I have the ELMO?

6 BY MR. ADAMS:

7 Q How many peer-reviewed scientific
8 publications do you have?

9 A I have 154 peer-reviewed papers, and I
10 have 56 book chapters and proceedings.

11 Q How many of your peer-reviewed published
12 papers are on asbestos, or asbestos disease?

13 A About 80 percent of them. I don't know
14 exactly the number, but it's about 80 percent. The
15 others deal with viruses and asthma disease that I
16 published on, as well.

17 Q I have a copy here of your CV or resume.
18 All right. I think I pressed a button and it froze.
19 What did I do? Well, I've got a copy here. If we
20 thumb through it, I just highlighted a couple here.
21 All right.

22 Page after page after page of publications
23 on asbestos and asbestos disease, fair?

24 A True.

25 See if it works. Maybe it'll work now.

1 MR. ADAMS: I think it's working, but it's
2 not focused. Well, everything highlighted but
3 no one can read this. It says asbestos, so...

4 THE WITNESS: Yes, it does.

5 MR. ADAMS: There it is. Okay.

6 BY MR. ADAMS:

7 Q Very quickly, has any of your work
8 publishing about asbestos or mesothelioma or
9 asbestos-related diseases been funded by industry or
10 asbestos companies?

11 A No. My funding has all been through the
12 National Institutes of Health through competitive
13 grants.

14 Again, I mean, you say what's the greatest
15 reward I've had in my career? It's to be funded by
16 the National Institutes of Health. It's a very
17 competitive process where I'm competing with these
18 great schools across the nation, whether it's MIT or
19 UCLA or Harvard. And the National Institutes of
20 Health receives tens of thousands of applications
21 every year, and only about 10 to 15 percent of them
22 get funded. And I was funded without interruption
23 through my career by the National Institutes of
24 Health.

25 Q Has part of your work publishing in the

1 peer-reviewed literature for the last 50 or so years
2 been an effort to try to find a cure to some of
3 these asbestos-related diseases?

4 A So the focus on these diseases are mainly
5 because there are no effective treatments for any of
6 these diseases. All of the asbestos-related
7 diseases shorten one's life or take the life. And
8 so the National Institutes of Health funds work that
9 helps us understand the disease process so these
10 treatments can be developed.

11 Q Have you served as a peer reviewer,
12 someone who reviews other scientists' work in this
13 arena?

14 A I do that regularly, sure.

15 Q Have you published book chapters on
16 scientific work?

17 A A number of them, yes.

18 MR. ADAMS: Your Honor, in the interest of
19 time, we would tender Dr. Brody at this time as
20 an expert in cell biology and experimental
21 pathology.

22 MS. BUENO: No objection, Your Honor.

23 THE COURT: All right. By reason of
24 Dr. Brody's training, education, and
25 experience, he is qualified as an expert in

1 cell biology and experimental pathology and may
2 express opinions on these matters to the jury.

3 You may continue.

4 MR. ADAMS: Thank you, Your Honor.

5 - - -

6 DIRECT EXAMINATION

7 - - -

8 BY MR. ADAMS:

9 Q Dr. Brody, quickly, just let's start with
10 the basics. You're our first witness. Can you tell
11 the jury what asbestos is?

12 A Well, asbestos is a naturally occurring
13 mineral. It's been mined in many countries around
14 the world, U.S., Australia, South Africa, Canada,
15 many different places; Italy, for example.

16 And this is the rock form. So there are
17 six different kinds of asbestos -- one, two, three,
18 four, five, six. Chrysotile is the main use --
19 mainly used type. It's used more than any other
20 type. About 95 percent of the world's use is
21 chrysotile.

22 The other five varieties make up the other
23 5 percent of the world's use. All of these asbestos
24 varieties cause all of the asbestos diseases:
25 scar tissue disease called asbestosis, lung

1 cancer, and this cancer we're talking about today,
2 mesothelioma.

3 Q In any of your peer-reviewed work, when
4 you've worked with asbestos, you've worked with raw
5 asbestos in your work, correct?

6 A Yes.

7 Q Do you ever have to consult with any kind
8 of geologist before determining that the asbestos
9 you were working with was actually asbestos?

10 A No. I told you where it comes from.
11 That's basically what you need to know. No, a
12 geologist wouldn't play a role in the kind of work
13 that I did. What happens then is you can see
14 there's a fiber form in the rock. And when that's
15 crushed and broken out, then you have the fiber form
16 that can be used in various -- and it has been used
17 in thousands of different products.

18 Q The jury in opening statement earlier
19 today saw slide after slide about something called
20 fibrous tremolite in Johnson's Baby Powder. What is
21 that?

22 A So tremolite is one of the asbestos
23 varieties. You can see it right here. If it's
24 fibrous tremolite, that makes it asbestos. I mean,
25 asbestos is a fiber. If you say something is

1 asbestiform, that means it's a mineral, one of these
2 minerals, in a fiber form. And a fiber means it's a
3 structure three times longer than it is wide. So
4 there you go. It's a fiber. Okay. Three-to-one
5 ratio as it's called.

6 Q So something that's three times longer
7 than it is wide or longer?

8 A Right.

9 Q That's a fiber?

10 A Sure.

11 Q And so if you have one of these six
12 asbestos minerals and it's in that shape, what is
13 it?

14 A It's asbestos, sure.

15 Q One of the things we prepared is some
16 slides that demonstrate how asbestos is inhaled in
17 the body and travels and causes disease. We're
18 looking at the first one. I'm going to give you the
19 pointer and have you sort of take the lead there,
20 and I'll have questions as you go along.

21 MR. ADAMS: Your Honor, is it okay if
22 Dr. Brody stands?

23 THE COURT: Why certainly.

24 MR. ADAMS: Okay.

25 THE WITNESS: Okay, Your Honor. I'm not

1 as agile as I used to be.

