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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.

EXHIBIT 7

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 7

DATE TAKEN: Wednesday, August 14, 2024

TIME BEGAN: 9:00 a.m.

TIME ENDED: 5:25 p.m.

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

REPORTED BY: Cynthia First, RPR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

APPEARANCES:

DEAN OMAR BRANHAM SHIRLEY, LLP
BY: RACHEL A. GROSS, ESQUIRE
BY: BENJAMIN H. ADAMS, ESQUIRE
BY: JONATHAN A. GEORGE, ESQUIRE
302 North Market Street, Suite 300
Dallas, Texas 75202
214-722-5990
rgross@dobslegal.com
badams@dobslegal.com
ageorge@dobslegal.com

and

KASSEL MCVEY
BY: THEILE B. MCVEY, ESQUIRE
BY: JAMIE RUTKOSKI, ESQUIRE
1330 Laurel Street
Columbia, South Carolina 29202
803-256-4242
tmcvey@kassellaw.com
jrutkoski@kassellaw.com
Representing the Plaintiffs

NELSON MULLINS RILEY & SCARBOROUGH, LLP
BY: C. MITCHELL BROWN, ESQUIRE
Meridian, 17th Floor
1320 Main Street
Columbia, South Carolina 29201
803-7900-2000
mitch.brown@nelsonmullins.com
Representing Defendants Johnson & Johnson; LTL
Management, LLC; J&J Holdco (NA), Inc.; Janssen
Pharmaceuticals, Inc.; and Kenvue, Inc.

APPEARANCES (Continued)

BUTLER SNOW

BY: KIM BUENO, ESQUIRE

BY: CHRISTOPHER R. COWAN, ESQUIRE

BY: AMY M. PEPKE, ESQUIRE

1400 Lavaca Street, Suite 1000

Austin, Texas 78701

737-802-1820

kim.bueno@butlersnow.com

chris.cowan@butlersnow.com

amy.pepke@butlersnow.com

Representing Defendants Johnson & Johnson; LTL
Management, LLC; J&J Holdco (NA), Inc.; Janssen
Pharmaceuticals, Inc.; and Kenvue, Inc.

FOX ROTHSCHILD

BY: STEPHANIE G. FLYNN, ESQUIRE

BY: NICHOLAS J. CHERRY, ESQUIRE

2 West Washington Street, Suite 1100

Greenville, South Carolina 29601

864-751-7607

sgflynn@foxrothschild.com

ncherry@foxrothschild.com

Representing Defendant American International
Industries

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P R O C E E D I N G S

THE COURT: The defendants have requested two things.

Number one, Mitch continues to have heartburn about the resting in front of the jury thing. I am going to cover that in what I say, and I think Mitch will be protective about that. If that is something that we know they'll raise it and -- or anything, they just have some heartburn about it. I am not going to worry about that; so I'm just telling you that's how we're going to handle that.

MS. MCVEY: May I speak on that for two seconds?

THE COURT: You may.

MS. MCVEY: I think it's important for the jury to hear that we rest because, when we left on Monday, we said that the plaintiffs are going to rest all your evidence. And I think it's important that we say that to them.

THE COURT: Well, I know. But I'm going to handle that, and I understand that that's what you want to do. But that's --

1 MS. MCVEY: And the last thing I'll say --
2 and I respect your ruling -- is the reason they
3 don't want us to do that is because they don't
4 want it to be obvious they're not going to have
5 any more evidence.

6 THE COURT: It's going to be very obvious.
7 So whatever -- and I'm sure it will be
8 discussed at length with the jury in closing
9 arguments. So that subtlety will escape us.

10 But here's the other thing. The defense
11 has an hour and a half for closing. It's been
12 divided, 1:15 for them and 15 for Ms. Flynn.

13 If Ms. Flynn does not use her entire 15, I
14 will give it to them. So if you want to expand
15 the time, that's good.

16 MS. MCVEY: I'm totally fine with that.
17 I'm much less cool about the resting, but I
18 understand.

19 MS. BUENO: So, Your Honor, if we start at
20 9:30 right when the jury gets here, and
21 plaintiffs do --

22 THE COURT: Well, you know, I'm going to
23 give the jury some wind-up as to what's going
24 on and so forth and the rest deal and all that
25 kind of thing. But we'll start -- whenever we

1 start -- Tasha keeps good time, but I rarely
2 interrupt people. If you don't go crazy and
3 complete your sentences, you all keep time on
4 each other; so I'm not worried about it.

5 MS. BUENO: I was thinking more about
6 scheduling breaks. So I'm assuming that --

7 THE COURT: Well, I generally try to let a
8 person do their whole close before I take a
9 break. And then the whole close for y'all, and
10 then take a break. And then come back.

11 MS. BUENO: Okay. And are we going to
12 take a lunch break?

13 THE COURT: Yes. And I have the jury -- I
14 have sheets for the jury to fill out what they
15 want for lunch.

16 MS. BUENO: I was going to ask if we
17 should bring lunch.

18 THE COURT: They will be fed lunch
19 whenever we take a break. That's kind of
20 depending on how it all goes. We'll see how it
21 goes. I've got to -- I can't split the charge.
22 That's going to be the time -- it generally
23 takes me about a half hour or 45 minutes to
24 read that charge.

25 MS. BUENO: Right.

1 THE COURT: So let's just see how we roll.
2 If it's close to lunchtime, we may wait until
3 after lunch to give them the charge. Let me
4 just see how that goes. I would prefer to get
5 it all done before they have lunch and have it
6 submitted.

7 But if that's not possible -- we've got
8 some that are restless, and particularly our
9 forelady; so I just want to be respectful to
10 everybody's situation.

11 MS. BUENO: And we would obviously prefer
12 that the closing arguments are totally done
13 before lunch; so --

14 THE COURT: Oh, the closing arguments will
15 be done before lunch, period. I can guarantee
16 you that. But I don't know that I can do the
17 charge.

18 MS. BUENO: That's fine, Your Honor. I
19 just didn't want a situation where they did
20 rebuttal after lunch.

21 THE COURT: Oh, no, no. All that is going
22 to take place this morning, and I think it'll
23 take place in good time. I don't think that
24 will be a problem.

25 MS. PEPKE: I'll state my objections to

1 the jury charge. I understand the Court has
2 now accepted -- issued the final charge.

3 THE COURT: Yes. If you all want to work
4 with -- I'll put it on the record right now,
5 each side has exceptions to the charges. We've
6 had a very lengthy charge conference yesterday.
7 And we now have the charge that's going to be
8 given because I wanted them to have that before
9 the closing arguments so they can be able to
10 rely on it, and they have that.

11 But they -- each side has some exceptions
12 to what has been charged. And what I would
13 suggest be done is -- have you gotten a written
14 form, Ms. Pepke?

15 MS. PEPKE: We do, and they're being
16 finalized right now.

17 THE COURT: When Ms. Pepke has those in
18 final form, she will bring them to you, Madam
19 Court Reporter, and they will be lodged as
20 official objections to the charge.

21 If you can't get it done before we start
22 closing arguments, I will receive them before I
23 make the charge.

24 MS. PEPKE: That's good.

25 THE COURT: If you think of something

1 after that, if you want to add to it, the
2 record is going to remain open until I actually
3 give the charge to the jury.

4 MS. PEPKE: Thank you.

5 THE COURT: Same with y'all, plaintiffs.

6 MS. MCVEY: Yes, ma'am. We haven't
7 done -- they have more bodies to do written
8 stuff. I'll just note our objections of what
9 we've previously submitted.

10 THE COURT: All right. Yeah, you've
11 already got something on the record about it.

12 MS. MCVEY: Right.

13 THE COURT: Okay. All right.

14 Ms. Flynn?

15 MS. FLYNN: We will of course have
16 objections to the charge as well that I wanted
17 to raise some -- I'll do that on the record
18 when we have written objections.

19 THE COURT: Yeah. All right. I don't
20 think it's anything I haven't heard, right?

21 MS. FLYNN: The only thing, I note 9:45
22 last night, we got the additional about the
23 medical stipulation. As I understand, our only
24 objection --

25 THE COURT: You're going to have to come

1 up here.

2 MS. FLYNN: I apologize for that.

3 THE COURT: That's all right.

4 MS. FLYNN: My only objection is a
5 technical one, Your Honor. During the -- on
6 the record, when I mentioned that I would
7 stipulate to the medicals, the Court did not
8 accept that stipulation at the time. Those
9 medicals were never actually presented to the
10 jury during the course of the trial. And so if
11 it's a technical objection, I don't know that
12 it's proper to --

13 THE COURT: It hasn't been tried and been
14 closed yet.

15 MS. FLYNN: I understand. But the
16 plaintiffs rested, Your Honor.

17 THE COURT: So what's your technical
18 objection? That they can't get --

19 MS. FLYNN: It's just there's a procedure,
20 and it should have been presented to the jury.

21 THE COURT: Well, the case is still open.

22 MS. FLYNN: And I didn't -- I understand,
23 Your Honor.

24 THE COURT: Well, then --

25 MS. MCVEY: Your Honor, I'd like to reopen

1 our case to publish the medical stipulation.

2 THE COURT: Granted. Sorry. That's --

3 MR. BROWN: That's fine.

4 THE COURT: I try to accommodate --

5 MS. PEPKE: I know --

6 THE COURT: And then you --

7 MS. MCVEY: It's just --

8 MS. FLYNN: I apologize. It's just --

9 MS. MCVEY: When they want accommodations,
10 I give it; and they don't give it in return.
11 So I'm going to reopen the case, and then we'll
12 rest again.

13 MS. PEPKE: I'll stand up and renew our --

14 THE COURT: Exactly.

15 Now, I would like to know where the tax
16 returns are.

17 MS. FLYNN: Those were -- I believe we're
18 bringing three years' worth today, Your Honor,
19 that they were able --

20 THE COURT: Of course, I asked for five --
21 I've directed five.

22 MS. FLYNN: I understand, Your Honor.

23 THE COURT: When are they going to be
24 brought here?

25 MS. FLYNN: Sometime this morning. I

1 could -- somebody else is bringing them, and
2 they're being brought.

3 THE COURT: All right. Well, that's
4 not -- what I wanted was for everybody, both
5 sides, to have them before they began their
6 closing arguments.

7 Where are they right now?

8 MS. FLYNN: They're being printed, Your
9 Honor. I only got this request to bring the
10 tax returns today at 4:30 yesterday.

11 THE COURT: Yeah, I jumped through a lot
12 of hoops myself, including getting up at 4:00
13 in the morning and reading these things. So
14 you could have gotten up that early and printed
15 them.

16 MS. MCVEY: Just let us know the
17 objection. That would have been easier.

18 THE COURT: Yeah. I want these tax
19 returns, at least some version of them, in this
20 courtroom before these closing arguments begin.
21 And it is now 5 minutes of 9:00. Whoever is
22 printing them for you, tell them to get the
23 things here in this courtroom.

24 MS. FLYNN: Yes, Your Honor. We've moved
25 mountains to get this information here.

1 THE COURT: I'm glad you have.

2 MS. FLYNN: The CPA is in Israel. It's
3 been a tough situation.

4 MS. MCVEY: If you want to e-mail them, we
5 can take a digital file.

6 THE COURT: Yes. How about e-mailing
7 them? You've gotten them in e-mail --

8 MS. FLYNN: I do not have them. I promise
9 you, I do not have them. I have not seen them.

10 THE COURT: Who is printing them?

11 MS. FLYNN: My national coordinating
12 counsel, the people who deal with the client.

13 THE COURT: Well, are they printing them
14 here in Columbia, South Carolina? I hope.

15 MS. FLYNN: They are.

16 THE COURT: You tell your national
17 coordinating counsel right now to e-mail them
18 to the plaintiff.

19 MS. FLYNN: Your Honor, we would request
20 strenuously that we not -- we really don't want
21 them in the cyberspace. If I could just
22 present a hard copy, I would really request
23 that.

24 THE COURT: Well, then, you're going to
25 have to get it here before 9:30. All right?

1 That's it. I don't know what else to say.

2 MS. MCVEY: Thank you, Your Honor. I'll
3 just read the stipulation, and then we'll rest.

4 - - -

5 THE COURT: Guys, listen up one more time.

6 MS. MCVEY: Yes, ma'am.

7 THE COURT: I'm having some heartburn
8 myself about exactly what's going to happen
9 here about the presentation of the case,
10 et cetera, et cetera.

11 Is that Mr. Allen?

12 So let's go over exactly what is going to
13 be said to this jury. I assume that the
14 subject of the case that's been presented by
15 each side will be extensively explored by each
16 side in their closing argument to the jury.
17 And I am sure that the defendants will take the
18 position that the burden of proof is on the
19 plaintiff at all times and never shifts.

20 They've got to prove their case, and they
21 will talk about the standards of proof that are
22 required depending on the causes that are
23 presented for their consideration.

24 The defendants have presented a good many
25 exhibits, which is a part of their own

1 presentation. Those exhibits have been
2 presented in connection with cross-examinations
3 in the plaintiffs' case, but they nevertheless
4 are defendants' exhibits and evidence, and
5 they'll be argued to the jury for what they
6 represent and what they show about the failure
7 of the plaintiff to prove its case and the lack
8 of information about their clients -- according
9 to their clients -- about asbestos being in
10 their product and whatever else these pieces of
11 evidence are going to show.

12 So what specifically am I going to say to
13 the jury? All I was planning to say to the
14 jury is that, in extensive conferences
15 yesterday, we developed all of our verdict
16 forms, charges, plaintiff rested its case,
17 defendant rested its case.

18 So what you have already heard and what
19 you've received into evidence will be the case
20 presented by each side. They will discuss what
21 they think their case means. The plaintiffs
22 are certainly going to say, "They didn't put on
23 one witness to tell you any of this stuff.
24 They just put up some evidence in our case,"
25 and so forth. And defendants are going to

1 strongly claim they never proved their case and
2 here's why. So that's the first thing.

3 The second thing is I want to understand
4 completely how spoliation is going to work in
5 this scenario.

6 MS. MCVEY: Well, Your Honor, you declined
7 to give a spoliation charge.

8 THE COURT: Right. However, y'all have
9 made some of these side agreements about things
10 and so forth and so on; so how does that play
11 into it? Is that something I need to say
12 anything to the jury about?

13 MS. MCVEY: I don't think so, Your Honor.
14 But here's why I think a couple things need to
15 happen.

16 THE COURT: Just a second. Just a second.

17 MS. MCVEY: Okay.

18 THE COURT: All right, guys. I'm on the
19 record with the lawyers.

20 All right.

21 MS. PEPKE: AII has withdrawn their
22 objection --

23 THE COURT: Just a second. Please don't
24 get into AII with me at every turn of the way.
25 I'm trying to solve this other problem right

1 now.

2 MS. MCVEY: Well, two things need to
3 happen.

4 One, even though AII is telling me they're
5 going to withdraw their medical stipulation
6 objection, I would like to publish it to the
7 jury.

8 THE COURT: Well, I think you need to
9 publish it to the jury. That's how we always
10 do.

11 MS. MCVEY: So I'm going to publish that
12 to the jury, and then we will rest.

13 THE COURT: All right.

14 MS. MCVEY: And then you can stand up and
15 say, "We'll move for directed verdict and
16 incorporate all our arguments made yesterday."

17 I think the judge can then deny the
18 directed verdict.

19 And then defendants can -- I don't know if
20 you're going to read in your exhibits or do any
21 of that stuff, but then they can rest. And
22 then I'll renew my directed verdict motion.

23 MS. PEPKE: And then I'll --

24 MS. MCVEY: And then you'll deny it. I
25 mean, incorporating all the --

1 THE COURT: Right. And I'll explain to
2 the jury beforehand we're doing some very
3 technical things today to place these things on
4 the record, but these things were dealt with at
5 length yesterday, and now we're going to
6 memorialize them in the record.

7 MS. MCVEY: I think that's fair. And then
8 what we can do is you can just then go and
9 start -- we can start closing arguments.

10 THE COURT: Right. Well, that is what I'm
11 more inclined to do now. I don't want to take
12 upon myself any kind of comment one way or
13 another about how the defendant chooses to
14 present its case.

15 MS. MCVEY: I don't think you need to.

16 THE COURT: I think that is the implied
17 heartburn that my dear law clerk Mitch had
18 about the thing is that something was being
19 implied there, and I'll make sure that does not
20 happen.

21 MS. MCVEY: I don't think you need to
22 comment on it at all.

23 THE COURT: Exactly. Exactly. I'll just
24 say we'll place these things on the record.

25 Ms. Bueno?

1 MS. BUENO: That is absolutely fine, Your
2 Honor. I think that, given the fact that AII
3 has now withdrawn its request related to the
4 stipulation of economic damages, because it is
5 in Your Honor's jury instructions, there would
6 be no reason to put it on the record. And we
7 could proceed as we discussed this morning with
8 just keeping things closed and not having to
9 reiterate it.

10 THE COURT: I'm nervous about that. There
11 are some cases -- we got into a major calamity
12 about that in an early asbestos case where they
13 screwed up and didn't put their damage -- their
14 medical damages in the record. And they had to
15 live with that because I couldn't figure out
16 any way under our cases.

17 And I looked at a bunch of that at the
18 time. I couldn't figure out how to cure that
19 with the jury instructions, which we'd already
20 developed and had it in there. But we couldn't
21 use that because they hadn't -- they had a very
22 inexperienced lawyer. It wasn't Ms. McVey
23 doing this. But that screw-up occurred. And
24 so that was why I would let them say that on
25 the record. I don't want to get involved in

1 any mess about that.

2 MS. MCVEY: Thank you, Your Honor.

3 MS. FLYNN: Thank you, Your Honor. I did
4 offer also to not only withdraw but to
5 affirmatively state for the record that we
6 would not make that appellate point if we could
7 move forward with the trial. I understand that
8 she still wants to make that stipulation, and
9 that's fine.

10 Either way, I just wanted to let the Court
11 know that I did make that proffer, but she --

12 THE COURT: Well, that's good. I'm going
13 to solve in the way I've just described, where
14 they're just going to put these things on the
15 record in a neutral kind of way. Both sides
16 are going to put some things on the record, and
17 then we're going to proceed to closing
18 arguments.

19 MS. MCVEY: Thank you.

20 THE COURT: I think that's the better way
21 to handle it.

22 Now, has your international or national
23 counsel right up the street at Nelson Mullins
24 gotten these things, Ms. Flynn, to the other
25 side?

1 MS. FLYNN: I do not know that, Your
2 Honor.

3 THE COURT: I'm not tagging Mr. Brown with
4 that. That's not his responsibility. He's
5 here in a different capacity. But that needs
6 to be here. I'm not kidding you.

7 MS. FLYNN: I understand they're on the
8 way.

9 THE COURT: All right.

10 MS. MCVEY: And just a last thing on the
11 record. We are going to mark just as court
12 exhibits the keynotes that were shown to the
13 jury.

14 THE COURT: Very good.

15 - - -

16 (Court Exhibit 20 admitted into
17 evidence.)

18 - - -

19 (Court Exhibit 21 admitted into
20 evidence.)

21 - - -

22 THE COURT: Yeah, go on and get your
23 exhibits in on that is what I would say, Chris.

24 MR. COWAN: I'm doing that right now.
25 These are the court exhibits. They're just the

1 slides. We're just putting them on the record.
2 I believe Court Exhibit 21, and mine are 22.

3 THE COURT: Good. Y'all just handle that
4 between yourselves.

5 MR. COWAN: This is not something you need
6 to rule on; I just need to put it in the
7 record, Your Honor. We had a little bit of a
8 disagreement about which plaintiffs' slides
9 were actually shown. So it's defendants'
10 position that the following slides --
11 plaintiffs' slides were not actually shown:
12 Brody Slide Number 27 to 32.

13 Gibney Slide Number 5, and Slide 3 and 4
14 on the second page.

15 Haber Slide Number 2, 3, 5, 7, 47, 59,
16 105, 106, 108, 112, 147, 148, 156, 160,
17 redirect Haber Slide Number 47.

18 MS. MCVEY: And just for the record, we
19 were overinclusive because we couldn't confirm
20 what slides were actually shown to the jury or
21 not; so we put our entire jury presentation.

22 - - -

23 (Discussion off the record.)

24 - - -

25 MR. COWAN: We made a mistake earlier in

1 the numbering of the court's exhibits of the
2 slides. Plaintiffs' slides are Court Exhibit
3 Number 20, and the defendants are Court
4 Exhibit 21. That's the J&J defendants.

5 - - -

6 (Discussion off the record.)

7 - - -

8 MR. BROWN: Can we talk about this
9 housekeeping matter? Theile and I have talked
10 about this already. This is -- regardless of
11 which party, depending upon the verdict, we'd
12 like 10 days to file any posttrial --

13 THE COURT: Yes. Yes, absolutely.

14 MR. BROWN: Thank you very much.

15 THE COURT: Absolutely. I know that
16 you'll make a note to put on the record and
17 then expand it, and then you have 10 days to
18 expand it.

19 MR. BROWN: Thank you.

20 THE COURT: Absolutely. I think that
21 conforms with the deadlines and all that kind
22 of thing.

23 MR. BROWN: Thank you.

24 THE COURT: And, again, let's just talk
25 one more time.

1 Shut that door.

2 Let's just talk one more time. We can
3 revisit this again about punitives and the
4 charge. We know what we put in there so far.
5 I'm going to listen very closely to how closing
6 goes and cogitate over whether there's anything
7 more than what we've done, which is simply to
8 put that thing in there but not tell them.

9 You know, I kind of went back and forth in
10 my mind about that a little bit, because this
11 is a smart jury; they're going to know that
12 punitive damages can sometimes be awarded and
13 things, I would bet.

14 But I'm just so nervous about the
15 bifurcation of things because of what the Court
16 has said about not injecting punitive into the
17 damage part of a case, and that's what's got me
18 kind of hesitant.

19 MS. MCVEY: Your Honor, this is -- the
20 only thing we've agreed to -- and I think both
21 sides agreed -- is just so they can answer the
22 last question on the verdict form with
23 discharge on -- I'm sorry -- willful, wanton,
24 reckless --

25 THE COURT: Yes. And I think that's

1 great. And that's going to be read to the
2 jury.

3 MS. PEPKE: I think what Your Honor is
4 addressing, based on the closings, you're
5 watching to see if you need to give the
6 instructions we requested, that the jury is not
7 to be considering punitive in the first phase.

8 THE COURT: Right. I just want to be sure
9 that that doesn't get trod upon. If it does by
10 either side, I will try to correct it, even if
11 I have to mention the dreaded word "punitive"
12 in the actual damages part of the case. I'm
13 trying to avoid that if I can.

14 MS. MCVEY: We're going to talk about
15 conduct.

16 THE COURT: Right. But you're not going
17 to talk about actual --

18 MS. MCVEY: But only actual damages.

19 THE COURT: Exactly. So I'm going to keep
20 a weather eye out and see if anything happens
21 that I need to readjust.

22 MS. PEPKE: I do have our printed
23 objections renewal.

24 THE COURT: Sure.

25 MS. PEPKE: They have been filed.

1 THE COURT: Yeah. And I've got -- go
2 ahead. Your motion for directed verdict, and
3 then you are supplementing that with --

4 MS. PEPKE: These are objections to jury
5 charge, renewing all objections.

6 THE COURT: Jury charge objections renewed
7 and the verdict form. Good.

8 MS. PEPKE: Based on all prior filings and
9 objections.

10 - - -

11 (Court's Exhibit 22 admitted into
12 evidence.)

13 - - -

14 THE COURT: Does AII have anything
15 separate on that?

16 MS. FLYNN: Your Honor, we have filed
17 objections. I don't have a printed copy for
18 you just yet. Obviously, once the charge is
19 made, we can make exceptions to the charge at
20 that time as well.

21 THE COURT: I've denied those, and you
22 know what charge I'm giving. So just be sure
23 that's with the court reporter is what I'm
24 trying to tell you.

25 MS. FLYNN: I do. I want to make sure

1 that I reserve time and just get my objection
2 on the record after we do the charge.

3 THE COURT: I'm trying to avoid that like
4 the plague. That is just why Ms. Pepke came up
5 there and gave those objections and put them on
6 the record right now. I want you to do the
7 same thing.

8 Was there some mystery about that from the
9 charge conference?

10 MS. FLYNN: I did misunderstand what you
11 were saying. I didn't know. I thought after
12 you did the charges to the jury, after the jury
13 leaves, we would do the exceptions to the
14 charge.

15 THE COURT: No. I certainly will turn to
16 you, but I don't expect any big, long argument
17 about it because all that has been put upon the
18 record. And I want to refer to what's been put
19 upon the record and say I've ruled upon it, and
20 that's the end of it.

21 What do you have in mind?

22 MS. FLYNN: I will get you our written
23 objections as well. If you would like to hear
24 any oral objections, I'm happy to make that
25 too.

1 THE COURT: I don't want to hear the oral
2 argument. I just want to make sure they're in
3 the written record.

4 MS. FLYNN: Yes, Your Honor. I'll get
5 those to you.

6 THE COURT: Have we done everything we
7 need to do? Can I bring in the jury?

8 MS. MCVEY: Yes, ma'am.

9 MS. BUENO: Yes, ma'am.

10 THE COURT: Bring in the jury.

11 Tasha will print your objections,
12 Ms. Flynn.

13 MS. FLYNN: Fantastic.

14 - - -

15 (The jury entered the courtroom at
16 9:35 a.m.)

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

19 THE COURT: Thank you, ma'am.

20 Ladies and gentlemen of the jury, we had a
21 very productive day. I hope you did too not
22 being in this courthouse yesterday. We used
23 that time to advantage to do a lot of technical
24 things that are necessary to get us to this
25 point.

1 What will happen now is I'll turn to each
2 side, and they will put some technical things
3 before you and on the record. And then we'll
4 proceed to closing arguments of each side.
5 They have time limits on each side, but the
6 closing arguments will take a little while.

7 After that, technical matters very simply,
8 and then I will charge the jury. You will have
9 these charges and the jury verdict form in the
10 jury room. Each of you will have the ability
11 to have that. So you don't need to stress out,
12 Hey, gosh, do I need to take some notes on
13 this? You'll have the complete jury charge in
14 the jury room with you.

15 So that's how we're going to proceed. My
16 guess is that the closings will take place;
17 then we would probably break for lunch, even if
18 it's a little early.

19 And so, clerks, be sure that we have
20 what's been ordered in a timely fashion.

21 And then when we return from our lunch
22 break, then we would go into the charge by the
23 Court. And then the case would be submitted to
24 you. So that's what today brings.

25 Please be seated. I turn first to the

1 plaintiff.

2 Ms. McVey.

3 MS. MCVEY: Thank you, Your Honor. Just
4 briefly, we have a stipulation. The plaintiffs
5 and defendant AII stipulate that the reasonable
6 and necessary past medical bills as a result of
7 Michael Perry's mesothelioma diagnosis and
8 treatment are \$510,620.05.

9 And, Your Honor, with that, the plaintiffs
10 rest.

11 THE COURT: Very good. Please note that
12 these stipulations will be in the jury charge
13 and figures on both economic damages and the
14 medical expenses.

15 I call for the defendant, Ms. Pepke.

16 MS. PEPKE: Thank you, Your Honor. The
17 Johnson & Johnson defendants renew our prior
18 directed verdict motion based on prior
19 agreements and *The Kitchen Planners* case
20 standards and other applicable standards of
21 evidence as required.

22 THE COURT: Thank you. Those matters have
23 been fully explored with the Court with very
24 detailed briefs and other materials. The Court
25 has considered those and denied those motions,

1 and they are now formally submitted for the
2 record, along with detailed memoranda
3 explaining the positions that the defendant has
4 taken.

5 Ms. Bueno.

6 MS. BUENO: Yes, Your Honor. The rest of
7 our exhibits were offered and entered into
8 evidence yesterday. Defendants rest, and we're
9 ready to proceed to closing arguments.

10 MS. FLYNN: Your Honor, I would also renew
11 AII's motion for directed verdict.

12 MS. PEPKE: We would renew ours as well.

13 THE COURT: Those materials are in
14 writing. They have been submitted to me.
15 Those motions have been denied. I deny them on
16 the record. The information will be
17 memorialized in the material you put in the
18 record on that, Ms. Flynn.

19 MS. FLYNN: Thank you, Your Honor. The
20 defense rests.

21 THE COURT: Ms. McVey.

22 MS. MCVEY: Your Honor, the plaintiffs
23 would renew our directed verdict motion that we
24 discussed at length yesterday on the record.

25 THE COURT: Very good. Again, I heard

1 extensive arguments about these matters
2 yesterday. And we're formally putting on the
3 record that I have denied the motions for the
4 directed verdict. And the positions that
5 plaintiff took and that defendant took on the
6 plaintiffs' motions are in the record with
7 briefing and materials. All you need to know
8 is that each side's motions were denied.

9 All right. Now, plaintiff, are you ready
10 to proceed? All right.

11 MR. ADAMS: Yes, ma'am.

12 THE COURT: Plaintiffs may proceed with
13 closing argument.

14 - - -

15 CLOSING ARGUMENT BY MR. ADAMS

16 - - -

17 MR. ADAMS: Good morning, everybody.
18 Thank you for patiently listening for so long.
19 Thank you for showing up for jury service, for
20 volunteering to stay, for being here every day,
21 for taking such good notes. I know that it
22 costs money to be here and that people had work
23 and school conflicts, and I'm sure there's a
24 hundred other inconveniences that we don't even
25 know about. We appreciate so much you coming

1 here.

2 Today is the last day that Michael Perry
3 and Lonnie Long's case belongs to us. This
4 afternoon the case is going to belong to you.
5 You're going to go back in that jury room, and
6 you're going to be able to discuss and
7 deliberate the case with one another for the
8 first time.

9 When you go back there, you're going to
10 have three jobs. Number one is to follow the
11 law that the judge gives you. Number two is to
12 fill out the questions on the verdict form that
13 you're going to get and we're going to go over
14 in closing argument. And number three is to,
15 when you believe a question on the verdict form
16 should be answered in a certain way, tell your
17 fellow jurors why, why you think a question
18 should be answered in a certain way.

19 In my time for closing arguments, I going
20 to try to help to give you some of that why,
21 why we believe every single question on the
22 verdict form should be answered yes.

23 But before I do that, I want to give you
24 two tools to guide you along your way, to guide
25 you through your deliberation process. I think

1 they're going to be your guiding light in this
2 case so you can get it right.

3 The first tool is what I think is the most
4 powerful thing in the courtroom. I think it's
5 more powerful than the lawyers, it's more
6 powerful than the witnesses, it's more powerful
7 than the clerks. It might even be more
8 powerful than the judge. It's your common
9 sense. Your common sense. Because this is a
10 commonsense case.

11 Michael Perry, a human being, was born on
12 this earth, and from the day he was born until
13 he was 50 years old, he breathed dust from
14 Johnson's Baby Powder almost every single day
15 of his life. And the dust from Johnson's Baby
16 Powder contained asbestos. And then he got
17 asbestos cancer.

18 And he came to court to hold the companies
19 responsible who we believe played a role in
20 giving him that cancer. One of those companies
21 was Johnson & Johnson.

22 And when we came into court on behalf of
23 Michael Perry and Lonnie Long, we accused
24 Johnson & Johnson of the most heinous acts you
25 can do to a human being -- knowingly selling a

1 baby powder for over a hundred years that has
2 the worst carcinogen in it in the industry.
3 And Johnson & Johnson, with all its resources
4 and power and strength, defended itself in the
5 case.

6 You've heard they hired seven separate
7 expert witnesses to come into court to swear
8 under oath and to tell you they didn't do it.

9 But then something very -- and those
10 expert witnesses, you heard, wrote long
11 reports. And they gave depositions. And they
12 were ready to come into court and defend this
13 company.

14 But then something very interesting
15 happened. We looked at Michael Perry's body,
16 and we found the exact talc and the exact
17 asbestos that was in Johnson's Baby Powder that
18 he breathed for 50 years. And then not a
19 single expert witness came into court to look
20 you in the eye and defend this company. Not
21 one. Please don't set aside your common sense.

22 In this country you can buy almost
23 anything. You can pay people to eat bugs on TV
24 or marry someone they've never met. You can
25 pay experts to come into court and say smoking

1 doesn't cause lung cancer, arsenic in the water
2 doesn't cause leukemia. If you can afford it,
3 you can pay for almost anything.

4 Once we realized what was in Michael
5 Perry's lungs, they couldn't find an expert on
6 earth to come into this court and tell you they
7 didn't do it.

8 MS. BUENO: Objection, Your Honor.

9 THE COURT: Approach.

10 (Whereupon a bench conference was
11 held.)

12 MS. BUENO: Yes, ma'am. That's absolutely
13 not true. It's not in the evidence. He's
14 saying that we couldn't find an expert to come
15 in and defend this product. That is not true.

16 THE COURT: Okay.

17 MS. BUENO: It's inaccurate. It's
18 inflaming passions for no reason. It's
19 improper.

20 THE COURT: Reply.

21 MS. MCVEY: Your Honor, she can argue that
22 all she wants. This is an argument about our
23 interpretation of the evidence. She can't make
24 this argument.

25 THE COURT: No. Here's what she's saying.

1 She's saying that there's nothing in the
2 evidence that isn't in the record that
3 justifies saying they couldn't find an expert.
4 That's a little bit more nuanced thing.

5 MS. MCVEY: I think --

6 MR. ADAMS: Dr. Kuffner testified about
7 these experts they hired and that they put out
8 the reports and arguments, and they didn't
9 come.

10 MS. BUENO: Your Honor, we talked about
11 *Gonzalez* yesterday and the *Gonzalez* case says
12 they are able to comment on the fact we didn't
13 bring experts, but they shouldn't be able to
14 say we didn't bring somebody in to defend it.

15 THE COURT: I think it's a little bit of a
16 nuance, and I agree with them about that. You
17 can certainly say they didn't offer experts,
18 but you can't say they couldn't find an expert.

19 MS. PEPKE: Can we have a curative
20 instruction on the strike?

21 THE COURT: Yes.

22 MS. BUENO: Please, yes.

23 MS. MCVEY: That's inappropriate to give
24 an instruction on this. We can move on from
25 this.

1 THE COURT: I note your objection and,
2 over your objection, I'm going to give an
3 instruction to the jury about that.

4 MS. MCVEY: And *Gonzalez* clearly says we
5 can make this --

6 THE COURT: *Gonzalez* says you can say the
7 failure to call. It's a little nuanced thing
8 that is a factual assertion that is concerning
9 me a little bit. Frankly, I think that may
10 have an appellate value different than
11 *Gonzalez*. That's why I'm going to give this
12 instruction.

13 (Bench conference concluded.)

14 THE COURT: Ladies and gentlemen of the
15 jury, I have partially granted defendants'
16 motion, and what I have granted is this:
17 Discussion of failure to call an expert is
18 completely permitted, but the assertion they
19 couldn't find any expert is not something that
20 is in evidence; and therefore, I'm striking
21 that.

22 And you may continue, Mr. Adams.

23 MR. ADAMS: Thank you, Your Honor.

24 When they come up and they tell you and
25 they show you their slides and they argue and

1 they talk about the dose and the brakes and
2 they talk about all the things that they're
3 going to tell you about, I want to keep in
4 mind -- I want you to keep in mind and remember
5 that they had expert witnesses who they could
6 have called to say everything the lawyers are
7 about to say, but they didn't. Please don't
8 set aside your common sense.

9 The second tool you have that will guide
10 you through the verdict form --

11 THE COURT: Mr. Adams, I'm sorry to
12 interrupt you, but approach again.

13 (Whereupon a bench conference was
14 held.)

15 THE COURT: Wish we had worked this out
16 beforehand, but *Gonzalez* also says this: It's
17 the missing witness rule. We do have such a
18 rule in South Carolina. And the missing
19 witness rule, as *Gonzalez* said, "is based on
20 the premise 'that the party's failure to rebut
21 evidence that the party would naturally be able
22 to, through testimony and physical evidence,
23 may warrant an inference that such evidence
24 either does not exist or would be unfavorable."
25 That's in *Gonzalez*.

1 MS. BUENO: For fact witnesses, Your
2 Honor. And it applies to fact witnesses.

3 MS. MCVEY: And we can make the argument,
4 of course --

5 THE COURT: It does say the "party's
6 invocation of the missing witness rule should
7 be limited to fact witnesses."

8 I agree with you on that. I'm just
9 saying --

10 MS. BUENO: We were talking about experts.

11 MS. MCVEY: Which can be clearly argued at
12 length about their failure to call an expert.

13 THE COURT: Well, I'm going to listen very
14 closely to how they argue because they may open
15 that door.

16 MS. MCVEY: Thank you.

17 THE COURT: I'm just saying I'm sticking
18 to what I've said so far, but I'm listening.

19 MS. MCVEY: Thank you.

20 MS. BUENO: Thank you.

21 (Bench conference concluded.)

22 THE COURT: By the way, these conferences,
23 if I have to have them -- and you know I don't
24 like to do that if there's any way possible;
25 that's why I don't send you out -- does not

1 count against your time, any time. So take
2 that into account when you all are doing your
3 calculations about time.

4 You may continue.

5 MR. ADAMS: Thank you, Your Honor.

6 The second rule is the burden of proof.
7 It's just 51 percent. It's not beyond a
8 reasonable doubt. It's just 51 percent on
9 every question on the verdict form except two,
10 and I'll tell you about those two. There's a
11 fraud claim and a claim about reckless
12 behavior. Those have a higher burden of proof.
13 But for every other question on the verdict
14 form, it's just 51 percent.

15 So if you're back there and people say,
16 I'm not sure or I'm not completely convinced,
17 you don't have to be. You can have all the
18 doubts in the world. If 12 of you get to
19 51 percent, you can just check yes and move on
20 in the verdict form.

21 It's a little counterintuitive in cases
22 with so much at stake in cases like this. Why
23 would it be 51 percent? It's 51 percent on a
24 thousand-dollar case; it's 51 percent in a
25 million-dollar case. And the reason for that

1 is twofold.

2 The first reason is that the law
3 understands that good lawyers can confuse
4 anything. They can come into court and they
5 can tell you Dr. Langer, when he found asbestos
6 in Johnson's Baby Powder 53 years ago, in
7 1971 -- they have a video of Dr. Langer under
8 oath that we have to show you saying he never
9 took it back.

10 They can come into court, and they can
11 talk about how brakes were 100 percent of what
12 caused Mr. Perry's mesothelioma when their own
13 expert in this case said the brakes didn't
14 count at all.

15 Lawyers can come into court, and they can
16 talk about the furor law. From 1969, the furor
17 memo, where Johnson & Johnson wrote down, their
18 medical director wrote down, "If people knew
19 there was tremolite in our baby powder, there
20 would be outrage."

21 They can come into court and call their
22 corporate representative, who pretends on the
23 stand he's never seen it, and then tells you
24 it's about skin irritation, not people's lungs
25 being crushed until they can't breathe from

1 terminal cancer.

2 Good lawyers can confuse anything. And so
3 once you get to 51 percent, you can just move
4 on.

5 The second reason the burden of proof is
6 only 51 percent is because the law respects
7 your time. Believe it or not -- I know it
8 doesn't feel like it sometimes when those
9 videos went on forever -- but the law really
10 does respect your time.

11 And so if you went back there and you sat
12 there for a month and you discussed it and you
13 went over every exhibit and you read every
14 transcript, you'd probably reach certainty like
15 we have that Johnson & Johnson played a role in
16 Michael Perry's cancer.

17 But the law says you don't have to. Once
18 12 of you reach 51 percent, you can just move
19 on to the next question.

20 The verdict form is five sections and
21 eight questions. We have different legal
22 claims. We have three legal claims, and then
23 there's the damages section, and then there's a
24 section about willful and reckless conduct.

25 The first section on the verdict form is

1 negligence. Were the Johnson & Johnson -- was
2 Johnson & Johnson negligent? And negligence
3 has a definition. It just means the failure to
4 act reasonably.

5 A lot of times people think, well,
6 negligence, it sounds like this really bad,
7 sort of evil thing that someone did.
8 Negligence just means if you don't act
9 reasonably careful and you hurt somebody,
10 you're negligent. That's it.

11 The classic sort of example of what
12 negligence is is somebody running a stop sign.
13 Nobody runs a stop sign and crashes into
14 somebody because they want to, because they
15 looked at the stop sign and they said, "I want
16 to hurt somebody; I'm going to run a stop
17 sign."

18 What happens is people take their eye off
19 the road for a moment. They run the stop sign,
20 and they crash into somebody. They didn't want
21 to. They didn't mean to. They didn't want to
22 hurt anybody. But the law says if you take
23 your eye off the road, that's not reasonably
24 careful. That's negligence.

25 I think what we've proven in this case is

1 that what Johnson & Johnson did was so far past
2 a reasonable mistake, it's not even close.

3 What we know about Johnson & Johnson is
4 that, by 1958, they knew two things:

5 Number one, there was asbestos -- number
6 one was asbestos gives people cancer.

7 And number two is there was asbestos in
8 the baby powder.

9 They wrote it down, fibrous particles of
10 amphibole in our baby powder are tremolite.
11 That's asbestos. That's not my definition.
12 That's not a lawyer's definition. That's not a
13 paid expert's definition. That's
14 Johnson & Johnson's own definition written down
15 in their own files. That's what they found in
16 the baby powder in 1958.

17 And I showed you this picture from their
18 Vermont mine. This was some of the material
19 from their Vermont talcum powder, fibrous
20 material from the waste rock identified as
21 tremolite.

22 I wanted to show you that so you know what
23 it looks like. That's part of the material
24 they were grinding into the baby powder and
25 that they knew was there in 1958.

1 At the same time, Johnson & Johnson was
2 advertising about how fragile babies are.
3 Babies are so fragile. Use our pure and safe
4 powder when they've written down in their own
5 records it contained asbestos.

6 And so Johnson & Johnson as a company was
7 at a turning point. They had to decide what to
8 do, a fork in the road, right? They could have
9 recalled the powder. They could have warned
10 people. They could have switched to
11 cornstarch. They had cornstarch the whole
12 time. They could have taken the talc out, and
13 they could have used cornstarch.

14 And what I think you'll learn and what we
15 know is that corporations, just like people,
16 can be responsible or irresponsible.
17 Corporations, just like people, can be honest
18 or they can be dishonest. And corporations,
19 just like people, can have character or they
20 can lack it.

21 When Johnson & Johnson knew there was
22 asbestos in their baby powder and they were
23 advertising it to moms, they showed you who
24 they were. They just kept selling it year
25 after year after year. Not for a day or a week

1 or a month, but for years they kept selling it
2 all over this country and telling moms it was
3 the purest protection; put it on your babies.

4 In 1966, a worker inside
5 Johnson & Johnson, one of their employees, sent
6 around this document. And he was asking why
7 are we still selling talc baby powder? Why are
8 we still selling it?

9 It has no medicinal value. It's a foreign
10 body that goes into babies' lungs, and there
11 have been at least three deaths not from
12 mesothelioma but from babies choking on the
13 powder. Sometime they'd knock it over and it
14 would fall on them, and they would choke.

15 Johnson & Johnson, in 1966, knowing that
16 it was a foreign body and that babies were
17 dying, wrote down why they kept selling it.

18 They said baby powder represents the
19 cornerstone of our company. They built their
20 entire company with baby powder. Not the baby
21 division. Not the baby powder that they said
22 they only made 45 million a year on. The whole
23 J&J. They built the company on baby powder.
24 And they'd also spent a bunch of money on the
25 talcum. And so they just kept selling the baby

1 powder year after year.

2 In 1967, Johnson & Johnson, they had been
3 using Italian talc and they were still using
4 Italian talc, but they bought this Vermont talc
5 mine. And they were going to slowly start
6 using the Vermont talc and the Italian until
7 1973 when they switched over to Vermont
8 completely.

9 They immediately tested the new Vermont
10 talc and found it to be exactly the same thing
11 that was in the other talc -- tremolite. And
12 then they just kept selling it.

13 By 1968 Johnson & Johnson in its own
14 records had 153 tests finding tremolite
15 asbestos in the baby powder, 153.

16 In 1969 the medical director of
17 Johnson & Johnson, the head guy in charge of
18 medicine, Dr. Thompson, wrote this memo to the
19 people in charge at J&J. There'd been a furor,
20 an outbreak of public anger -- what's that
21 furor means, outrage -- if it became known our
22 talc contained any significant amount of
23 tremolite.

24 And so when they get up and they tell you
25 the tremolite was safe and it wasn't asbestos

1 and it was no big deal and it couldn't hurt
2 anybody, they wrote down there'd be outrage if
3 people knew. We need to contact the law
4 department.

5 55 years ago, they knew this day would
6 come. They wrote it down and they said we
7 better lawyer up. And then they just kept
8 selling the asbestos baby powder and didn't
9 tell anybody.

10 And the tests just keep coming and coming
11 and coming, and there's over a thousand of
12 them. I'm just going to show you a few.
13 They're in evidence. You can look at them if
14 you want.

15 1971, Colorado School of Mines, J&J's own
16 consultant, the needles are tremolite in the
17 baby powder.

18 1971, Dr. Langer of Mount Sinai finds
19 another kind of asbestos, chrysotile, in
20 Johnson's Baby Powder, the same thing that
21 Dr. Lewin at the FDA found in 1972, the same
22 thing that Sperry Rand found in J&J's talc that
23 same year in the same sample.

24 And then there's Dr. Hutchinson. And I
25 just didn't do a good job during the trial

1 explaining exactly what Dr. Hutchinson did and
2 what J&J did to him.

3 J&J hired Dr. Hutchinson through their
4 go-to lab, McCrone, to double-check what
5 Dr. Lewin had found through the FDA, to
6 double-check the Lewin samples, to see if what
7 Lewin found, the asbestos was really there.

8 Dr. Hutchinson wrote a report finding the
9 exact same asbestos in the exact same Lewin
10 sample that Dr. Lewin, Dr. Langer, Sperry Rand,
11 and everyone else found. And he took pictures
12 of it. He took pictures of it.

13 Then the report went to Johnson & Johnson,
14 and the report talked throughout about the
15 asbestos he found. And then Johnson & Johnson
16 had another report written up that went to the
17 FDA that mentioned Dr. Hutchinson but left out
18 the dot dot dot.

19 The dot dot dot was the part of
20 Dr. Hutchinson's report where he found the
21 asbestos. They scrubbed that from the report
22 that went to the FDA and only sent the part
23 about Dr. Hutchinson not finding it with the
24 weaker microscope.

25 It would have been bad enough to just bury

1 Dr. Hutchinson's report and never tell anybody
2 about it. They didn't just do that. They took
3 his report and told the FDA he didn't write it
4 when he did, and it was written down and there
5 were pictures.

6 And in that report Johnson & Johnson told
7 the FDA there's been an extensive survey of the
8 Lewin sample -- that's Johnson & Johnson's
9 talc, the same talc they used in the baby
10 powder -- using the strongest microscope, the
11 big, giant microscope. None of the techniques
12 revealed any trace of chrysotile. That's what
13 they told the FDA when they had
14 Dr. Hutchinson's report finding chrysotile in
15 the talc in their files.

16 And then they buried Hutchinson's report
17 for 46 years. And it worked.
18 Johnson & Johnson documented about how
19 Dr. Schaffner -- that's the FDA -- was now
20 convinced that Dr. Lewin's findings are not
21 reliable and we don't think he's going to tell
22 anybody. They told the FDA Dr. Lewin was
23 wrong, there was no asbestos, when they have it
24 written down in their own files, and the FDA
25 believed them.

1 And then they just kept selling the
2 asbestos baby powder. And the documents and
3 the testing keep coming. This is 1973.
4 Asbestos, our powder contains quantities of
5 tremolite, which might be classified as
6 asbestos.

7 1974, Johnson & Johnson, they kept trying
8 to tell the FDA substantial asbestos can be
9 allowed safely in a baby powder. Why would
10 they say that if it wasn't there? Why would
11 they say asbestos is okay in our baby powder if
12 it was never there?

13 McCrone, Vermont talc samples that they
14 used in their baby powder for over 30 years,
15 fibrous tremolite, four times.

16 They always had the option to switch out
17 the talc for cornstarch, to take out the thing
18 that had asbestos in it and use cornstarch.
19 Cornstarch has been used in some body powders
20 since the turn of the last century. That's
21 what they told you under oath. They could have
22 always done it. Why didn't they?

23 They wrote down why. They knew that if
24 they switched out the talc for cornstarch, they
25 might get caught. Due to growing attention

1 shown by scientific and regulatory groups, we
2 should avoid changes to the product which would
3 increase our vulnerability to criticism or
4 suspicion.

5 They want you to believe they did nothing
6 wrong, that there was nothing to be suspicious
7 about, that there was never any asbestos. They
8 wrote down if we switch to cornstarch, we might
9 get caught.

10 And they kept trying to convince the FDA
11 that 1 percent asbestos fibers by weight in a
12 baby powder, millions and millions and millions
13 of fibers per bottle, was safe.

14 So the FDA didn't need to adopt more
15 stringent testing methods. Use the weak tool
16 that can't see less than 1 percent asbestos
17 because 1 percent asbestos is safe.

18 And then they kept selling it. And they
19 kept finding it over and over and over and over
20 again. McCrone confirmed asbestos. McCrone,
21 talc samples, asbestos, over and over and over
22 again. McCrone, fibers of asbestos, rather
23 high, over and over and over and over.

24 This is another just totally separate,
25 independent lab with nothing to gain, no dog in

1 the fight. Mountain State Research Lab tests
2 Johnson & Johnson's talc. The tremolite occurs
3 in needles.

4 EMV Associates in 1977, another lab, a
5 consultant to Johnson & Johnson. When you
6 weigh the weight of evidence, there are paid
7 experts and there are paid witnesses who come
8 in. They might be entitled to less weight.

9 There are neutral witnesses with no dog in
10 the fight, like Dr. Gibney, no dog in the
11 fight. They're probably entitled to more
12 weight.

13 But the most weighty evidence is the
14 evidence from their own people who had every
15 motive in the world not to find asbestos in the
16 powder of the company that hired and paid them.

17 That's who all of these folks are,
18 Johnson & Johnson people, that they hired and
19 paid, and who told Johnson & Johnson you've got
20 asbestos in your powder and they took pictures
21 of it, pictures that look just like what
22 Dr. Longo has found over 140 times in Johnson's
23 Baby Powder. And then they just kept selling
24 it year after year after year after year after
25 year.

1 There are documents from the '80s which
2 show that they sort of just stopped doing much
3 quality control at all. The quality control
4 testing of all production is minimal. Process
5 control testing is virtually nonexistent.

6 They had hundreds and hundreds and
7 hundreds of tests in their own documents
8 finding asbestos in baby powder, and they
9 didn't even really bother to use quality
10 controls. Year after year of testing.

11 In 1991 Dr. Johnson had a consultant named
12 Dr. Blount. She was a mineralogist. She was
13 an expert in looking at products and finding
14 what they contained. She was not a paid
15 expert, not a plaintiffs' expert, not one of
16 our people; she was Johnson & Johnson's expert.

17 She tested something called Talc Sample I,
18 and she found tremolite asbestos in it, the
19 same thing in their records hundreds of times,
20 in their powder. Sample I was Johnson's Baby
21 Powder.

22 She put it in a peer-reviewed published
23 scientific paper. But the only thing the
24 peer-reviewed published scientific paper was
25 that Sample I contained asbestos. There was no

1 definition of what Sample I was. So people who
2 read the paper didn't know whose powder it was.

3 But Johnson & Johnson did.

4 Johnson & Johnson had the key in their files
5 for 23 years that said Sample I is our baby
6 powder that was first released to the public in
7 2017.

8 They kept selling the powder year after
9 year after year into the '90s, into the 2000s.

10 In 1997 Johnson & Johnson started getting
11 sued from people with mesothelioma. They
12 started getting sued. People came to
13 Johnson & Johnson and said I have mesothelioma.
14 Did your talc contain asbestos? Did you hurt
15 me? Did you give me this cancer?

16 Johnson & Johnson, in an internal memo,
17 said the majority of asbestos bodies isolated
18 from the lungs of women in the general
19 population have tremolite or anthophyllite.
20 They're talking about women because women were
21 the ones who sued them first because women used
22 this powder more than men.

23 Women were the ones who put it on their
24 babies the most. Women were the ones who put
25 it on their bodies the most. But the fact that

1 they were talking about women doesn't mean
2 anything because if you're a man and you used
3 the powder like a woman did for 50 years all
4 over your body, it does exactly the same thing
5 to a man that it did to a woman.

6 Johnson & Johnson said because tremolite
7 and anthophyllite are known contaminants of
8 talc, rare cases of mesothelioma might be
9 related to cosmetic talc. They wrote that down
10 27 years ago.

11 Do you know what you call that? It's a
12 confession. They wrote down our talc with
13 asbestos in it is giving people this horrific
14 cancer that Michael Perry has 27 years ago.
15 And then they just kept selling it. They kept
16 selling it.

17 You know, it's one thing to read something
18 in a book, right? Read it in a book, but it's
19 another thing to experience it in real life.
20 Real people in real world in real life with
21 real cancer came knocking and told
22 Johnson & Johnson you hurt me; just like
23 Michael Perry, you hurt me.

24 They wrote down that it might be true.
25 And then they just kept selling the baby

1 powder. They just kept selling it. And they
2 told you why. Because we built this entire
3 company on the mother-infant bond. We're the
4 most trustworthy caring health care home
5 products company in the world. It's our key
6 competitive advantages, the mother-baby
7 company. And they stressed the mother-infant
8 bond.

9 That's what they did. They knew that if
10 this got out, that if people knew that what
11 they built their entire company on, the
12 mother-infant bond, the big J&J, if that got
13 out, it would destroy the company.

14 They knew the entire company was at risk
15 because what Johnson & Johnson is is the image
16 of the mother-infant bond. They wrote it down.
17 They gave speeches on it. It's written down
18 year after year. Not one person, not two
19 people, people all over the company in
20 different decades at different times said the
21 mother-infant bond is our company. And so they
22 just kept selling the asbestos powder year
23 after year after year.

24 In 2000 more people sued
25 Johnson & Johnson, came to Johnson & Johnson

1 with mesothelioma. And they wrote questions
2 under oath that we got to exchange in
3 litigation, written questions under oath.

4 Did your baby powder ever contain
5 asbestos? Did it ever contain tremolite? They
6 had hundreds and hundreds and hundreds of
7 tests, not -- not that they had to go ask
8 someone else for, not that they had to
9 subpoena, not that they had from somebody
10 else -- in their own files showing tremolite in
11 their baby powder.

12 They told these dying people under oath
13 the powder never contained it. It tells you
14 everything you need to know. It tells you
15 everything you need to know. They said it
16 under oath, but it wasn't true. And then they
17 just kept selling the powder year after year
18 after year.

19 In 2004 a TV station up in Sacramento not
20 involved with the lawsuit at all, not suing for
21 money, not coming into court wanting anything,
22 just a TV station, bought baby powder off a
23 shelf, sent it to a lab, and found asbestos in
24 it.

25 They contacted Johnson & Johnson. They

1 said we found asbestos in your baby powder.
2 You saw that video of Steve Mann. It kind of
3 looked like Santa Claus, but he's not Santa
4 Claus. He was the director of the entire
5 company for toxicology for health, Steve Mann.

6 They sent it to him. They had hundreds
7 and hundreds of tests finding asbestos in the
8 baby powder in their files. They got it, and
9 they said no, we couldn't verify it. We
10 couldn't verify it.

11 They could verify it by looking at their
12 own documents. They knew it was true. They
13 didn't need an investigation. They'd known for
14 50 years. And so they just kept selling it,
15 and they never told anybody.

16 They wrote down over and over why they did
17 it. Johnson's Baby Powder is the primary link
18 to the positive J&J name in the public mind.
19 It's sacred. It's a sacred cow. It's the
20 golden egg. It's our number one equity, our
21 flagship, our foundation, the cornerstone of
22 our company.

23 So they just kept selling it. And they
24 didn't just keep quiet. You know that long
25 Steve Mann video? It was so long, and I don't

1 know. I saw you all paying attention, but it
2 was pretty long.

3 They went out to these organizations.
4 47 years after they found asbestos, they hired
5 Dr. Wehner -- remember Dr. Wehner? They paid
6 him a bunch of money to write articles in
7 science 47 years after they found asbestos.

8 Dr. Wehner wrote in the medical journal
9 where he was on the board and he could publish
10 whatever he wants talc is not a carcinogen.
11 It's totally safe. There aren't even fibers in
12 it. Fibers. Not just no asbestos, not even
13 fibers.

14 They paid this guy to write litigation --
15 or to write articles so they can send them to
16 the NTP and convince the NTP, the National
17 Toxicology Program, don't list the talc as a
18 carcinogen that we've known contains asbestos
19 for 47 years.

20 And then they celebrated. Write notes,
21 NTP, who was going to list it as a carcinogen,
22 withdrew it from consideration. Dr. Wehner,
23 who we secretly paid, convinced them. That's
24 not my words. J&J wrote that. This is a
25 direct result of our efforts. We did it.

1 That is so shameful. There are no words
2 for it. They've known for 47 years. Is that
3 reasonably careful?

4 And then they just kept selling it in the
5 2000s still, year after year after year after
6 year, until 2017 when the truth finally came
7 out. Johnson & Johnson was finally forced to
8 turn over millions of pages of internal
9 corporate documents listing asbestos in their
10 talc hundreds and hundreds of times, hundreds
11 and hundreds of times.

12 And then two years later the FDA bought a
13 bottle of Johnson's Baby Powder off the shelf,
14 tested it for asbestos, and found asbestos over
15 and over again, and called it poison.

16 Johnson & Johnson took that bottle of baby
17 powder, flew it on a private plane to their
18 go-to lab, RJ Lee. They were panicked because,
19 unlike Dr. Hutchinson in the 1970s, unlike
20 Dr. Mann in the 2000s, this was front-page
21 news. It was front-page news. Everybody knew
22 what Johnson & Johnson had known for 60 years.
23 There was asbestos in the baby powder.

24 So Johnson & Johnson flew it to RJ Lee and
25 said please double-check. Please don't find

1 it. But RJ Lee did. They found the exact same
2 asbestos in the exact same bottle in the exact
3 same container the FDA did, and they found it
4 27 times. They took pictures of it.

5 Johnson & Johnson is selling baby powder
6 to be put on babies while this is happening.
7 And then Johnson & Johnson told the American
8 public it didn't happen. It didn't happen, the
9 same thing they did with Dr. Hutchinson and the
10 FDA. Dr. Hutchinson finds it; they bury the
11 report and tell the FDA it didn't happen.

12 The FDA finds it. Johnson & Johnson
13 confirms it with their own lab. And then they
14 tell the American public it didn't happen. And
15 they're going to get up and tell you now, it
16 didn't happen. Please don't set aside your
17 common sense.

18 You've seen it with your own eyes 27
19 times. If that's not negligence, what is? If
20 that's reasonably careful, what wouldn't be?
21 The answer to Question 1 should be yes.

22 Our next claim is something called strict
23 liability. It's Question 3 on the verdict
24 form. Most people don't know what that means
25 who are not lawyers.

1 The judge is going to give you the law.
2 That's the jury charge. When the Court refers
3 to the jury charge, that's the law. The judge
4 is going to read it to you and give you copies
5 of it. You'll have it back with you.

6 But the law describes strict liability as
7 liability without fault. And, boy, that
8 doesn't seem right. Why would somebody be
9 liable if they weren't at fault? You have to
10 do something wrong to be liable, right?

11 What strict liability focuses on is not
12 the conduct of the defendant but their product,
13 the product they made. It's focused on the
14 product. And the law has struggled with this
15 for a long time.

16 What do we do if a company makes a product
17 and they're not negligent? They're not
18 negligent. They test it. They use it.
19 They're careful. They use the best materials.
20 They're really careful in what they do.
21 They're reasonably careful. They are
22 reasonably careful. What do we do if that
23 product hurts then somebody? Who pays for it?

24 Does the person who was hurt -- I like to
25 use the example of an exploding toaster. Let's

1 say General Electric made an exploding toaster,
2 and they were super careful and they had great
3 scientists and they tested it with the best
4 methods, and they thought it was a great
5 toaster, and it went out and exploded and it
6 hurt somebody. Who pays for that? The person
7 who got hurt or the company who made the
8 product?

9 And society has to decide if it's the
10 person that got hurt, then society has to pay
11 for it.

12 What the law has decided is that the
13 company should pay for it even if they weren't
14 negligent because at least the company has the
15 opportunity to change the design and make it
16 safer in the future. That's strict products
17 liability.

18 And so what you determine is not whether
19 the company was unreasonable or not careful but
20 whether the product itself was unreasonably
21 dangerous.

22 And how you do that is you look at dangers
23 that would be reasonably anticipated. Were the
24 dangers of the product reasonably anticipated
25 by the folks who used it? If they weren't

1 reasonably anticipated, then the product was
2 defective and they're strictly liable for it.
3 I hope that makes some sense.

4 This is what folks anticipated about
5 Johnson's Baby Powder. This is an easy one.
6 They anticipated it was safe. They anticipated
7 it was good for babies. They anticipated it
8 was good for dad. They didn't anticipate that.
9 But that was the truth of the baby powder.

10 We asked Michael specifically, "Why did
11 you use it?" It was trusted family brand, and
12 it was safe for babies. Michael never
13 anticipated in a million years that this
14 product for babies would give him cancer.

15 And J&J knew people didn't anticipate the
16 harms. That's why they wrote down 55 years
17 ago, if people found out, there'd be outrage
18 because they knew people didn't know.

19 Johnson & Johnson's own corporate
20 spokesperson in the video we played for you
21 admitted that people didn't know. "No mother
22 or father would ever buy talc for use on
23 themselves or their children if they knew it
24 had a single fiber of asbestos in it, correct?"
25 The answer under oath for Johnson & Johnson,

1 "Yes."

2 So people never anticipated the dangers,
3 and the product was unreasonably dangerous.
4 OSHA is aware of no instance in which exposure
5 to a toxic exposure has more clearly
6 demonstrated detrimental health effects on
7 humans than asbestos. OSHA said this is
8 literally the worst carcinogen of all time.
9 OSHA said there's no safe level. A few days of
10 exposure have caused mesothelioma in humans.
11 Michael Perry powdered himself with this for 50
12 years, not a few days.

13 It's not close. It's not a judgment call.
14 This product wasn't safe. It's not safe for
15 toxic substances on babies. And they didn't
16 say just put it on babies. They said use it
17 your whole life. Put it on the kids. Put it
18 on the teenagers. Put it on mom. Put it on
19 dad. Put it on yourself your whole life. A
20 few days of this powder, to people who are
21 susceptible, can give you mesothelioma. And
22 the FDA calls it poison as well.

23 This really isn't a close call. This was
24 a defective product, and it wasn't safe. The
25 answer to Number 3 should be yes.

1 Our third claim is fraud, fraud against
2 Johnson & Johnson. And it's Question 5 on the
3 verdict form. Fraud also has a definition.
4 It's the perversion of truth for the purpose of
5 inducing another in reliance upon it to part
6 with some valuable thing. The perversion of
7 truth.

8 They took the most sacred and precious
9 thing in this world and they said, "Put our
10 baby powder on it. It's so pure, it feels like
11 love, love from mom." And the whole time they
12 knew that was in the powder. If that's not a
13 perversion of truth, what would be?

14 And they did it for money. This is their
15 slide. Let's take that mother-baby bond, that
16 sacred, precious thing, a mom's love for the
17 most important thing in the world to her. And
18 if we communicate that and create deep personal
19 trust, we're going to make a lot of money.

20 And that's what they did. And they told
21 people to use it for life. And they induced
22 Mr. Perry, Michael, to use it. This is one of
23 the bottles that he found in his house. You
24 understand he found the poison in his house.
25 And he said, "When it said purest protection, I

1 thought that meant safe." Because who
2 wouldn't?

3 This was another bottle in his house.
4 "Clinically proven." Boy, that sounds
5 sciencey, huh? Clinically. Lab coat.
6 Scientists. Proven mild. He thought that
7 meant it was safe too.

8 These moms that they advertised the powder
9 to, they said, "Put this on your fragile
10 babies. It will feel like love." That's who
11 taught Michael how to do it. It worked.
12 Michael's mom, who loved him so much, who
13 called him her little piece of toast, she's the
14 one who taught him how to do it, just like the
15 ads told him to.

16 Piggy banks, money, mother-baby bond, and
17 the worst carcinogen in human history. That's
18 fraud. It just is. The answer to Question 5
19 should be yes.

20 All three of the claims talk about
21 proximate cause, a proximate cause, the
22 negligence claim, the strict liability claim,
23 and the fraud claim. A proximate cause. Not
24 the proximate cause, not the biggest cause, not
25 the only cause, not the most important cause.

1 A cause. Was the baby powder with asbestos
2 that he breathed for 50 years a cause of his
3 mesothelioma?

4 And I know you heard about all the other
5 powders, and you're going to hear about it when
6 they get up. And I know you heard about the
7 brakes, and you're going to hear about all
8 kinds of stuff. But none of that matters. The
9 only question for you is did the baby powder
10 count even 1 percent? Did it count at all?

11 If it did, it was a cause of Mr. Perry's
12 disease. It doesn't have to be the only cause
13 or the biggest or the one even though it
14 obviously was. It was the one he used the
15 longest, he used the most. It was his first
16 exposure. It was his last exposure. It was
17 his biggest exposure. It was in the home. It
18 was when he was literally an infant. It was
19 when he was going through puberty as a
20 teenager, when his cells were dividing.

21 But it doesn't have to be the only cause
22 to be proximate cause. It has to be a
23 substantial factor in bringing about his
24 disease. So it has to be substantial; it can't
25 be nothing. But it can be one of many causes.

1 A substantial factor can literally be
2 1 percent. That's substantial.

3 We know that the exact product he used
4 caused the exact disease he has, not from a
5 paid expert, not from -- from a world health
6 organization, from IARC, the International
7 Agency for Research on Cancer. Talc with the
8 stuff that Johnson's Baby Powder had in it can
9 give people mesothelioma.

10 And there's no safe level. Not just OSHA.
11 Their director, no known safe level. Their
12 corporate spokesperson, no known safe level,
13 especially for children.

14 They're going to try to get up and talk to
15 you for an hour about a safe level when their
16 own people, their own documents, and every
17 government organization says there isn't one.

18 Their own documents, "In order to be safe,
19 it has to be free from asbestos minerals."

20 Michael's own treating physician, "Have
21 you ever heard of a level of asbestos that's
22 safe in a hundred mesothelioma patients you've
23 seen and the peer-reviewed scientific articles
24 you've published about mesothelioma when you've
25 studied under the foremost expert on earth,

1 Dr. Bueno, on this disease? Ever heard of a
2 safe level?" "No."

3 A few days can give you this disease.
4 Michael used it for 50 years. He used
5 literally half a ton of baby powder if you add
6 up all the bottles throughout his life.
7 Thousands of uses, hundreds of bottles, a
8 powder product used on him as a baby in the
9 home for a lifetime, during all the times when
10 he was having the most cellular division.

11 I know Dr. Brody was early in the case and
12 we ran out of time and he was really rushed,
13 but what he said is that the DNA in our cells,
14 when it divides, there's a shell around it.
15 That shell goes away, and the DNA is exposed.
16 And that's when the asbestos can hit the DNA
17 and damage it.

18 So when our cells are dividing the
19 fastest, our DNA is vulnerable the most because
20 the shell goes away and the DNA replicates in
21 the two cells.

22 When do you think our DNA -- when do you
23 think our cells are replicating the fastest?
24 When we're growing up. When we're babies.
25 When we're kids. When we're going through

1 puberty. That's when cells are dividing the
2 fastest. During every single stage of that in
3 Michael's life, he was breathing their asbestos
4 into his body in his home.

5 And what we know is that, when asbestos
6 gets in a home, it's nearly impossible to get
7 out. It doesn't just disappear. You don't
8 just powder yourself and then poof, it's gone.
9 It's in the carpet. It's in the drapes. It's
10 in the furniture. It's in the home.

11 Once asbestos is introduced in the home,
12 it will spread to all rooms, and it's almost
13 impossible to remove, even with a vacuum
14 cleaner. It will be easily disturbed in the
15 air from the slightest movement. And
16 sedimentation is very low. That means it
17 floats in the air, and it takes a long, long
18 time for it to hit the ground.

19 Johnson & Johnson in its own documents
20 said the type of asbestos in our baby powder is
21 not just that it was just asbestos, it's not
22 just that asbestos is horrible, it's not that
23 there's no safe level; they literally had one
24 of the worst kinds of asbestos in baby powder.

25 Erionite, which I know you never heard of,

1 is considered the most potent mesothelioma
2 producer, followed by tremolite. That's
3 Johnson & Johnson. Out of the six asbestos
4 minerals, the one in their baby powder is the
5 worst. There were guaranteed exposures.

6 We brought you a statistician, an
7 epidemiologist, to say, even though every
8 bottle didn't always have asbestos in it,
9 70-plus percent of them did. And if you add up
10 all the bottles that Michael used, it's more
11 likely for him to win Powerball twice than that
12 he miss the asbestos in Johnson's Baby Powder.
13 He was absolutely exposed. There's no doubt
14 about it.

15 And they used industrial talc in baby
16 powder. Industrial talc. The stuff in tire
17 factories, the stuff in roofing material. They
18 put that in the baby powder. It's undisputed.

19 Here is the definition of cosmetic talc.
20 Over 98 percent talc. Their own tests show, it
21 was never 98 percent here. It was even under
22 90. This is the Shower to Shower. 1972.
23 Michael's three years old. His mom is using it
24 in the house. It's industrial talc.

25 Johnson & Johnson's own documents say this

1 is a severe health hazard in all talc ores.

2 Not is it enough? Not do we need to do a dose
3 calculation? Not do we need to do funny money
4 math -- math. All the things you're about to
5 hear. If it's there, it's a hazard.

6 And the epidemiology proves it. The
7 epidemiology proves it.

8 These are separate epidemiology studies in
9 the peer-reviewed scientific literature. They
10 list the author's last name, reports the last
11 name. Rosenberg is the author's last name.

12 At the lowest levels of exposure to
13 asbestos, less than .1 fiber per cc years, four
14 times the risk, a quadrupling the risk of
15 mesothelioma at extremely low levels. 0.1
16 fibers per cc years, almost an eightfold
17 increase in mesothelioma. 0.07, less than
18 that, almost a tripling of the risk of
19 mesothelioma. .5 fibers per cc years, 28 times
20 the risk.

21 Those are the levels inhaled. The levels
22 inhaled from Johnson's Baby Powder are way more
23 than that. These are the levels from only 40
24 years of use. Michael's was 50, 50 years.

25 Dr. Gordon's paper, a peer-reviewed

1 scientific literature from a doctor, 1.9 fibers
2 per cc years. J&J's own internal estimates,
3 .18 fibers per cc years for diapering, 4.5-plus
4 for people who are 6-foot-2 tall, like Michael
5 Perry, who used it all over their body.

6 And then we have the folks who worked in
7 their mines, the miners. This disease is one
8 in a million, mesothelioma. It was one in 200
9 in their miners. Two out of 427 miners in
10 their Vermont mine died of mesothelioma, in the
11 thing they say had no asbestos in it and was
12 never there.

13 There are hundreds of cases of malignant
14 mesothelioma in folks who were exposed to
15 nothing but cosmetic talc in a peer-reviewed
16 scientific literature. 33 cases, only exposure
17 to cosmetic talc. 122 cases, the only known
18 exposure to asbestos from cosmetic talc. 75
19 individuals with mesothelioma, same thing.

20 And then there are Michael Perry's lungs,
21 with the exact same thing in the baby powder,
22 with the exact same thing they said causes
23 mesothelioma, looking exactly like the
24 tremolite asbestos standard, the tremolite in
25 Johnson's Baby Powder, the tremolite in Michael

1 Perry's lung.

2 The medical doctors came. Johnson's Baby
3 Powder was a substantial contributing factor to
4 Mr. Perry's disease. No medical doctor came to
5 dispute that. It's undisputed.

6 And his treater said it too. They made a
7 big deal about how well the treating doctor,
8 the guy who does these surgeries that take nine
9 hours, he's not an expert on what the products
10 can do. He's not a products expert.

11 So they're like, "Do you know about talc
12 in asbestos?"

13 He goes, "No, I'm not a product expert."

14 They made a big deal about that. But he
15 said if Johnson's Baby Powder had asbestos in
16 it, it caused Michael Perry's mesothelioma.
17 They brought no doctor to dispute that.

18 The answer on proximate cause for
19 negligence is yes, and for the other two claims
20 as well.

21 Then we get to Question 7. Question 7 is
22 about money damages for the things that were
23 taken from Michael Perry and Lonnie Long, money
24 for what was stolen from them.

25 It's not just what was stolen from them by

1 Johnson & Johnson. This is a little
2 counterintuitive. It's the total loss that
3 this disease has caused in their life, not just
4 the part caused by Johnson & Johnson, not just
5 the part caused by American International
6 Industries, not just the part caused by whoever
7 else you think may have played a role. It's
8 their total loss, the whole thing.

9 MS. BUENO: Objection, Your Honor.

10 THE COURT: Approach.

11 (Whereupon a bench conference was
12 held.)

13 MS. BUENO: He's suggesting some type of
14 an apportionment argument that they're allowed
15 to --

16 MS. MCVEY: I can't hear what you're
17 saying.

18 THE COURT: She's saying that this
19 suggests an apportionment argument.

20 I understand exactly the opposite. I
21 think what he's saying is you don't apportion;
22 you just look at the whole damage. That's what
23 I'm hearing.

24 MS. MCVEY: Exactly.

25 MR. ADAMS: Right.

1 THE COURT: I'll overrule the objection.

2 (Bench conference concluded.)

3 THE COURT: Objection is overruled.

4 MR. ADAMS: A total loss.

5 There's two categories that the losses
6 fall into. I know it's three lines, but
7 there's just two categories. There's one which
8 is the type of loss, the type of money damages,
9 that comes with a receipt, things like paycheck
10 losses, household services, funeral expenses,
11 medical bills. That's the economic loss,
12 things that come with a receipt.

13 We have a stipulation that the current
14 economic losses, the things that come with a
15 receipt, paycheck losses, is \$3.3 million and
16 change, \$3,329,973.05.

17 Remember Bob Johnson came and testified
18 over Zoom the other day, and he said the
19 household services, the value of what Michael
20 did around the house -- taking the garbage out,
21 mowing the lawn, making dinner, stuff like
22 that -- and his paycheck losses -- his money he
23 made every year -- was about \$2.8 million.

24 And then we had a stipulation read this
25 morning. I know it kind of whizzed by us. I

1 saw somebody trying to write it down. I don't
2 know if you got it all down -- it's in her
3 instruction -- was about \$510,000 more. So
4 2.8 million plus 510,000, that's how we get the
5 3.3 number. That's what that means.

6 It's only the current economic loss. But
7 the number that you have to write down is for
8 the past and the future. And I hate to say it
9 out loud with Michael in here, but there's
10 going to be a lot of medical expenses in
11 Michael's future. A lot. He's already had
12 510,000, and this has barely started. You
13 heard it came back, and his pleura is twice the
14 size it was. This is going to keep coming
15 back. And it's never going to stop coming
16 back.

17 And so I think, conservatively, Michael
18 has another half a million dollars of medical
19 expenses in his future. I think the number you
20 should write down is \$3.8 million.

21 These are for paycheck losses, medical
22 bills, household services. But I know y'all
23 know we didn't bring this case because Michael
24 can't mow the lawn. We brought this case
25 because they stole his life. And what the law

1 says is they have to pay for a fair trade for
2 what they took.

3 A lot of things about the law, we learned
4 in kindergarten, in preschool, kindergarten.
5 One of the things about the law that we learned
6 in kindergarten is that, if you take something
7 from someone else, if you take something that
8 doesn't belong to you from someone else,
9 there's three ways to make it right: You can
10 return it, replace it, or pay for it.

11 What they took can't be returned. Michael
12 will never live a day, another healthy day in
13 his life.

14 What they took can't be replaced. There
15 is only one Michael Perry.

16 And so they have to pay for what they
17 took. And it's the most expensive thing in the
18 world. It's a human being's life, a human
19 being who wants to live just as bad as any
20 human being who ever lived on this earth. He
21 wants to live so bad.

22 And so how do we put a value on what they
23 took?

24 You heard that, if Michael didn't have
25 this mesothelioma that's crushing his lungs, he

1 would have lived another 25.65 years. What's
2 that worth? If it's a small case, it's a small
3 verdict. If it's a medium case, it's a medium
4 verdict. If it's a big case, it's a big
5 verdict. If it's the most catastrophic and
6 horrible thing you can do to another human
7 being, it has to be the biggest and most
8 catastrophic thing the law allows. It's just
9 common sense.

10 What's a fair trade for stealing 25 years
11 of life? Is it a million dollars a year? If
12 they came to Michael and they said, "Michael,
13 we're going to give you this terminal cancer.
14 They're going to cut you in half. They're
15 going to literally peel the lining of your lung
16 off like an orange. You're going to have to go
17 through it all in front of your favorite person
18 in the whole world, who's going to have to take
19 care of you and take you to every doctor
20 appointment and watch you waste away." Do you
21 think he would have took it, \$25 million, to go
22 through what he's gone through? He never
23 would.

24 Even though they took the biggest thing
25 you can take from somebody -- what if they took

1 a finger? What's a finger worth? What would
2 people have to be paid to give up a finger?
3 Half a million dollars? A million dollars?
4 \$2 million? What about a whole hand? What
5 about every finger? What about their arm? 20?
6 30? 40 million? What about a leg?

7 They didn't take a finger or a hand or an
8 arm or a leg. They took his whole life. What
9 could be bigger?

10 But that's not even the biggest part of
11 the case because this case isn't about what
12 they took. It's about how they took it, what
13 they put him through, what he's facing in the
14 future.

15 Every person wants to die in their old age
16 in their sleep. Why is that? Because it's
17 scary to die. We're afraid that it's going to
18 hurt. And so we don't want to be conscious of
19 it. We want to be asleep. We want to just go
20 peacefully.

21 Michael is not going peacefully. They cut
22 him open. They poked him. They pumped him
23 full of chemicals. They radiated him. It's
24 just begun. This cancer literally crushes your
25 lungs until you can't breathe anymore. And I'm

1 sorry to say it in front of Michael, but it's
2 true. There's no hope.

3 You have to put a value on not just what
4 they took but how they took it, right? Michael
5 is afraid. He is scared to death. Pain and
6 suffering, mental anguish, grief, humiliation,
7 worry. You have to put a value on all that.

8 On every metric, it's as big as it gets.
9 Michael had a great life. It wasn't a big
10 life, a flashy life, a fancy life, but it was a
11 beautiful life that he had with his favorite
12 person in the whole world.

13 If you do 2 million a year, it's
14 \$51.3 million. I know that's a huge amount of
15 money. It's huge. I don't think it's enough.
16 For what he's going to go through, 2 million a
17 year, they stole his life.

18 MS. BUENO: Objection, Your Honor.

19 THE COURT: Approach.

20 (Whereupon a bench conference was
21 held.)

22 THE COURT: Let Mr. Brown get up here.

23 MR. BROWN: Thank you, Your Honor. The
24 problem is giving opinions about what the
25 verdict should be. That's for the jury to

1 determine. Filling in blanks with numbers is
2 inappropriate, in our opinion. We object to
3 that.

4 THE COURT: All right.

5 MS. MCVEY: And, Your Honor, he clearly
6 has given comparables to if it's a finger, a
7 leg, a suggestion. He's filling in there.
8 We've done it in every case. It's clearly
9 appropriate.

10 THE COURT: Overruled.

11 (Bench conference concluded.)

12 THE COURT: The objection is overruled.

13 MR. ADAMS: I could be up here asking for
14 \$100 million, and maybe I should have, but we
15 think that's fair. Please value his life.

16 You heard from Lonnie Long. He's also
17 lost something. I think you saw it when he
18 took the stand when he was so nervous and
19 afraid when he got up there and he did it
20 anyways.

21 When you take somebody's favorite person
22 in the whole world who they were going to grow
23 old with, who they loved more than anyone on
24 earth, you have to pay for it.

25 This is what Lonnie hand drew to Michael

1 to cheer him up when he got the worst news of
2 his life. I just think it tells you everything
3 you need to know.

4 Lonnie's been there every single day at
5 every single doctors' appointment, and he's
6 going to be there every single day and every
7 single doctors' appointment until Michael takes
8 his last breath.

9 I think half of Michael's loss is
10 appropriate. You can do more; you can do less.
11 You can do anything. That's what I think.

12 Question 8 is the most important question
13 on the entire verdict form. Did this company
14 do what it did because it didn't see a stop
15 sign and ran through it and was just negligent,
16 or is what they did willful? Did they see that
17 stop sign hundreds of times and put the pedal
18 to the floor?

19 Willful, wanton, or reckless conduct is
20 conscious. That means they knew. Failure to
21 exercise due care or conscious indifference to
22 the rights and safety of others or reckless
23 disregard of the rights and safety of others.

24 This company was so reckless, there's no
25 words for it. They knew it was bad. They knew

1 it would hurt people. That's why they tried to
2 cover it up over and over again.

3 They went from .5 percent -- that's
4 billions of fibers in a bottle -- to a few
5 isolated crystals. They minimized it. They
6 hid it. They concealed this for 46 years and
7 told the FDA it didn't exist and Hutchinson got
8 it wrong when there were pictures.

9 They tested with the weak tools when they
10 knew it wouldn't find asbestos. This is a
11 document we barely talked about, but it's in
12 evidence.

13 In 1977 Johnson & Johnson was trying to
14 get this J-41 method. I know you don't know
15 what that means. J-41 is their weak method
16 with XRD, the weakest tool that they tested the
17 baby powder with. In '77 they were testing out
18 that J-41 method.

19 They literally dumped asbestos in the
20 bottle. They spiked the samples with asbestos
21 to test this method to see if it was any good.
22 They sent the bottles which they've dumped
23 asbestos in to seven separate labs. Only one
24 of the seven found the tremolite they spiked
25 the sample with using their J-41 method.

1 The method was so trash, when they poured
2 asbestos in the bottle, six out of seven labs
3 missed it. That's the method they used for the
4 next 46 years. That is unconscionable. That
5 is so shameful. On babies.

6 MS. BUENO: Objection, Your Honor.

7 THE COURT: Approach.

8 (Whereupon a bench conference was
9 held.)

10 MS. BUENO: Objection to inflaming the
11 passions of the jury through words like
12 "unconscionable" and "shameful" and "use on
13 babies."

14 MS. MCVEY: We're talking about conscious
15 disregard for willful and wanton conduct. It's
16 clearly a word that can be used.

17 THE COURT: Ms. Pepke?

18 MS. PEPKE: I've been writing it down.
19 "Shameful," "heinous," "stole." They're using
20 criminal words.

21 THE COURT: I am concerned about that too.
22 I think you can make a point without as
23 pejorative a group of adjectives you're using.
24 So I'm going to sustain the objection and tell
25 the jury to disregard.

1 (Bench conference concluded.)

2 THE COURT: Ladies and gentlemen of the
3 jury, the defendant objects to the use of
4 pejorative words such as "stole" and words of
5 that nature. And I've sustained that
6 objection.

7 I think the argument can be made about the
8 nature of the conduct without using some of
9 those loaded words. So I've asked Mr. Allen to
10 refrain from that, and I strike those loaded
11 words from the record.

12 MR. ADAMS: Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Allen.
14 Proceed.

15 MR. ADAMS: It was conscience. They
16 tested talc baby powder for asbestos thousands
17 of times. That's what I asked their corporate
18 rep when he came and testified. They tested
19 talc baby powder for asbestos thousands of
20 times, right?

21 This was the guy who, when I showed him
22 the documents, he pretended he had never seen
23 them, the furor memo. He was like, "What's
24 that?" Remember?

25 And they never told the moms. They never

1 told the moms that were so concerned about
2 asbestos in our baby powder that we have to
3 test it hundreds of times for asbestos.

4 This is a document you never saw, but it's
5 in evidence. We just never had time. Folks
6 wrote Johnson & Johnson because sometimes there
7 was, like, some news about asbestos in baby
8 powder and some people heard.

9 They wrote Johnson & Johnson. They said,
10 "Johnson & Johnson, I heard talcum contains
11 asbestos. Any information on Johnson's Baby
12 Powder?"

13 Johnson & Johnson responded, "We obtain
14 the purest talc. It undergoes a cleansing
15 procedure known as flotation, many separate
16 washing operations to remove any impurities.
17 Don't worry. Keep putting it on your baby,
18 keep putting it on yourself. We washed the bad
19 stuff out."

20 Except two years earlier in 1972, two
21 years before that letter, J&J wrote down that
22 didn't work. Asbestiform particles cannot be
23 processed out of the talc. But when concerned
24 citizens wrote them and said can it? they said
25 yeah, don't worry, we process it out.

1 Then they used the big microscope.

2 Remember that we had seen in industry
3 standards. Remember all that? But when they
4 used the big microscope, they rigged the test.

5 They said you have to detect five or more
6 asbestos minerals of one variety or you can say
7 it's not there. You can say it's not there.

8 That means 16 -- you can find 16 separate
9 asbestos fibers -- 4 anthophyllite, 4
10 tremolite, 4 actinolite, 4 chrysotile --
11 billions of asbestos fibers in a single
12 bottle -- when you find 16 in a microscopic
13 sample, that means billions in the bottle --
14 and you can say it wasn't there.

15 Let's see if they get up and they tell you
16 about how great their testing was now. I hope
17 you'll listen close.

18 They kept telling the FDA 1 percent
19 asbestos is safe. They wrote down inside we
20 need to get the FDA to adopt our J-4 method
21 that doesn't work quickly. Because if we
22 don't, the FDA will recommend more
23 sophisticated techniques with higher levels of
24 sensitization.

25 We've got to get the FDA to do our XRD

1 method that we know doesn't find asbestos. So
2 they adopt that as an industry standard before
3 they figure out to use the big powerful
4 microscope and not rig the test.

5 Use it on your family your whole life.
6 Concentration method, we talked about in
7 opening a little bit. We didn't -- I talked
8 about it with Dr. Longo quickly, but it kind of
9 whizzed by. I doubt anyone understood it.

10 In the '70s Johnson & Johnson knew you can
11 do the concentration method where you can
12 separate the talc from the asbestos. Remember
13 the tubes and you put it in the centrifuge and
14 you spin it? The asbestos and the talc are
15 different weights. And so the asbestos weighs
16 more. So it goes down to the end of the tube
17 and the talc floats up to the top.

18 Then you can take the asbestos out and
19 look just at the asbestos in a microscope.
20 Preconcentrated. They knew about it in 1973.
21 And when they used it, they find asbestos in
22 the Vermont talc.

23 And then they wrote down why they didn't
24 want to use it. We deliberately have not
25 included a concentration technique as we felt

1 it would not be in worldwide company interests
2 to do so. Don't use the sensitive test. Don't
3 use the sensitive test; you might find the
4 truth.

5 They said under oath it never contained
6 tremolite. This was a series of documents
7 where they used the TM 7024 rape of the test.
8 We can count the asbestos and report it's not
9 there.

10 But somebody didn't get the memo the first
11 time. Dr. Millette didn't get the memo from
12 McCrone, and he sent Johnson & Johnson a report
13 saying chrysotile asbestos is detected in the
14 samples.

15 Now, this isn't Vermont talc; it's
16 California talc. But that's not the point.
17 The point of this is it's using the TM 7024
18 method.

19 And I know everybody is tired. I saw some
20 tired faces.

21 This is using their method. So
22 Dr. Millette from McCrone says I looked at your
23 talc; I found some asbestos.

24 Then Roger Miller, the president of
25 Windsor Minerals -- that's Johnson & Johnson;

1 Windsor Minerals is the part of Johnson &
2 Johnson that owned the talc mine -- wrote to
3 J&J and said, I'm touching base with you to
4 complain on failure to read our correspondence.
5 As I explained on my visit to Chicago, your
6 report is couched in substantially different
7 language."

8 You used the wrong language in your
9 report. We didn't like the language. It's
10 very important that specific language be used.

11 Roger Miller from the mine in Vermont flew
12 to Chicago to McCrone to tell them in person
13 their language is unacceptable. The language
14 was the asbestos word they used.

15 And so after that, Dr. Millette sent a new
16 report to J&J. On the same samples, nondetect,
17 nondetect. They rigged the test. That's how
18 they got away with it for 60 years.

19 This wasn't running a stop sign. It
20 wasn't an accident. It wasn't a careless
21 mistake. It was deliberate in 20 different
22 ways. The answer to Number 8 should be yes.

23 Thank you all so much for listening to me.
24 I appreciate it.

25 THE COURT: All right. Mr. Allen, does

1 that conclude your presentation?

2 MR. ADAMS: Yes, Your Honor.

3 THE COURT: Ladies and gentlemen, let's
4 take our morning break. And what we can
5 anticipate when you come back, we will then go,
6 of course, to defendants' principal closing
7 argument. And then we'll come back for a
8 reply.

9 But we're going to take -- it's 10 minutes
10 after, roughly. Be -- take a break until
11 11:25-ish, but be sure everyone is completely
12 refreshed before you come back in.

13 Please stand for the departure of the
14 jury.

15 (The jury exited the courtroom at
16 this time.)

17 (The following proceedings were held
18 outside the presence of the jury:)

19 THE COURT: All right. Before we take our
20 break, anything further for the record?

21 MS. MCVEY: Not from us, Your Honor.

22 THE COURT: Very good. Please be at ease.
23 Mr. Brown?

24 MR. BROWN: Yeah. Your Honor, we don't
25 agree that -- we appreciate the Court striking

1 the commentary from Mr. Adams that was
2 designed --

3 THE COURT: Yeah, I keep calling him
4 Allen. I'm sorry for that.

5 MR. BROWN: That's all right.

6 Those comments were designed, in our
7 opinion, to incite passion and prejudice, and
8 Your Honor struck them; but we don't believe
9 that cures the argument, and we move for a
10 mistrial on that issue.

11 THE COURT: All right. Motion for a
12 mistrial on the basis of arguments calculated
13 to inflame the passions of the jury.

14 Ms. McVey?

15 MS. MCVEY: Your Honor, they were not
16 designed to inflame the passion of the jury.
17 And, in fact, what we had to show is a
18 conscious disregard. And that's what that was
19 directed to.

20 They can certainly make an argument in
21 rebuttal. This is an argument in front of the
22 jury. But even if you've done it improper, you
23 struck it from the jury. You made an oral
24 instruction about striking it, and they were
25 pejorative, and you asked the jury to disregard

1 them. That's a curative instruction.

2 THE COURT: Ms. Pepke, you very helpfully,
3 when we were at the sidebar, quoted the things
4 that you highlighted as adjectives that were
5 calculated to inflame the passion of the jury.
6 How about put those on the record?

7 MS. PEPKE: Yes. I will do that right
8 now. You read my mind.

9 So it began with telling the jury that
10 "these are the most heinous acts you can do to
11 another human being," referring to
12 Johnson & Johnson's -- defendants as confessing
13 that they were giving -- talcum powder was
14 giving people mesothelioma, referencing harms
15 to other people, referencing killing other
16 people, telling the American public that --
17 lying under oath.

18 They told dying people under-oath lies.
19 It's so shameful, lied to the American public.
20 They should be given money for what was stolen
21 from them. They stole his life and are getting
22 away with it -- or they've got away with it.
23 This is the most catastrophic thing you can do.

24 And then, of course, they emphasize the
25 willful and wanton question is the most

1 important question on the verdict form. Of
2 course, the jury has no idea what they're
3 supposed to do with that unless they're told
4 that they cannot give punitive damages at this
5 stage and that question would take them to a
6 second stage.

7 If the Court is not going to grant a
8 mistrial, we would request the instruction
9 be -- it goes to 4 -- that no punitive damages
10 are to be awarded in this stage.

11 THE COURT: All right. Let me say with
12 respect to the recitation of the language that
13 was viewed as inflaming the passions of the
14 jury, and I'm just going to go down these.

15 "Heinous" was said in the very opening; no
16 objection.

17 "Confessing" was said at some point; no
18 objection.

19 "Harm to other people" is, in my view, a
20 legitimate thing to discuss.

21 "Lying under oath" is appropriate if they
22 took an oath in a particular document, and the
23 document was shown to the jury that was an
24 under-oath document in another case.

25 "Lying," I think, is a pejorative term.

1 And that is what I meant by striking pejorative
2 sort of terms.

3 "Shameful," I think, is a little over the
4 top. That's what I meant by -- I think that
5 was a valid objection.

6 And "catastrophic" -- "catastrophic" has
7 been said several times. I think it's a fair
8 commentary on the extent of the damages to
9 someone who they contend they have shown is
10 going to die because of the product. I don't
11 think "catastrophic" is a pejorative term; it
12 is a term that measures the extent of the
13 damage.

14 And "stolen," I felt that the use of the
15 word "steal" or "stolen" was a pejorative term,
16 and that's what I meant.

17 So if you want me to repeat to the jury
18 the words that I said pejorative, I think the
19 jury got the picture that what I was saying was
20 don't use pejorative terms or unduly dramatic
21 terms, but quantifying the part of -- the
22 extent of the damage, I think, is a legitimate
23 thing.

24 So in short I give that as a predicate to
25 say I don't believe the use of the few terms

1 that I would say were pejorative were so
2 inflammatory as to overcome the logic in the
3 minds of the jurors and have them decide the
4 matter on the basis of passion or emotion.

5 I know you disagree with that, but I'm
6 just putting on the record what my ruling is.

7 Now, with respect to this punitive damages
8 thing, I just go all over the block about it.
9 I am not going to put anything in there that
10 violates what I think is the clear preference
11 of the appellate authorities in this state for
12 not injecting punitive damages into the actual
13 damages portion of the trial.

14 But my feelings are a little bit
15 influenced by the fact that some pejorative
16 terms were used, and they were used in
17 connection with talking about willful, wanton,
18 and reckless conduct, which is the predicate
19 for punitive damages.

20 And so I'm going to instruct them on
21 something along those lines. And I haven't
22 decided exactly what that something is, but I'm
23 going to go to my chambers and cogitate about
24 that. And then I'll come back and tell you
25 what I'm going to charge.

1 MS. MCVEY: Judge, may I be heard on that
2 before you --

3 THE COURT: You can be heard as soon as I
4 figure out exactly what I'm going to say. But
5 if you want to say something in general about
6 the fact that you don't want me to mention
7 punitive damages, I --

8 MS. MCVEY: And we perfectly stayed away
9 from that, right? I mean, we stayed away from
10 any talk about damages. But we have a burden
11 on this first part to talk about willful,
12 wanton, reckless conduct by clear and
13 convincing evidence.

14 THE COURT: Yes. That's true.

15 MS. MCVEY: That's the standard, and
16 that's what we were addressing in this.

17 THE COURT: Yes. I understand that. And
18 that, frankly, is exactly what I would propose
19 to tell the jury is it is plaintiffs' burden to
20 show -- to prove all these elements and
21 findings that you're going to make in this
22 portion of the trial.

23 This is an actual damage portion of the
24 trial. One of the things that they're going to
25 have to prove is willful, wanton, and reckless

1 conduct by clear and convincing evidence. I've
2 asked you to find that in the actual damage
3 portion of this case. This is not a case about
4 anything at this point other than actual
5 damages.

6 MS. MCVEY: And that's all we argued in
7 terms of --

8 THE COURT: That's the way I would say it.

9 MR. BROWN: Your Honor --

10 THE COURT: And, therefore, I wouldn't use
11 the word "punitive damages," because I'm
12 wanting to stay away from that --

13 MS. MCVEY: Thank you.

14 THE COURT: -- in light of what I
15 explained to you -- as a judge, my
16 interpretation of what our court wants us to do
17 and not do in this matter.

18 MR. BROWN: Thank you, Your Honor.

19 MS. PEPKE: We'll wait until we hear what
20 the actual instruction is and put any other
21 objections --

22 THE COURT: Sure. But I can tell you it's
23 not going to use the word "punitive." It's
24 going to say that, as part of what they have to
25 show in this actual damage matter that's being

1 presented to you for your evaluation and
2 verdict, is they are being required to show
3 that the conduct was -- now, see, that's --
4 darn. I don't know how to do that because they
5 can still give a verdict without having to show
6 that.

7 MR. BROWN: Your Honor, may I say
8 something?

9 THE COURT: Yes.

10 MR. BROWN: There was a statement made
11 going to exactly what Your Honor is saying
12 you're intending to do about this is not a
13 punitive stage. This was the statement because
14 I wrote it down.

15 Cannot put a value on what they took but
16 how they took it. You have to look at how they
17 took it.

18 MS. MCVEY: How he's going to die?

19 THE COURT: Now, that's legitimate.

20 MS. MCVEY: How he's going to die.

21 THE COURT: Yeah, how he's going to die.

22 MR. BROWN: "How they took it" is a
23 reference to the conduct.

24 MS. MCVEY: Right, because --

25 THE COURT: Wait a minute, Ms. McVey.

1 MS. MCVEY: Sorry.

2 THE COURT: I know you feel very strongly
3 about this, as do your opposing counsel. I'm
4 trying to be the voice of reason, but I'm not
5 having much success at that.

6 MS. MCVEY: Sorry, Judge.

7 THE COURT: They have to prove, in my
8 view, Mr. Brown, that the conduct is, you know,
9 intentional conduct.

10 MR. BROWN: I understand. But he uses the
11 word "value" along with "conduct."

12 THE COURT: That's okay. That's part of
13 what they have to show, that this intentional
14 conduct has a value. And his life has a value.
15 What's wrong with that?

16 MR. BROWN: Your Honor, I --

17 THE COURT: Punitive damages, my friend,
18 is not about any of that. Punitive damages is
19 in a completely different separate hemisphere.
20 Punitive damages is predicated on the finding
21 of actual damages and then looking at whether
22 the conduct is so severe that it should be
23 punished with punishing damages. That's a
24 whole separate kettle of fish.

25 Now, the standard for the punishing

1 damages is willful, wanton, and reckless
2 conduct. And I have chosen to not simply open
3 a punitive case by saying, "Hey, they want some
4 punitive damages, but what you've first got to
5 do" -- if they don't find that, then we don't
6 have a punitive damages hearing.

7 I've done that in every one of these cases
8 I tried so far. Nobody's fussed about it. But
9 I must concede to you, Mr. Brown, that nobody's
10 really honed in on what you're honing in on
11 right now.

12 So I don't know quite what I'm going to
13 do, but here's what I would like to do before I
14 hear anything further from anybody. I would
15 like to go to my chambers and think about this
16 for a moment.

17 MS. MCVEY: Thank you, Judge.

18 MS. FLYNN: Your Honor, I'm so sorry. I
19 do have one more matter that's separate from
20 that one.

21 THE COURT: All right.

22 MS. FLYNN: It just relates to the
23 economic damages. I was just a little
24 confused. I thought that the way it came out,
25 I think with J&J, there was a \$3.3 million

1 stipulation; and then obviously AII stipulated
2 to actual medical expenses of 510,000. But
3 that 510,000 is inclusive in the J&J
4 stipulation; so it's only 3.3, not 3.8, which I
5 think is what they put on the verdict form as
6 past economic damages as if you're adding those
7 two numbers.

8 MS. MCVEY: He's talking about future.
9 3.8 refers to the future.

10 THE COURT: He was talking about present
11 and future economic damages. And he made that
12 very clear, Ms. Flynn. He said that he's going
13 to have a lot of additional medical expenses,
14 maybe as much as a half a million more dollars.
15 He added that to the already proved damages,
16 medical damages, to come up with that 3.8 total
17 loss figure.

18 So I overruled that objection.

19 MS. FLYNN: I understand, Your Honor.

20 THE COURT: I'm not going to hear any more
21 objections right now. I'm going to go think
22 about it.

23 MS. MCVEY: Thank you, Judge.

24 THE COURT: With all peace and love.

25 (Whereupon there was a recess in the

1 proceedings from 11:20 a.m. to 11:40 a.m.)

2 THE COURT: Please be seated.

3 (The following proceedings were held
4 outside the presence of the jury:)

5 THE COURT: All right. I still think the
6 safest thing to do is to do what I've been
7 doing. But if I were to say something to the
8 jury, I'm going to tell you what I would say to
9 them, and I'm going to receive some very brief
10 discussion about it. But I am not going to get
11 off on a huge, long tangent about this. We're
12 right in the middle of closing arguments.

13 Let me remind you that the only reason I
14 spend all this time with the lawyers developing
15 a complete and guaranteed group of charges and
16 receiving all your objections and getting all
17 that out of the way is so that -- I do it for
18 your benefit.

19 I've tried cases for many, many years.
20 And it used to be you didn't know what the
21 judge was going to charge. You had to kind of
22 guess in your closing arguments. You could
23 step into something you didn't want to step
24 into that way. And I don't -- I never liked
25 that. I also -- you sometimes didn't even know

1 what the verdict form was going to look like.

2 I've lived through those bad old times.

3 Thank the good Lord, the trial practice in this
4 country is such that you don't do ambush-type
5 things like that.

6 And I've got a group of some of the top
7 tier in this country of very skilled
8 litigators -- Ms. Bueno, Ms. Pepke, Mr. Cowan,
9 my own Mitch Brown, and every one of the people
10 in the plaintiffs' claim. Ms. McVey happens to
11 be local, but she can go toe to toe with
12 anybody in the country. And Ms. Gross and
13 Mr. Adams go all around the country, just as
14 Ms. Bueno and Ms. Pepke do, trying these very
15 complex cases.

16 Y'all are at the top of the line, and
17 things are now in a much more professional
18 posture than they ever were in the bad old days
19 when we tried products liability cases with the
20 Uniform Commercial Code being adopted my second
21 year in law school and certain product
22 liability matters just arising and being
23 mature. Now we have this very sophisticated
24 practice.

25 That's why I try to get all that settled

1 so you will know exactly how to argue your case
2 and present your case to the jury.

3 Now I've got this snafu that's developed.
4 That's a World War II term I don't want to
5 completely define. And I just don't know what
6 to do because the more you say, the more you
7 dig yourself a hole. If I were to say
8 something, it would run something like this:

9 I have not given you yet my charge, but I
10 have settled that so that the lawyers could
11 adequately and accurately argue their case.
12 The same is true with the verdict form. I
13 haven't given you the verdict form yet, but I
14 let them know what it would be so they could
15 show it to you and talk about it, and they've
16 done that and they're going to continue to do
17 that as defendant presents its closing
18 arguments.

19 At this moment, this is a trial about
20 actual present and future damages, economic as
21 well as noneconomic. And at the end of the
22 verdict that represent your views about that,
23 you'll ask the question, and that question asks
24 you to -- it's a question regarding the
25 character of the conduct.

1 If you find that they are -- and it says,
2 if you find an answer, an affirmative answer to
3 this conduct, that is a verdict for the
4 plaintiff on any of these causes, you are asked
5 to characterize the conduct of the defendant.
6 And that's the question on willful, wanton, and
7 reckless conduct.

8 Now, that's all I would say. What you
9 could then go and say -- but this is where you
10 start digging a hole -- this finding would
11 determine whether or not the plaintiff may also
12 request of you punitive damages. That is not
13 an issue at the present time.

14 That's kind of how I would do it, but I
15 just -- there are all kind of perils no matter
16 which way I go on this thing.

17 So, Ms. McVey, briefly.

18 MS. MCVEY: Briefly, I don't think you
19 need to say anything, but if you do say
20 something, we certainly don't think you should
21 say, "If you find yes on this question, you're
22 going to go to a punitive damages."

23 THE COURT: Well, see, and that's the
24 problem. It gets them -- but it's going to all
25 be over Friday. Once you start down that road,

1 you introduce elements into the jury's inquiry
2 that ought not to be in that inquiry right now.

3 MS. MCVEY: And that's the fear. I think
4 you've made a curative instruction to the
5 extent -- we don't believe there was one
6 needed, but to the extent that you needed to do
7 one, you've done that. I think we move on.
8 They're going to get your whole jury charge.
9 And it's coming.

10 THE COURT: And the verdict restricts them
11 to a warning frames for actual damages.

12 MS. MCVEY: Absolutely.

13 THE COURT: And I think -- so that's kind
14 of the way I am.

15 Ms. Pepke.

16 MS. PEPKE: Thank you, Your Honor. Of
17 course, we stand on our objections that we
18 made. We believe the line was crossed. We do
19 believe that the combination of the
20 inflammatory language that was used and also
21 asking the jury to focus on the most important
22 question on the verdict form being the willful,
23 wanton question and now leaving the jury with
24 wondering what in the world we're supposed to
25 do with it if it's the most important question

1 on the verdict form?

2 It's prejudicial to us. We do not think a
3 partial curative charge that you suggested
4 would be sufficient. It would be the entire
5 charge directing them that there would be a
6 base for punitive damages.