2 THE COURT: Me neither, Dr. Brody. No
3 apologies necessary.

4 THE WITNESS: I do want to explain my scar
5 face, though. I had a little procedure done.
6 I apologize for my appearance. That's the way
7 it goes.

8 BY MR. ADAMS:

9 Q How does this slide help us understand
10 mesothelioma and how asbestos causes disease?

11 A Right. So this obviously is a diagram I
12 took from a textbook. And I would just want to
13 remind you that when you take a breath, the air
14 comes into your nose, through down into your mouth,
15 and down this tube that's called a trachea or
16 windpipe. You can feel the top of that in your
17 Adam's apple right here. That's the trachea. And
18 the air goes rushing down into this series of tubes
19 that we call conducting airways because they conduct
20 air down into the lungs.

21 Now, this black line that runs around the
22 outside of the lung, that black line represents the
23 pleura, P-L-E-U-R-A, a Saran Wrap-thin membrane. It
24 wraps around the outside of the lungs and makes the
25 lungs airtight like balloons.

1 There's a single layer of cells that wrap
2 around the outside of the pleura, and those are
3 called mesothelial cells. If somebody has a cancer
4 of the mesothelial cells, that's this cancer,
5 mesothelioma.

6 Okay. So I'm going to kind of take this
7 apart and show you where the asbestos goes and how
8 it influences the cells that develop into cancer.

9 Okay. So this is -- you've already seen
10 it under the microscope. All right. So here's a
11 piece of lung tissue that I've taken with a
12 microscope. You get sort of a three-dimensional
13 view. And I'm going to focus -- well, if you take a
14 breath and the air comes running into these tubes,
15 the air then will move out into these small air
16 spaces that you see here.

17 And we have some excellent defenses that
18 get -- protect us, prevent us from getting sick.
19 Most people, no matter how much asbestos they're
20 exposed to, do not get any of the asbestos diseases
21 because of our excellent defense mechanisms.

22 Our defense mechanisms start with our nose
23 and our mouth where we have moisture that trap the
24 cells and trap the fibers. And then as we get down
25 into the airways, I'm going to show you, we have a

1 very effective defense mechanism that removes fibers
2 that land in the lung.

3 So I'm going to focus the microscope here
4 and I'm going to fill the screen with what's in that
5 green spot. It could be anywhere along the airway.
6 It could be in you, me, a rat, a cat, a dog. We all
7 have these same things. And here is what it looks
8 like.

9 Now, this says human bronchiole --
10 bronchiole is a small airway. And you can see that
11 our airways are lined by these little hairlike
12 structures called cilia, C-I-L-I-A. And these cilia
13 are beating a synchronous, wavelike action. So if
14 there's something like a pollen grain or an asbestos
15 fiber lands on that, it gets swept up to your mouth
16 where you swallow it or spit it out. That's going
17 on all the time, going on right now as we speak.

18 So now I just want to also point out
19 this -- see this bar here. This means 10 microns.
20 This is how we measure asbestos, in microns. So let
21 me explain how big a micron is.

22 Q How big is a micron?

23 A So if you take your thumb and your
24 forefinger and you just make a space you can barely
25 see with your naked eye, naked eye -- if you don't

1 have a magnifying glass or you don't have a
2 microscope, you can just barely see that splice.
3 That's about a millimeter. Now take that millimeter
4 and divide it a thousand times. What you've done
5 then is you've made a thousand microns.

6 Okay. Now, here in this picture it's easy
7 to see 10 microns because I magnified it so many
8 tens of thousands of times. And we'll be -- most of
9 the pictures will have these magnification bars so
10 you can see just how big and small these things
11 actually are.

12 Okay. So we're going to then move ahead.
13 And because I want to take us into -- sorry. I'm
14 going to take us into one of these air spaces, these
15 little air spaces. I'm going to go right inside of
16 these because I want to show you the last line of
17 defense, sitting in our air spaces.

18 Think of this room, this courtroom, as an
19 air space. And if you look down on the floor, you
20 see a carpet. And we have cells called epithelial
21 cells. Epithelial cells line surfaces, like the
22 epithelium and the epidermis. And this, the
23 epithelium we have in our lungs, is very thin like a
24 carpet, runs up over the walls into the next air
25 space, covers all these surfaces.

1 And on this air space surface we have our
2 last line of defense. I showed you the first line
3 of defense, the mucus and nose hairs, and then the
4 cilia in our airways. And now things go right past
5 those defenses and land -- I'm going to show you.
6 Asbestos lands right on the carpet of the lung.

7 Let's take a look at -- into one of these
8 air spaces in a person. Okay. That's what we have
9 right here. So here's the air space. Here's the
10 carpet down here.

11 And this lung once belonged to somebody
12 who was killed in a motorcycle accident. And I was
13 on the medical examiner's autopsy call. I prepared
14 this lung. And as I was going from air space to air
15 space, looking for interesting things to show the
16 medical students, I saw these two characters, this
17 one and this one, sitting on the carpet.

18 Now, these cells are well-known, but to
19 see one of these cells, as you see here, this one
20 has a tail end and a couple of false feet. I caught
21 it when it was just about ready to pick up this
22 pollen grain here. As this guy was zipping along in
23 his motorcycle, he was inhaling a lot of different
24 things. One thing we know he inhaled was this
25 pollen grain. It went right past this cilia and

1 landed on the carpet.

2 We have a very effective defense
3 mechanism, these cells. There's one that's just
4 sitting there, idle and fluffy, not doing anything.
5 But this one received a signal that something
6 doesn't belong there and was moving toward the
7 pollen grain when I stopped the action.