7 THE COURT: I understand your position,
8 and while I think it's well said and well put,
9 as it has been by your colleague Mr. Brown and
10 your colleague Ms. Bueno, both in our sidebars
11 and in this argument here, I just think there's
12 more danger and more peril if I step into this
13 arena than if not.

14 So I am going to decline the request that
15 I say something about punitive damages with
16 respect to the piece of the -- of the verdict
17 form that asks for a characterization of the
18 conduct.

19 I understand all your arguments. And, you
20 know, this is a big question. I mean, it will
21 be preserved for appeal, and who knows what the
22 appellate authorities will say?

23 I revere the appellate authorities, and
24 they have final words on these matters, not me,
25 the trial judge. I'm doing the best I can, but

1 my best at this moment tells me that there's
2 more danger in where you go with this punitive
3 thing and then how much you have to reassure
4 the jury and so forth and it is simply to leave
5 it as I've always left it in other trials.

6 And I don't think that the few remarks of
7 a pejorative nature that were made by
8 Mr. Adams, which I have struck, imperil the
9 situation to such an extent that I need to vary
10 from that by the request you asked me to
11 consider with respect to punitive damages.

12 But you've made a very good record on this
13 thing, and who knows how it will turn out? I
14 can't solve every problem and keep every
15 appellate issue out of the record. That's not
16 what I'm supposed to do.

17 So your issue is preserved big-time, as
18 far as I'm concerned.

19 MS. PEPKE: Thank you, Your Honor.

20 THE COURT: And I'm going to ask the jury
21 to come forward and listen to the very good
22 arguments of Ms. Bueno.

23 MS. BUENO: And we're starting with
24 Ms. Flynn, remember.

25 THE COURT: All right. Ms. Flynn.

1 Bring in the jury.

2 (The jury entered the courtroom at
3 this time.)

4 THE COURT: Have we got the material that
5 I asked to be brought?

6 MS. MCVEY: I just got a copy of it. I
7 don't know if it's full, but I have a copy.

8 THE COURT: At some point I would like to
9 see it.

10 MS. MCVEY: Do you want it now?

11 MS. BUENO: Yes.

12 MS. FLYNN: Yes, Your Honor. I did want
13 the record to reflect we did provide
14 information --

15 THE COURT: I'm going to reserve judgment
16 on how I would characterize this until I've
17 looked at it. All right.

18 THE BAILIFF: Jury is seated, Your Honor.

19 THE COURT: Thank you, ma'am.

20 Ladies and gentlemen of the jury -- you
21 may be seated, Counsel.

22 Ladies and gentlemen of the jury, you'll
23 now hear closing arguments presented on behalf
24 of AII by Ms. Flynn. They will be brief in
25 nature. And then we'll go right to closing

1 arguments presented by Ms. Bueno on behalf of
2 Johnson & Johnson.

3 All right. Ms. Flynn.

4 MS. FLYNN: Thank you, Your Honor.

5 - - -

6 CLOSING ARGUMENT BY MS. FLYNN

7 - - -

8 MS. FLYNN: Ladies and gentlemen of the
9 jury, I just wanted to spend a few moments with
10 you this morning. I'm not going to take up
11 much of your time before I turn you over to
12 Johnson & Johnson to listen to what they have
13 to say to you.

14 But as you know, I've been kind of tucked
15 in the corner back over there in the back of
16 the courtroom. I haven't had many
17 opportunities to talk to you.

18 My name is Stephanie Flynn, as the judge
19 told you. I do represent a company called
20 American International Industries. You've
21 probably heard them referred to throughout this
22 trial as AII. So when you hear that, that's my
23 client, American International Industries.

24 And what I wanted to say to you today is
25 that the only just verdict in this case as to

1 All is zero. Almost every decision that has --
2 in this case as to All has been made for you.

3 But soon there is a decision that you are
4 going to be able to make. You've not heard
5 from me very much because, as the Court has
6 told you, I could only discuss damages, and
7 that remains true right now. All I can do
8 right now in front of you is discuss damages
9 due to a function of the law.

10 You heard earlier this morning that we've
11 stipulated to actual medical damages. And what
12 that means is we looked at the medical bills,
13 and we saw what they were for, and we added
14 them up, and we agree the math is right. The
15 math is correct. That does not mean that we
16 think that that's what you should award to the
17 plaintiff.

18 We so too talked to Robert Johnson. You
19 remember the plaintiffs' economist. We did
20 that -- we hoped it wasn't a waste of time.
21 The reason we did that is because we had
22 concerns about his underlying assumptions that
23 make up the numbers. And we hope that you will
24 also take that to heart and really look at the
25 numbers and question his assumptions as well.

1 In the plaintiffs' closing argument, they
2 showed you the verdict form, the same one.
3 It's three pages. You're going to see it
4 again.

5 As you'll see on the verdict form as you
6 go down, you saw checks by American
7 International on each of the causes of action
8 already made for you.

9 You have heard the evidence that the
10 parties have elected to present to you in this
11 case. The decision is going to be yours.
12 You're free to award the damages the plaintiff
13 requested. You're free to award zero. You're
14 free to award a number that's somewhere in
15 between that. When you have the opportunity to
16 decide any damages as to AII, the only just
17 verdict in this case as to AII is zero.

18 I really wish we would have had more time
19 to spend with you, the jury. We appreciate
20 your attentiveness over these last few days. I
21 know that you've paid very close attention, and
22 it's much appreciated.

23 I'm going to let the Johnson & Johnson
24 lawyers now come up and say a few words to you.
25 Thank you.

1 THE COURT: Thank you, Ms. Flynn.

2 And now you'll hear from Ms. Bueno on
3 behalf of Johnson & Johnson.

4 MS. BUENO: Just one moment, Your Honor,
5 while I kind of get myself set up.

6 THE COURT: Certainly. You take your
7 time.

8 MS. BUENO: May I proceed?

9 THE COURT: Yes, ma'am.

10 - - -

11 CLOSING ARGUMENT BY MS. BUENO

12 - - -

13 MS. BUENO: Last Monday when I was here, I
14 told you I was going to stand right in this
15 spot in my closing argument, and here I am.
16 And here I am asking for you to find that the
17 plaintiffs have not proven that Johnson's Baby
18 Powder caused Mr. Perry's cancer. And if they
19 cannot prove that Johnson's Baby Powder caused
20 his cancer, they have no case.

21 And I sat here this morning, like you did,
22 and I sat here through this trial, and I've
23 heard these allegations. I know that you've
24 been disturbed by them, and it would be natural
25 if you felt some concern, some emotion when you

1 saw the documents and you heard the argument,
2 particularly the way they were put up there.
3 It's natural.

4 And, you know, I felt that same emotion,
5 but I think for a different reason. I felt
6 some emotion because it is a misrepresentation
7 of the documents and the story of the
8 scientists and the doctors at Johnson &
9 Johnson. It's a distortion of the truth. And
10 when you take words out of documents and you
11 cut them with scissors and you put them in an
12 order on a slide and say that that's what the
13 document says, that's a problem.

14 There are going to be documents with you
15 in the jury room, and I encourage you, I beg
16 you to read the documents because the documents
17 and the facts and the truth of this story are
18 not what you have heard throughout this trial
19 and it's not what you've heard this morning.
20 So if I'm getting emotional, that's why.

21 I'm going to spend some time on that
22 today. But I'm going to start today with you
23 where I started last Monday because I think my
24 defense in this case has been clear from the
25 start.

1 And what was it that I told you last
2 Monday? Dose matters. Dose matters.

3 And in order to win this case, the
4 plaintiffs' lawyers must prove to you that the
5 asbestos, not just in some bottle of Johnson &
6 Johnson somewhere decades ago, but the asbestos
7 in the bottles that Mr. Perry used was enough
8 to get into the air around him and to lodge in
9 his lungs and have it be retained. And they
10 cannot and did not do that.

11 And then they accused me of not bringing
12 any expert to refute their claims. But every
13 single thing I told you in opening statement
14 that the evidence will show came into this
15 trial. There's not one promise that I made to
16 you that you did not hear and that is not in
17 evidence.

18 So when you're weighing the evidence in
19 this case, as you are asked to do, think about
20 Dr. Brody because he told you what I said he
21 would. Dr. Haber. Dr. Gibney, the treating
22 physician. Dr. Madigan. Even Dr. Longo.
23 Their experts, along with Dr. Gibney, told you
24 exactly what I said they would. Exactly.

25 The evidence here is clear, and we're

1 going to go through that. I'm going to walk
2 through everything I told you in opening and
3 show you that I proved that with the evidence.

4 They said we didn't bring any other
5 experts. Their expert told my story and proved
6 my defense for Johnson & Johnson. And I'm
7 going to show you that.

8 And my plan when I started this trial,
9 when I was thinking through to today and
10 thinking what I was going to say to you in
11 closing statements, my plan was to structure it
12 and build it around this. I thought we would
13 spend our time together and I'd walk through
14 the bottle and the air and the body. And
15 that's the defense: Dose matters. And then I
16 thought I was going to talk to you about the
17 brake exposure that you've heard about. So
18 dose and brakes, that was my plan.

19 But then something happened to change that
20 plan. It kind of got derailed. And I think
21 you know why. It was a big moment. I told you
22 in opening statements that there was a tissue
23 test coming from Mr. Perry. Remember? And I
24 said I don't even know what it is. This wasn't
25 even evidence that we had when we started the

1 trial.

2 I knew Dr. Longo, their expert, was going
3 to come in and say, "Here's what I found in
4 Mr. Perry's tissue," but we didn't know, when I
5 first talked to you, what in the world that
6 was.

7 And it was after that opening statement on
8 Monday, before Dr. Longo came, that the truth
9 was revealed. And what I realized when I saw
10 that test result is that we now have physical
11 evidence to prove that Johnson's Baby Powder is
12 not to blame for Mr. Perry's cancer. So in
13 addition to everything we learned about dose,
14 we now have physical evidence that Johnson's
15 Baby Powder is not to blame.

16 So for that reason, I'm changing my order
17 here. I'm going to start by talking about the
18 tissue test; then I'm going to talk about dose;
19 and then I'm going to talk about the brake
20 exposure you've heard about.

21 And once we get through with this, these
22 three items proving why Johnson's Baby Powder
23 did not cause Mr. Perry's cancer, then you
24 better believe it, I'm going to address some of
25 those claims you heard this morning and I'm

1 going to tell you why they're wrong and I'm
2 going to explain why it is a distortion of the
3 facts. So that's my plan for you today.

4 And I have a lot to get through. I'm
5 going to try to slow it down and make sure it's
6 clear because all of this is very important.
7 All of this is evidence in this case.

8 Let's start with the tissue test. I have
9 a board here, and I'm sure plaintiffs might
10 want to see it as well if they haven't already.
11 This is a board -- and I hope you all can see
12 it. And I'm going to talk you through.

13 On the left-hand side I have the types of
14 asbestos that were shown to you in plaintiffs'
15 opening statement. So the slide that you're
16 seeing on the big screen are the six types of
17 asbestos that counsel told you in opening
18 statement are there. And then here were her
19 statements to you.

20 The statement was -- and looking at the
21 highlighted section in yellow -- the four you
22 have to worry about for the length of this
23 trial are tremolite, anthophyllite, actinolite,
24 and chrysotile.

25 So what I have here -- and I hope you can

1 see it -- in this first column is plaintiffs'
2 opening statement.

3 Can everybody see that okay? Okay.

4 So what I'm going to do is I'm going to
5 put a check next to what she said, the four
6 types of asbestos that we need to worry about
7 in this trial. And they were tremolite,
8 anthophyllite, actinolite, and chrysotile. So
9 that's what we heard in opening statement.

10 Then Dr. Haber, their pulmonology expert,
11 talked to you about something called a
12 fingerprint. I don't know if you remember
13 that, but he talked to you about some studies
14 that had been done on tissues of people who had
15 mesothelioma.

16 And he claimed to you that these patients
17 had only had cosmetic talc exposure. And what
18 he said is that in these studies, when you look
19 at the tissue, you find talc, tremolite, and
20 anthophyllite. He said it was the fingerprint.
21 He used that word a couple times.

22 So Dr. Haber's fingerprint is asbestos
23 tremolite and anthophyllite. That's what
24 Dr. Haber said is in the tissue of people using
25 Johnson's Baby Powder and cosmetic talc who get

1 mesothelioma.

2 Then you heard from Dr. Longo, their
3 testing expert. What I have here is what
4 Dr. Longo finds. And remember, Dr. Longo
5 generally looks at talc, right? So I'm going
6 to write "talc" up here so there's no
7 confusion.

8 So Dr. Longo testified that, when he's
9 looking in Johnson's Baby Powder and other
10 cosmetic talc, he finds anthophyllite,
11 tremolite. And then he also talked about
12 actinolite and chrysotile.

13 So when Dr. Longo is looking, this is what
14 he says he finds in our talc. And what he said
15 was that he finds more anthophyllite than
16 tremolite.

17 And I think I'll draw a red circle around
18 that because, according to Dr. Longo, the thing
19 he finds most often in Johnson's Baby Powder is
20 this one (indicating). Okay?

21 So then what happened? We got the tissue
22 testing from Mr. Perry's tissue. And what was
23 found in the tissue, according to Dr. Longo,
24 those particles -- so on this last column I
25 have "Mr. Perry's tissue, tremolite." And then

1 another one, winchite. Winchite.

2 Plaintiffs' lawyers clearly were not
3 expecting that. When they stood up in opening
4 statement and said here are the ones you need
5 to worry about, they clearly thought one of
6 those or that fingerprint was in Mr. Perry.

7 But all of a sudden, winchite is in his
8 tissue. Winchite, a completely different form
9 of asbestos.

10 Now, winchite was not discussed in
11 plaintiffs' opening statement. It is not part
12 of Dr. Haber's fingerprint. And it was not
13 something that Dr. Longo finds in the talc.
14 How do we know that?

15 Well, we asked him.

16 "Dr. Longo, you have never, not once,
17 identified winchite in Johnson & Johnson's talc
18 product, ever, in any report, correct?"

19 "That's correct."

20 Dr. Longo has never found it.

21 Now, what did they say in response?
22 Because they were loaded for bear. You know
23 they were ready for it. They had it all
24 planned out.

25 They showed you this slide. They showed

1 you this slide by an expert report in 2018 by a
2 gentleman named Dr. Matt Sanchez. And in this
3 report Dr. Sanchez indicated winchite in a
4 sample of Johnson's Baby Powder.

5 Now, interestingly, the sample number is
6 called out. And whether you knew it or not,
7 you had seen that before because the sample
8 that is discussed in this report was part of
9 the Round 1 testing of Dr. Longo, their testing
10 expert. It's the one up in the upper
11 right-hand corner. And when you look at the
12 numbers that's on that slide, it's the same
13 number.

14 And what did Dr. Longo say about that
15 sample? He said the ones that look really old,
16 those were the ones that were from the 1940s.
17 The World War II ones have California talc in
18 them. Do you remember that discussion about
19 Italy and we weren't getting our talc from
20 Italy anymore during that time and it came from
21 California?

22 Mr. Perry never used talc -- Johnson's
23 Baby Powder talc from California. So they
24 tried to say, aha, your own expert found
25 winchite in Johnson's Baby Powder; so that's

1 the reason we should think that it was from our
2 product.

3 Folks, there is no evidence of that.
4 There has never been a finding of winchite in
5 Johnson's Baby Powder in Vermont, Italy, or
6 China, where Mr. Perry's talc came from.

7 And here's why this is important:
8 Dr. Haber acknowledged that Johnson & Johnson
9 went to mines in different places like North
10 Carolina and California and determined that
11 those mines were not suitable for Johnson's
12 Baby Powder. And Dr. Longo said he found
13 winchite in some cosmetic talc products,
14 including Avon that came from California.

15 But here's what I want to point out:
16 There are a lot of documents that you're going
17 to see in the back room. And there's a lot of
18 documents that were produced in this case, you
19 heard about in the million pages.

20 And Dr. Kuffner, our corporate
21 representative, has reviewed all this. And he
22 confirmed for you there is not a single --
23 single document that talks about winchite in
24 Johnson's Baby Powder, not a single document.
25 And it's not just us.

1 Look, if you have seen these documents and
2 you don't know what to believe and you don't
3 know if Johnson & Johnson's shooting you
4 straight, then believe what plaintiffs have
5 told you. They put together what they called a
6 decades of evidence chart. You saw a snippet
7 of this throughout trial.

8 This is a chart that they marked as
9 Plaintiffs' Exhibit 72 that will go back with
10 you into the jury room. And you can take a
11 look.

12 And what they have put here, and Dr. Haber
13 described for you, was every incident of asbestos
14 exposure or asbestos that he saw in the documents.
15 Remember that? He said, "I created a chart. I went
16 through it. If it wasn't right, I corrected it."

17 This chart that they say is the decades of
18 evidence of what is in Johnson's Baby Powder, no
19 winchite. No winchite anywhere.

20 Allegations with evidence are not proof.
21 There is a fingerprint -- according to plaintiffs,
22 right, there is a fingerprint of if somebody has
23 mesothelioma caused by Johnson's Baby Powder and you
24 look in their body, they've got talc, they've got
25 tremolite, and they've got anthophyllite. This

1 fingerprint doesn't match.

2 The fingerprint doesn't match because the
3 tissue testing that came in said that there was
4 tremolite and talc and winchite. Winchite, which we
5 know from the evidence is not in Johnson's Baby
6 Powder. And there has been no proof -- no proof
7 offered to you that there could be winchite in
8 Johnson's Baby Powder. The fingerprint doesn't
9 match.

10 That's number one. The tissue testing
11 demonstrates physical evidence that Johnson's Baby
12 Powder is not responsible for Mr. Perry's cancer.

13 Now we're going to talk about dose. I
14 told you at the very beginning of trial that dose
15 matters. And I told you about you need to look at
16 what's in the bottle, the air, and the body. So I'm
17 going to go through it just like this, and I'm going
18 to tell you why everything I told you in opening
19 statements was proven.

20 And what did I tell you? I said, at the
21 end of this trial, you're not looking to see if
22 there's a fiber of Johnson's Baby Powder in some
23 bottle somewhere. Plaintiffs have to prove it was
24 in the bottles that Mr. Perry used.

25 But what we have and what they brought you

1 was testing by Dr. Longo about first some bottles he
2 bought off of eBay, including that California one
3 from the '40s. And then a group of bottles called
4 the museum test, right, the museum bottles. And
5 those museum bottles were called Round 2.

6 And I showed you this slide in opening
7 statement, and Dr. Longo agreed that, when he tested
8 the bottles from the Johnson & Johnson museum, many
9 of them didn't have asbestos.

10 But the lowest amount of asbestos that he
11 says he found was .0000033 percent in a Johnson's
12 Baby Powder bottle. And the one that he said he
13 found the most asbestos in was .0092 percent.
14 That's the highest amount, the highest amount,
15 trace, subtrace, ultratrace levels.

16 And so when Dr. Longo was here, he talked
17 about those same bottles. And then he did the
18 numbers for you. And this slide went up. The
19 average concentration in the bottle, 23,700 fibers
20 per gram. That's the amount in the bottle.

21 And then my partner had Dr. Longo do the
22 math about if that is the amount in the bottle, what
23 would be the average concentration be in the air?
24 Do you remember that discussion?

25 And what did Dr. Longo say? He said .004

1 fibers per cc. And, again, when we're talking cc,
2 remember that's the cubic centimeter of air, kind of
3 like a sugar cube. So that's the metric that is
4 analyzed here.

5 So this is Dr. Longo. He has admitted to
6 this. This is evidence that the average
7 concentration in the Johnson Baby Powder bottle,
8 according to his own testing, plaintiffs' own
9 testing, .004 fibers per cc.

10 And this was interesting. Dr. Longo also
11 told you that, when somebody uses a
12 Johnson & Johnson talc bottle, 99.5 to 99.9 percent
13 just goes onto the ground as opposed to being
14 airborne. So even a smaller amount would actually
15 get into the air.

16 So let's talk a little bit more about
17 what's in the air. Remember I told you that there's
18 a background level of asbestos. And we proved that
19 to you through Dr. Brody on the very first day of
20 trial. You remember Dr. Brody, the first witness.
21 I showed him this slide, and he agreed.

22 He agreed there are billions of asbestos
23 fibers in our lungs that we all breathe all day day
24 in and day out. He also agreed, when I asked him
25 this question:

1 "And we're all breathing asbestos fibers
2 every day, and that's what we call the background
3 level, right?"

4 "Correct."

5 And he told you that the background level
6 is indeed safe, the background level of asbestos.

7 And this was my question:

8 "So, Dr. Brody, in layman's terms, that
9 means anybody walking around, it's safe to breathe
10 the background level, true?"

11 "A As far as we can tell, yes."

12 And then I put this slide up here on the
13 ELMO, and he agreed that the background level
14 of .006 fibers per cc was safe.

15 That's my bad handwriting there.

16 And then I asked him -- I said:

17 "Okay. Even at that level, the National
18 Institute of Occupational Safety and Health,
19 .006 fibers per cc, there's no increased risk
20 of mesothelioma, correct?"

21 "Correct."

22 This is important, folks. This tells you
23 that Dr. Brody said .006 fibers per cc is safe.

24 And, look, I know there's a lot of numbers
25 here. I'm going to get to the point. But

1 these are important to keep in mind because
2 what we're trying to figure out here is a level
3 of asbestos exposure. Because nobody on the
4 plaintiffs' side did the math to try to tell
5 you how much asbestos exposure Mr. Perry had
6 from his Johnson & Johnson use.

7 Now, you heard about something called
8 OSHA, which is this government organization,
9 Occupational Safety and Health Administration.
10 They have these permissible exposure levels.

11 And, in fact, plaintiffs' counsel this
12 morning put up a slide with the definition of
13 OSHA talking about how asbestos was so
14 dangerous and toxic and hazardous. And nobody
15 disagrees with that.

16 But I think the suggestion was that
17 there's no safe level and you can never have
18 it. But we know that OSHA has a permissible
19 exposure level of .1 fibers per cc. You've
20 heard about this. And what is this level?

21 This is the level that the government
22 organization created and said if you have
23 eight-hour workday day in and day out, you can
24 be exposed to .1 fibers per cc. That's the
25 level, the limit.

1 And we know that Dr. Longo's Round 2
2 testing of how much he said was in the bottle
3 is .004.

4 And what I thought was the most
5 interesting was when Dr. Longo agreed with
6 exactly what I told you in opening statement,
7 which is this:

8 Somebody could take a bottle of Johnson's
9 Baby Powder and shake it on themselves for
10 eight hours a day for 40 years and still not
11 reach the OSHA limit. Think about that for a
12 minute. All day long, every day, eight hours a
13 day for 40 years.

14 So how did plaintiffs try to get around
15 this in the trial? They brought you Dr. Longo,
16 who put up this slide. This is their evidence.
17 This is what they put forth to try to tear
18 apart my entire dose argument.

19 But this slide is not accurate and not
20 correct. And here's why: If you look at the
21 highest level here, the J&J estimate and also
22 the J&J diapering estimate, this is Dr. Longo
23 trying to tell you, as he did, that
24 Johnson & Johnson, we did our own studies and
25 showed that the levels of asbestos exposure

1 were above background. That's what he told
2 you. But he's relying on a document that is in
3 evidence for this.

4 Now, I'm putting up these slides, and
5 plaintiffs did as well. And do you see on the
6 bottom right-hand corner how there's an exhibit
7 sticker? That's what we call them, that little
8 yellow sticker that has a number on it. That
9 tells you what document this comes from.

10 And I encourage you, if I say something
11 that you have a question about or you're
12 interested in, to write down that number so
13 when you go back to the jury room, you can take
14 a look.

15 This is Plaintiffs' Exhibit 191. And
16 here's what I want to point your attention to.
17 The numbers that I've highlighted there, 4.5 to
18 9.3, it says "fibers," doesn't it? And then
19 underneath it, "diapering, fibers." And this
20 says it's a hypothetical consumer exposure, and
21 it's talking about fibers. And here's why it
22 matters:

23 Because let's look at Dr. Longo's slide.
24 What does he say at the bottom? He says 4.5
25 fibers per cc, not fibers. It's a different

1 measurement, a different measurement. And what
2 would happen is if you actually took down to
3 the fibers amount, we're talking about a very
4 small amount.

5 So then what's left here on Dr. Longo's
6 slide? Do you see that Gordon article that he
7 still says is above background level? First of
8 all, you learned in this trial that's not even
9 our product; that was a different product.

10 But you also learned that the talc in that
11 study was a blend -- a blend from Italy, North
12 Carolina, and Montana. And you learned that
13 Johnson & Johnson, we never sourced our talc
14 from there.

15 So if we really go back to Dr. Longo's
16 slide and take off Gordon, and then we put on
17 there the background level that their own
18 expert, Dr. Brody, told you, and we put on
19 Dr. Longo's slide, every single exposure that
20 was brought to your attention was below
21 background level.

22 There's one -- it was interesting. You
23 were shown it today. I'm not sure if you
24 caught it. It was on a slide where plaintiffs'
25 counsel showed you a higher exposure level. It

1 was a study by an author named Steffen, who
2 you've heard about in this trial.

3 Do you know who the coauthor was on that
4 study? Dr. Longo. Dr. Longo. And he said I'm
5 not relying on my own study. He didn't put
6 that study on his own slide. That tells you
7 something.

8 Now, I know I'm getting in the weeds. I
9 know this trial went so fast. And those of us
10 who have been analyzing and studying this for a
11 really long time understand that this is a lot.

12 But what you're hearing and what you've
13 heard throughout this trial is not accurate.
14 And Dr. Longo agreed with us that .004 fibers
15 per cc was what he found. If you remember
16 nothing else about Dr. Longo, please remember
17 that. And it matters because their own expert
18 told you that .006 fibers per cc is safe. This
19 is what I told you on day one, and this is what
20 the evidence in this case.

21 So even if you believe what Dr. Longo says
22 he found in bottles of Johnson's Baby Powder,
23 their own experts agree that that amount in the
24 air is below background level.

25 So then what gets in the body? That's my

1 next point, isn't it? What gets in the body?
2 Their own expert, Dr. Haber, told you that just
3 because someone is exposed to something doesn't
4 mean they get the dose of it.

5 And this is really important because they
6 have this whole theory, don't they, that even
7 one little fiber of asbestos can add to it.
8 They kept talking about a cumulative dose, a
9 cumulative dose, they say, which is trying to
10 get you to believe that even a little bit can
11 cause cancer.

12 So I asked him this. I said, "You also
13 agree with the statement there is no evidence
14 that a de minimis dose increases one's risk of
15 mesothelioma, like one fiber or something like
16 that?"

17 And he fought me a little, as he kind of
18 had a tendency to do, but he said, "Right."
19 And he said at the end, "You wouldn't be able
20 to say that it increased the risk."

21 But then he showed you that -- that
22 demonstrative, that slide, right? And this is
23 what he said. He said that every little dose
24 will fill up a cup.

25 But in opening statement, I explained to

1 you how false that is. I told you this. I
2 told you that plaintiffs were going to do it.
3 I said they're going to come here and tell you
4 that your body is like a bowl.

5 I guess I was wrong because he said cup,
6 but same concept, right? That they're going to
7 say that the water in the bowl just sits there
8 stagnant, and every little drop adds up to a
9 cumulative dose.

10 But I explained to you that our bodies are
11 more like a colander. And it wasn't just me
12 that explained it. Their own experts told you
13 this. They explained that dose matters.

14 And Dr. Haber talked about the body's
15 defense systems that help clear the asbestos.
16 And he talked to you about you breathe in
17 fibers, you have nose hair that stops things,
18 you swallow, it gets into your body, it comes
19 out your stomach.

20 He also talked about once a fiber gets
21 into your lung, that you've got these
22 macrophages and cells that helps clear it out.
23 He said that these billions of asbestos fibers
24 that are in our body, our body knows how to
25 handle these.

1 So if our bodies are like a colander that
2 we're able to clear things out, that's why dose
3 matters and that's why dose is important.

4 This was another slide I put up for you
5 last Monday. And I said what's the dose? What
6 are plaintiffs going to say is the dose of
7 asbestos that Mr. Perry actually had from
8 Johnson's Baby Powder? Because it's an
9 important question, isn't it? Isn't it
10 important to tell you how much asbestos he
11 supposedly got in his body using our product?

12 They did not bring you anybody. We asked
13 each of them. Dr. Haber didn't do the math,
14 didn't give you a bottle count. Dr. Madigan
15 didn't look at dose. We'll talk about each of
16 these. But Dr. Madigan didn't look at dose.
17 And Dr. Longo, what did he say? Tons, tons of
18 talc this man used.

19 But even Dr. Longo, who's the guy that
20 studies the amount in the bottle and studies
21 the amount in the air, he didn't give you an
22 amount for Mr. Perry. They did not tell you
23 that. They did not give you that evidence.
24 They did not prove that.

25 These are the Tic Tacs from Dr. Madigan.

1 Do you remember he brought the Tic Tacs? He
2 wasn't here with us, but they were held up. He
3 said the orange means asbestos is in the bottle
4 and the white means asbestos is not in the
5 bottle, right? Orange and white, either/or.

6 And he said I'm not giving the jury any
7 information about quantity or dose. Remember?
8 Because I asked him are you kind of making it
9 more yellow or more orange if it's one thing or
10 another?

11 And he said no, that's not the
12 calculations. It's either present or it's
13 absent. It's either orange or it's white.

14 And I think I even asked him, so if it's
15 just a sub/ultra trace amount, could you make
16 it pink? And he said no. He said, in his
17 mind, it's orange or white. But we know that
18 dose matters.

19 So think about this for a minute. What
20 Dr. Madigan was telling you was the white Tic
21 Tacs have no asbestos in them, right? Those
22 are bottles where there's no asbestos. He did
23 it 50/50.

24 But he didn't tell you how many or what
25 number based on dose would apply. They just

1 didn't do the math. They didn't do the math.
2 And that matters.

3 So what -- what talcum powder did
4 Mr. Perry actually use? I thought it was
5 interesting that, aside from just saying they
6 used a lot of Johnson's Baby Powder, there
7 wasn't much evidence presented to you by
8 plaintiffs about exactly what products he used.
9 And we did our best to get that information
10 from their experts.

11 And we learned that his personal use and
12 his secondhand use included about 20 different
13 brands of talcum powder. And the allegation or
14 the claim was that he used it from his first
15 memory in 1974 all the way up to 2019, which is
16 45 years -- keep that in mind for a minute --
17 45 years of talc use.

18 But then when we asked Mr. Perry about the
19 actual amount, he said he bought 10 or more
20 bottles of Johnson's Baby Powder each year.
21 And for Clubman talc, it was similar, 10
22 bottles per year.

23 But he didn't stop there. When we asked
24 him about the other talc use, we've got the 10
25 bottles of baby powder, 10 bottles of Clubman.

1 He said about six per year of the Drakkar Noir
2 brand. And then he just said several. So I
3 put three on here, but he said several of the
4 Gold Bond, of the Ralph Lauren, of the Ammens,
5 of the Calvin Klein. And I forgot to ask him
6 how much Equate. We talked about Equate talc
7 powder too; so I have question marks there. I
8 didn't add it because I didn't ask. But we're
9 at about 38 bottles a year is his testimony.

10 So when he came up and when the experts
11 came up and said to you over and over again,
12 "Oh, it was the majority Johnson's Baby Powder,
13 that's pretty much what I used," that's not
14 what the evidence shows. We're talking about
15 25 percent, right, of what he testified he
16 actually used.

17 And you saw this medical record, which was
18 interesting. This was the medical record on
19 July 11th of 2023, and it has the exhibit
20 number there on the bottom. This is defense
21 exhibit. It was not put in by plaintiffs.
22 This was something we had to put in.

23 But this is the slide that was shown to
24 you by plaintiffs. And I point that out
25 because of the highlighting. Plaintiffs showed

1 you this slide with this highlighting about
2 what Mr. Perry told his doctor on the day he
3 went to see Dr. Gibney, his treating physician,
4 for the first time. And what it said was
5 "Mr. Perry denies any direct asbestos exposure;
6 however, he did use a lot of talc throughout
7 his life as a swimmer." As a swimmer.

8 So before filing the lawsuit, before
9 testifying under oath, before saying he used
10 talcum powder four times a day every day for
11 45 years, when he went to see his doctor, he
12 said he did use it in the past, a lot of talc
13 throughout his life, as a swimmer.

14 So I just wonder, if you're using four
15 times a day every day for 45 years, if that is
16 what you tell your doctor when you're diagnosed
17 with cancer. Or do you say, "Doctor, I have
18 asbestos, which is a disease of -- I have
19 mesothelioma, which is a disease of breathing
20 in asbestos. And, Doctor, I've used talcum
21 powder four times a day, four heaping
22 tablespoons, every day for 45 years."

23 I asked him questions, of both Mr. Perry
24 and Mr. Long, about his family history, his
25 family history of cancer, and I asked about his

1 father and his sister. And I think there was a
2 misunderstanding about why I asked these
3 questions.

4 The evidence was, prior to trial and what
5 was discussed in the depositions as you heard,
6 that Mr. Perry's father and sister had both
7 been estranged from him for many, many years.
8 And then about a month before trial, when we
9 had a chance to talk with Mr. Long, we learned
10 that they actually were in regular contact.

11 And the reason that was important and the
12 reason we asked is because there's questions
13 here. And it would have been nice to have
14 somebody at trial that they could have brought
15 to trial, either a father or a sister, to talk
16 about this talc use, to talk about when and how
17 talc was used in his family, right, and to talk
18 about the family history. Was it true that his
19 grandfather had mesothelioma? We know it's in
20 the record 31 times.

21 So these were not just rude questions by
22 an attorney trying to attack someone. I want
23 to just make sure that's clear. The point here
24 is there are questions about this family, this
25 history, this talc use. And there's a big

1 difference between whether or not they were
2 estranged or in touch and able to come and
3 share with you what they know.

4 So what do we know? What do we have? We
5 have some bottles that were found in his home,
6 right? This was one of them. It's an older
7 bottle. We know from Dr. Longo's slide that
8 this bottle that he showed you is in the 1970s.
9 And although Mr. Perry and Mr. Long didn't know
10 exactly the date of the bottle that they had in
11 their home, it shows it was from the '70s. And
12 it was in a dive bag or a sailing bag.

13 And you know what? I probably have some
14 things in my home too that are pretty dated and
15 old and in a back corner or a bag. So no
16 judgment there.

17 But the other bottle, the other one that
18 was found, was from 2004.

19 And so I guess my question is, if you are
20 regularly using a product all day every day up
21 until 2019 or maybe 2023, depending on what the
22 truth is, then when you have a diagnosis and
23 you go around your home and you look for every
24 talcum powder bottle you have, if you had been
25 using it more regularly, would you have found

1 one from 2019 or 2018 or 2016 or '15 or '14?
2 Or would you have found one from the 1970s,
3 back when you were a kid, and maybe one from
4 20 years ago?

5 And all we know is that Dr. Longo says 24
6 to 35 years, and he said a half ton of talc,
7 which is a lot, which is a lot.

8 And this is a half-ton truck. We're
9 talking about a lot of talc. And that's just
10 the Johnson's Baby Powder claimed in this case.
11 That's not even talking about the other
12 75 percent of the talc use.

13 And, look, why -- why do we hear this?
14 Why did we hear about tons -- literally tons --
15 truckloads of talc? I think the evidence shows
16 that there's a dose problem.

17 Because they didn't do the math and
18 couldn't tell you how much asbestos was
19 actually in the bottle and they couldn't tell
20 you how much he actually breathed in and got in
21 his lungs, I think what's going on here is that
22 they're trying to say it was substantial, it
23 was significant, there was so much talc, and
24 lead you to believe that dose is not an issue
25 because he used so much.

1 But keep in mind that even this -- even if
2 this amount of talc were true and we believe at
3 face value tons of talc, what Dr. Longo said,
4 you could shake that bottle all day every day,
5 eight hours a day, and never reach the OSHA
6 limits.

7 Dose matters. There is a dose problem
8 here. That's the second reason. Tissue
9 testing and dose matters, the second reason
10 that plaintiffs cannot prove causation.

11 And now I'm going to give you the third:
12 Brakes.

13 We talked to you about this in opening
14 statements. Plaintiffs' witnesses didn't
15 really want to talk about it, did they? We
16 asked them about it on cross-examination. I
17 don't think Dr. Longo mentioned brakes once
18 when he was providing testimony until
19 cross-examination when we asked him about it.

20 Brakes. There is no question, and the
21 record is clear, that Mr. Perry was exposed to
22 asbestos from his brake use in the 1980s.
23 There's no dispute there.

24 There is an affidavit in evidence that I
25 encourage you to look at. We went through it

1 quickly, but I knew you'd have it back there
2 with you. It is DX12007. This is the
3 affidavit that Mr. Perry himself signed on
4 August the 2nd of 2023. And I don't have time
5 to go through all of this with you right now,
6 but take a look. It talks about his brake use;
7 it talks about the fact that they contained
8 asbestos; it talks about the release of visible
9 dust into the air, "which I breathed."

10 And I asked him about this, and he fought
11 me a little bit, and he made me show him his
12 prior testimony saying he breathed in this.

13 But the evidence is clear that this was a
14 sworn affidavit that was provided just shortly
15 after the time of his mesothelioma diagnosis.

16 Then Dr. Longo comes to the stand, the
17 testing expert, and he tells you that asbestos
18 in brakes is, like, 15 to 40 percent asbestos.
19 That is quadrillions of asbestos fibers.

20 And think about this, folks. There's no
21 allegation that people were purposely putting
22 asbestos in baby powder. You heard some crazy
23 things and this theory about what Johnson &
24 Johnson was doing. One thing they're not
25 alleging is that we were putting it in there on

1 purpose. No question.

2 But the brake manufacturers were. The
3 whole purpose of using asbestos in brakes was
4 to use it for those qualities we talked about,
5 right? The fact that it doesn't catch on fire
6 and it's fire-resistant. And they were putting
7 a lot in there.

8 And just to put this in context, when I
9 hear "quadrillion fibers," it's hard for me to
10 kind of figure out what that means. So what we
11 said to ourselves was, if we took fibers and
12 put it into seconds, that's more manageable for
13 me.

14 So 23,700 seconds instead of fibers is 7.5
15 hours. Okay? Dr. Brody told us there's a
16 billion asbestos fibers in our lungs, and if we
17 do that in seconds, that's 31 years.

18 What about the quadrillions in the brakes?
19 Over 31 million years. So we're talking about
20 the difference between 7.5 hours and 31 million
21 years when we're talking about the amount of
22 fibers.

23 And here is a slide that Dr. Longo showed
24 you. On the left we have what he says is in
25 the average museum bottle, .004 fibers per cc;

1 and on the right is his own testing of brakes,
2 10,000 times higher when you get to 36 fibers
3 per cc.

4 If we are talking about dose -- and we
5 should be because dose matters -- what does
6 this tell us? What was his dose?

7 And we're going to get to the jury charges
8 here in a minute, but you're going to be asked
9 about substantial factor. Substantial factor.
10 There is no question, when you look at dose,
11 that brakes were a substantial factor, and
12 there is no question that Johnson's Baby Powder
13 was not.

14 And I'll stop right there and say there
15 was a statement by counsel that, when you hear
16 substantial factor when you're looking at that
17 jury form, anything over 1 percent is
18 substantial. And he may believe that. That's
19 not the law. That is not the law that
20 Justice Toal is going to give you. That just
21 came from him. There's nothing to say
22 1 percent is substantial. I could get up here
23 and say, folks, I think 51 percent is
24 substantial. You know what? That's not the
25 law either. That's not the law. So don't

1 listen to what I say or any counsel says about
2 the law. Justice Toal will give you that law.

3 Why am I doing this? Why am I talking so
4 much about brakes? Because Dr. Haber proved to
5 you my point. I said to him -- and I know this
6 is long, but it's important for me to read it
7 word for word so you remember what he said.

8 "Q Now, if Mr. Perry had never used
9 cosmetic talc at all -- all right? Let's
10 consider a scenario where Mr. Perry never used
11 cosmetic talc. His only asbestos exposure was
12 from doing brake jobs. In that circumstance,
13 you would give the opinion that the brake jobs
14 would be a significant factor in his
15 mesothelioma, correct?"

16 So what I'm asking there is take the
17 cosmetic talc out of it; what caused this man's
18 mesothelioma?

19 And Dr. Haber said:

20 "A If Mr. Perry got mesothelioma from
21 doing -- and did the brake jobs, then, yes,
22 then that would be the cause. But you can't do
23 the reverse. You can't say change exposure. I
24 mean, what would have happened is if" --
25 buh-buh-buh.

1 But then he said.

2 "But I can say that, if he did
3 get mesothelioma, then I would have attributed
4 the mesothelioma to that exposure."

5 Dr. Haber. If he never used cosmetic
6 talc, the brakes caused his cancer.

7 What did Dr. Longo tell you? Dr. Longo
8 told you that those brakes are contaminated
9 with what? Tremolite. Tremolite.

10 It's plaintiffs' burden to prove this
11 case. They have to do it by the weight of the
12 evidence. And they have to prove, for every
13 single question on that verdict form, cause.
14 They have to prove cause.

15 And you're going to hear this instruction
16 from the Court about substantial factor. A
17 substantial factor. The evidence has shown
18 that Johnson's Baby Powder, even if you believe
19 what plaintiffs have said, that was not a
20 substantial factor when you think about dose.

21 And this is what I really want to draw
22 your attention to. These are the questions --
23 1, 3, and 5 -- on the jury form. I know you
24 probably can't read this well right now, but
25 you're going to be holding that in your hands,

1 each one of you. These are the three questions
2 that you have to answer about Johnson &
3 Johnson.

4 And if you answer no to each of these, as
5 I think you should, your job is over. That's
6 it. And each and every one of them, whether it
7 be negligence, strict liability, or fraud, asks
8 a question about causation because no matter
9 what the conduct is that they're alleging, they
10 have to prove cause. Cause. Did the Johnson's
11 Baby Powder cause his cancer?

12 And they have to prove cause not just for
13 some person out there that used this product.
14 The instructions the Court will say is the
15 proximate cause of plaintiff Michael Perry's
16 injuries.

17 So if you make the determination that they
18 haven't proven their case because of the tissue
19 testing, the dose problem, and the brakes --
20 and I think the evidence is there, folks -- if
21 you make that decision that they have not
22 proven that Johnson's Baby Powder is the cause,
23 then the answer to every single question is no,
24 and your job is over. Your job is over.

25 And you might be hearing two different

1 stories right now, right? Because you're
2 hearing plaintiffs talking -- you're hearing
3 plaintiffs talking all about Johnson & Johnson
4 conduct, aren't you? And you're hearing me
5 talking about Mr. Perry and cause. And we're
6 kind of like two ships, right? But I'm going
7 to address some of these allegations with you
8 now.

9 I think that the cause is clear, and I
10 could just stop now and you could go back to
11 the jury room and do your deliberations and
12 determine that Johnson & Johnson should have
13 the verdict in this case, because plaintiffs
14 have not proven their case, but I'm not going
15 to do that because you deserve an answer to
16 some of these allegations about this company.

17 I told you I was emotional this morning
18 hearing about some of the argument, and I was,
19 and it's happened throughout trial. And so I'm
20 going to try to give you, in my short time with
21 you -- and I'm getting notes telling me to move
22 on -- but I'm trying to give you some ideas
23 about what this all means.

24 Could I have the ELMO, please. Actually,
25 before you do that -- before you do that,

1 Mr. Loebbaka.

2 I don't know if you can see this slide.
3 This is Dr. Mann. Remember when Dr. Mann was
4 testifying? And this is a screenshot from when
5 plaintiffs were asking him questions. And they
6 showed him this document, and it's an important
7 one. And I put that plaintiff exhibit sticker
8 up there because I want you to look at this.
9 It's Plaintiffs' Exhibit 347.

10 This is how they showed it to Dr. Mann,
11 and they showed it to Dr. Kuffner the exact
12 same way. And they showed it with the slide --
13 well, just real quick, before you do that, I
14 know it's so hard to see here, but at the very
15 bottom of the slide it's cut off after the
16 highlight that says, "Contain trace amounts of
17 asbestos." Are you able to see that? It's
18 that line.

19 So as an example, I want to show you what
20 that document says after that.

21 TECHNICIAN: Is it on?

22 MS. BUENO: It's on.

23 There we go. It's warming up. Thank you
24 very much.

25 All right. So the place that I have

1 stopped -- or not highlighted here, "Contain
2 trace amounts of asbestos," that is where they
3 stopped showing this document. Okay? But read
4 the whole document.

5 Dr. Blount, who you heard about this
6 morning from plaintiffs' counsel, it goes on to
7 say -- and you'll have this back there with you
8 so you can read it yourself -- "However,
9 Dr. Blount said that all powder she tested,
10 including Johnson & Johnson Baby Powder, were
11 well below acceptable limits as defined by OSHA
12 and that she considered Vermont talc as some of
13 the purest talc available. In addition,
14 Dr. Blount stated she did not think that
15 whatever amounts of asbestos that might --
16 might -- be present in baby powder was harmful,
17 that the concern about talc was blown out of
18 proportion, and that she has a very high
19 opinion of Johnson & Johnson Baby Powder."

20 An example -- I can't do every one, but an
21 example of reading the document and seeing
22 really the context for it, which I think is
23 just so important.

24 Can we go back to the slides? Defendants'
25 Exhibit 7694.

1 And, Your Honor, if we're going to take a
2 lunch break, you just tell me; otherwise, I'm
3 rocking and rolling and I'll keep going.

4 MS. PEPKE: I think we have about 30
5 minutes.

6 MS. BUENO: Do you want me to keep going?

7 THE COURT: Hang on for a minute. You
8 have about 30 minutes left?

9 MS. BUENO: I do.

10 THE COURT: And then, of course, we have
11 reply by the plaintiff.

12 So I'm going to ask you, Madam Foreperson,
13 do you want to take a break now for lunch?

14 JURY FOREPERSON: Keep going.

15 THE COURT: Keep on going.

16 MS. BUENO: If anyone needs one, let me
17 know.

18 THE COURT: You may proceed.

19 MS. BUENO: So a couple more documents to
20 kind of show you what's going on. I have put
21 these numbers up there because I encourage you
22 to go back and look at them if you have any
23 questions.

24 Now I'll go to the ELMO, please. 7694.

25 This is Defense Exhibit 7694. You've

1 heard a lot about this whole industrial versus
2 cosmetic talc thing. And I want you to keep in
3 mind that the mine at the Windsor Minerals that
4 you heard about had both industrial and
5 cosmetic. And that matters. And I'm going to
6 tell you right now why it matters.

7 This is a document from the president of
8 Windsor Minerals, who you heard about from
9 counsel this morning. And he talks about what
10 is cosmetic talc. He says, "The samples which
11 are relevant to the production and sale of
12 cosmetic talcs in the U.S. and Canadian markets
13 are those bearing the letters HC as part of
14 their prefix." As part of their prefix.

15 Now, do you remember back in school when
16 we learned prefixes and suffixes? Prefix came
17 before; suffix came after. Right? Prefix,
18 cosmetic talc. Keep that in mind.

19 The next exhibit I'm showing you is 8111.
20 This is a document that talks about roofing
21 material at Windsor Minerals. And it talks
22 about the talcs for roofing materials, and it
23 mentions HC. And where does it mention? A
24 prefix or a suffix? Suffix, at the end. Do
25 you see that?

1 Why am I bringing this up and spending my
2 time with you on this?

3 Well, can we go to the slide now?

4 That's the one that said HC in the prefix;
5 this is the one that said roofing materials
6 with HC in the suffix. And this is what they
7 showed Dr. Gibney.

8 You remember Dr. Gibney, the treating
9 physician that came into this courtroom by Zoom
10 to talk to you, who had never seen a
11 Johnson & Johnson company document in his life.
12 And the representation was made that would it
13 be ethical for a company like Johnson & Johnson
14 to put asbestos in our baby powder? And it got
15 real dramatic, showing him this document,
16 saying that the HC meant cosmetic talc.

17 Folks, that's not true. Look at this one,
18 Plaintiffs' 125. It's actually a chart on the
19 back of a document that has a cover page that
20 makes clear it's industrial talc. It talks
21 about crud and sediment in the ore body. This
22 is not cosmetic talc.

23 Other examples. You've seen slides like
24 this one. I pulled this out with Dr. Kuffner,
25 and he explained to you that the three deaths

1 that were discussed had to do with inhalation,
2 right? Babies who, unsupervised, got ahold of
3 a Johnson's Baby Powder product and bottle and
4 really hurt themselves and died as a result,
5 which is absolutely tragic, which led us to put
6 a warning label on the bottle, as Dr. Kuffner
7 explained to you. But if this is suggested
8 that this somehow has to do with this case, it
9 does not.

10 And I encourage you to look at this
11 document as well. They put it up there this
12 morning as well.

13 And here's one I want to take a minute on
14 because you've seen this multiple times. This
15 is another example of taking things out of
16 context and distorting the truth. This is P19.
17 Please look at this one. You've seen this
18 document. You've heard about it. These
19 allegations that Johnson & Johnson told the FDA
20 that we could have substantial asbestos in our
21 baby powder.

22 And the allegation was we knew it, we said
23 it could be substantial, we told that to the
24 FDA. And that was one of the examples you
25 heard this morning of us being willful and

1 wanton and reckless. This is what we're
2 talking about.

3 And when you read this document, this
4 document indicates that the FDA asked Johnson &
5 Johnson to do an exposure assessment. This was
6 not us saying it; they asked us. It's all
7 outlined here. They asked us to do it, and we
8 did that.

9 And, of course, what was not shown to you
10 in this document, which I can show you now, in
11 a discussion with the FDA and Johnson &
12 Johnson, right, this document says, "It was
13 brought out that critical review of all the
14 world literature failed to show any evidence of
15 adverse health effects following the normal use
16 of cosmetic talcs."

17 And it goes on to say that Dr. Fuller
18 stressed Johnson & Johnson's policy of full
19 cooperation with the FDA and that, if the
20 results of any scientific studies show any
21 question about the safety of talc,
22 Johnson & Johnson will not hesitate to take it
23 off the market.

24 There has been allegations in this case
25 that Johnson & Johnson knew there was

1 substantial asbestos in our baby powder and
2 that we just sold it anyway, that the tens of
3 thousands of employees and doctors and
4 scientists -- that Johnson & Johnson somehow
5 knew this and they were all in on it and all
6 kept the secret in a quest for a lot of money,
7 and that it went on for decades and decades and
8 there wasn't one whistleblower, somebody who
9 said, wait a minute, I think we have a problem
10 here.

11 Think about what is being alleged in this
12 courtroom. There is not evidence to support
13 that. And I wish I could go through every
14 single document and every single slide -- let's
15 go back to the slide.

16 I wish I could go through all of this and
17 point out why, whether it's ellipses like this,
18 dot, dot, dot, or whether it's the cutting and
19 the pasting of words and putting them in order,
20 why that is not the way you need to look at
21 scientific evidence.

22 And that the documents back with you in
23 the jury room, there's just going to be a
24 portion of the millions of pages that are out
25 there. I can't show you every one.

1 But I can tell you that for the
2 allegations of conduct, the fraud claims, the
3 willful, the wanton, the reckless, they have a
4 standard. Plaintiffs must prove this to a
5 higher standard.

6 They must prove by clear and convincing
7 evidence that Johnson & Johnson did all of
8 these acts that they allege. And they cannot
9 do that. And I encourage you to look at those
10 documents and not rely just on attorney
11 argument in how the story is woven together.

12 Let's just think for a minute, common
13 sense. Counsel said it this morning, chief
14 justice is going to say it later today. This
15 case asks you to rely on your common sense.

16 If you were a company and you knew that
17 there was something dangerous in your product,
18 would you test it? Would you exceed the
19 industry standards? Would you put your
20 documents out for everything to see?

21 That's what's happened here. You've seen
22 that Johnson & Johnson had a very robust
23 testing program. You heard that we didn't just
24 stop with the J-41 system. Counsel said today
25 that was Johnson & Johnson's testing program,

1 but that's not what the evidence shows.

2 The evidence shows we went above that. We
3 exceeded that standard. And even their expert,
4 Dr. Haber, said Johnson & Johnson exceeded
5 J-41. We did more than that.

6 So if the statement was made this morning
7 that we just stuck with J-41 and didn't do
8 anything more, that's flat wrong and that's
9 contradicted by the evidence in this case.

10 You heard that the FDA tested in 1976, no
11 asbestos in Johnson's Baby Powder.

12 In 1994 there was a symposium of hundreds
13 of folks that gathered together, toxicologists,
14 mineralogists, FDA. We talked about those
15 meeting minutes. What did they conclude?

16 In 1994 they concluded that talc was among
17 the safest of all consumer products and that
18 the probability of human risk is likely
19 nonexistent. You've heard that from
20 Dr. Kuffner, and you saw the article.

21 You also heard that in 2010 the FDA just
22 went and bought some bottles of Johnson's Baby
23 Powder off the shelf, as they did, to do their
24 testing. Once again, no asbestos in Johnson's
25 Baby Powder.

1 Think about this: If you wanted to be a
2 company that was willfully and wantonly and
3 recklessly just out selling a dangerous
4 product, would you just manufacture a lot of
5 bottles and just put it on the shelf for
6 anybody to test?

7 It doesn't sound like a good way to hide
8 evidence to me. Look, this -- this product was
9 on the market and available to test, and
10 evidence shows the FDA had a regular testing
11 program and did not find asbestos.

12 And you also heard that there are
13 thousands of documents that have been made
14 available from Johnson & Johnson that are just
15 online for the world to see. Okay?

16 I want you to think about this for a
17 second. You've seen a lot of documents. I
18 know you have. All of those -- everything
19 you've seen is online and was available even
20 before you walked into this courtroom. Every
21 single document that we made available, we made
22 public.

23 And yeah, it was at the time when we were
24 being sued and had to turn over documents. But
25 we said, "Here. Have them. Let's put them

1 online for the world to see." The FDA can look
2 at them, OSHA, the EPA, doctors. Anybody can
3 look at these documents.

4 And do you know what? Even after
5 publishing all of those documents, there is no
6 warning label on cosmetic talc for asbestos
7 today.

8 Now, we stopped selling it, and I'll get
9 to that. But even today this product is on the
10 market without a warning label. And when I say
11 "this product," just so I'm clear, not
12 Johnson's Baby Powder -- I'll talk about
13 that -- but cosmetic talc, no warning for
14 asbestos even today --

15 Now, 2019, there was testing by the FDA
16 and there was small amounts of chrysotile found
17 in September. You've heard about this. I
18 don't need to belabor it. But Dr. Kuffner came
19 over here and told you that he was overseas and
20 he flew home. This was a major issue for
21 Johnson & Johnson in 2019, because it had never
22 happened before.

23 The FDA had been doing decades of testing
24 of our talc off the shelf. And for the very
25 first time, they found what they believed to be

1 trace amounts of chrysotile. And you heard
2 that Johnson & Johnson acted quickly and
3 removed that single lot of Johnson's Baby
4 Powder. And it was what was called a Class II
5 recall.

6 We had some back and forth about that, you
7 remember. But the Class II recall means that
8 it was temporary or medically reversible
9 adverse health consequences, where the
10 probability of serious adverse health
11 consequences is remote. That was the FDA
12 regulatory language for that Class II.

13 But what's important to note here is this
14 was just one lot, right, one group of
15 manufacturer, with this sub/ultra trace
16 amounts. And what was the type of asbestos
17 that was found? I'll back up one.

18 Chrysotile. Chrysotile. Chrysotile,
19 which was not in Mr. Perry's tissue. But
20 Johnson & Johnson decided to do the right thing
21 and, out of an abundance of caution, took this
22 lot off the market.

23 Now I misplaced my clicker.

24 Thank you, sir.

25 As Dr. Kuffner explained to you, the

1 decision to take that one lot of Johnson's Baby
2 Powder off the market had nothing to do with
3 the ultimate decision to take the product --
4 talc product off the market entirely in the
5 U.S. the next year. Okay?

6 What did he tell you? In 2020
7 Johnson & Johnson made the decision to stop
8 selling talc. Okay? May of 2020.

9 And he explained to you that that decision
10 was made by the businesspeople. He said the
11 decision was not made by him and the medical
12 department. It was not a safety decision.

13 And there's a document that's DX0027
14 that's in evidence that is the press release
15 from Johnson & Johnson when we made the
16 decision to stop selling this product. And it
17 talks about why.

18 And you can read it for yourself, but it
19 talked about the fact that demand for
20 talc-based Johnson's Baby Powder in North
21 America has been declining due in large part to
22 changes in consumer habits and fueled by
23 misinformation around the safety of the
24 product.

25 The same misinformation that we've seen in

1 this courtroom led to declining sales because
2 when people hear this -- these allegations,
3 even though they're untrue and unfounded, and
4 you now know that because you've at least seen
5 some evidence, but of course the sales
6 declined. Of course the sales declined.

7 And as a business decision, it was made to
8 take this product -- this talc product off the
9 market. It had nothing to do with safety. And
10 Dr. Kuffner, the chief medical officer, came
11 here and testified to you because he believes
12 in the safety of this product and he believes
13 in this company.

14 Plaintiffs want you to say that we're
15 reckless and wanton and willful, deceptive,
16 deliberately trying to hurt patients like
17 Mr. Perry. But their own expert had to admit
18 that he hasn't seen a single cosmetic talc
19 company that did more testing than
20 Johnson & Johnson.

21 And you've heard about these studies of
22 the talc miners and millers, the ones that were
23 in the mill breathing in talc all day every day
24 and in the mine. And the evidence showed there
25 was no increased risk of mesothelioma for those

1 patients.

2 And who was the one person they brought in
3 to try to contradict that? It was Dr. Madigan,
4 right, the statistician, the epidemiologist who
5 came by Zoom.

6 But I showed him that International Agency
7 for Research on Cancer. And I indicated to him
8 that they had written the studies of talc
9 miners and millers are considered to be the
10 best source of evidence, and he had to admit
11 he'd seen it before.

12 And he was the one that picked at it and
13 said, well, they actually found mesothelioma in
14 those patients. But then remember, I took the
15 actual article and I put it under here and we
16 looked at it together. It was that article
17 from Vermont talc mining and milling, where it
18 indicated there was no asbestos in those mines.
19 There was no asbestos, but there was
20 mesothelioma.

21 And I asked him, "You're not aware of any
22 peer-reviewed published epidemiological study
23 that has ever concluded that
24 Johnson & Johnson's talc caused mesothelioma?"

25 "Yeah, yeah. I'm not aware of such

1 stuff."

2 And there is none. There's no study out
3 there. The science is not there. The science
4 is not there. These allegations are not true.
5 I don't know how else to sing it from the
6 rooftops.

7 Otherwise, Dr. Gibney -- if there's one
8 thing you think about as you go back into the
9 jury room today, maybe it's Dr. Gibney because
10 he's a treating physician for Mr. Perry, right?
11 He works at Medical University of South
12 Carolina.

13 He told us that he's one of 50 surgeons in
14 the country that does this specialized
15 mesothelioma surgery. This guy is at the top
16 of his game. He knows more about mesothelioma
17 than most people, even other specialists.

18 And he had never ever seen a published
19 study saying cosmetic talc contains asbestos.
20 He'd never even heard any of his colleagues say
21 that cosmetic talc has asbestos in it.

22 What is the strength of the science if the
23 specialists in the field dealing with
24 asbestos-related diseases don't know what the
25 plaintiff lawyers are telling you?

1 All those documents that went online in
2 2017, like I said, when the skies kind of
3 parted, according to plaintiffs' lawyers, and
4 all of a sudden the truth became known, that
5 was seven years ago.

6 And do you think that one of the foremost
7 mesothelioma surgeons in the entire country
8 doesn't have access to the latest and greatest
9 information? He does. He does.

10 And he does not know -- he's never seen,
11 he's never heard what you're hearing. There's
12 no truth to this. There's no science to this.
13 He doesn't ask his patients whether or not they
14 used talc.

15 If Dr. Gibney thought that there could be
16 asbestos in talc, wouldn't that be something on
17 the checklist he talks to his patients about?
18 He doesn't.

19 And he told us that the note about use of
20 talc as a swimmer in the past that you'll see,
21 that that was something Mr. Perry told him
22 about. And I asked him, "You're not here to
23 say that Mr. Perry's mesothelioma was caused by
24 Johnson's Baby Powder?"

25 "No."

1 Now, when he's asked a question by
2 plaintiffs' counsel, which you saw this
3 morning, which is if there was a lot of
4 asbestos in Johnson's Baby Powder and he used
5 it his whole life, couldn't that have been the
6 cause?

7 Well, any reasonable doctor would be like,
8 yeah, if he was exposed to lot of asbestos.
9 But that wasn't his testimony. He said no, he
10 is not offering the opinion that Johnson's Baby
11 Powder was to blame.

12 So I know we did not bring any witnesses,
13 but we didn't need to because the witnesses
14 that were called by plaintiffs demonstrate that
15 they cannot prove their case. When you go back
16 to the jury room and you're thinking about the
17 scales, you're thinking about what the evidence
18 is -- the brakes, the dose information, the
19 tissue test results showing that that
20 fingerprint doesn't match and can't be
21 Johnson's Baby Powder, the talc miners and
22 millers, the lack of science, the epidemiology
23 and all of the experts -- we didn't need to
24 make you stay for three more days to hear the
25 same thing over and over again.

1 The evidence is clear. Everything I told
2 you in opening statement that the evidence will
3 show was shown.

4 I want to end on a couple points that are
5 important to you as you go back to the jury
6 room.

7 You heard about damages, meaning the money
8 that plaintiffs are requesting. And you're
9 going to be instructed about actual damages.
10 The damages you are being asked to provide are
11 those to put Mr. Perry in the same position
12 they were in before the incident or accident.

13 The idea here is money to make Mr. Perry
14 and Mr. Long whole. That's what you're being
15 asked to do.

16 There were some numbers that were filled
17 in here by plaintiff lawyers. And I just want
18 to make sure you're clear.

19 In the verdict form there is a stipulation
20 that you saw that Johnson & Johnson agreed and
21 stipulated to economic damages. Now, we did
22 not agree that you should award them. I want
23 to make sure this is clear.

24 It's \$3.3 million. The stipulation was
25 not that we think we owe that. I think we owe

1 zero because I think you should put a verdict
2 for Johnson & Johnson.

3 What a stipulation means is that we agreed
4 that that is the number, right? You're going
5 to see the number for medical expenses. It's
6 about \$500,000. Mr. Johnson, the economist
7 that came, said about 2.8 million for economic
8 damages, loss of social security, loss of
9 income, et cetera.

10 And you notice we didn't cross-examine
11 Mr. Johnson; the AII lawyer did. Well, that's
12 all because we agreed to this. We basically
13 said we're not going to quibble with your
14 numbers.

15 We're not going to stand up there and try
16 to say, oh, it's 50 grand less or that medical
17 record shouldn't apply. We're not going to do
18 that. We agreed to the 3.3 million if you find
19 in plaintiffs' favor for economic damages.

20 But the other numbers that were put up
21 there by plaintiff lawyers were his suggestions
22 and not found in anything, right? You as
23 jurors would have the ability to decide the
24 amounts.

25 So just because somebody put something up

1 here doesn't mean that there's any basis for
2 it. This is a decision that you would make
3 independently if you decide Johnson & Johnson
4 is to blame.

5 And you know what? I don't think you get
6 there. Because if you answer no to the
7 question on proximate cause, if you find that
8 plaintiffs have not met their burden to prove
9 that Johnson's Baby Powder was the cause of his
10 cancer, you do not answer this question at all.
11 You don't even get there.

12 I showed you this last week, and I think
13 it's fitting to end on this.

14 Johnson & Johnson is here defending itself
15 with the spotlight on Johnson's Baby Powder.
16 Plaintiffs have told you that Johnson's Baby
17 Powder is used more than any other talc.
18 They've told you that Johnson's Baby Powder is
19 to blame for his cancer.

20 And I don't think there's any question why
21 they've chosen a company like
22 Johnson & Johnson, right? Each and every one
23 of you had heard of us before you walked in
24 this room. I think it's pretty clear why we
25 are in the crosshairs and why we're here.

1 But we're defending ourselves for a reason
2 because we think the claims have no scientific
3 merit and they are false. And this allegation
4 that this company somehow knew that we had
5 poison in our product and we sold it anyway and
6 we were out to kill people for decades is just
7 false. It's not supported by the documents.

8 And, please, please, if you have any
9 questions about that, go back and read those
10 documents. You're going to have plenty of
11 them. Look at what they say because what you
12 have heard from counsel in argument is not what
13 is in the evidence.

14 And let me leave you with this: I thought
15 it was interesting when we were talking with
16 Mr. Perry and Mr. Long about what happened when
17 they went to their doctor and got this
18 diagnosis the very first time.

19 You heard Mr. Perry say that his doctor
20 gave him a little warning. If you're going to
21 go and get on the internet, don't just go
22 anywhere looking but go to a reputable site.

23 She told him go to the National Institutes
24 of Health. Go there, look only there, and find
25 your answers there. And you heard he did go

1 there.

2 There was no discussion of Johnson's Baby
3 Powder. There was no discussion of cosmetic
4 talc causing mesothelioma. And we know from
5 Mr. Long that the internet research continued.
6 It was during that research that they came to
7 believe that Johnson's Baby Powder was to
8 blame. That's why we're here.

9 But the doctor -- the doctor told him to
10 look for advice at the NIH, which would not
11 have pointed him here.

12 And Dr. Gibney -- Dr. Gibney did not tell
13 you that Johnson's Baby Powder was to blame.

14 I'm so thankful for you for listening. I
15 know it's been a long morning already, and I
16 appreciate you giving me an opportunity to
17 defend Johnson & Johnson about these claims.

18 We take them very seriously. We are
19 disturbed by what you heard this morning. And
20 I just want you to know that this company is
21 defending itself because Johnson's Baby Powder
22 did not cause Mr. Perry's cancer. Thank you
23 very much for your time.

24 THE COURT: Now, Mr. Adams, how much time
25 is allotted to you?

1 MR. ADAMS: 30 minutes.

2 THE COURT: 30 minutes. I just wanted to
3 let you know that.

4 Now, the question comes, I had thought to
5 begin with that we would be finished more
6 quickly than we were. And some of the things
7 that I had to take up with the lawyers outside
8 your presence extended that time; so blame that
9 on me.

10 But I at least want to give you the option
11 to retire and have lunch or you can stay this
12 extra 30 minutes and we'll take a very lengthy
13 period of time for you to have your lunch and
14 relax before we come back for my charge and
15 deliberations. So your call.

16 JURY FOREPERSON: Let's go ahead and break
17 and eat lunch.

18 THE COURT: Very good. All right.

19 The jury will break for lunch. We'll try
20 to make it fairly short. So it's now 1:20.
21 Why don't we try to come back by about 2:10, if
22 we can.

23 Now, one thing that's very important to
24 keep in mind. Please do not talk about the
25 case. You're not there yet.

1 Thank you so much. You may go to your
2 jury room.

3 (The jury exited the courtroom at
4 this time.)

5 (The following proceedings were held
6 outside the presence of the jury:)

7 THE COURT: All right. The court will be
8 at ease. Anything for me before I go eat my
9 lunch? Very good. I'm apologetic as I can be
10 that we had to break, but I could see some
11 restlessness developing; so blame me.

12 Court will be in recess.

13 And Ms. McVey --

14 MS. MCVEY: Yes, ma'am.

15 THE COURT: -- I have now examined this
16 and know what's in it. This is Ms. Flynn's
17 confidential submission to you. It is three
18 years' worth of tax returns and does provide a
19 lot more information than the other information
20 that's been provided. And I'm giving it to you
21 now (handing).

22 And if there's anything to put on the
23 record, we'll do that at another time. But I'm
24 giving it to you for your examination right
25 now.

1 MS. MCVEY: Thank you, ma'am.

2 THE COURT: And I know you will keep it
3 confidential in accordance with the rules I
4 have made.

5 MS. MCVEY: Absolutely.

6 THE COURT: Wait a minute. One thing.
7 What is this?

8 THE LAW CLERK: I believe it is AII's --

9 THE COURT: Is this all the same thing?

10 THE LAW CLERK: Yes, ma'am.

11 THE COURT: I've got defendant American
12 International's objections to the jury charge
13 and the jury verdict form. I've got a lot of
14 different copies of it. I've got one for me.
15 I'm going to give these back to you, Ms. Flynn
16 (handing).

17 Off the record.

18 - - -

19 (Whereupon there was a recess in the
20 proceedings from 1:20 p.m. to 2:05 p.m.)

21 THE LAW CLERK: This is another court
22 exhibit.

23 THE COURT REPORTER: This is 23.

24 - - -

25 (Court's Exhibit 23 admitted into

1 evidence.)

2 - - -

3 THE COURT: On the record so we can do
4 these objections. I have received J&J
5 defendant's objections to the Court's final
6 jury charges and related final Court's verdict
7 form. And this is dated August the 14th, 2024.
8 It's been electronically filed in the records
9 of the case. I'm going to give it to our court
10 reporter so that we can be sure it's
11 memorialized in the record.

12 Similarly, I have defendant American
13 International industry's objection to the jury
14 charge in verdict form, and it was
15 electronically filed August the 14th, 2024.
16 I'm going to give that to the court reporter as
17 a memorialization of the objections to the
18 charges and the verdict form.

19 And that -- in addition to that, there
20 have been other arguments made and objections
21 lodged with respect to the damage issue and the
22 charge with regard to reckless, willful, and
23 wanton and the defendant's projections made
24 through Mr. Brown that more needed to be said
25 to the jury.

1 I put upon the record earlier the reason
2 why I'm not going to do anything, and I
3 detailed those rulings at that time. So I just
4 draw your attention to the fact that they are
5 also included in the exceptions to the verdict
6 form and the charges.

7 All right. And then with respect to
8 Ms. McVey, Ms. McVey has filed a copy of the
9 charges in the Sarah Plant case. And that is
10 her -- that would have been her preferred
11 version of the charge.

12 So to the extent that represents an
13 objection to what is charged, preserving her
14 position for any appellate review, I've
15 received the Plant charges and be sure that the
16 court reporter has them for her purposes,
17 Ms. McVey.

18 MS. MCVEY: I will, Your Honor. And I
19 have not yet filed them, but I will.

20 THE COURT: Very good. I'm going to give
21 these to you now, Madam Court Reporter. That's
22 J&J and American --

23 MS. PEPKE: For clarity, Your Honor, that
24 was a ruling that you --

25 THE COURT: Yes. I've ruled against the

1 two defendants on a good many issues related to
2 the charges and the verdict form, and they have
3 memorialized their position about that in the
4 memos I have just referred to, and I have
5 denied the requests made in those memos. So I
6 have made a ruling that is now preserved for
7 purposes of appeal.

8 MS. PEPKE: Thank you, Your Honor.

9 MS. MCVEY: And also granted some of their
10 requests as well.

11 THE COURT: Well, I certainly have. So
12 far they haven't appealed that.

13 Now, anything else that we need to do?
14 Let's talk for a minute about how we're going
15 to proceed. I'm really just going to let the
16 jury kind of guide me here. We will have this
17 close by the plaintiff, and that will take
18 about 30 minutes, as I was advised before we
19 took the break. And if they'll let me, I will
20 just go right into the charge, which is what I
21 prefer to do, so that they'll be here about an
22 hour before they then take their break, go to
23 the jury room, having the exhibits submitted,
24 et cetera, et cetera. That's how I'm going to
25 roll unless something else takes place that I

1 don't know about.

2 MS. MCVEY: Yes, Your Honor. And the
3 parties have agreed that the exhibits that are
4 in those three white bankers boxes and the
5 expandable file on top are the cumulative
6 plaintiff and defense exhibits.

7 THE COURT: Yes. So Mr. Clerk and Madam
8 Bailiff know that these will be the documents
9 that are taken into the jury room as exhibits
10 at the appropriate time when I indicate that
11 that is to be done.

12 THE CLERK: Yes, Your Honor.

13 MR. BROWN: Your Honor, we have one
14 court's exhibit we'd just like to make which
15 relates to the objection that you overruled
16 about the putting the numbers onto the slide.
17 This is a screenshot of it.

18 Mr. Adams, when he put the number up on
19 the slide, he didn't say audibly, I don't
20 think, the numbers. So unless we make this as
21 a court exhibit, it doesn't show up.

22 THE COURT: I kind of remember that he
23 did, but in any event, I'll accept that as a
24 court's exhibit to memorialize --

25 MS. MCVEY: We have no objection to that

1 at all.

2 THE COURT: No objection. So you just
3 submit that as an exhibit in support of your
4 objection that I overruled.

5 MR. BROWN: Thank you, Your Honor.

6 - - -

7 (Court's Exhibit 24 admitted into
8 evidence.)

9 - - -

10 (Court's Exhibit 25 admitted into
11 evidence.)

12 - - -

13 (Court's Exhibit 26 admitted into
14 evidence.)

15 - - -

16 THE COURT: I have a page out of -- I
17 guess it's out of one of y'all's learned
18 transcripts.

19 MR. COWAN: That was something I showed
20 Your Honor yesterday. You can throw it out.
21 Thank you.

22 THE COURT: Are we ready? Y'all do that
23 for a minute. I'll be right back.

24 - - -

25 (Discussion off the record.)

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1 week? The answer to that is still absolutely
2 not. As I told y'all, even if I had to declare
3 a mistrial, which would kill me with this
4 lengthy trial, rather than go back on my word
5 to you, I would do that. So be peaceful about
6 all that.

7 I think that's all I need to tell you.

8 Mr. Adams, whose name I have butchered
9 many times but he always says it's okay, you
10 may proceed.

11 MR. ADAMS: Thank you, Your Honor.

12 - - -

13 REBUTTAL ARGUMENT BY MR. ADAMS

14 - - -

15 MR. ADAMS: Long stretch, everybody.

16 Thank you for bearing with us.

17 One of the things you just heard is that
18 no epidemiology studies says talc causes
19 mesothelioma. Sounds pretty bad, right, for
20 us, except they chose their words very
21 carefully. They said talc. Because we know
22 that talc containing asbestos fibers gives
23 folks the disease Michael Perry has. That's
24 from the World Health Organization and IARC.

25 You also heard about these miners and

1 millers, and folks in the mine don't get the
2 disease, according to Johnson & Johnson; so it
3 must be safe. Except they do. A disease
4 that's only one or two per million for the
5 folks in Johnson & Johnson's Vermont talc mine,
6 the talc that Mr. Perry breathed for over three
7 decades, it's not one in a million, it's one in
8 2 million.

9 Then they talk about Dr. Gibney. Maybe
10 you remember opening statement, Johnson &
11 Johnson said, pay attention to Dr. Gibney.
12 They tried to co-opt him. They tried to say he
13 was their witness.

14 Then he came and literally said there's
15 asbestos in the baby powder that gave Michael
16 Perry this disease. He called their company
17 unethical because they concealed the asbestos
18 from doctors and nurses for decades, not just
19 by keeping quiet but by going to the doctors
20 and nurses and telling them it wasn't there.

21 But they said Dr. Gibney, who's a surgeon,
22 he didn't know about asbestos in talc. Why
23 would they say that? Does that prove there's
24 not asbestos in their talc because a doctor
25 didn't know about it? Or do their own records

1 finding asbestos in their talc over and over
2 and over and over and over again, hundreds and
3 hundreds of times? Why would they stand, look
4 at you, and say because Dr. Gibney didn't know
5 when they concealed it from doctors, maybe it
6 wasn't there. It's just not straight. Over
7 and over it's there.

8 Dr. Blount, they showed you something
9 where she said she didn't think asbestos was a
10 health hazard, their mineralogist. She knows a
11 lot about finding asbestos in talc. She's a
12 mineralogist. She's not a medical doctor. She
13 doesn't know. But it was there.

14 And then the lawyer for Johnson & Johnson
15 showed you some documents that they said that
16 maybe I used scissors. Remember that? They
17 said I used scissors and I cut out parts.

18 They've had the documents for 70 years.
19 What do you think I cut out? The word "not"
20 right before asbestos? Just kidding. Psych.
21 The word "asbestos" is there. Do you think, if
22 I cut out something, they wouldn't have got up
23 and shown you? They've had them for 70 years.
24 There was asbestos in their baby powder.

25 But they showed you this document, and

1 they said this is our industrial talc.

2 Mr. Adams showed you this document and he said
3 talc samples confirmed asbestos and then had
4 this big long list.

5 Folks, that was our industrial stuff.
6 That's what they just told you. It wasn't
7 true. But it doesn't matter because they put
8 industrial talc in the baby powder.

9 But let's take a look -- and the reason
10 they told you it was industrial because they
11 said, look, it has this HC acronym on it; so it
12 must be industrial. So this industrial talc
13 that we took out of the Vermont mine, the exact
14 same mine where they got the talc for the baby
15 powder, maybe we tried to mislead you.

16 Except what we know is that this was in
17 the sediments and the fines in this document,
18 and I'll show it to you in just a second. And
19 we know that the sediment and the fines was
20 only created when they floated the talc. The
21 only talc they floated was the cosmetic. I
22 don't know if that made any sense to anybody.

23 This is in the sediment and the fines, and
24 I'll show you it on the next document. The
25 sediment and the fines were only created when

1 they floated the talc, and they only floated
2 the cosmetic talc. That's what was in the baby
3 powder.

4 "Q You told me that industrial were not
5 floated, right? You told me that?

6 "A I believe they're not floated.

7 "Q We know that, because we have fines
8 and sediment, these were floated. And we know
9 that there was one, two, three, four, five,
10 six, seven, eight, nine findings of confirmed
11 asbestos in the fines, correct, sir?

12 "A You've read what was written on that
13 report.

14 "Q And I've counted, right?

15 "A You've counted correctly.

16 "Q And we know that in the sediment we
17 have one, two, three, four, five. That's a
18 total of 14 results for asbestos, correct?

19 "A Correct."

20 Confirmed asbestos in the fines of the
21 sediment, the thing that was only created when
22 they floated the talc, and they only floated
23 the cosmetic. That's what they put in baby
24 powder. He says it twice.

25 "Q The industrial talc was not floated,

1 correct?

2 "A That is my understanding."

3 But it doesn't matter at all anyways
4 because they put industrial talc in baby powder
5 anyways. And if you didn't think Dr. Haber
6 told the truth or he made that up, we have
7 their own documents that I showed you about the
8 talc not being over 90 percent talc -- that's
9 industrial talc -- and they didn't bring anyone
10 to say Dr. Haber was wrong.

11 Then they told you that this winchite,
12 this winchite proved they didn't do it.
13 Remember that? They had a big board and they
14 did the fill in the blanks and all that.
15 Except their own expert found winchite in
16 Johnson's Baby Powder, winchite in the powder
17 in Johnson's Baby Powder.

18 Then they said, don't believe our own
19 expert who didn't come. That was an old
20 bottle. Except their own expert found winchite
21 in the bottles over and over again, and so did
22 Dr. Longo.

23 To put a bow on this, your lab finds
24 winchite; Longo's lab finds richterite. You're
25 seeing the same thing, right? That's not

1 Mr. Adams. That's not our experts. That's
2 their expert under oath. Dr. Longo found
3 richterite in the Italian, the Vermont, and the
4 Chinese. Every type of talc Mr. Perry breathed
5 from Johnson's Baby Powder had richterite in
6 it, which Dr. Sanchez, their own expert, says
7 the exact same thing; it's winchite.

8 But Mr. Perry was also exposed to Italian
9 talc when he was most vulnerable, the first
10 four years of his life at least, from '69 to
11 '73. The talc that was put on him every day as
12 an infant from Johnson & Johnson was Italian
13 talc, and it was probably past '73 because when
14 they stopped making Italian, they didn't just
15 pull it all off the shelves; they kept selling
16 the inventory.

17 And then they went back to Italian talc in
18 1979 for another year. At least five years,
19 probably more, the most vulnerable years for
20 Mr. Perry, he was exposed to Italian talc. And
21 the peer-reviewed published literature about
22 Johnson & Johnson's Italian talc in a
23 peer-reviewed scientific paper says it's
24 contaminated with winchite.

25 That's the tremolite in Johnson's Baby

1 Powder and the tremolite in Michael Perry's
2 lung. That's the talc in Johnson's Baby Powder
3 and the talc in Michael Perry's lung. And
4 that's the winchite in Johnson's Baby Powder
5 and the winchite in Michael Perry's lung. The
6 winchite proves they did it.

7 The next thing they told you is it wasn't
8 enough. They said occupational levels, the PEL
9 from OSHA, .1, it never got above the PEL. But
10 OSHA said the PEL is not safe for the disease,
11 mesothelioma, anyways even if that were true.
12 Did OSHA say that it was safe for the disease
13 mesothelioma? No. It was the opposite. They
14 said even at .1, it was not.

15 And so they came up to you and they tried
16 to say, because it was below the OSHA PEL,
17 which it wasn't, by the way, but even if it
18 was, OSHA says that's not safe. That's for
19 grown men in a factory. That's for grown men
20 in a power plant. This was babies. It's not
21 safe.

22 Johnson & Johnson did all this math for
23 you. They excluded the Round 1 testing, which,
24 by the way, was Italian that he breathed. They
25 only did the museum samples. They did the

1 lowest number. They did all that stuff to try
2 to get this low number.

3 But when they weren't in court and they
4 weren't challenged, they said the numbers were
5 way higher.

6 "Q But Johnson & Johnson has actually
7 done some experimental calculations where
8 they've estimated what the dose of asbestos a
9 person would get would be if they used talc
10 that had a very small bit of asbestos, about
11 ten parts per million, correct?

12 "A I believe so, yes.

13 "Q Yes. And they calculated that. That
14 would create a dose of between 4.5 to 9.3
15 fibers per cc for the adult and .16 to .18
16 fibers per cc in a baby, correct?

17 "A I believe that's been stated."

18 Those are massive exposures. There's no
19 organization on earth that says that's safe for
20 anybody, let alone a baby. There's no one on
21 earth that they could get to come say that's
22 safe because no one on earth would.

23 Then they talked about epidemiology and
24 the fact that Johnson & Johnson, for the
25 hundred-plus years they were selling this baby

1 powder, never paid for an epidemiology study,
2 never conducted an epidemiology study, never
3 followed any of the people using their powder
4 for an epidemiology study.

5 But it doesn't matter because epidemiology
6 proves they played a role in Michael Perry's
7 mesothelioma. Do y'all understand the only way
8 they win is if they played zero role? They
9 wanted to be the biggest, the strongest, the
10 most --

11 MS. BUENO: Objection, Your Honor.

12 THE COURT: Approach.

13 (Whereupon a bench conference was
14 held.)

15 MS. BUENO: The objection is he just said
16 the only way we win is if we played zero role,
17 which is not the law. The law is substantial
18 factor. He's now trying to say that anything
19 above zero is substantial, which is not what
20 you are going to instruct them.

21 MS. MCVEY: Judge, you're going to
22 instruct them what "substantial factor" means.
23 It doesn't have to be the biggest role. It's
24 in expert testimony and undisputed there was a
25 substantial factor in this case. He doesn't

1 have to say they were the biggest exposure.

2 MS. BUENO: That wasn't my objection. He
3 said anything above zero, and that's not the
4 law.

5 THE COURT: I understand your argument. I
6 have listened to the testimony. I will
7 overrule your objection.

8 MS. MCVEY: Thank you.

9 THE COURT: Objection is overruled.

10 (Bench conference concluded.)

11 MR. ADAMS: Witnesses for
12 Johnson & Johnson under oath say 4.5 to 9.3
13 fibers per cc.

14 Look at these numbers. 0.1 fibers per cc,
15 quadrupling of the risk. I showed you this
16 already, but this is everything. This is it.
17 The epi shows the levels from their powder
18 gives people this disease, not a doubling of
19 the risk, a quadrupling of the risk, an
20 eightfold increase, a 28-fold increase, a
21 fraction of what their corporate representative
22 just told you people are exposed to.

23 And it's not just their corporate
24 representative. And it wasn't just fibers; it
25 was fibers per cc. That's why he admitted to

1 it under oath, that whole thing where they
2 tried to make it disappear. He said it under
3 oath.

4 Gordon 2014. It was Italian. 22 of the
5 50 samples were Italian talc, the exact same
6 thing Johnson & Johnson put in its powder for
7 the first four years of Michael's life. And in
8 1979 it was the exact same talc from the exact
9 same mine they did that study with. It was 1.9
10 fibers per cc, orders of magnitude higher than
11 all these epi studies we just looked at.

12 They told you that Dr. Longo didn't rely
13 on this paper, this peer-reviewed paper with no
14 citation. Do you know why they didn't have a
15 citation? Because he never said that ever. He
16 didn't say he doesn't rely on this. That's not
17 in this case. You can ask for a readback. You
18 can ask to see it. It doesn't exist. Those
19 numbers are way higher.

20 But it doesn't matter because Dr. Haber
21 came.

22 "Between .1 to 4 fibers per cc is my
23 estimate of what people were exposed to from
24 Johnson's Baby Powder."

25 It's undisputed. If a corporate rep got

1 it wrong, if all the peer-reviewed studies got
2 it wrong, if everyone got it wrong, why didn't
3 they bring someone to say it to your face? Why
4 didn't they bring an expert to say, "Everybody
5 got it wrong; I'm going to straighten it out."

6 After that, they did the OSHA thing, OSHA
7 said it's safe. Well, that's not true. Then
8 they did the winchite thing. Well, that's not
9 true. Then they did the fibers per cc dose
10 thing. Well, that's not true.

11 Then they tried to say, well, the
12 exposures were lower in the background. The
13 exposure to asbestos from our powder were lower
14 than background.

15 They said Dr. Brody said background, and
16 they had some number, was safe. They left out
17 the part where I came back and asked him
18 questions and said, "If they knew that
19 background number and said someone was exposed
20 to it their whole life, would that be safe?"
21 He said no.

22 But it doesn't matter because the
23 background, we learned, is short-fiber
24 chrysotile; it's not tremolite. When you
25 compare the amount of tremolite in their baby

1 powder to the amount of tremolite in the
2 background there, it's a million times more
3 than in baby powder. It's not below
4 background. It's a million times more.

5 And then they tried to say this was
6 100 percent brakes and other talc when their
7 own expert said the brakes didn't count at all.
8 Zero. Understand why they didn't bring him?

9 And we could go through this whole
10 exercise of comparing the brakes to the talc,
11 the 70 brake jobs, at least 18,000 uses of
12 Johnson's Baby Powder if he just used it once a
13 day. He did brakes for three years, J&J for
14 50.

15 Brakes are in a resin binder; Johnson's
16 Baby Powder is a powder. Brakes are mostly
17 chrysotile. I don't know if you noticed, but
18 they did this whole thing about how there
19 wasn't chrysotile in Mr. Perry's lungs; so
20 maybe it didn't come from the powder. But
21 brakes were 99.9 percent chrysotile.

22 They took a tiny little sliver of his lung
23 and looked at it. It doesn't mean it wasn't
24 there, but what they found is exactly what was
25 in the bottle of Johnson's Baby Powder. J&J

1 was mostly tremolite. Brakes were outdoors.
2 The powder was in the home. Brakes weren't on
3 a baby; the powder was.

4 But it doesn't matter. It really doesn't
5 matter at all because the undisputed testimony
6 is that it's the total dose of asbestos that
7 causes the disease. The total dose, all of it
8 counted. Of course the brakes counted. Of
9 course they count.

10 He worked with brakes; he was exposed to
11 asbestos. He breathed it into his body. It
12 was part of his dose. They counted. But so
13 did the asbestos from the baby powder that he
14 breathed for 50 years. It's the cumulative
15 dose that counts, the total dose. You can't go
16 back and start deleting asbestos exposures.

17 It would be like if someone had lung
18 cancer and they smoked Camels for 10 years,
19 Marlboros for three, and Kents -- Kools for 50
20 or whatever, and they got lung cancer. You
21 can't go back and say, oh, the Kents didn't
22 count, the Marlboros didn't count; it was just
23 the Kools. That's not how science works.

24 Asbestos is exactly the same. It's all
25 the cigarettes that caused the lung cancer, and

1 it's all of the asbestos that gave Michael
2 Perry mesothelioma. And it's a hundred percent
3 undisputed. This is medical stuff, folks. Why
4 didn't they bring a doctor to say it's not a
5 cumulative-dose disease, it didn't count, it
6 was too little?

7 And that's what the law says too.
8 Proximate cause doesn't mean the only cause.

9 There's another slide -- and you'll get it
10 from the judge as soon as I'm done -- and I'm
11 almost done, I promise -- that says multiple --
12 there can be multiple causes. I lost it. But
13 you'll hear it. You'll have it back there.
14 The law says the same thing.

15 We heard from Johnson & Johnson about how
16 they won't attack Mr. Perry. They won't attack
17 someone who's sick. And they said they won't
18 do that because they know that it would anger
19 you.

20 But then they got up and they did that
21 whole bottle thing. Remember, 10 bottles of
22 J&J, 10 bottles of Clubman, 8 bottles of
23 something else. Why?

24 Then they said, well, he had a bottle from
25 the '70s and he had a bottle of Johnson's Baby

1 Powder from 2004. So -- so what? What are
2 they saying? He made it up? He lied? He
3 didn't really use their powder? He had it in
4 his home, and he has it in his body. The talc
5 and the asbestos in their powder is in his
6 body, and that's all you need to know.

7 Thank you so much for listening to us. I
8 appreciate you so much. Please value Michael
9 Perry's life. Thank you.

10 THE COURT: Move the ELMO. Don't be
11 blocking the jurors. There you go.

12 MR. ADAMS: Do you need a mic, Your Honor?

13 THE COURT: Thank you.

14 - - -

15 JURY CHARGE GIVEN BY CHIEF JUSTICE TOAL

16 - - -

17 THE COURT: Ladies and gentlemen of the
18 jury, I am now going to give you the jury
19 charge. It's just a little bit easier for you
20 to hear me if I come down here. So I'm not
21 planning on making any arguments of any kind;
22 I'm just going to give you the jury charge.

23 Charge 1, Role of the jury. Ladies and
24 gentlemen, I'm going to charge you on the law
25 that applies to the case and the law that

1 applies to the facts of this case. And it is
2 your duty to find the facts from the evidence.

3 And to those facts, you must apply the law
4 as I give it to you. And you must decide this
5 case based on the evidence and the law.

6 You should not be concerned with what the
7 law should be but what it is. And you must not
8 be interested in this case by any personal
9 likes or dislikes or any undue sympathy or
10 prejudice.

11 And that means you must decide this case
12 solely on the evidence before you according to
13 the law. You will remember that you took an
14 oath to do just that when we began this trial.

15 So follow my instruction. You must follow
16 all of them and not single out some and ignore
17 the others because they are all equally
18 important.

19 Please don't read into these instructions
20 or into anything I may have said or done during
21 the course of this trial any indication as to
22 what I think the facts are or what I think your
23 verdict should be because, under our system of
24 justice, you the jury are the sole and
25 exclusive judges of the facts.

1 And I'm not going to intrude on your
2 constitutionally guaranteed right to determine
3 the facts, just as I know you're not going to
4 intrude on my responsibility as your judge
5 under the Constitution to charge you as to what
6 the law is.

7 Now, ladies and gentlemen, how do you
8 decide what the facts are? You do it by
9 evaluating or weighing the evidence you have
10 heard during this trial. And there's no way
11 for you to weigh the evidence in any literal
12 sense. I'm not going to give you a set of
13 scales to go back and conduct experiments.
14 That's not what I'm talking about.

15 You weigh and evaluate the evidence simply
16 by using your good common sense, your sense of
17 logic and reason, your life experiences. And
18 you bring those things to bear on the evidence
19 you've heard during this case.

20 And once you do that, you will be able to
21 determine the true facts of this case. And
22 once you determine -- done that, you will be
23 able to take the law as I'm about to give it to
24 you and apply that law to the facts, and you
25 will be able to reach a decision and a verdict

1 in this case.

2 In deciding the facts of this case, you
3 must not be swayed by any bias or prejudice or
4 favor as to any party. Our system of justice
5 does not permit jurors to be governed by
6 prejudice or sympathy or public opinion. This
7 case should be considered and decided by you as
8 an action between two parties of equal standing
9 in the community, of equal worth, and holding
10 the same or similar stations in life.

11 A corporation is entitled to the same fair
12 trial at your hands as a private individual.
13 All persons, including corporations, stand
14 equal before the law and are to be dealt with
15 as equals in the court of justice.

16 So you must not consider as evidence any
17 statement of counsel made during the trial.
18 Statements of counsel do not constitute
19 evidence. Rather, counsel is articulating the
20 position and the contentions of his or her
21 client. And this rule applies to the opening
22 statements of counsel and the closing
23 arguments.

24 Attorneys are officers of the court.
25 Attorneys have the absolute right and duty to

1 bring matters to the attention of the Court by
2 way of objections. So don't be upset or
3 disturbed by counsel because of an objection.
4 Our trial procedure includes the objection
5 process as a means of controlling the evidence;
6 in other words, letting in proper evidence and
7 keeping out improper evidence. So counsel by
8 objecting are simply performing their role in
9 the trial of the case.

10 Now, once the Court makes a ruling on an
11 objection, the jury is bound by that ruling.
12 If an objection is sustained, the question is
13 improper; and if the objection is overruled,
14 the question is proper.

15 In that regard, the jury must not under
16 any circumstances derive any inference to any
17 ruling made by the Court on objections as to
18 any opinion the Court may have on the case.

19 The judge does not have an opinion on the
20 evidence and is not entitled to an opinion
21 under the law. The judge is performing her
22 role in the trial of the case.

23 As to any questions to which an objection
24 was sustained, you must not speculate on what
25 the answer might have been or the reason for

1 the objection.

2 Burden of proof. I told you at the
3 beginning of the case that plaintiffs have the
4 burden of proving their case. And the burden
5 of proof in a civil case is by means of greater
6 weight or preponderance of the evidence.

7 And that means that the plaintiffs, in
8 order to obtain a verdict, must produce
9 evidence which, considered in light of all the
10 facts, leads you to believe that what they are
11 claiming is more likely true than not.

12 A better way to visualize it perhaps is to
13 envision a set of scales. And if you put the
14 plaintiff and the defense evidence on opposite
15 sides of the scale, in order to receive a
16 verdict, the plaintiff would have to tip the
17 scales in their favor.

18 If those scales tip in the plaintiffs'
19 favor even slightly, the most minute portion,
20 then the plaintiffs would be entitled to a
21 verdict because the greater weight would be on
22 their side.

23 However, after you review the evidence, if
24 the scales are evenly balanced and there's not
25 a greater weight on either side or the scales

1 are tipped even slightly in the defendant's
2 favor, then the defendant would be entitled to
3 a verdict because the plaintiff would not have
4 proved his case by the greater weight or
5 preponderance of the evidence.

6 Now, in connection with my charge on
7 burden of proof, I charge you that a party's
8 allegations -- that is, the stated case or
9 defense -- may be proved by any evidence
10 regardless of whether that evidence is brought
11 out or introduced by an opposing party or by
12 the opposing party's witness.

13 That is to say, a party in proving the
14 claim or defense is not limited solely to the
15 defendant -- to the testimony given by that
16 party's own witnesses but may rely on any
17 evidence that's been presented and introduced
18 by the opposing party and upon any testimony
19 elicited from the opposing party's witnesses on
20 direct or cross-examination.

21 Now, some of you may be familiar with the
22 burden of proof in a criminal case. Before the
23 state can convict someone of a crime, they must
24 prove each element of that crime beyond a
25 reasonable doubt.

1 And this is not a criminal case,
2 obviously, so that phrase, "beyond a reasonable
3 doubt," which is one of the highest standards
4 of proof the law knows, it has no place in this
5 civil case. The standard of proof that you
6 must use and the yardstick you must apply is
7 the burden of the greater weight of the
8 evidence.

9 Now, let's talk about evidence. You must
10 decide what the facts are from the evidence.
11 And the evidence consists of sworn witness
12 testimony, exhibits, and we've also had
13 something called stipulations in this case.

14 And a stipulation is simply an agreement
15 by the parties that a certain fact exists
16 without necessity of further proof. And you
17 must take a stipulation as conclusive evidence
18 of a fact so that -- the only things you can
19 use in determining what the facts are are
20 witness testimony, exhibits, stipulations, and
21 court-ordered instructions. Nothing else is
22 evidence.

23 We have had excellent lawyers in this
24 case. This is the cream of the crop in this
25 country that you and I have had the privilege

1 of hearing in a Richland County courtroom. And
2 they have zealously advocated for their
3 clients' positions.

4 But, again, they're not witnesses. So
5 what they say is not evidence. If you remember
6 something differently than the way the lawyers
7 remember it, your memory controls. What they
8 have said and argued in this case is very
9 important for you to listen to because, as I
10 said at the outset, they are trying to help you
11 understand the evidence. But do keep in mind,
12 what they say is not itself evidence.

13 Now, stipulations. There is an economic
14 loss stipulation. The plaintiffs and
15 defendants stipulate that the total current
16 economic loss is \$3,329,973.05. And you will
17 have this figure in the jury room with you.

18 Plaintiffs and defendant AII stipulate
19 that the reasonable and necessary past medical
20 bills, which is another element of loss, as a
21 result of Michael Perry's mesothelioma
22 diagnosis and treatment are \$510,620.05.

23 So when you saw those two figures added
24 together in argument, that's what is meant,
25 that those are -- if you're going to award

1 anything, that's what you'd consider in making
2 your award.

3 Direct and circumstantial evidence. In
4 any type of case, there are different types of
5 evidence. And what I'm discussing now is
6 direct as opposed to circumstantial evidence.
7 I'm going to give you a definition for each.

8 Direct evidence is the testimony of a
9 witness who claims to have actual and direct
10 knowledge of the facts such as an eyewitness.
11 It's evidence that, if believed, immediately
12 establishes a fact.

13 Another type of evidence is circumstantial
14 evidence. I'm sure you've heard that term.
15 Circumstantial evidence is indirect evidence.
16 Put another way, circumstantial evidence is
17 proof of a chain of facts and circumstances
18 from which you could find that another fact
19 exists even though it hasn't been proven to you
20 directly. In modern parlance, we call that
21 connecting the dots.

22 The law makes no distinction between the
23 weight or value to be given either direct or
24 circumstantial evidence. You may consider both
25 kinds of evidence in this case.

1 By way of an example, if a witness
2 testified that the witness saw it was raining
3 outside, that would be direct evidence that
4 it's raining.

5 But if a witness testified that the
6 witness saw someone enter the room wearing a
7 raincoat covered with drops of water and
8 carrying a wet umbrella, that would be
9 circumstantial evidence from which you could
10 conclude that it was raining.

11 Where circumstantial evidence is relied
12 upon, it is incumbent upon the party presenting
13 the evidence to show the existence of such
14 circumstances as would justify the inference
15 that a particular event actually occurred and
16 not to leave questions to speculation or
17 conjecture.

18 If the circumstances are proved to your
19 satisfaction, you may infer a fact from those
20 circumstances. But the circumstances must lead
21 to the conclusion with reasonable certainty.
22 If the circumstances are not proved to your
23 satisfaction, then you shouldn't infer the
24 facts.

25 Evidence, evaluating witness testimony.

1 You must consider all of the evidence in
2 deciding what the facts are. And if there has
3 been evidence that's been stricken from the
4 record or if I told you to disregard it, that
5 material is no longer a part of the record or
6 evidence in the case and you can't consider it
7 in your deliberations.

8 But you must, as judges of the facts,
9 determine the credibility of all evidence. So
10 as I told you at the beginning, for every
11 witness who testifies and every exhibit that is
12 admitted, you will have to determine whether
13 those things are worthy of belief. And how do
14 you do that?

15 In a case of a witness who testified, I
16 can give you some general guidelines. First,
17 you may consider whether the witness had some
18 interest in the outcome of the case, whether
19 they had some bias or prejudice towards someone
20 or some issue in the case, whether they had
21 something to gain by their testimony.

22 Second, you may consider what opportunity
23 the witness had to observe the things they were
24 here to tell you about.

25 Third, you may consider how the witness

1 evidence or testimony stacks up against other
2 evidence in the case. Is it consistent or
3 inconsistent?

4 Fourth, you may consider the demeanor on
5 the stand of the witness. Was the witness
6 hesitant or forthright in their testimony?

7 Fifth, you may certainly use what you'd
8 call your day-to-day life to determine whether
9 someone is telling you the truth because you
10 didn't surrender your common sense when you
11 walked into this courtroom last week.

12 I will tell you this: You may believe
13 everything a witness says; you may believe
14 nothing a witness says; you may believe parts
15 of a witness's testimony; you may disbelieve
16 other parts; you may believe the one witness
17 over the several; or you may believe the
18 several over the one.

19 But you certainly don't decide this matter
20 of credibility simply by counting up the
21 witnesses on one side or the other because your
22 sole objective, ladies and gentlemen, is to
23 determine the truth in this case. And it does
24 not matter to you whether that truth comes from
25 a witness for the plaintiff or for the

1 defendant.

2 Now, expert testimony. You've heard
3 testimony from people who have been described
4 and qualified as experts. They were qualified
5 as experts because they, by reason of their
6 education, training, or experience, achieved
7 some expertise in their given field. And they
8 can state their opinion on matters in their
9 field. And they may state their reasons for
10 their opinions.

11 But expert testimony, as I told you when
12 we had the very first expert qualified, must be
13 judged by you just as any other testimony in
14 this important respect. And that is that you,
15 the jury, are the sole judges of the
16 credibility of the witness. You may believe a
17 witness's testimony and accept it, or you may
18 reject it, or you may give it whatever weight
19 you think it deserves.

20 Expert witnesses and causation. Now, when
21 someone relies on expert testimony to show a
22 causal connection between an injury and the
23 subsequent condition, the testimony must meet
24 the most probably rule.

25 It's not sufficient to say the condition

1 in question possibly could have come or might
2 have come from the injury. Expert must go
3 further and testify that, taking into
4 consideration all the facts, it is his or her
5 professional opinion that the result in
6 question most probably came from the cause
7 alleged.

8 Deposition testimony. You've also heard
9 testimony presented through depositions. And I
10 just want to remind you that deposition
11 testimony is entitled to the same weight and
12 consideration as if that witness had been here
13 and testified from the stand.

14 Taking notes. Now, some of you have been
15 taking notes during the trial, and I gave you
16 an instruction on that. I just want to remind
17 you that the notes are for your own personal
18 use, and notes certainly don't overcome
19 another's independent recollection of the
20 testimony. They're not to be used in place of
21 your memory.

22 Multiple defendants. The plaintiffs in
23 this case are Michael Perry and his husband,
24 Lonnie Long. And there are multiple defendants
25 in this trial, the Johnson & Johnson entities

1 and American International Industries.

2 Plaintiffs contend that Johnson & Johnson
3 entities is responsible for Johnson's Baby
4 Powder during all the years of its use in this
5 case.

6 You should decide the case against each
7 defendant separately as if it were a separate
8 lawsuit. Each defendant is entitled to
9 separate consideration of its defenses.

10 Now, I have found as a matter of law that
11 American International Industries, AII, is
12 liable. So you don't have to make that
13 liability determination. They are liable.

14 The Court has already determined that
15 American International Industries, the company
16 responsible for Clubman talc products, is
17 liable to Michael Perry on each of the causes
18 of action pled against them, specifically
19 negligence, strict liability, fraudulent
20 misrepresentation.

21 The Court has determined that Clubman
22 asbestos-containing talc products was defective
23 and unreasonably dangerous and was a
24 substantial factor in the development of
25 Michael Perry's mesothelioma.

1 The Court has determined that American
2 International Industry's conduct was willful,
3 wanton, and reckless, meaning American
4 International Industries acted with a conscious
5 indifference to the rights and safety of
6 others.

7 Now, while these are issues you must
8 decide against Johnson & Johnson, you are
9 instructed that American International
10 Industries is liable to the plaintiffs in this
11 case. Your task -- your only task as to AII is
12 to determine the total amount of damages that
13 Michael Perry and Lonnie Long have suffered.

14 Summary of the plaintiffs' claims. This
15 is a claim for damages stemming from
16 personal -- from a personal injury that has
17 been alleged. And I want to go over with you
18 the various claims that have been made in this
19 case.

20 The plaintiffs Michael Perry and Lonnie
21 Long are seeking to recover damages for
22 personal injury arising out of alleged exposure
23 of Michael Perry to asbestos from the
24 defendant's products. Plaintiffs' claims in
25 this case are based on several theories:

1 negligence, strict liability, and fraudulent
2 misrepresentation.

3 There are three different ways a company
4 can be strictly liable under the law of this
5 state: design defect, manufacturing defect,
6 and warning defect. And the plaintiff must
7 only prove one of those defects to establish
8 defendant's liability under strict liability.