8 Q What are these called? You might have
9 said.

10 A Okay. These are macrophages. "Macro"
11 means big. "Phage" means big. Big eaters of the
12 lung. We'll see what they do in relation to
13 asbestos. See, they find the asbestos, too. We
14 discovered the chemical signal in our laboratory
15 that directs the macrophages to the asbestos. Turns
16 out that asbestos -- not all grains, but asbestos is
17 toxic to these macrophages, injures and kills the
18 macrophages, and they become part of the disease
19 process. We'll get to that in a minute.

20 Okay. So let's now take a look at the
21 lung for a minute. This is a normal pleura. I want
22 you to see a normal pleura, thin. I showed you a
23 diagram earlier. This was that black line. You can
24 see how very thin it is. And if you compare that to
25 the pleura of somebody with a mesothelioma, you can

1 see how dramatically thickened that is. Some of the
2 mesothelial tumor cells are invading the lung.

3 And so what I'm going to do is I'm going
4 to spend the rest of the time explaining how these
5 asbestos fibers cause cancer.

6 Q Can I just ask you one question about the
7 lung cancer, mesothelioma?

8 A Of course.

9 Q What are the diseases that asbestos
10 causes? What are the asbestos-related diseases?

11 A Yeah. So asbestosis develops in this part
12 of the lung. It's scar tissue from inhaling
13 asbestos. So the asbestos injures the lung. The
14 lung responds by making a scar. If you stuck
15 asbestos under your skin, you'd get scarring
16 wherever you stuck the asbestos because it causes
17 cell injury.

18 Okay. And then the next disease is lung
19 cancer. This actually is a lung cancer. It's not
20 an asbestos-induced lung cancer, but it is a lung
21 cancer. And that's developed from certain cells in
22 the airways.

23 And then there's a pleural thickening or
24 scarring out here on the surface, and that's another
25 scar tissue disease.

1 And then there's mesothelioma that we're
2 going to talk about.

3 Q Does -- sometimes people just wonder, does
4 smoking cigarettes give you mesothelioma? Does, you
5 know, pollution give you mesothelioma, or is it a
6 signal tumor for something?

7 A Yeah, so all good questions. It's a
8 signal tumor. Meaning if somebody walks into the
9 doctor with and has this diagnosis of mesothelioma,
10 it signals that that person has been exposed to
11 asbestos. It's very rare to find a mesothelioma
12 without an asbestos exposure. You find them,
13 they're there, but there is a number of diseases,
14 pleural diseases, that are idiopathic, meaning you
15 don't know the cause. If you have an asbestos
16 exposure, it's not worth talking about an idiopathic
17 disease. We know the cause.

18 Okay. Now, the issue of cigarette
19 smoking. Cigarette smoking causes lung cancer. It
20 has nothing to do with mesothelioma. There's no
21 association in cigarette smoking with lung cancer.
22 Air pollution -- I'm sorry. No association between
23 cigarette smoking and mesothelioma. Okay. Thank
24 you.

25 When you said -- you added pollution in

1 there. Just general pollution, I mean, gases, they
2 don't cause mesothelioma. They can cause a variety
3 of other lung diseases. We'll save that for another
4 time.

5 Q Thank you.

6 A All right. So we've been there.

7 All right. So this is what asbestos looks
8 like when it's -- when you see a little pinch of it
9 with the electron microscope, that microscope I was
10 sitting at.

11 So if this whole bundle -- see, it's a
12 fiber bundle, and it's easy to see one micron
13 because I magnified this 4,300 times. So now you
14 can see the individual fibers. And if this whole
15 bundle were to be floating by and the light was just
16 right, it would look like a speck of dust. You
17 cannot see the individual fibers.

18 So a human, as you saw, can see just about
19 a millimeter. To see a micron, as you see here, you
20 need an electron microscope to see that.

21 But this bundle then, even this bundle, if
22 you can see with the naked eye, is too big to
23 inhale. It's the fibers that fracture off these
24 bundles, those are the ones that get down onto the
25 carpet surfaces that we're going to see in a couple

1 minutes.

2 Q Do all of the varieties of asbestos cause
3 mesothelioma?

4 A All of the asbestos varieties cause all of
5 the asbestos diseases.

6 Q How does this slide help us understand how
7 asbestos causes diseases?

8 A Right. So in order to -- you don't get to
9 stand there and watch as a person is inhaling
10 asbestos, you know, right? You can't be there. And
11 even if you were, you wouldn't be looking inside
12 their lungs. You can't do that.

13 So scientists use animal models of
14 disease. Whether it's tuberculosis or genetic
15 diseases or a whole variety of different -- excuse
16 me -- infectious diseases, we use animal models,
17 typically rats and mice. If we can prove that the
18 rats and mice get the same diseases as people, we
19 can use them as models of diseases.

20 I typically use rats and mice. This is
21 the lung -- this is a piece of lung from a rat. And
22 you can see some of the things we were looking at in
23 a human, where there's an airway that comes down and
24 opens up into the small air spaces. Where I showed
25 you those macrophages sitting on the carpet, they

1 were sitting in one of these air spaces in a person.
2 And I can find exactly the same thing, as I'll show
3 you in a minute, in a rat.

4 So this is from an experiment we did where
5 we set up some animals and exposed them in chambers
6 about 6 feet high, 4 feet wide to a high
7 concentration of asbestos for a single hour. And
8 then after the hour, you give the animals an
9 overdose of anesthetic. Overdose means they don't
10 wake up from that. We go in and prepare the lungs
11 so we can look at the individual air spaces, and
12 where did the asbestos go?

13 When I started my work, there was no
14 answer to the question. We know the asbestos goes
15 in the lungs, but where does it go? We couldn't do
16 that.

17 So I'm going to show you, we're going to
18 look at this in this animal immediately after a
19 single hour of exposure, we're going to focus on
20 this spot right here. And you'll see this black
21 hole right here. Because when the animal or you or
22 I take a breath, the air comes down the tube and go
23 in this way, or the air can split and go in this
24 direction, or it can split again and go in this
25 direction.