9 The plaintiffs are not required to prove
10 all of these theories to recover. Proof of a
11 claim under any one of these theories would
12 enable you to find the plaintiffs are entitled
13 to a verdict. But the plaintiffs must meet
14 their burden of proof as to at least one of
15 these theories against at least one of the
16 defendants in order to recover. If you find
17 they have not, then the verdict would be --
18 then the defendant would be entitled to a
19 verdict.

20 Negligence. The first theory of the
21 plaintiffs is one of negligence. The focus on
22 the negligence is on the conduct of each of the
23 defendants. In order to prevail under this
24 claim, the plaintiffs must prove by the greater
25 weight of the evidence that the defendant

1 failed to exercise due care in some respect.

2 If you're having a hard time with the
3 phrase "negligence," you can substitute the
4 word "careless" because it really means
5 essentially the same thing. It means the
6 failure to act as a reasonably prudent person
7 would act under the same or similar
8 circumstances or doing something that a
9 reasonable person would not do under the same
10 or similar circumstances.

11 You must first determine if the defendant
12 owed the plaintiffs a duty of care. A
13 defendant will owe the plaintiff a duty of care
14 when the defendant knows of the risk of harm
15 posed by its product. This may be met by
16 showing the defendant was aware of the danger
17 and failed to take reasonable steps to correct
18 it.

19 A manufacturer is held to the skill of an
20 expert in the field as to the products itself
21 and is charged with an expert's knowledge of
22 materials and processes used in the industry.

23 A manufacturer has a duty to stay aware of
24 current standards and scientific knowledge in
25 the industry; and therefore, since the seller

1 assumes the duties of a manufacturer, a seller
2 is held to the skill of an expert in the field
3 as well and has a duty to stay aware of current
4 standards and scientific knowledge in the
5 industry.

6 Although evidence of industry standards
7 may be considered as evidence of the standard
8 of care, an industry can't set its own
9 unreasonable standards. An entire industry may
10 lag behind in adoption of new and available
11 products or safety features, and the failure to
12 use due care, even if no one in the industry
13 uses due care, does not excuse negligence.

14 It is for you to decide whether the
15 standard of care was proper considering what a
16 reasonable person would have done under similar
17 circumstances.

18 If you find the defendant owed the
19 plaintiff a duty of care, then the next thing
20 the plaintiffs must prove by the greater weight
21 of preponderance of the evidence is that the
22 defendant breached that duty of care by a
23 negligent act or omission.

24 In deciding whether the defendant breached
25 the duty of care, you should consider whether

1 the defendant has filed the normal and
2 customary procedures in the industry in light
3 of the defendant's expertise and ability to see
4 and appreciate the product and its cause.

5 If the defendant failed to exercise
6 reasonable care in fulfilling any of its
7 duties, the defendant would be responsible for
8 the injuries to any person the defendant should
9 expect to use the product, assuming the
10 injuries have been proven to have been
11 proximately caused by that breach. This burden
12 may be met by showing that the manufacturer was
13 aware of the danger and failed to take
14 reasonable steps to correct it.

15 In an action based on negligence,
16 plaintiffs must also prove that the product was
17 in a defective condition, unreasonably
18 dangerous to the user, when it left control of
19 the defendant and the defect caused the
20 plaintiff's injury.

21 Now, the next thing is the duty of product
22 manufacturers themselves.

23 A manufacturer owes a duty of care in the
24 manufacture of its product proportionate to the
25 dangers involved in the product's use. A

1 manufacturer of a product may, under a claim or
2 design that makes it dangerous for use for
3 which it's made, owe a duty to use reasonable
4 care in the adoption of a safe plan or design
5 those users you would expect to use the
6 product. A seller owes the duty to conduct
7 adequate tests and inspections of its product
8 to discover latent defects or defects that are
9 not visible or apparent on reasonable
10 inspection.

11 Now, if a seller had reason to know that
12 the product was likely to be dangerous or
13 defective, a seller owes a duty to exercise and
14 use reasonable care, inspecting and testing the
15 product, before selling.

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

23 But defendant can, however, be liable for
24 an alleged defective product it did not design,
25 recommend, specify, require, manufacture, sell,

1 or place in the stream of commerce. In
2 deciding whether the defendant had a duty to
3 test the product, you should consider the
4 defendant's ability to conduct tests at the
5 time the product was sold.

6 A seller of a defective product has a duty
7 to warn users of the product and any dangers
8 created by the product with which the
9 manufacturer is or should be aware at the time
10 the products are sold.

11 A supplier of a product who knew or should
12 have known that the product might be dangerous
13 during its foreseeable use and has a reason to
14 believe that the ultimate user would not
15 appreciate the danger has a duty to clearly and
16 understandably warn the ultimate user of the
17 danger.

18 Now, a seller is required only to warn
19 about dangers that are unreasonable or which
20 are dangerous beyond the expectation and
21 general knowledge of an ordinary person who
22 uses the product with an ordinary common
23 knowledge about the product's characteristics.

24 In other words, there's a duty to warn not
25 when scientific certainty is established but

1 when a reasonable person would want to be
2 informed of the risks. In deciding whether the
3 directions or instructions or warranties are
4 adequate, you should consider their location,
5 language, and size.

6 Strict liability, the elements.

7 Second theory I want to go over with you
8 is strict liability. The plaintiffs' claims
9 are that the defendant should be held strictly
10 liable for the plaintiffs' injuries; and to
11 recover under the strict liability, the
12 plaintiff must prove three things by the
13 greater weight of the evidence.

14 First, the product was in a defective
15 condition, unreasonably dangerous to the
16 plaintiff.

17 Second, that at the time of the injury,
18 the product was essentially in the same
19 condition as when it left the defendant's hand.

20 Third, the plaintiffs were injured by the
21 product.

22 Strict liability means liability without
23 fault. Under the law, the theory of strict
24 liability says that, even if a defendant used
25 due care, the defendant may still be

1 responsible for the plaintiff's injuries.

2 In other words, it does not matter whether
3 the defendant was negligent or not negligent.
4 If the products were defective and unreasonably
5 dangerous whether they left defendant's hands,
6 the defendant is liable, even if all reasonable
7 care was used in making and selling the product
8 and even if the plaintiff did not buy the
9 product from any of the defendants or enter
10 into a contract with the defendant because the
11 plaintiffs do not have to show negligence under
12 the theory of strict liability. The plaintiffs
13 must only prove the product was defective and
14 unreasonably dangerous when it was placed in
15 the stream of commerce. So your focus should
16 be on the product itself and not the conduct of
17 the defendant.

18 The defect must exist at the time that it
19 leaves defendant's control. The existence of a
20 defect is crucial because a manufacturer is not
21 an insurer against all risk of injury
22 associated with the product. In a products
23 liability case against a manufacturer, the
24 plaintiffs have the burden of proving that the
25 product in question was defective at the time

1 when the defendant had possession or control of
2 it or when the product was delivered or
3 purchased.

4 There's no duty on a manufacturer to
5 furnish a product which will not wear out. A
6 party who sells a product in a defective
7 condition unreasonably dangerous is subject to
8 liability for physical harm caused to the user
9 if the manufacturer is engaged in the business
10 of producing or selling a product and it is
11 expected to reach and reaches the consumer
12 without a substantial change in its condition.

13 So if you find it was probable that a user
14 would be injured by the product and the injury
15 was not reasonably perceivable to the user, the
16 product is defective. You cannot find the
17 product is defective if it's only possible that
18 such an injury would occur.

19 In deciding whether a product is
20 unreasonably dangerous and defective, you
21 should consider the dangers that would be
22 reasonably anticipated by a typical user of a
23 product of this kind. Then you should decide
24 whether the particular product involved in this
25 case has a tendency for causing dangers beyond

1 that that an ordinary user with common
2 knowledge of the product's characteristics
3 would anticipate. And you should also consider
4 whether the dangers associated with the use of
5 the product outweigh the usefulness of the
6 product, the costs involved for adding safety,
7 and the likelihood and seriousness of the
8 injury and the obviousness of the danger.

9 Now, many products cannot be made
10 completely safe for their use. If a product is
11 useful and desirable and properly prepared and
12 manufactured and packaged and accompanied by
13 adequate warnings and instructions, they cannot
14 be said to be defective. The fact that a
15 product can be made safer alone does not make
16 the product unreasonably dangerous.

17 In order for a defendant to be
18 responsible, the product must have been in a
19 condition not contemplated by the ultimate
20 user, which would be unreasonably dangerous to
21 that user when the product was used in a
22 foreseeable manner, including any intended use
23 of the product at the time it left defendant's
24 hands.

25 Now, there are three kinds of product

1 defects: design defects, manufacturing
2 defects, and warning defects.

3 Plaintiffs allege that defendant's
4 products have all three of these types of
5 defects. You only need to find one of these
6 defects, however, to find the defendant
7 strictly liable. And I will give you
8 instructions on each one of these defects.

9 Design defect. To prove a defective
10 condition, the plaintiff must prove that the
11 defendant sold the product and at the time of
12 sale it was unreasonably dangerous to the user.
13 A defect does not have to be a manufacturing
14 error. With a design defect, there's nothing
15 wrong with the manufacturing product and the
16 product is made according to its design;
17 however, there's a flaw in the product's
18 design. The plaintiffs must prove that the
19 product as designed was in a defective
20 condition, unreasonably dangerous. The test is
21 not whether the product could be made safer but
22 whether its design was unreasonably dangerous.

23 Now, you must balance the utility of the
24 risk inherent in the design of a product with
25 the magnitude of the risk to determine the

1 reasonableness of the manufacturer's action in
2 designing the product.

3 A product is unreasonably dangerous and
4 defective if the danger associated with the use
5 of the product outweighs the utility of the
6 product. Numerous factors must be considered
7 when determining whether a product is
8 unreasonably dangerous, including the
9 usefulness and desirability of the product, the
10 cost of adding additional safety, the
11 likelihood of potential seriousness of the
12 injury, and the obviousness of the danger.

13 The plaintiff must also prove the
14 existence of a reasonable alternative design.
15 If the plaintiff does not show that the
16 defendant could have designed the product in an
17 alternative manner that would have eliminated
18 the defect, plaintiff cannot recover under the
19 claim of design defect.

20 Strict liability manufacturing defect.

21 Plaintiffs also contend that defendant's
22 products were defectively manufactured. A
23 manufactured defect exists when the product
24 doesn't conform to the manufacturer's design
25 standard and specifications and the flaw makes

1 the product more dangerous and, therefore,
2 unfit for its intended or foreseeable use.

3 This type of defect is not a defective
4 design but a defective execution of the design.
5 When a manufacturing defect is claimed, the
6 test of whether a product is or is not
7 defective is whether the product is
8 unreasonably dangerous to the consumer or user
9 given the conditions and circumstances that
10 foreseeably attend the use of the product.

11 Now, strict liability warning defect.

12 The product may also be defective if the
13 defendant failed to warn or failed to provide
14 adequate instruction to the user. Product is
15 not defective for failure to warn of the
16 obvious. Seller is not required to warn with
17 respect to products when the danger or
18 potential danger is generally known and
19 recognized.

20 A product can't be deemed either defective
21 or unreasonably dangerous if the danger
22 associated with the product is one that
23 product's users generally recognize.

24 A product may, by reason of its nature and
25 use, be -- a product may be, by reason of its

1 nature and use, unreasonably dangerous unless
2 proper instructions and warnings are supplied
3 for its intended use. In those cases, a seller
4 or manufacturer must give an appropriate
5 warning of any dangerous conditions likely to
6 be encountered. The warning must be one that
7 would cause a reasonable person to use caution
8 proportionate to the potential danger.

9 There is a particular need for sufficient
10 warning when there is a representation that the
11 product in question is not dangerous. A
12 product may be found defective if the product
13 is unreasonably dangerous in the hands of the
14 user without suitable warning. A manufacturer
15 or seller is not required to warn about defects
16 of a product unless the manufacturer knew or
17 should have known about the defects when the
18 product was sold.

19 Now, state of the art. Something you must
20 consider in assessing the defendant product and
21 conduct is the state of the art at the time the
22 products left the defendant's hands. The issue
23 of due care, as well as the breach of any
24 warranty, must be assessed in light of the
25 circumstances existing at the time of sale.

1 In order for plaintiffs to prove their
2 product's liability action, they must show the
3 product was in a defective condition at the
4 time they left the hands of the particular
5 seller. The product must be measured against
6 standards existing at the time of sale.

7 State of the art includes all the
8 reasonably available scientific knowledge on
9 the subject at the given time. And this
10 includes scientific, medical, engineering, or
11 other knowledge that may be available. State
12 of the art includes the element of time, what
13 is known, and when this knowledge was
14 available.

15 If a product is nondefective under the
16 standards existing at the time of its
17 manufacture, the manufacturer does not have a
18 postsale duty to warn. You should return a
19 verdict in favor of the plaintiffs only if,
20 considering the state of the art existing at
21 the time defendant's products were sold, the
22 product was sold in a defective condition.

23 Causation. Under any products liability
24 theory of recovery -- negligence, strict
25 liability, or fraudulent misrepresentation --

1 the plaintiff must establish that the product
2 defect was a proximate cause of the injuries
3 sustained.

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

15 In a negligence claim, plaintiffs must
16 prove by a greater weight of the preponderance
17 of the evidence that defendant's negligence
18 proximately caused an injury to the plaintiff
19 and the damages suffered were proximately
20 caused by the defendant's breach of its duty of
21 care.

22 Proximate cause is conduct that produces a
23 natural chain of events and in the end brings
24 about an injury. And it is the direct cause of
25 the injury.

1 To prove the defendant's negligence
2 proximately caused plaintiff's injury,
3 plaintiffs must first prove something called
4 causation in fact. That is proved by showing
5 the defendant's negligence was a substantial
6 factor in causing the injury.

7 The plaintiff must also prove something
8 called legal cause, and that is proved by
9 showing the injury was foreseeable. That means
10 the injury occurred as a natural and probable
11 consequence of the defendant's negligence.

12 The plaintiffs must prove that some injury
13 from the defendant's negligence was
14 foreseeable, but they do not have to prove the
15 particular injury that occurred -- the
16 particular injury that occurred was
17 foreseeable. However, a defendant cannot be
18 held responsible for something that could not
19 have been expected to happen.

20 There can be more than one cause.
21 Proximate cause does not mean the only cause.
22 Defendant's actions can be a proximate cause of
23 plaintiff's injury if defendant's conduct was
24 at least one of the direct causes of the
25 injury. Where two or more causes combine to

1 produce an injury, a defendant is not relieved
2 from liability for negligence because it's
3 responsible for only one of the causes. It is
4 sufficient that its negligence or fault is a
5 substantial factor in causing the injury.

6 Consequently, if a defendant's negligence
7 is a proximate cause of an injury to another,
8 the fact that the negligence of a third party
9 occurred with its own negligence to produce the
10 harm does not relieve it of liability. In such
11 cases each wrongdoer is in breach of the duty
12 of care owed to the plaintiff because the
13 negligence of each contributed to produce an
14 injury. They can all be liable.

15 Under South Carolina law, a defendant is
16 entitled to assert that other persons or
17 entities caused or contributed to the alleged
18 injury or damage. The matter of others'
19 alleged fault in causing the plaintiffs'
20 injuries has been raised by the defendants, and
21 it's proper for you to consider the actions of
22 others but only insofar as plaintiff have made
23 their -- have met their burden of proof.

24 Eggshell plaintiff. A defendant who is
25 negligent must take the plaintiff as he finds

1 him, even though a defendant may not have been
2 on a notice of any particular -- any peculiar
3 susceptibility to injury on the part of the
4 plaintiff. If the defendant's conduct was such
5 as to come out of a failure to exercise due
6 care to a person of ordinary susceptibility, he
7 would be liable for all damages suffered by the
8 plaintiff notwithstanding the fact that those
9 damages were unusually extensive because of the
10 peculiar susceptibility on the part of the
11 plaintiff.

12 Fraudulent misrepresentation. Fraud is an
13 intentional perversion of the truth for the
14 purpose of inducing another in reliance upon it
15 to part with some valuable thing belonging to
16 him or to surrender a legal right. Fraud is a
17 false representation of a matter of fact,
18 whether by words or by conduct, by false or
19 misleading allegations, or by concealment of
20 that which should have been disclosed which
21 deceives and is intended to deceive another so
22 that he will act upon it to his legal injury.

23 To recover for fraud, the plaintiffs must
24 have relied on the misrepresentation. In order
25 to prove fraudulent misrepresentation,

1 plaintiff must show the following elements:

- 2 1. A representation;
- 3 2. Its falsity;
- 4 3. Its materiality;
- 5 4. Knowledge of the falsity or reckless
- 6 disregard of the truth or falsity;
- 7 5. The intent that the representation be
- 8 acted upon;
- 9 6. The careless ignorance of its falsity;
- 10 7. The hearer's reliance upon the truth;
- 11 8. The hearer's right to rely; and
- 12 9. The hearer's consequent and proximate
- 13 injury.

14 Plaintiffs must prove each of these
15 elements of fraudulent misrepresentation by
16 clear and convincing evidence.

17 And I'm going to tell you about clear and
18 convincing evidence because these others have
19 to be proved by the greater weight of
20 preponderance, but when you get into fraud,
21 it's a different standard. It's called clear
22 and convincing evidence.

23 As I've explained to you, in evaluating
24 whether the defendants were negligent, strictly
25 liable, or in breach of implied warranty, the

1 burden of proof is simply the greater weight or
2 the preponderance of the evidence.

3 But plaintiffs' fraud claim must be proven
4 by higher burden -- clear and convincing
5 evidence.

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

17 Clear and convincing is something more
18 than simply the greater weight of the evidence;
19 it's something less than beyond a reasonable
20 doubt. Clear and convincing evidence is proof
21 that leaves you firmly convinced -- clear and
22 convincing proof establishes in your mind not
23 only the fact is probable but that it is highly
24 probable.

25 Actual damages, personal injury. If you

1 find the plaintiffs have met their burden of
2 proving at least one of these theories --
3 negligence, strict liability -- by the greater
4 weight of the evidence, or that the plaintiffs
5 have made their clear and convincing burden as
6 to fraudulent misrepresentation and that the
7 damages were proximately caused by the
8 defendant's conduct or product, then you would
9 move on to assess damages.

10 That is how much money the defendant
11 should be required to pay. Actual damages are
12 designed to compensate a party for their loss
13 and to make that party as a whole as -- as
14 whole -- to make the party whole as near as
15 money can do so and to put him in the same
16 position as he was or they were prior to the
17 incident or accident occurring.

18 Actual damages include actual losses and
19 expenses that the plaintiffs have suffered
20 because of defendant's wrong.

21 Actual damages include several areas that
22 are recognized by the law. In a personal
23 injury action, plaintiffs may recover necessary
24 and reasonable expenses caused by the injury,
25 such as the amounts necessary for medical

1 treatment.

2 Persons who suffer personal injury because
3 of misconduct in another is entitled to recover
4 the reasonable value of medical care and
5 expenses for the treatment of the injury at the
6 time of trial as well as those reasonably
7 certain to be incurred in the future.

8 Accordingly, a plaintiff may recover
9 amounts incurred for past and future medical
10 care, including hospital, physician, nursing
11 care costs, medicine, or other out-of-pocket
12 anticipated expenses, such as vocational,
13 physical, or other rehabilitation.

14 Pain and suffering is also an element of
15 these actual damages, and it's properly
16 considered under the law. Pain and suffering
17 compensates the plaintiff for physical
18 discomfort, emotional response to the sensation
19 of pain caused by the injury.

20 There's no definite standard I can give
21 you for determining the amount of damages.
22 You, the jury, will have to use your calm,
23 reasonable judgment to determine them in light
24 of your own experiences, in light of testimony
25 and evidence presented in this case.

1 Another form of damages is enjoyment -- is
2 loss of enjoyment of life. This compensates
3 the plaintiff for limitations on the ability to
4 participate in and derive pleasure from normal
5 activities of daily life.

6 Another category is mental suffering, that
7 is, compensation for shock, fright, anxiety,
8 emotional upset.

9 Actual damages for the plaintiff who has
10 been physically injured include pain and
11 suffering both past and future as well as
12 mental anguish. Mental anguish is something
13 more than mere disappointment or anger or worry
14 or embarrassment or resentment.

15 While it may include all of these, it also
16 includes the mental sensation of pain resulting
17 from painful emotions such as grief, wounded
18 pride, shame, disparagement and humiliation.
19 It may also be composed of fright, nervousness,
20 grief, anxiety, and worry from an ordeal.

21 Actual damages, loss of consortium.
22 Plaintiffs also claim loss of consortium
23 damages due to the injuries received by Michael
24 Perry's husband, Lonnie Long.

25 The companionship or the society of a

1 spouse are not articles of commerce that can be
2 weighed or measured or bought or sold. No
3 expert is competent to testify as to their
4 value, and there is nowhere we can go to
5 determine their market price, of course. And
6 consideration on which they're based is not
7 monetary.

8 But Lonnie Long is entitled to
9 compensation and money for his loss. Loss of
10 consortium includes affording services provided
11 by the other spouse, love and companionship,
12 affection, society, sexual relations, comfort,
13 solace, and guidance. Plaintiff Lonnie Long is
14 entitled to recover the value of those services
15 of Michael Perry which have been lost,
16 including the loss of his society and
17 companionship in his home.

18 Now, future damages. In determining the
19 amount of compensation for someone personally
20 injured by another's conduct, it is proper to
21 consider past, present, and future aspects of
22 the injury. The injured party may recover
23 those future damages that are reasonably
24 certain to result.

25 The principle underlying the compensation

1 is -- there's only one action that can be
2 brought and therefore only one recovery had.
3 So it may be, depending on your view of the
4 evidence, proper to consider future damages,
5 future medical expenses, pain and suffering
6 that will, with reasonable certainty, result.

7 The plaintiff is never entitled to recover
8 speculative damages, and that is damages that
9 you arrive at by guesswork.

10 The plaintiff has a burden of proving the
11 existence and causation and the amount of
12 damages, which he does not have to prove to a
13 mathematical certainty. Instead, the plaintiff
14 must present to you evidence that's sufficient
15 to allow you to make a reasonable approximation
16 of damages. That is, plaintiff must prove the
17 damages to a reasonable degree of certainty.

18 Any future damages you award must be
19 reasonably calculated to -- as a result of the
20 alleged injury or damage sustained, and they
21 must be reduced to their present cash value.

22 I will charge you in this case that
23 Michael Perry is a 54-year-old male with a life
24 expectancy, according to the South Carolina
25 Code of Laws, of 25.65 years. This is a factor

1 you may consider along with any other facts and
2 circumstances that may bear on his health and
3 longevity, including his occupation, habits,
4 and health.

5 Willful and wanton and reckless conduct.
6 There's one question on the jury form that asks
7 about willful, wanton, or reckless conduct. A
8 defendant's conduct is reckless or willful or
9 wanton if there was a conscious failure to
10 exercise due care or conscious indifference to
11 the rights and safety of others or reckless
12 disregard to the rights and safety of others.

13 This must be established by clear and
14 convincing evidence, which is something more
15 than simple greater weight of the evidence and
16 something less than beyond a reasonable doubt.

17 Clear and convincing proof is proof that
18 leaves you firmly convinced. Clear and
19 convincing proof establishes in your mind not
20 only that a fact is probable but that it is
21 highly probable.

22 Jury deliberations. Now, I'm through with
23 my instructions on the law. And I just want to
24 give you some final instructions on your
25 deliberation.

1 Before we do that, I want to remind you
2 that you were chosen in this case not to be
3 partisans or advocates for either the plaintiff
4 or defendants.

5 You were chosen because all of them
6 believed you could be fair and reasonable. You
7 could be a juror who can decide this case
8 without any kind of bias or prejudice.

9 So you're the judges, the judges of fact.
10 And your sole interest is to determine the true
11 facts from the evidence in this case and take
12 the law as I just gave it to you and apply it
13 to those facts. And you will ultimately be
14 able to reach a verdict.

15 You should know that the record is closed
16 now. There's not going to be any more
17 witnesses. There's not going to be any more
18 exhibits. So if something was referred to
19 during the trial such as a particular document
20 and you don't have it back there as an exhibit,
21 I can't give it to you now. But you're going
22 to have all the exhibits, of course, that have
23 been introduced. They will go back into the
24 jury room with you.

25 So keep in mind the record is closed. You

1 have to make your decision based on the
2 exhibits you have and your memory of the
3 evidence.

4 A jury, if you look up the word in the
5 dictionary, would be defined as a company of
6 people sworn to render a true verdict. And
7 that is what you've been called upon to do, to
8 determine the true facts of this case.

9 Ladies and gentlemen, you each have a vote
10 in this case. Your vote is actually that.
11 It's your vote and no one else's vote. Don't
12 be afraid to change your mind if the discussion
13 you're going to have persuades you that you
14 should because that's what deliberation is all
15 about.

16 But don't surrender an honestly and
17 conscientiously held belief simply to get this
18 case over with or to reach a unanimous verdict
19 because these parties have waited a long time,
20 and this is their day in court. And I know you
21 recognize the importance of it to them. And we
22 appreciate the seriousness and respect you have
23 shown everyone in this case and your patience
24 with all of us.

25 The verdict form. Now, the verdict form

1 I'm going to go over with you briefly.

2 Under the constitution of this state, a
3 jury verdict must be unanimous. And unanimity
4 is mandated. Every single juror must agree on
5 the jury verdict. It can't be any split or
6 divided vote in any form or fashion, so 11 to
7 1, 10 to 2, 9 to 3. Every juror must agree on
8 the jury verdict.

9 And when the foreperson of the jury -- and
10 that is you, Madam Foreperson. When you write
11 down what the verdict is -- that's what you'll
12 do after all have voted on the various things
13 that are on this jury form -- and sign your
14 name, that assures this Court that the verdict
15 is a unanimous verdict.

16 Now, I thank you all for your attention to
17 me and your patience with me. Don't start
18 deliberating about this case until you receive
19 the exhibits. That will be your signal that
20 you can start talking about this case.

21 Believe it or not, as long as I've been up
22 here talking, I may have left something out.
23 If I have, my friends the lawyers will be quick
24 to remind me of that.

25 So what I want you to do is go back to

1 your jury room. When you get the exhibits,
2 that will be your sign that you can begin to
3 deliberate. And I will also have the first
4 bailiffs and court personnel deliver to you so
5 you each will have a copy of the verdict form
6 and a copy of these charges that I have just
7 read to you.

8 So with that, you may go to your jury
9 room. Please do not deliberate until all of
10 these materials have been placed in your jury
11 room. Thank you very much.

12 Mr. Bailiff, I know you're going to take
13 our very patient friends who are the alternates
14 into a place --

15 THE BAILIFF: We're going to put them next
16 door right here.

17 THE COURT: Alternates, if you would stay
18 in place.

19 Jury, if you will depart.

20 And then they'll take you, my friends the
21 alternates, into a separate room now.

22 Mr. Bailiff, these alternates may want to
23 go into the jury room and get materials that
24 they have in there that they would like to
25 have. So all may go to the jury room to begin

1 with, including the alternates, and then you
2 show them where they are to then sit. Make
3 sense?

4 Very good.

5 (The jury exited the courtroom at
6 this time.)

7 (The following proceedings were held
8 outside the presence of the jury:)

9 THE COURT: Before you finish -- please be
10 seated.

11 All right. I'll turn first to the
12 plaintiffs.

13 Plaintiffs?

14 MS. MCVEY: No issues from us, Your Honor,
15 other than what was previously raised.

16 THE COURT: Thank you.
17 Defense? Mr. Brown?

18 MR. BROWN: Yes, Your Honor. Thank you.

19 We think there is a problem here, Your
20 Honor, because of the overruling of Ms. Bueno's
21 objection which went to a law issue which
22 belongs solely to the Court.

23 Ms. Bueno objected to the closing argument
24 that the only way that our client would win is
25 if it had zero role. And the Court overruled

1 that objection.

2 And the Court's charge tells the jury
3 that, once the Court has made a ruling, the
4 jury is bound by that and so on.

5 So this is, Your Honor, prejudicial to us
6 because we don't think that is the law. And
7 I'd like to tell you quickly why. In the *Glenn*
8 case --

9 THE COURT: Well, before you get there,
10 let me just stop you for a moment.

11 Number one, the jury heard none of what
12 the basis for the objection was. That was at
13 sidebar. They didn't hear zero role or
14 anything else.

15 I overruled the objection because there
16 was not some suggestion of zero role. I did
17 not interpret the argument to be that way. And
18 therefore, I did not think it was supported.

19 You are objecting to something that had
20 been said, and I did not agree with your
21 interpretation of what had been said. And on
22 that basis, I denied your motion.

23 MR. BROWN: Your Honor, we --

24 THE COURT: And I understand you may see
25 it differently, and you can put on the record

1 briefly what you think.

2 MR. BROWN: Very briefly.

3 THE COURT: Yes, sir.

4 MR. BROWN: Anything that is essentially
5 the same which Mr. Adams, we think, said, such
6 as any part of a cumulative dose, that is
7 essentially the same as anything more than
8 zero, which is what we object is not the law.

9 And the reason it's not the law is the
10 *Glenn* case itself says that if other actors'
11 conduct is the predominant factor in bringing
12 the harm at issue, then the defendant's action
13 is not -- underlining that word -- a
14 substantial factor in causing the harm.

15 So Mr. Adams' recitations that anything
16 more than zero or any part of a cumulative dose
17 is a substantial factor is just not consistent
18 with the law, Your Honor.

19 THE COURT: All right.

20 Go ahead, Ms. McVey.

21 MS. MCVEY: Your Honor, you charged the
22 jury properly on the law.

23 THE COURT: No question about that. I
24 charged them extensively about substantial
25 factor, a cause, et cetera, et cetera.

1 MS. MCVEY: A hundred percent. We had
2 expert testimony saying that Mr. Perry's
3 exposure to Johnson & Johnson Baby Powder was a
4 substantial factor.

5 THE COURT: Correct.

6 MS. MCVEY: The idea of cumulative dose is
7 a scientific fact. That was established in
8 *Glenn* and *Jolly* and every other case that's
9 been decided. This is an argument they are
10 making right now that maybe they can take up on
11 appeal and make it.

12 But for purposes of our jury charge and
13 when the jury can start deliberating, that time
14 is now. This is not going into that.

15 THE COURT: I agree. And, again, I think
16 they have on the record very much so. When
17 Ms. Bueno made the objection, she articulated
18 it on the record.

19 I did not allow the jury to hear all of
20 that. And, again, I didn't think that's what
21 had been said. But in the meantime, I then
22 charged the jury as I charged the jury.

23 I believe if there was any slight issue
24 there, the combination of what I explained
25 about the weight to be given to arguments to

1 the jury as well as what I explained about the
2 law itself cured any potential problem in that
3 regard.

4 Now, I understand the defendants think
5 differently, and I respect that. And I believe
6 your objection is fully preserved. So I don't
7 think it was improper for them to raise it
8 again. I have no dilemmas with that at all.

9 MS. MCVEY: Thank you, Your Honor.

10 THE COURT: Thank you. Is there anything
11 else?

12 MS. FLYNN: Yes, I have one. For Charge
13 Number 4, Your Honor, this relates to the
14 stipulation.

15 THE COURT: Just a second. Charge
16 Number 4, economic loss.

17 MS. FLYNN: Yes, Your Honor. During the
18 middle of the charge you inserted some language
19 that said, "If you add those figures together,
20 those are what you award." And what you --

21 THE COURT: No, no. I did not say that.
22 I absolutely disagree with that. They had been
23 shown up on the thing a figure for economic
24 loss that was different from that number. And
25 I simply told them that the figure they had

1 been shown was the combination of the
2 \$3,329,000 figure and the \$510,000 figure.

3 I made it abundantly clear to them that
4 they can award anything or nothing. It's up to
5 them.

6 But I simply, since it had been put up --
7 a number that was different from that
8 \$3,300,000 number, I explained to them that the
9 figure on the board was a combination of those
10 two figures. And I believe that to be correct
11 to the penny. So I overrule your objection.

12 MS. FLYNN: Your Honor, if I may, I think
13 the stipulations were to past medical expenses.
14 The number put up on the record included
15 additional future medical expenses.

16 THE COURT: That was not in what I'm
17 talking about. And I know what I'm talking
18 about. They put up several different figures.

19 But one of the figures they put up was
20 past economic loss and current medical
21 expenses. And the combination of those two
22 figures was put up on the board. And that is
23 what I was explaining to the jury.

24 So I, again, overrule your objection.

25 MS. FLYNN: Your Honor, the only thing I

1 would ask would be for a curative instruction
2 that would say that the \$510,000 is included in
3 the stipulation that J&J made, that 3.3.

4 THE COURT: No, I didn't say that; I said
5 it was the addition of those two things.

6 I'm not going to do this anymore,
7 Ms. Flynn. I think you have very adequately --
8 I'm not going to bring this jury out again and
9 instruct them on this. So I note your
10 objection, and I overruled it.

11 MS. FLYNN: Thank you, Your Honor.

12 THE COURT: All right. Anything else?

13 MS. MCVEY: Not from the plaintiffs.

14 THE COURT: My dear bailiffs, you may take
15 the exhibits and the verdict forms and the
16 charges to the jury. And I know the clerk will
17 help you.

18 THE BAILIFF: Yes, ma'am.

19 (Whereupon there was a recess in the
20 proceedings from 3:44 p.m. to 5:16 p.m.
21 while the jury deliberated.)

22 THE COURT: Listen up. I've got two notes
23 from the jury.

24 Note Number 1, "Judge, it seems clear that
25 we will not be reaching a verdict in the next

1 hour or two. As a result, we would like to
2 know the process for if/when we adjourn for the
3 evening and how the process goes from here.
4 Thanks for any insight. Juror 31," the
5 foreperson of the jury.

6 And this second note is kind of related to
7 that.

8 It says, "I wanted to ask, if we don't
9 finish today, is it possible for us to start a
10 little later, about 10:00 a.m. I have a very
11 important doctor's appointment that I need to
12 attend for a procedure I have coming up on the
13 26th. If I miss this appointment, I won't be
14 able to obtain my procedure I had planned for a
15 few months. Appointment is for some abdominal
16 lab results, Number 37, Brandy Brown."

17 So let's go to the first one and talk
18 about this a little bit.

19 What they're saying -- the first thing
20 they say is, "Judge, it seems clear that we
21 will not be reaching a verdict in the next hour
22 or two." Okay. It's 5:20 now.

23 I generally have followed the practice, as
24 you know, of trying to let jurors go about 5:30
25 unless there's some reason to believe that

1 things can move along. I don't think there's
2 any reason to believe things are going to move
3 along quite that quickly. So my inclination
4 would be to have them come back.

5 Now, when we -- we'll talk about Brandy
6 Brown in a minute. We could -- I don't want to
7 restrict her in any way. And, frankly, I would
8 go on and let her go and put in an alternate so
9 she can be sure that there is no kind of issue.

10 MS. MCVEY: Judge, I think we can start at
11 10:00 to accommodate her.

12 THE COURT: We could start at 10:00. I
13 just want to have some clarity that that is
14 absolutely going to be okay because I don't
15 want her to try to rush things.

16 Obviously, she's going to get some tests
17 done, and then she can leave. I mean, we all
18 have had operations before. We know how that
19 is. That's not going to be any long office
20 visit. It's going to be whatever lab work
21 needs to be put into motion is what I'm
22 guessing.

23 So if y'all don't mind starting at 10:00,
24 we can certainly do that.

25 MS. MCVEY: We don't mind at all starting

1 at 10:00.

2 THE COURT: We've got Thursday and Friday.

3 So I first turned to Ms. McVey. And what
4 I hear you saying, Ms. McVey, is that it would
5 suit you to let them go now and then come back
6 at 10:00.

7 MS. MCVEY: Absolutely.

8 THE COURT: I now go to you, Ms. Bueno, or
9 anybody that would like to speak on y'all's
10 behalf.

11 MS. BUENO: I think that's fine, Your
12 Honor. I agree that we should get some clarity
13 to make sure 10:00 a.m. is a realistic start so
14 we have that information. But assuming she can
15 be here at 10:00, I think that's great.

16 THE COURT: Bring me the jury, including
17 the alternates. Let's seat them, and then
18 we'll have just a little bit of confab before
19 we deal with this.

20 THE CLERK: Yes, Your Honor.

21 THE COURT: Be at ease.

22 (The jury entered the courtroom at
23 this time.)

24 THE COURT: All right. You're bringing
25 the alternates in as well.

1 THE BAILIFF: Yes, ma'am.

2 THE COURT: They're coming in this way.

3 THE BAILIFF: Jury is all seated.

4 THE COURT: Thank you very much, members
5 of the jury. The first inquiry -- and I just
6 put it in the record and I'll tell you what
7 we've come to on this. This says, "Judge, it
8 seems clear that we will not be reaching a
9 verdict in the next hour or two. As a result,
10 we would like to know the process if/when we
11 adjourn for the evening and how the process
12 will go from here. Thanks for any insight.
13 Your foreperson."

14 It is now almost 5:25; and as you know, my
15 preference has been every day to have 5:30 be
16 kind of a cutoff thing, and I presume that's
17 why this note has come at this moment in time.

18 I have asked the plaintiff and defendant,
19 and they are perfectly willing to have you go
20 now. So that's no problem.

21 Now, we have one other thing that has been
22 asked of one of you jurors who said, "I want to
23 ask, if we don't finish today, is it possible
24 for us to start a little later, about 10:00? I
25 have an important doctor's appointment that I

1 need to attend for a procedure coming up."

2 She's got labs, apparently, to be done.

3 And here's what I have to say about that.

4 We will start at 10:00. That's not a problem.

5 But also I want to tell the juror who has made
6 the inquiry that not to feel rushed because we
7 do have alternates. And if you -- it turns out
8 that the unexpected develops and you cannot be
9 here by 10:00, then we can just use one of our
10 alternates. So be peaceful about that and do
11 what your doctors want you to do about the test
12 that you need to have for your procedure.

13 Is there any -- is anyone unclear about
14 what I have said?

15 Madam Foreperson, is that an adequate
16 answer to your question?

17 JURY FOREPERSON: We're good.

18 THE COURT: You're good? All right. Then
19 we'll see you at 10:00. And, again, for our
20 juror that has to have some preliminary tests,
21 I've been through all that myself many times,
22 know exactly how it is. You think you're just
23 going to go in and out, but sometimes it
24 doesn't work that way. Please have the comfort
25 of knowing that, if something unexpected

1 happens, we can use one of our alternates.

2 All right. You are dismissed for the day.

3 See you tomorrow morning. Hope you have a
4 pleasant evening. Now, of course, as you know,
5 please don't discuss the case. Please don't do
6 any independent research. And do have a
7 pleasant evening.

8 (Jury exited the courtroom at this
9 time.)

10 THE COURT: I'm going to give these notes
11 to the court reporter.

12 - - -

13 (Court's Exhibit 27 admitted into
14 evidence.)

15 - - -

16 (Court's Exhibit 28 admitted into
17 evidence.)

18 - - -

19 THE COURT: All right. My lawyers, you do
20 have a pleasant evening, and I hope it's not
21 quite as much of a scramble as it has been in
22 the late evening, early morning for you
23 throughout the trial so far. Put your feet up,
24 relax, maybe have a libation.

25 MS. BUENO: The Court too.

1 THE COURT: Have a pleasant evening. If
2 it turns out to be anything where there's
3 anything to be done, I will certainly be here
4 around 9:00 or so. I've got -- Tasha and I
5 have some things we've got to clear out of our
6 queue anyway. So I'll be around. If it turns
7 out that something comes up that you think
8 needs to be covered, just let me know. Text me
9 or call me. Y'all have my cell phone number,
10 have you?

11 MS. MCVEY: Yes, ma'am.

12 THE COURT: You just communicate as you
13 will if something comes up that you need my
14 assistance on.

15 Have a pleasant evening. Y'all, I just
16 have so much admiration for the way both sides
17 have handled and the approach you've taken to
18 this case. It's a high degree of
19 professionalism that judges like me in a small
20 state like this are not lucky to see all the
21 time. So I really appreciate the experience
22 I've had while having you try this very
23 complicated matter in front of me. And I thank
24 you for it.

25 - - -

1 (Proceedings were adjourned at 5:25 p.m.)

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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 14th 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

EXHIBIT 8

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 8

DATE TAKEN: Thursday, August 15, 2024

TIME BEGAN: 10:00 a.m.

TIME ENDED: 5:28 p.m.

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

REPORTED BY: Cynthia First, RPR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

APPEARANCES:

DEAN OMAR BRANHAM SHIRLEY, LLP
BY: RACHEL A. GROSS, ESQUIRE
BY: BENJAMIN H. ADAMS, ESQUIRE
BY: JONATHAN A. GEORGE, ESQUIRE
302 North Market Street, Suite 300
Dallas, Texas 75202
214-722-5990
rgross@dobslegal.com
badams@dobslegal.com
ageorge@dobslegal.com

and

KASSEL MCVEY
BY: THEILE B. MCVEY, ESQUIRE
BY: JAMIE RUTKOSKI, ESQUIRE
1330 Laurel Street
Columbia, South Carolina 29202
803-256-4242
tmcvey@kassellaw.com
jrutkoski@kassellaw.com
Representing the Plaintiffs

NELSON MULLINS RILEY & SCARBOROUGH, LLP
BY: C. MITCHELL BROWN, ESQUIRE
BY: MATTISON BOGAN, ESQUIRE
Meridian, 17th Floor
1320 Main Street
Columbia, South Carolina 29201
803-7900-2000
mitch.brown@nelsonmullins.com
matt.bogan@nelsonmullins.com
Representing Defendants Johnson & Johnson; LTL
Management, LLC; J&J Holdco (NA), Inc.; Janssen
Pharmaceuticals, Inc.; and Kenvue, Inc.

APPEARANCES (Continued)

BUTLER SNOW

BY: KIM BUENO, ESQUIRE

BY: CHRISTOPHER R. COWAN, ESQUIRE

BY: AMY M. PEPKE, ESQUIRE

1400 Lavaca Street, Suite 1000

Austin, Texas 78701

737-802-1820

kim.bueno@butlersnow.com

chris.cowan@butlersnow.com

amy.pepke@butlersnow.com

Representing Defendants Johnson & Johnson; LTL
Management, LLC; J&J Holdco (NA), Inc.; Janssen
Pharmaceuticals, Inc.; and Kenvue, Inc.

FOX ROTHSCHILD

BY: STEPHANIE G. FLYNN, ESQUIRE

BY: NICHOLAS J. CHERRY, ESQUIRE

2 West Washington Street, Suite 1100

Greenville, South Carolina 29601

864-751-7607

sgflynn@foxrothschild.com

ncherry@foxrothschild.com

Representing Defendant American International
Industries

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P R O C E E D I N G S

(The following discussion was held
outside the presence of the jury:)

THE COURT: This is a note from one of the
jurors. This is 355. She says: "Dear Judge
Toal, I am a Master's student at Clemson
University, and I am currently working on my
thesis. I am having to grow flowers
hydroponically in our lab, and one of my
classmates reached out to me to say they were
dying. I would really appreciate if I could be
excused today so I can get back to Clemson as
soon as I can and try to salvage my plants.
These have taken me months of work as I've had
to track all of their water/energy/nutrient
intake, and I'm worried if I don't get back
ASAP, they might wilt further.

"On a side note, thank you for looking out
for us, the jurors, the past two weeks. It has
been a very interesting experience. I am not
sure if it changes anything, but I am an
alternate juror.

"Thank you, Mary Kathryn Gillespie."

1 And, of course, I will dismiss her. Bring
2 Ms. Gillespie out.

3 THE BAILIFF: Yes, ma'am.

4 (Juror No. 355 entered the courtroom at
5 this time.)

6 THE COURT: Good morning, Ms. Gillespie.
7 I've read your note to counsel, of course. And
8 I can't get you out of here quickly enough. I
9 understand completely. And I hope you drive
10 safely up to Clemson and are able to get your
11 plants back to where they need to be.

12 JUROR NUMBER 355: We present to a sponsor
13 tomorrow on our thesis research.

14 THE COURT: No, no, no.

15 JUROR NUMBER 355: I'm stressing out.

16 THE COURT: Quite honestly, it wouldn't
17 make any difference whether you were an
18 alternate or regular juror. I absolutely will
19 dismiss you from your service. And thank you
20 very much for everything you've done to help us
21 out with this. Your role is a very important
22 one. Thanks for the kind words in the note.
23 So take care.

24 JUROR NUMBER 355: Thank you. I
25 appreciate it.

1 THE COURT: You're dismissed.

2 JUROR NUMBER 355: Thank you.

3 - - -

4 (Court's Exhibit 29 admitted into
5 evidence.)

6 - - -

7 THE COURT: Now, give me a minute more.

8 MS. MCVEY: Judge, I'm just wondering, if
9 the jury is here, can we bring them out and do
10 whatever you're going to do, then let them go
11 to start deliberating while we argue the
12 mistrial motion?

13 THE COURT: Yes, of course.

14 THE CLERK: The one juror who is at the
15 medical appointment, I've got in contact with
16 them, and they're now leaving. They're in
17 Lexington.

18 THE COURT: Where is she leaving, in
19 Lexington?

20 THE CLERK: Yes, ma'am.

21 THE COURT: That's too far away. You call
22 her back and tell her I will dismiss her.

23 THE CLERK: Okay.

24 MS. MCVEY: I think we should wait.

25 THE COURT: I don't want to do that. I

1 don't know what traffic is like in Lexington
2 coming here. We've got two more alternates.

3 MS. MCVEY: I know, but they haven't been
4 in the deliberations, and so they may have to
5 start over.

6 THE COURT: They're going to have to start
7 over.

8 MS. MCVEY: Respectfully, we would request
9 that we wait.

10 THE COURT: Well, I hear you. I mean,
11 Lexington, it's going to take her another 30
12 minutes to get here, wouldn't you think?

13 THE CLERK: 20 to 30 minutes possibly.

14 MS. MCVEY: I think that's better than
15 starting over.

16 THE COURT: We're going to lose a lot of
17 steam by starting over with whatever they did.
18 I mean, they have about an hour and a half of a
19 go at it. I don't see that as any big deficit
20 personally.

21 MS. MCVEY: Comparing an hour and a half
22 to 20 minutes, I just think it makes sense to
23 wait.

24 THE COURT: I'm going to turn to
25 Ms. Bueno. Ms. Bueno.

1 MS. BUENO: I think that it probably makes
2 sense to get them started. I worry about her
3 getting here late and having, you know,
4 delayed --

5 THE COURT: I mean, we can't get them to
6 start until she gets here. If we don't go on
7 and dismiss her and put somebody else in there,
8 we're going to lose all that time. You're not
9 saving any time by doing that because we can't
10 get started.

11 MS. BUENO: And given that we have two
12 alternates still, you were kind enough to give
13 us four. So we're in a position --

14 THE COURT: With respect, Theile, I don't
15 think I'm going to accede to that.

16 MS. MCVEY: I understand. I will say that
17 I have -- I extremely -- I really do object to
18 that. You're talking about an hour and a half
19 of deliberation versus waiting 20 to 30
20 minutes, and that math doesn't track.

21 And so respectfully we would ask that you
22 wait. She said she wanted to come back. She's
23 been a part of the jury. I think we ought to
24 give her a chance to do it. And I don't mean
25 to be difficult with the court.

1 THE COURT: You're being difficult.

2 MS. MCVEY: I'm being difficult?

3 THE COURT: Yes.

4 MS. MCVEY: Okay.

5 THE COURT: With peace and love and all
6 respect.

7 MS. MCVEY: This jury has been sitting
8 here for almost two weeks. She has been in
9 this courtroom. She's indicated she wanted to
10 come back and deliberate. We think we ought to
11 give her a chance to do that. I don't mean to
12 be difficult, but I think it's --

13 THE COURT: I hear you. Of course, you're
14 all difficult. Now I've got another mistrial
15 I've got to mess with.

16 MS. MCVEY: I only filed one motion for
17 mistrial.

18 THE COURT: I got that.

19 Here's what I'm going to do. We'll let
20 them sit there for a little bit longer. I'm
21 not going to decide what I'm going to do.
22 Let's see what happens in the next 20 minutes.
23 Meanwhile, I'm going to talk about this
24 mistrial thing for a little bit.

25 MS. MCVEY: That would be great.

1 THE COURT: Now, give me a moment and let
2 me complete my perusal of this thing.

3 And I can tell you right now without
4 completely finishing this, I'm not going to
5 allow them to continue to deliberate until I
6 decide this mistrial motion. So that's the
7 first thing I say.

8 This mistrial motion also carries with it
9 objections to the charges and it cites cases
10 that say that if the judge doesn't correct it.
11 So I've got to decide whether I'm going to
12 correct it with additional charges and have
13 them begin deliberations again. So that solves
14 my problem with the juror thing.

15 What I've got to do is hear this mistrial
16 motion, and I am going to hear this mistrial
17 motion right now.

18 And I say that without making a
19 determination as I sit here as to whether or
20 not all of what was done when the mistrial
21 motion was made before, and I then charged the
22 jury is preserved given some of the arguments
23 that are being made now, which seem to me to be
24 very additional to what was said when we were
25 talking about the charge and so forth. We're

1 going to go through this thing and see exactly
2 what's to be done.

3 Ms. Pepke, are you the one that's going to
4 be arguing this?

5 MS. PEPKE: I believe so.

6 THE COURT: Come on forward.

7 MS. PEPKE: Thank you, Your Honor. May it
8 please the court.

9 THE COURT: You've got a lot of things put
10 in here. And the first one you've got saying
11 he misstated substantial factor to the jury,
12 and then you get into several issues with
13 regard to charges.

14 So let's start with what was said.

15 MS. PEPKE: Yes, Your Honor.

16 So this does stem from an objection we
17 made during closing that was overruled. But
18 upon receiving the transcript, it was very
19 clear what had happened; and so we wanted to
20 bring it to Your Honor's attention.

21 THE COURT: Yeah, that's what's got me
22 in --

23 MS. PEPKE: So that's what triggered --

24 THE COURT: That's what worries me a
25 little bit, because these arguments were not

1 made in this depth -- let's put it that way --
2 when we had a sidebar. And now you've had the
3 benefit of a transcript and are asking for a
4 do-over of the mistrial motion that you made
5 then. You made a mistrial motion then.

6 MS. PEPKE: We did.

7 THE COURT: And I ruled on it. And now
8 you're seeking a do-over because you've got a
9 transcript and you've got a lot of other things
10 you think support it. Whether that's the right
11 thing or the wrong thing, I don't know, but
12 that's got me -- gives me a little bit of angst
13 because it puts me in the position of projected
14 to have made a mistake that you can examine
15 after the fact of the ruling. But I don't get
16 to have that privilege because I'm tied to what
17 I did at the time. So I need for you to come
18 up while I address that with you.

19 MS. PEPKE: Let me see if I can address
20 that, Your Honor.

21 THE COURT: Good.

22 MS. PEPKE: So I think, first of all, I'm
23 going to reframe it a little bit. What we
24 heard was that we heard at the time that
25 counsel for plaintiff says to the jury, "Do

1 y'all understand that the only way that they,"
2 meaning Johnson & Johnson, "win is if they
3 played zero role?"

4 We objected at the time, and there was a
5 sidebar. And at the sidebar, there appeared to
6 be some confusion over what maybe the court
7 heard versus what we thought we heard. And our
8 objection was overruled based on, I believe,
9 the court's understanding that he didn't quite
10 say that or he didn't --

11 THE COURT: That's right. And that was my
12 understanding at the time.

13 MS. PEPKE: And of course we disagree.
14 And then when we received the transcript last
15 night, it was confirmed that what we heard is
16 exactly what was said to the jury.

17 And so we thought it appropriate to bring
18 that to Your Honor to confirm, yes, what we
19 heard was exactly what was said. And it is a
20 complete misstatement of the law.

21 And then because the objection was
22 overruled, it left the impression with the jury
23 that the court had approved of what he said.

24 THE COURT: See, there's where I think
25 you've got to be careful. Those side bars were

1 deliberately done out of the presence of the
2 jury. They were sitting there, but they heard
3 nothing about zero and any of that kind of
4 stuff, the argument of why a mistrial motion
5 was made. All they heard was "objection; we
6 have a motion." And then I took you to the
7 sidebar, and I do that deliberately. I don't
8 like to send them in and out, but I don't let
9 them hear all of that.

10 MS. PEPKE: With respect, Your Honor, they
11 knew exactly what the problem was.

12 THE COURT: I don't think so, and I
13 absolutely will tell you I reject that as any
14 valid thing. I deliberately shielded the jury
15 by going to a confidential sidebar. And I do
16 not think they had any exposure to the grounds
17 for your motion for mistrial.

18 MS. PEPKE: Well, for the record, I'll go
19 on and state our request would be that they be
20 given an instruction that there was a
21 misstatement of the law by plaintiffs' counsel
22 during closing, and because of that, you are
23 clarifying what substantial cause means and
24 that you read the quote from the Glenn case
25 that substantial cause, the pertinent --

1 THE COURT: You've got substantial factor,
2 and then you've got causation.

3 MS. PEPKE: Yes, substantial factor. And
4 others' conduct is the predominant factor in
5 bringing you the harm at issue, and the
6 defendants' action is not a substantial factor
7 in causing the harm.

8 That would be our request, that that
9 curative instruction be read.

10 THE COURT: And, of course, I'm going to
11 hear from the plaintiffs, but I can tell you
12 that I'm very inclined to do that.

13 MS. MCVEY: No.

14 THE COURT: Don't be saying anything yet,
15 Ms. McVey. You're going to have to listen.

16 Mr. Adams went close to the line several
17 times during this thing with pejorative
18 adjectives used and things of that nature.
19 That flirts with things that are going to put
20 the record in a problem. I'm not trying to
21 punish you. Frankly, I'm trying to save your
22 case by correcting that in front of the jury.

23 Now that I've seen this thing, zero factor
24 is not the test. Now, I'm going to hear from
25 you about how that can legitimately be used.

1 And I'm not going to hear from you now, because
2 Ms. Pepke is still telling me about this thing.
3 But I would be very inclined to give them an
4 instruction and tell them to start over.

5 MS. PEPKE: That is our position. We
6 think it's supported by the case law. We have
7 a case cite in here where a similar
8 misstatement of the law was given and not
9 corrected.

10 THE COURT: It's Simmons. It was a
11 criminal case.

12 MS. PEPKE: It was a criminal case.

13 THE COURT: And no curative instruction
14 was given. And that was the basis for the
15 court's ruling that it couldn't be cured now
16 because they pointed out the error, and I think
17 they may have even made a request and the judge
18 wouldn't do it. I think there's a way to cure
19 that.

20 MS. PEPKE: Right, which is why we felt we
21 had to file it.

22 THE COURT: I'm not fussy about that.

23 MS. PEPKE: And then, of course, the
24 second issue in the motion is, as you pointed
25 out, it's the same issue we raised in the past,

1 but also is now confirmed after we read the
2 transcript, and the multiple references by
3 plaintiffs' counsel using the very inflammatory
4 language and pejorative terms throughout
5 closing, that clearly were headed in asking for
6 punitive damages without using the actual word
7 "punitive." So that was simply an end run
8 around it to inflame the jury, accusing us of
9 heinous acts, of killing -- and all sorts of
10 references to harm to other people, which, of
11 course --

12 THE COURT: What are you talking about
13 there?

14 MS. PEPKE: When he went through the
15 litigation against -- that we had denied that
16 we had been doing this in the past litigation,
17 in harming other people, and we were lying
18 while we were killing people.

19 THE COURT: I don't recall lying while
20 we're killing people.

21 MS. PEPKE: It was lying. There was.
22 And, Your Honor, for those reasons we would
23 reurge the court to give consideration to
24 instructing the jury about the difference
25 between actual damages and punitive damages,

1 and that punitive damages are not to be
2 considered in this stage of the trial. We
3 submitted -- in our original request for
4 charge, there was an instruction titled No
5 Punitive Damages that we would reurge.

6 THE COURT: Do you have that attached to
7 this or can you supply it?

8 MS. PEPKE: I don't think it's attached,
9 but I do have it here. I might have my notes
10 all over it.

11 THE COURT: We'll get to that. I mean,
12 I'm just saying before I make a complete
13 decision on that, I want to look at that and
14 see what that would say.

15 So basically your motion is a motion for
16 mistrial on two bases. One, they played zero
17 role, and other arguments surrounding that by
18 Mr. Adams is in direct conflict with the
19 substantial factor. And I think you also made
20 the argument that it also gets into the each
21 and every exposure thing where our court has
22 said cumulative factor is okay, but each and
23 every exposure's got its problems.

24 MS. PEPKE: That is correct.

25 THE COURT: And I understand all that.

1 MS. PEPKE: Right. And as to the second
2 part of the motion, the punitive versus actual
3 damage, I also was referring to reference to
4 harm to other people, the continual vein of
5 harming babies, the implication that we were
6 directing these actions towards babies and our
7 conduct was hurting babies. Clearly
8 inflammatory.

9 THE COURT: Well, let me see if I -- let
10 me parse this just a little bit and see if I
11 understand the argument. All right. Is it
12 your argument that it is completely improper to
13 say that the conduct that they allege J&J
14 engaged, which was knowing that they had
15 asbestos in their product and doing anything
16 about it, not taking it off the market or being
17 more assiduous about trying to eliminate it, or
18 using an alternate design, cornstarch, is it
19 your argument that it is improper to talk about
20 the harm to other people that was occasioned by
21 J&J, that they can only talk about the harm to
22 Mr. Perry?

23 MS. PEPKE: I think that is part of the
24 argument. It certainly --

25 THE COURT: Tell me what the basis for

1 that is. It's quite common in just regular old
2 garden variety automobile wreck cases to talk
3 about the harm, the potential harm to others by
4 the conduct. All right. And, you know, I
5 remember very well defendant trucking companies
6 where that's always an argument that's made as
7 to, you know, you hurt this person; it's also
8 bad conduct and has potential to harm others.

9 I don't know of any case that says that
10 can't be done. I think what you're saying is
11 it's a predicate to punitive damages, and you
12 think it's wrong to have it in the actual
13 damage case?

14 MS. PEPKE: Two-part. I do think it is
15 problematic since this same jury is going to
16 be -- could be moving to a Phase II punitive
17 where the --

18 THE COURT: But you're --

19 MS. PEPKE: But the fact -- the problem in
20 this stage is that it was combined with all of
21 the inflammatory language about how this has
22 been going on against these other people in
23 litigation.

24 THE COURT: What's wrong with that?

25 MS. PEPKE: Well, first of all --

1 THE COURT: You have to try your complete
2 factual case in the first phase. The punitive
3 phase is very limited. All right. It is
4 limited to whatever you want to discuss about
5 the defendant you think should be punished for
6 their conduct. But it doesn't have -- it is
7 not -- all the factual predicate, what happened
8 and what kind of conduct it was, is in your
9 case in chief and you can't go back -- I would
10 not let the plaintiff go back and do that in
11 the punitive damage case.

12 MS. PEPKE: Fair enough as to that point.
13 And the point of the mistrial motion is that
14 was done, but it's really the second part
15 that's problematic. So you have them saying
16 they've been doing this, they've been doing
17 this, they've been denying it or lying and it's
18 been harming all these people, combined with
19 the inflammatory language they used to
20 characterize the conduct, which is what you
21 mentioned before. It could be for heinous
22 acts, told dying people under oath lies, it was
23 shameful, lying to the American public, stolen
24 lives, stole the lives, willful and wanton is
25 the most important.

1 THE COURT: Willful and wanton and all
2 that kind of thing and aggravated conduct can
3 all be argued in the case in chief. What I
4 told them is don't use pejorative language.
5 That's probably too fancy a word to use, but
6 these people are smart enough, they understood
7 what I was saying. Don't use inflammatory
8 language when you do it.

9 And I didn't want to underline it by
10 repeating it all. I simply said, "Don't use
11 inflammatory language. And your objection is
12 sustained on that basis." I think they got the
13 point. So I'm not -- that part of the ruling,
14 I think, is okay.

15 What I'm grappling with here is the actual
16 and punitive damages charge. Tell me what, in
17 addition to what you just talked about, would
18 make me want to go back and charge them on this
19 is not a punitive damage phase.

20 MS. PEPKE: Sure.

21 THE COURT: Again, you know, it's an irony
22 that you all are doing that because this was
23 the great request of the defense bar that the
24 bifurcation occur so that the jury is not --
25 punitive damages and punishing is not discussed

1 with them in the first part of the case.

2 MS. PEPKE: Well, you know, that leads to
3 another kind of interesting issue because this
4 is almost like a modified bifurcation. You
5 know, under the statute you could read it to
6 say that a true bifurcation would have been
7 that the jury wouldn't have heard any of the
8 conduct of defense.

9 THE COURT: Yes, but the fault evidence
10 has to be in there for the actual part of the
11 case, even if it's aggravated fault and
12 aggravated conduct. That all goes in the
13 actual damage part of the case.

14 MS. PEPKE: We're not disagreeing. But
15 when that happens, you have this kind of -- how
16 do I want to say -- like fictional world where
17 we're talking about all the stuff that makes
18 people, especially laypeople --

19 THE COURT: But, Ms. Pepke, it relates
20 specifically to several of the causes that
21 require elevated proof and elevated finding of
22 fault such as strict liability and things of
23 that nature.

24 MS. PEPKE: And I agree with you. I think
25 what the problem is, as a lay juror, you hear

1 all of this stuff and you don't know what to do
2 with it. You feel like you're being asked to
3 award punitive damages, and then you see this
4 Question Number 8 on the jury verdict form that
5 says: Do you find this --

6 THE COURT: You characterize the conduct.

7 MS. PEPKE: And you don't know that
8 there's a Phase II coming up, but you feel like
9 you're supposed to do something with all this
10 information.

11 THE COURT: They do just what I ask them
12 to do. I want you to find about the character
13 of the conduct. What's wrong with that?

14 MS. PEPKE: Because they don't -- we're
15 expecting them to truly understand what actual
16 damages mean.

17 THE COURT: Yeah, and I think we've given
18 them a pretty good charge about that. It's
19 both compensatory and noneconomic.

20 MS. PEPKE: And with all due respect, I
21 know lawyers who have trouble understanding the
22 difference between what compensatory means when
23 you get it combined with the charges of
24 willful, wanton, and reckless conduct. We
25 simply want them to know --

1 THE COURT: I have no doubt about it, and
2 I don't think the court does, and I don't think
3 any of the lawyers who try these cases do. And
4 I can't do anything. I can't train them as
5 lawyers, but I can explain what I want them to
6 do. And what I want them to do is characterize
7 the conduct. I think I take far greater risk
8 of running afoul of what I've been asked to do
9 by way of bifurcating --

10 MS. PEPKE: Understood.

11 THE COURT: -- if I start mentioning
12 punitive damages.

13 Now, talking about this other thing, now
14 that I've seen the record -- I'll see what
15 Ms. McVey has to say -- but I'm very inclined
16 to do that.

17 MS. PEPKE: Thank you, Your Honor.

18 THE COURT: Thank you so much. Ms. McVey.

19 MS. MCVEY: Thank you, Your Honor. So, of
20 course, I just got this motion this morning
21 when we walked in.

22 THE COURT: I know. Me, too.

23 MS. MCVEY: So I haven't had a chance to
24 go through the transcript and pick out all the
25 things that we talked about, right? So that's

1 important because they nit-picked one sentence.
2 They nit-picked one sentence.

3 And at the same time you remember that
4 Johnson & Johnson's conduct -- I mean,
5 Johnson & Johnson's -- we'll get to conduct
6 momentarily. But Johnson & Johnson essentially
7 argued each and every fiber. That's what they
8 argued. And I'm going to get to what we argued
9 in a second. They argued it's all brakes.
10 They argued Dr. Brody said 18 million fibers
11 are already in their lungs. That's what they
12 argued, right, every fiber. They did this
13 calculation of if it was this many
14 Johnson & Johnson by seconds, it would be this
15 many fibers in brakes, and all that kind of
16 stuff.

17 THE COURT: Well, they also argued no safe
18 level.

19 MS. MCVEY: Exactly.

20 THE COURT: That, to me, is the most
21 pertinent thing. Their witnesses, their
22 employees, Mann and Hopkins both repeatedly
23 said there's no safe level of exposure and our
24 product does not contain asbestos.
25 Dr. Kuffner, even after 2017, said exactly

1 that.

2 MS. MCVEY: Right. So when we talk about
3 the context of this, they're arguing the empty
4 chair, right? They're arguing the empty chair,
5 which means that Johnson & Johnson had no role
6 in this, period.

7 What Mr. Adams is talking about when he's
8 arguing this, he told them what substantial
9 factor is. And I'm going to talk about what
10 you charged about what substantial factor is
11 because it's important to this. He also argued
12 the basic science that Dr. Haber talked about
13 and the others talked about, right, which is
14 the cumulative dose. That's science. It's not
15 the standard, of course, but it's the science.

16 THE COURT: No, he argued cumulative dose.
17 I don't think -- I'm not nervous that each and
18 every exposure was somehow made the test.

19 MS. MCVEY: But that's what they argued,
20 though.

21 THE COURT: I know. I already told
22 Ms. Pepke, I don't think that's what was said.
23 I think it was put in the proper context of
24 cumulative dose.

25 MS. MCVEY: Mr. Adams' argument, I agree.

1 THE COURT: No question.

2 MS. MCVEY: I'm just saying if we're going
3 to talk about the different standards that were
4 argued, they argued each and every. They
5 argued each and every. We argued something
6 that talks about all the doses count. They do
7 count. It's a basic scientific fact. They do
8 count.

9 And when you said -- when we went up to
10 sidebar and I said, "Judge, that's his
11 argument, and you're going to charge them on
12 causation," which you did.

13 Now, they really -- what they really are
14 trying to get you to charge is essentially
15 but-for causation.

16 THE COURT: Yes, and I'm not doing that,
17 of course, because it's not authorized.

18 MS. MCVEY: When you look at the Charge
19 Number 29 -- 20 on causation on page 20, what
20 you charged this jury is that the plaintiffs
21 must prove that the plaintiff's exposure to
22 asbestos in defendants' product was of such
23 frequency, regularity, and duration that it was
24 a substantial factor in bringing about the
25 disease or injury. The mere fact that an

1 injury or accident occurred standing alone does
2 not permit you to draw a conclusion that an
3 injury or accident was caused by anyone's
4 negligence or breach of -- there's a typo -- or
5 strict liability, and that what our burden was.

6 And then it went on to talk about the
7 empty chair in that last paragraph in the
8 charge. We also talked about there could be
9 more than one cause. That's Charge Number 21.
10 And down here you talk about how the defendants
11 assert that it was all the brakes.

12 Bringing this jury in to give another
13 charge on causation --

14 THE COURT: No. What I would do with the
15 jury, just so you understand, is I would
16 recharge what I charged before.

17 MS. MCVEY: But then you're focusing only
18 on causation as opposed to the conduct, as
19 opposed to damages.

20 THE COURT: No, I don't think so.

21 MS. MCVEY: Judge, I really -- I have
22 been, not with you, but in many charges where a
23 judge has brought out and charged one charge
24 that the defendants think is the best charge
25 for them, and it puts way too much focus on it

1 and it's unfair. If you're going to charge,
2 you have to recharge the entire thing, and
3 that's unfair to make this jury sit through
4 that for another 45 minutes.

5 THE COURT: I hear you.

6 MS. MCVEY: I'm going to go back then and
7 I'm going to pick out all the things that they
8 did, and I'm going to ask you to charge on some
9 other stuff. I can do that. I'll do that. We
10 didn't move for a mistrial because I didn't
11 want a mistrial on this case.

12 But the idea that Mr. Adams was talking
13 pejoratively about Johnson & Johnson while
14 arguing the basic facts of this case, and
15 Ms. Bueno stood up and called Michael Perry a
16 liar --

17 THE COURT: Which they did.

18 MS. MCVEY: They did. They didn't use the
19 word "liar," but they said essentially he went
20 on ebay or wherever and found these bottles
21 from 1970 and miraculously put them in his
22 house. That's what they argued. Is that
23 pejorative? It is. It is. They went online,
24 they researched, and then all of a sudden the
25 spotlight came down on Johnson & Johnson. And

1 why did they do it? Because Johnson & Johnson
2 is a big company. She sit there and said, "Why
3 do you think they sued us? Because we're a big
4 company." That's pejorative. It's argument.
5 I think she's entitled to do it just like we're
6 entitled to make argument.

7 And that thing about the previous
8 litigation that was shown up there where they
9 swore under oath that their baby powder didn't
10 contain asbestos and tremolite --

11 THE COURT: I don't think there's anything
12 improper about that.

13 MS. MCVEY: It was in evidence. The jury
14 had already seen it.

15 THE COURT: That's correct.

16 MS. MCVEY: So we can nit-pick words. I'm
17 happy to go back and do that. But if you bring
18 this jury out and you charge them again on just
19 causation, it is unfairly prejudicial to us.

20 THE COURT: Let's go back to where this
21 thing focused to begin with. And it focused
22 on -- here is what they focused on. This is
23 the transcript of record, page 2048. This is
24 Mr. Adams speaking, and he's talking about the
25 massive exposures, part of the argument that

1 talks about how big the dose was over the
2 years; they never put in any epidemiology
3 studies. And then he says, "But it doesn't
4 matter because epidemiology proved -- proves
5 they played a role in Michael Perry's
6 mesothelioma. Do y'all understand the only way
7 they win is if they played zero role? They
8 wanted to be the biggest, the strongest, and
9 the most" --

10 "Objection." And then Ms. Bueno:

11 "Objection. He just said the only way we win
12 is if we play zero role, which is not the law.
13 The law is substantial factor."

14 And then you said you're going to instruct
15 them on substantial factor.

16 And I said, "I understand your argument.
17 I've listened to the testimony. I will
18 overrule your objection. Objection is
19 overruled."

20 Now, that's the whole thing in terms of
21 the part that talks about zero. And the more I
22 think about it, the more I think that zero role
23 could be construed in a way that makes it an
24 improper argument, because it at least
25 potentially may conflict with the test, which

1 is substantial factor.

2 MS. MCVEY: Which you charged them on.

3 THE COURT: Which I charged them on. And
4 what I intend to do is recharge substantial
5 factor.

6 MS. MCVEY: Your Honor, I understand.
7 You've already charged them on that.

8 THE COURT: Yeah. And I think that is as
9 easy a thing to charge and is as nondirective
10 as you could possibly make it. It's simply a
11 charge on something they know about. It
12 doesn't push things one way or another. Both
13 sides agree that substantial factor is the
14 test.

15 MS. MCVEY: Right. And we argued
16 substantial factor --

17 THE COURT: Ms. McVey, I understand that
18 you don't want me to do that. Okay. I get
19 that.

20 MS. MCVEY: Thank you. I am glad you do,
21 and I think it's unfair.

22 THE COURT: I understand.

23 MS. MCVEY: It's unduly prejudicial. And
24 when we talk about the role, it's the role that
25 the exposure took place in causing this cancer.

1 That's what he's talking about. I don't even
2 know how you're going to bring them out and
3 say, "Hey, I'm going to recharge substantial
4 factor." Why?

5 THE COURT: Watch me.

6 MS. MCVEY: What are you going to say
7 about why?

8 THE COURT: I'm not going to say anything
9 about why.

10 MS. MCVEY: I'm just asking because now
11 you're going to bring them out and charge one
12 thing --

13 THE COURT: That's right.

14 MS. MCVEY: -- and I'm asking you, if
15 you're going to do that, you charge the entire
16 thing again.

17 THE COURT: The whole charge?

18 MS. MCVEY: Yes, ma'am.

19 THE COURT: Oh, no. I'm not going to do
20 that.

21 MS. MCVEY: Because now you're focusing
22 only on one charge --

23 THE COURT: I know.

24 MS. MCVEY: -- which is unduly
25 prejudicial.

1 THE COURT: Because I think he made an
2 argument that could -- I'm not saying
3 completely is, but could be misleading.

4 Now, what I can do is say, "I just want to
5 clarify something. An argument was made by the
6 plaintiff that the only way Johnson & Johnson
7 wins is if they played zero role. And I want
8 to make it clear to you that the causation
9 standard is this," and then charge them
10 substantial factor.

11 MS. MCVEY: I think that's even more
12 prejudicial if you say the plaintiff argued
13 this, and now I'm going to charge you this.

14 THE COURT: Well, that's why I'm doing it.
15 Do you think zero role was the proper thing to
16 say?

17 MS. MCVEY: That's not what he said.

18 THE COURT: Here is the transcript. The
19 transcript says -- and I'm going to read it one
20 more time word for word into the record.

21 "They never paid for an epidemiology
22 study, never conducted an epidemiology study,
23 never followed any of the people using their
24 power for an epidemiology study. But it
25 doesn't matter because epidemiology proves they

1 played a role in Michael Perry's mesothelioma.
2 Do y'all understand the only way they win is if
3 they played zero role?"

4 MS. MCVEY: Which is --

5 THE COURT: That's what he said. And that
6 at least has the potential to conflict with the
7 causation standard of substantial factor.

8 MS. MCVEY: I understand. Role is
9 substantial factor. Role is substantial
10 factor.

11 THE COURT: But zero role is not the
12 standard. It's not -- they can win if they
13 played some role, but it wasn't a substantial
14 factor.

15 MS. MCVEY: But you charged them on that
16 again.

17 THE COURT: I'm going to charge them
18 again.

19 MS. MCVEY: I just want to be clear for
20 the record. I'm really not trying to be
21 argumentative with you.

22 THE COURT: I understand.

23 MS. MCVEY: I think this is a really big
24 deal. I do.

25 THE COURT: Yeah.

1 MS. MCVEY: And if you come in and say,
2 "The plaintiffs' counsel made this argument.
3 That's improper. I'm going to charge you
4 again," that's incredibly prejudicial.

5 THE COURT: Well, I may not do that. I
6 take that into account what you say.

7 MS. MCVEY: And, Judge, he's not saying
8 zero gets them anything. He's saying more,
9 more than zero.

10 THE COURT: You said, "Do y'all understand
11 the only way they win is if they played zero
12 role?"

13 MS. MCVEY: So if they played zero role,
14 they win, no question.

15 THE COURT: He says the only way they
16 win --

17 MS. PEPKE: Your Honor --

18 MS. MCVEY: Please don't interrupt me.

19 MS. PEPKE: I am sorry.

20 MS. MCVEY: I mean it.

21 THE COURT: He said only way.

22 MS. MCVEY: Right, which means more than
23 zero. Which means more than zero.

24 THE COURT: I understand your argument.

25 MS. MCVEY: Okay. Do you want to talk

1 about anything else?

2 THE COURT: That's all I plan to deal
3 with. The rest of it about inflammatory
4 language and everything, I ruled on. And I'm
5 sticking by that ruling, and I'm not going to
6 revisit it. I'm not going to say anything
7 further to them about it. All I'm going to do
8 is recharge substantial factor.

9 MS. MCVEY: I'm not finished quite yet. I
10 would like to know, if you don't mind, exactly
11 what you're going to say because I am worried
12 that you're going to say something about
13 plaintiffs' counsel.

14 THE COURT: I'll tell you that here in a
15 minute. Let me see what Ms. Pepke says in
16 reply.

17 MS. PEPKE: Thank you, Your Honor. I
18 think I need to state for the record to make
19 sure our request is preserved.

20 THE COURT: Yes, ma'am.

21 MS. PEPKE: So our first request is that
22 we do believe --

23 THE COURT: You want a mistrial. I
24 gotcha.

25 MS. PEPKE: Yes, we want a mistrial. If

1 the court is denying that, we would request the
2 Glenn language be used. If the court is
3 denying that, then we would request that the
4 original substantial factor --

5 THE COURT: And what Glenn language are
6 you talking about?

7 MS. PEPKE: Sorry. From Glenn, if other
8 actor's conduct is the predominant factor
9 bringing -- in bringing the harm at issue, then
10 the defendants' actions --

11 THE COURT: Wait a minute. I'm looking at
12 page 2?

13 MS. PEPKE: Yes, Your Honor.

14 THE COURT: The court in Glenn stated the
15 pertinent part, "If other actor's conduct is a
16 predominant factor in bringing the harm at
17 issue, then the defendants' action is not a
18 substantial factor in causing the harm."

19 I will not charge that, and the reason is
20 that is the court's analysis of the thing, but
21 I don't think that is a directive to charge.
22 And that's not what I charged in Glenn. I did
23 charge substantial factor. That's what they
24 were looking at. And so I declined to charge
25 their analysis. I'll just charge substantial

1 factor as I did before.

2 MS. PEPKE: Thank you, Your Honor. I
3 understand your ruling.

4 And so in light of that, we would agree
5 with what Your Honor was previously discussing
6 you might do, was that there has to be some
7 context given to the jury as to why you state
8 what was misstated on the record and then give
9 the charge.

10 THE COURT: Okay. Here's what I'm going
11 to do. I'm going to bring the jury out and I
12 am going to say to them, "Ladies and gentlemen
13 of the jury, I want to recharge on one part of
14 my causation charge. You have the whole charge
15 there in the jury room with you, of all the
16 charges I gave. And I'm looking now at page 20
17 of the charges, and 21. And I just want to
18 read one part of that to you, but you have the
19 whole charge in your room to consider. And
20 that is the plaintiffs must prove that the
21 plaintiffs' exposure to asbestos in the
22 defendants' product was of such frequency,
23 regularity, and duration that it was a
24 substantial factor in bringing about the
25 disease or injury. The mere fact that the

1 injury or accident occurred standing alone does
2 not permit you to draw a conclusion that the
3 injury or accident was caused by anyone's
4 negligence, breach of warranty, or strict
5 liability."

6 Wait a minute.

7 MS. MCVEY: You can take out "breach of
8 warranty."

9 MS. PEPKE: You can take out "breach of
10 warranty."

11 THE COURT: I'll take out "breach of
12 warranty," right?

13 MS. PEPKE: Yep.

14 THE COURT: I'm just going -- I take it
15 back. What I'm going to do is just charge,
16 "The plaintiffs must prove the plaintiffs'
17 exposure to asbestos in defendants' product was
18 of such a frequency, regularity, and duration
19 that it was a substantial factor in bringing
20 about the disease or injury."

21 And then I am going to charge, "The mere
22 fact that an injury or accident occurred
23 standing alone does not permit you to draw a
24 conclusion that an injury or accident was
25 caused by anyone's negligence or strict

1 liability."

2 And then I'm going to say -- then I'm
3 going to draw their attention to Charge 21, and
4 I'm going to say proximate cause does not mean
5 the only cause. The defendants' actions can be
6 a proximate cause of plaintiff's injury if
7 defendants' conduct was at least one of the
8 direct causes of the injury. Where two or more
9 causes combine to produce an injury, the
10 defendant is not relieved from liability for
11 negligence because it is responsible for only
12 one of the causes. It is sufficient that its
13 negligence or fault is a substantial factor in
14 causing the injury."

15 And I think I'll read the rest of it.
16 "Consequently, if a defendants' negligence is
17 the proximate cause of injury to another, the
18 fact that the negligence of a third party
19 occurred with its own negligence to produce the
20 harm does not relieve it of liability. In such
21 cases each wrongdoer is in breach of the duty
22 of care of the plaintiff. And because of the
23 negligence each occurred to produce the injury,
24 they can all be liable."

25 That's what I'm going to do.

1 MS. MCVEY: You read my mind. I was going
2 to ask you to charge the more than one cause of
3 injury, as well.

4 THE COURT: So I'm going to charge out of
5 the causation charge what I read you, which is
6 the second full paragraph of Charge 20,
7 striking out "breach of warranty."

8 And then I'm going to charge there can be
9 more than one cause, 21, the first paragraph.
10 And that's what I'm going to do.

11 MS. MCVEY: Can I ask you to add one more
12 sentence, and that is just the beginning -- or
13 at the end, "No one charge is more important
14 than any other charge"?

15 THE COURT: I can do that. Let me get
16 that thought down here.

17 I'm going to -- what I will say about that
18 is this, I will say, "No one charge is more
19 important than any other charge. So as I said
20 in the beginning, follow my instructions. You
21 must follow all of them and not single out some
22 or ignore others because they are all equally
23 important."

24 MS. PEPKE: And, Your Honor, will you be
25 giving any context as to why you're making --

1 THE COURT: I'm not going to give any
2 context. I don't think I need to do that.

3 MS. PEPKE: Our position is, under
4 Simmons, it would be required to give them some
5 context.

6 THE COURT: Now, wait a minute. I don't
7 think Simmons said that. You got Simmons, the
8 case sitting there? Matt, you got that?

9 MS. MCVEY: Wait. I didn't hear what you
10 said. I'm sorry.

11 MS. PEPKE: Under the Simmons case --

12 THE COURT: Simmons is a criminal case in
13 which the case was reversed because of a
14 failure to correct by recharging.

15 MR. BOGAN: I only have it electronically.
16 I'd be happy to --

17 THE COURT: Bring it up here to me. Matt,
18 do you mind bringing it up here?

19 MR. BOGAN: I don't. I'm going to bring
20 it up.

21 MS. MCVEY: What are you asking me to do
22 with this?

23 MR. BOGAN: She asked for a copy of the
24 case.

25 MS. MCVEY: But what are you asking the

1 point of the case to be?

2 MR. BOGAN: We want the court to give
3 context. In Simmons the court was reversed
4 because it didn't give a corrective charge,
5 because the lawyer misstated the law. And we
6 believe because the law had been stated, the
7 judge has to correct it and explain why she's
8 corrected it.

9 THE COURT: Explain why, but I don't know
10 if that's in Simmons. Let me look.

11 MS. MCVEY: Judge, if we go down that far,
12 I'm going to then want you to correct what
13 Ms. Bueno said, as well.

14 MR. BOGAN: And, Judge --

15 THE COURT: Wait a minute. I can't do all
16 these things at one time. What are you talking
17 about what Ms. Bueno said?

18 MS. MCVEY: Ms. Bueno argued each and
19 every fiber. She argued that. And so if
20 you're going to correct it, then I want to go
21 and make sure we're going to correct hers, as
22 well.

23 THE COURT: Are you going to make a
24 mistrial motion on that?

25 MS. MCVEY: I'll move for a mistrial

1 because she misargued the law. Or you can
2 correct it.

3 THE COURT: Matt, it's not cooperating.
4 Can you show me here?

5 MS. PEPKE: I've got it pulled up,
6 Simmons.

7 MR. BOGAN: I have it, too. It's in PDF,
8 Judge. You can just use your finger or the
9 arrow, either way. It's kind of like an iPad.

10 THE COURT: Okay. I got it.

11 MR. BOGAN: Yes, ma'am.

12 THE COURT: Y'all just bear with me for a
13 minute.

14 MR. BOGAN: And, Judge, I will tell you I
15 think that's the implication drawn from that
16 case. I don't think you'll find a quote that
17 says --

18 THE COURT: I remember Simmons, and I
19 don't think I am either, but it's been a while.
20 This is an oldy but a goody. It's a 1998.

21 You know, I wrote the State versus Arnold
22 and Plath. That's where they're getting all
23 this from.

24 MS. MCVEY: Judge, I need to put something
25 on the record that I don't think I made very

1 clear, if you'll give me two seconds to do
2 that.

3 THE COURT: Let's take a look and see. In
4 State v. Plath and State v. Arnold, I think
5 that's where all this is coming from. Just
6 take a look at it during Theile's turn.

7 Okay, Theile.

8 MS. MCVEY: Your Honor, I just want to
9 make sure, because I don't think I've argued it
10 well or at all.

11 In order for the empty chair, in this case
12 the brakes, to be the proximate cause, the sole
13 cause, in order for them to win on the brakes
14 issue, it has to be the sole cause.

15 THE COURT: Yes. They don't agree with me
16 about that, but I think it's -- the empty chair
17 is superseding intervening cause. It's got to
18 be -- no matter what badges you deal with,
19 there was a superseding intervening cause.
20 They haven't gotten close to pointing that
21 finger.

22 MS. MCVEY: That's what he's arguing.
23 When he's talking about the only way they get
24 off is if they have zero cause, that's what
25 he's arguing. He's arguing the empty chair.

1 And that's really important here.

2 He talked about substantial factor and how
3 they're responsible when there's substantial
4 factor. And what he's arguing there is empty
5 chair because that's their defense.

6 THE COURT: That's true. That's true.
7 Their defense is something else -- he's gotten
8 mesothelioma; we're not sure it's caused by
9 asbestos, but if it is, it didn't come from us.

10 MS. MCVEY: It only came from the brakes.

11 THE COURT: It came from the brakes. So
12 that's the empty chair. The brakes are the
13 empty chair.

14 MS. MCVEY: They said none -- it can't be
15 the powder, because none of the powder had it.

16 THE COURT: That's right.

17 MS. MCVEY: So it has to be the only other
18 thing that he was exposed to was asbestos.

19 THE COURT: Empty chair was the brakes.
20 No question about that.

21 MS. MCVEY: And that's what he's talking
22 about. And they did abandon the genetics.
23 Mr. Adams is reminding me. So they're arguing
24 the only cause is the empty chair.

25 THE COURT: Yeah, that's right. We don't

1 apportion. So if you are a cause, a proximate
2 cause, then your liability can be evaluated on
3 that basis, and we told the jury that.

4 Empty chair, you've got to show that
5 somebody else is -- no matter what you did,
6 somebody else was responsible for the
7 mesothelioma. That's the pitch they made about
8 the brake thing.

9 MS. MCVEY: And that's what he's arguing,
10 the only reason they get off.

11 THE COURT: Well, it's a pitiful way to
12 argue it. I should have done something to get
13 it clarified. So here's what I'm going to do.
14 I am going to charge substantial factor,
15 because I think I've got to do that to not run
16 afoul of Simmons. I don't think Simmons in
17 this context makes me go all the way to the end
18 and say, talk about the zero, because then I've
19 got to talk about the empty chair, and I
20 haven't charged it. Nobody asked me to charge
21 empty chair.

22 MS. MCVEY: Well, you kind of charged it.
23 You charged they allege that somebody else is
24 at fault, and to the extent you believe that --
25 it's in there.

1 THE COURT: I'm not thinking that what
2 they zeroed in on, if you want to use that
3 term, is something they said undermines
4 substantial factor.

5 So I'm not going to get into empty chair.
6 I'm just going to deal with substantial factor.
7 That's the basis upon which they pitched this
8 thing. And I'm going to cure it by charging
9 substantial factor again. And there can be
10 more than one cause, and that's it.

11 MS. MCVEY: Last two things I'll say and
12 then I'll stop. After these arguments were
13 made --

14 THE COURT: Yes.

15 MS. MCVEY: -- you charged exactly what
16 you're going to recharge.

17 THE COURT: Exactly. And I think that by
18 itself cures it.

19 MS. MCVEY: Absolutely. That's the
20 dilemma.

21 THE COURT: That's the dilemma, but I
22 don't see where -- if I thought for a moment
23 that singling this charge out would do some
24 harm to the plaintiff's case, I wouldn't do it.
25 But I just don't see that it does any harm to

1 recharge them on this.

2 So with that -- and I think I get to
3 evaluate that in deciding how to charge it.
4 And, frankly, I think I would step into the
5 plaintiff's business big time if I put it
6 so-called in context, which is what they want
7 to do, with knocking out the zero thing,
8 because that thing gets into saying, "But wait
9 a minute. There's empty chair." I'm not going
10 to do that.

11 MS. MCVEY: I appreciate that. And just
12 note my objection for the record because --

13 THE COURT: Sure.

14 MS. MCVEY: -- I think this charge you're
15 going to give was the exact charge you already
16 gave after this argument.

17 THE COURT: That's right.

18 MS. MCVEY: Number two, I just want to
19 make sure on the record we're clear. Mr. Adams
20 never said that they were liars or lied or any
21 of that stuff. It's not in the transcript. So
22 they keep talking about him using pejorative
23 terms and that kind of thing.

24 THE COURT: The pejorative terms, I made
25 Ms. Pepke tell them to me when she argued it

1 before. And they were specific words that were
2 used. I told her I didn't think "catastrophic"
3 was tough, but some of the other words that
4 were used I thought were a little bit around
5 the bend.

6 MS. MCVEY: I say that because when she
7 stood up, she called us crazy. I mean, "crazy"
8 is in the transcript.

9 THE COURT: Yes.

10 MS. MCVEY: So I don't think one side used
11 pejorative and the other side, if you're
12 calling those kind of --

13 THE COURT: I don't think we need to get
14 there because I cured that.

15 MS. MCVEY: Listen, a hundred percent.
16 I'm just saying you didn't have to cure it
17 about what they said.

18 Here is why it matters. I don't want
19 somebody using this transcript to somehow say
20 that Ben Adams was pejorative. He wasn't.

21 THE COURT: I understand that. And, quite
22 frankly, I have reserved to the end what
23 further I say about the exchange that was had.
24 I'm going to put something on the record that I
25 think will cure all that.

1 MS. MCVEY: Thank you.

2 THE COURT: I don't want anybody going
3 away from this trial being harmed because they
4 lost their temper.

5 MS. MCVEY: Thank you.

6 THE COURT: And I hope that includes me.

7 MS. MCVEY: Well, I lost mine, too, so
8 it's fair. Will you absolve me, too?

9 THE COURT: Te absolvo. Anyway, I'm doing
10 what I told you.

11 Matt.

12 MS. MCVEY: We've got to get going.

13 Please --

14 MR. BOGAN: Well, she asked me to do that.

15 THE COURT: What you got?

16 MR. BOGAN: Matt Bogan for
17 Johnson & Johnson. Justice Toal, the Plath
18 case referenced the Goolsby case, which I can
19 hand Your Honor.

20 THE COURT: Yeah, hand it up to me. Am I
21 remembering right?

22 MR. BOGAN: I think you've got to get some
23 context, because that's Goolsby from. And I
24 highlighted where the jury was told to
25 disregard the comments.

1 THE COURT: Well, I mean, the bottom line
2 of the case, though, of course, was that
3 although the able judge in his discretion
4 denied the motion, he took every precaution
5 possible to ensure that this somewhat
6 impertinent remark -- this is the one about
7 nobody is going to be electrocuted again in
8 Time Magazine and all that kind of stuff --
9 although provoked by appellate's counsel, we
10 disagree. A curative instruction and trial
11 judge's directive to the jury to disregard the
12 remark was ineffective.

13 MR. BOGAN: So they said disregard it and
14 it was confirmed after the judge did it.

15 THE COURT: Right. This thing is a little
16 bit different, and here's what I think. The
17 zero thing can be read a couple of different
18 ways. And one of those ways is what Ms. McVey
19 has been arguing is empty chair. And I think
20 that's a fair argument.

21 It might also be read, as Ms. Pepke
22 argued, to say the only way they win the
23 causation battle is if they weren't at all
24 responsible. And I'm going to solve that by
25 charging substantial factor because in asbestos

1 cases, it's not but for, it's substantial
2 factor; it's a substantial factor. I'm not
3 going to tell them why I'm doing that, and I
4 don't think I need to do that. And I think I
5 open a rat's nest if I do, because then I've
6 got to explain if you take it to be zero means
7 the only way they win is if they have
8 absolutely no responsibility, that's wrong.
9 Everything has to be a substantial factor in
10 causation. I'm not going to get into that.
11 That just muddies the water too much. And I
12 think the main thing to emphasize is what it
13 takes to find that they are the cause of the
14 injury claimed. So that's how I'm going to do
15 it.

16 MR. BOGAN: Your Honor, I understand your
17 ruling. We respectfully disagree with it. I
18 think that instruction will cure it. After you
19 instruct the jury, we will raise our objection
20 for the record that we didn't think you cured
21 it. Thank you, Your Honor.

22 THE COURT: That's fine. Now,
23 Mr. Bailiff, is everybody here?

24 THE BAILIFF: Yes, ma'am.

25 MS. MCVEY: I want to make sure --

1 THE COURT: Wait a minute. You've got
2 some kind of note?

3 THE BAILIFF: Yes.

4 THE COURT: Let me see the note. I want
5 to tell you one thing, that's the most
6 dangerous part of trials, in my opinion, is
7 notes.

8 MS. MCVEY: I think it may be curative
9 instructions.

10 THE COURT: A very pertinent question, by
11 the way. This is from the foreperson. Do all
12 12 of us have to agree on each question before
13 we move on to the next or do we go with the
14 majority? Is that our decision? We want to
15 make sure we are abiding by the law. Of
16 course, they have to agree on each thing as you
17 go through, no question about that. And I will
18 so instruct.

19 MS. MCVEY: I think, can you say -- also,
20 I think they can answer however they're going
21 to answer, but they can move to the next
22 question without answering the first one and
23 come back. Do you see what I'm saying?

24 THE COURT: They can discuss it however
25 they want to. When they take their final vote

1 for the verdict, then each question has got to
2 be unanimous. I'll explain it to them that
3 way.

4 MS. MCVEY: And, finally, I think I heard
5 you correctly saying that you're just going to
6 charge substantial factor --

7 THE COURT: And it's more than one cause.

8 MS. MCVEY: -- without any narrative or
9 context.

10 THE COURT: I am not going to provide
11 context. I have looked at the cases Matt
12 cited, and I think it's a close matter. But
13 with what we're dealing with here, I don't
14 think it's necessary to pinpoint the zero
15 remark because I think it has two possible
16 meanings, one of which is perfectly okay, one
17 of which is not. And we're going to duly
18 complicate things and confuse things more to
19 point that out. But I can achieve the same
20 objective, I think, by repeating the causation
21 substantial factor, and there can be more than
22 one cause, realizing that the defendant takes
23 exception to that.

24 MS. MCVEY: Understood. And particularly
25 in response to this question about isolating

1 one charge to give them again, we find to be
2 unduly prejudicial and we object to it.

3 THE COURT: Very good.

4 MS. MCVEY: And just to be clear, the
5 motion for mistrial is denied?

6 THE COURT: Yes, the motion for mistrial
7 is denied.

8 Bring me the jury.

9 THE BAILIFF: Yes, ma'am.

10 (The jury entered the courtroom at this
11 time.)

12 THE BAILIFF: Jury is seated, Your Honor.

13 THE COURT: Thank you, sir.

14 - - -

15 JURY CHARGE BY CHIEF JUSTICE TOAL

16 - - -

17 THE COURT: And I think the first thing is
18 you know that we had to have our Clemson
19 Master's student, we had to let her go, just in
20 case you were wondering about that. Her plants
21 were wilting that she has spent her whole
22 thesis working on, and she needs to get up to
23 Clemson right now to see if she can revive them
24 because they're measuring every piece of
25 nutrient and they're getting all the rest of

1 that. So because of that, I did excuse her
2 with our thanks for everything she's done. And
3 she is an alternate, so the main composition of
4 the jury, of course, remains as it is. But
5 thank goodness we still have two more
6 alternates with us, and we may very well need
7 them.

8 Now, this is a question from your
9 foreperson on behalf of the jury as a whole:
10 "Do all 12 of us have to agree on each question
11 before we move on to the next or do we go with
12 a majority? Is that our decision? We want to
13 make sure we are abiding by the law."

14 First of all, let me say that with respect
15 to the verdict form, when you finally decide on
16 your verdict, you must go down each one of
17 these questions that we've got on the jury form
18 and you must answer each one of them, and it
19 has to be a unanimous vote.

20 Now, you will spend a whole lot of time
21 talking about this and deliberating, and I'm
22 not giving you any limitations on how you
23 discuss these matters. But I'm saying to you
24 that when you reach the final verdict, you must
25 go to each question, and each question must be

1 agreed to however you answer it, "yes" or "no."
2 Each question must be answered by all 12 in
3 complete unanimity, all in complete agreement.

4 Am I making sense?

5 THE JURY: Yes.

6 THE COURT: And in addition to that,
7 before you return to deliberations, I want to
8 recharge you something that is in your charge.
9 And remember that you have your charges there.
10 And, Madam Foreperson, if you just want to know
11 where I'm going and put it in your notes, I am
12 on page 20 of the charge, and it's a charge
13 about causation. And I want to read you
14 something specific out of it that's on page 20.
15 And then I'm going to read you something out of
16 Charge Number 21, which is on page 21.

17 So the first thing is: I charge you that
18 the plaintiff must prove that the plaintiff's
19 exposure to the asbestos in defendants' product
20 was of such a frequency, regularity, and
21 duration that it was a substantial factor in
22 bringing about the disease or injury. The mere
23 fact that the injury or accident occurred
24 standing alone does not permit you to draw a
25 conclusion that the injury or accident was

1 caused by anyone's negligence or strict
2 liability.

3 And I further charge you that proximate
4 cause does not mean the only cause. The
5 defendants' actions can be a proximate cause of
6 the plaintiff's injury if the defendants'
7 conduct was at least one of the direct causes
8 of the injury. Where two or more causes
9 combine to produce an injury, a defendant is
10 not relieved from liability for negligence
11 because it's responsible for only one of the
12 causes. It is sufficient that its negligence
13 or fault is a substantial factor in causing the
14 injury.

15 Consequently, if a defendants' negligence
16 is a proximate cause of the injury to another,
17 the fact that the negligence of a third party
18 occurred with its own negligence to produce the
19 harm does not relieve it of liability. In such
20 cases each wrongdoer is in breach of the duty
21 of care over the plaintiffs. And because the
22 negligence of each concurred to produce the
23 injury, they can all be liable.

24 So with that, I ask you to go and continue
25 your deliberations with much thanks from all of

1 us.

2 Please stand while the jury retires to the
3 jury room.

4 (The jury exited the courtroom at this
5 time.)

6 (The following discussion was held
7 outside the presence of the jury:)

8 THE COURT: All right.

9 MS. PEPKE: I think, for the record, I am
10 being told --

11 THE COURT: Yes. Ms. Pepke.

12 MS. PEPKE: For the record, Your Honor, I
13 just preserve our objections. We stand by our
14 motion for mistrial. We don't think that was
15 curative of the error we raised, and that the
16 Glenn language should have been used. So we
17 stand on our prior objections.

18 THE COURT: Thank you, Ms. Pepke. And the
19 motion is denied with all rights preserved,
20 both as they were explained in the initial
21 motion made yesterday and in the record, and as
22 further amplified. And I do not find that the
23 argument that is made is some new argument.
24 It's simply an expansion of an argument that
25 was made yesterday. So both motions are

1 recognized as proper and both have been denied.

2 MS. PEPKE: Thank you, Your Honor.

3 THE COURT: Ms. McVey.

4 MS. MCVEY: Your Honor, just for the
5 record, we of course object to singling out one
6 charge. Mr. Adams' argument was totally
7 appropriate and proper in dealing with empty
8 chair defense that Johnson & Johnson itself
9 raised, and that by focusing on just causation,
10 we've been prejudiced by that.

11 THE COURT: And I will say on the record,
12 as I did when we discussed this before, that
13 you are -- the language we are talking about is
14 a particular piece of language in Mr. Adams'
15 argument to the -- closing argument to the jury
16 where he said, "Do y'all understand the only
17 way they," meaning Johnson & Johnson, "win is
18 if they played zero role?"

19 I have determined that that language could
20 be read to refer to the empty chair or it might
21 be referring to the causation. I have chosen
22 to cure any possible error, and I don't think
23 there is something that really needs to be
24 cured. I have chosen to cure it without
25 discussing the specific language used, but

1 rather recharging the jury on substantial
2 factor and there could be more than one cause.

3 I have not been asked to say anything
4 further about empty chair or any of that kind
5 of thing, so I've not done that. And of course
6 the plaintiff -- the defendant feels that that
7 is not enough, that I should have gone further,
8 I should have zeroed in on the zero language, I
9 should have discussed it specifically with the
10 jury, and given, in addition to the charge I
11 gave, the analytical wording of Glenn, of the
12 recent Glenn opinion. And I declined to do
13 that as I feel that's simply court analysis,
14 not the kind of thing that should be charged to
15 the jury.

16 MS. MCVEY: Thank you, Your Honor. And
17 last thing. Then I'll sit down, I promise. I
18 was handed this motion for mistrial as I walked
19 in this morning with no forewarning.

20 THE COURT: Yes.

21 MS. MCVEY: So I was unable to go through
22 the entire transcript to point out each
23 inappropriate argument that they made in both
24 arguing the law and how they described both the
25 plaintiff and plaintiffs' counsel.

1 THE COURT: Yes.

2 MS. MCVEY: So I note for the record,
3 depending on what happens here, we may want to
4 revisit this.

5 THE COURT: Understood.

6 MS. MCVEY: So for that reason.

7 Last thing. I did notice my husband
8 walked in. Tell him that I have not totally
9 misbehaved this morning when I got real mad.

10 THE COURT: What?

11 MS. MCVEY: I was a little misbehaving
12 this morning. Ian walked in and I don't want
13 to get in trouble.

14 THE COURT: I know you'll keep her in a
15 calm and friendly mood, Ian.

16 MR. MCVEY: (Inaudible.)

17 THE COURT: Ian, Bill says every day to
18 me, "Be nice." Sometimes it has effect, and
19 sometimes it does not.

20 All right. One thing that -- I mean, you
21 can't control everything, but it is a kindness
22 if you produce something like this, even if you
23 have to send it to them in the middle of the
24 night, to send it. But that being said, I
25 don't think you lost any steam about the

1 arguments you made, Ms. McVey. So thanks very
2 much for that.

3 Anything else we need to put on the
4 record?

5 MR. BOGAN: Your Honor, we did the best we
6 could. We got a transcript late last night.
7 The court reporter got it to us last night, so
8 we apologize for the delay.

9 THE COURT: I understand. I'm not
10 pointing any negative fingers. No problem.
11 It's all done in the heat of battle. I stayed
12 up late and got up early in this case myself.

13 Be at ease.

14 (Whereupon there was a recess in the
15 proceedings from 11:15 a.m. to 2:26 p.m.)

16 THE COURT: All right. Bring me the jury.

17 (The jury entered the courtroom at this
18 time.)

19 THE BAILIFF: The jury is seated, Your
20 Honor.

21 THE COURT: Very well. Bring the verdict
22 to me. I understand you have a verdict?

23 JURY FOREPERSON: We do.

24 THE COURT: Good. Mr. Bailiff, if you'll
25 bring that verdict to me, I will then hand it

1 to the clerk after I have read it.

2 THE BAILIFF: Here, Your Honor (handing).

3 THE COURT: Got it?

4 All right, Mr. Clerk, you may publish the
5 verdict.

6 THE CLERK: Yes, Your Honor.

7 - - -

8 JURY VERDICT

9 - - -

10 THE CLERK: In the State of South
11 Carolina, County of Richland, in the Court of
12 Common Pleas, Fifth Judicial Circuit, Class
13 Action Number 2023-CP-40-04072. Michael L.
14 Perry and Lonnie L. Long, Plaintiffs, versus
15 Johnson & Johnson and American International
16 Industries, Defendants.

17 Negligence. We the jury find Defendant,
18 the Johnson & Johnson entities, were negligent
19 and its negligence was a proximate cause of the
20 Plaintiff Michael Perry's injuries: Yes.

21 We the jury find Defendant American
22 International Industries, AII, was negligent
23 and its negligence was a proximate cause of the
24 Plaintiff Michael Perry's injuries: Yes.

25 Strict liability. We the jury find

1 Defendant, the Johnson & Johnson entities, are
2 strictly liable for selling defective products
3 that was a proximate cause of Plaintiff Michael
4 Perry's injuries: Yes.

5 We the jury find Defendant American
6 International Industries, AII, is strictly
7 liable for the selling -- for selling defective
8 products that was a proximate cause of
9 Michael -- Plaintiff Michael Perry's injuries:
10 Yes.

11 Fraudulent misrepresentation. We the jury
12 find Defendant, the Johnson & Johnson entities,
13 engaged in the fraudulent misrepresentation in
14 selling its products and that fraudulent
15 misrepresentation was a proximate cause of
16 Plaintiff Michael Perry's injuries: No.

17 We the jury find Defendant American
18 International Industries, AII, engaged in
19 fraudulent misrepresentation in selling its
20 products and that fraudulent misrepresentation
21 was a proximate cause of Michael Perry's
22 injuries: Yes.

23 Damages. If you answered "yes" to any of
24 the questions 1 through 6, please state the
25 amount of actual damages that have been proven

1 by the greater weight of the evidence. Michael
2 Perry's economic loss, past and future,
3 \$3,800,000. Michael Perry's other damages,
4 past and future, 19,337,000 --

5 THE COURT: Check that, Mr. Clerk. Say
6 again. Look at that. 19 million how much?

7 THE CLERK: 19,300,00 -- 237,000.

8 THE COURT: That's right. I have
9 19,230,000 -- 37,500. Isn't that correct?

10 THE CLERK: Yes, Your Honor.

11 THE COURT: All right. And continue.

12 THE CLERK: Lonnie Long's loss of
13 consortium damages, past and future,
14 \$9,618,750.

15 Willful, wanton, and reckless conduct. If
16 you answered "yes" to questions 1, 2, 5 or 6,
17 please answer this question as to any defendant
18 for which you answered "yes."