1 So these are called bifurcations. Like a
2 road bifurcates and splits, the air is doing the
3 same thing. And the asbestos fibers that are being
4 inhaled are traveling along with the airflow. It
5 turns out they flow in the middle of the air. We
6 found out the asbestos is flowing through the center
7 of the air space or through the airway. And
8 therefore they get -- there's interference by these
9 splits.

10 So I'm going to show you this spot right
11 here in the next slide. I'm going to focus on this
12 area. Okay. And so this black hole right here is
13 this black hole right here. Okay. So now we're
14 looking at the -- this is that carpet that covers --
15 that you're standing on is the carpet. Okay.

16 And here's the carpet. Now, this is a
17 10-micron bar. That means this fiber is about
18 10 microns long. There's some short fibers.
19 There's some long, curly fibers. There's some
20 short, straight ones. There's a whole variety of
21 different shapes and sizes just like we saw when we
22 looked at the asbestos by itself in the microscope.
23 Now all of these fibers are sitting on the carpet.

24 Now, this is one of thousands of spots,
25 millions of spots like this around the lung. And

1 every time there's an exposure to a human or a
2 person, some proportion of those fibers are cleared,
3 protected by the -- by our defenses, and some
4 proportion of them get right past those and land on
5 the carpet.

6 Okay. So we're concerned with the fibers
7 that land on the carpet. Yes, we have excellent
8 defenses, they do a great job, but they don't trap
9 everything. So here we're going to see what happens
10 to these fibers.

11 Now, I use this as an example because as I
12 was sitting in a laboratory late at night, I noticed
13 that one of these -- I noticed in some of these
14 sections that some of the fibers were disappearing
15 under the carpet. In fact, you can see the fibers
16 here, but you can't see them here. You can see them
17 here, but you can't see them here.

18 So no one had ever seen this before.
19 There was nothing about it in the literature. So I
20 started doing the studies required to find what's
21 going on. And what we learned was when the fibers
22 land, these carpet cells come up over the top of the
23 fibers and shove them under the carpet. Now, they
24 do that because we have a storage space under the
25 carpet. You, me, rats, cats, dogs.

1 Q Giraffes?

2 A Whales, giraffes. We all have a space
3 under the carpet. And we store lots of things in
4 there. If you look at a lung of a cigarette smoker,
5 if you look at the lung of a cigarette smoker, that
6 space is black and it outlines all the air spaces
7 because the person inhaling cigarette smoke is
8 inhaling carbon, which is black. And it outlines --
9 by sticking in these spaces, it outlines the lung.
10 But asbestos gets into that space, as well.

11 Question?

12 Q Well, I'm hoping to get you out of here
13 before 5:30.

14 A Well, you can't ask me questions.

15 Q I know.

16 So we've inhaled the asbestos. It's
17 landed on the carpet. It's going under the carpet.
18 What happens next?

19 A Yeah, so in this carpet and underneath the
20 carpet in that space is a fluid. It's called lymph,
21 L-Y-M-P-H. And lymph is a clear fluid that runs
22 head to toe in our bodies. It has two very
23 important functions. It carries cells in the immune
24 system and it also plays a role in -- in preventing
25 too much pressure in our blood vessels.

1 It turns out that the lymph fluid in the
2 lung flows to the pleura. So to make a long story
3 short, the fibers that are getting into that space
4 now have access to the pleura, and they do that
5 through the lymph.

6 So let's go -- in fact, this is a picture
7 by Dr. Netter, N-E-T-T-E-R. Dr. Netter has given us
8 atlases of the human body in health and disease.
9 And here he's showing us the pattern of lymph flow
10 in the lung. He's showing these very small vessels,
11 many of which end at the pleura. You can see the
12 network of small vessels out in the pleura.

13 Now, there's another way to look at this
14 and other scientists have shown this. The
15 scientists cut a piece of the lung out and made a
16 diagram out of it. So you can see the pleura on the
17 right and you see some fibers coming in. And the
18 fibers then move into the -- so here's the -- here
19 are the air spaces. Here's the space underneath
20 that I was talking about, and the artist says
21 lymphatic fiber transport to the pleura.

22 So that's the illustration of it going to
23 the pleura. And a number of scientists -- not my
24 work, but -- have studied the collection of asbestos
25 fibers of all kinds in the pleura.

1 Q Is the pleura another word for this lining
2 of the lung where the mesothelioma develops?

3 A Exactly.

4 Q Thank you.

5 How does this slide help us understand our
6 defense mechanisms?

7 A Right. So here, this is the rat now.
8 This is the rat lung. One, two, three, four, five,
9 six, seven macrophages have arrived, having detected
10 the signal that we discovered that they -- that they
11 followed to find odd things that don't belong in the
12 lung.

13 And you can see that -- so this fiber is
14 about 10 microns long, and you can see they're
15 sharing fibers, but these macrophages are dead and
16 dying. They have holes in them and they're not
17 doing very well. And dead and dying macrophages
18 make what are called growth factors. Growth factors
19 cause other cells to divide and multiply. And a
20 dividing cell is more likely to become a cancer
21 cell. So we don't want our cells dividing out of
22 turn.

23 Okay. So a few slides on cancer.

24 Q All right. What is cancer and how do
25 these slides help us understand it?

1 A Okay. So the best definition of cancer is
2 the loss of control of cell growth. That's what I
3 have on my sheet. It's the next thing. Okay. The
4 loss of control of cell growth. The cells will keep
5 growing, and they have to be removed or killed in
6 other ways.

7 Okay. And so this is the cover of the
8 proceedings of a meeting I was at a few years ago.
9 And the topic was, How do fibers cause cancer,
10 carcino -- cancer -- genesis formation? How do
11 fibers cause cancer to form?

12 We've been talking about cells today.
13 I've shown you a lot of different kinds of cells,
14 but you can't talk about carcinogenesis until you
15 talk about the molecular aspect.

16 Cancer is a genetic disease. Molecular
17 biology is the study of genes and genetics. You
18 can't talk about carcinogenesis unless you talk
19 about the molecular aspects, which genes are
20 involved. That's the key to cancer.

21 Now, what I'm going to show in the next
22 couple slides is that asbestos causes damage to DNA
23 genetic material, and that's how it acts as a
24 carcinogen, as a cancer-causing agent.

25 Okay. So one of the ways we do that is by

1 taking cells. There's two cells here; one and
2 another one. We take cells out of animals and
3 people and put the cells in a dish. If you give
4 them the right nutrients, those cells will grow.
5 You can feed them the materials you want to study.

6 For example, some fibers have been added
7 here. You see there's kind of a long fiber and some
8 short fibers. And notice how those fibers have
9 collected around the center circle in the cell. The
10 center cell is called the nucleus. The nucleus of
11 our cells contains all of our genes, all of our DNA.

12 But notice how the fibers are excluding
13 because we have a protective membrane around the
14 DNA. When a cell is dividing, it loses that
15 protective membrane. That's where we're going to
16 go. These are dividing cells.

17 Okay. I'm showing you now what is
18 supposed to happen, normal cell division; three
19 cells, one, two, three. I put an "N" on here for
20 nucleus. Did I tell you that was the nucleus, that
21 circle? No. Okay. So this circle here that the
22 fibers are attached to, that's the nucleus, the
23 center circle is called the nucleus of the cell.

24 So here now we have nucleus in this cell,
25 nucleus here. But this cell is dividing, is

1 replicating. We need -- it's going to have two of
2 the same. It might be if you cut your skin and you
3 scrape your skin, you need to make new skin cells.
4 That's a reason for the cells to divide.

5 Our cells divide at a specific rate, and
6 that rate is controlled by specific genes. When you
7 get errors in a set of those genes that control cell
8 growth, you get cancer. That makes it more likely
9 that you get a cancer.

10 Okay. So I put some notes in here about
11 how often cells divide or are supposed to divide.
12 So here this cell, I put "CH" here for chromosomes,
13 because all the DNA now is stained blue. And the
14 DNA is going to condense into what are called
15 chromosomes.

16 Chromosomes are condensed strands of DNA,
17 all of our genes. I'm going to take these
18 chromosomes out, spread them out so you can see
19 human chromosomes.

20 So humans have 23 pairs of chromosomes.
21 And all of our 20,000 or so genes are distributed
22 across our chromosomes. And every chromosome has to
23 be in the right place on the right chromosome or
24 it's not going to function.

25 So those genes, we have a set of genes

1 that are called growth control genes. I think I
2 said that. Okay. Now, these growth control genes
3 are what protect us from getting cancers. And if
4 their growth control gene isn't where it's supposed
5 to be on a chromosome, then it's not going to work.

6 We have about 150 of them. I'll tell you
7 about one in a second. It's found in the tip of
8 human chromosome 17. It's called P53. P53 was in
9 the year 1994, and it has some great nicknames.
10 It's a tumor-suppressant gene. It is the guardian
11 of the genome. And it's found to be damaged in
12 about half of all human cancers. This is a very
13 important gene that protects us from getting cancer.
14 And it sits -- we know exactly where it sits at the
15 tip of human chromosome 17.

16 So let's see what happens then as cells
17 divide.

18 MS. BUENO: Your Honor, I have no
19 objection to the testimony, but the
20 narrative --

21 MR. ADAMS: I'll ask the question, Your
22 Honor.

23 MS. BUENO: Okay. All right.

24 MR. ADAMS: That's fine. I'll ask another
25 question. I'm sorry.

1 THE COURT: I'm going to be very liberal
2 with him because I'm trying to get him out on
3 time. And I don't see how in the world it
4 helps you for him to narrate; so overruled.

5 Go ahead.

6 MR. ADAMS: All right. We've been given a
7 five-minute warning, Dr. Brody, just so you
8 know.

9 BY MR. ADAMS:

10 Q How does this slide help us understand how
11 a dividing cell is a vulnerable cell?

12 A Yeah, so here's a normally dividing cell.
13 The chromosome is this time a purple. You can make
14 them any color you like. But the key here is that
15 yellow background. In this previous picture the
16 background was red. And that background is called a
17 cytoskeleton.

18 Cells have skeletons just like we do. Not
19 made of bone, but made of connect -- contractual
20 filaments that actually bind to the chromosomes and
21 pull them into the new cell. So we know that we
22 have to have contractual filaments to move the new
23 chromosomes into the two new cells that we call
24 daughter cells.

25 And let's see what actually happens when

1 you put the asbestos into the cells that we've been
2 talking about. Over here is a normal cell. Half
3 the chromosomes go to one side, half -- half to the
4 other. Okay. Half go to one side, half to the
5 other.

6 Do we have another pointer somewhere?

7 Q Did the battery die?

8 A It seems to have.

9 Q Come on, guys.

10 A I'll keep talking while you find another.

11 Yeah, right.

12 MR. ADAMS: Sorry, Your Honor. Can I go
13 over here?

14 THE WITNESS: What are you doing? You
15 don't have another pointer anywhere? Okay.

16 BY MR. ADAMS:

17 Q We'll keep going.

18 A All right. So I will narrate what's
19 happening there.

20 So the one on the left has no asbestos on
21 it. The cell on the right, the asbestos fibers have
22 an arrow. You see I put arrows there? Those show
23 the asbestos fibers.

24 The arrowheads show where the asbestos is
25 bound and the DNA, the black DNA that's bound to the

1 asbestos. So in this case instead of the DNA being
2 able to move to the newly forming cells, it's bound
3 to the asbestos. And I told you that every gene has
4 to be in the right place in the right chromosome.
5 That means any genes that are in that DNA are not
6 going to be able to function.