19 We the jury find by clear and convincing
20 evidence that the conduct of the following
21 defendants was willful, wanton, and reckless:
22 Johnson & Johnson, yes. American International
23 Industries, AII, yes. Signed Juror 31,
24 Foreperson.

25 Madam Forelady, was this the verdict of

1 the entire jury?

2 JURY FOREPERSON: Yes.

3 THE COURT: Shall the jury be polled?

4 MS. MCVEY: Not from the plaintiff, Your
5 Honor.

6 THE COURT: Shall the jury be polled?

7 MS. BUENO: Yes, please.

8 THE COURT: Poll the jury.

9 THE CLERK: Yes, Your Honor.

10 THE COURT: And what that means is that
11 each of you will be asked if that's your
12 verdict and if it's still your verdict. So
13 what happens is, starting with the foreperson,
14 you'll stand and you will be polled, and each
15 one will be polled so that we verify that each
16 individual, that this is your -- this was your
17 verdict and it's still your verdict. Do you
18 understand?

19 Very good. You may poll the jury.

20 THE CLERK: Yes, Your Honor.

21 Juror 31, Forelady, was this your verdict?

22 JURY FOREPERSON: Yes.

23 THE CLERK: Is this still your verdict?

24 JURY FOREPERSON: Yes.

25 THE CLERK: Juror 37, was this your

1 verdict?

2 **JUROR NUMBER 37:** Yes.

3 THE CLERK: Is it still your verdict?

4 **JUROR NUMBER 37:** Yes.

5 THE CLERK: Juror 40, was this your
6 verdict?

7 **JUROR NUMBER 40:** Yes.

8 THE CLERK: Is this still your verdict?

9 **JUROR NUMBER 40:** Yes.

10 THE CLERK: Juror 253, was this your
11 verdict?

12 **JUROR NUMBER 253:** Yes.

13 THE CLERK: Is it still your verdict?

14 JUROR NUMBER 253: Yes.

15 THE CLERK: Juror 51, was this your
16 verdict?

17 **JUROR NUMBER 51:** Yes.

18 THE CLERK: Is this still your verdict?

19 **JUROR NUMBER 51:** Yes.

20 THE CLERK: Juror 78, was this your
21 verdict?

22 **JUROR NUMBER 78:** Yes.

23 THE CLERK: Is this still your verdict?

24 JUROR NUMBER 78: Yes.

25 THE CLERK: Juror 235, was this your

1 verdict?

2 **JUROR NUMBER 235:** Yes.

3 THE CLERK: Is it still your verdict?

4 JUROR NUMBER 235: Yes.

5 THE CLERK: Juror 166, is this your
6 verdict?

7 **JUROR NUMBER 166:** Yes.

8 THE CLERK: Is it still your verdict?

9 **JUROR NUMBER 166:** Yes.

10 THE CLERK: Juror 360, was this your
11 verdict?

12 **JUROR NUMBER 360:** Yes.

13 THE CLERK: Is it still your verdict?

14 JUROR NUMBER 360: Yes.

15 THE CLERK: Juror 191, was this your
16 verdict?

17 **JUROR NUMBER 191:** Yes.

18 THE CLERK: Is it still your verdict?

19 **JUROR NUMBER 191:** Yes.

20 THE CLERK: Juror 296, was this your
21 verdict?

22 **JUROR NUMBER 296:** Yes.

23 THE CLERK: Is it still your verdict?

24 **JUROR NUMBER 296:** Yes.

25 THE CLERK: Juror 50, is this your

1 verdict?

2 **JUROR NUMBER 50:** Yes.

3 THE CLERK: Is it still your verdict?

4 **JUROR NUMBER 50:** Yes.

5 THE CLERK: The jury's been polled, Your
6 Honor.

7 THE COURT: Ladies and gentlemen of the
8 jury, let me tell you what will now happen.
9 You have answered Question Number 8 on the
10 verdict form, willful, wanton, and reckless
11 conduct, "yes." Your answer "yes" entitles the
12 plaintiff to proceed to present their request
13 for punitive damages.

14 What we will do is this: I'll send you
15 back to your jury room. I will verify details
16 with the plaintiff as to exactly what they are
17 to present. It will be limited. I believe
18 that we will finish today, but I'm not going to
19 rush you about that any more than I rushed you
20 about the decision you've just given to me.

21 So what I would like you to do now is
22 retire to your jury room. Alternates, retire
23 to your alternates room. Do not further
24 discuss what might happen in the punitive stage
25 until I give you instructions about that. And

1 I thank you so much.

2 (The jury exited the courtroom at this
3 time.)

4 (The following discussion was held
5 outside the presence of the jury:)

6 THE COURT: Ladies and gentlemen, please
7 be seated. I turn first, Mr. Bogan, to you and
8 your defense team. I know you will want to --
9 even though we don't have a complete verdict
10 yet, I know you may want to note motions with
11 regard to the verdict we've just received. I
12 will advise you that I intend to ask you again,
13 after we receive whatever we receive with
14 respect to the punitive phase, and you may
15 repeat those motions again at that time, just
16 noting for the record. I will turn to you now
17 for any motions you may wish to make on the
18 record or note on the record.

19 MR. BOGAN: Your Honor, we'd like 10 days,
20 if Your Honor will give us 10 days.

21 THE COURT: Yes, I will. And I've already
22 spoken with Mr. Bogan about that. I will note
23 that you have post-trial motions that you wish
24 to make with respect to defendants' position
25 challenging the verdict. Those are noted as

1 having been requested and made with details to
2 follow within 10 days. All right.

3 Now, let's talk about how we're going to
4 proceed --

5 MS. FLYNN: Your Honor, I need to make
6 post-trial motions, as well.

7 THE COURT: What's that?

8 MS. FLYNN: I need to make post-trial
9 motions, as well.

10 THE COURT: Yes, and I wrote the same
11 thing for you, that you desire to make
12 post-trial motion, that they will be noted as
13 having been requested. And you will have 10
14 days to make them in detailed form.

15 MS. FLYNN: The only other thing, Your
16 Honor, I believe that I need to raise is an
17 inconsistent verdict as it relates to the
18 fraudulent misrepresentation.

19 THE COURT: You're going to do that in the
20 motions that you make. And you had indicated
21 before that you would do that; so I fully
22 expect that you will do that. And I note that
23 you are requesting that you be allowed to make
24 those motions. You will be. I'll note it for
25 the record now. And then after you've had a

1 chance to submit them in writing, with full
2 citations, we will argue them.

3 MS. FLYNN: I believe inconsistent verdict
4 needs to be raised before the jury leaves, so I
5 just wanted to raise that.

6 THE COURT: I understand that. That's why
7 I'm accepting it as having been raised now.

8 MS. FLYNN: Thank you, Your Honor.

9 THE COURT: And I'll do the same for
10 Johnson & Johnson if it has any thoughts about
11 the matter. I think that's really more
12 something Ms. Flynn is raising than you would
13 raise.

14 But I would say to you, both you,
15 Mr. Bogan, and you, Ms. Flynn, obviously there
16 will be all kinds of motions you will want to
17 make not only globally about the propriety of
18 the verdict, but about any inconsistencies,
19 impermissible amount, not consistent with the
20 evidence, motivated by passion or whatever.
21 All of those things that you would naturally
22 raise and challenge in the actual damage
23 verdict will be fully protected and able to be
24 raised. And normally I don't do it until the
25 whole case is over and then decide on

1 punitives, but you know how sticky these things
2 can get sometimes, so I just want to be sure I
3 put in the record that you are requesting that
4 all those motions be raised. And they will be
5 submitted to me and I will conduct a hearing on
6 them at the appropriate time.

7 MS. FLYNN: As long as that is preserved.

8 THE COURT: Absolutely. Now, let's talk
9 about how we proceed now. What I would like to
10 understand is what plaintiff intends to offer.
11 I would like to be very focused and limited
12 about this. I don't want to have a huge, long
13 thing, because I think South Carolina in
14 particular is very focused now and rather
15 conservative about its approach to punitive
16 damages. As we know, we have a punitive damage
17 statute now that was passed in 2010. The
18 punitive damages are, first of all, capped at
19 500,000 with the additur. And at the present
20 time, as you know, every year the Department of
21 Fiscal Affairs and Revenue in South Carolina
22 pursuant to the statute reviews the damage
23 statute, which is Section 15-32-200, et seq, of
24 the South Carolina Code of Laws, and has a
25 punitive damage limitation which increases

1 annually with the Consumer Price Index. And
2 this year, for -- it's set every year at the
3 end of the year. And for the applicable
4 setting, which is December the 20th --
5 December 2023, using a CPI at an annual
6 percentage rate and a cumulative index
7 adjustment from December 2010, the punitive
8 damage limitation is now \$699,761. So that is
9 the -- instead of 500,000, which was written
10 into the original statute, the fiscal office
11 adjustment turns that figure into 699,761.

12 MS. MCVEY: Right, but the cap is that
13 number.

14 THE COURT: Or greater, or three times
15 greater.

16 MS. MCVEY: Or three times the actual
17 damages.

18 THE COURT: Actual damages, right. The
19 cap is the greater of that number that I just
20 read you or three times the amount of the
21 actual damage verdict. And the actual damage
22 verdict would be for Michael Perry the
23 combination of \$3,800,000 and \$19,237,500. For
24 Long, \$9,618,750.

25 And I ask you this. Do you get punitives

1 on a loss of consortium?

2 MS. PEPKE: No, Your Honor.

3 THE COURT: I don't think you do. So
4 really the only thing we're looking at then is
5 punitive damages with respect to the economic
6 loss and other actual damages.

7 MS. MCVEY: And I don't think for our
8 purposes today that matters because you'll
9 apply it afterwards. We're not going to tell
10 the jury about the cap.

11 THE COURT: Yes. Well, I'm putting this
12 on the record and I'm saying, as the statute
13 requires me to, that the jury should not be
14 told of these limitations. And I take the
15 position that the jury should not be -- well, I
16 want to hear you on what the jury may be told.
17 The jury may be told something about the
18 financial status of Johnson & Johnson and AII.
19 And I want to let you just in brief terms tell
20 me what that's going to be like so I can put
21 some time limits on it, both for the
22 presentation and the cross-examination. And
23 then I want to understand what's your position.
24 Mr. Adams, either I'm going to talk to her
25 or you're going to talk to her.

1 MS. MCVEY: I'm sorry. He was trying to
2 give me the time limit.

3 THE COURT: Don't do the time limit yet.
4 What I'm doing right now is trying to
5 understand what you believe -- and I'm going to
6 ask the defendants the same question -- what
7 both sides believe is proper to be said to the
8 jury about the amount sought.

9 The Supreme Court of South Carolina has
10 turned increasingly restrictive about that.
11 And I think that I would like to hear you say
12 what you think you're entitled to do in terms
13 of asking for a number from the jury. Because
14 we've now got some writings that seek to
15 confine that. So I'd like each side to give me
16 some reaction as to what you think should be
17 presented both by way of financial status of
18 the two corporations and about the punitive
19 damages requested, specifically whether a
20 number may be asked for. So go ahead.

21 MS. MCVEY: Sorry, Your Honor.

22 THE COURT: Go ahead.

23 MS. MCVEY: So two things. The new
24 evidence that we're going to put on is simply
25 the economist talk about net worth type

1 numbers.

2 THE COURT: How long do you think that's
3 going to take?

4 MS. MCVEY: We were just talking about
5 that. I think 20 minutes of direct.

6 THE COURT: Yes.

7 MS. MCVEY: Maybe half an hour at the
8 most.

9 THE COURT: Yes.

10 MS. MCVEY: And I don't know what they
11 would want to cross him with on that. And then
12 five minutes of redirect if needed.

13 THE COURT: Yes.

14 MS. MCVEY: What we request is a
15 five-minute opening essentially --

16 THE COURT: Yes.

17 MS. MCVEY: -- put the economist on, and
18 there would be some kind of closing where we
19 could ask for or suggest a number.

20 Your Honor, I went back and looked at
21 Glenn. I e-mailed to both you and Mr. Bogan --
22 I didn't e-mail Stephanie. I'll do that right
23 now -- what you charged in Glenn on the
24 punitive phase.

25 THE COURT: Yes.

1 MS. MCVEY: Because I know we went all
2 through it then. I saw Mr. Graham walk in. I
3 know he was there, as well. I'll forward that
4 to everybody. So we would request that same
5 charge.

6 THE COURT: Yeah. I think it's the same
7 charge I also gave in Weist and Bond. I've
8 given it several times, of course.

9 MS. MCVEY: Your Honor, in Glenn I
10 certainly suggested a number for the jury to
11 come back with, which we're entitled to do. I
12 read the cases that Johnson & Johnson cited in
13 their motion for a mistrial motion about what
14 could be suggested. The court certainly says
15 you can make comparisons, you can make
16 analogies, you can suggest a number. They
17 allow you to do that. And we would think just
18 to give the jury some context, we should be
19 able to do that. It's clearly in the jury's
20 province about what the proper number is. But
21 we're allowed to suggest and plan to do that.

22 In terms of what could be gotten into
23 about the net worth, we're familiar, of course,
24 with the limitations that the Branham case set
25 forth. But we believe that the economist

1 should be able to talk about the net worth
2 numbers that apply to Johnson & Johnson and put
3 that in some context.

4 THE COURT: What do you mean specifically
5 by that?

6 MS. MCVEY: Well, what I mean is what that
7 net worth number means. It might be sales. It
8 might be -- you know, allow some context about
9 that.

10 THE COURT: You mean the data that the
11 economist used to come forward with a net worth
12 projection?

13 MS. MCVEY: Right.

14 THE COURT: I see.

15 MS. MCVEY: AII is a little bit trickier
16 because --

17 THE COURT: We're going to take up the
18 question of sanctions for them because they
19 have not cooperated to any great degree with
20 the kind of normal information you would get.

21 MS. MCVEY: And they gave us some tax
22 returns, but they're real funky; they're
23 unsigned.

24 THE COURT: Yes, they're not verified.
25 It's very unsatisfactory. I agree with you.

1 MS. MCVEY: So I think we'll come up with
2 something on that. Our economist can be
3 available at 3:30. He'll have to appear
4 remotely. I think by the time we get the
5 verdict form situated, the charge situated,
6 he'll be here ready to go.

7 THE COURT: All right. And let me just
8 look for a minute. Did you e-mail me the
9 Glenn?

10 MS. MCVEY: Yes.

11 THE COURT: I've got punitive damages
12 here.

13 MS. MCVEY: Stephanie, I didn't e-mail
14 that to you. I'll do that right now.

15 THE COURT: Hang on. I see the charge.

16 MS. MCVEY: That's just from the start of
17 our conversation when we argued a bunch of
18 stuff. If you go down about 20 pages, you'll
19 see what you actually charged the jury.

20 THE COURT: Yes. And how about the
21 verdict form?

22 MS. MCVEY: I think I have the same one
23 that we used in Glenn that I can modify. I can
24 e-mail it to y'all so everybody can see it.
25 And I'll just say I'm sure there's going to be

1 objection to it, but the Glenn punitive charge
2 has been upheld at this point.

3 THE COURT: Yes, it has.

4 MS. MCVEY: And I apologize --

5 THE COURT: A lot of what's been done has
6 been done by our court since then. I was kind
7 of looking through a state -- a Campbell versus
8 State Farm lens.

9 MS. MCVEY: Does anybody else want a copy
10 of this?

11 MS. PEPKE: What she charged in Glenn?

12 THE COURT: Mitch, you made all the
13 arguments in Glenn about what should be done.

14 MS. PEPKE: I'm going to let Mr. Brown
15 handle that part of it, but when Your Honor is
16 ready for me to --

17 THE COURT: I'm trying to get to what I
18 charged.

19 Theile, where is the charge? What page?

20 MS. MCVEY: Starting on -- okay. So if
21 you look at page 32 --

22 THE COURT: Okay. Let me get there. All
23 right. I see this charge.

24 Now, then we go to -- now that we've had a
25 preliminary discussion, Mr. Brown, I'll go to

1 you.

2 MR. BROWN: Your Honor, our first position
3 on this is that the verdicts in the case
4 already reflects that punitive damages have
5 been awarded. The court, with all due respect,
6 should have told them that there's a punitive
7 phase coming up.

8 THE COURT: Sure, I understand.

9 MR. BROWN: So that's our first position.

10 THE COURT: Yes. All right. I decline to
11 find that the verdict already reflects
12 punitives on the basis of the rulings I've
13 already made, but you're certainly entitled to
14 have that in the record.

15 MS. FLYNN: I join, Your Honor.

16 THE COURT: Ms. Flynn joins in that.

17 MR. BROWN: There's also a case, Your
18 Honor might have authored it, called Durham
19 versus Benson -- it might be Benson versus
20 Durham. But in that case, the Supreme Court
21 held that they reversed a punitive award
22 because there was evidence put in was
23 against -- had to do with third-party harm.
24 And in this case, Your Honor, there has been an
25 abundance of third-party harm asserted in the

1 case, including to people that are not
2 Mr. Perry, such as mothers, babies. He's not a
3 mother or a baby, and there was lots and lots
4 of evidence in this case --

5 THE COURT: I understood the argument.

6 MS. FLYNN: I join in that, as well.

7 THE COURT: My approach to that would be
8 to solve it in the charge.

9 MR. BROWN: And our position, Your Honor,
10 as you can guess, is you can't unring that
11 bell, and you won't be able to charge them
12 effectively that they can't consider any of
13 that kind of evidence in the punitive phase.

14 THE COURT: Are you saying that they
15 therefore could not have considered it in the
16 actual damage phase? I will note that you did
17 not object on that basis to the receipt of what
18 you now call third-party harm evidence in the
19 actual damage case because it was part of the
20 proof about the character of the defendants'
21 conduct, as well as the direct issue of
22 negligence and strict liability.

23 So I note that you are now saying the
24 third-party harm was one of the foundations for
25 the award of punitive damages, and I would

1 solve that in my charge. But I reject the
2 argument that they've already awarded punitive
3 damages, and I indicate with respect to
4 third-party harm -- is that Durham?

5 MR. BROWN: I think it is Durham.

6 THE COURT: I'll look at it in a minute.
7 I reject the argument that it can't be solved.
8 I'm going to look at Durham, and it might solve
9 it with some sort of charge if I think it's
10 warranted.

11 MR. BROWN: Your Honor, we think -- I
12 don't have a list in front of me, but I think
13 we might have objected in a motion in limine.
14 We certainly made mistrial motions based on
15 inappropriate evidence.

16 THE COURT: You did. You did. I take it
17 back. Yes, you did. You raised that.

18 MR. BROWN: Thank you.

19 MS. MCVEY: Can I respond just to that
20 little --

21 MR. BROWN: The cite for Durham is 360
22 South Carolina 639.

23 Your Honor --

24 THE COURT: South Carolina or Southeast?

25 MR. BROWN: South Carolina.

1 THE COURT: That's fine.

2 MR. BROWN: And, Your Honor, on the net
3 worth -- I hope I'm not messing up Ms. Pepke on
4 something. But, you know, this is a worldwide
5 organization that we're talking about,
6 depending upon who we're talking about. And
7 also talc is only a single product that they
8 used to sell. And they don't sell it anymore,
9 as you know. And for that -- for that original
10 reason, Your Honor, net worth numbers and
11 talking to an economist about J&J's worldwide
12 other products and all this kind of stuff, that
13 is out of bounds. That is not going to be
14 constitutional. It's not fair because you're
15 punishing somebody who already stopped selling
16 the product as well.

17 So, Your Honor, really, based on this
18 actual damages verdict, we would respectfully
19 request that the punitive damages charge is not
20 warranted whatsoever.

21 THE COURT: All right. I understand the
22 argument there. Of course I will deny the
23 motion to prevent punitive damages for being
24 sought because it's already in the verdict.

25 In addition, the economist discussion of

1 net worth is not per se out of bounds because
2 it's unconstitutional in my view. Do you have
3 some argument on that, Ms. Pepke?

4 MS. PEPKE: I do, but I don't want to step
5 on her --

6 THE COURT: Well, let Ms. McVey hear your
7 argument first, and then she can respond to all
8 of it.

9 MS. MCVEY: I just wanted to respond to
10 the baby-mother thing real quick because I
11 think we're moving on to net worth about the
12 evidence that came in.

13 THE COURT: The harm to others,
14 third-party harm?

15 MS. MCVEY: Right. The difference here,
16 of course, is the evidence was that Michael
17 Perry's mother used it on him when he was a
18 baby. That's why all that is relevant.

19 THE COURT: I think it's a predicate to
20 the explanation of what their -- your position
21 was about the knowing and intentional nature of
22 the conduct.

23 MS. MCVEY: Exactly.

24 THE COURT: I will not rule that there's
25 some impropriety about the verdict, either

1 presently received of actual damages or the
2 seeking of punitive damage based on the need to
3 exclude third-party harm, because I think the
4 third-party harm, as they term it, is simply an
5 indication of the character of the conduct.

6 MS. MCVEY: Thank you, Your Honor.

7 MS. FLYNN: Before we move on to another
8 motion, I wanted to join in the motion, Your
9 Honor, that Mitch Brown made, on behalf of AII
10 to the extent applicable.

11 I also wanted to point out that we don't
12 think punitives are appropriate. AII no longer
13 sells any talc-based products either. We
14 haven't sold talc-based products for seven
15 years, so it couldn't constitute a deterrence.

16 THE COURT: I understand. I will just say
17 on the issue of we no longer sell it, I reject
18 that as a proper basis for not allowing the
19 seeking of punitive damages. The fact that you
20 no longer sell the product does not minimize
21 your responsibility for actual punitive damages
22 in the material that I've read.

23 So I would reject that, and your objection
24 is noted.

25 MS. FLYNN: And we also want to just renew

1 our due process concerns that punitive damages
2 haven't been proven against AII.

3 THE COURT: Well, they have been --

4 MS. FLYNN: I understand.

5 THE COURT: That's a premature one,
6 Ms. Flynn. You're going to have to see what
7 they do attempt to prove there.

8 Now, Ms. Pepke.

9 MS. PEPKE: Thank you, Your Honor. I
10 would call the court's attention to two things.
11 First of all, we did file a motion to exclude
12 their economist's testimony on the finances to
13 the extent it's anything other than the net
14 worth number. So that is on file and has been
15 pending.

16 THE COURT: Tell me your authority for
17 that.

18 MS. PEPKE: It's Branham. I want to point
19 the court to this exact language in Branham.

20 THE COURT: All right.

21 MS. PEPKE: After a very thorough
22 analysis, the court came to the conclusion --

23 THE COURT: Hang on a minute. Where is my
24 little notebook that's got all the cases in it?
25 Have I got Branham in there? Nope.

1 MS. PEPKE: I have several.

2 THE COURT: Just hand it up to me. I've
3 got it here somewhere.

4 MS. PEPKE: I have several copies.

5 MS. MCVEY: I can e-mail it to you. Do
6 you want me to e-mail it to you real quick?

7 THE COURT: Yeah. I just can't find it
8 real quick.

9 MS. MCVEY: You've got a copy.

10 MS. PEPKE: (Handing.)

11 THE COURT: Thank you so much. I just
12 want to be able to follow along.

13 MS. PEPKE: And I'll direct the court's
14 attention to the actual page 15. I don't know
15 what the cite page is, but page 15.

16 THE COURT: Page 15?

17 MS. PEPKE: Yes, Your Honor.

18 THE COURT: All right. I got it.

19 MS. PEPKE: So after a thorough analysis
20 of all this different information that had been
21 offered, which included stuff like assets and
22 per-day sales and all these extrapolated
23 figures, the court ultimately concluded that
24 evidence concerning net worth appears to be the
25 only safe harbor. That is the safe harbor.

1 THE COURT: Hang on. Where is it?

2 MS. PEPKE: So at the top of the second
3 column, quote, evidence concerning net worth
4 appears the safest harbor.

5 So reference to the defendants' assets has
6 little to do with actual harm sustained by the
7 plaintiff. It specifically addressed in the
8 previous analysis in the left-hand column all
9 of the stuff they had.

10 THE COURT: I am not tracking with you.

11 MS. PEPKE: (Indicating.)

12 THE COURT: This is Supreme Court, Branham
13 versus Ford Motor Company. Let's see yours.
14 Is this 701 Southeast 5?

15 MS. PEPKE: My copy is just from a
16 different printout.

17 THE COURT: Yeah, so it's not page 15?
18 Which page is it?

19 MS. PEPKE: On yours here, I've got it
20 highlighted.

21 THE COURT: So it's "Because the Supreme
22 Court has discovered"?

23 MS. PEPKE: Yes, that's the paragraph
24 where we start.

25 THE COURT: Okay. Tell me where you want

1 me to start.

2 MS. PEPKE: In that paragraph, go to the
3 second sentence beginning, "Evidence."

4 THE COURT: Concerning net worth?

5 MS. PEPKE: "Appears to be the safest
6 harbor."

7 THE COURT: Hang on. Let me read this.
8 Because the U.S. Supreme Court discovered that
9 a state's damage award implicates federal
10 subject to due process, this court is not the
11 final arbiter to determine what financial
12 evidence is proper in assessing punitive
13 damages. This is South Carolina Supreme Court
14 speaking. Evidence concerning net worth
15 appears the safest harbor.

16 MS. PEPKE: And if you'll note --

17 THE COURT: While the U.S. Supreme
18 Court -- there can be no serious doubt
19 concerning financial evidence of salary,
20 compensation of defendants' corporate officers.
21 Branham went far beyond the pale in submitting
22 evidence of former senior management pay.

23 That was prejudicial. So let me see if I
24 can understand. I don't want to take forever
25 here, because I don't want to keep the jury

1 waiting, but let me see if I can understand
2 exactly what you have -- what the economist is
3 going to do.

4 MS. PEPKE: Well, we would stipulate to
5 the net worth number. That's public knowledge.

6 THE COURT: That's generally how they try
7 it. I really haven't had anybody present
8 evidence in the punitive damage part.

9 MS. PEPKE: If you'll see in Branham, in
10 the column before what they had tried to do is
11 submit evidence of income, revenues, cash flow,
12 per-day sales. And the court rejected all
13 that, as well.

14 THE COURT: That's right.

15 MS. MCVEY: Where do they reject that? I
16 don't see them rejecting --

17 THE COURT: Branham presented evidence of
18 Ford's net worth, income, revenues and cash
19 flow, in 2005, the net worth was so-and-so.
20 Branham extrapolated those figures per week,
21 per day, per hour. The court has approved the
22 use of defendants' net worth in ability to pay
23 factor. All right.

24 And then it says this court has not
25 addressed the propriety of extrapolating

1 financial data in the manner introduced at
2 trial. The Court of Appeals directly addressed
3 this issue and found no abuse of discretion in
4 the admission of per-day earnings of a
5 defendant. It has found -- nor has it found
6 abuse of discretion in admitting per-day
7 operating revenue or per-day net income. These
8 Court of Appeals decisions have not been tested
9 since 2003.

10 Then they go into an analysis of what
11 happened post the --

12 MS. PEPKE: Correct.

13 THE COURT: -- Orangeburg Company case.
14 And they say the Supreme Court has -- it says
15 the court of appeals decision has been tested
16 through the lens of State Farm versus Campbell.
17 That's when they then go into all this. And I
18 think what they're saying is net worth and the
19 extrapolations from net worth are okay.

20 What else did you plan to do besides that?

21 MS. MCVEY: So it's just the extrapolation
22 of net worth. But I want to be clear about
23 what that is, what we believe it is, so that
24 we're on the same page.

25 THE COURT: All right.

1 MS. MCVEY: So it would be for five --
2 we're talking about a five-year lens a little
3 bit. We're talking about total sales, net
4 earnings, net worth, cash on hand, cash flow,
5 capital expenditures, free cash, dividends
6 paid, stock repo purchases, R&O expenditures,
7 advertising expenditures, available line of
8 credit, and stock market valuation.

9 And then the same information for Kenvue,
10 but through a three-year lens, because they've
11 only been --

12 THE COURT: I'm worried about that because
13 when you get into figures outside of what net
14 worth is, with several of those are going to be
15 like stock value, dividends, and things of that
16 nature, investments -- cash on hand would
17 probably be within that work. But a lot of
18 what you're reading are additional -- they're
19 certainly financial indicators for a company.
20 But what the court is telling us is that that
21 is restricted now.

22 MS. MCVEY: I agree. So they called out
23 specifically the salaries, right, of
24 executives. And I think that's fair. We're
25 not going to ask any of that stuff about CEO

1 pay.

2 MS. PEPKE: Also they call out assets. It
3 said cautionary observation -- in State Farm
4 the United States Supreme Court, as cautionary
5 observation, the reference to defendants'
6 assets has little to do with the actual harm
7 sustained by the plaintiff.

8 And, Your Honor, the net worth number only
9 comes in for purposes of ability to pay.

10 THE COURT: The ability to pay is the
11 whole thing. The baseline is a punishing
12 award. And ability to pay simply is the
13 touchstone in the analysis of how they can be
14 punished or the extent to which they can be
15 financially punished if the jury decides to do
16 that.

17 MS. PEPKE: Exactly. So going into
18 assets, which cash on hand is --

19 THE COURT: I don't need any further
20 argument about this. I am going to restrict
21 the information that can be put to the jury on
22 net worth.

23 MS. PEPKE: And we will stipulate to net
24 worth.

25 THE COURT: And that's where I think I'm

1 going with it. I just don't see any sense in
2 imperilling this whole situation by getting
3 into it. Justice Kittredge is off of this.
4 He's now the chief. He takes a very
5 stay-in-your-lane view of what we do with what
6 the Supreme Court tells us. And I'm going to
7 stay there.

8 Now, I have got some big indigestion with
9 AII on this, because AII never gave us any net
10 worth information.

11 MS. FLYNN: I strongly, strongly disagree.

12 THE COURT: Show me what it is. I don't
13 want a strongly-disagree-type argument. I want
14 to see exactly what you gave them that deals
15 with net worth.

16 MS. FLYNN: Absolutely. We have a whole
17 spreadsheet that literally says "net worth."

18 THE COURT: Well, let me see it.

19 MS. MCVEY: Judge, I'm asking
20 Johnson & Johnson what they think the --

21 THE COURT: What's that?

22 MS. MCVEY: I would like to know what
23 Johnson & Johnson would stipulate to for net
24 worth.

25 THE COURT: Yeah. I want those figures

1 right now. I want to see them.

2 MS. PEPKE: It's in their report. We
3 didn't contest what he said the net worth
4 number was. So that is in their expert's
5 report.

6 THE COURT: Tell me what the net worth --
7 I just want to know what net worth figure we're
8 going to put in front of the jury.

9 MS. MCVEY: Judge, we also want to talk
10 about Kenvue. It's time to talk about Kenvue,
11 because they moved a lot of money into Kenvue.

12 THE COURT: It's net worth. And net worth
13 is going to be of all the Johnson & Johnson
14 entities. I've already said that. So you're
15 going to get a shot at all of them, because I
16 believe in amalgamation. They disagree with me
17 about that, but the net worth figures should
18 include net worth of everybody.

19 MS. PEPKE: Well, that's a different
20 issue, Your Honor.

21 THE COURT: I'm not going to spend all day
22 on this.

23 MS. PEPKE: I understand, but Question 8
24 only asked willful and wantonness of
25 Johnson & Johnson, and that's the verdict. So

1 Johnson & Johnson's net worth is with them.

2 THE COURT: It says that
3 Johnson & Johnson, because we decided to refer
4 to all the Johnson & Johnson folks as
5 Johnson & Johnson entities. I don't view the
6 use of that term in Question 8 as some
7 limitation on what the other -- what entities
8 were asked to have actual damages. If 8 is all
9 you've got, all I can tell you is the future
10 damages form will say Johnson & Johnson
11 entities.

12 MS. MCVEY: And, Your Honor, so -- I'm
13 sorry. But Kenvue, the net worth that our
14 economist would testify to for 2024 would be
15 10.2 billion.

16 THE COURT: 10.2 billion for Kenvue.

17 MS. MCVEY: For 2024.

18 THE COURT: How about J&J?

19 MS. MCVEY: I have three years of Kenvue
20 if you want that.

21 MS. PEPKE: It's only appropriate to give
22 one.

23 THE COURT: Don't interrupt her. We're
24 going to do this in a civilized way.

25 MS. MCVEY: 2023 is 11.2 billion. 2022 is

1 20 billion.

2 THE COURT: 11 point what?

3 MS. MCVEY: 11.2.

4 THE COURT: What's going to the jury is
5 10.2 billion for Kenvue and 11.2 for
6 Johnson & Johnson.

7 MS. MCVEY: Well, I don't have
8 Johnson & Johnson's number. That was for
9 Kenvue.

10 THE COURT: Kenvue was 10.2 billion.

11 MS. MCVEY: For 2024.

12 THE COURT: Yeah. And I want the last
13 number for -- oh, these are all Kenvue numbers?
14 I just want one number for Kenvue, 2024.

15 MS. MCVEY: That's fine. And the
16 Johnson & Johnson number is 358 billion.

17 MR. COWAN: No, no, no. Net worth,
18 70 billion as of March 31st, 2024. That's in
19 your expert --

20 THE COURT: Friends, we're not going to do
21 this this way. Now, if she gives a number, and
22 you disagree with it, Mr. Cowan, you're going
23 to tell me.

24 MR. COWAN: I apologize, Your Honor.

25 THE COURT: Let's do this in an organized

1 way. Ms. McVey, you propose to put before the
2 jury Kenvue 10.2 billion, right?

3 MS. MCVEY: Yes, ma'am.

4 THE COURT: And what do you propose to put
5 to J&J?

6 MS. MCVEY: I'm just looking now.

7 THE COURT: I mean, that's an enormous
8 figure. I don't see why we're griping about
9 this. That's plenty to put in front --

10 MS. MCVEY: I was making sure it was
11 right. So 70 billion.

12 THE COURT: 70 billion. All right. Now,
13 what are you going to say about AII?

14 MR. BROWN: Your Honor, may I say one
15 thing first?

16 THE COURT: Yes.

17 MR. BROWN: It's going to be an error to
18 put Kenvue's numbers and all that into this,
19 because that is putting the cart before the
20 horse. The court hasn't determined the
21 amalgamation issue yet.

22 THE COURT: I have determined it.

23 MR. BROWN: Oh.

24 THE COURT: I have determined it. I'm not
25 going to sit here and have y'all waste time.

1 If you're telling me that I can't decide fully
2 on the Kenvue issue until I decide
3 amalgamation, I'm going to tell you I regard
4 them as amalgamated.

5 MS. PEPKE: We would also reurge our prior
6 argument that he successors are not subject to
7 punitive damages, so their net worth would be
8 irrelevant on that as well because they aren't
9 the ones that should pay punitive damages.

10 MS. MCVEY: Your Honor, just to get this
11 going, I think what we can stipulate to is just
12 using Johnson & Johnson's net worth number.

13 THE COURT: That's fine. We're going to
14 use Johnson & Johnson's net worth number of
15 70 billion. All right.

16 Now, what are we going to use for AII?

17 MS. MCVEY: And we -- I'm sorry. Tell me
18 what you think the net worth of AII is.

19 MS. FLYNN: And this is all, obviously,
20 subject to confidentiality, which --

21 THE COURT: Speak up now, Ms. Flynn.

22 MS. FLYNN: Yes, Your Honor. I just
23 wanted to note for the record this is subject
24 to confidentiality, so I will want to know --

25 THE COURT: Ms. Flynn, we are now in the

1 trial of this case. It's going to be in the
2 record of this case and it's going to be in the
3 public, because I don't have private
4 confidential trials.

5 Now, I want the number of their net worth,
6 and I want you to speak into the microphone so
7 I can hear it. I don't want any other words
8 about confidential.

9 MS. FLYNN: The number --

10 THE COURT: It's not confidential. They
11 are going to put it in front of the jury.
12 That's as public a forum as they can be.

13 MS. FLYNN: I understand that, Your Honor.
14 I understand that. I just want to be sure
15 about the confidentiality --

16 THE COURT: Ms. Flynn, you talk real fast
17 and real low and I can't hear you. And I need
18 to hear you about this.

19 MS. FLYNN: The number that we have for
20 net worth for 2023 is 76 million.

21 THE COURT: 76 million? All right.

22 MS. FLYNN: We would join Your Honor in
23 the motion in limine made by the
24 Johnson & Johnson defendants.

25 THE COURT: I'm not going back and plow

1 that ground. I went through those things a
2 long time ago. We don't need to go through
3 that again.

4 MS. FLYNN: I don't intend to reargue it,
5 Your Honor.

6 THE COURT: Good.

7 MS. MCVEY: Your Honor, if they're willing
8 to stipulate to the 76 million being the net
9 worth, then we don't need to -- we can just
10 take the stipulation.

11 THE COURT: That's where I'm going with
12 this thing. What I'm saying is to me we've got
13 a stipulated number for J&J, we've got a
14 stipulated number for AII. We're going to
15 allow plaintiff to publish those stipulated
16 numbers to the jury and say whatever small
17 thing needs to be said before we submit it to
18 the jury.

19 Now, let's talk about timing. You've got
20 other things?

21 MS. PEPKE: I never got my chance to
22 respond to Ms. McVey's argument that they could
23 ask for a specific amount of punitive damages.

24 THE COURT: All right. What's your
25 position about that?

1 MS. PEPKE: I would say that under South
2 Carolina Rule of Civil Procedure, Rule 8, that
3 they are not permitted to. While plaintiff may
4 ask for a sum certain for actual damages,
5 claims for punitive or exemplary damages shall
6 be in general terms only and not for a stated
7 sum.

8 THE COURT: I agree with that. That's
9 exactly what it said. That's why I said to
10 begin with that I had indigestion about any
11 attempt to ask for a specific number.

12 MS. MCVEY: Your Honor, I think we need to
13 be able to make suggestions.

14 THE COURT: No, I'm not going to let you
15 do that, because I won't imperil the verdict in
16 that way. You have to speak in generalities
17 just like the rule says. And asking for a
18 specific number is not generalities. Also
19 suggesting.

20 MS. MCVEY: For the record, I understand
21 your ruling. In Glenn I clearly made a
22 suggestion to the jury.

23 THE COURT: I know.

24 MS. MCVEY: And it was affirmed.

25 THE COURT: Nobody raised that. We didn't

1 get into that at all, so what ain't raised --

2 MS. PEPKE: I will raise it.

3 THE COURT: That's right. You have raised
4 it and I agree with that. So now let's talk
5 timing.

6 MS. MCVEY: I want to talk clarity.

7 THE COURT: Yes, ma'am.

8 MS. MCVEY: Can we make clear that the net
9 worth -- I'm sorry -- that the number that they
10 should bring back should punish and deter and
11 make sure this never happens again? This is
12 the punishment phase.

13 THE COURT: That's right. You can make
14 those arguments, but let's not get pejorative
15 about it and crazy about it and argue all this.

16 MS. MCVEY: I get it, but what they're
17 calling pejorative I disagree with.

18 THE COURT: I understand that, but let's
19 not get into they lied for years and things of
20 that nature.

21 MR. BROWN: I think there is a case, Your
22 Honor, that you should not send the message,
23 you can't do this, send the message --

24 THE COURT: Right. Don't use the word
25 "send a message" or anything of that nature.

1 Let the community send the message and all that
2 kind of thing, that's not permitted on the
3 criminal side and it's not now permitted on the
4 civil side. And that is a result of some later
5 rulings by the court when I was still on the
6 court.

7 MS. MCVEY: I just want to make sure the
8 record is clear that Ben never said they lied,
9 ever. It's on --

10 THE COURT: If I hear that one more time.

11 MS. MCVEY: They keep saying it. I'm
12 scared to death it's going to --

13 THE COURT: And I say it because I don't
14 want any slips to be made in getting into any
15 pejorative language.

16 MS. MCVEY: And we didn't say it. That's
17 all I wanted to say.

18 THE COURT: Well, *exempli gratia*, don't
19 say it.

20 What I want to be done is to talk in
21 general terms about the jury making an award
22 that reflects what you say their ability to pay
23 is. And that is what I want you to be focused
24 on. And that's what you will be focused on.

25 MS. MCVEY: Of course. And, Your Honor, I

1 did have a copy of the verdict form. It's the
2 same one that we used in --

3 THE COURT: Glenn?

4 MS. MCVEY: -- Glenn (handing).

5 THE COURT: All right.

6 MS. PEPKE: This is an honest question. I
7 don't understand the blank in front of it. Is
8 it an X?

9 THE COURT: Let me see it before y'all get
10 into that, please.

11 All right. Now, what is it you're having
12 to worry about, Ms. Pepke?

13 MS. PEPKE: The blank that comes before
14 the "For Michael Perry" on each one, I'm not
15 clear what the jury is supposed to -- are they
16 supposed to put an X there?

17 THE COURT: Check. They're supposed to
18 check it. I'll tell them they're just supposed
19 to check "For Michael Perry." That
20 indicates -- if they just put the amount in
21 there, I don't want there to be any ambiguity.
22 So I do that always. I have them check the
23 "For Michael Perry," and then I have them put
24 in the amount. That's just the way I do it.

25 MR. BROWN: Your Honor, they have the

1 right to award zero. And I don't know if
2 that's in Your Honor's charge. We proposed
3 charges, and we did propose punitive damages
4 charges. I don't think we got to it in the
5 charge conference.

6 THE COURT: I did not, and I'm not going
7 to get into it, but I am going to change this
8 form. It has to reflect -- well, what I will
9 tell them is this. I will tell them that they
10 check if they're wanting to award Michael Perry
11 punitive damages. What I'm going to tell them
12 is they can put zero in there.

13 MS. MCVEY: Yeah.

14 MR. BROWN: Right. They are not required
15 to award a number.

16 THE COURT: They're not required to award
17 anything. So they can put zero if they want to
18 or they can put a number.

19 MS. PEPKE: And just for a clean record,
20 could we get a ruling on rejecting our -- if
21 that's Your Honor's order. We had submitted
22 our own post charges.

23 THE COURT: I haven't even seen it.

24 MS. MCVEY: I e-mailed you all the Glenn
25 charge just so we have it.

1 THE COURT: Hang on. All these bunch of
2 pages on punitive damages?

3 MS. MCVEY: That's why I suggest, Your
4 Honor, so we don't spend any more time on it.

5 THE COURT: Are y'all serious about this?
6 That would be -- you've got 21 pages of charges
7 on punitive damages.

8 MS. MCVEY: Do you have an extra copy?

9 MS. PEPKE: I don't even have a copy.

10 THE COURT: Oh, man, I'll tell you this is
11 not a helpful submission to me. I am not
12 thinking about charging all this stuff.

13 MS. MCVEY: That's why we would suggest we
14 use Glenn. It was aptly argued in a prior
15 case.

16 THE COURT: Where is Glenn?

17 MS. MCVEY: I think it's electronic. I
18 can have it printed out if we need to.

19 THE COURT: Yes, because I'm going to let
20 them take it back with them as I did the other
21 charges. Wait a minute. I may have it here.
22 No.

23 I should have done this beforehand. I'm
24 not going to make that mistake again. That's
25 on me. We've been sitting right here all that

1 damn length of time and I should have done
2 this.

3 MS. MCVEY: Judge, I'm going to e-mail it
4 to Ryan, and he can print it out. I only have
5 the PDF, so I'm going to have to cut it off a
6 little bit. Ryan can probably do that for me.

7 THE COURT: Okay. I got it. You just
8 gave it to me. Where the heck did I put it?

9 MS. MCVEY: I didn't have it printed. I
10 e-mailed it to you.

11 THE COURT: Yeah, that's right, you
12 e-mailed it to me.

13 MS. MCVEY: Amy, I e-mailed it to you,
14 too, if that's helpful.

15 THE COURT: Yeah, I got it. Wait a
16 minute. Here's what I've got. Here's what
17 I've got: Ladies and gentlemen, I hope you've
18 had a pleasant evening. Let me begin by
19 explaining to you how this phase of the trial
20 will work. When the plaintiff brought this
21 lawsuit, the plaintiff asked for actual and
22 punitive damages. The way I handle these kinds
23 of cases, particularly complex cases like this,
24 is that I bifurcate. And that's just a fancy
25 word for I divide the case. And the first

1 thing that is presented to you is actual
2 damages. That would involve first whether the
3 defendant is liable. And that is based on
4 whether the activities of the defendant
5 proximately caused the injury that the
6 plaintiff alleges was suffered.

7 You've now gone through that phase. I
8 don't talk about punitive damages in that phase
9 or have that presented because I don't want to
10 impact your decision about the issues of
11 liability. At the end of your verdict form, I
12 always ask in the first phase of the trial,
13 after you've been -- after you've been
14 instructed, I ask about clear and convincing
15 evidence. I ask you whether the conduct of any
16 defendant that you find is liable and that you
17 award damage -- or actual damage, I ask whether
18 that conduct was willful, reckless, and wanton.
19 And you have found that it was. And that is
20 the precursor or predicate for moving to this
21 phase of the trial.

22 This is the last phase of the trial. It
23 is a short phase of the trial. So please be
24 assured to begin with we're not talking about
25 any lengthy process. I'll begin this phase by

1 giving you some instructions about punitive
2 damages. Then I will turn to the plaintiff to
3 open the plaintiff's case on punitive damages,
4 which will be rather short. And I'll start by
5 reading to you a stipulation about the
6 defendant. So that's how we're going to
7 proceed. Plaintiff will present their case.
8 Defendant will present its case. They will be
9 rather short. And then they are permitted to
10 make an argument to you. And then I will give
11 you whatever other charges I may need to give
12 you, which will be very brief. I think this
13 can all be accomplished with dispatch.

14 So let me begin with these instructions.
15 As I have told you, if you award actual damages
16 against the defendant, you may also consider an
17 award of punitive damages. You've already
18 crossed the first hurdle, which is you found
19 the conduct was willful, reckless, and wanton.
20 Punitive damages are intended to punish the
21 defendant for willful, reckless, and wanton
22 misconduct, and prevent the defendant and
23 others from committing similar acts in the
24 future. Punitive damages can only be awarded
25 when the conduct of the defendant has been

1 something more than mere negligence. The
2 evidence must clearly and convincingly
3 establish that the defendant was reckless,
4 willful, or wanton, meaning it was a conscious
5 failure to exercise due care or asbestos
6 fibers.

7 I don't know why that's in there.

8 MS. MCVEY: That might have been a typo.

9 THE COURT: It should say conscious
10 failure to exercise due care or conscious
11 indifference to the rights and safety of others
12 or reckless disregard of the rights and safety
13 of others. South Carolina has a statute on this
14 subject. I will read pertinent portions to
15 you. Statute is Code Section 15-32-520, and it
16 is entitled Bifurcated Trials Clear and
17 Convincing Evidence Standard, Factors for
18 Liability Determinations. A, in all actions
19 tried before a jury involving punitive damages,
20 if requested by any defendant against whom
21 punitive damages are sought, must be conduct --
22 must be conducted in a bifurcated manner before
23 the same jury. I have conducted it that way.

24 In the first phase of a bifurcated trial
25 the jury shall determine liability and

1 compensatory damages and the amount of
2 compensatory or nominal damages. In this case
3 you determined compensatory damages. Evidence
4 relevant only to the issue of punitive damages
5 is not admitted in the first stage. Punitive
6 damages may be awarded only if the plaintiff
7 proves by clear and convincing evidence that
8 its harm was as a result of the defendants'
9 willful, wanton, and reckless conduct. That
10 has been done.

11 In the second stage of a bifurcated trial,
12 the jury shall determine whether the defendant
13 is liable for punitive damages, and if
14 determined to be liable, the amount of punitive
15 damages. In determining the amount of punitive
16 damages, the jury may consider all relevant
17 evidence, including but not limited to the
18 defendants' degree of culpability.

19 2, the severity of harm caused by the
20 defendant;

21 3, the duration of the conduct;

22 4, the defendants' awareness of any
23 concealment by the defendant;

24 5, the existence of similar past conduct;

25 6, the profitability of the conduct of the

1 defendant;

2 7, the ability -- defendants' ability to
3 pay;

4 8, the likelihood that the award will
5 deter the defendants and others from acting in
6 like conduct.

7 These are the pertinent portions of the
8 statute.

9 I turn to Ms. McVey and I begin by reading
10 to you this financial disclosure. Then it says
11 net worth information for two calendar years.
12 All right. And then McVey goes and makes her
13 pitch. And then Mr. Reid made his reply. And
14 then --

15 MS. MCVEY: A short rebuttal.

16 THE COURT: You made a rebuttal. And then
17 I sent them to the jury room, and that was it.
18 I don't think I made any further charges. So
19 that's what I did, and that's what I propose to
20 do this time.

21 MS. PEPKE: When would they be instructed
22 about that they can award zero?

23 MS. MCVEY: It's in there.

24 MS. PEPKE: Was it in there?

25 MS. MCVEY: It doesn't say "zero," but it

1 says you don't have to award any damages.

2 THE COURT: Yeah, I'll make sure they know
3 that. Has the form been reprinted for me to
4 give to the jury?

5 MS. MCVEY: The jury charges?

6 THE COURT: No.

7 MS. MCVEY: What changes did you want me
8 to make? I'm sorry. I missed it.

9 THE COURT: You've got the verdict form
10 for me, right?

11 MS. MCVEY: Yes.

12 THE COURT: The question is -- this has
13 typos all in it, this does.

14 MS. MCVEY: I need just a second to
15 convert it to a Word document. And let me type
16 in the proper numbers for the stipulation. And
17 then I'll try to fix the typos very quickly.

18 THE COURT: All right. Let's get it done
19 as quick as you can.

20 MR. BROWN: Your Honor, there's one part
21 of that charge -- in addition to the other
22 objections we filed earlier, there's one part
23 of that charge that I really, really don't
24 think is appropriate in this case, and it's
25 talking about deterring others. And in this

1 case you've got --

2 THE COURT: I agree. I'll take that out.
3 I don't need it.

4 MS. MCVEY: Wait, wait. That's part of
5 the statute. Why is it not applicable here?

6 MR. BROWN: It's not applicable here and
7 it shouldn't be here. There were screenshots
8 of numbers and multitudes of different talc
9 products that Mr. Perry used.
10 Johnson & Johnson should not be punished for
11 that --

12 THE COURT: No, no, no.

13 MS. MCVEY: That's not what they're
14 talking about.

15 MR. BROWN: -- with a number to deter all
16 the other companies from making their talc.

17 THE COURT: I don't think that's what it
18 means.

19 MS. MCVEY: I don't either. And they used
20 that slide, not us.

21 MR. BROWN: It's Mr. Perry's testimony.

22 THE COURT: We're arguing about things
23 that don't make any difference.

24 MS. MCVEY: That language is in the
25 statute.

1 THE COURT: Yeah, it is in the statute.

2 MR. BROWN: Well, in this case we object
3 to it.

4 THE COURT: Okay. I gotcha.

5 MS. PEPKE: For the record, has the court
6 overruled our request for our own jury charge
7 that we submitted to the court that's rejected
8 by the court?

9 THE COURT: If I could ever find it. Oh,
10 yes, this 21-page document? Yes. All right.
11 I have never seen a charge of that length.
12 This is a 21-page document with all kinds of
13 abstruse discussion of legal principles and
14 relationships between various kinds of damages,
15 and so forth and so on, and no punishment for
16 corporate location and a bunch of things that
17 aren't relevant. So it has many irrelevant
18 things, it has many things that are wordy, and
19 it has many things that I don't think you
20 really want because I don't think they're
21 consistent with the limitations that I think
22 are present as a result of the Branham case.
23 So for that reason, I reject it.

24 MS. PEPKE: Thank you, Your Honor.

25 And as to the motions in limine that were

1 made before court, is it the court's position
2 that those have been confirmed for this
3 Phase II, as well?

4 THE COURT: Absolutely. Absolutely.

5 MS. MCVEY: I'm sorry. I missed that.

6 THE COURT: Any objections that were made
7 in the motions in limine are now repeated in
8 the trial of the case and repeated in the
9 punitive phase trial of the case. And yes, to
10 the extent that there's some suggestion that we
11 do that, because there's some suggestion in
12 some of the cases that if you don't repeat the
13 rulings, that the motions in limine doesn't
14 count. So I repeat all of those rulings here.

15 MS. FLYNN: If you could please confirm
16 that for AII, as well.

17 THE COURT: Yes, for AII, as well.

18 MS. PEPKE: And you are prohibiting us
19 from further argument under Rule 43 on those
20 motions?

21 THE COURT: Yes. Thank you.

22 MS. FLYNN: Same for AII?

23 MS. MCVEY: I'm going to keep that in my
24 back pocket now that I know that's a thing.

25 THE COURT: That was Walter Bristow's

1 favorite rule.