7 Now, this is the same kind of thing
8 published by another author. I'd love to go into it
9 and tell you what she found, the same kind of thing.
10 The -- the term is called aneuploiding.
11 Aneuploiding is abnormal chromosome separation.
12 Aneuploid cells are not cancer cells, but the door
13 is opening. And the more aneuploid cells you have,
14 the more likely it is you'll get a cancer.

15 Last slide. I need a pointer. I'm, like,
16 helpless without a pointer. I'm trying. We've got
17 some pretty good colors here.

18 Anybody? Anybody?

19 THE COURT: Anybody on the defense side
20 have a pointer?

21 TECHNICIAN: I have one right here.

22 THE COURT: Cute. Thank you so much.

23 THE WITNESS: Here we go, last slide. So
24 this kind of summarizes everything I've been
25 trying to say about cancer. Here's a layer of

1 cells, mesothelial cells sitting on the outside
2 lining of the wall, millions of them, hundreds
3 of millions of them.

4 This says "DNA damage." Now, it shows
5 lightning bolts, but in this case we're talking
6 about a mesothelioma. So from the environment
7 we're talking about asbestos coming in there
8 and damaging DNA, as I just showed you.

9 Now, what happens then as the cell
10 divides, one of the daughter cells goes off and
11 if there's DNA damage like I've showed you in
12 those aneuploid cells, those cells typically
13 die because P53 and other genes drive them down
14 a death path and you never hear about them
15 again.

16 It's going on all the time in our bodies.
17 It's programmed cell death. But in order to
18 have a cancer, one of these daughter cells must
19 survive. And here it is. Here's the surviving
20 daughter cell.

21 Now, between the surviving daughter cell
22 and this tumor here, you've got to give me
23 whatever the latency is. Latency is the time
24 from the first exposure till the time the
25 person came to the clinic. It could be

1 anywhere between 30 and 70 years. Typically
2 it's around 50, 60 years, but it can be in any
3 of that time frame.

4 So here's what's going on with this cell
5 during those -- during that interim period. I
6 mean that latency period. So picture that cell
7 now. It sits there looking and acting like a
8 normal mesothelial cell for months. But
9 eventually it has to divide. Two cells, four,
10 eight, 16, 32, 64, making what's called a field
11 of similar cells. And one or more of those
12 cells now picks up another error, another
13 asbestos fiber, another error forms. So now
14 you have two errors.

15 One is not enough to cause a cancer. Two
16 is not enough. Three is not enough. Four is
17 probably not enough. When you start getting
18 into five, six, seven different errors in these
19 genes like P53 that protect us, you increase
20 the likelihood that cancer will develop.

21 So now we have two errors and you have a
22 field of all the cells in there have two
23 errors, and those cells sit there for months.
24 Eventually they have to divide again. You get
25 now they pick up a third error or fourth error.

1 And then you find fields, multiple fields,
2 scattered across the mesothelial surface until
3 one cell, a single cell, with sufficient number
4 of errors for that person and with the right
5 combination of errors for that person grows out
6 into this tumor.

7 That's why the artist made this all the
8 same color, because they were cloned from a
9 single cell with sufficient errors in the right
10 combination for that person. And that's what,
11 when that keeps growing, causes the cancer and
12 brings the person to the clinic.

13 BY MR. ADAMS:

14 Q Dr. Brody, thank you so much for answering
15 my questions. Were all of the opinions you gave
16 today within a reasonable degree of scientific
17 certainty?

18 A Yes.

19 MR. ADAMS: Thank you. Pass the witness.

20 MS. BUENO: Your Honor?

21 THE COURT: Cross-examination.

22 MS. BUENO: Yes, thank you.

23 - - -

24 CROSS-EXAMINATION

25 - - -

1 BY MS. BUENO:

2 Q Dr. Brody, hello. My name is Kim Bueno.

3 I've never asked you questions before. It's nice to
4 see you.

5 A Thank you.

6 Q All of the slides that you just showed the
7 jury were about asbestos, right?

8 A Yeah, I would say so.

9 Q There wasn't anything that you showed the
10 jury about Johnson's Baby Powder, true?

11 A Well, if there's asbestos in Johnson's
12 Baby Powder, then it would be like the asbestos I
13 just showed.

14 Q The slides you showed were asbestos from
15 experiments not involving Johnson's Baby Powder,
16 true?

17 A Agreed.

18 Q You have never done anything to determine
19 whether Johnson's Baby Powder has asbestos in it,
20 right?

21 A That's not what I do. That's correct.

22 Q You've never tested talcum powder?

23 A I have not. I've never tested any
24 product, actually.

25 Q You've never done studies to see if

1 exposure to cosmetic talc causes mesothelioma?

2 A I've never tested any kind of product.

3 That's not what I've ever done.

4 Q You've never exposed rats or mice to
5 cosmetic talc, right?

6 A True.

7 Q And you talked about all the articles
8 you've published, but you've never written any
9 articles on cosmetic talc, correct?

10 A No, just in asbestos because talc doesn't
11 cause mesothelioma. Asbestos does.

12 Q I told the jury earlier today that dose
13 matters. And you agree with that?

14 A Of course.

15 Q You agree with me that asbestos-related
16 mesothelioma is what we call a dose-response
17 disease?

18 A Correct.

19 Q That means the greater the dose of
20 asbestos, the greater the risk of developing
21 mesothelioma?

22 A Certainly.

23 Q And conversely, the smaller the dose means
24 less risk?

25 A Certainly.

1 Q And the lower the dose, the better the
2 body's defense mechanisms are in getting rid of it,
3 true?

4 A Sure.

5 Q And most of the dusts that we breathe in
6 are very efficiently handled by our body's defense
7 systems, true?

8 A Right.

9 Q And our defense mechanisms remove the
10 great majority, well over 90 percent, of all the
11 dust we inhale, right?

12 A That's right.

13 Q We're all exposed to low, low doses of
14 asbestos, true?

15 A Yeah, sure, and some people are exposed to
16 more than that. That's right.

17 Q Sure. And we're all breathing asbestos
18 fibers every day. And that's what we call the
19 background level, right?

20 A Correct.

21 Q And there are billions of asbestos fibers
22 in the background air that we breathe, correct?

23 A Not all at once. I mean, in your
24 lifespan, you might pick up a billion fibers.
25 But -- and you can get a billion fibers into a

1 thimble, don't forget, so...