2 MS. MCVEY: I didn't know. Your Honor,
3 we're tweaking these charges right now. I'm
4 sorry, Stephanie.

5 MS. FLYNN: I'm just confirming the same
6 for AII.

7 THE COURT: Yeah, yeah, absolutely. And
8 renewal and appropriate rulings in this phase
9 of the case, as well, yes.

10 MS. PEPKE: All right. So can we get a
11 little more clarity about how it's going to
12 roll?

13 THE COURT: I'm going to bring the jury in
14 here.

15 MS. PEPKE: You'll bring the jury in.

16 THE COURT: I'll bring the jury in. And
17 I'm going to do just like I did in the Glenn
18 case. I'm going to give them the explanation
19 of how this thing is going to work. Where does
20 that start, 32?

21 MS. MCVEY: I'm so sorry. What was the
22 question?

23 THE COURT: She's trying to find out how
24 this is going to roll. And I'm telling her I'm
25 going to do just what I just finished reading

1 out of the Glenn case. And she's entitled to
2 have that. She wants that on the record so she
3 can say that she objects to it.

4 I am going to have them please be seated;
5 hope you had a pleasant break. And then I'm
6 going to recite that that I just read to you
7 about when the plaintiff brought this lawsuit,
8 she asked for actual and punitive damages. The
9 way I handle these cases, I'll tell them about
10 the bifurcation situation.

11 And then I'm going to give them the
12 charge. And then I'm going to go over the
13 verdict form with them. And I will be sure to
14 emphasize in both the charge and the verdict
15 form that it is not required to award any
16 punitive damages; zero can be put there.

17 MS. MCVEY: You already say it in there.

18 MS. PEPKE: And then is there an opening?

19 THE COURT: And then I will turn to the
20 parties and I will have Ms. McVey make her
21 argument. And let's talk about timing. You
22 said you could do it in 20 minutes? We're not
23 going to use the economist now, right?

24 MS. MCVEY: No, we're not going to use the
25 economist. We're going to stipulate to the net

1 worth.

2 THE COURT: Which I will agree.

3 MS. MCVEY: So it will be in as part of
4 your instructions.

5 THE COURT: Right.

6 MS. MCVEY: Then we'll argue, I think, 20
7 minutes at most.

8 THE COURT: Yes.

9 MS. MCVEY: And in the argument he may use
10 some documents that we believe are relevant
11 to --

12 THE COURT: You may use the ELMO or videos
13 and everything you want.

14 MS. MCVEY: So 20 minutes, and then
15 whatever they would want, and then a short
16 rebuttal.

17 THE COURT: My idea would be to go to them
18 for 20 minutes.

19 Well, Ms. Bueno, tell me what you want.

20 MS. BUENO: Well, I guess I'm a little
21 unclear about the parameters of the evidence.
22 I mean, they've already had a liability finding
23 on the reckless, wanton, willful conduct. So
24 our opinion would be that they shouldn't go
25 through and go through a bunch of documents

1 again to establish that finding.

2 THE COURT: Yes, I agree with that. I
3 don't think they're going to do that. I'm
4 familiar with how they'll do it. They'll talk
5 a little bit about the conduct.

6 MS. MCVEY: We're going to show the jury
7 some documents that we think shows
8 reprehensibility. It's still going to be
9 within a 20-minute parameter.

10 THE COURT: They're entitled to do that.

11 MS. PEPKE: But they have already made
12 that decision.

13 MS. BUENO: That's where I'm hung up here.

14 THE COURT: You have been in many trials
15 where many people have argued the punitive
16 damages, and they have not been limited to just
17 saying here's the net worth; please punish
18 them.

19 They are allowed to talk about the
20 aggravated nature of the conduct. That's what
21 he's going to do.

22 MS. BUENO: Okay. I just -- they have
23 already made a finding. And so the purpose of
24 this stage, in my mind, is how much, right?

25 THE COURT: Well, the purpose of this

1 thing is two things. Number one, it's the
2 finding that the conduct was reckless, willful,
3 and wanton. They can talk about that and what
4 its implications are as they lead into the
5 discussion of why they should be punished and
6 their ability to pay. I will allow it.

7 MS. BUENO: Understood.

8 MS. PEPKE: To be clear, we do object to
9 that. And I understand Your Honor is now
10 overruling our objection.

11 THE COURT: Yes, that's right.

12 MS. BUENO: So given the nature of this
13 phase, I would ask Your Honor to please revisit
14 your ruling about the response to the Citizens'
15 Petition which came out in 1986. I know you
16 said that the motions in limine apply here, but
17 I do think it's important for the jury to
18 understand that the issues that were alleged in
19 this case were brought before the FDA, and
20 there was actually a response letter issued
21 saying that a warning label was not necessary.
22 And that was not involving Johnson & Johnson.

23 THE COURT: I would overrule your
24 objection and your request that you be allowed
25 to go back into that. That's actual damage

1 evidence. It's before the jury. Well, let's
2 see. How much is it before the jury? You
3 weren't allowed to go into that.

4 MS. BUENO: We weren't allowed to talk at
5 all about the fact in 1986 the FDA considered
6 the issues that were alleged in this trial.

7 THE COURT: Right. And having ruled it
8 out of the liability portion, I will not allow
9 it to be argued in the punitive portion.

10 MS. BUENO: And then the same request I
11 will make for two other documents that Your
12 Honor excluded -- and I understand your ruling,
13 but there was the Health Hazard Evaluation that
14 we wished to get in, where the company made an
15 exposure assessment following the 2019 FDA
16 finding, and then there was another document
17 called The Comprehensive Review that was done
18 by Dr. Kuffner, where he reviewed the totality
19 of evidence. And I understand that Your Honor
20 had excluded those, but now that we're talking
21 about this reprehensibility issue, I do think
22 it's important for the jury to understand some
23 of the efforts the company has done in recent
24 years to analyze these issues. And it really
25 does go to mitigation, Your Honor.

1 THE COURT: I will allow that.

2 MS. MCVEY: Hold on a second, Your Honor.

3 I really object to that for one reason: We
4 weren't allowed to cross Kuffner on that;
5 there's no context for it; it's expert opinion
6 that the jury has never seen. So now it's just
7 going to be counsel arguing without any context
8 to it. That's inappropriate at this stage.

9 THE COURT: All right. I'm going to
10 overrule that and I'm going to allow her to
11 refer to those two things.

12 MS. BUENO: So may we seek to admit those
13 two documents now? I don't have the number in
14 front of me. I'll get them and we'll put it on
15 the record.

16 THE COURT: Are they huge documents?

17 MS. BUENO: The Health Hazard Evaluation I
18 believe is 17 pages, and The Comprehensive
19 Review is indeed a very big document. And what
20 it does is it has a compilation -- it's about,
21 I think, 250 pages. And then it has hundreds
22 of pages of exhibits, which we don't need to
23 offer. But I would suggest that we offer The
24 Comprehensive Review document, which outlines
25 the company's position after a full analysis of

1 all of the data. And I think it's important
2 for the jury to see that when they're
3 considering why the company has come here and
4 defended these claims in this case.

5 THE COURT: Just a minute.

6 MS. MCVEY: I'm so sorry.

7 THE COURT: It's going to be a tit for
8 tat. If I start letting you do that, I'm going
9 to let them put in additional different
10 evidence about reprehensibility and so forth.
11 I'm not going to do that. I'm going to rest on
12 what was in the liability trial in chief, and
13 I'm going to stick with those rulings. So I
14 will not allow that to be admitted.

15 MS. BUENO: So just to be clear, you are
16 excluding from Phase II the Health Hazard
17 Evaluation, the Citizens' Petition and The
18 Comprehensive Review?

19 THE COURT: That's right.

20 MS. BUENO: We have actually issued
21 proffers on those for Phase I, and so I would
22 ask the record to reflect that we are
23 reoffering the proffers for the purpose of
24 Phase II, because we certainly think that.

25 THE COURT: All right. I'm not going to

1 go on forever with this. I have heard enough
2 and I've ruled enough, and we're going to get
3 this jury in here to do this.

4 MS. PEPKE: Do we need a few minutes?

5 MS. BUENO: Yes. Could we just have a
6 break and a few minutes to gather our thoughts?

7 THE COURT: Certainly. Let's talk about
8 your time first. They want --

9 MS. MCVEY: 20 minutes.

10 THE COURT: -- 20 minutes. And then you
11 want 10 in reply?

12 MS. MCVEY: 10 in reply, yes.

13 THE COURT: I'm going to give them --
14 you'll have 20 minutes to open. They'll have
15 30 minutes to do their thing. And you'll have
16 10 minutes in reply.

17 MS. BUENO: Will that be shared with AII?

18 THE COURT: That will be shared with AII.
19 You can work that out.

20 MS. BUENO: Thank you.

21 MS. MCVEY: And, Your Honor, we're trying
22 to tweak these. It's a little slow going with
23 a PDF trying to be converted. So I'm trying.

24 MS. BUENO: And we do need a copy of that
25 before we start. We'll print it when we get

1 it.

2 THE COURT: Of course. They're working
3 hard. I should have done this when I had all
4 that length of time. Live and learn.

5 (Whereupon there was a recess in the
6 proceedings from 3:44 p.m. to 3:58 p.m.)

7 THE COURT: After I've read the pertinent
8 portions of the statute, I say, I turn to
9 Mr. Adams to begin the plaintiffs' presentation
10 of its case in the punitive damages phase. And
11 I begin by reading to you this financial
12 disclosure. This disclosure is made on behalf
13 of Johnson & Johnson.

14 Financial data condition of defendant.
15 Defendants' net worth information for the past
16 calendar year is sufficient for the scope of
17 the topic of defendants' financial condition.
18 The year is 2023. The defendants' net equity
19 for fiscal year 2003 is \$70 billion. This
20 disclosure is made on behalf of AII. It's net
21 worth for 2023 is \$76 million. Mr. Adams is
22 recognized for the plaintiff.

23 MS. MCVEY: That's fine, Your Honor. I
24 wanted to raise one tiny thing with you about
25 they raised Rule 8 about suggesting a number.

1 THE COURT: Yes.

2 MS. MCVEY: Do you recall that? That Rule
3 8 is for pleadings.

4 THE COURT: What's that?

5 MS. MCVEY: Rule 8 is for pleadings. It
6 doesn't talk at all -- it's just for how you
7 plead it in a complaint. I just pulled it up
8 and I wanted you to look at it (handing). It's
9 not --

10 THE COURT: Ms. Pepke?

11 MS. PEPKE: Your Honor, I think it's quite
12 clear that they can ask on actual damages for
13 specific numbers, but as to punitive numbers,
14 they are only allowed to ask for general, both
15 in the pleadings, but also in front of the
16 jury.

17 THE COURT: Well, I'm going to say that
18 that's how it's going to be done. I don't
19 think it makes a particle of difference. I
20 think we're arguing over something that's not
21 going to make a huge amount of difference in
22 what they do or don't do on the punitive
23 damages. I am not going to allow them to ask
24 for a particular number, but they're going to
25 probably do something that suggests just that

1 because they're going to talk about net worth
2 and what it would take to punish someone with
3 that kind of net worth, and so forth and so on,
4 and you've got to use your judgment, blah,
5 blah, blah, blah. So I think that's going to
6 be said and I think that's going to be fine.

7 MS. MCVEY: Thank you, Your Honor. We do
8 believe and have in the past argued numbers
9 that the jury should award for punitive
10 damages. Rule 8 only applies to pleadings, and
11 that's clear.

12 THE COURT: Well, I think you're probably
13 right, but in a superabundance of caution,
14 that's the way I'm going to do it.

15 MS. MCVEY: Fair enough. Thank you,
16 Judge.

17 MS. PEPKE: Are we on the record?

18 THE COURT: Yes. I've got my verdict
19 forms.

20 MS. MCVEY: I'd love to get going because
21 it's 4:00 now.

22 THE COURT: I've got the verdict forms and
23 I will go over them with the jury.

24 MR. BROWN: Your Honor, on the
25 amalgamation ruling, we are just wanting to

1 make sure that the court received our directed
2 verdict arguments about successor liability and
3 that you are rejecting all of those arguments
4 because --

5 THE COURT: Well, it doesn't make any
6 difference now, Mitch, because I didn't let
7 them put Kenvue in. So don't come to me with
8 that now. We're just putting J&J on this.

9 MS. MCVEY: That's right. And I
10 understand that we are going to brief for you
11 following this verdict the successor liability
12 amalgamation, which then you would make a
13 ruling after you see it.

14 THE COURT: That's correct.

15 MR. BROWN: I thought you said you had
16 already made the ruling.

17 THE COURT: No. I said I was just going
18 to go with J&J. And I think Theile would renew
19 her request that we put in the number for
20 Kenvue.

21 MS. MCVEY: That's right. That's exactly
22 right, just so we can move this along.

23 THE COURT: So we don't have anything to
24 worry about with that. In terms of enforcement
25 of the judgment, we may have some rulings about

1 amalgamation on that and successor liability
2 and that kind of thing. For this purpose,
3 Mitch, I don't think you've got anything to
4 worry about. They withdrew it.

5 MS. MCVEY: Can we get everybody in so we
6 can get going if you're ready.

7 THE COURT: I'm ready.

8 MS. MCVEY: I'll go get everybody.

9 Judge, I want to make sure. You said we
10 can't say a number, but certainly we can argue
11 percentages of net worth, that sort of thing.

12 THE COURT: Oh, yeah, yeah.

13 Mr. Adams, this is such a huge number that
14 I don't see why y'all would try to skirt into
15 anything that gets in the way of that.

16 MR. ADAMS: I just don't want to get in
17 trouble, Your Honor.

18 THE COURT: If you're going to have good
19 common sense, then I think we can do business.

20 MS. MCVEY: We want to make sure that
21 we're not saying what you don't want us to say.
22 That's the only reason.

23 THE COURT: You're going to argue about
24 what it takes to punish a company that's this
25 big. So go right ahead. Have at it.

1 - - -

2 (Discussion off the record.)

3 - - -

4 THE COURT: Bring me the jury.

5 THE BAILIFF: Yes, ma'am.

6 (The jury entered the courtroom at this
7 time.)

8 THE BAILIFF: Jury is seated, Your Honor.

9 THE COURT: Thank you, sir. You're so
10 tall and I'm so short.

11 - - -

12 JURY CHARGE BY CHIEF JUSTICE TOAL

13 - - -

14 THE COURT: All right. Ladies and
15 gentlemen, first let me say that this delay is
16 not the lawyers' fault. I blame this on
17 myself. I should have, while y'all were
18 deliberating, done this, but I kind of don't
19 like to get ahead of myself and jinx things.
20 So we'll just blame it on a Catholic
21 superstition.

22 Ladies and gentlemen, let me first begin
23 by explaining how this phase of the trial will
24 work. When the plaintiff brought this lawsuit,
25 the plaintiff asked for actual and punitive

1 damages. And the way I handle these type of
2 cases, particularly when they're complex, is
3 that I bifurcate. And that is just a fancy
4 word for I divide the case into the first thing
5 that is presented to you, which is actual
6 damages. And that would involve, first,
7 whether the defendant is liable. That's based
8 on whether the activities of the defendant
9 proximately caused the injury that the
10 plaintiff suffered.

11 Now, you've gone through that phase. And
12 I don't talk about punitive damages in that
13 phase or have that presented because I don't
14 want that to impact your thoughts when you're
15 just dealing with liability. So I stay away
16 from talking about punitive damages.

17 Now, at the end of your verdict form you
18 will notice, and I always ask in that first
19 phase, after you have been instructed about
20 clear and convincing evidence, I ask you
21 whether the conduct of any defendant that you
22 find is liable and that you award actual
23 damages against, whether that conduct was
24 willful, reckless, and wanton. And you have
25 found that it was. And that is the precursor

1 or predicate for moving this case to this phase
2 of the trial.

3 This is the last phase of the trial. It
4 is a short phase of the trial. So please be
5 assured that to begin with we're not talking
6 about any lengthy process. In this phase I'm
7 giving you some instructions about punitive
8 damages. And then I will turn to the plaintiff
9 to open their case on punitive damages, which
10 will be rather short and a strictly limited
11 time. And I'll start by reading you a
12 stipulation by the defendants. So that's how
13 we're going to proceed. Plaintiffs will
14 present their case. Defendants will present
15 their case. They will both be rather short.
16 And then they are permitted to make a closing
17 argument to you. And I may need to give you
18 other instructions, but I don't think so. The
19 ones I'm going to give you will suffice.

20 So we will begin with these instructions.
21 As I have told you, if you award actual damages
22 against the defendant, you may also consider
23 and award punitive damages. You've already
24 crossed the first hurdle, which is you have
25 found that the conduct was willful, reckless,

1 and wanton. Punitive damages are intended to
2 punish a defendant for willful, reckless, and
3 wanton misconduct and to prevent the defendant
4 and others from committing similar acts in the
5 future. Punitive damages can only be awarded
6 when the conduct of the defendant has been
7 something more than mere negligence. The
8 evidence must clearly and convincingly
9 establish that the defendant was reckless or
10 willful or wanton, meaning there was a
11 conscious failure to exercise due care or a
12 conscious indifference to the rights and safety
13 of others or reckless disregard for the safety
14 of others.

15 Now, there's a statute on that, a law, and
16 I'm going to read portions of that to you. The
17 statute is Code Section 15-32-520, and it's
18 entitled Bifurcated Trials Clear and Convincing
19 Evidence Standard, Factors for Liability
20 Determination. In all actions tried before a
21 jury involving punitive damages, if requested
22 by any defendant against whom punitive damages
23 are sought, the punitive damage phase must be
24 conducted in a bifurcated manner before the
25 same jury. I have conducted it that way. In

1 the first phase of the bifurcated trial, the
2 jury shall determine the liability for
3 compensatory damages and the amount of
4 compensatory or nominal damages. In this case
5 you have determined compensatory damages.
6 Evidence relevant only to the issue of punitive
7 damages -- evidence only relevant to the issue
8 of punitive damages is not admitted in the
9 first stage. Punitive damages may be awarded
10 only if the plaintiff proves by clear and
11 convincing evidence that his harm was a result
12 of willful, wanton, and reckless conduct, and
13 that has been done.

14 In the second phase of the bifurcated
15 trial, the jury shall determine if the
16 defendant is liable for punitive damages, and
17 if determined to be liable, the amount of
18 punitive damages. In determining the amount of
19 punitive damages, the jury may consider all
20 relevant evidence, including but not limited to
21 defendants' degree of culpability, the severity
22 of the harm caused by the defendant, the
23 duration of the conduct, the defendants'
24 awareness and any concealment by the defendant,
25 the existence of similar past conduct, the

1 profitability of the conduct of the defendant,
2 the defendants' ability to pay, the likelihood
3 that the award would deter the defendant or
4 others from like conduct. Those are the
5 pertinent portions of the statute.

6 Now, in a minute I'm going to turn to
7 Mr. Adams to begin the plaintiffs' presentation
8 of the case in this punitive damages case. And
9 I'm going to begin by reading you this
10 financial disclosure. This disclosure is made
11 on behalf of Johnson & Johnson. Financial
12 data, condition of defendant. Defendants' net
13 worth information for the past calendar year is
14 sufficient for the scope of the topic of the
15 defendants' financial condition. The year is
16 2023. The defendants' net equity for fiscal
17 year 2023 is \$70 billion. This disclosure is
18 made on behalf of AII. Its net worth for 2023
19 is \$76 million.

20 Now, I also have a punitive damages form.
21 And in a moment, I'm going to give that to your
22 foreperson of the jury, each one of you. And,
23 of course, just like we did before, you'll fill
24 it out at the end. It's a pretty simple form.
25 It says, "As to Plaintiff Michael Perry's claim

1 against Defendant Johnson & Johnson entities
2 for punitive damages, we the jury, by unanimous
3 consent, find." And you check "Michael Perry"
4 there. And then you would put in the amount of
5 blank punitive damages. You could put zero
6 there. It's not mandatory that you award
7 punitive damages. Or you can put a figure that
8 you think should be awarded considering the
9 arguments of the parties and the instructions I
10 have given you.

11 And then it says, "As to Plaintiff Michael
12 Perry's claim against Defendant American
13 International Industries for punitive damages,
14 we the jury, by unanimous consent, find" --
15 check "Michael Perry," and then there's a blank
16 for punitive damage. You can put zero there or
17 you can put the amount that you think should be
18 awarded as punitive damages. And the amount,
19 of course, depends on considerations that I
20 just read you in my instructions and arguments
21 that the parties will make to you as they make
22 their presentation.

23 So, Madam Foreperson, I am going to hand
24 you at this time blank verdict forms (handing).
25 I don't have a printed out copy of the charge I

1 just made to you, but the stipulation you can
2 just write down in your notebook, Madam
3 Foreperson, the net worth of Johnson & Johnson
4 is \$70 billion, and the net worth of AII is
5 \$76 million.

6 JURY FOREPERSON: Million?

7 THE COURT: That's AII, 76 million; J&J,
8 70 billion. All right? Very good.

9 Now, Mr. Adams, you may proceed.

10 MR. ADAMS: Thank you.

11 - - -

12 CLOSING ARGUMENT BY MR. ADAMS

13 - - -

14 MR. ADAMS: There's no more phases. This
15 is it, I promise. And it's supershort. It's
16 real short, but it's real important. I know
17 you all probably thought we were going to go
18 home. We're not allowed to tell you if you
19 check "yes" on 8, there's another phase. I'm
20 going to talk to you for about five minutes.
21 You've already heard the stipulations. J&J
22 will talk to you, and then you'll be done.
23 It's one question on the verdict form, and no
24 more phases.

25 Thank you so much for your deliberations.

1 Thank you for taking us so seriously. Thank
2 you for finding that the wrongful conduct of
3 Johnson & Johnson played a role in the cancer
4 that's going to take Michael Perry's life.
5 Thank you for valuing Lonnie Long's claim and
6 the loss that he's had. But most of all, I
7 just want to thank you for valuing Michael
8 Perry's life. Thank you so much.

9 This phase is about something completely
10 different. It's about punishment and
11 deterrence. You compensated Michael and Lonnie
12 already for their loss. That's done. This
13 phase is just about punishing the company.
14 Companies are not like human beings. They're
15 not made of flesh and blood. And so when a
16 company does something horrible and hurts
17 somebody, you can punish the company with
18 money. That's what this is about, punishment
19 and deterrence.

20 I talked about money damages that come
21 with a receipt. Remember that the paycheck
22 losses, the funeral expenses, the medical
23 bills, that's one kind. The other kind was the
24 type of money damages that don't come with a
25 receipt, the human loss in the case. This is a

1 third kind, money in a verdict to punish the
2 company and to tell them, "Don't ever do
3 anything like this again. Don't ever do
4 anything like this again." That's what this is
5 about.

6 But in order to do that, you have to know
7 how much money the companies have because
8 you're not allowed to destroy the company with
9 your verdict. It can't -- it can't be so much
10 that it would destroy the company, but it can't
11 be so little that they don't feel it at all.
12 It has to be actual punishment that will deter
13 them from doing this again.

14 And so --

15 MR. BROWN: Objection, Your Honor.

16 THE COURT: Yes. I think your objection
17 is "it has to be."

18 MR. BROWN: Yes.

19 THE COURT: And I agree with you. It
20 doesn't have to be any amount; and therefore
21 your objection is sustained. Strike that from
22 the record.

23 MR. ADAMS: Sorry about that. You don't
24 have to punish them at all.

25 We believe the evidence, selling the worst

1 carcinogen in human history to children, is
2 worth punishing.

3 MS. PEPKE: Objection, Your Honor. May I
4 approach?

5 THE COURT: You may.

6 (Whereupon a bench conference was
7 held.)

8 MS. PEPKE: I believe I heard him say,
9 "selling it to children," which would be asking
10 them to punish the harm to other people.

11 MS. MCVEY: He used it as a child. His
12 mother used it on him as a child. This is the
13 punishment phase.

14 THE COURT: Then use those terms. Don't
15 say, "selling it to a child."

16 MS. PEPKE: I would object to punishing
17 Johnson & Johnson for harm to other people.

18 THE COURT: Well, deterring that is what
19 they are asking for. And that they can ask.

20 MS. PEPKE: Overruled?

21 THE COURT: Overruled.

22 MS. MCVEY: Thank you, Your Honor.

23 (Bench conference concluded.)

24 THE COURT: Proceed, Mr. Adams.

25 MR. ADAMS: Yes, Your Honor. Thank you.

1 You all have to come up with the number on
2 your own. We're not allowed to tell you a
3 number, but I just want to put some of the
4 numbers in context, if I can. That
5 \$70 billion, that's what it looks like. I have
6 trouble sort of understanding that number.
7 It's seventy thousand million dollars.
8 1 percent of \$70 billion is \$70 million.
9 That's 1 percent. One of the ways that
10 sometimes I think about it is if you got rid of
11 the million, it would be 70,000. That's kind
12 of a number that we can understand, 70,000. If
13 somebody had \$70,000, and they sold something
14 that caused a person's death, and we were
15 wondering what would be appropriate to fine
16 them for that conduct, \$70 for someone with
17 70,000 in this case would be the same as
18 70 million, just to put the numbers in context.

19 MS. BUENO: Objection, Your Honor.

20 THE COURT: Overruled.

21 MR. ADAMS: But it's up to you. I hope
22 you all will do something -- you did such a
23 good job compensating Michael Perry, but
24 they're listening closer than they've ever
25 listened right now. This is the most important

1 thing to the company, what you do right now.
2 And I know you're tired, and you're probably
3 tired of hearing me talk, and you're tired of
4 sitting here, and you're tired of it all. This
5 is the most important part to this company.

6 Please stay with us, please do the right
7 thing, and please tell this company, "Don't
8 ever do anything like this again."

9 Thank you so much.

10 MR. BROWN: Your Honor, I object to "doing
11 the right thing."

12 THE COURT: Overruled.

13 All right. Ms. Bueno.

14 MS. BUENO: Ms. Flynn is going to start,
15 Your Honor.

16 THE COURT: Very good. Ms. Flynn for AII.

17 - - -

18 CLOSING ARGUMENT BY MS. FLYNN

19 - - -

20 MS. FLYNN: Ladies and gentlemen of the
21 jury, as I told you before, I've only been able
22 to talk to you about damages. And that's
23 because AII was found to be in default in this
24 case. And what that means is that AII, my
25 company, did not respond to plaintiffs' legal

1 claim within the required time frame.

2 MS. MCVEY: Objection, Your Honor.

3 THE COURT: I'll tell you what. Approach.

4 (Whereupon a bench conference was
5 held.)

6 THE COURT: Tell me what the objection is.

7 MS. MCVEY: She just said the only reason
8 they are here is because they were in default
9 and didn't file timely.

10 THE COURT: Ms. Flynn, I've told you what
11 I told the jury is that the law, by law, you've
12 been found liable. Please don't do that again.
13 Sustained.

14 MS. MCVEY: Thank you, Your Honor.

15 (Bench conference concluded.)

16 THE COURT: Objection is sustained.

17 MS. FLYNN: I did tell you before that AII
18 is here by operation of law. Sadly, I did not
19 have the opportunity to truly defend this
20 company before you. Had I been able to do so,
21 I would have told you that they are a
22 family-owned company in California. It was
23 started by a man named Mr. Ryzman who
24 immigrated to the United States. And he
25 basically went door to door -- he started the

1 company going door to door selling false nails
2 and eyelashes. He would literally wear them
3 himself and go door to door, and that's how his
4 business started. Today that's still AII's
5 main business. They're still located in
6 California, one building, a family-owned
7 company.

8 For a brief period of time, from 1987 to
9 2017, they sold Clubman talc. While I was not
10 able to put on evidence or defend AII in this
11 case, the plaintiffs could have put on a case
12 against AII, and they did not. They showed you
13 no evidence that there was ever any asbestos in
14 the pharmaceutical-grade talc that they elected
15 to use, they showed you no evidence that AII
16 intentionally ignored or disregarded any
17 information that any pharmaceutical --

18 MS. MCVEY: Objection, Your Honor.

19 THE COURT: Yes, the objection is
20 sustained. They have been -- ladies and
21 gentlemen of the jury, by operation of law,
22 they have been found liable, and they have been
23 found liable on the averments of the complaint,
24 which includes multitudinous discussion of the
25 content of their Clubman talc. And they are

1 liable for injuries suffered as a result of the
2 content of their talc. And that is how the
3 matter was pled, and by law they have been
4 found liable for that.

5 You may proceed. Objection is sustained.

6 MS. FLYNN: Ladies and gentlemen, in this
7 final phase of trial, you do not have to award
8 damages. Punitive damages are intended to
9 punish a defendant for extraordinary and
10 outrageous misconduct and to prevent the
11 defendant from committing similar acts in the
12 future. Punitive damages can only be awarded
13 when the evidence clearly and convincingly
14 establishes that the defendant was actually
15 reckless and willful and wanton.

16 Now, over the last week and a half,
17 Mr. Perry's -- almost two weeks now --
18 Mr. Perry's lawyers have showed you evidence
19 related to Johnson & Johnson. Please
20 understand that AII is not associated with
21 Johnson & Johnson, and the evidence that you
22 saw does not apply to us and should not be
23 considered against American International
24 Industries.

25 The situation in which we find ourselves

1 does not reflect the reality of AII's business
2 practices. And the heart of the case as to AII
3 is essentially this: We've not been shown to
4 have done anything wrong and should not be
5 punished.

6 MS. MCVEY: Objection, Your Honor.

7 THE COURT: By operation of law, AII has
8 been found liable for a tort, the commission of
9 a wrong, the infliction of an injury on
10 Mr. Perry. It is not correct to argue that
11 they have not been shown to have done anything
12 wrong. By operation of law, they have been
13 found to have injured Mr. Perry.

14 So the objection is sustained.

15 MS. MCVEY: Thank you.

16 MS. FLYNN: To award punitive damages
17 against AII in this case would be like going
18 into a room where something is broken and
19 beating your kid over it. It's not right. We
20 ask ourselves if it's fair to punish someone
21 without knowing anything about them.

22 In conclusion, I ask you to consider the
23 lack of evidence that's been presented to you
24 against AII. We respectfully request that you
25 refrain from punishing a company that you heard

1 nothing about and please place a zero next to
2 AII on the verdict form. I apologize. I'm a
3 little bit nervous. This is a big deal for the
4 company, and so I just ask that you please take
5 a look at the evidence and place a zero next to
6 AII's name. Thank you.

7 THE COURT: Thank you, ma'am.

8 Ms. Bueno. Ms. Bueno for Defendant
9 Johnson & Johnson.

10 MS. BUENO: Thank you, Your Honor.

11 THE COURT: Yes, ma'am.

12 - - -

13 CLOSING ARGUMENT BY MS. BUENO

14 - - -

15 MS. BUENO: Thank you, ladies and
16 gentlemen, for the last two weeks of your time.
17 I am so appreciative of the time and energy you
18 put into this case, and we hear you. On behalf
19 of Johnson & Johnson, we hear you. We respect
20 your decision and we appreciate you being here.
21 We needed you. We had a dispute that we could
22 not resolve outside of the courtroom, which is
23 why we needed you and your service. And we
24 thank you for it.

25 You're here in this stage to figure out

1 whether to punish Johnson & Johnson. And the
2 conduct that you're considering is the
3 company's conduct, not mine. So if I did
4 something in this trial, if I asked a question
5 in cross-examination, if I took an action that
6 you thought was inappropriate, you hold that
7 against me. I ask you not to punish my client
8 for it.

9 And I'm going to spend a little time today
10 talking to you about the evidence you've heard,
11 because what you're being asked to do is figure
12 out whether or not a company is reprehensible.
13 And so I want to talk through some of the
14 evidence you heard that I'd ask you to think
15 about as you're figuring out what number, if
16 any, to put on that line.

17 You heard about Johnson & Johnson doing
18 more than any other cosmetic talc company. You
19 heard that we exceeded industry standards. We
20 did more when we tested our talc. And I'm not
21 going to go through and do my whole closing
22 argument again. That's not appropriate here
23 and I don't want to waste your time. But I ask
24 you to remember that it wasn't just
25 Johnson & Johnson, but it was the FDA who was

1 looking at our products bought off the shelves,
2 that symposiums were held, not with
3 Johnson & Johnson, but with the FDA and
4 specialists and toxicologists who looked at the
5 issue and determined that cosmetic talc was not
6 a health hazard. And I ask you to remember
7 about other testing you've seen, the fact that
8 we put documents on the Web for anybody to look
9 at. There was not an effort to conceal the
10 information.

11 And I ask you to remember Dr. Kuffner. We
12 did not bring an expert witness to this trial,
13 as plaintiffs pointed out over and over again,
14 but we brought the head doctor of a large
15 company, Dr. Kuffner. And Dr. Kuffner, when I
16 asked him about the allegations in this
17 courtroom about Johnson & Johnson hiding
18 information from the FDA and not telling the
19 FDA our findings, he told you that that was not
20 true. And he said, "That's not true, and so I
21 reviewed the company documents. And I also
22 talked about my time in the company from 2006
23 until today. And that's not how the company
24 behaves."

25 And this is a big company, no question.

1 \$70 billion is a lot for a net worth. But that
2 amount is for a lot of different subsidiaries,
3 tens of thousands of employees. And I heard
4 counsel say that a company is not flesh and
5 blood. And, you know, that's technically
6 correct, but it is, right? We're talking about
7 conduct of people, of people. And there's a
8 lot of people that make up this company,
9 doctors and scientists from all over the world.

10 So that big number you hear is not related
11 to talc, it's not related to talc sales. And
12 keep in mind, if you will, please, that the one
13 time the FDA found asbestos in talc, that small
14 amount, within two days this company made the
15 decision to take that lot off the market
16 immediately. And Johnson & Johnson no longer
17 sells talc, talc-based Johnson's Baby Powder.
18 And so one of the things that Justice Toal told
19 you was the purpose of punitive damages in part
20 is to deter, which means to stop behavior from
21 continuing. This product is no longer on the
22 market.

23 Dr. Kuffner, the head doctor, I also asked
24 him about the allegations in this courtroom and
25 the fact that there are claims that

1 Johnson & Johnson knew there was asbestos and
2 sold it anyway. And I asked him what he
3 thought about that. And he told you that he
4 was insulted by that allegation because, as a
5 physician, he's dedicated his whole life to
6 caring for patients, protecting patients, as
7 have the other physicians and nurses and
8 pharmacists on the safety team. And so it goes
9 against who we all are as health care
10 professionals. And so, yeah, it cuts right to
11 the heart when I hear that.

12 Look, I wasn't back with you in the jury
13 room, obviously. I have no idea how you came
14 to check "yes" for Question Number 8, whether
15 you thought our conduct was willful, whether
16 you thought it was wanton, whether you thought
17 it was reckless. I don't know the severity of
18 your feelings about this. But one thing I know
19 for sure is that a lot of the documents that
20 you saw in this trial were from many decades
21 ago. They were from the '70s, '60s, a time
22 when the people who are currently at this
23 company were not there. And the people who
24 were there are no longer with the company.
25 This company is a different company today. So

1 if your goal is to punish conduct that happened
2 those decades ago, I'd just ask you to take
3 that into consideration, as well.

4 And, again, as the judge told you and as
5 you heard, you don't have to award punitive
6 damages in this case. You have already given a
7 large award to Mr. Perry and Mr. Long, which we
8 respect, and we thank you again for your time.
9 I wish there was more I could say and answer
10 questions for each of you. I wish I could sit
11 there and hear your decision and why. And I
12 can't do that; so I don't know what I can say
13 right now, other than thank you, and thank you
14 for being here. On behalf of
15 Johnson & Johnson, thank you.

16 THE COURT: Thank you, Ms. Bueno.
17 Mr. Adams in reply?

18 MR. ADAMS: Thank you, Your Honor.

19 - - -

20 REBUTTAL ARGUMENT BY MR. ADAMS

21 - - -

22 MR. ADAMS: They told you they hear you,
23 "We hear you. We hear you." And then they
24 went and they reargued what you've already
25 seen, that the FDA said it was okay, that they

1 didn't really know, that it wasn't so bad, that
2 they exceeded industry standards with the tests
3 that said you could find a billion asbestos
4 fibers in a bottle and say it wasn't there.

5 They haven't heard you at all. If they
6 heard you, they would have got up and said,
7 "We're sorry. We'll never do it again." But
8 they got up and they said, "We exceeded
9 industry standards." They haven't heard a
10 thing. Please make them hear you.

11 My math was wrong. 1 percent is
12 \$700 million. .1 percent is 70 million.
13 Please make them hear you.

14 MR. BROWN: Your Honor, we object. May I
15 approach?

16 THE COURT: Yes.

17 (Whereupon a bench conference was
18 held.)

19 MR. BROWN: It's just the same.

20 THE COURT: You've obviously given them a
21 number. I understand that. Overruled.

22 MS. MCVEY: Thank you.

23 (Bench conference concluded.)

24 THE COURT: Objection is overruled.

25 MR. ADAMS: They said they never hid it

1 from the FDA. You've seen Dr. Hutchinson's
2 report in the '70s, where he found the same
3 asbestos that everyone else had found. They
4 hid the report and they convinced the FDA
5 everybody else got it wrong. And then they got
6 away with it for 70 years. And they just got
7 up in front of you and said, "This happened a
8 long time ago." It happened a long time ago
9 because they hid it from the American public
10 for 70 years.

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

20 This happened a long time ago? I'm going
21 to leave you with this. This didn't happen a
22 long time ago. This is May 9th, 2020, after
23 the FDA found it, found the asbestos, took
24 pictures of it. They sent it to RJ Lee.
25 RJ Lee found the same thing, and then they told

1 the American public it wasn't there. And you
2 know what they did next? They sent out this
3 press release saying, "We're taking it off the
4 market, but it's not because it's not safe."
5 And then they said, "Existing inventory will
6 continue to be sold through retailers until it
7 runs out." Sell it all, even the last drop.
8 Sell it. Sell all of it, and get up and take
9 zero responsibility after you told them they
10 are responsible.

11 Please do the right thing. Thank you so
12 much.

13 THE COURT: Thank you, Mr. Adams.

14 Ladies and gentlemen of the jury, you may
15 retire to your jury room.

16 JURY FOREPERSON: May I ask you a
17 question?

18 THE COURT: Yes, ma'am. Do you have it in
19 written form there?

20 JURY FOREPERSON: Yes, ma'am.

21 THE COURT: Let the bailiff bring it to
22 me. Thank you.

23 THE BAILIFF: (Handing.)

24 THE COURT: All right. "To be clear, who
25 does the money from punitive damage get paid

1 out to?" Signed by the foreperson of the jury.

2 Approach.

3 (Whereupon a bench conference was
4 held.)

5 THE COURT: I'm supposed to tell them to
6 Mr. Perry; is that right?

7 MS. MCVEY: Yeah.

8 THE COURT: Very good.

9 MS. PEPKE: It's a complicated question.
10 It doesn't all go to Mr. Perry, but I don't
11 know what their --

12 THE COURT: No, no, no. It's all his.
13 Out of that he pays his attorneys' fees, but it
14 all is his.

15 MS. MCVEY: Taxes.

16 THE COURT: Absolutely that will not be
17 said.

18 MS. MCVEY: He pays tax on it.

19 THE COURT: Absolutely.

20 (Bench conference concluded.)

21 THE COURT: Thank you, ma'am. The answer
22 to your question is: To Mr. Perry.

23 All right. You may go to your jury room.

24 (The jury exited the courtroom at this
25 time.)

1 (The following discussion was held
2 outside the presence of the jury:)

3 THE COURT: Court will be at ease.

4 - - -

5 (Court's Exhibit 32 admitted into
6 evidence.)

7 - - -

8 THE COURT: Anything else that needs to be
9 done? Mitch?

10 MR. BROWN: Your Honor, we just renew the
11 motion for mistrial that we previously made.
12 And, in addition, to the closing argument,
13 objections were made.

14 THE COURT: Of course. Of course, as I
15 would expect. Motion is denied.

16 MS. MCVEY: Nothing from us other than to
17 note the total improper argument that Ms. Flynn
18 made on behalf of AII, to tell the jury that
19 they were only here because they were in
20 default, weren't allowed to put on any
21 evidence. All of that kind of stuff I think is
22 beyond the pale.

23 THE COURT: I agree that was beyond the
24 pale. I hope I instructed the jury correctly
25 about that. I was shocked by that argument

1 because it is the law that they are
2 responsible. And they can't get up here and
3 say, "We really didn't do any of this, and the
4 only reason we're here is because of a default
5 just because we didn't get our pleadings in on
6 time."

7 That is not the implication. The
8 implication, as I have ruled consistently
9 throughout this entire matter, is that AII is
10 liable for everything that was averred in the
11 complaint. It has been proved. It is beyond
12 any doubt.

13 And, Ms. Flynn, that -- I mean, that is
14 sanctionable conduct, as far as I'm concerned,
15 to make that kind of argument to the jury.
16 Making it to me has frustrated me throughout
17 this entire thing because I know what the law
18 is. And the law is that it's not some kind of
19 little technical thing, but really we're not so
20 bad. It is an admission. The penalty for not
21 answering a complaint timely is that everything
22 that's been said in the complaint is proved
23 against your client. It is a fact, an unable
24 to be controverted fact.

25 So that was a very improper argument. And

1 I thought about saying something to the jury
2 about that, but there's no percentage in that
3 either, in my view. But, yes, you're correct,
4 Ms. McVey. And, you know, I think it was
5 beyond the pale.

6 MS. FLYNN: If I may just address. The
7 court has used the word "default" at least
8 twice, maybe three times, in front of the jury.
9 So I know that the court has -- perhaps not
10 intentionally. I'm not sure -- but the word
11 "default" has come in.

12 THE COURT: Well, what's the big deal
13 about that? Because what you were trying to do
14 is tell them, "Well, default is just some
15 little technical thing that we didn't get our
16 papers in on time," kind of like, "Teacher, the
17 dog ate my homework."

18 It is not that. It is something quite a
19 bit more serious than that. It is positive,
20 irrefutable proof that your client was guilty
21 of fraud, negligence, strict liability, and
22 that's been proved. And you cannot minimize
23 that in front of the jury by saying, "Well,
24 it's just a little default." That's the
25 problem with it.

1 And I clarified that for the jury. To the
2 extent I used the word "default," I told them
3 exactly what that meant, that it was proved.

4 MS. MCVEY: And, Your Honor, I just want
5 to remind the court that when AII made their
6 motion to lift default, it wasn't some little
7 technicality they didn't reach in the
8 complaint. Instead what they wrote, and signed
9 affidavits and put in front of Your Honor and
10 filed publicly for everyone to see, is they
11 made these heinous allegations against both me
12 personally and Trey Branham.

13 THE COURT: That's correct.

14 MS. MCVEY: And instead of just saying,
15 "We dropped the ball," or something else
16 happened, or "We didn't do what we were
17 supposed to do," they somehow made it our fault
18 publicly.

19 THE COURT: Yes.

20 MS. MCVEY: So to come in here and argue
21 "We just simply didn't answer the complaint" is
22 super-outrageous to me. It's totally improper.
23 But it also kind of misses all the bad stuff
24 that they did from start to finish.

25 THE COURT: I agree with everything that's

1 been said and find it bad conduct that I don't
2 approve of.

3 MS. MCVEY: Thank you, Your Honor.

4 THE COURT: All right.

5 MR. BROWN: Your Honor, we have a court
6 exhibit we'd like to make, which is the
7 document that Mr. Adams showed that had a
8 number written on it.

9 THE COURT: Yes. I did not consider that
10 violation of my thing because he can talk about
11 net worth and what it means and what
12 percentages of net worth are. I don't think
13 that was encompassed in what I said at all, so
14 I consider it proper argument. But certainly
15 you can make a court exhibit of it to be sure
16 that it's memorialized in the record that that
17 is what he wrote on there and showed it to the
18 jury. No problem.

19 MS. MCVEY: Thank you, Your Honor. We
20 also got permission from you to use a
21 percentage of net worth.

22 THE COURT: I understand. I considered it
23 proper, but Mitch is very much entitled to make
24 a record of it.

25 MS. MCVEY: Absolutely. I handed it to

1 him for the record.

2 THE COURT: Very good. Thank you.

3 - - -

4 (Court's Exhibit 33 admitted into
5 evidence.)

6 - - -

7 (Court's Exhibit 34 admitted into
8 evidence.)

9 - - -

10 THE COURT: Be at ease.

11 (The jury entered the courtroom at this
12 time.)

13 THE COURT: Bring in the jury.

14 THE BAILIFF: The jury is seated, Your
15 Honor.

16 THE COURT: Thank you, sir.

17 Madam Forelady, do you have a verdict?

18 JURY FOREPERSON: Yes.

19 THE COURT: Very good. Would you please
20 give it to the bailiff and he will take it to
21 the clerk.

22 THE BAILIFF: (Handing.)

23 THE COURT: All right. It's in order.

24 Mr. Clerk, publish the verdict.

25 THE CLERK: Yes, Your Honor.

JURY VERDICT ON PUNITIVE DAMAGES

THE CLERK: In the State of South Carolina, County of Richland, in the Court of Common Pleas, Fifth Judicial Circuit, Civil Action Number 2023-CP-40-04072, Michael L. Perry and Lonnie L. Long versus American International Industries and Johnson & Johnson, punitive damages. As to Plaintiff Michael Perry's claims against Defendant Johnson & Johnson entities for punitive damages, we the jury, by unanimous consent, find, check, for Michael Perry in the amount of \$30 million punitive damages. As to the Plaintiff Michael Perry's claims against Defendant American International Industries for punitive damages, we the jury, by unanimous consent, find, check, for Michael Perry in the amount of \$760,000 punitive damages. Signed Juror 31, Foreperson.

Madam Forelady, is this the verdict of the
entire jury?

JURY FOREPERSON: Yes.

THE COURT: Shall the jury be polled,

1 Plaintiff?

2 MS. MCVEY: Not from the plaintiff, Your
3 Honor.

4 THE COURT: Shall the jury be polled,
5 Defendant?

6 MS. BUENO: No, Your Honor.

7 THE COURT: All right. Ladies and
8 gentlemen of the jury, you have completed your
9 service. And what an absolutely wonderful job
10 you have done. Alternate jurors, this couldn't
11 have been done without you, too. It's all part
12 of a system that has to work together to
13 produce a result in such a complicated matter
14 as this.

15 It's just been my honor to have you serve
16 in this court. I don't say this to every jury,
17 but you're a very special jury. I haven't seen
18 this attentiveness to detail and done in an
19 uncomplaining manner, with certainly a lot of
20 personal sacrifice in your life these last two
21 weeks. So I thank you. And the people of
22 Richland County and the people of the State of
23 South Carolina thank you for your service.

24 You are dismissed.

25 (Jury dismissed from the courtroom.)

1 (The following discussion was held
2 outside the presence of the jury:)

3 THE COURT: All right. Please be seated.
4 For the plaintiffs, anything to place upon the
5 record?

6 MS. MCVEY: No, Your Honor, nothing to do
7 with the verdict. The only thing I did want to
8 ask you is if you wanted us to submit briefing
9 and evidence to you about successor
10 liability/amalgamation issues.

11 THE COURT: Yes, because the defendants
12 have submitted rather fulsome briefs on this
13 subject already, and I think you have those.
14 And I think you would want to submit something
15 because I am sure we will have argument about
16 those things again in the post-trial motions
17 material that will be submitted within 10 days.

18 MS. MCVEY: And we're happy to get a brief
19 to you. I think we can do it next week, which
20 would make sense.

21 THE COURT: That would be fine. You at
22 some point will receive what Mr. Brown has
23 filed as well and can react as you see fit.

24 MR. BROWN: So I think we jointly are
25 moving for the 10 days.

1 THE COURT: That's correct. That's
2 correct. And you should conform to this 10-day
3 window, as you should, Ms. Flynn. And then we
4 will go from there in terms of scheduling
5 arguments.

6 MR. BROWN: And Mr. Bogan reminds me, that
7 means August 26th.

8 THE COURT: That's correct. That is
9 correct, Matt.

10 MR. BROWN: For post-trial. Thank you,
11 Your Honor.

12 MS. FLYNN: AII has the same 10 days?

13 THE COURT: Of course. Of course.
14 Nothing, Ms. McVey?

15 MS. MCVEY: Nothing else.

16 THE COURT: One final thing I want to
17 place upon the record. I said some mighty
18 fierce things earlier this week or last week
19 about Mr. Adams. And I felt them in my heart,
20 because I just don't like that kind of
21 repartee, even if it's out of my presence. And
22 I thank you, Mr. Adams, for conforming your
23 conduct to our rules of civility. I decline to
24 consider any sanction for your conduct. I
25 think the conduct's been cured by your further

1 participation in this trial. And like all of
2 these lawyers in this case, I respect all of
3 you more than I can say.

4 MS. MCVEY: Thank you, Judge.

5 THE COURT: Court will be adjourned.

6 MS. MCVEY: Thank you, Judge.

7 - - -

8 (Court's Exhibit 35 admitted into
9 evidence.)

10 - - -

11 THE COURT: I want order in this courtroom
12 right now. Take your seats.

13 All right. I want counsel to take your
14 seats at counsel table, please.

15 MS. BUENO: Your Honor, this is not
16 necessary.

17 THE COURT: Take your seats at counsel
18 table.

19 MS. MCVEY: Your Honor --

20 THE COURT: Take your seats at counsel
21 table. Where is --

22 Now, Mr. Bogan, you came and addressed me.
23 I want you to stand and tell me what you told
24 me.

25 MR. BOGAN: I said at the end of this

1 case, Your Honor, my co-counsel, Ms. Bueno,
2 went to shake Mr. Adams' hand, and he refused
3 to. He refused to do that after you just
4 admonished him for his behavior. And then he
5 had an exchange with her. I couldn't hear, but
6 I watched the interaction. That's what I told
7 Your Honor. It's on the record.

8 THE COURT: All right. Sit, Ms. McVey.
9 I'm not hearing from you at this time.

10 Mr. Adams, Mr. Adams, please stand. I
11 just sat here at the end of this case and put a
12 te absolvo, a good old Latin phrase for you are
13 absolved and forgiven, on the record so that
14 this thing would not follow you around.

15 And then Ms. Bueno sticks out her hand to
16 be civil and offer you her hand, and you
17 continue to treat her badly.

18 MR. ADAMS: No.

19 THE COURT: Why did that happen?

20 MR. ADAMS: And I explained what happened.

21 THE COURT: You can tell me. And I swear
22 if there's anything other than the truth that
23 emanates out of this, we're going to have some
24 real troubles. I consider you delivering these
25 remarks to me on your oath as a lawyer.

1 MR. ADAMS: Ms. Bueno came up to me and
2 did try to shake my hand.

3 THE COURT: Yes, sir.

4 MR. ADAMS: Which was very gracious.

5 THE COURT: Yes, it was.

6 MR. ADAMS: And what I said to Ms. Bueno
7 is "I respect you as a lawyer. You are an
8 amazing, amazing lawyer," which I do believe.
9 "You are an incredible lawyer, but when you try
10 to destroy my career, I cannot shake your
11 hand."

12 THE COURT: Shame on you.

13 MR. ADAMS: That's it.

14 THE COURT: Shame on you. That did not
15 need to be said, Mr. Adams. I dealt with it on
16 the record. I expected you to behave in a
17 civil manner instead of having to have one more
18 na-na-na-na-boo-boo to stick it back to her.
19 And I am very, very unhappy with that. And I
20 can tell you I'm going to deal with it.

21 Now, I can't believe that I put on the
22 record, trying to bring some peace and love to
23 this situation, and put on the record what I
24 did. You're bringing shame on yourself; you're
25 bringing shame on Ms. McVey and Ms. Gross, two

1 of the finest lawyers I know. I don't know
2 what's in your head. You had that -- I thought
3 you just kind of lost your temper a little bit,
4 but then you've got to put that final dig in.

5 You went skating close to the line when
6 you made your final arguments to the jury. I
7 tried to just kind of ameliorate that as best I
8 could. I am very, very unhappy with your
9 conduct.

10 MR. ADAMS: I am sorry, Your Honor. I am
11 sorry.

12 THE COURT: Well, I want you to turn to
13 Ms. Bueno right now and unconditionally express
14 your apologies to her for your conduct just a
15 minute ago and during the course of this trial.
16 I want to hear it right now.

17 MR. ADAMS: I am sorry.

18 MS. BUENO: Apology accepted.

19 MR. ADAMS: I do think you're a great
20 lawyer.

21 MS. BUENO: And you are as well.

22 THE COURT: All right. That's the end of
23 this. Court will be adjourned.

24 - - -

25 (Proceedings were concluded at 5:28 p.m.)

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 15th 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