2 Q Sure. So over our lifetime, you agree we
3 accumulate billions of asbestos fibers in our lungs?

4 A It's possible. Not everybody does that,
5 but it's possible.

6 Q You can pull up slide 1, please.

7 These billions of asbestos fibers in our
8 lungs that we all breathe, they're just one of the
9 many things we live with and our bodies know how to
10 handle, correct?

11 A I agree.

12 Q As a general principle, there actually is
13 a safe level of asbestos exposure, that being
14 background. True?

15 A It appears that way for most people, yes.

16 Q There's no measurement of disease from the
17 background level, correct?

18 A If that's all one is exposed to, correct.

19 Q And in layman's terms, that means anybody
20 walking around, it's safe to breathe the background
21 level. True?

22 A As far as we can tell, yes.

23 Q Let's talk about what the background level
24 is. When we talk about the background levels of
25 dust or particles in the air, sometimes researchers

1 use fibers per cc, correct?

2 A Right.

3 Q And a cc is a cubic centimeter, kind of
4 like a sugar cube size, right?

5 A That's right.

6 Q And you agree that .006 fibers per cc is a
7 background number from the National Institute of
8 Occupational Safety and Health that you have
9 testified about before, correct?

10 A Yes.

11 Q I'm going to try to use this ELMO. And if
12 I can't do it, we'll make do, Dr. Brody.

13 TECHNICIAN: Hit the little button in the
14 middle that says -- add, article, then circle.

15 THE COURT: That's the focus button.

16 MS. BUENO: Thank you, Judge.

17 BY MS. BUENO:

18 Q There. How about that? All right.

19 A I'm getting tired of seeing me.

20 Q .006 fibers of -- fibers per cc is what
21 you've testified about as a background level,
22 correct?

23 A It's a high background, correct.

24 Q And you've even testified before that
25 there are background levels of exposure as high as

1 .01, true?

2 A Well, it depends on where you are. I
3 mean, if you're outside a shipyard or a place where
4 asbestos is being used, sure, you can get higher
5 than that even.

6 Q And even at that level, the NIOSH, the
7 National Institute of Occupational Safety and
8 Health, .006 fibers per cc, there is no increased
9 risk of mesothelioma, correct?

10 A Correct.

11 Q And just so the jury understands, that's
12 breathing that .006 fibers per cc day in, day out,
13 every day of your entire life. And there's no
14 evidence that causes cancer, true?

15 A Well, I don't know if they know what a
16 person is breathing every day, every minute of their
17 life, but as a general principle, that's what that
18 means, yes.

19 Q And, again, that's breathing that .006
20 fibers per cc of asbestos day in and day out over
21 one's entire life, correct?

22 A I'm saying I don't know that you get to
23 know everything that's going in every minute, but as
24 a general principle, that's the way they measure it,
25 yes.

1 Q As a general principle at that level, that
2 doesn't cause cancer, correct, Dr. Brody?

3 A As far as we know.

4 MS. BUENO: Thank you. I have no further
5 questions.

6 THE COURT: Thank you. Redirect?

7 MR. ADAMS: Very brief, Your Honor.

8 THE COURT: Good.

9 - - -

10 REDIRECT EXAMINATION

11 - - -

12 BY MR. ADAMS:

13 Q Dr. Brody, very quickly, I just want to
14 follow up on the background level, 0.006, that the
15 lawyer for Johnson & Johnson just asked you about.
16 Do you remember that?

17 A Sure.

18 Q And you indicated that's a very high
19 background. Do you remember that?

20 A I don't know if I said "very," but it is a
21 high background.

22 Q What's a more typical background?

23 A Well, instead of -- instead of two zeros
24 in front of, you see five or six zeros. So .006
25 means that you'd need a thousand sugar cube volume,

1 you'd need 6,000 volumes of air to find a single
2 fiber. That's what that means.

3 Q Okay. That's a more typical background
4 level?

5 A Well, no. I'm saying that's what that
6 .006 means. But if you go .0000, then you need
7 10,000 of those spaces, or if you start getting more
8 zeros, you get 100,000 before you can find a fiber.
9 So it's a very low background.

10 Q If a paid expert for Johnson & Johnson
11 came and said it was okay for us to expose children
12 and babies and teenagers going through puberty, with
13 their cells dividing, to asbestos in a powder
14 product in the home -- because if you add up our
15 asbestos, it's less than a cumulative dose of 0.1 or
16 0.4 fibers per cc years.

17 Are you with me?

18 MS. BUENO: Objection, Your Honor.

19 THE COURT: Overruled.

20 BY MR. ADAMS:

21 Q Are you with me?

22 A Only sort of. I mean, you know, there are
23 a whole variety of different backgrounds there. Go
24 ahead.

25 Q Right. But if the cumulative dose from

1 Johnson's Baby Powder was more like 0.1 or 0.4
2 fibers per cc, that was the argument?

3 A That's high, yeah.

4 Q How many epidemiology studies are there
5 showing a double and 28-fold increased risk of
6 mesothelioma at those levels?

7 MS. BUENO: Objection, Your Honor.

8 THE COURT: Overruled.

9 THE WITNESS: At .1, it's -- it's clear.
10 I mean, .1 is actually the permitted exposure
11 level in the workplace nowadays by OSHA,
12 Occupational Safety and Health. And they say
13 at that level there will be increased numbers
14 of mesothelioma.

15 BY MR. ADAMS:

16 Q You were asked if you tested talc. Do you
17 remember?

18 A Yes.

19 Q Have you tested talc products? And you
20 said no, right?

21 A I never tested any products.

22 Q Are you familiar with the International
23 Agency for Research on Cancer?

24 A Of course.

25 Q What do they say about talc-containing

1 asbestos?

2 A They say it's a carcinogen.

3 Q And what disease does it cause?

4 A I'm sorry?

5 Q What disease does it cause?

6 A Mesothelioma.

7 MR. ADAMS: Thank you. That's all I have.

8 THE WITNESS: You're welcome.

9 THE COURT: Dr. Brody, thank you very
10 much. You may step down, and we appreciate
11 your testimony very much.

12 THE WITNESS: Thank you, Your Honor.

13 - - -

14 (Witness excused.)

15 - - -

16 THE COURT: Ladies and gentlemen of the
17 jury, this completes your service today. A
18 couple of things.

19 First of all, the alternates are just like
20 jurors. We don't know what happens over the
21 course of this time, but alternates and jurors
22 have no distinction. So don't you alternates
23 feel like, "Well, hey, maybe I'm kind of off
24 here in a corner someplace." Alternates are
25 jurors just like regular jurors are jurors, and

1 they may become a juror at any point during
2 this trial. So that's the first thing.

3 Second thing is, before you come back into
4 the courtroom tomorrow, elect a foreperson of
5 the jury.

6 Third thing is, leave your personal notes
7 in the jury room. Personal notes, as I told
8 you, are perfectly okay for you to take. Kind
9 of leave them in a spot in the jury room.
10 Don't take them home with you.

11 And the last thing is don't talk about the
12 case. It's awfully tempting when you get home
13 to family or friends to talk about this
14 experience, but please resist that temptation.

15 And I thank you for it, as does everyone
16 else involved in the trial. Have a pleasant
17 evening. See you tomorrow morning. We will
18 begin the case at 9:30, so arrive a little
19 early so you can refresh and get set so that we
20 can try to promptly get moving on the trial.

21 Thank you so much. Great attention paid
22 by everyone. I can't tell you how much I am
23 impressed with the way you all have listened to
24 this evidence.

25 All right. Stand for the departure of the

1 jury.

2 (The jury exited the courtroom at this
3 time.)

4 THE COURT: All right, ladies and
5 gentlemen, what have we to do? I'm tired and I
6 know y'all are tired.

7 MS. MCVEY: So let's do this. We do need
8 to discuss some of the exhibits. If we can
9 come in maybe early tomorrow morning.

10 THE COURT: Yes, I'll be happy to.

11 MS. MCVEY: Okay. So whatever time the
12 Court wants to be here, we'll be here to
13 discuss it.

14 THE COURT: Madam Court Reporter, it's
15 really up to you. Would you be able to be in
16 place and set up at 9:00?

17 THE COURT REPORTER: Yes.

18 THE COURT: Would 9:00 give enough time to
19 look at what we need to look at?

20 MS. MCVEY: I think it should, Your Honor.

21 THE COURT: Okay. If you all have any
22 communications about anything this evening, I
23 know you won't resist the temptation to send
24 them to me. And I will --

25 MS. MCVEY: I will send an e-mail just

1 confirming who's coming tomorrow, but certainly
2 Dr. Haber.

3 Just one tiny preview is that on
4 Wednesday, two of the witnesses -- Dr. Gibney,
5 who is the MUSC physician that Ms. Bueno just
6 referenced, he has patients. He's going to
7 appear remotely. So we'll have all that set
8 up. Just so you know that.

9 THE COURT: Good. And I will promise you
10 I will bring my computer tomorrow, technical
11 folks, so we can get set up if my computer is
12 needed in that regard.

13 MS. MCVEY: Okay. Great. So we'll have
14 it situated.

15 THE COURT: Okay. And just so you know my
16 habits and schedule. I am a very early riser.
17 So things that come in, I will view very early
18 in the morning. But as my grandchildren are
19 fond of saying, Big Mama doesn't go into four
20 figures very often. I'm an early go to bedder.
21 So if you don't hear from me, it's because I'm
22 already up in the upper deck, as we say in my
23 house.

24 MS. MCVEY: And, Your Honor, the last
25 thing, and I know they're going to, but it

1 would be great if they would tell us if they're
2 calling Weill or Diette.

3 THE COURT: Yeah, that would be nice. I
4 would like to know that as well tomorrow. I
5 think Ms. Bueno will be able to accommodate us
6 on that.

7 MS. BUENO: We need to do a little bit of
8 shuffling now that we can't call Dr. Barlow.

9 THE COURT: Understood.

10 MS. BUENO: So we'll find out and we'll
11 let the Court know.

12 THE COURT: Understood. Thank you so
13 much. And thank you for the very professional
14 way you're presenting this case. I am most
15 impressed with you, and I think the jury is
16 attentive to what you're bringing to them. So
17 thank you so much.

18 MS. BUENO: Thank you, Your Honor.

19 MS. MCVEY: Thank you.

20 THE COURT: Have a good evening.

21 MS. BUENO: You, too.

22 - - -

23 (Proceedings were adjourned at 5:39 p.m.)

24 - - -

25

CERTIFICATE OF REPORTER

I, Cynthia First, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify: That the proceedings and evidence are contained fully and accurately in the notes taken by me in the above cause and that it is a correct transcript of the same.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof. Witness my hand, I have hereunto affixed my official seal this 5th day of August 2024, at Chapin, Lexington County, South Carolina.

Cynthia First,
Registered Professional Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
October 16, 2028